CONFERENCE SUMMARY

New York University School of Law and Concurrences Review hosted the 2nd Edition of the Conference "Antitrust in Emerging and Developing Economies" at NYU School of Law in New York City on Friday, October 23, 2015. **Kevin Davis** (*Vice Dean, New York University School of Law*) welcomed over 100 participants to the conference, which featured the law, practice and policy in several of the most antitrust-prominent developing nations, including China, India, Brazil, Mexico, and Africa.

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.

ANTITRUST POLICY IN EMERGING AND DEVELOPING ECONOMIES

The conference opened with a conversation between **Eleanor Fox** (*Professor, New York University School of Law*) and **Eduardo Pérez Motta** (*former President, Federal Competition Commission, Mexico, now Partner at AGON, Mexico City*) about antitrust policy in emerging and developing economies.

Mr. Pérez Motta identified lack of institutions as a major obstacle to robust market systems. While acknowledging that there are many challenges developing countries face, the lack of well-functioning institutions is the greatest, particularly in Mexico. He stressed the importance of credible, independent, transparent, and inclusive institutions.

Building institutions takes time and political will, according to Mr. Pérez Motta. He highlighted advocacy as the principal tool for competition agencies to raise consciousness about the importance of creating institutions. He emphasized the importance of frequent, public discussions to persuade others of the need to focus on institutional reform and help sway the political pendulum in that direction.

Professor Fox turned the conversation to Mr. Pérez Motta's experience at the Federal Competition Commission (CFC, the Spanish acronym), recognizing his success despite powerful vested interests. Mr. Pérez Motta explained his strategy was to rely heavily on advocacy as a tool for change – whether it was to have better instruments, changes in the competition law, to improve market regulation, or to create better institutions that could help enforce the law. Lacking sufficient resources to do it all, he had to set his priorities: enforcing the law on private decisions that impede competition and advocating for regulatory change.

Pursuing that strategy, the CFC concentrated on studying the most important sectors that had the greatest impact on the Mexican economy (telecommunications, energy, financial services, and transportation), performing market diagnostics, developing proposals for regulatory change, and then advocating for those changes. At the same time, the CFC started to vigorously apply and enforce the law, imposing behavioral remedies and sanctions on many of the powerful companies. As explained by Mr. Pérez Motta, these actions led to a series of changes, culminating in major reforms last year – including changes to the Mexican Constitution – that increased the regulatory powers of the government to make markets more efficient and to sanction players in the telecom sector.

Mr. Pérez Motta cited the creation of specialized courts as one of the most successful elements of last year's reform. Mr. Pérez Motta explained that historically in Mexico, judges ruled more frequently on procedural issues in antitrust cases rather than on the more difficult economic arguments. More experienced judges are now able to decide cases faster and with more profound analysis of the substance.

Even though there were many successes, the CFC also had some failures. One of them, as Mr. Pérez Motta indicated, was the fact that, as part of these major reforms, the legislature decided to take competition law in the telecommunications sector out of the hands of the competition authority and place it under the control of the telecommunications regulator.

Professor Fox shifted subjects, asking Mr. Pérez Motta how competition law and policy fit with, and can advance, the UN post-millennium development goals targeting problems of poverty and inequalities within countries. Mr. Pérez Motta replied: competition and market oriented ingredients. While acknowledging competition reform is only one element of meeting these goals, he explained in detail how inserting market ingredients on every one of these fields would improve them. He addressed how lack of competition in areas such as health, education, and infrastructure prevents growth.

The conversation concluded with questions from the audience. Mariana Tavares de Araújo (*Partner, Levy & Salomão, Rio de Janeiro*) asked about the challenges of enforcement and international coordination among competition agencies. Mr. Pérez Motta indicated that enforcement and international coordination are indeed important challenges today, and agencies must be prepared to understand differences across regimes, both how the legal standards and their implementation differ. Mr. Pérez Motta believed enhanced coordination and other mechanisms could address these situations. Agencies could take the cue from private players who coordinate work among practitioners from different countries and could similarly coordinate more. He considers that there is sufficient space for competition agencies to engage in "work sharing." Doing so, Mr. Pérez Motta emphasized, would reduce enormous costs related to legal uncertainty in the competition field.

