Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law

Thomas K. Cheng*

Abstract

This Article examines the recent phenomenon of the convergence of competition law regimes across the globe. The increasing harmonization of competition law, at both the procedural and substantive levels, has been widely discussed and applauded in recent years. This Article casts doubt on the conventional wisdom that convergence necessarily constitutes a positive development in global competition law. After analyzing the causes of the phenomenon, this Article argues that there should be limits to the pursuit of convergence. First, the costs of convergence should not be overlooked. The most important of such costs is the loss of national regulatory prerogative. Second, the multitude of goals that are pursued by different jurisdictions in their competition laws poses serious obstacles to convergence. Finally, the need to incorporate economic development considerations and cultural variations in market behavior further cautions against wholesale harmonization of competition laws.

Table of Contents

---

* The author is an assistant professor at the Faculty of Law of the University of Hong Kong. He would like to thank Addiped Cheng and Henry Chau for their able assistance in the research for this Article.

I. INTRODUCTION

If there is one most important development in international competition law in recent years, it is convergence. With the proliferation of competition law regimes in the last three decades, there has been increasing concern about inconsistent enforcement and consequently a drive to harmonize competition law globally. Led by established jurisdictions, most notably the US and the EU, and a host of international organizations, such as the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), proponents of convergence have attempted to build a consensus on various aspects of competition law and encouraged other jurisdictions to converge on these so-called international best practices.[1] These best practices are encapsulated in the form of guidelines, recommendations, and discussion papers. The expectation is that the emerging jurisdictions will incorporate these practices and converge toward the approaches to competition law of the established jurisdictions.

---

[1] There are no formal definitions of "established" and "emerging" jurisdictions. The two indisputably established jurisdictions in competition law are the US and the EU. OECD member states are generally also considered established jurisdictions to varying degrees. Emerging jurisdictions are those countries that adopted competition law relatively recently—over the last decade or two—or those that only stepped up enforcement recently after years of inactivity. Examples include India, China, and most developing countries.

What distinguishes convergence in competition law from attempts at harmonization in other areas of law is the voluntary nature of the enterprise and the lack of formal, binding international treaties. With the abandonment of the Singapore agenda in the World Trade Organization (WTO),[2] it seems that the international competition community has decided to eschew formal harmonization through international treaties and has instead focused its efforts on voluntary convergence. The established jurisdictions and the international organizations make no explicit attempt to compel or pressure other jurisdictions to conform to the international best practices. Instead, these other jurisdictions are left to decide on their own whether and to what extent they will align their domestic regimes with the international consensus. Convergence can be said to be a form of informal harmonization, while the pursuit of a binding international treaty is more appropriately described as formal harmonization. Harmonization in competition law is distinctly informal in nature.

The general view is that convergence benefits the global competition law community by reducing cross-jurisdictional divergences and minimizing instances of inconsistent enforcement. At first blush, the logic of harmonization seems irresistible. With the internationalization of markets and the expanding reach of Multi-National Corporations (MNCs), the regulation of markets needs to be globalized as well. A uniform set of rules should apply to business conduct by a firm operating in multiple jurisdictions. Conventional wisdom holds that this would reduce compliance costs and facilitate cross-border transactions. This Article seeks to demonstrate the need to question and qualify this logic. There are, in fact, a number of important reasons why the case for convergence may have been overstated and why regulatory diversity across jurisdictions should be preserved.

This Article is divided into seven sections. Section I has introduced the basic premise of the Article. Section II provides an overview of the proliferation of competition law and the phenomenon of convergence. Section III examines in greater detail the key actors and mechanisms of convergence and briefly explains the reasons for its success thus far. Section IV delves into the costs and benefits of convergence and casts doubt on the prevailing wisdom that harmonization of competition law is a universally positive development. Section

---

2 See generally Martin Khor, *The "Singapore Issues" in the WTO: Evolution and Implications for Developing Countries*, 33 TWN Trade and Dev Ser 1 (2007). The "Singapore issues" refer to four permanent working groups on transparency in government procurement, trade facilitation, trade and investment, and trade and competition. At the fifth Doha Ministerial at Cancun in 2003, persistent deadlock led to three of the issues' being dropped in order to refocus negotiations on trade facilitation. The issues were officially abandoned by the August 1, 2004, decision of the General Council (The July Package). See World Trade Organization (WTO), *Decision Adopted by the General Council on 1 August 2004* ¶ 1(g), WTO Doc No WT/L/579 (Aug 2, 2004).

V focuses on the disagreement concerning the policy goals and some key concepts in competition law and examines its implications for convergence. Section VI surveys a number of economic and socio-political characteristics of developing countries and proposes possible accommodations of these characteristics in competition law. Section VII suggests that competition law principles and enforcement need to incorporate cultural considerations, which provide a further reason for divergences. Section VIII concludes the Article.

II. PROLIFERATION OF COMPETITION LAW AND THE DRIVE FOR CONVERGENCE

Competition law promotes free competition by prohibiting anti-competitive conduct by firms.[3] Competition law has proliferated across the globe in recent years. Fewer than thirty jurisdictions had competition law thirty years ago.[4] In many of those thirty jurisdictions, enforcement was far from active.[5] By early 2011, it is estimated that more than 110 jurisdictions had adopted competition law.[6] In conjunction with this rapid proliferation of competition law has been a push for convergence. Both at the national and the international levels, concerns have arisen about the growth in the number of competition law regimes and potentially inconsistent enforcement.[7] Until about fifteen years ago, the US and the EU were the only two jurisdictions in the world that mattered to the operation of multinational corporations. Due to factors both related and unrelated to competition law, the dynamics have shifted and a number of new key players have emerged.

Since the late 1990s, the Korea Fair Trade Commission (KFTC) has begun to direct its attention to foreign companies, including Microsoft, Intel, and

---

3 See Martyn D. Taylor, *International Competition Law: A New Dimension for the WTO* 1 (Cambridge 2006).

4 See Brendan Sweeney, *International Competition Law and Policy: A Work in Progress*, 10 Melb J Intl L 58, 58 (2009).

5 For example, competition law enforcement was de-emphasized in Japan for decades until the 1990s. See David J. Gerber, *Global Competition: Law, Markets, and Globalization* 211–13 (Oxford 2010); Masako Wakui, *Antimonopoly Law: Competition Law and Policy in Japan* 16–36 (Arima 2008).

6 See Sweeney, 10 Melb J Intl L at 58 (cited in note 4).

7 See Jane E. Willis and Matthew P. Garvey, *Promoting Convergence on Anti-Monopoly Standards* (Law 360 Sept 30, 2008), online at http://www.ropesgray.com/files/Publication/8c9e440a-f59a-46be-be1f-1a788d0d984c/Presentation/PublicationAttachment/ed1011df-73d8-4fd9-b1fc-23f8eb636450/Law360.pdf (visited Oct 24, 2011); Tefft Smith and Catherine Fazio, *Convergence: A Call to Arms* (Kirkland and Ellis 2003), online at http://www.kirkland.com/siteFiles/kirkexp/publications/2492/Document1/Euromoney.pdf (visited Oct 24, 2011); James S. Venit, *Modernization and Enforcement – The Need for Convergence: On Procedure and Substance*, European Competition Law Annual 2006: Enforcement of Prohibition of Cartels (Hart 2006).

Qualcomm, in its enforcement activities.[8] In the 1990s, the Japan Fair Trade Commission (JFTC) also became more active in enforcing the Japanese Anti-Monopoly Act.[9] The emergence of the so-called BRIC countries (Brazil, Russia, India and China), especially China and India, as global economic powerhouses following the financial crisis of 2008 has propelled these countries' competition law regimes to the forefront of the global competition community. The People's Republic of China's (PRC) Anti-Monopoly Law has attracted intense scrutiny since it was promulgated in 2007 and came into effect in August 2008.[10] Meanwhile, India's competition law regime has been revamped in recent years. A new statute, the Competition Act, was passed and a new agency set up to rejuvenate competition law enforcement in the country.[11] With the global competition community shifting from a bipolar to a multi-polar world, there is increasing concern that the growing number of jurisdictions will enforce their competition laws inconsistently, raising the compliance costs to MNCs operating in multiple jurisdictions.

This anxiety is by no means unfounded. From the mid-1990s onward, the generally harmonious relationship between US and EU competition authorities

---

8 See Korea Fair Trade Commission (KFTC), *2006 Annual Report* **21–26, online at http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301 (visited Oct 24, 2011); KFTC, *2009 Annual Report* **45–49, online at http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301 (visited Oct 24, 2011); KFTC, *2010 Annual Report* **49–53, online at http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301(visited Oct 24, 2011).

9 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No 54 of 1947 (Japan). See Gerber, *Global Competition* at 213–15 (cited note 5); Wakui, *Antimonopoly Law* at 31–38 (cited in note 5). This shift in attitude was partly due to pressure by the US, which had complained for years that lax enforcement of competition law had allowed Japanese firms to erect entry barriers against American firms. It was also partly due to the realization, after the burst of the economic bubble in the late-1980s, that the economic model that had allowed Japan to attain phenomenal growth after the Second World War, which had de-emphasized domestic competition, no longer sufficed. Japan must turn to competition to inject vitality into its moribund economy. See Wakui, *Antimonopoly Law* at 30–38.

10 One reflection of the amount of attention on the Anti-Monopoly Law is the fact that the Antitrust Law Journal published by the American Bar Association (ABA) devoted one full issue to it. See 75 Antitrust L J 1 (2008). The overriding concern has been that the Chinese (PRC) government will use competition law for protectionist purposes as opposed to for promoting domestic competition. This concern was not assuaged by the Ministry of Commerce's rejection of Coca-Cola's acquisition of Huiyuan, a major Chinese fruit juice and beverage company, in 2008. See Stephanie Wong and Wing-gar Cheng, *China Blocks Coca-Cola's $2.3 Billion Huiyuan Bid (Update2)* (Bloomberg Mar 18, 2009), online at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awHnS1HJ2Usw (visited Nov 10, 2011).

11 See generally Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 J Competition L & Econ 609 (2008).

has been repeatedly marred by disputes, mostly in the form of US complaints about EU enforcement activity against American corporations. These disputes, including the GE-Honeywell merger and the European Commission's action against Microsoft, have at times assumed an acrimonious tone, with the US officials accusing the European Commission of misapplying competition law principles to the detriment of effective competition.[12] If two mature jurisdictions at relatively similar stages of economic development and with similar conceptions of competition cannot avoid serious confrontations with each other, one may justifiably despair about the prospect of cooperation in a multi-polar global community. Convergence is an attempt to forestall future conflicts.

The criticisms of the EU by the US officials and commentators betray the Americans' presumption that there exists a set of universally applicable competition law principles.[13] If the EU officials had applied these principles correctly, the Americans argue, they would have reached the same results as their American counterparts. It is this notion of the universality of competition law that has propelled the recent drive for convergence. This notion is premised on the existence of a common set of principles to which jurisdictions converge, and the belief that these principles are flexible enough to be adapted to countries under disparate socio-economic circumstances. These principles are built upon modern industrial organization economics, and are mainly informed by US and EU experiences. Thus, while the drive for convergence is motivated by a desire to minimize cross-jurisdictional conflicts, the theoretical foundation is built upon the notion of the universality of competition law.

III. A Closer Look at Convergence

A. Different Levels of Convergence

Convergence of competition law can take place at procedural, substantive, and normative levels. Procedural convergence refers to the harmonization of procedural rules that apply in competition cases. The only area of competition

---

12 See Gerber, *Global Competition* at 95–98 (cited in note 5); Deborah Platt Majoras, *GE-Honeywell: The U.S. Decision, Remarks Before the Antitrust Law Section of the State Bar of Georgia* **13–17 (Nov 29, 2001), online at http://www.justice.gov/atr/public/speeches/9893.pdf (visited Oct 24, 2011); Thomas O. Barnett, *Statement on European Microsoft Decision* (Dept of Justice Sept 17, 2007), online at http://www.justice.gov/atr/public/press_releases/2007/226070.htm (visited Oct 24, 2011).

13 See, for example, William J. Kolasky, *Conglomerate Mergers and Range Effects: It is a Long Way from Chicago to Brussels*, 10 Geo Mason U L Rev 533 (2002); John R. Wilke, *US Antitrust Chief Criticizes EU Decision to Reject Merger of GE and Honeywell*, Wall St J A3 (July 5, 2001) (quoting Assistant Attorney General Charles James: "Clear and longstanding U.S. antitrust policy holds that the antitrust laws protect competition, not competitors . . . . [The EU decision] reflects a significant point of divergence").

law that has witnessed significant international procedural convergence is merger review.[14] In other areas of competition law, the applicable procedural rules tend to follow the general civil and criminal procedural laws of the presiding jurisdiction. There has been no attempt to harmonize them, apart from the insistence on basic procedural fairness.

Substantive convergence refers to the harmonization of substantive competition law principles, in other words, the standard for the legality of various modes of business conduct. Substantive convergence is the main focus of most convergence efforts. It is beneficial to firms because it provides uniformity of legal rules, thereby lowering their regulatory compliance costs. It can take place at the administrative level by way of guidelines and policy statements. This will be referred to as administrative substantive convergence in the remainder of this Article. It can also take place at the judicial level through court decisions. This will be referred to as judicial substantive convergence.

While administrative substantive convergence is relatively well understood, judicial substantive convergence has received less attention from commentators and officials. Domestic courts do refer to the jurisprudence of other jurisdictions when confronted with a novel issue. The High Court of Australia routinely refers to cases from other jurisdictions. One example is *Queensland Wire Industries v Broken Hill Proprietary*,[15] which concerned a refusal to supply. In its discussion of market definition, the lead opinion of this Australian High Court case referred to the EU cases of *Hoffman-La Roche*[16] and *United Brands*,[17] the US Second Circuit *Alcoa* case,[18] and the US Supreme Court cases of *Grinnell*[19] and *American Tobacco*.[20] In his discussion of the definition of exclusionary conduct, Judge Dawson discussed *United Shoe Machinery Corp*[21] and *Aspen Skiing Co v Aspen Highlands Skiing Corp*.[22] In *Cancun Trading No 24 CC and Others and Seven-Eleven*

---

14 The timeline for the merger review process of a number of jurisdictions, such as China, has aligned with the EU model. See Anti-Monopoly Law of People's Republic of China, Arts 25–26 (promulgated by the Standing Committee of the National People's Congress on Aug 30, 2007 and effective Aug 1, 2008).

15 167 CLR 177 (High Ct 1989) (Aus).

16 Id at 188, citing *Hoffman-La Roche & Co v Commission,* 1 ECR 461 (1979).

17 Id, citing *United Brands v Commission,* 1 ECR 207 (1978).

18 Id at 189, citing *United States v Aluminum Co of Am*, 148 F2d 416, 425 (2d Cir 1945).

19 *Queensland* at 189, citing *United States v Grinnell Corp*, 384 US 563, 571 (1966).

20 Id, citing *United States v Am Tobacco Co,* 328 US 781 (1946).

21 Id at 202, citing *United States v United Shoe Machinery Corp*, 110 F Supp 295, affd in 347 US 521 (1954).

22 Id, citing *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985).

Corp (Pty) Ltd,[23] the South African Competition Tribunal referred to the US cases of *Socony-Vacuum Oil* and *Dr Miles*[24] and the EU case of *Pronuptia v Schillgalis*[25] when discussing the legality of resale price maintenance and a number of other restrictive practices in the franchise context. In *Axiom Plastics Inc v EI Dupont Canada Co*,[26] the Ontario Superior Court of Justice discussed the US Supreme Court case *Hanover Shoe v United Shoe Machinery Corp*[27] and the Third Circuit case *In re Linerboard* when addressing the issue of the "passing on" defense to direct purchaser claims.[28] The EU courts have also discussed relevant US case law on a number of occasions. The European Court of Justice did so in *Tetra Pak International SA v Commission*,[29] for instance, when it was asked to decide whether a predatory pricing claim requires proof of the likelihood of recoupment of losses under EU law.[30]

Normative convergence focuses on the alignment of cultural norms regarding competition. These norms may, and in fact do, vary widely across the globe. Arguing against a globally centralized competition law regime, Professor Oliver Budzinski observes that citizens of different jurisdictions "can have diverging majority preferences about elementary competition policy characteristics, for example, the goal(s) of competition policy, its relation to other political and societal goals, the borderline between fair and unfair (legitimate and illegitimate) means of competitive interaction."[31] Social psychologists have documented that different cultures hold divergent attitudes toward competitiveness. Some, such as the Anglo-Saxon cultures, are more competitive—and more receptive to competitiveness as a social trait—than others, such as Asian cultures.[32]

Normative convergence represents the deepest kind of convergence and is hence the most elusive. It is perhaps for this reason that it has received the least

---

23 18/IR/Dec99 (ZACT 2000) (S Afr).

