Competition Law in the BRICS Countries

Edited by
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§6.01 INTRODUCTION

Today, throughout the world cartels are considered to cause potentially great harm to consumer welfare, leading to misallocated resources, a slower pace of innovation, and a loss of economic efficiency. This applies to developing as well as more mature economies. In fact, cartels may be most destructive in an environment that would otherwise be dynamic: they stifle exactly those forces that let an economy advance—allowing producers and service providers to try less hard to improve their offering, cut corners when it comes to quality or service, or overcharge customers. In many countries, this view has not always been embraced. In fact, for a long time, none of the BRICS countries had legislation that prohibited cartels, let alone an effective anti-cartel enforcement practice. The recent past has seen considerable change in this respect. Legislation has been passed; agencies have been set up and provided with resources. Administrative practices have started to develop with enforcers taking an increasingly tough stand when it comes to anticompetitive agreements. Agencies in this respect face considerable challenges, in particular because when antitrust legislation is introduced, cartels are often government sponsored and reflect a business culture that is not easily changed. Unlike other elements of antitrust legislation such as merger control rules, cartel rules are not merely another administrative nuisance to comply with. In an environment where collusion is considered acceptable, they will require businesses to fundamentally reconsider the way they interact with other market participants—for antitrust policy to succeed, enterprises may need to be convinced to have a fresh look at how they position themselves vis-à-vis competitors and customers. Thus, criminal or administrative enforcement action alone may not be sufficient to win the fight against cartels. Rather, such activities need to be supported by advocacy efforts that reach out to stakeholders—including, as the Chairman of the
Competition Commission of India (CCI) recently pointed out, other government agencies—to change a mindset that tolerates or even supports a culture that substitutes coordination for competition.

It is impressive to see how far the BRICS countries have come in their fight against cartels in a very short time. Even newcomers to the enforcement arena such as China and India are seriously pursuing cartels and have already taken a number of decisions. In this respect, it is encouraging to note that enforcement action by and large has avoided “me-too”-proceedings that merely follow cartel investigations pursued in other jurisdictions. Rather, enforcement action in the BRICS countries has focused on local cartels that directly affect local end customers. For example, the Russian Federal Anti-Monopoly Service (FAS) hastaken action against a price fixing arrangements amongst vodka producers, the CCI moved against collusion amongst film producers and distributors, the Chinese authorities took action against rice noodle and green bean cartels, the South African Competition Commission fined South African Airways and Singapore Airlines for fixing prices for flights between Johannesburg and Hong Kong, and in Brazil bid rigging in the context of Government works contracts has received special attention. Such actions show an impressive commitment of local authorities to protect their constituents from potential harm.

While important achievements have been made by legislators and authorities in the BRICS countries, antitrust enforcement is still in its early stages in most of these jurisdictions. This article takes a look at the status quo of their cartel enforcement regimes and administrative practices, focusing on recent achievements as well as legal and practical challenges that do remain. It will consider a number of key issues that enterprises, authorities and courts need to deal with when dealing with potential cartels. One possible basis for benchmarking generally acknowledged in the international competition community are the good practices of the International Competition Network (ICN) in the area of cartel enforcement. This article will return to these as it provides an overview of what has been achieved and what still needs to be done. It will focus on the key parameters that impact the likelihood of successfully fighting cartels, namely the legislative context (see section §6.02 below), the institutional arrangements (see section §6.03 below), and enforcement procedure as well as the ability to reach decisions that effectively sanction cartels that have been uncovered (see section §6.04 below).

§6.02 LEGISLATIVE CONTEXT

All BRICS countries have legislation on their books that prohibits hard-core cartels. Brazil was the first of the five countries to introduce such legislation, in 1990 and 1994; its agencies have been actively prosecuting cartel arrangements as well as pursuing an advocacy program that does not shy away from aggressive advertising to the general public to bring home its message about the detrimental effects of cartels. The major

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1. The ICN good practices are available at: <www.internationalcompetitionnetwork.org>. The recommended practices of particular relevance in this chapter are the ‘good practices’ identified in the Anti-Cartel Enforcement Manual developed by the ICN Cartel Working Group.
overhaul of its competition legislation that comes into effect in 2012 will leave the substantive provisions unaffected. South Africa’s is the second oldest regime having come into force in 1998/1999. The current Russian anti-cartel legislation dates from 2006. The earlier Law on Competition and Restriction of Monopoly Activities on Product Markets contained a prohibition of anticompetitive agreements in Russia, but these rules were not effectively enforced. Relative newcomers are China and India whose prohibitions came into force in August 2008 and 2009 respectively but have already started to enforce those rules by taking action against suspected cartels.

