Competition Policy and Its Convergence as Key Drivers of Economic Development

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I. Introduction

Competition policy is increasingly recognized as an important tool for promoting economic development.[2] Competition policy, the aim of which generally is viewed today as the promotion of consumer welfare and a vibrant economy,[3] does not exist in a vacuum; it requires an appropriate institutional framework to succeed. In particular, a strong rule of law tradition (including independent judges not tainted by corruption or political favoritism) and respect for property rights and freedom of contract are important institutional features conducive to long-term market-driven economic growth that benefits consumers.[4] Trade liberalization – that is, the reduction of government rules that distort and limit trade among nations (comprising tariffs and non-tariff barriers) – also tends to enhance consumer welfare and thereby complements competition policy. Indeed, by exposing domestic firms to heightened competition from foreign rivals, trade liberalization, like competition policy itself, enhances competition.[5] Although vitally important, questions relating to the rule of law, property protection, contract enforcement, and trade liberalization are beyond the scope of this chapter. Rather, this chapter focuses

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[2] R. S. Khemani, Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries, 1 (2007) (noting that "Competition – the process of rivalry between business enterprises for customers – is a fundamental characteristic of a flexible, dynamic market economy."); Hayri, Aydin and Dutz, Mark, Does More Intense Competition Lead to Higher Growth?, World Bank Policy Research Working Paper No. 2320 (November 30, 1999), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/05/25/000094946_00050405325137/Rendered/PDF/multi_page.pdf

[3] *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address to the U.S. Chamber of Commerce on its Global Regulatory Cooperation Project: Defending Competition Principles on a Global Basis (Jul. 17, 2007), *available at* http://www.ftc.gov/speeches/majoras/070717coc.pdf; *see also* Thomas O. Barnett, Assistant Att'y Gen., Antitrust Division, U.S. Dep't. of Justice, Address to the Georgetown Law Global Antitrust Enforcement Symposium: Global Antitrust Enforcement (Sept. 26, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/226334.htm.

[4] *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address to the Jones Day Chicago 20th Anniversary Celebration: The Rule of Law in Chicago and Around the Globe (May 2, 2007), *available at* http://www.ftc.gov/speeches/majoras/070502jonesday20thanniversary.pdf. *See also*, WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY, 11 (2004).

[5] *See, e.g.*, MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS, (1990) (noting that Japanese firms exposed to liberalized international trade (e.g., carmakers) were more successful than Japanese sectors not exposed to international trade due to protectionism (e.g., retail services and agriculture); *see also* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address to the International Competition Conference and EU Competition Day in Munich, Germany: National Champions: I Don't Even Think it Sounds Good (Mar. 26, 2007), *available at* http://www.ftc.gov/speeches/majoras/070326munich.pdf .

broadly on the specific role competition policy can play in furthering economic development goals.

II. The Spread of Competition Policy

Competition policy has been defined broadly as involving efforts to reduce impediments to competition that arise from governmental as well as private actions.[6] Thus, it may involve both the enforcement of competition law (referred to as antitrust law in the United States) and "competition advocacy" aimed at encouraging government to adopt policies that promote competitive forces.[7] Successful competition policy may have beneficial effects that go beyond strengthening the competitive process. As one expert has put it, "[i]n addition to helping realize the benefits of competition, competition law-policy fosters broader and shared economic development by reducing barriers to entry and competition, increasing accountability and transparency in government-business relations, and limiting opportunities for rent-seeking and corruption."[8]

Competition law has spread rapidly in recent years, and now has been adopted by over 100 jurisdictions.[9] Many jurisdictions look to the examples of highly developed competition law enforcement regimes – such as those of the United States and Europe – in enacting their new laws. Competition law doctrine has evolved substantially since the 1970s in the United States,[10] moving from a general distrust of facially restrictive contractual arrangements and all horizontal mergers toward an "economic approach" that seeks to condemn only those restraints and only those mergers that will undermine the competitive process (not protect particular competitors) and reduce consumer welfare.[11]

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[6] Khemani, *supra* note 2, at 1.

