Chair’s Showcase Session: 
Competition in the Context of Financial Crisis*

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S P E A K E R S

RICHARD STEUER: In 2010, when I began to conceive what the Chair’s Showcase would be, we had an economy with no growth and no jobs, and it seemed impossible to ignore the financial crisis we were in. The question for those of us in the competition community, including lawyers and economists, was this: What good are low prices for consumers if consumers do not have jobs?

Enforcers all around the world were giving speeches at that time, which you will recall, about how part of the mission of competition enforcement was to create and preserve jobs. Just what did that mean and was that accurate? I undertook at that time to write an article that addressed jobs and antitrust. It raised more questions than answers.

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Today we are in a somewhat different situation. The economy is like a patient being discharged from the hospital. You are declared “cured,” but they always wheel you out in a wheelchair because nobody is quite convinced whether you can walk on your own. So we will see how strong the economy is.

Our topic is this: What is the role of competition in creating jobs and generating growth, and how specifically does competition law fit within the other economic priorities and economic regulatory schemes that exist in the world?

It is important to understand that each of us has more than one economic identity, and this provides a lens for examining our topic. We are consumers and we have the interests of consumers; but most of us are also workers; and almost all of us are also investors, whether through a retirement plan or some other mechanism, or we may own businesses as well; and we also of course are citizens and taxpayers of our respective countries. These interests are not completely aligned, and yet we carry them all the time.

Another reality today is that in our interconnected world, with great mobility for both jobs and the movement of capital, there is more than one kind of competition. Of course, there is the competition for sales among companies that we are all familiar with in the competition world. But there also increasingly is competition among workers for jobs, something that we were not as cognizant of before the last few years. At the same time, there is also competition among nations themselves for tax revenue, for capital, for factories, for power. All of this is interrelated. All of it goes into the policy hopper.

So what should be the role of antitrust? There are at least a couple of schools of thought on this. One is that the only goal of competition should be consumer welfare, which, of course, is not always defined by everyone as exactly the same thing, but we more or less know what we mean by this. Should consumer welfare as the goal of competition law exist in pristine isolation from every other economic goal that we know about? Or should there be coordination? Is isolation of consumer welfare as the only goal of competition just “straightening out the deck chairs on the Titanic”? Would coordinating with other goals beyond consumer welfare be selling out as competition advocates?

You may be asking yourselves: “This sounds like a lot of policy wonk stuff. Should I stay or should I go and make some calls?” It is important to understand that, whatever part of competition or consumer protection you practice in, you need to be in this room because increasingly these issues are being brought into the conversation. Whether it is merger review, or even litigation, it is important to know.

If you need a couple of examples, just think about the press reports recently about the AT&T/T-Mobile matter, where the preservation of jobs was argued on more than one side of the debate; the Tyson Food/George’s merger, where the Governor of Virginia wrote an impassioned letter about job preservation to the antitrust enforcers. This is not something that can be kept out of the conversation. Whether you think that competition law should ignore job growth or not, it is impossible to ignore it completely.

So what is the recipe for jobs and growth? Is competition law the answer? Is it at least part of the answer? And if it is only a part, does trade law play a role, or does tax law play a role? What other economic laws that regulate our economic life should play a role?

In short, what we are talking about here—and we do not take on any small issues for the Showcase program—is, for those of us in the competition/consumer protection community, “What is the meaning of life?”

We all like to think that what we do really matters. But we have just been through a rocky few
years, and it raises the question in sharp relief: How much does competition law really matter when the chips are down?

So to find the answer, I invited the most talented group of people I could assemble. I am going to introduce them only in the most abbreviated way because the introductions for this illustrious panel could easily take the entire two hours. I will do it alphabetically.

Frédéric Jenny is Professor of Economics at ESSEC Business School in Paris. He is a judge of the Supreme Court of France and Chair of the Organization for Economic Co-operation and Development's (OECD) Competition Committee. And that is just scratching the surface.

Susan Schwab is a Professor at the Maryland School of Public Policy and was the United States Trade Representative (USTR) until 2009, and also a former Director General at the U.S. Department of Commerce.

Carl Shapiro is a member of the President's Council of Economic Advisers (CEA); he formerly was Deputy Assistant Attorney General for Economics at the Antitrust Division; and he is also a Professor of Economics at UC Berkeley.

Joseph Stiglitz is University Professor at Columbia University; a winner of not one but two Nobel Prizes, not only in Economics but also the Nobel Peace Prize; and a former Chair of the President's Council of Economic Advisers.

Phil Weiser is Dean of the University of Colorado Law School; he was senior advisor to the National Economic Council Director until 2011, and another former Deputy Assistant Attorney General at the Antitrust Division.

To moderate this brilliant panel, I asked two exceptionally well-qualified experts, Jonathan Baker and Spencer Waller. First, Spencer is going to take the panel on an exploration of how these questions that I touched on play out globally. Then Jon is going to lead an exploration of how these questions impact national policy and practice.

Jon is a Professor at American University, Washington College of Law; he was the Chief Economist at the Federal Communications Commission (FCC) until 2011, which brings another important perspective that we will get into during the morning, and a former Director of the Federal Trade Commission (FTC) Bureau of Economics.

Spencer Waller is a Professor at Loyola University Chicago School of Law and Director of Loyola's Institute for Consumer Antitrust Studies; he was formerly in the Foreign Commerce Section of the Antitrust Division and an author of a leading treatise on this topic.

Spencer, let me turn it over to you.

MR. WALLER: Thank you, Dick. It is great to be here with this distinguished panel. I am going to guide us through some of the international aspects of this, as Dick said, and then Jon will focus on some of the more domestic aspects.

Turning to the international economic issues, I want to start first with Joe Stiglitz, who has explored so many of these themes of financial crisis and globalization in much of his recent work. Joe, to what extent are national antitrust laws—ours, the European Union's, anybody else's—contribute to the recovery of the world economy, impeding it, or just not mattering that much at all?

JOSEPH STIGLITZ: Let me begin by talking about the financial sector because I think everybody recognizes the financial sector was at the center of the crisis. The financial sector, I think everybody also recognizes, is rife with serious competition issues. But, unfortunately, in the response to the crisis those issues have in many ways become worse.

One of the issues, obviously, is the degree of concentration in the banking sector, which
increased enormously after the repeal of Glass-Steagall, and in the response to the crisis we merged and we now have a more concentrated financial sector.

But it is not only that. We now realize that we have banks that are too big to fail, too interconnected to fail, and too correlated to fail. When you have financial institutions like that, there is an implicit government subsidy, and it leads to an uneven playing field for getting access to capital at lower interest rates—there is well-documented evidence on that—and it distorts behavior and imposes enormous costs on the rest of our society.

The second point—and this is related to the nature of the bailouts—is that not only is there increased concentration, but when the government paid out these huge amounts of money, it gave disproportionate benefits to some large banks relative to smaller banks, and that adversely affects competition in the financial sector.

Third, there are some longstanding problems that have been brought out: (a) credit and debit card fees, something we have begun to address but clearly not adequately enough; (b) there is a lack of competition in underwriting, and very little has been done about that; (c) and there is a lack of transparency, which undermines competition. This is a point that we may come to later. We now know there is another way by which competition can be impeded—having too few firms is one problem, but even when you have a large number of firms, if you have lack of transparency and lack of information, it leads to inelasticity of demand curves, which leads to lack of competition, and to monopoly profits.

So that is one set of issues that I would outline.

A second is when you go back to the origins of competition policy/antitrust, back to Teddy Roosevelt, they did not have the neoclassical model of competition that underlies much of today's modeling. They were worried about monopolies and both the economic and political distortions associated with monopolies. Those are really very much at the center of discussions today because monopoly is a source of inequality.

One of the reasons our economy is not performing very well—indeed, the key reason—is lack of aggregate demand, and inequality leads to lower aggregate demand. When you shift money from the bottom to the top, people at the top do not spend as much as those at the bottom and that leads to lower overall demand, weakening the economy.

The third set of issues is that in the Great Recession, while we have not had the “beggar thy neighbor” kinds of policies of Smoot-Hawley that characterized the Great Depression, what we are seeing is an increase in non-tariff barriers—the use of countervailing duties and dumping duties, for example. This has been a longstanding problem: that the standards for competition that we use in trade policy are totally different from the standards that we use in domestic competition policy. Some calculations showed that if we used the standards that we used in competition policy, almost no dumping cases would prevail; and if we used the standards we used in dumping duties, almost every American firm would be guilty of dumping. So it is not just slightly different standards; the differences are really marked. This has been brought into focus as we start bringing countervailing duty and dumping cases in partial response to the downturn. The inconsistencies really become glaring.

SPENCER WALLER: So in your view to what extent do we need to revise our conceptions of competition or competition law to continue the global recovery?

MR. STIGLITZ: I would add: we need to revise our laws not only for continued recovery but also to make sure that we do not have the kinds of crises that we have had before.
The first point is that the standards for competition that we ought to be using in the financial sector need to be different, because what is at stake is not just market share (leading to market power) but also financial stability, which costs taxpayers an enormous amount.

The second thing is that we now know so clearly in that industry that lack of transparency, lack of information, is a major barrier to effective competition. We ought to be focusing more on that as an instrument of anticompetitive behavior.

