

**THE INTERNATIONALIZATION
OF COMPETITION LAW AND
THE NEED FOR GLOBAL
CONVERGENCE**

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1. INTRODUCTION***

? **Just as the impact of globalization is apparent in virtually all aspects of today's political and economic climate, it is no surprise that globalization is also fundamentally affecting competition policy and enforcement.**

? Government officials and members of the business community alike have recognized that global convergence is greatly needed. To address that need, the top antitrust authorities, including Canada, the United States and the European Union, have now established the International Competition Network (ICN) to "provide antitrust agencies from developed and developing countries a stronger and broader network for addressing practical competition enforcement and policy issues."¹

? Canada has been an active participant in this development. Historically, Canadian competition authorities were somewhat reluctant to participate in reciprocal international enforcement efforts out of concerns about the extraterritorial (i.e., "long arm") application

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¹ *Antitrust Authorities Launch the "International Competition Network"*, International Competition Network Press Release and Backgrounder (October 25, 2001).

of U.S. antitrust law.² That attitude has changed.³ Significant steps have been taken in the last several decades to both increase inter-agency cooperation⁴ and to bring Canadian competition laws into greater harmony with those of Canada's trading partners, most particularly the United States.⁵

? More recently, Canada took a very important step towards aiding global convergence in competition policy and enforcement when Konrad von Finckenstein, Commissioner of the Canadian Competition Bureau, was named interim chairman of the ICN Steering Group.⁶

? **In this paper, we propose to briefly outline the significant factors behind the globalization of competition law, discuss some of the issues to which this**

² Paul Crampton, *The 1995 Antitrust Enforcement Guidelines for International Operations: A Foreign Perspective*, [1996] Intl. Bus. L.J. (No. 1) 99. See also COMPETITION LAW OF CANADA, Goldman and Bodrug, eds., Chapter 13.

³ In a speech last year, for example, the Canadian Commissioner of Competition expressed the view that "[international] cooperation in respect of all of a nation's competition laws ought to be the rule, rather than the exception". Konrad von Finckenstein, Q.C., *Opening Remarks*, ABA Section on Antitrust Law Conference on Global Warming? International Reaction to the ICPAC Report, New York City, July 11, 2000.

⁴ The Competition Bureau has entered into agreements with antitrust agencies in the United States, the E.U., Australia and New Zealand and continues to negotiate with Chile and Mexico in this regard. Canada is also a party with the U.S. to a treaty on mutual assistance in criminal matters which extends to competition law offences. The Competition Bureau also has taken a leading role in various international organizations such as the OECD and this November will be hosting a major conference on anti-cartel enforcement in Ottawa. For a discussion of the Competition Bureau's international efforts, see Dominique Burlone, *Canada and the Internationalization of Competition Policy*, Annual Conference of the Canadian Bar Association Competition Law Section, Ottawa, Ontario, September 21, 2000 and *The Challenges of Globalization of Trade and Competition Policy in Canada*, presented to the Canadian Bar Association, Quebec Division, May 10, 2001.

⁵ The key development in terms of harmonizing Canadian merger law was the adoption in 1986 of a merger review regime that now closely parallels that of the United States. That said, more work remains to be done. See, for example, Calvin S. Goldman, Q.C. and Mark Katz, *Canadian Competition Policy: Where Do We Go From Here?*, Canadian Competition Policy: Preparing for the Future, Toronto, Canada, June 19-20, 2001. An example of convergence in the area of anti-cartel enforcement is the latest Immunity Bulletin released by the Competition Bureau (Competition Bureau, *Immunity Program Under the Competition Act* (September 2000)), which brings Canada's cartel enforcement/leniency program even closer to that of the U.S. See Calvin S. Goldman, Q.C. and Mark Katz, *A Canadian Perspective on International Cartel Investigations and Prosecutions*, ABA Advanced International Cartel Workshop, New York City, February 15-16, 2001. Even more fundamental changes are now being considered to Canada's conspiracy law to bring it more in line with the U.S. approach, i.e., by introducing a *per se* element to the offence. See Konrad von Finckenstein, Q.C., *Section 45 at the Crossroads*, 2001 Invitational Forum on Competition Law, October 12, 2001.

⁶ See ICN News Release and Backgrounder, *supra*, note 1.

development gives rise and describe the most important of the convergence initiatives that are currently underway. We hope that this will provide a useful context for this conference's consideration of international competition law and the business case for convergence.

? **The timing of this conference is particularly fortuitous in that we have recently witnessed the type of repercussions for business that can occur in the absence of convergence. We are referring, of course, to the E.U.'s recent decision to block the proposed GE/Honeywell merger, notwithstanding that antitrust authorities in the United States had approved the transaction earlier, conditioned upon certain divestitures.⁷ The GE/Honeywell case highlights the need for continued efforts towards convergence by enforcement agencies.⁸ At the same time, it also raises questions about the extent to which this goal can be effectively achieved and the impact that the absence of convergence may have on the fate of future transborder mergers.⁹**

2. WHY CONVERGENCE?

? A recognition of the benefits inherent in the international coordination of competition policy is not new.¹⁰ That said, a number of recent trends have contributed to the impetus for an enhanced and more broadly-based effort towards international cooperation. The first such trend is the dramatic expansion in multijurisdictional business activity, particularly over the last decade.¹¹ The second trend is the adoption by an ever-growing number of countries of national competition legislation.¹² These two factors have

⁷ See Commission Decision, *General Electric/Honeywell*, Case No. COMP/M. 2220, July 3, 2001 (Public Version); *Justice Department Requires Divestitures in Merger Between General Electric and Honeywell*, U.S. Department of Justice Press Release (May 2, 2001). The GE/Honeywell merger was also cleared by Canada's Competition Bureau.