[A] Cartel Prohibition

All BRICS countries have a general prohibition of agreements and concerted practices that have the aim or effect of restricting competition. As a rule, they broadly follow the wording of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). 2

The general prohibition usually has a counterpart that is the equivalent of Article 101(3) TFEU. While these exemptions will not normally apply to the most serious infringements such as price fixing, they may take less serious restrictions outside the scope of the prohibition—an example of this is the potential application of the relevant provision to code-share agreements between local airlines under the Indian rules. While such an approach seems to be in line with antitrust policy in other jurisdictions, some questions remain. The exemption provided for under the Indian Competition Act, for example, is something of an oddity as it exclusively focuses on joint venture arrangements and requires a legal entity engaged in a joint undertaking. Thus, it does not capture less structural arrangements even if they create the same efficiencies and consumer benefits.

Furthermore, some concern may exist where exemption provisions capture anticompetitive agreements for reasons other than the benefit to end consumers which they bring about. Article 15 of the Chinese Anti-Monopoly Law (AML), for example, contains a number of “traditional” exemptions that are found in other jurisdictions (such as technology advances, quality improvement, efficiency gains, and cost reductions). However, it also includes further grounds for exemption where the ultimate consumer benefit is less clear. Restrictions may be exempted if they are aimed at dealing with severe decreases in sales volumes or excessive overstock during economic recession, protecting the “legitimate interest in foreign trade” and other circumstances stipulated by laws and regulations of the State Council. This exemption thus captures crisis cartels and export cartels as well as providing a catch-all provision that allows competition to be suspended if this politically convenient. It is interesting to note that parties relying on these exemptions do not have to show that their arrangement will not substantially restrict competition and will enable consumers to share the benefit derived from the agreement. There is nothing to indicate that such exemptions would

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2. See, e.g., Article 13 AML, section 3(3) Indian Competition Act, Articles 8, 11 and 11.1 Russian Competition Law, section 36 of the Current Brazilian Antitrust Law, and section 4(1)(b) South African Competition Act.
not be available to hard-core cartels and experience in other jurisdictions has shown that output coordination and price fixing are usually at the core of this type of cartel—and that this, while cushioning enterprises that have failed to adapt to changing market conditions, has a profoundly negative effect on consumers.

This brief overview of substantive cartel provisions shows that in general the BRICS countries have established legislative structures that allow for an effective fight against cartels. Some areas of concern remain where a jurisdiction has tried to introduce specific rules that may ultimately not work for the benefit of the end consumer. In addition, the general nature of the prohibitions necessarily means that some uncertainty exists with regard to their scope, in particular outside the core types of hard-core restrictions. However, this is not a situation which is unique to the BRICS countries. Even more mature jurisdictions today struggle to define the extent to which certain types of conduct such as exchanges of sensitive information should be treated as a cartel. Thus, it should be acknowledged that it takes time to define and implement even the substantive elements of a sound enforcement system. At this stage, it is encouraging to see that the basic substantive building blocks are in place in all BRICS countries. It now remains to be seen to what use they will be put.

[B] Sanctions

A substantive prohibition of cartel-type anticompetitive behavior as such is unlikely to be sufficient to prevent the creation or existence of cartels. Individuals who must decide whether to compete or collude will be more impressed by sanctions that threaten themselves or their employer if a cartel is uncovered. Such sanctions may apply to the individual who has acted (or failed in his duty of supervision) and/or to the enterprise which employs the individual. Sanctions may be of an administrative or criminal nature. They can include financial penalties (i.e. administrative or criminal fines), prison terms, and a loss of the ability to hold positions of authority in an enterprise (director disqualification).

[1] Corporate Liability

All BRICS countries have the power to impose administrative fines on the enterprises whose employees were involved in a cartel. In India, the maximum fine is three times the profit of year of the cartel’s existence or 10% of the turnover of the last three years. No maximum amount of the fine is set. In Russia, the fine for an enterprise may be 15% of its revenues in the relevant market during the last year.

China has adopted a similar approach in the AML, allowing (besides the confiscation of the illegal gains) for a fine of up to 10% of the revenues generated by the enterprise in the previous year. It is somewhat worrying that Chinese legislation does not clearly define which revenues should be taken into account—potentially this could be the global turnover with all relevant products. While such a value is also referred to in other jurisdictions, it is usually used as a maximum amount—in particular in order to prevent unduly harsh fines on smaller companies. It is not a particularly useful
parameter to calculate a fine that would be proportionate to the specific infringement. It is hoped that the Chinese authorities will develop a mechanism that better reflects the gravity and duration of the infringement. Interestingly, the maximum fine under the AML for cartels that have not yet been implemented is RMB 500,000. Sanctions under the Price Law include a confiscation of the illegal gains and a fine of up to five times of the illegal gains—if the existence of illegal gains cannot be proven, the maximum fine is RMB 5 million.

