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ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES

FEATURING **CHINA, INDIA, MEXICO, BRAZIL, SOUTH AFRICA…**

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Abstract of the Conference Program: Rapidly emerging economies such as China, India, Mexico, Brazil and South Africa are taking center stage in antitrust enforcement. Multinational firms must have regard to the competition systems of these and other developing nations when engaging in merger activity, collaborating with competitors, and pricing, distributing, and licensing their products. Competition authorities in countries at different stages of development are trying to meet the daunting challenges posed by public and private power, cronyism and privilege, and are trying to make their markets work for the good of their peoples. This program addressed the coming of age of developing countries' competition law systems, and what this means in law, policy and on-the-ground reality for entrepreneurs, consumers, "the people," and the world.

CONFERENCE SUMMARY

WELCOME

Trevor Morrison (*Dean, New York University School of Law*), and **Eleanor Fox** (*Professor, New York University School of Law*), opened the conference on Antitrust in Emerging and Developing Countries by inviting participants to view the day's topics through the lens of emerging and developing countries and firms seeking to do business in those countries. **Santiago Levy Algazi** (*Vice President for Sectors and Knowledge, Inter-American Development Bank, Washington, DC*), set the scene with his keynote address on the role of antitrust policy in promoting growth and development in emerging and developing countries.

KEYNOTE SPEECH

ANTITRUST POLICY IN EMERGING AND DEVELOPING COUNTRIES

Dr. Santiago Levy Algazi illustrated that development and long-term growth is about productivity rather than a country's labor force and capital investment by comparing South Korea and Latin America. In the 1970s through the 1990s, South Korea succeeded in narrowing the gap of per capita income with the United States, by increasing its level of productivity. Analyzing the same parameters in Latin America, despite high capital investments, a large labor force, and high rates of savings, per capita income in Latin America lagged behind the United States and South Korea. Dr. Levy identified low productivity as the reason behind the lack of economic growth and income disparity.

Economic models in the 1990s related productivity and GDP to the technology available to the economy and factors of production (including education, human capital, and the stock of capital goods available). Subsequent research added another factor to understanding economic growth and productivity – the environment. An enabling environment, described by Dr. Levy as the context in which economic activity takes place, plays a key role in increasing productivity. Aspects of environment include how workers and firms interact, labor regulation, social insurance, access to credit, tax policies, and competition and regulation in the markets for goods, services, and inputs. Environment is largely the factor dividing the developed countries and developing countries in terms of efficiently utilizing labor and capital. In his view, development is not about accumulating capital and educating workers. Instead, development depends on how a country constructs its competition policy and other institutions, how it regulates its workers, and how they interact in creating output.

Dr. Levy then demonstrated how the absence of competition policy in a country often will lead to monopolies – driving employment and productivity down – and in some cases will concentrate political power in the hands of a few. The concentration of economic and political power, in turn, can generate policies that are inefficient and anticompetitive. One example he provided was credit – where there is limited collateral, credit may be allocated to inefficient projects championed by the rich, whereas other efficient projects may go unfunded. Competition policy plays a key role in preventing this concentration of economic and political power and supports efficient markets and democracy.

Competition policy was identified by Dr. Levy as an important component of a development strategy for emerging and developing countries because of its impact on the environment. Its absence can limit productivity. A vigorous competition policy, on the other hand, can make the difference between "crony capitalism" and healthy institutions and markets.

MAKING MARKETS WORK
FOR DEVELOPMENT

This first session, Making Markets Work for Development, moderated by **Eleanor Fox** (*Professor, New York University School of Law),* began by exploring the obstacles to effective competition in developing countries and how effectively competition authorities addressed the main competition problems in their country.