24 Id at ¶44 n 12, citing *United States v Socony Vacuum Oil Co*, 310 US 150, 228 (1940) and *Dr Miles Medical Co v John D Parke & Sons*, 220 US 373, 1408 (1911).

25 *Cancun Trading*, 18/IR/Dec99 at ¶40 n 11, citing [1986] ECR 353 (1986).

26 87 OR (3d) 352 (Super Ct Just 2007) (Can).

27 Id at ¶127, citing 392 US 481 (1968).

28 *Axion Plastics*, 87 OR (3d) at ¶¶ 129–30, citing *In re Linerboard Antitrust Litig*, 305 F3d 145 (3d Cir 2002).

29 Case C-333/94 P, [1996] ECR I-5951 (1996).

30 See id.

31 Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* 71 (Edward Elgar 2008).

32 See Geert Hofstede and Michael Harris Bond, *The Confucius Connection: From Cultural Roots to Economic Growth*, 16 Organizational Dynamics 5, 10–15 (1988).

attention among the three types of convergence. It is, however, critical to the success of the convergence project for a number of reasons. First, competition law enforcement will be most effective if government officials and members of society share a common and genuine belief in the benefits of competition. Second, the law generally, and competition law specifically, must correspond to local norms to gain legitimacy. For instance, in a country that is new to competition law and where a "competition culture" is not deeply ingrained, the immediate introduction of the criminalization of cartels may not be appropriate. Its citizens may genuinely believe that price fixing is not a sufficiently blameworthy conduct to warrant criminal sanctions. The disconnect between the law and social norms may be so significant that competition law loses its legitimacy. This is a particularly grave concern given that competition law is perceived as a foreign import in many countries. Extensive and sustainable substantive convergence will likely require some degree of normative convergence—that is, the gap between the social norms regarding competition prevailing in different countries must narrow.

B. The Mechanisms for Convergence

Convergence has taken place at both the national and the international levels. On the national level, emerging jurisdictions have made considerable effort to learn from the experiences of more established jurisdictions, especially the US and the EU. The evolution of the law on resale price maintenance (RPM) in recent years provides an apt illustration of convergence. In the 2007 case *Leegin Creative Leather Products v PSKS*,[33] the US Supreme Court overturned the per se rule for RPMs, which had been in force in the US for almost a century, in favor of the rule of reason.[34] Since then, other jurisdictions have either reconsidered their own positions on the legality of RPMs or adopted the new US position. The South Korean Supreme Court, despite clear statutory language suggesting a per se approach to RPMs, followed the lead of the US court and applied the rule of reason to decide a pharmaceutical case.[35] Similarly, the

---

33 551 US 877, 881 (2007).

34 The Court explained, "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 [of the Sherman Antitrust Act]." Id at 885. But, "[t]he rule of reason does not govern all restraints. Some types 'are deemed unlawful *per se* . . . . The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." Id at 886 (internal citations ommitted).

35 See Faaez Samadi, *Korean Court Overrules Competition Law in Pharma Appeal*, Global Competition Rev (Nov 26, 2010), online at http://www.globalcompetitionreview.com/news/article/29380/korean-court-overrules-competition-law-pharma-appeal/ (visited Oct 22, 2011).

Indonesian competition authority, the Commission for the Supervision of Business Competition (KPPU), announced in Regulation 8/2011 that RPMs will be subject to a rule of reason analysis.[36] It is unlikely that these jurisdictions would have adopted this position on RPMs absent *Leegin*.

Convergence on the national level has been even more pronounced in cartel enforcement. Up until two decades ago, the US was the only jurisdiction with an active criminal enforcement program against cartels. Most other jurisdictions did not even impose criminal sanctions on cartel members. Over the last decade or so, a number of jurisdictions, such as Australia, Ireland, Mexico, New Zealand, and the UK, have either introduced criminal sanctions or made them more readily available.[37] To complement criminal cartel enforcement, leniency programs have been widely adopted, even in jurisdictions such as Japan, for which such programs had previously been assumed to be unsuitable.[38] It had been argued that because of Japan's cultural emphasis on harmony and social cohesion, an enforcement apparatus that relies on betrayal had a small chance of success.[39] It is no exaggeration to state that a global consensus has emerged, at least among the enforcers, on the competitive harms caused by cartels and the most effective ways of combating them, including a combination of high fines, imprisonment of executives, and leniency programs to induce defections. No other area of competition law has witnessed the same degree of convergence.

Convergence has not been confined to the national level. A number of international organizations, namely the ICN, the OECD, and the United Nations Conference on Trade and Development (UNCTAD), have played a pivotal role in bringing about global convergence. UNCTAD has been active in international competition law for decades, with a special focus on developing countries.[40] One of its early accomplishments was the adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, otherwise known as the UN Set, in 1980.[41] In addition to the UN Set, UNCTAD also published the Model Law on

---

36 See Norton Rose Group, *Indonesia Consults on Draft Guidelines on Discriminatory Practices* (May 2011), online at http://www.nortonrose.com/knowledge/publications/51671/competition-law-developments-in-east-asia (visited Oct 7, 2011).

37 See Caron Beaton-Wells and Ariel Ezrachi, eds, *Criminalizing Cartels: Critical Studies of an International Regulatory Movement* 109–10, 130–34, 183 (Hart 2011).

38 See Akinori Uesugi, *How Japan is Tackling Enforcement Activities Against Cartels*, 13 Geo Mason L Rev 349, 362 (2005).

39 See id.

40 See Gerber, *Global Competition* at 112–16 (cited in note 5).

41 See id; UNCTAD, *The United Nations Set of Principles and Rules on Competition* § IV(C), UN Doc TD/RBP/CONF/10 (1980).

Competition in 2010.[42] This is a model competition code of sorts that attempts to address the needs of developing countries. It includes an extensive commentary on the current practices of not only the established jurisdictions, but also the developing country ones. UNCTAD holds annual meetings that bring together officials and experts from across the globe to discuss competition law issues with particular attention on developing country jurisdictions. These meetings also feature peer review of national competition law regimes. Armenia, Costa Rica, and Indonesia are some of the recently reviewed jurisdictions.[43]

The OECD Competition Committee, currently chaired by Judge Frédéric Jenny of the French Cour de Cassation, has been no less active in international competition law. Similar to UNCTAD, the OECD conducts peer reviews of competition law regimes,[44] most recently of Egypt.[45] Furthermore, the OECD has published recommendations and best practices on a wide variety of competition law and policy issues, including competition assessment of legislation, merger review, structural separation in regulated industries, cartel enforcement, cooperation among OECD member states, and exemptions from competition law.[46] It has also produced guidelines on bid rigging in public procurement.[47] The work products of the OCED are influential. Its guidelines and recommendations, especially the 1998 Recommendations on Hard Core Cartels and 2005 Recommendations on Merger Review, are highly regarded.[48] The OECD also hosts the annual Global Forum on Competition, which is a high-level gathering of officials and experts mainly from developed countries.

Lastly, the organization that has been most widely credited with the success of convergence on the international level over the last decade is the ICN. It was founded in 2000 by the competition authorities of a number of jurisdictions, all

---

42 UNCTAD, *Model Law on Competition (2010)*, UN Doc TD/RBP/CONF.7/L.1–L.13 (2010).

43 UNCTAD, Voluntary Peer Review of Competition Policy: Armenia, UN Doc UNCTAD/DITC/CLP/2010/1 (2010); UNCTAD, Voluntary Peer Review on Competition Policy: Costa Rica, UN Doc UNCTAD/DITC/CLP/2008/1 (2008); UNCTAD, Voluntary Peer Review on Competition Policy: Indonesia, UN Doc UNCTAD/DITC/CLP/2009/1 (2009).

44 See, for example, OECD and IDB, Competition Law and Policy in Brazil: A Peer Review (2010).

45 Brazil, Egypt, and Panama have been reviewed recently.

46 See, for example, OECD, *Recommendation of the Council on Competition Assessment*, OECD Competition Committee Doc C(2009)130 (2009); OECD, *OECD Guiding Principles for Regulatory Quality and Performance* (2005); OECD, *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (2005). For the OECD's full list of Recommendations and Best Practices on Competition, see OECD, *Recommendations and Best Practices on Competition*, online at http://www.oecd.org/document/59/0,3746,en_2649_37463_4599739_1_1_1_37463,00.html (visited Oct 24, 2011).

47 See generally OECD, *Guidelines for Fighting Bid Rigging in Public Procurement* (2009).

48 Gerber, *Global Competition* at 112 (cited in note 5).

of which, except for South Africa and Zambia, are also OECD members.[49] What distinguishes the ICN from other international organizations is that it is not a formal international organization, like the UN or the WTO, in which members are admitted on a national basis.[50] Instead, it is an informal network of competition authorities. According to the factsheet published by the ICN, it now boasts 104 member agencies from 92 jurisdictions.[51] Apart from its annual meeting, which is probably the largest gathering of competition law officials from across the globe, the ICN exerts its greatest influence through the recommended practices and other work products produced by its working groups. The five current working groups cover advocacy, agency effectiveness, cartels, mergers, and unilateral conduct.[52] The merger review working group, for example, has issued recommended practices on both procedural and substantive aspects of merger review[53] and has produced handbooks on merger guidelines and investigative techniques.[54] Membership of these working groups is drawn from agencies and non-governmental advisors, who are predominantly private practitioners from established jurisdictions.

It is worth discussing briefly how the activities of these international organizations promote convergence.[55] Peer review facilitates convergence to the extent that the reviewers' suggestions are shaped by their own experiences with

---

49 The founding members include Australia, Canada, the EU, France, Germany, Italy, Japan, Korea, Mexico, South Africa, the UK, the US, and Zambia. Although Israel was not a member of the OECD when the ICN was launched, it became an OECD member in 2010.

50 See Hugh M. Hollman and William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 Minn J Intl L 274, 275 n 3 (2011).

51 See ICN, *ICN Factsheet and Key Messages* (April 2009), online at http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf (visited Oct 24, 2011).

52 For a list of the current ICN working groups, see ICN, *Current Working Groups*, online at http://www.internationalcompetitionnetwork.org/working-groups/current.aspx (visited Oct 24, 2011).

53 See ICN, *Recommended Practices for Merger Notification Procedures*, online at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf (visited Oct 24, 2011); ICN, *Recommended Practices for Merger Analysis*, online at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (visited Oct 24, 2011).

54 See ICN Merger Working Group: Investigation and Analysis Subgroup, *ICN Merger Guidelines Workbook* (Apr 2006), online at http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf (visited Oct 24, 2011); ICN, *ICN Investigative Techniques Handbook for Merger Review* (June 2005), online at http://www.internationalcompetitionnetwork.org/uploads/library/doc322.pdf (visited Oct 24, 2011).

55 For an extended discussion, see generally Claire R. Kelly and Sungjoon Cho, *Promises and Perils of New Global Governance: A Case of the G20*, 12 Chi J Intl L 491 (2011).

their respective jurisdictions and what they perceive to be international best practices, which are mostly drawn from the established jurisdictions. The impact of socialization at meetings and gatherings should not be underestimated. Discussions at the meetings of these international organizations generally focus on the practices of the established jurisdictions. Attendance at these meetings is likely to encourage, both consciously and subconsciously, officials from the emerging jurisdictions to emulate these practices. This tendency to emulate is probably reinforced by the relative lack of experience and expertise of the officials of the emerging jurisdictions, many of whom consider the ICN and other international organization meetings to be mainly educational opportunities.

The most important way in which these international organizations promote convergence is through the issuance of best practices and recommendations. The work products of the OECD and the ICN in the area of merger review have been particularly influential. Using the terminologies of Professors John Braithwaite and Peter Drahos, who conducted an exhaustive study of the harmonization of business regulation, the established competition law jurisdictions pursue convergence through what is known as modeling. They define modeling as "[g]lobalization of regulation achieved by observational learning with a symbolic content."[56] The established jurisdictions put forward their models through their own guidelines or their input into the work products of international organizations. These models are then emulated by the emerging jurisdictions. The learning that takes place through modeling is augmented by the peer review process and socialization at the various international meetings.

Although the foregoing discussion seems to suggest that convergence at the national and international levels constitute two distinct processes, the two are, in fact, closely interrelated. As explained earlier, convergence by national competition authorities is often pursued in response to efforts by the international organizations. Meanwhile, judicial convergence is less closely tied to convergence efforts at the international level. The various mechanisms of convergence, such as international meetings, peer review, and issuance of guidelines and best practices, have less relevance for the judiciary.[57] Judicial convergence mainly takes place when judges on their own initiative refer to cases

---

[56] John Braithwaite and Peter Drahos, *Global Business Regulation* 25 (Cambridge 2000).

[57] The one possible minor exception is the issuance of guidelines. It is widely acknowledged that the 1992 Horizontal Merger Guidelines have garnered considerable respect from the US judiciary. Judges have often followed the analytical framework laid out in the Guidelines when deciding merger cases. To the extent that the same phenomenon is observed in other jurisdictions, issuance of guidelines may indirectly facilitate judicial convergence. See, for example, ICN Merger Working Group: Investigation and Analysis Subgroup, *ICN Merger Guidelines Workbook* *93 (cited in note 54).

from other jurisdictions.[58] However, even judicial convergence is not insulated from activities at the international level. If the domestic authority frequently cites foreign cases, which is bound to happen as convergence among the agencies intensifies, the courts will be more likely to rely on foreign jurisprudence. Moreover, judges also attend international meetings and receive training from foreign officials and experts, which will familiarize them with foreign cases and practices.[59]

Modeling can take place from the core to the periphery, in other words, from the established jurisdictions to the emerging jurisdictions, or within the core itself.[60] These two types of modeling are observed in competition law as well. There is convergence between the US and the EU, and convergence of the rest of the world to the trans-Atlantic core. Although intra-core convergence is an integral part of the global convergence process, this Article will focus on periphery-to-core convergence. As a theoretical phenomenon, periphery-to-core convergence raises questions that have hitherto received scant attention, such as the relationship between competition law and development and between competition law and culture, which will form the focus of this Article.

Aside from modeling, the only other mechanism in Braithwaite's and Drahos's classification that has been utilized extensively in competition law is capacity building. The established jurisdictions have provided extensive technical

---

58 Even if judges do decide to refer to foreign jurisprudence, there is certainly no obligation to follow it. For instance, in *France Telecom v Commission*, the European Court of Justice expressly refused to follow the US Supreme Court's lead in *Brooke Group* and impose a requirement of proof of likelihood of loss recoupment in predatory pricing cases. See *France Telecom v Commission*, Case C-202/07 P, [2009] ECR I-2369, referencing *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993). Despite the importance of the authorities in competition law enforcement, the lack of a conscious effort to pursue judicial convergence will limit the ultimate degree of uniformity that can be achieved across jurisdictions.

59 UNCTAD provides capacity building and technical assistance to developing countries in the area of competition law and policy. Training courses on the implementation of competition policy were provided to judges as well as enforcement officials in numerous countries including Namibia, the Philippines, and Ukraine. See UNCTAD, *Review of Technical Assistance, Advisory and Training Programmes on Competition Law and Policy*, UN Doc TD/RBP/CONF.5/5 *9 (Sept 25, 2000). The EU also provides training for judges of its member states on competition law. See Vlaams-Europees Verbindingsagentschap, *Training of National Judges in EU Competition Law and Judicial Co-operation between National Judges* (Apr 4, 2011), online at http://www.vleva.eu/call/training-national-judges-eu-competition-law-and-judicial-co-operation-between-national-judges-0 (visited Oct 24, 2011); The Jevons Institute, University College London and Institute d'Economie Industrielle, Université des Sciences Sociales de Toulouse, *Training of Judges in EC Competition Law and Economics* (2009), online at www.ucl.ac.uk/laws/judges-programme/Judges_Training_brochure.pdf (visited Oct 24, 2011).

60 See Braithwaite and Drahos, *Global Business Regulation* at 136 (cited in note 56).

assistance to emerging jurisdictions.[61] When a South Korean official offers technical assistance to Vietnam, the frame of reference will inevitably be the South Korean regime. This is to be expected, as that is the regime with which the official is most familiar. Consciously or not, the South Korean official will be facilitating convergence of Vietnamese competition law to the South Korean model. Capacity building thus may indirectly contribute to convergence.

