

**“Challenges Presented by Globalization to Competition Policy”**  
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**JAMES F. RILL AND MARK C. SCHECHTER<sup>1</sup>**  
**HOWREY SIMON ARNOLD & WHITE**  
**WASHINGTON, DC**

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***Introduction***

As the impact of globalization is apparent in virtually all aspects of today’s political and economic climate, it is not surprising that globalization has fundamentally altered competition policy and enforcement as well. According to widely cited statistics, more than 90 countries now maintain some form of competition law or policy, most of which also establish an enforcement authority. With the proliferation of national competition policies has come the potential both for cooperation and convergence, for greater confidence in governments’ relations to commerce, and for friction and conflict associated with overlapping jurisdictions. The ramifications of this proliferation already have manifested themselves in the policies and actual cases brought by competition enforcement officials. The impact of globalization has produced substantial reaction from the business community and by competition enforcement officials through efforts toward greater cooperation. Since it is evident that the real world is already confronted with the challenges presented by globalization, major efforts have been focused on finding the appropriate solutions or mechanisms to address these issues.

While the benefits of greater convergence of competition regimes are apparent, the potential for friction is present across a spectrum of various substantive areas within the competition policy arena. These concerns arise in at least four distinct areas, including multijurisdictional mergers, vertical agreements, monopolization or dominance, and hard-core cartels. First and perhaps foremost, of significant concern to the business community is the sheer number of jurisdictions which have enacted merger control statutes – to date, that number has reached at least 60 separate merger control regimes.<sup>2</sup> The proliferation of international merger review regimes is subjecting a large number of

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<sup>1</sup> JAMES F. RILL IS A PARTNER AT HOWREY SIMON ARNOLD & WHITE IN WASHINGTON, DC AND IS CO-CHAIR OF THE FIRM’S ANTITRUST SECTION. MR. RILL SERVED AS ASSISTANT ATTORNEY GENERAL FOR ANTITRUST AT THE U.S. DEPARTMENT OF JUSTICE FROM 1989-1992. MARK C. SCHECHTER IS A PARTNER AT HOWREY SIMON ARNOLD & WHITE IN WASHINGTON, DC AND IS CHAIR OF THE FIRM’S GOVERNMENT ANTITRUST PRACTICE GROUP. MR. SCHECHTER SPENT 18 YEARS AT THE U.S. DEPARTMENT OF JUSTICE’S ANTITRUST DIVISION, WHERE HE LAST SERVED AS DEPUTY DIRECTOR OF OPERATIONS. THE AUTHORS GRATEFULLY ACKNOWLEDGE SARAH E. BAUERS FOR HER INVALUABLE ASSISTANCE IN PREPARING THIS PAPER.

<sup>2</sup> SEE, E.G., SUBMISSION BY THE U.S. COUNCIL FOR INTERNATIONAL BUSINESS, IPCAC HEARINGS (APR. 22, 1999), AT 4 (“THE PROLIFERATION OF MERGER NOTIFICATION REQUIREMENTS IN COUNTRIES DEVELOPING COMPETITION LAWS IS INCREASINGLY BURDENSOME FOR BUSINESS. PRESENTLY, IT IS NOT UNHEARD OF THAT A MULTINATIONAL

transactions to multiple notification requirements, disparate time requirements, and possible multiple substantive reviews. On occasion, this multiplicity of reviewing agencies can lead to different and conflicting outcomes or remedies. All of these concerns increase the transaction costs for business and add to the legal uncertainty associated with the merger review process – even for those transactions that may raise no substantive antitrust issues.<sup>3</sup>

While multijurisdictional mergers often receive the most attention for frictions caused by the globalization of antitrust, disparate or divergent policies affect other substantive antitrust areas as well. As to vertical agreements, the discrepancies between the enforcement policies in the U.S. and the EU are apparent on the surface.<sup>4</sup> Differences in basic competition principles also are present when dealing with monopolization or dominant firm issues, where lower thresholds for establishing the presence of a dominant firm exist in some jurisdictions. Even in the hard-core cartel context, basic distinctions in policy can hold the potential to create friction. This was apparent as the OECD undertook drafting a recommendation prohibiting hard-core cartels.<sup>5</sup> This process was both difficult and time-consuming as various OECD member governments struggled with reaching some consensus on fundamental principles, including the basic definition of a hard-core cartel.

To date there has been almost no direct conflict arising from the overlap of national competition policies. Problems are more likely to develop from procedural aspects of differing policies such as increased transaction costs, time delays, and differing non-policy based results. Nonetheless, the potential exists for a fundamental policy conflict to arise. A glimpse at this possibility was visible in several recent instances, although none even approached the full extent of actual conflict. While the Boeing/McDonnell Douglas merger review process by both the U.S. and the EU brought the possibility of such conflict to the attention of the international community, the level of tension between the competition officials of both jurisdictions was resolved with both parties minimizing the appearance of conflict.<sup>6</sup> The situation also brought to light the potential for political interference in merger cases, as

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CORPORATION WITH A PROPOSED MERGER WOULD BE REQUIRED TO FILE IN 20 OR 30 JURISDICTIONS.”)