[7] *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address to the AEI/Brookings Joint Center, Washington, DC: The Role of Competition Analysis in Regulatory Decisions (May 15, 2007), *available at* http://www.ftc.gov/speeches/majoras/070515aei.pdf). *See also* R. Hewitt Pate, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Address to the Int'l Competition Network Conference in Merida, Mexico: Building Consensus: The Int'l Competition Network's Merger Review Working Group (June 24, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/209658.htm.

[8] Khemani, *supra* note 2, at 1.

[9] The International Competition Network (ICN), alone, has 102 member agencies from 91 jurisdictions. *See* Sheridan Scott, Commissioner of Competition, Competition Bureau (Canada), Opening Remarks, 7th Annual ICN Conference (April 14, 2008), *available at* http://www.icn-kyoto.org/documents/materials2/April_14_Scott_Opening.pdf.

[10] *See generally* Deborah A. Garza et al., Antitrust Modernization Comm'n, Report and Recommendations (Apr. 2007) [*hereinafter AMC Report*]; *see also*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005).

[11] *See generally* Timothy J. Muris, Chairman, Fed. Trade Comm'n, Address to the American Bar Ass'n Section of Antitrust Annual Meeting, Chicago, Ill.: Antitrust Enforcement at the Federal Trade Comm'n: In a Word – Continuity (Aug. 7, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm ; *see also, e.g.*, Illinois Tool Works, Inc., v. Independent Ink, Inc., 547 U.S. 28 (2006) (eliminating a *per se* rule against 'tying' the purchase of a patented product to an additional unpatented product (the 'tied' product), in favor of a holistic approach that considers many economic factors and the overall effect of the 'tying' arrangement on competition). *See also* Leegin Creative Leather Products, Inc., v. PSKS, Inc., 127 S.Ct. 2705 (2007) (eliminating a *per se* rule against vertical minimum resale price maintenance in favor of a macro approach that considers the overall affect of such practices on competition, including the stimulation of 'inter-brand' competition (the competition among manufacturers selling different brands of the same type of

This change in U.S. enforcement policy has greatly increased the flexibility of business arrangements and reduced uncertainty for business planners, enabling firms to compete more vigorously by using a variety of tactics that formerly would have been condemned to effectively expand the scope for permissible market transactions. Although further improvements to the American antitrust system are of course desirable, it is now generally recognized as a well-functioning area of U.S. government policy that promotes economic welfare.[12] Moreover, although competition law enforcement under the European civil law system differs in certain respects from American enforcement practices, in recent years the European Commission also has moved toward an "economic approach" that emphasizes consumer welfare. Thus, there has been growing convergence in competition policy between these two important regimes, a point that we will develop further later in discussing international convergence efforts.

The international proliferation of competition law regimes is dramatic. Twenty years ago there were relatively few competition agencies in the world. Today that number has increased to over 100.[13] Of particular note, the world's two most populous nations, India and China, have adopted competition laws, with China's Antimonopoly Law, an integrated law that builds on prior piecemeal legislation dealing with competition law topics, to take effect in August 2008. Thus, competition law has become a key part of the legal framework of most developing as well as developed nations.

On the whole, despite remaining limitations on its reach and imperfections in its application, the spread of consumer welfare-oriented competition policy has been a positive good. It has tended steadily to increase the business flexibility of firms that seek to exploit new international trade opportunities spawned through trade law liberalization and the growth in market economies around the world over the last twenty years.[14] It has discouraged welfare-inimical trade-restrictive hard core cartel arrangements among competitors (the acceptance and adoption of strong anti-cartel rules by growing numbers of jurisdictions – and cooperation among those jurisdictions – has led to successful prosecutions of international cartels).[15] It has given developing countries and former state-controlled economies tools to prevent newly privatized firms from engaging in anticompetitive abuses that harm consumers and undermine innovation and economic growth. It has prevented substantial consumer injury due to harmful single firm conduct lacking in efficiency justifications.[16] In sum, through these mechanisms, properly conceived and implemented competition law enforcement can bring significant benefits –

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product) through a reduction in 'intra-brand' competition (the competition among retailers selling the same brand)).