In Brazil, the penalties for an infringement under the current rules may range from 1% to 30% of the total group wide turnover of the enterprise in the year prior to the launching of the investigation. Under the new rules, administrative fines can range from 0.1% to 20% of the turnover in “the branch of business activity in which the violation occurred.” Unfortunately, the law still provides that the total turnover can be used as a basis for the calculation of the fine, where the product-related turnover cannot be properly established. Still, the introduction of a provision that allows the authority to link the amount of the fine to the revenues generated by the activity in question is a very welcome change: It establishes a relationship between the infringement and the resulting fine. However, the proposed legislation is far from perfect: It is still unclear whether the relevant revenues on which the calculation should be based are domestic or the worldwide revenues generated by the business at hand. Given that Brazilian competition rules should apply only to the extent that activities have an effect in Brazil, it is suggested that the domestic turnover would be the appropriate point of reference for the calculation of the fine: Not only would this link the fine to the detrimental effects of the cartel on the domestic market; it would also avoid punishing a company twice as foreign turnover is likely already used as a basis for determining corporate liability in other jurisdictions. It should be noted that as an additional sanction, enterprises may be barred from participating in public procurement for at least five years and may be required to pay for the publication of the decision against them in certain public media. In particular the exclusion from public tenders for a period of five years or more may be very harsh and in fact force companies in businesses that rely on contracts with public authorities to leave the market. Whilst this may be an effective deterrent to others, it seems to be a rather harsh penalty for those affected by it.

[2] Individual Liability

In India, where a company is held to have infringed the law, all directors with responsibilities for its affairs at the time of the contravention may be prosecuted. In addition, all officers and managers who consented to or connived the cartel or who negligently allowed the cartel to exist may be prosecuted as well. In Russia, the focus is on those individuals who have actually behaved in violation of the competition law. The maximum administrative fine is RUB 50,000 or disqualification for a period of up to three years. In Brazil, the penalties for individuals are 10% to 50% of the fine imposed on the enterprise. Under the new rules, this is brought down to 0.1% to a maximum of 20% of the fine applied to the company. At first sight, this looks like an
improvement—especially if fines on the enterprises rise. However, linking the individual’s fine to the fine that is actually imposed on the enterprise (rather than to—as has been the case so far—the fine that could be imposed) may actually result in higher fines for the individual. This could especially be the case in major cartels, in particular if the worldwide revenues generated by the affected business are used as a basis for calculating the corporate fine. It remains to be seen how the administrative practice will deal with this potential issue.

[C]  **Criminal Liability**

In Russia, individuals who infringe competition rules may also be subject to criminal fines. These may be criminal fines of up to RUB 1 million or imprisonment for up to seven years. In China, the Criminal Code captures a number of anticompetitive activities as well. This applies to bid rigging which may attract a prison sentence of up to three years or a financial penalty. However, less clearly defined economic crimes may give rise to criminal liability as well. Thus, those who “in violation of the state’s regulations, commit any of the following acts of illegal business operations, thus disturbing the market order” are subject to imprisonment of up to five years and a fine of up to five times the illegal gains. In particularly serious circumstances, prison sentences of more than five years can be imposed besides a financial penalty and the confiscation of property. The open-ended nature of this provision in particular has given rise to some concern that competition law infringements could be subject to criminal penalties that may be very harsh in relation to the seriousness of the infringement. In Brazil, criminal penalties may range from two to five years in prison or the imposition of a criminal fine. Under the new law, this will be changed to prison sentences from two to five years and the imposition of a criminal fine. Indian competition legislation does not include criminal penalties. Imprisonment is possible for contravention con orders issued by the CCI or as a consequence of furnishing false evidence or documents.

[C]  **Leniency**

All BRICS countries have rules that allow leniency to be granted to those enterprises and individuals who come forward to admit to and provide evidence of their participation in a cartel. Usually, a distinction is made between those who come forward first, in particular in situations where the authority is not yet aware of the infringement or has insufficient evidence to start a formal investigation, and those who subsequently apply for leniency. Applicants in the former category may be eligible for full amnesty, whereas those subsequently applying for leniency may be granted a reduction of their fines if they meet the requirements defined in the relevant rules.

