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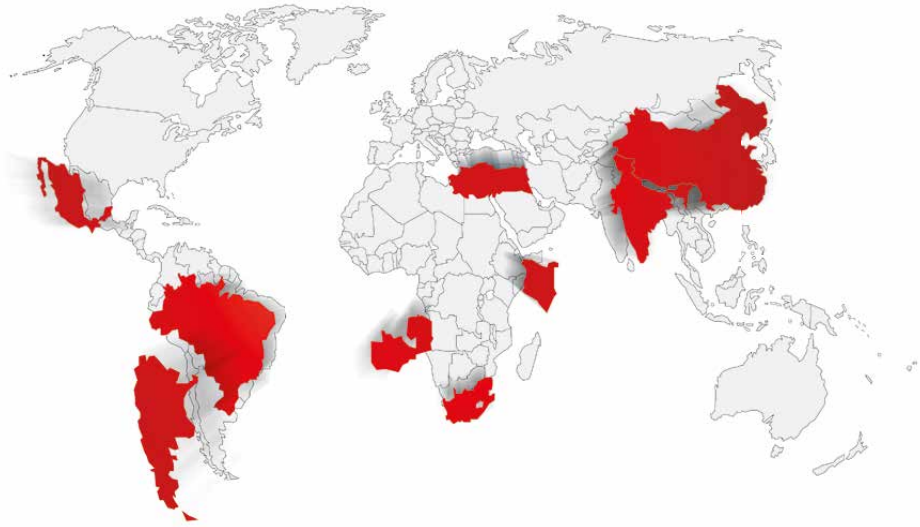

COMPETITION AND GLOBALIZATION IN DEVELOPING ECONOMIES

New York, October 28, 2016 | 3rd Annual Conference – New York University

PROGRAM

8:00 am REGISTRATION & BREAKFAST

8:30 am WELCOME REMARKS

Trevor W. MORRISON | Dean, New York University School of Law

INTRODUCTORY REMARKS

Eleanor M. FOX | Professor, New York University School of Law

8:45 am OPENING KEYNOTE

THE PLACE OF COMPETITION AND DEVELOPMENT IN THE GLOBAL TRADE AND ECONOMIC ARCHITECTURE

Jonathan FRIED | Ambassador and Permanent Representative of Canada, World Trade Organization, Geneva

9:15 am **GLOBALIZATION AND THE RISE OF REGIONALISM:** TPP, ASEAN, COMESA, MINT AND COHERENCE IN THE WORLD

Tembinkosi BONAKELE | Commissioner, South Africa Competition Commission, Pretoria

Gönenç GÜRKAYNAK | Managing Partner, ELIG, Attorneys-at-Law, Istanbul

R. Ian McEWIN | Managing Partner, Competition Consulting Asia, Singapore | Arndt-Corden Dept of Economics, ANU

Randolph W. TRITELL | Director, Office of International Affairs, FTC, Washington, DC

Moderator: **Eleanor M. FOX** | *Professor, New York University School of Law*

10:45 am Coffee Break

11:00 am **PRICING AND DEVELOPMENT ISSUES:** EXPLOITATION AND COLLUSION

Dennis DAVIS | President, South African Competition Appeal Court, Cape Town

Assimakis KOMNINOS | Partner, White & Case, Brussels

Janusz ORDOVER | Senior Consultant, Compass Lexecon, New York

Alvaro RAMOS | Head, Global Antitrust, Qualcomm, San Diego

Moderator: **Harry FIRST** | *Professor, New York University School of Law*

12:30 pm LUNCH KEYNOTE

Dennis DAVIS | President, South African Competition Appeal Court, Cape Town

1:30 pm **MERGERS:** ANATOMY OF A CLEARANCE IN YOUNGER JURISDICTIONS

Alejandro CASTAÑEDA SABIDO | Commissioner, COFECE, Mexico City

Sabine CHALMERS | Chief Legal & Corporate Affairs Officer, Anheuser-Busch InBev, New York

Vani CHETTY | Partner, Baker & McKenzie, Johannesburg

George LIPIMILE | Director, COMESA Competition Commission, Lusaka

Jonathan NYSTROM | Executive Director, Ernst & Young, Washington, DC

Moderator: **Frédéric JENNY** | *Chairman, OECD Competition Committee, Paris*

3:20 pm Coffee Break

3:30 pm **INNOVATION AND DEVELOPMENT:** LICENSING AND ANTITRUST/IP RULES AND GUIDELINES

Jay JURATA | Partner, Orrick, Herrington & Sutcliffe, Washington, DC

Dina KALLAY | Director, Intellectual Property & Competition, Ericsson, Washington, DC

Christopher MEYERS | Associate General Counsel, Microsoft, Redmond

Susan NING | Partner, King & Wood Mallesons, Beijing

Moderator: **Daniel RUBINFELD** | *Professor, New York University School of Law*

5:00 pm **ENFORCERS' ROUNDTABLE:** WHAT'S UNDER THE RADAR?

Tembinkosi BONAKELE | Commissioner, South Africa Competition Commission, Pretoria

Alejandro CASTAÑEDA SABIDO | Commissioner, COFECE, Mexico City

George LIPIMILE | Director, COMESA Competition Commission, Lusaka

Pablo TREVISÁN | Commissioner, Argentine Competition Commission, Buenos Aires

Moderator: **William E. KOVACIC** | *Non-Executive Director, Competition and Markets Authority, London*

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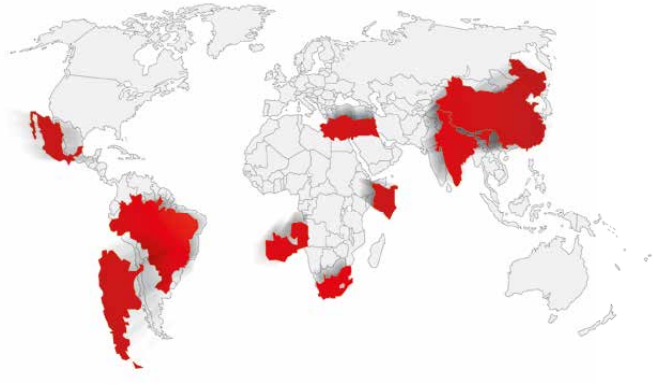

FOREWORD

The 3rd edition of the conference focusing on emerging and developing economies, organized by Concurrences Review in partnership with New York University School of Law, was attended by more than 110 people on October 28, 2016 at the NYU School of Law's Greenberg Lounge. Attendees encompassed enforcers, academics, economists, attorneys, and students that engaged in a lively debate about competition and globalization and what they mean for developing economies' competition law systems.

In the last several years, developing countries have acquired a high profile in the world of antitrust. Issues of context, resources, institutions and state of development present challenges to the newer authorities in making their markets work. Competition law enforcement presents cross-border business risks and counseling opportunities. The issues of competition policy in the context of various stages of development have been under-explored in the antitrust world in spite of their increasing relevance. The program aspired to bridge the gap and help policy makers and practitioners keep pace with the new reality. In the opening keynote speech, Jonathan Fried – World Trade Organization – underlined how trade liberalization and market opening are keys to reach Sustainable Development Goals. In the second keynote speech of the day, Dennis Davis – South African Competition Appeal Court – discussed the relationship among economic growth, inequality, and the role of competition law and regulation. Five panels gathered 22 prominent speakers representing 10 jurisdictions yielding a unique platform to address the issues of special importance in emerging economies.

We would like to thank the panel sponsors – Baker & McKenzie, Compass Lexecon, Ernst & Young, ELIG, Attorneys-at-Law, King & Wood Mallesons, Orrick, Herrington & Sutcliffe, Qualcomm, and White & Case – and our media sponsor – PaRR-Global – who helped make this event such a success from both scholarship and networking perspectives.

We hope to see you for the next edition of this conference. Meanwhile, we invite you to review the highlights from the 2016 conference, as set out in this booklet. ■

Nicolas Charbit
The Editor
Concurrences Review

Harry First
Charles L. Denison Professor of Law
Co-Director, Competition, Innovation, and Information Law Program
New York University School of Law

Eleanor Fox
Walter J. Derenberg
Professor of Trade Regulation
New York University School of Law

Elisa Ramundo
Managing Editor
Concurrences Review

CONFERENCE SUMMARY

New York University School of Law and Concurrences Review hosted the 3rd Edition of the conference "Competition and Globalization in Developing Economies" at NYU School of Law in New York City on Friday, October 28, 2016. Trevor W. Morrison (Dean, New York University School of Law) welcomed over 110 participants from 21 jurisdictions to the conference, which featured the law, practice, and policy in several of the most antitrust prominent developing nations, including China, India, Argentina, Mexico, and South Africa.

OPENING KEYNOTE SPEECH
JONATHAN FRIED

THE PLACE OF COMPETITION AND DEVELOPMENT IN THE GLOBAL TRADE AND ECONOMIC ARCHITECTURE

The conference opened with a keynote delivered by **Jonathan Fried** *(Ambassador and Permanent Representative of Canada, World Trade Organization, Geneva)* regarding the place of competition and development in global trade and the global economic architecture more generally.

Mr. Fried laid out the background of his speech by introducing the 2030 Agenda for Sustainable Development (Sustainable Development Goals, also known as SDGs), adopted by the UN General Assembly last year. The Agenda defines sustainability not only in environmental terms, but also with regard to economic and social dimensions. Trade liberalization and market opening were not identified as targets or goals, Mr. Fried noted, but rather as key means towards achieving other goals. While "trade" is mentioned 19 different times in the SDG action plan, the word "competition" is absent. Bringing trade and competition together in the name of sustainable development, Mr. Fried delivered three main messages.

First, Mr. Fried asserted, trade consistent with SDGs has to be aligned with sound economic regulation that enables trade and investment to occur. He argued that trade should be seen as an enhancer, or catalyst, for economic growth, and not a panacea. To achieve consistent development, especially for developing countries, creating and sustaining a sound economic environment is essential.

He recounted the achievement of the WTO in reducing tariffs and other impediments that prevented cross border trade, such as quantitative restriction through GATT. Increasingly, international agreements have been endorsed to tear down non-tariff barriers and ensure a minimum level of IP protection. Mr. Fried also emphasized that the WTO has used dispute settlement effectively to maintain these rules. However, while the evidence is clear that countries open to trade and investment achieve higher growth and at a faster pace than those which have been less open, Mr. Fried expressed concern. Trade growth is slower than the global GDP increase for the first time in 15 years, with lack of demand as the alleged cause.

