**Keynote Remarks of FTC Chairwoman Edith Ramirez**
**Problems with Global Antitrust Enforcement Conference**
**Yale School of Management**
**New Haven, C0hI am at the Yale School of Management and want t** **delighted to be here**

**Snyder and Professor Fiona Scott Morton for inviting me to be part of this prog**

**What I heard of yesterday's discussion appeared to be in keeping with**

**conference – a conversation centered on the**

In other words, what U.S. antitrust enforcers(U)2(.S)-4(. a)t

composition and authority was challenged before the Indian Supreme Court, and it was not until September 2007 that the Act was amended to address these concerns, with substantive enforcement provisions coming into effect later

And, of course, another newcomer, China, has also emerged as an important figure in the antitrust world. China's Anti-Monopoly Law (AML) is among the newest antitrust laws governing a major world economy. The AML took effect in 2008 and led to the creation of three antitrust enforcement agencies: MOFCOM, which conducts merger reviews, and two other agencies, SAIC and NDRC, that share enforcement responsibility over conduct cases

I could go on to describe many other relatively new antitrust regimes What I want to emphasize is that in any conversation about convergence it is crucial to recognize, first, that many of these competition regimes have emerged out of legal, political, economic, and social circumstances that are quite different from our own, and, second, that a large number of agencies are at an early stage of their development and have limited experience applying competition laws.

So, given the diversity of competition agencies and jurisdictions we have today, what can we realistically hope for – much less demand – in the way of convergence?

## II. Defining Convergence

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procedural rules used to resolve antitrust disputes look very different from jurisdiction to jurisdiction. When people talk of a need for greater convergence in international antitrust enforcement, they are typically not advocating for procedural convergence.

But process is important. I think it is essential. There are basic procedural norms to which all antitrust regimes should aspire, including procedural fairness and transparency to the parties and the public. Using a variety of tools and channels, we have made great progress in developing international consensus on investigative principles and practices that promote procedural fairness and effective enforcement around the globe. Much work remains, however, particularly but not only in jurisdictions that have recently established new competition authorities.

When it comes to differences in the substance of competition law from jurisdiction to jurisdiction, there is no question that substantive differences are far more pronounced today in the rules governing single-firm conduct than in the rules governing cartels and mergers, where competition authorities have made the greatest strides.

Competition authorities around the world now generally accept that price-fixing is undesirable because it thwarts the very nature of competition and lacks any efficiency justification or socially redeeming value.

We have also made a great deal of progress in merger enforcement. Today, a merger of global dimension may require notifications in a number of jurisdictions. But, spurred by the ICN's recommended practices for merger notification and review procedures,[3] turnover thresholds and other screens for the most part ensure that only those jurisdictions with a

[3] INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2004), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

significant nexus to the transaction need to invest agency time and resources in evaluating competitive effects, and that parties need not incur the costs and burdens of notification and review in jurisdictions where such a nexus does not exist. And when multiple agencies do investigate a merger, regular communication and exchanges of information among agencies tend to reduce the likelihood of divergent analyses and outcomes.

Unilateral conduct enforcement poses many more challenges. Whereas merger timetables tend to synchronize agency review across borders, no such timetable prevents agencies from conducting independent and less coordinated review of unilateral conduct. And unlike enforcement against categorically undesirable coordinated activity such as price-fixing, unilateral conduct enforcement invariably raises fact-sensitive questions about where to draw the line between competitive and anticompetitive conduct. Such enforcement often presents complex analytical issues as to which agency learning is evolving, and reasonable and learned minds may differ, including within the United States.

Differences in how dominant firm behavior is treated under U.S. and EU antitrust law help to show why some amount of difference is inevitable, and why convergence should be viewed more as a continuous process than an end-state.

Some differences are a product of interpretation and judgment. For instance, a market share of around 40% may suffice to establish dominance in the EU, whereas shares under 50% are typically not enough even for a claim of attempted monopolization in the United States.

Sometimes the differences are baked into the relevant statute. Article 102 of the TFEU expressly enumerates excessive pricing, as well as other “exploitative” acts, as species of abusive conduct.[4] Various other jurisdictions – including China, Germany, and South Africa – have

[4] Consolidated Version of the Treaty on the Functioning of the European Union art. 102(a), Dec. 13, 2007, 2012 O.J. (C 326) 89.

While the differences I have highlighted might lead to divergent outcomes in unilateral conduct enforcement, there are also important commonalities that tend to promote more convergent enforcement. I will mention two of them.

First, competition agencies have increasingly relied on the use of economics to inform decision-making about enforcement. As we do in the United States, many agencies now have installed within their organizational structure the position of a chief economist, who leads a staff of economists working alongside the lawyers and investigators. And regardless of structure, most agencies now recognize that economic analysis is critical to realizing their stated goal of basing competition enforcement and policy on consumer welfare. Even if legal principles and doctrines relating to monopolization and dominance differ, the agencies still share a common parlance through the language of economics. While economists may reach different conclusions based on facts, and differing national goals may lead to different policy choices, basic microeconomic principles are the same everywhere.

Second, competition enforcers have given more prominence to an effects-based approach to antitrust analysis. In the United States, exclusionary conduct must be conduct that harms competition or the competitive process and thereby harms consumers. We therefore predicate liability on evidence that, without a procompetitive justification, a monopolist's conduct prevented rivals from becoming more effective competitors. Likewise, in Europe, the EC's 2009 guidance document on Article 102 enforcement signaled greater receptivity to the same types of evidence.[6]

[6] See Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, ¶¶ 5–6, 2009 O.J. (C 45) 7; but see Case T-286/09, Intel Corp. v. Comm'n, 2014

A shared vocabulary and analytical tools will help us to narrow certain differences as we develop more refined understandings of key concepts, such as what constitutes "substantial market power," which builds on the ICN's consensus-driven recommended practices providing for a multi-factor, effects-based analysis.[7]

But, realistically, we will not be able to achieve complete harmonization in substantive doctrine, nor is that even desirable. Going back to where I started, our joint aim should be convergence on "better practices." Although each jurisdiction naturally favors its own regime, we have m

competition agencies grow and mature, they should find more opportunities to collaborate and exchange ideas and information.

Engagement through multilateral forums such as the ICN, where competition agencies can assemble to debate and discuss issues and topics of interest, is also crucial. Both the Federal Trade Commission and the Department of Justice have taken leadership roles in the ICN, including heading the working groups that study specific aspects of competition enforcement.

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Finally, articulating the grounds for a particular enforcement outcome and the underlying decision-making process can aid the parties' and the public's understanding of the differences between antitrust regimes.

## IV. Conclusion

For me, the topic of convergence in global antitrust enforcement calls to mind a metaphor attributed to former EU President Jacques Delors. He likened the integration of Europe to riding a bicycle: "Europe," he said, "is like a bicycle. You either keep pedaling or fall off."

In the area of competition policy we should celebrate the fact that in the span of thirty-plus years, we have grown from two dozen jurisdictions with antitrust regimes to over 120. The enterprise, however, is a work in progress, and we have to keep pedaling.

Thank you.