[12] *AMC Report*, *supra* note 10, at 333-337 (recognizing the generally strong state of American antitrust law, but calling for further appropriate reforms).

[13] *See* Scott, *supra* note 9.

[14] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 9 (2000).

[15] Frederic Jenny, *Cartels and Collusion: Lessons from Empirical Evidence*, 29 WORLD COMPETITION LAW REV. 109 (2006) (noting that cartels often are particularly harmful to small and developing economies, thus a reduction in cartelization is particularly important to the promotion of consumer welfare in the developing world); Barnett, *supra* note 3, *available at* http://www.usdoj.gov/atr/public/speeches/226334.htm.

[16] Press Release, Federal Trade Comm'n, FTC Provides Senate Testimony on Initiatives To Protect Competition in the U.S. Petroleum Industry (Sept. 21, 2005) (citing a multibillion dollar gain for consumers from the FTC / UNOCAL settlement in 2005).

enhanced efficiency, lower prices, greater product choice, more innovation, etc. – to developed and developing countries alike.[17]

III. Promoting Competition Policy Convergence

The widespread adoption of competition laws, however, presents a series of challenges. New agencies may not have the tools and resources to do their jobs. Even if they do, the country's economic and legal infrastructure may be inadequate to enable sound implementation of competition law and policy. The laws may not always be enforced in a manner that promotes efficiency and consumer welfare. Different countries' laws may be construed in a conflicting manner, even as applied to a single transaction. The sheer transaction costs of dealing with a multiplicity of regimes may seriously detract from or even outweigh the laws' purported benefits. It is incumbent upon enforcers to make every effort to see that the resulting international competition law system works with at least some degree of harmony.

But harmony will not come from above, either through a supranational regime or the mandatory harmonization of domestic systems. Even if this were a desirable result, there is simply no realistic prospect that harmonization will occur in the foreseeable future.[18] The road to a more smoothly functioning international antitrust system lies down the path of voluntary cooperation and incremental steps toward soft convergence. Let us examine how competition law enforcement agencies have pursued soft convergence in bilateral relationships and multilateral fora.

First, consider bilateral relationships. The bilateral initiatives of the two U.S. competition law enforcement agencies – the Federal Trade Commission and the United States Department of Justice – are instructive. The U.S. agencies have developed an extensive network of cooperation relationships with competition agencies around the

[17] Economic studies cited by the OECD support this conclusion. For example, a 2001 EBRD/World Bank survey of 3,300 firms in 25 countries (by Carlin, Fries, Schaffer, and Seabright) found that the degree of competition perceived by enterprise managers is positively correlated with the growth of sales and labor productivity and with firms' decisions to improve their products. Another 2001 study by Dutz and Hayri found a positive relationship between measures of effective competition policy and residual growth. Various other studies report similar sorts of results. *See* OECD Global Forum on Development, Competition Policy and Economic Growth and Development at 6-10 (Feb. 11, 2002), available at http://www.oecd.org/dataoecd/34/45/1845998.pdf.

[18] Leading commentators, such as Judge Diane Wood, echo this position. *See, e.g.*, Diane Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow*, COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 178-79 (Richard A. Epstein and Michael S. Greve eds., American Enterprise Institute Press 2004) ("In my judgment we need to exercise caution before we take the leap into a formal international antitrust regime." Instead, "[t]here's a better way forward, which involves education, consensus building in a voluntary environment, and targeted cooperation with like-minded countries."); Kerrin Vautier, *International Approaches to Competition Laws*: *Government Cooperation for Business Competition*, in Frederic Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES 187-216 (Kluwer Law International 2001), at 187-216 (concluding that "there is little, if any, prospect of a single workable approach to transnational competition issues, let alone any prospect of multilateral competition rules and supra-national enforcement" and discussing various other approaches that have been initiated and show more promise, including bilateral cooperation agreements).

