Antitrust enforcement in emerging jurisdictions

On 26 March 2014, an historic panel consisting of senior officials from the antitrust enforcement authorities of Africa, Brazil, and China presented to, and took questions from, a packed house of attorneys at the ABA Section of Antitrust Law's Spring Meeting in Washington, DC (ABA Spring Meeting). This was the first time these emerging antitrust jurisdictions had been represented by such senior officials at an ABA Spring Meeting. The panel comprised Vinicius Marques de Carvalho, President of Brazil's Conselho Administrativo de Defesa Econômica (CADE); George K. Lipimile, Director and Chief Executive Officer of the Competition Commission of the Common Market of Eastern and Southern Africa (COMESA); Li Qing, Deputy Director General of the Price Supervision and Anti-Monopoly Department of China's National Development and Reform Commission (NDRC); and Zhao Yiqin, Deputy Director of the Anti-Monopoly Enforcement Division of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of China's State Administration for Industry and Commerce (SAIC).*

Drawn from three key emerging jurisdictions from around the world, and representing three continents – Africa, Asia and South America – the enforcement officials spoke about the authorities they lead and the issues their authorities face as emerging antitrust regimes in a world of increasing globalization financially, commercially, and in terms of antitrust enforcement.**

Emerging economies and globalization

Commentators cite many factors as contributing to the growth of so-called emerging economies relative to so-called developed economies. These include lower labour costs, rising productivity, improvements in transport and communication systems connecting emerging economies to global markets, a rising middle class, growth in world trade, and a decline in trade tariffs.

It is estimated that the economies of the most prominent emerging markets, including Brazil, China, and India, have grown by about 600 percent since 1960 compared with 300 percent for the richer, more industrialized countries. Over the past 20 years, emerging markets' share of world GDP, private consumption, investment and trade is estimated to have nearly doubled. In addition, "developing" economies are estimated to have attracted over half of the total global foreign direct investment in 2013; the share of foreign direct investment into "developed" countries has been in decline for some time. The U.S. remains the top destination in the world for foreign direct investment, with China (excluding Hong Kong) in second place. Brazil was 7th, Mexico 12th, and India 16th in 2012 according to UNCTAD.

Last year, China was reported to have become the biggest trader in goods, ahead of the U.S. for the first time in modern times.[1] Nonetheless, the U.S. continues to lead the world in the trade for services; China's trade in services was less than half that of the U.S. in 2012, for example. Recently, the International Comparison Program hosted by the World Bank has forecast that China will overtake the U.S. as the largest overall economy in the world by the end of this year and not 2019, as previously forecast. Nevertheless, the world's "rich" countries still account for 50 percent of global GDP while comprising only 17 percent of the world's population.

Globalization has also been an increasing feature of the international enforcement of antitrust law over the last couple of decades. The great interest in what the emerging jurisdiction enforcers from Africa, Brazil, and China had to say at the ABA Spring Meeting is clear evidence of this trend – a trend that shows every sign of continuing, and, indeed, of accelerating.

The growth in the number of jurisdictions that have adopted antitrust laws in the last 20 years or so has been well-documented elsewhere. This article focuses on the jurisdictions that were represented on the ABA Spring Meeting panel. Brazil has substantially amended its antitrust law and institutional structure with effect from 2012, bringing about major changes to its previous regime. China's Anti-Monopoly Law is five years old, although China first started to consider the adoption of an antitrust law regime and to study other jurisdictions' regimes many years ago. The COMESA Competition

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**** The material in this article is drawn not only from the panel at the ABA Spring Meeting but also from other sources.**

1 Some historians believe that China was the largest trading nation during the Qing dynasty which lasted from 1644 to 1912.

Commission was established in 2008, but became fully operational only in 2013.[2]

The tendency to refer collectively to "emerging" antitrust jurisdictions suggests a greater homogeneity than in fact exists. In reality, there is considerable diversity in terms of the economic, social, political, historical, and cultural influences that affect the objectives and goals, as well as the institutional structures, laws and implementation of the antitrust laws and regimes in emerging jurisdictions, as is illustrated in the rest of this article.

Brazil

Brazil substantially amended its antitrust law and institutional enforcement structure resulting in major changes to its previous antitrust law regime. The new regime merged the Secretariat for Economic Defence (SDE) with the Administrative Council for Economic Defence (CADE) to create a single unified competition authority. The law also generally increased the financial and personnel resources for competition law enforcement and introduced a pre-merger control regime. These revisions did not occur in a vacuum; CADE analysed several antitrust regimes around the world, including the United States and European Union, before introducing the changes in Brazil.

