

LINKED-IN: ANTITRUST AND THE VIRTUES OF A VIRTUAL NETWORK*

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1. INTRODUCTION

If networking is the new world order¹, antitrust law is a provocative example.

Antitrust law is part of a genre. The genre is economic law that is national in origin, that has been adopted in scores of countries, and that addresses conduct that increasingly transcends national borders. Within this genre, cooperation is needed to carry out tasks that lie at the core of the law; commonality in rules, standards and modes of analysis is desirable to facilitate a linked world system and to soften clashes; and rules of priority and modes for respect are needed to intermediate differences. Moreover, nations that have recently adopted the law, and especially developing countries, appreciate guidance from more experienced jurisdictions, and the guidance itself is part of a feedback loop that generates soft norms. Finally, the area of law has been resistant to becoming international law. In this genre, networking fills a real need in a globalized world.

This article contains four parts. Part one explores the internationalization of markets and the stalled attempt to achieve an international law of antitrust. Part

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¹ See Anne-Marie Slaughter, *A New World Order* (2004). Slaughter conceptualizes networking across borders, and particularly networks of government officials, as a key feature of the new world order and a phenomenon that is “underappreciated, undersupported, and underused to address the central problems of global governance.” *Id.* at 1.

two explores the rise of the International Competition Network (ICN), which is a unique, virtual network of competition law officials.² Part three explores the functioning of the ICN, its benefits and its limitations. Part four contains an assessment and conclusions.

This article argues that the ICN provides an outstanding example of a vehicle for interaction and cross-fertilization among national authorities, producing some convergences of law, procedures and policy; increasing knowledge and understanding; and facilitating mentoring and other collaborative relationships. It observes that, in spite of great efforts of inclusiveness, the ICN agenda is principally set and the norms principally forged by the developed world, although consensus when reached involves give-and-take on all sides. The article explores whether the ICN, in spite of its founding concept of “no power,” *has* power deriving from the soft-norm formation that it generates. The article ends with an assessment of the ICN as it is and might be. It concludes that the ICN has exceeded expectations of effectiveness to accomplish its circumscribed mission and that it can be credited with a high degree of legitimacy. By its nature, it is not sufficient (and not intended) to accomplish tasks that could create more nearly seamless antitrust governance. For the future: The ICN has surprisingly strong (virtual) roots; but it needs continued leadership and new momentum, some of which can be supplied by mining the depths of controversial issues that it has thus far chosen to avoid.³

2. ANTITRUST, THE WORLD, AND THE STALLED POSSIBILITY OF A GLOBAL SYSTEM

2.1. WHAT IS ANTITRUST LAW?

The ICN is a network that arose somewhat serendipitously to fill a void. It arose in the absence of an international law of antitrust. To begin this description and assessment of the ICN, antitrust itself needs an introduction, in order to identify the seeds of national divergences as well as the space for commonalities.

² The ICN differs from networks in some other fields of law, which often are engaged in explicit rule-making and standard-setting. See Slaughter, *supra* note 1; Kal Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, 43 *Va. J. Int’l L.* 1 (2002); Pierre-Hugues Verdier, “Transnational Regulatory Networks and Their Limits”, 34 *Yale J. Int’l L.* 113 (2009) (comparing the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Competition Network).

³ For example, inclusive growth as an antitrust guide for developing countries, industrial policy as an unshakeable reality for not only China and India but the whole world.

Antitrust is law designed for market-based economies to control creation and uses of economic power and thus to help markets work for the benefit of the people (buyers, sellers, and firms competing on the merits) rather than for the benefit of a privileged and powerful few. The definition of antitrust law and the articulation of its goals change from time to time and are sensitive both to the context of each particular country, its state of development, and its economic conditions. In the United States for some ninety years, beginning in the Industrial Revolution, antitrust was conceptualized as law against power in the marketplace. In the 1960s, this concept was broadened. Antitrust became synonymous with marketplace pluralism and empowerment for the underdog. In the 1980s in view of lowered trade barriers and a quest for global competitiveness, U.S. antitrust was reconceived. It became and is now a tool for efficiency, usually interpreted as a tool to prevent consumer loss through creation or abuse of market power.

In Europe, competition law was defined at the outset of the European Economic Community in 1957 as a vehicle for three goals: market integration; control of abuses of economic power, often state-granted power; and leveling the playing field for business actors across the Member States of the Community. Especially since the mid-1990s, European competition law has emphasized consumers and efficiency, while still conceiving of competition law as a valuable tool to help carry out the agenda of Europe for innovation, integration and competitiveness.

In Asia, antitrust law was slower in development because business by consensus was the norm, such as in Japan under the umbrella of administrative guidance. Industrial policy and fairness to business were priorities. Eventually in Asia as well as most of the rest of the world, markets and competition became accepted as a norm. The embrace of markets was especially palpable after the fall of the Berlin Wall in late 1989 and in recognition of the failures of Russian communism and other totalitarian regimes to deliver an acceptable standard of living for the people. In many Asian countries and many other communities that have adopted competition laws, equity and industrial policy objectives – fairness to small and indigenous businesses, and the creation of national champions – were built into the law and remain goals. The national-policy mandate is clear on the face of the new antitrust law of China. Even in the supposedly market-friendly West, industrial policy and protectionism are not unknown, as is evident in the current financial crisis; but to the U.S. and the EU competition authorities, protectionism is an unwelcome intrusion into competition policy, while in Asian nations it may be an inseparable part.

Developing countries historically favored a restrictive-practices law, which was meant to proscribe restraints, especially by multinational enterprises, that coerced, foreclosed or squeezed domestic competitors or restricted their export opportunities. Much of the restrictive business practices (RBP) law addressed concerns with the gapingly unequal distribution of wealth and power. Eventually, most developing countries allowed “reasonableness” defenses to charges of restraints of trade and demanded that their law be friendly to consumers. Moreover, in the modern age of globalization wherein integration into the global economy is seen as the best hope for economic growth and alleviation of poverty, developing countries also desire a competition law likely to produce efficiencies and competitiveness for their firms.

Within each of these divergent conceptions there lie more differences, albeit less dramatic ones. For example, in modern times, although U.S. antitrust law and European competition law are by many measures congruent, they employ modes for reaching efficiency and serving consumers that sometimes differ from one another. U.S. authorities and courts are more likely to assume that the unfettered market will work to produce efficiency; that efficiencies gained by even a monopoly firm will inure to the benefit of the public; and that antitrust intervention tends to compromise efficiency and protect inefficient competitors, raising prices for consumers (except for cartels, which fix prices, divide markets or rig bids and are clearly inefficient).⁴ Therefore, non-cartel conduct must reach a high threshold before it is labeled anticompetitive. The European Commission and European courts are more likely to pursue the same goal (an efficient system that serves its consumers) by protecting dynamic rivalry, market access, and the competitive structure of the market. Moreover, European antitrust is sometimes proactive and is used, along with other tools, to liberalize markets such as telecommunications; whereas U.S. antitrust is defensive; the place of U.S. antitrust is to prevent obstructive acts that harm consumers but not to *create* environments or duties that might help them.

Despite the differences of the now 100 antitrust regimes, however, the generic characterization above works as a general description of antitrust.

2.2. WHY ANTITRUST NEEDS A GLOBAL FRAMEWORK

Antitrust needs a global framework, both because markets are global and because nations are strategic.⁵ Conduct launched in one nation can harm

⁴ See Eleanor M. Fox, “The Efficiency Paradox” in *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 77, 79 (R. Pitofsky ed., Oxford 2008).

⁵ See Eleanor M. Fox, “International Antitrust and the Doha Dome”, 43 *VA. J. Int’l L.* 911 (2003).

people around the world. Without a framework that rises above national boundaries, vision is impaired and coherence is lacking. Full costs and benefits of transactions are obscured. Firms in one nation may squeeze out competitors and harm consumers in another. Culprits may escape detection and punishment.

A piece of this problem – negative externalities – can in theory be handled by norms of extraterritorial jurisdiction embodied in the effects doctrine, by which victim nations can call foreigners to account. But often the victim nation does not have the resources or power to catch the offshore perpetrators. It may not even be able to obtain personal jurisdiction over them. Recourse is often more theoretical than real. These difficulties are experienced especially by developing countries, which almost by definition do not have the resources to catch and deter violations that originate beyond their borders.⁶ Therefore, ironically, in the case of a detected cartel that harms the whole world, victims in developed countries may be well compensated, while developing-country victims of the same conduct, who may need recompense much more, are left to suffer their wounds.