In order to increase consumer demand, countries have to provide people with jobs and build confidence for consumers to participate in the global economy. Mr. Fried argued that for trade to serve as an accelerator for growth, open trade policies must be accompanied by sound domestic regulation that creates and maintains an enabling environment for business to grow. Policy makers must establish domestically (1) the rule of law that gives business the transparency, certainty, and predictability to invest and create jobs; (2) sound macroeconomic policies that provide currency stability accompanied by fiscal policies to budget properly; and (3) well-structured regulation on four key sectors that enable trade development: banking, telecommunications, transportation, and energy industries.

Mr. Fried next introduced his second message: competition law is a key element among a range of domestic economic regulations necessary to create a fertile trade environment, and therefore, is an important contributor to achieving SDGs. A competition regime, especially if robust and effective, levels the playing field for all actors in a market economy. Mr. Fried recognized that developing countries have an acute need to shift away from vested interests in established elites and towards an emphasis on consumer welfare. Consumers in developing countries are particularly vulnerable to cartels and abuses of monopoly power. Mr. Fried observed that competition policy has both offensive and defensive roles to play in protecting these consumers. Competition enforcement guards against cartels and abuses of market dominances that characterize many emerging market economies, and creates competitive market conditions necessary for growth. He urges that international assistance and domestic development plans must encompass the strengthening of competition laws and the capacity to administer them as a central element of sustainable growth strategies.

Finally, Mr. Fried proposed that there is more that can be done to better integrate trade and competition perspectives in the name of sustainable development. He noted that while the trade and competition law communities largely work independently of each other, they share much common ground. Both regimes are predicated on the theory that free and fair competition results in the best allocation of resources. Both seek to ensure that commercial actors benefit from a level playing field. Admittedly, there are important differences. Mr. Fried pointed out that trade deals aim to restrain government from intervention, while antitrust focuses on economic sectors and empowers governments to intervene. He then illustrated how competition and trade law disciplines intersect in a substantive way in four areas: state capitalism and attempts to address the competition challenges posed by State-Owned Enterprises (SOEs), the treatment of telecommunications at the WTO, government procurement, and questions regarding the WTO principles of non-discrimination as applied to prosecutorial discretion in antitrust. According to Mr. Fried, these subjects underscore the commonality of purpose of these two regimes and highlight the potential for synergies.

Mr. Fried concluded his speech by returning to the development dimension. Mr. Fried urged sequencing capacity building with bringing developing countries into international frameworks while taking into account the needs of developing countries. He called for better coordination between bilateral donors and recipients, and for the WTO, UNCTAD, OECD, and ICN to promote more comprehensive and coherent economic reform in the spirit of the Sustainable Development Goals. ■

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PANEL 1

GLOBALIZATION AND THE RISE OF REGIONALISM: TPP, ASEAN, COMESA, MINT AND COHERENCE IN THE WORLD

The first panel, moderated by **Eleanor M. Fox** *(Professor, New York University School of Law)* explored the rising trend of regional trade arrangements among developing countries. Professor Fox asked panelists to consider the following questions: Does regionalism help advance competition policies? What drives countries to form regional arrangements? Is regionalism a meaningful response to globalization?

Randolph W. Tritell (Director, Office of International Affairs, Federal Trade Commission, Washington, DC) set the stage for the panel discussion by distinguishing among three types of regional arrangements, each with their own characteristics and experience: (i) voluntary regional associations of competition agencies; (ii) regional groupings of nations at the government level; and (iii) free trade agreements with competition provisions. According to Mr. Tritell, the first type of arrangement, exemplified by the African Competition Forum, can be a valuable platform for experience sharing, cooperation, and technical assistance among younger agencies, particularly among countries with cultural, political, and economic commonalities. These kinds of regional arrangements can catalyze the maturation of younger agencies as they adopt good practices and avoid the mistakes of their neighbors.

The foremost example of the second type of arrangement is the EU, although there are now numerous regional groupings (for example, the Andean Pact, CARICOM, and ASEAN). These groupings are not motivated primarily by competition policy. Apart from the EU, indeed, most either have no competition system or a weakly functioning one. Little cooperation is also a reality. Mr. Tritell suggested that regional groupings probably work best and are more successful in adopting a common competition policy when member countries also have meaningful economic integration, as in the EU.

The third, now common, type of arrangement often requires trading countries to enact competition laws and typically provides for basic aspects of competition regimes. Although general and, at least in the case of US FTAs, not enforceable through dispute settlement mechanisms, they contribute to a body of international soft law by affirming high-level competition principles such as a goal of consumer welfare and encouraging cooperation and procedural fairness. There are some downsides, however, including poor implementation, when countries that are either unprepared or unwilling to enact competition laws are compelled to do so.

All forms of regionalism can be a stepping stone to convergence with international norms. According to Mr. Tritell, convergence is most likely to come to fruition when initiated by competition agencies rather than imposed through supranational political arrangements or trade agreements. Mr. Tritell closed with a pitch for soft convergence through international bodies, such at the International Competition Network, which has achieved consensus across many areas of competition law on not only basic principles but also on some sophisticated and seemingly contentious issues in the areas of cartels, mergers, unilateral conduct, and investigational process.

Tembinkosi Bonakele (Commissioner, South Africa Competition Commission, Pretoria) addressed regional trade arrangements in Africa and their impact on national competition policies. He began by introducing the African Competition Forum, which is a voluntary association of competition authorities. The focus of the forum is local capacity building, since most members are young competition agencies. He explained that the forum also facilitates informal exchange of views and conducts common research projects on the effects of varying competition policies in the continent. Cooperation is driven by the agencies themselves rather than by national governments.

Mr. Bonakele explained that Africa is divided by several free trade arrangements. This has created a problem of overlapping memberships, where some countries must apply conflicting rules – for example, conflicting tariffs because a state is part of two different customs unions. Similarly, the regional competition agencies of COMESA and EAC now have overlapping jurisdictions because some states (e.g., Kenya) are members of both regional authorities. In addition, African countries are all at very different development stages, both in terms of competition policy and economic maturation more generally. Although there is an initiative to merge the African trading blocs, Mr. Bonakele pointed out that there are complex institutional issues that would follow from such a project.

To Mr. Bonakele, regional arrangements reflect commonalities within different regions, such as their judicial systems, public policy considerations in merger deals, and corporate leniency programs. In Africa, they facilitate cooperation among national competition agencies on cross-border cartel investigations, which would not be possible in the African Competition Forum due to its broad membership.

Gönenç Gürkaynak (Managing Partner, ELIG, Attorneys-at-Law, Istanbul) explored the effects of regionalism by discussing the Turkey-EU relationship. While boosting trade, the customs union between Turkey and the EU has also created an imbalance between the two trade blocs to the detriment of Turkey. An

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1 **Panel**
2 **Eleanor Fox**
3 **Randolph W. Tritell**
4 **Tembinkosi Bonakele**
5 **Gönenç Gürkaynak**
6 **R. Ian McEwin**

example of this is the automatic access to the Turkish market by a third country that enters into a trade agreement with the EU. However, such an agreement will not automatically give Turkey reciprocal access to the third country market. Mr. Gürkaynak stated that the imbalance vis à vis the EU has driven Turkey to seek out free trade agreements with other blocs, such as Russia. He suggested three solutions: full EU membership of Turkey; joint negotiations between the EU and Turkey with third countries; or deepening the scope of the customs union, for example, by including agricultural products.

Mr. Gürkaynak nevertheless expressed a positive view on regional trade agreements more generally. For competition policy, he remarked that the negotiations with the EU have had a positive effect in Turkey, leading to the very establishment of Turkey's competition law. Further, principles of transparency and due process have been adopted, such as EU-style oral hearings before the competition authority. According to Mr. Gürkaynak, regional trade agreement can provide a nation's first step towards a competition policy, but the policy must also be internalized by the nation itself in order to be successful.

R. Ian McEwin *(Managing Partner, Competition Consulting Asia, Singapore, Visiting Fellow, Arndt-Corden Department of Economics, Australian National University)* discussed the challenges faced by ASEAN, including the limited economic integration, different languages, and lack of cooperation in competition matters among the Southeast Asian countries. Mr. McEwin explored the roadmap to development of an ASEAN competition policy, the objective of which is to foster fair competition. He noted the 2010 regional guidelines have not been followed by the member states, which he said could be explained by the fact that the guidelines were drafted from a European perspective with little effort to account for the specific conditions of the region.

Some commentators have suggested that Asian business is different from western business. Mr. McEwin suggested that Southeast Asian economies appear to have slightly different views on capitalism as well. Several countries have a high concentration of economic power in a handful of families, which raises unique issues for competition policy and certainly challenges to reaching convergence in approach. Mr. McEwin cited, however, optimistic examples of change brought on by the pressure of multinational companies. He concluded by suggesting an evolutionary approach to regionalism in Southeast Asia. ■

PANEL 2

PRICING AND DEVELOPMENT ISSUES: EXPLOITATION AND COLLUSION

The second panel of the conference, moderated by **Harry First** (Professor, New York University School of Law), addressed competition issues surrounding exploitative and collusive pricing in the context of developing economies.

Janusz Ordover *(Senior Consultant, Compass Lexecon, New York)* stressed that collusion should be the enforcement priority of competition authorities in developing countries. Tackling collusion yields tremendous benefits for consumers and should, therefore, lie at the heart of sound competition enforcement in developing economies. In contrast, Mr. Ordover expressed strong skepticism regarding antitrust enforcement against exploitative abuses. He underlined that identifying the appropriate benchmark to determine when prices are exploitative or excessive and what the competitive price should be constitutes, both in theoretical and practical terms, a highly complex exercise. So-called "exploitative prices" are highly prone to analytical errors and competition authorities - in particular in developing countries - often also lack empirical data for showing a price is excessive or exploitative. He also pointed out that cases alleging exploitative abuses confront judges with the daunting task of having to make a trade-off between consumer and producer welfare. They confer too much power on competition authorities and make them more likely to be manipulated by politics. Emphasizing the difficulties in defining and measuring excessive or exploitative pricing, he concluded that exploitative abuses should have no place in competition law enforcement.

Alvaro Ramos *(Head, Global Antitrust, Qualcomm, San Diego)* shared Mr. Ordover's skeptical stance towards determining exploitative pricing and the political consequences of such a determination. Mr. Ramos acknowledged that in contrast to the US approach, which is exclusively concerned with the protection of the competitive process, rather than its outcome, "fairness" constitutes an important goal of the EU and in developing countries. He cautioned that moving away from the traditional antitrust concern of protecting the competitive process towards other objectives increases the complexity of antitrust enforcement, blurs the transparency of decision making processes, and entails the risk of political capture of competition authorities. All of these factors cause legal uncertainty for companies. Mr. Ramos stressed the importance of due process and transparency and underlined that competition authorities should be explicit when a decision is based on industrial policy goals. He also expressed concern about exploitative pricing cases transforming competition agencies into price regulators. He suggested instead that competition authorities should investigate the causes of excessive prices (e.g. trade barriers) and advise regulators and legislators on how to address these underlying causes.