Panel members agreed that competition law and policy is not a panacea for making markets work for development, but can be used as an instrument to maintain competition and promote a culture of competition. **Dennis Davis** (*President, South African Competition Appeal Court and Judge of the High Court of Cape Town; Professor, University of Cape Town*), emphasized the importance of historical legacy in shaping the design of South Africa's competition law, pointing to key characteristics of South Africa's economy: highly concentrated markets, significant barriers to entry, high concentration of ownership in large conglomerates and an absence of small and medium-sized enterprises, and historical and institutional inequality. Mr. Davis spoke about early cases in SA, including the monopolization of intermediate goods and cartels in essential products like bread and milk. Mr. Davis illustrated the significance of privatizing state owned enterprises, giving the example of SA's success story in the electric utilities market. He recalled that the ANC, after Nelson Mandela's release from prison, promoted nationalization as a means to grow the economy, but competition policy advocates led the ANC to change course and promote competition as part of a broader policy approach to address issues of inequality and economic development.

Tania Begazo Gomez (*Economist, Competition Policy Team Investment Climate, International Finance Corporation, World Bank, Washington, DC),* focused on obstacles to competition imposed by a regulatory framework, which may allow for a monopoly or few players in a market (facilitating coordination), or provide for exclusivity (e.g. limit licensing to attract investment). Other barriers to competition include policies that shield domestic industries from foreign competition and favor state owned enterprises. Ms. Gomez advocated for a reduction in government-created competitive barriers and restraints and increasing anti-cartel enforcement. Reducing overcharges, especially for food, can have a direct effect on poverty and inputs and impact the competitiveness of a country. She cited examples from her study of competition in Kenya where a 20% reduction in the price of sugar and maize could reduce poverty by nearly 2%.

R. Ian McEwin *(Khazanah Nasional Chair of the University of Malaya Malaysian Centre of Regulatory Studies, Kuala Lumpur, Visiting Professor of Law, Chulalongkorn University, Bangkok*), provided insights from a South East Asian perspective. Mr. McEwin asserted that the unique legal and cultural background of the region, including colonial legacies, authoritarian forms of government, and hierarchical societies, account for differences in competition policy, law, and enforcement. Mr. McEwin observed that competition agencies in developing countries can sometimes take on non-competition roles. They might, for

example, consider industrial policy issues, especially when there is not a clear champion for these issues in other parts of government. In such cases the competition agency is seen the vehicle to fill this void. Mr. McEwin cited difficulties involved in trying to understand South East Asian business systems and practices in terms of U.S. or Western models.

R. Shyam Khemani (*former Advisor, Competition Policy, World Bank Group, Washington, DC*), considers competition policy to be a blunt instrument. Mr. Khemani's remarks focused on the role of trade and investment liberalization to help develop competition, drawing on his experience at the World Bank. Countries can make policy changes to open markets, which can break the cycle of dominant domestic enterprises, weak markets, and vested interests. India's experience, after adopting economic policies of liberalization, privatization, and globalization in 1991, illustrates that such changes can have a large impact in infusing markets with competition. Mr. Khemani also discussed the importance of trade regulations and treaties, such as the NAFTA, which were instrumental in increasing competition in Canada, where it led to the failure of large, inefficient conglomerates that could not withstand competitive pressures.

André Marques Gilberto (*Partner, Chaves, Gelman, Machado, Gilberto e Barboza Sociedade de Advogados, São Paulo*), provided a Brazilian perspective, discussing the new competition law that came into force in May 2012, which addressed many of the problems identified with the previous law. Changes included consolidating enforcement power into one, rather than three, agencies, and changing from a post-closing to a pre-closing merger notification regime. While lauding the single agency for overcoming a lack of financial and human resources to be a respected enforcement agency, he also acknowledged its challenges in fostering competition and making markets work. Corruption remains a problem in Brazil. Mr. Marques Gilberto stated that competition, trade policies, and regulation need to work together to support competitive markets. Brazil's new Clean Company Act targets corruption, and it is a very stringent law, but has not yet received the federal decree required for its enactment.

