Keynote Address by Chairwoman Edith Ramirez
7th Annual Global Antitrust Enforcement Symposium
Georgetown University Law Center
Washington, DC
September 25, 2013

To be an antitrust enforcement agency today is to be a global antitrust enforcement agency. Every day, the Federal Trade Commission and other competition agencies work on matters that involve firms based outside their borders, evidence located abroad, and a large and increasing number of counterpart agencies that are reviewing the same transactions and conduct. That reflects not only the globalization of commerce but the recognition by countries around the globe that competition laws and enforcement are essential ingredients of a well-functioning market economy.

While the widespread adoption of antitrust laws can enable economies and consumers to reap the benefits of competition, it also creates challenges to ensure that the system of national rules operate coherently across borders. As a leader in the export of antitrust law, the United States has an important responsibility to promote its sound application. The FTC's international competition program focuses on ensuring the effective application of our competition rules in cases with a cross-border dimension, strengthening cooperative relationships with counterpart agencies, and advocating for convergence toward sound competition policies. This morning I will discuss the great progress that has occurred in international cooperation and convergence, and then focus on several of the important challenges that we face, along with some thoughts on how these challenges can be addressed.

I. Progress in International Antitrust Cooperation and Convergence

A generation ago, application of U.S. antitrust law to firms and conduct abroad often met with hostility and resistance, usually based on claims that it infringed national sovereignty.

Many of our closest trading partners lacked antitrust laws and sometimes even encouraged cartel conduct that had long been criminal in the United States. The past twenty years have witnessed dramatic progress on international antitrust, including the near universal recognition of the value of competition policy and the growth in competition laws to some 130 today. This has led to a sea change in the international competition dynamic, from conflict and its management to working together to stop anticompetitive practices that harm consumers.

With cross-border transactions and conduct subject to parallel review by numerous competition agencies, it is important for agencies to be able to cooperate to avoid conflicting results and, ideally, arrive at consistent analyses and outcomes. Through intense bilateral and multilateral engagement, cooperation is now pervasive and productive. The U.S. agencies have formal cooperative relationships through bilateral agreements[1] and OECD instruments[2] with virtually all of our major counterparts. These relationships are integral parts of a larger, and growing, network of cooperative arrangements among competition agencies around the world. For the FTC, this translates into constant interaction with other agencies on both merger and conduct cases. Last year alone we worked with other agencies in 26 competition investigations, with over 50 instances of cooperation.

The widespread adoption of competition laws has also generated understandable concern about the risk of conflicting decisions, especially in the wake of the *GE/Honeywell* and *Microsoft* matters. We at the agencies share the private sector's concern and have worked hard to promote common understandings of the goals and analytical principles of competition enforcement, including through multilateral competition bodies such as the ICN, OECD, UNCTAD, and

[1] The U.S. competition cooperation agreements are available at http://www.ftc.gov/oia/agreements.shtm.
[2] *See, e.g.*, OECD Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade (1995), *available at* http://www.oecd.org/daf/competition/sectors/21570317.pdf.

APEC. The results have included ICN and OECD best practice recommendations on a wide range of substantive and procedural issues, including combatting hard-core cartels,[3] the assessment of dominance,[4] merger analysis,[5] and merger notification and review procedures.[6]

Sharing experience in enforcement techniques and analysis has disseminated vast amounts of expertise and built strong cooperative relationships. For example, the U.S. agencies' revised horizontal merger guidelines, a project announced here at this symposium four years ago, benefited from input from our international colleagues, and other agencies have since introduced concepts from our guidelines into their own practices. We have likewise offered input on proposed reforms to merger laws abroad. Dozens of agencies have reformed their merger notification and review procedures to conform more closely to the ICN and OECD best practices. Among them is Brazil, which just celebrated the first anniversary of its reformed merger review system that included the establishment of a pre-merger notification process with revised thresholds.

Every year more countries adopt leniency programs and treat hard core cartels as criminal. The FTC's efforts to prevent anticompetitive pay-for-delay settlements are mirrored in the EU, including the European Commission's recent decision in *Lundbeck*.[7] And, as Vice President Almunia and I will discuss at Fordham later this week, we all confront and cooperate

[3] OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, *available at* http://www.oecd.org/daf/competition/cartels/recommendationconcerningeffectiveactionagainsthardcorecartels.htm.
[4] ICN Recommended Practices, Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf.
[5] ICN Recommended Practices for Merger Analysis, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.
[6] ICN Recommended Practices for Merger Notification and Review Procedures, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf; OECD Recommendation of the Council on Merger Review (2005), *available at* http://www.oecd.org/daf/competition/mergers/40537528.pdf.
[7] *See* Press Release, European Comm'n, Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines (June 19, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-563_en.htm.

on issues at the intersection of antitrust and intellectual property, such as practices relating to standard-essential patents.