world. Some of these are based on bilateral cooperation agreements,[19] while many others rely on informal arrangements.[20] The Agencies also cooperate extensively with other competition agencies under the OECD Recommendation on Antitrust Cooperation.[21]

Pursuant to these arrangements, U.S. competition agency staff cooperate with competition agencies abroad both on individual cases and on developing competition policy. This cooperation may include sharing public and "agency confidential" information[22] to facilitate investigations. In some enforcement areas, such as mergers, the parties also routinely waive protection of their confidential information in order to facilitate cross-agency cooperation.[23]

The U.S. agencies also work with their counterparts abroad to promote policy convergence on broader competition issues. This may involve the presentation of formal comments. For example, in the area of dominant firm conduct, U.S. agency officials attended the European Commission's hearings on the Directorate General for

[19] The U.S. currently has formal bilateral cooperation agreements with eight jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); and Mexico (2000). *See generally*, http://www.ftc.gov/bc/international/coopagree.html for a compilation of these Agreements; *see also,* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1261-63 (6th ed. 2007) (discussing bilateral cooperation agreements). Although their terms vary to some degree, the agreements generally require the signatories to notify one another about antitrust enforcement activities that affect the other's interests; to cooperate and coordinate with one another in investigations; and to consult with one another about matters that arise under the Agreements. All of the Agreements contain traditional negative comity principles, and most, including those with the European Union, contain positive comity principles as well. *See, e.g.*, Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (June 4, 1998), *available at* http://www.ftc.gov/bc/us–ec–pc.htm (elaborating on the basic positive comity provisions of the 1991 US-EC agreement); Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 1991), *available at* http://www/usdoj.gov/atr/public/international/docs/0525.pdf. Negative comity requires an enforcement agency in country A, when enforcing its law, also to take into account important interests of country B. Positive comity allows one country's enforcement agency to request another country's agency to initiate an enforcement action within its jurisdiction when the conduct at issue harms the requesting country and would be illegal in the requested jurisdiction.

[20] *See generally* John J. Parisi, Counsel for European Union Affairs in the International Antitrust Division of the United States Federal Trade Commission, Enforcement Cooperation Among Antitrust Authorities, before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law, London, England, 19 May 1999 (Updated October 2000), *available at* http://www.ftc.gov/speeches/other/ibc99059911update.shtm.

[21] *See* OECD, Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (July 27, 1995) *available at* http://www.oecd.org/dataoecd/60/42/21570317.pdf; http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130 .

[22] Agency confidential information is information that the Agency does not routinely disclose but as to which there are not statutory disclosure prohibitions, for example, staff views on market definition, competitive effects, and remedies, and the fact that the Agency is investigating a particular party.

[23] *See* INTERNATIONAL COMPETITION NETWORK, WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS, 2006 ICN Cartel Workshop, 2006 Annual Conference Materials (2006), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf.

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Competition's ("DG-Comp") Discussion Paper on Article 82,[24] and the Director General of DG-Comp, Philip Lowe, testified at the U.S. agencies' Unilateral Conduct hearing on international issues.[25] In other cases, coordination may be more informal, with staff and officials engaging in off-the-record dialogue about competition policy issues. For example, the U.S. agencies consulted informally with DG-Comp in connection with the latter agency's drafting of horizontal merger enforcement guidelines. The Guidelines that were adopted by the European Union[26] are in essential harmony with the Horizontal Merger Guidelines promulgated by the U.S. competition agencies. Principles embodied in the International Competition Network's Merger Guidelines Workbook[27] in large part reflect the general consensus on horizontal mergers that was the fruit of informal U.S. and European consultations. Thus, jurisdictions having markedly different legal systems have already reached a broad consensus on horizontal merger assessment, one of the most important areas of competition policy. In addition, the U.S., Mexican, and Canadian agencies have formed informal working groups to discuss issues involving intellectual property and conduct by dominant firms, and U.S. Agency officials often meet with their foreign counterparts to discuss competition policy.[28] Examples of cooperation involving developed and developing country agencies also are notable, and organizations, such as the ICN have endeavored to provide conduits for transferring expertise from developed to developing agencies. Although such initiatives cannot guarantee that competition agencies will necessarily reach consistent decisions,[29] they have been important in fostering increased understanding of the issues and in facilitating constructive dialogue among regimes with somewhat different approaches.

