

**5th BRICS
INTERNATIONAL COMPETITION CONFERENCE
Royal Tulip Hotel, Brasilia, Brazil
(8-10 NOVEMBER 2017)**

Towards a Successful Second Decade of Cooperation

PLENARY SESSION 1 (Thursday, the 9th Nov., 2017 at 11 a.m.-12.30 p.m.)
Competition Developments in the BRICS
Talking points format

I. Introduction: Globalization and BRICS economies

1. Ladies & Gentlemen, We meet here in Brasilia in the backdrop of a transformation of the global economic landscape that is being shaped by a backlash to globalisation. Until recently, it looked as if the world's economic and political order was set on an established, predictable course.

2. However, the populist backlash has been on the rise, for at least a decade if not more, for the reason that globally inequalities have been on the increase. But let us be clear that it is not globalization that is responsible for it alone. There are other factors such as changes in technology, rise of winner-take-all markets, erosion of labour market protections, and decline of norms restricting pay differentials which have also played a part. Interestingly, these developments are also not divorced and independent from globalization.

In fact, they have fostered globalization and at the same time have been reinforced by it.¹

3. Having said that, the fact remains that global economy is more integrated today than during the peak of the early 20th century. Looking to the future, we expect that the years ahead will be characterized either by stabilization in the level of globalization, or further integration.

4. BRICS has been an important source of growth and political influence in the globalised world. BRICS account for over 40 per cent of the world population, hold over US\$4 trillion in reserves and account for over 17 per cent of global trade. BRICS economies grew rapidly with their share of global GDP rising from 11 per cent in 1990 to almost 30 per cent in 2014. Our five nations, with a joint estimated GDP of \$16tn, have their own development bank in parallel to the IMF and World Bank and hold summits similar to that by the G7 forum.

5. We had an impressive performance up till 2014. However, since then BRICS countries started to slow down. The slowdown reflected in a number of

¹ POPULISM AND ECONOMICS OF GLOBALIZATION, Dani Rodrik, John F. Kennedy School of Government Harvard University, retrieved on September 30, 2017

areas. Exports from BRICS to developed markets and investments into their respective economies have declined; our collective contribution to global growth has fallen from a peak of nearly 50 per cent in 2013 to around 36 per cent in 2015. Real GDP growth of BRICS, which was over 8 per cent in 2010, declined to just over 4 per cent in 2015 and the decline continued in 2016. But 2017 has started more brightly and for the first time in two and a half years, BRICS nations are all growing at the same time, though the growth is not as impressive as in the past.

6. The real challenge is to bring about a sustained economic rebound by addressing the dual concerns of efficiency and equity. The need then is not just for a growth that is rapid, but a growth that is broad-based in which all sections of our people have a stake. Building credible institutions for sustained and equitable growth will also be a priority.
7. In spite of different governance and political structures, we have in the past shared a common philosophy of development - the belief that governments have a significant role in the growth and development process. However, the BRICS

economies are moving away from this and are at varying degrees of transition in which the State is relinquishing the driving seat in economic matters to markets. There is an increased belief in the ability of markets to allocate resources in an efficient manner possible, so as to realise the growth potential of an open economy.

II. Challenges for BRICS Competition Authorities in the “New” World Order

8. Friends, we all understand that liberalised markets cannot be presumed to be competitive *per se*. They can be fraught with distortions caused by vested interest groups, large monopolistic firms or groups of firms in concert. Such distortions break the link between liberalised markets and the productivity and innovation gains that they are believed to yield. Hence the need for a robust competition law and policy. We need to ask ourselves if liberalization in our countries has been pro-business or pro market? If it is pro business, then there is a reason to believe competitive pressures have not emerged and market concentration has increased having a negative impact on productivity.
9. Second, while all our jurisdictions remain committed to enforcing the competition law with a

view to ensure that markets function well, the link between competition and economic development cannot be established through standalone application of the competition law. It would require a number of complementary government policies to work in tandem. If the industry and economy has to continue to move on a high efficiency path leading to higher trade and economic development, it must also be ensured that other policy or regulatory instruments of the government do not intervene in markets.

