# BRIC in the International Merger Review Edifice

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## Introduction

The importance of the emerging economies to firms in the western world has increased exponentially over recent years; these markets provide huge opportunities for sales and potential for growth. Since Goldman Sachs invented the BRIC acronym in 2001 to describe Brazil, Russia, India, and China, the economies of those countries have run well ahead of the bank's expectations.[1] As the importance of the BRIC economies continues to grow, and more transactions have some connection to these jurisdictions, so too will the impact of their merger regimes.

Each of the BRIC countries has adopted an antitrust regime that regulates mergers. While Russia and Brazil have had a merger regime since 1991 and 1994, respectively,[2] the Indian and Chinese regimes are newer.[3]

1. *Special Report on Globalisation: The New Champions*, ECONOMIST, Sept. 20, 2008, at 3 ("In 2001 Goldman Sachs had predicted that by the end of the decade the BRIC economies would account for 10% of global GDP at purchasing-power parity (PPP); by 2007 their share was already 14%.").

2. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), MINISTRY OF THE RUSSIAN FEDERATION, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE RUSSIAN FEDERATION IN 1999 1-2 (1999), *available at* http://www.oecd.org/dataoecd/53/7/2406707.pdf; OECD, COMPETITION LAW & POLICY IN BRAZIL: A PEER REVIEW 13 (2005) [hereinafter OECD BRAZIL REPORT], *available at* http://www.oecd.org/dataoecd/12/45/35445196.pdf (stating that Brazil's antitrust regime was introduced in 1962 but did not incorporate a merger regime until 1994).

3. *See* Rajiv K. Luthra & G.R. Bhatia, *India*, *in* GLOBAL COMPETITION REV., THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES 2009, at 137, 132 (2009), *available at* http://www.globalcompetitionreview.com/handbooks/15/the-handbook-competition-enforcement-agencies-2009; Liz McKenzie, *Coca-Cola to Test China's New Antitrust Laws*, COMPETITION LAW 360, Sept. 8, 2008, *available at* http://www.law360.?com/articles/68536. India's first competition law, the Monopolies and Restrictive Trade Practices Act (MRTPA) was enacted in 1969; this law was replaced by the Competition Act, 2002, No. 12 of 2003, as amended by The Competition (Amendment) Act, 2007. Atleen Kaur, *Competition Laws in the Lands of Tigers and Dragons*, MICHIGAN B.J., Sept. 2008, at 34, 35.

Nonetheless, all but India, where the merger legislation has not yet come into effect, appear to be active.[4] For example, *Conselho Administrativo de Defesa Econômica* (CADE), the Brazilian antitrust agency, recently disallowed an acquisition in the cement market[5] and intervened in the *Sky-DirecTV* transaction, where it imposed regulatory-style limitations on the ability of the acquirer to exercise management control over the combined entity.[6] The Russian Federal Anti-monopoly Service (FAS) in 2008 and 2009 disallowed Google's acquisition of ZAO Begun[7] and Disney's joint venture with Media-One,[8] challenged an acquisition by Carlsberg in the Russian beer market,[9] and ordered the divestiture of a controlling interest in a petroleum drilling platform manufacturer.[10] Since the entry into force of China's first comprehensive competition law, the Anti-Monopoly Law (AML) in 2008, the Chinese merger agency has both imposed conditions on, and prohibited, transactions;[11] conditions were imposed for the first

China's competition law, the Anti-Monopoly Law (AML), came into effect in August, 2008. *Id.* at 35; *see also infra* note 59.

4. *See* Luthra & Bhatia, *supra* note 3 ("India is on the threshold of ushering in a modernised competition regime . . . .").

5. CADE Obriga Votorantim a Vender Fábricas de Concreto na Região Sul [CADE Requires Votorantim to Downsize Concrete Assets], VALOR ECONÔMICO (Braz.), Mar. 20, 2008 (noting that CADE required Engemix to divest certain Brazilian concrete plants).

6. This transaction combined the two largest paid television companies using "direct-to-home" technology, resulting in both horizontal overlaps and a vertical relationship. The primary concern was the horizontal concentration in the paid television market. However, CADE also had concerns regarding the vertical relationships. Therefore, it required the seller, active on the downstream market, to relinquish rights in the merged entity. Further, it placed restrictions on Fox's ability to acquire certain input into media content in the domestic market. *See* Tulio Coelho & Alessandro Martins, *Brazil*, *in* GLOBAL COMPETITION REV., THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES 2008, at 34, 40–41 (2008), *available at* http://www.globalcompetitionreview.com/reviews/7/the-handbook-competition-enforcement-agencies-2008.

7. Melissa Lipman, *Russian Regulator Squashes Google Takeover Bid*, COMPETITION LAW 360, Oct. 24, 2008, *available at* http://www.law360.com/articles/73991.

8. Ron Knox, *Typos Thwart Russian Media* Mergers, GLOBAL COMPETITION REV., May 7, 2009, *available at* http://www.globalcompetitionreview.com/news/article/13374.

9. FAS challenged both Carlsberg's acquisition of 50% of Baltika via its acquisition of Scottish & Newcastle and its subsequent offer to purchase the remaining 50% from Baltic Beverages Holding. On March 25, 2008, FAS found that the acquisition would give Carlsberg control of over 35% of the Russian beer market, sufficient to gain market dominance. FAS imposed behavioral conditions on the merged entity, requiring that Carlsberg inform FAS of any material changes in sales policy, or any price increase or decrease in excess of 10%. Carlsberg is also prohibited from restricting supply on the basis of territory or turnover and must not refuse to supply its products without sufficient justification. Other restrictive distributive practices are also prohibited. *See Russia Puts Conditions on Carlsberg/Baltika*, GLOBAL COMPETITION REV., Mar. 25, 2008, *available at* http://www.globalcompetitionreview.com/news/article/10156/russia-puts-conditions-carlsberg-baltika.

10. *See Russia Unwinds Engineering Merger*, GLOBAL COMPETITION REV., Feb. 5, 2008, *available at* http://www.globalcompetitionreview.com/news/article/10358/russia-unwinds-engineering-merger.

11. As of April 27, 2009, the Ministry of Commerce (MOFCOM) had received fifty-one merger filing notifications, forty-two of which it had investigated. *See* [*The Three Anti-Monopoly Agencies Recap the One-Year AML Enforcement Experience; New Implement-*

time on the clearance of the *InBev/Anheuser-Busch* merger,[12] followed four months later by the agency's first prohibition decision, in relation to Coca-Cola's planned acquisition of a domestic juice manufacturer.[13]

In this article we describe and compare the procedural and substantive aspects of each of the BRIC merger regimes, including issues such as jurisdiction, standard of review, third party involvement, remedies, and sanctions.[14] Importantly, we do not attempt to assess the success of the various regimes or their enforcement agencies. At least the Indian and Chinese regimes[15] are sufficiently new that it would be both difficult and unfair to award grades at this stage.[16]

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*ing Rules Will Be Forthcoming*], Economic Observer Online (P.R.C.), May 19, 2009, *available at* http://www.eeo.com.cn/eeo/jjgcb/2009/05/18/137747.shtml.

12. On November 18, 2008, MOFCOM issued its decision, stating that the acquisition would not eliminate or restrict competition in China's beer market. Nevertheless, it added that, given the large scale of the acquisition and the strong market share and market position of the combined group, conditions would be imposed to minimize potentially adverse effects on China's beer market in the future as follows: (1) Anheuser-Busch's existing 27% stake in Tsingdao Brewery may not be increased; (2) InBev must notify MOFCOM in a timely manner if there is any change in its controlling shareholders, or the shareholders of such controlling shareholders; (3) InBev must not increase its existing 28.56% stake in Zhujiang Brewery; and (4) InBev must not hold any stake in China Resources Snow Breweries or Beijing Yanjing Brewery, two other major breweries in China. InBev is required to notify, and to obtain prior approval from, MOFCOM before seeking to take any such steps. MOFCOM Announcement No. 95 of 2008, MOFCOM Decision Regarding InBev Group's Acquisition of Anheuser-Busch (Nov. 18, 2008), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html?3815482743=3683028003.

13. Coca-Cola announced plans to acquire Huiyuan Juice Group Ltd. on September 3, 2008. *See* McKenzie, *supra* note 3. Coca-Cola submitted its merger filing notification on September 18, 2008, and on March 18, 2009, MOFCOM published its prohibition decision after discussions with Coca-Cola with respect to potential conditions had failed. MOFCOM identified the following concerns in its decision: (1) Coca-Cola would have gained the ability to leverage its dominant position in the carbonated drinks market over the juice market; (2) the increase in entry barriers due to Coca-Cola's control over the juice brands 'Minute Maid' and 'Huiyuan'; and (3) squeezing of the ability of domestic small- and mid-sized juice producers to compete effectively and to innovate. MOFCOM Announcement No. 22 of 2009, MOFCOM Decision Regarding Coca-Cola's Acquisition of Huiyuan Juice Group, Ltd. (Mar. 18, 2009) [hereinafter MOFCOM Announcement No. 22 of 2009], *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?376087927=3683028003.

14. This article is not a substitute for research when confronted with a specific transaction. Regulations change often, and even where there has been no change, interpretation may differ. This is true of mature agencies, but it is particularly true with new regimes where practices may not be firmly established.

15. *See supra* note 3 and accompanying text.

16. Although Brazil has had a competition policy for almost five decades, it is not much more advanced than the other competition regimes discussed in this article. CADE was created in 1962 when Brazil's first competition law was enacted. *See generally* OECD Brazil Report, *supra* note 2. The pervasive state control of the economy and the limitation of CADE's jurisdiction to the private sector dramatically limited the scope of an effective competition policy. In response to severe inflation, the so-called "Real Plan" was instituted in 1994. Reform of competition policy, including the enactment of the new Law 8884 (BAL), was part of these economic reforms in the hope that invigorated competition enforcement might restrain inflation. These changes included a new "troika" of agencies and a merger regulation. Since 1994, there have been two revisions of the law (in 1999 and 2000), which instituted a merger fee and increased investigative

Grading is nonetheless important. Almost 100 jurisdictions worldwide now have some form of competition regime in place; since the so-called "globalization of competition enforcement," many conferences and publications have featured the work of the new regimes, giving rise to the view that competition policy is indeed global.[17] While it is true that there are many more competition enforcement agencies in the world today than fifteen years ago, the number of countries with effective competition enforcement programs remains small.[18] Many agencies attend international meetings, charge fees for notifications, support segments of their local legal professions, and generate paper, but otherwise do little.[19] It will be important to see whether the BRIC agencies join the larger group of competition drones or seek admission to the much smaller fraternity of true competition regimes.

## I. Background

### A. Legislative History and Institutions

The BRIC merger regimes are at different stages of development and have in place different systems of agency organization. Other than Brazil, each BRIC country has given one administrative body jurisdiction to review mergers.[20]

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powers, among other things. During the tenure of Dr. Gesner Jose de Oliveira Filho as CADE President during the 1990s, many, including your senior author, anticipated that Brazil might become the model for competition policy among emerging economies. Suffice it to say, this did not happen. Despite Dr. Oliveira's leadership, the legal structure, including the "troika" of agencies and institutional design, doomed this development. *See infra* notes 21-25 and accompanying text.

17. *See, e.g.*, Michael D. Hausfeld, *Global Enforcement of Anticompetitive Conduct*, 10 Sedona Conf. J. 9, 9 (2009) (noting the global reach of competition laws and collecting sources on competition laws of different countries); David Lewis, *Introduction*, *in* The Handbook of Competition Enforcement Agencies 2009, *supra* note 3 (noting that ninety-three jurisdictions are members of the International Competition Network (ICN), which provides competition agencies from developed and developing nations with a network for addressing enforcement and policy issues of common concern).

18. *See* William E. Kovacic, General Counsel, U.S. Federal Trade Commission, Presentation at the Annual Meeting of the American Society of International Law: Extraterritoriality, Institutions, and Convergence in International Competition Policy 1-3 (Apr. 5, 2003), *available at* http://www.ftc.gov/speeches/other/031210kovacic.pdf ("Many antitrust laws lack effective implementation.").

19. *See generally* Kenneth M. Davidson, *Creating Effective Competition Institutions: Ideas for Transitional Economies*, 6 Asian Pac L. & Pol'y J. 3, 3 n.2 (2005) (noting the existence of the ICN, the OECD, and several other conferences to discuss the establishment of competition agencies in transitional economies); *see also id.* at 73-74 (noting that many circumstances in developing economies impede the formation of effective competition agencies).

20. It should be noted that China also has multiple competition enforcement agencies, albeit only the Anti-Monopoly Bureau of MOFCOM has responsibility for merger review. Nonetheless, the State Administration of Industry and Commerce (SAIC) has jurisdiction over non-price related monopoly agreements, non-price related abuses of dominant market position, administrative monopolies, and other acts that restrict or eliminate competition; and the National Development and Reform Commission (NDRC) has jurisdiction over the investigation and regulation of price related monopoly agreements and abuses of a dominant market position. An antitrust commission has also

1. **Brazil.** The principal competition merger legislation is Law 8884/94 (BAL), enacted in 1994.[21] Brazil is unusual because responsibility for merger review is split among three different agencies: (1) the Secretariat of Economic Law (SDE), which is part of the Ministry of Justice and is responsible for the legal investigation into a transaction;[22] (2) the Secretariat for Economic Monitoring (SEAE), which is part of the Ministry of Finance and is responsible for the economic investigation into a transaction;[23] and (3) CADE, which is an independent administrative tribunal responsible for the final decision; CADE's decisions are not subject to review by the Executive.[24] This troika of agencies is referred to collectively as the *Sistema Brasiliero de Defesa de Concorrência*.[25]

CADE is governed by a council of six commissioners and a president that is appointed by the President of the Republic of Brazil and approved by the national senate, each for a term of two years.[26] The commissioners

been set up under the State Council to: (1) conduct research and draft policies relating to competition; (2) organize investigations and evaluations of overall market competition; (3) formulate and publish antitrust guidelines; and (4) coordinate the enforcement of the AML. The commission is headed by Vice-Premier Wang Qishan, who would likely be in a position to mitigate friction and inconsistencies arising from the parallel enforcement of the AML by each of NDRC, MOFCOM and SAIC in their respective substantive areas. *See* Yijun Tian, *The Impacts of the Chinese Anti-Monopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, 2010 Duke L. & Tech. Rev. 004, ¶ 14 (2010); *see also* Dina Kallay, Counsel for I.P. and International Antitrust, U.S. Federal Trade Commission, Remarks at the Melbourne Law School Conference: Unleashing the Tiger? Competition Law in China and Hong Kong: China's New Anti-Monopoly Law: An International Antitrust Convergence Perspective 1 (Oct. 4, 2008).

21. *See* Lei No. 8884, de 11 de junho de 1994 [Brazilian Antitrust Law (BAL)], D.O. de 13.06.1994, art. 54, *amended by* Lei No. 10149, de 21 de dezembro de 2000. Article 54 of the BAL governs mergers, acquisitions, and similar transactions: "Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review." *Id.*

22. SDE also performs some preliminary enforcement functions, and is headed by a Secretary appointed by the Minister of Justice. It is divided into two Departments, of which the Department of Economic Protection and Defense (DPDE) is responsible for competition law. The DPDE is headed by an appointee of the Secretary. Although SDE is not an independent agency, the Secretary's decisions "cannot be appealed to higher ranks in the Justice Ministry." Traditionally, the Ministry has not interfered in SDE's activities. OECD Brazil Report, *supra* note 2, at 49-50.

23. SEAE is headed by an appointee of the Minister of Finance, and is responsible for providing a technical analysis report to SDE. SEAE has authority to employ all the investigative powers available to SDE but does not have any adjudicatory or enforcement functions under the competition law. *See id.* at 50.

24. CADE adjudicates alleged violations of the law and imposes appropriate remedies and fines. It was established as "a federal independent agency." *See* BAL art. 3. The SEAE prepares an initial non-binding economic analysis and the SDE prepares its non-binding substantive analysis. Both agencies then submit a report and recommendation to CADE, which issues the final decision. *Brazil: Questions and Answers*, *in* Global Competition Rev., The Handbook on Competition Economics 2009, at 32, 33 (2009), *available at* http://www.globalcompetitionreview.com/_files/_handbooks/_18/gcr_hce09_qa_brazil.pdf.

25. Secretaria de Acompanhamento Econômico—SEAE—Glossários—Sistema Brasileiro de Defesa da Concorrência, http://www.seae.fazenda.gov.br/central_documentos/glossarios.

26. BAL art. 4.

may be reappointed for one additional term.[27] In its 2005 review of the agency, the Organisation for Economic Co-operation and Development (OECD) reported the view in the Brazilian competition community that politics, rather than expertise, characterized most appointments to the council.[28] Nonetheless, there is some disagreement on this issue; a number of practitioners take the view that such politicization has not affected CADE.[29]

A bill currently pending before the Brazilian congress (Antitrust Bill)[30] would extend the terms of office to four years but would preclude reappointment for a consecutive term.[31] The President of the Republic of Brazil would appoint the CADE President and the commissioners to the council, after their approval by the senate.[32] The Antitrust Bill explicitly provides for staggered commissioner appointments.[33]

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27. *See id.* Appointees must be citizens, over thirty years of age and "reputed for their legal or economic knowledge . . . ." *Id.* They may be removed from office only for certain criminal offenses or other malfeasance. *Id.* art. 5. Members of CADE, while in office, may not undertake outside employment (except of an academic nature) or engage in political activities. *See id.* art. 6. BAL further provides for the involvement in CADE's activities of two independent officers. *Id.* arts. 10, 12. The CADE Attorney General is appointed by the Minister of Justice and commissioned by the President of Brazil after Senate approval. *Id.* art. 11. The Attorney General serves under the same conditions that apply to Commissioners with respect to term of office, qualifications, re-appointment, and removal. *Id.* The Attorney General's statutory duties are to provide legal advice to CADE, render opinions on cases pending before CADE for judgment, defend the agency in court, arrange for judicial execution of its decisions, and, with CADE's preliminary approval, enter into settlements of cases pending in court. *Id.* art 10. The Attorney General of the Republic appoints the second officer to handle cases submitted to CADE for review. *Id.* art. 12. CADE may request that the Attorney General Office of the Republic enforce CADE decisions in court. *Id.*

28. OECD Brazil Report, *supra* note 2, at 45.

29. Interview with Marcello Calliari of Tozzini, Freire, Teixeira e Silva Advogados (Feb. 26, 2009).

30. Decreto No. 5877/05, de 17 de agosto de 2006 [Antitrust Bill], D.O.U. de 18.08.2006 (Braz.). The Antitrust Bill was endorsed by CADE. *See* David Thorley, *CADE Okays Competition Bill*, Global Competition Rev., Apr. 7, 2009, *available at* http://www.globalcompetitionreview.com/news/article/13203/cade-okays-competition-bill. The Antitrust Bill has been approved by the Brazilian House of Representatives and is awaiting approval in the Senate. Carlos Francisco de Magalhães & Gabriel Nogueira Dias, *Brazil*, *in* The Handbook of Competition Enforcement Agencies 2009, *supra* note 3, at 33, 34. There have been reports that approval could come by the end of 2010. Ron Knox, *Brazil Nearing Single-Enforcer System*, Global Competition Rev., Apr. 23 2010, *available at* http://www.globalcompetitionreview.com/news/article/28340. If approved by the Senate, the Antitrust Bill shall replace the BAL. The Senate has not yet said whether it will submit the Antitrust Bill to public consultation or if it will accept comments from interested third parties, although it has consulted with certain government officials, attorneys in private practice and economists. The Antitrust Bill proposes several reforms to the BAL, including introduction of a mandatory pre-merger notification regime, fixed deadlines, and an expedited merger review process. *Brazilian Antitrust Reform Gains Momentum*, Global Competition Rev., Dec. 19, 2008, *available at* http://www.globalcompetitionreview.com/news/article/12491. It would also modify the notification thresholds. *See infra* notes 103, 105 and accompanying text.

31. Antitrust Bill art. 6(1).

32. *Id.* art. 6.

33. *Id.*

The most dramatic change proposed by the Antitrust Bill is the abolition of the SDE[34] and the reduction of the powers of the SEAE.[35] Under the provisions of the Antitrust Bill, the SEAE would focus principally on competition advocacy, rather than conducting economic investigations into each transaction.[36] The SEAE would thus no longer provide an opinion in all merger cases, but instead could opine on a matter on its own motion or when asked to do so by the Directorate General or the reporting commissioner.[37]

**2. Russia.** The Russian Law on Protection of Competition (LPC) entered into force on October 26, 2006.[38] The LPC governs merger control in commodity and financial markets.[39] FAS, together with its local agencies, enforces the provisions of the LPC;[40] there are local agencies in eighty-two of the eighty-three Russian constituent geographic areas.[41] FAS is divided into a number of departments and offices responsible for the enforcement of specific laws.[42] Enforcement is divided among several departments responsible for particular sectors of the economy: (1) fuel and energy; (2) electric power; (3) transport and communications; (4) construction, environment and natural resources; (5) industry; and (6) agricul-

34. Under the Antitrust Bill, SDE would be incorporated into CADE, becoming a Directorate General. Francisco de Magalhães & Nogueira Dias, *supra* note 30, at 34. The Director General would be appointed by the President of the Republic of Brazil, after approval by the senate, for a two-year term with the possibility of reappointment for one term. Antitrust Bill art. 12(2).

35. *Id.* art. 19; *see also Brazilian Antitrust Reform Gains Momentum*, GLOBAL COMPETITION REV., Dec. 19, 2008, *available at* http://www.globalcompetitionreview.com/news/article/12491.

36. Antitrust Bill art. 19. CADE would continue to be an independent administrative tribunal, but would accumulate—after the incorporation of the SDE—the responsibilities for investigating and judging cases. Francisco de Magalhães & Nogueira Dias, *supra* note 30, at 34.

37. *Id.*

38. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 135-FZ, July 26, 2006 [hereinafter LPC], *available at* http://www.fas.gov.ru/english/legislation/26940.shtml. The LPC was subsequently amended in July 2009; these amendments came into effect in August 2009. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2009, No. 164-FZ, July 17, 2009, *available at* http://www.rg.ru/2009/07/23/izmeneniya-dok.html.

39. The LPC replaced two separate laws on financial and commodity markets (Law No. 948-I and Law No. 117-FZ), which cast a wider net. The LPC is expected to increase efficiency and reduce the number of filings in comparison to the previous regime, thus enabling FAS to focus on transactions that raise substantive concerns. The LPC also sets out precise filing and review procedures, providing greater certainty to parties.

40. FAS was established in 2004 as the successor to the Russian Soviet Federative Socialist Republic State Committee for Antimonopoly Policy and Support for New Economic Structures, which was founded in 1990. Natalia Ivolgina & Tapani Manninen, *Russian Competition Law: Overview and Recent Developments*, *in* GLOBAL COMPETITION REV., THE EUROPEAN ANTITRUST REVIEW 2010 (2010), *available at* http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/773/russia.

41. *Id.*

42. Consumer protection, advertising, and investments in companies having strategic importance for the defense of the country. *See* OECD, COMPETITION LAW & POLICY IN RUSSIA: A PEER REVIEW 45 (2004), *available at* http://www.oecd.org/dataoecd/10/60/32005515.pdf.

ture, chemicals, and use of natural resources.[43] This structure is thought to allow staff members to gain greater expertise in the area in which they are enforcing the law than under the previous structure, which divided enforcement among the different substantive areas of the law (anticompetitive agreements, abuse of dominance, and merger control).[44]

Each local agency is responsible for enforcement in a particular constituent geographic area of the Russian Federation where it also participates in analytical work, policy development, and prognosis of economic conditions.[45] Specific administrative regulations establish whether a case shall be referred to the relevant local agency or the central office of FAS.[46] For example, the central office must conduct merger reviews above certain asset thresholds.[47] In other respects, the local agencies act fairly independently—methodological recommendations and other documents issued by FAS guide the agencies, but they do not need to seek permissions or approvals in individual cases.[48] Nonetheless, FAS has the right to reverse the decision or order of a local agency that is contrary to legislation or exceeds the authority of the local agency.[49] In practice, this is a rare occurrence and decisions of the local agencies are usually appealed directly to a local court.[50]

**3. India.** The Competition (Amendment) Act 2007 (CAA) was enacted in September 2007 and amends the Competition Act 2002, which in turn replaced the Monopolies and Restrictive Trade Practices Act 1969 (MRTPA).[51] The provisions of the CAA dealing with mergers and acquisitions have yet to be notified and therefore are not yet in force.[52]

The Competition Commission of India (CCI)[53] is responsible for

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 45-46.
47. *Id.* at 46.
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* Mark Sansom & Priya Christian, *India's New Competition Regime: The Elephant Who Became a Tiger*, 1 J. Eur. Competition L. & Prac. 62, 62 (2010).
52. *Id.* The provisions dealing with anticompetitive agreements and abuse of dominant positions (Sections 3 and 4, respectively) were notified and came into force on May 20, 2009. The CCI may therefore now investigate alleged breaches of these sections of the Competition (Amendment) Act (CAA). *See id.*
53. Under Chapter III of the CAA, the CCI has a chairperson and two to six other members. The Competition Act, 2002, No. 12 of 2003, as amended by The Competition (Amendment) Act, 2007 [hereinafter CAA]; India Code (2003), § 8. The chairperson and every other member must be a person of ability, integrity, and standing and have special knowledge of, and at least fifteen years' professional experience in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters. *Id.* The chairperson and other members must have no other occupation. *Id.* The chairperson and other members of the commission are appointed by the Central Government from a panel recommended by, in the case of the chairperson, the Chief Justice, and in the case of the members, (1) the Ministries of (i) Corporate Affairs and (ii) Law and Justice; and (2) two experts with special knowledge and professional experience in the above fields. *Id.* § 9. The term of office of the

enforcing the CAA.[54] A new chairman of the CCI, together with four additional members, was appointed in the first half of 2009, and all six of the CCI positions have now been filled.[55]

In July 2008, the CCI published revised draft merger regulations (draft Merger Regulations) under the then-acting Chairman;[56] however, there has as yet been no indication as to when the CCI will finalize the draft Merger Regulations. After the appointment of the new chairman in 2009, the CCI removed the draft Merger Regulations from its website for further review and consideration of their potential impact on corporate deals.[57] It is expected that the CCI will further refine the draft Merger Regulations after carrying out another round of consultations.[58]

4. **China.** The AML came into effect on August 1, 2008. The AML, among other things, introduced a new merger control regime that applies equally to domestic and foreign undertakings,[59] unlike the previous regime, which applied only to foreign undertakings.[60] The Ministry of Commerce (MOFCOM) remains responsible for enforcing the merger review process of the AML.[61]

The government has also issued various secondary legislation; on August 3, 2008, the Rules on Notification Thresholds for Concentrations of

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chairperson and other members is five years, and reappointment is possible; however, office may not be held by any individual past the age of sixty-five years. *Id.* § 10. The Central Government also may appoint a Director General to assist the CCI. *Id.* § 16.

