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International Convergence, Competition Policy, and the Public Interest

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Good morning. Thank you to the International Bar Association, Janet McDavid, and the conference organizers. It is a pleasure to be here today with so many distinguished international speakers and guests.[1] I have spent the last two years as a Commissioner – and many years before that as the head of our competition advocacy program – pursuing policies at the FTC and around the world that are transparent, predictable, and grounded in the pursuit of economic efficiency and consumer welfare. I want to focus my remarks today on the need for cooperation and convergence among competition regimes and the roles of competition law and policy.

I. Cooperation and Convergence

A. Unity

Although this is my first trip to the country of South Africa, I was in a way on South African soil just two weeks ago, when I attended a dinner at the home of his Excellency Ebrahim Rasool, South Africa's ambassador to the United States. Ambassador Rasool is a remarkably insightful and gracious person, who joined in the struggle to remake South African society and served time in prison with Nelson Mandela. In his remarks about what his experiences in South

[1] My remarks today reflect only my opinions; I am not speaking for the Commission or any other Commissioner.

Africa have taught him about relationships between nations, Ambassador Rasool talked about the South African concept of "ubuntu," which he described as recognizing the interdependence and interconnectedness of all humanity.

I believe the interdependence and interconnectedness he described grows clearer each day in our increasingly globalized economies. In turn, this ubuntu among nations must extend to the work of our competition enforcers, both in terms of cooperation among agencies and international convergence of nations on norms relating to competition enforcement. Let me spend a few minutes discussing each.

B. Cooperation

First, cooperation. There are more than 125 antitrust agencies in the world today enforcing the competition laws of over 100 jurisdictions. The increasingly interdependent world economy and the global scope of many modern transactions require more cooperation among agency officials. This can range from discussions of substantive law, economic analysis, and procedural issues to sharing knowledge about a particular industry; and, of course, coordinating on specific investigations. Cooperation allows agencies to identify issues of common interest, to improve their analyses, build trust and relationships at all levels of the respective agencies, and ideally to avoid contradictory outcomes. As enforcers, we need to remember that failure to cooperate well can have serious repercussions for the global economy. My hope is that the FTC and other agencies add concrete value by efficiently protecting competition and consumers and, in the process, avoid imposing an unreasonable government burden that could drag on innovation and economic development.

C. Convergence

Cooperation helps lead to convergence, as agencies learn from each other, discuss their respective perspectives and goals, and begin to adopt common approaches. In particular, the move to convergence on substantive norms, procedural standards, and operational techniques will help competition agencies stay in step with the globalization of markets. Given differences in histories, cultures, legal systems, and levels of economic development, it is inevitable that some differences will persist in how each nation understands and applies competition laws and policies. But, I believe that learning from the experience of others in handling similar issues – including those involving institutional arrangements, procedures, and the substance of antitrust enforcement – can promote convergence toward better practices.

The FTC works in several multilateral fora on competition law and policy issues. Prominent among these are the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD). The ICN was founded in 2001 by the FTC, the Antitrust Division, and 14 other competition agencies. Its membership has risen to 127 competition authorities, including 20 members in Africa. Despite that diverse membership, the ICN has succeeded in achieving consensus on recommended practices in several areas, including merger review procedures, substantive merger analysis, and the criteria for assessing abuse of dominance. Work product by the ICN has included recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, and workshops.[2]

The FTC's work in the ICN is a top priority of our international program. We serve on its Steering Group and as Co-Chair of its Agency Effectiveness Working Group, and are active across the wide range of its work. With our partners at DG-Comp, we co-lead a project on "investigative process" that examines aspects of procedural fairness in the context of agency

[2] The ICN's work product is available on the ICN website at http://www.internationalcompetitionnetwork.org/.

investigations, including topics such as transparency, meaningful engagement between the parties and the decision makers, confidentiality, and internal checks and balances. This multiyear project entails conducting a broad overview of agencies' practices, which we expect to culminate in agreement on best practices or other forms of guidance for agencies. As it addresses fundamental principles for all agencies and is important to our business community stakeholders who face investigations around the world, I expect this to be a banner project, and one worth following.

We also participate in regional capacity-building workshops, including here in Africa. Currently, the FTC, the U.S. Department of Justice (DOJ), and the South African Competition Commission, with funding provided by the United States Agency for International Development (USAID), are engaged in a joint program to build the capacity of eight newer competition agencies in countries in central and southern Africa: Botswana, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Swaziland, and Zambia. The funding for this program arose from an earlier successful program between 1999 and 2006, and again in 2008, when the FTC and DOJ maintained a resident advisor in South Africa on an almost continuous basis, and had conducted several capacity building workshops.