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4. See Article 225(4) of the Criminal Code.
In Brazil, the current law provides a leniency program that grants a reduction of the fine only to the first applicant. Even for this enterprise, full immunity is only available if the authorities are not yet aware of a potential cartel. If they are—but still have insufficient evidence—a reduction in the applicant’s fine of between 33% and 66% may be granted. A second applicant may be granted a reduction of its fine only if it reveals a further cartel (immunity plus).

In India, leniency is available under the Lesser Penalty Regulations issued by the CCI in 2009. They require that the applicant discontinue its participation in the cartel and comprehensively cooperate with the CCI. The first applicant to fulfill these requirements may receive up to 100% reduction of the fine, provided that he makes a “vital disclosure”—a disclosure of information that enables the CCI to form a prima facie opinion about, or that provides evidence to establish the existence of, a cartel. The second applicant may obtain a reduction of up to 50% and the third applicant may receive a reduction of up to 30%. It is interesting to note that the CCI enjoys discretion to what extent a reduction is actually granted—even for the first applicant. It is suggested that this uncertainty may negatively impact the willingness of potential applicants which consider submitting a leniency application. Experience shows that, where enterprises are considering coming forward to report a cartel, legal certainty is a key element in favor of taking such a step. Even the threat of a potential fine—even if only in a nominal amount—may result in an unwillingness to come forward. In other jurisdictions, this issue comes up mostly when assessing whether available evidence is sufficient to support the application. Making this assessment may already require a difficult judgment call; if the assessment also needs to predict the exercise of discretion on the part of the CCI, the complexity may increase to a point where an enterprise will be unwilling to commit itself to the process.

In China, Article 46 of the AML also gives the agencies a discretion when it comes to reducing or canceling fines for those enterprises that have come forward to provide “important evidence”. Both NDRC and SAIC have issued regulations that more clearly define the way in which they will exercise this jurisdiction. NDRC’s rules appear to retain this discretion. The first applicant may receive full immunity, the second applicant may receive at least 50% reduction of its fine and subsequent applicants may receive a reduction of up to 50%—always provided that they submit important evidence. SAIC’s rules say that the first applicant should be given full immunity, while the fine of subsequent applicants shall be reduced—albeit by a nonspecified percentage. While there may be varying degrees of discretion involved, uncertainty exists in all instances. This puts the effectiveness of such program into question—although it remains to be seen whether such detrimental effects will materialize in reality. So far, the limited number of decisions that have been adopted does not allow any firm conclusions to be drawn whether the Chinese leniency program will be successful in practice.

In Russia, two leniency programs exist—one under the Code of Administrative Offences and another program under the Criminal Code. Under the former, the first applicant to voluntarily provide information about a cartel to the FAS will obtain full immunity from fines if it discontinues its participation in the arrangement. The authority does not enjoy discretion in this regard. However, it is interesting to note that
at least under the current provisions of leniency program subsequent applicants do not automatically receive a reduction of their fines. This is a surprising policy choice as the first applicant, although willing to come forward and able to provide some evidence, may not be in a position to provide the competition authority with evidence that is sufficient to establish the existence of a cartel. In particular if dawn raids do not provide sufficient additional evidence, the authority will have to depend on further applicants coming forward to provide additional information. Under the Russian system, the FAS would seem to have a number of options, none of which is particularly attractive: It may conclude that leniency has been awarded so that no further reductions are available. This will discourage other participants from cooperating with the authority in the case at hand. It may also conclude that the first applicant did not supply sufficient information to justify immunity. This would allow them to encourage others to come forward; however, such an approach—if applied consistently—would have a chilling effect on the willingness of enterprises to be the first to come forward in future cases. Thus, none of the options seems to be really attractive.

Criminal leniency may be granted under the Criminal Code if the relevant person facilitates the establishment of the relevant facts and compensates the victims for the damage done or transfers the illegal gains to the state coffers. The problem is that immunity under the administrative program does not automatically provide immunity under the criminal leniency program. In fact, it has been argued that obtaining administrative leniency may trigger a subsequent criminal investigation where the question of who obtains leniency is raised anew. This uneasy (and unresolved) issue may in fact deter potential leniency applicants from coming forward in the first place. No case law exists that addresses these issues so the uncertainty will continue to exist in the foreseeable future.

§6.03 INSTITUTIONAL CONTEXT

The effectiveness of cartel enforcement to a large extent depends on the institutional context in which it occurs. Where agencies lack the necessary resources or where their work is made hampered by interference from other government agencies, successfully fighting cartels will be difficult.