<sup>3</sup> WITH THE INCREASE IN MERGER CONTROL REGIMES HAS COME AN INCREASE IN THE NUMBER OF JURISDICTIONS THAT MANDATE NOTIFICATION DESPITE A LACK OF NEXUS BETWEEN ANY COMPETITIVE EFFECT IN THE JURISDICTION. THIS SITUATION CAN ARISE WHEN A JURISDICTION BASES ITS NOTIFICATION THRESHOLD REQUIREMENTS ON WORLDWIDE DATA, INCLUDING WORLDWIDE SALES OR ASSETS, WITHOUT REGARD TO THE PRESENCE OF SALES OR ASSETS IN THAT JURISDICTION.

<sup>4</sup> FOR A DISCUSSION OF THE DISPARITIES BETWEEN U.S. AND EU POLICY REGARDING THE TREATMENT OF VERTICAL RESTRAINTS, SEE GEORG TERHOST, *THE REFORMATION OF THE EC COMPETITION POLICY ON VERTICAL RESTRAINTS*, 21 J. INTL. L. BUS. 343, (2000).

<sup>5</sup> *OECD RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD-CORE CARTELS*, [C(98)35/FINAL] (1998).

<sup>6</sup> *FTC ALLOWS MERGER OF THE BOEING CO. AND MCDONNELL DOUGLAS CORP.*, FTC PRESS RELEASE (JULY 1, 1997); *THE COMMISSION CLEARS THE MERGER BETWEEN BOEING AND MCDONNELL DOUGLAS UNDER CONDITIONS AND OBLIGATIONS*, EC PRESS RELEASE (JULY 30, 1997). SEE ALSO REMARKS BY DEBRA A. VALENTINE, GENERAL COUNSEL, U.S. FEDERAL TRADE COMMISSION, *BUILDING A COOPERATIVE FRAMEWORK FOR OVERSIGHT IN MERGERS – THE ANSWER TO EXTRATERRITORIAL ISSUES IN MERGER REVIEW* (OCT. 10, 1997).

officials of the highest levels from both the U.S. and the EU became involved in this antitrust matter. Conflicts resulting from divergent outcomes also were evident between the U.S. and Canada several years ago involving the Institut Merieux case.<sup>7</sup> In this instance, the U.S. Federal Trade Commission entered into a consent order to resolve concerns regarding a merger between Institut Merieux and Connaught BioSciences – despite the fact that neither of the companies maintained assets or production facilities within the U.S. The FTC included provisions in the consent decree to appoint an American trustee to facilitate the leasing of assets located in Canada. After complaints by the Canadian government, the FTC included a veto provision in the consent order for an official Canadian agency to block any trustee or lessee candidate the FTC might approve. The provisions contained in the FTC order provided an unusual involvement by a foreign jurisdiction in the remedial aspects of a proceeding. In addition to instances of conflict resulting from jurisdiction or the consideration of non-competition related principles, sometimes different policy approaches can result simply from distinctive market conditions or substantive legal principles in separate jurisdictions. Most recently, this occurrence was evident in several multinational mergers including Guinness/Grand Met<sup>8</sup> and, very possibly, General Electric/Honeywell.<sup>9</sup>

A number of measures have been proposed to address the challenges presented by global competition, including bilateral, regional, or multilateral cooperation; convergence of procedural or substantive antitrust policies; or the unilateral enforcement of domestic antitrust laws through extraterritoriality. The question now remains as to which, if any, of these alternatives holds the greater promise for addressing issues that transcend national borders and reducing associated frictions. Before we address this ultimate question, however, some preliminary issues present themselves for discussion.

### ***Preliminary Questions regarding Globalization***

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<sup>7</sup> *IN THE MATTER OF INSITUT MERIEUX S.A.*, 113 F.T.C. 742 (1990).

<sup>8</sup> *IN THE MATTER OF GUINNESS PLC*, 125 F.T.C. 735 (1998). *SEE ALSO* REMARKS BY JOHN PARISI, U.S. FEDERAL TRADE COMMISSION, *ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES*, PRESENTED BEFORE THE IBC UK CONFERENCES SIXTH ANNUAL LONDON CONFERENCE ON EC COMPETITION LAW (MAY 19, 1999).

