**Keynote Address by Commissioner Edith Ramirez**
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# "Building Effective Global Antitrust Enforcement BRIC by BRIC"

Parallel antitrust investigations across jurisdictions are nothing new. But we are now entering an unprecedented era of regulatory interdependence. Last year, Western Digital and Seagate Technology, two U.S.-based high-tech companies, each entered into agreements to acquire another player in the global hard disk drive business. The proposed transactions were announced around the same time, and at least eleven jurisdictions, including the Federal Trade Commission here in the United States, worked together as each of us determined whether they presented any competitive concerns.

No prior transaction has involved cooperation by such a large number of competition agencies. A decision reached by any one jurisdiction could have had significant ramifications for the others, so a high level of coordination was crucial. Although the degree of cooperation with each agency varied, as did the substantive issues discussed, it was critical to keep each other informed of our progress. And, while not everyone reached the same result—due at least in part to different facts in each country—engagement with our counterparts enhanced our review and made the process more effective and efficient, including for the parties.

With over 120 antitrust agencies worldwide, multi-jurisdictional reviews will only become more common. As a result, we all need to think about the implications of these reviews for U.S. enforcers, businesses, and the consumers who buy their products.

For much of the last two decades, the focus of international antitrust has largely been on the relationship between the United States and its major trading partners, especially Europe and Canada. This focus has shifted more recently to emerging economies that are either at early stages in their antitrust development or implementing reforms that will significantly impact their operations. Due to their increasing economic importance, the BRIC countries in particular have garnered considerable recent attention, as evidenced by the agenda at this very conference. This morning, I will focus on the antitrust regimes of those four countries.

Political support for free markets and competition, the presence of effective institutions, and a commitment to adequate training are a few of the factors that will determine whether antitrust enforcement succeeds in these jurisdictions. How these challenges are met will have profound consequences for enforcers, the companies that are being regulated, and consumers. All of us benefit from antitrust systems that are fair, transparent, and predictable.

Much of the direction that each competition regime takes will continue to be determined domestically, but the international community can help to tilt the balance toward sound and predictable enforcement. The FTC is committed to working with our foreign counterparts to

create an international antitrust community that addresses the needs and concerns of consumers and businesses worldwide.

Let me now turn to a brief discussion of the antitrust systems in each BRIC country and share some of the work the FTC has been doing to help speed up their entry into the mainstream antitrust community.

## I. Brazil

I would like to start with Brazil, the most mature of the antitrust regimes I am focusing on today. The modern era of antitrust enforcement in Brazil began in 1994 with the enactment of Law 8884, concurrent with the country's transition to a market-based economy. This law established the Brazilian Competition Policy System, which included a trio of enforcement agencies. Since then, just as the Brazilian economy has flourished—recently surpassing the United Kingdom to become the world's sixth largest economy—considerable progress has been made in antitrust enforcement, particularly on the merger and cartel fronts. In its 2010 Peer Review, the OECD praised Brazil's antitrust agencies for making "steady, even remarkable, progress."[1]

But despite considerable success, there remained a number of obstacles preventing the Brazilian competition system from achieving as much as its supporters would have liked. Several of those shortcomings have now been addressed through the most substantive reforms to Brazil's competition laws since 1994.[2] These reforms just took effect at the end of May, and although there is some uncertainty surrounding their implementation, they should lead to even more effective antitrust enforcement in Brazil and lower burdens on companies doing business there.

Perhaps the most significant change is the unification of Brazil's three independent competition agencies. Since 1994, the Brazilian competition system has been comprised of two investigative and advisory agencies as well as a third component, the Council for Economic Defense, commonly known as CADE, which served as an administrative tribunal that decided merger and conduct cases. These agencies, which previously had overlapping responsibilities, are now combined into a single independent agency, the new CADE, comprised of an administrative tribunal, a directorate general of competition that will investigate mergers and conduct investigations, and an economics department.[3]

By combining these three agencies, the reform should eliminate the considerable overlap among them and increase efficiency. To address concerns about inadequate staffing, Brazil's reform includes funding to increase the number of professionals working at the agency.

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[1] Organization for Economic Cooperation and Development & Int'l Development Bank, Competition Law & Policy in Brazil: A Peer Review 9 (2010), *available at* http://www.oecd.org/dataoecd/4/42/45154362.pdf.

[2] Law 12,529/2011. The Brazilian Congress approved the law in October 2011, and President Dilma Rousseff signed it on November 30, 2011. In addition to the reforms discussed, the law also modifies the basis for assessing fines in conduct cases, permits the sanctioning of individuals for conduct violations, and expands the cartel leniency program.

