MEETING THE CHALLENGES OF THE EVOLVING INTERNATIONAL ANTITRUST LANDSCAPE

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INTRODUCTION

I would like to thank *George Mason Law Review* and the law school for hosting this excellent program. I am very glad to be here, especially given the commitment that the law school has demonstrated to the international antitrust field through the Global Antitrust Institute. I am particularly honored to have been asked to deliver a keynote talk to a symposium with such a distinguished faculty, which includes one of my Commissioners, three former bosses and mentors, and this high-level audience.

I would like to share with you some of the Federal Trade Commission's ("FTC") main international antitrust activities and some of the challenges that we face in our work. Let's begin with a brief look back. When I returned to the FTC in 1998, the rapid increase in competition laws and agencies that accompanied transitions to market economies that began following the collapse of the Soviet Union was in full swing. The FTC was already beginning to adapt to the challenges of globalization of antitrust. Having begun with a single lawyer in the General Counsel's office, the international antitrust program was established as a division in the Bureau of Competition to investigate and litigate these new-fangled cases with an international party or evidence of some other international dimension. As the number of those cases grew, the investigation and litigation functions were returned to the Bureau of Competition Divisions that handled the relevant subject matter. The International Antitrust Division remained responsible for providing support on international issues and, with the Antitrust Division of the Department of Justice ("DOJ"), handling relationships with foreign agencies and the increasing policy work spawned by the growth of the field.[1]

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[1] *See* RANDOLPH TRITELL & ELIZABETH KRAUS, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION'S INTERNATIONAL ANTITRUST PROGRAM 2-3 (2015), https://www.ftc.gov/system/files/attachments/international-competition/the_ftcs_international_antitrust_program_may_2015.pdf; *see also* Dina Kallay & Marc Winerman, *First in the World: The FTC International Program at 100*, 29 ANTITRUST 39, 42 (2014).

In 1998, the International Antitrust Division consisted of four staff attorneys. Our big picture goals were to build cooperative relationships with our foreign agency counterparts, reach compatible results on cross-border cases, and promote convergence toward sound policy. Those remain key goals of our program, but the way we go about implementing them has changed along with the international landscape. Not only are there far more competition laws and agencies, but many more agencies have become active enforcers, including in reviewing cross-border mergers and investigating multinational firms. In 1998, General Electric ("GE") had not yet attempted to purchase Honeywell,[2] but the need to seek policy convergence had already become clear with the near conflict between the EU and the United States in the Boeing/McDonnell Douglas matter,[3] and was poised to loom larger as more countries adopted laws that included the ability to review global merger transactions. The FTC had a young technical assistance program through which it, with the Antitrust Division, dispatched long-term advisors to agencies in central and eastern Europe. At that time, India had an antitrust law in name only, and China had no competition law.[4] The "Washington Consensus" held that market liberalization was the key to growth and development,[5] and the United States was viewed as the model and the leader in promoting the right policies to achieve those goals. A working group at the World Trade Organization was pursuing international

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[2] The U.S. Department of Justice ("DOJ") permitted the merger with a modest divestiture. Press Release, Dep't of Justice, Justice Department Requires Divestitures in Merger between General Electric and Honeywell (May 2, 2001), http://www.justice.gov/archive/atr/public/press_releases/2001/8140.pdf. However, the European Commission blocked the merger based on a conglomerate theory of harm. Press Release, European Commission, The Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), http://europa.eu/rapid/press-release_IP-01-939_en.pdf.

[3] *Compare* Press Release, Fed. Trade Comm'n, FTC Allows Merger of the Boeing Company and McDonnell Douglas Corporation (July 1, 1997), *available at* https://www.ftc.gov/news-events/press-releases/1997/07/ftc-allows-merger-boeing-company-and-mcdonnell-douglas (stating that the FTC would take no action in the Boeing/McDonnell Douglas merger), *with* Commission Decision 97/816, of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement (Case No. IV/M.877-Boeing/McDonnell Douglas), 1997 O.J. (L 336) 16, 17-18, 39 (noting that the FTC chose not to take action against the merger, that the U.S. Department of Defense had expressed concern regarding the European Commission's interference with a defense contractor, and declaring that the merger would only result in acceptable concentration levels only if Boeing complied with several Commission recommendations).