The panelists discussed issues that business entities and multinational corporations face when doing business in developing countries. While certain competition agencies were lauded for following merger review timelines, there are remaining challenges related to merger review including: high filing fees, lack of merger notification thresholds, and demands for information beyond the scope of the merger and competition concerns.

CARTELS & OTHER CONCERTED PRACTICES: PROOF, EVIDENCE, PRESUMPTIONS, ENFORCEMENT

Frederic Jenny *(Chairman, OECD Competition Committee: Professor, ESSEC; President International Committee of Concurrences, Paris),* opened the panel by asking the speakers a set of questions, including whether cartels should be the top priority for developing countries, if they should apply the highest fines they can to deter cartels, or should they first educate people about illegal cartel behavior and develop leniency programs.

For **Percival Billimoria** *(Senior Partner, AZB & Partners, New Delhi)*, cartels should indeed be a priority in India. They are prevalent and legally easier to deal with than abuse of dominance cases. The fines imposed on them also make them effective advocacy vehicles to raise awareness of competition law in the formative years and stamp out cartels early on. However, dealing with cartels also requires a wider trade policy to open markets to competition, agency staff to investigate, as well as the police and bench on board to prosecute and punish cartels. In Mr. Billimoria's view, the leniency program has not been effective in India – with only one application so far. The process lacks clarity and there is no immunity from private damage actions, although he noted that no private cases had been brought. He stated that market regulations need to be clear. For example, many businesses in India grew up in an interdependent world and what to them is legitimate business conduct may be viewed as collusion by CCI. Guidance from the agency is important. Mr. Billimoria mentioned that the right to cross examination is on the horizon in India.

In South Africa, initially cartels were not a priority. The SA Competition Commission focused on mergers and abuse cases. **Simon Roberts** *(Professor, University of Johannesburg; Director, Centre for Competition, Regulation & Economic Development, Johannesburg),* explained that in 2006, when investigations in certain sectors were prioritized, cartels were uncovered, particularly in markets for intermediate inputs. Cartel enforcement became a priority and uncovering and preventing cartel behavior was important because it allowed for new entrants. Screens (i.e., rules applied to data in order to try to detect cartels) cannot alone prove the existence of a cartel. Additional evidence is needed. However, screens are useful tools to (i) identify cases that should be further investigated or closed; (ii) corroborate other evidence; and (iii) generate leniency applications by incentivizing weaker members of cartels to come forward. Roberts' views on fines have changed over time. Imposing fines at a high enough level to deter cartels would not find support from the judiciary and, moreover, the amount of the fines would be the focus of attention rather than the real value of competition. The agency must show the community that a competitive economy will benefit all by increasing growth and not lose focus by talking about high fines.

Agustín Ros *(Vice President, NERA, Boston/Mexico City),* remarked that even though the loss of welfare due to cartels is often higher than from monopolistic pricing, agency priorities may be a function of resources, with agencies focusing on mergers subject to statutory deadlines. Agencies must choose how to allocate any remaining resources between monopolization and cartel cases, as well as advocacy efforts to educate the community on

competition law. Under such constraints, agencies in developing countries should concentrate their resources on bid-rigging and public procurement cases – they are pervasive, impact the economy, disproportionately on those with lower incomes, and are easier to find evidence of collusion than other types of cartel conduct. Screens may also be a useful tool to detect cartels in developing economies, although they are insufficient to prove them. Screens should be used to identify cases that are easy to follow and would have a great impact in the media. Mr. Ros also noted the usefulness of leniency programs, although he remarked that those typically expose newer, unstable cartels, and risk distracting from established, deep rooted, cartels.