Technical assistance in capacity building is not confined to implementation and enforcement. It has been offered at the legislative stage as well. During the drafting of China's Anti-Monopoly Law, many established jurisdictions, including the US, the EU, Japan, and South Korea, offered technical advice to the Chinese government.[62] It was widely known at the time that there was a battle among the advisors, especially between the US and the EU, to persuade the Chinese to follow their respective models. In this instance, the sources of technical assistance were actively pushing for convergence to their own models.

Compared to harmonization in other realms of business and economic regulation, competition law is noteworthy for the limited range of mechanisms that have been deployed. Apart from modeling and capacity building, Braithwaite and Drahos refer to military coercion, economic coercion, systems of reward, reciprocal adjustment, and non-reciprocal coordination as mechanisms for harmonization. The first three should be self-explanatory, and have not been deployed at all in competition law. The fourth and fifth ones require some explanation. They refer to adjustments made by parties to the negotiation of international treaties. Braithwaite and Drahos define reciprocal adjustment as "[g]lobalization of regulation achieved by non-coerced negotiation where parties agree to adjust the rules they follow," while non-reciprocal coordination "[o]ccurs when movement toward common rules happen without all parties believing they have a common interest in that movement."[63] As there are no formal treaty negotiations, these two mechanisms are absent from the convergence of competition law.

The limited range of harmonization mechanisms deployed and the absence of formal treaty negotiations have their advantages and disadvantages. The main advantage is that the pursuit of convergence in competition law has been spared

---

61 See D. Daniel Sokol and Kyle W. Stiegart, *Exporting Knowledge through Technical Assistance and Capacity Building*, 6 J Comp L and Econ 233, 236–37 (2010). The US Department of Justice (DOJ) and Federal Trade Commission (FTC) have provided technical assistance to more than fifty countries around the world from 1988 to 2008. See US DOJ and FTC, *Charting the Future Course of International Technical Assistance at the Federal Trade Commission and U.S. Department of Justice: A Report* *1 (2009), online at http://www.ftc.gov/oia/wkshp/docs/exp.pdf (visited Oct 24, 2011).

62 See H. Stephen Harris, *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 Chi J Intl Law 169, 175 (2006).

63 Braithwaite and Drahos, *Global Business Regulation* at 25 (cited in note 56).

the protracted and at times acrimonious negotiations that have plagued other areas of economic regulation, such as trade law and intellectual property law.[64] The main international organizations driving convergence of competition law have largely been able to reach agreement among their members through constructive discussions and consensus building. The kind of horse-trading and tit-for-tat negotiations that have marred treaty negotiations in other areas of global economic regulation are thankfully absent in competition law.

There are two main reasons for the absence of these problematic negotiations: first, the final products—model codes, recommendations, or best practices—produced by these organizations are not formally binding. A member is free to ignore a particular recommendation as it sees fit. Second, there are generally no overriding national interests at stake in the creation of these documents. Convergence of competition law is not about preferential treatment of foreign goods or opening of national markets, in which various parties may consider their interests to be at odds with each other's. Rather, it is about narrowing differences between the various national regimes. The general belief is that within the convergence enterprise, all of the jurisdictions are striving toward the most effective competition law principles. Convergence of competition law is not the tit-for-tat that generally characterizes trade negotiations, which helps to minimize conflicts and confrontations.

The absence of explicit negotiations may have its own disadvantages as well. Negotiations are important for precisely the same reasons that they may be counterproductive. They give each party the opportunity to provide input into the final product. In Braithwaite's and Drahos's parlance, negotiations provide a platform for reciprocal adjustments. While convergence of competition law differs from trade and other international economic treaty negotiations in that there are fewer overt exchanges of interests, this does not mean that parties to convergence should be denied a meaningful opportunity to provide input into the consensus-building process. Without such an opportunity, convergence risks being reduced to a series of non-reciprocal coordinations by the emerging jurisdictions.[65]

This dearth of opportunity for input is compounded by the fact that the international consensus to which other jurisdictions are expected to converge

---

[64] See Oxford Analytica, *Fate of WTO's Doha Round Uncertain* (Forbes.com Dec 19, 2006), online at http://www.forbes.com/2006/12/18/wto-doha-trade-business-cx_1218oxford.html (visited Oct 24, 2011); Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* 3–4 (Zed 2000).

[65] According to Braithwaite and Drahos, non-reciprocal coordination occurs "when movement toward common rules happens without all parties believing they have a common interest in that movement. One party believes the new rule is in their interest, but this belief is not reciprocated." Braithwaite and Drahos, *Global Business Regulation* at 25 (cited in note 56).

has been largely informed by the US' and EU's experiences. Although the recommendations and best practices issued by the international organizations do not blindly reflect US and EU practices, they are nonetheless heavily influenced by them.[66] This is a crucial observation. So long as the US and EU approaches are suited for the rest of the world, convergence is to be welcomed. However, if for any reason the trans-Atlantic consensus does not adequately address the needs and circumstances of other countries, convergence could be counterproductive.[67] The trans-Atlantic consensus will suit other jurisdictions if either there exists a set of universally applicable competition law principles or the consensus building process contains an effective mechanism to solicit and incorporate input from all stakeholders to address their needs. As will be explained subsequently, the search for universally applicable competition law principles is unlikely to be fruitful. This creates a greater need for inclusiveness in the consensus-building process.

The extent to which the consensus-building process within international organizations incorporates input from the emerging competition law jurisdictions varies. UNCTAD has probably done the most to incorporate the concerns and needs of developing countries, which form the bulk of the competition law jurisdictions in the world. OECD is a club of developed nations. Its recommendations and best practices are formulated by and primarily intended for its own members, which are predominantly developed countries. While non-OECD members may become observers of the Competition Committee, their input into the final products of the Committee is necessarily

---

66 For example, one can certainly detect the influence of the US and the EU merger guidelines in the ICN Merger Guidelines Workbook. See ICN Merger Working Group: Investigation and Analysis Subgroup, *ICN Merger Guidelines Workbook* (cited in note 54). Also, in the OECD peer review issued in 2006, Argentina was encouraged to focus on anti-cartel enforcement. See OECD, *Competition Law and Policy in Argentina: A Peer Review* *46 (2006), online at http://www.oecd.org/dataoecd/36/57/37970045.pdf (visited Nov 9, 2011). While there is a general consensus among developed countries that anti-cartel enforcement is the most important aspect of competition enforcement, some have argued that abuse of dominance is a more serious problem in developing countries, especially where there is a powerful state-owned sector. In the peer review report issued in 2010, the OECD Competition Committee recommended that the Brazilian authority focus on structural remedies as opposed to behavioral remedies in merger cases. See OECD Competition Committee, *Competition Law and Policy in Brazil: A Peer Review* at 78 (cited in note 44). This recommendation also reflects to some extent the enforcement strategy of the US agencies, which generally prefer structural remedies.

67 This concern would be alleviated if the US and the EU took into account the possibility of convergence when fashioning their approaches to competition law issues. However, there is no evidence that this is done. One may even argue that it would be absurd for them to do so and resolve cases differently in light of the possibility of convergence. After all, their regulations and guidelines are primarily intended to provide guidance on their own enforcement strategies and methodologies and not as models for other jurisdictions.

limited.[68] In fact, the purpose of the observer program seems not to be to obtain non-member input, but to help spread the OECD's views on competition law and policy to non-members.[69] ICN membership covers competition authorities from across the world. It has the mandate to forge a truly global consensus. However, the way in which its working groups function may invite criticisms of overrepresentation by developed-country private practitioners and cast doubt on the representativeness of its consensus.[70] In particular, there seems to be insufficient recognition within the ICN of the need for competition law principles to be tailored to local circumstances. All of this places the onus on the emerging jurisdictions to exercise caution when deciding the extent to which their domestic laws and practices should converge to the international consensus.

C. Effectiveness of Convergence as a Harmonization Strategy

The convergence promoted by these international organizations is of a soft rather than a hard kind. The choice of mechanisms—modeling and capacity building—limits the kind of convergence that can be achieved. Proponents of convergence do not endeavor to adopt a formally binding code or principles on competition law, as was attempted under the Havana Charter by the aborted International Trade Organization (ITO) after the Second World War and under the so-called Singapore agenda within the WTO in the 1990s.[71] Harmonization within the ITO and the WTO would have been formally binding. It would have involved a top-down effort, as opposed to a bottom-up process. Instead, international organizations, such as the ICN, the OECD, and UNCTAD, promote convergence that is initiated on a voluntary basis by the jurisdictions

---

68 See OECD, Competition Committee, *Pro-Active Strategy vis-à-vis Non-Members*, OECD Doc DAF/COMP(2005)26 (2005). The main role of the observers is "to associate themselves to certain Council Recommendations, to undergo a peer review exercise, to make written contributions to Committee roundtables, to actively participate in the Committee's outreach events and to disseminate the Committee's recommendations and best practices to other authorities." Id at 2.

69 See id at 7. The *Proactive Strategy* document enumerates a list of criteria for evaluating the performance of observers and states that renewal of observer status is not automatic, so as to give observers the incentives to meet the expectations of the Committee, one of which is to "associate themselves to certain Council Recommendations." Id.

70 See Hollman and Kovacic, 20 Minn J Intl L at 304 (cited in note 50) ("To date, the principal contributions have been made by NGAs from the private sector. As noted above, this has raised questions within the ICN about whether the network ought to engage academics, consumer groups, and think tanks more fully in its program.").

71 Gerber, *Global Competition* at 38–52 (cited in note 5); WTO, *Understanding the WTO: Cross-Cutting and New Issues*, online at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (visited Oct 24, 2011).

themselves. In fact, the term "convergence" was probably chosen to avoid the connotation of compulsion or top-down imposition and to emphasize the voluntary nature of the enterprise.

The lack of binding force, however, has not undermined the effectiveness of the approach. Competition law stands out as a field of law that has achieved a considerable degree of global uniformity without resorting to formally binding legal instruments. The most notable example is the 1992 Horizontal Merger Guidelines (1992 Guidelines) issued by the US Department of Justice and the US Federal Trade Commission. A casual examination of the horizontal merger guidelines issued by most major jurisdictions would reveal a substantial degree of similarity to the 1992 Guidelines.[72] The analytical approach laid down in those Guidelines, especially the Small but Significant and Non-transitory Increase in Price (SSNIP) test used for market definition, has been embraced by most jurisdictions. Until the issuance of a new set of guidelines by the US agencies in 2010, the 1992 Guidelines were widely regarded as the gold standard for merger review across the globe.[73]

It is worth pondering what accounts for the remarkable success of convergence thus far, especially in light of its voluntary nature. There are a number of reasons for this success. First and foremost, competition law is a highly technical area of law that requires intimate knowledge of a variety of disciplines, such as economics, accounting, and business. Its highly interdisciplinary nature sets it apart from most other areas of law and contributes to its unfamiliarity to most legal practitioners and even judges outside of the field. This unfamiliarity is compounded by the fact that competition law is relatively new to most jurisdictions. Most of the existing competition law jurisdictions only adopted their law within the last three decades.[74] The lack of expertise and experience in most emerging jurisdictions renders them more receptive to knowledge transfer from more established jurisdictions.

Another reason for the success of convergence is the largely administrative nature of competition law enforcement. With the exception of the US,

---

72 See William Blumenthal, *The Challenge of Sovereignty and the Mechanisms of Convergence*, 72 Antitrust L J 267, 270 (2004) ("For twenty-two years the U.S. Merger Guidelines have offered something of a template for substantive merger analysis."). See generally Rachel Brandenburger and Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 Antitrust 48, 49 (2011).

73 An examination of horizontal merger guidelines adopted in other jurisdictions since 1992 reveals that many of them are similar to the 1992 Guidelines. See, for example, European Commission, *Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings* 2008 OJ (C 265) 7; KFTC, *Guidelines for M&A Review* (2007); UK Competition Commission and Office of Fair Trading, *Merger Assessment Guidelines* (2010).

74 See UNCTAD, *Guidebook on Competition Systems*, UN Doc UNCTAD/DITC/CLP/2007/2 (2007).

enforcement authorities rather than private parties bring the bulk of competition cases in most jurisdictions.[75] Private action plays a very small role in a majority of jurisdictions.[76] The preponderance of public enforcement gives competition authorities a powerful lever to steer development of the law in their respective jurisdictions. They can do so through careful selection of cases. If an authority believes that a particular mode of business conduct, such as unilateral refusal to deal, should be legal, the authority could limit the judiciary's opportunity to reach a contrary result by declining to bring cases involving such conduct. The role of the authorities is even more prominent in merger review than in enforcement against restrictive agreements and abuse of dominance. Few merger cases are litigated. In most transactions, the authorities have the final word on whether a merger may proceed. This state of affairs is conducive to convergence, as the number of actors that need to agree within a jurisdiction for successful convergence is reduced by virtue of the administrative nature of competition law enforcement.

Two other characteristics of competition law enforcement further facilitate convergence. The first is the reliance on informal instruments such as guidelines. Because guidelines do not legally bind the authorities themselves or the courts in most jurisdictions, and are mere articulations of enforcement policies, the authorities have considerable discretion over their content. There is generally little or no national legislative involvement in the issuance of guidelines. This means that whatever consensus is reached among the enforcement officials can be given direct effect through these informal instruments without being adulterated by domestic political compromise, which is a necessary feature of the legislative process.

The second characteristic is the case-specific nature of competition law enforcement. Competition law does not impose detailed ex ante regulation that applies across the board. Business conduct is presumed to be legal unless determined otherwise ex post by the authorities or the courts. This contrasts with, say, banking regulation, which requires the regulator to issue detailed rules on the operations of a bank. Banks need to know with what rules they must

---

75 Close to 90 percent of the antitrust cases in the US are brought by private plaintiffs. See Robert H. Lande and Joshua P. Davis, *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, Interim Report for the American Antitrust Institute Private Enforcement Project 3 (November 8, 2006). See also Bureau of Justice Statistics, *Antitrust Cases filed in United States District Courts by Type of Case, 1975–2010* in Kathleen Maguire, ed, *Sourcebook of Criminal Justice Statistics Online* (Albany 2010), online at http://www.albany.edu/sourcebook/pdf/t5412010.pdf (visited Oct 24, 2011).

76 For instance, the European Commission has been trying for years to encourage private enforcement of competition law in the EU. It has issued a number of consultation documents on this. See, for example, European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, EC Doc COM(2008) 165 final (2008).

comply in advance, and contradictory rules may render compliance impossible. Therefore, in order for banking regulation to converge globally, the regulators must reach an explicit agreement on the content of the various detailed national rules.[77] The sort of open-ended convergence process that has taken place in competition is unlikely to work as a harmonization strategy for banking regulation. The lack of detailed ex ante rules in competition law reduces the need for the authorities to pursue express negotiations and creates an environment conducive to voluntary convergence. The international consensus is articulated by established jurisdictions and international organizations. Other jurisdictions can then choose to converge upon it at their own pace and to the extent suitable for their domestic circumstances. This explains why the voluntary convergence model, which is somewhat unusual in the international harmonization context, has worked so well for competition law.

IV. THE COSTS AND BENEFITS OF CONVERGENCE

Having examined the phenomenon of convergence in some detail, the rest of this Article will be devoted to the questions of how far convergence should continue and whether there are reasons to caution against a push for further convergence. It is important to clarify the precise focus of the ensuing discussion. As suggested in the previous Section, convergence can take place at the procedural level, the substantive level, and the normative level. With respect to substantive convergence, this Article has no objection to the propagation of competition law analysis that is effects-based and incorporates economic learning. The competitive effects of a business practice should be determined by the application of sound economic principles to solid empirical data. The emerging competition law jurisdictions should guard against the kind of form-based adjudication that characterized US antitrust law in the 1950s and 1960s and the early EU jurisprudence.[78]

---

[77] See Philip R. Wood, *Law and Practice of International Finance* 329, 352 (Sweet and Maxwell 2009); World Bank, *Finance and Private Sector Research* (Bank Regulation and Supervision Database 2007), online at http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/Banking_regulation_Survey_III_061008.xls (visited Oct 27, 2011) (compiling data for 143 countries on domestic regulatory requirements for entry into banking sector by domestic and foreign entities); Basel Committee on Banking Supervision, *Progress Report on Basel III Implementation* (Oct 2011), online at http://www.bis.org/publ/bcbs203.pdf (visited Oct 27, 2011) (detailing domestic implementation of Basel rules on financial regulation).

[78] For criticisms of the kind of form-based approach to vertical agreements adopted by the US Supreme Court, in particular in the 1960s, see Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 280–98 (Basic 1978); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U Chi L Rev 6 (1981).