<sup>9</sup> WHILE THE U.S. DEPARTMENT OF JUSTICE HAS ALLOWED THE MERGER TO PROCEED ON THE CONDITION THAT HONEYWELL DIVEST ITS HELICOPTER AIRLINE BUSINESS, REPORTS HAVE INDICATED THAT THE EU MAY IMPOSE CONDITIONS SO STRICT THAT GE WOULD OPT TO DISSOLVE THE PROPOSED TRANSACTION. THE EU COMPETITION OFFICIALS ARE CONCERNED THAT THE MERGER MIGHT GIVE THE COMBINED COMPANIES A PORTFOLIO EFFECT IN EUROPE'S AVIATION MARKET. THIS COULD REPRESENT THE FIRST INSTANCE WHERE THE EU TAKES ACTION TO BLOCK A MERGER OF TWO U.S. COMPANIES DESPITE APPROVAL FROM THE U.S. ANTITRUST AUTHORITIES. IT SHOULD BE NOTED THAT U.S. COMPANIES ALSO ARE FOREMOST AMONG THOSE WHO HAVE RAISED OBJECTIONS TO THIS MERGER, AND THERE DOES NOT APPEAR TO BE ANY BASIS FOR THE CLAIM THAT EC ACTION SHOULD BE VIEWED AS DISCRIMINATORY. *SEE WILLIAM DROZDIK, EU DEMAND THREATENS GE-HONEYWELL*, WASHINGTON POST, JUNE 9, 2001, AT E1. *SEE ALSO JUSTICE DEPARTMENT REQUIRES DIVESTITURES IN MERGER BETWEEN GENERAL ELECTRIC AND HONEYWELL*, U.S. DEPARTMENT OF JUSTICE PRESS RELEASE (MAY 2, 2001) (ANNOUNCING PROPOSED SETTLEMENT CONTINGENT UPON NEGOTIATION OF ACCEPTABLE CONSENT DECREE).

As we examine the issues surrounding the plethora of domestic competition policies, a question that arises is whether the development of national competition policies or legislation should be encouraged at all. There is a concern that national competition laws may hold the potential to foment protectionism. Also, the rapid increase of competition laws has led to concerns over increasing interference with global commerce. Some fear that any efforts to work toward harmonization or convergence of these numerous national laws could lead to a “lowest common denominator” approach to competition policy enforcement – where weak or ineffective competition policies are legitimized in the attempt for convergence.<sup>10</sup> In addition, as discussed above, procedural frictions develop as firms must confront the multiplicity of laws and agencies on a worldwide basis. These frictions hold the potential to impact both the financial standing and the types of international initiatives pursued by multinational companies.

Conversely, substantial benefits are inherent in the further recognition of the goals of competition-based policies, although competition policy does not necessarily require legislation. The implementation of sound competition policy supports the recognition of private property rights and increases overall confidence in the legal system. Businesses may be more likely to expand operations into nations that maintain and enforce legitimate competition laws based on this increased level of confidence. Furthermore, the rise of national competition laws that contains provisions prohibiting such activity as hard-core cartels obviously benefits the economy as a whole – if those laws are enforced. And finally, national competition policies can act as a counterforce to state command and control systems.

Another preliminary question that should be addressed is whether harmonization or convergence of competition policy is actually a positive endeavor. While there does not appear to be any generalized support for harmonization of competition policies at this time, there are many realized and many still conceptual benefits associated with convergence. First, convergence can result in a common and unified position on core competition principles (e.g., hard-core cartel prohibitions) that could be expanded through dialogue and cooperation to more complex issues. Second, efforts at convergence can enhance the level of transparency afforded to the legal process and subsequently increase legitimacy and confidence in any proceedings. Third, convergence leads to a reduction in frictions associated with the multiplicity of national laws. And finally, these efforts aid in the dissemination of basic principles of non-discrimination.

While the benefits associated with convergence appear to significantly outweigh any disadvantages, future efforts to expand the current level of convergence should take into account the possible negative components of convergence. Whenever efforts are made to reach a common understanding based upon divergent and differing principles, the potential for diminishing the legitimacy of those principles always exists. In this regard, steps toward convergence should recognize and avoid the possibility for a “lowest common denominator” approach to competition policy enforcement. In

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<sup>10</sup> *SEE REMARKS OF ASSISTANT ATTORNEY GENERAL JOEL KLEIN, ANTICIPATING THE MILLENNIUM: INTERNATIONAL ANTITRUST ENFORCEMENT AT THE END OF THE TWENTIETH CENTURY, PRESENTED AT FORDHAM CORPORATE LAW INSTITUTE (OCT. 16, 1997).*

addition, while efforts toward increased cooperation in the antitrust arena in general have place significant importance on the ability to share information, U.S. law among others prohibits the exchange of confidential, business-sensitive information without an accompanying waiver. Members of the business community have expressed concern regarding the potential exchange of confidential information and the possibility that the information could be released or disclosed to foreign competitors or others without permission. While U.S. officials have stressed the use of downstream safeguards associated with any document exchange, the problem remains a significant concern for the business community.<sup>11</sup> Finally, there have been fears that increased levels of convergence could lead to multiple and excessive enforcement actions against businesses or enforcement by “ganging up” – although it is noted that convergence is not a prerequisite for this to occur.