⁸ See, for example, "Can Globalization Include Regulators: After GE, Multinationals Seek More Cooperation Among Trust Busters", *Wall Street Journal*, Monday, June 25, 2001.

⁹ See *infra* for a further discussion.

¹⁰ For example, a draft Chapter dealing with anti-competitive practices was included in the "Havana Charter" of 1947, a comprehensive economic charter which was drafted in conjunction with the establishment of the International Monetary Fund, the World Bank and the Bretton-Woods System. Although this Chapter was never ratified by the major nations, the issue of competition policy remained on the international agenda, as evidenced by, among other things, the OECD's issuance of its first Recommendation on antitrust cooperation in 1967. See Chapter 1 of ABA Section of Antitrust Law, *COMPETITION LAWS OUTSIDE THE UNITED STATES* (2001) for an excellent and detailed history of the multijurisdictional enforcement of antitrust laws.

¹¹ As an illustration, it is estimated that more than \$5 trillion in goods and nearly \$1.5 trillion in services were traded across national borders last year.

¹² According to the most widely cited statistics, more than 90 countries now maintain some form of competition law or policy and roughly 20 or more countries are in the process of drafting such laws.

combined to require competition authorities to increase their efforts at coordination in order to support common enforcement objectives and to prevent or manage possible conflicts.¹³

- ? The benefits to enforcement authorities of increased cooperation are apparent, including a reduction in the cost and time of investigations, less duplication of effort and improvements to the data and evidence gathering process.¹⁴ However, international convergence is a pressing issue for the private sector as well.¹⁵
- ? Of perhaps foremost concern to the business community is the sheer number of jurisdictions which have adopted merger control statutes – to date, that number has reached at least 73 separate merger control regimes.¹⁶ The proliferation of international merger review regimes is subjecting a large number of 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 (as in the GE/Honeywell case). All of these concerns increase the transaction costs for business and add to the uncertainty associated with the

¹³ See the following speeches by Charles A. James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice: *International Antitrust in the Bush Administration*, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, September 21, 2001; *International Antitrust in the 21st Century: Cooperation and Convergence*, OECD Global Forum on Competition, Paris, France, October 17, 2001; and *Reconciling Divergent Enforcement Policies: Where Do We Go From Here?*, Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy, New York City, October 25, 2001. See also Mario Monti, *International Cooperation and Technical Assistance: A View from the EU*, UNCTAD 3rd IGE Session, Geneva, Switzerland, July 4, 2001 and *Opening Speech*, OECD Global Forum on Competition, Paris, France, October 17, 2001; and Konrad von Finckenstein, Q.C., *International Antitrust Cooperation: Bilateralism or Multilateralism?*, CBA/ABA Conference on International Antitrust Issues - Pacific Rim and Beyond, Vancouver, British Columbia, May 31-June 1, 2001.

¹⁴ *Ibid.*

¹⁵ As discussed *infra*, a number of business/professional organizations have taken an active role in ensuring that convergence initiatives are informed by a private sector perspective. Prominent among these organizations are the ICC (International Chamber of Commerce), BIAC (the Business and Industry Advisory Committee to the OECD), the ABA (American Bar Association) and the IBA (International Bar Association).

¹⁶ See, e.g., Submission by the U.S. Council for International Business to ICPAC (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 corporation with a proposed merger would be required to file in 20 or 30 jurisdictions." (ICPAC refers to the "International Competition Policy Advisory Committee" that was established in 1997 to provide recommendations to former U.S. Attorney General Janet Reno and former Assistant Attorney General Joel Klein on issues relating to international antitrust enforcement. Mr. Rill was one of ICPAC's Co-Chairs. ICPAC released its Final Report on February 28, 2000.) See also Howrey Simon Arnold & White, LLP, *Worldwide Competition Filing Requirements: Country-By-Country Report* (2001).

merger review process – even for those transactions that may not raise normative substantive antitrust issues.¹⁷

- ? Simply put, there is enough uncertainty inherent in the process of trying to effectively accomplish the merger of two companies – with different locations, cultures and product mixes – such that adding further uncertainty due to the merger review process is likely to create a chill on what may prove ultimately to be pro-competitive transactions.
- ? 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 current discrepancies between the enforcement policies in the U.S. and the E.U. are apparent on the surface.¹⁸ 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 create difficulties, such as in respect of divergences in the application of immunity programs (assuming these programs exist at all).¹⁹
- ? In short, convergence offers many practical and conceptual benefits. 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 and certainty 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. All of this is of potential benefit to companies doing business across different jurisdictions.

¹⁷ 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.

¹⁸ For a discussion of the disparities between U.S. and E.U. policy regarding the treatment of vertical restraints, see Goerg Terhost, *The Reformation of the EC Competition Policy on Vertical Restraints*, 21 J. Intl. L. Bus. 343 (2000).

¹⁹ This was apparent in the OECD's effort to draft a recommendation prohibiting hard-core cartels. This process was both difficult and time-consuming as various OECD Member governments struggled to reach some consensus on fundamental principles, including the basic definition of a hard-core cartel. See OECD Council, *Recommendation Concerning Effective Action Against Hard-Core Cartels* [C(98)35/Final] (1998). See also Calvin S. Goldman, Q.C., Mark Katz and David Fruitman, *The Internationalization of Anti-Cartel Enforcement: A Canadian Perspective*, 2001 Invitational Forum on Competition Law, Toronto, Ontario, October 12, 2001.