PANEL 1
SETTING THE STAGE:
STATE INVOLVEMENT IN A MARKET ECONOMY

In this first panel, moderated by **Eleanor M. Fox** (*Professor, New York University School of Law*) panelists explored the impact of state restraints on competition, how competition policy can combat undue state restraints, and strategies for doing so.

Simon Roberts (*Professor of Economics, University of Johannesburg, Executive Director of Centre for Competition, Regulation and Economic Development (CCRED)*) addressed state involvement with respect to the South African economy. Professor Roberts noted that, while it has been 21 years since the first democratic elections, South Africa is still influenced by previous state policies. There is little movement in the ranking of corporations in many sectors, which he attributed to a legacy of privileged access to infrastructure and capital. Professor Roberts also discussed how corporations have used trade barriers to divide markets regionally and stressed the need to remove these barriers.

Professor Roberts described the South African competition regime's prosecution of state owned enterprises (SOEs) in the telecommunications and airlines industries and offered insight into how to foster competitive markets. He pointed to case studies that show entrants need the knowhow, financing, and a path to market. Competition authorities can facilitate new market entrants by monitoring barriers to entry, such as trade barriers that prevent entry from firms in neighboring markets, access to distribution, railway lines, mining rights, and other input requirements.

Professor Roberts suggested two areas for competition agency engagement in combating state restraints. First, competition authorities have lawyers and economists who can offer evidence, domestic or examples from other countries, to help politicians and legislators understand the competitive impact of a particular restraint. Second, competition authorities can develop an enforcement agenda and strategy to help shape the rules of the game to allow new entrants into various network industries, supporting dynamic rivalry.

Susan Ning (*Partner, King & Wood Mallesons, Beijing*) noted that China is still in the process of transitioning from a planned economy to a market economy. As a result, many "administrative monopolists" (monopolists that are supported by the administration) that came into existence during the planned economy still exist, affecting the free flow of services, goods, and technology. For example, the administration allocates natural resources to its preferred SOEs, rather than relying on the market itself, which leads to abuse of other market players and impedes healthy economic operations. The State Council of China recently advocated for reform to encourage competition through antitrust enforcement, including against SOEs.

Article 5 of China's Anti-Monopoly Law (AML) identifies specific conduct of government administrative monopolies that will be found to violate the law. Such conduct includes discriminating between local and non-local enterprises and obstructing the free flow of products. Article 7 of the AML, which deals specifically with SOEs, has been interpreted by some as favoring SOEs and the status quo of administrative monopolies. A clearer reading, and the one favored by the government is that Article 7 is a neutral provision that requires SOEs to abide by the law. Ms. Ning noted that litigation can be a potential remedy to counter an SOE's abuse of power and mentioned a few cases in which SOEs have been sued by the competition authorities.

Ms. Ning also discussed the expected introduction in 2018 of a negative list to make industries not listed more accessible to foreign investors (in contrast to the current positive list limiting access to those enumerated industries). Through this general trend of "opening up," domestic private firms also can have more access to industries traditionally limited to SOEs. Furthermore, limiting necessary administrative approval requirements reduces opportunities for rent-seeking and corruption.

Francis W. Kariuki (*Director General, Competition Authority of Kenya*) explained that to understand the current landscape in Kenya, one needs to understand the historical perspective. Until 1994, Kenya had a state controlled economy. The competition law enacted in 1989 exempted SOEs from its scope. Even today, SOEs continue to receive subsidies in particular industries, such as sugar, dairy, and retail markets. And, as in China, dominant SOEs distort the landscape for private investors wishing to enter the market. However, Kenya's new competition act covers SOEs, and the competition agency can and does conduct competition assessments of existing or proposed government regulations in order to advise sector regulators and help formulate competition-friendly policies.

Mr. Kariuki also discussed the importance of ensuring that competition law and policy are entrenched in the economic agenda, particularly in regulated sectors like telecommunications, agriculture, and transportation. Key to making that happen, according to Mr. Kariuki, is that the competition agency has a seat at the table when laws and regulations are under consideration. The Kenyan authority uses research on the benefits of competition to demonstrate to government officials the positive effects (such as price and/or poverty reduction) of opening up particular markets and effect change.