The international dialogue has also led to wide acceptance of the role of economic analysis in applying competition laws. Thus, it is no coincidence that despite the vast growth in cross-border commerce and competition enforcement regimes, consistent case outcomes are the norm and conflicts the exception.

II. Challenges Facing the International Antitrust Community

But while there has been impressive progress, significant challenges remain. With the vast multiplicity of laws administered by countries with diverse histories, legal systems, and experience, as well as constantly changing technologies and economic conditions, the antitrust community must constantly adapt to ensure that the enforcement system operates coherently. I want to focus on three challenges that we at the FTC see as important issues on the current landscape: one involving our enforcement cooperation, the second concerning agencies' investigation practices, and the last relating to the overarching context in which competition policy operates.

A. Potential Limits on Enforcement Cooperation

I will begin with a challenge that directly affects the FTC's enforcement efforts – limits to effective cooperation. Cooperation has been critical to ensuring consistent, and thus workable, remedies in international matters. But the increasing number of enforcers that concurrently review complex matters has exposed some signs of frailty in the existing system.

Recently, parties to a transaction told FTC staff they may have to notify their merger in up to 70 jurisdictions. It is unclear whether our current tools can promote effective cooperation in a complex matter with even a fraction of that number of reviewing agencies. For example, our

cooperation with ten agencies in the review of Western Digital's proposed acquisition of Hitachi Global Storage Technologies[8] was largely successful but was at times cumbersome, and one of the reviewing countries imposed a remedy out of sync with that adopted by the FTC and other agencies. To address such concerns, we are working to improve both the breadth and depth of our cooperation.

In recent years, the U.S. agencies have concluded antitrust cooperation agreements with China,[9] India,[10] Russia,[11] and Chile,[12] and we have another under negotiation now, to go along with our previous eight agreements. While agreements are not a prerequisite to effective cooperation, they have proven to be catalysts for staff contacts that have facilitated effective case cooperation.

We are also examining ways to improve our cooperation tools. For example, the FTC has explored more integrated work sharing, such as joint investigative interviews and exchanges related to data and document review, with trusted counterparts. The 2011 revision of the U.S.-EU Best Practices on Cooperation in Merger Investigations[13] reflects these advances in our

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[8] *See* Press Release, Fed. Trade Comm'n, FTC Action Preserves Competition in the Market for Desktop Hard Disk Drives Used in Personal Computers (March 5, 2012), *available at* http://www.ftc.gov/opa/2012/03/westerndigital.shtm.

[9] Memorandum of Understanding on Antitrust and Antimonopoly Cooperation between the United States Department of Justice and the United States Federal Trade Commission, on the one hand, and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce, on the other hand (July 2011), *available at* http://www.ftc.gov/os/2011/07/110726mou-english.pdf.

[10] Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, and the Ministry of Corporate Affairs (Government of India) and the Competition Commission of India (Sept. 2012), *available at* http://www.ftc.gov/oia/agreements/1209indiamou.pdf.

[11] Memorandum of Understanding on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission on the one hand, and the Russian Federal Anti-Monopoly Service, on the other hand (Nov. 2009), *available at* http://www.ftc.gov/os/2009/11/091110usrussiamou.pdf.

[12] Agreement on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission and the Fiscalía Nacional Económica of Chile (March 2011), *available at* http://www.ftc.gov/os/2011/03/110331us-chile-agree.pdf.

[13] *See* Fed. Trade Comm'n, Press Release, *United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews* (Oct. 14, 2001), *available at* http://www.ftc.gov/opa/2011/10/eumerger.shtm; U.S.-EU MERGER WORKING GROUP, BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS, *available at* http://www.ftc.gov/os/2011/10/111014eumerger.pdf.

cooperation. The revision places greater emphasis on coordination at key stages, especially when the agencies are considering potential remedies, and provides additional guidance to parties on how to work with agencies to facilitate coordination. In an effort to further enhance multilateral cooperation frameworks, the FTC helped initiate and is actively participating in cooperation projects in the OECD and ICN.