Second, for businesses (and therefore their customers), maneuvering a balkanized antitrust terrain is costly. A business firm may be forced to deal with twenty or fifty or more jurisdictions, all with different laws, to accomplish one transaction or to implement one business strategy. Being subject to the laws of 100 jurisdictions is disruptive and expensive. The costs are even greater when some nations' laws condemn what others allow, and especially if host laws handicap cost-saving or innovative conduct or impose divergent remedies.⁷ Therefore one hears the business plea in developed country fora: adopt *our* law. Converge to us.

Third, by national level law alone, we cannot achieve global coherence. Neither can we appreciate the full costs and benefits of a multinational merger, nor devise and enforce optimal and congruent penalties for world cartels or monopolistic conduct. Nor can we assure adequate compensation for antitrust victims or appropriately constrain state-authored restraints that privilege private or nationalistic interests.

⁶ See Eleanor M. Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways", 75 *N.Y.U. L. Rev.* 1781 (2000).

⁷ See A. Neil Campbell & J. William Rowley, "The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?", 75 *Antitrust L. J.* 267 (2008).

2.3. THE AGENDA FOR WORLD ANTITRUST LAW AND WHY IT HAS FAILED

In modern times, the Europeans were the first to articulate and promote a world antitrust agenda.⁸ Europe has spent half a century studying and implementing modes of establishing community among nations, having in mind the benefits of community-wide vision while being mindful of the realm preserved to the non-parochial sovereignty interests of each Member State. It is not surprising, therefore, that the European Community was the first jurisdiction to study the need for global vision in competition policy and to make recommendations to achieve it. A Committee of Wise Men convened, opined, and sketched a model of a competition law for the world, which they placed institutionally within the World Trade Organization (WTO). Under this proposal, designed for transactions or conduct with cross-border effects, the project for a world antitrust framework would begin slowly and from the ground up. It would start with building blocks of cooperation among nations' antitrust authorities, principles of transparency, non-discrimination and due process, and a program for capacity building and technical assistance to developing countries. It would multilateralize existing bilateral cooperation agreements. The system would advance to the adoption of common substantive principles against abuse of dominance and cartels, eventually encompassing the substantive law common to antitrust systems, and would put into place a process for dispute resolution within the WTO framework.⁹

The proposal was vetted within the Competition Directorate of the European Commission and then within the European Commission and European Council. It was aired and refined and became the basis for the Singapore antitrust initiative adopted by the WTO in December 1996, which established the WTO Working Group on the Interaction between Trade and Competition Policy.¹⁰ The Working Group, which met many times over the course of seven years, became a vehicle for discussions and submissions from scores of nations, developed and developing, on the benefits and drawbacks of a world competition-policy initiative, as well as submissions on the various discrete subjects of antitrust.¹¹

⁸ See also, for a useful account of the development of international competition policy as launched by the European Commission, Alberto Heimler, "Competition Policy as a Tool of EU Foreign Policy: Multilateralism, Bilateralism and Soft Convergence" in *The European Union Foreign Policy: Myth or Reality?* (F. Bindi ed., Brookings 2009).

⁹ *Commission of the European Communities, Report of the Group of Experts, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, COM (1995) 359 final (Dec. 7, 1995) [hereinafter Van Miert Report]. See European Commission, *XXVIth Report on Competition Policy*, at 95, COM (1997) 628 final (1996), available at http://ec.europa.eu/competition/annual_reports/rap96_en.html.

¹⁰ See European Commission, *XXVIth Report on Competition Policy*, supra note 9, at 95.

¹¹ See World Trade Organization, *Annual Report 1997, Trade and Competition Policy*, Vol. 1, Ch. 4, p. 29–91 [hereinafter WTO 1997 Report], www.wto.org/english/news_e/pres97_e/pr85_e.

Reactions of jurisdictions to an antitrust competence in the WTO differed widely. The United States expressed strong skepticism toward a world initiative for fear that developing and other countries' protectionist goals would be enshrined, that consensus principles would be reduced to the lowest common denominator, that disputes would be resolved by uninformed bureaucrats, and that independent agencies would lose their prerogative of prosecutorial discretion.¹² Europe, Japan, Korea, and Canada favored a WTO framework for antitrust as the natural next step. Hong Kong would support only a regime against state restraints of trade, while India and various developing countries stood against a world antitrust initiative for fear that resulting rules would favor the West and further colonize and marginalize developing countries. Developing countries feared also that they lacked the technical knowledge and sophistication to protect their interests in the course of negotiations, and that they lacked the resources and other capacities to establish and carry on the work of a competition agency.¹³

Despite the doubts, the idea of a competition initiative within the WTO gained traction and held its grip for some years. Reactively, the United States introduced a different idea. U.S. officials proposed a recommendation against cartels in the Organization for Economic Development and Co-operation (OECD). The OECD is an organization of developed nations, with no dispute resolution powers. While the Europeans had prioritized abuse of dominance and vertical restraints at national boundaries as the most heinous of antitrust offenses, Americans prioritized cartels. Americans regarded single firm (non-conspiratorial) acts and vertical restraints as usually efficient and good. They wanted to shift focus away from abuse of dominance and vertical restraints.¹⁴ They were not pleased with the WTO as an antitrust forum, for the WTO caters to the trade community. Results are negotiated among more than 140 (now 155) nations, including many developing countries, many of which were seen to prefer protection to

htm. See also the annual reports of the working group and the underlying documents, available at www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

For the history and early evolution of the WTO initiative, see Clifford A. Jones, "Come the Millennium (Round)? Competing Visions of International Antitrust Policy in the European Union and the United States" in *International Antitrust Law & Policy*, Fordham Corporate Law Institute 2000 31 (B. Hawk ed., 2001). For reflections on the work of the WTO Working Group, see Robert D. Anderson & Frédéric Jenny, "Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy" in *Competition Policy in East Asia* (E. Medalla ed., 2005).

¹² See Joel Klein, "Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century" in *International Antitrust Law & Policy*, Fordham Corporate Law Institute 1997 1 (B. Hawk ed., 1998).

¹³ See countries' submissions, www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm.

¹⁴ Vertical restraints are restraints in the course of distributing a product, such as exclusive dealing and exclusive directories.

competition. The virtues of a recommendation against cartels in the OECD were three-fold: it would prioritize hard core cartels (price fixing and market division among competitors); it would mute the stress on abuse of dominance and vertical restraints; and it would move the forum from the WTO to one comprised of more nearly like-minded countries and one without enforcement powers. At the OECD, no nation would risk being disciplined by a remote world organization and by decision-makers who might dislike multinationals, lack understanding of economics, and distrust free markets.¹⁵

The two initiatives – the focused one in the OECD and the broad one in the WTO – proceeded side by side. The OECD nations adopted the Hard Core Cartel Recommendation.¹⁶ The Hard Core Cartel Recommendation urges that nations adopt and maintain an anti-cartel law. It does not forbid derogations from the anti-cartel principle but it urges that nations limit and review their derogations. The signatory nations undertake to report new derogations to the OECD.

Meanwhile, in the face of U.S. criticism of its WTO initiative, the European Commission streamlined its proposal, limiting the substantive undertaking of states to adopting and maintaining an anti-cartel law¹⁷, and all but eliminating dispute resolution. Dispute resolution would be available only for certain objective defaults such as failing to maintain an anti-cartel law. Left unmodified were the recommendations that nations cooperate in matters of common interest, ensure transparency and procedural fairness in application of their competition laws, and support capacity building and technical assistance for developing countries. This slimmed-down proposal became a part of the provisional agenda of the round of the WTO introduced at the ministerial meeting at Doha, Qatar, in 2001 – a round dubbed the Doha Development Round in recognition of the fact that the developed countries had been the big winners of the recent trade rounds and the developing nations had not received a fair share of the gains. The Doha Agenda was meant to focus on measures that would especially help developing countries. At the ministerial meeting in Cancun in fall 2003, however, Europe and the United States came forward with insufficient offers to reduce

¹⁵ See Daniel Tarullo, “Norms and Institutions in Global Competition Policy”, 94 *Am. J. Int’l L.* 478 (2000), recommending that the OECD, not the WTO, be the forum for antitrust convergence.