### ***Progress toward Convergence to Date***

Recent steps toward convergence of national competition laws and policies have been both positive and generally successful. Perhaps one of the most effective mechanisms to date has been the implementation of bilateral agreements. Beginning with the 1991 Cooperation Agreement between the U.S. and the EU,<sup>12</sup> competition enforcement officials have focused significant efforts toward reaching bilateral agreements. Not only has there been a concentration on improving existing bilateral agreements, such as the revised 1998 U.S.-EU Cooperation Agreement,<sup>13</sup> but substantial progress has been made in establishing bilateral agreements between jurisdictions without a long-standing history of antitrust cooperation.<sup>14</sup>

Existing bilateral agreements also provide a fundamental level of interaction between the parties that holds the potential to lead to eventual soft harmonization of competition policies and legal principles. This trend is evidenced by developments such as the principles for product market definition in both the U.S.

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<sup>11</sup> *SEE ICC/BIAC COMMENTS ON REPORT OF THE U.S. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (JUNE 5, 2000).*

<sup>12</sup> *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. 23, 1991).*

<sup>13</sup> *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).*

<sup>14</sup> *SEE, E.G., AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE FEDERATIVE REPUBLIC OF BRAZIL REGARDING COOPERATION BETWEEN THEIR COMPETITION AUTHORITIES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS (OCT. 26, 1999); AGREEMENT REGARDING THE APPLICATION OF THEIR COMPETITION LAWS BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE STATE OF ISRAEL (MAR, 15, 1999).*

and EU.<sup>15</sup> It also is evident in the level of cooperation exhibited in recent transborder enforcement efforts, where enforcement officials exchange documents,<sup>16</sup> where legally appropriate, and confer in detail at the remedy stage of transactions.<sup>17</sup>

Regional organizations also have become actively engaged in increased cooperation among competition regimes. Competition issues have been included in a number of recently enacted regional agreements, if only in an elementary context. These agreements include the U.S./Canadian Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and deliberations within the Asia-Pacific Economic Cooperation (APEC) forum. It seems inevitable that, with increased utilization of bilateral or regional agreements, additional steps will be taken toward both soft harmonization and extensive levels of cooperation.

In addition to bilateral and regional cooperation that is occurring between specific jurisdictions, several multinational organizations have been instrumental in facilitating greater cooperation and attempts at convergence. In the forefront has been the OECD Competition Law and Policy Committee where efforts thus far have contributed significantly toward the initial stages of convergence and cooperation. In this vein, the OECD CLP issued a Recommendation regarding cooperation on anticompetitive practices between member countries. Initially released in 1986 and then revised in 1995,<sup>18</sup> this Recommendation provides a model for bilateral agreements, while stressing the importance of cooperation and coordination. In addition, the CLP has issued a Recommendation on hard-core cartel activity that advocates the establishment of laws by member countries to attack and deter hard-core cartels.<sup>19</sup> The Recommendation further outlines methods for cooperation between member countries designed to assist in the

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<sup>15</sup> *SEE REMARKS BY CHAIRMAN ROBERT PITOFKY, FEDERAL TRADE COMMISSION, EU AND U.S. APPROACHES TO INTERNATIONAL MERGERS – VIEWS FROM THE U.S. FEDERAL TRADE COMMISSION, AT 3 (SEPT. 14-15, 2000) (DISCUSSING SIMILARITIES BETWEEN 1997 EC MARKET DEFINITION GUIDELINES AND THOSE CONTAINED IN THE U.S. MERGER GUIDELINES).*

<sup>16</sup> *U.S. AND CANADIAN COMPETITION ENFORCEMENT OFFICIALS HAVE COOPERATED EXTENSIVELY ON NUMEROUS CASES, INCLUDING IN THE FAX PAPER AND PLASTIC DINNERWARE PRICE FIXING CASES WHERE THE TWO AGENCIES EXCHANGED INFORMATION AND DOCUMENTS. THE SIGNIFICANT CROSS-BORDER COOPERATION THAT OCCURRED HAS BEEN CREDITED FOR THE SUCCESSFUL PROSECUTION IN THOSE CASES. SEE REMARKS BY ASSISTANT ATTORNEY GENERAL ANNE K. BINGAMAN, U.S. DEPARTMENT OF JUSTICE, INTERNATIONAL COOPERATION AND THE FUTURE OF U.S. ANTITRUST ENFORCEMENT, BEFORE THE AMERICAN LAW INSTITUTE (MAY 16, 1996).*