10. In this direction, the Competition Commission of India has recently issued Competition Assessment of Legislations and Bills Guidelines. The Commission intends to play a proactive role in 'competition assessment' of economic statutes with a view to identify and eliminate provisions that distort competition in Indian markets.

11. I believe the Chinese government has introduced the fair competition review system in 2016 to gradually reconcile industrial policies with competition policies, and to liberalize certain regulated markets.

12. Third, our enforcement has to do a balancing when faced with conflict between competition policy and industrial policy. SOEs are very vital for economic growth of a country. According to the OECD, 14% of the largest companies in the world are SOEs distributed across 37 countries, many of them in India, China and Russia. Inherited privileges to these SOEs can block competition and harm markets. In many jurisdictions they enjoy competition law exceptions that further distort the ability of domestic and international firms to effectively compete with these enterprises on their domestic and, increasingly, international markets. Going forward, there is a need to do away with the privileges given to SOEs and ensure that there is full application of national competition laws to SOEs that compete with non-state owned actors unless it is justified by local compulsions which override competition law.

13. Fourth, owing to the discontent with globalisation, we are seeing a current surge of nationalistic tendencies by many nations in the world. These tendencies can have an impact on competition law and its application. Domestic firms, when faced with trade liberalization that threatens to expose them to increased foreign competition, will turn to

the government or state agencies to achieve a degree of protection. Firms' actions can aim at effectively locking competing imports or foreign investors out of their domestic market and can even include the use of antitrust to subvert competition. We in the antitrust authorities will have to be careful not to succumb to such pressures. In times such as these, it is better if we go back to the drawing board to answer a very fundamental question: *"What is the point of the law—what are its goals? Everything else follows from the answer we give. Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."* (Robert Bork)

14. It is obvious that different goals of competition imply a different role for antitrust law, which in turn affects the criteria according to which the law is applied. Different policy alternatives can guide antitrust enforcement in our countries. These include efficiency-based goals (allocative, productive and dynamic efficiency) and non-efficiency-based goals (protecting small businesses; achieving international competitiveness; eradicating poverty; and promoting fairness, equality, and justice). Jurisprudence emerging from South Africa provide

some lessons regarding the pursuit of non-efficiency goals by Competition Authorities.

15. Given the variety of goals that guide antitrust enforcement and that many of them are incompatible, it is essential for an enforcing authority to frame its guiding policy in a clear and transparent manner. Such clarity and transparency will allow the enforcement process to be stable, predictable, and accountable. If these aspects are lacking, antitrust enforcement could become susceptible to cronyism and nepotism.

16. Lastly, in the area of enforcement, one of the very important issues facing each of our jurisdictions today is the rapid change in markets, led by technology and innovation dominated by transnational corporations. Advances in technology and, more particularly, digital technology and disruptive innovations, are transforming markets at an unprecedented scale and pace. Digital markets have spurred debate on big data and competition law. While this debate is continuing, the fact remains that business models based on vast collection of data and its processing on a near real-time basis, are enabling data service provider to offer a wide range of innovative and customized

services. This brings advantage to consumers in terms of reduction of cost, customized offerings as well as convenience of choice. But at the same time, data-driven network effects can be a source of market power and can be used for influencing the choices of the customers.

III. Major developments in the Indian Economy and its implication on the instrumentality of Competition Law

17. Speaking of India, there has been a dramatic shift in the Indian economic development paradigm. The intervening period from the last time we met has witnessed a slew of economic reforms, which have the potential to transform the crucial macro aspects of the Indian economy. Measures such as GST; bankruptcy code; and demonetisation have changed the entire business environment.

18. Both demonetisation and GST have created conditions for greater formalisation and digitisation of the economy. The Insolvency and Bankruptcy Code has put in place the much-sought legal framework for speedier, transparent and efficient resolution of corporate insolvencies. India jumped 30 places to rank 100th in the World Bank's 'ease of doing business' ranking, helped by these reforms.

