

SOME REFLECTIONS ON THE ICN^{*}

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By 2009 – eight years into the life of the ICN – the network and its portfolio of projects had already grown well beyond the stage where its past activities could be meaningfully summarised by an opening oral presentation to the Annual Conference. This claim could be easily verified by the packed agenda – a feature of ICN annual conferences; by the formidable pack of documents that confronts each delegate; and by the dauntingly impressive schedule of activities. Indeed those who have been responsible for planning and hosting annual conferences will know that probably the most difficult and politically sensitive task is structuring the agenda so that the work of each of the working groups is adequately reflected and appreciated.

The sheer volume of work – and, possibly more to the point, its generally high standard – is a remarkable testament to the commitment of ICN members and to the highly participative group of NGAs who conduct their work on, often inconveniently timed, international telephone conferences and without the benefit of a permanent secretariat or a large piece of real estate in Geneva, New York or Paris.

In some sense the fact that the ICN Annual Conferences are without exception smoothly run – full of content and yet with significant opportunity for networking, re-connecting with old friends and colleagues and connecting up with new ones – camouflages the tremendous unseen effort that underpins the work necessary to arrive at the key annual showpiece of the network. To the best of my knowledge, there is not a single person – even in the best resourced agencies with large international departments – who is engaged in a full-time capacity on ICN work. All have busy jobs carrying out the ‘internal’ work of their agencies, and, although increasingly, working on the various ICN working

* This is an elaborated and somewhat updated version of my keynote address to the 2009 Annual Conference of the ICN held in Zurich. The address was given in my then-capacity as Chairman of the ICN Steering Group. It will be further elaborated in a forthcoming collection edited by the author which will comprise an essay on South Africa’s first decade of competition law enforcement and a number of essays dealing with comparative and related themes.

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groups *is* viewed as an intrinsic part of the internal work of the member agencies, the fact is that the ICN does not enjoy the luxury of a single full time employee. It does not have a stapler, much less an office block, that it can call its own. Viewed against that reality, the volume and quality of work produced by the ICN is nothing short of awesome.

This lean structure was in fact discussed and supported by those who participated in the Ditchley Park conference of 2001, the gathering from which the ICN was soon to emerge. I confess that I was, at that stage, sceptical of the prospects of an international network run along these unusually slimmed down lines. I remained sceptical during the first several years of the life of the ICN, where, although each conference proved a resounding success, one began immediately to plan the following year's activities and its culminating conference, with the unnerving sense that this year we may not make it, that we may not generate the same level of output and commitment from those upon whose voluntary service the ICN depended.

However, on each occasion my scepticism and anxiety have proved groundless. I have finally come to recognise that it is precisely the ICN's reliance on volunteers that accounts for the unusually high level of personal commitment that each passing year demonstrates. It is, *because* there is no professional, full time secretariat on which to lean, that ICN members are willing to step up to the plate in the manner that they have.

This is, of course, not without its shortcomings and challenges. The effort required to ensure the year-on-year success of the ICN is truly herculean. And while the effort put in by some of the smallest agencies is extremely impressive – for example, I think that El Salvador's hosting of the 2007 cartel conference must count as one of the ICN's proudest moments – it does leave the ICN somewhat hostage to the largest agencies maintaining their level of commitment. Should one of the US or the EU or Canada significantly downscale its level of commitment, the ICN may well find itself in serious trouble. This is not a comfortable position for an institution that is involved in heavily contested terrain where, on important occasions, national interest rears its head.

And, of course, it is the weakest who generally rely most heavily upon the work of a full-time secretariat – to prepare and circulate the background papers, to chivvy up the submissions, to prepare the agendas. But on the other side of the scale, I repeat, it is, in significant part, the absence of a full-time secretariat that has called forth an exceptional level of commitment, including from some very poorly resourced agencies.

However, even if the ICN decides, at some stage of its existence, to secure funding and take on a small staff, it will, by any measure, remain a lean network, not least of all because this characteristic has proven so successful in encouraging membership participation. Accordingly, if it wants to maintain or, preferably, increase the level of involvement of developing countries in its activities, then it has to consistently be thinking about specific approaches that ease the ability of these agencies to do so.

From its inception the ICN has seen its broad base, one that encompasses both developed and developing countries, as its central 'value proposition', and this was strongly borne out by the tone of the Ditchley Park meeting. The strong leaning towards inclusiveness is indicative of the powerful material basis of inclusiveness which is at the heart of antitrust law and practice. Certainly, the Ditchley meeting confirms that the driving imperative underpinning the formation of ICN was the proliferation of pre-notification merger regimes in developing countries and hence the need to incorporate these new regimes in the management of multijurisdictional merger review. In general, the growing instance of cross border, multijurisdictional antitrust 'events', be these mergers or cartels, combined with the growing number of national antitrust statutes and agencies, created a need for a broad-based international antitrust institution, of which developing countries were an essential part. Furthermore, given that the US and others were strongly resistant to the idea of linking international antitrust rules and international trade rules, the WTO was not going to be able to play this role. Hence, the need for an inclusive international antitrust institution.