An important recent example of this policy dialog concerns China. The two U.S. antitrust agencies, as well as competition agencies and practitioners from around the globe, devoted substantial resources to working with China as it drafted its Antimonopoly Law,

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[24] *See* Deborah Platt Majoras, Chairman, Federal Trade Commission, Address at the Hearing on Section 2 of the Sherman Act: The Consumer Reigns: Using Section 2 to Ensure a "Competitive Kingdom", 10 (Jun. 20, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf.

[25] *See*, Transcript of Fed. Trade Comm'n and Dep't of Justice Sherman Act Section 2 Joint Hearing, Int'l Issues, statements of Phillip Lowe, Director General of Competition, European Comm'n, Address at Sherman Act Section 2 Joint Hearing on International Issues, 8-23 (Sept. 12, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/060912FTC.pdf.

[26] Council Regulation 139/2004, Jan., 20, 2004 O.J. (L 24) 1-22 (EC) [*hereinafter EU Merger Guidelines*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT.

[27] The Merger Guidelines Workbook, prepared for the Fifth Annual ICN Conference in Cape Town, South Africa, *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=ICNMergerGuidelinesWorkbook.pdf.

[28] *See* Transcript of Fed. Trade Comm'n and Dep't of Justice Sherman Act Section 2 Joint Hearing, Welcome and Overview of Hearings, statements of Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, 11 (Jun. 20, 2006) (noting that FTC and DOJ officials held talks with colleagues in Japan, Mexico, and Canada on unilateral conduct issues), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf.

[29] *See* Transcript of Fed. Trade Comm'n and Dep't of Justice Sherman Act Section 2 Joint Hearing, Business Testimony, prepared testimony of Sean Heather, U.S. Dep't of Commerce, 139 (Feb. 13, 2007)("While existing bilateral agreements and the existing application of comity principles have certainly been useful, they have limitations, as illustrated by the inconsistent remedies imposed by the U.S. and EU enforcement authorities in the Microsoft matter."), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/transcripts/07.02.13_Chicago_Final70213FTC.pdf.

which was enacted on August 3l, 2007. Chinese authorities invited this dialogue, to learn and benefit from the best international practices that can effectively promote their economic development goals through establishment of a framework embodying sound competition principles. Foreign officials and experts expect to continue consulting with their Chinese counterparts, as they implement their new law.

The U.S. agencies, like many others, also provide bilateral technical assistance to countries establishing new competition agencies. Historically, such technical assistance has been funded through the U.S. Agency for International Development.[30] Such programs, which began in the early 1990s in Central and Eastern Europe, are now active in many areas of the world, including Southeast Asia, Russia, India, Egypt, South Africa, and Central America.[31] In its recent report, the Antitrust Modernization Commission reported that the Agencies' technical assistance programs have been successful, and recommended that they receive direct funding in the future.[32] Congress considered this recommendation, and, in fiscal year 2008, the FTC was granted supplemental funds to be distributed to a number of activities, including technical assistance for both competition and consumer protection.[33] Moreover, under authority provided in the U.S. SAFE WEB Act of 2006,[34] the U.S. Federal Trade Commission has begun to provide internships that expose professionals from competition and consumer protection agencies to investigative and analytical approaches used in the United States.