<sup>17</sup> *SEE JUSTICE DEPARTMENT CLEARS WORLD/COM/MCI MERGER AFTER MCI AGREES TO SELL ITS INTERNET BUSINESS, U.S. DEPARTMENT OF JUSTICE PRESS RELEASE (JULY 15, 1998).*

<sup>18</sup> *OECD REVISED RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE, [C(95)130/FINAL] (1995).*

<sup>19</sup> *OECD RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD-CORE CARTELS, [C(98)35/FINAL] (1998).*

cross-border enforcement of laws prohibiting such activity. In another move toward convergence, the CLP issued a framework for the notification of transnational mergers. The model form was developed through the synthesis of common elements and specifications from existing individual notification forms. The form was designed to be used, in part, as a framework for emerging competition regimes, as well as an attempt to harmonize specific portions of current premerger notification forms of established regimes. The CLP is continuing to address merger harmonization procedural issues by studying the possible release of guidelines for “best practices” in this area.<sup>20</sup>

Worthwhile efforts toward the goal of increasing recognition of the benefits of competition policy also have been undertaken by the WTO Working Group on the Interaction between Trade and Competition Policy. Recent efforts have focused on continued education of the benefits of a sound competition policy and advancement of specific fundamental legal principles in relation to competition policy, such as non-discrimination and transparency.<sup>21</sup> With a broad and inclusive membership, the WTO Working Group holds the ability to reach out to developing economies that may or may not already have in place a functioning and effective competition regime.

### *Substantial Efforts Underway*

#### *The Global Competition Initiative*

In the Final Report issued by the U.S. International Competition Policy Advisory Committee (ICPAC),<sup>22</sup> the Committee concluded that, since no comprehensive international competition-based organization currently exists, a global forum should be established to address those issues that transcend national borders.<sup>23</sup> This forum, named the Global Competition Initiative (GCI), would be an inclusive

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<sup>20</sup> *PROPOSALS FOR WORK ON HARMONIZATION OF MERGER REVIEW PROCEDURES, WORKING PARTY 3 ISSUES PAPER BY THE OECD SECRETARIAT, DAFFE/CLP/WP3(2001)10, MAY 2, 2001.*

<sup>21</sup> *SEE REPORT (2000) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/4 (NOV. 30, 2000).*

<sup>22</sup> *THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (ICPAC) WAS ESTABLISHED IN NOVEMBER 1997 BY THE U.S. ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST. SEE “RENO, KLEIN UNVEIL FIRST-EVER COMMITTEE TO ATTACK ANTICOMPETITIVE CARTELS,” U.S. DEPARTMENT OF JUSTICE PRESS RELEASE (NOV. 24, 1997). THE MANDATE FOR THE ADVISORY COMMITTEE WAS TO STUDY AND PROVIDE RECOMMENDATIONS REGARDING THE FUTURE DIRECTION OF U.S. COMPETITION POLICY IN THE FACE OF INCREASING GLOBALIZATION. THE COMMITTEE WAS COMPRISED OF TWELVE MEMBERS REPRESENTING THE BUSINESS, LEGAL, AND ACADEMIC COMMUNITIES. THE ADVISORY COMMITTEE FOCUSED ITS EFFORTS ON THREE RELATED BUT DISTINCT POLICY AREAS: (1) THE INTERFACE BETWEEN TRADE AND COMPETITION POLICIES; (2) MULTIJURISDICTIONAL MERGER REVIEW; AND (3) ENFORCEMENT COOPERATION. ICPAC RELEASED ITS FINAL REPORT DETAILING ITS RECOMMENDATIONS TO THE U.S. ATTORNEY GENERAL IN FEBRUARY 2000.*

<sup>23</sup> *SEE ICPAC FINAL REPORT, AT 281-285.*

body open to all interested governments from both developed and developing economies. Structurally, the GCI could be a forum initiated and led by the governments themselves, with the private sector and non-governmental organizations (NGOs) participating and offering advisory support and assistance as needed.

Following the release of the ICPAC Report, the GCI concept received endorsements from leading officials of both the U.S. and EU, among others. Support was initially voiced by then U.S. Assistant Attorney General Joel Klein in October 2000 and was quickly followed by similar support for the concept by EU Commissioner Mario Monti.<sup>24</sup> From there, representatives of both jurisdictions proposed specific suggestions for both the procedural aspects of establishing a new international forum, as well as a possible substantive agenda for the GCI. At the European Competition Law Conference in Fiesole, Commissioner Monti suggested that the central focus of the forum should be “to forge as broad a worldwide consensus as possible about competition policy issues generally, while at the same time assisting those authorities which are new to the business of antitrust enforcement.”<sup>25</sup> Commissioner Monti proposed that the meetings of the GCI could occur at regular intervals and be directed by a “permanent steering committee” to maintain continuity and organization of the group. Separate organizations representing industry, consumers, the bar, and academia could act as facilitators of the GCI and offer support financially or through the provision of technical expertise.<sup>26</sup>