¹⁶ Organisation for Economic Co-operation and Development [OECD], *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, C(98)35/Final (Mar. 25, 1998), available at http://strategis.ic.gc.ca/pics/ct/1998oecd_hccrec.pdf.

¹⁷ This change effected a sharp shift of focus from vertical restraints and abuses by dominant firms to cartels. See State Secretariat of Economic Affairs & Simon Evenett, eds., *The Singapore Issues and the World trading System: The road to Cancun and beyond* (WTI 2003); Heimler, *supra* note 8. The shift was a U.S. victory.

agricultural tariffs and subsidies, and the whole round faltered.¹⁸ The negotiators considered it necessary to jettison the more tangential aspirations, and the antitrust agenda was sacrificed to the hoped-for success of the round, which has now substantially failed.¹⁹

At present, there is no active agenda for world antitrust law, and the enterprise is not likely to be revived in the near future. While ongoing research, roundtables, and peer review activity continue in the OECD and United Nations Conference on Trade and Development (UNCTAD), much attention has shifted to the ICN. The work of these older organizations is important, and they continue to make significant contributions to the progress and coherence of antitrust in a globalized world, sometimes in collaboration with one another and with the ICN. The focus of this article on the ICN is not meant to minimize their continuing contributions.

3. THE RISE OF THE NETWORK

3.1. THE BIRTH OF THE ICN

By the late 1990s, in the wake of the successfully completed Uruguay Trade Round, heightened global business activity exposed the need for deeper transnational coordination in vetting mergers and rooting out cartels. In 1997 President Clinton's Attorney General Janet Reno convened the International Competition Policy Advisory Committee (ICPAC) to the US Attorney General and Assistant Attorney General for Antitrust to study the implications of globalization on antitrust cooperation and enforcement. The Committee was co-chaired by James Rill, former Assistant Attorney General for Antitrust, and Paula Stern, former Chair of the International Trade Commission. Its executive director was Professor Merit Janow of Columbia University. The Committee was comprised of ten other members, including seven business or foundation executives and three professors (including the author) of law, business and economics. At the time, the debate about a competition initiative in the WTO

¹⁸ See Joseph Stiglitz & Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* 1-6 (2005).

¹⁹ In the wake of the Cancun Ministerial Meeting, the European Commission issued a Communication considering how the EU could contribute to a revival of negotiations on competition and the other Singapore issues (investment, trade facilitation, and government procurement). As to the development dimension of the Doha Development Agenda, it said: "The integration of developing countries into the world economy is a necessary condition for development. Such integration will be deeper and fairer if anchored in the multilateral trading system." Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee, 26 Nov. 2003.

was active and gaining traction, and the U.S. Assistant Attorney General in charge of Antitrust, Joel Klein, had expressed strong opposition.²⁰

The Committee held hearings, received submissions, and deliberated. In 2000, it issued a report containing numerous recommendations for increased coordination and cooperation and modes for convergence of law and process, in particular regarding multinational mergers and world cartels. It recommended also a Global Competition Initiative (GCI).²¹ The GCI was envisioned as a virtual, voluntary forum with no ground address or secretariat, no power to make binding rules, and no power of adjudication. The idea for the enterprise stemmed from the realization that antitrust authorities, business people, and experts lacked a forum for the sharing of views and experiences, for close cooperation, and for exploration of common issues that could lead to convergence or harmonization. Although competition problems were increasingly global, these issues had no logical antitrust home.

No existing organization filled the need.²² The OECD was and is an organization of developed nations and is therefore – despite its outreach efforts – exclusive or limited. The UNCTAD caters to developing countries and was not satisfactory to developed countries. The WTO is a trade organization at which trade representatives have the seat at the table. Moreover, success at the WTO entails bargaining and trade-offs, in contrast to (what some antitrust officials saw as) the “purer” antitrust rule-of-law. Antitrust authorities lacked a table of their own. Further, in the WTO the mere prospect of committing their nations seemed to make the representatives reluctant to talk freely about solutions to common problems.

The GCI would by-pass the limits of each of these organizations. It would be a roots-up forum. It would include developing as well as developed countries. It would be purely voluntary, with no binding action. The logic of GCI, said the ICPAC Report, “stems in part from a recognition that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law.”²³

The ICPAC submitted its report to Attorney General Reno and Assistant Attorney General Klein in February 2000. In September 2000 at the Tenth

²⁰ See Klein, *supra* note 12.

²¹ U.S. Dep’t of Justice, Antitrust Div., *Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust* 281–85 (2000), available at www.usdoj.gov/atr/icpac/chapter6.htm [hereinafter ICPAC Report].

²² See Eleanor M. Fox, “Competition Law and the Millennium Round”, 2 J. *Intl Econ. L.* 665, 677 (1999) (proposing a World Competition Forum).

²³ ICPAC Report, *supra* note 21, at 284.

Anniversary Conference for European Merger Control, Assistant Attorney General Joel Klein made a proposal to the international group present:

[W]e all realize that bilateral efforts, while absolutely essential, are not a complete answer... There is still a lot of work to be done without an obvious unifying forum in which to do it. Our Advisory Committee recognized the problem and called for a Global Competition Initiative. I have been giving this considerable thought and believe that, whatever happens on antitrust at the WTO... we should move in the direction of a Global Competition Initiative, cautiously and on an exploratory basis, but in the end I think such a development is almost inevitable.²⁴

Klein's proposal came as a surprise to his counterparts, for until this moment unilateralism had held sway. European Competition Commissioner Mario Monti almost immediately welcomed the idea as a positive move towards multilateralism. But Klein's proposal was met with skepticism. Why yet another forum? Would the GCI only tread on the toes of the OECD, the UNCTAD, and to some extent the World Bank? Was the GCI an empty vessel, a "headless horseman," only meant to take the wind out of antitrust sails in the WTO?²⁵

Gradually, however, the idea of a virtual global antitrust initiative gained acceptance. In February 2001, the International Bar Association, with support from the American Bar Association Antitrust Law Section and the Fordham Corporate Law Institute, convened a meeting at Ditchley Park near London, under the leadership of William Rowley. The meeting resulted in support for an international competition initiative, which was to be useful to "multiple audiences: government, business, legal and other communities"²⁶; inclusive of developing as well as developed jurisdictions, and a forum in which participants could speak in their individual capacities. Rationalizing the merger process was to be high on the agenda. Indeed, rationalizing the burdensome, uncoordinated premerger filing processes of scores of jurisdictions seemed to be business lawyers' motivating passion for their support. The bar associations offered resources and analytical support and offered to host an initial meeting to

²⁴ See Joel Klein, Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Address at the EC Merger Control 10th Anniversary Conference: Time for a Global Competition Initiative? (Sept. 14, 2000), available at www.usdoj.gov/atr/public/speeches/6486.pdf. See also Merit Janow, "Observations on Two Multilateral Venues: The International Competition Network (ICN) and the WTO" in *International Antitrust Law & Policy: Fordham Corporate Law Institute 2002* 49 (B. Hawk ed., 2003); Jones, supra note 11.

²⁵ See Lawson Hunter & Susan Hutton, "Global Competition Initiative: A 'Headless Horseman'?" in *International Antitrust Law & Policy: Fordham Corporate Law Institute 2000* 25 (B. Hawk ed., 2001); "U.S. and Canadian Antitrust (Panel Discussion)" in *International Antitrust Law & Policy: Fordham Corporate Law Institute 2000* 45-59 (B. Hawk ed., 2001).

²⁶ Janow, supra note 24, at 51.

consider how to proceed.²⁷ This offer was not accepted by the antitrust authorities, who envisioned government agency control; but the Ditchley meeting and the support it engendered was to be a crucial factor in the eventual launch of the ICN.