In contrast, **Dennis Davis** *(President, South African Competition Appeal Court, Cape Town)* highlighted the importance of antitrust enforcement against exploitative practices for developing countries by drawing on his experience as an adjudicator in South Africa. He acknowledged the complexity that judges face when it comes to determining exploitative pricing and in defining appropriate remedies. Yet, Judge Davis emphasized that developing countries cannot simply dismiss exploitative conduct, contending that exploitative pricing cases also are concerned with the competitive process. In South Africa, excessive pricing cases often involve large monopolists that control the vast majority of the markets for essential inputs used by small and medium enterprises active on downstream markets. According to Judge Davis, these SMEs hold the key to South Africa's economic development – yet the input costs for these firms are onerous. Tackling exploitation and its distributive effects constitutes a salient concern and contributes to the legitimacy of competition law and competitive markets in developing countries. Judge Davis recounted the Mittal case and described how the South African competition authority eventually tackled Mittal's exploitative prices as a collusive practice and imposed price caps, which Judge Davis regarded as a creative remedy.

Assimakis Komninos *(Partner, White & Case, Brussels)* tried to reconcile the polarized positions by pointing out that both collusive and exclusionary practices entail exploitation. From this perspective, the prevention of exploitation constitutes the ultimate goal of competition law. Yet, Mr. Komninos advised against going directly after exploitative pricing practices in developing countries. Doing so would place competition authorities in the uncomfortable position of becoming price regulators. Instead he suggested that developing countries are better served by understanding and tackling the underlying causes of exploitative outcomes, namely monopoly power and the problem of collusion, though it might not be as easy as attacking the problem of exploitation by setting prices. He also endorsed Mr. Ramos' argument that the legislator is in a better position to deal legitimately with exploitative prices than the competition authority. Too often, governments or legislators try to avoid these difficult political tasks by shifting the responsibility to the competition authorities.

1 **Audience**
2 **Harry First**
3 **Janusz Ordover**
4 **Alvaro Ramos**
5 **Dennis Davis**
6 **Assimakis Komninos**

The panel concluded with a discussion of exploitative drug prices, given the recent example of the overnight price increase of an HIV drug from $13.50 to $750. Mr. Ordover reiterated that, since there is no economic theory that would allow one to establish a reliable benchmark for the right price, imposing price regulation through competition law might amount to the abuse of regulatory or government power. Mr. Ramos asserted that antitrust has a limited scope and should not try to resolve all societal problems such as access to drugs by the poor. Mr. Komninos underscored again that instead of engaging in price regulation of drug prices, competition authorities should try to address the roots of excessive drug prices. By contrast, Judge Davis pointed out that prohibitively high drug prices constitute a crucial antitrust issue in developing countries such as South Africa, where the access to affordable HIV drugs determines the life chances of hundreds of thousands of people. Therefore, competition authorities and judges cannot legitimately ignore this issue by denying that it constitutes an antitrust problem. He also pointed out that in many jurisdictions judges are obliged to decide all cases in compliance with the constitutionally enshrined right to health care access. Judge Davis suggested that one potential solution would be to transpose the proportionality test from constitutional law cases to competition cases, so as to assess whether drug prices are excessive.

Professor First summarized the debate by pointing out that the issue of exploitative pricing illustrates that developing countries play the role of disrupters of the current consensus on the appropriate role of antitrust. He concluded by suggesting that developed countries could learn from some of the insights and issues prevailing in the developing countries. ■

LUNCH KEYNOTE SPEECH

DENNIS DAVIS

In the lunchtime keynote address, **Dennis Davis** *(President, South African Competition Appeal Court, Cape Town)* offered his perspective on the relationship among economic growth, inequality, and the role of competition law and regulation.

Judge Davis began by noting that the traditional goal of competition policy is to maximize consumer welfare. He then introduced several countries' competition laws with more ambitious terms. South African competition law includes public interests in its goals, namely "to promote a greater spread of ownership and particularly to increase the ownership stakes of historically disadvantaged persons." Korean competition law's goals include "stimulate the creative initiative of enterprises, to protect consumers, and to strive for the balanced development of the national economy." Australian competition law addresses benefits to the public and total welfare effects.

While acknowledging that those objectives may not be incompatible with the traditional concerns of competition policy, Judge Davis was of the view that competition law could effectively regulate the relationship between the citizenry and market power. He pointed out that scholars in both law and economics, such as David Lewis, Robert Hale, and Joseph Stiglitz, have all noted that market power could enhance distributional problems and inequality, which are particularly pressing issues in developing countries.

In South Africa, Judge Davis explained that competition policy has already been concerned with distributional problems and inequality, and a 2016 World Bank report has shown that competition law has made contributions to addressing distributional problems and inequality. He then shared his view on the debate about growth, inequality, and competition policy through the eyes of a judge pondering the possibilities of what of this vision is possible by way of adjudication, based on competition law enforcement in South Africa.

First, Judge Davis noted that adjudication in the competition law area has its limits. As economic conducts are dynamic, the decision-makers often have to adjudicate in a climate of considerable uncertainty, thus resulting in possible errors. Judge Davis went on to explore the various components of standard competition law through the prism of the limits of adjudication, noting some areas of competition law clearly fit the adjudicative process better than others.

According to Judge Davis, competition authorities such as the South African agency need a clear set of priorities, given limited resources as well as the narrow scope for successful adjudication. In key areas of cartel regulation, abuse of dominance, and merger control, Judge Davis suggested a developing jurisprudence has begun to take place notwithstanding some of the errors that have been committed in the past, including by the South African Competition Appeal Court.

Judge Davis explained how competition regulators in South Africa have sought to strike the difficult balance between traditionally cognizable competition considerations and public interest factors. While recognizing this, Judge Davis cautioned against the idea that a comprehensive industrial policy can be snuck into competition jurisprudence, which would conflate significantly different, albeit related, areas of policy with major pressure on adjudicators.

In conclusion, Judge Davis found it possible for competition law to play a significant role from both perspectives of economic growth and greater equality. Mr. Davis reminded the audience that there may still be a potential path to negotiate the broader ambitions of competition law as it seeks to engage key distributional challenges. ■


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PANEL 3

MERGERS: ANATOMY OF A CLEARANCE IN YOUNGER JURISDICTIONS

This panel, moderated by **Frédéric Jenny** *(Chairman, OECD Competition Committee)*, addressed the anatomy of merger review in younger jurisdictions, using the Anheuser-Busch InBev merger with SABMiller to illustrate the challenges of multijurisdictional merger review from the perspective of merging parties, their lawyers, other advisors, and reviewing officials.

The discussion kicked off with an explanation by **Sabine Chalmers** *(Chief Legal & Corporate Affairs Officer, Anheuser-Busch InBev)* of the rationale for the transaction, namely to strengthen market position where Anheuser-Busch InBev was not present and bring the brewer's beer to new markets, in particular Africa and other developing countries. She also presented some of the challenges that Anheuser-Busch InBev faced in seeking clearance of the transaction, which required the company to engage local counsel in 80 jurisdictions, file merger notifications in 29 of these, and negotiate remedies in 13 jurisdictions. She highlighted how detailed pre-planning and regular dialogue with all the parties involved was crucial in navigating the multi-jurisdictional merger review process and closing the transaction in less than 12 months. She stressed the importance of focusing on the primary objectives of the transaction, for key company officials to engage in conversations with regulators, and most importantly, for the specific concerns of regulators, including public interest related concerns, to be heard. Ms. Chalmers reiterated the importance of ensuring younger jurisdictions are treated with the same degree of attention, urgency, and respect as more mature agencies.

According to **Jonathan Nystrom** *(Executive Director, Ernst & Young)* global coordination is of the utmost importance, particularly in managing evidence in multijurisdictional merger review. In the Anheuser-Busch InBev merger with SABMiller, the parties produced 10 terabytes of documents and data, roughly equivalent to 800 million printed pages. Mr. Nystrom noted that regulators cooperate in an unprecedented way and discussed the implications of different documents being produced among the various regulators and cautioned against any unnecessary inconsistencies in the materials produced. Mr. Nystrom stressed the importance of identifying any inconsistencies early on and mitigating any harm. He suggested this can best be achieved through close coordination among the parties and local counsel through a global advisory consultant.

Alejandro Castañeda Sabido *(Commissioner, COFECE, Mexico City)* turned to the substantive analysis of the merger, noting that in Mexico the transaction was cleared without conditions despite the oligopolistic structure of the Mexican market. Anheuser-Busch InBev owned Grupo Modelo, one of two large players in Mexico, with many local distribution channels. SABMiller had only a marginal share. Mr. Castañeda pointed out that barriers to entry in the Mexican beer market are structural, with most beer sold through small "corner" shops. He recalled also that in the years prior to the transaction the largest players were engaged in certain exclusive distribution agreements. The investigation by COFECE, however, showed no significant increase in concentration and that global divestitures imposed by other jurisdictions would effectively address any potential competition concerns.

George Lipimile *(Director, COMESA Competition Commission, Lusaka)* described a somewhat different situation. First, he provided a few brief facts about the COMESA Competition Commission and its operations, emphasizing the jurisdiction and competences of the Commission. Mr. Lipimile noted that although the Anheuser-Busch InBev merger with SABMiller raised concerns among COMESA member states, the COMESA Competition Commission could not take any formal position on the merger because the notification thresholds were not met and therefore the transaction did not qualify for COMESA review. Notwithstanding this, based on numerous calls from COMESA member state officials asking whether COMESA will react to the merger, the COMESA Competition Commission issued an opinion. The opinion discussed what might be a problem after the transaction, whereas it did not take a position on the merger itself. In doing so, COMESA was able to express its concerns to the member states involved as well as to the merging parties.