As far as the establishment of independent antitrust enforcement agencies is concerned, all BRICS countries seem to be ‘on track’—but some of them have already covered more ground than others. In the short to medium term, each authority will face its own set of challenges.

The Brazilian enforcers already have had the opportunity to gather significant experience in the fight against cartels and recent years have seen a marked improvement in both the quantity and the quality of the decisional practice. So far, the Brazilian authorities have been hampered by a very complex institutional structure and a lack of resources. Both of these issues are addressed by the revision of Brazilian competition rules. The institutional structure will be greatly simplified: It will move from a three-tier
structure (SDE—SEAE—CADE) to a single tier structure that will combine the investigatory activities of SDE with the adjudicating functions of the current CADE Commission. Besides consolidating administrative functions in a single entity, the changes will have the advantage of removing the decisions to open new investigations from what was an inherently political body (SDE) to an independent authority whose head will be appointed for a fixed four-year term.

These changes are to be applauded and should in the long term have a positive impact on the efficiency of the investigative and decisional process. However, significant concerns exist in relation to the ability of the new authority to effectively enforce competition rules—including the cartel provisions—in the short to medium term. The new law brings a number of procedural as well as substantive changes to Brazilian competition law. Implementing these changes alone would pose a significant challenge to any authority. In the case of the Brazilian enforcers, ADD s the issue is made more serious by the lack of resources from which the authorities are suffering today. The legislator has acknowledged the problem and has provided for an additional 200 positions within the new CADE. Again, this is a move in the right direction—but it seems doubtful that the new positions will be filled in the short term. This raises the worry that changes to the institutional structure as well as to the procedural rules will force the authority to direct its scarce resources away from cartel enforcement to other areas of the law (in particular to the new merger control rules which require notification and clearance within clearly defined deadlines before a transaction can be consummated). This may well result in a loss of quality of the enforcement effort. The near future will show whether Brazil will be able to sustain what has been a very brisk enforcement record.

India, too, is facing a capacity issue. While the CCI has been off to a good start in taking some high profile decisions in very visible industries, it still needs to build an effective organization. Too many tasks are handled by a very small number of officials—and the timelines for reaching decisions put these officials under incredible pressure. The current chairman has very publicly acknowledged that building sufficient capacity required for an effective antitrust enforcement is one of the top priorities of the current team.

Regulators in China are also increasing capacity. While enforcement agencies have been formed as a part of existing administrative structures—the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC)—they still need sufficient human resources to carry out their functions. Like all the other BRICS countries, China is a large economy—both in terms of the size of the country as well as the number of market participants—and the authorities rightly consider anti-cartel enforcement to be a task that cannot be handled by a central authority alone. In the area of fighting cartels, capacity building must therefore occur at national as well as provincial level. For this reason, NDRC has recently not only assigned 20 officials to fight price-related infringements at the national level. It has also added 150 new officials to the provincial units involved in this work. Thus, the need to build capacity seems to result in concrete actions. Apart from the challenges faced by any authority that is integrated into a larger ministerial entity with a number of policy objectives
besides the implementation of competition principles, the bigger challenge for the
Chinese authorities may thus lie in the effective coordination of enforcement activities
between NDRC and SAIC. Both agencies are responsible for the apprehension of
enterprises engaged in anticompetitive conduct. Jurisdiction depends whether a
potential infringement involves price-related conduct or non-price-related conduct. It is
suggested that the distinction may not always be clear and that cartels in particular may
have elements of both categories—for example in a cartel that fixes prices and allocates
customer groups to individual members. It will be interesting to see whether the two
agencies will succeed in effectively allocating such complex cartels amongst each
other.

The FAS does not have this problem—as it has the power to investigate both price
and non-price-related infringements. It is the challenge presented by the sheer size of
the jurisdiction that Russia shares with China. The FAS, too, has addressed this
challenge by decentralizing cartel enforcement activities to a significant extent. Thus,
enforcement is not only carried out by the team in Moscow. Rather, it is shared
between those parts of the FAS at federal level and its regional offices. Decentralization
within Russia has not created an institutional challenge—but this might be brought
about by the creation of a supranational competition authority within a unified
customs area (the Eurasian Economic Commission) that will initially span Belarus,
Kazakhstan, and Russia. It appears that this authority will have jurisdiction to
investigate antitrust infringements in the customs union. It will be interesting to see
how smoothly jurisdictional issues will be dealt with between the FAS and this new
agency.

