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WILLIAM E. KOVACIC: Today I'm going to meet with you to speak about the origins and purposes of competition law. This is the first of a series of presentations that the ICN is making available on the development and content of competition policy systems. And what you'll be hearing today is the first two modules of the longer series. We're going to examine today the way in which competition laws came into being, we're going to look at their purposes, and we're going to look at the key elements of competition policy systems.

In many respects, the development of these systems, for someone of my age, is quite remarkable. When I was finishing my university studies in 1978, I had a conversation with my advisor on the law faculty and he asked me what I meant to do with my degree from the law school. And I said, I'd like to have a career in international competition law. This was in 1978. And upon hearing this, he shook his head with some evident sadness and said, I could never advise you to go into a field that will never be important.

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KOVACIC: In 1978, that wasn't a foolish recommendation. And what's happened since is a very remarkable story in the development of economic regulation around the world.

Today, over 110 jurisdictions have competition policy systems, and for a variety of reasons, this is an extremely important development for all of us.

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KOVACIC: First, the application of competition law has tremendous economic significance. It can provide great economic benefits in the form of greater productivity and growth. It can assist in the development and more effective ways of delivering goods or services. And for those of us who have careers in this field, one of its greater attractions is the capacity that we all have to provide tremendous economic benefits to our fellow citizens and indeed, in many circumstances, to provide methods and policies that can reduce the sum of human misery in many contexts.

A second reason that this is of great interest to all of us is I think those of us who work in this field have discovered that this is a uniquely interesting area of law in which to practice. It's a way of getting an unequalled glimpse into the way in which an economic system operates. It's a wonderful window to study the history and political science of the development of a jurisdiction and its method for regulating business. It's a special way to study the sociology, not simply the economy, but of the interaction between the economy and other forces in society.

And I think those of us who work in this area have found that this is a uniquely satisfying area of practice because of the broad and remarkable collection of skills that it draws upon to focus our attention on the application of a single area of law.

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KOVACIC: What I'm going to do in these two presentations is to give you a quick survey of the history of competition law, globally; to describe the purposes that such laws seek to fulfill; and then to identify some major characteristics of competition policy systems.

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KOVACIC: Where have these systems come from? As I suggested before, the emergence and development of systems is quite a remarkable story. If we were to go back into the 20th Century, at mid-century in 1950, we would have found that fewer than ten jurisdictions around the world had any form of competition laws, and for the most part, measured by levels of activity and significance in terms of impact in the operation of businesses, only one really mattered, and that was the United States.

But to come forward from 1950 to the present, we have, as I mentioned before, over 110 jurisdictions with competition laws, and over 80 of these 110 systems were formed since 1980. Current developments have featured the emergence of remarkable new systems in only the last five years in countries such as China, Egypt, Serbia.

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KOVACIC: As well, we've had the actual or contemplated retooling of older systems in Brazil, India, Mexico, Pakistan and the United Kingdom. And this provides a tremendous opportunity for comparative study that takes account of distinctive national circumstances, but enables us to improve systems by drawing connections across jurisdictions with respect to substantive policy, but also with respect to the design of our institutions.

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KOVACIC: Let's go back to the origins of competition law.

We can find distant antecedents in the far, far past millennia where individual jurisdictions attempted to develop mechanisms to promote rivalry among businesses. But for our purposes, the modern story really begins in the second half of the 19th Century in North America. The first national laws were established in Canada in 1889 and in the United States in 1890, as well in the United States we saw the development of state-based laws in the 1880s. What brought these about?

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KOVACIC: In many ways, the development of competition law in North America stemmed from the kinds of forces that we see at work in the world today.

After the Civil War in the United States, there were major revolutions in both transport and communications.

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KOVACIC: The transport revolution took the form of the growth of the railroad as a way of moving goods across broad geographic areas.

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KOVACIC: The communications revolution was the development of telegraphy, which permitted, in real time, firms in far-flung locations to communicate with each other.

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KOVACIC: What these developments did is to link together in North America what previously had been separate and insular geographic markets. It also permitted the development of much

larger business enterprises than one had ever seen before because it now became possible, as a result of these communications and transport developments, to manage more effectively firms that were not located and had their facilities on the same site, but to take far removed geographic locations and unite them into single, integrated firms.