19. All these moves, I believe, will dismantle the status quo and will help laying the foundation for a cleaner economic organisation of the nation. As the market regulator, Commission is conscious of the larger policy milieu, and is carefully gauging its implications for markets as they unfold. However, my priors are that with the economy becoming more dynamic, legacy issues that had tempered competition, will slowly fade away providing a much larger canvas for the instrumentality of competition law.

20. Coming to enforcement, 'Cartels' remain CCI's top priority. Horizontal agreements entered into between competitors to fix prices, share markets and customers or rig bids, raise a presumption of causing anti-competitive harm under the Act. The Legislature has carved out stricter penalty provisions in case of cartelization. It is telling that over 60 per cent of infringement decisions relate to sectors that are not regarded as cartel enforcement hotspots internationally. These include entertainment, pharmaceuticals distribution and transport (excluding railways). Moreover, almost all the infringement findings in these sectors share striking common

characteristics such as (i) extremely strong trade association forming the fulcrum of the cartel; (ii) small or micro enterprises or individuals with a low business turnover; and (iii) the participants in the informal sector, with high degree of self-regulation and ineffective government regulation. As of September 2017, the Commission has found contravention in 61 cases involving cartels.

21. Our general approach is to deter them through penalties as well as to use the lesser penalty provisions to encourage enterprises to cooperate in uncovering the cartels. In India, there has been a surge in leniency applications in the last one year. Recently, we have issued our first order in a case where a 75% reduction in penalty has been granted to an applicant under the Lesser Penalty Regulations. This has been received well and we expect that more and more enterprises will come forward and help us unravel cartels in many more areas with definite evidence. Regulations have been recently tweaked to make leniency more effective. We have amended the confidentiality provisions and have provided a roadmap for moving from a covert to overt phase in leniency cases. We have amended the definition of "applicant" to include individuals and have clarified

that the benefit of the leniency provision is not restricted to only 3 applicants.

22. As you must all be aware the Commission is hosting the ICN in March of next year and the theme of the ICN project is keeping in mind the enforcement priority of the Commission: Cartel enforcement and competition.

23. The last one year has seen a number of important and positive developments in the areas of evolving jurisprudence, lesser penalty and merger regulations and compliance. These developments would provide tailwinds to the competition regime in India. And what is heartening is the fact that the government of the day is committed to a liberal and a facilitating competition law regime - a regime that enables economic development instead of putting a spanner in the works.

IV. Moving towards effective international cooperation amongst BRICS authorities

24. Coming to the theme of the conference. At the multilateral level, various WTO agreements, including the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the

Agreement on Trade-Related Investment Measures (TRIMs) touch upon aspects of anti-competitive practices by firms, and provide for consultation between Members affected by such practices. But these institutions themselves didn't impose any obligation to deal with anti-competitive practices.

25. Thus, to deal with the challenges of antitrust enforcement in the increasingly globalized economy and given the need for effective international cooperation, competition provision in Regional Trade Agreement is essential. What form should international cooperation take? Does it necessarily imply a convergence of antitrust governance structures across the BRICS nations? Is such a convergence really desirable? In our view, broad agreement on contours of cooperation will be essential and we must work to collectively address the challenges of sharing of confidential information and dispute settlement that often restrict the effectiveness of international cooperation.

26. International cooperation will help us in overcoming challenges faced in cross-border investigations such as trust, different legal systems, gathering evidence and its limitations,

and implementing leniency and immunity programmes. FAS Russia has brought forward a proposal on developing legal tools for international cooperation in investigating cross-border cases in the recently concluded 16th session of Intergovernmental group of experts on Competition Law and policy held under the aegis's of UNCTAD for facilitating international cooperation. Going forward, BRICS competition authorities must try and overcome the structural obstacles among our five countries, despite the huge discrepancy between our economies and the heterogeneous nature of the membership.

27. To conclude, there are many challenges that all of the BRICS countries face. Our authorities have not had decades to develop a competition policy, yet the world looks at us and expects us to establish a credible enforcement practice sooner rather than later. We have been thrust onto the world stage and now need to prove ourselves. Our first steps have been promising but much remains to be done.

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