In addition to seeking to modernize frameworks for cooperation, we have been working to improve the process through which parties grant confidentiality waivers that facilitate cooperation. As parties have recognized the benefits of facilitating cooperation, the use of waivers has expanded from merger to conduct investigations and has extended to an increasing number of foreign agencies. Waivers enable enforcers to conduct informed discussions of complex issues, leading to better analyses and often more consistent outcomes. However, the provision of waivers has increasingly entailed lengthy negotiations with parties that have produced inconsistent terms and implementation, including even between the U.S. agencies. This process has sometimes frustrated effective cooperation, to the detriment of both the agencies involved as well as the parties. To bring greater consistency and efficiency to our waiver practice, today the FTC and DOJ will release our first joint model waiver of confidentiality for use in civil matters.[14] The revision is an adaptation to today's cooperation needs and will streamline the waiver process.

While waivers often provide a workable solution to legal barriers to information exchange, the more direct route of achieving a legal framework that provides for such exchange, as well as the provision of mutual legal assistance, has proven elusive. The 1994 International

[14] *See* Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Issue Updated Model Waiver of Confidentiality for International Civil Matters and Accompanying FAQ (Sept. 25, 2013), *available at* http://www.ftc.gov/opa/2013/09/jointwaiver.shtm.

Antitrust Enforcement Assistance Act[15] provided the U.S. agencies with the authority to enter into "second generation" cooperation agreements that enable these tools, but we have been able to conclude only one agreement, with Australia.[16] These agreements authorize sharing confidential information in the agency's files and providing investigative assistance to the other agency, with assurances of protection of shared confidential information. We are working to overcome the obstacles that have prevented bilateral agreements with our major counterparts that can promote deeper cooperation.

While the international community's approach to enforcement cooperation is not broken, we must continue to improve our tools. The U.S. antitrust agencies and our international colleagues have taken up this challenge, and the FTC is committed to playing a leading role in developing practical guidance and improved frameworks for international enforcement cooperation.

B. Procedural Fairness

The second challenge I want to discuss concerns differences in investigative processes that affect the actual and perceived fairness of agencies' investigations. While antitrust enforcement will continue to be conducted under a variety of institutional arrangements and legal systems, all systems should provide at least basic levels of fairness. A transparent and meaningful dialogue between parties and agencies about procedures, working theories, and the nature of the evidence is not only essential to safeguard rights of parties, but enables better informed agency decisions. Conversely, the failure to provide adequate protections is

[15] International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. 6201-6212, Public Law No. 103-438, 108 Stat. 4597.

[16] AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA ON MUTUAL ANTITRUST ENFORCEMENT ASSISTANCE (April 1999), *available at* http://www.ftc.gov/os/1997/04/lastaus.htm.

detrimental not only to the affected parties and agency but can also undermine the legitimacy of our interlinked international antitrust enforcement system.

Not surprisingly, all agencies state that they provide an appropriate level of transparency and due process in their investigations. Nonetheless, we continue to hear plausible accounts of instances in which these principles were not respected – for example, by not informing parties of the basis for concern, imposing unreasonably short deadlines to respond to charges, or failing to offer meaningful opportunities to engage with decision-makers prior to an adverse decision.

The impact of procedural differences is real. We see antitrust investigations that are concluded in the United States, yet languish elsewhere due to lack of effective processes. It is not uncommon for FTC staff to interact with another agency that lacks critical information because it failed to engage with the parties. We have reached different conclusions and even pursued differing remedies in parallel investigations in part because of differences in investigative processes. A common analytical framework cannot guarantee consistent results when our agencies do not benefit from the same information to determine and test our investigative hypotheses and theories.

Recently, it was reported that a Chinese antitrust authority encouraged companies not to question accusations from the regulator, but rather to relent through corporate admissions.[17] Setting aside any details or nuances lost in translation, we are of the firm belief that engagement with parties, including a meaningful opportunity for them to defend their views, strengthens an agency's enforcement efforts as well as the legitimacy of the international antitrust system. It is a message we are not shy to convey in international contexts.

[17] *See* Michael Martina, *Tough-talking China pricing regulator sought confessions from foreign firms*, Reuters (Aug. 21, 2013), *available at* http://www.reuters.com/article/2013/08/21/us-china-antitrust-idUSBRE97K05020130821.