The adoption of effects-based analysis premised on economic learning, however, does not mandate one approach or one outcome to cases. Contrary to common belief, there need not be one single economic approach to competition issues. There is a considerable range of issues over which mainstream economists have disagreed, such as whether concentrated or competitive markets are more conducive to innovation, the importance of predation and entry deterrence, the impact of industry concentration on market performance, and the meaning of the standard oligopoly models for real-world markets.[79] This Article lends full support to substantive convergence of a methodological kind, in other words, to convergence with respect to the techniques used in economic analysis. The ensuing discussion, however, questions whether substantive convergence of a doctrinal kind, specifically, the harmonization of rules on the legality of conduct, is advisable. As Budzinski has argued, the reliance on economics does not necessitate such kind of convergence.[80] What remains to be explored is whether there are other economic or non-economic reasons justifying such convergence.

A. Globalization and Convergence

Before turning to possible reasons for caution, we need to ask ourselves several questions. Why should the competition laws of various jurisdictions converge in the first place? What would be the harm if current efforts at convergence stalled? Does the harm outweigh whatever possible benefits there may be of maintaining regulatory diversity? Are there good reasons for retaining regulatory diversity? As it turns out, the answers to these questions vary somewhat according to the areas of competition law at issue.

The obvious justification for convergence is that it will help to minimize instances of contradictory rules and decisions, which in turn will lower compliance costs for firms operating in multiple jurisdictions. To some

---

79 See Budzinski, *Governance of Global Competition* at 108 (cited in note 31). Joseph Schumpeter and Kenneth Arrow famously disagreed over whether a concentrated or a competitive market is more conducive to innovation. See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 87–120 (Harper Collins 2008); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention,* in Universities-Natl Bureau Committee for Econ Research, ed, *The Rate and Direction of Inventive Activity: Economic and Social Factors* 609, 619–20 (Natl Bureau of Econ Research 1962). Harold Demsetz also critiqued the structure-conduct-performance paradigm proposed by Joe Bain. See Harold Demsetz, *Two Systems of Belief About Monopoly*, in H.J. Goldschmid and J.F. Weston, eds, *Industrial Concentration: The New Learning* 167–84 (Little, Brown 1974). See generally Joseph Bain, *Industrial Organization* (2d ed John Wiley 1968).

80 See Budzinski, *Governance of Global Competition* at 108 (cited in note 31) ("However, any claim that industrial economics would have provided a [sic] unambiguous manual to the 'right' competition policy cannot be sustained—even if competition economics could been [sic] reduced to theoretical industrial economics.").

commentators, the convergence of competition law is a necessary consequence of globalization.[81] The argument is that globalization has eroded the boundaries of national markets and has caused markets to become increasingly integrated, if not outright global in reach.[82] When firms and consumers are no longer confined by national boundaries, any regulation of markets that is premised on these boundaries becomes obsolete. Global markets with multinational corporations as participants require a global competition law. This argument seems highly convincing at first blush, and has been invoked in other areas of law to justify international harmonization. However, it also runs the risk of oversimplification. While it may be accurate to characterize markets as global if both the buyers and the sellers are international in scope and transactions take place across borders, the same characterization may not be accurate when internationalization only happens on the seller's side.

Take commercial aircraft as an example. This market is generally considered to be global in nature because there are only a few firms supplying customers wherever they are located. In fact, it is largely a duopoly consisting of Boeing and Airbus.[83] The commercial customers are airline companies, which are global in reach. In contrast, the market for consumer personal care products, such as toothpaste and shampoo, has long been dominated by a handful of multinational corporations, especially Unilever and Procter & Gamble.[84] That alone, however, does not render that market global. It is a well-known fact that these products require a high degree of localization.[85] What is considered an attractive odor for shampoo in one country may be repulsive in another. The buyer's side of the market for these products remains highly local in nature. It is difficult to see why regulation of such a market should be internationally

---

81 See Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 Colum J Eur L 289, 312–13 (2000); Gerber, *Global Competition* at 79–85 (cited in note 5). But see Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw J L & Trade Am 211, 216–220 (2007) ("Developing countries retort that antitrust for developing countries must also address concerns of distribution and power. Developed countries rejoin that global efficiency demands that laws converge, and laws should converge toward that of the developed world.").

82 See Rodger, 6 Colum J Eur L at 291–92 (cited in note 81). National competition authorities and courts have found the relevant market to be global in quite a few cases, such as the Oracle-PeopleSoft merger case. See *United States v Oracle Corp*, 331 F Supp 2d 1098, 1164 (ND Cal 2007).

83 See Richard Aboulafia, *Airbus vs. Boeing: Year Four* (Aerospace America Online Nov 2001), online at http://www.aiaa.org/aerospace/Article.cfm?issuetocid=151&ArchiveIssueID=20 (visited Oct 24, 2011).

84 See Lee Ann Graul, et al, *Procter & Gamble, Unilever and the Personal Products Industry* (AMBA 607 Feb 2006).

85 See Peter Mouncey and Frank Wimmer, eds, *Market Research Best Practice: 30 Visions for the Future* 450–51 (Wiley 2009).

harmonized simply because a few multinational corporations are the major global producers.

Budzinski puts the argument most succinctly:

> Internationalization and globalisation of markets do not imply that each market becomes an international one in the course of time. With traditional industries, a coexistence of national or more regional or local markets can be observed, depending—among other things—on the characteristics of the respective goods and services as well as on the preferences of consumers. It is difficult to identify reasons why this would be different even in a fully integrated world economy.[86]

In other words, globalization does not imply the disappearance of local markets. So long as such local markets exist, there remains a role for national competition regimes to play and possible grounds for divergence among them. While globalization may justify alignment of competition law rules that apply to truly transnational business practices, it does not require the wholesale convergence of national competition regimes. Convergence requires a more persuasive justification than that.

Competition law is not the only area of business regulation that faces the problem of cross-jurisdictional regulatory inconsistencies. Such inconsistencies are a fact of life for multinational corporations and are present in most areas of law. Corporation law, tax law, labor law, products liability law, securities regulation, food and drug safety law, environmental law, and sector-specific regulations for network industries are but a few examples. Compliance costs would certainly be lower for multinational firms if all these areas of law were harmonized. Firms would only need to produce one set of financial reports for every jurisdiction in which they issue shares.[87] They could use the same employment contracts and adopt the same human resource policies. They could avoid problems with double taxation. They could adopt the same content labels for their food and drug products. And they would only need to comply with one set of environmental regulations. These would no doubt be highly convenient for multinational firms. Yet calls for harmonization in these areas of law are less often heard than in competition law. For instance, Braithwaite and Drahos note that corporation law is one of the areas of business regulation that has been relatively free from efforts at harmonization.[88] Therefore, it is worth pondering whether competition law possesses any special attributes that render it particularly suitable for or in need of convergence.

---

86 Budzinski, *Governance of Global Competition* at 13 (cited in note 31).

87 This is, to some extent, possible under current SEC regulations, which allow foreign issuers to use the financial reports prepared for their home jurisdictions to meet SEC requirements.

88 See Braithwaite and Drahos, *Global Business Regulation* at 167 (cited in note 56).

B. A Proposed Analytical Framework

For the purpose of determining its suitability for harmonization, business regulation can be classified by the subject matter of regulation. A regulation may focus on a business entity, such as a bank or an insurance company; a product, such as a food item or a pharmaceutical product; or a process, such as manufacturing production or a securities issuance. There is, of course, overlap between these categories. For example, securities regulation may be characterized as regulation of shares as a product, as opposed to the issuance process itself. Likewise, merger review can be plausibly characterized as either an entity-based regulation or regulation of the merger process. The classification exercise inevitably requires some judgment calls and ultimately depends on the relative emphasis of the regulation. Merger review is more appropriately classified as entity-based regulation as opposed to process-based regulation because it is not focused on the corporate procedures governing a merger transaction, but on the competitive effects exerted by the merged entity on the relevant market. Securities regulation is more aptly described as process-based regulation because it is primarily concerned with the process of issuing shares to the public rather than the content of the shares themselves.

The reach of product-based and process-based regulations is usually limited by the geographical area of a jurisdiction. These regulations rarely apply if the product is not sold or the process does not take place within the jurisdiction's territory, although extra-territorial application of regulations is on the rise in some areas.[89] For instance, a jurisdiction's food and drug regulation will only govern food and pharmaceutical products sold or manufactured within its territory.[90] In general, a jurisdiction's environmental standards will only apply if a firm sells its products or operates in that jurisdiction.[91]

The situation is slightly more complex for entity-based regulation. Entity-based regulation may apply to any business entities that operate in its territory, or only those that have established a nexus to the jurisdiction, such as through

---

89 One notable example of extra-territorial application of domestic regulation in recent years is the UK Bribery Act, which applies to the corrupt practices of UK firms operating abroad. See Bribery Act, 2010, c 23, § 6 (UK). Another area which has seen expansion of extra-territorial application is anti-money laundering laws. See International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, 18 USC §§ 301–03, 311–30, 351–66, 371–77 (2006).

90 See Braithwaite and Drahos, *Global Business Regulation* at 386–87 (cited in note 56) (discussing harmonization of national pharmaceutical regulatory regimes and regulatory competition among regimes); id at 410–11 (referring to mutual recognition of national food regulations).

91 See Daniel Esty and Damien Geradin, *Environmental Protection and International Competitiveness: A Conceptual Framework*, 32 J World Trade 5, 8–9 (1998). See also Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 Am J of Comp L 897, 921–22 (2009).

business registration or incorporation. Corporation law generally only applies to corporate entities that are incorporated within a jurisdiction.[92] Meanwhile, banking regulation, or at least some parts of it, will apply to any bank that operates in it.

The case for harmonization ultimately comes down to a weighing of the costs and benefits of convergence. The benefits of convergence are determined by the possibility and costs of accommodating inconsistent regulations, which this Article will call regulatory accommodation, by the regulated entity, which in turn depends on the type of regulation at issue. By harmonizing inconsistent regulations, convergence reduces or eliminates the need for regulatory accommodation. The costs of regulatory accommodation are hence reduced or eliminated. The costs of convergence are the loss of national regulatory prerogative, which refers to the ability to design and enforce regulation according to local needs and circumstances.

Let us first turn our attention to the benefits of convergence. The possibility of regulatory accommodation varies by the type of regulation at issue. Some types of regulation give firms considerable leeway to accommodate regulatory inconsistencies, while others may not leave open such a possibility. The easiest case is probably product-based regulations, which can be accommodated by producing and labeling the products according to local regulation. The possibility and ease of such accommodation is attested to by the fact that it is regularly done by firms all over the world.

The ability of firms to accommodate inconsistent process-based regulations depends on the portability of the process at issue. There are two main types of processes undertaken by firms that may be the subject of regulation: production and sales. Regulation of the sales process may in turn focus on marketing, distribution, or other steps in the sales process. A production process would be highly portable before a plant is built. When a firm is still deciding the location of its production facility, it can choose the most favorable regulatory regime. Regulatory competition among jurisdictions to attract foreign direct investment is well documented.[93] Therefore, at that stage, inconsistent regulations are generally not a serious obstacle, and may, in fact, present lucrative opportunities for regulatory arbitrage. A production process becomes highly immobile once the manufacturing facility has been built. Firms

---

92 See Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum L Rev 1098, 1098 (1998) (referring to jurisdiction-based limitations of corporate law and the ensuing regulatory competition among the various states in the US).

93 See, for example Ehud Kamar, *Beyond Competition for Incorporations*, 94 Georgetown L J 1725 (2005); Charles Oman, *Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI* (OECD 2000).

will have no choice but to comply with the local regulations. However, by then, regulatory inconsistencies cease to be an issue for that facility; it complies with one set of regulations. A manufacturing plant is usually only subject to the regulations of the jurisdiction in which it is located. Regulatory inconsistencies only become relevant at the firm-wide level.

If the process being regulated is a sales transaction, portability hinges on the transferability of the transaction, which in turn is determined by the geographical mobility of the buyer and the seller. Unsurprisingly, the mobility of the buyer and the seller varies by the type of transaction at issue. For a securities offering, the seller is generally highly mobile. A corporation can choose to list itself in New York, London, Hong Kong, or practically anywhere else in the world.[94] Buyer mobility is constrained by the sophistication of the buyer and government regulation. An institutional investor will have no trouble following the issuer to another stock exchange.[95] A retail investor will have greater difficulty doing the same. However, even that may be changing with the advent of new technology and the convenience of online trading. With more general types of sales transaction, either the seller or, more likely, the buyer may have little geographical mobility. For example, the sale of foodstuffs to retail consumers is unlikely to be portable: the buyer is unlikely to travel long distances for such goods.[96] In that case, the firm may have little choice but to comply with the local regulation.

The possibility of accommodating inconsistent entity-based regulations depends on the coverage of the regulation, whether it covers the full entity or only part of it. If a regulation applies to the entire firm, there is little room for accommodating inconsistent regulations. If a regulation only applies to the local subsidiary, and it is possible for different branches of the firm to comply with different regulations, the situation is no different from that of process-based regulation after a manufacturing facility has been constructed. While the local

---

94 See Howell E. Jackson and Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe—Part II*, 3 Va L Bus Rev 207, 228 (2008) (analyzing reasons why European issuers choose to gain access to the US capital markets); Erica Fung, *Regulatory Competition in International Capital Markets: Evidence from China in 2004-2005,* 3 NYU J L & Bus 243, 290–96 (2007) (discussing Chinese issuers' choice of capital markets from among US, Hong Kong, London, Japan, and Singapore).

95 Fung, 3 NYU J L & Bus at 296 (cited in note 94) ("Finally, an emerging theme from the interviews was that US investors are becoming increasingly indifferent to where a company is listed. . . . The fact is, US-based institutional investors do not limit their investments to shares listed only on US exchanges. . . . Capital markets have become truly global, and this fundamental change has dramatically altered the traditional fund raising practices of Chinese firms.")

96 The advent of the Internet and online websites has no doubt considerably enhanced the geographical mobility of the buyer. Yet it remains possible for a local jurisdiction to regulate a sales transaction between a domestic buyer and an online website.

operation will have no choice but to comply with local regulation, regulatory inconsistencies will only arise at the firm-wide level. These inconsistencies do not render compliance impossible.

As should be obvious, the case for convergence is stronger if regulatory accommodation is impossible. If mutually exclusive regulations from two jurisdictions apply to the same firm simultaneously, there is a pressing need to harmonize these regulations. This refers to full entity regulation. If accommodation is possible, as in the case of the remaining types of regulation, the desirability of convergence depends on the magnitude of accommodation costs incurred by the firms and the mode of accommodation.

Within the subset of regulations for which regulatory accommodation is possible, there are two modes of accommodation. The first mode of accommodation is circumvention. Firms simply eschew less desirable regulatory regimes in favor of more business-friendly ones. If the listing rules of a certain jurisdiction are deemed to be too onerous, a firm can choose to list its shares elsewhere. To the extent that other relevant factors such as the liquidity and prestige of the alternative markets are comparable, firms can circumvent the problem of regulatory inconsistencies by submitting to the most favorable regime. This kind of forum shopping is only possible if the transaction process is portable. Otherwise, firms are left with the only other mode of accommodation, which is compliance. This is most likely to be the case with product-based regulation. If a jurisdiction stipulates certain content or labeling requirements for all beef products sold within it, a firm will have no choice but to comply with these rules if it sells in that jurisdiction. Purchasers of beef are unlikely to be sufficiently mobile to permit effective circumvention of that jurisdiction's regulation by the seller.

The relationship between the mode of accommodation and harmonization—whether ease of circumvention justifies more or less harmonization—depends on the perspective one takes. From a firm's perspective, easy circumvention probably renders regulatory inconsistencies a less pressing issue. So long as the alternatives are comparable in most other respects, a firm can choose the regulatory environment that best meets its business needs. From a regulator's perspective, however, the possibility of forum shopping lends support to harmonization. This is aptly illustrated by the US' and the OECD's focus on money laundering.[97] If one accepts that a particular regulatory objective, such as combating money laundering, should be pursued internationally, the ease of circumvention justifies upward harmonization of

---

[97] The OECD Committee on Fiscal Affairs collaborates with the Financial Action Task Force, an inter-governmental policymaking body, to harmonize anti-money laundering efforts. See OECD, *Tax Crimes and Money Laundering*, online at www.oecd.org/ctp/taxcrimes (visited Oct 24, 2011).

relevant laws and efforts to eliminate havens for money laundering. Which perspective dominates, it seems, would depend on the regulatory objective being pursued. If the kind of conduct being targeted is clearly wrongful, such as money laundering or bribery, the regulator's perspective tends to dominate. If the kind of conduct being targeted is morally neutral or concerns a matter of national importance, such as fiscal sovereignty, the regulator's desire for harmonization may need to be balanced against other considerations. Political concerns may interfere and prevent regulators from pursuing the optimal regulatory strategy.