The third is, going again into the international context, that we have all these rules about trying to design a global system of fair competition. But when you have a government like the United States that implicitly and explicitly gave trillions of dollars to the banking sector in the midst of the crisis, there simply is not fair competition. Other countries cannot match America’s largesse. (The exact magnitude of the gift to the banks is a matter of dispute; what is clear, though, is that the amounts were enormous.) And it is not just the money that was given. The fact that the United States is able to give that money to American banks if they make a mistake, changes the playing field enormously. Just the potential bail-out results in an uneven playing field. We now have a situation where those in emerging markets say: “We’ve destroyed the level playing field.” It is also clear that we will not be able to rectify this very easily. This was a point that the United Nations commission I chaired, which looked at the recovery (the Commission of Experts on Reforms of the International Monetary and Financial System), emphasized very strongly.

A fourth aspect that we are beginning to come to grips with is the fact that in some of the international agreements, there may be restrictions that make it difficult for us to respond in the right way to the economic crisis and to make sure we do not have another one. Particularly, I am thinking about the financial service agreements, or the bilateral trade agreement like the one between Chile and the United States. In the case of the bilateral trade agreement with Chile, there is a restriction on their employing capital controls.

Fifteen years ago, it was part of the conventional wisdom that capital market liberalization was a good thing, even though there was no empirical evidence—in fact the empirical evidence pointed out that capital market liberalization led to more instability and did not lead to more growth. But since then, we now understand that capital market liberalization can be very dangerous. Even the International Monetary Fund (IMF) has changed its position on this issue in 2011. And yet, Chile is now being strangled by this bilateral trade agreement and unable to respond to the global crisis in the way that it would like to respond.

In the United States the concern is that there may be other kinds of agreements that are part of the financial service agreement and restrain the United States, Europe, or other countries—restrictions that may impede the pursuit of broader social goals, or even the goal of ensuring the stability of the financial system. In short, we have agreements which were driven by a particular mindset that today, seem inappropriate and out of date.

**MR. WALLER:** Thanks. You have brought up some great themes that have to do with both the different ideas of competition in the antitrust sphere and in the trade sphere and the different ideas of competition between domestic and international.

Fred Jenny, you work in the European Union (EU) and the French competition framework, which view competition in a much broader context than we do typically in the United States. The competition laws of the European Union include all the familiar U.S. antitrust components of anti-competitive agreements, abuse of a dominant position, and mergers. But they also include other prohibitions of the kind that Joe was referring to: restraints on anticompetitive activity by public entities; antidumping policies; and limitations on the provision of state aid, or subsidies, depend-
In light of the financial crisis, the continuing state we are in, should all jurisdictions—the United States and others—conceive of competition policy as broadly as the European Union does, or is there something unique about the European Union that is just as important but sui generis?

FRÉDÉRIC JENNY: That is a big question. Let me start by saying that I strongly believe that there are no two competition laws that are alike. When you look across the world, you see differences either in substantive provisions or in procedural provisions. The Japanese are very keen on abuse of buying power, which is not recognized as a serious problem in other jurisdictions. Korea has a concern about the diversification of chaebols, which we do not consider to be problematic in other countries. The United States does not deal with state aid, as you mentioned, whereas the European Union does.

Before one gets to saying, “Well, we should abolish all those differences,” I think that we should be aware of the fact that they come from historical, legal, and constitutional issues in those different countries, and that they reflect the variety of countries.

If you look at the European Union, to get to your specific question about the European Union and the United States, it is very clear that the Constitution of the European Union is quite different from the Constitution of the United States when it comes to the relationship between the federal (or quasi-federal in the case of Europe) level and the Member States or the federated states in the United States.

In the United States, the interpretation of the Dormant Commerce Clause leaves a lot of freedom to states, for example, to enact state laws that discriminate against firms from other states.

The European Community was created from a set of countries that were protectionist and had a long history of government intervention in economic development. The desire to create a unique market required the ability to control the initiatives of nation states and to eliminate all of the protectionist tendencies. So it is completely unacceptable in the EU constitutional context for a country to discriminate against firms from another Member State.

So the fact that you do not have a control of state aid in your antitrust law does not reflect the idea that state aid does not raise a competition issue in the United States, but it reflects the idea that there is a political consensus not to deal with those problems.

In Europe, the integration of trade policy, competition policy, and state aid control has been very good for Europe.

I think that we have seen this difference play out during the financial crisis. The competition authorities in the United States have been very much left out of the discussions about if and how to save or restructure banks or firms. In the European Union, however, the use of state aid controls by the Directorate-General for Competition (DG Comp) has been quite important to check what Member States were doing in terms of either mergers of their banks, or in terms of subsidizing their banks, or sometimes even in terms of giving subsidies to firms in the real economy to try to spur growth. In this process, DG Comp has played a very important role in terms of reshaping or contributing to the restructuring of the banking sector, in order to ensure that it would be more resistant, more resilient, than it was before we had the crisis.

It does not mean that state aid control is perfect in Europe. I think that sometimes it is still something that we are developing. For example, sometimes it is difficult when you say, “Okay, you are going to have this subsidy. The subsidy can destroy competition. I am going to try to remedy this by telling you that you should not use this subsidy to develop your market share or to lower your prices.” I think it does raise some competition issues. But still, the fact that the competition author-
ity was (a) part of the executive, (b) in charge of controlling state aid, and (c) was linked with other policy I think has been hugely beneficial for Europe.

**MR. WALLER:** Perhaps an even broader question: We live in a world right now where antitrust is inherently national and the economy is increasingly global, and we live in a world where our antitrust authorities do their best to cooperate with each other. In your view, from the many different roles that you have played, is that enough or do we have to create true global rules; and, if we do have to, is there any chance we can get there?

**MR. JENNY:** That is a loaded question. Clearly, what has happened over the last 10–15 years is that many more countries, more than 90 new countries, have adopted a competition law. We now have more than 120 competition regimes in the world. They are all national, of course, most of them; I mean there are a few transnational but most of them are national.

It does raise the issue: Even if these numerous national competition laws have a lot of common provisions, can transnational anticompetitive practices be controlled and sanctioned? A transnational anticompetitive practice is a practice initiated in Country A that has a negative effect on competition in Country B. For this kind of case, right now, there is no systematic procedure to deal with the problem.

If I am the competition authority of Country B, I am competent to deal with the restriction of competition in my country but I need some help because I do not have jurisdiction to go and investigate in Country A, even though that is where the practice was initiated. If I am Country A, I have the ability to investigate but not the incentive since the transnational practice affected competition in Country B but not in Country A.

So we have been through phases. One of the phases has been to say, “Well, let’s try to develop voluntary cooperation between competition authorities of different countries.” We all know that there are costs and benefits to cooperating. Depending on the distribution of costs and benefits in a cooperation agreement, participating countries are going to decide to cooperate or not to cooperate on a case. If we are dealing, let’s say, with an international cartel, and Country A and Country B are both victims of this practice, then they have a common interest in sharing the cost because they are going to get the benefits of this cooperation by enforcing their respective laws.

If, on the other hand, we are dealing with an export cartel from Country A to Country B, it means that the investigation is going to be in Country A but the benefit to Country A is going to be zero since there was no restriction of competition on its markets; the benefit of the cooperation is all going to be for Country B, which will be able to implement its law and eliminate the restriction to competition in its country. In such a case the competition authority in Country A is likely to say, “I don’t feel like cooperating.” Or, rather, in a more sophisticated version, it is going to say, “Oh, I’ve got to prioritize. I’ve got limited resources, so I am going to use my resources to what is most important to my country. It just happens that investigating on your behalf is not exactly on the top of my list.”

We have had all over the world a considerable number of cases like this. To take a few:

- The United States has refused to cooperate with Brazil when Enron colluded with some other firms to rig the bids for the privatization of Eletropaulo Metropolitana.
- Another example is in Joe Stiglitz’s book, *Globalization and Its Discontents*, where he recounts his experience at the Council of Economic Advisers. The aluminum cartel was an extremely good example, where not only there was no cooperation, there was actually the
creation of an anticompetitive practice in the United States, the cost of which was going to be borne by all the users of aluminum, which include, by the way, a lot of developing countries.

- Recently at OECD, Turkey came to the Competition Committee and said, “I have been told that I should cooperate more with other jurisdictions. Let me tell you what happened. I had two export cartels from Europe into Turkey, one on coal and the other one on electrical appliances. In both cases I asked for cooperation from the EU authorities. Both times I was told, ‘(a) we don’t give secret information to other countries, and (b) we don’t have time to do it. Good-bye. Go away.’ So clearly the system doesn’t work.”

It works in some cases, but there are many cases, important cases, where it does not work.

I think that there are two things that are required to improve the situation. First, one may ask whether it is admissible to allow government-sponsored export cartels, which exist in many countries. A current example is the Canadian potash cartel, which victimizes a large number of developing countries, such as China, India, or Brazil. My answer is that we should agree that governments should refrain from sponsoring or even tolerating anticompetitive export cartels. But eliminating state-supported cartels is not going to be enough.