[4] *See* Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) [hereinafter China Anti-Monopoly Law], *available at* http://www.lawinfochina.com/display.aspx?id=6351&lib=law&SearchKeyword=monopoly&SearchCKeyword=; *see also 80% Indian Enterprises Unaware of Competition Law: EY Report*, ERNST & YOUNG (Dec. 22, 2014), http://www.ey.com/IN/en/Newsroom/News-releases/EY-80-indian-enterprises-unaware-of-competition-law-ey-report.

[5] *Washington Consensus*, GLOBAL TRADE NEGOTIATIONS: HARVARD UNIV. CTR. FOR INT'L DEV., http://www.cid.harvard.edu/cidtrade/issues/washington.html (last visited July 23, 2015).

competition rules,[6] but what later became the International Competition Network ("ICN") was just a gleam in the eye of a report by a Committee convened by the Justice Department.[7]

I. COOPERATION

Let's take a look at the development of international cooperation and then at international convergence. The United States entered its first antitrust cooperation agreements in the late 1970s and early 1980s.[8] These were motivated primarily by the desire to minimize political tensions that had arisen in response to the so-called extraterritorial enforcement of US antitrust laws.[9] This was a time when many of our trading partners did not have antitrust laws, or even explicitly authorized anticompetitive conduct, including cartels, that in the United States were being prosecuted criminally and through private treble damages actions.[10] By the 1990s, antitrust had gone mainstream internationally and competition agencies sought cooperation agreements as a framework for working together in the increasing number of cross-border investigations, primarily of proposed mergers. This led to a spate of agreements, including with Brazil, Canada, the EU, Israel, Japan, and Mexico,[11] to go along with earlier agreements with Germany and Australia. We also entered into specific agreements with the EU and Cana-

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6 *Interaction between Trade and Competition Policy*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited July 23, 2015).

7 In 1997, the DOJ commissioned the International Competition Policy Advisory Committee to study global antitrust issues with a focus on three broad topics: "multijurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts." INT'L COMPETITION POLICY ADVISORY COMM., U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 1 (2000), http://www.justice.gov/atr/icpac/execsummary.pdf.

8 *See* Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, U.S.-Austl., June 29, 1982, 34 U.S.T. 388; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, U.S.-Ger., June 23, 1976, 27 U.S.T. 1956.

9 Molly Askin & Randolph Tritell, International Antitrust Cooperation: Expanding the Circle, Presentation at the Antitrust in Emerging and Developing Countries Conference 6 (Oct. 24, 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/141024expandcircle-askin-tritell.pdf.

10 *See, e.g.*, In re Uranium Antitrust Litigation, 617 F.2d 1248, 1250 (7th Cir. 1980).

11 For a list of cooperation agreements see *International Competition and Consumer Protection Cooperation Agreements*, FEDERAL TRADE COMM'N, https://www.ftc.gov/policy/international/international-cooperation-agreements (last visited Mar. 31, 2015).

da that addressed the new concept of positive comity,[12] including the terms under which parties might defer to the other agency to deal with certain anticompetitive practices in their territory.[13]

While these agreements have never been legally necessary for the U.S. agencies to engage in cooperation, I think they, as well as the cooperation instrument of the Organization for Economic Co-operation and Development ("OECD"),[14] were useful in establishing the central importance of interagency cooperation, and served as catalysts to facilitate greater contact between agency staffs. In the past several years we have entered into Memoranda of Understanding ("MoU") with competition agencies in Russia, China, and India and an agreement with the competition agency of Colombia.[15] The MoU are at the agency rather than government level and are worded in terms of best efforts rather than containing mandatory provisions. But I would not spend any time trying to divine any grand method behind the taxonomy of the cooperation mechanisms. What is important is the relationships we have forged with important emerging agencies, which

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12 Under positive comity agreements, one party can request that another party enforce its antitrust laws to address anticompetitive conduct occurring in the latter's territory but that is having an effect on the requesting party.