The GCI took a step forward when forty-three senior competition law officials and professionals met at Ditchley Park, England in February 2001 to gauge the level of interest and feasibility of the global forum. The Ditchley Park conference was organized into three separate topics, including multijurisdictional merger review, competition policy in developing economies, and structural issues facing the establishment of the GCI. Broadly speaking, there was a general consensus among the conference participants that the concept of the GCI was worthy of further consideration and discussion. Specifically, the group reached several conclusions regarding the framework for the GCI, including:

- (1) The GCI must add practical value and should not be duplicative of ongoing work at existing international organizations.
- (2) The GCI should be, first and foremost, a forum led by government competition officials with a minimal permanent infrastructure. Additionally, the GCI could benefit from selected input from other interested parties representing a cross-section of the private sector.

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<sup>24</sup> **REMARKS BY ASSISTANT ATTORNEY GENERAL JOEL I. KLEIN, U.S. DEPARTMENT OF JUSTICE, *TIME FOR A GLOBAL COMPETITION INITIATIVE?*, PRESENTED AT THE EC MERGER CONTROL 10<sup>TH</sup> ANNIVERSARY CONFERENCE, BRUSSELS (SEPT. 14, 2000); REMARKS BY EC COMMISSIONER MARIO MONTI, *THE MAIN CHALLENGES FOR A NEW DECADE OF EC MERGER CONTROL*, PRESENTED AT THE EC MERGER CONTROL 10<sup>TH</sup> ANNIVERSARY CONFERENCE, BRUSSELS (SEPT. 14-15, 2001).**

<sup>25</sup> ***EU COMPETITION COMMISSIONER OUTLINES IDEAS FOR AN INTERNATIONAL FORUM TO DISCUSS COMPETITION POLICY ISSUES*, EC PRESS RELEASE (OCT. 27, 2000).**

<sup>26</sup> *Id.*

- (3) The agenda for the GCI to consider should be evolutionary as the forum progresses and should not be finalized until further discussions have matured. Possible topics for consideration include multijurisdictional merger review, transborder cartel enforcement, and issues related to international cooperation.
- (4) The GCI must be open to representatives from developing economies and should strive to focus on specific issues relevant to competition enforcement officials in fledgling competition regimes.
- (5) An interim planning group was established to guide further development of the GCI, in the hope of forming an official Steering Committee as the process continued.<sup>27</sup>

At present, members of the interim planning group continue to meet and work toward the goal of establishing the GCI as a new forum for international competition discussions. At the forefront of this effort is Commissioner Konrad von Finckenstein who has dedicated countless hours and his extraordinary knowledge and foresight to the goal of greater cooperation among competition authorities.

#### *OECD*

In addition, efforts are underway at the OECD Competition Law and Policy Committee to establish a “Global Forum” as a means to include a broader audience in the current OECD CLP discussions. The Forum would consist of officials from the 30 member countries, regular “observer” countries, and 21 non-member countries to which invitations already have been extended.<sup>28</sup> The Forum is slated to meet twice a year in conjunction with ongoing CLP meetings, with the first meeting scheduled for a one and a half day conference in October 2001. The proposed agenda for the October meeting focuses on discussions regarding hard-core cartels, multijurisdictional mergers, instruments of cooperation, and issues related to compliance. The second meeting of the Global Forum tentatively is planned for February 2002, including possible further discussions of hard-core cartels, technical cooperation issues, and competition advocacy.<sup>29</sup> The OECD Global Forum appears to be a very useful venue for increasing interaction between competition authorities, as well as a mechanism to enhance the OECD efforts in the area of cooperation and convergence. By broadening participation in traditionally limited OECD activities, the Global Forum undoubtedly would be a complementary forum to the continuous and fully inclusive discussions within the GCI. The scope or extent of participation in

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<sup>27</sup> MERIT E. JANOW, *THE INITIATIVE FOR A GLOBAL COMPETITION FORUM*, AT 6-8 (2001).

<sup>28</sup> THESE INVITATIONS HAVE BEEN EXTENDED TO OFFICIALS FROM BULGARIA, CHILE, CHINA, EGYPT, ESTONIA, INDIA, INDONESIA, KENYA, LATVIA, MALAYSIA, MOROCCO, PERU, ROMANIA, SINGAPORE, SLOVENIA, SOUTH AFRICA, CHINESE TAIPEI, THAILAND, UKRAINE, VENEZUELA, AND ZAMBIA. *SEE THE OECD GLOBAL FORUM ON COMPETITION*, NOTE BY THE SECRETARIAT OF THE OECD COMMITTEE ON COMPETITION LAW AND POLICY, DAF/CLP(2001)7, MAY 23, 2001.