Second, we should look for ways to improve voluntary cooperation and ways to improve consistency of competition law enforcement throughout the world. There are many different techniques to improve competition law enforcement at the international level that could be explored. It could be, for example, mutual recognition of judgments, which would allow some country not to have to restart an investigation but just to base its case on what has been challenged in another country.

But there is a need for the international community to agree to some kind of governance of global markets; we need to bridge the gap between the globalization of economic markets and the fragmentation of legal orders if we want international trade to develop.

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**MR. WALLER:** Before we move on, I just have to get your reactions to something that is specific to Europe. We have the rare circumstance where a competition enforcer, Mario Monti, is now the Prime Minister of Italy.* He has said in the press that the cure for Italy’s economic woes—and I think perhaps Europe more generally—is more competition and for Italians to get used to competing as an important part of the continuing recovery. I just want to get your quick reactions to that.

**MR. JENNY:** In the United States, you do not have the benefit of having an economist as your leader. Italy has, rightly I think, particularly given the economic crisis, been wise to select Mario Monti for Prime Minister. He could push a much needed reformist agenda.

But let me add another point. When one looks at competition law enforcement—and we have done quite a bit of study of this at OECD, it is very depressing to see that competition law enforcement does not seem to make much difference to any macroeconomic indicator. It may be because there are measurement errors that do not allow us to see the positive effect of competition on those macroeconomic indicators but it may also be that competition law enforcement does not have a strong influence on the intensity of competition in markets at the aggregate level.

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* Ed. Note: Mario Monti is no longer Prime Minister of Italy.
But there is something that makes a big difference for the intensity of market competition. It is deregulation. Irrespective of the effect of competition law enforcement, deregulation promotes productivity and fosters growth. In Italy, and in many countries in Europe, the sectors that are the least deregulated and where there is the least potential competition, because they are often non-transferrable services, are local services. If you want to infuse a culture of competition, if you want to show that you are committed to opening up the economy, where do you start? You start with things that everybody knows about—maybe the taxis, maybe the hairdressers—as a symbolic gesture to say, “I’m serious about deregulating, opening the economy to more competition, and I know that, together with other factors, in the long run this is going to help the competitiveness of the country.” So I think that Mario Monti was quite courageous and quite right when he pushed the deregulation agenda in Italy.

When you try to deregulate, you face very fierce lobbying by those who want to keep enjoying the protection offered by regulation.

MR. WALLER: Thank you so much, Fred.

Let’s turn to Susan Schwab, who has dealt with competition issues and everything else in the international trading system in her day-to-day role as head of USTR.

I want to go back to some of the comments that Joe talked about. He just talked about the different way we look at competition in the trade system and in the antitrust world. Is there any realistic way to reconcile these differing values? He used the example of antidumping law. Could we realistically revise our understandings of antidumping law at either the World Trade Organization (WTO) level or at the national level, to make it look a little more like predatory pricing? Or is that just not in the cards because trade law is simply different and addresses different issues?

SUSAN SCHWAB: Probably not in the cards. Speaking as a non-lawyer, I think you need to look at trade policy and recognize it is something of a hybrid. Certainly in the United States, but also in my experience in Geneva at the WTO and previously at the General Agreement on Tariffs and Trade (GATT), you have lawyers and you have economists. In the United States you have foreign policy experts involved, you have politicians involved, and never the twain shall meet.

One of the reasons we are set up the way we are set up, at least currently, in the United States, and we have our trade policy configured in the Executive Office of the President, is because you have multiple agencies in the U.S. government. Plus, courtesy of Article I, Section 8, you have the executive and legislative branches interacting here, all with legitimate interests in trade policy.

When you look at our antidumping and countervailing duty laws, with countervailing duty laws being the anti-subsidy laws, they are the most legalistic of our trade laws. The fundamentals as we know them today were put down on paper in the Tokyo Round negotiations in 1979. The United States was the principal drafter. The principal drafters for the U.S. side came from the steel industry in the United States, and they were attorneys deployed by the steel industry.

Interestingly enough, today the principal users of antidumping statutes, antidumping actions, are India, Brazil, and China—generally against each other, by the way, or against the United States and the European Union. This is sort of an evolution of the use of these practices.

It is also worth noting that up until 1979 the operation of the U.S. antidumping laws resided in the Treasury Department. In 1979, part of the price that Congress exacted from the Carter administration Executive Branch for enacting the Tokyo Round Multilateral Trade Agreement was moving the antidumping determination and the anti-subsidy determination from the Treasury Department to the more industry-inclined Department of Commerce, again to give you a sense of
the relative politics in the United States underlying this statute.

The determination, for those of you not familiar with this wonderful arcane subject, the bases for determining dumping are as follows (we have three bases unless you are a nonmarket economy): (1) the product is being sold at less than the cost of production; (2) it is being sold for less in the market where it is being supposedly dumped than what it is being sold in the home market; or (3) it is being sold for less in a third-country market than in the target market.

If you happen to be a nonmarket economy, then we find a proxy country that is a market economy and we decide that you should be as competitive as, or as uncompetitive as, that proxy market. Then the International Trade Commission looks at whether there has been material injury.

So the chances of unscrambling the eggs in this particular case are pretty slim, I would say.

**MR. WALLER:** Let me go back to some of the ideas Fred was commenting on. On the international side, there is obviously no competition code that is part of the WTO system. It was originally proposed, all the way back in the 1940s, as part of the International Trade Organization (ITO) that was never passed by Congress. Bits and pieces of antitrust-type issues reside in various places of the WTO and pop up from time to time in individual disputes that are settled by the WTO panels.

What are the prospects and desirability of having a more formal set of antitrust-type rules embedded in the WTO system? In your view is it a good idea? And, I guess more importantly again, is it ever going to happen in our working lifetime?

**MS. SCHWAB:** I would say as a trade policy person and a policy wonk, my first desire right now is for the WTO and the trading system to move beyond the Doha Round, which for those of you who follow it, the 150-some-odd countries who are members of the WTO have been stuck for the last ten years trying to negotiate the Doha Round of Multilateral Trade Negotiations. It has been stuck. It is dead.

The biggest threat facing the multilateral trading system currently, quite frankly, is not anti-competition, but the Doha Round itself. Unless and until we can move on beyond that, all of the rest of this stuff is just academic. Setting that aside, the chances of us getting to “yes” on this are slim to none.

Where we do see some action that could conceivably at some point reverse-integrate, because we have been stuck in the multilateral negotiating front, is a proliferation of bilateral and regional deals. We, the United States, are negotiating the Trans-Pacific Partnership (TPP) with eight other countries. We have been talking about a trans-Atlantic negotiation, another potential free trade agreement.

Three free-trade agreements were enacted into law last year, one with Colombia, one with Panama, one with South Korea that had been negotiated in the Bush Administration, and was passed by Congress under the Obama Administration.

One of the things in the TPP negotiation is something involving state-owned enterprises and state-supported enterprises. The Australians have coined the term “competitive neutrality.” That is probably as close as I think we are coming to something that addresses this general area. It is largely focused on China, but not exclusively, and has to do with state-owned and state-supported enterprises.

**MR. WALLER:** In the course materials there is a terrific article that Susan wrote for *Foreign Affairs*, entitled “Beyond Doha,” which explores these themes in greater detail.

Let’s turn it over to more of the domestic side and the interplay of competition and other poli-
cies. Jon is going to take it away from here.

JONATHAN BAKER: Thank you, Spencer.

I would like to begin with a question for our Section Chair. Dick wrote a terrific article for Antitrust magazine where he points out that efficiency-enhancing conduct tends to lead to sustainable job growth, while anticompetitive conduct tends to harm output and, with it, employment. I am wondering how far we should go with this thinking and whether you would recommend that courts and antitrust enforcers consider the likely effects on industry employment within their jurisdiction when they are evaluating firm conduct.

MR. STEUER: I would, but to a limited extent. When in the course of evaluating a deal or in the context of litigation there are pro- and anticompetitive effects that are being weighed against one another, if the procompetitive effect has the effect of creating or preserving jobs, that should not be entirely disregarded. At the same time, if, as sometimes happens, the anticompetitive effect arguably preserves jobs, that should be discounted in an antitrust analysis. If there is any part of government policy that treats anticompetitive practices which preserve jobs as a social good, that should be outside the context of an antitrust analysis. That is for others to weigh. There are mechanisms in some sectors of the economy where those things are, in fact, given weight.

Today we have rather an ad hoc process for doing that, in this country at least, and I think the open question, which is yet to be addressed, is whether it would be a good thing or a bad thing to have a more structured way of coordinating these different considerations. Or is the structure that we have in place right now—where there are various mechanisms, like the Committee on Foreign Investment in the United States (CFIUS) and so forth, that work in isolation of an antitrust analysis—the right way to go?

I am hoping that we will get more enlightenment from the rest of this panel.

MR. BAKER: We will have some more enlightenment on institutional details in a moment. But before we get to that, I want to ask Carl something about a comment you made in a speech you gave about three years ago at an Antitrust Section conference when the recession and the financial crisis were at their worst. You said that “keeping markets competitive is no less important during times of economic hardship than during normal economic times.”