3. ISSUES ON THE ROAD TO CONVERGENCE

- ? While the benefits associated with increased convergence are clear, there are a number of hurdles that must be taken into account.
- ? The first, and perhaps most obvious difficulty, concerns whether it is even possible to reconcile the policies and procedures of numerous different competition regimes.²⁰
- ? The GE/Honeywell case has brought this issue into sharp relief. As Assistant Attorney General Charles James has stated, the U.S. and E.U. reached their inconsistent decisions notwithstanding "a tremendous amount of coordination over several months," including extensive staff meetings, the sharing of expert evidence and discussions at the highest levels. Rather than a failure of coordination, therefore, the divergence in results "flowed from an apparent substantive difference, perhaps a fundamental one, between the two agencies on the proper scope of antitrust enforcement". While the U.S. Antitrust Division concluded that the merged firm would be able to offer better products and services at more attractive prices, the E.U. was concerned that the GE/Honeywell merger would allow the combined company to detrimentally affect competitors, and thus the competitive process, by giving it a dominant "portfolio" of products and services in Europe's aviation market.²¹
- ? There is no denying the significance of the GE/Honeywell case. This is the first time that a foreign competition authority has prohibited a merger between U.S. entities which U.S. antitrust officials had approved. Moreover, the difference in views between the U.S. and E.U. authorities in this case is the product of what appear to be diametrically opposed theories of antitrust law regarding the meaning of competition and how to best protect the competitive process.²² Consequently, it is legitimate to ask whether GE/Honeywell

²⁰ In his paper cited in note 13, *supra*, the Canadian Commissioner of Competition, Konrad von Finckenstein, describes the problem as follows: "The overriding impediment relates to the diversity of domestic legal regimes and the vast array of legal and economic traditions in which they are embedded ... Different countries have different substantive laws, so there is at least some risk of disparate enforcement. In addition, the competition philosophies and the aims of competition policy differ significantly across the globe... [D]ifferent legal cultures and the weakness of judicial and administrative institutions in some jurisdictions are also impediments to the emergence of a multilateral consensus."

²¹ See Mr. James' speeches to the OECD and the Fordham Corporate Law Institute cited in note 13, *supra*. For an E.U. perspective on the GE/Honeywell merger, see Mario Monti, *The Future for Competition Policy in the European Union*, Merchant Taylor's Hall, London, England, July 9, 2001 and Götz Drauz, *Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers Under EC Competition Law*, Fordham Corporate Law Institute, 28th Annual Conference on International Antitrust Law and Policy, New York City, October 25, 2001.

²² In his speech prepared for the OECD Global Forum on Competition, *supra*, note 13, Charles James did not mince words in expressing the U.S. position on the so-called "portfolio effect" theory: "In our view, the so-called 'portfolio effect' or 'range effects' analysis as it has recently been employed is neither soundly

signals a marked change in the dynamic that has brought about increasing convergence over the last 10 years.²³

- ? Although we certainly have some concerns about these issues, we ultimately do not believe that GE/Honeywell will spell an end to the convergence endeavour. It must be recognized that increased convergence does not of necessity entail complete uniformity. In other words, while increased harmonization may be a desirable objective, it does not require that all jurisdictions adhere to an identical set of laws and procedures. Rather, the goal should be to ensure that different legal structures and processes are compatible with each other, and that appropriate mechanisms are in place to smooth over conflicts should they arise. In that regard, we are encouraged by the joint steps that have been taken by the U.S. and E.U. authorities to try to ensure that GE/Honeywell does not become a negative watershed event but remains only an aberration.²⁴ That said, it is clear that

grounded in economic theory nor supported by empirical evidence, but rather, is antithetical to the goals of sound antitrust enforcement. We fear that it will result in some pro-competitive mergers being blocked, and others never being attempted, to the detriment of consumers in many countries. It will dissuade merging parties from talking candidly to antitrust agencies about the efficiencies they expect to realize, out of fear that such efficiencies – even when they would clearly benefit consumers – would be viewed negatively."

²³ There have been other instances in which the possibility of conflict between U.S. and E.U. authorities was raised, but none that attained the degree of open divergence seen in GE/Honeywell. For example, while the Boeing/McDonnell Douglas merger review process raised issues between the U.S. and E.U., the level of tension between the competition officials of both jurisdictions was resolved with both parties minimizing the appearance of conflict. See *FTC Allows Merger of the Boeing Co. and McDonnell Douglas Corp.*, FTC Press Release (July 1, 1997) and *The Commission Clears the Merger Between Boeing and McDonnell Douglas under Conditions and Obligations*, EC Press Release (July 30, 1997). See also Debra A. Valentine, *Building a Cooperative Framework for Oversight in Mergers – The Answer to Extraterritorial Issues in Merger Review* (Oct. 10, 1997).