54. CAA § 7(1). It was initially envisaged that on notification and entering into force of section 66 of the CAA, the Monopolies and Restrictive Trade Practices Commission (MRTPC), established pursuant to the MRTPA, would cease accepting new cases, though it would continue to deal with pending cases for a two-year transition period. *Id.* § 66. However, section 66 of the CAA was amended by the Competition (Amendment) Ordinance, 2009, which was promulgated on October 14, 2009 and provides for the immediate dissolution of the MRTPC and transfer of all pending antitrust cases to the Competition Appellate Tribunal. The Competition (Amendment) Ordinance, No. 6 of 2009, *available at* http://dpal.kar.nic.in/Central%20Acts&Ordinance%20PDF/.%5Cordi6of2009PR-63.pdf.

55. For details on the fully constituted CCI, see Competition Commission of India, http://www.cci.gov.in/index.php?option=com_content&task=view&id=117.

56. The CCI published initial draft merger regulations in January 2008.

57. Souvik Sanyal & Gireesh Chandra Prasad, *No M&As on Competition Panel's Plate*, The Economic Times (India), Apr. 15, 2009, *available at* http://economictimes.indiatimes.com/news/economy/policy/No-MAs-on-competition-panels-plate/articleshow/4402419.cms (indicating that additional consultation is required before the merger regulations can be finalized).

58. *Id.* (noting that the CCI looks to "fine tune" its merger regulations).

59. *See* [Anti-Monopoly Law], (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (P.R.C.) [hereinafter AML].

60. [Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by the Ministry of Commerce, State Administration for Industry and Commerce, State Administration of Taxation, State Administration of Foreign Exchange, State Administration of State-owned Assets Commission, and Securities Regulatory Commission of China, effective September 8, 2006) (P.R.C.).

61. The SAIC, which previously was jointly responsible with MOFCOM for the merger review process, has ceased to be so responsible under the AML. *See* Global Competition Rev., Getting the Deal Through: Merger Control 2008 83 (2008).

Undertakings (Rules on Notification Thresholds) came into effect.[62] On January 7, 2009, MOFCOM issued its Guidance for Notification of Concentrations of Undertakings (Procedural Guidance)[63] and Guidance for Notification Documents and Materials for Concentrations of Undertakings (Information Requirement Guidance).[64] An accompanying sample notification form, the Working Guidance for Notification Review,[65] and a chart outlining MOFCOM's merger control review process were issued on January 1, 2009.[66] Subsequently, the Guidelines for the Definition of the Relevant Product Market[67] were published in July 2009, followed in November by the Measures on Notification of Concentrations[68] and the Measures on Review of Concentrations.[69] This secondary legislation covers matters ranging from substantive issues such as the definition of the relevant market and the scope of a notifiable "concentration of undertakings," to notification and review procedures.[70]

62. [Provisions of the State Council on Thresholds of Declaration by Business Operators Concentrations] (promulgated by the State Council, Aug. 1, 2008, effective Aug. 3, 2008) (P.R.C.), *available at* http://www.isinolaw.com (click "English"; then search for "Provisions of the State Council on Thresholds of Declaration by Business Operators Concentrations.").

63. [Guidance for Notification of Concentrations of Undertakings] (promulgated by the Ministry of Commerce, Jan. 5, 2009, effective Jan. 7, 2009) [hereinafter MOFCOM Procedural Guidance], *available at* http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993824.html?3082164343=3683028003 (P.R.C.).

64. [Guidance for Notification Documents and Materials for Concentrations of Undertakings] (promulgated by the Ministry of Commerce, Jan. 5, 2009, effective Jan. 7, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993841.html?2343966839=3683028003 (P.R.C.).

65. [Working Guidance for Notification Review] (promulgated by the Ministry of Commerce, Jan. 1, 2009) [hereinafter MOFCOM Working Guidance], *available at* http://fldj.mofcom.gov.cn/aarticle/xgxz/200902/20090206034057.html?95754359=3683028003 (P.R.C.).

66. [Flowchart for the Ministry of Commerce's Anti-Monopoly Review on Concentration of Undertakings] (promulgated by the Ministry of Commerce, Jan. 1, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993080.html?733288567=3683028003.

67. [Guidelines for the Definition of the Relevant Product Market] (promulgated by the State Administration for Industry and Commerce, July 7, 2009), *available at* http://news.xinhuanet.com/politics/2009-07/07/content_11668739.htm; *see also* Rosalind Donald, *China Issues Market Definition Guidelines*, Global Competition Rev., July 8 2009, *available at* http://www.globalcompetitionreview.com/news/article/16520/china-issues-market-definition-guidelines/.

68. [Measures on Notification of Concentrations of Undertakings] (promulgated by Ministry of Commerce, November 24, 2009, effective January 1, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639149.html.

69. [Measures on Review of Concentrations of Undertakings] (promulgated by the Ministry of Commerce, November 21, 2009, effective January 1, 2010), *available at* http://fldj.mofcom.gov.cn/aarticle/c/200911/20091106639145.html.

70. Draft guidance in respect of transactions that do not meet the relevant thresholds for notification has also been released. *See* [Draft Interim Measures on Investigation and Handling of Suspected Anti-competitive Concentrations that Do Not Meet the Notification Thresholds] (promulgated by the Ministry of Commerce, Feb. 6, 2007), *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200902/20090206031314.html?984881271=3683028003 (P.R.C.); Draft Interim Measures on Collection of Evidence for Suspected Anti-Competitive Concentrations that Do Not Meet the Notification Thresholds (promulgated by the Ministry of Commerce, Jan. 19, 2009), *available at* http://

## B. Comparative Design

India and Russia appear to have superior organizational design. Both vest competition enforcement in one agency,[71] which permits formulation of consistent policy, fosters more sophisticated economic analysis, and permits better utilization of staff. Despite obvious differences between merger and cartel enforcement, the underlying predicate for both is the same. Tools such as market definition are common to the analyses of dominance and mergers.[72] Issues too are often common, e.g., differentiation between legitimate joint ventures and cartels. A single competition enforcement agency also permits the development of stronger economic resources (in comparison to smaller units attached to different agencies) and the assignment of staff as needs arise.[73] During a merger downturn, for example, additional staff can be devoted to cartel enforcement, particularly relevant in the current economic climate.

China has multiple competition enforcement organs, but only one merger enforcement agency.[74] While not optimal, it does avoid the inefficiencies seen in Brazil, where three agencies, with ill-defined roles, currently participate in the merger review.[75] For example, all three Brazilian agencies have the power to issue requests for additional information that will "stop the clock."[76] Nonetheless, Brazil appears to be moving toward a more streamlined and efficient institutional organization with the Antitrust Bill currently before the Senate.[77]

While we take no view here as to whether an administrator (as in Russia) or a commission (as in India) is preferable,[78] the current constitution of CADE and the provision for two-year terms is problematic.[79] The terms are too short, and the long absence of staggered terms exacerbated the

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fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106010097.html?2343835767=3683028003.

71. *See* D.C. Singhania, Foreign Collaborations & Investments in India: Law and Procedures 258, 263-65 (2d ed. 2006) (describing Indian competition laws and the CCI); OECD, Reviews of Regulatory Reform, Russia: Building Rules for the Market 116-17 (2005) (describing broadly FAS).

72. *See* ABA Section of Antitrust Law, Antitrust Law Developments 65 (6th ed. 2007)) ("The standards for determining the scope of the relevant product and geographic markets under Section 1 [prohibiting anticompetitive agreements] are the same as those used under Section 2 [prohibiting creation and maintenance of a monopoly] of the Sherman Act and Section 7 of the Clayton Act [regulating mergers and acquisitions]").

73. *See* Francisco de Magalhães & Nogueira Dias, *supra* note 30, at 34 (discussing efficiencies in the Brazilian context).

74. *See supra* note 20.

75. *See* Francisco de Magalhães & Nogueira Dias, *supra* note 30, at 33 (enumerating Brazil's three antitrust enforcement agencies).

76. *See* BAL art. 54(8); *see also* OECD Brazil Report, *supra* note 2, at 57.

77. *See supra* notes 30-37 and accompanying text; *see also* Knox, *supra* note 30.

78. The senior author, having served on two collegiate bodies, admits some sympathy for the administrator model.

79. *See* John W. Clark, *Competition Policy and Regulatory Reform in Brazil: A Progress Report*, OECD J. Competition L. & Pol'y, Oct. 2000, at 182, 214-15; *see also* OECD, Policy Brief: Competition Law & Policy in Brazil 4 (2005), *available at* http://www.oecd.org/dataoecd/62/35/35415135.pdf.

problem by injecting too much inexperience at one time.[80] It has also been suggested that the term length encourages Commissioners to curry favor with politicians in an effort to secure reappointment.[81] Obviously the proposed amendments, if enacted, will help, but it is debatable whether the proposed four-year term is sufficient.[82]

## II. Jurisdiction Generally

Each of the BRIC jurisdictions has a mandatory pre-merger notification regime;[83] Russia also has a mandatory post-merger notification regime.[84] Of the four jurisdictions, only Brazil does not have a suspensory regime at the present time.[85]

The BRIC jurisdictions have taken different approaches to the definition of a concentration; whereas Brazil and India provide a broad definition,[86] China and Russia identify those transactions that constitute a concentration.[87] Corresponding to their respective approaches in relation to the definition of concentration, Brazil and India also define "control" broadly;[88] China, in contrast, provides no definition of control.[89] Russia does not define "control" as such, but instead provides examples of various forms of control via the definition of a "group."[90]

Each of the BRIC jurisdictions imposes a turnover jurisdictional test;[91]

80. *See* OECD Brazil Report, *supra* note 2, at 48. For a period of many years, for several reasons, including delays in individual appointments and resignations, the appointment of three Commissioners and the CADE President coincided. Because the confirmation of the current President was delayed by a number of months, his term is now separated from that of the three Commissioners (who were appointed at the same time, but confirmed months earlier). In the future (if the law does not change), the appointments of the President and two groups each of three Commissioners will be staggered.

81. *See id.*

82. *See* Policy Brief: Competition Law & Policy in Brazil, *supra* note 79, at 4 (suggesting that four-year terms may be insufficient to ensure agency autonomy because the Brazilian President, who appoints the commissioners, also serves a four-year term).

83. BAL art. 54; LPC arts. 27(1), 28(1), 29(1); CAA § 6(2); AML art. 21.

84. *See* LPC art. 30.

85. *See* BAL (not prohibiting the parties from closing a transaction for a definitive period of time in order to allow the competition agencies to complete their review). The Antitrust Bill, however, introduces a suspensory regime in Brazil. *See* Antitrust Bill arts. 88(3)–(4); *see also supra* note 30.

86. *See* CAA § 2(a); BAL art. 54(3). The Antitrust Bill identifies those acts that constitute a concentration. Antitrust Bill art. 90; *see also infra* note 100 and accompanying text.

87. *See* AML art. 20; LPC arts. 27–29.

88. *See* Conselho Administrativo de Defesa Econômica, Resolução No. 15, de 19 de agosto de 1998, D.O.U. 28.8.98 (Braz.) [hereinafter CADE Resolution No. 15] (defining "control"); CAA §5(a).

89. *See* AML (lacking a definition of control); *see also infra* notes 159–161 and accompanying text.

90. *See* LPC art. 9.

91. BAL art. 54(3); LPC arts. 27(1), 28(1), 29(1), 30(1); CAA §5; Rules on Notification Thresholds, *supra* note 62, art. 3; *see also infra* notes 102, 105 and accompanying text (discussing Brazil); *infra* notes 137, 141–142, 145–146 and accompanying text (dis-

India and Russia also incorporate an asset test.[92] Moreover, both Russia and Brazil also apply a market share test.[93]

**1. Brazil.** Although Brazil currently has a non-suspensory regime,[94] CADE has made use of preliminary injunctions in complex and potentially anticompetitive transactions to prevent the parties from closing the transaction before completion of the review process and thus preserve the efficacy of CADE's final decision.[95] The injunction may be issued ex officio, or at the request of SEAE, SDE, or an interested third party.[96] CADE also may enter into an agreement with the parties, known as an APRO,[97] preventing the implementation of the transaction until completion of the merger review process.[98]

Concentration is defined broadly to cover any act that may limit or otherwise restrain open competition or that results in the control of relevant markets for certain products or services.[99] The BAL clarifies that this includes actions intended for any form of economic concentration, whether through a merger, an acquisition of sole or joint control over an undertaking, or an acquisition of shares or votes.[100]

While the BAL does not provide a definition of control, CADE's Resolutions define control broadly, as the power to direct the activities of an undertaking and its business policy.[101]

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cussing Russia); *infra* notes 149-156 and accompanying text (discussing India); *infra* note 162 and accompanying text (discussing China).

92. CAA § 5; LPC arts. 27(1), 28(1), 29(1), 30(1); *see also infra* notes 149-156 and accompanying text (discussing India); *infra* notes 136-137, 139-142, 145-146 and accompanying text (discussing Russia).

93. *See* LPC arts. 27(1), 28(1); *see also* BAL art. 54(3). The Antitrust Bill provides for a turnover test only. *See* Antitrust Bill art. 88; *see also infra* notes 138, 143 and accompanying text (discussing Russia); *infra* notes 102, 111 and accompanying text (discussing Brazil).

94. *See supra* note 85.

95. CADE Resolution 28/02 formalized CADE's power to issue injunctions (prior to this resolution, CADE had issued such injunctions, e.g., in the *AmBev* and *WorldCom/Sprint* cases). *See* Conselho Administrativo de Defesa Econômica, Resolução No. 28, de 24 de julho de 2002, D.O.U. de 2.8.2002, republicada em 9.8.2002 [hereinafter CADE Resolution No. 28/02], *available at* http://www.cade.gov.br/Default.aspx?ef30f03fcd4ccc6dfa5c (Braz.). CADE Resolution 45/07 later replaced CADE Resolution 28/02. *See* Conselho Administrativo de Defesa Econômica, Resolução No. 45, de 28 de marco de 2007 [hereinafter CADE Resolution No. 45/07], *available at* http://www.cade.gov.br/Default.aspx?ef30f03fcd4ccc6dfa5c (Braz.).

96. *See* ICN, Merger Notification And Procedures Template: Brazil 10 (2005) [hereinafter Brazil Merger Notification and Procedures Template], *available at* http://www.cade.gov.br/Internacional/ICN_Merger_Template_2005.pdf.

97. Acordos de Preservação de Reversibilidade da Operação, or a Transaction Reversibility Preservation Agreement.

98. *See* CADE Resolution No. 28/02, *supra* note 95, ch. 2, later replaced by CADE Resolution No. 45/07, *supra* note 95; *see also infra* note 316.

99. BAL art. 54(3).

100. BAL art. 54(3). The Antitrust Bill identifies those acts that constitute a concentration as: the consummation of an amalgamation of two or more previously independent companies; the acquisition of control of, or portions of, one or more companies; merger; or the execution of a joint venture or consortium agreement. Antitrust Bill art. 90.

101. *See* CADE Resolution No. 15, *supra* note 88.

Brazil currently applies both a turnover and a market share jurisdictional test,[102] but the Antitrust Bill provides for a turnover test only.[103] The transaction is notifiable if one of the parties to the transaction has a turnover of BRL 400 million (approx. USD 200 million[104]).[105] The BAL does not explicitly state whether the turnover test applies to the parties' worldwide sales or only to their Brazilian sales.[106] Previously the test was applied to the former; however, in January 2005, CADE issued a decision,[107] followed by its *Súmula* No. 1 issued on October 18, 2005, clarifying that the test would henceforth apply only to turnover in, into, and from Brazil.[108] This has significantly reduced the number of transactions requiring notification in Brazil.[109] Nonetheless, when calculating the turnover of the parties, the turnover of the entire group (including any undertakings under common control) must be taken into account.[110] Although such a requirement is arguably justifiable in respect of the purchaser's group, in the case of the seller, only the turnover of the target should be considered. Taking the turnover of additional seller group companies acts merely to increase the number of filings without enabling the agency to identify additional potentially harmful transactions.

Alternatively, a filing will be triggered on the basis of a market share of 20% or more in any relevant market, which must include, at least in part, the Brazilian market.[111] This test was initially applied to the market share of the target only; i.e., a filing was triggered if the target alone reached the 20% market share threshold, even if the acquirer was not active in that

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102. BAL art. 54(3).

103. Antitrust Bill art. 88.

104. All currency conversions are based on the OECD average exchange rates for 2009, available at http://stats.oecd.org/Index.aspx (expand "Finance" theme; then follow "Financial Indicators (MEI)" hyperlinks to "Exchange Rates (USD monthly averages)").

105. The Antitrust Bill includes a proposal to modify the notification thresholds to impose a turnover threshold on both parties and is therefore expected to reduce the number of filings. Article 88 requires that one party's group has turnover of at least BRL 400 million (approx. USD 200 million) and another party's group has turnover of at least BRL 30 million in Brazil (approx. USD 15 million) in order to trigger a merger notification requirement. *Compare* BAL art. 54(3) *with* Antitrust Bill art. 88.

106. *See* BAL art. 54(3).

107. ADC Telecommunications Inc./Krone International Holding Inc., CADE, Case No. 08012.002992/02004-14, Relator: Roberto Augusto Catellanos Pfeiffer, Jan. 19, 2005 (Brazil).

108. Súmula No. 1, D.O. de 18.10.2005 (Brazil), *available at* http://www.cade.gov.br/Default.aspx?1629f90fe63cd052a491a3b48c. The Antitrust Bill includes a nexus requirement; under the proposed legislation, the turnover of each party must be in Brazil in order to trigger a merger filing notification. Antitrust Bill art. 88.

109. Mauro Grinberg & Camilla Paoletti, *Brazil: Merger Control*, *in* GLOBAL COMPETITION REV., ANTITRUST REVIEW OF THE AMERICAS 2010 (2010), *available at* http://www.globalcompetitionreview.com/reviews/20/sections/76/chapters/800/brazil-merger-control.

110. GLOBAL COMPETITION REV., GETTING THE DEAL THROUGH: MERGER CONTROL 2010 (2010).

111. BAL art. 54.

market.[112] In its October 1, 2008 decision, *Cintinori Acquisition GmbH/ Jost Holding GmbH*,[113] CADE effectively reduced the scope of the market share test by ruling that where there is neither a horizontal overlap nor a vertical relationship between the parties, a filing will not be triggered.[114] At least until (and if) the Antitrust Bill comes into force, it remains to be seen whether CADE will follow its precedent on this issue, although it seems likely. There are no guidelines for calculating market shares.[115]

**2. Russia.** The Russian legislation sets out a comprehensive list of the events that constitute a merger, including the:

1) Acquisition of (indirect or direct) rights that make it possible for the acquirer to determine the commercial behavior of the target;[116]
2) Acquisition of shares resulting in the acquirer holding a stake of over 25%,[117] 50%,[118] or 75%[119] in a joint-stock company, or over 33.33%,[120] 50%,[121] or 66.67%[122] in a limited liability company;[123]
3) Incorporation of a company by contribution of assets or shares in another company;[124]
4) Merger of one company with another or the consolidation of several companies; and[125]
5) Acquisition of over 20% (by book value) of an entity's fixed production assets (other than land, non-industrial buildings and premises (or parts thereof) and unfinished construction sites) and/ or intangible assets.[126]

Unlike the previous merger control laws,[127] the LPC does not provide

112. Cristianne S. Zarzur, Lilian Barreira & Marcos P. Garrido, Pinheiro Neto Advogados, *CADE Decision Signals New Interpretation of Criterion for Notification of Concentration Acts*, Attachment: Biblioteca Informa Newsletter No. 2030, Oct. 12–18, 2008, at 2, *available at* http://www.pinheironeto.com.br/upload/tb_pinheironeto_artigo/pdf/231008155853Microsoft_Word___anexo_bi2030_i.pdf.

113. CADE, No. 08012.007026/2008-17, Relator: Paulo Furquim de Azevedo, 11.10.2008 (Brazil). *See also* Zarzur, Barreira & Garrido, *supra* note 112, at 2 ("[A]t its 430th Ordinary Judgment Session held on October 1, 2008, in a decision rendered in connection with Concentration Act No, 08012.007026/2008-17, CADE adopted, by unanimous vote, the stand that there must be a causal relation between the notified transaction and actual verification of the 20% market share . . . .").

114. *See* Zarzur, Barreira & Garrido, *supra* note 112, at 2–3.

115. Brazil Merger Notification and Procedures Template, *supra* note 96, at 6.

116. LPC arts. 28(1)(8), 29(1)(8).

117. *Id.* arts. 28(1)(1), 29(1)(1).

118. *Id.* arts. 28(1)(4), 29(1)(4).

119. *Id.* arts. 28(1)(6), 29(1)(6).

120. *Id.* arts. 28(1)(2), 29(1)(2).

121. *Id.* arts. 28(1)(3), 29(1)(3).

122. *Id.* arts. 28(1)(5), 29(1)(5).

123. These thresholds require a filing if the acquirer crosses the relevant threshold; e.g., an acquirer that holds 26% and purchases additional stock, taking it over the 50% threshold, must submit a merger filing notification.

124. LPC arts. 27(1)(4)–(5).

125. *Id.* arts. 27(1)(1)–(3).

126. *Id.* art. 28(1)(7).

127. *See supra* note 39.

a definition of control.[128] However, through the definition of a "group", the LPC determines that control includes the following situations: (1) holding more than 50% of the voting shares in a company;[129] (2) having the right to determine the business activities of another company, either (a) contractually,[130] or (b) through the right to appoint the general director[131] or more than 50% of the members of the executive or supervisory body;[132] and (3) having the right to give binding instructions to another company on the basis either of corporate documents or a contractual arrangement.[133] The need for a filing on the basis of so-called "negative control" (i.e., the ability to veto certain actions by the company) therefore cannot be excluded. Several jurisdictions, including the European Union (E.U.), require merger notification on the acquisition of negative control[134] and therefore such a requirement cannot be said to be against international practice. However, provision for a filing in such circumstances generally creates uncertainty for the parties, necessitating difficult judgment calls to be made as to whether a filing is required.

Russia applies three alternative jurisdictional tests for a pre-merger filing:[135] the first applies to the assets of the acquirer's group and target's group,[136] the second applies to the turnover and assets of the acquirer's group and target's group,[137] and the third applies to the market share of any entity within either the acquirer's group or the target's group.[138] Thus, the transaction will be notifiable if:

1) The worldwide book value of the assets of the:
    a. Acquirer's group and the target's group when aggregated exceeds RUB 7 billion (approx. USD 221 million);[139] and

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128. LPC arts. 27–30 (failing to provide a definition of control).

129. *Id.* arts. 9(1)–(2), (15).

130. *Id.* arts. 9(5)–(6).

131. *Id.* arts. 9(7)–(8).

132. *Id.* arts. 9(9)–(10).

133. *Id.* arts. 9(5)–(6).

134. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, para. 54, 2008 O.J. (C 95) 01, 16, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF.

135. For transactions in which "financial organizations" are targets, separate asset value thresholds were established on May 30, 2007 by the Russian government. Government Resolutions 334 and 335, dated May 30, 2007, as amended. Under the LPC, "financial organizations" include banks, insurance companies, and securities management companies, etc. LPC art. 4(6). Changes proposed by FAS were recently implemented, enabling smaller banks to combine: banks with assets of no more than RUR 24 billion (approx. USD 756 million) (increased from RUR 14 billion (approx. USD 441 million)) can now acquire banks with assets of up to RUR 6 billion (approx. USD 189 million) (increased from RUR 4 billion (approx. USD 126 million)) without the need to submit a merger notification filing. *See* Russian Federation Government Resolution on Amendment of Government Ruling No. 335 of May 30, 2007, No. 591 of July 17, 2009.

136. *See infra* notes 139–140.

137. *See infra* notes 141–142.

138. *See infra* note 143.