Probably the biggest institutional challenge the FAS faces is one it shares with the
Brazilian competition authority: The application of criminal law to competition
infringements has meant that public prosecutors are becoming increasingly involved in
cartel investigations. In Russia, criminal prosecutions seem to follow cartel investiga-
tions. Thus, it is only once the FAS has concluded its investigation that the public
prosecutors will become active. While public prosecutors in Russia—still—seem to
deer to the FAS when it comes to competition issues, the situation is somewhat
different in Brazil. Here, public prosecutors seem to be well aware of the fact that they
are not only older and better established but are also generally provided with much
greater human resources than the competition authorities. At the same time, these
agencies are not as well versed in the intricacies of competition policy and
procedure—a problem that has been particularly acute in relation to the handling of
sensitive case-related information, especially in the area of leniency applications. The
matter is not helped by the fact that the antitrust agencies are dealing with a number of
regional public prosecutors and police agencies—the nature of the challenge is
reflected in the fact that a total of 27 cooperation agreements have been negotiated with
prosecutors and police agencies throughout Brazil. Much will depend on the willing-
ness of both sides to learn to work together. Whether divergent views on the conduct

5. Interestingly, it has become an issue in Brazil, where decentralization means shifting enforce-
ment away from the antitrust authorities at federal level to the public prosecutors at regional
level.
of investigations will continue to lead to irritations of both agencies and those under investigation remains to be seen.

It is thus clear that mostly solid institutional foundations have been laid in all of the BRICS countries. Some challenges remain as enforcers have to pursue their objectives against the backdrop of other government policy objectives and activities that may sometimes not be fully aligned with competition principles. Beyond this, the main challenge for all of the agencies is the building of sufficient capacity to effectively carry out their enforcement tasks. The availability of sufficient funding as well as the ability to create sufficient interest of well trained staff to fill designated position will be a key factor in whether agencies will be able to effectively carry out their responsibilities.

§6.04 ADMINISTRATIVE PRACTICE

A proper set of substantive rules against anticompetitive collusion, a sound institutional organization that gives the antitrust enforcer room to pursue its objectives and the availability of sufficient human resources to carry out this task are necessary, but not sufficient, conditions for a successful fight against cartels. To attain this goal, an enforcer needs the right set of procedural rules that define the scope of its jurisdiction and the investigative process as well as the willingness to make these rules work in practice. Only when all of these elements come together will it be possible to successfully fight against cartels.

[A] Jurisdiction

All BRICS countries apply a version of the effects doctrine, usually combined with the application of the principle of territoriality. Thus, all cartels that are actually implemented through acts done on the territory of one of the states (including export cartels) will be subject to the jurisdiction of this country. In addition, national law will apply to all cartels that have an—appreciable—effect in the country even if the relevant acts were done abroad.

Whilst this is broadly in line with the requirements of public international law, it raises a number of procedural questions. The apprehension of individuals (and possibly also enterprises) residing in a third country in particular will raise procedural challenges—unless the individual voluntarily submits to the jurisdiction of the country. This has already raised some issues in Brazil, which amongst the BRICS countries has the most comprehensive track record of pursuing international cartels. However, this is an issue that is neither specific to the BRICS countries nor susceptible to any easy procedural solutions. Ultimately, effective ‘solutions’ depend on the willingness of third country authorities and courts to support foreign investigations (e.g. by serving documents to individuals located in their jurisdiction) and the somewhat heavy handed tactics employed by enforcers in some more mature antitrust jurisdictions that create ‘incentives’ for individuals and enterprises to ‘voluntarily’ submit to the jurisdiction of the investigating authority.
All BRICS countries have procedural rules that govern the conduct of their investigations—even the changes to the Brazilian competition rules that will shortly be implemented do not materially change the procedural rules governing the apprehension of cartels. However, there are some oddities that are worth noting. In India, for example, the CCI does not have the power to conduct dawn raids (which authorities in the other BRICS countries do have if certain conditions are fulfilled). On the other end of the spectrum, Brazilian authorities conducted 260 dawn raids between 2003 and 2006. About 100 dawn raids were held by the FAS in 2011.

In China, the AML appears to be somewhat light on procedural rules. While it does contain provisions on some key procedural elements (such as the right to state one’s opinions), it is the more general Administrative Penalties Law that contains more detailed rules (e.g. on the right to a hearing). Nevertheless, further rules are dispersed amongst various other laws and regulations (making access more difficult) and some issues are not covered at all (in particular the right to access to the file). Time—and administrative practice—will tell how these issues will be dealt with. What is clear today is that all of the BRICS countries are facing a real challenge—after the formal rules are put into place, they must be fleshed out and brought to life.