With respect to regulation for which the mode of accommodation is compliance, the desirability of harmonization comes down to a weighing of its costs and benefits. The benefits are the potential savings of compliance costs incurred by the firms. While such potential savings are to be welcomed, their significance depends on the extent of globalization of the market at issue. To the extent that a market is truly globalized, in the sense that both the buyer's and the seller's sides of the market are internationally integrated, firms could realistically adopt a uniform distribution and operational strategy across countries. Disparate regulations are a genuine, or perhaps even the only, stumbling block to achieving substantial transaction cost savings across countries. Meanwhile, for a non-globalized market, firms will have to adopt localized business strategies anyway. The potential savings from harmonization will be considerably smaller. The justification for convergence is correspondingly less persuasive.

As mentioned earlier, the costs of harmonization include loss of the regulatory prerogative of individual jurisdictions. Such loss may not impose substantial costs, which would be the case when there is a single efficient approach to regulation, or when what matters is not the merit, but the uniformity, of regulation. An example would be the design for electric plugs and sockets. While different designs may vary somewhat in their safety and other performance features, the gains from a superior but inconsistent design are dwarfed by the benefits of uniformity. Travelers across the world would save much hassle and money if sockets and plugs in different countries were standardized. Manufacturers could also avoid substantial costs by producing electrical appliances with one type of plug. Aside from this subset of regulations, however, there are myriad considerations that demand diversity in regulatory approaches. The loss of national regulatory prerogative will be particularly costly if these considerations bear on the effectiveness of the regulation or even the general welfare of the jurisdiction. As will be illustrated below, this is likely to be the case for competition law.

To sum up, the three types of regulation—entity-based, product-based, and process-based regulations—present cases of varying strengths for harmonization. Full entity regulation presents the most convincing case for harmonization. Whether circumventable process-based regulation should be harmonized depends on the regulatory objective being pursued. The remaining

types of regulation—product-based regulation, non-circumventable process-based regulation, and partial entity regulation—all leave firms only with the option of compliance. Whether these types of regulation should be harmonized boils down to a tradeoff between potential savings in compliance costs and the importance of preserving national regulatory prerogative.

C. Harmonization and National Regulatory Prerogative

At this juncture, it may be worthwhile to explore the relationship between harmonization and regulatory prerogative. The compatibility of harmonization with the preservation of national regulatory prerogative depends on the number of regulatory objectives implicated by an area of regulation. Most realms of regulation pursue multiple and potentially conflicting regulatory objectives, which entails a weighing of the objectives and a tradeoff between regulatory costs and effectiveness. The fewer the regulatory objectives, the more likely it is that different jurisdictions will arrive at a similar balance or tradeoff. Conversely, the higher the number of regulatory objectives, the harder it is to reach a consensus. Therefore, the multiplicity of regulatory objectives may render an area of regulation unsuitable for harmonization; harmonization will entail the imposition of a consensus in the face of justified diversity.

This can be illustrated by food safety regulation. Food safety has been substantially harmonized on the global scale. The Codex Alimentarius Commission in Rome has issued common standards for food safety that run twenty-five volumes in three languages, including over two hundred standards, forty codes and guidelines on a wide variety of issues related to food production, packaging, and distribution.[98] The Codex has received support from developed and developing nations alike.[99] Its standards have been adopted as references in trade disputes within the WTO by the Agreement on Sanitary and Phytosanitary Measures, which was part of the 1993 Final Act of the Uruguay Round of GATT negotiations.[100]

A host of political, economic, and historical factors have contributed to the success of the harmonization of food safety standards.[101] This success, however, is at least partly explained by the fact that food safety standards chiefly focus on one regulatory objective: the protection of consumers from unsafe food products. The relevant regulatory tradeoff is between ensuring the safety of food products and keeping compliance costs by food producers and distributors

---

98 See Braithwaite and Drahos, *Global Business Regulation* at 401 (cited in note 56).

99 See id.

100 See id at 403.

101 See generally id at 399–417.

manageable. Jurisdictions may disagree on the appropriate tradeoff, but their differences are only a matter of degree. Meanwhile, the compromise will be considerably more complicated if the relevant tradeoff involves multiple regulatory objectives. Jurisdictions may accord different weights to the various regulatory objectives, which in turn may affect how the tradeoff on regulatory effectiveness is struck. Divergence in how countries choose to make this tradeoff will obviously render the attainment of a global consensus considerably more difficult, if not impossible.

D. Application of the Proposed Framework to Competition Law

What does all this mean for the global convergence of competition law? Does competition law present a convincing case for convergence? Various areas of competition law need to be analyzed differently under the proposed framework. Merger review is entity-based regulation. Even though it governs a process—merger or acquisition—the ultimate outcome is a change in the structure of business entities. The focus of the regulation is not on the process of merger, but on the competitive impact of the merged entity on the relevant markets. Whether merger review is partial or full entity regulation may depend on the remedy being ordered. If a merger is being blocked, it affects the firms concerned in their entirety. If only divestitures are ordered, the decision only affects parts of the firms.[102] Divestiture orders imposed by different jurisdictions may still conflict with each other. Given the possibility of an outright rejection of a proposed transaction, merger review should be considered as full entity regulation, which means that there is a strong case for convergence from the perspective of regulatory accommodation.

The need to avoid conflicting merger review decisions, however, should not be overstated. Here, it is again important to distinguish between genuinely globalized markets and local markets. If a merger involves global markets, and the competitive effects of the transaction are felt the same way in different jurisdictions, there is a strong argument for a harmonized approach to merger analysis and perhaps a single decision on the transaction. Assuming that these jurisdictions pursue similar goals under their competition law—and this assumption will be substantially qualified in subsequent sections—and their competition authorities are analyzing the same transaction in the same market(s) involving the same parties, conflicting decisions by different authorities are indefensible.

---

[102] See ABA Section of Antitrust Law, *Antitrust Law Developments* 414 (ABA 6th ed 2007) ("[W]here only a portion of the merged assets raises competition concerns, a divestiture or injunction may be confined to the assets related to the markets adversely affected.")

This argument loses its force when the markets are not globalized and the authorities are analyzing the effects of the merger on their respective national markets. If a merger affects a particular national market in such a way that no remedy can alleviate the competitive harm, the competition authority should block the merger. While it may be frustrating for the proponents of a transaction to abort a merger simply because one jurisdiction objects to it, if an informed and well-supported economic analysis of the transaction demonstrates irremediable anticompetitive effects in a local market, the desire for uniformity cannot deny the local authority's prerogative to protect its own market and consumers. Even for a full entity regulation, the argument for harmonization is not absolute.

Regulation of restrictive agreements and abuse of dominance are both concerned with business conduct. They focus on business-to-business transactions and transactions with end consumers. They may restrict the production or distribution of a product or service, but they generally do not go directly to the content of the product or the substance of the service, as in the case of drug safety standards, and are hence more appropriately considered as process-based regulation.[103] Regulation of restrictive agreements and abuse of dominance are not easily circumventable, if at all. The buyers in transactions regulated by these two areas of competition law are usually not very geographically mobile, at least not to a degree that permits forum shopping by the sellers. Therefore, the only accommodation strategy for firms often is compliance.

While some of the transactions regulated by these two areas of competition law are global in scope, many of them are local in nature. International cartels, which have almost become the mainstay of international competition law, are often global in reach and involve firms from multiple continents. Meanwhile, many vertical restraint and abuse of dominance cases are confined to national markets. More importantly, to the extent that these types of practices are pursued on a cross-border basis, they can be segregated in response to local regulation. This segregability means that if jurisdictions were to have divergent rules on one type of business conduct, say, resale price maintenance, it would be possible for a multinational corporation to adjust its distribution policies to accommodate the variations. It is hence possible for firms to accommodate

---

[103] One may argue that competition rules on, say, standard setting amount to product-based regulation, as they regulate technology standards that are incorporated in a product. However, it is important to remember that competition law does not directly mandate or regulate the type of technology standard adopted, but only how it is adopted. As such, it is still more appropriately characterized as process-based regulation.

regulatory inconsistencies, albeit with some costs. These costs could be saved if competition law were harmonized internationally.

This is only half of the analysis, however. First, as suggested earlier, the significance of these potential savings depends on the degree of the globalization of the market at issue. If the relevant market is not genuinely globalized and firms still pursue localized distribution and marketing strategies, the savings will be less significant. Second, these savings will need to be balanced against the loss of national regulatory prerogative. Here is where the analysis becomes more complex. To the extent that one believes that competition law should only focus on economic factors,[104] and its analysis is only guided by one or two economic goals, such as the maximization of economic efficiency or societal welfare of some kind, and to the extent that there is a uniform understanding of the meaning of these goals, one may expect jurisdictions to have relatively little difficulty in reaching a consensus on the calibration of regulatory objectives. The loss of national regulatory prerogative as a result of harmonization will not raise serious concerns.

However, if these economic goals are in fact subject to different interpretations, if these interpretations are dependent on the stage of economic development and the socio-economic environment of the country at issue, if competition law does pursue non-economic goals, or at least non-market-related economic goals, if competition and markets are themselves not purely economic constructs and are conditioned by cultural norms, and if the enforcement infrastructure and general legal environment of a country is such that the rules designed for other, more advanced, jurisdictions cannot be effectively and impartially enforced in the local environment, then there are reasons to believe that a consensus on the calibration of regulatory objectives will be difficult to achieve. These possibilities suggest reasons to be concerned about the loss of national regulatory prerogative and cautious about pursuing global convergence of competition law.

V. DIVERGENT UNDERSTANDING OF THE GOALS OF COMPETITION LAW

It was argued earlier that convergence would be more desirable and feasible if there was an international consensus on the objectives of competition law. As it turns out, such a consensus is lacking. There are disagreements as to

---

[104] See, for example, Richard A. Posner, *Antitrust Law* vii–viii (Chicago 2d ed 2001) (rejecting Michael Jacobs's view that the conflict between Chicago and post-Chicago schools of antitrust is ultimately a matter of political choice, while espousing the economic approach of the Chicago School); Bork, *The Antitrust Paradox: A Policy at War with Itself* at 134–160 (cited in note 78) (analyzing various theories of harm in antitrust from an economic perspective).

whether competition law should be a technocratic area of regulation that is purely based on economic analysis,[105] or whether it should encompass other non-market or even non-economic goals.[106] Some scholars have argued that there is an inherent political content in competition law that cannot be assumed away simply by the incorporation of economic analysis.[107] Disagreement is not confined to the goals pursued by competition law. It extends to the definition of some of the fundamental concepts that serve as guideposts for competition law analysis. These concepts include consumer welfare, total welfare, and even competition itself.

Even if one were to subscribe to the notion that competition law should be based entirely on economic theories, a technocratic conception of competition law by no means necessitates convergence. Budzinski has argued that "there neither is, nor can ever be, an ultimately 'right' competition theory."[108] There are often a few credible approaches in mainstream economics to some of the most controversial issues in competition law. In fact, he goes one step further and argues that even if jurisdictions apply the same economic approach and adopt a world welfare standard, they will arrive at divergent outcomes so long as there is asymmetric distribution of consumers and producers in different countries.[109] What follows is an exploration of these sources of disagreement and their implications for the drive for convergence.

A. Different Conceptions of Competition

It is a basic tenet of competition law that it protects competition and not competitors.[110] The question that naturally follows is: What is competition? Although both US and EU competition laws share the same professed goal of protecting competition, it has been argued that the two jurisdictions understand and apply the term differently. According to Professor Eleanor Fox, the US has tended to focus on whether a particular business practice restricts output or

---

105 One of the leading proponents of this view is Professor Daniel Crane. See Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex L Rev 1159, 1160 (2008).

106 See Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 BC L Rev **63–65 (2012) (forthcoming), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904686## (visited Oct 24, 2011).

107 See, for example, Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051, 1051 (1979).

108 Budzinski, *Governance of Global Competition* at 105 n 51 (cited in note 31).

109 See id at 96.

110 This famous aphorism originated from the *Brown Shoe* case. *Brown Shoe Co v United States*, 370 US 294, 320 (1962). The US Supreme Court reiterated it again in *Brunswick Corp v Pueblo Bowl-O-Mat,* 429 US 477 (1977), in which it said that antitrust laws "were enacted for the 'protection of competition, not competitors.'" 429 US at 487, quoting *Brown Shoe*, 370 US at 320.

raises prices, that is, whether competition is harmed is generally measured by its impact on allocative efficiency.[111] In the EU, competition is harmed when "openness and access to markets on the merits" is impaired and the market mechanism is degraded.[112] What constitutes harm to competition is potentially broader under the EU definition than under the American one. What ultimately accounts for this difference, she explains, is that there is greater faith in the efficiency and benignancy of business conduct in the US.[113] She believes that both understandings of competition are consistent with the axiom that competition law protects competition and not competitors. Which understanding one adopts "is largely a matter of context and political economy perspective."[114]

The most intuitive understanding of competition, perhaps, is that it refers to the rivalry among firms to vie for consumers by offering lower prices and better-quality products. Competition law protects competition under the belief that rivalry among competitors drives progress in society. This belief in the inherent merit of competition is the most entrenched in the US, especially among the Chicago School scholars.[115] The focus on the preservation of rivalry in the US is even more apparent when one compares the historical development of merger review law across the Atlantic. For years, the US merger review regime paid much closer attention to coordinated interaction than to unilateral effects. As a matter of fact, the section on unilateral effects in the US Horizontal Merger Guidelines was only added in 1992.[116] Meanwhile, the EU has progressed in the opposite direction: EU merger control traditionally has focused on preventing the creation or strengthening of a dominant position. Most of the early EU merger cases were concerned with dominance resulting from a merger.[117] It was only when the European Community Merger Regulation was revised in 2004 that the substantive test became "significant impediment of effective competition."[118] The revision was made specifically to clarify that coordinated effects can be a basis for prohibiting a merger under EU law.

---

111 Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, 26 World Competition 149, 149 (2003).

112 Id at 150.

113 See id at 152–53.

114 Id at 150.

115 See, for example, Bork, *The Antitrust Paradox: A Policy at War with Itself* at 51 (cited in note 78); Posner, *Antitrust Law* at vii–x (cited in note 104).

116 See Jonathan B. Baker, *Why Did the Antitrust Agencies Embrace Unilateral Effects?*, 12 Geo Mason L Rev 31, 32 (2003).

117 A prime example is the Continental Can case. *Europemballage Corp and Continental Can Co v Commission*, Case 6/72, [1973] ECR 215.

118 Council Regulation 139/2004, 2004 OJ (L 24) 7.

This belief in the inherent merit of competition, however, is not universally shared. Professor Ronald Dworkin has criticized then-Professor Richard Posner's economic approach to the law, which espouses a belief in the markets, wealth maximization, and the rationality of the individual as premised on "purely 'protestant' political values."[119] Professor Wolfgang Pape asserts that "[t]he concept of competition in the West is clearly linked to a certain degree of *individualism, egoism and striving for personal wealth*—'values' which, although not necessarily regarded as positive, are, according to the Western perception, immanent traits of human beings."[120]

This link between faith in competition and individualism has been affirmed by cross-cultural psychologist Geert Hofstede in his famous multinational study of cultural values in the late-1960s and early-1970s. Hofstede's surveys and subsequent studies have repeatedly shown the US to be the most individualistic country in the world.[121] Countries that share similar faith in competition, mainly other Anglo-Saxon countries, have also ranked highly on individualism.[122] According to cross-cultural value surveys, the US and the other Anglo-Saxon countries are clear outliers in their predilection for individualism. In light of the demonstrated link between individualism and a preference for rivalry, there are reasons to expect other countries not to share the same abiding faith in the inherent merit of competition. This may be especially true of cultures that have been traditionally known as collectivist.

Pape has carefully documented the different understandings of competition in East Asian and Islamic cultures, and argued that these understandings generally diverge from Western conceptions of competition. Regarding Japan, Pape observes that the Japanese word for competition, *kyoso*, was only coined in the nineteenth century and consists of two Chinese characters, *kyo* and *so*.[123] The first character stands for emulation and race, "whilst the second part '*so*' . . . carries the negative meaning of dispute, quarrel and conflict."[124] According to Pape, "the Meiji-regime originally opposed the introduction of this term, since it did not reflect the traditional understanding of the harmony of '*wa*', an old

---

119 Josef Drexl, *On the (A)political Character of the Economic Approach to Competition Law*, in Josef Drexl, Wolfgang Kerber, and Rupprecht Podszun, eds, *Competition Policy and the Economic Approach: Foundations and Limitations* 312, 312 (Edward Elgar 2010).