Multilateral arrangements and fora also are critically important in promoting convergence. The United Nations Conference on Trade and Development (UNCTAD) has a long history as an intergovernmental forum dedicated to promoting economic development through various means, including competition policy. A multilateral forum that is solely dedicated to competition promotion and convergence efforts is the International Competition Network ("ICN"), which was launched in 2001 by 14 antitrust enforcement agencies. Its mission is two-fold: (i) to promote greater substantive and procedural convergence among antitrust authorities around the world toward sound competition policies; and (ii) to provide support for new antitrust agencies both in

[30] *See generally* Fed. Trade Comm'n and Dep't of Justice, U.S. Federal Trade Commission's And Department of Justice's Experience With Technical Assistance For The Effective Application of Competition Laws (Feb. 6, 2008), *available at* http://www.ftc.gov/oia/wkshp/docs/exp.pdf.

[31] The FTC and DOJ sent 47 different agency staff experts on 31 missions to 13 countries. In addition, the FTC maintained a resident advisor in Jakarta, Indonesia, through April, 2007, to assist the member states of the Association of South East Asian Nations (ASEAN) in developing competition laws.

[32] *See AMC Report*, *supra* note 10, at 219; *see also* Statement of Mr. Obey, Chairman of the House Committee on Appropriations regarding the Consolidated Appropriations Amendment of the House of Representatives to the Senate Amendment to H.R. 2764 (Dec. 17, 2007) ("The Appropriations Committees recognize and support the FTC's international programs. The FTC should continue competition policy and consumer protection efforts, including training and technical assistance, in developing countries."), *available at* http://thomas.loc.gov/cgi-bin/query/F?r110:1:./temp/~r110vXXwps:e1622594.

[33] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Opening Remarks, International Technical Assistance Roundtable (February 6, 2008), *available at* http://www.ftc.gov/speeches/majoras/internltechassist.pdf.

[34] Pub. L. No. 109–455 (codified at 15 U.S.C. §57c-1).

enforcing their laws and in building strong competition cultures.[35]

ICN's membership now includes virtually all competition enforcement agencies around the world.[36] Although the ICN has no permanent staff, it benefits from the advice of many advisors from diverse backgrounds, and operates through working groups comprised of agency enforcement officials as well as representatives from relevant international fora, academia, the legal community, and business groups. The ICN has had considerable success in fostering cooperation and convergence in the areas of unilateral conduct, mergers and cartels and generally is viewed as an important vehicle for encouraging multi-jurisdictional cooperation and convergence.[37]

The ICN's most recent initiative is a multi-year project to gather information and explore the possibility of developing best practices in the area of single-firm conduct. In June, 2007, the ICN Unilateral Conduct Working Group released the first of a planned series of reports. The 2007 Report, based on questionnaire responses submitted by 35 member jurisdictions and 14 non-governmental advisors, focused on three topics: (i) the objectives of unilateral conduct laws; (ii) the assessment of dominance and substantial market power; and (iii) state-created monopolies.[38]

With respect to the *objectives* of unilateral conduct laws, the Report noted that the vast majority of respondents identified consumer welfare, efficiency, and ensuring an effective competitive process as important goals.[39] However, unlike the U.S., where consumer welfare is essentially the only goal, certain other respondents identified other goals as well, including, for example, the preservation of fairness and equality within markets and ensuring a level playing field for small and medium sized enterprises.[40] Moreover, the goal of market integration remains important in the EU, where achieving a common market among Member States was one of the original reasons for adopting a

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[35] Press Release, International Competition Network, Antitrust Authorities Launch the "International Competition Network" (October 25, 2001), *available at* http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2001/10/25/25.

[36] *See* Scott, *supra* note 9.