In this regard, competition authorities do not operate in a vacuum. In particular the availability of criminal sanctions and the concurrent cooperation with local criminal law enforcement agencies (i.e. police and public prosecutors) in most BRICS countries (except for India) has extended the tools available to antitrust enforcers as well as their ability to use them. However, this cooperation gives rise to its own challenges. We have already considered the sometimes uneasy and often competitive institutional relationship between antitrust enforcers and public prosecutors. The tension between the two is amplified where the timing of criminal and administrative procedures diverges. An example for this is the Russian antitrust leniency program operated in the context of the Code of Administrative Offences—which only applies in relation to the administrative sanctions for cartel infringements. It does not apply to possible criminal sanctions for the same conduct (which would be subject to a separate leniency program under the Criminal Code). An application to the FAS under the administrative leniency program thus may have the effect of shielding the enterprise from administrative fines but will not protect its employees from criminal penalties—in fact, a leniency application may actually increase the likelihood of a later criminal prosecution leaving in doubt the attractiveness of the program for enterprises wishing to come forward to confess their misbehavior.

However, the procedural rules and their implementation are often still in their infancy, raising many novel questions. It is submitted that these will only be addressed through a growing body of administrative practice and judicial review. In Brazil, in particular, the willingness to litigate procedural questions has negatively impacted the ability of the authorities to bring individual cases to a speedy conclusion. At the same time, local practitioners hope that judicial review will resolve many open questions and bring greater clarity in future proceedings—and, thus, hopefully speed up these investigations.
This overview has shown that the BRICS countries have established an institutional, substantive and procedural framework that should allow them to take up the fight against cartels. Have they been effective in doing so? The proof is, as they say, in the pudding—or, in the present case, in the track record of effectively apprehending cartel offences.

Brazil has made enormous progress in their fight against cartels. Part 2 of chapter 1 of this book provides data that shows the rise in investigations, dawn raids and criminal prosecutions over the last decade. A significant rise in the number of formal investigations opened in the most recent past (14 in the first nine months of 2009 as opposed to an average 3–5 during the previous years) shows that the investment in staff over the last decade is starting to pay off. Dawn raids, too, have become a tool that is more commonly used—with the authorities conducting nearly 100 unannounced inspections throughout Brazil per year in the most recent past. However, while the number of new investigations is on the rise, the same cannot be said of the number of cases closed. In fact, the number of convictions achieved in 2008 and 2009 closely mirrored the numbers achieved during the early part of that decade. In the last 10 years, Brazilian authorities have managed to reach 10 convictions a year only once (in 2005). Thus, the main challenge the new CADE will face is not the starting of formal investigations, but reaching a conclusion of pending cases. Commentators have been worried that the availability of human resources (or lack thereof) will be a key factor in determining the ability to conclude investigations and thus the number of cases where convictions are reached. While opening investigations sends a clear signal to the business community that the authorities are willing to take up the fight against cartels. However, it is the number of cases that are actually brought to a conclusion that show their ability to pursue such a course of action effectively. It will be for the new CADE to show that it can effectively deliver such results.

Having said that, one achievement must be acknowledged: It is impressive to see the effort that has gone into, and the effects achieved by the agencies, in the area of competition advocacy. Today, Brazil is at the forefront of efforts to change the business culture in a way that goes beyond the mere prosecution of cartels. It has developed novel approaches to communicating with the general public as well as the legal community. This included advertisements in the general media as well as pursuing the concept of the ‘competition day’ that reaches out to ordinary citizens to inform them of the importance of competition and steps taken to build and protect an environment where competition can flourish. It is submitted that such efforts may pay even bigger dividends by changing the mindset of those subject to the law even more effectively than a handful of additional convictions. The Brazilian authorities should be lauded for their achievements in this area.

The FAS in Russia has decided a number of cases that show its focus on cartels that have a direct impact on Russian end consumers. This includes price fixing arrangements in the areas of vodka, coal, and the Moscow construction market. Even international cartels that have recently been pursued appear to have a strong local nexus. In 2009 the investigation into a price and volume cartel between manufacturers
of matches, for example, involved companies based in Russia, the Ukraine and Belarus. First steps have been taken successfully, only time will tell whether the FAS will be able to effectively take up the fight against cartels. In this regard, it will be interesting to see, what role the Ministry of Internal Affairs will play in bringing criminal cases: Will it support the efforts of the FAS or will its role lead to irritation through uncoordinated enforcement activities? From an international perspective, another important element will be the establishment of the first supranational competition authority in the area of the customs union of Belarus, Kazakhstan and Russia. As Russia, Belarus and Kazakhstan are setting up their joint agency, it will be interesting to see what, if any, role this body will play in the area of cartel enforcement and how its activities will relate to those of the FAS.