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KOVACIC: What this yielded were business enterprises of absolutely unprecedented size and scope.

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KOVACIC: In many ways, these developments in the 19th Century anticipated what we see in the world today, where similar changes in transport and communications now link not simply discrete areas in North America, but entire countries and continents into more integrated economic systems.

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KOVACIC: These transformative developments in North America in the late 19th Century produced tremendous upheaval. In the economy, it meant that large, integrated, national firms tended to displace smaller firms because they were able to achieve massive cost reductions that were passed along to consumers in the form of price cuts. These price cuts placed enormous pressure on the capacity of smaller local enterprises to compete effectively.

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KOVACIC: The emergence of Goliath-like enterprises that truly must have seemed about as remarkable as watching dinosaurs, huge dinosaurs, return to the face of the earth, brought about tremendous upheaval in the political economy as well.

There was a great fear, in the United States in particular, that the emergence of these large enterprises would generate a form of political power that would fuse together power in the economic sphere with power in the electoral process so that the large business enterprises would not only control large parts of the economy, but might control the apparatus of the government itself.

And this upheaval also affected the social structure of the United States, because with the development of the large, massive, national enterprise came a loss of control over business within specific communities. Small firms no longer were the dominant form of local commerce, but truly global markets would link together the operation of business enterprises, meaning that the headquarters of the relevant firm might be hundreds, if not thousands, of miles away, rather than resident in the local community itself.

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KOVACIC: These impulses provided a basic change in the legislative framework, both in Canada and in the United States. And as the U.S. Congress considered the adoption of the Sherman Act in 1890, a variety of policy impulses affected the shaping of the legislation.

What did Congress mean to do?

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KOVACIC: I go through this list of goals because, in many ways, it resonates with what we see in the modern development of competition law in many countries. What did Congress wish to do? Well, it wished to attack restrictions in production that affected the amount that was produced and the price paid. It wanted to promote, by enhancing rivalry, efficiency in individual markets.

It also was concerned that small and medium enterprises have opportunities to compete and thrive in the marketplace. It also feared that cartel-like arrangements and dominant enterprises were essentially transferring massive amounts of wealth from consumers, surplus that should have remained with consumers, now into the hands of producers.

And there was a concern that unless the inexorable march towards larger and larger business size was somehow arrested, that you would have corresponding effects in the political process that would divest individual citizens with the ability to control the direction of their government.

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KOVACIC: In the 20th Century, we have, over time, a slow but significant expansion, culminating at the end of the 20th Century with an outburst in the number of new systems. From 1900 to 1950, there are a few new systems. The Depression in the 1930s cast a pall over, for example, the operation of competition policy.

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KOVACIC: But after World War II, we see the roots of a number of new, important systems formed in Japan and the United Kingdom, for example, in the late 1940s.

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KOVACIC: From 1950 to 1975, we see the basic foundations of competition law set in Asia, Europe and Latin America. With the development of Germany's competition system in the '50s, the adoption of the Treaty of Rome, which creates the European Union in the 1950s, and significantly, that treaty has powerful competition policy provisions that provide the foundation for competition policy later in Europe.

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KOVACIC: Brazil and Colombia established systems during this quarter century in Latin America. South Korea sets in place its first competition law. And from 1975 to 2000, global adoption becomes the norm with the dissolution of the former Soviet Union. With the establishment of competition regimes in Central and Eastern Europe, a relatively small number of jurisdictions refused to adopt market processes such that market-oriented form with competition policy as an ingredient become the mainstream approaches for economic organization by the end of the 20th Century. And that growth has continued into this century.

Let's look at some specific national illustrations.

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ALBERTO HEIMLER: Italy was the last country in Europe to adopt a competition law in 1990. This was a time when the merger regulation entered into force in Europe and it was felt that the national competition authorities would be important in Italy to address issues related to competition law violations in the country. It was the time when privatization started,

liberalization of public utilities started, and this was the major problems that the anti-trust authorities was made to overcome. Privatization of formerly state-owned companies, liberalization of public utility sectors, modernization of the economy in general.

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KOVACIC: And that growth has continued into this century. In Africa, Asia and Latin America, we are now seeing and can continue to expect to see the development of new systems.

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KOVACIC: For example, in the ASEAN region, the members of ASEAN have committed themselves to all have competition laws by 2015, a development that will add as many as five new laws to the existing roster of systems.