120 Wolfgang Pape, *Socio-Cultural Differences and International Competition Law*, 5 Eur L J 438, 444 (1999).

121 See Geert Hofstede, *National Cultures in Four Dimensions: A Research-based Theory of Cultural Differences Among Nations*, 8 Intl Studies Mgmt & Org 46, 52 (1983).

122 See id at 48–49, 52.

123 See Pape, 5 Eur L J at 448 (cited in note 120).

124 Id.

symbol for Japan."[125] Regarding Islamic cultures, Pape notes that "egoism as an extreme form of Western individualism and as a fundamental principle of capitalism is alien to the Islamic tradition. The basic aim is not individual performance, but being part of the community."[126] Although competition is not inconsistent with Islamic thinking, "extreme accumulation of private wealth and power is forbidden."[127] Moreover, the Islamic concept of *zakaet*, which "gives those people who do not have the means to find a job or gain the necessary education, a legal claim to other people's wealth,"[128] may deter the drive for profit by individual entrepreneurs.[129]

This discussion of the different attitudes toward competition is not meant to suggest that firms in these countries do not compete. They very much do. It is meant to illustrate that the belief in the inherent merit of competition may not be universally shared. In countries that do not share this belief, competition is generally considered a means to a higher end and not an end in itself. This higher end may be consumer welfare, economic development, national competitiveness, protection of employment, or other economic goals.[130] It may be a combination of them. It even has been argued that fairness justifies the protection of competition.[131] While these different conceptions of competition may not produce marked variations in the application of competition law in most cases, they do matter in the "hard" cases, where divergences between jurisdictions are most likely. In cases where the preservation of rivalry directly conflicts with the other goals of competition law, jurisdictions that hold fostering rivalry to be the overriding goal of competition law may reach a different outcome from that of jurisdictions that espouse a multiplicity of goals. And it is in these cases where calls for convergence are the most vociferous.

In fact, one need not traverse between cultures and academic disciplines to encounter different conceptions of competition. Even economists from advanced jurisdictions have disagreed on its precise meaning and relevance. No

---

125 Id.

126 Id at 452.

127 Pape, 5 Eur L J at 453 (cited in note 120).

128 Id at 452.

129 Id at 453.

130 For instance, German merger laws provide for an international competitiveness defense, which may be granted by the relevant minister. See Kai-Uwe Kuhn, *Germany*, in Edward M. Graham and J. David Richardson, eds, *Global Competition Policy* 115, 133–35 (Peterson 1997). Canadian competition law provides for a similar defense under Section 96 of the Canadian Competition Act RSC, C-34 (1985) (Can).

131 See Daniel Zimmer, *Consumer Welfare, Economic Freedom and the Moral Quality of Competition Law—Comments on Gregory Werden and Victor Vanberg*, in Drexl, Kerber, and Podszun, eds, *Competition Policy* at 77 (cited in note 119).

less than Gregory Werden, Senior Economic Counsel in the Antitrust Division of the US Department of Justice, has argued that "the word 'competition' is not understood to mean 'rivalry', but the product of it."[132] The implication is that competition is worth protecting not as a process, but for the benefits it brings. Other economists have posited negative externalities to competition, such as excessive entry costs and excessive product differentiation, which is particularly serious in oligopolistic markets featuring differentiated products.[133] Compared to the neoclassical economists, the Ordoliberals from the Freiburg School are even more circumspect about unfettered competition. The Ordoliberals are concerned by the "'inherent self-destructive tendency within competition . . . Ordoliberals are more sensitive to the political power of large companies . . . [and] have other goals apart from that of the efficient allocation of resources.'"[134] Thus while the Chicago School scholars firmly believe in the inherent merit of inter-firm rivalry, which has largely become the orthodoxy in competition law, this belief is not shared by all economists and certainly not by all cultures.

B. Consumer Welfare Versus Total Welfare

The disagreement is not confined to whether the competitive process should be protected in its own right. Consensus on whether consumer welfare or total welfare should be the relevant standard for analysis is equally elusive. In fact, commentators cannot even agree on the meaning of "consumer welfare."

While there is general agreement on what a total welfare standard attempts to maximize, namely, total surplus,[135] the definition of consumer welfare is shrouded in controversy.[136] Even if one agrees that consumer welfare is only confined to the economic concept of consumer surplus, there is the obvious question of who constitutes the consumers whose surplus is protected. Some argue that consumers should only include end consumers, while others, such as Professor Herbert Hovenkamp, believe that customers of all kinds should count

---

132 Gregory J. Werden, *Consumer Welfare and Competition Policy*, in Drexl, Kerber, and Podszun, eds, *Competition Policy* at 20 (cited in note 119).

133 See Kenneth Heyer, *Welfare Standards and Merger Analysis: Why not the Best?*, Economic Analysis Group Discussion Paper 06-8, *21 (2006), online at http://ssrn.com/abstract=959454 (visited Oct 29, 2011).

134 Rodger, 6 Colum J Eur L at 294 & n 23 (cited in note 81), quoting Heinz G. Grosskettler, *On Designing an Economic Order: The Contribution of the Freiburg School*, in Donald A. Walker, ed, *Perspectives on the History of Economic Thought Volume II, Twentieth Century Economic Thought* 59 (Edward Elgar 1989).

135 Heyer, *Welfare Standards* at *11 (cited in note 133).

136 To muddy the water further, Robert Bork has confusingly advocated a total welfare standard under the appellation of consumer welfare. Bork, *The Antitrust Paradox* at 107–15 (cited in note 78).

as consumers under the consumer welfare standard.[137] It has been argued that under the former formulation of consumer welfare, a buyer cartel would be unobjectionable so long as the downstream retail market is competitive and the end consumers are unharmed.[138] Those who find unpalatable the prospect of buyer cartels being upheld either argue that these cartels should be singled out for special condemnation even if consumer welfare only encompasses end consumers or that consumer welfare extends to intermediate customers as well.

Beyond the disagreement about definition, the relative merits of consumer welfare versus total welfare remain unresolved. Professor Dennis Carlton believes that total welfare is a superior standard for competition law analysis for a number of reasons. First, the consumer welfare standard tends to undervalue dynamic efficiency gains by overemphasizing short-run price reductions.[139] Second, using the consumer welfare standard as a means of wealth redistribution is misleading because most competition law cases involve disputes between firms, and firm profits flow back to consumers in the form of dividends.[140] Finally, Carlton argues that buyer cartels and monopsony power should raise no competitive concerns under a true consumer welfare standard.[141] Carlton's preference for the total welfare standard is shared by none other than Nobel Laureate Oliver Williamson, who, in a famous 1968 article, forcefully argues in favor of a total welfare standard for merger review.[142]

Russell Pittman of the US Department of Justice rejects the total welfare standard for merger review, arguing that such a standard will inevitably carry a systemic bias for producer surplus.[143] He also questions the validity of a common rejoinder by proponents of the total welfare standard that any bias for firms inherent in such a standard can be offset by transfer payments and other government policies.[144] Pittman argues that until effective government policy is in place to address the severe income inequality that afflicts most nations, "it seems quite reasonable to argue that those making and enforcing other public

---

137 See Werden, *Consumer Welfare* at 39 (cited in note 132); Dennis W. Carlton, *Does Antitrust Need to Be Modernized?,* 21 J Econ Perspectives 155, 165 (2007).

138 See Carlton, 21 J Econ Perspectives at 158 (cited in note 137).

139 See id at 157.

140 See id at 158.

141 See id.

142 See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoff*, 58 Am Econ Rev 18 (1968).

143 Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement* *1 (US DOJ Economic Analysis Group Discussion Paper 07-9 2007), online at http://ssrn.com/abstract=996643 (visited Oct 29, 2011).

144 See id at *5.

policies, like antitrust enforcement, should, to the degree manageable, take into account the distributional implications of their actions."[145]

The debate is further complicated when one moves beyond the theoretical merits of the two standards to implementation issues. Professors Damien Neven and Lars-Hendrik Röller conclude that a consumer welfare standard is generally superior for merger review purposes when lobbying by business interests is efficient and agency accountability low.[146] This observation is echoed by Carlton.[147] Professors David Besanko and Daniel Spülber similarly came out in favor of the consumer welfare standard, mostly on the grounds of the information asymmetry between the enforcement agency and the firms.[148]

The unresolved debate about the relative merits of the two welfare standards casts doubt on the feasibility of convergence across the globe. The emerging jurisdictions may rightfully question which standard they should adopt when the established jurisdictions themselves cannot reach a consensus. This is evidenced by Werden's observation that the 1992 US Horizontal Merger Guidelines seem to have left the issue of welfare standard intentionally vague.[149] This vagueness persists despite the common belief that US antitrust law generally espouses the consumer welfare standard.[150]

The choice of welfare standard may have critical implications for developing countries, and it may incorporate different considerations from those facing developed nations. In developing countries, small- and medium-sized enterprises (SMEs) often play a pivotal role in alleviating poverty. There is a strong argument that surplus redounding to these firms should be given weight by their competition laws, which militates in favor of a total welfare standard. Meanwhile, given that many of the consumers in developing countries, especially those in markets for foodstuffs and other basic necessities, are likely to be poor, their welfare deserves extra protection. If Pittman is right in saying that there is an inherent pro-business bias in a total welfare standard, developing countries may better serve their citizens' interests by adopting a consumer welfare standard. A full investigation of the appropriate welfare standard for developing

---

145 Id at *5. See also generally Sven-Olof Fridolfsson, *A Consumer Surplus Defense in Merger Control*, in Johan Stennek, ed, *Contributions to Economic Analysis* 287 (Emerald 2007)

146 See generally Damien J. Neven and Lars-Hendrik Röller, *Consumer Surplus vs. Welfare Standard in a Political Economy Model of Merger Control*, 23 Intl J Indust Org 829 (2005).

147 See Carlton, *Does Antitrust Need to be Modernized?* at 159 (cited in note 137).

148 See Fridolfsson, *A Consumer Surplus Defense* at 9 (cited in note 145).

149 See Werden, *Consumer Welfare* at 21 (cited in note 132).

150 See Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 77 (West 3d ed 2005) ("Antitrust analysts commonly use a substitute, the 'consumer welfare' principle. Many people who probably believe that maximizing allocative efficiency should be the exclusive goal of antitrust, *state* that the goal of antitrust should be to maximize the welfare of consumers.").

countries is beyond the scope of this Article. In light of the continual disagreement within the established jurisdictions about the appropriate welfare standard, and the special considerations facing developing countries in making the choice, there is little reason to expect jurisdictions to converge on a common welfare standard in the foreseeable future.

C. Competition Law as Technocratic Regulation

A more fundamental disagreement concerns whether competition law is a technocratic area of regulation that is purely concerned with economic issues or whether it encompasses non-economic goals. Under the technocratic view of competition law, competition law is about microeconomic issues presented by the relevant markets at issue. Competition law cases are decided based on the market effects of a business practice according to some benchmark for economic performance, such as economic efficiency or some measure of societal welfare.[151]

This is by no means the only possible or plausible conception of competition law. Even if one accepts that competition law is concerned with economics, it need not be confined to microeconomic issues. For instance, the competition law of some jurisdictions, such as Canada and South Africa, explicitly requires effects on employment and national competitiveness to be taken into account.[152] Employment and national competitiveness are excluded from the purview of competition law in the technocratic tradition, but are nonetheless important macroeconomic objectives. Different jurisdictions may have divergent expectations about what economic goals should be served by their competition laws. Those that do not consider competition as an end worth protecting in its own right are more likely to incorporate non-market related goals in their competition laws. These divergent expectations are reflected in the ICN's *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, which lists the following as the objectives of unilateral conduct laws of ICN member jurisdictions: "ensure effective competitive process as a goal and/or a means, promote consumer welfare, maximize efficiency, ensure economic freedom, ensure a level playing field for SMEs, promote fairness and equality, promote

---

151 See Paul S. Crampton, *Alternative Approaches to Competition Law*, 17 World Competition 55, 85 (1994). See generally Frédéric Jenny, *Competition and Efficiency*, in Barry E. Hawk, ed, *Annual Proceedings of the Fordham Corporate Law Institute: Antitrust in a Global Economy* 185 (Turis Pub 1997).

152 Article 2 of the South African Competition Act states the promotion of employment and expansion of opportunities for South African participation in world markets as some of the purposes of the Act. Competition Act (RCL 1999) (S Africa). Section 1.1 of the Canadian Competition Act similarly states the expansion of opportunities for Canadian participation in world markets as a purpose of the Act. Canadian Competition Act RSC, C-34, § 1.1 (1985) (Can).

consumer choice, achieve market integration, facilitate privatization and market liberalization, and promote international competitiveness."[153] Most of these goals are deemed unacceptable by the technocratic tradition of competition law, yet numerous jurisdictions pursue them in their abuse of dominance laws.

Beyond economic goals, some commentators have argued that there is an inherent political content in competition law and believe that competition law may properly pursue political and social goals. For instance, Professor Barry Rodger asserts that "competition law is not necessarily solely concerned with the fulfillment of economic ideals;" politics and economics "have played [a significant role] in the formation of competition policy."[154] He proceeds to enumerate a number of political objectives that may be pursued by competition law, including the control of the excessive concentration of economic power, regional policy, and market integration, which is particularly relevant to the EU.[155] One important non-economic goal pursued by EU competition law is market integration. The European courts' hostility toward vertical territorial restrictions and ban on parallel imports can be best understood from the perspective of fostering the internal market.[156] While market integration may be viewed as an economic policy in general, in the European context, it is intimately related to the political integration of the EU that began as an attempt to prevent the European nations from descending into a self-destructive war again. Market integration is thus as much a political as an economic enterprise in Europe.

On the other side of the Atlantic, Professor Robert Pitofsky, former Chairman of the US FTC, famously asserted that "[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[157] These political values include the antidemocratic political impulses that may result from an excessive economic concentration of power and the pressure on the state to play a more intrusive role in the economic affairs of an economy dominated by a few giants.[158] The US Supreme Court has voiced a similar concern about the political ramifications of anticompetitive conduct. It has

---

153 ICN, *Unilateral Conduct Working Group, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* *93 (Report presented at the 6th Annual Conference of the ICN 2007), online at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf (visited Oct 29, 2011).

154 Rodger, 6 Colum J Eur L at 302 (cited in note 81).

155 Id at 304.

156 See, for example, *Consten and Grundig v Commission*, Cases 56 and 58/64, [1966] ECR 299; *AstraZeneca v Commission*, Case T-321/05, 2010 OJ 33–34.

157 Pitofsky, 127 U Pa L Rev at 1051 (cited in note 107).

158 See id at 1075.

justified the protection of the competitive process with political and social values, noting in the *Northern Pacific* case that:

> [t]he Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[159]

Consideration of broader economic and non-economic goals does not require the wholesale displacement of market-related goals from competition law. This Article in no way argues that competition law should be preoccupied with broader economic and non-economic goals. Ensuring employment or promoting national competitiveness should not be the primary foci of competition law, nor should competition law be principally concerned with fairness or the broader political implications of economic concentration. The main concerns of competition law should be the protection of the competitive process and the enhancement of societal welfare. Being the chief focus, however, does not require being the exclusive focus. Non-market-related goals may have a role to play on the margin. In cases where the arguments based on welfare or efficiency are close, there is room for considering these secondary goals. In other words, these secondary goals could be treated as tiebreakers in close cases.[160] Some jurisdictions choose to exclude these secondary goals entirely, while some adopt a broader conception of the goals of their competition laws. Within the latter group, each jurisdiction may accord different weights to these broader non-market goals. There is no one correct approach. This multitude of possible approaches poses a serious dilemma for convergence. It increases the costs resulting from the loss of national regulatory prerogative by reducing the ability of jurisdictions to ascertain the correct balance of goals for themselves, thus rendering it less likely that the benefits of convergence will outweigh its costs.

D. Implications for Convergence

What are the implications of the foregoing discussion for convergence? There is little salience for procedural convergence, at least concerning what has been contemplated thus far, namely, the procedures for merger review. The

---

159 *Northern Pacific Railway Co v United States*, 356 US 1, 15 (1958).

160 The existence of multiple goals to be taken into account will increase the discretion given to competition authorities and legal uncertainty. There is the obvious question of how the authority will prioritize the various goals. One possible way to deal with this problem is to have the legislature specify the relative importance of different goals in the legislation. This will impose some structure on the prioritization of the goals and avoid giving excessive discretion to the authority.

implication for substantive convergence, however, is clear. If countries attribute different goals, some economic and some non-economic, to competition law, and there is no consensus on the scope and relative weight of each of these goals, substantive convergence will be difficult to achieve.