This desire for inclusiveness has been reflected in the work and thinking of the ICN and, as I have said, it has, to a fairly significant degree, paid off. It could, however, be improved upon. The challenge of maintaining the inclusion and participation of developing countries in ICN activities has generally been viewed from the perspective of content, that is, by attempting to identify substantive content of particular interest to developing countries. This led to the formation of the *Competition Policy Implementation Working Group* which was, in reality, the group where developing country issues were discussed – technical assistance principal amongst them. Interestingly, because this group was also the natural home for talking about agency effectiveness which has, in recent years, become an issue of major concern to developed country regimes, this has had the effect of 'mainstreaming' what were previously conceived of as topics most pertinent for new agencies.

In fact, as the agency effectiveness issue illustrates, it is not easy – and nor is it desirable – to 'ghettoise' topics. All agencies are required to be effective; and all agencies require a technically capable staff, amongst other attributes, if they are to be effective. Although a substantive issue like abuse of dominance may be

difficult and costly to prosecute, it arguably rears its head most frequently in the relatively small markets of developing countries and so, like it or not, their competition enforcers, will want to participate in discussions of these technically complex and doctrinally controversial issues.

So effectiveness and technical assistance – though the forms may differ – as well as the full range of substantive competition issues, are all matters of vital concern to all agencies, wherever they hail from, and whatever their scale or longevity. To maximise participation of all of its members, a vital resource for a lean network, the ICN should rather be thinking about mechanisms of inclusion rather than what, in effect, becomes a mechanism of division along issue-defined grounds. There have been examples of this. The early decision to ‘twin’ a developing and developed country in the leadership of every working group is one good example.

The induction session for new members which the two US agencies, the Korean Fair Trade Commission and the Japan Fair Trade Commission hosted at the Zurich conference is another example. This is something that should be repeated at regular intervals with all small and new agencies, thus enabling them to make an informed choice regarding where, in the vast spectrum of ICN activities, to devote their energies. Indeed, the scale of ICN activities probably necessitates that all of its members be regularly updated on its programmes and activities.

Once better informed, the programmes in which the various agencies choose to involve themselves may be surprising. Advocacy techniques, generally thought to be vital ingredients in the building of a competition culture and so of special interest to young agencies, may well be too nationally specific to be usefully summarised into general ‘best practices’. It is probably difficult for a well established European antitrust agency to help school a young African agency in the conduct of advocacy campaigns. However, developed agencies will certainly be able to assist with the technically complex and more generic business of dealing with abuse of dominance, which may, as elaborated above, turn out to be of particular interest to new agencies in developing countries.

The simple take-away is that, from humble beginnings, the range and depth of work undertaken by the ICN has grown exponentially. Let’s reflect then on aspects of the path down which the ICN is headed. Principally I want to ask: is the ICN effective? Is it worth the massive energy and effort that has been committed to its success? This is a question that any institution must consistently ask itself and answer if it is to thrive. Furthermore, given the ICN’s origins and its attempts to include and raise the level of participation of its developing country members, I want to focus particularly on its effectiveness from the perspective of the latter group of members.

The ICN is the product of a number of diverse initiatives and imperatives. However, when representatives of some 14 agencies gathered in England in 2001, largely at the initiative of anti-trust lawyers in the private bar, I think that it is, at the risk of repeating myself, fair to say that uppermost in the concerns of those who initiated the meeting was the co-incidence of increasing cross border mergers and the proliferation of national anti-trust authorities. This had striking and potentially disturbing implications for the substance and efficiency of merger review.

This concern with the increasing difficulties of multijurisdictional merger review, although serious and warranting persistent close attention, has long been supplemented by other concerns, arguably more pressing to anti-trust enforcers. However, the initial desire to expedite the regulation of cross border mergers established a *modus operandi* within the ICN that is most clearly reflected in the overriding concern with agreeing recommended practices; and with judging the organisation by the extent to which these agreed practices have been implemented. While this is an approach that remains valid, it lends itself most easily to dealing with the relatively straightforward, technical questions raised by merger notifications and procedures. However this approach is, at once, too ambitious and too narrow to deal with the more nuanced and controversial questions that increasingly characterise ICN work.

It is too ambitious because the transmission belt from ICN recommendation to national legislation is bound to be extremely slow and imperfect and so, by this criterion, the network will always be judged to be falling short of its own targets and expectations. In any event, the evidence is that 'best practices', even in relatively uncontroversial areas, usually have to be tailored to national circumstances and so implementation will always be uneven at best.

It is furthermore too narrow because if the ICN has chosen to adopt an organisational form and character distinct from that of an organisation responsible for devising binding rules, then it should not judge itself by precisely the same norms and standards of those organisations. Instead, it should judge itself by a more qualitative and nuanced set of norms: for example are its component national parts developing a deeper understanding of each other's key drivers and practices? Is the ICN providing a framework where the better resourced and more experienced agencies are able to transmit the learnings from their successes and failures to the newer agencies? Is the ICN providing room for the full participation and voice of these newer agencies? Is the ICN a voice for competition on the international stage and in the various national policy debates?