South Africa also had various concerns with the Anheuser-Busch InBev merger with SABMiller. According to **Tembinkosi Bonakele** *(Commissioner, South Africa Competition Commission, Pretoria),* the Competition Commission had both competition related concerns, as well as reservations from the public interest perspective. One of the most interesting competition concerns related to the parties' bottling businesses. Anheuser-Busch InBev was bottling for Pepsi and SABMiller was bottling for Coca-Cola. The Commission was concerned about information sharing between Coca-Cola and Pepsi and that post-merger only one company would be bottling for both Pepsi and Coca-Cola. The Commission therefore imposed a "Chinese wall" between the two bottling divisions. In addition, the Commission had public interest-related concerns, especially related to the impact on jobs and on small and medium size businesses. To address these concerns, the Commission imposed conditions such as the continuation of supply of hops and barley to other beer makers, investments in local farms, and the reservation of a percentage of refrigeration space for small local beer makers. Mr. Bonakele concluded that these remedies show that the institutional home of the public interest in South

1 **Frédéric Jenny**
2 **Sabine Chalmers**
3 **Jonathan Nystrom**
4 **Alejandro Castañeda Sabido**
5 **George Lipimile**
6 **Tembinkosi Bonakele**
7 **Vani Chetty**
8 **Audience**

Africa is at the Competition Commission and not in politics, as some have suggested is the case in other countries.

Vani Chetty *(Partner, Baker & McKenzie, Johannesburg)* continued the public interest discussion on a more general level. She explained that public interest analysis still means that the merger is looked into on its merits, and in parallel, public interest objectives also are assessed in order to evaluate its impact on a merger. In recent years, however, public interest objectives like employment have received increasing scrutiny, often resulting in conditions imposed on a merger that was otherwise competitive on the merits. In certain cases, this can result in extensive delays and can adversely affect the timing and certainty of the process. A further complexity is the intervention by the Minister of Economic Development. In an effort to ensure that mergers do not result in an adverse impact on employment, the Minister has intervened and sought to obtain far-reaching commitments from various merging parties. This intervention has added a degree of complexity in a regime that is otherwise transparent and clear in its approach towards the application of public interest consideration in mergers.

The panel discussion was concluded by Frédéric Jenny, who highlighted the importance of conducting a competitive effects analysis separately from a public interest assessment. He reiterated the point that both Ms. Chetty and Mr. Bonakele also made, that public interest objects be clear and applied transparently. His closing thought was more of an invitation for future discussion: Mr. Jenny asked whether we should be looking at a transaction country-by-country or if we should have a more global approach when clearing mergers. He questioned whether we should look beyond the borders of an individual jurisdiction, especially considering that many mergers do not raise competition concerns in individual jurisdictions, whereas they might lead to high concentrations and thus might have significant anticompetitive effects on the global level. ■

PANEL 4

INNOVATION AND DEVELOPMENT: LICENSING AND ANTITRUST/IP RULES AND GUIDELINES

Moderator **Daniel Rubinfeld** *(Professor, New York University School of Law and Professor (Emeritus) University of California Berkley)* opened the panel by asking the panelists to address global antitrust enforcement issues they observe relating to intellectual property.

Susan Ning *(Partner, King & Wood Mallesons, Beijing)* discussed the challenges to IP enforcement in China, such as difficulties in evidence collection and enforcement of arbitration judgments, but noted that progress continues to be made. For instance, last year the copyright bureau issued guidance for the removal of musical products that were posted without IP authorization from Internet platforms, leading to the withdrawal of over 2 million files. Ms. Ning also noted the increased sophistication of the administrative agencies and courts in China. For example, in 2014 a special IP court was tasked with hearing all IP and antitrust complaints, and different legislative efforts from National Development and Reform Commission (NDRC) and State Administrative for Industry and Commerce (SAIC) have been made to formulate IPR guidelines for antitrust.

Christopher Meyers *(Associate General Counsel, Microsoft, Redmond, WA)* focused on the evolution in the way regulators approach the intersection between IP rights and antitrust noting, e.g., the growing recognition that patents do not necessarily convey market power. Regulators, he explained, are increasingly using more sophisticated analyses and finding that IP is not necessarily at odds with antitrust. As counsel for a company that is both licensor and licensee, Mr. Meyers highlighted the importance to companies like Microsoft of the balance between strong IP protections and a recognition of the benefits of the broad dissemination of standards at royalties that licensees can afford.

Dina Kallay *(Director, IP & Competition, Ericsson, Washington, DC)* focused her remarks on the telecommunications market. She presented data reflecting the robust state of competition in telecommunication markets worldwide, including dramatic price decreases for smartphones and data usage; huge continuous leaps in innovation; extensive market entry by new players and fluctuations of the market composition. For example, she showed that the average mobile subscriber cost per megabyte decreased by 99 percent between 2005 and 2013. Hence, she explained, antitrust complaints in this area often attempt to utilize antitrust agencies as a tool to gain an edge in a fiercely competitive marketplace rather than to resolve real competition issues. One example is the filing of antitrust complaints as a "hold out" strategy to avoid paying for the use of intellectual property rights, and international forum shopping using less experienced agencies for such complaints.

In the second part of her opening remarks Ms. Kallay dispelled 10 common misperceptions about F/RAND assured standard essential patents. For example, she explained that that F/RAND assurances are always voluntary; that ICT standards are valuable performance standards rather than mere interoperability standards; and that F/RAND assurances assure access, not a license – and that the two are not synonymous because of the patent exhaustion doctrine. She also presented data on the anticompetitive effects of the new IEEE patent policy – that include a growing refusal to provide F/RAND assurances for IEEE standards and a slowdown in IEEE standards development – data that demonstrates the importance of a balanced patent policy for standards development organizations.

Jay Jurata *(Partner, Orrick, Herrington & Sutcliffe, Washington, DC)* mentioned trends he has noticed during his work at the intersection of antitrust and IP rights, including an increasingly critical assessment and examination of patent rights around the world and the concerning use of antitrust law (which is national in nature) to address patent rights issued by another country.

Professor Rubinfeld then led the panel to discuss topics such as forum shopping, a recent FTC study on patents assertion entities (PAEs), and the treatment of standard essential and non-essential patents. In the discussion of forum shopping, Mr. Meyers cautioned that there is no silver bullet for this challenge, which is almost inevitable where jurisdictions diverge in terms of substantive law, procedure, and enforcement philosophy. Using the Microsoft/Nokia acquisition as an example, Mr. Meyers noted that many competitors lodged antitrust complaints to regulators in less developed regimes where they believe their complaints would be received with less sophisticated pushback, and cautioned regulators to take complaints from competitors with a grain of salt.

1 **Panel**
2 **Daniel Rubinfeld**
3 **Susan Ning**
4 **Christopher Meyers**
5 **Dina Kallay**
6 **Jay Jurata**

Ms. Kallay recommended that when antitrust enforcement agencies receive complaints from foreign complainants, they ask them whether they have complained to their domestic agencies or elsewhere in the world. Continuing with the Microsoft/Nokia example, Mr. Jurata clarified that the more problematic review processes in Asia were actually about pre-existing patent portfolios that were not affected by the merger, and involved remedies as to what the merging parties would do post-acquisition with the same portfolios they already owned, an approach that the US and European authorities dismissed as being outside of the scope of merger review. Ms. Ning discussed forum shopping within China, where enterprises may try choosing different Chinese antitrust agencies (SAIC vs. NDRC) and private litigation in courts.

Referring to the recent Federal Trade Commission report, "Patent Assertion Entity Activity: An FTC Study," (October, 2016), Professor Rubinfeld asked panelists to react to the claim that competition law should apply differently to PAEs than to operating companies. Mr. Jurata warned it would be unwise to change the application of competition law based on the business model of a particular company, noting agencies' historical focus on specific courses of conduct rather than on specific industries. Mr. Meyers and Ms. Ning echoed Mr. Jarata's call for a focus on conduct. Mr. Meyers added that he saw a major focus of the report being high litigation costs, to which Mr. Jurata added that efforts for reform to address PAEs should focus on patent standard, damages reform, etc. rather than competition law.

Finally, in response to Professor Rubinfeld's suggestion that standard essential patents (SEPs) may require a unique antitrust analytical framework, Ms. Kallay warned about the coordinated attacks on standard essential patents by some advocacy groups and regulators. Mr. Jurata favored a unique approach of Japan and Korea with regards to SEPs, because post-standard adoption may distort competition by allowing patent owners to increase the price they charge at a later time. In China, Ms. Ning pointed out, SEP holders are presumed to have more responsibilities and are more easily found to have a dominant position.

In closing, Mr. Meyers was optimistic that litigation had gotten rid of extreme F/RAND licensing scenarios, and that legal standards have developed on issues such as the standards for injunctions, determining F/RANDs, etc. The exception, Mr. Meyers noted, may be in litigations surrounding the integration of established technologies into the "internet of things" (IoT) devices, where manufacturers are new to the process. Ms. Kallay mentioned a recently launched industry platform for IoT licensing, called Avanci, that is showing promising signs of eliminating such future issues. ■

PANEL 5

ENFORCERS' ROUNDTABLE: WHAT'S UNDER THE RADAR?

The last panel, moderated by **William E. Kovacic** *(Non-Executive Director, Competition and Markets Authority, London)*, highlighted the positive changes taking place that may have not received ample attention, as well as the difficult challenges faced by the competition agencies in Argentina, South Africa, Mexico and COMESA.

Pablo Trevisán *(Commissioner, Argentine Competition Commission, Buenos Aires)* spoke about building a culture of competition both inside and outside the agency in Argentina and the establishment of a competition advocacy unit. The unit came as part of a greater restructuring effort that included a new unit on economic studies and four new divisions. In addition, more than 30 professionals were hired. Mr. Trevisán noted that the Argentine Commission strives to excel, including on procedural issues, which necessitates on-going training for staff. Training from the US antitrust agencies and the World Bank, according to Mr. Trevisán, have been helpful in this regard. When Mr. Trevisán assumed office earlier this year, there were a significant backlog of competition cases, however, the Commission has managed to reduce the delay, often by a year or more. For example, in March 2016, there were 344 merger cases and it typically took 2.6 years for a resolution to be reached. Today, the resolution period has been reduced to 1 year. The Commission was able to do so as a result of its new structure with specialized divisions, each led by a director and staffed with trained professionals.

While significant strides have been made, he sees room for additional improvement and challenges that have to be dealt with in order to continue making progress. The greatest challenge according to Mr. Trevisán is achieving cultural changes inside and outside the competition authority. He also cited several concurrent challenges, including a lack of agency independence and that the previous government had repealed a measure that had authorized a specialized competition court. He mentioned the need for tools to improve private enforcement, which currently is not well developed, and the need to update low merger notification thresholds and fines, which are currently very small. Another challenge mentioned was the lack of a leniency program. He concluded that a new law is more in order with good practices is required.

