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COMPETITION POLICY AND ITS CONVERGENCE AS KEY DRIVERS OF ECONOMIC DEVELOPMENT

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I. INTRODUCTION

Competition policy increasingly is recognized as an important tool for promoting economic development.[1] Competition policy, the aim of which generally is viewed as the promotion of consumer welfare and a vibrant economy,[2] 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.[3] 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.[4]

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* Associate Director, Bureau of Competition, U.S. Federal Trade Commission. The views set forth below are attributable solely to the author and do not necessarily represent the views of the U.S. Federal Trade Commission or any U.S. Federal Trade Commissioner. The author thanks his colleagues in the Federal Trade Commission's Office of International Affairs (especially Elizabeth Kraus, Russell Damtoft, Maria Coppola Tineo, and Michael Barnett) for their editorial advice and research assistance.

1. R. S. Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries* 1 (The World Bank, Occasional Paper No. 19, 2007), *available at* http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/OccasionalPaper19_CompetitionPolicy/$FILE/FIAS+Competition+Policy+final.pdf (noting that "Competition – the process of rivalry between business enterprises for customers – is a fundamental characteristic of a flexible, dynamic market economy."); Mark Dutz & Aydin Hayri, *Does More Intense Competition Lead to Higher Growth?* (World Bank Policy Research Working Paper No. 2320 (Nov. 30, 1999), *available at* http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/05/25/000094946_00050405325137/Rendered/PDF/multi_page.pdf.

2. *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 (July 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.

3. *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).

4. *See generally* 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

Although vitally important, questions relating to the rule of law, property protection, contract enforcement, and trade liberalization are beyond the scope of this Article. Rather, this Article will focus broadly on the specific role competition policy can play in furthering economic development goals. It will emphasize the general economic benefits associated with the spread of competition policy and the slow but steady convergence of competition law regimes. In so doing, it will also note evidence supporting the proposition that the strengthening of competitive forces promotes economic growth, innovation, and the enhancement of consumer welfare.

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.[5] 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.[6] 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, increas[ing] accountability and transparency in government-business relations, and limiting opportunities for rent-seeking and corruption."[7]

Competition law has spread rapidly in recent years, and now has been adopted by over 100 jurisdictions.[8] 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.[9] The doctrine has moved 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

Champions: I Don't Even Think it Sounds Good (Mar. 26, 2007), *available at* http://www.ftc.gov/speeches/majoras/070326munich.pdf.

5. Khemani, *supra* note 1, at 1.

6. *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address to the AEI/Brookings Joint Center, Washington, D.C.: 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 International Competition Network Conference in Merida, Mexico: Building Consensus: The International Competition Network's Merger Review Working Group (June 24, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/209658.htm.

7. Khemani, *supra* note 1, at 1.

8. The International Competition Network (ICN), alone, has 102 member agencies from 91 jurisdictions. *See* Sheridan Scott, Comm'r of Competition, Competition Bureau (Canada), Remarks 7th Annual ICN Conference 2 (Apr. 14, 2008), *available at* http://www.icn-kyoto.org/documents/materials2/April_14_Scott_Opening.pdf.

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

those mergers that will undermine the competitive process (not protect particular competitors) and reduce consumer welfare.[10] 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.[11] 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.[12] Thus, there has been growing convergence in competition policy between these two important regimes, a point that will be developed 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, which took effect in August 2008.[14] 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 steadily increased the business flexibility of firms that seek to exploit new international trade opportunities spawned through trade law liberalization and the growth in market

10. *See generally* Timothy J. Muris, Chairman, Fed. Trade Comm'n, Address to the American Bar Association Section of Antitrust Annual Meeting, Chicago, Ill.: Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity (Aug. 7, 2001), *available at* http://www.ftc.gov/speeches/muris/murisaba.shtm; *see also* Leegin Creative Leather Products, Inc., v. PSKS, Inc., 127 S.Ct. 2705, 2724 (2007) (eliminating a *per se* rule against vertical minimum resale price maintenance in favor of a macro approach that considers the overall effect of such practices on competition, including the stimulation of "inter-brand" competition (the competition among manufacturers selling different brands of the same type of product) through a reduction in "intra-brand" competition (the competition among retailers selling the same brand)); *see also, e.g.*, Illinois Tool Works, Inc., v. Independent Ink, Inc., 547 U.S. 28, 42 (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).