<sup>29</sup> *SEE ID.* AT 6.

the Global Forum by non-governmental organizations, including business and professional associations, remains unclear.

### *WTO*

The 1996 WTO Singapore Declaration established a working group of WTO members to consider and study the “interaction between trade and competition policy, including anticompetitive practices in order to identify any areas that may merit further consideration in the WTO framework.” In its most recent annual report, the WTO Working Group stated that it is continuing its educative work and will focus specific efforts on fundamental principles such as national treatment and transparency; approaches to promoting cooperation and communication; and the contribution of competition policy to achieving the objectives of the WTO.<sup>30</sup> In addition to this productive work that focuses on education and establishing basic legal principles, there is still an impetus for a broader role among some. Some support has been voiced for inclusion of a competition segment in the next WTO round. In a recent “non-paper on competition policy” circulated among a limited audience, the issue of whether to launch negotiations on competition policy in the WTO was put forth. Any ultimate resolution of this issue is unclear at present.

### *Questions Raised by Each Planned Initiative*

While the need for additional paths toward convergence is apparent to us, at least, each planned initiative described above raises distinct, but important, questions as to the possible effectiveness and feasibility of their stated goals. For example, despite the advantages of an inclusive, competition-based forum such as the GCI, creating and implementing a new international forum can be complicated. With no concrete infrastructure or funding, development and formation of the GCI is a challenge. Progress is being made, however, and the state of these efforts should become more solidified by the fall.

Alternatively, while the OECD CLP already has a framework and infrastructure on which to build the new Global Forum, the OECD consists of industrial nations, and there is a concern among developing countries that its activities are slanted toward that sector. In order for the Global Forum to be effective, emerging market economies and newly established competition regimes must accept the OECD’s initiatives, a proposition that currently remains unanswered.

And finally, the WTO Working Group has a more inclusive membership than that of the OECD, however, the WTO’s foundation is rooted in primarily trade dispute settlement. In addition to its trade history, the WTO generally enters into binding agreements with an enforcement mechanism provision – some of which are not based on procompetitive principles. The addition of a competition element would be a departure from the traditional scope of activity within the WTO. Nevertheless,

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<sup>30</sup> *SEE REPORT (2000) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/4, AT 1(NOV. 30, 2000).*

there is a precedent for the WTO to address core principles in a competition regime, particularly transparency and non-discrimination, without becoming involved in dispute settlement proceedings.<sup>31</sup>

### ***Business and Professional Community Issues***

In addition to the initiatives being undertaken by inter-governmental organizations, the business and professional communities have been engaged in efforts to facilitate cooperation and convergence. In this regard, a priority of the business community has been to work toward making the multijurisdictional merger review process simpler, swifter, and more certain. To this end, business advisors have been participating in exercises underway within the OECD CLP Working Party 3 designed to work toward harmonization of merger review procedures.

Most recently, the OECD WP3 held a roundtable to discuss current efforts to establish guidelines for “best practices” in the procedural aspects of merger control regimes.<sup>32</sup> The OECD WP3 considered the discussion of issues related to the obligation to provide premerger notification, including issues such as the definition of “merger” or “concentration,” exemptions, notification thresholds, and establishing a competitive nexus. The Business and Industry Advisory Committee to the OECD presented its views in this area and focused attention on establishing rational procedural elements in any merger review system. BIAC highlighted the need to study jurisdictional thresholds and triggering events, translation of documents, requiring the minimum amount of information necessary for competitive analysis, and the concerns associated with any exchange of confidential information. Notwithstanding these specific concerns, there is broad-scale business support for sensible convergence efforts.<sup>33</sup>

### ***A Modest Proposition***

While it is obvious that a next step is needed in the transition to increased cooperation and convergence, this realization should not be overshadowed by the complexity of the path toward that goal. Coordination must occur between these separate initiatives described above, and the fact that these initiatives can and should be complimentary should be recognized and stressed. Since these

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<sup>31</sup> CERTAIN PROVISIONS CONTAINED IN THE WTO’S TRADE-RELATED INTELLECTUAL PROPERTY (TRIPS) AGREEMENT EMBODY COMPETITION POLICY CONCEPTS, INCLUDING ARTICLE 40 THAT STATES THAT “SOME LICENSING PRACTICES OR CONDITIONS PERTAINING TO INTELLECTUAL PROPERTY RIGHTS WHICH RESTRAIN COMPETITION MAY HAVE ADVERSE EFFECTS ON TRADE AND MAY IMPEDE THE TRANSFER AND DISSEMINATION OF TECHNOLOGY.”