George Lipimile *(Director, COMESA Competition Commission, Lusaka)* discussed how merger notification fees are used to raise money to fund training and capacity building among the member states' national competition authorities. He noted that about $18 million has been generated from notification fees with $9 million having been allocated to the national competition authorities. He also emphasized the promising institutional growth that has occurred within the COMESA Competition Commission. The CCC started with one person. Shortly thereafter the agency's professional staff grew to four. Today, the agency has a staff of 15 (both professional and support) and approval has been obtained to hire additional staff. Mr. Lipimile posited that by the end of 2017, the agency's staff may increase to as many as 25. There have also been secondments; five CCC staff were seconded to the Egyptian Competition Authority, and five staff members from the Djibouti Competition Commission were seconded to the Zambian Competition and Consumer Protection Commission.

Mr. Lipimile further described how the workload is increasing. Since January 2013, CCI has enforced COMESA's Competition Regulations relating to mergers and acquisitions. In 2016, CCC began to enforce the Competition Regulations' conduct provisions on abuse of a dominant position.

Mr. Lipimile then explained that the main challenge of COMESA is implementation of the merger regulation at the regional level for those members of COMESA that belong to more than one regional economic bloc. He also recognized the importance and difficulty of recruiting competition officers. This is particularly important as he noted that as the agency continues to deliver results, it has more credibility and importance.

Alejandro Castañeda Sabido *(Commissioner, COFECE, Mexico City)* focused his remarks on the debate currently underway in Mexico regarding the best technique for addressing competition problems and whether traditional tools are too narrow. Mr. Castañeda illustrated this issue through the example of the Delta-Aeromexico joint venture, suggesting that sometimes a case requires a different perspective or consideration of additional factors that are not included in traditional analysis. For example, in the joint venture, congestion analysis at the airport was a key consideration. This broader perspective led to a different remedy than a traditional analysis would have supplied, requiring Delta to cede eight pairs of slots at the heavily congested Mexico City airport.

Mr. Castañeda explained that the trajectory of competition law in Mexico from the 1940s forward has been a series of upgrades over time and discussed the challenges to continuing this ascent. The main challenge is the so called "incremental discretion" introduced by the constitutional amendments of 2013 giving COFECE the power to issue orders to remove competition barriers and regulate access to essential facilities without regard to anticompetitive conduct. He referenced a pending case where COFECE used the independent investigation authority provided by the amendment to initiate an investigation involving the allocation of slots in the Mexico

1 **Panel**
2 **William E. Kovacic**
3 **Pablo Trevisán**
4 **George Lipimile**
5 **Alejandro Castañeda Sabido**
6 **Tembinkosi Bonakele**

City airport, based on an essential facilities doctrine. The revisions to the competition act, which followed the constitutional amendment, gave COFECE fewer powers than the constitution did. Under the law, the outcome of an investigation involving a government entity, such as an airport, would be a recommendation to the regulators on possible solutions. Under the constitution, however, the agency can issue specific orders to anyone, both the government and private actors. Subject to much on-going discussion is whether the agency should interpret the constitution or use the enacted law.

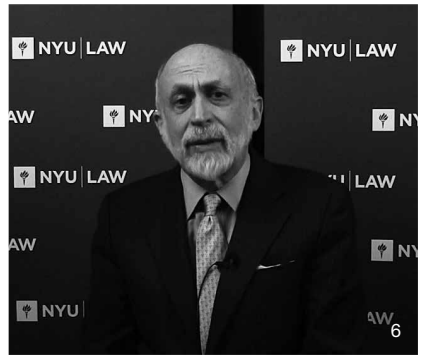
Tembinkosi Bonakele *(Commissioner, South Africa Competition Commission, Pretoria)* is gearing up to take advantage of a new strategy awaiting government approval that would change how complex cases are handled. Mr. Bonakele explained that while the bulk of complex cases have been outsourced to private lawyers and economists, he has begun to shift some of these cases in-house to Commission staff. He noted that this new emphasis on insourcing has had a tremendous impact on the energy of the case teams as they appear before the Competition Tribunal. Mr. Bonakele is hopeful that this new model will be more cost effective and help in recruiting. He suggested that having the opportunity to work closely on complex cases at a young age is appealing to new lawyers. To make this model successful, however, Mr. Bonakele expressed the need to recruit from the entire competition community and for the Commission to demonstrate that its staff is expert. To address this concern, Mr. Bonakele announced that the Commission is working with two academic institutions to establish centers in economics policy aimed at developing lawyers and economists in the area of competition.

Mr. Bonakele called for an increased emphasis on cooperation and for the competition community to rethink the basic paradigm in light of new challenges and questions. According to Mr. Bonakele, the nature of competition is changing, and so are the sources of market power. Certain markets, such as the seed mergers, or even big data, can no longer usefully be addressed within a particular country. They have an impact across value chains and across borders and so both product market and geographic market definitions in a traditional sense are not adequate. Mr. Bonakele suggested a need to re-examine forms of international cooperation, contending current forms are inadequate. These challenges pose a particular complexity for developing countries that may lack both the institutional or technical capacity to address these questions, and are often outside of the global antitrust enforcement networks. He also noted that a lot of the large jurisdictions are too inward-looking when addressing these questions, which he believed would create regulatory gaps in the world.

Mr. Kovacic concluded that all the panelists suggested a path to building relationships and have laid out approaches for collecting and sharing know how beyond cases or what is written in articles and papers. ■

VIDEOS

During the Conference some of the speakers summarized some of their ideas in short videos. These can be watched at concurrences.com (Events > October 28, 2016 > New York).



1 **Jonathan Fried** (Canada Ambassador, World Trade Organization, Geneva)

2 **Eleanor Fox** (NYU Law)

3 **Gönenç Gürkaynak** (ELIG, Attorneys-at-Law)

4 **Ian McEwin** (University of Malaya)

5 **Janusz Ordover** (Compass Lexecon)

6 **Harry First** (NYU Law)

7 **Assimakis Komninos** (White & Case)

8 **George Lipimile** (COMESA)

9 **Alejandro Castañeda Sabido** (COFECE)

10 **Tembinkosi Bonakele** (South Africa Competition Commission)

11 **Dennis Davis** (South African Competition Appeal Court)

12 **Dina Kallay** (Ericsson)

13 **Jay Jurata** (Orrick)

14 **Frédéric Jenny** (OECD)

15 **William Kovacic** (GWU Law)

16 **Christopher Meyers** (Microsoft)

17 **Jonathan Nystrom** (Ernst & Young)

18 **Susan Ning** (King & Wood Mallesons)

19 **Pablo Trevisán** (Argentine Competition Commission)

PRESS REPORTS

WTO AMBASSADOR: COMPETITION IS KEY TO SUSTAINABLE ECONOMIC DEVELOPMENT

BY CHARLES McCONNELL, GLOBAL COMPETITION REVIEW®

Jonathan Fried, also Canada's permanent representative to the WTO, said during his keynote at the Competition and Globalization in Developing Economies conference that competition law, «especially if robust and effective,» is a key ingredient toward establishing sustainable economies in the developing world.

In September 2015, UN members adopted an agenda of 17 sustainable development goals they have agreed to pursue and attempt to achieve by 2030. These include an end to poverty and hunger, the promotion of industrialization and innovation, and inclusive and sustainable economic growth and employment.

...

There is more overlap between trade and competition policy already than may meet the eye, as Fried insisted that trade experts have the same broad theories as competition proponents: that free and fair competition ensures optimal economic growth, and that commercial actors benefit from a level playing field.

...

The two areas of policy and law also interact regarding telecommunications, a sector of many countries' economies that monopolies have traditionally dominated, Fried noted, adding that the WTO policy on the industry «incorporates pro-competition principals directly into [its] agreement.»

Fried's remarks kicked off a day-long conference at New York University School of Law, organized by Concurrences and NYU. ■

ARGENTINA'S COMPETITION LAW LIMITS ENFORCEMENT SUCCESS, OFFICIAL SAYS

BY CHARLES McCONNELL, GLOBAL COMPETITION REVIEW®

During an enforcers' roundtable at the Competition and Globalisation in Developing Economies conference, Trevisan said his agency has a plan for the future rooted in teamwork, trust and effort.

He highlighted some of the changes the authority has already made, such as hiring 30 young professionals, creating new divisions, fixing the backlog of cases, getting training from foreign agencies including the US Federal Trade Commission and Department of Justice, and more.

But challenges remain, Trevisan said, pointing specifically to the country's competition law. The agency hopes that its Antitrust Draft Bill will change the law to incorporate competition best practices and address some of the glaring issues with the current version.

...

The country needs to "urgently update the thresholds" for merger proceedings, he said, as they are currently so low that the authority receives a lot of notifications unnecessarily, which takes resources away from other areas, including conduct cases that require greater scrutiny and research.

Common to a theme across Latin America, the law also needs to better address private enforcement, Trevisan said, including implementing class actions into the law – currently class actions are not legislative.

...

Former FTC chairman Bill Kovacic, who moderated the panel, called the proposed solutions to the challenges facing Argentina's competition agency "an enormously ambitious programme."

Trevisan responded that it is a historic moment in the country's history, including within the competition context. While he is "optimistic that one day harvest will come" regarding the country's antitrust enforcement, he has accepted the challenges that lie ahead – including dealing with a Congress made up mostly of legislators who have no idea how to handle competition law, he said.

...

Tembinkosi Bonakele, head of the Competition Commission of South Africa; Alejandro Castañeda, a commissioner at the Federal Economic Competition Commission in Mexico; and George Lipimile, the director of the Competition Commission of the Common Market for Eastern and Southern Africa, joined Trevisan on the panel.

The conference, hosted by New York University and organised by Concurrences Review, ended on Friday. ■

SOUTH AFRICAN COMPETITION COMMISSIONER DEFENDS MERGER PUBLIC-INTEREST CONSIDERATIONS

BY RICHARD VANDERFORD AND LEAH NYLEN, MLEX®

South Africa's top competition enforcer defended the country's consideration of public interest factors in evaluating mergers, saying that the nation's complex problems demand different strategies.

High inequality and unemployment demand a competition regime that incorporates public interest into merger reviews, Thembinkosi Bonakele, the commissioner of the Competition Commission of South Africa, said at a conference in New York on Friday.*

...

"If you have the most unequal country in the world, you're going to adopt slightly different strategies than a country that doesn't have that problem," Bonakele said.

...

Though some critics in the press have lambasted the public interest consideration, a high-ranking AB InBev executive said it wasn't «the nightmare» that it's been made out to be.

"At the end of the day, genuinely we want to create jobs in South Africa," Sabine Chalmers, who serves as the brewer's chief legal and corporate affairs officer, said at the conference during a different panel discussion.