With regard to mergers, the changes have resulted in a significant acceleration of the review process. In 2005, the average length of proceedings was 252 days; today, CADE President Vinicius Marques de Carvalho told the ABA Spring Meeting, it is less than 30 days. Despite this positive development, there remain some concerns about the new merger regime, including the scope of the jurisdictional thresholds that are perceived by the international business community to be too far reaching.

CADE also investigates non-merger cases involving both domestic and international companies, including both cartel and unilateral conduct cases. In 2013, CADE introduced a new regulation for the settlement of cartel investigations through cease and desist agreements and reductions in fines. CADE President Vinicius Marques de Carvalho told the ABA Spring Meeting that the new rules aim to improve settlement agreements and evidence collection. Specifically, applicants must confess participation in the antitrust infringement at issue and cooperate during the investigation to be eligible for the settlement procedure and fine reduction. There are four pre-defined discounts based on the degree of cooperation and order parties reach agreement with CADE: 1) 30-50% reduction of fine; 2) 25–40%; 3) up to 25%; and, 4) after closure of the investigation, up to 15%. CADE President Vinicius Marques de Carvalho also explained that this new system aims to increase parties' incentives to seek leniency. So far, one case has been completed under the new system, with more than 10 more under review.

With the new law and more resources, CADE has been increasingly active. For example, CADE has announced investigations into the alleged bid rigging of government tenders for medical supplies; fines in relation to cartels in the garbage collection and fire extinguisher industries, as well as the pharmacy sector; settlements in relation to cartel investigations in the air freight and international cable industries; and investigations into alleged abusive practices in the mobile, rail freight and ice cream sectors, as well as into Google search business.

China

China's anti-monopoly regime includes three anti-monopoly authorities. The Ministry of Commerce (MOFCOM) is the authority that reviews mergers. The National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have jurisdiction over price and non-price infringements, respectively, of the Anti-Monopoly Law (AML) involving horizontal agreements, vertical agreements, and abuse of dominance matters.[3]

In the past two years, NDRC and SAIC have been initiating investigations with increased frequency and levying increasingly large fines against non-compliant parties. During that period, NDRC is reported to have concluded more than 30 cases and SAIC at least 12. The two agencies have investigated cases in a broad range of consumer-facing sectors, including construction, agriculture, consumer goods, insurance, pharmaceuticals, and automobiles.

2 In addition, although a number of COMESA member states and other jurisdictions in Africa have had their own competition laws and regimes for longer, others have only recently adopted their own laws and regimes or are proposing to do so.

3 MOFCOM, represented by Director General Shang Ming, participated in a separate panel dedicated to mergers at the ABA Spring Meeting.

The increased enforcement activity of the Chinese anti-monopoly authorities has triggered concerns about transparency, procedural fairness, resources, and timing on the part of the international businesses subject to the proceedings.

NDRC

At the ABA Spring Meeting, Deputy Director General Li Qing said that NDRC has strengthened its enforcement staffing since 2011 by adding 20 administrative staff in the central office and 160 enforcement staff throughout the provincial offices. She also said that NDRC now covers more than 20 sectors of the Chinese economy and that NDRC has taken recent enforcement action in relation to cartels, vertical restraints, abuse of dominance, and abuse of administrative monopolies. Those investigations have been against domestic and international companies, privately owned companies and state owned enterprises, and industry associations.

In January 2013, NDRC took China's first enforcement action against an international cartel. The agency imposed a penalty of RMB 353 million (approx. US$ 56.6 million)[4] against six international manufacturers (from Japan, South Korea, and Taiwan) of liquid crystal display, or LCD, flat panel displays.[5] The case was brought under China's Price Law, because the LCD cartel operated prior to the adoption of the AML. NDRC is reported to have commented that, had the LCD cartel been operating following the introduction of the AML, the fines would have been significantly higher under the AML.

NDRC has also launched a series of enforcement actions against restraints in vertical agreements between manufacturers and retailers, particularly with regard to resale price maintenance (RPM). Following an investigation into RPM practices in the automotive industry in 2012, NDRC levied penalties of RMB 247 million (approx. US$ 39.6 million) and RMB 202 million (approx. US$ 32.4 million) against two state-owned enterprises, Moutai and Wuliangye, for imposing vertical restraints in commercial agreements that included RPM clauses. NDRC has also investigated Chinese and international infant formula manufacturers in relation to RPM and vertical restraints.