I am wondering whether there is any dissent from that proposition. Since you came to Washington this time around, how often have you heard anyone take a different view and say that we should let competition concerns take a backseat to protecting jobs or that we should restrict competition to promote economic recovery or economic growth?

CARL SHAPIRO: When I came to D.C., to the Department of Justice (DOJ) actually—that was March of 2009, about three years ago—it is good to remember the economy was really going downhill and it was very scary times. The stock market, employment—all these things were looking just very, very scary. So, coming to the DOJ, I thought, “There could very well be some backlash from people the way we saw it in the Great Depression, saying, “Competition is not a good thing, we need to control that.” In fact, I relied heavily on the great book by Ellis Hawley, The New Deal and the Problem of Monopoly. I was hoping we would not fall into that trap. I just discussed what an unwise set of policies that was, walking away from competition in the Depression.

Well, let’s spin the clock forward three years. That really has not happened. We did not see a repeat of that. We also did not see a repeat of the Great Depression, although obviously it has
been a recovery that has not been as strong as we would have liked, in large part because we are recovering from a financial crisis.

So, in a sense, I would say to folks here you should declare victory, in that the principle of competition held up very well during a time when it could have been under more attack, and was, seventy-five years ago.

Then, more positively, what have I heard? How do competition issues play out? How has that actually evolved? Certainly, since I have come to the CEA, over the last year or so, there is an intense desire to help the recovery along and, of course, focus on jobs. If you think of that as a primary policy goal, how does that relate to competition?

I think one of the things that we have stressed at the CEA is the tremendous importance of young startup firms in creating jobs. Here is a statistic that I think is quite telling. This is from work by Haltiwanger and others. In 2005—so this is before the crisis—the U.S. economy created 2.5 million new jobs in the private sector on net, net job growth that year. Of those 2.5 million, if you look at the firms that were startups, defined as they were in the first year, they created 3.5 million jobs on net. The rest of the firms lost 1 million. Now people are updating this and looking at other years.

But it has long been known we have an extremely dynamic economy in terms of jobs and in terms of businesses, in terms of startups and failures of businesses, and in terms of people flowing in and out of jobs. There is the Job Openings and Labor Turnover Survey (http://www.bls.gov/jlt/) that is done regularly and shows tremendous inflows and outflows.

So one of the lessons that I take away from that and we have been pushing is the importance of helping firms get started. This raises a whole bunch of issues, since startup activity of course was weakened by the financial crisis. For example, startup companies often rely on equity from their home historically in order to get financing. Well, a lot of that has evaporated. And of course credit tightened substantially following the financial crisis. So we have had a whole series of policies to help access the capital. The Small Business Administration of course works on this and has its own loan program. There are a number of policies.

The startup work I have described relates directly to the things we do in antitrust in that I think of it as a generalized lowering of entry barriers. We often ask, “What do we do in industry analysis? What are the entry barriers in the industry; are they high, are they low?” We think about that for mergers. The fact is there are a lot of policies that kind of generally raise or lower entry barriers—not in particular industries, but across the board. So we have been pushing in that direction, and I see there is a definite competition side to that.

For example, one of the unfortunately relatively few bipartisan pieces of legislation, the Act that the House just passed yesterday that will go to the President for signature, has to do with what is called “jumpstart our business startups,” something like that. So it has to do with basically relaxing in various ways some of the SEC rules and some other rules that arguably have stood in the way of IPOs and startups. We pushed, in particular, for crowdfunding, to open up for more crowdfunding, which I know is very popular in the tech community, coming from Berkeley. That is going to be possible now. The President will sign that soon.

I will stop there, but we can return to this.

MR. BAKER: We in the United States are not as lucky as the Italians to have an economist as our leader. But we do have the next-best thing. Our President has the Council of Economic Advisers who work in the White House. You moved from a competition agency, Carl, to a White House agency that has a broader economic portfolio. I am wondering how that move affected your
views about the role of antitrust and competition policy in formulating national economic policy.

MR. SHAPIRO: Well, I have to tell you, I think it was six months ago, I got a call from Mario Monti. He wanted to come visit me. We knew each other from when he was DG-Comp and I had done various things. I thought: “Oh, that's very nice.” This was well before anybody had a sense he was going to be the leader of Italy. This man came and visited me in my office. I am in the Executive Office Building right next to the White House. We had a nice chat. He was asking about how things work at the CEA. Of course he has long had a broader set of economic interests than just competition policy. Then things spun forward and he is now the Prime Minister of Italy. I noticed the next time he came to visit he was meeting with the President of the United States instead of me and I did not see him. [Laughter] I was delighted, of course.

I brought along a copy of The Economic Report of the President, which the Council of Economic Advisers puts out every year. It gives you a sense of some of the key issues we see on the table. This is on our Web site. I would also say I am very fortunate that Craig Peters, who is from the DOJ Antitrust Division, is on detail over to the Council of Economic Advisers as Senior Economist. So we have a lot of strength actually in competition issues at the CEA, at least between the two of us and others.

From my point of view, we first have the fact that nobody really talks against competition. So it is a question about how do those principles come up more broadly as we do our job. Let me give one example. Craig and I and others are continually looking for and finding opportunities to inject competition and industry analysis ideas into the policy mix and to steer things in the right direction, whether it's health care or financial markets.

Let me give an example in housing. We actually spend a lot of time on housing issues because it is such an ongoing challenge to the recovery actually, the fact that housing prices have not recovered, with so many people underwater on their mortgages. One of the things we have been pushing for, the Administration has pushed for over the past three years, is to help people refinance their mortgages. Interest rates are very, very low now, at historically low levels. And yet there are obstacles. If you have a mortgage and it is for more than your house is now worth, which unfortunately is the situation of 10 million people in this country, it is hard to refinance under those circumstances.

Fannie and Freddie (Mac) have had some programs to allow refinancing even when the loan-to-value ratio is above 100 percent, when you are underwater. Usually they have a limit of 80 percent in terms of what they will allow. But it turns out that the programs have given a very big advantage to your current bank, basically. If Wells Fargo is your servicer, just to use that as an example, it is much easier for them to do a refinance for you than for another bank to come in to do it. This has to do with the way various liabilities are associated, so-called representations and warranties.

So we realized—we were not the first people to realize this—that the way the program was structured, for some legitimate reasons, it was not really good. It did not promote competition among banks to do the refinance. The consequence was that there was not as much refinancing, even though rates are so low, as you would expect. And, when it did occur, the incumbent bank, if you will, or servicer, would charge more because they had—I will not say monopoly power, but they had some pricing power because of the higher costs or obstacles to anybody else coming in to refinance the homeowners’ mortgage. This is both disrupting monetary policy, because one of the ways lower interest rates are supposed to work is through the housing market and financing to put more money in people’s pockets. It is not helping with the housing market generally. It is basically allowing banks to get some degree of market power.
So we have continued to push for changes in that program. It is not easy—nothing in housing is easy—because it is very tricky in terms of Fannie and Freddie not wanting to give up the right to go back to banks that had originated loans based on fraud or other faulty problems and basically “put back the loan to them”—that’s what it’s called—so that the default risk stays with the bank. So there are tricky aspects, but we are trying to harness competition there. Everybody says, “Yeah, that’s great, competition is great, you should do it.” But then there is a debate about the nuances of how to do it. But competition is great. It is like a magic word, so we should use it.

MR. BAKER: That is good to hear.

Phil, you made a similar move, from a competition agency at the Antitrust Division to a White House agency when you went to the National Economic Council. I wonder if you have any comment on the same question I just asked Carl.

PHILIP WEISER: I have a couple of different comments.

First, I need to acknowledge both you and Carl. When I went over to the National Economic Council, Jon said to me, “Phil, the best policymaking in the White House that I saw is when the National Economic Council worked hand in hand with the Council of Economic Advisers.” That was familiar advice because the best work at the Antitrust Division is when the lawyers work well with economists. So having had the experience in an antitrust agency of working well with economists, I was well suited to go over to the White House.

That was very good advice. Having had that training, much of what I worked on was really about figuring out how to weave together sound policy and sound economics within legal constraints and within political constraints. One important principle, having started at the Antitrust Division, is knowing about true north. So this gets back to Carl’s point about competition. You can always say the magic word, and it is powerful, but can you actually do it? Because the truth is there are enormous pressures from the interests of producers. But the antitrust regime is all about thinking about consumers and having the discipline and rigor to say, “How does this actually impact consumers?” Carl’s example of people seeking to refinance their mortgages is, in effect, a “true north” perspective. I was lucky to start from that, because if you get thrown into a difficult regulatory environment where you are hearing from a lot of producers, it is not always easy to sort through and say, “Where’s true north? How does this affect consumers?”

What is also important about the antitrust discipline is you ask yourself about the people who are not represented. Because antitrust has a discipline and rigor and a healthy skepticism, if you will, sometimes of competitor complaints, you say: “Okay, there are entrepreneurs who aren’t even here yet. What do they think?” This gets back to Carl’s point about funding for entrepreneurs.

So the perspective on innovation, on entry, on people who are not coming before you, was something that I at least was able to keep in mind. A lot of that comes from the training, having spent two tours of duty in the Antitrust Division. Had I been thrown into economic policy without that, I would not have had that discipline and rigor. So from my perspective, really, the gift of starting out at the Antitrust Division is one that has kept on giving.