²⁴ For example, Commissioner Monti travelled to Washington, D.C. in late September 2001 to speak to Charles James and Timothy Muris about how to narrow their apparent policy differences in conjunction with the 10th anniversary of the U.S.-E.U. cooperation agreement. One result of the meeting was to direct the joint working group on mergers (which was established last year) to examine the "portfolio effect" issue. The intention is for each side to educate the other about its views and, working at both staff and senior policy levels, to try to reach some common ground. See "Monti, U.S. Regulators Hope to Align Policies", *The Deal*, September 25, 2001. It also may be noted that the "portfolio effect" theory was one of the topics of a roundtable discussion at a meeting of the OECD's Competition Law and Policy Committee in Paris in October 2001. See *Roundtable on Portfolio Effects in Conglomerate Mergers*, Issues Paper by the Secretariat, October 2, 2001. In addition, dialogue between U.S. and E.U. representatives has continued at various fora beyond the OECD – for example, at the Fordham Corporate Law Institute conference (October 25, 2001) and at a workshop on convergence held the following day at Columbia University in New York City.

much work remains to be done in the future to reduce the likelihood that a GE/Honeywell type result will recur.²⁵

- ? Another concern that has been expressed about convergence is that it may lead to a "lowest common denominator" approach to competition policy enforcement – where weak or ineffective competition policies are legitimized in the attempt to bring about harmonization.²⁶ Whenever efforts are made to reach a common understanding based upon divergent and different 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.
- ? Finally, from a private sector perspective, one of the key issues surrounding inter-agency cooperation is the treatment of confidential business information. Indeed, many in the international business community believe that greater international cooperation cannot proceed fairly and effectively unless and until there are satisfactory measures in place to

²⁵ At the September 2001 conference of the Canadian Bar Association's Competition Law Section, Alexander Schaub, Director-General of the E.U.'s Competition Directorate-General, offered the view that the GE/Honeywell case was an exceptional event or "accident" as he put it. However, the extent to which GE/Honeywell continues to elicit strong feelings was made evident at the OECD Global Competition Forum meeting held in October 2001 in Paris. In response to Charles James' pointed and public criticisms (see note 22), which were delivered by Deputy Assistant Attorney General William Kolasky, Commissioner Monti stated at a joint press conference that "if serious progress is to be made, I do not believe that it is helpful that one or the other side launches a public debate or assessment" of the GE/Honeywell deal. He also said that he "bluntly rejected" aspects of the U.S. criticism of the E.U.'s antitrust policies as "a gross misrepresentation of European competition policy". See "Monti, Kolasky trade barbs", *The Deal*, Wednesday, October 17, 2001 and "Ex-Honeywell chief blames Welch for failure of GE bid", *Financial Times*, Thursday, October 18, 2001. On a positive note, however, the tone adopted by U.S. and E.U. officials at subsequent venues was more conciliatory. For example, in his Fordham speech cited in note 13, *supra*, which also was delivered by Deputy Assistant Attorney General Kolasky, Charles James emphasized that while the U.S. and E.U. may disagree over the application of the "portfolio effect" theory, they nevertheless "continue to cooperate, consult and discuss the important issues that bear upon our work". He added that "[t]he fact that competition authorities around the world can share perspectives and exchange ideas is a testament to the progress we have made up to this point, and our determination to progress in the future." At the Columbia University roundtable on convergence held the next day, Alex Schaub of the E.U. indicated that he welcomed the type of constructive and open discussion of these issues that had taken place at Fordham and Columbia. Finally, in remarks made the following week to a session at the IBA's annual conference in Cancun, Mexico, Deputy Assistant Attorney General Kolasky said that GE/Honeywell should not be "blown out of proportion" and that this case should not "overshadow" the many cooperative efforts currently underway between the U.S. and E.U.

²⁶ Joel Klein, *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century*, Fordham Corporate Law Institute, October 16, 1997.

provide appropriate safeguards for the protection of proprietary business information that moves between jurisdictions.²⁷

- ? The degree of business concern may vary with the specific context. Thus, parties may be more willing to submit to exchanges of information between authorities when the issue is whether their merger transactions should receive clearance, so long as suitable protections are available.²⁸ By way of contrast, there may be more resistance to exchanges of information in the context of cartel investigations, particularly given the possibility of subsequent disclosure to civil plaintiffs. Indeed, a good number of corporations, including some based outside of North America, have raised serious concerns about the pros and cons of confidentiality waivers in cartel cases - these raise issues that are unique and cannot be equated to merger cases.
- ? Some regulators (although we believe a minority) appear to have adopted the view that the business community's concerns regarding confidentiality are merely a device to impede enforcement cooperation.²⁹ We disagree. It is our uniform experience that the international business community is legitimately concerned that its confidential business information might come into the hands of competitors (including but not limited to state-owned competitors) or authorities in other countries pursuing different competition policy goals in different ways. Such information also may be accessible to third parties such as state attorneys general and civil plaintiffs through access to information statutes or court-compelled disclosure. There is also a concern that proprietary information may be exchanged or disclosed without the owner of such information even being aware of its disclosure.³⁰

²⁷ See ICC Policy Statement, *ICC Statement on International Cooperation Between Antitrust Authorities*, Document No. 225/450, Rev. 3, March 28, 1996; James F. Rill and Calvin S. Goldman, Q.C., *Confidentiality in the Era of Increased Cooperation Between Antitrust Authorities*, COMPETITION POLICY IN THE GLOBAL ECONOMY, Waverman, Comanor and Goto eds. (1997); Calvin S. Goldman, Q.C. and Mark Katz, *Globalization and Competition Law Enforcement*, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, September 21, 2001.

²⁸ See, for example, *ICC Recommendation to the International Competition Policy Advisory Committee (ICPAC) on Exchange of Confidential Information Between Competition Authorities in the Merger Context*, Document 225/525, May 21, 1999.

²⁹ See, for example, *Roundtable Discussion on International Cooperation in Transnational Mergers*, Working Party No. 3 on International Cooperation of the OECD's Committee on Competition Law Policy, Issues Paper by the Secretariat, April 27, 2001.