...

A leading South African competition jurist echoed Bonakele's remarks on the necessity of adopting unconventional competition measures in a developing economy.

"We are now in a position where competition law has embraced a whole range of objectives, which, whether we like it or not, are there and we have to work with it," Dennis Davis, the president of South African Competition Appeal Court, said in a speech.

...

"Law only works when it's not just efficacious but when it has some level of legitimacy," Davis said. "If the system were seen to be at war with foundational economic development that then causes a problem."

Since South Africa implemented its law in 1998, the country's competition authority has pursued at least six excessive pricing cases, most of which were settled. ■

...

*Competition and Globalization in Developing Economies; New York University School of Law; New York; Oct. 28, 2016.

INTERVIEWS

> “IT IS CRITICAL FOR A DEVELOPING COUNTRY WITH LIMITED RESOURCES TO PRIORITIZE ITS AGENDA. FOR ME, CARTELS ARE THE MOST URGENT QUESTION.”

DENNIS DAVIS

ASSIMAKIS KOMNINOS

> Concurrences Review, October 25, 2016

Assimakis Komninos – partner at White & Case – has interviewed Dennis Davis – President of the South African Competition Appeal Court. Dennis Davis and Assimakis Komninos both participated in the panel “PRICING AND DEVELOPMENT ISSUES: EXPLOITATION AND COLLUSION” and Dennis Davis also served as the lunch keynote speaker.

Assimakis Komninos: Do you think there is a divergence between developed and developing countries in terms of the types of monopolisation or abuse of dominance that agencies are more inclined to pursue? For example, would you say that agencies in developing countries have an inclination towards pursuing exploitative abuses, such as “excessive pricing”?

Dennis Davis: Excessive pricing has become important for developing countries, arguably for two reasons: there is a concern with small downstream enterprises being heavily restricted in their development by the pricing imposed by large, often previously run para statal corporations on key inputs. In addition there are concerns about the pricing of access to IP which is desperately needed by developing countries. It is ironic thus that in a country like South Africa the test as laid down in United Brands more than 30 years ago has been ‘dusted off’ for use.

Assimakis Komninos: We are seeing again a certain Transatlantic divide in treating unilateral conduct. After the Microsoft cases there was calm but recently there are again signs of disaccord between the US and the EU. Why is the area of unilateral conduct prone to that disaccord and does it mean that the IT sector, in particular, will have to be regulated in a global scale by the enforcer following the stricter approach?

Dennis Davis: It is hardly surprising, given the current global context that there is again significant attention being paid to powerful multinational corporations and their use of economic/financial power to subvert a competitive process or more narrowly couched, the national interest. With the growing power of global value chains and thus global forms of production of goods and services, the scope and range of national regulation has been severely to the test; hence the need to lift our regulatory gaze towards the global.

Assimakis Komninos: What are the recommendations you would make to young antitrust agencies when selecting which unilateral conduct cases they should give priority to?

Dennis Davis: It is critical for a developing country with limited resources to prioritize its agenda. For me, cartels are the most urgent question. But if developing countries fashion a merger law to suit their developmental needs then the abuse of dominance doctrine assumes greater importance; that is if a merger is allowed to respond to global competition, it may be that any abuse can be cured by way of the abuse doctrine. I am uncertain as to whether exploitative conduct should be a priority as cases of this kind require significant resources and expertise which may not be available to a developing country’s authority. ■

> “THERE WAS FURTHER A NEED TO RESOLVE THE ISSUE OF DISTRIBUTION OF COMPETENCIES BETWEEN NATIONAL AND REGIONAL COMPETITION LAWS. ALL THINGS SAID, WE HAVE NOW COMMENCED INVESTIGATIONS ON RESTRICTIVE BUSINESS PRACTICES AND A DIVISION HAS BEEN CREATED.”

GEORGE LIPIMILE

VANI CHETTY
> Concurrences Review, October 20, 2016

Vani Chetty – partner at Baker & McKenzie – has interviewed George Lipimile – Director of the COMESA Competition Commision. Vani Chetty and George Lipimile both participated in the panel “MERGERS: ANATOMY OF A CLEARANCE IN YOUNGER JURISDICTIONS.”

Vani Chetty: Is it correct that the enforcement of cases has been hampered by the teething issues of overcoming jurisdictional issues and inconsistencies between the Commission’s Regulations and domestic frameworks?

George Lipimile: It is important to note that when the Commission became operational in 2013, there was a deliberate decision that the enforcement priority area should be competition advocacy and education aimed at sensitizing Member States on compliance requirements under the new regional competition regime. The second priority area was enforcement of the merger control regulations, due to the nature of the provisions, as merger control provisions require the notification and approval with and by the Commission.

The non-enforcement of Part 3 of the COMESA Competition Regulations which deals with restrictive business practices was mainly to allow Member States and the Commission to develop a legal enforcement framework. This took time and it involved or required negotiations to develop the desired framework which took into account the regional law and respective national laws of the respective Member States. The Commission has concluded formal cooperation agreements with Malawi, Swaziland, Egypt, Kenya, and Seychelles. The agreements provide for reciprocal notification of cases; coordination of enforcement activities; and mutual assistance and requests to the other jurisdiction to take enforcement action.

In some instances there were delays in the negotiations of the enforcement cooperation agreements due to the status of competition law in the individual member states. These factors included lack of national competition laws in some Member States, weak enforcement capacities, lack of technical expertise and the general unwillingness by some Member States to surrender their jurisdiction in favour of a regional competition agency. These factors contributed to the slow operationisation of the provisions dealing with the enforcement of the restrictive business practices.

There was further a need to resolve the issue of distribution of competencies between national and regional competition laws. All things said, we have now commenced investigations on restrictive business practices and a division has been created.

Vani Chetty: Does the lack of uniform penalty and leniency policies between the Commission and domestic jurisdictions undermine firms’ incentives to come forward thus impacting on enforcement?

George Lipimile: While this may be true, it should be understood that the national and regional competition laws by and large deal or address different competition situations hence, there is a distinct difference in the scope of application. The penalties provided for under the COMESA Competition Regulations do not depart much from those provided for at national level. Suffice to say, that at regional level, there are no criminal sanctions. However, a closer look at the penalties provided for at national level as regards the quantum, it would appear that the level of the fine being 10% of turnover is common to both systems. The Commission from its early stage of operations has continued to prefer the soft enforcement approach, mostly through enhanced advocacy and educational programs.

As regards a leniency policy, it should be observed that currently there are few Member States who have a leniency policy at national level. Even those Member States who have adopted the leniency policies i.e. Mauritius have not been actively used as compared with other jurisdictions like South Africa. South Africa has enjoyed one of the best successes with their leniency policy. After a re-vamp of the corporate leniency policy in 2007/8, the Competition Commission of South Africa saw a dramatic increase in leniency applicants from just 3 in the 6-month period January to June of 2008, to 16 applications in the 6-month period July to December 2008. ▶▶

Whereas the desirability and importance of the leniency policy has been well understood by Member States, there are still some legal impediments at national level which have delayed the adoption of leniency policies across the region.

At the regional level, the Commission has engaged a consultant to draft a regional leniency programme which shall be discussed in detail with Member States. Given the different legal systems and the feedback coming from the consultations with Member States so far, this may take some time.

Vani Chetty: What would you attribute the growth in merger notifications to? Which of the following factors, if any, can be considered most significant in the increased notification statistic in the recent years? a. Growing awareness of the COMESA merger control regime; b. Amendments to the regulatory framework including the publication of merger assessment guidelines in October 2014 and a review of the merger notification thresholds and filing fees in April 2015; c. Trends in the continent's M&A activity, driven by global businesses looking at high growth African economies to expand their operation?

George Lipimile: By and large, the growth of Merger notifications is as a result of the manner Article 24 of the COMESA Competition Regulations are framed; more especially the caution which reads:

"Any notifiable merger carried out in contravention of this part shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market."

This in itself has compelled partied to a merger to come forward to the Commission and notify their transaction; this system is self-policing.

The publication of the Merger Assessment Guidelines also enhanced the understanding of the regional merger control system by expanding on issues around notification thresholds and method for calculation of filing fees. The Merger Assessment Guidelines set out the mechanisms for determining whether a transaction is a notifiable merger i.e. merger with regional dimension. They also explain the procedural obligations of the parties and describe the substantive elements of the merger assessment. This greatly increased the transparency of the Commission's merger assessment protocols, and attracted more merger notifications.

Further, mergers and acquisitions are a useful mechanism to expand investments in the region and generate efficiencies through consolidation; more efficient, clear, and predictable rules on merger control avoid discouraging investment in the region. Consequently, it is now evident that the region has registered economic growth which has seen an increase in foreign direct investment using the vehicle of mergers and other forms of acquisitions. This translated to an increase in the mergers notified to the Commission. Further, the advantage associated with the 'one stop shop' notification facility has attracted more market operators to use the COMESA System.

Vani Chetty: Despite the powers afforded to the Commission in terms of Article 24, the Commission has not imposed penalties on any offending parties to date in relation to gun-jumping contraventions. Would you say this lenient approach can be attributed to the uncertainty around the notification process and the requirements for notification? Is this uncertainty alleviated by the significant changes to the merger control regime that have been effected or is there still an element on ambiguity in this regard?

George Lipimile: The non-imposition of penalties can mostly be attributed to a deliberate policy decision of the Commission. The Commission has employed a 'consultative approach' whereby the Commission engages the parties first through 'pre-conference' discussions before a formal notification is filed with the Commission. During the 'pre-conference' discussions, the Commission staff engage representatives of the parties where most and sometimes all of the competition concerns are discussed informally. In most instances, all the areas of conflict, or matters raising competition concerns are resolved during the 'pre-conference' period. Consequently, by the time the application is formally filed, all matters raising competition concerns could have been sufficiently addressed and in most cases, the transactions are approved with or without conditions.

Vani Chetty: Does the Commission actively monitor markets within the Common Area or is it mostly reliant on its advocacy initiatives and information obtained from Member States through formalized cooperation agreements?

George Lipimile: Under Rule 42 of the COMESA Competition Rules, the Commission is mandated to conduct a general inquiry into a sector where the trend of trade suggests that competition is being restricted. During the market inquiry, the Commission has broad powers to request any undertaking in the Common Market to provide it with the necessary information.