There is another level, too, which is really important, which is not just the knowledge you get but the relationships you develop. Carl mentioned bringing Craig over to help out. The federal government has a lot more complexity than many people from the outside think. People from the outside say, “Oh, you’re all in the federal government, right?” as if it is one happy family. Not so much. It takes a lot of effort to bring together different people across different agencies. Bringing particularly people in from competition agencies and empowering their voice was something else I
was able to do because I had such a healthy respect for what they could bring to the table.

A couple more things, too, that I want to get to. I think Fred’s point was very helpful about regulation. The other thing you get from a competition perspective is a healthy skepticism about how regulation gets used. I have heard once the good expression, “It should be like garlic in cooking, used very carefully and thoughtfully.” That is something that has again been a huge boon to our economy, is thinking critically about the role of regulation.

Here I will just end with a nod to Fred Kahn, someone else who had his career shaped through a competition policy lens and was able to bring that to regulation and really accomplish a lot with that.

MR. BAKER: Then let’s talk a little about some of the institutions by which competition policy is implemented in the United States. A great deal of that operates not just through the antitrust agencies but through sectoral regulators. So there are the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the banking agencies, etc. These agencies are all concerned with competition. But Congress has told them, to pick up on your metaphor, to use a more complex compass, that they also should consider other public-interest values. They vary by agency, but they might include ensuring the diversity of voices or meeting community needs, etc.

At the same time, we also have two federal agencies, the Antitrust Division and the Federal Trade Commission, that focus exclusively on competition—or in the FTC’s case, also on consumer protection. So does this institutional design enhance or lessen the attention that is paid to competition in federal regulation and policymaking as a whole?

MR. WEISER: I believe it is critical to enhancing and protecting competition policy. There are often proposals, and different countries have different regimes that we should talk about—I know that Fred has got some very valuable perspective on that—which do try to add more elements to the mix, and even say to an authority: “Balance the effect,” to use Dick’s point, “on jobs,” or “balance the effect on, in Canada, the Inuit people,” etc.

The challenge, if you try to ask the competition agency to take on more and more of these tasks, is it is difficult to remain disciplined about what is true north. Often you will find yourself tempted to try to mix it all up and mush it all up. Part of the challenge in keeping the rigor and discipline is thinking hard about consumer welfare and keeping that constant from impacts on jobs or on other values.

So I am a firm believer that our current institutional design serves consumers and competition policy very well. To the extent there are other values—say in the financial sector or in the media sector—it is important to have different agencies charged with vindicating and protecting those other values, whether in prophylactic regulation, or even case-by-case decision-making, with a second review. There are obviously temptations—“Wouldn’t it be more efficient if you combined them both?” But then you have to ask the question: Are you going to keep these values separate or are you going to end up with a less transparent, less effective, and potentially compromised system? I worry a lot about that.

Let me give one example. CFIUS is a regime set up for national security and it is totally separate from the antitrust review. But if you combined those two, you would end up with, I would say, a very difficult animal, where you would be asking the same agency to pursue two totally different goals. It would then have certain times when it might not be able to fully know or say what the reasons were. From a perspective of the common law system of antitrust we have, where reason-
giving, transparency, and procedural fairness are all so hardwired into the system, this would be to me a real setback and would have a lot of unintended, unfortunate consequences.

**MR. BAKER:** Carl, did you want to comment on this?

**MR. SHAPIRO:** Yes. Let me just jump into that because I am the person at CEA who is involved in the CFIUS cases, as it happens, which is a classified process. Having done plenty of Hart-Scott-Rodino (HSR) types of things over the years as well, and a small number of CFIUS cases now, I do not see that they should be combined at all. There is a different set of goals. There is a different set of expertise that is involved in terms of evaluating things. So it seems to me that it is right to keep them separate. And there are different degrees of confidentiality. Having lived that, it just seems to me it does not make sense and it is really appropriately separated.

**MR. BAKER:** Fred, did you want to add something?

**MR. JENNY:** Yes. I wanted to dissent a little bit, respectfully, and to try to bring some controversy in this debate. What you said describes very well and very convincingly the situation in the United States where you have a Council of Economic Advisers, which is composed of economists who know about competition. But this is not the typical circumstance everywhere. In many other countries, you actually have to promote competition; it is not always obvious in the minds of policymakers that competition is good. Competition authorities advocate to a certain extent for competition. But they do so somewhat clumsily.

When you start from the standpoint that you are only interested in consumer surplus and you do not care, or you do not care much, about producer surplus, which is what competition authorities tend to do, you are likely to be faced with a strong opposition. The business community is immediately alerted to the fact that you are the enemy. The politicians will consider that you have a very limited scope of vision, whereas they defend not only the welfare of consumers but also the welfare of firms and workers. Simultaneously, when you advocate your independence from the rest of the state apparatus, as competition authorities do, you do two things. You give reassurances about the quality of your decisions since they will be fair and not politically motivated. But by insisting on your independence from the executive, you also insist on your political irrelevance and in so doing create a lot of difficulties for your advocacy function.

There are different models. I will start with the EU model, for example. The Commissioners who decide on competition cases are the members of the executive of the EU. As such, they deal with all kinds of economic issues, such as industrial policy, consumer policy, trade policy, etc. If each Commissioner has an area of specialization, they talk among each other. So competition policy is integrated into the economic policy.

I think that the combination of wanting to have independent competition agencies that look only at consumer surplus, and are biased in favor of consumer surplus rather than adopting a total welfare surplus approach, has in fact slowed down the acceptability of competition in a great many countries.

**MR. WEISER:** This is a very important point. As we look at other countries around the world, we cannot be blind to these considerations. What I would say on that is there is an important role for political leadership and savvy about building a constituency and building a case. What Carl described is—we should not take this for granted—the blessing that we have in this country, that competi-

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**Source:** Antitrust Source, June 2013
tion and entrepreneurship are part of our DNA. So we can kind of take it for granted. Other coun-
tries, not unlike, say, John Marshall building the case for judicial review in our court system, have

to find a way to build the case and get there.

My point still is, even if you are in those other countries, it is important to still know where true

north is.

MR. BAKER: Let me turn to Joe, because Joe was the Chair of the Council of Economic Advisers
and so sat in the same kind of position that Carl is in now. How did you take into account com-
petition policy in formulating broader goals?

MR. STIGLITZ: We had exactly this issue in telecom; there was very heated debate whether over-
sight should be just with the Department of Justice, just with the FCC, or both. We came to the
view, and I think correctly, that it should be in both.

One of our concerns, which has not been raised so far in today’s discussion, is about the FCC
being captured. The Department of Justice really does have a commitment to competition; it is in
its DNA. We were not convinced that the FCC had it so strongly in its DNA. It is important, though,
that the FCC (or the Federal Reserve, when we are looking at financial concentration) has a clear
set of criteria that it is examining.

I mentioned before that in the case of the financial sector we should be asking questions, not
just in terms of conventional approaches to market concentration, but in terms of the implications
for financial stability, taking into account the problems posed by too-big-to-fail, too-interconnect-
ed-to-fail, and too-correlated-to-fail financial institutions. In the case of media, the issue is not just
advertising, which is what you might want to focus on if the media were just an ordinary commodity
or service, but rather things like the availability of a diversity of perspectives. The media are a
part—one might even say at the center—of the marketplace of ideas that I think is absolutely crit-
ical.

So in making judgments about whether there is insufficient competition, it should be the high-
est of the standards—the conventional competition standard and the “special” standard that
relates to these industries that I have just discussed. There is no tradeoff. Part of the reason I
believe in this is that there is very little evidence of significant economies of scale and scope. And
that means that there is little if any cost in making sure that the sectors have many, small firms. I
have not seen any convincing case that backing off from strong competition standards would have
significant efficiency benefit as a result of economies of scale or scope.

MR. BAKER: So Joe wants to prioritize competition. Susan, do you feel like that is an appropriate
way to go?

MS. SCHWAB: No. I have this overwhelming urge to play the turd in the punchbowl in this conver-
sation here. [Laughter] You are just being all too lawyerly. I am going to inject a little dose of trade
policy and trade politics reality here.

First of all, the following observation. It was your comment about CFIUS that set this off.

MR. WEISER: Uh-oh.

MS. SCHWAB: No, no. I am agreeing with you, agreeing with everything that you said. When I was
United States Trade Representative, I was the USTR’s representative on CFIUS.
As you know, there is a limit to what you can say about CFIUS because it is classified. But there
is public data that show that since the Exon-Florio Amendment was passed in the late 1980s, se-
veral hundred cases have gone before CFIUS. There are, I believe, two cases where the U.S.
Government is on record having said, “No, this foreign acquisition of a U.S. target can’t take
place.”

The United States in all of these cases, whether we are talking about antidumping, coun-
tervailing duty laws, even in CFIUS cases, we tend to be very, very transparent, very above-board
in how we go about doing these things. Our trading partners pick up the worst of our habits and
proceed to use the least-transparent versions of them, whether we are talking about antidumping,
whether we are talking about anti-competition, regardless of what we’re talking about.