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KOVACIC: And for all of us, what this means is not only a new form of economic organization and regulation, but for our own work, it means that we are linked together in a truly global community. It means that our careers increasingly have global significance, and it means that all of our agencies, admittedly in varying degrees, still are linked together by a global vocabulary, so that to practice competition law today, unlike the circumstances I faced when I was finishing my studies in the 1970s, means to practice in a genuinely global enterprise that can take you literally to just about every corner of the globe.

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KOVACIC: What goals do these competition laws seek to fulfill? It's important to underscore how the objectives of competition law vary from jurisdiction to jurisdiction. And to think about this, it's not remarkable because competition law, like any other form of public law, is very much linked to distinctive context.

All of our law is developed in what can be called a unique set of circumstances, a unique history, a unique political science, a unique sociology, unique economic circumstances; some economies featuring long-standing mechanisms of central planning and orchestration; others featuring greater reliance on market processes; a whole of political systems that involve varying degrees of political decentralization. So, it's not surprisingly that each of our systems has its own competition policy history, some older, some newer, so that to ask what the goals are requires us to understand that context has generated specific goal structures that are distinctive for each of our systems.

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THULA KAIRA: I think Zambia is one of the least developed countries in the world and a country like that, of course, has certain peculiar problems in terms of the socio-economic situation. First is the issue of employment. When you have high unemployment rates, as well as low infrastructure development, of course, you're looking at opening up markets to attract investment into such an economy. You're also trying to look at ways of ensuring that the high cost infrastructure projects in the country are actually given to the best people through a competitive bidding process without bid-rigging and collusive tendering.

So, the role of a competition authority in a country like ours would really be engaged in looking at much as to do with barriers to entry to ensure that markets that exist in our economy do not have monopolistic structures or catalytic behaviors that prevent entry into any sector in the

economy, because with entry comes innovation and with innovation comes greater possibility of creating wealth, as well as employment for the country. And it is through this that what is referred to as gross domestic product comes in through the wealth creation process of as many firms as possible, and through that, of course, the aggregate social effects that come with the employment of people through the entry of companies.

Of course, added to that is the issue of collusion. With the major public works, health -- construction of schools, health facilities and so forth, a country like Zambia would obviously be affected by any cartel behavior. So, the competition authority, again, the thrust is to enforce the law, as well as advocate the law in a manner that adds value in terms of removing barriers to entry as well as creating competitive bidding processes in major construction and other building works.

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KOVACIC: But despite the uniqueness of individual national experience, it's possible to identify across countries some common aims.

One common set of policy aims can be grouped under the rubric of improving economic performance. If you ask each of our legislatures as they contemplated the development of new competition laws, economic policy improvements probably would stand high on the list of important objectives. These include promoting economic growth; using business rivalry as a way to spur the development of new products and services; to increase productivity and reduce costs so that individual firms and individual sectors and the economy as a whole operates more efficiently; and last, to stimulate innovation, to use the contest to obtain the favor of consumers, both consumers of intermediate industrial goods or end users of goods and services, to use the contest to serve those consumers as a stimulant to provide new products and to provide better ways of supplying services.

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EDUARDO PEREZ MOTTA: Well, clearly, competition has to do with market efficiency. If you purely believe in marketing, competition is the best environment to get the best of the market. And that means, basically, to promote the basis to promote growth, to promote opportunity, to promote and to generate better employment opportunities for a just society.

And let me tell you, at least in the case of Mexico, we have also found that competition is a very good instrument to have a better income distribution because competition effects, the lack of competition affects basically, or more importantly, the group of people who have greater necessities, at a lower income level.

So, in the end, competition means market efficiency. And competition is the best instrument that you have to promote growth and produce opportunities.

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KOVACIC: So certainly one paramount aim of competition law is to improve economic performance. But these aims co-exist with others. One important set of objectives that we can identify in a number of different systems involve ensuring a fair distribution of wealth. This can sometimes be identified in statements that observe the hope that competition law, by promoting growth, will help promote poverty reduction.

But in many of our countries, a key aim has been to enable historically disadvantaged classes to achieve greater access to the market and to enjoy more fully participation as consumers in an array of goods and services that previously had been beyond their reach.

