



# ANTITRUST IN EMERGING AND DEVELOPING ECONOMIES

## **AFRICA, BRAZIL, CHINA, INDIA, MEXICO...**

**New York, October 23, 2015** | 2<sup>nd</sup> Annual Conference – New York University

## PANEL 5

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# INTERNATIONAL ENFORCEMENT: WHAT HELPS OR HURTS DEVELOPMENT?

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The last panel, moderated by **Eleanor M. Fox** (*Professor, New York University School of Law*), addressed international enforcement from the perspective of developing countries: how it helps, or possibly hurts, developing countries, the role of substantive and procedural convergence, and the impact of technical assistance.

**Mariana Tavares De Araújo** (*Partner, Levy & Salomão, Rio de Janeiro*) addressed Brazilian competition enforcement involving multinational companies, and the importance and limits of international cooperation. She highlighted the value of international cooperation, including reputational gains in the domestic and international arena. Brazil's Council for Economic Defence's (CADE) cooperation with foreign enforcers in orchestrating dawn raids or coordinating merger remedies increased its credibility as a strong enforcer. Moreover, working with foreign counterparts can allow the agency to benefit from the knowledge and resources of larger enforcers. Ms. Tavares de Araújo credits technical assistance with contributing to successful cooperation efforts.

On the topic of convergence, Ms. Tavares de Araújo asserted that, generally, convergence of antitrust laws is particularly important across developing and developed countries, disagreeing with commentators who suggest developing countries need their own set of rules. Using the example of leniency programs, she explained the difficulty of the system working for global cartels if the rules are inconsistent and if the information requirements differ greatly among competition agencies. Ms. Tavares De Araújo recognized that convergence can be challenging, however, and noted differences in dealing with legal privilege and engagement with the parties as examples of areas where it is difficult to reach harmonization.

**Simon Roberts** (*Professor of Economics, University of Johannesburg, Executive Director of CCRED*) explained that South Africa has benefited from working with other agencies to combat global cartels, and noted the need for more cooperation in addressing cartels that take place only in developing countries, where individual enforcement may be weaker. International cooperation is similarly important in merger analysis, Professor Roberts explained, citing in particular the benefits of regional cooperation among countries in Africa with similar economic conditions.

On the topic of convergence, Professor Roberts noted the challenges of reaching convergence given the disparity in economic conditions across jurisdictions as well as the differences in the types of infringements. For example, in developing countries, many industries are controlled by a single dominant firm.

**Randolph W. Tritell** (*Director, Office of International Affairs, US Federal Trade Commission*) asserted that well-designed and -implemented competition policy can foster economic growth and benefit consumers. Mr. Tritell pointed out several studies in support of this proposition, including a study by the UK Competition and Markets Authority that found strong evidence that effective competition policy can improve productivity and a country's overall economic growth and another by McKinsey that found that economic progress depends on increasing productivity, which depends on undistorted competition. Mr. Tritell also pointed to a World Bank study showing large benefits to consumers and productivity resulting from sectoral deregulation and liberalization.

Convergence is a key goal of the FTC and of international competition bodies. Mr. Tritell explained that analytical convergence facilitates cooperation among competition agencies, avoids conflicting outcomes in investigations of cross-border mergers and conduct, reduces unnecessary burdens, and provides a predictable environment for firms. Most developed and developing countries say that consumer welfare is an, if not the only, objective of their competition policy. He recognized that governments have other economic and social goals, which may include employment, protection of small businesses, promotion of national champions, and other industrial policies. However, in Mr. Tritell's view, these are best pursued outside the competition laws. He also suggested that competition agencies in developing and developed countries aspire to similar standards of procedural fairness, noting that the ICN, consisting of 130 agencies, mostly from developing countries, just adopted by consensus a broad guidance document covering procedural fairness issues in antitrust investigations.

**Mark Gidley** (*Partner, White & Case, Washington, DC*) pointed to studies that show institutions are the primary drivers of growth, noting that the wealthiest countries are



those with the strongest institutions. He contended that legal institutions, which protect property and enforce contract rights, are more important to economic growth than a country's natural resources. Mr. Gidley discussed how antitrust law can help build legal institutions. He also pointed to other benefits of sound competition policy, pointing to the deregulation of the aviation, truck, and train industries in the United States as examples of how competition is good for economic development. However, he cautioned that even the most developed countries with mature antitrust agencies will not function as intended, and indeed

will actually harm the economy, if governments do not respect defendant's fundamental legal rights. He advocated for universal norms on minimum due process rights, including access to evidence, the right to cross examine witnesses, and a process in which parties have sufficient time to respond to allegations. He noted that it can take decades to sort out due process issues, and requires brave lawyers to bring the cases and brave judges who are not worried about political ramifications to shape the fairness of antitrust institutions. ■