Stephen Harris *(Partner, Winston & Strawn, Washington, DC)*, remarked that, in China, cartels are difficult to prosecute, as a vast portion of the economy is State-owned and cartels are often organized under State supervision. Many cartel cases in developing and emerging countries are brought after receiving leniency applicants or as follow-on cases after other jurisdictions have conducted an investigation. Enforcement is slowed down by lack of agency resources as well as discretionary use of leniency and amnesty, different interpretations of leniency (which is applicable to any violation of the law, not only cartels) by the various competition agencies, and limited use of screens. At the same time, there is a surprising amount of private enforcement in China. Mr. Harris emphasized the need for due process as a way to build trust in the system. According to Mr. Harris, the following principles should be universal with respect to due process: (i) transparency, including notification of the theories of harm and opportunity for meaningful dialogue with the agency; (ii) independent review (with different prosecutorial and adjudication functions as well as an independent Judiciary); (iii) non-discrimination; (iv) accountability (written decisions); (v) capacity (necessary resources for investigators); and (vi) strong anti-corruption enforcement.

For **George Paul** *(Partner, White & Case, Washington, DC)*, global cartels should not be the priority of emerging economies. The proliferation of leniency programs has created strong incentives to over-report cartels, both in terms of reporting cartels throughout production chains in an industry and in grey areas where companies may be unsure of whether or not there is any cartel behavior. This may include reports about potentially efficient exchanges of information. Mr. Paul urges developing countries to focus on domestic cartels first and do so carefully so as not to challenge innocent conduct. He raised concerns related to extraterritorial application of antitrust laws (with criminal and civil sanctions varying around the globe) and the exchange of confidential information (e.g., long depositions of executives without the presence of the lawyer, and the possible use of these depositions as evidence in other jurisdictions). With limited resources, it is often wasteful to spend time responding to requests for information in a global cartel. Instead, competition agencies in developing countries should focus on the cases that matter to them in their basic industries, looking for markets with standardized products, loyal customers, and significant market share, and should pursue sectorial inquiries where it is easier to find cartels (e.g. cement and food sectors). Mr. Paul disagreed with the use of screens to identify cartels and proposed screens only to screen out big cases.

In a lunchtime keynote address, **William E. Kovacic** (*Professor, George Washington University, Washington, DC*) unveiled the results of a global benchmarking survey on the design of competition systems.

The survey, carried out by the George Washington Competition Law Center, with the help of ICN, OECD, and UNCTAD, culls the learning of the past two decades, which witnessed an explosive growth in the number of competition agencies worldwide. The emergence of so many new regimes raises two questions: What should the substantive law prohibit? How should we enforce it? While much progress has been made on the first question, the answers to the second question remain evasive. The survey is an important inquiry into possible solutions.

The survey aims to map out the different design trends, to formulate qualitative observations, and to extract policy implications from the data. The results will benefit both legislators, to inform their policy choices, and agencies, to help them identify similarly-situated peers.

Without advocating a particular model, the survey studies a wide array of design characteristics, including independence, accountability, and governance. Should the competition agency be a standalone body or part of a larger entity? What are its policy assignments and the portfolio of instruments? How is decision-making carried out? What are the protections for due process?

Professor Kovacic's keynote addressed three design characteristics: assigning policy responsibilities, governance, and the integration or unbundling of decision-making.

On policy responsibilities, Professor Kovacic shared the result that today nearly half of the competition agencies have a broader remit than competition enforcement and policy. Agencies are often responsible for consumer protection, public procurement, price regulation, or aspects of sector regulation. The combination of objectives may be efficient when they are complementary and the agency can enjoy economies of scope and scale. But, Professor Kovacic cautioned, they also can create challenges. First, as more tasks are added, it becomes more difficult for agencies to brand themselves and to explain their responsibilities to stakeholders. There is a risk that agencies become schizophrenic or waste resources in trying to develop a coherent line of enforcement despite contradictions. Second, when more competences are added to a competition agency's portfolio, they rarely come with an equivalent increase in budget, and thus stretch the agency's already limited resources. Limited resources then impact agency priorities.