NDRC levied fines totalling RMB 670 million (approx. US$107.4 million) on six of the manufacturers and granted full immunity to three manufacturers. Following the investigation, a number of the manufacturers in question are reported to have implemented significant price reductions for their products.

In 2011, NDRC opened a high-profile investigation into two state-owned telecommunications companies for abusing their dominance in pricing discriminatingly wholesale access to their broadband networks. In that investigation, NDRC is reported to have accepted a three-year behavioural remedy.

More recently, there has been an apparent focus on information technology and intellectual property corporations, including corporations that license patent technology for mobile devices and networks. It is reported that NDRC is investigating allegations that the chip manufacturer Qualcomm charges discriminatory patent licensing fees in China. The Qualcomm investigation comes on the heels of a reported investigation into InterDigital, which develops patent technologies for wireless devices and networks.

SAIC

Increased non-merger enforcement activity in China has not been limited to NDRC; SAIC has also increased its enforcement efforts. At the ABA Spring Meeting, Deputy Director Zhao Yiqin highlighted four features in particular. First, the total number of cases has increased significantly, with an annual increase of 58 percent. Second, the overall capability of the whole system has been improved. Third, the range of entities being investigated has grown, with more than 30 cases involving corporations spanning the building materials, insurance, telecoms, second-hand cars, tourism, and public utilities sectors. In particular, companies in the building materials, insurance, and public utilities sectors have been investigated for monopolistic activities. Fourth, SAIC has begun to publish case decisions as it attaches importance to transparency.

To date, many of SAIC's investigations have involved industry associations, particularly in the insurance and construction industries. In 2012, SAIC fined 13 operating companies and the Building Materials Industry Association of Liaoning Province, around RMB 15 million (approx. US$ 2.4 million). SAIC concluded that the association had facilitated

4 The currency conversions in this article are estimated as of 5/12/2014.
5 The U.S. Department of Justice, the European Commission, and other international antitrust agencies have also investigated and sanctioned LCD manufacturers.

the reaching of monopoly agreements among its members. In 2013, SAIC concluded an investigation into the tourism industry in Yunnan. The investigation involved the bundling of services by hotels, tourist attraction sites, coach companies and travel agencies, and SAIC imposed fines on the Yunnan Tourism Association and the Yunnan Travel Agency Association.

Also in 2013, SAIC was reported to have launched an investigation into Tetra Pak. It is reported that more than 20 officials are involved in the investigation of the company's alleged abuse of its dominant position by tying the sale of its packaging machines to packaging materials.

Also among SAIC's significant anti-monopoly initiatives are proposed guidelines on the enforcement of competition law in relation to intellectual property rights in China. SAIC is currently reviewing a draft of the guidelines in connection with which it had previously consulted with antitrust authorities, including the US and EU authorities, and domestic and international corporations. SAIC is also focusing on capacity building, training of staff, and building a database to improve information sharing and help standardize its enforcement efforts around the country.

Deputy Director General Li Qing and Deputy Director Zhao Yiqin both explained how NDRC and SAIC coordinate their investigations at national and local levels, transferring a matter if necessary between the two authorities, without conflict or dispute between the two authorities over which authority investigates which matter.

Common Market for Eastern and Southern Africa (COMESA)

COMESA is a regional organization with the mission of promoting economic integration through trade and investment in Eastern and Southern Africa (the Common Market). Currently, COMESA has 19 member states – Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. According to figures presented by COMESA Director and Chief Executive Officer George Lipimile at the ABA Spring Meeting, the COMESA region represents about US$152 billion of imports and about US$157 billion of exports (based on 2008 data).

The COMESA Competition Commission (CCC) has powers to investigate mergers and anti-competitive business practices within the COMESA nations, and is based in Lilongwe, Malawi. The CCC was established in 2008 and became fully operational in 2013.

To date, about 30 merger filings have been made to the CCC. As well as reviewing mergers, the CCC is empowered to prohibit anti-competitive agreements that prevent, restrict or distort competition within the Common Market, practices between firms engaged in rival or potentially rival activities in the Common Market, and conduct that constitutes an abuse of dominance in the Common Market or a substantial part of the Common Market. The regulations empower the CCC to impose fines on firms that have infringed these regulations. The CCC also has powers to authorize agreements or arrangements if it determines that there are, broadly, efficiencies or public interest benefits (as recognized by the regulations) that outweigh the anti-competitive effects. There are similar, but it seems not identical, powers in relation to mergers.

Director and CEO George Lipimile reported that the CCC has issued several advisory opinions and reprimands of restrictive business behavior since the CCC started work last year.