139. LPC art. 28(1).

b. Target's group alone exceeds RUB 250 million (approx. USD 8 million);[140] or

2) Worldwide, the:

a. Aggregate turnover in the last financial year of the acquirer's group and the target's group exceeds RUB 10 billion (approx. USD 315 million); and[141]

b. Book value of the assets of the target's group alone exceeds RUB 250 million (approx. USD 8 million);[142] or

3) One of the companies of the acquirer's group or the target's group is listed in the Register as either a dominant company or a company with a market share exceeding 35% on a relevant Russian commodities market.[143]

A post-merger filing may be required if the pre-merger filing thresholds were not met.[144] The jurisdictional thresholds for a post-merger filing are:

1) The worldwide asset book value or turnover in the last financial year of the acquirer's group and the target's group when aggregated exceeds RUB 400 million (approx. USD 13 million);[145] and

2) The book value of the assets of the target's group alone exceeds RUB 60 million (approx. USD 2 million).[146]

The post-merger notification test is thus similar to the pre-merger test, but the thresholds are set at a much lower level, giving FAS the opportunity to review smaller, less economically significant mergers without impacting the transaction, unless of course substantive issues arise.

**3. India.** The CAA applies to any "combination," which includes those transactions that involve the acquisition of shares, voting rights, assets, or "control."[147] Control is defined neither in the CAA nor in the draft Merger Regulations, but is stated to include control of the affairs or management of an enterprise or group either jointly or singly.[148]

India applies two alternative thresholds, the first of which applies to the joint assets and turnover of the parties,[149] and the second of which applies to the assets and turnover of the acquirer's group only.[150] The transaction will be notifiable if:

1) The parties jointly have either:

a. Assets in India of INR 10 billion (approx. USD 207 million) or more or turnover in India of INR 30 billion (approx. USD 620

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* arts. 27(1)(1), 28(1)(1).
144. *Id.* art. 30(2).
145. *Id.* arts. 30(1), (2).
146. *Id.* arts. 30(1), (2), (5).
147. CAA § 2(a).
148. *Id.* § 5.
149. *See infra* notes 151–153.
150. *See infra* notes 154–156.

million) or more;[151] or

b. Worldwide assets of USD 500 million or more and assets in India of INR 5 billion (approx. USD 103 million) or more;[152] or

c. Worldwide turnover of USD 1.5 billion or more and turnover in India of INR 15 billion (approx. USD 310 million) or more;[153] or

2) The acquirer's group has:

a. Assets in India of INR 40 billion (approx. USD 826 million) or more, or turnover in India of INR 120 billion (approx. USD 2.5 billion) or more;[154] or

b. Worldwide assets of USD 2 billion or more and assets in India of INR 5 billion (approx. USD 103 million) or more;[155] or

c. Worldwide turnover of USD 6 billion or more and turnover in India of INR 15 billion (approx. USD 310 million)[156] or more.

This test has been criticized as potentially requiring a filing even though the target has no Indian nexus, because the test is based on either the parties' combined activities or the acquirer's activities alone.[157]

4. **China.** The AML defines a "concentration" as: a merger of undertakings; an acquisition by an undertaking of control over one or more undertakings by acquiring equity interests or assets; or an acquisition by an undertaking of control or the ability to exert a decisive influence over one or more undertakings by contract or other means.[158]

The AML does not define the level of shareholding or influence that confers control or "decisive influence."[159] The draft Interim Measures on Notification of Concentrations defined the "acquisition of control of other undertakings,"[160] but this definition was dropped from the final version.[161] The level of influence that will trigger a notification filing therefore remains unclear.

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151. CAA § 5(a)(i)(A).
152. *Id.* § 5(a)(i)(B).
153. *Id.*
154. *Id.* § 5(a)(ii)(A).
155. *Id.* § 5(a)(ii)(B).
156. *Id.*
157. Shantanu Mukherjee, *Indian Competition Law and the Challenge of Merger Control*, AsiaLaw, Aug. 2009, *available at* http://www.asialaw.com/Article/2267785/Channel/16707/Indian-competition-law-and-the-challenge-of-merger-control.html.
158. AML art. 20.
159. *Id.*
160. Draft Interim Measures on Notification of Concentrations of Undertakings, art. 3, *available at* http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html?2511673463=3683028003 (defining control as the acquisition of over 50% of the voting rights or assets of another undertaking; or in the absence of acquisition of over 50% of the voting rights or assets of another undertaking, obtaining the ability to decide the appointment of one or more board members and key management members, budgets, operations and sales, pricing, substantial investment or other important management and operational strategies, through acquisition of shares and assets or through contract(s) or other means).
161. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 3.

China applies a turnover jurisdictional test. A transaction will require notification if it satisfies either of the following tests:

1) The parties have a combined worldwide turnover in excess of RMB 10 billion (approx. USD 1.5 billion) and the turnover of each of at least two parties in China exceeds RMB 400 million (approx. USD 59 million); or
2) The parties have a combined turnover in China in excess of RMB 2 billion (approx. USD 293 million) and the turnover of each of at least two parties in China exceeds RMB 400 million (approx. USD 59 million).[162]

Moreover, it is open to the parties to voluntarily notify a transaction, even if it fails to meet the thresholds outlined above.[163]

When calculating a party's turnover, the turnover of all entities that it controls, or that are controlled by it, must be included; the requisite control may be either direct or indirect.[164] Nonetheless, in an asset acquisition, only the turnover generated by those assets to be acquired needs to be taken into account when assessing the target's turnover.[165]

As is generally the case, onshore sales from Chinese subsidiaries and export sales into China must be included when calculating turnover in order to determine whether a transaction is notifiable or not.[166]

It merits mention that China does not require notification in two-party transactions unless there is a nexus between the parties and the jurisdiction.[167] Each of the alternative turnover tests requires that each of at least two parties has turnover in excess of approximately USD 59 million in China.[168] In the case of three-party (or more) transactions, however, a filing may be required on the basis that each of the acquirers meets the threshold, even though the target has little or no presence in China.[169]

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162. Rules on Notification Thresholds, *supra* note 62, art. 3.

163. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 16.

164. AML art. 20; *see also* Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 3.

165. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 7.

166. Although the initial draft Interim Measures on Notification of Concentrations of Undertakings specifically excluded turnover from Hong Kong, Macau, and Taiwan, the final version is silent on this point. *See* Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 4; *see also supra* note 160.

167. *See* Jonathan Galloway, *Convergence in International Merger Controls*, 5 Competition L.Rev. 179, 183–184 (2009) (discussing China's local nexus requirement).

168. Rules on Notification Thresholds, *supra* note 62, art. 3; *see also supra* note 162 and accompanying text.

169. The turnover thresholds require that each of at least two parties has a turnover in excess of 400 million RMB (approx. USD 59 million). Rules on Notification Thresholds, *supra* note 62, art. 3. In a transaction involving three or more parties, this requirement could potentially be satisfied by the two buyers, and thus the target need not necessarily have a significant presence in China.

A. Comparative Jurisdictional Issues

Market share jurisdictional tests pose problems. First, it can be difficult to determine with certainty whether a notification is required because there is frequently little or no guidance on market definition at an early stage of a transaction.[170] Second, even where market definition analysis could be done, it can be costly and time consuming, even where the transaction obviously presents no substantive issue. It should be noted that the market share test as applied in Russia avoids the former criticism, because it imposes an objective test; a notification is triggered on the basis of whether a party is registered with the requisite market share.[171] The move to abolish the Brazilian market share test in the Antitrust Bill is welcomed, although it remains to be seen whether the Antitrust Bill will pass into law.[172]

There is a consensus within the international competition community that transactions ought not to be reviewed unless there is a nexus between the reviewing jurisdiction and the transaction.[173] Yet of the BRIC jurisdictions, only China includes such a test.[174] Fortunately, it appears that the enforcement agencies in Brazil[175] and India[176] appreciate the wisdom of a

170. *See* ICN, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES 3-4 (2002) [hereinafter RECOMMENDED PRACTICES], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf (adopted by the ICN membership at its inaugural conference in September 2002).

171. LPC arts. 27(1)(1), 28(1)(1); *see also supra* note 143 and accompanying text.

172. *See supra* note 30.

173. RECOMMENDED PRACTICES, *supra* note 170, at 1.

174. *See* Galloway, *supra* note 167, at 183-84 (describing China's local nexus requirement); *see also supra* notes 167-169.

175. *See* BAL art. 54. Mergers between foreign companies that are not situated in Brazil must be notified only if they have or could have "effects" in Brazil. *Id.* art. 2. "Effects" are defined broadly for the purposes of the merger legislation and, in practice, if the parties have sales in or into Brazil or assets in Brazil, a notification must be filed. Moreover, a filing can be triggered on the basis of the seller's turnover alone. However, in 2005, CADE clarified that the turnover test would apply henceforth only to turnover into or from Brazil. *See supra* note 108 and accompanying text. Moreover, there appears to be a new trend to dismiss notifications of foreign-to-foreign transactions that: (1) have no impact, or insignificant impact, in Brazil; or (2) involve a target with *de minimis* turnover in Brazil (there has as yet been no indication of the level of sales below which a filing will not be required). SEAE and SDE have argued in cases since 2006 and 2007 that jurisdiction should be refused on the basis that the target's connection with Brazil is *de minimis*, but to date, CADE has not dismissed such cases; rather, it has gone on to review those cases. As discussed above, the Antitrust Bill introduces a requirement that two parties must have turnover in excess of the relevant thresholds in Brazil, thus effectively introducing a nexus test, except in the case of a transaction involving more than two parties. *See supra* note 108 and accompanying text.

176. *See* Joint Comments of the American Bar Association's Sections of Antitrust, Business, and International Law, *Implementing Regulations for and Amendments to the Merger Control Provisions of India's Competition (Amendment) Act*, 2007 A.B.A. SECS. OF ANTITRUST LAW, BUS. LAW, AND INT'L LAW at 5 [hereinafter ABA Joint Comments] (explaining that India's statutory notification requirements seem inconsistent with the ICN's Recommended Practices recommending asserting jurisdiction only over those transactions that have an appropriate nexus with the jurisdiction concerned); *see also* Galloway, *supra* note 167, at 184. In India, the CCI has jurisdiction if the relevant combination "causes or is likely to cause an appreciable adverse effect on competition in the

nexus requirement. Each of these two regulators has recognized and developed a different means of introducing the principle that parties to a transaction with no effect on a jurisdiction should not be required to notify that transaction in that jurisdiction.[177] Nonetheless, in Russia, although a transaction is notifiable under the LPC only if it may influence competition in the Russian market, in practice, if the transaction involves shares or rights in a Russian company or the direct acquisition of Russian assets, a notification is required.[178]

Suspensory regimes, *ceteris paribus*, are to be preferred. This qualification is important because prohibition of closing pending review imposes costs on the parties. Abuse of this power may result in the abandonment of transactions posing no competitive threat. Assuming no abuse, suspensory merger review ensures that adequate remedies are preserved. The United States' (U.S.) experience prior to its pre-merger notification program well illustrates these problems.[179] Although Brazil does not currently have a suspensory regime, the Antitrust Bill, if passed, would introduce such a regime.[180] In the event that the Antitrust Bill fails to pass, CADE's power to obtain an injunction blocking the transaction pending review may continue to ameliorate this problem.[181]

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relevant market in India." CAA § 6. The CAA provides a non-exhaustive list of factors to which the CCI must have "due regard" when considering whether a combination causes an "appreciable adverse effect." *Id.* § 20(4). Perhaps in reaction to criticism of the lack of a requirement that the target have a nexus with India, the draft Merger Regulations address this concern by stating that those combinations where each of at least two parties (e.g., the acquirer and target) does not meet either a turnover or asset threshold in India are not "likely to cause an appreciable adverse effect" on competition. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), regs. 5(1), (2)(iv). The CCI has issued a press release stating that transactions that do not meet these thresholds are not notifiable. *See* Gireesh Chandra Prasad, *Competition Commission Ready to Address Industry's Concerns Over 9 Issues*, THE ECONOMIC TIMES, April 10, 2008, *available at* http://www.cci.gov.in/index.php?option=com_news&sid=4&task=details. Thus, it is likely that, in practice, a combination will be notifiable only where the target meets either the asset or turnover threshold in India.

177. *See supra* notes 175-176.

178. *See* Tapani Manninen, et al., *Russian Competition Law: Overview and Recent Developments*, *in* GLOBAL COMPETITION REV., EUROPEAN ANTITRUST REV. 2009 (2009) (discussing the inconsistencies in FAS' approach to the merger notification requirements). In Russia, a foreign-to-foreign transaction falls within the scope of the LPC only if it: (1)(i) involves the acquisition of shares in, or rights to determine the commercial activity of, a Russian company, or (ii) involves the direct acquisition of assets (fixed production or intangible) located in Russia; and (2) may influence competition in the Russian market. LPC art. 3(2). In practice, however, a filing is required if the criteria in (1) above, together with the jurisdictional thresholds, are satisfied, because FAS takes the position that only it is empowered to decide whether the transaction may or may not influence competition. FAS now applies a broader concept of effect on the Russian market, which includes consideration of market shares and presence.

179. *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J. L. & ECON. 43, 50-52 (1969).

180. *See supra* note 85 and accompanying text; *see also supra* note 30.

181. *See supra* notes 95-98 and accompanying text.

## III. Specific Jurisdictional Issues

### A. Minority Interests

Of the BRIC jurisdictions, it appears that only Russia and India require a merger notification in the case of a minority acquisition that does not result in some change in control over the target.[182]

**1. Brazil.** An acquisition of a minority interest must be notified where it may cause a change in the target's management policy or in the internal dynamics of corporate control.[183] In its 2006 decision in *OHL/Vianorte*, CADE recognized that the acquisition of a minority shareholding will be notifiable only if the buyer acquires "relevant influence" over the target.[184] In assessing whether relevant influence is being acquired, CADE routinely considers rights to appoint board members, access to strategic information and decisions and veto rights beyond mere protection of minority shareholders' economic interests.[185]

CADE subsequently issued *Súmula* No. 2, confirming that an increase in shareholding by a majority shareholder will not be notifiable unless there is some change in control or a change in the competitive environment.[186] Therefore, notification will not be required unless: (1) the seller has statutory or contractual powers to appoint management, to influence the target's commercial policy, or to exercise veto rights; (2) the transaction imposes a non-compete valid for over five years or with a geographic scope broader than the target's area of activity; or (3) a clause provides for control among the parties.[187]

**2. Russia.** The acquisition of a minority interest falls within the scope of the LPC.[188] A direct acquisition of shares resulting in the acquirer holding an interest of over 25% in a joint stock company, or over 33.33% in a limited liability company, is potentially notifiable.[189] Where a minority interest in a Russian company is acquired indirectly, even if it is below the

182. *See* LPC arts. 28–29; CAA § 5 (requiring notification where control, shares, voting rights or assets are acquired); Competition Commission of India [CCI], *Proposed Draft (Combination) Regulations* (200_), regs. 5(1), 5(2)(i); *see also infra* notes 183–185 and accompanying text (discussing Brazil); *infra* notes 188–190 and accompanying text (discussing Russia); *infra* notes 191–192 and accompanying text (discussing India); *infra* note 193 and accompanying text (discussing China).

183. *See* BAL art. 54 (outlining which acts should be submitted to CADE for review); *see also* Getting the Deal Through: Merger Control 2010, *supra* note 110, at 66. The Antitrust Bill clarifies that an acquisition of a minority interest that does not have direct or indirect decision-making power or the capacity to influence the competitive behavior of the target is not a concentration for the purpose of merger review notification. OECD, Policy Roundtables: Minority Shareholdings 189 (2008), DAF/COMP (Dec. 2, 2008) [hereinafter OECD, Policy Roundtables], *available at* http://www.oecd.org/dataoecd/40/38/41774055.pdf.

184. No. 0812.006124/2006-75, Realtor: Conselheiro Luis Fernando Schuartz, 4.10.2006 (Brazil).

185. OECD, Policy Roundtables, *supra* note 183, at 190.

186. Súmula No. 2, de 22 de agosto de 2007, D.O. de 27.08.2007 (Brazil), *available at* http://www.cade.gov.br/Default.aspx?91a475849d73898a9ca9bb8ca7.

187. *Id.*

188. LPC arts. 28–29; *see also supra* notes 117, 120 and accompanying text.

189. LPC arts. 28(1)(1)–(2), 29(1)(1)–(2).

25% or 33.33% threshold, the filing requirement will be triggered if the interest gives the acquirer certain material rights (e.g., under a shareholder agreement) with respect to the Russian company.[190]

3. **India.** The draft Merger Regulations in the context of the substantive review create a number of safe harbors for acquisitions that are not "likely to cause an appreciable adverse effect on competition," including the acquisition of shares not exceeding a 15% stake in the target that does not confer control and is solely for the purpose of investment or in the ordinary course of business.[191] Although the draft Merger Regulations are silent on the point, it has been suggested that the CCI may, in practice, treat transactions falling within these safe harbors as non-notifiable.[192]

4. **China.** As a general rule, it is expected that the acquisition of a minority interest will not trigger a notification requirement unless control is acquired.[193]

## B. Joint Ventures

Some jurisdictions distinguish between "concentrative" (i.e., corporate) joint ventures (JVs) and "cooperative" JVs.[194] A further distinction can be made between "full-function" and "non-full-function" JVs.[195] None of the BRIC jurisdictions utilizes these distinctions.

None of the BRIC jurisdictions has special rules for the formation of a JV; if the thresholds/jurisdictional tests are met, the formation of a JV will be notifiable, whether concentrative or cooperative, full-function or not.[196]

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190. *Id.* arts. 28(1)(8), 29(1)(8).

191. *See* Competition Commission of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), regs. 5(1), 5(2)(i). A similar safe harbor applies to: an acquisition of assets not directly related to the acquirer's business or made solely as an investment or in the ordinary course of business that does not result in the acquisition of control over the target, except where the acquired assets represent the target's entire business operations in a particular location or for a particular product. *See id.* reg. 5(2)(ii).

192. *See* ABA Joint Comments, *supra* note 176, at 7; ABA, Perspectives on the Recent Amendments to India's Competition Act 2002 (2002), *available at* http://www.abanet.org/antitrust/at-committees/at-ic/programs.shtml.

193. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 3

194. See Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings (EU), 2004 O.J. (C 31) 3, para. 85, in which the E.U. refers to concentrative joint ventures.

195. *See* Commission Notice on the Concept of Full-Function Joint Ventures under Council Regulation (EEC) No 4064/89 on the Control of Concentrations Between Undertakings COM (1998) final (Mar. 2, 1998).

196. *See* BAL art. 54 (outlining which acts should be submitted to CADE for review and lacking specific rules for formation of a joint venture); LPC arts. 27–30 (outlining notification requirements and lacking specific rules for formation of a joint venture); CAA §§ 5, 6 (outlining notification requirements and lacking specific rules for formation of a joint venture). In China, the draft Interim Measures on Notification of Concentrations at article 3 provided that "two or more undertakings jointly establishing a new enterprise" constitutes a concentration. *See supra* note 160. This provision was omitted from the final version of the Measures on Notification of Concentrations of Undertakings. *See supra* note 68.

C. Intra-Person Exemption

There appears to be a growing consensus in the BRIC jurisdictions that a filing should not be required in the case of intra-person transactions. In Brazil, India, and China such transactions are exempt from notification.[197] In Russia, although a pre-merger filing is technically required, it is possible to obtain an exemption and to file instead a post-merger notification.[198]

1. **Brazil.** Intra-person transactions are exempt.[199] Thus, a simple corporate restructuring need not be notified.[200]

2. **Russia.** Intra-person transfers are technically subject to mandatory pre-notification; however, the LPC Amendment introduced an exemption from this requirement.[201] Transfers within a group, the structure of which is transparent and based on holding more than 50% of the voting shares, are subject only to post-merger notification.[202] In order to obtain this exemption, a member of the group must submit to FAS one month before consummation a list of its group members, stating the reason that each entity is included within the group.[203] Within fourteen days of receipt, FAS will inform the parties whether the list has been accepted.[204]

3. **India.** Although there is no exemption for intra-person transactions under the CAA, the draft Merger Regulations provide a safe harbor, carving out as not "likely to cause an appreciable adverse effect on competition" share acquisitions where the acquirer holds a 50% shareholding prior to the acquisition.[205] There has been some indication that, in practice, the CCI will treat such transactions as non-notifiable.[206]

4. **China.** A prior notification is not required for intra-person transactions; under the AML, no filing is required if one entity (whether or not itself involved in the transaction) holds more than 50% of the voting shares or assets of each undertaking involved in the transaction.[207]

D. "Knock on the Door": Jurisdiction over Non-Reportable Transactions

Only in Brazil and India may the relevant competition agency be denied jurisdiction to investigate a transaction that raises substantive com-

197. *See infra* note 199 and accompanying text (discussing Brazil); *infra* notes 205–206 and accompanying text (discussing India); *infra* note 207 and accompanying text (discussing China).

198. LPC art. 31.

199. *See* Brazil Merger Notification and Procedures Template, *supra* note 96, at 3.

200. *See id.*

201. *See* LPC art. 31.

202. *Id.* arts. 9, 31(1).

203. *Id.* art. 31(1).

204. *Id.* art. 31(2).

205. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), regs. 5(1), (2)(iv).

206. *See* ABA, Perspectives on the Recent Amendments to India's Competition Act 2002, *supra* note 192.

207. *See* AML art. 22.

petition concerns but does not meet the applicable threshold(s).[208] Although such a limitation provides certainty to parties, it also acts to undermine the policy underlying the merger notification regime: prevention of anticompetitive conduct.[209]

## IV. Timing

### A. Filing Deadlines

Generally, suspensory regimes do not have filing deadlines; because the parties cannot consummate the transaction until either it has been cleared or the relevant waiting period has expired, imposition of a filing deadline is unnecessary.[210] Consistent with this principle, Brazil imposes a deadline, whereas China and Russia (in respect of the pre-merger filing obligation) do not.[211] India is an anomaly.[212]

1. **Brazil.** Notifiable transactions must be notified within fifteen business days of the "realization" of the transaction.[213] CADE issued a resolution to clarify the time at which a transaction is "realized" as the execution of a binding document or agreement. [214] In the past, CADE treated almost

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208. In Brazil, although there is no express provision giving the agencies jurisdiction over non-reportable transactions, CADE could potentially pursue such a transaction as an anticompetitive act. *See* BAL art. 20. In India, the turnover thresholds are used in the definition of a "combination"; because the CCI has jurisdiction only over "combinations," it appears that it will not have the power to investigate transactions that do not meet the applicable threshold(s). *See* CAA §§ 5, 6. In China, under Article 4 of the Rules on Notification Thresholds, MOFCOM has the power to initiate an investigation if there is "evidence showing that the concentration has or may have the effect of foreclosing or restricting competition even where the relevant turnover thresholds are not met." *See supra* note 62. The draft Interim Measures on Investigation and Handling of Suspected Anti-competitive Concentrations that Do Not Meet the Notification Thresholds clarify MOFCOM's procedures in respect of such cases. *See China Clarifies Merger Review Process*, GLOBAL COMPETITION REVIEW, January 20, 2009, *available at* http://www.globalcompetistionreview.com/news/article/12730/china-clarifies-merger-review-process; *see also supra* note 70.

209. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1-2 (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf (describing the purposes of merger policy).

210. *See, e.g.*, RECOMMENDED PRACTICES, *supra* note 170, at 6.

211. *See* BAL arts. 54(4)-(5); *see also* AML (failing to impose a filing deadline); LPC art. 30 (imposing a filing deadline in respect only of the post-merger notification); *see also infra* note 213 and accompanying text (discussing Brazil); *infra* note 221 and accompanying text (discussing Russia); *infra* note 225 and accompanying text (discussing China).

212. *See infra* notes 223 and 224 and accompanying text.

213. *See* BAL art. 54(4).

214. CADE Resolution 15/98 established that "realization" of the transaction is the moment when the parties sign a first binding document, or when there is any modification in the competitive relation between them, or between them and third parties. *See* CADE Resolution 15, *supra* note 88, art. 2. Subsequently, there was a sequence of different interpretations of the triggering event, because CADE started to discuss not only when the realization of a transaction took place, but also which was the first binding agreement signed by the parties.

every document, whether definitive or not, as binding.[215] For example, both confidentiality letters and "stand-still" agreements[216] executed at the initiation of discussions between the parties have triggered a need to file.[217] Failure to file on the basis of such documents was routinely prosecuted by CADE, notwithstanding the fact that the documents provided nothing of a substantive nature to review. This standard subjected Brazil to much criticism from within the international competition community.[218]

CADE is gradually becoming more flexible in this respect and has recently moved toward treating the definitive agreement as triggering the obligation to notify, although care is still needed in drafting the terms of preliminary documents such as letters of intent and memoranda of understanding in order to avoid triggering such an obligation.[219] The deadline is strictly enforced and no extension is possible.[220]

**2. Russia.** In line with international norms and logic, Russia does not impose a filing deadline in respect of the pre-merger filing notification.[221] With respect to the post-merger notification only, a filing must be made within forty-five calendar days from the consummation of the transaction.[222]

**3. India.** A combination must be notified within thirty days either of: (1) approval by the Board of Directors of a merger proposal or (2) the execution of an agreement setting out the parties' intent to convey control

215. GLOBAL COMPETITION REV., GETTING THE DEAL THROUGH: MERGER CONTROL 2003 35 (2003).

216. An agreement whereby two or more parties agree not to deal with other parties in a particular matter for a period of time, e.g., they enter into an agreement under which the target agrees not to solicit an acquisition by another party, and the acquirer agrees not to embark on another acquisition. This encourages the parties to invest more heavily in the negotiation, due diligence, and details of a potential acquisition.