Jonathan Orszag (*Senior Managing Director, Compass Lexecon, New York*) offered his perspective on some of the challenges and issues raised by the other panelists. Mr. Orszag divided government intervention into two categories: market intervention due to conduct of firms, and market intervention based on market performance and outcomes. Intervention challenging the conduct of firms, such as cartels and unilateral conduct, seeks to remedy consumer harm and deter future anticompetitive conduct. In the second category, policymakers may intervene if they do not like the outcomes of the market, for example, by limiting credit card fees that can be imposed or capping late fees. The government also may pick winners and losers. As an example, Mr. Orszag pointed to the telecommunications industry and the US government's decision to engage in wireless spectrum auctions, which not only raised money for the government, but also led to a more efficient allocation of resources.

Mr. Orszag advocated for competition agencies to engage in a retrospective evaluation of mergers. By focusing on the actual effects of previous mergers and the efficacy of any remedies, agencies can gain insight for future enforcement. Mr. Orszag also emphasized the important role of competition agencies in shaping policies outside of antitrust. Mr. Orszag pointed to the US Department of Justice's participation in policymaking, through, inter alia, the issuance of advisory letters. Furthermore, Mr. Orszag noted the importance of competition agencies making economic concepts and conversations more accessible to the politicians and legislators who will be developing competition laws.

PANEL 2
ANTITRUST AND IP IN HIGH TECH:
WHAT'S GOOD FOR INNOVATION AND DEVELOPMENT?

Harry First (*Professor, New York University School of Law*) opened the panel by asking the speakers how developing countries approach antitrust in the context of intellectual property in high tech, and what role, if any, antitrust law should play when addressing intellectual property issues.

H. Stephen Harris (*Partner, Winston & Strawn, Washington, DC*) described how standard essential patents are developed in standard setting organizations and licensed on fair, reasonable, and non-discriminatory (FRAND) terms. He asserted that disputes over licensing under FRAND terms are rarely a competition issue – or at least should not be a competition issue. Mr. Harris described Microsoft's complaint of FRAND violations against Motorola, which was resolved in the US on the basis of contract law principles. In China, two comparable cases were analyzed – one under contract law, the other under antitrust law. The Chinese cases were consolidated on appeal, but Mr. Harris noted that the outcome was very similar to the US case, including a similar reduction in the amount of royalties. You could argue, suggested Mr. Harris, that you get to the same outcome under contract or antitrust law. Mr. Harris also questioned whether patent hold up is a real or imagined problem and whether antitrust remedies should be available.

Kirti Gupta (*Director of Economic Strategy, Qualcomm, San Diego*) provided context as to why the debate over the intersection of antitrust and intellectual property law in India is focused on mobile technology. India is the second largest mobile technology market in the world, after China and before the United States. However, Indian jurisprudence on FRAND licensing practices for SEPs has begun to take shape only very recently. One issue under discussion is whether cases involving FRAND commitments are a matter of antitrust law at all. According to Ms. Gupta they have usually been addressed as a contract or tort law matter. The issue of jurisdiction is playing out in India, with cases involving the same parties involved in FRAND licensing disputes being heard both in the Delhi High Court and pending investigation at the CCI. Ms. Gupta addressed the complex and difficult issues a competition authority must deal with in applying competition law to cases involving license agreements. She asserted that when antitrust agencies set or regulate royalty rates, it raises the question of whether a particular royalty rate fairly and adequately compensates an innovators for their investment and risk, and cautioned that if not determined appropriately, may seriously harm the incentives for innovators to invest in risky R&D. She suggested that in cases in which parties raise concerns of potential patent hold-up or "exorbitant" royalties, competition authorities should seek concrete evidence of anticompetitive effect before challenging the conduct as an antitrust violation. As the government implements initiatives to encourage India to climb further up the value chain, Ms. Gupta asserts that it is imperative that the approach to intellectual property is attractive both to implementers and inventors.