So let’s ratchet back to the example that we were starting with. We were walking down this road
about telecom deregulation. From a trade policy perspective, Judge Greene’s decision in AT&T—
and I am out of my natural lane here—but from a trade policy perspective, what we did by delink-
ing the supplier of the service and the producer of the equipment was we unilaterally gave away
a major trade concession that we could have used, speaking as a former trade negotiator, to open
foreign markets in a procurement sense, that we are still, thirty years later, paying for. There are
still negotiations going on in government procurement in the telecom sector where governments
control the provision of telecom services and they provide special favoritism to their national-
champion suppliers of the equipment.

Those of you who in the last couple weeks have been reading about Bell Labs, the former—
speaking about entrepreneurial activity, investment in basic research—RIP, Bell Labs, and for
those of you who travel, you will know that we do not actually get in the United States today, we
do not actually benefit from, the highest quality. We may have among the least expensive tele-
com/IT services available. We do not necessarily have the highest technologically available serv-
tices.

So I put that out there saying that there are linkages here. In our work in the trade policy arena,
the Department of Justice and our antitrust experts do sit at the table in the interagency process.
They tend not to be the most vocal or engaged. CEA is at the table. But again, I just sort of put
this out there because we are having fun with this topic.

MR. BAKER: I see both Phil and Carl are very excited now. Go ahead, Carl, and then Phil.

MR. SHAPIRO: I am glad we are focusing a little on trade issues because, as I said before, com-
petition is kind of “motherhood and apple pie.” But one of the exceptions—there are several, I am
sure—has to do with when it is competition from abroad, and particularly when it is perceived as
unfair in some sense. That is when things get tricky.

Certainly, China has had huge growth, and it has been particularly in the last decade export-
ing to us, since they acceded to the WTO, during the same period of time when our manufactur-
ing jobs have fallen in a way that they had not in decades previous to that, even before
2007–2008. So this is an ongoing hot spot. You definitely get into these issues about “Well, are
they really meeting their WTO commitments?” as well as other things, like currency, which keeps
coming up, government procurement, and intellectual property. So that is where it is not enough
to say the magic word; it is what does it mean when you put it into effect?

In a way going back to your first question for me, Jonathan, certainly I have seen—well, you
lived through, I am sure—policies that may look pretty good but are nuanced from our point of view
still prove to be hazardous because they will be reflected in a way in another country that we think
really will not be with the same nuances and in a way that kind of undermines the multilateral trading regime. USTR is often bringing that point up, and it does not matter whether it is a Republican or Democratic administration. That is a reality. So that is kind of a rich ongoing area. I am sure Joe saw this when he was at CEA too.

**MS. SCHWAB:** And competition is global.

**MR. SHAPIRO:** Yes. And China, as a nonmarket economy, really does raise some very tricky issues that I think the academics have to work on, the practitioners have to work on, and will be with us for a while.

**MR. WEISER:** You had two great points.

The first point is when I was the Deputy in charge of International at the Antitrust Division, I was very deeply sensitized to this point, which is whatever we do here, there is this risk that it gets unintentionally or intentionally misinterpreted and abused elsewhere or the worst attributes get picked up on. There is a lot there to reflect on. It is a very challenging, and I think underappreciated, point.

So one issue here, for example, is however we talk about intellectual property and the intersection of antitrust, it is obviously a different discussion for other countries, which may say, “Oh, you’re rich in intellectual property. We’re not. We’ll use our antitrust regime to basically justify whatever we want to do.” That is a risk.

It gets a little back to Fred’s point, which is if you in the United States are going to say “competition is true north, but we understand your difficult situation.” If we give you too much license to do whatever you want, because that is what you have to do to get an antitrust regime at all, it does risk that these worst elements, and they develop these really bad habits, and you never get out of it. That is a very complicated calculus and I think a difficult issue.

I think also Carl’s point about practitioners, and the time helping agencies, whether it’s India or China, develop their DNA—once you develop your DNA in a certain way, it is very hard to then say, “Okay, now we’re ready to change it.” So when these other countries in a formative stage develop their agencies and practices, it is worth some attention and time.

The second point on telecom—I will give you one optimistic piece that is worth noting. Because of our model of competition, we did go across the world, and there was a trade agreement on telecoms that did help open markets across the world and get away from state ownership of postal, telegraph, and telephone services (PTTs), as they were called, which again was a huge change where the United States was able to be a leader. That would be the positive side to the story. You emphasized a different side.

**MS. STIGLITZ:** The first point I want to make about the international context is this: it is always the case that people in one country feel that those who are successful in competing against them are successful only because there was unfair competition. They just believe that they are more efficient and anybody else that is beating them has to be doing something unfair or benefiting from some unfair subsidy. I saw that all the time. That is one of the reasons why I feel very nervous about this language of “fair” and “unfair” competition.

The second point: I agree that the danger of our using rules that are unfair or rules that can be abused is great. The contagion of those rules has been enormous. You gave some data on that.

One of the aspects of what I would call unfair rules is the way we treat China as a nonmarket economy. In one of my books, I talk about the abuses of how we treat dumping for nonmarket economy.
economies. We do not ask, “Is the country selling goods below cost?” We ask, “Is the country selling goods below what it would cost a ‘comparable’ country to produce those?” In one instance, we said the country that was comparable to Poland was Canada for assessing dumping duties for golf carts. The amusing part about that was Canada did not produce golf carts because it was too expensive. But then the question was: “Well, what would it have cost Canada to produce golf carts if Canada did produce golf carts?” You get really absurd conclusions.

I thought China’s response to the allegation that it was still a nonmarket economy for which such special calculations were merited was also amusing. On one occasion, they said, “You believe that the only successful economies, don’t you, are market economies, right?” Then, the second part of the syllogism was: “Looking at our growth rate, almost 10 percent for thirty years; one has to acknowledge that that’s a success, right?” “Well, that means that China has to be a market economy.” [Laughter] Well, that may not be fully convincing, but it should be clear that China is moving toward a market economy, and that the way the U.S. calculates dumping duties for nonmarket economies is subject to extensive abuse.

As I mentioned, the couple-trillion-dollar subsidies that we gave to our financial sector and to auto and other sectors suggest that we are not really a perfect market economy. That is the reason for the sensitivity that Fred expressed about state aid, which really raises questions: Did you want to not give aid and let the economy collapse? And if one does give state aid, how does one deal with it in ensuring “fair” competition?

The final issue with respect to China that I wanted to raise is one of the areas where there is both an antidumping and a countervailing duty case going on right now: solar panels. China is providing solar panels at a low price, which is providing a global public good. We have to admit that we have not been doing our share at reducing global emissions. There is hardly a more important, global public good than preserving the planet. It seems to me this is an example where we have three issues at play: fair competition, jobs in the United States, and saving the planet. To me, the trade authorities seem to think that saving jobs is more important than saving the planet. I find that an uncomfortable position.

MR. WALLER: To say the least. [Laughter]

MS. SCHWAB: Again I would note that our antidumping and countervailing duty laws, first of all, are the least discretionary of all U.S. trade laws. Interestingly, they are the ones that lawyers had the most to do with writing, just for the record.

The Commerce Department and the International Trade Commission, as distinct from the U.S. Trade Representative’s Office—or the White House, I might add—implement these laws with limited discretion. So far, all we have on the table is the initial countervailing duty determination with single-digit subsidies identified for Chinese firms. So that is all there is so far.

The question obviously from a competition perspective, it seems to me, is: If the objective is predatory in nature, as in if you subsidize enough or you dump enough that you wipe out everybody else’s production capacity, and then you can hike up prices, you are not only going to lose the jobs but you are also not going to benefit the planet.

But yes, there is no saving-the-planet out or exception in U.S. countervailing duty law.

MR. WALLER: I just had a quick comment and then a question.

The comment is this: Particularly with respect to the antidumping and the anti-subsidy regime, why is competition so undervalued? Because Congress said so. That is the simple answer with
MS. SCHWAB: And in fact these trade laws were written by tax lawyers. My understanding is tax lawyers think differently than antitrust lawyers. [Laughter]

MR. WALLER: But we are starting to mix two different questions. One is sort of the normative “what’s more important?” The other is the institutional design of how you do it.

I have a question for Jon. You have been at two different agencies, particularly at the FCC, where the same agency is tasked with considering a public-interest standard that includes things beyond just the competition side. So I want to get your perspective on that.

And then I wanted to throw open to the panel again a question of institutional design. At the end of the day, on the policy side, not on administering a statute set by Congress, addressing a situation where anticompetitive harm is manifest, but perhaps it conflicts with a trade policy, a general foreign policy, because there are demonstrable jobs that would be created by something that is nonetheless anticompetitive—what is the best structure? Is it just that, at the end of the day, the President can instruct the Antitrust Division or some other part of the Executive agency branch simply not to proceed?

MR. BAKER: I think that the competition issues that I worked on when I was at the FCC were as interesting as the competition issues I have worked on anywhere. I worked on the Open Internet rulemaking and then two big mergers, Comcast/NBC and AT&T/T-Mobile. In all three, and particularly the last two, we had two great advantages at the FCC in being able to keep our focus on true north, as Phil would say.