217. GLOBAL COMPETITION REV., GETTING THE DEAL THROUGH: MERGER CONTROL 2003, *supra* note 215, at 35.

218. *See generally* GLOBAL COMPETITION FORUM, IMPROVEMENTS ON BRAZILIAN ANTITRUST PRACTICE, *available at* http://www.globalcompetitionforum.org/regions/s_america/Brazil/Microsoft%20Word%20-%20Improvements%20on%20Brazilian%20antitrust%20practice.pdf ("[U]pon the publication of the Resolution . . . none of the interpretations CADE had concerning [the] triggering event coincided with companies [*sic*.] and antitrust lawyers [*sic*.] opinion, who kept taking into consideration the criteria established in the antitrust statute, and not in CADE's Resolution, which cannot, under any circumstance, change the [BAL]. This problem resulted in countless penalties imposed by CADE on companies that notified their transaction following only the instructions of the law, or even following one of CADE's different interpretations that, for some reason, was no longer being adopted by the Commissioners. As a natural consequence, many suits were filed before Federal Courts against CADE's decisions."); *see also* Mauro Grinberg & Natalia Felix, *Merger Control in Brazil: Maturity*, GLOBAL COMPETITION REV., ANTITRUST REVIEW OF THE AMERICAS 2009 79, 80 (2009), *available at* http://www.gcba.com.br/pdf/008public_iaxmm2205__mauroenatalia02.pdf.

219. Grinberg & Felix, *supra* note 218, at 80; *see also* GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 67.

220. *See* GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 67.

221. *See* LPC arts. 27–28 (lacking a filing deadline in respect of pre-merger notifications).

222. *See id.* arts. 30(1)–(3), (5).

(including a letter of intent or memorandum of understanding).[223] It has been suggested that because this requirement was included in the context of the initial draft of the CAA, which provided for a voluntary, non-suspensory regime, the CCI will in practice be flexible, extending the deadline at the request of the parties, and allowing early notification to facilitate coordination of filings in different jurisdictions.[224]

4. **China.** China has a suspensory mandatory merger filing regime and therefore, in line with international norms and logic, does not impose a filing deadline.[225]

### B. Waiting Periods

Each of the BRIC jurisdictions, with the exception of Brazil (which has no waiting period), imposes an initial waiting period (Phase 1), followed by a subsequent waiting period (Phase 2).[226] Russia and China impose a Phase 1 waiting period of thirty days, followed by a Phase 2 period of varying duration if competition concerns arise.[227] In contrast, India provides for a Phase 1 period of thirty to sixty days, depending on the complexity of the transaction.[228] Although at first sight there appears to be no consensus between the agencies as to whether business or calendar days are the correct measure to use, in practice it seems that each of the agencies applies (or, in the case of India, will apply) calendar days to the waiting periods,[229] thus conforming with the U.S., rather than the E.U. model.[230]

Each of the BRIC jurisdictions allows the parties to consummate the transaction once the statutory waiting periods have expired, with the exception of Russia, where clearance must be obtained regardless of

223. CAA § 6(2). Under regulation 6(2)(b) of the draft Merger Regulations, the execution of any other document that purports "to convey the *bona fide* intention to acquire control" also triggers a filing. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 6(2)(b). Therefore, a filing may also potentially be required for a transaction that signs prior to the CAA coming into force, but closes thereafter, in the event that any transaction documents are executed prior to or on closing. It is not yet clear whether the CCI will take this approach.

224. *See* ABA, PERSPECTIVES ON AMENDMENTS TO INDIA'S COMPETITION ACT 2002, *supra* note 192.

225. *See* AML (lacking a filing deadline).

226. *See supra* note 85 (discussing Brazil); *see also infra* notes 245-246 and accompanying text (discussing Russia); *infra* notes 250-254 and accompanying text (discussing India); *infra* notes 256-258 and accompanying text (discussing China).

227. LPC arts. 33(1), 33(2)(2), 33(3); AML arts. 25, 26.

228. *See* CAA art. 31(11); *see also* Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 26(2).

229. *Compare* BAL art. 54 *with* the Antitrust Bill, which largely refers to business days. *See infra* note 232. Additionally, see LPC art. 49(2) (referencing "working days;" all other references to time requirements simply refer to "days," without clarifying whether they are business or calendar days); CAA § 31(11) and *infra* notes 249-250 and accompanying text; AML arts. 25-26 and *infra* note 259 and accompanying text.

230. *Compare* 15 U.S.C. §18a(b) *with* Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings [hereinafter ECMR], 2004 O.J. (L24) 1 *and* Council Regulation 802/2004 of 21 April 2004 Implementing Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings [hereinafter Implementing Regulation], art. 8, 2004 O.J. (L 133), 1.

whether the waiting period has expired.[231]

1. **Brazil.** As noted above, Brazilian law does not impose a mandatory suspensory waiting period.[232] However, CADE may impose an injunction in cases involving a substantial horizontal overlap or important vertical issues in order to preserve the competitive status quo in the relevant market until CADE has reached a final decision.[233]

Although the BAL does not impose a suspensory obligation on the parties, the statute does impose deadlines by which the reviewing agencies must complete their review.[234] The SEAE has thirty calendar days after notification to prepare its economic analysis and issue its recommendation.[235] Subsequently, the SDE has thirty calendar days to complete its own separate analysis. The reports from the SEAE and the SDE are submitted to CADE, which has an additional sixty day period from the date of receipt of the SDE report to issue its final decision.[236] In 2003 and 2004, the SEAE and SDE instituted various procedures in order to expedite the merger review process,[237] which can reduce the total duration of the agencies' review to one to two months.[238] The agencies may potentially complete the entire review process prior to expiration of this period: CADE recently issued its speediest merger clearance to date, requiring a mere twenty-three business days from notification until authorization.[239]

The Federal Prosecutor General's Office and CADE's General Attorney's Office may review the transaction prior to CADE's final decision and issue non-binding opinions on legal issues raised by the transaction.[240]

It is important to note that if the agency requests information from the

231. *See* BAL art. 54(7); *infra* note 248 (discussing Russia); CAA art. 31(11); AML art. 25.

232. *See supra* note 85. The Antitrust Bill introduces a mandatory suspensory waiting period and a process similar to that under the U.S. system. Antitrust Bill art. 88(3). Within twenty days of submission of the complete filing, CADE must either issue a decision that the transaction causes no harm to competition, or seek the submission of complementary documents. *Id.* art. 54. Once the complementary documents have been provided by the parties, CADE must, within five business days, either declare the filing complete, or seek an additional filing. *Id.* art. 55. Within fifty business days of the complete filing, CADE may issue an opinion declaring the transaction complete or must indicate that additional information is required. *Id.* art. 56. If CADE does issue the ruling on completeness, it must either clear or prohibit the transaction within sixty business days from submission of the filing. *Id.* art. 56. Alternatively, the additional information gathering period must be completed within ninety days of the filing, and once completed, CADE has ten business days to either approve or object to the transaction. *See supra* note 30.

233. *See supra* note 95 and accompanying text.

234. BAL art. 54.

235. BAL art. 54(6).

236. *Id.*

237. *See infra* notes 273-278.

238. GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 67.

239. David Thorley, *CADE Squeezes Through Juice Merger in Record Time*, GLOBAL COMPETITION REV., April 24, 2009, *available at* http://www.globalcompetitionreview.com/news/article/13305/cade-squeezes-juice-merger-record-time.

240. BAL arts. 10, 12; *see also supra* note 27.

parties, the waiting period is suspended until the request is satisfied.[241] The Brazilian Federal Court, however, ruled in the *Nestlé/Garoto*[242] case that each information request must be supported by a reasoned decision in order to suspend the running of the waiting period and thus effectively extend the deadline.[243] CADE has appealed the decision to the Brazilian Federal Circuit Court but to date judgment remains pending.[244]

2. **Russia.** On expiration of the Phase 1 initial thirty calendar day waiting period, FAS must clear the transaction if no competition concerns are identified.[245] If competition concerns are identified, FAS may choose to prohibit the transaction, clear the transaction subject to conditions, or extend the review process by an additional two month Phase 2 period.[246] If FAS grants a conditional clearance and defers clearance until the parties have complied, it must set a deadline, not to exceed nine months, for the parties to fulfill the relevant conditions. [247]

Even if the statutory waiting periods have expired, however, the parties are not free to close the transaction until they obtain clearance from FAS.[248] Moreover, there is no provision for early termination.

3. **India.** Although the waiting periods are not explicitly stated in "calendar days," elsewhere the CAA does explicitly refer to "working days,"[249] and thus implicitly the provision on waiting periods references calendar days. The CAA provides for a total waiting period of 210 days (approximately seven months) from the date of notification.[250] This unusually long suspensory waiting period has been criticized for creating considerable uncertainty for businesses and as likely to cause delays in multinational deals with an Indian element.[251]

The CCI addressed this concern in its draft Merger Regulations, which contemplate a three-stage waiting period: an initial assessment to be completed in Phase 1 (thirty days or sixty days, depending on the complexity of

241. BAL art. 54(8).

242. J.F.D.F.-4V.F., 2005.34.00.015042-8, 03.16.2007, *available at* http://www.jfdf.jus.br (search by docket number).

243. *Id.*

244. *See* TRF-1, Ap. No. 2005.34.00.015042-8, Relator: João Batista Moreira (pending judgment).

245. LPC arts. 33(1), 33(2)(1).

246. *Id.* art. 33(2).

247. *Id.* art. 33(2)(3).

248. *Id.* arts. 27(1), 28(1), 29(1) requiring the parties to obtain FAS' consent prior to consummation of the transaction; *see generally id.* (failing to provide an exception to this obligation in the event that the relevant waiting periods expire prior to obtaining FAS' consent).

249. *See e.g.*, CAA § 29(2).

250. *Id.* § 31(11).

251. *See* PTI, *CCI to Promote M&As by Fair Means*, FINANCIAL EXPRESS, April 13, 2009, *available at* http://www.financialexpress.com/news/cci-to-promote-m&as-by-fair-means/446152 (in which Mr. Dhanendra Kumar, the chairman of the CCI, stated that although the CAA provides for a waiting period of 210 days for giving clearance, "[I]t doesn't mean that the [CCI] is going to take that much time . . . we will try to do it as quickly as possible.").

the transaction);[252] an extension of the investigation into Phase 2 (up to 105 days) if further information is required;[253] and if more information and time is required, the investigation will enter the third phase (lasting the reminder of the 210 days).[254]

Once the 210-day period has expired the transaction is deemed to have been cleared by the CCI.[255]

4. **China.** The AML gives MOFCOM thirty days for its Phase 1 review.[256] Before the expiration of Phase 1, MOFCOM must either clear the transaction or initiate its Phase 2 review, which MOFCOM must complete within ninety days of its decision to conduct the Phase 2 review.[257] MOFCOM can extend the Phase 2 review by an additional sixty days under certain circumstances, including on agreement by the parties, or in the event that further verification of documents is required or material changes occur during the review.[258] Although it is unclear from the legislation whether the relevant periods refer to "calendar days" or "business days," it appears from MOFCOM's treatment of the *Mitsubishi Rayon/Lucite International* merger that in practice the time limits will be interpreted as calendar days.[259]

The Working Guidance creates a registration center for the submission of notifications as an additional interface between the parties and the MOFCOM case handlers.[260] This registry system aligns MOFCOM with international practice by creating a central registry to accept filings and should resolve practical issues, such as the inability to make filings due to the absence of certain MOFCOM officials.

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252. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 26(2).

253. *See id.* reg. 31.

254. The CAA provides deadlines within which the parties to the transaction, the general public and/or the Director General may provide additional information regarding the transaction or the parties may negotiate a remedy. *See* CAA §§ 29, 31. Under the draft Merger Regulations these additional time periods are excluded from the calculation of the 210-day deadline. *See* Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), regs. 18(1), 19. Therefore, the deadline could potentially extend beyond 210 days. It is unclear how this will operate in practice.

255. CAA § 31(11).

256. AML art. 25.

257. *Id.* art. 26.

258. *Id.*

259. In the *Mitsubishi Rayon/Lucite International* transaction, the parties submitted the merger notification filing on December 22, 2008 and MOFCOM accepted the filing as complete on January 20, 2009; on February 20, 2009, MOFCOM initiated its Phase 2 investigation, which it indicated was due to end on May 20, 2009 (i.e., after thirty calendar days); in the event, MOFCOM published its clearance decision on April 24, 2009, prior to the expiration of the deadline. *See* [Ministry of Commerce of the People's Republic of China] [MOFCOM], Announcement No. 28 of 2009, (P.R.C.) [hereinafter MOFCOM Announcement No. 28 of 2009], *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?4168590711=3683028003.

260. *See supra* note 65. Under the pre-AML merger control regime, representatives of the notifying parties directly submitted the notification to MOFCOM reviewers. *See supra* note 60.

Nonetheless, under the Working Guidance, the completeness of the notification and the start of the Phase 1 review period—or the need for further information—will not be confirmed until the MOFCOM case team has reviewed the filing, some time after the transaction's submission to the registration center.[261] There is no timetable prescribed for this initial review by the case team.[262] Thus, despite the deadlines set out in the AML, MOFCOM in practice controls the start date of the Phase 1 review period and can potentially significantly extend the review period by refusing to accept a notification as complete, thereby delaying the start of the review clock until supplementary materials are submitted to MOFCOM's satisfaction.[263]

Moreover, the more formalized notification procedures set out in the new Procedural Guidance (e.g., in relation to pre-notification discussions and information requirements) may cause further delays in the notification submission and acceptance process and increase the delay before MOFCOM will start the clock for the review process.[264]

## C. Pre-Filing Negotiations

Of the three BRIC jurisdictions that have implemented their merger regimes, it appears that only Russia discourages pre-filing negotiations, albeit Brazil will not entertain such discussions once the agreements have been signed and the fifteen-day deadline for filing has started to run. Relevant legislation in India has yet to come into effect, therefore creating uncertainty regarding whether the CCI will permit, encourage, or refuse to conduct pre-filing negotiations. In China, pre-notification discussions were previously carried out on an informal basis, usually in the form of a short briefing paper, and this practice is expected to continue under the

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261. MOFCOM Working Guidance, *supra* note 65, art. 1.

262. *See id.*

263. In each of the *InBev/Anheuser-Busch* and *Mitsubishi Rayon/Lucite International* transactions, MOFCOM accepted the merger notification filing as complete only after the parties had submitted supplemental information and/or documents. In *InBev/Anheuser-Busch,* the filing was submitted on September 10, 2008 and accepted as complete on October 27, 2009. *See* MOFCOM Announcement No. 95 of 2008, *supra* note 12. In *Mitsubishi Rayon/Lucite International*, Mitsubishi submitted the notification to MOFCOM on December 22, 2008; the filing was accepted by MOFCOM as complete on January 20, 2009. *See* MOFCOM Announcement No. 28 of 2009, *supra* note 259.

264. The new Procedural Guidance formalizes the pre-notification discussion process by requiring the parties to submit a detailed written application (with documents and materials relating to the transaction) before the pre-notification discussion. Because of the extensive additional information requirements for the notification itself, it is likely that many notifying parties may find it necessary to use the pre-notification discussion process to try to obtain waivers for certain information requirements. To the extent that the pre-notification discussion process must be used, the formalization of the process may require more preparation time; it remains to be seen whether MOFCOM will insist on significant amounts of information at this stage of the process. *See* MOFCOM Procedural Guidance, *supra* note 63. The interrelationship between the pre-notification discussions and the post-submission "completeness review" will need to be considered in each case to arrive at the best way of dealing with the information requirements as efficiently as possible.

new regime.[265]

D. "Fast Track" vs. "Short-Form" vs. "Long-Form"

The "fast track" and "short-form" procedures are mechanisms to enable transactions that do not raise substantive issues, or are below a certain value threshold, to be reviewed and cleared on an expedited basis.[266] The fast track route provides a faster time frame for clearance, whereas the short-form route allows the parties to provide less information and/or documentation, thus facilitating faster compliance with the notification requirements.[267] Neither Russia nor China provides for such a system.[268] Although both Brazil and India provide for such a system,[269] at least in the case of Brazil, the competition agency retains the right to revert to the more comprehensive review process.[270] Although this approach is understandable from the competition policy perspective, it introduces an element of uncertainty into the process for the parties.

1. **Brazil.** Brazil in theory utilizes both the fast track and short-form procedures.[271] CADE introduced the short-form and long-form process in 1998, under which the parties made initial notification using a simplified form; a second, more detailed form was provided in the event that CADE, SEAE, and SDE decided to further investigate the transaction.[272]

CADE subsequently introduced a faster review procedure for mergers that clearly do not present substantive concerns in February 2003.[273] Under this procedure, SEAE and SDE each has fifteen days to issue its opinion;[274] but, if SDE concurs with SEAE's opinion, SDE merely adds a para-

265. *See* MOFCOM Procedural Guidance, *supra* note 63; Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 8; *see also supra* note 264.

266. *See* Recommended Practices, *supra* note 170, at 10, 12.

267. *See id.*

268. *See generally* LPC (failing to provide a fast track or short-form notification); AML (failing to provide a fast track or short-form notification); *see also infra* note 282 and accompanying text (discussing Russia); *infra* notes 286–287 and accompanying text (discussing China).

269. *See* SEAE/SDE Joint Ordinance No. 1, of February, 2003 art. 3, *available at* http://www.seae.fazenda.gov.br/central_documentos/legislacao/3-5-1-defesa-da-concorrencia/PORTARIA-1; *see also* OECD Brazil Report, *supra* note 2, at 39; U.N. Conference on Trade and Development, *Handbook on Competitive Legislation*, 40–41, U.N. Doc. TD/B/COM.2/CLP/64 (May 13, 2008) [hereinafter *U.N. Handbook on Competitive Legislation*], *available at* http://www.unctad.org/en/docs/c2clpd64_en.pdf; Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), regs. 6(1), 10, 26, forms 1, 2; *infra* note 271 and accompanying text (discussing Brazil); *infra* note 283 and accompanying text (discussing India).

270. *See infra* notes 280–281.

271. *See* CADE Resolution No. 15, *supra* note 88, ch. 1, § I, art. 1; ch. II, § 1, art. 7, Exhibits 1 and 2; *see also* SEAE/SDE Joint Ordinance No. 1, *supra* note 269; SEAE/SDE Joint Ordinance No. 33/2006, of January 33, 2006, *available at* http://www.seae.fazenda.gov.br/central_documentos/notas_imprensa/2006-1/portaria-conjunta-no-33-4-de-janeiro-de-2006.

272. *See* CADE Resolution No. 15, *supra* note 88.

273. *See* SEAE/SDE Joint Ordinance No. 1, *supra* note 269.

274. *See id.* art. 3.

graph to SEAE's opinion, memorializing its agreement with SEAE.[275] In January 2004, SEAE and SDE further expedited the merger review process, introducing a procedure whereby they both begin to review the transaction immediately upon receipt of the filing, thus avoiding the delay inherent in referring a case to SEAE and awaiting its analysis before SDE commences work.[276] SEAE and SDE subsequently submit a joint report to CADE,[277] where it precedes all other transactions on CADE's docket, and CADE in practice merely adopts SEAE's opinion as its decision.[278] It has been reported that approximately 75% of cases reviewed by CADE are reviewed under this procedure.[279] However, the simplified procedure is implemented at the discretion of SEAE and SDE, which can revert to the regular proceedings at any time.[280] Further, if CADE deems that the case requires a more detailed review, it can request at the decision stage that SEAE and SDE conduct a full analysis.[281]

2. **Russia.** There is no provision in the LPC for a fast track or short-form notification.[282]

3. **India.** The draft Merger Regulations provide for long- and short-form notification.[283] It has been suggested that short-form notification will be appropriate in cases of new entry, a post-merger market share of less than 15%, a failing firm defense, or a vertical merger with no overlap, and that mergers notified using the short-form will be assessed by a designated division of the CCI in order to ensure their expedited review.[284] Rather perversely, the draft Merger Regulations provide that if the parties do not receive a request for additional information within thirty days of receipt of a long-form notification and within sixty days of receipt of a short-form notification, the merger will be deemed cleared.[285] A possible justification for this approach is that, because the parties provide less information in the case of a short-form notification, the CCI may need to revert back to the parties in order to request additional information.

4. **China.** Although an early draft of the Rules on Notification Thresholds included a provision for a formal expedited procedure, it was

275. *See id.* art. 5; *see also U.N. Handbook on Competitive Legislation*, *supra* note 269, at 41.

276. Joint Procedure for Merger Review and Anticompetitive Conduct Analysis, which was formalized by Joint Ordinance No. 33/2006, *supra* note note 271.

277. *Id.* art. 13.

278. *See U.N. Handbook on Competitive Legislation*, *supra* note 269, at 41.

279. OECD, Directorate for Fin. and Enter. Affairs Competition Comm., Global Forum on Competition, *Questionnaire on the Challenges Facing Young Competition Authorities, Contribution from Brazil*, 4, DAF/COMP/GF/WD(2009) 51, Feb. 2, 2009, *available at* http://www.oecd.org/dataoecd/59/6/42010868.pdf.

280. Brazil Merger Notification and Procedures Template, *supra* note 96, at 7.

281. *Id* at 8.

282. *See generally* LPC (failing to provide for a fast track or short-form notification).

283. *See* Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 6(1), forms 1, 2.

284. ABA, Perspectives on the Recent Amendments to India's Competition Act, *supra* note 192.

285. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 26(2).

not retained in the final version.[286] Moreover, the new Information Requirement Guidance does not appear to envisage short-form notification.[287] Thus, the parties will need to use the pre-notification discussion process in order to try to persuade the MOFCOM case team to grant specific waivers for information requirements that are either not practicable or not possible to fulfill, particularly for those transactions that do not raise substantive competition concerns. Nonetheless, as discussed above, the Procedural Guidance has formalized the pre-notification discussion process, which may itself create delays.[288]

E. Documents to Be Submitted

The document requirements are burdensome in each of the BRIC jurisdictions, although arguably not more so than in more mature merger regimes. However, Brazil and Russia each requires that translated documents be formally notarized, creating an additional procedural step.[289]

1. **Brazil.** The parties must submit with the filing certified copies of all binding transaction documents, together with the most recent Annual Report.[290] In the past, CADE has taken the position that this requirement includes annexes and appendices to contracts, such as patent information.[291] Foreign documents must be translated and notarized.[292] These requirements can dramatically increase the burden on the parties when filing. The parties also must identify all their board members who are on the board of other companies in the same market, and provide any agreement relating to the future administration of the combined entity (e.g., a shareholder agreement).[293] CADE can also request supplementary documents, such as analyses, reports, and market studies prepared by the parties, together with their financial reports for the three years preceding the transaction.[294]

In practice, these formal requirements are often waived by CADE,

286. *See* Alex Potter & Michael Han, Briefing, *China Publishes Merger Control Notification Thresholds*, Freshfields Bruckhaus Deringer LLP, Aug. 4, 2008, http://www.freshfields.com/publications/pdfs/2008/aug05/23614.pdf; *see also supra* note 62. The earlier draft was by the State Council Legislative Affairs Office. This draft not only set out notification thresholds, but also covered other substantive and procedural issues. Subsequently, it appears that the Office decided that addressing these issues in the final draft would encroach on MOFCOM's sphere of responsibility. As a result, all such provisions other than the notification thresholds were deleted from the final version.

287. *See* Information Requirement Guidance, *supra* note 64.

288. *See supra* notes 63, 264 and accompanying text.

289. *See* Brazil Merger Notification and Procedures Template, *supra* note 96, at 12; Alexander Egorushkin & Igor Panshensky, *Russia*, *in* Global Legal Group, Merger Control 2010, at 284, 286 para. 3.2 (2010), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/3282.pdf.

290. CADE Resolution No. 15, *supra* note 88, Exhibit I, Part III.

291. *See* CADE Resolution No. 15, *supra* note 88, Exhibit I, Part III; Brazil Merger Notification and Procedures Template, *supra* note 96, at 8–9.

292. Brazil Merger Notification And Procedures Template, *supra* note 96, at 7, 9, 12.

293. CADE Resolution No. 15, *supra* note 88, Exhibit I, Part III.

294. *Id.* Exhibit II, Part III.

SEAE, and SDE, and only if later requested must they be fulfilled.[295] This is more common in investigative proceedings, where appeals to the courts are likely, than in merger reviews.

In July 2008, CADE issued a resolution mandating electronic submission of filings,[296] which should further facilitate the merger notification process, albeit the system will take effect only once SDE has declared formally that it is up and running.[297]

**2. Russia.** The parties must submit with the filing a large number of documents,[298] including: a signed copy or the latest draft of the share purchase agreement or other document "explaining" the transaction (e.g., a memorandum of understanding, a letter of intent, etc.); signed copies or drafts of the loan documentation if the deal is financed other than by the acquirer's own funds; the corporate and registration documents of the acquirer and the target and their balance sheets (and, separately, the consolidated balance sheet of the acquirer's group); and information on the business activities of the acquirer's Russian subsidiaries and the target for the preceding two years.[299] All non-Russian documents submitted to FAS must be apostilled or legalized (with the exception of a share purchase (or similar) agreement and loan documentation) and must also be translated; subject to a few exceptions, the translator's signature must be certified by a public notary.[300]

Reportedly, FAS has recently declined to approve two acquisitions due to issues with paperwork, including incomplete filings and typographical errors.[301]

**3. India.** The parties must submit detailed information in the notification to substantiate the market definition, together with a detailed analysis of the competitive impact of the transaction.[302] In addition, they must submit with the filing copies of filing notifications made and decisions

295. In practice, an executed translated copy of the transaction documents often suffices and foreign documents may not need to be notarized or consularized. Annual reports may be presented in their original language (often printed directly from the internet) and are translated upon the request of the agency, which rarely happens. Moreover, in practice, annexes and appendices need not be presented at the filing; if they are considered necessary during the review, the agencies may request them. The only certified copies that must be presented upfront are the powers of attorney and the receipt for payment of the filing fee.

296. Ministério da Justiça, Conselho Administrativo de Defesa Econômica [CADE], Resolução No. 49, de 23 de Julho de 2008 (Brazil), *available at* http://www.cade.gov.br/Default.aspx?9393959b60be41192e2f.