11. *AMC Report*, *supra* note 9, at 333–337 (recognizing the generally strong state of American antitrust law, but calling for further appropriate reforms).

12. *See* Wolfgang Wurmnest, The Reform of Article 82 EC in the Light of the "Economic Approach", Max Planck Forum on Competition Law 2006, Munich, Germany (Oct. 13, 2006).

13. *See* Scott, *supra* note 8.

14. *See* Atleen Kaur, *Competition Laws in the Land of Lions and Tigers*, Michigan Bar Journal, Antitrust and Franchise Law (Sep. 2008), *available at* http://www.michbar.org/journal/pdf/pdf4article1411.pdf.

economies around the world over the last twenty years.[15] The policy has discouraged welfare-inimical, trade-restrictive, hardcore 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).[16] 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.[17] In sum, through these mechanisms, properly conceived and implemented competition law enforcement can bring significant benefits – enhanced efficiency, lower prices, greater product choice, more innovation, etc. – to developed and developing countries alike.[18]

Before proceeding further, let us consider broad principles that should be kept in mind in designing an ideal competition policy regime, from this American enforcer's perspective. First, competition policy should not be viewed as just another layer of regulation with which businesses must cope. Indeed, unlike traditional regulation, which specifies detailed rules of conduct to which commercial entities must adhere, antitrust policy should seek to allow private actors maximum flexibility to compete aggressively, even if such aggressive behavior harms individual competitors. Consistent with this standard, antitrust enforcement should only target artificial distortions in the business environment that preclude commercial entities from competing effectively on the merits. Thus, conduct that is not well understood, and conduct that has the potential to yield major inefficiencies, should not be sanctioned. In advancing this principle, enforcers should employ sound economic analysis, rooted in market facts, not unsubstantiated theory. Second, competition agencies should seek to minimize the administrative burdens they place on the private sector, consistent with effective enforcement. Minimizing burdens means tailoring investigative plans,

15. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 9 (2000).

16. Frederic Jenny, *Cartels and Collusion: Lessons from Empirical Evidence*, 29 WORLD COMPETITION L. & ECON. 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 2.

17. 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).

18. Economic studies cited by the Organisation for Economic Co-operation and Development ("OECD") support this conclusion. For example, a 2001 European Bank for Reconstruction and Development/World Bank ("EBRD/WB") 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* 6–10 (Feb. 11, 2002), *available at* http://www.oecd.org/dataoecd/34/45/1845998.pdf.

merger filing requirements, and information requests to preclude unnecessary demands. Third, enforcers should seek to develop clear enforcement principles that minimize costly business uncertainty. Fourth, public competition authorities should, when feasible, engage in competition advocacy that explains how particular laws or regulations may unnecessarily undermine competition on the merits. For example, advocacy efforts might point out how government regulatory restrictions on discounting below certain price or cost benchmarks typically tend to prevent pro-competitive price competition that would benefit consumers. In sum, antitrust enforcers should bear in mind at all times that the goal of competition policy is to foster a vibrant competitive environment, free from artificial private or governmental restrictions on the competitive process – and also free from unnecessary government-imposed costs and uncertainty. Because the goals summarized above are linked to broad notions of welfare, not of narrow self-interest, they are goals that can and should fruitfully be pursued by all competition authorities. Of course, the administration of competition policy, like all other human endeavors, is an imperfect enterprise. Thus one should not expect perfect achievement of these ideal goals.

These ideal competition policy goals were stated in very general terms. One might well ask how competition agencies can select the specific best practices to achieve these goals. As FTC Chairman Kovacic has put it, there are no "best practices," only "better practices," which should be refined over time as new and improved information and economic analyses come to light.[19] "Better practices" can be identified through the sharing of notes and experiences among the competition authorities of the world. Such sharing allows new agencies to learn from experienced agencies and learn from the mistakes – as well as the successes – of well-established authorities. Such sharing, when mediated through appropriate institutions, may also disseminate throughout the competition enforcement community the latest information on the economic and policy implications and practical effects of particular rules. Absorption of this information by competition authorities worldwide should promote a gradual convergence toward better practices and a concomitant improvement in the global state of competition policy.[20] The means and the outlook for the promotion of desirable competition policy convergence and the implications for economic development are addressed below.