A country that does not share the belief in the inherent merit of competition and is instead more concerned with the excessive concentration of economic power will pay less attention to collusive conduct and focus more on abuses of dominance. A jurisdiction that adopts a total welfare standard on the grounds that its producers are equally worthy of protection as its consumers, especially in markets where the producers are drawn from the underprivileged classes in society, will decide a potentially anticompetitive merger with promises of considerable efficiency gains differently from a jurisdiction applying the consumer welfare standard. A jurisdiction espousing the consumer welfare standard may show relative leniency to buyer cartels and monopsonists so long as the end consumers are unharmed. Different conceptions about competition, the appropriate welfare standards and their applications, and the permissible scope of non-market goals in competition law may result in substantive divergences.

With respect to normative convergence, disagreement on these issues itself constitutes normative disagreement. Whether competition is inherently beneficial, whether producers' interests deserve protection, whether competition law should pursue distributive goals, and whether competition law should be concerned about excessive accumulation of economic power are themselves normative issues, each of which bears on competition law enforcement. It was asserted earlier that law must not be detached from the social and cultural norms of a jurisdiction, lest it lose legitimacy.[161] To the extent that the diversity of goals contained in competition laws across the globe reflects the prevailing social and cultural norms about competition in the various jurisdictions, there exist significant normative divergences, which in turn render substantive convergence difficult to achieve.

VI. DEVELOPMENTAL CONSIDERATIONS AND CONVERGENCE

The discussion thus far has largely focused on established jurisdictions. It is argued that disparate views on the goals of competition law pose great obstacles to convergence. Global consensus becomes even more elusive once developing countries are brought into the picture. Policy goals that are particularly relevant to these countries include economic development, poverty reduction, and inclusive growth—growth that benefits not only the elite but also the general

[161] See Section III.A.

population. These are goals that have not been given particular priority in the industrialized nations and have not been explicitly incorporated into their approaches to competition law. The different economic environment in developing countries—such as the lack of market dynamism; the prevalence of corruption and cronyism; the need to offer assistance to SMEs, which hold the key to poverty alleviation; the prominence of the informal economy; and the lack of innovative capacity—may call for different emphases in competition law analysis from that of industrialized nations.

A. Special Characteristics of Developing Economies

Serious poverty and income inequality are prevalent in many developing economies. These phenomena present two main challenges to developing countries as far as competition law enforcement is concerned. One is the need to encourage entrepreneurship to promote inclusive growth; the other is the need to protect impoverished consumers from exploitative practices. A number of commentators, including Fox, have argued that developing countries must pursue inclusive growth that will alleviate poverty and reduce income inequality.[162] Inclusive growth requires opportunities for upward economic mobility, an important avenue for which is entrepreneurship.[163] For those who are at the bottom of the economic ladder in a developing country, often the only way to break out of poverty is to start their own businesses, which are going to be, at least initially, SMEs. Therefore, encouragement of entrepreneurship and assistance to SMEs must be a central pillar in every inclusive growth strategy. If competition law is to complement an inclusive growth strategy, it must afford SMEs stronger protection than is customary in established jurisdictions and be particularly vigilant against abuse of dominance. This is especially so because dominant firms in developing countries are often former state monopolies that still benefit from official patronage or informal connections to the state. Their privileged positions make it even harder for new private firm rivals to compete with them.

---

162 See Fox, 13 Sw J L & Trade Am at 216–20 (cited in note 81).

163 See Leora Klapper, Raphael Amit, and Mauro F. Guillen, *Entrepreneurship and Firm Formation Across Countries* *2 (World Bank Group Entrepreneurship Snapshots Feb 2008), online at http://siteresources.worldbank.org/INTFR/Resources/475459-1222364030476/FirmFormation_NBER.pdf (visited Oct 25, 2011); Inter-American Development Bank, *Private Sector Development Strategy* *4 (March 12, 2004), online at www.iadb.org/document.cfm?id=352366 (visited Oct 25, 2011); United Nations Development Programme, *Unleashing Entrepreneurship* **5–9 (March 1, 2004), online at www.undp.org/cpsd/documents/report/english/fullreport.pdf (visited Oct 25, 2011).

The poorest in many developing countries live below the poverty line and often scrape by with no more than a dollar or two a day.[164] They are often malnourished, sick, and illiterate, which severely curtails their productivity and ability to improve their economic well-being. Therefore, an inclusive growth strategy must include policies to combat malnourishment, poor health, and illiteracy. While the bulk of the responsibility will fall on government programs that directly confront these problems, competition law has a role to play. Competition law enforcement may focus on goods that have the most direct impact on the nutritional, health, and educational needs of the poorest in developing countries. Anticompetitive conduct in these sectors should be dealt with harshly.

Beyond that, developing country competition authorities may consider taking a tougher stance on exploitative practices by dominant firms. This is despite the fact that most established jurisdictions, especially the US, have largely left exploitative practices out of the purview of competition law.[165] The usual justification for this stance is two-fold. First, there is a serious implementation problem of distinguishing between very high prices and excessive prices.[166] Such distinctions are notoriously difficult to draw. The inability to do so undermines effective enforcement and legal certainty for firms seeking to comply with the law. Second, there is the theoretical objection that the opportunity to reap temporary monopoly profit spurs firms to compete and innovate.[167] In the industrialized nations, the general view is that consumers are able to bear momentary high prices, which will be eroded once a new competitor enters the market. Short-run monopolistic prices are the price that consumers pay for the benefit of keener long-run competition and innovation. While consumers in developed nations may be in a position to withstand such high prices, the poorest consumers in developing countries are not. Any extra cost for a basic necessity will have a direct and severe impact on their overall standard of living. For example, 10 percent more spent on foodstuffs may require consumers to

---

164 See World Bank, *Extreme Poverty Rates Continue to Fall* (June 2, 2010), online at http://data.worldbank.org/news/extreme-poverty-rates-continue-to-fall (visited Oct 5, 2011).

165 See *Verizon Comm Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 407 (2004); *Berkey Photo, Inc v Eastman Kodak Co*, 603 F2d 263, 296 (2d Cir 1979).

166 See Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief about Monopoly?*, 49 Antitrust Bull 343, 367, 373–74 (2004).

167 *Trinko*, 540 US at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

remove their children from school.[168] The plight of these consumers therefore may justify a more assertive stance on exploitative practices in markets for basic necessities.

Dynamic markets are less likely to be found in developing countries than in industrialized nations. Most sectors of developing country economies are dominated by a handful of firms.[169] The lack of a well-functioning capital market, which is the case in many developing countries, means that new entrants may have difficulty in obtaining financing.[170] The dearth of skilled human capital may constrain a new firm's ability to establish itself and compete. Rapid market entry is hence by no means assured. Even if a new firm successfully establishes a foothold in the market, it may be no match for the well-funded and well-connected incumbent firms. This means that Justice Scalia's pronouncement in *Verizon Comm Inc v Law Offices of Curtis V. Trinko, LLP*,[171] that temporary monopoly profit could be beneficial because it attracts new market entrants and entrepreneurial activities, rings hollow in developing countries.[172] There may be no market entry in response to the existence of monopolistic profit. This lack of market dynamism has important implications for regulating abuse of dominance in developing countries. It calls for a more aggressive abuse of dominance enforcement agenda. The dearth of potential market entrants means that incumbents will have greater incentive to harm existing rivals, as the payoff will be substantial after existing rivals are eliminated. It also means that it is more important to protect these competitors, as they are vital, perhaps even indispensable, to keeping the market competitive.[173]

Most developing countries possess little of what development economists call innovative capacity: the ability to come up with novel products or

---

168 For example, in Nepal, households that have experienced food price increases over the last three months were most likely to use education-related coping mechanisms, with 14 percent taking their children out of school for work. See UNICEF, Department of Education, and Research Input and Development Action, *3F Crisis: Impact on Education*, Quarterly Monitoring Report *1 (July–Sept 2009).

169 See James Tybout, *Manufacturing Firms in Developing Countries: How Well Do They Do, and Why?*, 38 J Econ Lit 1, 16 (2000); Philippe Brusick and Simon J. Evenett, *Should Developing Countries Worry about Abuse of Dominant Power?*, 2008 Wis L Rev 269, 276 (2008).

170 Thorsten Beck and Asil Demirguc-Kunt, *Access to Finance: An Unfinished Agenda*, 22 World Bank Econ Rev 3 (2008); Brusick and Evenett, *Should Developing Countries Worry about Abuse of Dominant Power?* at 276 (cited in note 169); Tybout, *Manufacturing Firms in Developing Countries* at 6 (cited in note 169).

171 540 US 398 (2004).

172 See id at 402.

173 See Fox, 26 World Competition at 163–64 (cited in note 111).

production processes.[174] Most of them possess no more than imitative capacity, that is, the ability to imitate a technology that has been invented elsewhere, usually a developed country.[175] The lack of innovative capacity means that the social calculus behind the grant of patent protection needs to be recalibrated. If there are no inventors to take advantage of the innovation incentives offered by the patent system, competition law rules on intellectual property exploitation need not be as deferential to the preservation of innovation incentives as their developed country counterparts. This is a crucial qualification to the patent-competition interface because the need to preserve innovation incentives is the most forceful argument offered to defend potentially anticompetitive patent exploitation practices in developed nations. This means that developing countries may have greater leeway in regulating these practices.

Many developing countries have pursued industrial policy as a growth strategy. There has been much academic discussion about the merits of such policy. Some notable commentators, such as Professors Michael Porter and Simon Evenett, have cast serious doubt on the efficacy of industrial policy, while others take a more sanguine view of it.[176] This Article does not attempt to resolve the debate. Instead, it focuses on the ramifications of industrial policy on competition law enforcement. To the extent that industrial policy is in place, competition law analysis needs to take into account how such policy distorts the competitive dynamics of the markets.[177] This may require adjustment in enforcement priority or even legal principles.

Lastly, one must give explicit recognition to the political environment and resource limitations facing many developing countries. As mentioned earlier, many developing countries are afflicted by serious corruption and cronyism. The independence and reliability of their competition law enforcement infrastructure

---

174 For application of the concepts of innovative and imitative capacities, see Edwin Lai, *International Intellectual Property Rights Protection and the Rate of Product Innovation*, 55 J Dev Econ 133 (1998); Carmelo Pierpaolo Parello, *A North-South Model of Intellectual Property Rights Protection and Skill Accumulation*, 85 J Dev Econ 253 (2008). The relative strength of industrialized nations in research and development (R&D) and innovation is attested to by the fact that they account for a vast majority of global R&D expenditure. Developing countries only contributed 24 percent of the global R&D expenditure in 2007. If China is excluded, the figure drops to 14.8 percent. See UNESCO Institute for Statistics, *Global Investments in R&D*, 15 UIS Fact Sheet 3 (2011).

175 See Correa, *Intellectual Property Rights, the WTO and Developing Countries* at 5 (cited in note 64).

176 See Simon J. Evenett, *Lessons From the Six Country Analyses*, in Brooks and Evenett, eds, *Competition Policy and Development in Asia* (MacMillan 2005); Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach* 339, 346–49 (2002), online at http://www.isc.hbs.edu/053002antitrust.pdf (visited Nov 11, 2011).

177 For an overview of industrial policy in general, see Maroi Cimoli, Giovanni Dosi, and Joseph E. Stiglitz, eds, *Industrial Policy and Development: The Political Economy of Capabilities Accumulation* (Oxford 2009).

cannot be taken for granted. Even if the officials were honest and independent in their application of the law, they may face serious limitations in their resources and expertise. Many of them have not received extensive training in competition law and industrial organization economics.[178] Even if the enforcement authority possesses the expertise, the judiciary most likely does not.[179] This greatly limits the sophistication of the analysis that can be incorporated into the competition law regimes of developing countries.

B. Implications for Convergence

The important question, again, is: What are the implications of these economic and political characteristics of developing countries for the convergence of competition law? The implications for procedural and normative convergences are likely to be limited.[180] The relevance for substantive convergence, however, is immense. On a more general level, if developing countries are to take poverty alleviation and the pursuit of inclusive growth seriously, they may need to adopt a more interventionist approach to competition law enforcement than has been practiced in established jurisdictions. Fox and Rodger have both noted that a non-interventionist enforcement approach generally preserves the existing distribution of wealth and economic structure.[181] This is obviously undesirable for developing countries, many of which have deleteriously unequal wealth distribution.[182]

The lack of expertise, experience, and resources in the enforcement infrastructure means that bright-line rules, as opposed to nuanced rule of reason analysis, may be more appropriate.[183] This may reduce the range of analytical options at the disposal of the enforcement authority when tackling a

---

178 See Brusick and Evenett, 2008 Wis L Rev at 293 (cited in note 169).

179 See id at 279–80.

180 These characteristics are unlikely to have much relevance for the harmonization of merger review procedures. Their relevance may be greater for procedural convergence in other areas of competition law, especially the relative lack of expertise and resources in the enforcement infrastructure.

181 See Rodger, 6 Colum J Eur L at 297 (cited in note 81); Fox, 13 Sw J L & Trade Am at 215 (cited in note 81).

182 See Xubei Luo and Nong Zhu, *Rising Income Inequality in China: A Race to the Top* **3, 7 (World Bank Policy Research Working Paper 4700 Aug 2008), online at http://library1.nida.ac.th/worldbankf/fulltext/wps04700.pdf (visited Oct 30, 2011) (analyzing increasing income inequality in China in recent years); J. Humberto Lopez and Guillermo Perry, *Inequality in Latin America: Determinants and Consequences* (World Bank Policy Research Paper 4504 Feb 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090391 (visited Nov 6, 2011) (reviewing causes for income inequality in Latin America).

183 See Fox, 13 Sw J L & Trade Am at 230 (cited in note 81).

competition law issue. For instance, a per se approach for resale price maintenance may be more suitable for developing countries. While the majority in *Leegin* forcefully argued that RPMs are procompetitive in a sufficient number of instances that per se treatment is not appropriate,[184] most developing countries do not have the resources to devote to the investigation and analysis of every instance of RPM. If a sufficient proportion of RPMs is anticompetitive, such jurisdictions should opt for a per se rule.

The choice of welfare standard in merger review may similarly need to be adjusted. To the extent that the authority's independence is in doubt, Neven and Röller have argued that a consumer welfare standard will be more appropriate.[185] This is because the pro-consumer bias of the standard will counteract the effective lobbying by business interests, thereby creating a more balanced outcome. Market dynamism also affects the choice of welfare standard in merger review. Professor Bruce Lyons has demonstrated that a consumer welfare standard is generally preferable only when the market is large and there are alternative efficiency-enhancing mergers available in the market. He notes that "[i]f there are only two firms, the [total welfare standard] is always superior because the proposed merger has no alternatives."[186] The relative weight of these considerations is likely to vary by country, or perhaps even by market.[187]

The characteristics of developing countries require adjustments to specific competition law doctrines and principles. While it may be argued that these characteristics can be adequately taken into account by shifting enforcement priorities, only doctrinal changes can adequately reflect these characteristics. Take the patent-competition interface as an example. The lack of innovative capacity in a developing country means that patent competition law rules need to pay much less attention to innovation incentives, and there are much weaker reasons to incur short-term consumer welfare loss to generate these incentives. More concretely, this may mean that unilateral refusal to license is more susceptible to challenges in developing countries than in developed nations. This may be especially so if the product at issue is a basic necessity, the access to which significantly contributes to poverty alleviation and improved well-being of the poor. A more interventionist approach to unilateral refusal to license

---

184 See *Leegin*, 551 US at 886–907.

185 See Neven and Röller, 23 Intl J Indust Org at 831 (cited in note 146).

186 Bruce R. Lyons, *Could Politicians Be More Right than Economists? A Theory of Merger Standards* *21 (Revised CCR Working Paper 02-1 2002), online at www.uea.ac.uk/polopoly_fs/1.104451!ccr02-1revised.pdf (visited Nov 6, 2011).

187 The choice of a different welfare standard depending on the number of firms in the market is unlikely to be feasible and will be open to criticisms on fairness concerns. Therefore, developing countries are likely to be required to take market dynamism into account by examining their domestic markets on an aggregate basis.

intellectual property would not be possible with a mere adjustment in enforcement priorities. It would require a doctrinal shift that may preclude substantive convergence on this prominent issue in competition law.

