Thank you Mr. Chairman, and I'd like to thank UNCTAD for inviting me to speak today. Before I begin today, I should note that my comments have not been reviewed by anyone in my agency or the United States Government, and are very much my own views.

Let me lay out the following situation, which may sound familiar to you. A major financial institution has failed. The existing regulatory structure has proven inadequate to solve the problem. Public confidence in the financial system is falling, and the system itself is in danger of collapse. A major financial firm finds itself in trouble, largely because of the imminent failure of an industrial firm it controls. But at the last moment,

persuaded Roosevelt that the greater industrial policy goal of saving the financial system justified the merger, and Roosevelt personally approved the deal.[4]

So what happened? It turns out that the failing coal company in fact produced a type of coal that was especially well-suited to a new technology that was coming on line – and U.S. Steel now controlled it. As there had been no investigation, this fact did not come out. A few years later, the Justice Department under the next President tried to challenge the deal as part of a broader challenge to U.S. Steel. When the case reached the Supreme Court some years later, the Court rebuffed the challenge, partly on the grounds that President Roosevelt had approved it.[5] Because of our common law system, that precedent may have made it harder to challenge mergers, and this may have contributed to the wave of concentration that took place in the 1920s.[6]

The lesson for us should have been clear. As Deputy Assistant Attorney General Carl Shapiro recently said, "Keeping markets competitive is no less important during times of economic hardship than during normal times."[7] I liken the situation to highway speed limits. While it is important to drive safely on a beautiful today like today, it is even more important to follow the safety laws when it's icy, dark and raining, because that's when the bad things are most likely to happen.

Did we learn our lesson? Let's move the clock forward to the next economic crisis, the Great Depression of 1929. In 1933, another President Roosevelt (Franklin) took office and tried to stem the crisis. Some things seemed to help, like enacting securities regulation. But he also persuaded the Congress to pass the National Industrial Recovery Act. This law essentially legalized cartels and suspended enforcement of our antitrust law. It authorized firms to establish "industrial codes" that were subject to nominal government review and were enforceable by the government. What did industries do with this new authority? They did exactly what you might expect: they established cartels that restrained price and constrained output, all justified in the name of preventing "disruptive" and "wasteful" competition. The very language of commerce changed – discounters were called "chiselers," a pejorative term in English.

What was the effect? I'll quote Christina Romer, one of Carl Shapiro's colleagues at Berkeley and now Chairman of the President's Council of Economic Advisors: "The more important effect of the NIRA was to diminish the responsiveness of price changes to the deviation of output from the trend. . . . It prevented the economy's self-correction mechanism from working. Thus, the NIRA can be best thought of as a force holding

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[4] It is highly unusual for the President to become personally involved with the direct enforcement of the antitrust laws, which is normally left to the Department of Justice and Federal Trade Commission.
[5] United States v. United States Steel Corp., 251 U.S. 417, 446–47 (1920).
[6]

back recovery."[8] One academic found that output was depressed by 10% due to the NIRA.[9] In the end, the NIRA made the depression longer and more severe than it would otherwise.

Ultimately, the United States Supreme Court declared the NIRA unconstitutional in 1935. By then, Roosevelt had realized that it had been a bad idea. He changed course and appointed strong antitrust enforcers, who began to resume enforcement of the antitrust laws.

The climate that led to the passage of NIRA, which favored protecting firms from competition, had other effects that were not as easy to eliminate. I'll give you two examples.

The airline industry, which was in its adolescence if not still in infancy, had originally been dependent on airmail subsidies to survive. By the 1930s, new technology had led the industry to the point where airlines could begin to make a profit carrying passengers. And indeed, some innovative new carriers began to move into the market to compete with the holders of the airmail contracts, such as one that began hourly service between New York and Washington. At the request of the airline industry, which claimed to need protection from harmful competition, Congress enacted a pervasive regulatory scheme in 1938 that regulated entry, price, and routes. Airlines could compete on the basis of food service and schedules, but very little else.

At the same time, as our highway system was becoming better, trucking emerged as a viable competitor to the railroads. The railroad industry had long been regulated by the

and second, insulating our firms from competition made the inefficient and ill-prepared to cope with foreign competition, let alone more efficient domestic competitors.[11]

You may think that I am attacking the idea of regulation. This is not the case, as regulation certainly has its place. In air transportation, for example, nobody argues with the idea of regulating safety. But regulation can go too far when it is employed only to exclude competition, which is typically justified in the interest of promoting “stability,” “competitiveness,” or other industrial policy goals. The trick, of course, is to find the balance by weighing the cost of regulation against the benefits.

Why is this hard? It’s hard because economic crisis creates an opportunity for those who would exclude competition to claim that the emergency situation justifies brushing aside sound competition principles with only the slightest glance, as Theodore Roosevelt did in 1907, and as Congress did in the 1930s when it regulated the airline and trucking industries.

I won’t speak to the question of whether regulation was, as some suggest, to blame for the present crisis, as I’m not an expert in financial markets. The important point is that the legitimate purpose of regulation must be carefully balanced with its impact on the functioning of competitive markets. We must recognize that those who would exclude competition will be quick to propose regulation that benefits them at the expense of consumers and will try to justify it on the basis of economic crisis without taking the trouble to measure the true costs and benefits.

So moving the clock forward again to 2009, we have another economic crisis. Have we learned our lesson this time? In our recent election, neither candidate called for setting aside our antitrust laws. Indeed, President Obama has appointed committed antitrust enforcers to head both of our antitrust agencies. However, calls for the application of industrial policy are likely to persist, and we will have to be vigilant in the years to come. Our experience has been that these calls must be met with well reasoned argument in favor of competition. While regulation may well be appropriate where the benefits of regulation exceed the costs, that does not justify casting aside what we have learned about the benefits of competition.

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[11] See Michael Porter, The Competitive Advantage of Nations (1998) 662-65.