According to **R. Ian McEwin** (*Khazanah National Chair, University of Malaya Malaysan Centre of Regulatory Studies*) the meaning of innovation and intellectual property differs between developing and developed countries. Approaching the topic from the viewpoint of much poorer southeastern Asian countries, innovation centers on how to commercialize new ideas and take products to the market on advantageous terms. He asserted that copyright and trademark protections are more important than patents. Professor McEwin observed a clash between developing countries who want to use the technology protected by patents and developed countries who own the patents. Multinationals do not always appear to understand that developing countries have different policy objectives. He noted that many developing countries try to limit the scope of IP coming from developed countries, and misuse of IP rights in products sold in developing countries is a subject of debate. Professor McEwin believes bilateral agreements would provide an appropriate solution, noting few southeast Asian countries take advantage of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). He suggested differences in development, institutions, and recognition of intellectual property rights may be the reason why TRIPS is not used in developing policy responses.

In response to a question posed from the audience, the panelists discussed the implications of negotiating worldwide rights and rates even though in many countries patents don't exist. Another audience member asserted antitrust enforcement against standard essential patents is a way to allow developing countries to take away property rights, either by regulating price or requiring licensing.

LUNCH KEYNOTE:
LIFE CYCLES OF NEW COMPETITION AGENCIES

In a lunchtime keynote address, Professor **William E. Kovacic** (*Non-Executive Director, Competition Markets Authority, London; Professor, George Washington University, Washington, DC*) offered his perspective on the life cycles of new competition agencies.

Professor Kovacic began by noting the transformation within the field of competition law. Within the last twenty-five years, about one hundred new competition authorities have been established. Professor Kovacic suggested that assessment of a new competition authority's success can only reliably take place twenty to twenty-five years after the authority's establishment, for a variety of reasons. First, it takes around twenty-five years for the authority to identify its principle objectives and to establish an internal hierarchy of these objectives. Second, during this initial period, the extent of the agency's powers will be severely tested. Every significant mandate will be challenged in court, and the process of legally affirming the agency's authority is very gradual. Third, these initial decades also provide a sense of the system's resiliency in the face of both external and internal leadership change. Some questions during this period focus on how an agency responds to a regime change in which the new leader has a different view about the value of competition. Furthermore, how does the agency survive after its *own* leadership changes? Finally, it takes a quarter of a century to assess the agency's long term capacity to deal with challenges such as quality of human capital, corruption, and the lack of transparency and/or predictability of administrative protocol.

Professor Kovacic discussed three basic profiles of the life cycles of new competition agencies: "rapid ascent and rapid fall"; "flatline," in which the agency has not done much of anything; and "gradual ascent." Professor Kovacic described the requirements of the "gradual ascent" life cycle and explained why these features contribute to a successful competition agency.

First, new agencies must commit to periodic upgrades every five years – reviewing from top to bottom how the agency functions. Successful new agencies, such as those in Brazil and Mexico, have committed to these kinds of consistent and systematic improvements. Second, new agencies must have a leader who has broad experience with the nation's political economy and reality. This leader must know how to work through the political process and must be able to assess opportune moments for maximizing the agency's authority. Third, agencies must commit to hiring a staff of younger people (and paying them well) in order to maintain a fresh perspective and enthusiasm for the new agency's goals. Fourth, agencies must make foundational investments in institution building, while establishing credibility through a minimum critical mass of enforcement activity. Professor Kovacic pointed to Mexico's focus on the transportation, telecommunications, and finance industries and emphasized the need for new agencies to develop an enforcement strategy that achieves results in significant sectors. New agencies must also focus on expanding its intellectual foundation, both within the agency and in the courts. Professor Kovacic noted that long-term engagement with outside countries can encourage this intellectual foundation, and pointed to the relationship between the US and Polish competition agencies during the 1990s. Furthermore, new agencies need to invest in judicial education so that courts can analyze the problems presented by competition law and policy and can decide cases on the underlying merits rather than just procedural issues. Professor Kovacic reiterated the importance of periodic review of agency activity. This process not only requires intra-agency transparency and disclosure, but also requires extensive consultation with outside parties and agencies. Though it may be difficult for a new agency to receive criticism from outsiders, such as from agencies in other countries, this kind of assessment is beneficial in the long run.

Professor Kovacic highlighted several countries with agencies on a "gradual ascent" trajectory, including Brazil, Mexico, Kenya, and South Africa. All of these agencies have assessed their activities, made upgrades to their systems, and invested in institutions and the judiciary. For some countries, such as China and India, it is too early to tell whether their agencies will settle into the "gradual ascent" life cycle. However, Professor Kovacic was optimistic. China is slowly transitioning to a more engaged and transparent system, while India has established a much improved merger review system.