13 Agreement between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws, U.S.-Can., art. IV, Oct. 5, 2004, T.I.A.S. No. 04-1005.1; Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, U.S.-EC, art. IV, June 4, 1998, T.I.A.S. No. 12958.

14 Org. for Econ. Co-operation & Dev. [OECD], *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*, OECD Doc. C(95)130/FINAL (Sep. 21, 1995), http://www.oecd.org/daf/competition/21570317.pdf.

15 Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Superintendence of Industry and Commerce of Colombia, of the Other Part, U.S.-Colom., Sept. 16, 2014, T.I.A.S. No. 14-916, https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/140916agree-colombia.pdf; Memorandum of Understanding on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, and the Ministry of Corporation Affairs (Government of India) and the Competition Commission of India, U.S.-India, Sept. 27, 2012, https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/1209indiamou.pdf; Memorandum of Understanding on Antitrust and Antimonopoly Cooperation Between the United States Department of Justice and Federal Trade Commission, on the One Hand, and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce, on the Other Hand, U.S.-China, July 27, 2011, https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/110726mou-english.pdf; Memorandum of Understanding on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, on the One Hand, and the Russian Federal Anti-Monopoly Service, on the Other Hand, U.S.-Russ., Nov. 10, 2009, https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/091110usrussiamou.pdf.

have facilitated the provision of training and, in the case of China, cooperation on mergers that we are both reviewing, an opportunity for input on key aspects of the implementation of the anti-monopoly law, and frank dialogue with high-level counterparts on issues of concern to the United States.

We have also advanced cooperation with our closest and most frequent cooperation partners, the European Communities ("EC") and the Canadian Competition Bureau. In 2011, the FTC, DOJ, and the EC's Directorate General for Competition ("DG COMP") issued revised best practices in merger review, providing greater guidance to parties and strengthening coordination between our agencies.[16] The FTC and DOJ also last year issued a set of best practices in merger review with the Canadian Competition Bureau,[17] and we now hold semi-annual workshops for case handlers. We have also conducted exchanges of lawyers and economists with DG COMP and the Canadian Competition Bureau. To better facilitate cooperation, last year the FTC and DOJ issued a new model confidentiality waiver form to streamline the waiver process to make it work best for agencies and parties.[18]

While most cooperation takes place in merger investigations, we have recently been able to cooperate with DG COMP and others, sometimes with the benefit of waivers, on conduct investigations as well.[19] Our antitrust cooperation with foreign counterparts is literally a daily activity, and you can see from FTC press releases the many cases in which we have cooperated with agencies around the world on the competition analysis and, importantly, on remedies to ensure that when there are multiple remedies, they are interoperable. What you don't see, because there usually is no press release, but are at least as important, are the cases on which our staffs cooperate that lead to decisions by us and the foreign agency not to prosecute.

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16 U.S.-EU MERGER WORKING GRP., BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (2011), https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/111014eumerger.pdf.

17 CANADA-U.S. MERGER WORKING GRP., BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS (2014), https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/canada-us_merger_cooperation_best_practices.pdf.

18 FED. TRADE COMM'N & U.S. DEP'T. OF JUSTICE, MODEL WAIVER OF CONFIDENTIALITY (2015), https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf.

19 *See, e.g.*, Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc; Press Release, Fed. Trade Comm'n, FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2010), *available at* https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel; Press Release, Fed. Trade Comm'n, FTC Finds Rambus Unlawfully Obtained Monopoly Power (Aug. 2, 2006), *available at* https://www.ftc.gov/news-events/press-releases/2006/08/ftc-finds-rambus-unlawfully-obtained-monopoly-power.

The FTC has also played a lead role in international cooperation initiatives in the OECD and the ICN. The OECD effort led to the first update since 1995 of the OECD's antitrust cooperation instrument.[20] The revised Council Recommendation clarifies and strengthens the Recommendation, and also encourages information gateways that, with adequate safeguards, could provide a mechanism for agencies to share confidential investigative information.[21]