³⁰ The issue of confidentiality has been the source of a long-standing debate in Canada, revolving around whether the Competition Bureau requires the consent of parties to provide information in its possession to foreign antitrust authorities. The Bureau's position is that the *Competition Act* entitles it to unilaterally disclose information to another agency if this communication is for the purpose of receiving the reciprocal assistance of the foreign agency in respect of a Canadian investigation. The Canadian Bar Association disagrees, taking the view that the consent of the parties is necessary before any disclosure of information

- ? In our view, considerations of transparency and due process dictate that the confidentiality issue be dealt with as a pre-condition for increased international cooperation. One possible suggestion is for competition law authorities, in consultation with representatives of the private sector, to develop a set of comprehensive guidelines, or best practices, regarding confidentiality. Such a document could clarify what use will be made of any information exchanged, what risks there are, if any, of third party disclosure, what procedural safeguards will be observed, the standards and procedures for confidentiality waivers and what oversight mechanism will exist (including remedies) for non-compliance. The objective would be to provide comfort to the business sector that international cooperation is consistent with ensuring that their rights and interests are properly protected. These guidelines would then be implemented by specific authorities within an appropriate legal framework, such as bilateral or multilateral cooperation treaties or agreements. This level of clarification is necessary before significant progress can be made toward enforcement cooperation; they really do go hand in hand in ensuring a balanced approach.³¹
- ? We note in this regard that a number of safeguards designed to protect confidential information and to provide other due process standards were recently outlined to the OECD in the context of a proposed framework for merger "best practices" presented by BIAC and the ICC in October 2001.³² This detailed framework also discusses other normative standards for merger reviews by competition authorities including jurisdictional nexus, information filings and review periods. The BIAC/ICC paper is now being reviewed by OECD Members, and it is hoped that this will provide a foundation for convergence in merger review in the future.³³

can take place. Recently, the Minister of Industry tabled in the House of Commons legislation to amend the Canadian *Competition Act* by establishing certain safeguards governing foreign requests to obtain information in Canada through resort to compulsory processes (such as searches and seizures) in the context of civil investigations. However, the legislation does not cover the type of situation described above, i.e., where the Bureau intends to disclose to the foreign agency information that it has obtained on its own. This is an important omission that must be addressed in order to comprehensively deal with the confidentiality question. Based on recent comments by the Commissioner of Competition, however, it is unlikely that this particular issue will be dealt with at this stage. See Konrad von Finckenstein, Q.C., *Speaking Notes on Bill C-23*, October 2001.

³¹ This is consistent with the recommendation made by ICPAC, which called upon antitrust authorities to develop policy statements on the issue of confidentiality to increase transparency and build private sector confidence.

³² *BIAC/ICC Recommended Framework for Best Practices in International Merger Control Procedures*, October 4, 2001. (Both Mr. Goldman and Mr. Rill participated in drafting this document. The principal author was Joseph Winterscheid of the law firm of Jones Day Reavis & Pogue.)

³³ See *infra* for a further discussion.

4. 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, which provide a fundamental level of interaction between the parties and hold the potential for the eventual soft harmonization of competition policies and legal principles. The Canada/U.S. bilateral relationship is often held up as a model in this regard.³⁴ Canada is expanding the scope of cooperation with E.U. antitrust officials as well.³⁵ To date, the U.S. has successfully entered into bilateral cooperation agreements with Australia, Brazil, Canada, Germany, the European Union, Israel, Japan and Mexico.³⁶
- ? Regional organizations also have become actively engaged in increased cooperation among competition regimes. Competition issues have been included or are being negotiated with respect to a number of regional agreements, if only in an elementary context. These include the North American Free Trade Agreement (NAFTA), the Free Trade Agreement of the Americas (FTAA), the Asia Pacific Economic Cooperation (APEC) and Mercosur (Brazil, Argentina, Paraguay and Uruguay).³⁷

³⁴ There is a significant degree of enforcement cooperation across the Canada/U.S. border, both formal and informal, particularly in the areas of merger review and the prosecution of international cartels. This cooperation is based on instruments such as the 1985 *Canada/U.S. Treaty on Mutual Legal Assistance in Criminal Matters* and the 1995 *Canada/U.S. Agreement Regarding the Application of Competition and Deceptive Marketing Practices Laws*. For a further discussion, see e.g., Anne K. Bingaman, *International Cooperation and the Future of U.S. Antitrust Enforcement*, Address to the American Law Institute, 72nd Annual Meeting, May 16, 1996; Joel Klein, *Criminal Enforcement in a Globalized Economy*, Advanced Criminal Antitrust Workshop, Phoenix, Arizona, February 20, 1997; Calvin S. Goldman, Q.C. and J.T. Kissack, *Current Issues in Cross-Border Criminal Investigations: A Canadian Perspective*, [1999] FORDHAM CORP. L. INST. (B. Hawk ed.); Debra A. Valentine, *Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions*, Canada/United States Law Institute, Case Western Reserve University School of Law, April 15, 2000; Calvin S. Goldman, Q.C. and Mark Katz, *A Canadian Perspective on International Cartel Investigations and Prosecutions*, *supra*, note 5; and the speeches by Dominique Burlone, *supra*, note 4.

³⁵ In June 1999, Canada and the E.U. concluded a cooperation agreement governing competition matters. The Competition Bureau is also now increasingly coordinating its merger review efforts with EC officials. For example, Bureau officers attended at the Commission's hearings involving the proposed merger between Alcoa Inc. and Reynolds Metal Company and the proposed merger between Dow Chemical Company and Union Carbide Corporation. See Dominique Burlone, *Canada and the Internationalization of Competition Policy*, *supra*, note 4.