One of those advantages is that the agency leadership was comfortable staffing the matters with people who had competition backgrounds. That was particularly true in AT&T/T-Mobile, where the transaction review was headed by Renata Hesse, who is a longtime antitrust lawyer and now back at the Justice Department in a senior position, as well as by me and some others. But the other great advantage was that we worked very closely with the Antitrust Division on these matters. My sense is that without these particular advantages competition, as a value, might be a little more contested at the FCC, and it probably, my guess would be, has been in different eras and in different economic times. I was just lucky to be there at the time I was.

MR. WALLER: But again, sometimes those values are really going to be at loggerheads. I am thinking about examples like Laker Airways, where there was an antitrust way to proceed and a foreign policy reason not to proceed, and the White House chose not to proceed.

I could imagine perhaps another situation where the antitrust harm is manifest, but there is simply demonstrable job creation or job preservation at stake. I know what the antitrust answer would be, because we do not tend to look at those things.

How should we structure a world where these other values get considered by somebody else as you have talked about?

MR. WEISER: I think a concept that is not as well understood is intra-Executive Branch deference. We often understand, when an agency does something, the court giving deference. But what may be less often thought of is deference within the Executive Branch. So when you get to the White House, thinking about whether to exercise the authority that, say, Teddy Roosevelt exercised much more readily, whether to bring an antitrust case, unless you have some extreme situation
where it’s a non-competition value that’s going to trump it—so CFIUS would be one example; you mentioned foreign policy—the White House really over the last I don’t know how long—since Nixon—has stayed out of it.

The most famous, probably, was in Ronald Reagan’s time, where the AT&T litigation went to the White House. There is a very famous meeting where, I believe, at that time Bill Baxter was the head of the Justice Department because the three people above him were all recused, so he represented the DOJ at the meeting. Jim Baker’s goal was not to have the White House get involved because he thought politically it would be bad. But in practice they deferred to Baxter. Reagan during the campaign had said things about the case that were quite critical. That was, I think, a very wise decision, and it is a very wise practice, because the level of sophistication that happens in true north, if you will, is quite high, and it is going to be only a very rare circumstance where some other factor can trump it. So I think the system we have is well set up.

In other countries, again thinking about how much political involvement to have over competition policy, again that is a risky road to go down.

MR. JENNY: I have two comments.

First of all, I have never understood, and I still do not understand, why an aggregate welfare standard would be unacceptable, because I think from the economic standpoint it would make sense. It would not necessarily translate into the protection of employment, and I think that it would be politically much more defensible then the consumer surplus standard.

I just want to point out that across the world it is not always true that the competition authorities look only at the consumer surplus and that some other body somewhere else looks at other things, “but we don’t want to know how that happens.” In other words, I think there is a bit too much of “principles that are not really backed by empirical evidence.” It is not enough to say, “I’ll do my share and the others do what they want and it is not my problem to know how all this gets together.”

My second comment is that I am not so sure that if you limit yourself to the consumer surplus standard, you necessarily end up with better decisions than if you have a wider spectrum. It seems to me when one looks across the world, that view is not particularly backed by very good empirical evidence.

MR. STIGLITZ: First, I agree with Fred that one ought to take, you might say, a comprehensive welfare perspective. But in my mind, when I think about comprehensive welfare, I think about a dynamic economy, about consumers today and in the future. This really fits in with what Carl said.

If we create an economy, for instance, where we have an environment in which new firms can easily come in, if we create a more fundamentally competitive economy, then that will give rise to higher consumer surplus over the long run. Where this is really important is in developing countries and emerging markets, where they are transforming their economy, they are restructuring their economy. The question often gets raised that, say, a large foreign company that comes in could have the effect of stifling small domestic entrepreneurship. These countries then pass laws about sourcing agreements—equivalent to community reinvestment act agreements (CRAs), employment agreements, training agreements—that some people think destroy the level playing field. I think those are absolutely essential for these countries to try to create a more dynamic economy.

Finally, when it comes to the United States, though—and I think other advanced industrial countries—the argument about jobs is more often abused than used appropriately. The responsibility
for maintaining full employment really ought to lie with macro policy, with monetary policy. While there may be some limited instances where jobs may be relevant, I think it is something that we ought to be very cautious about using.

This goes back to the point that Phil made. You want to think about not only the firms that are at the table in the room, but also the firms that are not there, today, in the economy. A focus on protecting those jobs may lead to economic policies that make it more difficult for the creation of new jobs in new industries.

Mr. Shapiro: I would just pick up briefly on Joe’s point about what makes for a dynamic economy and it is related to what I said earlier about low barriers to entry.

I wrote a paper recently for the National Bureau of Economic Research. They are doing a 50th anniversary volume on the famous paper by Arrow in 1962 on innovation and patents and so forth. There is some completely convincing literature that if you look across countries, you look across industries, there is an enormous variation in how efficient and productive firms are, even within an industry, even within a country, and so much more productivity—the big gains in productivity are to be had by letting the competitive process play out effectively, by having those firms that are more efficient grow—and yes, at the expense of others. For example, there are some of these findings that in Europe there are a lot more family firms than we have in the United States, and they are generally not as efficient. John Van Reenen has done some very nice work along these lines, for example.

So whether you are talking about developing economies or our economy, lowering entry barriers, promoting a fluid dynamic economy is so critical. And that is true for economic growth and for creating jobs.

Mr. Steuer: What I think I am hearing is that if we had folks with the wisdom of Solomon and the incorruptibility of Midas, it might make sense to have them put everything into the mix and make these decisions. But short of that, we are probably safer compartmentalizing these different considerations.

The one wild card I wanted to point out is that, in this country at least, there is the possibility that, whatever the agencies decide, customers will have standing to bring private litigation to block a deal or otherwise become involved in transactions and ask a federal judge to make decisions based on whatever the proper legal standards might be. I think this avenue thrusts that federal judge into the position of deciding which considerations are valid to evaluate, which are not, and how to make that evaluation, which is just one more level of complexity that does not exist in all jurisdictions. But as jurisdictions consider adding that prospect, it is certainly something to consider.

Mr. Weiser: And actually, the other avenue we have not talked about is the state attorneys general in this country. They do have often a different perspective than the federal enforcement agencies, particularly on remedies, where they have been a lot more comfortable with commitments maybe on jobs or keeping a plant open, or even on prices, which generally are viewed as anathema in the antitrust agencies. You do not want to say to a firm, “We’ll let you do the merger but promise to keep your prices at a certain level.” There are all sorts of concerns as to how that sort of decree would not really work. But a number of state attorneys general have said, “Well, that’s a way to protect our consumers.” So that is another component in the mix as well.

Mr. Waller: I have seen in the federal courts in hospital mergers, where, either explicitly or implic-
itly, the judges seem to be allowing some deals based on values that are other than the pure competition issues and commitments of the type that Phil is talking about.

**MR. BAKER:** I think we just switched topics in the conversation on institutional design. We were talking about separate structures that would insulate competition values in order to protect them. Then we switched over, especially in the conversation about the states, to talking about privileging competition in some ways—about institutional structures that make it trump other values. I think this issue is worth exploring here, by asking, “How far should we go in privileging competition?”

Joe has talked about environmental values being important in some context. Dick has talked about—we all can view job growth as important. To some extent, greater competition promotes those other values, but it does not always. So how do you all react to that?

**MR. SHAPIRO:** That is actually the point I was trying to make. If you really think dynamically and look at the evidence, competition often promotes jobs and economic growth. That was one of the flaws with the National Industrial Recovery Act back in the Depression.

Now, I am not going to make that argument across the board for environmental values. But I am more in favor of compartmentalizing. Look, if you have an environmental problem with greenhouse gas or mercury emissions, deal with that through other regulations; don’t muck up competition policy.

**MR. BAKER:** What if the environmental regulators or the trade folks get that trump instead of the competition folks?

**MR. SHAPIRO:** I was not trumping. I was playing regular cards. They just happen to be honor cards. [Laughter]

I just want to add the point that to argue that you ought to give up on competition would be, in effect, to say that large enterprises with dominant market share, with market power, would be better able to deal with some problem and there was no other way, like having an environmental tax or environmental regulation, to deal with it. I think the presumption is that most of these other problems in an advanced industrial country can be dealt with by other mechanisms. If we want to encourage R&D, we should maybe have an R&D subsidy or an R&D tax credit. But that is something that ought to be part of it. Use other instruments to do that.

What I was trying to say for developing-country, emerging markets, they do not have the same panoply of instruments that we have. For them I think that they may face some difficulties where even the mechanism by which they maintain competition may entail in the short run not allowing some large firm to come in and dominate and destroy markets in their country.

**MR. JENNY:** I tend to agree with Carl on the fact that competition in the long-run benefits consumers, benefits growth, and so on.

But one of the questions, at least as it is framed in the context of the OECD, is a bit different: Does competition law enforcement promote growth? There is very little evidence. As a matter of fact, the Secretariat of OECD has been looking for years to try to find any kind of evidence that competition law enforcement made any difference to growth or productivity. As I said, they did find evidence that deregulation made a difference, and that is it. That is the only thing.