[3] Law No. 12.529, Art. 5.

In addition to structural changes, the reform significantly modifies the merger review process. The primary change is the adoption of a mandatory pre-merger review system to replace the previous post-merger system. Under the old law, parties were free to consummate a merger without first obtaining antitrust approval.[4] Now mergers that meet the filing thresholds must receive CADE's approval before closing.[5]

Moving to a pre-merger system will allow CADE to approve or deny a merger without needing to unwind a consummated deal. No longer will a company have to face uncertainty about whether it will be required to divest an acquired asset years after consummating the transaction. It should also lessen CADE's reliance on behavioral remedies, increase the effectiveness of relief, and bring Brazil further into the antitrust mainstream. The shift may also help expedite the review process by providing parties incentives to cooperate with CADE to accelerate clearance. We worked closely with all three agencies during the crafting of the legislation to share our experience, and while there are still some issues that need to be worked out, I think everyone hopes that the new pre-merger system will be a significant improvement.

Even with these positive changes, some challenges remain. Although designed to expedite the review process, the law does not provide any consequences if CADE fails to meet its statutory deadlines. Nor does it provide deadlines for completing the various stages of merger review or a time frame for clearing transactions that do not raise competitive concerns, something akin to the 30-day preliminary investigation period in the United States. It also fails to streamline the remedial process, which could delay final approval of a deal. Finally, questions remain about how to interpret the new filing thresholds and what deals they cover. While some of these issues should be resolved quickly, others may linger for some time.

Despite these challenges, I am confident that these reforms will usher in a new era in Brazilian antitrust enforcement. Brazilian antitrust authorities have shown an admirable willingness to acknowledge weaknesses in their system and to engage with peer agencies to address them. The FTC, both directly and through international organizations like the International Competition Network, has been at the forefront of these efforts, including through the antitrust cooperation agreement between the United States and Brazil signed in 1999, technical assistance, and the routine dialogue we have maintained over the years. The FTC will continue its efforts to ensure that the new CADE fulfills its promise to become a world-class enforcement agency, a real possibility so long as the political will in Brazil remains committed to the benefits of sound antitrust enforcement.

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[4] Law No. 8,884, Art. 54

[5] Law No. 12,529, Art. 37. On May 31, 2012, two days after the new law took effect, the Ministry of Justice and the Ministry of Finance issued a joint statement increasing the filing thresholds. The filing thresholds now require reporting if one company's reported revenues in Brazil are at least R$750 million (approximately US$375 million) and the other party had Brazilian sales of at least R$75 million (approximately US$37 million). *See* Melissa Lipman, *Brazil Merger Filings to Drop as Gov't Raises Thresholds*, Law360 (May 31, 2012), *available at* http://www.law360.com/competition/articles/345726/brazil-merger-filings-to-drop-as-gov-t-raises-thresholds. The new filing thresholds determined by revenue replace a system based, in part, on meeting certain market share thresholds.

II. China

Let me now turn to China. Currently the second largest economy in the world, China has been a key player on the global economic stage for some time. It is now also emerging as an important figure in the antitrust world, despite being a newcomer to the scene. China's Anti-Monopoly Law (AML) took effect in 2008 and led to the creation of three antitrust enforcement agencies: the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) to conduct merger reviews and two other agencies to deal with conduct matters.

The passage of the Anti-Monopoly Law was seen by outside observers as a potentially promising development. But there was also deep concern that enforcers would not be independent from the larger Chinese government and that the law might be used for purposes other than the promotion of competition and consumer welfare.

These fears were heightened by MOFCOM's decision in March 2009 to block Coca Cola's proposed $2.4 billion acquisition of Huiyuan Juice Group, the owner of a highly popular Chinese juice brand. And MOFCOM's short public statement, providing little insight into its reasoning, did little to allay those concerns. But despite this somewhat controversial start, our impression is that this young agency is working hard to deal with the daunting procedural and substantive issues it faces in reviewing major international transactions.

Two recent decisions have also helped to calm concerns that the merger laws would disadvantage foreign investors. In November 2011, MOFCOM approved the $584 million acquisition of a controlling interest in Little Sheep Group, the Chinese owner of a popular chain of Mongolian hot pot restaurants, by Yum! Brands, the Kentucky-based owner of the KFC, Taco Bell, and Pizza Hut chains. A month later, MOFCOM cleared Nestlé's purchase of a 60% stake in one of China's largest candy producers.[6]

These decisions have helped to quell some of the worst fears expressed by skeptics. At the same time though, MOFCOM has made decisions that are inconsistent with other agencies, including by imposing remedies that would be unusual here in the United States.