To look at countries, for example, as South Africa, we see in the development of the South African law and its reformulation in the late 1990s, a decided aim to ensure that historically disadvantaged non-white groups would have access to the market and would be beneficiaries of the market process.

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DAVID LEWIS: You know, when the -- when the new democratic order was established, it inherited extremely high rates of unemployment, extremely high rates of inequality and, naturally, the exclusion of the majority black population from all meaningful -- all economic activity except -- except employment. And, so, every major piece of socio-economic legislation has in it the objective to promote employment, to promote black economic empowerment and to promote small business.

Again, you know, we're in the unusual situation of first it is part of the general objectives of the act and, naturally, they must be considered, all other things being equal, but it's only really in merger regulation where we actually have to take account of these other objectives like employment, promotion of small business, promotion of black economic empowerment.

And one of the unusual features of the act is that it's the competition authority that takes that into account when it does its merger regulation. It's not as though we only do competition. And like, I think, in Germany where the public interest issues are handed over to a government minister, we do all the balancing between the public interest and the competition issues. And, so, I think that we've been able to resolve those conflicting objectives and balance them rather well.

The one that emerges most strongly in mergers is employment and we have seen ourselves -- we have a very elaborate industrial relations system and framework in South Africa and we've seen ourselves as a fairly small adjunct to that system. We haven't seen ourselves as replacing it. So, when we analyze a merger, we analyze it first through the competition prism and that's the decision -- those are the grounds on which we make our competition decision and then we counterbalance it with impacts on employment. But the counterbalance, if there is a problem, usually results in the imposition of a condition and has never resulted in the prohibition of a merger.

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KOVACIC: Other important aims deal with the integrity of the political process. As I mentioned before, there was a keen concern in North America that the growth of large and seemingly unrestrained business enterprises would yield a degree of political control such that major business enterprises would not only be controlling economic activity, but by virtue of their significant position in the market would be able to directly influence the political process, to control legislators, to control heads of state and cabinet ministers, and that competition law, by preserving a somewhat more egalitarian business environment, would provide a safeguard against the dominance in the political sphere of businesses that were dominant in the economic sphere.

And a further objective that appears in many systems is to secure a position for small and medium enterprises. Again, for much of the history of many of our countries, the small and medium enterprise was indeed the dominant form of business organization. In the United States, in the period that precedes the transport and communications revolution I mentioned before, a

large firm was a firm that might have employed 25 or 50 people. This basic model, to a large extent, is displaced by the growth of large horizontally and vertically integrated firms in the late 19th Century.

But there is still a view, in many countries, that it is the small and medium enterprise that provides a vital path of entry for new entrepreneurs into the market, a vital stimulant for economic progress in the form of innovation and superior customer service, so that you see, in many legislative records accompanying the development of new competition law, specific comments about how competition law can help achieve a greater position for small and medium enterprises in the national economy.

I would say there is a broader political significance as well, and this is especially in the case of countries that have undergone the transition from central planning to greater reliance on market-based systems.

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KOVACIC: In the era of central planning, the government was a key, if not the only market participant, and the choice in moving to markets basically involves moving the government out, partially or completely, as the market participant to the position of a referee, so that private entrepreneurs, to a greater degree, are the market participants, and the government, rather than being the key player, now becomes the referee among others.

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ANATOLY GOLOMOLOZIN: As great economical, social and political changes, so sufficient changes in competition policy has taken place in Russia. This year, we celebrated 20th anniversary of our competition legislation. It was 20 years when we can recognize our work on a new manner and great transformation in Russian economy was also take place. For example, in the field of fuel and energy and telecommunications and great reforms was -- reforms was very great and we can compare our -- for example, these reforms with transformations of Standard Oil or AT&T companies in the United States.

Now, we can tell that we have modern competition legislation. We can apply very serious fines for lawbreakers, so this can organize very, very good base for competition environment of market economy.

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KOVACIC: This is a fundamental and difficult adjustment to make, and it's hard to imagine in many economies that governments -- that citizens would be willing to make that adjustment without some assurance that private economic actors would serve larger social needs by promoting improved economic performance, improved innovation.

In these instances, competition law can be seen as a bridge, a bridge between central economic planning and greater reliance on market processes, and in doing so, it helps defeat demands that the government retain its comprehensive role as planner and market participant.