On governance, Professor Kovacic reported that two thirds of the world's competition agencies are governed by a multi-member board. This type of structure often gives rise to competing interests between the chair and non-chair members. Professor Kovacic compared these boards with a group in a car. Passengers often give driving advice, but situations can become dangerous if they try to grab the wheel in moving traffic. Frustration among non-chair members can build up and give rise to inefficient outcomes. Similarly, different members of the board may send different messages to the media and other stakeholders.

These mixed messages run the risk of contradictions and of blurring the agency's message on a particular topic. Professor Kovacic also expressed his concern on the capability issue, particularly for agencies with multiple jurisdictions. If the portfolio is too diverse, it becomes difficult to find board members with sufficient expertise in each competence area. One risk of this is that a reviewing court might cast doubt on the reliability of the board's decision and the deference it should have for it.

Professor Kovacic shared the striking survey result that about 80% of all agencies bundle the investigative, prosecutorial, and decision-making tasks. Within that group, there are a striking number of mechanisms to ensure due process, which the study maps out. Professor Kovacic emphasized the importance of due process in ensuring quality control. The system, Professor Kovacic argued, should test the evidence in a rigorous way to come to a correct result. This has a strong legitimacy effect, as society respects the agency that comes to a correct solution. Integrated agencies often realize that the concerns about the lack of due process in their structure will remain, and seek to address these concerns by dedicating significant resources to install mechanisms to promote fairness. The current trend is towards more disclosure of the reasoning of enforcement decisions, more speeches, more guidelines, and more willingness to engage in discussion.

The George Washington Competition Law Center will aim to publish an annual report updating the study results in the Journal of Antitrust Enforcement. Meanwhile, the raw results are publicly available at the Center's webpage, www.gwclc.com .

The next step is for agencies to use the study to talk to each other. Boards should meet other boards to discuss their experiences; new chairs should meet veteran chairs and learn what they wish they had known from day one.

DOMINANCE AND ABUSE:
WHAT'S THE PROBLEM?
WHAT ARE THE REMEDIES?

Harry First (*Professor, New York University School of Law),* introduced this panel by posing questions derived from the previous panels: What is the link, if any, between competition law and policy, on one hand, and development, on the other? Should competition law be limited to the classic antitrust goals? Professor First observed that abuse of dominance is the area of competition law where there is less convergence, with different views and approaches toward certain business practices. He opened the panel discussion by asking the speakers to identify the critical issues related to investigating abuses of dominance.

Geeta Gouri (*Former Commissioner, Competition Commission of India (CCI), New Delhi*), explained that some of the key issues considered by the CCI were developing the public's and government official's understanding of the goals and benefits of competition and market definition, which applies across cases - How should potential entrants be viewed? How are the geographic boundaries of a virtual market to be defined? How should after-markets be analyzed? What happens when the firms under investigation are dominant internationally? Ms. Gouri explained that India does not use a market share threshold in deciding dominance; rather, India considers a range of factors set out in the Competition Act. She was appreciative of the cooperation extended by other competition authorities, finding the experience of the U.S. agencies and the EU helpful in addressing challenges of the competition law in India. However, she pointed out that every competition authority ultimately is responsible for applying its own law and arriving at its own decisions.

Mariana Tavares de Araujo *(Senior Partner, Levy & Salomão Advogados, Rio de Janeiro),* identified difficulties in distinguishing lawful unilateral conduct from unlawful behavior and the consequences of decisions. The same conduct can have pro- or anti- competitive effects and unpredictable enforcement can have a negative effect on business and consumers. She noted that convergence toward internationally recommended best practices is useful in helping agencies find the right balance, predictably enforcing abuse of dominance laws without over-enforcement. Ms. Tavares de Araujo explained that Brazilian competition law has a dominance presumption with a low threshold of 20% market share. In practice, the threshold has worked as a safe harbor. When firms have shares above the threshold, challenged conduct is analyzed using a rule of reason approach.