The increasing but still tentative enthusiasm for the global forum coincided with the change in presidential administrations in the United States, from Bill Clinton to George W. Bush. U.S. support was crucial to the project. But “in early 2001 it was ... not yet clear how the incoming U.S. [Bush] administration would view the proposed initiative.”²⁸

Charles James was confirmed by the Senate as Assistant Attorney General in Charge of Antitrust in June 2001. He consulted with Timothy Muris, newly appointed Chairman of the Federal Trade Commission, and both gave their support to the project. James was especially attracted to the idea that the initiative would be “all antitrust, all of the time”²⁹ (i.e., not trade), and that the initiative would focus on practical tasks where solutions were achievable (i.e., ICN was not to be or to auger a lofty antitrust code for the world). The collaborators in the new initiative would pick the “low-hanging fruit” that touched no raw nerves. For example they would seek consensus as to the earliest date on which jurisdictions would receive pre-merger notifications, thus eliminating the inefficiencies of multiple uncoordinated filing requirements and waiting periods for multinational mergers.

By fall 2001, sufficient consensus had been achieved, and at the annual Fordham International Antitrust Conference, representatives of fourteen jurisdictions³⁰ came on stage and announced the launching of the initiative. As for the name of the enterprise, the word “global” was dropped. In the wake of the rioting at the G-8 summit in Genoa, “global” was feared to be a red flag to anti-globalization activists. “International” was a less-charged descriptor. “Network” added an interactive, non-hierarchical flavor. Thus: The International Competition Network.

By the time of the announcement of the launching at Fordham, some contours of the enterprise were clear and others soon became clear. The members of the ICN were to be the government antitrust (competition law) authorities. Representatives

²⁷ Id. at 52–53.

²⁸ Id. at 53.

²⁹ See Charles James, “Reconciling Divergent Enforcement Policies: Where Do We Go From Here?” in *International Antitrust Law & Policy*, Fordham Corporate Law Institute 2001 1, 5 (B. Hawk ed., 2002).

³⁰ Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia.

of international organizations such as the OECD, the UNCTAD and the World Bank were to be invited to participate in the work and meetings (but not the voting) as non-governmental advisors (NGAs). NGAs were to be drawn, also, from the legal, business, academic and consumer communities. The latter would be designated by the antitrust authorities of their nation. There would be a steering group, with a chair and vice chairs who would facilitate activities, including the annual conference and telephone conference calls on issues and procedures, and who would manage a web site. The work was to be project-based. Working groups would do research, draft memos, formulate proposed best practices, guidelines and recommendations for consideration at the annual meetings, and engage in other projects such as (as it developed) informal technical assistance. The ICN would facilitate the sharing of information and experience, facilitate cooperation, and work towards consensus rules, principles, methodologies, and procedures.

Thus, the ICN was born. As trade events took their course in Cancun³¹, the WTO initiative dissolved into the background and the ICN emerged center stage.

3.2. THE FUNCTIONING AND EVOLUTION OF THE ICN

One of the first tasks of the ICN steering group was to launch a work plan. Projects were to be prepared for the first annual meeting, which, it was decided, would be held in Naples in September 2002. To qualify, the subject matter of the project was to be of broad general interest and likely to engage a large portion of the membership, and the project was to be capable of achieving practical outcomes that would make a difference. A project on merger process was inevitable.

The project work would be carried out by working groups. Each working group would be guided by a chair or by co-chairs, often pairing (as it later developed) a developed and a less developed nation. All interested members of the ICN and the NGAs would be invited to participate in the work of the working groups.

In the initial stages of the ICN, working groups were formed on multijurisdictional mergers and advocacy. The project of the Advocacy Working Group was designed to highlight the important but daunting work competition authorities can do within their own governments: supporting pro-market policies where the market can work, advocating against unnecessary regulation and statism, and helping to develop a culture of competition. The working group

³¹ See Stiglitz & Charlton, *supra* note 18.

devised and distributed questionnaires to all members, synthesized the answers, and wrote a report, which was distributed at the first annual conference in Naples and posted on the ICN's website. The report addressed the role of advocacy, the fruits of advocacy in terms of tangible benefits for consumers and respect for the competition authority, political influences on advocacy, and the importance of institutional settings in either facilitating or obstructing the authority's advocacy efforts. This work has been, reportedly, of significant aid to competition authorities.

The Merger Working Group was divided into three subgroups: notification and procedures, the analytical framework of merger review, and investigation techniques in merger review. In the first year, the investigative techniques subgroup planned and soon thereafter held a workshop. The analytical framework subgroup sent questionnaires to all members, with a view to comparing the substantive tests for merger prohibition of each jurisdiction. The subgroup compiled the information for each jurisdiction and wrote a discussion paper on the objectives of analytical frameworks. This subgroup was later to compile an extremely helpful handbook consolidating the analytical methodologies of all responding jurisdictions, with case examples.

The subgroup on notifications and procedures was charged with the subject at the core of the defense bar's support for ICN. Leading members of the bar had been decrying chaos in merger control.³² At the time, approximately sixty-five nations required merger review, and the jurisdictions had different timing, different informational requirements, arbitrary filing deadlines, and often a long-arm reach to mergers with little relationship with the regulating jurisdiction.

The subgroup included leading merger lawyers from the private sector, who were active and indeed essential participants and became the reliable backbone of the work. The subgroup studied merger notification requirements in all member jurisdictions. It deliberated on practical possibilities for coherence. For the first annual meeting, it proposed that the ICN members adopt eight guiding principles to make the process more transparent, fair, and efficient, and it proposed three recommended practices to address needs for clarity, efficiency, and limits on excessive jurisdiction. It organized a "weblinks" project which posted links to the merger laws and guidelines of all members; it prepared a report on the costs and burdens of merger notification and review; and it later

³² See Global Forum for Competition and Trade Policy, Special Report, *Policy Directions for Global Merger Review* (1999) (organized by J. William Rowley, then Chairman of the International Bar Association's Section on Business Law and Director of the Global Forum on Competition and Trade Policy) [hereinafter *Global Competition Review* 1999].

published a report on confidentiality waivers with a model form, and a survey and report on merger filing fees. Also, the subgroup devised and facilitated a common template for the presentation of information about merger review procedures from the various jurisdictions. The group requested the member authorities to fill out the template with their own information for posting on the ICN website. More than 50 jurisdictions have now posted their information in template form, which is a form very friendly to practitioners and other users.³³

The eight guiding principles proposed were: recognition of each jurisdiction's sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely and effective review; coordination among agencies reviewing the same transaction; convergence of processes to agreed best practices; and protection of confidential information. The three recommended practices were: an appropriate nexus with the reviewing jurisdiction; clear and understandable notification thresholds based on objectively quantifiable criteria such as sales and assets (not market share); and a recommendation on the timing of merger notifications. The latter had two aspects: flexibility as to the earliest date of notification so as to permit parties to coordinate multijurisdictional filings, and elimination of filing deadlines.

The guiding principles were adopted, after discussion, at the first annual conference. The recommended practices were discussed, and later amended and adopted, along with others, at the second annual conference.

Thereafter, more working groups were formed. A Working Group on Competition Policy Implementation studied technical assistance by more mature to younger agencies and wrote a detailed report on what types and character of technical assistance tends to work and what does not work. The same working group devised and implemented an informal program of technical assistance. It introduced two models. Under one model, the consultation model, more mature agencies were invited to offer assistance (usually answering questions and having dialogues by telephone) in whatever area of competition law they chose, and younger agencies were invited to make inquiries of designated persons. Under the second form, the partnership model, more mature and younger agencies were paired, and they developed a mentoring/mentored relationship for the give-and-take in answering inquiries and addressing problems.

A Cartel Working Group was formed. Its members are currently preparing a manual on Anti-Cartel Enforcement Techniques. The working group has thus

³³ See International Competition Network [ICN], *Merger Working Group 2008–2009 Work Plan*, available at www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_3.pdf.

far posted three chapters on the website. It produced an anti-cartel enforcement template, available on the website, providing a common format for organizing the information of rules and procedures of the various jurisdictions' anti-cartel enforcement regimes. It assists host nations in organizing cartel workshops in many places in the world, attempting to make the training geographically available.

Also formed was a Working Group on Antitrust Enforcement in Regulated Sectors. This group studied the role of antitrust in banking and produced a report on the appropriate interaction between competition and regulations in the banking sector. It developed ten best practices, such as an open competitive environment without unnecessary restrictions. A Working Group on Telecommunications Services produced best practices of a similar sort on the respective roles for antitrust and regulation in the telecommunications sector.