This highlights, though, an area of cooperation in which we have not made as much progress as hoped, which is in the ability to share confidential investigative information. Our basic cooperation agreements are subject to domestic law, including restrictions on disclosing investigatory information.[22] This means that absent a waiver or, in the case of certain criminal investigations, a Mutual Legal Assistance Treaty,[23] the FTC is statutorily prohibited from sharing information we collect in merger or other investigations. When the US Congress enacted the International Antitrust Enforcement Assistance Act of 1994,[24] the expectation was that the agencies would be able to negotiate agreements with key partners that would allow them to share confidential information in their files and to obtain information for the use of the other country's agency. However, twenty years later, due to issues such as lack of dual criminality and restraints on downstream use of shared materials, the United States still has only one little-used agreement, with Australia, to show.[25] Given that parties routinely grant confidentiality waivers in mergers investigations, this has not been a major problem at least in most civil cases, but we should try to overcome the obstacles and find ways to be able to share more investigative information with our trusted counterparts in order to facilitate consistent analyses and outcomes of cross-border matters.

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20 OECD, *Recommendation of the OECD Council Concerning International Cooperation on Competition Investigations and Proceedings*, OECD Doc. C(2014)108 (Sept. 16, 2014), http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

21 *Id*. art. VII, ¶¶ 10-16.

22 *See* Agreement on Antitrust Cooperation between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Fiscalía Nacional Económica of Chile, of the Other Part, U.S.-Chile, arts. IV, VII, Mar. 31, 2011, T.I.A.S. No. 11-331; Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws, U.S.-Braz., arts. VI, IX, Oct. 26, 1999, T.I.A.S. No. 13068.

23 *See, e.g.*, Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters, U.S.-Ir., Jan. 18, 2001, T.I.A.S. No. 13137; Treaty Between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, U.S.-Braz., Oct. 14, 1997, T.I.A.S. No. 12889.

24 15 U.S.C. §§ 6201-6212 (2012).

25 Agreement Between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, U.S.-Austl., Apr. 27, 1997, T.I.A.S. No. 13033.

II. CONVERGENCE

For many years, there has been no more important goal than promoting international convergence, and I hasten to add that the phrase must always be completed with "toward good practices." Convergence around principles of sound economic analysis and maximizing consumer welfare enables agencies to implement competition laws in a way that promotes economic growth and development, facilitates cooperation among competition agencies, and fosters a predictable legal environment for businesses. Given the multiplicity and diversity of laws and enforcers and the absence of global rules or enforcement mechanisms, achieving this goal is a constant challenge.[26] Yet, I think that through diligent application of soft law mechanisms, we have seen that real progress is possible.

Cooperation, though different from convergence, is important to promoting it. While academic papers, conferences, and abstract discussions are useful, there is perhaps nothing that drives convergence as concretely as having staffs from two or more agencies focus together on the analysis of a particular set of facts and body of evidence.

We have also successfully pursued convergence through our bilateral relationships. A now dated, but I think still important, example is our intensive engagement with DG COMP following our conflicting resolutions of the GE/Honeywell merger. Many of you may recall that the press was full of speculation about a deep gulf between our agencies that threatened the ability of firms to engage in cross-border transactions.[27] But in the ensuing almost fifteen years there have been hardly any conflicts in United States and EC merger enforcement, which I like to think is at least partially attributable to our joint efforts. As we meet with our counterparts at staff and senior levels throughout the year, we use our dialogues to identify important areas of enforcement and frankly discuss areas of difference with the goal of more closely aligning our enforcement approaches, both procedurally and substantively.

Another important facet of our convergence efforts is our technical assistance program. The FTC, sometimes with the DOJ Antitrust Division, provides experts as long-term resident advisors, conducts regional and nationally based workshops, and assists young agencies with the full spectrum

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26 For a discussion of the role of industrial policy and fairness concerns in the application of competition law, see D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247 (2015).