297. *See* Getting the Deal Through: Merger Control 2010, *supra* note 110, at 67.

298. *See* LPC art. 32(5). A complete list of the documents to be submitted with the filing is set out in Federal Antimonopoly Service Order No. 129, On Approval of Forms Providing Antimonopoly Authorities Documents and Information when Filing Applications and Notifications Provided for by Articles 27 to 31 of the Law on Protection of Commerce, Apr. 17, 2008.

299. *See* Getting the Deal Through: Merger Control 2010, *supra* note 110, at 303.

300. *Id.*

301. Disney's joint venture with MediaOne and Google's proposed acquisition of Begun. *See* Knox, *supra* note 8.

302. Competition Comm'n of India [CCI], *Proposed Draft (Combination) Regulations* (200_), reg. 6(1), forms 1, 2.

obtained in other jurisdictions.[303]

4. **China.** The parties must submit detailed information in the notification to substantiate the market definition and provide a detailed analysis of the competitive impact on the Chinese market of the transaction.[304] Together with the notification, the parties must also submit the transaction agreements, the audited financial and accounting reports of the parties for the previous year, and any other documentation required by MOFCOM.[305] If the notification is filed by counsel, it must be accompanied by a power of attorney.[306]

The new Information Requirement Guidance also introduces a requirement that the parties provide certain reports and analyses that are gathered either by the parties or others not involved in the transaction—including feasibility studies, due diligence reports, industry development reports, strategy reports for the transaction, and post-transaction forecast reports.[307] Certain practitioners have noted that "[w]hile filings in the E.U. and U.S. also contain requirements to disclose internal documents, MOFCOM's guidance does not contain any of the limitations on disclosure usually contained in such requests – for example, that the documents must have been prepared for or by a board member."[308] Practitioners have further noted that "it likely will prove necessary to agree to a sensible disclosure list with MOFCOM on a case-by-case basis" due to "the large amount of internal documentation often generated in the preparation of transactions."[309] In light of these documentation requirements, some practitioners have concluded that practitioners will "need to observe a high level of care in the preparation of internal documents."[310]

With respect to potential substantive concerns, the Information Requirement Guidance requires an explanation of the concentration's effects on "competition in the relevant market."[311] This explanation must

303. *Id.* form 1, item 12; form 2, item 12.

304. AML art. 23.

305. *Id.*; *see also* Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 10.

306. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 10(1).

307. *See supra* note 64; *see also* Alex Potter, Connie Carnabuci & Michael Han, *Briefing: China's MOFCOM Publishes First Round of Merger Control Guidance*, Freshfields Bruckhaus Deringer, LLP, January 2009, at 2, *available at* http://www.freshfields.com/publications/pdfs/2009/jan09/24964.pdf.

308. Potter, Carnabuci & Han, *supra* note 307, at 2; *see also* Council Regulation (EC) No. 802/2004 of 21 April 2004 Implementing Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, Form CO § 5.4, 2004 O.J. (L 133) 1, 22, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0802:20081023:EN:PDF; Hart-Scott-Rodino Act Notification and Report Form for Certain Mergers and Acquisitions, Item 4(c), *available at* http://www.ftc.gov/bc/hsr/P989316PMNRulesandFormalInterpretationsElectronicSubmission-Instructions.pdf.

309. Potter, Carnabuci & Han, *supra* note 307, at 2.

310. *Id.*

311. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 10.

address: (1) the transaction; (2) the relevant market, including market shares of the parties and competitors, and entry barriers; and (3) the transaction's expected effects on competition, industrial development, technological progress, national economic development, and consumers.[312] All documents, with the exception of annual reports and transaction documents, must be submitted in Chinese.[313]

F. Solutions, e.g., Hold-Separates

Hold-separates provide a mechanism for ensuring that the overall transaction is not delayed by waiting for clearance in one jurisdiction, by structuring the transaction so that the parties may close the main transaction but hold separate the businesses in the jurisdiction(s) in which clearance is still awaited.

1. **Brazil.** There is no mandatory suspensory waiting period; thus, the parties technically are free to consummate the transaction prior to obtaining clearance from the agency.[314] As discussed above, however, CADE will issue an injunction to prevent the parties closing where there are substantial horizontal overlaps or important vertical issues.[315] In practice, such an injunction generally does not prohibit closing, but instead imposes a hold-separate in respect of the Brazilian assets. Similarly, CADE may also enter into agreements with the parties under which the parties agree not to close or combine assets.[316] CADE will also consider whether remedies imposed in other jurisdictions resolve the anticompetitive effects in Brazil (e.g., an order to divest a trademark used in Brazil).[317] Although it is theoretically possible that CADE could issue an extra-jurisdictional order, it has to date not done so.[318]

2. **Russia.** The LPC does not provide for hold-separates,[319] although

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312. *Id.*

313. *Id.* art. 12.

314. *See* Sérgio Varella Bruna, Caio de Queiroz & Natalia S. Pinheiro da Silveira, *Merger Control– Brazil*, LatinLawyer, *available at* http://www.latinlawyer.com/reference/article/27381/brazil.

315. *See supra* note 95 and accompanying text.

316. *See supra* notes 97-98 and accompanying text. Examples of APROs into which CADE has entered include in the *GOL/VARIC*, *White Martins/Air Liquide*, and *Sadia/Perdigão* transactions. The former involved the acquisition of a Brazilian airline by another Brazilian airline. Under the terms of the APRO, the parties were obliged to hold their administrative councils separate and the acquirer was obliged to maintain the target's assets and not to take decisions that would materially impact the target's economic value (e.g., firing employees, reducing flight routes). In *White Martins/Air Liquide*, two of the four players in the industrial gas industry proposed to create a JV for the sole purpose of the construction of a ground plant. The APRO in this case was intended to prevent information exchange and cartelization. In the *Sadia/Perdigão* transaction, the APRO imposed both structural and behavioral conditions, requiring the parties to keep separate and independent their administrative, production and trade structures, and to keep separate sensitive competitive information. See also Coca-Cola's acquisition of Leão Junior, in which CADE in August 2007 required the parties to execute an APRO.

317. Getting the Deal Through: Merger Control 2010, *supra* note 110, at 67.

318. *See generally* BAL art. 7 (granting CADE jurisdiction over any transaction that may in any way affect the Brazilian market).

319. *See generally* LPC (failing to provide for hold-separates).

such arrangements have been used on rare occasions in which Russian issues held up a larger foreign transaction.[320] Such arrangements have not, however, to date been tested before FAS or in the Russian courts.

**3. India.** There is no specific provision for hold-separates in the CAA;[321] it remains to be seen whether the CCI will be receptive to such solutions once the merger regime comes into effect.

**4. China.** The AML does not make specific provision for hold-separates[322] and to date, there is little precedent on this issue; however, some MOFCOM officials have suggested informally that such a solution might be acceptable in a foreign-to-foreign merger.[323]

### G. Special Situations, e.g., Public Takeovers

Many jurisdictions impose a mandatory timetable on public takeovers, which governs the latest date by which the bid must become unconditional. Therefore, in certain jurisdictions the competition agencies allow such transactions to close prior to the parties obtaining merger clearance, although there may be limits placed on the actions that the acquirer may undertake in relation to the target.[324] In the E.U., for example, the transaction may be consummated, provided that the acquirer does not exercise the rights attached to the acquired shares, or does so only to protect the full value of its investment and on the basis of a derogation granted by the European Commission.[325] In this case, there is a risk of subsequent forced divestment if the transaction eventually is prohibited.[326] Other regimes require the relevant competition agency to complete its review of such transactions within a shorter time period.[327] For example, in the U.S. the agencies have an initial review period of fifteen days, (instead of thirty days as for other transactions), and in the case of a Phase 2 investigation, a second review period of ten days (instead of thirty days) following substantial compliance by the parties with the agencies' information request (the so-called "Second Request").[328] However, the BRIC jurisdictions do not provide for similar solutions.

**1. Brazil.** There are no special rules for public takeovers.[329] However, CADE has issued *Súmula* No. 3 consolidating its case law and stating that a public tender must be notified within fifteen business days of the

320. Getting the Deal Through: Merger Control 2010, *supra* note 110, at 303.
321. *See generally* CAA (failing to provide for hold-separates).
322. *See generally* AML (failing to provide for hold-separates).
323. Getting the Deal Through: Merger Control 2010, *supra* note 110, at 91.
324. *See, e.g.*, ECMR, *supra* note 230, art. 7 (prescribing the circumstances under which a public takeover may be consummated prior to completion of the merger review process).
325. *Id.* art. 7(3).
326. *See id.* arts. 7(4), 8(3)-(4) (providing that where the EC Commission finds an implemented transaction to violate the ECMR, it may order the dissolution of the transaction, or "any other appropriate measure").
327. *See, e.g.*, 15 U.S.C. § 18a(b)(1).
328. 15 U.S.C. §§ 18a(b)(1), (e)(2) (2000).
329. *See generally* BAL (failing to make specific provision for public takeovers).

execution of the concession agreement.[330]

2. **Russia.** There are no special rules for public takeovers;[331] a filing can be made on the basis of the announcement of the bid. If Russian clearance is not obtained by the date on which the bid becomes unconditional, neither FAS nor the courts can prevent the bidder from declaring the offer unconditional and acquiring the target's shares.[332] However, in this case FAS may impose sanctions on the entity and its officers for consummation of a transaction prior to receiving clearance and/or start court proceedings to invalidate the transaction.[333] In a foreign-to-foreign transaction enforceability is likely to be difficult, but reputational damage would occur.

3. **India.** There are no special rules for public takeovers.[334]

4. **China.** There are no special rules for public takeovers.[335] Under Chinese law, the time limit for a public bid generally cannot exceed sixty days,[336] whereas the maximum time for obtaining merger clearance under the AML is 180 days.[337] It is unclear how this apparent conflict will be resolved in practice.

### H. Comparative Timing Issues

Filing deadlines in a suspensory regime serve no purpose. Hopefully India will clarify its policy and eschew such a requirement.[338] In contrast, as long as Brazil does not suspend closing pending review,[339] it will require a filing deadline. Its management of this issue in the past has earned CADE much criticism from the international competition community.[340]

If India's seven month final-stage review period is truly a maximum,[341] reserved for exceptional cases only, the various BRIC waiting periods[342] are all reasonable. Obviously, it is necessary that each regime

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330. Súmula No. 3, de 21 de setembro de 2007, Conselho Administrativo de Defesa Economica, D.O. de 21.09.2007 (Brazil), *available at*: http://www.cade.gov.br/Default.aspx?ba8d9d6bba50a46eb885d76fc3.

331. *See generally* LPC (failing to make specific provision for public takeovers).

332. *See generally* LPC.

333. LPC arts. 34(1)-(2); Kodeks RF ob Administrativnykh Pravonarusheniiakh [KOAP] [Code of Administrative Violations] art. 19.8 (Russ.).

334. *See generally* CAA (failing to make specific provision for public takeovers).

335. *See generally* AML (failing to make specific provision for public takeovers).

336. [Measures on Administration of the Takeover of Listed Companies] (promulgated by the China Securities Regulatory Commission (CSRC), July 31, 2006, effective September 1, 2006) art. 37 (P.R.C.).

337. AML arts. 25-26 (describing the circumstances in which the usual 120-day waiting period may be extended to 180 days).

338. CAA § 6(2). This is particularly important in light of the penalty that may potentially be imposed for a failure to file within the relevant deadline. CAA § 43A; *see also infra* note 514 and accompanying text.

339. *See supra* note 85 and accompanying text. As discussed previously, the Antitrust Bill introduces a suspensory regime. Antitrust Bill arts. 88(3)-(4); *see also supra* notes 30 and 85.

340. Grinberg & Felix, *supra* note 218, at 79-80.

341. *See supra* note 251.

342. *See supra* notes 234-239 and accompanying text (discussing Brazil); *supra* notes 245-247 and accompanying text (discussing Russia); *supra* notes 250-254 and accom-

clarify, for example, how days are to be calculated.[343] The Russian system is curious, coupling suspensory review with the requirement for affirmative approval, which appears to serve no purpose other than potentially enabling the reviewing agency to ignore the legal period of review. Suspensory regimes should consider "early termination" provisions, which permit transactions posing no competition issue to close after the agency indicates that it has no objection.[344]

Pre-filing discussions should not be compelled, but neither should they be discouraged.[345] It is the senior author's view, having experienced both models, that pre-filing negotiations are often very productive and can save both the agency and the parties valuable time and resources.

All BRIC regimes require the parties to submit a very large number of documents.[346] Brazil's recent change to permit electronic filings will, once implemented,[347] hopefully ameliorate the formalistic busy-work that historically has been required. One cannot fault an agency that wants relevant documents translated into the national language. Nonetheless, a certain degree of flexibility in this regard would appreciably reduce the cost and time burdens on the parties without significantly impacting the ability of the relevant agency to conduct its review.[348]

Whether hold-separates are permissible in Russia, India, and China is unclear,[349] and their use poses difficult questions. On the one hand, mechanisms that permit large international transactions to close, holding separate domestic assets pending agency review, offer a solution to the situation in which one regime could otherwise impede the closing of a multinational deal.[350] On the other hand, hold-separates can, if

panying text (discussing India); *supra* notes 256–258 and accompanying text (discussing China).

343. *See supra* note 229 and accompanying text.

344. *See, e.g.*, Recommended Practices, *supra* note 170, at 9.

345. The International Competition Network (ICN) notes that "[s]ome jurisdictions find it valuable to hold pre-notification guidance sessions in appropriate cases, for example, where the competition agency has experience in the sector and/or where the parties have provided sufficient information prior to notification to permit the competition agency to formulate preliminary views." Recommended Practices, *supra* note 170, at 14; *see also infra* notes 615–617 and accompanying text (discussing the ICN).

346. *See supra* notes 290–294 and accompanying text (discussing Brazil); *supra* notes 298–299 and accompanying text (discussing Russia); *supra* notes 302–303 and accompanying text (discussing India); *supra* notes 304–306 and accompanying text (discussing China).

347. *See supra* notes 296–297 and accompanying text.

348. In this regard, it is regrettable that the final version of the Measures on Notification of Concentrations of Undertakings did not include a provision (which had appeared in the initial draft) permitting the submission of Chinese summaries of documents, rather than requiring full translations. *See* Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 12; *see also* draft Interim Measures on Notification of Concentrations of Undertakings, *supra* note 160.

349. *See supra* note 319 and accompanying text (discussing Russia); *supra* note 321 and accompanying text (discussing India); *supra* note 322 and accompanying text (discussing China).

350. *See* George S. Cary, Senior Deputy Director, Bureau of Competition, Fed. Trade Comm'n, Remarks at the American Bar Association Spring Antitrust Meeting (Apr. 10,

inappropriately structured, leave the reviewing agency with no effective remedy where the held-separate assets are not independently viable.[351] Nonetheless, used in appropriate cases and structured with care, hold-separates should permit an agency to continue its review after others have completed theirs and the transaction has closed.

Public takeovers present unique issues. Both the E.U. and the U.S. address the issue but in different ways. The European approach places the burden and the risk on the parties; the parties must apply for a derogation and subsequently have limited rights with respect to the acquired shares.[352] In the event that substantive issues arise, the agency may impose remedies.[353] In contrast, the U.S. approach imposes an obligation on the relevant agency to expedite its review, and the parties may proceed to close without risk once the applicable deadline(s) has/have expired.[354] None of the BRIC jurisdictions appears to have addressed these issues, and it is recommended that they do so.

## V. Substantive Assessment

### A. Standard of Review

The Brazilian and Russian regimes focus on the "dominant position" test,[355] although it appears that there is a move away from a dogmatic reliance on market shares, and more openness to effects-based arguments in the newer Chinese and Indian regimes.[356]

**1. Brazil.** The Brazilian law includes both a dominant position and a "restriction of competition" test.[357] A transaction is objectionable if it may limit or otherwise restrain open competition, or result in the control of

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1997), *available at* http://www.ftc.gov/speeches/other/aba397.shtm; FEDERAL TRADE COMMISSION, FREQUENTLY ASKED QUESTIONS ABOUT MERGER CONSENT ORDER PROVISIONS, http://www.ftc.gov/bc/mergerfaq.shtm#Hold Separate Orders; *see also* ICN MERGER WORKING GROUP: ANALYTICAL FRAMEWORK SUBGROUP, MERGER REMEDIES REVIEW PROJECT, REPORT FOR THE FOURTH ICN ANNUAL CONFERENCE 39–40 (2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf.

351. *See* Staff of the Bureau of Competition of the Federal Trade Commission, A Study of the Commission's Divestiture Process 10–12 (1999), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf (finding that the divestiture of an ongoing business is more likely to be successful than the divestiture of selected assets).

352. ECMR, *supra* note 230, arts. 7(2)–(3); *see also supra* note 325 and accompanying text.

353. ECMR, *supra* note 230, arts. 7(4), 8(3)–(4); *see also supra* note 326 and accompanying text.

354. Hart-Scott-Rodino Act, 15 U.S.C. § 18a (2006); *see also supra* note 328 and accompanying text.

355. GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 67, 304; Torsten Syrbe & Evgeny Khokhlov, *Merger Control: Getting the Deal Cleared in Russia*, Clifford Chance, L.L.P., Feb. 2010, at 4.3, *available at* http://www.cliffordchance.com/showimage/showimage.aspx?LangID=UK&binaryname=/Merger%20control%20-%20getting%20the%20deal%20cleared%20in%20russia%20(eng)%20feb10%20(282787%20v4a).pdf.

356. *See infra* note 386 (discussing India); *infra* note 392 and accompanying text (discussing China).

357. BAL art. 54.

relevant markets for products or services.[358] In practice, most of CADE's decisions focus on the dominant position test and, as a result, CADE will generally clear a transaction if it determines the transaction will not create or strengthen a dominant position.[359]

The relevant market is defined using the hypothetical monopolist test, i.e., the most restricted group of products in the most restricted area enabling a potential monopolist to introduce a "small but significant non-transitory increase in price" (SSNIP).[360] The increasing sophistication of the market definition analysis conducted by CADE is demonstrated in its recent decision to clear the *Philips/Dixtal* merger, based on its distinction between the relevant premium and non-premium markets.[361]

The Merger Guidelines issued jointly by the SEAE and the SDE (Brazil Merger Guidelines) provide for the analysis of both unilateral and coordinated effects.[362] In the case of a unilateral effects theory, a market share of at least 20% will raise a significant prospect of post-merger market power;[363] under a theory of coordinated harm, the threshold is a four-firm concentration ratio of at least 75%, together with a merged entity market share of at least 10%.[364] Although the Guidelines do not discuss the Herfindahl-Hirschman Index (HHI), it appears that the agencies nonetheless do calculate the HHI in order to assist in their determination of market concentration.[365]

Once the relevant market has been defined and the market shares calculated, the probability that the merged entity will in fact exercise market power must be assessed.[366] This assessment involves consideration of such factors as imports, entry (which must be "probable, timely, and sufficient"[367]), and market dynamism, including the extent to which other market players have both the capacity and the motivation to resist attempts by

358. *Id.*

359. GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 67.

360. Decreto No. 50, de agosto de 2001, D.O.U. de 16.08.2001, paras. 28–33 (Brazil) [hereinafter Decreto No. 50], *available at* http://www.seae.fazenda.gov.br/document_center.

361. The acquisition by Philips Medical Systems (the healthcare arm of the electronics group) of Dixtal (the leading Brazilian manufacturer of vital signs monitors) was cleared without conditions, based on CADE's market definition findings. CADE agreed with the parties' arguments that there was a premium and non-premium market. Philips operated in the premium market, together with competitors such as Draeger Siemens and GE, all of which have high levels of technological innovation and sell to leading, high-standard hospitals and clinics. In contrast, Dixtal operated in the non-premium market, together with other local and Asian players, with less sophisticated and cheaper products aimed at low-end hospitals and clinics. *See* Sebastian Perry, *Philips Wins Approval for Vital Signs Merger*, GLOBAL COMPETITION REV., May 20, 2009, *available at* http://www.globalcompetitionreview.com/news/article/15579/philips-wins-approval-vital-signs-merger/.

362. Decreto No. 50, *supra* note 360, para. 15.

363. *Id.* para. 36(a).

364. *Id.* para. 36(b).

365. *See* OECD BRAZIL REPORT, *supra* note 2, at 29–30.

366. Decreto No. 50, *supra* note 360, paras. 39–69; *see also* OECD BRAZIL REPORT, *supra* note 2, at 29.

367. Decreto No. 50, *supra* note 360, paras. 19(b), 45, 47.

the merged entity to exercise market power.[368] If it is found probable that the merged entity will exercise market power, efficiencies generated by the transaction may be taken into account.[369] Finally, the net economic effect of the transaction is evaluated.[370] A transaction will be found anticompetitive if, after accounting for efficiencies, it will produce a net decrease in economic surplus.[371] If surplus will increase, because the anticompetitive effects are outweighed by efficiencies, further analysis is required.[372]

Vertical issues also are becoming more important, and several remedies have been imposed based on foreclosure theories or arguments analogous to essential-facilities.[373]

**2. Russia.** FAS will prohibit, or impose conditions on, a transaction that creates or strengthens a dominant position or otherwise leads to a limitation of competition on the relevant Russian market.[374] The LPC defines dominance as a position held by a single entity (or by several entities) in a market for a specific product or service that allows it (or them) to materially influence the terms of trade of such product or service, to exclude other companies from the market, or to impede competitors' access to the market.[375]

The market share figures used by FAS in its analysis are obtained from the Federal Service of State Statistics, market research agencies and/or the parties;[376] the market share data provided by the parties to FAS may be based on internal estimates, official statistics or reports by independent third party agencies.[377]

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368. *See* BAL art. 54(1); *see also* Decreto No. 50, *supra* note 360, paras. 39-69.

369. *See* Decreto No. 50, *supra* note 360, paras. 70-84.

370. *See id.* paras. 85-92.

371. *See* OECD Brazil Report, *supra* note 2, at 29.

372. *Id.*

373. *See, e.g.*, Getting the Deal Through: Merger Control 2010, *supra* note 110, at 68; *see also supra* note 6 and accompanying text. See also the *AmBev* case, in which CADE required (among other remedies) Ambev to divest the "Bavaria" brand, together with five breweries located in different regions of Brazil and to provide the purchaser with access to the Brahma distribution system for a period of four years, with an option to extend for a further two years. OECD, Annual Report on Competition Policy Developments in Brazil 4 (2000), *available at* http://www.oecd.org/dataoecd/52/49/2406761.pdf.

374. LPC arts. 33(2)(2), 33(2)(5).

375. *Id.* arts. 5(1), 5(3), 5(6), 5(7). There are specific rules for finding dominance in the financial sector; a financial organization is presumed not dominant if its market share does not exceed 10% where there is a single Russian market or 20% where there is more than one Russian market on which the products are sold. LPC art. 5(7); *see also* Government Resolutions No. 359, dated June 9, 2007, and No. 499, dated June 26, 2007.

376. The Role of Economic Analysis in Competition Law Enforcement in Russia, Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Antalya, Turk., Nov. 14-18, 2005, *available at* http://www.unctad.org/sections/wcmu/docs/tdrbpconf6p036_en.pdf; *see also* Jacky Baudon & Alexander Viktorov, *Merger Control in Russia: Key Questions and Answers*, Freshfields Bruckhaus Deringer, LLP, May 2007, at 6 [hereinafter Freshfields Russia Memo], *available at* http://www.freshfields.com/publications/pdfs/2007/may14/18567.pdf.

377. Freshfields Russia Memo, *supra* note 376, at 6.

As a general rule, there is a safe harbor with respect to market shares of 35% or less,[378] except in a situation of collective dominance; if the collective market share of up to the top three companies in the market exceeds 50% or, in the case of up to the top five companies, exceeds 70%, there is a rebuttable presumption that each of these companies is dominant[379] provided that:

1) The market share of each is not less than 8%;
2) The market share of each has been stable over a period of time not less than one year;[380]
3) The relevant products of each have no substitutes;
4) Access by new entrants to the market is restricted;
5) Price increase does not result in a proportionate decline in demand; and
6) Information on the price of the product and the terms of its sale or purchase is accessible to an indefinite number of parties.[381]

Nonetheless, under the LPC Amendment, FAS may find that a single company is dominant even if its market share is less than 35% if the company's market share is greater than the market shares of its competitors, and the company can materially influence the general terms of trade in the relevant market, provided that:

1) The company can unilaterally determine price and has decisive influence on the general terms of trade in the relevant market;
2) Entry to the relevant market is impeded due to, *inter alia*, economic, technological, administrative or other limitations;
3) The goods may not be substituted; and
4) The change in price of the goods does not lead to a decrease in demand.[382]

Moreover, there is a rebuttable presumption of single-firm dominance where a party has a market share of over 50%.[383] When considering whether the transaction will create or strengthen a dominant position for market shares between the 35% and 50% thresholds, and to rebut the presumption of dominance in the event that the 50% threshold is exceeded, FAS considers other market factors.[384] The factors that FAS will consider include: an increase in concentration; stability of market shares; competitors' market shares; the possibility of entry; and other circumstances that allow a company or companies to unilaterally influence trade.[385]

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378. LPC art. 5(2).
379. *Id.* arts. 5(3)(1), 5(4).
380. *Id.* art. 5(3)(2). Or less if the relevant market has existed for less than one year. *Id.*
381. *Id.* art. 5(3).
382. *Id.* art. 5(6[1]).
383. LPC art. 5(1)(1) (providing that a company may be found not dominant even if this threshold is exceeded).
384. *See* LPC arts. 5(1), 5(3).
385. *Id.*

3. **India.** The CAA introduces an effects-based test prohibiting any combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.[386] The CAA identifies a non-exhaustive list of factors that are relevant to determining whether a transaction has such an effect but does not attempt either to rank them in importance or to impose the order in which the CCI must consider or address them.[387] The relevant factors include:

1) Actual and potential competition from imports;
2) Market concentration;
3) Barriers to entry;
4) Degree of countervailing power;
5) Likelihood of post-transaction price or margin increase(s);
6) Removal of a vigorous and effective competitor;
7) Nature and extent of vertical integration;
8) Failing firm defense; and
9) Whether the benefits of the transaction outweigh its adverse impact.[388]

Market concentration is determined on the basis of the relevant product and geographic markets.[389] The product market definition emphasizes demand-side rather than supply-side substitutability.[390] The geographic market is defined as "the area in which the conditions of competition for supply of goods or services, or demand for goods or services, are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas."[391]

4. **China.** MOFCOM must prohibit a transaction that "has or is likely to have the effect of eliminating or restricting competition."[392] Factors relevant to determining whether a transaction has such an effect include:

1) The parties' market shares and market power;
2) Market concentration;
3) The transaction's effect on "market access" and "technology development;"
4) The transaction's effect on consumers and other undertakings;
5) The transaction's effect on "the national economic development;" and

386. CAA § 6(1).
387. *Id.* § 20(4).
388. *Id.* §§ 20(4)(a)–(n).
389. *Id.* § 2(r).
390. *Id.* § 2(t) (defining "relevant product market" as all the "products or services which are regarded as interchangeable or substitutable *by the consumer*, by reason of characteristics of the products or services, their prices and intended use") (emphasis added).
391. *Id.* § 2(s).
392. AML art. 28.