From the perspective of **Simon Roberts** (*Professor, University of Johannesburg; Director, Centre for Competition, Regulation & Economic Development, Johannesburg*), informed divergence is most important in the unilateral conduct area. There is a need to question applicability of the perspective taken from the international debate, which is based on the experience of developed economies. It may be hard for developed country experts to conceive of an economy composed of firms with 80 to 95% of a market, entrenched over decades; historically state-owned or supported; but this is the landscape in South Africa and many developing economies. In these economies, the balance between under- and over-

enforcement should not be struck as it is in the United States. The structure of the markets requires more intervention. Roberts pointed out that South Africa has been very successful in enforcing merger and cartel provisions of the law, but less so in abuse of dominance cases. Compounding the problem of entrenched monopoly, the agency's power to investigate is restricted. Due to flawed wording in the law, if the situation does not fit a specific statutory prohibition, the Commission cannot investigate even if there is harm to competition. Roberts noted that, under the South African statute, dominance is presumed when a firm has more than a 45% market share, but typically the shares are much higher. The Competition Commission draws inferences from durable, high shares; but it applies an effects-based approach when analyzing conduct.

Frank Fine (*Executive Director, China Institute of International, Antitrust and Investment, Beijing*), pointed out that there are significant challenges in the enforcement of competition law in China. Chinese Anti-monopoly Law (AML) seeks to find a balance between a market economy and the formerly state-run economy. The AML does not insulate state owned enterprises (SOEs) from its reach, and Mr. Fine mentioned two cases involving abuse of dominance brought against SOEs. He rebutted contentions that the Chinese authorities discriminate against foreign firms in the application of its competition law, citing statistics showing that more than 50% of investigations are against Chinese companies. With regard to the analysis of abuse of dominance, Mr. Fine pointed out that Chinese law looks at abuse of dominance in a similar way to EU law. A market share of 50% is required for a showing of prima facie dominance. However, the analysis does not start or end with an assessment of market share.

MERGERS: THINKING LOCALLY AND GLOBALLY

This panel, moderated by **Daniel Rubinfeld** (*Professor, New York University School of Law*), explored merger review in China, Brazil, and South Africa, and the role of economics in merger analysis and remedies. Panelists discussed challenges faced by developing countries while analyzing multinational mergers that may harm domestic competition and the issue of whether and how to incorporate public interest factors in merger assessment.

Alessandro Octaviani (*Former Commissioner, Administrative Council for Economic Defense, Brasilia; Professor, University of São Paulo Law School*), opened the discussion by identifying how the location of assets and likely competitive effects helps Brazil's antitrust agency prioritize merger review and anticipate the potential for international cooperation. Mr. Octaviani suggested that competition policy could be improved and implemented more effectively to address the economic power of the financial sector, encourage technological innovation, and support the democratization of economic development. He also suggested that competition policy could support developing capabilities and public service policies as part of a humbler and more generous policy. He stressed that economics is not an exact science, and that a critical and cautious review of economic analysis is essential, especially when economic tests are used predictively in merger analysis.

Huang Yong (*Professor, University of International Business & Economics School of Law, Beijing*), reported that the Anti-Monopoly Bureau (AMB) under MOFCOM has successfully reviewed more than 900 cases within 6 years with only 30 staff members. Professor Huang explained that the new fast track procedures allow the AMB to efficiently and quickly review simple merger cases. On the question about differing economic theories and its impact on merger review, he commented that most economists in China were trained in the Marxist tradition, and others have learned western industrial economics in the past decades. He added that even though economists take the best of both traditions and work well with one another, they face challenges when data necessary to run models is lacking and that guidance in the assessment of efficiencies would be helpful, as it is currently referenced in just one sentence of the law. MOFCOM is perceived as having a higher percentage of behavioral remedies than other jurisdictions. Outsiders have questioned the role of a permanent or long-term hold-separate agreement as a remedy, but its use allows closing a merger that may otherwise be blocked. The agency is paying more attention to economic analysis and looking to the future, he emphasized that economic analysis will play a more and more important role, but that for now there are only two economists working for the AMB.