Professor Kovacic concluded with advice for continued improvement for new agencies, including encouraging newer agencies to work with other agencies that have gone through similar processes and to draw inspiration from those agencies that have developed techniques to meet the challenges they face.

PANEL 3
COMPETITION POLICY FOR PHARMACEUTICALS: ACCESS, ABUSE, AND INCENTIVES

This panel, moderated by **Bhaven Sampat** (*Associate Professor, School of Public Health, Columbia University*) addressed competition policy in the pharmaceutical sector and highlighted the unique challenges faced by Mexico, China, and India, as compared to the United States.

Carlos Mena Labarthe (*Head of the Investigative Authority, Mexican Competition Authority*) emphasized how recent changes have vastly altered the functioning of the Mexican pharmaceutical market. Many of these changes were informed by a 2009 competition assessment conducted in conjunction with the Organisation for Economic Cooperation and Development (OECD). The OECD assessment identified significant barriers to entry in the Mexican pharmaceutical market, including regulations that limited doctors' ability to prescribe generics, and the failure of public entities to leverage their buying power to negotiate lower prices on purchased drugs. The Mexican Competition Authority advocated for changes to these barriers, working with regulators to facilitate more rapid generic entry, enabling doctors to prescribe generic drugs, and encouraging public entities to consolidate procurement. Mr. Mena Labarthe emphasized the role the private sector plays in ensuring access and highlighted the recent acquisition of a major pharmacy chain by a Mexican Coca Cola bottler, a move that leveraged the bottler's pre-existing distribution network in order to broaden access to drugs.

Thomas Cheng (*Associate Professor, University of Hong Kong)* described the unique challenges faced by China as it moves away from state and locally run healthcare systems. In particular, he noted that price controls incentivized hospitals, a major channel of drug distribution in China, to increase drug sales by both overprescribing drugs and prescribing more expensive drug variants. In addition, until this past year, state regulators set the prices for roughly 500-600 "essential drugs," with some prices set below the cost of production. These unprofitable prices created shortages as producers left the market. and induced others to reduce drug quality and safety. Consumers reacted to these changes in quality and safety by shunning domestic generics in favor of higher priced, but trusted, imported branded drugs. From a competition standpoint, this dynamic reduced the ability of generics to serve as a check on the price of branded drugs. Professor Cheng was hopeful that, with the lifting of price controls, generic competition would intensify.

Aditya Bhattacharjea (*Professor, Delhi School of Economics*) discussed how the Indian pharmaceutical industry has transitioned from relative isolation to openness to international markets. In the 1990s, foreign investment was welcomed and patent laws were enacted to comply with WTO agreements. India is now one of the world's top drug producers by volume, with a pharmaceutical industry that is large, diverse, and highly fragmented. This structure seemingly would preclude many traditional antitrust concerns. Yet, Professor Bhattacharjea explained that there are serious problems. He referenced the low buying power of Indian consumers, limited insurance coverage, deteriorating government healthcare infrastructure, and markets that exhibit anticompetitive features. For instance, markets for particular therapies are highly concentrated, and distribution often is "lopsided" – with a very large number of small producers and a small number of very large producers. Moreover, generics themselves are branded and marketed under brand names, including through "dubious" techniques – such as kickbacks to doctors and pharmacies that prescribe a producer's branded generics. Emboldened by a new competition law, regulators have challenged manufacturing and pharmacists associations for anticompetitive practices, including several enforcement actions alleging cartel-like behavior and are seeking ways to increase the fines levied against associations.

In contrast, **C. Scott Hemphill** (*Professor*, *New York University School of Law*) provided an overview of the policy challenges in jurisdictions with more mature pharmaceutical industries. Professor Hemphill highlighted four areas in particular, including: 1) a slowdown in innovation by branded drug manufacturers, potentially the result of insufficient intellectual property protection needed to incentivize the development of new drugs; 2) high pricing in several categories of drugs; 3) intermittent drug shortages of basic medications, a problem that Professor Hemphill suggests should be easy to fix, but questions who has the incentive to do so; and 4) evergreening strategies employed by pharmaceutical developers to extend their periods of exclusivity, such as product-hopping and "pay for delay" patent settlements.