The international community has been devoting increased attention to these issues.[18] While procedural fairness provisions have been increasingly featured in competition chapters of free trade agreements, I believe it is also important that the competition community, which knows these issues best, address them in a competition context. There have been several productive private sector initiatives in this area, and last year, following a series of "roundtable" discussions of these issues, the OECD produced a comprehensive overview of agencies' practices.[19]

Believing there was a need for further work by agencies, the FTC initiated a project on investigative processes in the ICN, and now co-leads the project with DG-Competition.[20] In this project and other relevant fora, the FTC will be an advocate for procedural fairness standards that can serve as international norms of good practice for all agencies.

C. Maintaining a Consensus on Core Competition Values

The final challenge I will discuss relates to the need to maintain a substantial consensus regarding the proper function and goals of competition policy.

Notwithstanding the progress in the development of common approaches, antitrust enforcement is not always characterized by sound, consumer welfare-based application. Young competition agencies face choices in how they apply their laws and are often tested by entrenched interests and competing government policies. Both new and established agencies can face pressures for relaxed enforcement in favor of industrial policy considerations, especially in

[18] *See, e.g.*, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Fair Process in EU Competition Enforcement, European Competition Day, Budapest (May 30, 2011), *available at* http://europa.eu/rapid/press-release_SPEECH-11-396_en.htm; Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Procedural Fairness, Remarks at the 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy (Sept. 12, 2009), *available at* http://www.justice.gov/atr/public/speeches/249974.htm.

[19] Procedural Fairness and Transparency, Key Points, OECD Competition Committee (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf.

[20] ICN Investigative Process Project Issues Paper and Mandate (2012), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf.

times of economic stress. When governments or agencies infuse competition enforcement with other economic and social goals, they risk distorting competition. Such policies can result in harm to domestic consumers, and ultimately undermine the legitimacy of sound competition enforcement.

In the United States, it is second nature, as well as a mandate of the Supreme Court, that antitrust decisions be based solely on competition considerations, not other economic or social goals, however worthy. Around the world, we sometimes see antitrust decisions that appear to be influenced by other factors, some implicitly and others pursuant to laws that provide for the consideration of other values.

Although there has long been concern about decisions that mix competition and other objectives, it has been amplified recently by some decisions issued under China's Anti-Monopoly Law. The AML is an example of a statute that provides for the consideration of factors beyond pure competition goals.[21] These factors appear to have played a role in several merger decisions involving multinational firms, with some alleging that the decisions were motivated by a desire to protect domestic firms.

While every country must determine its own competition policy, we believe that consumers and economic development are best served when competition enforcement is based solely on an economic analysis of effects on competition. But if other factors nonetheless enter into competition decisions, their nature and effect should be made transparent. While not an antidote to analytical divergence, transparency about the objectives and application of

[21] For example, Article 1 of the Anti-monopoly Law states that "[t]his Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and the public interest and promoting the healthy development of the socialist market economy."

competition laws can allow for increased understanding of differences, additional predictability, and a more open dialogue about their merits.

The growth of competition regimes in the major emerging economies holds great promise, but also poses risks to the prevailing competition consensus. We are encouraged by many aspects of the development of the regimes in the BRICS countries and other countries with young competition regimes. For example, pursuant to our bilateral agreements, we have had opportunities to work with agencies in China and India, which have impressed us with their dedication, increasingly sophisticated analyses, and improved transparency. The agencies continue to welcome our training programs for their staffs, and I look forward to participating, along with our colleagues from the Justice Department, in high-level meetings with both agencies in the coming months. I remain hopeful that competition agencies will reject protectionism and industrial policy, which represent a serious threat to the coherence of the international enforcement system, and embrace competition and consumer welfare as the lodestar of their enforcement.

III. Conclusion

Before I conclude, I want to note the key role that the private sector has played in the development and improvement of competition policy around the world. We at the agencies have benefited, directly and through the ICN and other organizations, from the input of practitioners, in-house counsel, and academics who have generously shared their time and experience in discussions and projects aimed at identifying and disseminating good practices. Together, I believe we have made considerable progress in advocating sound practices and the importance of the coherence of the international competition enterprise during a period of expansion and turbulence. While the worst fears of dysfunction have thankfully not been realized, we must

remain engaged and vigilant to deal with emerging challenges as the global economy and the competition enforcement landscape continue to evolve. I look forward to working with all of you to address these challenges.

Thank you.