The CCI in India has gotten off to a flying start. Infringement decisions against producers of Bollywood movies, travel agents and their associations, airlines, and manufacturers of liquid petroleum gas cylinders show that the CCI is serious about enforcing competition rules. These cases also show that, while the Indian Competition Act also applies to foreign cartels if they have an effect in India, the focus of enforcement is on local cartels. Such cases may, of course, involve international companies as well as Indian enterprises. What distinguishes these cases is a strong local nexus and their direct impact on Indian end consumers. This shows a sensible allocation of the limited resources which the CCI has at its disposal—it focuses on those matters which would otherwise be left unattended instead of joining a group of other national competition agencies in pursuit of global cartels.

In the same vein, the CCI is to be applauded for focusing on its advocacy efforts. In this area, too, its work can have a real impact on the way business is conducted in India. This not only applies to educational efforts to end consumers as well as the Indian business community; it also applies to the outreach effort directed at other parts of the government. In fact, given the reluctance of many of these bodies to fully embrace the idea of free markets and competition that is not directed by government agencies, this part of the CCI’s work may be its most important. Changing attitudes of all those involved in the economy (and the related legislative and ministerial activities) appears to be a crucial element of making competition work in India.

In China, both NDRC and SAIC have also focused their enforcement activities on local matters. Individual cases have focused on activities that directly impact Chinese end consumers, relying on both the AML and the Price Law. This includes price-related matters brought against arrangements between producers of green beans and garlic in Jilin, Shandong, Henan, and Guangdong provinces, as well as rice noodles in the Guangxi Zhuang Autonomous Region, price fixing arrangements concerning the sterilization of dishware in Fujian province as well as a market allocation cartel by local cement manufacturers through their trade association in Jiangsu province.

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6. This matter is also interesting for another reason: After detection of the cartel, all participants availed themselves of the possibility to (individually) apply for leniency and receive full immunity from administrative fines. Thus, no administrative sanctions were imposed on the companies. The legal situation has changed since and only the first successful applicant can receive full immunity.
The last case shows both the intricacies as well as the effectiveness of the process of enforcing competition rules in China: the investigation was triggered by a whistleblower contacting the local Administration for Industry and Commerce (AIC) which reports the matter to the provincial Administration for Industry and Commerce which in turn reports the matter to and requests an investigation authorization from SAIC. Once authorization has been obtained by the provincial AIC, the local AIC forms a special team and conducts the investigation. It is fascinating to see that merely 18 months elapsed between the first contact with the whistleblower and the issuance of the final decision. This shows that while the internal process may be complex, it can lead to results in a time-frame that agencies in more mature jurisdictions can only aspire to. Thus, it is clear that the scene has been set for effective cartel enforcement within China.

§6.05 CONCLUSION

This overview has shown that both the institutional as well as legislative framework for effective cartel enforcement has been built in all of the BRICS countries. Procedural details are slowly being added and substantive guidance is emerging. Authorities are willing to actively and aggressively enforce their competition laws and are slowly but steadily gaining experience in this area of the law. One major challenge is the availability of sufficient resources to deal with such matters. All of the BRICS countries represent large economies where a handful of officers in a central location are unlikely to effectively pursue the fight against cartels. Much will therefore depend on the willingness of central and local authorities to work together in their fight against cartels. The Russian FAS with its numerous regional offices may have an institutional system that is best suited to this task, but the ability to cooperate with the Ministry of Internal Affairs when conducting investigations may yet turn out to pose a significant challenge. In China, SAIC combines central functions with provincial and even local branches that has been proven to work. However, it will remain to be seen whether NDRC and SAIC will be effective in allocating major cases amongst each other to ensure an effective fight against cartels. The Indian authority still is in its institutional infancy—the great challenge it faces is the ability to build a sound team—both in New Delhi as well as in the regional offices that it plans to establish in the medium term. The CCI has already taken some important steps towards effective cartel enforcement; whether it is able to pursue a comprehensive cartel enforcement effort remains to be seen. This is also true for Brazil where significant institutional as well as legal changes are about to occur. Effective enforcement will depend on the ability to address the issues raised by those changes and move on to pursue its ‘everyday’ cartel enforcement activities.

Ultimately, this is the challenge all of the BRICS countries face—unlike the United States and Europe, their authorities have not had decades to develop a competition-policy, yet the world looks at them and expects them to establish a credible enforcement practice sooner rather than later. They have been thrust onto the world stage and now need to prove themselves. Their first steps have been promising but much remains to be done.