Pursuant to Article 22 of the COMESA Competition Regulations, the Commission may launch an investigation where it has reason to believe that business conduct by an undertaking restrains competition in the Common Market. One such investigation was an investigation into misleading advertising by a regional low cost carrier airline. The Commission's investigation found that the airline had published misleading advertisements which showed ticket prices exclusive of other charges. The Commission noted that the airline was a first time offender and noted further that at the time of the decision, the conducted had already ceased following proceedings against the airline which were instituted by the national Civil Aviation Authority. The Commission warned the airline to desist from such conduct in the future.

The Commission shall soon, in conjunction with the World Bank launch an anti-cartel project, which shall examine the extent of harm caused by the cartels prosecuted in South Africa on the COMESA Common Market. ■

> “SOFT CONVERGENCE THROUGH BILATERAL RELATIONSHIPS AND MULTILATERAL COMPETITION BODIES SUCH AS THE ICN HAVE DONE THE MOST TO HELP DEVELOPING COUNTRIES LEARN INTERNATIONAL BEST PRACTICE FROM LIKE-MINDED COLLEAGUES, WHICH THEY CAN ADAPT TO THEIR DOMESTIC CIRCUMSTANCES.”

RANDY TRITELL

GÖNENÇ GÜRKAYNAK
> Concurrences Review, October 17, 2016

Gönenç Gürkaynak – managing partner of ELIG, Attorneys-at-Law – has interviewed Randy Tritell – director of the Office of International Affairs at US FTC. They participated in the panel “GLOBALIZATION AND THE RISE OF REGIONALISM: TPP, ASEAN, COMESA, MINT AND COHERENCE IN THE WORLD.”

Gönenç Gürkaynak: How do you think the increasing trend of regionalism affects the national competition laws of countries with developing economies? For instance, do you believe that the national competition laws of countries with developing economies are positively affected as the regional agreements set a legal benchmark? More specifically, do you believe in the benefits of including competition-related provisions in regional free trade agreements, especially from a perspective to reconcile potential differences between competing approaches and compile best practices? In contrast, would you rather believe that developing economies are negatively affected through blending diverse legal and regulatory systems?

Randy Tritell: I see value in competition agencies in a region that face common challenges forming voluntary arrangements to share experience and strengthen their institutions. Commonalities of, in example, histories, culture, language, economic development, and legal systems can catalyze maturation of younger agencies, include by importing and adapting best practices and avoiding mistakes. Regional arrangements may facilitate cooperation, realization of economies of scale, and efficient platforms for receiving technical assistance.

Competition provisions of trade agreements can usefully set forth high-level competition principles, contributing to a body of international soft law. However, they can also risk imposing competitions rules on countries that are not ready, may not be well suited to some member countries, and may detract from efforts to foster convergence on an international level.

Soft convergence through bilateral relationships and multilateral competition bodies such as the ICN have done the most to help developing countries learn international best practice from like-minded colleagues, which they can adapt to their domestic circumstances. These mechanisms offer the most promising path toward the development of strong and convergent competition regimes.

Gönenç Gürkaynak: Especially with the rise of mega-regional agreements such as the Trans-Pacific Partnership (TTP), what are the economic and political economy rationales for including competition-related provisions in such mega-regional agreements, especially considering that the signatories/parties to such agreements are already likely to have competition law regulations of their own or likely to be a signatory/party to other regional agreements.

As far as future regional or mega-regional trade agreements are concerned, do you agree/disagree that such venues offer potential ways of dealing with competition-related issues? What are some of the competition related issues/policies that should be included in such regional or mega-regional trade agreements and whether such policies should go beyond a mere obligation to promote competition? On a similar vein, should the policies include or exclude considerations specific to certain sectors.

Randy Tritell: The traditional rationale for including competition provisions in trade agreements is to prevent “behind-the-border” domestic restraints from undermining the benefits of trade liberalization. While some trade agreements have required countries that did not have a competition law to enact one, a more recent motivation is to raise to the treaty level commitments to implement competition laws in specific ways, for example to ensure transparency and procedural rights or provide a private right of action.

Competition provisions of trade agreements can contribute to strengthening consensus around high-level principles, such as a consumer welfare goal, transparency, and procedural fairness. However, given that competition enforcement often entails analysis of complex issues, evolves with new economic and other learning, is highly fact-dependent, and requires wide scope for prosecutorial discretion, I would be skeptical of the value of very detailed or substantive competition provisions in trade agreements, and believe competition provisions remain unsuitable for mandatory dispute settlement.

Gönenç Gürkaynak: Could problems in the antitrust enforcement as well as the lack of sufficient cooperation among antitrust agencies be overcome through a more globalization oriented approach in terms of free trade agreements?

Randy Tritell: Efforts to enact global competition codes have foundered from the Havana Charter almost 70 years ago through the Doha Round in the WTO, and there is no current prospect for their revival. In any event, trade instruments are ill suited to address specific enforcement issues and are unlikely to succeed in mandating cooperation, which is an inherently voluntary activity.

As mentioned above, soft convergence through bilateral and multilateral engagement by competition officials is the most effective path to the development of sound and convergent competition enforcement. For example, the ICN and OECD have issued consensus, non-binding but authoritative recommendations that have advanced substantive and procedural convergence. The OECD has recently issued an updated Council Recommendation on antitrust cooperation and the ICN and other competition bodies have facilitated cooperation both through provisions in its non-binding instruments and, importantly, by providing a supportive venue for officials to get to know their colleagues around the world. ■

* The views expressed are those of Mr. Tritell and not necessarily those of the Federal Trade Commission or its Commissioners.

> “… THERE’S DEFINITELY A PLACE FOR ANTITRUST AS IT RELATES TO INTELLECTURAL PROPERTY. AS THIS AREA DEVELOPS, THE KEY SHOULD BE TO EXAMINE THE EFFECTS OF ANY RULES ON INCENTIVES TO INNOVATE – AND ULTIMATELY, CONSUMER WELFARE – AND STRIKE THE RIGHT BALANCE.”

SUSAN NING

CHRISTOPHER MEYERS
> Concurrences Review, October 13, 2016

Christopher Meyers – associate general counsel of Microsoft – has interviewed Susan Ning – partner at King & Wood Mallesons. They participated in the panel “INNOVATION AND DEVELOPMENT: LICENSING AND ANTITRUST/IP RULES AND GUIDELINES.”

Christopher Meyers: The interplay between antitrust and IP is quite a hot topic around the world. Nowadays, many jurisdictions have issued or are contemplating to issue IP related antitrust rules/guidelines. As can be seen, there are many differences between the (draft) IP related antitrust rules/guidelines released by different jurisdictions. In that regard, how can multinational technology companies, like Microsoft, be compliant with all those IP related antitrust rules/guidelines? Will the company use a unified template of licensing agreement or different ones for different jurisdictions?

Susan Ning: It is a complicated area, but in many ways it’s no different than other substantive areas of competition law. Although intellectual property issues have been part of antitrust for decades, new practices are causing authorities to focus in and develop more nuanced approaches. As with any new area, one should expect some differences at the beginning. Microsoft experienced that with respect to developing unilateral conduct theories across multiple jurisdictions starting in the 90s. I think what most companies hope on the IP front is that enforcers keep working to get it right, openly discussing principles, theories and enforcement with each other and learning from how the markets actually develop. In the meantime, we’ll all do our best to cope with differences in the law. Sometimes that will mean adopting country-specific approaches. Other times we will resort to the least-common denominator world-wide.

Christopher Meyers: Developing countries, such as China, now attach great importance to intellectual properties. Their IP/antitrust policies, legislation and enforcement activities are also evolving rapidly in recent years. In that regard, as Associate General Counsel who leads the Antitrust Competition Law Group for Microsoft, how do you coordinate with local teams to bring the company’s compliance up to the speed?

Susan Ning: Over the years, we’ve tried to put the right resources in place globally so that we can be agile in anticipating and responding to new developments. For example, we’ve had a dedicated in-house Anti-Monopoly Law lawyer based in Beijing for years, and another in-house competition lawyer supporting our Asia-Pacific region more broadly. Our global antitrust team then coordinates closely with others in our legal and corporate affairs group and the respective businesses, both channel and product design, to provide the right training and advice. Our focus is on deeply understanding our business, and being embedded with them so that we’re involved in any current issues and looking toward the future.

Christopher Meyers: Do you think that IP related antitrust rules/guidelines impose unnecessary burden on technology companies that may restrict the company’s innovation?

Susan Ning: They certainly can, but that is why getting the balance right matters so much. When I was a law student I wrote a paper on the US market power presumption for patents, particularly as it applied in tying theories. Since then, the law has changed and all enforcers recognize that a patent doesn’t convey market power in and of itself. Looking back, that former rule obviously imposed burdens that were ultimately bad for consumers, so these principles absolutely can have a negative impact. That said, there’s definitely a place for antitrust as it relates to intellectual property. As this area develops, the key should be to examine the effects of any rules on incentives to innovate – and ultimately, consumer welfare – and strike the right balance. As importantly, solid and robust IP regimes can alleviate the call for antitrust to step in to address apparent problems in the market. When IP regimes are well-tuned, they serve the exact same purpose as antitrust: incenting and encouraging innovation. ■

> “…TRADE AND INVESTMENT CANNOT CONTRIBUTE TO DEVELOPMENT OUTCOMES IN THE ABSENCE OF A POLICY FRAMEWORK THAT CREATES CONDITIONS THAT ARE CONDUCIVE TO ECONOMIC GROWTH AND POVERTY REDUCTION. HENCE, SOUND TRADE AND INVESTMENT POLICIES SHOULD BE REGARDED AS COMPONENTS OF GOOD ECONOMIC GOVERNANCE.”

JONATHAN FRIED

ELEANOR FOX

> Concurrences Review, September 1, 2016

Eleanor Fox – professor at the New York University School of Law – has interviewed Ambassador Jonathan Fried – WTO. Ambassador Jonathan Fried delivered the opening keynote speech “The Place of Competition and Development in the Global Trade and Economic Architecture” and Professor Eleanor Fox moderated the “Globalization and the Rise of Regionalism: TPP, ASEAN, COMESA, MINT and Coherence in the World” panel.

Prof. Fox: Ambassador, you have thought deeply and spoke eloquently about the global economic architecture of the future, and about the place of developing countries in that architecture. Very often today, while trade, investment, environment, labor, development, global value chains, and a host of other subjects and phenomena are invoked as pillars of our emerging global architecture, competition is omitted. Why is that the case? Do you think the omission should be rectified, and why? If you should have observations of particular relevance to developing countries, we would be especially interested in them.