Another possible divergence from the established jurisdictions is more robust enforcement against abuse of dominance. This is necessitated by the need to provide special assistance to SMEs, the lack of market dynamism, and the need to protect consumers from exploitative practices. For example, in the context of predatory pricing, stagnant markets mean that the requirement for proof of a reasonable likelihood of recoupment of lost profit may be overly stringent. Preservation of existing competitors may need to be accorded greater weight if subsequent market entry in response to price increases by the successful predator is unlikely to materialize. Once the existing competitors have been driven out of the market, the predating firm may face no further threats to its dominance. The diversity of possible approaches to abuses of dominance, such as predatory pricing, is affirmed by Budzinski's observation that microeconomics and competition theories do not propound a single view on whether a long-run decrease in market contestability is justified by short-run price cuts.[188] Jurisdictions may legitimately differ on whether such a justification is acceptable based on the preferences of society at large.

To the extent that a developing country has pursued industrial policies that shield domestic firms from foreign competitors, leaving the domestic markets uncompetitive, the competition authority should be more vigilant against collusion, both express and tacit, by the domestic firms. In a stable market populated by a small number of firms and protected by government barriers, tacit collusion may be particularly easy to achieve.[189] This may be especially so if the domestic firms maintain close ties with government officials, who may directly or indirectly facilitate collusion. The possible increased incidence of tacit collusion means that the hurdle for successful prosecution of such conduct will need to be lowered. The authority may consider relaxing the standard of proof for tacit collusion, perhaps by dropping the so-called "plus factors" from the elements of proof.[190]

This discussion is not intended to be an exhaustive list of possible divergences necessitated by the characteristics by developing countries. Instead,

---

188 See Budzinski, *The Governance of Global Competition* at 44 (cited in note 31).

189 See Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 172–74 (West 2000).

190 "Plus factors" are additional facts that the plaintiff may prove to strengthen the inference of collusion from merely parallel conduct. They include "an oligopolistic market structure, advance posting of parallel prices, a history of price fixing or exchange of price information." Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* at 175 (cited in note 150).

it seeks to demonstrate that there are so many fundamental differences in the way that markets, the economy, the judiciary, and the political system function in developed and developing countries that it is unrealistic to expect the same competition law rules to apply effectively to both of them. If one believes that competition law principles should reflect their surrounding socio-economic environment, substantive divergences instead of convergences should be the norm.

VII. CULTURAL VARIATIONS AND CONVERGENCE

The last, and perhaps most controversial, obstacle to convergence is the need to take into account how cultural norms affect competition and market behavior. Neoclassical economics and industrial organization, which has underpinned the theoretical development and application of competition law for a large part of the last thirty years, posits that consumers and firms are rational and operate in a utility- or profit-maximizing manner. Over the last decade or so, behavioral economists have challenged this fundamental assumption of neoclassical economics, arguing that individuals do not always act in a rational manner.[191] One implication of this stream of research is that consumers and managers can no longer be assumed to be Homo Oeconomicus, reacting in the same rational way to market events across cultures.

A. Cultural Norms and Competition

Sociologists and cross-cultural psychologists such as Geert Hofstede and Shalom Schwartz have long recognized that cultural norms affect economic behavior. Hofstede defines culture as "*the collective programming of the mind which distinguishes the members of one group from another*."[192] He measures business culture along four dimensions: masculinity versus femininity, individualism versus collectivism, uncertainty avoidance, and power distance.[193] The first three

---

191 See, for example, Maurice E. Stucke and Amanda P. Reeves, *Behavioral Antitrust*, 86 Ind L J 1527, 1570 (2011). See generally Cass R. Sunstein, ed, *Behavioral Law and Economics* (2000).

192 Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations Across Nations* 9 (Sage 2d ed 2001).

193 See Hofstede, 8 Intl Studies Mgmt & Org at 46, 52–54 (cited in note 121). Hofstede later added the fifth dimension of long-term orientation. Hofstede, *Culture's Consequences* at 359 (cited in note 192). Hofstede defines "power distance" as "[t]he extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally." Id at 98. He defines "uncertainty avoidance" as "[t]he extent to which the members of a culture feel threatened by uncertain or unknown situations." Id at 161. Furthermore, he understands "individualism" and "collectivism" as follows: "Individualism stands for a society in which the ties between individuals are loose[.] . . . Collectivism stands for a society in which people from birth onwards are integrated into strong, cohesive in-groups, which throughout

dimensions in particular have been shown to influence attitude toward competition. Cultures that are individualistic, masculine, and uncertainty-tolerant generally hold a more positive attitude about competition.[194] Meanwhile, collectivist, feminine, and uncertainty-avoiding cultures tend to prefer collaboration and eschew hard-nosed competition.[195]

In addition, cultural and historical development has been shown to affect the prevailing norms of industrial organization. Richard Whitley has demonstrated the links between the common forms of industrial organization in the major East Asian countries, namely *keiretsu* in Japan, *chaebols* in South Korea, and family businesses in the Chinese-speaking world, and their respective historical institutional environments. He observes that the "strong separation of ownership from control in large Japanese kaisha reflects the combination of integrated vertical loyalties, political and economic differentiation and decentralization and patterns of village organization in Tokugawa Japan."[196] Market dynamics have similarly been influenced by historical development in Japan.[197] Whitley notes that relational contracting in Japan is less dependent on personal ties than it is in China. The relatively impersonal connections between firms are built instead on collective corporate identities. This, again, was attributed to the governance structure in historical Japan.

B. Implications for Substantive Convergence

Cultural considerations may engender substantive divergences in competition law. Social scientists have noted that trust, which is the quintessential building block of cartels, is formed and maintained differently in various cultures. Doney, Cannon, and Mullen argue that trust is less likely to form in an individualistic and masculine society because of the greater incidence of self-serving and opportunistic behavior, which is deemed more acceptable in

---

people's lifetime continue to protect them in exchange for unquestioning loyalty." Id at 225. Lastly, a "masculine society" is one in which social gender roles are clearly distinct. There is greater emphasis on assertiveness, toughness, and material success, at least if they are exhibited and pursued by men. A "feminine society" is one in which social gender roles overlap: "[b]oth men and women are supposed to be modest, tender, and concerned with the quality of life." Id at 297.

194 See Hofstede and Bond, 16 Org Dynamics at 10–15 (cited in note 32). But see Eva G. Green, Jean-Claude Deschamp, and Dario Paez, *Variation of Individualism and Collectivism within and between 20 Countries: A Typological Analysis*, 36 J Cross-Cultural Psych 321, 334 (2005) (finding that "competitiveness can be associated with both individualism and collectivism because it appeared combined with both self-reliance and group-oriented interdependence").

195 See Hofstede and Bond, 16 Organizational Dynamics at 10–15 (cited in note 32).

196 Richard Whitley, *Business Systems in East Asia: Firms, Markets and Societies* 171 (Sage 1992).

197 See id at 174–77.

such a society than in a more collectivist society.[198] Moreover, the social sanction for such behavior is likely to be higher in a more collectivist society than in a more individualistic society. To the extent that individuals are highly trusting or collectivist in certain cultures, which has been found to be the case in some East Asian countries, cartel enforcement may need to be emphasized.[199]

There are reasons to believe that leniency programs may work less well in collectivist cultures. Defection is likely to be frowned upon, given the social ties among business executives in the same industry and the general aversion to confrontations in such cultures. Not only will the defecting firm likely be expelled from the trade association, but the business executives involved will also likely be socially ostracized and lose business connections.[200] In order to increase the attractiveness of leniency and induce defection, criminal sanctions may be necessary. Only when the cost of belated defection is prohibitively high, as in the case of imprisonment, will firms break away from their cartels and take advantage of leniency programs. Cultural considerations may thus bolster the case for criminalization in more collectivist cultures.[201]

Tacit collusion is similarly facilitated by the prevalence of trust and a collectivist mentality, which means that the determination of the existence of tacit collusion, may also require adjustment. One crucial difference between cartels and tacit collusion is that the co-conspirators do not explicitly negotiate with one another in the case of the latter. They must be able to reach terms of understanding among themselves tacitly. In more collectivist cultures, tacit understanding can be more easily attained: Co-conspirators can decipher and predict each other's conduct with less uncertainty as the range of possible conduct and motives will be narrower.[202] A lower burden of proof for substantiating a claim of tacit collusion may be appropriate. One may go even further and reverse the burden of proof once the plaintiff has provided evidence

---

198 Patricia M. Doney, Joseph P. Cannon, and Michael R. Mullen, *Understanding the Influence of National Culture on the Development of Trust*, 23 Acad of Mgmt Rev 601, 601–12 (1998).

199 Guiso and his co-authors found that the level of trust among different ethnic groups in the US shows significant divergences, with Japanese Americans being most trusting and African Americans being least so. See Luigi Guiso, Paola Sapienza, and Luigi Zingales, *Does Culture Affect Economic Outcomes?*, 20 J Econ Perspectives 23, 31 (Spring 2006).

200 As Ki Jong Lee noted, "[i]n a culture[] which regards cartel as a form of cooperation rather than a conspiracy for crime, an informer is nothing but a betrayer." Ki Jong Lee, *Cultures and Cartels: Cross-Cultural Psychology for Antitrust Policies* **8–9 (Loyola Law School, Institute for Consumer Antitrust Studies Working Paper 2003), online at http://www.luc.edu/law/academics/special/center/antitrust/pdfs/cultures.pdf (visited Oct 31, 2011).

201 For an excellent discussion of the recent trends in the criminalization of cartels, see Beaton-Wells and Ezrachi, eds, *Criminalizing Cartels* (cited in note 37).

202 See Doney, Cannon, and Mullen, 23 The Acad of Mgmt Rev at 610–11 (cited in note 198).

of parallel conduct. Once such evidence is furnished, the burden shifts to the defendant to negate the existence of tacit collusion.

Cultural factors may also be pertinent to the treatment of facilitating practices such as information exchanges. The general concern about these practices is that they may facilitate collusion.[203] It follows that in cultures where collusion is already easier to achieve, facilitating practices should be subject to closer scrutiny. Price information circulated and price recommendations issued by trade associations are more likely to lead to alignment in prices in countries with a highly collectivist culture. Leaders of trade associations may hold greater sway over their fellow members' business decisions. Competition authorities in these countries hence may need to adopt a stricter standard for facilitating practices.

Incorporation of cultural considerations in the design of competition law does not imply a wholesale repudiation of the primacy of industrial organization economics in competition law analysis. Far from it. Nor is it intended to imply that there are fundamental differences in the way the competitive process operates across countries. Firms and consumers largely behave in a similar fashion across cultures. The differences are in degree rather than in kind. However, there are instances where these minor differences may matter in how competition law analyzes certain competitive conduct. These differences may again call for divergent outcomes in the hard cases. Cultural considerations hence may necessitate substantive divergences and limit the feasibility of substantive convergence across the board.

C. Cultures and the Pursuit of Normative Convergence

Cultural considerations have even greater relevance for normative convergence than substantive convergence. Differences in cultural norms regarding competition directly bear on normative convergence. In some countries, there is a general lack of awareness, both within the general public and the bureaucracy, of the benefits of competition. If the awareness exists, it is weak and easily retreats in the face of competing policy objectives. For example, some countries have permitted the formation of cartels in the pursuit of industrial policy.[204] Government officials were even directly or indirectly involved in the formation of these cartels. For example, when sales tax was first introduced in Japan in 1989, the government allowed small and medium-sized businesses to fix prices so that they could pass on the tax burden to

---

[203] See Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* at 180 (cited in note 150); Sullivan and Grimes, *The Law of Antitrust: An Integrated Handbook* at 234 (cited in note 189).

[204] See Gerber, *Global Competition* at 211–13 (cited in note 5); Wakui, *Antimonopoly Law* at 17 (cited in note 5).

consumers.[205] There is much discussion within the international competition community about the inculcation of a "competition culture."[206] There is growing recognition that competition law will not achieve its full potential if it is not supported by a culture in which there is general appreciation of the benefits of competition.[207] Competition law enforcement will not gain legitimacy in the eyes of the public and receive the support it needs from the rest of the government and society at large. In this sense, efforts to promote normative convergence are to be welcomed.

It was argued earlier that a belief in the inherent merit of competition is not shared across the globe. Social scientists have found that countries that are more individualistic and uncertainty-tolerant are more likely to embrace competition. If efforts to promote a "competition culture" are to be welcomed, how far should such efforts go? Should we endeavor to raise the receptiveness to competition to that of the individualistic and uncertainty-tolerant cultures? There are reasons to believe that such an ambitious agenda is both unlikely to succeed and ill-advised. It is unlikely to succeed because cultural norms and values are notoriously impervious to change. Social scientists have shown that cultures tend to remain very stable over time.[208] While minor shifts are possible, significant changes are very difficult to achieve.

More importantly, such an ambitious agenda is ill-advised because attempts to harmonize cultural norms regarding competition presume a uniquely optimal level of belief in competition for all countries. Whether such an optimal level exists is open to dispute. A minimal level of faith in competition must prevail for markets to reap the benefits of competition. For example, it is a commonplace assumption in competition law that cartels are harmful to consumers. This is a reflection of the fundamental belief that firms are expected to compete and that such competition will benefit consumers. The aforementioned example of government-endorsed cartelization in certain countries is an apt illustration. The cartelization policy does not tinker with the degree of competition among firms; competition is eliminated altogether. Government-endorsed cartelization is most certainly a bad policy from the perspective of competition. There is an unassailable case for aligning cultural norms regarding competition beyond this

---

205 See Uesugi, 13 Geo Mason L Rev at 355–56 (cited in note 38).

206 ICN Advocacy Working Group, *Advocacy and Competition Policy* *31 (ICN 2002), online at http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf (visited Oct 26, 2011).

207 See id at **25–40.

208 See Ronald F. Inglehart and Wayne E. Baker, *Modernization, Cultural Change, and the Persistence of Traditional Values*, 65 Am Socio Rev 19, 21–22 (2000).

basic level, where such overt stymying of competition is tolerated if not encouraged.

However, once one moves beyond this minimum level of acceptance of competition, different cultures may understandably and legitimately differ on whether competition is to be maximized to the extent possible. While it is easy to agree that a complete displacement of competition is detrimental, the consensus breaks down once the question turns into one of degree. In particular, divergences arise in abuse of dominance. Here the question is not whether firms should be made to compete, but how vigorously they are allowed to compete. There are many areas of abuse of dominance, such as exclusive dealing, predatory pricing, and unilateral refusal to deal, that require difficult judgment calls. In particular, in calibrating the stringency of the legal standards for these practices, a jurisdiction will need to decide whether it prefers to err on the side of encouraging competition at the risk of under-protecting smaller firms from exclusionary conduct or on the side of over-protection of smaller firms at the risk of stifling competition and indulging inefficient firms. How this balance is struck is, to some extent, dependent on the prevalent cultural beliefs about competition in a given jurisdiction. Attempts to foster normative convergence by enforcing a common set of substantive rules across countries will be counterproductive. Such a project risks creating such a sharp divide between legal rules and cultural norms that it will undermine the legitimacy of the entire competition law enterprise in the eyes of the general public.

VIII. CONCLUSION

In light of the myriad divergences among jurisdictions, or even within individual jurisdictions, on some of the fundamental aspects of competition law, such as the range and meaning of its policy goals, the state of economic development and differences in how markets function, and cultural norms about competition, it is unlikely that deep convergence encompassing procedural, substantive, and normative aspects of competition law will be attainable over the short term. Nonetheless, it is important to emphasize that this Article does not suggest a wholesale repudiation of the convergence project. Convergence has, no doubt, improved the quality of enforcement in the emerging jurisdictions. Much useful knowledge and expertise has been transferred through capacity building and technical assistance programs to emerging jurisdictions. It has brought about a more sophisticated understanding and use of economic concepts in competition law analysis, focusing on the effects rather than the form of business conduct. This is an encouraging development.

This Article adds to the existing literature on convergence by questioning the facile assumption that a universally applicable set of competition law principles exists and should be followed across the globe. This Article has

hopefully illustrated that such an assumption is highly questionable. Competition law principles and doctrines must be fashioned and applied with an acute awareness of the local economic and socio-cultural environment. The lack of experience and expertise of most emerging jurisdictions in fact places a greater responsibility on established jurisdictions and international organizations to exercise care when forging and formulating an international consensus. Recommendations and best practices need to be prepared with their target audience in mind. The consensus builders must be aware that what has worked in their jurisdictions may not achieve the same results in other jurisdictions. If possible, caveats should be incorporated in the consensus documents so that emerging jurisdictions are aware of possible grounds for divergent practices. If that proves impossible, the onus falls on the officials involved in technical assistance programs to familiarize themselves with the recipient jurisdiction's economic and socio-cultural environment and to assist local officials in identifying needs for possible local adaptations. Only then will we achieve sensible convergence, one that reduces global divergences of competition law without neglecting local circumstances.