6) Any other factors that affect the relevant market as determined by MOFCOM.[393]

As recognized by the Guidelines for the Definition of the Relevant Product Market, the relevant market must first be defined in order to determine market concentration, power and shares.[394] The principles introduced for doing so are generally in line with international norms. Substitutability generally will be dispositive in respect of the product market, with an emphasis on demand-side, rather than supply-side, substitution.[395] In complex cases, MOFCOM will use the hypothetical monopolist test (the so-called SSNIP test[396]).[397] The issue of a pre-existing, non-competitive price is addressed, and provision is made for a different benchmark to be taken.[398] The price ranges to be applied by the SSNIP test may differ from 5% to 10%, depending on the circumstances and industry, and differing price ranges may be applied to different categories of customers and/or geographic areas.[399]

Homogeneity of competition conditions is paramount with respect to the geographic market.[400] Interestingly, the concept of "timeliness" is explicitly introduced in relation to products characterized by, for example, production cycle, service life, seasonal factors, fashion or the duration of intellectual property rights (IPR).[401]

There were concerns that MOFCOM might apply the AML favorably toward domestic industries as a result of the inclusion of factors such as a transaction's effect on "market access" and "technology development" in the AML.[402] These concerns were exacerbated during the drafting of the AML because of criticism of alleged abuses of IPR by, and the high market shares in China of, non-domestic companies in high-technology indus-

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393. *Id.* arts. 27(1)-(6).

394. Guidelines for the Definition of the Relevant Product Market, *supra* note 67, art. 2.

395. *Id.* art. 3 (defining "relevant product market" as "a market comprised of a group or a category of products that are considered by the consumers to have a relatively close substitution relationship based on factors such as characteristics, uses and prices of the products."); *see also id.* art. 8.

396. *See supra* text accompanying note 360 (discussing the SSNIP test generally).

397. Guidelines for the Definition of the Relevant Product Market, *supra* note 67, arts. 7, 10; *see also id.* art. 10.

398. *Id.* art. 11.

399. *Id.* art. 10.

400. *Id.* art. 3 (describing the "relevant geographic market" as a geographic area within which consumers acquire the products that have relatively strong substitution relationships).

401. *Id.*

402. AML art. 27(3); *see also* Office of the U.S. Trade Representative, 2010 National Trade Estimate Report—China 32 (2010), *available at* http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf (noting that the U.S. urged China not to use the AML to pursue industrial policy objectives and to ensure that the relevant implementing measures do not create barriers to trade or treat foreign goods or investments less favorably).

tries.[403] Nonetheless, these concerns do not appear to have materialized in the Guidelines for the Definition of the Relevant Product Market.[404]

To date, MOFCOM has prohibited one transaction[405] and imposed remedies in respect of five transactions.[406] MOFCOM's prohibition of the *Coca-Cola/Huiyuan* transaction appears not to have been based on concerns related directly to the horizontal overlap between the parties; rather, its decision was based on Coca-Cola's ability to leverage its dominant position in the carbonated drinks market over the juice market, increase entry barriers and harm the ability of smaller domestic competitors to both compete effectively and innovate.[407]

In contrast, MOFCOM imposed a remedy in the *Mitsubishi/Lucite* transaction based on the parties' combined market share of 64%,[408] which was much higher than the second and third largest participants, and which

403. *See* Niraj Chokshi, *Bracing for China Monopoly Law*, CAL LAW: CALIFORNIA'S LEGAL NEWS SOURCE, July 9, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1202422835203.

404. *See* Guidelines for the Definition of the Relevant Product Market, *supra* note 67, art. 3 (referencing IPR solely in relation to timeliness and the requirement that, in a review of issues such as technology trade and/or licensing agreements, factors including IPR, innovation, and technology markets must be considered).

405. *See supra* note 13 and accompanying text (discussing *Coca-Cola/Huiyuan*).

406. *See supra* note 12 and accompanying text (discussing *InBev/Anheuser-Busch*); *supra* note 259 and *infra* note 408 and accompanying text (discussing *Mitsubishi/Lucite*); *infra* note 412 and accompanying text (discussing *GM/Delphi*). In *Pfizer/Wyeth*, MOFCOM required the companies to divest part of their animal drug portfolio. MOFCOM Announcement No. 77 of 2009, MOFCOM Decision on the Conditions of Approval of Pfizer's Acquisition of Wyeth (Sept. 29, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html. In *Panasonic/Sanyo* MOFCOM cleared the transaction subject to the divestiture of certain battery production facilities and also required Panasonic to reduce its stake in a joint venture with Toshiba to below 20% (i.e., from 40% to 19.5%). MOFCOM Announcement No. 82 of 2009, MOFCOM Decision on the Conditions of Approval of Matsushita's acquisition of Sanyo (30 Oct. 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html; *see also* Rosalind Donald, *China Clears Panasonic/Sanyo*, GLOBAL COMPETITION REV., Nov. 2, 2009, *available at* http://www.globalcompetitionreview.com/news/article/19256/china-clears-panasonic-sanyo.

407. *See supra* note 13 and accompanying text.

408. The parties agreed to implement one of two remedy packages: (1) "capacity separation," whereby Lucite's Chinese entity is to divest 50% of its annual methyl methacrylate (MMA) output to one or more independent third party buyers for a period of five years at cost; or (2) "complete separation," whereby, if within six months (extendable by six months by MOFCOM) after the main transaction closes, the merged entity is not able to perform the capacity separation, MOFCOM may appoint a divestment trustee to oversee the sale of 100% of the Lucite Chinese entity. Lucite China and Mitsubishi agreed to operate independently with separate management teams and boards of directors until the relevant separation, during which time the parties are to continue to compete with one another in the sale of MMA in China, and are prohibited from exchanging information on Chinese pricing, customer information and other competitively sensitive information. MOFCOM Announcement No. 28 of 2009, *supra* note 259. Mitsubishi/Lucite further agreed not to, without MOFCOM's prior approval, in the five years following completion of the transaction: (1) acquire a manufacturer in China of MMA or PMMA or related products; or (2) establish facilities in China to manufacture MMA. *Id.*

would have given the parties a controlling position in China.[409] Thus, the parties could potentially have eliminated and restricted competition post-transaction. Moreover, because Mitsubishi was active also on a downstream market, the parties could potentially have foreclosed downstream competitors due to their dominance in the upstream market. Similarly, in respect of Pfizer's acquisition of Wyeth, MOFCOM imposed a remedy based on a horizontal overlap in the swine mycoplasma pneumonia vaccine market, resulting in a post-merger market share of 49.4% and a HHI of 2182, with an increase of 336.[410] MOFCOM also considered that market entry was difficult due to the investment needed, the long development time and technological barriers.[411] In the *GM/Delphi* transaction, MOFCOM's review focused on the upstream and downstream vertical relationships between the parties; MOFCOM ultimately cleared the transaction subject to behavioral remedies.[412]

B. Defenses

Each of the BRIC jurisdictions provides the opportunity for the parties to counter any substantive concerns raised by the relevant antitrust agency with efficiencies arguments and/or other positive benefits of the transaction.[413]

**1. Brazil.** As discussed above, CADE will balance a transaction's resulting efficiencies and benefits to consumers against its anticompetitive effects.[414] The competition agency will accept an efficiencies defense only if the economic benefits of the transaction are equitably allocated between the merging parties and consumers or end-users.[415] Moreover, it appears that CADE will consider the failing firm defense, which the Brazil Merger Guidelines do not reference, although CADE has not yet cleared a merger on this basis.[416]

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409. *Id.*; *see also* Matthew Bachrack, Cunzhen Huang, & Jay Modrall, *Merger Control Under China's Antimonopoly Law: the First Year*, China Bus. Rev., Jul.-Aug. 2009, at 18, *available at* http://www.chinabusinessreview.com/public/0907/aml.html.

410. MOFCOM Announcement No. 77 of 2009, *supra* note 406.

411. *See id.*

412. MOFCOM Announcement No. 76 of 2009, MOFCOM Decision in General Motors Limited's Acquisition of Delphi Corporation (Sept. 28, 2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html.

413. *See* BAL art. 54(1); Decreto No. 50, *supra* note 360, paras. 70–84; LPC art. 13; CAA §§ 20(4)(m)-(n); AML art. 28.

414. *See* BAL art. 54(1); Decreto No. 50, *supra* note 360, paras. 70–84; *see also supra* notes 369–372 and accompanying text (discussing efficiencies and balancing the pro and anticompetitive effects of a transaction under the Brazil Merger Guidelines, which were promulgated in Decreto No. 50).

415. BAL art. 54(1)(II); Decreto No. 50, *supra* note 360, para. 87. Moreover, CADE will find a merger lawful only if consumers or end-users are not harmed. BAL art. 54(2).

416. *See In re* Mahle GmbH (rejecting an auto-parts manufacturer's failing firm defense). In its decision, CADE construed the defense in accordance with the formulation developed in the U.S. OECD Brazil Report, *supra* note 2, at 30. Further, CADE has continued to reject this defense usually on the grounds of "inadequate efforts to identify less anti-competitive purchasers." *Id.*

2. **Russia.** If the parties can show that the positive effects of the transaction, particularly in a socio-economic context, outweigh its negative effects, then FAS may approve the transaction.[417] Thus, FAS will balance a transaction's resulting efficiencies against its anticompetitive effects.[418]

3. **India.** Under the CAA, the CCI must consider all relevant factors, such as economic efficiencies and the failing firm defense, when determining the anticompetitive effects of a combination.[419]

4. **China.** The AML allows MOFCOM to clear an anticompetitive transaction if the parties can show that the positive effects of the transaction significantly outweigh its negative effects on competition or that the transaction is in the public interest.[420] This suggests that economic efficiencies may be considered during the review process.

C. Non-Competition Issues, e.g., Public Policy, National Security, Interaction with Regulated Sectors

When a competition agency considers non-competition concerns during the review process, it is obviously more difficult to accurately predict the outcome of the review.[421] There also may be a perception that non-competitive considerations are considered in order to protect domestic companies at the expense of foreign entities.

1. **Brazil.** Although the analyses and decisions of the reviewing agencies largely tend to be based solely on competition grounds, the agencies may take other factors into consideration, such as the public interest and the transaction's effects on the Brazilian economy and consumer interests.[422]

No particular sector or industry, such as any regulated industry, is excluded from the notification requirements, and no particular sector or industry enjoys special threshold calculations.[423] However, procedural differences do exist.[424]

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417. LPC art. 13.

418. *Id.* This balancing typically occurs when the parties plan to enter into a commercial contract that may limit competition and make a special filing with FAS to obtain its prior approval. Nonetheless, there are no obstacles to taking the same approach in the merger control context.

419. CAA §§ 20(4)(k), (m)-(n); *see also supra* note 388 and accompanying text.

420. AML art. 28.

421. *See* Recommended Practices, *supra* note 170, at 23 (discussing the need for transparency when considering such factors).

422. *See* BAL art. 54(2).

423. *See generally* BAL.

424. For example, telecommunications mergers are filed with CADE through the National Telecommunications Agency, and unless another sector is also involved, SEAE and SDE do not participate in the review. Decreto No. 9472, de 16 de julho de 1997 [National Telecommunications Act of 1997], arts. 7, 19(XIX); OECD Brazil Report, *supra* note 2, at 19. A jurisdictional dispute between CADE and the Central Bank was recently resolved, and CADE now has responsibility for regulating mergers in the banking sector. *See* Brazil's Council for Economic Defense, http://ftp.cade.gov.br/Default.aspx?5aed3ccd27fc13101a273c0a5f. Moreover, in the insurance, public health, oil and gas, and electricity sectors, special clearance must be obtained from the relevant sectoral regulators. Bruna, de Queiroz & Pinheiro da Silveira, *supra* note 314.

**2. Russia.** Specific rules govern transactions involving financial organizations, and those rules address both the jurisdictional issues regarding the notification requirement[425] and the substantive review.[426]

Because parties must submit certain filings to FAS that are unrelated to competition law,[427] this potentially may give rise to the perception and/or the possibility that FAS may transfer its consideration of factors unrelated to competitive effects when reviewing mergers. If a non-Russian company acquires, directly or indirectly, a triggering stake in a Russian company that is active in a strategic sector,[428] the non-Russian company must make such a filing to FAS.[429] If any entity owned or controlled by a foreign state acquires negative control over a Russian company of strategic importance, the entity is subjected to a filing requirement;[430] in some cases, the shareholding threshold for triggering the filing requirement is even lower.[431] Moreover, certain industries have restrictions on the amount of foreign investment permitted.[432]

If the merger control filing is made together with a filing under foreign investment laws, FAS typically does not issue a merger control approval until the deal is cleared from a "strategic" or "state ownership" perspective.

**3. India.** Although the CCI must as a general rule take into account only competition factors in its review,[433] the central government can exempt classes of enterprises from the application of the CAA if the government deems it necessary in the public interest or in the interest of national

425. *See* LPC arts. 27(1)(3), 29, 30(3)–(4), (6).

426. *See id.* art. 5(7) (providing for specific rules for finding dominance in the financial sector); *see also supra* note 374 and accompanying text (discussing dominant position test).

427. *See id.* art. 33(2)(6); *see also* Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security, Resolutions of the State Duma and Federation Council of the Federal Assembly, April 29, 2008, Federal Law No. 57-FZ, art. 8 [hereinafter Strategic Filing Law] (governing the filing obligation).

428. *See* Strategic Filing Law *supra* note 427, art. 6 (indicating that there are forty-two such sectors, including weapons and military equipment, nuclear materials or radioactive substances, aviation security, space exploration, explosives, oil, gas and mineral deposits of federal significance and significant mass media).

429. *See id.* art. 7 (indicating that although the size of the stake that triggers such a filing varies according to the sector, a filing is generally required if control is acquired through the acquisition of a fifty percent or greater shareholding or through the acquisition of a smaller stake with additional rights such as acquisition of negative control).

430. *See id.* art. 2(3) (indicating that a state-owned or state-controlled non-Russian acquirer must make a separate filing where it directly or indirectly acquires a stake in any Russian company that exceeds 25% or otherwise permits the blocking of corporate decisions).

431. *See id.* art. 7(5) (indicating that a filing may be required in respect of the acquisition of a 5% stake when the target involves subsurface deposits of federal significance and/or the acquirer is state-owned).

432. *See e.g.*, Vozdushnyi Kodeks [VOK] [Air Code] ch. 9, art. 61(2) (Russ.) (stating that a Russian aviation company may not comprise foreign capital over forty-nine percent); On the Organisation of Insurance in the Russian Federation, November 27, 1992, Federal Law No. 4015-1 (indicating that the aggregated foreign investment in Russian insurance companies may not exceed twenty-five percent).

433. CAA § 20(4).

security.[434]

Additional requirements may be imposed on certain sectors; for example mergers in the banking sector require approval from the Reserve Bank of India.[435]

The Ministry of Commerce and Industry has set guidelines in Foreign Direct Investment Policy.[436] The guidelines cap non-Indian persons' investment in certain Indian companies based on the goods or services and the sector involved.[437] The Foreign Exchange Management Act also places certain conditions on foreign investments made by Indian persons.[438] It is unclear how such sectoral regulation will interact with the CAA provisions on mergers once the latter come into effect.

4. **China.** Several provisions under the AML prioritize non-competition concerns over MOFCOM's review of a transaction. For example, MOFCOM has discretion not to prohibit a concentration that creates serious competition issues if proof exists that a concentration is in the public interest.[439] The AML also provides that the People's Republic of China must protect the legitimate operation of industries dominated by the "[s]tate-owned economy" and/or industries that are vital to the Chinese national economy or national security or both.[440]

Such provisions have raised concerns that MOFCOM will take into account non-competition issues, including industrial policy, in its review process and that state-owned monopolies, such as railway, mail, telecommunications, electricity, banking, and energy industries, will be given special treatment under the AML.[441] The Information Requirement Guidance has now clarified that factors not related to competition must be discussed in the merger filing notification.[442] Moreover, the notification form includes a section that allows "relevant parties," such as local governments, industry authorities and the general public, to explain their opinions and a section for predicting the concentration's social effect.[443] The Information Requirement Guidance also requires information to be provided if the following issues are relevant to the transaction: bankruptcy; national security; industry policies; state-owned assets; famous brands; or the jurisdiction of

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434. *Id.* § 54(c). The Central Government may also supersede the CCI for a maximum period of six months in certain circumstances, including if the government deems it necessary in the public interest. *Id.* § 56(1)(c).

435. The Banking Regulation Act, No. 10 of 1949; India Code (1993), §§ 44A, 45.

436. Ministry of Commerce & Industry, Investing In India: Foreign Direct Investment-Policy & Procedures (2006), *available at* http://dipp.nic.in/manual/FDI_Manual_text_Latest.pdf.

437. *See id.* Annexure 1 ("Sector Specific Guidelines for Foreign Direct Investment").

438. The Foreign Exchange Management Act, No. 42 of 1999; India Code (1999), § 3.

439. AML art. 28.

440. *Id.* art. 7.

441. *See e.g.*, Office of the U.S. Trade Representative, 2010 National Trade Estimate Report—China, *supra* note 402, at 32 (indicating that the AML contains "provisions that have generated concern").

442. *See, e.g.*, Information Requirement Guidance, *supra* note 64, art. 18.

443. *See id.* art. 16.

other authorities.[444]

Moreover, foreign investment in certain sectors continues to be subject to heightened regulation.[445] For example, MOFCOM must conduct a national security review of acquisitions by foreign undertakings that concern national security.[446] Discussions between China and the U.S. have been reported, detailing the effort to seek common ground between MOFCOM's review under the AML in China and the Committee on Foreign Investment's review under the Exon-Florio Act[447] in the U.S.[448] Finally, all foreign direct investment, whether by way of formation of a new entity or acquisition of interests in existing domestic or foreign-invested companies, is subject to additional approval by either MOFCOM or one of its local branches.[449]

D. Comparative Substantive Analysis

The debate concerning the merits of the "substantial lessening of competition" test and the "dominant position" test generally focuses on the U.S. and the E.U.[450] It is important to note that despite the different tests,

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444. *Id.* art. 18.

445. *See* [Provisions on Guiding the Orientation of Foreign Investment, Decree No. 346] (promulgated by the State Council of the National People's Republic of China on April 1, 2002 and effective April 1, 2002), arts. 6, 7 (2002) (P.R.C.), *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51267 (indicating that foreign investment in certain sectors is, respectively, restricted or prohibited).

446. AML art. 31. The AML addresses neither the review process nor the factors that may be considered during the review, and therefore it is unclear whether the national security provisions of the previous merger regime survive. Under the previous merger regime, foreign entities were required to report to MOFCOM when they acquired a controlling equity interest in a domestic target that: (1) may impact on state economic security; or (2) involves a "key industry," or possession of a well-known trademark or an established Chinese brand. *See supra* note 60.

447. *See* Defense Production Act of 1950, 50 U.S.C. App. § 2170 (2000) (giving the President the authority to consider national security effects on mergers and acquisitions).

448. Paul Denis, Michael Hickman, & Liang Tsui, *China's Anti-Monopoly Law - A New Era*, BLOOMBERG LAW REPORTS, January 2009.

449. *See* Notice, Ministry of Commerce, Improving the Admin. Work for Examination and Approval of Foreign Invest. Enters. in Accordance with the Law (Mar. 3, 2005); Notice, Ministry of Commerce, Further Improving the Admin. Work for Examination and Approval of Foreign Invest. (Mar. 5, 2009). Approval by MOFCOM itself can take three to four months; local branches usually take about one month to issue an approval. The transfer of shares will not be effective without prior approval. With very limited exceptions, foreign companies may not establish branch operations and all investment projects must be structured through onshore subsidiaries. A corporate entity with any degree of foreign ownership is referred to in generic terms as a "foreign investment enterprise" (FIE). Government approval of transfers of equity in a FIE is required. *See* Peggy Chow & Frankie Cheung, *An Update on the Opportunities for Foreign Investment in the Distribution Center in Mainland China*, METROPOLITAN CORPORATE COUNSEL, Apr. 2009, at 45.

450. *See* Clayton Act, 15 U.S.C. § 18 (2000) (providing that mergers are prohibited where the effect of an acquisition "may be substantially to lessen competition, or to tend to create a monopoly . . . "); ECMR, *supra* note 230; Press Release, European Comm'n, New Merger Regulation Frequently Asked Questions (Jan. 20, 2004) (explaining that the previous regulation was based on the concept of dominance and that the ECMR makes

substantive conflicts are rare; examples include the near miss in the *Boeing/McDonnell Douglas* transaction[451] and the *GE/Honeywell* transaction, in which an actual conflict did arise.[452]

The main criticism of the dominant position test is that it does not cover oligopolistic markets.[453] However, the introduction of the concept of "collective dominance" has enabled jurisdictions to deal with situations in which there is no one dominant firm, but rather a number of firms that are able to coordinate their activities.[454] Russia explicitly incorporates consideration of collective dominance into its substantive merger review.[455] The question of collective dominance is beyond the scope of this article; we do however note that even in mature jurisdictions such as the E.U., the issue has been difficult to address and remains unsettled.[456] We question whether younger regimes are equipped to address this subject while contemporaneously establishing their respective merger regimes.

While market definition and the subsequent assessment of market power using share as a proxy is commonplace, it is important to recognize that these are merely useful tools with which to begin the assessment of whether injury to competition is likely.[457] It is exceedingly important to recognize that such proxies are not substitutes for a careful and thorough analysis of competitive effects. Nonetheless, both Brazil and Russia employ

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clear that all mergers that "significantly impede effective competition" are anticompetitive).

451. *See* Case IV/M.877, Boeing v. Comm'n, 1997 O.J. (L 336) 16, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m877_19970730_600_en.pdf; Letter from William J. Baer, Director, Federal Trade Comm'n, to Marc G. Schildkraut, Esquire, The Boeing Co., and to Benjamin M. Sharp, Esquire, the Boeing Co. (July 1, 1997), *available at* http://www.ftc.gov/os/1997/07/boeingclose.htm.

452. *See* Case COMP/M.2220, General Electric/Honeywell, 2001 O.J. (C 331) 24, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf (holding that the transaction would result in a dominant position); Case T-209/01, Honeywell International v. Comm'n, 2005, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:048:0026:0027:EN:PDF (dismissing Honeywell's action for annulment of the decision); Case T-210/01, General Electric v. Comm'n, 2005, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0210:EN:HTML (dismissing General Electric's action for an annulment of the decision); *see also* Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks at State Bar of Georgia Antitrust Law Section: GE-Honeywell: The U.S. Decision (Nov. 29, 2001), *available at* http://www.justice.gov/atr/public/speeches/9893.pdf.

453. *See, e.g.*, Maria Litzell, *The Appraisal of Collective Dominance Under the Clarified Substantive Test of the New EC Merger Regulation: A Step Towards Greater Global Convergence of Merger Control?*, 1 Eur. Law Student Ass'n Selected Papers on Eur. Law 32, 41 (2005) (describing the "enforcement gap" in relation to the market dominance test and oligopolistic markets).

454. The concept of collective dominance itself is not without problems, but a detailed discussion of the issues arising from this concept is beyond the scope of this article.

455. *See* LPC art. 5(3).

456. *See* Litzell, *supra* note 453, at 34–35.

457. *See* Alison Jones & Brenda Sufrin, EC Competition Law: Text, Cases, and Materials 60, 404 (Oxford University Press 3d ed. 2008).

presumptions of injury based on market shares;[458] we find the use of such presumptions to be dangerous, as they potentially encourage a less than rigorous analysis of competitive effects.