³⁶ U.S. Department of Justice, *Antitrust Cooperation Agreements*, at: http://www.usdoj.gov/atr/public/international/int_arrangements.htm (last updated October 30, 2001).

³⁷ For example, Chapter 15 of NAFTA formally commits the NAFTA countries (Canada, the United States and Mexico) to basic shared objectives of competition policy and formally recognizes that competition

- ? 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. The OECD (Organization for Economic Cooperation and Development) Committee on Competition Law and Policy (the "CLP") has been at the forefront of these efforts. For example, the CLP has issued a series of recommendations and reports on topics such as cooperation on anti-competitive practices affecting international trade, enforcement efforts against hard-core cartels and a notification framework for transnational mergers.³⁸ Through its Working Party 3 ("WP3"), which is chaired by the Canadian Commissioner of Competition, the CLP is now working to develop a framework of "best practices" for merger review to promote the harmonization of merger control procedures.³⁹ WP3 is also considering issues relating to anti-cartel enforcement, such as leniency programs, cooperation among agencies in cartel investigations and the use of various investigative tools.⁴⁰ The OECD's other main initiative is the development of a "Global Forum on Competition". This program is designed to bring together high-level officials from both member and non-member countries twice a year to discuss competition law issues as a companion to ongoing CLP meetings.⁴¹ The Forum's first session was held on October 17-18, 2001 in Paris, with a second meeting planned for February 2002.
- ? Worthwhile efforts also have been undertaken by the WTO (World Trade Organization) and UNCTAD (United Nations Conference on Trade and Development). For example, following the 1996 Ministerial Conference in Singapore, the WTO created a Working Group on the Interaction Between Trade and Competition Policy to "identify any areas that may merit further consideration in the WTO framework".⁴² To date, the Working Group has focussed its efforts on education, emphasizing fundamental principles such as

policy has an important role in furthering NAFTA's goals. See *North American Free Trade Agreement*, December 17, 1992, U.S.-Canada-Mexico, 1994 Can. T.S. No. 2.

³⁸ OECD Council, *Revised Recommendation Concerning Cooperation Between Member Countries in Anti-Competitive Practices Affecting International Trade* (1995); OECD Council, *Recommendation Concerning Effective Action Against Hard-Core Cartels* (1998); OECD Committee on Competition Law Policy, *Report on Notification of Transnational Mergers* (1999); OECD Report, *Hard-Core Cartels* (2000).

³⁹ See OECD CLP-WP3, *Proposals for Work on Harmonization of Merger Review Procedures* (May 2001); OECD CLP-WP3, *Roundtable Discussion on International Cooperation on Transnational Mergers* (April 2001). See also the joint BIAC/ICC submission to WP3, *supra*, note 32.

⁴⁰ See OECD CLP-WP3, *Report on Leniency Programmes to Fight Hard-Core Cartels* (April 2001); OECD CLP-WP3, *Issues Paper on Investigative Tools Other than Leniency in Cartel Investigations* (August 2001).

⁴¹ See OECD CLP, *The OECD Global Forum on Competition* (May 2000) and the section on the Forum at the OECD's website, www.oecd.org.

⁴² Singapore Ministerial Declaration, Paragraph 20.

national treatment and transparency.⁴³ However, there are now suggestions that the WTO should assume a broader role in this area and that an enhanced mandate for competition law be included as a topic for the next round of WTO negotiations.⁴⁴ For its part, UNCTAD has been involved in competition law issues primarily through its role in monitoring the multilateral code of conduct on restrictive trade practices adopted by the U.N. General Assembly in 1980.⁴⁵ In this regard, UNCTAD sponsors a variety of bodies which provide a forum for discussing competition-related issues including (i) annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy (the "IGE"), and (ii) U.N. Review Conferences which meet every five years (the last one having been held in September 2000 and the next one scheduled for 2005).⁴⁶ UNCTAD also provides technical assistance to countries in establishing competition and consumer protection laws, including the development of model competition legislation.⁴⁷

? Much of the discussion regarding multilateral cooperation is now focussed on the so-called (and newly named) "International Competition Network". This concept first originated with ICPAC, which envisioned the establishment of a "Global Competition Initiative" ("GCI") to provide a venue, open to interested governments from both developed and developing economies, where there could be an exchange of ideas on

⁴³ See *Report of the Working Group on the Interaction Between Trade and Competition Policy to the Working Council* (November 2000).

⁴⁴ The E.U., supported by Canada and others, has advocated this position. (See, e.g., *Communication from the European Community and its Member States* (WT/WGTCP/W1152).) The U.S. has traditionally opposed this position, expressing the particular concern that a WTO agreement on competition would encompass binding rules that could fetter the exercise of national jurisdiction. (See, e.g., Joel Klein, *A Note of Caution With Respect to a WTO Agenda on Competition Policy*, The Royal Institute of International Affairs, London, England, November 18, 1996.) A recent statement by U.S. Trade Representative Robert Zoellick, however, indicates that the U.S. may now be prepared to show more flexibility. In this statement, Mr. Zoellick said that the U.S. "can see merit in adherence to core competition principles of transparency, non-discrimination and procedural fairness. We can also support consultative and capacity-building efforts to help countries develop modern competition policy that promotes efficient, effective and dynamic markets." (See *U.S.-E.U. Efforts to Launch a Global Round of Trade Negotiations*, Statement of U.S. Trade Representative, Robert B. Zoellick, July 17, 2001.) See also Mitsuo Matsushita, *Competition Policy in the Framework of the WTO*, IBA Annual Conference, Cancun, Mexico, October 30, 2001.