As an example, let me turn back to the hard disk drive cases I discussed at the start. Of the jurisdictions that examined the Seagate transaction, only China imposed conditions. In December 2011, MOFCOM announced it would require Seagate to operate the Samsung hard disk drive business as a separate competitor for at least a year. MOFCOM imposed similar conditions on Western Digital in March, apparently concluding that the divestiture of Hitachi's 3.5 inch desktop hard disk drive assets required by the FTC and the European Commission was not enough.

What may be at least as pressing a concern to the business community, however, is the timing of merger reviews. As MOFCOM itself has acknowledged, it takes longer to clear transactions that do not present significant competitive concerns than it should. In the United States, about 96% of transactions are cleared within the first 30 days, and only 4% face a second request. By comparison, over 40% of MOFCOM's merger investigations proceed to Phase 2.

[6] *See* Jim O'Connell, *The Year of the Metal Rabbit: Antitrust Enforcement in China in 2011*, ANTITRUST, Spring 2012, at 68-69.

The lengthy reviews may be driven less by substantive concerns than by resource constraints. Agency staff is showing growing sophistication, but they are still learning and gaining valuable experience. At the same time, the volume of cases they are handling has risen dramatically, so the delays are hardly surprising. MOFCOM's leadership understands that this is a problem. In a press conference in December, the head of MOFCOM's Anti-Monopoly Bureau committed to a review of its merger process in an effort to make it more efficient.[7] This will undoubtedly continue to be an ongoing challenge, especially given the small size of the agency, which has a staff numbering only in the dozens.

For me, one of the most encouraging signs out of China is the willingness of Chinese regulators to engage in an open and extensive dialogue with foreign experts, including the FTC and the Department of Justice.

Last summer, along with the Justice Department, we entered into a Memorandum of Understanding with the Chinese antitrust agencies to allow for cooperation between our agencies. We quickly had a chance to put the new arrangement to the test during the hard disk drive cases. Our engagement with MOFCOM was not very different from our experience cooperating with other agencies. While we did not get to exactly the same place in the end, the overall experience was positive, and we anticipate closer ties as we review more cases in common. My hope is that China will also continue to increase its level of participation in international antitrust organizations.

It is also worth pointing out that the level of engagement we have had with Chinese regulators in the last year is not new. As early as the drafting stages of the Anti-Monopoly Law, we began a dialogue with representatives of the National Peoples' Congress and MOFCOM, and we have continued to provide comments on proposed regulations and procedures. We would like to think that, as a result, the regulations MOFCOM issued are more efficient, and more closely resemble worldwide mainstream practices than they might have otherwise.

The FTC's support to China extends well beyond commenting on proposed policy and legislation. The FTC provides extensive training programs to representatives of the Chinese antitrust agencies, and had started doing so even before China passed the Anti-Monopoly Law in 2007. Through these programs, the FTC shares its best practices to assist China in developing analytical and decision-making standards similar to those employed by other competition agencies.

The Chinese agencies' decisions are subject to review in the courts, and the capabilities of the Chinese courts will therefore also be an essential ingredient of successful implementation of the Anti-Monopoly Law. Our working relationship with the Supreme People's Court of China stretches back several years and has already led to two significant judicial workshops. Just last month, the Supreme People's Court issued rules that address important matters such as burdens of proof in private AML litigation.[8]

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[7] *See id.* at 73.

[8] The rules issued by the Supreme Court covering, among other topics, jurisdiction, burden of proof, evidence, expert witnesses, and statutes of limitations. *See* Fangda Partners, *The Supreme People's Court Published the First*

How these and other issues play out remains to be seen. But there is no question that the Chinese antitrust agencies, barely approaching their fourth full year, have made substantial progress in a short period of time.

## III. India

India is another relative newcomer to the antitrust world. India passed a new and more economically-grounded Competition Act in 2002 to replace an earlier outdated law. But before the Act came into full force, the constitutional validity of the new enforcement agency's composition and authority was challenged before the Indian Supreme Court,[9] and it was not until September 2007 that the Act was amended to address these concerns.