The panel concluded with a discussion of intellectual property protections in the pharmaceutical sector and the role of competition policy. For the most part, the highlighted jurisdictions had not addressed intellectual property issues in pharmaceutical cases. Mr. Mena Labarthe noted that while Mexico grants relatively more patents than other countries, it is important to send the message that a patent is not immunity from the antitrust laws. More discussion and research was called for on the role of competition policy and how to balance incentives to promote innovation.

PANEL 4
MERGERS:
PUBLIC INTEREST, INDUSTRIAL POLICY, AND REMEDIES

This panel, moderated by **Daniel Rubinfeld** (*Professor, New York University School of Law*), explored merger review in Kenya, South Africa, India, and the United States. Panelists discussed the issue of whether and how to incorporate public interest factors and industrial policy in merger assessment, and challenges faced by developing countries in monitoring compliance with remedies.

Francis W. Kariuki (*Director General, Competition Authority of Kenya*) highlighted some of the challenges faced by the Kenyan agency, including the difficulty of excluding passive control from the scope of merger notification, particularly in the case of acquisitions by foreign venture capitalists. Mr. Kariuki also discussed challenges relating to the relationship between his agency and the COMESA Competition Commission and the East African Community Competition Authority. Mr. Kariuki raised concerns about possible forum shopping and the complications arising from the different regimes having different members, some of which do not have antitrust laws. He underscored the need for coherent and consistent rules across economic communities. Mr. Kariuki also discussed concurrent jurisdiction over mergers with sectoral regulators and the need for competition agencies to work together with these other regulators. He noted the challenges of overlapping review are magnified when a transaction also is being reviewed by foreign competition authorities. On the topic of public interest tests, Mr. Kariuki explained that the law in Kenya provides for a public interest assessment, including of the impact on employment and exports and salvaging a declining industry. The agency developed guidance on the public interests test to increase transparency and predictability and enhance accountability in decision making.

Dennis Davis (*President, South African Competition Appeal Court, Professor, Cape Town University*) addressed South Africa's merger review system and the application of the public interest standard. In South Africa, even if a merger raises competition concerns, it can be justified on public interest grounds (or as in the Wal-Mart case, a merger that does not raise competition concerns can still be challenged on public interest grounds). Mr. Davis asserted that this bifurcated inquiry raises important issues of how to balance public interest and traditional competition concerns and how to remedy public interest issues. With respect to the latter, Mr. Davis referenced the importance of evaluating remedies to determine whether the prescribed remedies made sense ex post facto. He also noted that the threats to the public interest raised in the Wal-Mart case may not have been realized.

Samir Gandhi (*Partner, AZB Partners, New Delhi*) spoke about merger review in India where merger filings have doubled from 43 to 87 this past year. The uptick in reviewable deals has put pressure on staffing at the Competition Commission of India, Mr. Gandhi observed that CCI appears keen on coordinating with foreign counterparts, particularly on remedies. CCI is active in the global community, chairing International Competition Network) working groups, and having signed a Memorandum of Understanding with global counterparts such as Canada, the US antitrust agencies, and Russia's Federal Anti-Monopoly service. Unlike South Africa and Kenya, the Indian statute does not specifically provide for public interest considerations. Rather, the law allows CCI to assess a merger's contribution to economic development in India. This provision opens the door to using public policy in merger review.

George Cary (*Partner, Cleary Gottlieb Steen Hamilton, Washington, DC*) provided an overview of the US merger review system and the role of the courts in blocking a challenged transaction. He noted that, while the competition law is broad and covers horizontal, vertical, and conglomerate mergers, the thrust of review in the US is predominately on horizontal mergers and their likely effect on competition. The US FTC and DOJ use an economics based analysis, and non-competition concerns are not taken into account. He explained that consideration of efficiencies is subsumed in an effects analysis. He noted, however, that other US regulators, such as the telecommunications and banking regulators, take other interests into account in their merger review. Mr. Cary was of the view that public interest considerations have no relevant role to play in a competition agency's merger review.