27 *See, e.g.*, Michael Elliott, *The Anatomy of the GE-Honeywell Disaster*, TIME, July 8, 2001, *available at* http://content.time.com/time/business/article/0,8599,166732,00.html; *Engine Failure: How the Americans Helped Block GE's Merger with Honeywell*, ECONOMIST, July 5, 2001, *available at* http://www.economist.com/node/687696.

of activities from drafting rules to analyzing individual cases.[28] We have been active recently in a wide range of countries including Brazil, India, China, Colombia, Turkey, South Africa, and many others. A few weeks ago, two of my colleagues returned from training judges and agency staff in India, where we have made a major training commitment, on the application of antitrust law to intellectual property rights; this is an area in which the work of our office has increased exponentially along with the controversies around the world regarding the meaning of fair, reasonable, and non-discriminatory, or "FRAND" commitments, and the balance between competition rules and intellectual property protection. We are out on the frontiers, and not just on the antitrust front. One lawyer in my office was just in the Ukraine, which, amidst everything else that is going on, is seeking to improve its antitrust agency. And just last week, two brave souls from my office conducted training in Pakistan. We also operate a vibrant International Fellows program under which staff from many foreign agencies spend several months working on FTC case teams, after which they can take their learning back to their home agencies. We have also detailed FTC staff to agencies in Canada, Mexico, the EC, and the United Kingdom, learning from their experience and strengthening our ties.

Multilateral bodies, especially the OECD and the ICN, are important venues in which the FTC promotes international convergence. At the OECD, we join our counterparts from the agencies of the world's major economies to share experience and best practices. Chairwoman Edith Ramirez and Assistant Attorney General ("AAG") Bill Baer attend these meetings, as do senior officials from the other members. Though there are no binding outcomes, the discussions contribute to a common competition culture and facilitate the dissemination not only of agencies' enforcement experience but also of the ideas and views of outside experts that are regularly invited to present. This past December, Chairwoman Ramirez and AAG Baer had lead roles in our session on the treatment under antitrust laws of intellectual property rights, particularly in the context of patent licensing and standard setting organizations.[29] At our next meeting in this June, we will hold the first of what are likely to be several sessions on a topic introduced by the FTC on how competition agencies have dealt with, and could address, barriers imposed by regulation and entrenched incumbents to disruptive technologies and new business models such as Uber, Tesla, and Airbnb.

Turning to the ICN, in my view it has been the biggest success story of the recent era. I don't think anyone imagined when it was founded by a

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28 *International Technical Assistance Program*, FEDERAL TRADE COMM'N, https://www.ftc.gov/policy/international/international-technical-assistance-program (last visited Mar. 31, 2015).

29 *See* OECD, *Intellectual Property and Standard Setting—Note by the United States*, at 2 & n.3, OECD Doc. DAF/COMP/WD(2014)116 (Dec. 8, 2014), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/standard_setting_us_oecd.pdf.

handful of agencies in 2001 that we would today have 128 members from 115 countries and be looking forward to a gathering of some five hundred officials, practitioners, and academics from approximately eighty countries at our upcoming fourteenth annual conference. More than the numbers, the ICN's unique features—virtual, membership as agencies rather than governments, consensus driven and non-binding, practical enforcement focus, and partnership with private sector experts—have enabled it to make great strides in advancing international cooperation and convergence toward good practice.[30] One example is the ICN's set of recommended practices for merger review procedures. Adopted at a time when the rapid implementation of new merger review regimes was imposing escalating costs and burdens on cross-border transactions, the ICN recommendations on points such as the need for a local nexus and objective thresholds have led directly to legislative and administrative reforms that have reduced these burdens.[31] Not that this work is done—we are well aware of numerous remaining problems stemming from lack of conformity to these norms, and we hope to use the upcoming tenth anniversary of the recommendations to spur renewed efforts to promote the implementation of the recommendations. The ICN has gone on to conduct valuable work almost across the spectrum of competition issues, including recommended practices and other materials on cartels, assessment of dominance and conduct by dominant firms, competition advocacy, and agency effectiveness.[32]

Regarding the last of these, the FTC now co-leads the agency effectiveness working group and initiated and leads or co-leads two noteworthy projects. Through the ICN's Training on Demand project, we are creating a comprehensive library of video training modules on all aspects of competition law and its implementation.[33] The modules are particularly designed to assist new competition officials but are freely available to all through the ICN website. The project has already produced modules on topics such as market definition, competitive effects, leniency, predatory pricing, and effective investigation techniques, using a combination of lecture, role-play, and slides that feature leading officials, practitioners, and academics; more are in the works on topics such as merger remedies and proof of an agreement.[34]

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30 Press Release, Int'l Competition Network, The International Competition Network Lays the Groundwork for Further Convergence (Apr. 25, 2014), http://internationalcompetitionnetwork.org/uploads/library/doc964.pdf.