In the earliest years of the ICN, the projects undertaken were chosen in part for their essentially noncontroversial and practical nature, in line with the formulation expressed by Charles James and echoed by the steering group's first chair, Konrad von Finckenstein of Canada, that the ICN would be devoted to getting practical tasks done. It became apparent, however, that some of the major issues of coherence were not about the nuts and bolts of practice. A proposal was made to study legal standards for abuse of dominance, with a view towards proposing recommended practices. Abuse of dominance was potentially a "lightning rod" subject. In the United States, the scope of the law (the prohibition against monopolization) had been increasingly narrowed.³⁴ Indeed many American jurists and policy-makers had expressed the view that almost all strategies of dominant firms, acting alone and not with competitors, are procompetitive and help consumers, and that most antitrust challenges to dominant firm conduct merely protect competitors from efficient conduct.³⁵ Many jurisdictions, and probably most developing countries, have a different perspective. In their experience, abusive use of power by dominant firms is a principal obstacle to achieving a competitive market. After discussion and debate, the steering group authorized the study of abuse of dominance.

Accordingly, a Working Group on Unilateral Conduct³⁶ was formed. It is co-chaired by the German Bundeskartellamt and the U.S. Federal Trade Commission. An unprecedented number of members signed up to participate in the Working Group on Unilateral Conduct, and a very large number of NGAs

³⁴ E.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

³⁵ See U.S. Dep't of Justice, Competition and Monopoly: *Report on Single-Firm Conduct Under Section 2 of the Sherman Act (2008)*, available at www.usdoj.gov/atr/public/reports/236681.pdf.

³⁶ Essentially, this means the law of abuse of dominance and its U.S. counterpart, monopolization.

joined the group as well. The initial subjects studied were: what are the objectives of unilateral conduct rules?, and what is substantial market power³⁷ and how is it proved? Questionnaires were formulated and distributed, answered by scores of members and NGAs, and analyzed. Memoranda were drafted, summarizing and describing the results, and were vetted in telephone conference calls with contributions from participants around the world, and by e-mail. The working group co-chairs and other interested participants then drafted recommended practices, which again were vetted by participants around the world. The work product was submitted to the steering group, and eventually submitted to the membership, debated and adopted.

The Working Group on Unilateral Conduct is also addressing specific practices that may be anticompetitive. It studied or is studying exclusive dealing, tying and bundling, discounts and rebates, and predatory pricing. It designs and distributes questionnaires to the members, to obtain information about their rules and methodologies. It is in the process of assimilating answers regarding certain practices. In doing so, the co-chairs pay particular attention to what the various authorities mean when they use words such as “anticompetitive,” “effect,” “foreclosure,” and “intent,” in order to understand divergences – often concealed by a superficially common language.

The above description gives a sense of the work of the working groups. There is much more.

In addition to the work of the working groups, the ICN (as noted) sponsors workshops on merger and cartel analysis, detection and enforcement. Most recently, it held a workshop on unilateral conduct, which focused on implementation of the recommended practices thus far adopted and analytical techniques for identifying significant market power and abuses.

The annual conferences are the culminating event of each year’s work and a focal point for completing promised work product. They provide a platform for the recommendations of the working groups, and other proposals, which are presented, debated, and normally adopted. The programming is designed to be inclusive of a large range of participants, including individuals from developing countries. For the first years, the annual conference programmers shied away from controversial issues. At the last annual conference (Kyoto 2008), however, there was at last lively debate. Issues of unilateral market power and abuse of superior bargaining position were addressed. All annual conferences feature a number of break-out sessions, at which participants explore issues more deeply and personally in small discussion groups.

³⁷ This would include dominant firm power and monopoly power.

After recommended practices are adopted, the working group that originated them normally gives guidance on how to implement them.³⁸ It may hold workshops to do so. For the recommended practices on merger process in particular, the ICN keeps track of their implementation, including which members change their legislation or rules to bring their systems into conformity. At least thirty-five ICN members, which is approximately half of all members with a merger notification system, have amended their laws, regulations or procedures, bringing them into closer conformity with the ICN recommendations.³⁹

Do members have any (soft) obligation to adopt the ICN recommended practices? On this point there is some difference of opinion or nuance. Konrad von Finckenstein, while chair of the Steering Group, said:

[T]he ICN is aspirational in nature. It makes best practice proposals. These practices are the product of the best minds in both the private and public sectors. While there is no obligation to adopt any of the best practices endorsed by the ICN, implementation will result from the persuasiveness of our work products, peer pressure among Members and the advocacy and support of NGAs.⁴⁰

William Rowley has suggested that ICN's success is directly related to implementation of the merger recommendations. He has expressed concern that "the implementation effort to date has not found sufficient traction to make a material difference with many of those agencies or regimes where implementation is most needed."⁴¹ The ICN Steering Group issued a news release at the close of

³⁸ See Implementation Handbook, Examples of Legislative Text, Rules, and Practices that Conform to Selected ICN Guiding Principles and Recommended Practices for Merger Notification and Review Procedures (April 2006), posted on www.internationalcompetitionnetwork.org/media/archive0611/notification.html, Fifth Annual ICN Conference, Cape Town, South Africa (May 2006). See also Randy Tritell, U.S. Federal Commission, slides, Panel II: Notification and Procedures, Third Annual ICN Conference, Seoul, Korea (April 2004), available at www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/notiproctritell.pdf.

³⁹ E-mail from Randy Tritell, Director, Office of International Affairs, U.S. Federal Trade Commission, to Eleanor Fox, Dec. 12, 2008.

⁴⁰ Konrad von Finckenstein, "International Antitrust Policy and the International Competition Network", in *International Antitrust Law & Policy: Fordham Corporate Law Institute 2002* 38 (B. Hawk ed., 2003).

⁴¹ See William Rowley & Omar Wakil, "The ICN Five Years On", *Global Competition Review*, May 2007 p. 29, available at www.mcmillan.ca/Upload/Publication/WRowley_OWakil_The_ICN_five_years_on.pdf.

The authors decry the fact that "the merger review provisions of a considerable number of ICN member regimes do not conform with, or even fall below, the ICN's recommended practices." They list non-conforming jurisdictions and their thresholds. *Id.*, 30-31. See also Ron Stern, General Electric, ICN Implementation Panel, Fourth Annual ICN Conference, Bonn, Germany, June 2005: "Implementation is the goal of the ICN," available at www.internationalcompetitionnetwork.org/index.php/en/library/conference/4.

the 2008 Kyoto meeting entitled “Competition authorities from around the world send clear message on convergence” – implying that greater conformity of the ICN members with the ICN recommendations is a measure of the ICN’s success.⁴²

4. ASSESSMENT: EFFECTIVENESS, LEGITIMACY, SUFFICIENCY

In this section we ask: is the ICN effective? Is it legitimate? Is it sufficient? Then we turn to a question that has bearing on all three inquiries: does the ICN have power or influence, and if so, what are the implications?

4.1. EFFECTIVENESS: IS THE ICN EFFECTIVE?

To assess effectiveness, we revert to the ICN’s ambitions. The ICN’s stated ambitions are modest. It aspires to provide “competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns,”⁴³ with a view also to facilitating consensus on issues of law and procedure, thereby bringing antitrust enforcement practices, techniques, and interpretations into greater alignment. The ICN also works to facilitate mentoring of newer and less experienced antitrust authorities.

The ICN was designed to be informal, to have no ground location, and to make no binding rules. The ICN was meant to have no power. The ICN was designed *not* to be antitrust governance.

Recall that the question at the outset was not whether the ICN would fulfill tasks of governance but whether it would do anything at all; whether it would be a “headless horseman”⁴⁴; whether it would be redundant; whether it could and would have any momentum given its humble virtual aspirations; and whether, even if it got traction, it would quickly wither away.

Judged by its own aspirations and against a chorus of skeptics, the ICN has been an enormous success. It appears to be stable and (virtually) rooted. It has leadership and momentum. It is a unique connector of people around the world

⁴² ICN, Newsroom 2008, www.internationalcompetitionnetwork.org/index.php/en/newsroom/2008 (last visited 18 March 2009).

⁴³ ICN, About the ICN, www.internationalcompetitionnetwork.org/index.php/en/about-icn (last visited Mar. 18, 2009).