Conceived as a supranational authority, the CCC faces a number of challenges, including the scope of its jurisdiction over mergers, the size of filing fees for mergers, the relationship between the laws and regulations of the COMESA regime and those of its member states, as well as its overall resourcing levels. The CCC is taking proactive steps to address these concerns. At the ABA Spring Meeting, Director and CEO George Lipimile explained that the CCC is working on setting out a framework for analysing mergers, including criteria for evaluating potential unilateral and coordinated anticompetitive effects, guidelines for the treatment of efficiencies, and criteria for remedies or conditions to address the anti-competitive effects of a merger, as well as on the jurisdictional issues that the merger regulations have given rise to. In April 2013, the CCC published initial draft merger assessment guidelines and, in collaboration with the International Finance Corporation of the World Bank, has since engaged a consultant to

advise on the review of the current merger regulations. In addition, the CCC has been seeking feedback from corporations and advisers that have experience with the COMESA regime. For example, a workshop was held in April 2014 to discuss suggested amendments to the draft guidelines, and a second workshop is expected to be held over the summer. It has been reported that the CCC intends to finalize the draft merger assessment guidelines after the second workshop.

The CCC has also taken informal steps to adjust its enforcement regime. For example, the absence of turnover thresholds has been widely criticized as it could lead to an interpretation that all mergers in which either or both of the parties generate turnover in two or more COMESA member states would require a complete notification filing and payment of a substantial filing fee. The CCC has elected to interpret the relevant regulations for parties who pro-actively approach the CCC so as to resolve issues for transactions that lack a sufficient nexus with COMESA and do not restrict competition in COMESA. There are reports that the CCC has issued five "comfort letters" that, in effect, exempt such transactions from the need for a complete filing and payment of the high filing fees.

The increasing importance of antitrust enforcement in emerging regimes

As the senior enforcement officials at the ABA Spring Meeting each made clear, antitrust enforcement in emerging jurisdictions is having an increasing effect on corporations that do business around the world. The number of filings needed to be made in any global merger and the number of cartel or conduct investigations to which global companies are subject around the world seems to be set only to increase, with emerging jurisdictions playing an increasingly significant role in this enlarged enforcement activity.

In response, global corporations increasingly need to engage in global strategies and coordinated multi-jurisdictional assessments of their antitrust issues to minimize the risks of unexpected or inconsistent outcomes around the world – all the more so as procedural and substantive differences continue to exist among different antitrust jurisdictions, including not least emerging jurisdictions.

Interestingly, the four authorities represented at the ABA Spring Meeting talked about the role of economic analysis in their investigations. CADE President Vinicius Marques de Carvalho explained that two of the seven CADE Commissioners are economists, and since 2012, CADE has had a specific unit dedicated to helping the Commissioners and Superintendent with the economic issues arising in complex mergers and conduct cases. NDRC Deputy Director Li Qing referred to enforcement generally as a collaboration of law and economics, and explained that, in NDRC's anti-monopoly division, half of the staff members are lawyers, and the other half are economists. She also said that NDRC regularly consults with professional institutions, academic institutions, scholars, and expert committees under the State Council, and frequently involves economic analysis in the penalty phase of an investigation. SAIC Deputy Director Zhao Yiqin explained that SAIC follows similar methods as NDRC with respect to economists in its case investigations. As well as using in-house economists, SAIC also works with external economists, such as professors and economic consulting groups, both domestic and international. Director and CEO George Lipimile explained that the CCC has two economists on staff and has the authority to seek outside academic or consulting advice for complex matters.

Also significantly, the officials talked about international assistance and cooperation among antitrust authorities around the world. Director and CEO George Lipimile, representing the newest authority, spoke of the assistance the CCC has received from various organizations and institutions, including the ABA, major law firms, and the U.S. Federal Trade Commission. NDRC Deputy Director Li Qing explained that NDRC communicates with other antitrust jurisdictions and seeks international collaboration. She referred to the memoranda of understanding for cooperation that the Chinese anti-monopoly authorities have signed with the EU, Korean, UK, and U.S. authorities, and said that anti-monopoly rules are a world language. In addition, she said that every jurisdiction has its own characteristics and features according to its own political and economic systems and its developmental stages.

She also said that NDRC is continuing to strengthen its international collaboration and is also willing to collaborate with other antitrust authorities on specific cases. CADE President Vinicius Marques de Carvalho stressed the increasing role of multi-jurisdictional antitrust enforcement, the need for international cooperation especially in combating global cartels, and the importance of convergence in international enforcement practices. n

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