The workshops are designed around international recommended practices, include substantive and practical skills, and are interactive in that they include mock investigation based on the relevant subject matter. The first regional program, held in September 2013, was on merger notification and review. The second regional program, held just last week (February 24-28), was on assessment of unilateral conduct. Participants at that workshop also were able to attend part of the Competition Tribunal's hearing in a predatory pricing case brought by the Competition Commission of South Africa. We plan to hold a workshop on cartels and other

anticompetitive agreements later this year and, if funds permit, a fourth workshop dedicated to practical skills such as interview techniques, drafting document requests, and report writing. Moreover, the training is not book-marked by the first and last day of each workshop. Rather, we supplement each workshop with two or three monthly webinar conferences addressing additional issues related to the workshop topic.

II. The Respective Realms of Competition and Public Interest

A. Public Interest Factors May Harm Competition

Ideally, we would like all competition regimes to converge on a consensus enforcement paradigm grounded in contemporary economic principles and focused on competitive effects and consumer welfare because evidence and experience shows that robust competition produces substantial benefits for consumers – and society as a whole – by promoting growth, spurring innovation, and facilitating the efficient allocation of resources. This counsels strongly against use of non-competition or public interest factors as part of competition analyses. I'm sympathetic to arguments to the contrary, particularly in nations with emerging economies exhibiting high levels of unemployment, poverty, and economic dislocation. For the governments of such countries, accounting for public interest factors like employment or protection of export industries may be viewed by many as a responsible approach to governance.

I see that many African nations, including South Africa, Botswana, Malawi, Namibia, Swaziland, Zambia, have adopted express references to public interest considerations in their competition laws. And that these nations' competition enforcers routinely balance public interest concerns like employment with other competitive effects and sometimes impose remedies on transactions that may result in retrenchment of employees. Examples I am sure you will find familiar from the past few years include *Wal-Mart/MassMart*, *Glencore/Xstrata*, *AON/Glenrand*,

and *Kansai/Freeworld*. I also note that regional organizations like COMESA[3] allow for public interest concerns, as well. I appreciate this viewpoint, but want to offer a few observations as to why I think, in the long run, such policies may hurt emerging economies more than help them.

At the outset, let me note that these concerns are not foreign to us in the United States. After enacting the Sherman Act in 1890, our courts and policy makers spent decades reading our competition laws to include numerous social and political objectives. The Supreme Court repeatedly read the laws to protect non-economic ideals, including famously remarking that the Court "cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[4]

This philosophy was not limited to the courts. In the 1930s, the U.S. Congress passed the National Industrial Recovery Act (NIRA) in reaction to the Great Depression. NIRA allowed industries to agree to certain "industrial codes" that, while subject to nominal governmental oversight, ultimately encouraged the formation of cartels to restrain prices and output and restrict entry. Many economists have studied NIRA and concluded that, despite its intentions, it actually made the Great Depression worse by lowering domestic output by more than 10%. NIRA served as a lesson in the United States that there are no shortcuts to national prosperity. Our policies since have been increasingly animated by the recognition that competition, consumer welfare, and economic growth are linked, and our U.S. Supreme Court (beginning with *U.S. v. Philadelphia National Bank*) has explicitly rejected the notion that non-competition factors, such

[3] Common Market for Eastern and Southern Africa.
[4] *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962).

as economic development, effects on local or national control, and international competitiveness, may be considered in competition analysis.[5]

B. The Link Between Competition and Wealth

The McKinsey Global Institute conducted a well-known twelve year study of thirteen nations to examine the differing plights of rich and poor countries; specifically, they sought to explain why it is that some countries grow or remain wealthy while others seem stuck in poverty despite years of international financial aid and assistance. The study revealed, without much surprise, that levels of productivity were associated with increasing wealth. But, more surprisingly, the study also found that differences in the amount of competition in the nations' respective domestic markets were far more important drivers of national wealth than were other differences, for instance, in the labor or capital markets.[6]