⁴⁴ See Hunter & Hutton, *supra* note 25.

committed to a common task. It inspires hard work and devotion. It provides information, perspective, and contacts. It provides guidance and moral support to newer and more vulnerable agencies pursuing the lonely and often resisted task within their nation of creating a competition culture. It provides a blueprint or referent for agencies in drafting or revising their rules or regulations.⁴⁵ And it gives anchor to officials of the newer agencies appearing before legislators and jurists. “This is the way it is done in the world” or: “This is the international standard of good practice” is powerful testimony.

The ICN has created a unique work product. Its leaders and cadre of volunteer workers are continually adding to the work product, virtually all of which is posted on the website. The templates for merger analysis and cartel enforcement convey important information about each jurisdiction in a common form, and the merger guidelines handbook of principles, analysis, and methodologies is both an informative comparative document and a guidance document. The competition advocacy toolkit, and the cartel handbook, including methods of detection and enforcement, are deeply informational and useful sources for knowledge and skills. The various authorities’ answers to questionnaires, for example on the objectives of their law and on their framework for analyzing unilateral practices, are all posted on the website and form a unique trove of information for research and understanding of comparative antitrust law. The guiding principles and recommended practices in merger review are a particular achievement. Nations’ implementation of the recommended practices and use of the guiding principles have rationalized the global merger process, reducing costs, eliminating conflicts, and facilitating transactions. The annual workshops on cartels and periodic workshops on mergers and, more recently, unilateral practices, educate and facilitate convergence. Close professional relationships are forged in the working groups, in the course of the informal mentoring and technical assistance, and at the annual meetings. These networks of relationships deepen understanding, respect, and trust, build community, and provide ready-made avenues for mutual assistance and cooperation.

It appears to this observer that, as a result of the ICN, merger process in the world has improved, cartel enforcement in the world has improved, and the mutual understanding of laws, policies and cultures among the myriad participants has reached a new level.

⁴⁵ The ICN has, for example, given advice to officials of the new antitrust regimes in China and India. The American Bar Association Antitrust and International Law Sections and the International Bar Association have likewise given advice to China and India based in the ICN recommendations. India has explicitly linked revisions to its draft merger rules to the ICN recommendations.

One may also assess the effectiveness of the ICN in relation to other organizations. Recall that skeptics argued that existing organizations were already performing or could easily perform the tasks targeted by the ICN. From the vantage of eight years later, what are the merits of this claim of redundancy? The answer to the question is clear. The ICN is doing work that neither the OECD, nor the UNCTAD, nor the WTO could do or could do as well, given the nature, the constituency, and the orientation of each of these bodies.⁴⁶ Moreover, a WTO antitrust regime never materialized. The very informality of the ICN, with its lack of secretariat, antitrust-only agenda, noncontroversial initial agenda (merger filing rules and modes of advocacy), and lack of power to make rules or enforce them, has conduced to the fruitful interchange that characterizes the ICN.

Should the ICN's effectiveness be assessed also in terms of the extent to which its recommended practices have been adopted and implemented? Some argue that implementation is the measure of the ICN's success.⁴⁷ This author disagrees, but observes nonetheless that there has been a substantial degree of implementation of the ICN's merger process recommendations.

4.2. LEGITIMACY: IS THE ICN LEGITIMATE?

The ICN is built around notions of participation and transparency.⁴⁸ All antitrust jurisdictions of the world are invited to belong to the ICN. Representatives of all authorities are invited to attend the annual meetings and workshops and to take part in all working groups. A substantial number of non-governmental advisors (predominantly from the defense bar and business but also some academics and others) actively participate; although consumer groups and representatives of the private plaintiffs' bar are noticeably underrepresented. Attendance at the annual meetings is high. More than 500 delegates, representing more than seventy agencies, NGAs, observers and guests, took part in the Seventh Annual

⁴⁶ The ICN's unique networking approach, which harnesses immense energy of private stakeholders, is a distinguishing feature.

Also, there is a complementarity among the organizations. The ICN's active and dynamic work has acted as a competitive spur to enliven the competition policy work of the OECD.

⁴⁷ See Rowley & Wakil, *supra* note 40; ICN, Newsroom 2008, *supra* note 41.

⁴⁸ See summary of remarks of William Kovacic regarding efforts of the ICN fund-raising committee to attract sufficient funds to enable the attendance of representatives of the developing countries, Report on the First Annual Conference of the ICN (Naples, Italy, Sept. 2002), page 11, posted on the ICN website at www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/icn_naples_report.pdf. Most systems, however, do not follow the United States procedure but limit challenges to notifiable mergers. For the importance, generally, of transparency, see William Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, Remarks before the Seoul Competition Forum, April 20, 2004, available at www.ftc.gov/speeches/other/040420compolicyinst.pdf. See also Slaughter, *supra* note 1; Raustiala, *supra* note 2.

Conference in Kyoto in April 2008. The ICN prides itself on its open, inviting, inclusive, and transparent process.

The degree of participation by other than a central core of mature antitrust jurisdictions is predictably limited by lack of funds (despite some funding by the ICN), lack of time, sometimes by lack of expertise, and sometimes by language. (The lingua franca of the meetings is, most often, the language of the host plus English.)⁴⁹ The numerous round-the-world telephone conferences are scheduled for times that will be not inconvenient for most of the world, but this often means 8:00 a.m. eastern time, disadvantaging Australia, New Zealand, and the Far East. Less well-resourced authorities have constraints against aspiring to be chair of the steering group and even serving as a member of the steering group. This means that authorities from resource-strained nations have less opportunity to participate in setting the agenda and to write first drafts of recommendations. Individuals not confident of their English language abilities or their level of technical knowledge are reluctant to speak and often remain silent. These practical considerations may produce effective underrepresentation of developing countries, and (at least by default) greater voice of the two antitrust leading models in the world – the United States and the European Union.⁵⁰

These observations would make less difference if the ICN had no power. But does the ICN have power, in spite of its proclaimed nature? This is a question to which we shall come.

4.3. SUFFICIENCY: IS THE ICN SUFFICIENT?

By definition, the ICN is not sufficient as antitrust global governance; it was never meant to be. It is not sufficient to solve world competition problems that arise from the internationalization of markets such as the disconnect between anti-dumping laws and predatory pricing, jurisdictional gaps allowing export cartels, parochial uses of state measures that immunize private action, and the lack of a coherent view of world competition and trade-and-competition

⁴⁹ Sometimes an additional option, such as German, Italian, French or Spanish, is available; but translation is expensive. The documents are almost all in English. The merger recommended practices are posted also in French and Spanish.

⁵⁰ See Daniel Sokol, "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age", 4 *Berkeley Bus. L.J.* 37, 106–07 (2007). Sokol notes that the concern is mitigated by membership of several developing countries on the ICN steering committee. Indeed, in January 2009, David Lewis of South Africa became the interim chair of ICN, succeeding Sheridan Scott of Canada upon her stepping down as Competition Commissioner of Canada.

problems.⁵¹ The ICN limits itself to facilitating dialogue, mentoring, and nudging applications of national laws to be more alike.

By facilitating convergence of procedures and legal principles, the ICN could pave the way towards a future international antitrust system.⁵² Perhaps more likely, the ICN and the work of the sister institutions, think tanks, and international conferences and training programs, will fill enough of the gap, softening rough edges, to alleviate a felt need for an international law of antitrust. The work of the ICN may tend to confirm the perspective that only an open, informal, and notionally non-consequential process can achieve as much trust, respect, sharing and consensus as the ICN has done and is likely to do.⁵³

4.4. DOES THE ICN HAVE POWER?

What if the ICN has power, by effect if not purpose? What if the ICN is becoming the international antitrust standard-setting (norm-setting) organization for the world? The answer has bearing on all three of the factors examined: effectiveness, legitimacy, and (in part) sufficiency.

We have seen in other fields, such as banking, the migration of soft law standards set by discrete and even secretive bodies into harder international standards.⁵⁴ We have noted the use of soft antitrust law to influence legislators and jurists. And we have noted the claim that if the ICN does not achieve convergence, it has failed. More particularly, the ICN merger recommendations have influenced and continue to influence the drafting and revision of merger laws of member nations⁵⁵, and they informed an OECD recommendation on merger

⁵¹ See Eleanor M. Fox & Janusz Ordover, "Internationalizing Competition Law to Limit Parochial State and Private Action: Moving Towards the Vision of World Welfare", 24 *Int'l Bus. Law.* 458 (1996); WTO 1997 Report, supra note 11; Heimler, supra note 8.