The panel concluded with a discussion of structural (divestitures) and behavioral (conduct) remedies. All of the jurisdictions represented on the panel provide for both structural and behavioral remedies. Mr. Kariuki pointed out that for agencies, ordering remedies is easy – it is ensuring that the conditions are met that is the hard part. Mr. Gandhi agreed, noting that CCI orders more structural relief because of the difficulty in monitoring compliance with behavioral remedies and the tremendous resources involved in trying to do so. He also noted the complexities raised by global mergers, where other agencies also may be negotiating remedies. Mr. Cary commented that clean, structural remedies are preferred by the US agencies. But Mr. Cary noted that, with some structural remedies, ancillary agreements may be needed, such as supply agreements for valuable inputs or for services to be provided by the divesting company. Mr. Davis provided an interesting recount of the Wal-Mart remedy, including development of a fund for small businesses. While there was some question as to whether the remedy would work, subsequent reports indicate that many small companies have integrated into Wal-Mart's value chain and into other supply chains as well.

PANEL 5
INTERNATIONAL ENFORCEMENT: WHAT HELPS OR HURTS DEVELOPMENT

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

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

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

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

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

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

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

Mark Gidley (*Partner, White & Case, Washington, DC*) pointed to studies that show institutions are the primary drivers of growth, noting that the wealthiest countries are those with the strongest institutions. He contended that legal institutions, which protect property and enforce contract rights, are more important to economic growth than a country's natural resources. Mr. Gidley discussed how antitrust law can help build legal institutions. He also pointed to other benefits of sound competition policy, pointing to the deregulation of the aviation, truck, and train industries in the United States as examples of how competition is good for economic development. However, he cautioned that even the most developed countries with mature antitrust agencies will not function as intended, and indeed will actually harm the economy, if governments do not respect defendant's fundamental legal rights. He advocated for universal norms on minimum due process rights, including access to evidence, the right to cross examine witnesses, and a process in which parties have sufficient time to respond to allegations. He noted that it can take decades to sort out due process issues, and requires brave lawyers to bring the cases and brave judges who are not worried about political ramifications to shape the fairness of antitrust institutions.

CLOSING CONVERSATION

The conference closed with a conversation between **Dennis Davis** (*President, South African Competition Appeal Court; Professor, Cape Town University*) and **Harry First** (*Professor, New York University of Law*).

Professor First offered four reasons why he considered the conference a success. First, there was a sound debate about substantive differences in antitrust law between the US and many other regimes around the world, including on topics such as using public interest factors in merger review and enforcement against excessive or unfair prices set by dominant firms. Second, the conference explored the link between competition and economic development, and how developing countries can use competition policy to advance development goals. Third, the discussion did not shy away from identifying the challenge of applying a set of fixed principles in very different markets and through very different institutions. Fourth, conference participants explored the risks associated with the international community providing normative evaluations to the developing world without a full understanding of the local environment.

Mr. Davis elaborated on the difficulties associated with international advice that is not cognizant of local realities. According to Mr. Davis, every law must be framed in its own context, and antitrust law is no exception, shaping both the substantive understanding and the enforcement of competition law. "If we want markets to work," he asked "the questions should be: Work for what? What kind of consumer welfare should we think about?" Local environment, for example, helps explain why public interest concerns may be included in an antitrust analysis. The same applies to the necessity to address the links between development and competition: "If we deal with countries with a profound level of inequality, we can't expect this enterprise to work without addressing these concerns." The challenge for convergence then is how to adapt generally accepted principles and practices to the local environment. The concepts might be the same, but the nuances are different. He insisted that cases cannot be read ignoring the context. Finally, Mr. Davis illustrated the differences between preaching and guiding through the remarkable example of Professor Eleanor Fox's consulting work for the South African competition institutions in their early years.

In closing, Professor First noted that the spread of competition law allows us to see different experiments around the world and that the exercise of comparative law analyses is like looking into a mirror: by seeing the outcomes of antitrust regimes in other economies we can better understand our own systems.

Mr. Davis concluded that in a global economy we need to understand the changing way goods are produced and services are rendered. These changes have profound effects on competition law, and as such, competition agencies must be careful about improper enforcement of the law, particularly in emerging countries, where the system is usually more fragile and where mistakes can permanently damage the antitrust enterprise.