So when you try to justify the fact that the competition authority is going to take a stand on a particular case by saying, “Well, this is going to promote competition innovation and growth in the
long term, there may be an exaggeration of the importance of competition law enforcement. There may be other determinants of competition besides competition law enforcement that are equally important. For example international trade may be equally or possibly more important.

So in a lot of countries the idea is not that competition is bad, it is that there may be more effective ways than competition law enforcement to promote competition.

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—Joseph Stiglitz

**I just want to question the notion that Fred mentioned, that competition law enforcement does not make a difference. It seems to me it is very difficult to do convincing empirical work because it is not just the cases that you enforce that determine the effectiveness of competition policy. The fact that you have a legal framework leads people to behave differently. If you did not have it, we would easily wind up, I think, with rampant monopolies. Adam Smith pointed this out 200 years ago.

I think an economy rife with monopolies would be very innovative in figuring out how to deter entry, to create entry barriers. We already know with all our laws how clever some of our firms are in creating entry barriers. If we had no laws, I think there would be enormous lack of competitive dynamics in our economy.

So I just want to emphasize that I think competition authorities are doing a very important job in enforcement, the effect of which cannot be judged from the number of cases actually brought.

**MR. JENNY:** Yes, I believe that competition law makes a difference for the reasons mentioned by Joe, but political leaders are more difficult to convince when you cannot show clear correlations.

**MR. BAKER:** I want to interject before we go to Carl that we have actually run this experiment in the United States a couple times. For example, there was a period when the antitrust laws were basically not enforced after they were enacted and we had a wave of mergers to monopoly. Then there was the National Recovery Administration (NRA) period, and we saw what the firms did with those codes. And Appalachian Coals was around the same time, in the Depression.
So when we have run the experiment in the United States, we see that when antitrust is not enforced in some gross, large way, we get the very kinds of competitive issues that show up that Joe was talking about.

MR. SHAPIRO: On exactly that same point, Fred, I think you should go back to the OECD and tell them to stop torturing themselves by looking for this connection, because unless you see a sharp change in competition policy not caused by some other things, and then you can track GDP growth for some number of years after that, it is very unlikely you are going to be able to see that connection looking across these countries.

The fact is—think about it—we have, I would say, compelling evidence that competition promotes productivity growth and jobs. We can talk about that evidence. So what you should go back and tell them to focus on is making sure that competition policy promotes competition, and then we will be okay in terms of GDP.

MR. JENNY: But it is not the OECD Secretariat that is obsessed with this issue. Very often competition authorities in developing, and sometimes developed, countries have to justify to their ministers that they are useful. The ministers say, “Show me a proof somewhere that what you do is helpful.” The competition authority says, “Economic reasoning tells us—“Yes,” say the minister, “but this is not enough.”

MR. SHAPIRO: I stand by my previous comments. [Laughter]

MR. WEISER: Let me go back to the AT&T case, where the FCC had not been in effect promoting competition in telecommunications and where you did get the antitrust case making a big impact. One way to think about why that was important on the innovation front that Joe—

MR. BAKER: You are talking about the divestiture?

MR. WEISER: Sorry. I should be clear. You have to keep track. The 1974-filed and settled-in-the-1980s case.

That was an era where Dow Corning had invented fiber optic cable—initially invented at Bell Labs—but they were really commercializing it. They wanted to sell it to AT&T. AT&T was a monopoly at that point, and had not depreciated its long-haul network. AT&T said, “Go pound sand. By the time we are ready to upgrade to fiber optics, it will be the 1990s and by then we’ll do it ourselves.” Not the best message to entrepreneurs.

What happened after the case was that both MCI and Sprint bought fiber optic cables. Sprint famously ran a commercial that you could hear a pin drop on its network. AT&T then depreciated its whole network and laid fiber optics. That type of innovation, that openness to entrepreneurship, was because you undid a monopoly control of an industry. In that sense, deregulation and competition fit together.

So I think there are good stories we can tell. They may not be as empirically grounded as what some of the economists are looking for.

MR. WALLER: If this was The Chris Matthews Show, we have reached a point where we would get to scoops and predictions. I wanted to give each of the panelists, because we have covered so much ground, a chance to do any predictions or recommendations that deal with these issues of
competition, other values, institutional design, competition, and the global economy.

I will start with myself. I am going to limit myself to a prediction. That is, we are going to see more and more antitrust-type dispute settlement cases in the WTO, building on cases like Kodak/Fuji, Mexican Telecom, the rare earths and minerals cases coming out of China, and that over time you will begin to see a common law of antitrust begin to emerge in the WTO, but not the kinds of codes that most of us think are just not politically likely to be negotiated. That is my prediction.

Can I challenge any of our panelists to offer any similar prediction or recommendation?

**MR. WEISER:** I will give a prediction and a recommendation. Following the great work of Carl on the CEA and others, I think we are going to get more and more economists and “antitrust types” going to different economic policy positions. I think that is a great harbinger. I think also at the FCC, we will get more people like Jon and Renata. Again, I do think there is a lot of benefit that comes from bringing that expertise throughout the government.

**MS. SCHWAB:** I would like to see the Obama Administration not pull its punches in the TPP negotiations on state-owned enterprises and state-supported enterprises. Do not be timid. Lead by example.

I do not know if this is a prediction or just an observation. The trade issues intersect with competition and intellectual property issues involving China, which is not part of TPP but is lurking—I do not mean that in a bad way—just that it is the huge elephant in the room, in a sense, in the Pacific trading context—those I just think will continue to heat up and put stress essentially on our WTO and international multilateral regime because their economy is big, growing, different, and they are prepared to push the limits on things.

Other areas that I think intersect with competition and many of you work on—not so much the trade as such for many of you, but the intellectual property issues, exclusion orders of the ITC—there is going to be a lot of activity here and it will intersect with the trade issues.

**MR. STIGLITZ:** In terms of prediction, I think in the aftermath of the financial crisis there is going to be more sensitivity to other kinds of sources of imperfections of competition—barriers to entry of the kind that Carl talked about in the housing sector. These are quite different from the standard kinds of barriers to competition or limits to competition, and they will need to be given more attention.

Second, in terms of recommendation, I think that, as I emphasized in my talk, in the area of finance what we are concerned with in terms of bigness is too big to fail, too intertwined, too correlated to fail, and those have very big consequences and are not going to be judged by standard competition criteria.

In the media, access to information and diversity of views have very big social consequences, again not to be judged by conventional market share kind of analysis.

**MR. SHAPIRO:** I guess my question coming in is: should there be and will there be structural changes in how these various considerations are going to be evaluated? I think that, at least in the foreseeable future, my prediction is there will not be any changes. Whether we have the best system or not, we probably have the most practical system. But in terms of should there be, I think the hope is that exchanges like this and greater sensitivity among people making these decisions in different settings will help to make more rational decisions, even if we have only the best sys-
tem that we can possibly have. It is maybe second-best, but it will do.

**MR. JENNY:** One prediction and one recommendation.

The prediction is that trade policy is going to take over competition policy in the next twenty years. One can see that already. Many regional trade agreements all over the world provide for the establishment of fairly elaborate competition regimes at the federal level or the sub-regional level. This is becoming quite important. You can see this happening in CARICOM, UEMOA, COMESA, ECOWAS, but also in the Andean Community, in the Eurasian Economic Community; even APEC is moving in that direction, even if a little bit more slowly.* But clearly, in those trade discussions there is more and more consideration for the issue of competition and there is the development of new initiatives. This is what pushes the competition issue forward.

The recommendation is to the competition authorities. I think that competition authorities should stop living in splendid isolation and should try to recognize that in industrial policy, consumer policy, and trade policy there are important elements promoting competition. Competition authorities should have to establish some kind of link with those policies, rather than saying, “Oh, consumer protection, this is different, I don’t want to deal with it,” or, “Trade policy, I don’t want to hear about it, trade negotiators do not understand competition” or, “Industrial policy means government intervention which can only be less successful than the competitive market.”

So I think there would be a great increase in the visibility, the importance, and the influence of competition policy if competition authorities were more open to a wider view of what promotes competition.

**MR. BAKER:** I think I am going to go in a different direction. It is a U.S.-oriented observation, and not a prediction or a recommendation but a worry. I see the way that the conversation has been going about the health care legislation over the past couple years and in the Supreme Court, and I am wondering whether—in an environment where there is greater energy behind views that the government should play less of a role in our economic life, on the one hand, and, on the other hand, a greater attention to concerns about inequality growing out of Occupy Wall Street, and given that we have a divided political system, and a situation in which the Supreme Court has changed the campaign finance regulations in ways that may allow some financial interests to have more voice than before—whether competition concerns will be left behind as regulation, and what we are going to do as a country in the regulatory arena, become more contested or up in the air.

**MR. STEUER:** I must say even though a lot of this was born of the recent globalization, I have a cartoon in my office that is about 110 years old from *Puck,* and it is called, “The high tariff and big monopoly juggernaut.” I can assure you that we have been having this conversation for at least 110 years. Perhaps it is more urgent today than ever because the world is so much smaller.

But I hope everybody here appreciates that while the issues that we have been discussing seem like very big policy issues off in the clouds, they impact everything that all of us here do on one level or another. If these issues are not on your radar screen, you need a bigger radar screen.

Please join me in thanking everybody on this illustrious panel.

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