19. *See* William E. Kovacic, General Counsel, Fed. Trade Comm'n, Achieving Better Practices in the Design of Competition Policy Institutions, Remarks before the Seoul competition Forum 2004, (Apr. 20, 2004), *available at* http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf; William E. Kovacic, *Competition Policy Cooperation and the Pursuit of Better Practices*, *in* THE FUTURE OF TRANSATLANTIC RELATIONS –CONTINUITY AMID DISCORD 65 (David M. Andrews et al. eds., 2005); William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309 (2003).

20. FTC Chairman William Kovacic has discussed the process of competition policy convergence at length in a series of papers. *See* William E. Kovacic, Chairman, Fed. Trade Comm'n, Competition policy in the European Union and the United States: Convergence or Divergence?, Remarks before the Bates White Fifth Annual Antitrust Conference, (June 2, 2008), *available at* http://www.ftc.gov/

III. PROMOTING COMPETITION POLICY CONVERGENCE

The widespread adoption of competition laws 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.[21] 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 world. Some of these are

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speeches/kovacic/080602bateswhite.pdf. Chairman Kovacic has argued that, as a "normative principle[,] . . . there should be mechanisms to promote adoption of superior norms." *Id.* at 5. As Chairman Kovacic (drawing partially upon the thinking of former FTC Chairman Muris) explains, those mechanisms should involve (1) decentralized experimentation within individual jurisidictions, (2) the identification of superior standards and implementation methods, (3) individual jurisdictions' voluntary "opting in" to superior norms, and (4) the building of institutional mechanisms that increase interoperability. (The fourth element involves intergovernmental contacts among senior government officials, trans-governmental day-to-day contacts among lower level officials (the officials who carry out competition law enforcement on a day-to-day basis), and transnational contacts among non-government institutions and individuals) *Id.* at 6–7. This article focuses on the fourth element in Chairman Kovacic's typology.

21. Leading commentators, such as Judge Diane Wood, echo this position. *See, e.g.*, 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 Int'l 2001) (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); Diane Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow, in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 177, 178–79 (Richard A. Epstein and Michael S. Greve eds., American Enter. Inst. 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.").

based on bilateral cooperation agreements,[22] while many others rely on informal arrangements.[23] The Agencies also cooperate extensively with other competition agencies under the Organization for Economic Cooperation and Development ("OECD") Recommendation on Antitrust Cooperation.[24]

Pursuant to these arrangements, U.S. competition agency staff cooperates with competition agencies abroad both on individual cases and on developing competition policy. This cooperation may include sharing public and "agency confidential" information to facilitate investigations.[25] In some enforcement areas, such as mergers, the parties also routinely waive protection of their confidential information in order to facilitate cross-agency cooperation.[26]

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 Competition's ("DG-Comp") Discussion Paper on Article 82,[27] and the Director General of DG-Comp, Philip Lowe, testified at the U.S. agencies' Unilateral Conduct

22. 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* Federal Trade Commission, *International Antitrust and Consumer Protection Cooperation Agreements*, *available at* http://www.ftc.gov/bc/international/coopagree.html (providing a compilation of these agreements); *see also* 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.

23. *See generally* John J. Parisi, *Enforcement Cooperation Among Antitrust Authorities* (Oct. 2000), *available at* http://www.ftc.gov/speeches/other/ibc99059911update.shtm.

24. *See 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.

25. 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.

26. *See Waivers of Confidentiality in Merger Investigations* 1 (International Competition Network 2006), http://www.internationalcompetitionnetwork.org/media/archive0611/NPWaiversFinal.pdf.

27. *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Address at the Hearing on Section 2 of the Sherman Act: The Consumer Reigns: Using Section 2 to Ensure a "Competitive Kingdom" 10 (June 20, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf.

hearing on international issues.[28] 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 are essential in harmony with the Horizontal Merger Guidelines promulgated by the U.S. competition agencies.[29] Principles embodied in the International Competition Network's Merger Guidelines Workbook in large part reflect the general consensus on horizontal mergers that was the fruit of informal U.S. and European consultations.[30] 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.[31] Examples of cooperation involving developed and developing country agencies are also notable, and organizations, such as the International Competition Network ("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,[32] 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

28. *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, Dir. Gen. 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.