⁴⁵ *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (December 1980).

⁴⁶ The IGE is now working on a number of issues leading up to the next Review Conference in 2005. Among the issues to be examined are (i) international merger control, (ii) international cooperation and capacity-building in competition policy, and (iii) the interface between competition policy and intellectual property rights. These issues were discussed at a meeting in Geneva this past July and will be considered further at meetings to be held in mid-October 2001. (See UNCTAD Secretary General Rubens Ricuperro, *Opening Speech to the Third Session of IGE on Competition Law and Policy*, July 2, 2001.) Mr. Goldman presented a paper on BIAC's behalf to the IGE's July 2001 session.

⁴⁷ UNCTAD, *Model Law on Competition*, Geneva, 2000.

common solutions for competition law and policy problems. NGOs and the private sector also would have a role to play.⁴⁸

- ? U.S. antitrust officials, who had previously focussed primarily on promoting bilateral relationships, voiced a degree of support for the ICPAC recommendations after they were made.⁴⁹ Competition officials from the E.U. also expressed interest.⁵⁰ While Commissioner von Finckenstein of Canada initially raised issues regarding certain aspects of the proposal, he more recently has expressed considerable support.⁵¹
- ? Efforts to proceed with the GCI got off to a relatively quick start with the convening of a meeting at Ditchley Park, England in February 2001 to explore the feasibility of this initiative.⁵² The momentum behind the GCI slowed somewhat thereafter, but was reinvigorated after the new heads of the U.S. antitrust agencies were confirmed in the Spring of this year. Both Charles James (Assistant Attorney General of the U.S. Department of Justice Antitrust Division) and Timothy Muris (Chair of the FTC) expressed strong support for the idea of a GCI as a practical, task-oriented forum where antitrust officials would be able to create consensus on proposals for procedural and substantive convergence in antitrust enforcement.⁵³
- ? On October 25, 2001, the ICPAC recommendations were put into effect with the formal launching at the Fordham Corporate Law Institute's annual international antitrust

⁴⁸ See the ICPAC Report of February 28, 2000, Chapter 6.

⁴⁹ See Joel Klein, *Time for a Global Competition Initiative?*, EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 2000. See also Douglas Melamed, *Promoting Sound Antitrust Enforcement in the Global Economy*, Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York City, October 19, 2000.

⁵⁰ See Mario Monti, *Cooperation Between Competition Authorities – A Vision for the Future*, The Japan Foundation Conference, Washington, D.C., June 23, 2000; Mario Monti, *The Main Challenges for A New Decade of EC Merger Control*, EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 2000; Mario Monti, *European Competition Policy for the 21st Century*, The Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law and Policy, New York City, October 20, 2000; Dr. Alexander Schaub, *The Global Competition Forum: How it Should be Organized and Operated*, European Policy Centre, Brussels, March 14, 2001; Mario Monti, *The EU Views on Global Competition Forum*, Annual Spring Meeting of the ABA Section of Antitrust Law, Washington, D.C., March 29, 2001.

⁵¹ See Konrad von Finckenstein, Q.C., *supra*, notes 3 and 13. The Commissioner's more favourable comments were made at the Canadian Bar Association's Annual Competition Law Conference this past September.

⁵² For an official report on the Ditchley Park meeting, see Merit E. Janow, *The Initiative for a Global Competition forum* (2001).

⁵³ See, for example, Mr. James' speeches cited in note 13, *supra*. See also Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word - Continuity*, Annual Meeting of the ABA Antitrust Section, Chicago, Illinois, August 7, 2001.

conference of the "International Competition Network" (ICN). The ICN will be dedicated exclusively to problem-solving in the international antitrust field (all antitrust, all the time). It is open to any national or regional competition agency. Instead of a "bricks and mortar" organization with a permanent secretariat, the ICN will be flexibly organized around a few projects, which will be aimed at drafting non-binding general guidelines or "best practice" recommendations. The ICN's first two projects will focus on the merger control process in the multijurisdictional context and the competition advocacy role of antitrust agencies.⁵⁴

- ? The ICN's work will be guided by a Steering Group, whose membership will be decided at the ICN's first meeting next year in Italy. In the meantime, there will be an Interim Steering Group, chaired by Konrad von Finckenstein, Canadian Commissioner of Competition, and consisting of the following jurisdictions: Australia, Canada, the E.U., France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom and Zambia.

- ? The agenda of the ICN raises a number of interesting questions. For example, despite the advantages of an inclusive, ongoing competition-based forum such as the ICN, creating and implementing a new international forum can be a complicated and time consuming task. With no concrete infrastructure or special funding, development and formation of the ICN could be a challenge. That said, we want to make it clear that we strongly endorse this initiative; we believe that the focus on "all antitrust, all the time" and particularly on the practical enforcement aspects of antitrust is a welcome step toward potentially more effective convergence.

- ? Questions can be raised about the other initiatives as well. For example, while the OECD CLP already has an existing 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 primarily directed toward that sector. Similarly, although the WTO Working Group has a more inclusive membership than that of the OECD, the WTO's foundation is rooted primarily in trade dispute settlement and the addition of a competition element would be a departure from the traditional scope of activity within the WTO.