The legislation did much more, though, including introducing a mandatory pre-merger notification system. The 2007 amendment raised a host of questions for the global antitrust community, such as whether transactions having little or no connection to India had to be notified, whether companies were obligated to consider all of the selling party's assets, not just the assets being sold, in determining whether the transaction met India's notification thresholds, and the length of the review period. Many of those questions have only recently begun to be answered, as merger review under the Competition Act began just last June.[10]

The FTC started to work closely with the Competition Commission of India, or CCI, and its parent agency, the Ministry of Corporate Affairs, to address some of the problems created by the Competition Act and the 2007 amendment well in advance of the Act's implementation. We believe those discussions, along with those of the business and legal communities in India and abroad, led to the recent rulings by the Ministry of Corporate Affairs establishing a minimum Indian nexus requirement for notification.[11]

Similarly, in response to the concerns that we and others raised about the lengthy 210-day review period set out in the Act, CCI issued regulations setting internal review periods. Consistent with global norms, CCI is now required to complete its initial review within 30 days of notification[12] and its examination of the most complex transactions within 180 days.[13]

To be sure, some of the Competition Act's shortcomings remain. For example, the notification form is still quite burdensome, and for notification purposes, CCI appears to consider all of the seller's assets, and not just the value of the assets being sold. CCI has acknowledged this problem, but we understand that it believes that a legislative fix is required.

As with China and Brazil, we have found that all of the major players in the establishment of India's antitrust regime have been open to our input. The Ministry of Corporate

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*Judicial Interpretation for the PRC Anti-Monopoly Law* (May 2012), *available at* http://www.fangdalaw.com/files/The%20Supreme%20People%20Court%20Published.pdf.

[9] *Brahm Dutt v. Union of India*, 2005 2 SCC 431.

[10] Ministry of Corporate Affairs Notification S.O. 479(E) (Mar. 4, 2011).

[11] Ministry of Corporate Affairs Notifications S.O. 482(E) (Mar. 4, 2011) and S.O. 1218(E) (May 27, 2011).

[12] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, at 19(1).

[13] *Id*. at 28(6).

Affairs invited us to make comments on two drafts of India's National Competition Policy, and CCI began a dialogue with us from the day it opened for business.

We have also provided technical assistance dating back to 2004, when CCI had only a skeleton staff. These efforts increased substantially after the Competition Act took effect and CCI hired more personnel. Over the past two years alone we have conducted eight one-week workshops in Delhi. A merger economics workshop is scheduled for July, and we hope to conduct additional workshops later this year, including a program for the Competition Appellate Tribunal, the three-member body that hears appeals from CCI decisions.

We hope to sign an MOU with CCI and the Ministry of Corporate Affairs in the near future to facilitate greater cooperation and further strengthen our working relationship.

IV. Russia

I will close with a few words about Russia. Russia's economic transition was more abrupt than any of the other BRIC countries, but it had created an antitrust agency, now called the Federal Antimonopoly Service, even before the hammer and sickle was pulled down from the Kremlin.

Over the years, the FAS has become an effective advocate for competition in Russia. It has ramped up its ability to take on cartels, and also effectively adjusted its laws to distinguish between per se and rule of reason conduct much like we do in the United States.

We have maintained a close dialogue at all levels with the FAS throughout its existence—I met with Director Igor Artemyev in Moscow just a few months ago—and we and the Justice Department signed an MOU with the FAS three years ago. We have also had a regular technical assistance program for the FAS for several years. For example, earlier this year our Bureau of Competition Director, Richard Feinstein, visited Russia to discuss competition problems in the pharmaceutical sector. Last summer, we conducted a judicial training seminar for Russian judges that featured Judge Michael Melloy of the Eighth Circuit Court of Appeals, and we are planning another judicial training seminar for this summer.

The FAS has made significant strides in developing and implementing antitrust policy. But until the FAS and its antitrust enforcement become more mature, the global antitrust community will remain concerned that the political climate of the country could stymie its progress. In particular, the recent presidential elections in Russia caused the global antitrust community to hold its collective breath. The news that Mr. Artemyev, who has been the head of the FAS since 2004, was re-nominated by President Putin for another six-year term provides us with great comfort. Mr. Artemyev is a leader in the international antitrust community and is committed to the development of sound antitrust policy. We look forward to continuing to work with him and the other members of the FAS.

## V. Conclusion

If there is a common theme among the BRIC countries, it is one of steady progress under sometimes challenging circumstances. Challenges still lie ahead, particularly amid new signs that the BRIC economies are slowing. There is always a concern that in the face of economic pressure, the political will behind the recent adoption of prudent competition policies will evaporate. In the face of these concerns, it is more important than ever that we remain committed to working with these and other jurisdictions to promote sound and fair competition systems. By doing so, we hope to reduce the burden and increase predictability for companies entering into procompetitive deals that ultimately benefit consumers.

I would like to thank the organizers for inviting me to be a part of this outstanding conference and look forward to learning more about these issues over the next two days.

Thank you.