[37] *See, e.g.*, William Blumenthal, "*The Challenge of Sovereignty and the Mechanisms of Convergence*," 72 ANTITRUST L. J. 267, 276 (2004) (noting that the "[ICN] has had great success in achieving multilateral consensus in a time frame that from the perspective of multi-jurisdictional diplomacy must be viewed as . . . very short. Until another, better vehicle can be identified, it is probably the best hope for convergence."); D. Daniel Sokol, *"Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age,"* 4 BERKELEY BUS. L.J. 37 (2007) (concluding that the ICN, with its "soft law" approach, is the institution best suited to address international competition issues). *See also* discussion *supra* note 27 and accompanying text, concerning the ICN's Merger Guidelines workbook.

[38] *See* ICN UNILATERAL CONDUCT WORKING GROUP, REPORT OF THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE CREATED MONOPOLIES, Presented at the 6th Annual Conference of the ICN, Moscow, 2007 [*hereinafter* ICN REPORT], *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateralconduct/objectives%20of%Unilateral1%20Conduct%20May%2007.pdf.

[39] *See id.* at 2 ("survey suggests important similarities as to these three central objectives"); and 11 (highlighting the U.S. and the EU as jurisdictions that "underscore the protection of consumer welfare as an important or primary objective").

[40] *See id.* at 18 (noting that six agencies reported that preservation of fairness and equality within markets was central to their authority and that seven reported that ensuring a level playing field was important).

competition policy.[41] Most respondents also viewed the goals of antitrust and intellectual property laws as consistent and complementary, and acknowledged the importance of predictability and transparency in the area of single-firm conduct.[42] Interestingly, there was no support for the proposition that promoting industrial policy goals is an appropriate objective,[43] despite concerns that protectionist objectives do, in fact, sometimes play a role in enforcement decisions.

With respect to *market power and dominance*, the Report found significant consensus regarding the key criteria used for purposes of assessment. Almost all jurisdictions identified "market share of the firm and its competitors" as well as "barriers to entry and expansion" as the most important criteria in assessing single-firm dominance.[44] Durability was also identified as an important consideration, but by fewer respondents.[45] Most agreed that "market shares alone do not determine whether an undertaking is dominant or has substantial market power," and are generally used only as a starting point in the analysis.[46] Over half of the respondents reported that they used a market-share threshold as either a rebuttable presumption and/or a safe harbor,[47] but the level of the thresholds varied significantly from one jurisdiction to another.[48] The result of lower thresholds in some foreign jurisdictions is to expose a much larger number of leading firms to potential challenge abroad than would be subject to challenge in the U.S.[49]

Further progress by the Unilateral Conduct Working Group occurred at the April 2008 ICN 7th Annual Meeting in Kyoto, Japan. The ICN Members adopted Working Group recommended practices on the assessment of dominance/substantial market power and on the analysis of state-created monopolies. Because the determination of whether substantial market power or dominance exists is a key element of single firm conduct analysis in all jurisdictions with competition laws, the achievement of a consensus on principles that are key to making such a determination is a significant convergence milestone. The Unilateral Conduct Working Group now will press forward with assessing the treatment of particular practices and with holding workshops aimed at furthering the understanding of issues raised in its reports and guidance documents.

The Organisation for Economic Cooperation and Development ("OECD") also

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[41] *See id.* at 19 ("EC competition policy is seen as a means of ensuring that the accomplishment of an internal market through the abolition of trade barriers is not nullified by the erection of private barriers to trade in the form of abusive conduct").

[42] *Id.* at 36-37 (observing that enhancing predictability and transparency is especially important in jurisdictions pursuing a multiplicity of goals, and also in enforcement regimes that rely on an effects-based, case-by-case approach).

[43] *Id.* at 31.

[44] *Id.* at 43-44. However, three countries could not identify any "most important" criteria because of the case-by-case nature of their analysis. *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 3.

[48] *See id.* at 3.