- ? It seems apparent to us, at least, that in order to truly benefit from all of these initiatives, there must be an attempt at coordination to take advantage of available complementarities. For example, we see possible synergies between the ICN and the OECD's Global Forum, given that the ICN will have a very practical focus on key enforcement issues while the Global Forum seems designed more to encourage a sharing of experiences on a broad range of competition policy subjects. At the same time, both

⁵⁴ See ICN News Release and Backgrounder, *supra*, note 1.

the WTO and UNCTAD could continue to work on the establishment of very basic competition principles for a much broader "audience" of government authorities.⁵⁵

? Finally, what role should the private sector play in this process? At present, a number of private sector organizations are very active in the convergence arena, including the ICC and BIAC⁵⁶, the IBA (International Bar Association)⁵⁷ and the ABA (American Bar Association).⁵⁸ We believe that this role must continue. We recognize that some

⁵⁵ According to the Backgrounder issued in tandem with the News Release announcing the ICN, *ibid*, the ICN will work closely with other international institutions such as the WTO, the OECD, UNCTAD and the World Bank. As an example, it is noted that ICN members already have discussed with the OECD the possibility of coordinating the ICN's efforts with the OECD's newly created Global Forum on Competition. Similar sentiments have been expressed on behalf of the OECD. For example, in his Opening Remarks to the Global Forum on Competition on October 17, 2001, Mr. Seiichi Kondo, Deputy Secretary General of the OECD, stated that he welcomed the opportunity to cooperate with other programs and that the relationship between the Global Forum and these other programs should evolve on a complementary basis. At the same session, Mr. Rubens Ricupero, Secretary-General of UNCTAD, stated that UNCTAD "stands ready to support the efforts of the [OECD's] Global Forum" by enhancing "the inclusiveness and responsiveness of this process to the concerns of developing countries." These speeches can be found at www.oecd.org.

⁵⁶ The ICC has two standing working groups that are concerned with competition policy: one working group focussed on the convergence of competition laws and the second working group focussed on the interaction of competition law and international trade. Among other things, the ICC has issued a number of position papers on issues such as confidentiality and computer searches and made submissions to ICPAC on business concerns regarding the exchange of information among antitrust authorities in the context of multijurisdictional review. As noted previously, the ICC also has prepared with BIAC and submitted to the OECD a draft framework of "best practices" relating to international merger control procedures. See ICC Policy Statement, *ICC Statement on International Cooperation Between Antitrust Authorities*, Document No. 225/450, Rev. 3, (March 1996); *ICC Recommended Code of Practice for Competition Authorities in Searches and Subpoenas of Computer Records* (October 1998); ICC Policy Statement, *ICC Recommendations to the International Competition Policy Advisory Committee (ICPAC) on Exchange of Confidential Information Between Competition Authorities in the Merger Context*, Document 225/525 (May 1999); ICC/BIAC, *Comments on Report of the U.S. International Competition Policy Advisory Committee* (June 2000); ICC/BIAC, *Recommended Framework for Best Practices in International Merger Control Procedures*, October 4, 2001.

⁵⁷ The IBA, in an effort spearheaded by Bill Rowley and others, has embarked on a "Merger Streamlining Project" to promote harmonization in the merger review process across jurisdictions. This project hopes to establish a Sponsor Group of approximately 25-35 major multinational enterprises, supported by a Project Team of leading competition law practitioners, to provide input from a business perspective to key agencies, legislators and the ICN on streamlining international merger review processes. Among other efforts, the Project participants drafted their own set of proposed "best practices" for international merger review which was presented to the OECD CLP's WP 3 in October.

⁵⁸ The ABA Section of Antitrust Law has long played an active and influential role in the debate over convergence questions. Beginning at least with the publication of the seminal edition of ANTI-TRUST LAW DEVELOPMENTS in 1975, it has catalogued the evolution of international antitrust as an important field of law. Through numerous reports, Task Forces and other *ad hoc* comments and occasional papers, the Section has provided key input and recommendations to the various institutions seeking to facilitate cost- and conflict-reduction in global antitrust enforcement. In this effort, the Section has enjoyed a long history

authorities remain wary of private sector involvement. However, while we are prepared to state unequivocally that the leadership role must lie with enforcement authorities, we strongly believe that the participation of the private sector (business, legal and academic) in these various projects and initiatives is fundamental to their success. Private sector input is necessary to ensure that the work done is realistic, potentially effective, balanced and stands a greater chance of acceptance. While the private sector should not "drive the train", it must without question have a seat on one of the "cars on the train".

? From what we have seen from certain statements made in relation to the ICN, as well as contacts on the part of the OECD's CLP and other organizations, we have a good degree of confidence that private sector input will be sought and welcomed as the convergence efforts unfold.⁵⁹

5. 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 International Competition Network could prove to be one of the most effective mechanisms for navigating through the increasing multitude of national competition laws.

of close cooperation with the ABA Section of International Law & Practice and other ABA components. In August of this year, the Section acknowledged the scope and complexity of the convergence effort and the importance of the Section's own role in that effort by appointing its first International Officer, Abbot (Tad) Lipsky, who is Senior Competition Counsel for The Coca-Cola Company. Under the leadership of its current Chair, Roxane Busey, and the co-chairs of its International Committee, Debra Valentine and Steve Harris, the Section also has launched an International Task Force (ITF) to provide legal and policy analysis and both practical and visionary thinking about global antitrust issues. Preliminary reports are expected from the ITF by the time of the Section's traditional Annual Spring Meeting in Washington, D.C., in late April 2002.

⁵⁹ For example, the ICN News Release and Backgrounder, *supra*, note 1, states that the ICN expects to call on the private sector to help identify projects, become members of various working groups, participate in information gathering, share their views on how projects should proceed and recommend possible outcomes. The mechanism for the participation of the private sector, however, has not yet been developed.