29. Council Regulation 139/2004, 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.

30. ICN Merger Working Group: Investigation and Analysis Subgroup, *The Merger Guidelines Workbook*, *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMergerGuidelinesWorkbook.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=ICNMergerGuidelinesWorkbook.pdf.

31. *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 (June 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.

32. *See* Transcript of Fed. Trade Comm'n and Dep't of Justice Sherman Act Section 2 Joint Hearing, Bus. 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., E.U., and enforcement authorities in the Microsoft matter."), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/transcripts/07.02.13_Chicago_Final70213FTC.pdf.

with China as it drafted its Antimonopoly Law, which was enacted on August 31, 2007.[33] 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 ("USAID").[34] 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.[35] 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.[36] 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.[37] Moreover, under authority provided in the U.S. SAFE WEB Act of 2006, the FTC has begun to provide internships that expose professionals from competition and consumer protection agencies to investigative and analytical approaches used in the United States.[38]

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 ICN, which was

33. *See* Scott, *supra* note 9.

34. *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* 2 (Feb. 6, 2008), *available at* http://www.ftc.gov/oia/wkshp/docs/exp.pdf.

35. 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.

36. *See AMC Report*, *supra* note 9, 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."), 154 CONG. REC. H16054 (daily ed. Dec. 17, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H16054&dbname=2007_record.

37. Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Opening Remarks, International Technical Assistance Roundtable 7 (Feb. 6, 2008), *available at* http://www.ftc.gov/speeches/majoras/internltechassist.pdf.

38. Pub. L. No. 109-455 (codified at 15 U.S.C. §57c-1 (2006)).

launched in 2001 by 14 antitrust enforcement agencies.[39] 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 enforcing their laws and in building strong competition cultures.[40]

ICN's membership now includes virtually all competition enforcement agencies around the world.[41] 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.[42]

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.[43]

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.[44] However, unlike the U.S., where consumer welfare is essentially

39. Press Release, International Competition Network, Antitrust Authorities Launch the "International Competition Network" 1 (Oct. 25, 2001), *available at* http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2001/10/25/25.

40. *Id.*

41. *See* Scott, *supra* note 8, at 3.

42. *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, 38 (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 30 and accompanying text, concerning the ICN's Merger Guidelines workbook.

43. *See* ICN UNILATERAL CONDUCT WORKING GROUP, REPORT OF THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE CREATED MONOPOLIES 2–4 (2007), *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf [hereinafter ICN REPORT].

44. *Id.* at 2 ("survey suggests important similarities as to these three central objectives"); *Id.* at 11 (highlighting the U.S. and the E.U. as jurisdictions that "underscore the protection of consumer welfare as an important or primary objective").

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.[45] Moreover, the goal of market integration remains important in the E.U., where achieving a common market among Member States was one of the original reasons for adopting a competition policy.[46] 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.[47] Interestingly, there was no support for the proposition that promoting industrial policy goals is an appropriate objective,[48] 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.[49] Durability was also identified as an important consideration, but by fewer respondents.[50] 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.[51] Over half of the respondents reported that they used a market-share threshold as either a rebuttable presumption and/or a safe harbor, but the level of the thresholds varied significantly from one jurisdiction to another.[52] 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.[53]

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

45. *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).

46. *Id.* at 19 ("EC competition policy is seen as a means to ensure 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.").

47. *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).

48. *Id.* at 31.

49. ICN REPORT, *supra* note 43, at 43–44. However, three countries could not identify any "most important" criteria because of the case-by-case nature of their analysis. *Id.*

50. *Id.*

51. *Id.* at 45.

52. *Id.* at 47.

53. *See* Transcript of Fed. Trade Comm'n 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 57–58 (Feb. 13, 2007), *available at* http://www.usdoj.gov/atr/public/hearings/single_firm/docs/224623.htm.

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.