<sup>32</sup> PROPOSALS FOR WORK ON HARMONIZATION OF MERGER REVIEW PROCEDURES, WORKING PARTY 3 ISSUES PAPER BY THE OECD SECRETARIAT, DAFFE/CLP/WP3(2001)10, MAY 2, 2001.

<sup>33</sup> IN COMMENTS RELEASED IN RESPONSE TO THE ICPAC REPORT, THE ICC AND BIAC VOICE THEIR SUPPORT FOR THE PROSPECTS OF CONVERGENCE FOR REDUCING THE FRICTIONS AND BURDENS ASSOCIATED WITH THE PROLIFERATION OF MERGER CONTROL REGIMES. ICC/BIAC COMMENTS ON REPORT OF THE U.S. INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (JUNE 5, 2000) (“ICC AND BIAC SUPPORT ICPAC IN ITS BELIEF THAT SUBSTANTIVE HARMONIZATION AND CONVERGENCE AMONG MERGER REVIEW REGIMES ARE THE BEST MEANS TO MINIMIZE OR EVEN AVOID CONFLICT.”)

initiatives each have a distinct “target audience” and stated goals, there is room and a need for each effort to be directed at increased recognition and convergence of competition principles.

In this vein, the OECD framework for the Global Forum appears to be a more formal structure that could support periodic discussions in conjunction with the ongoing CLP meetings among OECD members and invited non-member participants. Since these meetings are scheduled to occur at most twice a year, the Global Forum could refer specific issues to the GCI for more in-depth and continuing discussion among a broader range of jurisdictions. These issues could then be placed on the agenda for a subsequent OECD Global Forum meeting for additional and enhanced discussion.

While the OECD Global Forum could operate as a more structured mechanism, the GCI might be most effective as a more informal forum with ongoing discussions, possibly consisting of working groups, that would meet in various locations worldwide.<sup>34</sup> These meetings could occur as needed and could be in addition to a central meeting of the entire GCI that could be held on an annual basis. Participation in these working groups could be variable in nature and would be dictated by the specific topic being addressed. Possible topics for inclusion in the GCI could include the development of a compendium of national competition laws, the enhancement of transparency, enforcement sharing, and the definition and expansion of core principles. Limited staffing for the GCI could be provided by member governments, possibly on a rotating basis. As already contemplated the GCI would be a government-led initiative, with NGOs participating via an advisory committee role. This advisory committee, consisting of representatives from business, professional, academic, and consumer associations, could be divided into sub-groups to focus on specific assignments based on expertise.<sup>35</sup>

Finally, the WTO Working Group could continue its focus on the establishment of very basic competition-based principles, including non-discrimination. Discussion also could center on fundamental legal principles associated with the establishment of a framework for a competition enforcement structure.

In any of these ongoing initiatives, the role of NGOs should be ancillary and not part of the controlling leadership. NGOs could play an advisory role in specific instances as deemed appropriate by the government-led organization. Further, the NGOs should include not only the business community, but representatives from professional, academic, and consumer associations as well. Appropriate and relevant inclusion of the NGOs in these initiatives is critically important to generate the support for the initiatives themselves.

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<sup>34</sup> REMARKS BY COMMISSIONER MARIO MONTI, *THE EU VIEWS ON GLOBAL COMPETITION FORUM*, PRESENTED AT THE ABA ANTITRUST SECTION ANNUAL MEETING, AT 9 (MAR. 29, 2001)

<sup>35</sup> IT SHOULD BE NOTED THAT THE POSSIBLE ROLES OF THE GCI AND OECD GLOBAL FORUM AS IDENTIFIED HERE ARE SOMEWHAT REVERSED IN COMPARISON WITH THOSE IDENTIFIED BY COMMISSIONER KONRAD VON FINCKENSTEIN IN HIS RECENT REMARKS BEFORE THE ABA SECTION OF ANTITRUST LAW AND CBA NATIONAL COMPETITION LAW SECTION IN VANCOUVER ON MAY 31, 2001. THE IMPORTANT FACT, HOWEVER, IS THAT UNDER BOTH PROPOSALS, THE ROLES OF THE GLOBAL FORUM AND THE GCI ARE DISTINCT, COOPERATIVE, AND CLEARLY DELINEATED.

## *Conclusion*

Efforts by competition officials and the business community to promote cooperation and convergence have produced notable results to date. Further efforts appear to hold significant potential for enhancing competition policy as well as minimizing conflicts that can arise between competition enforcement authorities and reducing frictions and transaction costs for business. Mechanisms to address competition issues that transcend national borders should not only be encouraged but also could be facilitated through international fora dedicated to competition-related issues. The establishment of a fully inclusive Global Competition Initiative could prove to be one of the most effective mechanisms to navigate the current framework of national competition laws.