While all the BRIC jurisdictions would appear to recognize efficiencies either as a defense or as part of their analysis of competitive effects,[459] certain jurisdictions also include public interest considerations.[460] We suggest that competition enforcement agencies are poorly equipped to analyze countervailing public interest considerations in the discharge of their competition missions. Rather, if employed, an independent body should conduct this analysis so that the policy trade-offs, including the impact on competition, are transparent.[461]

Foreign direct investment and national security provisions are common to many jurisdictions. Here, too, it is important that these analyses are not integrated into the competitive assessment and that transparency is protected.[462]

## VI. Remedies

### A. Prohibition of Merger

Each of the BRIC regimes provides for the competition agencies to prohibit a transaction or to permit a transaction to go ahead if structural and/or behavioral remedies can eliminate the negative competitive impact of the transaction.[463]

**1. Brazil.** If a transaction is found to be anticompetitive, it may be prohibited or a partial divestment may be ordered,[464] targeting, for example, brands, production facilities, and distribution networks.[465] Traditionally, CADE unilaterally imposed such remedies on the parties; however it now appears that there is more opportunity to discuss and negotiate reme-

458. Decreto No. 50, *supra* note 360, para. 36; LPC arts. 5(1), 5(3); *see also supra* notes 363–364 and accompanying text (discussing Brazil); *supra notes* 379, 383 and accompanying text (discussing Russia).

459. *See supra* note 414 and accompanying text (discussing Brazil); *supra* notes 417–418 and accompanying text (discussing Russia); *supra* note 419 and accompanying text (discussing India); *supra* note 420 and accompanying text (discussing China).

460. *See e.g.*, *supra* note 422 and accompanying text (discussing Brazil); *supra* notes 439, 440 and accompanying text (discussing China).

461. *See* Recommended Practices, *supra* note 170, at 23; *see also* Debra A. Valentine, General Counsel, Fed. Trade Comm'n, Remarks on Changes in Competition Policy and Law at the Global Level (Dec. 13, 1998), *available at* http://www.ftc.gov/speeches/other/dvchangesincompetitionpolicy.shtm (arguing for transparency in the competition analysis).

462. *See* Recommended Practices, *supra* note 170, at 1 (stating that merger review should focus exclusively on anticompetitive mergers and should not be used to pursue other goals); Valentine, *supra* note 461 (arguing that competition laws should be transparent, and that the application of non-competition criteria, including national security interests, should be made clear).

463. *See* BAL art. 54(9); LPC art. 33(2); CAA §§ 31(2)–(3); AML arts. 28–29.

464. *See* BAL, art. 54(9).

465. *See e.g.*, the *Ambev* case, *supra* note 373; *see also supra* note 6 (discussing *Sky-DirecTV*).

dies with the agency.[466] The remedies CADE imposes must be specific and address the competition concerns raised by the transaction; CADE generally prefers structural to behavioral remedies.[467]

2. **Russia.** FAS may prohibit a transaction, or require a remedy to mitigate the negative effects of a transaction found to be anticompetitive,[468] including requiring the parties to comply with certain conditions prior to clearance or granting clearance subject to certain conditions.[469] Examples of such conditions include: granting third parties industrial property rights or access to assets or information; divesting assets or claims to third parties; amending, or entering into, contracts; implementing specific economic, technical, or informational measures to prevent creation of discriminatory conditions in the market; requiring the parties to refrain from the transfer of assets; or notifying FAS prior to taking certain actions.[470] As a general rule, FAS sets a deadline for compliance with its remedy; where FAS defers clearance until compliance, the deadline must not exceed nine months.[471] Although FAS technically can require the above remedies either for transactions involving a Russian company or foreign-to-foreign transactions, in the past it has rarely applied remedies to the latter.[472]

3. **India.** Under the CAA, the CCI may approve or prohibit a transaction,[473] declare a transaction void *ab initio*,[474] or propose modifications to a combination to eliminate any appreciable adverse effect it may have on competition.[475]

4. **China.** If MOFCOM finds a transaction to be anticompetitive, it has the power to block the transaction or impose remedies before clearing the transaction.[476] MOFCOM may impose structural remedies, behavioral remedies, or a combination of both.[477] It remains unclear at which stage

466. *See* Global Legal Group, The International Comparative Legal Guide to: Merger Control 2007 38 (2007), *available at* http://www.iclg.co.uk/khadmin/Publications/pdf/3242.pdf; Int'l Antitrust Law Comm., American Bar Association, Essentials of Merger Review in Brazil 7 (2008).

467. *See* OECD Competition Comm., OECD Policy Roundtables Merger Remedies 2003 94–95 (2003) (explaining the inefficiency of behavioral remedies, the low cost of monitoring structural remedies, and the greater emphasis CADE puts on structural remedies).

468. *See* LPC art. 33(2).

469. *See id.* art. 33(2)(3).

470. *See id.* art. 33(5); *see also* Freshfields Russia Memo, *supra* note 376, at 9.

471. *See* LPC art. 33(2)(3).

472. *See* Getting the Deal Through: Merger Control 2010, *supra* note 110, at 305.

473. *See* CAA §§ 31(1)-(2).

474. *See id.* § 6(1).

475. *See id.* § 31(3). It appears that it is the CCI rather than the parties that proposes the remedies. Arguably, the parties are better placed to propose any divestment, as they are familiar with the industry and the assets involved. This is the approach taken in the E.U. *See* ECMR, *supra* note 230, pmbl. paras. 30, 35, art. 10.

476. *See* AML arts. 28–29.

477. *See id.* art. 29; Measures on Review of Concentrations of Undertakings, *supra* note 69, art. 11 (specifying that MOFCOM may impose structural or behavioral remedies, or a combination of both).

of the review the parties may offer remedies.[478]

Since the AML came into force, MOFCOM has required remedies with respect to several transactions, including the *InBev/Anheuser-Busch* transaction, in which MOFCOM imposed remedies regulating the future structure of the market,[479] the *Mitsubishi Rayon/Lucite International* transaction, in which MOFCOM essentially imposed a structural remedy, albeit one with a degree of flexibility[480] and the *GM/Delphi* transaction, in which MOFCOM imposed a pure behavioral remedy.[481]

B. Ancillary Restraints

The competition agencies in Brazil and Russia consider the effects of ancillary restraints during their respective reviews.[482] In India and China, there is no express provision in the legislation regarding this issue and it remains to be seen how the CCI and MOFCOM, respectively, approach this issue.[483]

C. Comparative Analysis of Remedies

The guiding principle of an effective antitrust remedy must be to restore the competitive conditions that the completed transaction would otherwise remove.[484] Once careful legal and economic analysis demonstrates that a competition law violation will result from the proposed trans-

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478. *See* AML art. 29 (not including a time line for the parties to offer remedies); Measures on Review of Concentrations of Undertakings, *supra* note 69, art. 11 (stating only that the parties may propose remedies "during the review process").

479. *See supra* note 12 (discussing MOFCOM's decision in *InBev/Anheuser-Busch*).

480. *See supra* note 408 and accompanying text.

481. MOFCOM prohibited GM and Delphi from exchanging confidential information relating to Delphi's other Chinese customers, and required Delphi to deal with other car manufacturers on a non-discriminatory basis; the transaction was cleared in Phase 1. *See supra* note 412; *see also* Rosalind Donald, *China Clears GM/Delphi with Conditions*, Global Competition Rev., Sept. 29, 2009, *available at* http://www.globalcompetition review.com/news/article/18914/china-clears-gm-delphi-conditions.

482. *See* BAL art. 54. In investigating a transaction, CADE routinely reviews non-compete agreements; as a general rule, the maximum permissible period for a non-compete is five years, and CADE has frequently ordered parties, including in a foreign-to-foreign transaction, to amend agreements to comply with this rule, although CADE may accept longer periods of time if the parties can show a justification for the extension. Moreover, CADE will order the elimination of exclusivity agreements that it does not deem reasonably justified. *See* Getting the Deal Through: Merger Control 2010 *supra* note 110, at 68. With regard to Russia, see LPC art. 13. To the extent that FAS has been fully informed of arrangements related to the transaction, such arrangements generally will be covered by the clearance decision. However, in the event that such arrangements themselves fall within the scope of the LPC, FAS usually will require a separate filing. *See* Tatiana Kachalina & Oleg Volkov, *Russia*, *in* International Comparative Legal Guide to: Merger Control 2008 § 5.7 (2008), *available at* http://www.liniaprava.ru/ru/file/Merger%20Control_2008_FAQ_TK_OV_190907.pdf.

483. *See generally* CAA (showing no provision involving ancillary restrictions); AML (showing no provision involving ancillary restrictions).

484. *See* Recommended Practices, *supra* note 170, at 2; ICN Merger Working Group, Analytical Framework Subgroup, Merger Remedies Review Project: Report for the Fourth ICN Annual Conference at Bonn 1 (June 2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf.

action, regulators must carefully analyze the remedy to ensure that it eliminates the identified harm, no more and no less.[485] In particular, the remedy should be designed to protect not competitors, but rather competition.[486]

As a general principle, structural remedies are to be preferred; while there may be a role for conduct remedies from time to time, they present very substantial enforcement issues for the enforcing agency and should be avoided unless absolutely necessary.[487]

All the BRIC agencies employ the traditional remedies used by more mature regimes, such as the E.U. and U.S. An observation or two is warranted here.

First, there is no justification under competition law to apply a remedy absent a finding that a transaction violates relevant antitrust law.[488] Nonetheless, the Chinese agency in the *InBev/Anheuser-Busch* transaction imposed conditions on the parties, despite the fact that MOFCOM's decision expressly stated that the transaction did not give rise to competition concerns in China.[489] Similarly, the remedies imposed in the *Mitsubishi/Lucite* transaction extended to non-MMA products, albeit the decision found that the transaction would have an anticompetitive effect only with respect to the MMA market, and also extended to regulate organic growth.[490]

Second, by imposing controls on InBev's future ability to make acquisitions in China before InBev has notified or MOFCOM has analyzed any such potential acquisitions under the AML,[491] MOFCOM appears to be lay-

485. *See id.* ("The appropriate goal of agency intervention . . . is to restore or maintain competition affected by the merger, not to enhance premerger competition.").

486. *See e.g.*, William J. Kolasky, Deputy Assistant Attorney General, Address at the TokyoAmerica Center: The Role of Competition in Promoting Dynamic Markets and Economic Growth (Nov. 12, 2002), *available at* http://www.justice.gov/atr/public/speeches/200484.pdf.

487. *See, e.g.*, Commission Notice on Remedies Acceptable Under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004, 2008 O.J. (C 267) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF (stating explicitly at paragraph 17 that "commitments in the form of undertakings not to raise prices, to reduce product ranges or remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps," and stating that such remedies can only "exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring . . . and if they do not risk leading to distorting effects on competition"). Similarly, the U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 17–18 (2004) [hereinafter ANTITRUST DIVISION POLICY GUIDE], *available at* http://www.usdoj.gov/atr/public/guidelines/205108.pdf, states that conduct remedies are to be avoided because "they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid."

488. ANTITRUST DIVISION POLICY GUIDE, *supra* note 487, at 3.

489. *See supra* note 12 and accompanying text (discussing MOFCOM *Inbev/Anheuser-Busch* decision).

490. *See* MOFCOM Announcement No. 28 of 2009, *supra* note 259; *see also supra* note 408.

491. *See supra* note 12 (discussing MOFCOM's decision in *InBev/Anheuser-Busch*).

ing down a marker as to the extent of the consolidation it is prepared to countenance in the industry; moreover, MOFCOM is imposing a degree of oversight in excess of that contemplated by the AML (which may in any event have required notification of such future acquisitions).[492]

These requirements, combined with MOFCOM's prohibition decision in the *Coca-Cola/Huiyuan* transaction,[493] have led to suggestions that MOFCOM's approach has as much to do with industrial policy as it does with competition assessment—a suggestion further supported by the publication of the Information Requirement Guidance, with its requirement that information be provided to MOFCOM in the merger notification filing if, *inter alia*, famous brands are relevant to the transaction.[494] However, a spokesperson for MOFCOM denied that its decision in the *Coca-Cola/Huiyuan* transaction was based on protectionism, stating that the consideration of Huiyuan as a national brand had "nothing to do with the . . . rejection" of the transaction.[495]

## VII. Sanctions

### A. Failure to File

The main risk of failure to notify is that of unenforceability: each of the BRIC competition agencies has the power either to declare the transaction null and void or to order the transaction to be unraveled by requiring divestment of the acquired assets should the transaction have an anticompetitive effect.[496]

Each of the BRIC competition agencies also has the power to impose fines for failure to notify.[497] The fines may vary from a fixed maximum penalty[498] to a percentage of the company's turnover,[499] depending on the jurisdiction. There is also the potential for loss of goodwill of the relevant competition agency. The BRIC countries are likely to comprise an increas-

492. It should be noted that although the U.S. agencies may impose a similar notification condition, these are generally limited to acquisition(s) made in the relevant market(s). *See, e.g.*, the FTC's Decision and Order in respect of BASF's acquisition of Ciba, *In re* BASF SE, Corp., No. C-4253, *available at* http://www.ftc.gov/os/caselist/0810265/090526basfdo.pdf, and DOJ's Consent Order in respect of Monsanto's acquisition of Delta and Pine Land, U.S. v. Monsanto Company, No. 1:07-cv-00992 (D.D.C. 2008), *available at* http://www.justice.gov/atr/cases/f239400/239476.htm.

493. *See* MOFCOM Announcement No. 22 of 2009, *supra* note 13.

494. *See* Information Requirement Guidance, *supra* note 64, art. 18; *see also supra* note 444.

495. *China Defends Decision to Block Coca-Cola Merger*, Competition Law 360, Mar. 27, 2009, *available at* http://www.law360.com/articles/94197.

496. *See supra note* 464 and accompanying text (discussing Brazil); *supra* note 468 and accompanying text (discussing Russia); *supra* notes 474–475 and accompanying text (discussing India); *supra* notes 476–477 and accompanying text (discussing China).

497. *See infra* notes 502–503 and accompanying text (discussing Brazil); *infra* note 508 and accompanying text (discussing Russia); *infra* note 514 and accompanying text (discussing India); *infra* note 517 and accompanying text (discussing China).

498. *See e.g.*, *infra* note 508 and accompanying text (discussing Russia); *infra* note 517 and accompanying text (discussing China).

499. *See e.g.*, *infra* note 514 and accompanying text (discussing India).

ing part of the global economy,[500] and it is likely that companies will wish to make additional future acquisitions in these jurisdictions. Indeed, competition agencies worldwide commonly discover failures to file upon notification of a subsequent transaction.[501]

1. **Brazil.** Failure to file by the deadline will result in fines calculated on the basis of the following formula: (i) a starting minimum fine of approximately BRL 60,000 (approx. USD 30,000); to which (ii) a daily fine of BRL 600 (approx. USD 300) is added; to which (iii) where the parties' average group revenues in Brazil exceed BRL 400 million (approx. USD 200 million), 0.005% of the aggregated turnover is added.[502] A minimum and maximum penalty of BRL 60,000 (approx. USD 30,000) to BRL 6 million (approx. USD 3 million) applies,[503] which may be increased by aggravating factors such as the length of the delay, the turnover of the parties, the anticompetitive effects of the transaction, and repeat-offender parties.[504] The resolution also establishes a 30% reduction of the fine if the parties voluntarily bring the late notification to the agency's attention.[505]

The agencies generally enforce the filing requirements rigorously and failures to file that CADE subsequently discovers are nearly always fined.[506] No distinction is made between the parties to the transaction, and thus the obligation to file is on all parties;[507] nonetheless, although the parties are jointly and severally liable, CADE will generally pursue the party from which it is most likely to obtain payment.

2. **Russia.** For failure to file a pre- or post-merger notification, FAS may impose fines of twenty to fifty times a corporate officer's base salary, and may also fine the corporation in the amount of 500 to 5,000 times annual earnings.[508]

Fines for failure to file are imposed regularly, but the risk of a fine is much lower if consummation of the transaction occurs after filing, even if the parties have not yet obtained clearance;[509] even after expiration of the

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500. Grant Thornton International, International Business Report 2007: Emerging Markets 2 (2007), *available at* http://www.internationalbusinessreport.com/files/international_business_report_2007_emerging_markets.pdf ("By 2050, the BRIC economies will account for 44% of global GDP").

501. *See* Jack E. Pace III, *Roundtable Discussion: Counseling on Complex Issues*, Antitrust, Spring 2008, at 7, 23 (Vanessa Turner commenting).

502. *See* BAL arts. 54, 67; Conselho Administrativo de Defesa Econômica Resolução No. 44/07 de 14 de fevereiro de 2007 [hereinafter CADE Resolution No. 44/07], art. 1(III), *available at* http://www.cade.gov.br/Default.aspx?2a0a0a161af83b1f3415.

503. BAL, art. 54(5); CADE Resolution No. 44/07, *supra* note 502, art. 3.

504. CADE Resolution No. 44/07, *supra* note 502, arts. 1(IV)-(V).

505. *See id.* art. 2.

506. *See* Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil*, 67 Antitrust L. J. 113, 127 (1999).

507. *See generally* BAL (failing to impose the filing obligation on a specific party to the transaction).

508. *See* Code of Administrative Violations, *supra* note 333, art. 19.8.

509. In April 2009, FAS imposed administrative fines on Vertoletnaya Servisnaya Kompania (helicopter services) and Voenno-Promyshlennaya Kompania (a military-industrial company) for closing a transaction without prior approval. *See* Ivolgina & Manninen, *supra* note 40.

statutory waiting periods, the parties technically are prohibited from consummating the transaction until obtaining clearance from FAS.[510]

The LPC Amendment clarified that for an acquisition of shares, assets or rights, the acquirer is under the legal obligation to file.[511] Otherwise, the LPC does not currently define which of the parties to the transaction is responsible for the pre-merger filing; instead, any party interested in the transaction (i.e., the acquirer, the seller, or even the target) can file.[512]

3. **India.** The obligation to notify is on both parties in the case of a merger and on the acquirer in the case of an acquisition, including an acquisition of control.[513] A finding by the CCI of a failure to notify or a late filing attracts a penalty of 1% of either the turnover or the assets (whichever is higher) of the offending combination.[514] It is currently unclear whether the correct measure is the violator's Indian or worldwide turnover or assets;[515] which measure is used will have potentially significant implications for the level of any fine. In the case of imposing a fine for late filing of an acquisition, the draft Merger Regulations provide that the calculation of the thirty day deadline to file starts from execution of the definitive purchase agreement.[516]

4. **China.** Under the AML, a failure to notify may result in a fine of up to RMB 500,000 (approx. USD 73,000).[517] In the case of a merger, the parties must jointly file the notification,[518] although as a matter of practice, the acquirer generally submits the filing. In the case of an acquisition of control or the ability to impose decisive influence over an undertaking, the acquirer must submit the filing.[519] If the party responsible for filing fails to submit the merger notification, any other party may do so.[520]

## B. Implementation Before Clearance

In both non-suspensory and suspensory jurisdictions, the competition agency may impose a remedy to rectify the substantive anticompetitive impact of a transaction that is consummated prior to receiving clearance.[521] In non-suspensory jurisdictions such as Brazil, there is no obligation not to consummate prior to obtaining clearance, and therefore the

510. *See* LPC arts. 27(1), 28(1), 29(1) (stating that the relevant transactions can be performed or conducted only with FAS' prior consent); *see also id.* art. 34 (imposing remedy where FAS' prior consent is not obtained).

511. LPC art. 32(1)(3).

512. *See* LPC art. 32(1).

513. CAA § 6(2); Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 10.

514. CAA § 43A.

515. *See id.*

516. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 6(2)(a).

517. AML art. 48.

518. Measures on Notification of Concentrations of Undertakings, *supra* note 68, art. 9.

519. *Id.*

520. *Id.*

521. *See* Recommended Practices, *supra* note 170.

competition agency will not impose sanctions for doing so.[522] However, in suspensory jurisdictions, the competition agency will impose a penalty for taking such action.[523]

1. **Brazil.** Although there is no obligation not to consummate prior to receiving clearance, CADE may order remedies in the event that it subsequently determines that the transaction is in violation of the competition laws.[524] As discussed above, after it found that the transaction would harm competition, CADE ordered Votorantim to divest the cement plants it had acquired from Holcim.[525] Similarly, in October 2004, CADE ordered Nestlé to unwind its acquisition of Garoto.[526]

2. **Russia.** The court may annul transactions carried out in breach of the notification requirements if such transactions have led or may lead to the restriction of competition.[527] This standard incorporates the substantive test.[528] Although fines may be imposed for consummating the transaction without the receipt of clearance by FAS,[529] to date it appears that the court has yet to impose a fine on a transaction that closed after the filing but prior to obtaining clearance. In theory, there is a risk that FAS could impose the same fine as for closing without filing by analogy.

3. **India.** Consummation of the transaction prior to receipt of clearance may result in a fine of up to 1% of the total turnover or assets of the combination, whichever is higher.[530] As discussed above, it is unclear whether the correct measure is Indian or worldwide turnover or assets.[531]

4. **China.** Consummation of the transaction prior to expiration of the waiting period may result in fines of up to RMB 500,000 (approx. USD 73,000).[532]

### C. Comparative Analysis of Sanctions

The purpose behind sanctions in this context is to deter violation.[533] Thus, the question is whether the sanction is sufficient to achieve this aim.

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522. *See supra* note 85 and accompanying text. If the parties close a transaction despite an injunction prohibiting them from doing so, civil law penalties will apply. BAL art. 62.

523. *See infra* notes 527–532 and accompanying text.

524. BAL art. 54(9).

525. *CADE Requires Cement Divestitures*, GLOBAL COMPETITION REV., Mar. 25, 2008, *available at* http://www.globalcompetitionreview.com/news/article/10158/cade-requires-cement-divestitures.

526. *CADE Sticks with Nestlé Decision*, GLOBAL COMPETITION REV., Oct. 15, 2004, *available at* http://www.globalcompetitionreview.com/news/article/4889/cade-sticks-nestleacute-decision. CADE ordered the unwinding of the acquisition, although the companies were already integrated, and despite an offer by Nestlé to divest other brands and thus reduce its market share from 56% to 38%. *Id.*

527. LPC art. 34.

528. *See id.* arts. 33(2), 34; *see also supra* note 374 and accompanying text.

529. *See* Tapani Manninen, et. al., *supra* note 178.

530. CAA § 43A.

531. *See id.*; *see also supra* note 515 and accompanying text.

532. AML art. 48.

533. *See* Harald Kahlenberg & Janine Weinhold, *European Commission Imposes €20 Million Fine for Failure to File Transaction*, Aug. 27 2009, *available at* http://

Each of the BRIC regimes imposes a fine on the parties for failure to file.[534] In this respect, the sanctions imposed by the U.S. and E.U., respectively, are instructive. In both jurisdictions, a fine is imposed for each day that the company is in violation of the relevant legislation,[535] thus rapidly escalating the costs of non-compliance and providing an ongoing incentive for the company in breach to comply as quickly as possible. The sanctions imposed by the BRIC regimes are much less severe[536] and whether they will act as a sufficient deterrent remains to be seen.

The severity of the sanction imposed for consummating a transaction prior to receipt of clearance, together with the availability of a hold-separate, will obviously influence whether parties decide to wait for clearance.[537] Only India and China impose sanctions on parties that consummate the transaction prior to receipt of clearance from the competition agency.[538] Nonetheless, in practice the Brazilian agencies will obtain an injunction preventing the parties from closing, a breach of which will result in civil penalties.[539] Russia therefore remains the sole jurisdiction in which it is unclear whether the competition agency will impose a sanction for closing after submission of a filing, but prior to clearance.[540]

## VIII. Third Party Involvement

### A. Confidentiality and Cooperation with Other Jurisdictions

A balance must be struck between allowing companies to restrict the public dissemination of their confidential information and providing the competition agency (and third parties) with sufficient information to enable the agency to make its determination (and third parties to make relevant submissions). Most competition agencies require that companies

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www.internationallawoffice.com/newsletters/detail.aspx?g=950e1059-06da-4759-aae4-2742cf79acaf&redir=1.

534. *See supra* notes 502–520 and accompanying text.

535. *See* 15 U.S.C. § 18a(g)(1); ECMR arts. 8(5), (15). In the U.S., failure to comply with the HSR Act, including the obligation not to consummate the transaction until expiration of the applicable waiting period, is punishable by a civil fine of up to USD 16,000 per day; moreover, those in violation are also subject to injunctive or other equitable relief. 15 U.S.C. § 18a(g)(1). Although the language provides that the fine shall be USD 10,000, the Debt Collection Improvement Act 1996 requires the FTC to index the fine to inflation. The fine was set at USD 16,000 per day in 2009. *See* Federal Penalties Inflation Adjustment Act 1990, as amended by the Debt Collection Improvement Act 1996, 65 Fed. Reg. 69,665 (FTC Nov. 20, 2000 (final rule amendments)); *see also* 74 Fed. Reg. 857 (Jan. 9, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-210.pdf. Similarly, in the E.U., the competition agency may fine a company up to 10% of its aggregate worldwide annual turnover, and up to 5% of the aggregate daily turnover of the companies involved for each working day of the infringement. *See* ECMR, *supra* note 230, arts. 8(5), (15).

536. *See supra* notes 502–520 and accompanying text (discussing sanctions for failure to file).

537. *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 653–61 (1983) (outlining model for optimal antitrust penalties).

538. *See supra* notes 530–532 and accompanying text.

539. *See supra* notes 524–526 and accompanying text.