⁵² The degree of divergence of the law of the various nations has been cited as one reason why the world was not ready for an antitrust regime in the WTO. See Douglas Melamed, "Promoting Sound Antitrust Enforcement in the Global Economy" in *International Antitrust Law & Policy: Fordham Corporate Law Institute 2000 1* (B. Hawk ed., 2001).

⁵³ These accomplishments, however, do not imply that the ICN meets the unfilled need for a coherent trade-and-competition perspective. See Fox & Ordover, supra note 51; WTO 1997 Report, supra note 11. See Chris Noonan, *The Emerging Principles of International Competition Law* (2008), suggesting that "The work of the ICN could formally and informally feed into the WTO processes." *Id.* at 563.

⁵⁴ Roman Grynberg & Sacha Silva, "Harmonization Without Representation: Small States, the Basel Committee, and the WTO", 34 *World Dev.* 1223 (2006) (noting that small states, excluded from the process, were put at competitive disadvantage by banking standards).

⁵⁵ See Tritell, supra note 38; Rowley & Wakil, supra note 40.

notifications.⁵⁶ It is therefore not fanciful to consider that the ICN's output may develop into soft law with some influence.

On this hypothesis, we might wish to consider two points. First in setting the agenda, is more deference due to the ideas and preferences of the "outer group"? If more deference is accorded, might more issues surface that are of particular interest to the less mature and smaller nations and other jurisdictions that are less like the United States and Europe? Second, might the ICN wish to balance the benefits of consensus against the benefits of freedom to diverge? After debate has failed to convince all members that a proposed standard or methodology is good for it, might the ICN, rather than pressing for consensus and thus tending to discount outliers, give the nod to a diversity of perspectives?⁵⁷ To consider this balance between convergence and recognition and appreciation of diversity, I present below two examples and then ask, how important to "global antitrust" is the emergence of one rule for the world?

At the first annual conference, in Naples 2002, the Mergers Working Group presented recommended practices regarding merger notifications: what mergers must be notified to reviewing authorities, when, and in what form? The proposed recommended practices required (among many other things) a significant nexus between the merging parties and the reviewing jurisdiction, so that transactions that were unlikely to have an appreciable anticompetitive effect in a potential reviewing jurisdiction would be screened out of the process. One of the recommended practices stated that the nexus (e.g., sales in the jurisdiction) should be measured by the local activities of at least two parties to the transaction or by reference to the acquired firm's business in the local territory.

The director general of a competition authority of a small country argued that sales of the *acquiring* business in the local territory should also, independently, satisfy the nexus requirements, since a domestic acquiring company might harm competition in that nation by acquiring a foreign potential entrant. He proposed amending the language of the recommendation so that nexus could be satisfied by the activity of the acquired company "or the acquiring company." The amendment was opposed on grounds that the addition would pick up too many

⁵⁶ OECD Recommendation on Merger Review, 23 March 2005 – C(2005)34, available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c\(2005\)34](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/c(2005)34).

⁵⁷ See Dani Rodrik, "Institutions for High Quality Growth: What Are They and How to Acquire Them?", 35 *Studies in Comparative International Development*, No. 3, p. 3 (fall 2000): "I emphasize the importance of 'local knowledge' and argue that a strategy of institution building must not overemphasize best-practice 'blueprints' at the expense of local experimentation." p. 5. Yet, there are trade-offs between blueprints and experimentation; there is opportunity for "institutional arbitrage"; much technical legislation can be borrowed wholesale or at least be a source for learning. *Id.* at 13–14.

non-problematic mergers, and that nations could, as does the United States, address the problem by allowing the authorities to challenge even non-notifiable mergers. The proponent of the amendment was later accommodated.⁵⁸

Smaller and transitional jurisdictions may have preferred the wider net for merger control (although they also may be relieved by a smaller pool of transactions to vet). The ICN recommendation was advantageous to the business communities, which worried about the business costs of a wider net more than the public costs of mergers that might slip through the holes in the net.⁵⁹

The second example involves abuse of dominance. There was, as to be expected, some diversity of point of view on how to analyze and apply abuse-of-dominance law. The first important issue was how to prove “substantial market power” – which is a first step in the proof of whether the economic power was abused. In proving substantial market power, may significant or even controlling weight be appropriately given to the putative dominant firm’s large market share? May and should proof of a large market share satisfy the plaintiff’s prima facie case?

Most mature jurisdictions and their NGAs argued that proof of substantial market power is a very complex matter; that market shares mean very little in themselves, and that significant economic evidence is necessary to hurdle this first stage in an abuse of dominance case. They expressed concern that a simplistic market share test for market power would unjustly label too many firms “dominant,” the label of dominance would focus a spotlight of suspicion, and the effect would be to cause the firms to pull their punches and thus to chill their procompetitive, inventive behavior.

The South African representative, David Lewis, Chair of the South African Competition Tribunal, strongly disagreed with the rejection of the market share proxy. He especially disagreed with the proposed recommendation as applied to South Africa. He argued that developing countries cannot bear a heavy burden of proof at this first stage of proceedings against an apparently dominant firm;

⁵⁸ The ICN addressed the problem by adding to the recommendation: notification thresholds may be based on the acquiring firm’s local activities but only if 1) the authority would otherwise be deprived of jurisdiction over the merger, and 2) additional jurisdictional screens are added to minimize filing requirements for non-problematic acquisitions. See the recommended practices on ICN website, at www.internationalcompetitionnetwork.org/index.php/en/library/doc-type/1.

⁵⁹ Of course, if business is paying unnecessary costs; this also harms their customers – the consumers.

Under either proposal, filing thresholds based on sales or assets in the reviewing jurisdiction are arbitrary. A larger quantum of sales is no indication of anticompetitive effects. Market share in the jurisdiction would be better correlated with anticompetitive effects, but market share as the benchmark was rejected as too subjective and giving less certainty.

that authorities should be able to use high market share as a proxy for market power, and that a rule requiring complex economic evidence and analysis to determine whether a firm with a high market share was indeed dominant would tend to put beyond the ability of developing countries' competition authorities the power to challenge the persistent monopolistic conduct that blights their economies.⁶⁰

A document emerged from the process and was adopted at the annual conference. It states that proof of substantial market power is a complex inquiry; “[a] firm should not be found to possess dominance/substantial market power without a comprehensive consideration of factors affecting competitive conditions in the market under investigation.” “Market shares... should be used” as a starting point for analysis. “However, since market shares fail to reflect certain important features of the competitive environment, in particular market dynamics, they should be put into perspective by consideration of other factors, such as potential entry...” The recommendation identifies the various indicia that should influence analysis.

South Africa lost the battle. However, the mature jurisdictions and their NGAs lost their claim that large market share is no sign at all of economic power and should never be a basis for burden-shifting.

Developing countries and poorly-resourced authorities might have been better satisfied by an ICN endorsement of the use of a high market share, or persistent high market share in the context of a high-barrier market, as a proxy for substantial market power. They might have been better satisfied by an ICN document stating that a high market share accompanied by barriers to entry may give rise to a presumption of economic power, which is in fact the law in many jurisdictions.⁶¹ The recommendation is more conservative than the law.

An unastounding observation can be drawn from these vignettes. The voices of the major players in the developed world are likely to be more influential than the voices of developing and small economies. Even so, the leaders of the ICN have shown consistent resolve to include, involve, and respond to all voices.

⁶⁰ David Lewis, “Chilling Competition”, *International Antitrust Law & Policy: Fordham Competition Law Institute* 2008 419 (B. Hawk ed., 2009). Under South African competition law, “[a] firm is dominant in a market if – (a) it has at least 45 percent of that market...” Competition Act of 1989, Section 7.

⁶¹ Caselaw in most jurisdictions, including the United States, provides that very high market shares (such as in excess of 70 percent) shifts the burden to the putative dominant firm to show that it does not have significant market power. See “Market Share as an Indicator of Monopoly Power” in ABA Section of Antitrust Law, *Antitrust Law Developments* 234–236 (5th ed. 2002). For Europe, see *AKZO Chemie BV v. Commission*, Case C-62/86, [1991] ECR 3151.