31 Int'l Competition Network [ICN], *Implementation of the ICN Recommended Practices for Merger Notification and Review Procedure*, at 10-11 (Apr. 2005), http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf.

32 *Current Working Groups*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/working-groups/current.aspx (last visited June 16, 2015).

33 *ICN Training on Demand*, INT'L COMPETITION NETWORK, http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx (last visited Aug. 4, 2015).

34 *Id.*

While our bilateral work and multilateral efforts have done a great deal to further international convergence, important areas of differences remain which means there is more work to be done. Agencies' approaches to conduct by dominant firms are certainly among those, and I am sure we can all think of others. Given the diversity and recency of so many laws, this is not surprising, and differences in approach are not necessarily harmful and can even be beneficial to the extent they enable experimentation and adaptation to new circumstances. I mentioned that I would discuss some challenges to convergence, and so I will now discuss two that I consider important: due process and the role of non-competition considerations in competition agency proceedings.

While getting substantive antitrust law "right" is of course important, at a more fundamental level it is critical that the procedures antitrust agencies use to conduct investigations that can lead to sanctions be fair in actuality and perception. Recently, this has become an area of deep concern to businesses[35] and, in my view, understandably so. At the FTC, we take this issue most seriously not only because we believe in fair treatment of subjects of government proceedings but because we strongly believe that only through fair processes can agencies obtain and test the evidence necessary to reach well informed and reasoned outcomes, and because lack of fair processes harms the credibility and integrity of our entire enterprise.

There have been many efforts to address fair processes, including by individual agencies, by the OECD, and by private sector organizations; in fact, the American Bar Association Antitrust Section's International Task Force is embarking on a project that may lead to recommended practices in a number of procedural areas.[36] There are also, increasingly, efforts to address procedural issues in antitrust investigations through trade agreements. For many years, US free trade agreements either did not include competition provisions or, like the North American Free Trade Agreement, included only basic requirements, not subject to dispute settlement, to maintain and enforce a competition law and to cooperate in matters of mutual interest.[37] Some recent agreements have added provisions to address process issues.[38] The FTC along with the DOJ participates in the negotiation of these competition chapters, including in the Trans-Pacific Partnership agreement[39] and the Transatlantic Trade and Investment Partnership now being

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35 *See* Douglas H. Ginsburg & Taylor M. Owings, *Due Process in Competition Proceedings,* 11 COMPETITION L. INT'L 39, 39 (2015).

36 Randolph Tritell is Co-Chair of the ABA Antitrust Section's International Task Force.

37 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1501, Dec. 17, 1992, 32 I.L.M. 289 (1993).

38 *See e.g.*, Free Trade Agreement Between the United States of America and the Republic of Korea, art. 16.1, U.S.-S. Kor., June 30, 2007, https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf.

39 For more information on the proposed Trans-Pacific Partnership see *Trans-Pacific Partnership (TPP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/tpp (last visited Aug. 4, 2015).

discussed with the EU.[40] While one can debate whether trade instruments are the right vehicle to address the way antitrust agencies conduct their investigations, I think antitrust agencies should lead the way in setting forth good practice standards in this area.

For this reason, the FTC initiated a project in the ICN, which it now leads with DG COMP, on investigative process.[41] The premise of the project is that to conduct sound investigations, agencies need, among other things, evidence regarding the conduct under investigation and the ability to test it, which means they have to be sufficiently transparent about their theories and provide meaningful opportunities for parties to engage with the agency. The project has thus far issued detailed reports based on surveys of member agencies.[42]

This work is challenging on several levels. Unlike in the merger process area, where many agencies were able to look beyond their own merger review rules—often set by their legislatures—to embrace recommended practices with which they didn't comply,[43] agencies tend to see their own procedures as fair, or at least necessary to do their job effectively. But thanks to much hard work by our members and non-government advisors, I am hopeful that the working group will produce a consensus guidance document that will be adopted at the ICN's annual conference this April. At the same time, the FTC will continue to stress due process issues in its interactions with other competition agencies.