[49] *See* Transcript of Fed. Trade Commission and Dept. of Justice Sherman Act Section 2 Joint Hearing, Business Testimony, statements of Ronald Stern, Vice President and Senior Counsel for Antitrust of General Electric Company, at 57-58 (Feb. 13, 2007), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/docs/224623.htm.

merits prominent mention. It has long served as an important consultative body for countries with competition regimes as well as a source of technical assistance to jurisdictions enacting new competition laws.[50] The OECD's Competition Committee, comprised of representatives from the competition enforcement authorities of the OECD members, "aims primarily to promote common understanding and cooperation among competition policy authorities and officials."[51] Through its reports, sponsorship of roundtable discussions, and provision of a forum where enforcers can meet and discuss competition issues, it has promoted convergence both in substantive analysis and competition policy.[52] It has also published non-binding recommendations, including one that provided the basis for the bilateral cooperation agreements that have become an important part of U.S. policy.[53] OECD work on cartel conduct, including (for example) the 2005 OECD Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Investigations,[54] has helped develop an international consensus regarding the best means for agencies to address harmful cartel conduct.

In short, the ICN and OECD have played and will continue to play a valuable role in promoting convergence with respect to competition policy norms and competition law enforcement practices. Nevertheless, institutions whose particular expertise is development – such as UNCTAD and the World Bark (plus regional organizations such as APEC) – are also needed to further the practical adoption and application of competition principles in the developing world. In particular, UNCTAD, as the focal point for work on competition policy and related consumer welfare within the United Nations system,[55] is especially well placed to play a very significant role in promoting the sound implementation of competition policy in developing nations. This is particularly the case, as UNCTAD has strengthened its cooperative efforts with the ICN, the OECD, and major well established national competition authorities to help spread the welfare benefits of sound competition policy throughout the developing world.

IV. Conclusion

In conclusion, a strong competition policy contributes substantially to successful economic development. But the mere enactment of competition laws is not sufficient to achieve the benefits of enhanced competition. Rather, new competition regimes are likely to benefit from assistance from well-established competition agencies and multilateral

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[50] *See*, Walter T. Winslow, *OECD Programmes for International Responses to Global Competition Issues*, in Frederic Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES 235-48 (Kluwer Law International 2001), at 235-48.

[51] *Id.* at 240-41.

[52] *See* Transcript of Fed. Trade Commission and Dept. of Justice Sherman Act Section 2 Joint Hearing, International Issues, statements of James F. Rill, Partner, Howrey, LLP, at 14-15 (Sept. 12, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/060912FTC.pdf .

[53] Winslow, *supra* note 50, at 240-41.

[54] For a discussion of OECD work regarding cartels, *see*, http://www.oecd.org/about/0,3347,en_2649_40381615_1_1_1_1_37463,00.html.

[55] *See* Accra Accord, adopted on April 25, 2008, available at http://www.unctad.org/en/docs/tdxii_accra_accord_en.pdf, at para. 104. For a description of UNCTAD's mission, *see* http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1.

organizations in implementing a competition culture, to develop and adopt sound principles and enforcement techniques, which will result in "soft" convergence toward the best current practices. Soft convergence will reduce the costs to business of compliance with inconsistent enforcement standards and will encourage trade and investment that accrues to the benefit of developing countries. Properly understood, bilateral and multilateral cooperative activities in competition law and policy are complementary means to advance competition policy convergence. As the preceding discussion reveals, there has already been a substantial degree of convergence brought about through such efforts. Differences in enforcement policies in such areas as cartels and mergers have been noticeably receding, and even in other areas, such as single firm conduct, a surprising degree of agreement on certain basic principles has been revealed. A growing international appreciation for the importance of consumer welfare and sound economic reasoning in the application of competition policy may be gleaned, in both developed and developing countries. Significant differences in approach and degrees of appreciation for competition principles remain, of course. Accordingly, additional bilateral and multilateral work involving UNCTAD and other multilateral institutions is necessary to continue to build consensus on appropriate competition law and policy principles in developing as well as developed nations. The appropriate implementation of sound, economically-based competition policies may be expected to promote consumer welfare, innovation, and economic growth in developing nations, as it has in the developed world.