540. *See supra* notes 527–529 and accompanying text.

provide them with all requested information, including business secrets.[541] However, competition agencies are generally sympathetic to the need to safeguard the parties' confidential information from general publication,[542] and the BRIC regimes are no exception. The parties in Brazil, India and China are generally permitted to provide the agency with a non-confidential version of the submitted information, which third parties may then access.[543]

Competition agencies reviewing the same deal in different jurisdictions will often informally or formally contact each other.[544] The extent to which competition agencies cooperate with each other or are influenced by each other's conduct on individual cases is increasing.[545] Cooperation can be through the framework of formal bilateral cooperation agreements, multilateral recommendations and meetings, or more informal contacts.[546]

1. **Brazil.** At the time of filing, the type of transaction, the parties, and the affected industry are published by the SDE. Later in the review, rulings on requests for confidential treatment are also published (stating whether or not they were granted). Finally, a summary of the opinion issued by SDE is published, while the non-confidential versions of the SEAE and SDE opinions are also made available on their respective websites.[547] CADE's final decision is also publicly available, with the confidential information redacted.[548]

Third parties can request access to the file;[549] but the agencies generally respect requests for confidential treatment of sensitive information

541. *See* ABA Section of Antitrust Law, International Antitrust Cooperation Handbook, 79, 91, 106, 118, 129-30, 146-47, 162-63, 173-74, 187, 200, 211, 224, 237, 245-46, 257-58, 268, 280-81 (2004) (outlining information sharing policies of the competition agencies of, respectively, Australia, Austria, Belgium, Brazil, Canada, the E.U., France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, Spain, Switzerland, and the United Kingdom).

542. *See id.* (outlining the protections afforded to confidential information by the competition agencies of the same countries).

543. *See infra* notes 547-550 and accompanying text (discussing Brazil); *infra* notes 571-572 and accompanying text (discussing India); *infra* notes 576-577 and accompanying text (discussing China).

544. *See* International Antitrust Cooperation Handbook, *supra* note 541, at 3-5.

545. Deborah Platt Majoras, *Convergence Conflict and Comity: The Search for Coherence in International Competition Policy*, 2007 Fordham Comp. L. Inst. 5 (B. Hawk. Ed. 2008).

546. *See* International Antitrust Cooperation Handbook, *supra* note 541, at 3-5.

547. *See* BAL arts. 14(V), (XV) (requiring the SDE to have due regard for the confidentiality of information that it requests and to make public violations of the BAL and any remedies imposed); *see also* Portaria No. 04/2006, de 5 de janeiro de 2006, D.O.U. de 06.01.2006, *available at* http://www.cade.gov.br/upload/2006portariaMJ04.pdf (regulating the protection of confidential information by SDE); Portaria No. 46/2006, de 28 de março de 2006, *available at* http://www.seae.fazenda.gov.br/central_documentos/legislacao/3-5-1-defesa-da-concorrencia/portaria-seae-no-46 (regulating the protection of confidential information by SEAE).

548. *See* BAL art. 7(IX), (XVIII) (requiring CADE to have due regard for the confidentiality of information that it requests and to make public violations of the BAL); *see also* CADE Resolution No. 45/2007, *supra* note 95 (regulating the protection of confidential information by CADE).

549. Getting the Deal Through: Merger Control 2010, *supra* note 110, at 69.

within the file.[550] Third parties may also present submissions to the agencies and request meetings with officials throughout the review process.[551] Moreover, the agencies will often send customers and competitors information requests and ask for their opinion of the transaction.[552] As discussed above, interested third parties may request that CADE issue a preliminary injunction to prevent the transaction closing.[553]

Brazil has antitrust cooperation agreements with several other jurisdictions, including Canada,[554] Russia,[555] and the U.S.,[556] each of which permits the exchange of non-confidential information; confidential information will not be shared unless the parties expressly authorize such disclosure.

**2. Russia.** FAS is under an obligation not to disclose commercial or other legally protected secrets.[557] FAS officials bear civil, administrative or criminal liability for unauthorized disclosures, and any damage caused by such a disclosure must be compensated by the federal state.[558] Officers of FAS have indicated that even with respect to information in filings that is not designated as sensitive, FAS remains under an obligation to maintain its confidential status and should not disclose the information except as discussed below.[559]

Under the LPC, FAS must publish on its website information on a transaction subject to a Phase 2 review, and any interested party has the right to comment on the potential impact of the transaction on the compet-

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550. *See id.*

551. *See id.*

552. *Id.*

553. *See also supra* note 96 and accompanying text.

554. Cooperation Arrangement Between the Commissioner of Competition, Competition Bureau of the Government of Canada, and the Council for Economic Defense, the Secretariat of Economic Law of the Ministry of Justice, and the Secretariat for Economic Monitoring of the Ministry of Finance of the Government of the Federal Republic of Brazil Regarding the Application of their Competition Laws, Braz.-Can., Apr. 25, 2008, *available at* http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Brazil%20Coop%20-%20final%20text%20-%2025Apr083.pdf/$FILE/Brazil%20Coop%20-%20final%20text%20-%2025Apr083.pdf.

555. Agreement on Cooperation in the Sphere of Competition Policy Between the Government of the Russian Federation and the Government of the Federative Republic of Brazil, Russ.-Braz., Dec. 2001, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/1568.shtml; Programme on Co-operation Between FAS Russia and Council for Economic Defense, Secretariat of Economic Law of Ministry of Justice of Federal Republic of Brazil and Secretariat of Economic Monitoring of Ministry of Finance for 2006–2007, Russ.-Braz., Dec. 31, 2007, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/8580.shtml.

556. Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between their Competition Authorities in the Enforcement of their Competition Laws, U.S.-Braz., Oct. 26, 1999, *available at* http://www.ftc.gov/os/1999/10/BrazilUStreaty.htm.

557. *See* LPC art. 26(1).

558. *See id.* arts. 26(2)–(3).

559. *See infra* note 560 and accompanying text. Nonetheless, there has been at least one incident in which a FAS case-handler commented on a transaction in an interview with a newspaper. The transaction had been notified to FAS in a filing not designated as confidential.

itive environment.[560] Therefore, third parties are likely to start becoming more involved in the merger review process as more information on filings enters the public domain.

FAS cooperates with a number of antitrust agencies in other jurisdictions,[561] including those of the former Eastern Europe (e.g., Czech Republic,[562] Hungary,[563] Poland,[564] Romania[565]), certain E.U. states (e.g., Finland,[566] Italy,[567] Sweden[568]), and Asian states (e.g., China[569] and

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560. *See* LPC art. 33(3). In the case of an intra-person transfer, FAS publishes on its website the list of group entities submitted by the parties in order to obtain an exemption from the pre-notification obligation. *See* LPC art. 31(2)(1).

561. *See* OECD, Peer Review of Russia's Competition Law and Policy: The Role of Competition Policy in Regulatory Reform 32 (Jan. 21, 2004), *available at* http://www.fas.gov.ru/english/international/oecd/1571.shtml.

562. Memorandum on the Cooperation Between the Federal Antimonopoly Service of the Russian Federation and the Office for the Protection of Competition of the Czech Republic, Russ.-Czech. Rep., May 31, 2007, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20968.shtml.

563. Memorandum on the Co-operation Between the State Antimonopoly Committee of Russian Federation and the Office of Economic Competition of the Republic of Hungary, Russ.-Hung., Aug. 29, 1997, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/1574.shtml.

564. Programme on Co-operation Between the Federal Antimonopoly Service of the Russian Federation and the Office of Competition and Consumer Protection of the Republic of Poland for 2006–2007, Russ.-Pol., Jan. 19, 2006, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/8591.shtml; Programme on Co-operation Between the Federal Antimonopoly Service of the Russian Federation and the Office of Competition and Consumer Protection of the Republic of Poland for 2008–2010, Russ.-Pol., Dec. 10, 2007, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20965.shtml.

565. Memorandum on Cooperation Between the Federal Antimonopoly Service of the Russian Federation and the Romanian Competition Council, Russ.-Rom., Oct. 22, 2008, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20951.shtml.

566. Programme on Cooperation Between the Federal Antimonopoly Service of the Russian Federation and the Finnish Competition Authority for 2008–2009, Russ.-Fin., Oct. 17, 2007, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20966.shtml; Programme on Cooperation Between the Federal Antimonopoly Service of the Russian Federation and the Finnish Competition Authority for 2006–2007, Russ.-Fin., Feb. 8, 2006, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/4817.shtml.

567. Memorandum of Understanding Between the Federal Antimonopoly Service (Russian Federation) and the Italian Competition Authority, Russ.-Italy, Sept. 19, 2008, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20964.shtml.

568. Memorandum on Understanding Between the Federal Antimonopoly Service (Russian Federation) and the Swedish Competition Authority for the Years 2009–2010, Russ.-Swed., Dec. 15, 2008, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/21530.shtml; Memorandum on Understanding Between Federal Antimonopoly Service (Russian Federation) and Swedish Competition Authority for the Years 2007–2008, Russ.-Swed., *available at* http://www.fas.gov.ru/english/inetrnational/agreements/20963.shtml; Memorandum on Mutual Understanding Between the Federal Antimonopoly Service of the Russian Federation and the Swedish Competition Authority, Russ.-Swed., Dec. 4, 2004, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/8579.shtml.

569. Memorandum of Understanding Between FAS Russia and SAIC China for Implementation of the Agreement Between the Government of Russia and Government of China on Cooperation in the Fields of Countering Unfair Competition and Antimono-

Korea[570]).

3. **India.** If the CCI is prima facie of the opinion that a transaction is likely to have an appreciable adverse effect on competition, it will require the parties to publish details of the transaction in order to bring the transaction to the attention of the public and third parties likely to be affected by it.[571] The parties may provide to the CCI a non-confidential version for publication.[572] Moreover, the CCI may invite comments from particular third parties.[573]

The agencies of other jurisdictions were extensively involved in the drafting and consultation of the CAA and the draft Merger Regulations;[574] such consultation and cooperation are likely to continue once the CAA is fully implemented.[575]

4. **China.** Under the AML, MOFCOM is required to publish its decision only if it prohibits a transaction or imposes remedies on the parties involved.[576] Thus, MOFCOM is not required to publish pre-merger notifications or clearance decisions.[577]

At least in relation to transactions in which a remedy is required, customers and competitors are invited to attend meetings with MOFCOM under the AML merger regime.[578]

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poly Policy in 2006–2007, Russ.-P.R.C., Nov. 3, 2005, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/8582.shtml.

570. Memorandum on Co-operation Between the Ministry of the Russian Federation for Antimonopoly Policy and Support to Entrepreneurship and the Fair Trade Commission of the Republic of Korea, Russ.-S. Korea, Dec. 7, 1999, *available at* http://www.fas.gov.ru/english/inetrnational/agreements/1573.shtml.

571. *See* CAA § 29(2).

572. Competition Comm'n of India [CCI], *Proposed Draft of (Combination) Regulations* (200_), reg. 55; Competition Comm'n of India [CCI] (General) Regulations, 2009 (No. 2 of 2009), May 21, 2009, art. 35, *available at* http://www.cci.gov.in/images/media/Regulations/general.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00.

573. *See* CAA § 29(3).

574. *See, e.g.*, Submission Regarding the Proposed Indian Mandatory Merger Notification Regime from the Antitrust Working Group of the International Bar Association, February 13, 2007, *available at* http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Antitrust_WkGp_Indian_Comp.aspx; Joint Comments of the American Bar Association's Secs. of Antitrust, Business, and International Law on Proposed Draft of the Competition Commission of India (Combination) Regulations (March 2008) [hereinafter ABA Joint Comments on India's Proposed Merger Regulations], *available at* http://www.abanet.org/antitrust/at-comments/2008/03-08/comments-india.pdf; Joint Comments of the American Bar Association's Sections of Antitrust Law, Business, and International Law on Implementing Regulations for and Amendments to the Merger Control Provisions of India's Competition (Amendment) Act 2007 (November 2007), *available at* http://www.abanet.org/antitrust/at-comments/2007/11-07/Comments-IndianCompetition.pdf.

575. *See, e.g.*, India's participation in the ICN, *infra* note 615 and accompanying text.

576. *See* AML art. 30.

577. *See id.*

578. *See* Measures on the Review of Concentration of Undertakings, *supra* note 69. MOFCOM may request information and documentation from government agencies, customers, suppliers, competitors and consumers. *Id.* art. 6. Moreover, MOFCOM may require a hearing, either on its own initiative or at the request of third parties, to which it may invite competitors, relevant experts, industry associations, and government agencies. *Id.* art. 7. It is unclear whether such hearings will be open to the public. During

There is no formal cooperation mechanism between MOFCOM and the competition agencies of other regimes.[579] However, during the drafting of the AML, there was extensive consultation between MOFCOM and other competition agencies in mature jurisdictions, including the E.U., Japan and the U.S.[580] This cooperation, or at least consultation, is likely to continue.[581]

### B. Comparative Analysis of Confidentiality and International Cooperation

In each of the BRIC regimes provision exists for the publication of information on the transaction but the degree of transparency greatly varies. At one end of the spectrum, Brazil publishes details of every filing regardless of whether substantive concerns arise as a result of the transaction; [582] at the other end of the spectrum, China publishes the decision only if remedies are imposed on the transaction or the transaction is prohibited.[583] Russia and India have found the middle ground, publishing details of the transaction only if the transaction requires a Phase 2 investigation.[584] This mid-spectrum approach should enable third parties to participate constructively in the review process and also protect confidential information and avoid incurring the additional cost of creating non-confidential versions of documentation where no substantive issue arises.

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its investigation of the *InBev/Anheuser-Busch* transaction, and after receipt of the filing, together with all supporting documentation from the parties, MOFCOM held several seminars, symposia, and public hearings to hear opinions and suggestions from third parties, including industry associations, local governments, and competitors. *See supra* note 12.

579. *See generally* AML.

580. *See, e.g.*, JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST AND INTERNATIONAL LAW AND PRACTICE ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (July 2003), *available at* http://www.abanet.org/antitrust/at-comments/2003/07-03/jointsubmission.pdf; JOINT SUBMISSION OF THE AMERICAN BAR ASSOCIATION'S SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW AND INTERNATIONAL LAW ON THE PROPOSED ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA (May 2005) [hereinafter ABA JOINT SUBMISSION ON CHINA'S PROPOSED ANTI-MONOPOLY LAW], *available at* http://www.abanet.org/antitrust/at-comments/2005/05-05/commentsprc2005wapp.pdf; JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON DRAFT FOR COMMENTS OF THE STATE COUNCIL REGULATIONS ON NOTIFICATIONS OF CONCENTRATIONS OF UNDERTAKINGS (April 2008), *available at* http://www.abanet.org/antitrust/at-comments/2008/04-08/comments-undertakingdraft.pdf; COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE GUIDELINES ON ANTITRUST FILINGS FOR MERGERS AND ACQUISITIONS OF DOMESTIC ENTERPRISES BY FOREIGN INVESTORS (March 2007), *available at* http://www.abanet.org/antitrust/at-comments/2007/03-07/comm-PRC.pdf.

581. *See e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 NATIONAL TRADE ESTIMATE REPORT—CHINA, *supra* note 402, at 32 (indicating that the relevant agencies in China have been willing to seek public comment on proposed implementing measures).

582. *See supra* notes 547–548 and accompanying text.

583. AML art. 30; *see also supra* note 576 and accompanying text.

584. LPC art. 33(3); CAA § 29(2); *see also supra* notes 560 and accompanying text (discussing Russia); *supra* note 571 and accompanying text (discussing India).

The agencies of each of the BRIC jurisdictions can and do contact the parties' customers during their investigations regarding whether the transaction is likely to harm competition.[585] Customers obviously have an interest in communicating to the agencies if a transaction is likely to result in higher prices, and obtaining the perspective of the customers can be an efficient short-cut for the agencies. Nonetheless, agencies should objectively assess negative responses from customers because complaining customers may have ulterior motives for giving such responses (e.g., a supplier may have raised prices recently for reasons unrelated to the transaction at hand).

Russia is the only BRIC regime to impose criminal sanctions on an individual who is responsible for publication of a party's confidential information.[586] A discussion of the merits of holding administrative employees criminally responsible for acts taken in the course of their duties is beyond the scope of this article, but suffice it to say that neither the U.S. nor the E.U. imposes similar sanctions.[587]

Both Brazil and Russia have concluded a number of antitrust cooperation agreements with a variety of other jurisdictions,[588] although India and China, which are newer regimes, have yet to do so. Moreover, it appears that there may be a growing trend toward cooperation and consultation between the antitrust agencies of the BRIC jurisdictions themselves.[589]

## IX. Judicial Review

### A. Opportunities for Appeal

Of the BRIC jurisdictions, only India has a specialist competition law court.[590] In China and Brazil, the initial appeal is to the administrative body that makes the initial decision, although there is provision for an appeal to the court thereafter.[591] In Russia, it is possible to appeal directly to the court.[592]

**1. Brazil.** Administrative appeals against CADE's decisions are submitted to the original panel of Commissioners and are rarely successful unless new evidence is presented.[593] The parties may petition for judicial

585. *See e.g.*, *supra* note 552 and accompanying text (discussing Brazil); *supra* note 578 and accompanying text (discussing China).

586. *See* LPC art. 26(2); *see also supra* note 558 and accompanying text.

587. *See* 15 U.S.C. § 18a(g)(1); *see generally* ECMR, *supra* note 230.

588. *See supra* notes 554-556 and accompanying text (discussing Brazil); *supra* notes 561-570 and accompanying text (discussing Russia).

589. *See, e.g.*, Joint Communique of the Meeting of the Heads of Competition Authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, and the People's Republic of China, BRIC International Competition Conference (Sept. 1, 2009), *available at* http://www.fas.gov.ru/english/inetrnational/agreements/26924.shtml.

590. *See* CAA § 53A.

591. *See* AML art. 53; GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 69.

592. *See* LPC art. 52.

593. *See* GETTING THE DEAL THROUGH: MERGER CONTROL 2010, *supra* note 110, at 69.

review of a CADE decision; grounds for review include new evidence not originally presented to the agency, evidence of procedural error, and evidence of the decision imposing unreasonable costs on the parties.[594]

Although the judicial process may take several years to produce a final outcome if challenged up to the Supreme Court, the parties will initially seek an injunction to suspend the effects of CADE's decision;[595] if unsuccessful, they likely will not proceed with the action.

2. **Russia.** FAS' decisions may be challenged in court in a civil law procedure within three months of issuance.[596] The failure of FAS to issue a decision within the requisite time period may also be challenged.

Each of the first three stages of the judicial review process (i.e., trial court, court of first appeal, and court of second appeal) takes approximately two months. A review by the Russian Supreme Court (which is highly unlikely) could take up to six months.

Significant delays in service can arise if one party to the proceedings is a non-Russian entity; if a party to the proceedings is incorporated in a jurisdiction that is party to the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters (1965),[597] the requirements for service may result in delays of up to six months at each level of review.

3. **India.** The Competition Appellate Tribunal (CAT), which is a three member quasi-judicial body, has jurisdiction to hear appeals against the directions and orders of the CCI.[598] Under the CAA, a party may appeal to the CAT against a decision within sixty days of communication of the decision or order of the CCI.[599] Appeals from the CAT are heard by the Supreme Court of India and must be filed within sixty days of the order of the CAT.[600]

4. **China.** In the first instance, parties must appeal to MOFCOM for "administrative reconsideration" within sixty days of becoming aware of MOFCOM's decision; this process will take sixty days, with a possible extension of thirty days in complex cases.[601] If not satisfied by the outcome of this procedure, the parties must bring an action to challenge MOFCOM's decision in a People's Court within fifteen days of the receipt

594. *See* Bruna, de Queiroz & Pinheiro da Silveira, *supra* note 314.

595. *See* Getting the Deal Through: Merger Control 2010, *supra* note 110, at 69–70.

596. LPC art. 52.

597. Hague Conference on Private International Law, *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, November 18, 1965, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=17.

598. *See* CAA § 53A.

599. *Id.* § 53B(2).

600. *Id.* § 53T.

601. AML art. 53; *see also* Administrative Reconsideration Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), arts. 9, 31 (1999), *available at* http://en.lg.gov.cn/en-web/ArticlePrint.aspx?artId=22755.

of MOFCOM's decision; this process may take up to two months.[602]

B. Comparative Analysis of Judicial Review

It is an oft-cited maxim that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[603] It is not immediately apparent that an appeal, as in Brazil and China, to the same members of the same body that issued the initial decision[604] fulfills this requirement. Nonetheless, this is an issue that also arises in some mature regimes[605] and both Brazil and China do provide for eventual judicial oversight.[606]

As a general matter, judicial review by a specialist court is preferable, as it allows the members of the judiciary to develop their expertise in an area of law that they might otherwise encounter only infrequently.[607] This will potentially act to improve the quality of the judgments handed down, thus adding valuable precedent to the jurisprudence of the jurisdiction.[608] Of the BRIC regimes, only India has such a specialist court.[609]

## X. Other

A. International Cooperation

International cooperation and communication between competition agencies are to be encouraged because they facilitate the exchange of knowledge and policy considerations, thus increasing the likelihood of convergence between the merger regimes of different jurisdictions.[610] Convergence is important because it increases efficiency, reducing both the parties' costs of compliance and the risk of an unwitting violation of the law.[611]

It is therefore encouraging that, in addition to the specific bilateral

602. Administrative Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., April 4, 1989, effective Oct. 1, 1990), arts. 58 and 60 (1990), *available at* http://www.asianlii.org/cn/legis/cen/laws/aplotproc536.

603. R v. Sussex, Ex parte McCarthy, [1924] 1 K.B. 256 at 259.

604. *See supra* note 593 and accompanying text (discussing Brazil); *supra* note 601 (discussing China).

605. For example, in the U.S., the Federal Trade Commission litigates the antitrust cases it elects to prosecute before its own administrative law judges and will hear any subsequent appeal itself.

606. *See supra* note 594 and accompanying text (discussing Brazil); *supra* note 602 (discussing China).

607. Edward Cazalet, *Specialised Courts: Are They a 'Quick Fix' or a Long-Term Improvement in the Quality of Justice?*, March 5, 2001, http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/SpecializedCourtsCazadet.pdf.

608. *Id.*

609. *See supra* note 590 and accompanying text.

610. *See e.g.*, BRIC International Competition Conference, *Conference and Its Tasks*, http://www.bric-competition.com/page.php?id=9.

611. *See* Galloway, *supra* note 167, at 183 (discussing the costs associated with multiple merger notifications and convergence).

agreements concluded by certain of the BRIC jurisdictions,[612] the BRIC regimes appear willing to actively participate in international fora to exchange ideas and policy considerations. For example, representatives from Brazil, Russia, and China attended the OECD Eighth Global Forum on Competition, which took place in February 2009 in France.[613] Representatives from each of the BRIC jurisdictions attended the twelfth session of the United Nations Conference on Trade and Development, which took place in Ghana in April 2008.[614]

Moreover, Brazil, Russia, and India are members of the ICN.[615] Although there were reports in 2008 that China would join the ICN before April 2009,[616] these predictions have yet to materialize. The ICN is an association of almost 100 competition agencies which encourages input from the private sector. It meets annually to develop best practices in competition regulation and is intended to provide a forum for countries at all stages of development to discuss practical competition enforcement and policy issues.[617]

## Conclusion

Notwithstanding the recent economic downturn, the BRIC economies will continue to increase in relative importance. Whether competition policy will play a significant role in that development remains to be seen. In this article we have sought to review both the substantive and procedural aspects of the four regimes. While there are, as is to be expected, differences between the competition law regimes in these jurisdictions, both in terms of the legislation passed and the institutional models employed, efficiency is asserted to be the underlying predicate for each. This is good, but how will this play out in reality?

Writing a conclusion at this juncture seems premature. India's legislation has yet to be fully implemented,[618] and Brazil is contemplating an extensive overhaul of its current regime.[619] Nonetheless, all four jurisdictions face similar challenges. Corruption, for example, is no stranger to

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612. *See supra* notes 554-556 and accompanying text (discussing Brazil); *supra* notes 561-570 and accompanying text (discussing Russia).

613. *See* OECD, *Eighth Global Forum on Competition, 19-20 February 2009, Paris (France)*, *available at* http://www.oecd.org/document/33/0,3343,en_40382599_40393105_41512929_1_1_1_1,00.html; *see also* OECD, *Seventh Global Forum on Competition, 21-22 February 2008, Paris (France)* (at which Russia, India and China made submissions), *available at* http://www.oecd.org/document/54/0,3343,?en_40382599_?40393105_40442550_1_1_1_1,00.html.

614. *See* United Nations, United Nations Conference on Trade and Development: List of Participants, U.N. Doc. TD/INF.41 (May 23, 2008), *available at* http://www.unctad.org/en/docs/tdinf41_en.pdf.

615. *See* ICN, Members, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx.

616. *China to Join Antitrust Network: U.K. Official*, Competition Law 360, April 14, 2008, *available at* http://www.law360.com/articles/52987.

617. ICN, About, http://www.internationalcompetitionnetwork.org/about.aspx.

618. *See supra* note 4 and accompanying text.

619. *See supra* note 30 and accompanying text.

any of these countries.[620] Will honesty and transparency characterize future competition enforcement? Industrial policy—if not complete "command and control"—has historically been central to the economies of each.[621] Will the exemptions that characterize each law (and which, in fairness, also characterize the law of more mature regimes) provide license for industrial policy to preempt competition? Will "national champions" have a receptive audience within the agencies? Will the relevant legislation be enforced impartially against domestic and foreign transactions and conduct?

Earlier we suggested gradations between the few truly effective competition enforcement regimes and the many competition drones whose principal function is to attend international meetings.[622] Where will each of the BRIC regimes find its place? Perhaps the Cornell Journal of International Law will convene another symposium ten years hence to answer this question.

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620. *See* Tomas Hult, *The BRIC Countries*, GLOBAL EDGE BUSINESS REVIEW, 2009, http://globaledge.msu.edu/newsAndViews/businessReviews/gBR%203-4.pdf.

621. *See generally* Patrizio Bianchi & Sandrine Labory, *From "Old" Industrial Policy to "New" Industrial Development Policies*, *in* INTERNATIONAL HANDBOOK ON INDUSTRIAL POLICY, at 3 (2006).

622. *See supra* note 19 and accompanying text.