Another challenge to convergence is the consideration of factors other than competitive effects in decisions of competition agencies. The U.S. agencies have consistently counseled other agencies to stick to competition.[44] There are many reasons for this. For one, it is hard enough to decide cases based on an analysis of competitive effects, and it strikes us as near impossible to add various other economic and social policies to the mix and balance them in some intellectually coherent way. So for example, on the first high-level FTC/DOJ trip to Beijing when China was just drafting its competition law, Commissioner Thomas Leary used the example of a mer-

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40 For more information on the proposed Transatlantic Trade and Investment Partnership see *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/ttip (last visited Aug. 4, 2015).

41 *See* ICN, *Investigative Process Project: Issues Paper and Mandate*, at 1 (2012), http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf.

42 *See, e.g.*, ICN, *ICN Roundtable on Competition Agency Investigative Process: Roundtable Report*, at 1 (2014), http://www.internationalcompetitionnetwork.org/uploads/library/doc1023.pdf.

43 Maria Coppola & Cynthia Lagdameo, *Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures*, *in* THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS 297, 299 (Paul Lugard, ed., 2011).

44 *See e.g.*, Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address at the Antitrust in Asia Conference (May 22, 2014), https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

ger of cigarette companies to teach that, while it may be good social and even economic policy to encourage cigarette prices to rise by approving an anticompetitive merger, the competition agency should decide based only on competitive effects and leave other policies to other parts of the government.[45]

When surveyed, almost all competition agencies declare that their main or sole goal in implementing their competition law is consumer welfare.[46] Yet, it is not clear that there is a widely shared understanding of what that means or how it is to be applied. Thus, we see laws and policies that provide for consideration of other goals such as employment, protection of small business, international competitiveness, and some notion of fairness. Sometimes this is explicit in national laws,[47] which at least has the virtue of transparency. At this moment, the South African Competition Commission, which is under pressure from its Ministry to place more emphasis on non-competition factors, is conducting a public consultation on how it applies various public interest factors in reviewing mergers.[48] Sometimes the application of non-competition factors is not explicit or transparent, which makes the job of promoting convergence particularly difficult. When I raised this issue with Professor and OECD Competition Committee Chair Frédéric Jenny at a recent conference, he replied that, of course, developing countries will use competition laws to achieve a variety of politically driven goals and it is naïve to pretend otherwise. Perhaps Fred is right and I am naïve, but I think it remains worth advocating a focus on competitive merits not only for the sake of convergence but, more importantly, to enable competition agencies to use their powers to maximize the welfare of their citizens.

One arena in which non-competition goals have become an issue is the implementation of China's anti-monopoly law. The law is explicit in encompassing a variety of goals beyond pure competition objectives.[49] As

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45 *See* Thomas B. Leary, Comm'r, Fed. Trade Comm'n, The Economic Roots of Antitrust, Outline Prepared for a Presentation at the International Seminar on Antitrust Law and Economic Development 4 (July 1, 2004), https://www.ftc.gov/sites/default/files/documents/public_statements/economic-roots-antitrust-outline./040706rootsofantitrust.pdf (noting that there is "general bipartisan agreement" that competition law should not be based on "nebulous social and political concerns").

46 *See, e.g.*, ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Credited Monopolies*, at 9 (May 2007), http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf; *see also* OECD Secretariat, *The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency*, 5 OECD J. OF COMPETITION L. & POL'Y, no. 1, 2003, at 7, 9.

47 *See, e.g.*, Competition Act 89 of 1998 pmbl. (S. Afr.), *amended by* Competition Second Amendment Act 39 of 2000; *see also* China Anti-Monopoly Law, *supra* note 4, art. 1.

48 *See* COMPETITION COMM'N, GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED) 5 (2015) (S. Afr.), http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf.

49 *See* China Anti-Monopoly Law, *supra* note 4, art. 1.