Ambassador Fried: In my view, the issue is not whether competition is or should be part of the emerging global economic environment, but where competition issues are best addressed. The WTO Agreements, for example, share the objective of antitrust laws of ensuring that commercial actors benefit from a level playing field. However, trade and investment rules are typically designed to discourage governments from acting on the temptation to discriminate against foreign actors. In contrast, competition laws discourage commercial actors from engaging in anti-competitive conduct. In addition, whereas trade and investment rules usually limit the ability of governments to interfere in commercial affairs, antitrust laws facilitate the intervention of governments in the market to address anti-competitive conduct.

As national competition authorities tackle issues in the “relevant market”, they are not always confined by national borders. For instance, Canada’s Competition Bureau might regard the Niagara region, which includes parts of New York state and Ontario as the relevant market for the purposes of an investigation. So it is clear that antitrust issues often contain an international element. Consequently, it is not hard to see why there have been calls for the establishment of a treaty-based regime to address these issues.

As a result, competition matters do figure on the international agenda. For instance, despite its considerable informality, the International Competition Network has had success in addressing global antitrust problems and has complemented efforts undertaken by UNCTAD and the OECD. And there is some degree of formalization of anti-competitive rules at the international level. The WTO includes the GATT’s disciplines on State Trading Enterprises and the Anti-Dumping Agreement’s focus on a type of anti-competitive price discrimination. At the regional level, the NAFTA set a trend that has seen many RTAs incorporate obligations related to competition policy. And the proliferation of such commitments at the regional level may portend a more focused effort multilaterally, building on the discussion forums endorsed at both the Singapore and Doha Ministerial Conferences but never completed.

Developing country interest in and concern about anti-competitive conduct [earlier] focused on alleged restrictive business practices of multilateral corporations. Efforts to codify a binding response at UNCTAD floundered in the late 1970’s resulted only in a set voluntary principles adopted in 1980. More recently, more developing countries have come to see the benefit of adopting modern competition law regimes, and of enhanced international cooperation. For example, in 2009, fourteen African countries met in Kinshasa under the auspices of the Southern African Development Community to adopt the SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

Prof. Fox: Ambassador, a number of nations' economies, especially developing countries' economies, are still dominated by state-owned enterprises, and those enterprises are often accorded many privileges. This includes China, many nations in South East Asia, and a number of others. How should this phenomenon be taken into account as we try to move to a more coherent and fair world trading system, and what are the chances that your suggestions will be embraced?

Ambassador Fried: The post-war trading system, first under the GATT and now the WTO, has always been cognizant of the potential distorting impact of certain state entities. Article XVII of the GATT since 1948 has bound members to ensure that the buying and selling activities of "state trading enterprises", whether for imports or exports, shall be non-discriminatory. An interpretative note confirms that this discipline applies to marketing boards. In 1995, the General Agreement on Trade in Services (GATS) added disciplines to ensure monopoly service providers compete on commercial terms. But state-owned and state-supported enterprises (SOEs and SSEs) have become more common vehicles for doing business in key sectors, from natural resource extraction, production and marketing to finance, telecommunications and transportation. For example, one count suggests that state-owned entities control more than three-quarters of the world's oil reserves. And as your question implies, and the record shows, policies to protect and promote national champions have played a significant role in the rapid development of major emerging economies, including in East Asia.

So SOEs have been the focus of significant and increasing attention in recent years within the trade community, because various elements of state control, such as subsidization (whether direct or by way of preferred tax treatment or access to credit) or regulatory preferences, can distort competition with private firms at home or abroad. Many now speak of the importance of ensuring a principle of "competitive neutrality".

While the Canada-US FTA and NAFTA were among the first preferential trade agreements to address competition law and policy directly, most recently the Trans-Pacific Partnership agreement (TPP) reflects a more comprehensive attempt to address commercial activities of SOEs that compete with private firms in international trade and investment. Building on work done by many of the parties in APEC's Competition Policy and Law Group, and reflecting the basic doctrine of "restricted sovereign immunity", the TPP requires parties to ensure that such entities principally engaged in commercial activity shall act in accordance with commercial considerations, to give courts jurisdiction to enforce this requirement, and to ensure that regulatory authorities act impartially. Exemptions are provided for entities providing a public service and in country-specific annexes.

At the WTO, a Working Group on the Interaction between Trade and Competition Policy was established at the Singapore Ministerial Conference in December 1996, but its work has been suspended. A fresh approach would entail taking inspiration from TPP to modernize GATT disciplines on state trading enterprises, combined with a comprehensive review of the extent to which existing WTO disciplines, for example on subsidies, are adequate to address financial and regulatory advantages. Given the lack of consensus on the continuation of the work of the Singapore Working Group, however, prospects are slim for early engagement at the WTO. More promising is the ongoing work at the OECD, UNCTAD and APEC.

Prof. Fox: It seems to me that in some respects globalization has been hard on developing countries, and in other respects it offers great opportunities to them and their people. Do you agree, and would you comment?

Ambassador Fried: The adoption by the UN of the Sustainable Development Goals in December, 2015 reflects a global consensus that trade and investment can and should play a positive role in assisting developing countries and their peoples benefit from globalization. Indeed, a vast array of evidence and experience demonstrates that openness to trade and investment, by fostering connections to large markets, can improve the economic prospects of developing countries.

However, trade and investment cannot contribute to development outcomes in the absence of a policy framework that creates conditions that are conducive to economic growth and poverty reduction. Hence, sound trade and investment policies should be regarded as components of good economic governance. In this regard, the UN's SDGs are right to regard trade and investment liberalization as a means to an end rather than an end in itself.

For a country's sustainable development prospects to be positive, its regulatory environment must enable business to do business. This entails first, a commitment to the rule of law that fosters predictability. Secondly, a sound macroeconomic framework is essential, encompassing prudent fiscal and monetary policies, to foster the stability that allows investors and economic actors to form expectations and to commit to projects to spur economic development. Thirdly, an enabling framework in key sectors can provide the infrastructure on which all business is dependent, such as finance, energy, transportation, and telecommunications. For example, the development and entrenchment of competitive and liquid financial markets that facilitate access to credit for small and independent producers, indigenous groups, and SMEs, among others, allows these actors to connect to global value chains. Finally, related policies to promote education and skills development, health and the environment, ensure the sustainability of a development path.

Seen in this light, openness to trade and investment can be an enhancer, a catalyst, to improve growth prospects. Admittedly, the differing levels of economic development of developing countries needs to be borne in mind in undertaking reforms. To put it simply, different developing countries have different capacities, so the sequence of trade and investment liberalization vis-*à*-vis other policy pillars of economic development needs to be carefully considered.

The Trade Facilitation Agreement (TFA), concluded in 2013 at the WTO's Ministerial Conference in Bali, provides an important new paradigm. The TFA permits developing and least-developed countries to both make their own determinations regarding the timing of the implementation of obligations and to identify provisions that they will implement after receiving technical assistance and support for capacity building. Ultimately, however, all WTO Members will respect the same level of obligation. ■

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Set up in a wonderful venue - at the heart of the NYC Village. The room was also very comfortable - with cozy sofas, chairs, and tables that made it easy to take notes. This conference is the best kept secret of antitrust conferences."

DINA KALLAY
Ericsson

I learned a great deal from our panel and from the entire conference, which occupies a unique and valuable niche in the antitrust landscape."

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The conference was very interesting, and the topic of developing countries is an urgent and relevant one. I really appreciated the high standard speakers, the organization and planning of the event."

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Insightful and informative presentations."

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It was a pleasure to be a panelist at this October 2016 conference on competition and developing economies and to have the opportunity to discuss competition policy in Turkey and its relation to regional development. The conference brought together an impressive list of speakers and delegates in New York and at a great conference setting. I am looking forward to next year's event."

GÖNENÇ GÜRKAYNAK
ELIG, Attorneys-at-Law

Very insightful and international oriented conference. I benefited a lot from the speakers, who are very experienced and knowledgeable, and I very much look forward to next year's event"

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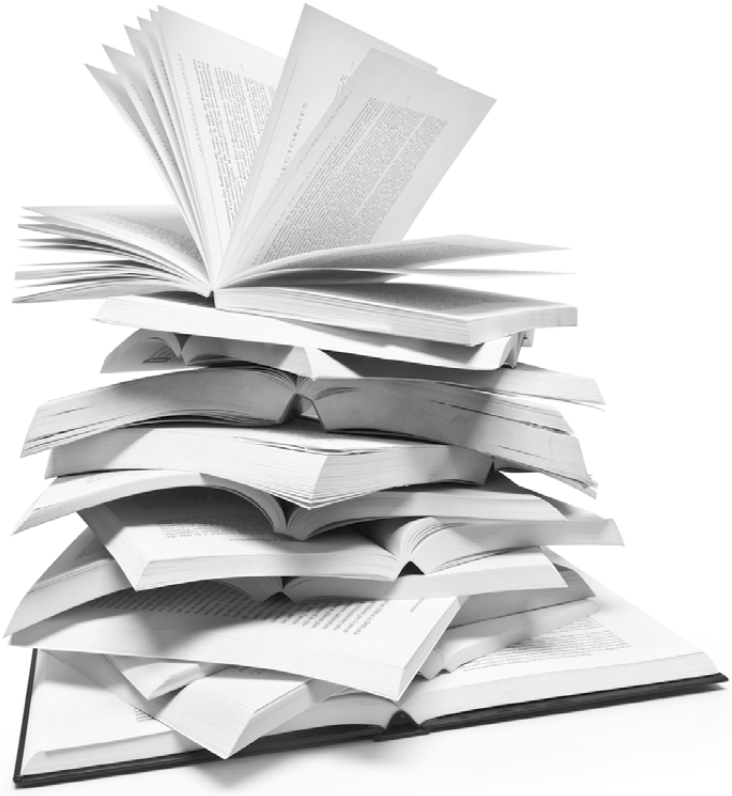

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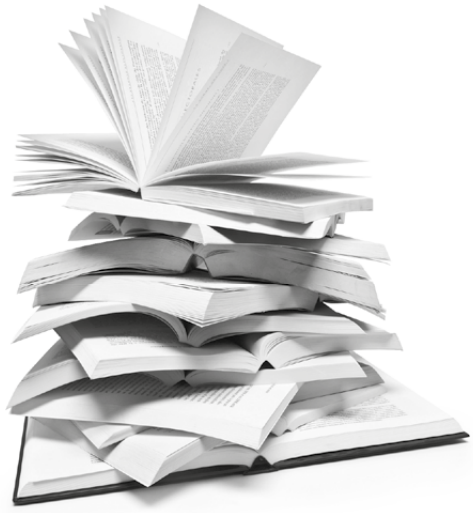

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