Additionally, state-created monopolies often play a prominent role in developing and newly industrialized countries. The mere privatization of a formerly state-owned enterprise does not assure that competition will be promoted. To the contrary, there is a substantial risk that the former state enterprises may use subsidies they received from the state, or personal connections with government officials, to maintain an artificial competitive advantage over former competitors and exercise unwarranted market power. Former state enterprises should not be allowed to enjoy competitive advantages not available to other firms that lack state ties. Ideally, a competition authority, backed by an independent judiciary, should subject former state enterprises to rigorous scrutiny and take enforcement action when such enterprises are found to be engaging in anticompetitive conduct.

The ICN Unilateral Conduct Working Group spelled out recommended practices for dealing with state-created monopolies in a report adopted by the ICN's Members at the April 2008 ICN Annual Meeting.[54] Specific recommended practices for competition enforcers dealing with state-created monopolies included: (1) "taking appropriate enforcement action against anticompetitive unilateral conduct;" (2) "treating state-created monopolies like private undertakings, . . . regardless of state ownership or legal status of the undertaking;" (3) "possessing effective investigative and remedial instruments . . . to carry out successful enforcement;" and (4) "apply[ing] sound antitrust analysis and remedies when . . . deciding whether enforcement action is appropriate."[55] Additional recommended practices called for enforcers to engage in competition advocacy with respect to state-created monopolies issues, specifically: (1) to "advocate that competition considerations be taken into account from the inception of the [privatization] process;" (2) to "participate in planning" liberalization and privatization; (3) to "promote an effective role for competition authorities in the course of liberalization and privatization;" (4) to "advocate for a . . . liberalization of barriers to entry in markets with state-created dominant enterprises;" and (5) to "possess effective instruments . . . to carry out successful advocacy work."[56] Advocacy instruments that may help competition authorities include: (1) the provision of formal input in the form of expert reports and opinions "to other government agencies

54. *See generally* ICN, STATE-CREATED MONOPOLIES ANALYSIS PURSUANT TO UNILATERAL CONDUCT LAWS: RECOMMENDED PRACTICES (2008), *available at* http://www.icn-kyoto.org/documents/materials/Unilateral_WG_2.pdf.

55. *Id.* at 1–2.

56. *Id.* at 2.

responsible for privatization/liberalization;" (2) "participating in meetings . . . and briefings with government officials;" (3) "the ability to bring legislative instruments and administrative decisions before the courts;" and (4) "publications of the competition authority's decisions in order to promote transparency in decision-making."[57]

The OECD also 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.[58] 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."[59] 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.[60] 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.[61] 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,[62] 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 Bank (plus regional organizations such as APEC) – are also needed to further the practical adoption and application of competition principles in the developing world.[63] In particular, UNCTAD, as the focal point for work on competition policy and related consumer welfare within the United Nations system, may be especially well placed to play a very

57. *Id.* at 2–3.

58. *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*, *in* INTERNATIONAL AND COMPARATIVE COMPETITION LAW AND POLICIES 235–48 (Kluwer Law International 2001), at 235-48.

59. *Id.* at 240–41.

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

61. Winslow, *supra* note 58, at 240–41.

62. 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.

63. The Foreign Investment Advisory Service (FIAS) is the World Bank System institution that works with developing countries to promote pro-market policies, including competition policy, that support economic development. For information about FIAS, *see* http://www.fias.net/ifcext/fias.nsf/Content/Advisory_Services.

significant future role in promoting the sound implementation of competition policy in developing nations.[64] If it is to do so, UNCTAD will need to strengthen its cooperative efforts with the ICN, the OECD, the World Bank, and major well established national competition authorities that seek to help spread the welfare benefits of sound competition policy throughout the developing world.[65]

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 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 businesses 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.

64. *See* United Nations Conference on Trade and Development, Accra, Ghana, Apr. 20-25, 2008, *Accra Accord*, ¶ 104, U.N. Doc. (Apr. 25, 2008), *available at* http://www.unctad.org/en/docs/tdxii_accra_accord_en.pdf. For a description of UNCTAD's mission, *see* http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1.

65. In this author's opinion, UNCTAD should fully weigh the evidence supporting the benefits that accrue to *all* nations when competition is strengthened and lend its unequivocal support to market-based development – in order to play the most constructive role possible in supporting sound competition policy. *See* Khemani, *supra* note 1.