China's three enforcement agencies have become much more active, significant concerns have been raised about the alleged use of the law to achieve industrial policy objectives as well as the manner in which the investigations have been conducted. Our Chairwoman and Commissioner Ohlhausen have addressed these concerns in publicly available speeches,[50] so I will not reiterate the points here. But I will just note that dealing with the emergence of Chinese enforcement involving international firms and transactions is one of the key challenges with which we are dealing, although it is by no means the only country in which these issues arise.

Because enforcement involving U.S. firms has attracted the high-level attention of several U.S. government agencies, the antitrust agencies both maintain our important direct dialogues with our counterparts and participate in the U.S. interagency process. Our engagement includes participating in high-level government dialogues with China such as the Strategic and Economic Dialogue ("S&ED"),[51] and the Joint Commission on Commerce and Trade, ("JCCT").[52] Last summer, the S&ED produced "outcomes" that included recognition that the objective of competition policy is to promote consumer welfare and economic efficiency rather than individual competitors or industries, and that enforcement of their respective competition laws should be fair, objective, transparent, and non-discriminatory.[53] China also committed that its three Anti-Monopoly Enforcement Agencies are to provide to any party under investigation information about the agencies' competition concerns with the conduct or transaction, as well as an effective opportunity for the party to present evidence in its defense.[54] At the December 2014 JCCT summit, China affirmed that it will treat all firms equally and that its competition remedies will be designed to address harm to com-

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50 *See, e.g.*, Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Antitrust Enforcement In China—What Next?, Remarks at the Second Annual GCR Live Conference 2-3 (Sept. 16, 2014), https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf; Ramirez, *supra* note 44, at 7-8; Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at the 7th Annual Global Antitrust Enforcement Symposium 8 (Sept. 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks at the China Competition Policy Forum 11 (July 31, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/nurturing-competition-regimes-evaluation-and-evolution/130731comppolicychina.pdf.

51 *See U.S.-China Strategic and Economic Dialogue*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/initiatives/Pages/china.aspx (last visited Aug. 4, 2015).

52 *See 25th U.S.-China Joint Commission on Commerce and Trade Concludes with Key Outcomes*, DEP'T OF COMMERCE (Dec. 19, 2014) [hereinafter *JCCT Key Outcomes*], https://www.commerce.gov/news/blog/2014/12/25th-us-china-joint-commission-commerce-and-trade-concludes-key-outcomes.

53 Press Release, U.S. Dep't of Treasury, Sixth Meeting of the U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet—Economic Track (July 11, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2563.aspx.

54 *Id.*

petition, not to promote individual competitors or industries. China also made further important commitments regarding transparency and due process to the parties during competition investigations and that parties will be able to be fully represented by counsel of their choice subject to Chinese bar rules.[55] We look forward to continuing our engagement with the Chinese agencies as they implement these important commitments and continue to build their young competition system.

CONCLUSION

I would like to close by noting that throughout the major changes in the international antitrust landscape over the past years, there have been some reassuring constants. First, from my first Chairman in this position, Bob Pitofsky, through Tim Muris, Debbie Majoras, Bill Kovacic, John Leibowitz, and now Edith Ramirez, the international mission at the FTC has benefitted from unstinting support from the top. All have embraced the FTC's international mission personally and have strongly supported the work of our office. In 2007, Chairman Majoras gave enhanced prominence to the international function by establishing the Office of International Affairs from the international offices of the Bureaus of Competition and Consumer Protection as well as the technical assistance group in the General Counsel's office. Second, we have been able to hire and retain a staff of unparalleled talent and dedication to carry out this important mission. Third, despite concerns about whether the U.S. has lost influence to the EC or otherwise in the world, I find that the U.S. agencies still enjoy the highest level of respect and influence. Our experience is highly valued, our assistance is sought around the globe, and we are able to play a leadership role in all aspects of the international antitrust policy dialogue. Despite challenges and inevitable, and not necessarily unhealthy, differences in views and approaches, most governments and competition agencies seek to be part of an international mainstream based on a notion of consumer welfare. Finally, we have continued to benefit from the cross-fertilization with stakeholders including the bar and academia in settings like this one. We always welcome your suggestions and criticisms as we seek to adapt to the constantly evolving international antitrust landscape, in our efforts to foster competition and enhance the welfare of all of our citizens.

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55 *JCCT Key Outcomes*, *supra* note 52.