Markets with vigorous competition force participants to best rivals in one of two ways – either sell consumers goods more cheaply or sell them new and better goods. Either outcome benefits the economy. The first, selling goods more cheaply, requires innovation in the means of production. Although increased productivity sometimes may mean dislocation of workers in the short run, in the long run it yields globally competitive industries and more efficient uses of national resources. Global competitiveness, even in basic resource extraction, is the horizon every country needs to mind in the face of ever-cheaper shipping networks for physical goods and ubiquitous telecommunications platforms for virtual goods and services. Today, we are all both customers and competitors, whether we live in the U.S., South Africa, China, India, or Europe. This is a global market and it requires government enforcers to adopt global thinking. As management visionary Michael Porter wrote: "Few roles of government are more important

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[5] *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 371-72 (1963).
[6] *See, e.g.,* William Lewis, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY 13 (2004) (discussing the study from the perspective of its leader, Mr. Lewis).

to the upgrading of an economy than insuring vigorous domestic rivalry. . . Firms that do not have to compete at home rarely succeed abroad."[7]

Selling customers better and newer goods – product innovation – is the second ingredient to greater economic welfare. It is less easy to articulate the right recipe for product innovation – how does one capture a process for great ideas? But if I could point to one truth that holds here it is Plato's maxim that necessity is the mother of invention. The world's most financially-valuable technology company, Apple, offers perhaps the best modern example of the far-reaching implications a well-implemented idea can have on the fortunes of a company and, in turn, the prosperity of a nation. In 1997, Apple was nearly finished. Its computers were no longer selling and it was fast running out of cash and ideas. Steve Jobs was tapped by the board to re-join the company and search for a solution. It was a matter of survival. His solution was to throw the old ideas out and start fresh – to "Think Different" as the company's new marketing slogan professed. And so he and his team of designers and engineers pushed themselves to their limits over the ensuing years, yielding a rapid succession of hit products – the iMac, the iPod, the iPhone, and the iPad – that reversed the fortunes of Apple and helped spark a new era of mobile computing that has created new fields, like mobile applications development, populated by hundreds of thousands of well-paying jobs that did not exist, even in the imagination, less than ten years ago. I could say similar things about other innovative companies like Google, Qualcomm, Facebook, Microsoft, IBM, and Intel, each of which is successful globally in large part because they were forged in the cauldron of intense domestic competition.

When government distorts competition, for example by forcing the retention of employees after a merger where doing so reduces efficiencies, it allows firms to escape the demands of the market. It allows inefficiencies to fester, pushing the costs of goods up and the

[7] M. Porter, The Competitive Advantage of Nations (1990), 662.

need to innovate down. In addition, inefficiency in any one corner of the economy can spread, like a sickness, elsewhere, even where the hand of government has not yet touched industry directly. For instance, encouraging inefficiencies in one merger means that the elevated costs of goods produced by the merged business, to the extent purchased at all, will be passed on to other companies that rely on the merged firms' products as inputs. These downstream companies, in turn, will be less cost competitive than their peers, and so on. The interconnectedness of the supply chain means that barriers to competition erected by the government can make not only the merged entities less competitive, but also could potentially infect other segments of the domestic economy. As the World Bank has explained, "barriers to competition benefit some firms but deny opportunities and increase costs to other firms and to consumers. They also weaken incentives for protected firms to innovate and improve their productivity. Increasing competitive pressure can increase the probability of firm innovation by more than 50 percent."[8]

Additionally, from a policy perspective, it is important to consider the potential impact of implementing a test that attempts to reconcile a wide range of factors. Such a test is likely to increase the complexity, uncertainty, and cost of merger and conduct reviews, and may significantly deter investment. As we in the United States have seen in the past, competition agencies are ill-equipped to evaluate public interest factors, and mixing social and political objectives within competition analysis undermines the clarity and predictability of competition law and its enforcement. Lastly, public interest factors raise additional challenges when considering remedies, including the potential to lead to significant inefficiencies, not only in preventing procompetitive mergers (but that reduce employment in the short run), but also in

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[8] World Bank, World Development Report 2005, at 18 (2005), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23083004~pagePK:478093~piPK:477627~theSitePK:477624,00.html.

raising the costs of employment-enhancing mergers, and thereby reducing employment and growth.

III. Conclusion.

To return to the concept of ubuntu, I hope my remarks today have helped explain why convergence is such an important goal for competition agencies to pursue in our interconnected global economy. Further, the interdependence of businesses within an economy – relying on each other for inputs and spurring each other to innovate – shows why pursuing competition values is crucial to improving a nation's overall wealth and its people's well-being.

Thanks very much.