4.5. IMPLICATIONS OF THE HYPOTHESIS OF ICN'S POWER OR INFLUENCE: THE IMPORTANCE OF CONVERGENCE VERSUS THE IMPORTANCE OF RECOGNIZING DIVERSITY

How important to a linked world is commonality of rules, standards and procedures? How important is recognition of diversity?

To explore these questions, we might take three examples. The first example is one of the ICN merger recommendations: the recommendation of flexibility in the required timing of filings so as to permit early merger notification – e.g., merger notification may be made upon the parties' certification of a good faith intent to consummate the transaction. This recommendation addressed the problem that jurisdictions specified different triggering dates, resulting in a situation in which the same merger could not be filed on the same day in the many regulating jurisdictions. Uniform implementation of the recommendation would simplify the filing process and save millions of dollars for the merging firms. Also, it would enable agencies to coordinate reviews. Retaining divergences would serve no purpose. Nothing was at stake for a nation faced (merely) with changing its permissible filing date to accord with the recommendation.

The second example is the nexus requirement, discussed above. Mature jurisdictions and the business community preferred a rule limiting the set of mergers subject to notification in a jurisdiction to those in which both merger partners or at least the acquired partner had sufficient sales or assets in the jurisdiction. At least one small jurisdiction expressed preference for a more copious rule that would have allowed the nexus requirement to be fulfilled by the significant presence of either merger partner. Adopting the smaller net would go some distance in helping to solve the recognized problem of excessive reach of merger filing laws. It would help grease the wheels of business efficiency in the world. It would also relieve agencies of the burden of vetting large numbers of probably non-problematic mergers. Yet (at least *arguendo* for purposes of this example), for some jurisdictions the larger net would enhance the quality of their antitrust enforcement, catching acquisitions of potential entrants. Would the wider reach significantly disrupt and unduly burden business? Experts may disagree. In any event, mere advocacy for conformity with an ICN recommendation such as this seems harmless.⁶² The *principle* requiring an appreciable nexus is not fairly contestable. The recommendation brings home the importance of the principle in a potentially unruly world. One may hope that all

⁶² Such advocacy is especially harmless in view of the amendment to the proposed nexus recommendation. See note 57 *supra*.

nations will take cognizance of the principle. If some nations object to its restrictive application, they may simply design their nexus rules as they see fit.

Third is the proof-of-dominance example from the unilateral conduct project. The problem here is much more complex, because it is about substantive principles of law, claims of “sound economics,” practicalities in enforcement, market contexts, and agency capabilities. Economies differ from one another. Some economies have been historically monopolized by state enterprise; others boast merit-grown businesses in robust markets, and no historic statism. Some agencies are well funded and staffed with teams of economists; others are resource-starved. The different characteristics may call for different formulations of law.⁶³

This third example is the one example in which ICN outputs are susceptible to becoming soft and maybe harder law for the world. Common substantive principles of law for the world are good and useful, for coherence, efficiency and guidance, all other things being equal. But all other things are not equal, as the developing country experience constantly affirms.⁶⁴ Especially if ICN standards might become an influential source for antitrust standards in the world, it seems to this writer that, in the third situation, recognition of diversity is more important than conformity. Thus, the ICN might usefully adopt Slaughter’s “norm of legitimate difference.”⁶⁵

5. CONCLUSION

In conclusion, the ICN has been dramatically successful. Its limits have also been its success. It has carved out a space for itself that no other enterprise or project could have achieved. Its own success may have overtaken calls for a global framework for antitrust proper, suggesting that a future WTO project might limit itself to the trade-competition issues left unaddressed.⁶⁶ The agenda of “all antitrust all the time” has paid off.⁶⁷

⁶³ See John Fingleton & Ali Nikpay, “Stimulating or Chilling Competition” in *International Antitrust Law & Policy: Fordham Competition Law Institute 2008* 385 (B. Hawk ed., 2009) (noting that economies with sluggish markets might need more affirmative antitrust).

⁶⁴ See *The Growth Report: Strategies for Sustained Growth and Inclusive Development*, Michael Spence, chair (2008), available at www.growthcommission.org.

⁶⁵ See Slaughter, *supra* note 1, at 247–50, 259. The norm of legitimate difference mandates “respect ... to national officials unless a specific reason exists to suspect that they will chauvinistically privilege their own citizens.” *Id.* at 248. “It enshrines pluralism as a basis for, rather than a bar to, regulatory cooperation...” *Id.* at 249.

⁶⁶ These include the flanking issues of dumping/predatory pricing, market access, export cartels, and state shields that protect private anticompetitive conduct.

⁶⁷ The circumscribed mandate need not deter the ICN from addressing global questions that *are* “all antitrust” – such as a world clearing house for filings of international mergers,

The exuberance comes with two big caveats, based on inconsistent scenarios. First, the ICN's roots are only virtual roots. Virtual roots are easily pulled up. If the leaders and networkers stop pedaling the ICN bicycle, the bicycle will fall. This amazing virtual organization is fully in place and its movers are unusually hard working and productive (and open and inviting). But ICN depends on continuous devoted leadership and engaging and useful projects. While there is almost no end to global competition problems, the ICN has picked much of the low-hanging fruit. The problems yet to be tackled are more controversial and harder to solve.

To address these problems, a productive future might encompass three aspects: First, the agenda. Some projects might be chosen even when the problems appear intractable. For example, future projects might include nationalistic aspects of financial rescues; cumulative regulation (where laws of many nations are applied to the same cross-border conduct) that becomes over-regulation; jurisdictional clashes; and needs of developing countries in addition to technical assistance and capacity building. Discussing these problems with new sympathy and in new light might lead to an architecture for building bridges over persistent gaps.

Second, testing effectiveness. The ICN might take inventory to examine its apparent successes and shortcomings.⁶⁸ What do the representatives at the ICN annual conferences do when they return home? Do they brief their fellow officials and staff? Do they examine their nation's state of compliance with ICN recommended practices, and consider how to comply (or why not to comply)? Do they do nothing? How well do the working groups function, and how useful is their output? How useful are the workshops for learning techniques and ideas that can be implemented at home? What can be learned from networks in other disciplines, such as are examined in this symposium issue?⁶⁹

Third: movers and leaders. Inspired and hard-working movers and leaders are critical. The ICN has been blessed with such leaders from scores of countries for

methodologies and priorities to modulate systems clashes, and the role of the financial crisis in the application and enforcement of antitrust laws.

⁶⁸ See generally Kovacic, *Achieving Better Practices*, supra note 48, for a wise presentation of the virtues of self-examination.

⁶⁹ Other networks, however, are likely to be more ambitious and by their very ambition they confront challenges that the ICN avoids. By working towards rules and world governance, other networks may confront two types of problems, as identified by Pierre-Hugues Verdier, supra note 2 at 115. First, domestic political pressures may be brought to bear to constrain regulators' autonomy to pursue wise global policy. Second, tighter cooperation is likely to raise significant conflicts over distributive consequences, for the costs and benefits of proposed standards may fall differently on different states. In view of these problems, Verdier questions Slaughter's claim that networks offer an alternative to regulatory races to the top or bottom. *Id.* at 143. By rejecting the pursuit of binding rules, the ICN by-passes these problems.

all of its nine years. The inspirational flame must keep burning. It is most likely to keep burning in a world in which the ICN matters.

While the first caveat was that the ICN could fall apart, the second caveat is: the ICN might have power. The ICN is a vehicle for soft-law formation, and soft law has a tendency to become hard law. For that reason, more acknowledgment might be made of the needs and context of developing countries, small economies, and indeed all jurisdictions other than the U.S. and the EU. This can be done seamlessly within existing frameworks. Work product, even in the form of recommended practices, can acknowledge differences among nations in analytical methodologies and in preferred rules – differences that may stem from stages of development, unequal agency capacities, and weakness of competition in local markets. Moreover, the power scenario means that the ICN must pay continued attention to transparency, process and participation, and indeed might consider a greater voice for consumer groups, plaintiffs' lawyers, and other underrepresented stakeholders.

The ICN has far surpassed expectations. It fills a real need in global antitrust. As Joel Klein said in the months before the birth of the ICN, if it did not exist, it would have to be invented. It is a model worth exploring by other disciplines in the cohort of national economic law that applies to conduct in global markets and yet resists internationalization.