Dennis Davis (*President, South African Competition Appeal Court and Judge of the High Court of Cape Town; Professor, University of Cape Town*), took issue with suggestions that public interest should play no part in competition law and particularly that it should play no part in the merger law of developing countries with extreme inequality of wealth. He stated that free market policies are skewed against developing countries, and worried that inequality is exacerbated by multinational takeovers that entrench global value chains, take most of the gains for themselves, and harm the social welfare of small business and workers in the host nation. Mr. Davis noted that under South African competition law a merger can be refused or remedied based on certain key public interest considerations that reflect the country's history, such as loss of employment, the impact on small and middle sized suppliers, and the impact

on historically disadvantaged persons. He gave the example of the *Walmart* case. Walmart's acquisition of a 51% interest in Massmart did not raise competition concerns; Walmart was not previously present in South Africa and evidence indicated that the transaction was likely to lower prices for consumers, but it could harm small suppliers and employment. Mr. Davis also identified problems caused by the adversarial system such as lengthy legal proceedings and trial records that must be reviewed if the case is appealed. He suggested that an inquisitorial procedure may lead to clearer records and more efficient resolution of merger cases on appeal.

Elizabeth Xiao-Ru Wang (*Principal, CRA, Boston*), discussed how economic analysis is used in merger review by MOFCOM, and the challenges faced by the agency. Ms. Wang identified three issues. First, at an early stage of review, it is crucial that MOFCOM incorporate an economic analysis into the review process, and that the agency is constrained by having only two PhD-level economists. This shortage of experts has forced the authorities to use outside economic experts, especially in complex cases. Second, many markets in China do not have detailed, reliable data that economists could rely on when creating models. For example, scanner data is not available for products sold in markets or in small shops. And lastly, there are challenges related to history and culture especially in the case of China where historically there has been an absence of competition in the markets. She also noted that there is a lack of communication between the parties and agency staff, and many business people have a mindset based on their experiences operating in a planned economy in which they did not set their own prices or quantity produced. This, she observed, contributes to a lack of competition culture.

George Cary (*Partner, Cleary Gottlieb Steen & Hamilton, Washington, DC*), talked about the increasing complexity of merger control due to the proliferation of national regimes and identified some concerns about how the international system can minimize costs and maximize the benefits of international mergers. Mergers benefit consumers and the public in general by increasing economic growth and development. He opined that merger review should be applied to ensure that these benefits, including opportunities for entrepreneurship and innovation, are not prevented or deterred. Mr. Cary stated that merger reviews based solely on competition concerns yield the most benefits for consumers because they allow transactions that are likely to lead to lower prices. He argued against bundling industrial policies with antitrust principles, whether in developed or developing countries. He advocated for more competition and less protectionism to benefit for the global economy.

COORDINATION & COOPERATION WITH DEVELOPING COUNTRIES

The closing panel, moderated by **Eleanor Fox** (*Professor, New York University School of Law*), explored coordination and cooperation between competition agencies in developed and developing countries, and among competition agencies in developing countries. Professor Fox asked panelists to consider: Does coordination help to avoid conflicts, to increase coherence in competition policy approaches around the world, and to move developing country's competition enforcement procedures closer to those used in more developed countries? What is the goal and end game of cooperation, and does the outreach by the developed world correspond to the needs of the developing world?

Blanca Galindo Rodriguez (*Head of the International Relations Unit, Directorate-General for Competition (DG-Comp), European Commission, Brussels*), noted the rising number of new competition authorities and regimes in the last 15 years. This rise is reflected in the increase of International Competition Network (ICN) members and the number of cases on which DG-Comp cooperated with other competition agencies. A survey of DG-Comp cases showed that 60% involved review by more than just the European Commission, including a large number of competition agencies in developing countries. DG-Comp also works with agencies in developing countries to build competition enforcement capacity. In her view, agencies coordinate their reviews to promote the legitimacy of competition law and policy, and support competition law enforcement that encourages procompetitive business activity. Cooperation with developing countries involves two stages, initially supporting the implementation of a competition regime and later on, sharing experiences and supporting enforcement. The key to effective cooperation is to tailor the assistance provided to the needs of the country.