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KOVACIC: What are the challenges that a competition policy system faces in light of what I've just described to be a diversity of policy goals? One problem is that there is inevitably an internal tension among some of these goals. It's one thing to say that we want competition to promote cost reduction, improved productivity, because in a number of instances, that will only

be accomplished by achieving the realization of scale economies so that the cost of producing each unit declines over time. That tends to press in the direction of relying on larger, rather than smaller, business enterprises to accomplish production for a number of forms of industrial or consumer goods.

But at the same time, the legislature wants to preserve a position for small and medium enterprises, and an evident tension will emerge, to the extent that the legislature is telling the competition agency, achieve economic growth, cost reduction, enhance productivity and efficiency, but at the same time, preserve the position of small and medium enterprises.

Legislatures, in the run up to the adoption of a competition law, rarely see these kinds of trade-offs; indeed, the trade-offs might not be anticipated or understood. But over time, it becomes evident that there will be a tension among a number of these goals and the competition agency, in many cases, becomes the social shock absorber, the mechanism that absorbs the tensions between these goals, and seeks to adapt the competition law in each generation to new economic and social circumstances.

What becomes key for the competition agency is to engage in a continuing discussion with the larger society, with public officials, about the appropriate focus of competition law, to continually define and redefine the aims of the law.

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KOVACIC: I'd like to suggest to you that there is a life cycle approach, a life cycle theory that characterizes experience. And the modern trend in competition law, I would suggest, in general, is that we see over time a greater emphasis in our individual systems to a goal structure that emphasizes improved economic performance, that focuses on improving the well-being of consumers so that the focus over time, in a diversified goal structure, emphasizes more significantly the improvement of economic performance through gains in productivity, cost reduction, the stimulation of innovation,

all with the objective of answering the question, how can competition law best promote the well-being of individual consumers?

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KOVACIC: This consumer-oriented focus, this focus on improved economic performance, tends to subordinate over time some of the other social and political objectives that accompany the development of competition law. These other objectives don't go away. I think, in our larger political history, ideas don't die. They may become more dormant at different times, but they don't go away.

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KOVACIC: But what does happen is that society, in many instances, tries to accomplish these other objectives through other public policy tools. For example, to assist small or medium-sized firms and the entrepreneurs who create them with direct investments in education and retraining, to make direct transfer payments to employees who are displaced by the development of new firms and the introduction of new technologies, to rely on larger employment insurance schemes to provide some means to facilitate the transition from one economic order to another, so that as many countries rely more on other policy tools to accomplish the broader social and economic agenda, we see competition agencies finding that what they tend to do best is to find ways to promote improvements in economic performance that serve the interests of individual consumers.

This is not to say that any of our systems have adopted a single goal or only one focus at all times, but it means that among a diverse collection of goals, what competition agencies tend to do over time, with variations in individual systems, is to focus more on how to improve economic performance in ways that makes the well-being of individual citizens better off.

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JOHN FINGLETON: Markets work well when informed consumers make effective choices. Those choices then drive which companies get rewarded in the marketplace and the companies that get rewarded in the marketplace that have an advantage over their rivals in terms of better cost, better innovation are rewarded. That's what we call the virtuous circle.

So, the active consumers driving competition by a variety of suppliers which drives, in turn, productive efficiency in the economy. And when that works well, the consumer gets what he or she wants. Efficient business is a reward of -- long-term consumer welfare is high, but also the economy grows because the market rewards efficient players. Companies with lower costs win market share over their rivals, companies that give the consumer better of what they want and do better. And that's why it's important that we join up our consumer and competition policies.

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KOVACIC: So, what we've seen in this first segment is we've seen a remarkable development in the number of competition laws. We've seen how competition law has its roots in modern experience in North America in the second half of the 19th Century. We see a slow growth in the number of new systems in the first half of the 20th Century. We see important foundations being set for global developments from 1950 to 1975. But it's from 1975 to the present that we see the true transformation of competition policy globally so that over 110 jurisdictions today have different forms of competition laws.

If we ask what are these laws seeking to accomplish, the answer would be a broad array of economic, political and social policy goals, but that over time many competition systems tend to gravitate towards emphasizing improvements in economic performance and to achieve adjustments in policy that serve the well-being of individual consumers so that more and more we ask the question, how do our policies affect the well-being of consumers? How does it make their lives better off?