Randolph W. Tritell (*Director, Office of International Affairs, Federal Trade Commission (FTC), Washington, DC*), praised the spread of competition law. Although it is easy to focus on the problems, widespread adoption of competition laws is a net plus for consumers, businesses, and economic growth. These benefits, however, may be outweighed if competition laws are not properly applied or managed correctly. The challenges posed by more than 120 agencies and competition laws can be addressed best, and arguably only, by increased cooperation and soft convergence, which must include developing countries. International cooperation has been facilitated by a variety of written agreements, which were first used defensively to avoid conflicts, but have expanded to include policy and other cooperation. The U.S. has signed bilateral agreements with agencies in emerging markets, including with China, Colombia, and India. The multilateral OECD Recommendation concerning international cooperation on competition investigations and proceedings includes all OECD members, and it invites non-OECD members to follow the Recommendation.

Today, international cooperation helps avoid conflicting outcomes, furthers mutual understanding of different systems and approaches, and allows staffs to share good practices, and achieve broader policy objectives. Mr. Tritell concluded by saying that The FTC places a high priority on broadening and deepening cooperation through formal and informal arrangements, and on fostering convergence through technical assistance and multilateral organizations.

Kiran Nandinee Meetarbhan (*Executive Director, Competition Commission of Mauritius (CCM), Port Louis*), gave a point of view from a young competition regime in a small developing island. Mauritius has a high GDP and high competitiveness rankings, and, despite being only 5-years old, competition policy developed quickly. The CCM cooperates with similar jurisdictions regionally and has had many interactions with developed countries around the world. Cooperation has mainly focused on technical assistance, and more experienced competition agencies have trained CCM staff on a variety of topics and hosted CCM staff to work in sister agencies. Cooperation has helped CCM overcome constraints of limited technical and human resources, a challenge faced by almost all competition authorities. Regional cooperation is especially important for competition agencies in developing countries, since neighboring countries are likely to have many similarities in history, in educational and governmental systems, and in market structures. Moreover, convergence, for example, in the form of common objectives at a regional level, may not be the best solution for developing countries, since they may have their own specificities (i.e. different legal systems and policy goals) and it could have a negative impact on their economies. According to Ms. Metarbhan, cooperation is the best way forward.

CONCLUDING REMARKS

Professor Fox concluded the day by reiterating the conference's goal of encouraging participants to look at competition law and policy from a different perspective – through the lens of the various developing countries, rooted in their context, history, and political economy. There were many areas of agreement – including acknowledgement that each country has its own specificities that drive its competition policy choices and one area Professor Fox contends in which there are different viewpoints – on developing countries' needs to put distributional value into their competition systems.

Editors
Cynthia Lagdameo, Counsel for International Antitrust, U.S. Federal Trade Commission, Special Rapporteur
Molly Askin, Counsel for International Antitrust, U.S. Federal Trade Commission
Sindhu Kandachar Suresh, consultant, Office of International Affairs, U.S. Federal Trade Commission
Fabriciou Almeida, consultant, Office of International Affairs, U.S. Federal Trade Commission

Assistant Rapporteurs
Natalia Arango Botero
Noga Blickstein
Luis Claudio Nagalli Guedes de Camargo
Andrea Carlón
Nirmalee De Mel
Marta Elisa de Sousa Carmo
Masahiro Heike
Abhay Joshi
Tomas Kubick
Elia Maria Naranjo
Osarugue Courage Obayuwana
Marta Palacin Guarné
Paloma Szerman
Shuyue Tan
Rugeradh Tungsupakul
Geoffroy van de Walle de Ghelcke