A glance at the ICN's range of activities will reveal that it is extending its work into areas that do not easily lend themselves to textual consensus and harmonised

implementation. For example, the expanding work on agency effectiveness and market studies will be difficult to measure according to the extent of adherence to recommended practices or degrees of convergence. The ICN is also fully immersed in the muddy waters of unilateral conduct, an area where debate and controversy is endless, not simply for the sake of argument, but because it confronts dynamic and diverse national environmental and policy orientations. It has thus predictably proved to be an area that does not easily lend itself to recommended practices.

However, the fact that the ICN is in the business of making 'soft law' and promoting 'soft convergence' does not absolve it from the necessity of devising means to assess and evaluate its effectiveness. Indeed, in doing so we cannot treat 'soft law' as simply a less binding, pale version of 'hard' law. It is different. It is rooted in consensus, rather than majority; in persuasion through shared experience, rather than coercion; in understanding and celebrating differences, rather than suppressing them.

I want to identify two broad tests to which the ICN should submit itself. The first is outward looking, while the second has a more inward looking character.

The first is related, but not limited to, the current financial crisis and economic recession. The ICN must ask itself whether its agenda is sufficiently flexible to assist its member agencies in responding to radical changes in the social and economic environment in which they all work, starkly typified by the global economic crisis. The ICN has to ask itself whether it is playing a sufficiently active role on the international stage in informing responses to the crisis.

I think that the ICN could do much more here. When I look at the agendas of recent ICN conferences, I am confirmed in my view that the ICN must broaden its concerns if it is to remain relevant. There are exceptions. Japan's insistence on including a discussion of 'fair trade' at the Kyoto conference – a suggestion that encountered some opposition – gave rise to an interesting, because controversial, discussion. It also enabled a deeper appreciation of what may be cast as a particular east Asian approach to competition law and policy, an approach which, for obvious reasons, all of those concerned about the application of competition laws in the international arena, are well advised to understand better.

However, in order to systematically broaden its agenda, the ICN should re-visit its inflexible founding mantra of 'all competition, all of the time'.

This was always a restrictive principle on which to base the agenda of the ICN because it was a tactical consideration rooted in caution, in the fear that one nation would begin interfering with the internal economic policies of another. In

a sentence, it was rooted in what was another powerful, albeit less overtly articulated, imperative leading to the formation of the ICN: the desire to separate competition discussions, on the one hand, from industrial and trade policy discussions, on the other. And so 'all competition, all of the time' is not a positive, expansive and forward looking statement of our mission and vision. It is, on the contrary, a limiting statement, the very antithesis of a vision.

However, competition law, as a US Supreme Court justice once famously reminded us, is the Magna Carta, the fundamental law, of the market system. As such, it cannot be confined to an island where its relationship with every other branch of economic and social policy – particularly with trade and industrial policy – is studiously ignored. And if anybody seriously believed that this was ever possible, then the financial and economic storm that has battered the world since the latter half of 2007 and the policy responses to these events should have put paid to any such illusions.

With industrial policy ascendant and protectionism in the air, can the ICN afford to remain aloof? Must it not rather engage with the concerns of policy makers to ensure that their interventions – many of them necessary – respect and preserve that which is dynamic and creative and democratic in a market system? There can be little doubt that the unusual effectiveness of the European Commission's competition directorate rests – in significant part – on its authority over national state aid, thus effectively empowering it to deal with both competition law and policy and the critical instruments of industrial policy. Few, if any, national competition authorities can aspire to this level of institutionalised authority over industrial policy, but they can and should use the forum of the ICN to discuss the appropriate interface of competition enforcement and advocacy with industrial and trade policy; and with social and developmental policies – and needs. This is the least that the ICN can do.

The ICN is already embarking on this journey. The work of the vice-chair for international co-ordination, in developing relations with agencies like the World Bank and the various regional development finance institutions will, if carried to its logical conclusion, inevitably involve the ICN in taking a view on a wide range of national policies and practices ranging from trade policy to procurement practices, from support for national champions to bail-outs of distressed firms. The work of the vice-chair for advocacy and implementation will, if carried to its logical conclusion, presuppose that the ICN publicly articulates the case for markets in the on-going development of responses to the massive market failures that have characterised the world's present economic predicament.

In order to be successful, these initiatives will need to be injected into the mainstream work of the ICN. However, it is to ensure the continued centrality of

competition on national and global policy agendas the ICN will need to cast off the purist competition law cloak in which it has shrouded itself.

In part inspired by the economic crisis, in part inspired by the strong streak of mercantilism and nationalism that runs through all governments, we frequently see actions that stand in stark contrast to the principles espoused by the ICN. An interesting recent example is the Canadian government's blocking of an attempted merger in the potash market that would have resulted in the acquisition of Canada's largest potash producer by a large Australian mining company. There were no competition issues involved, only unspecified 'strategic' issues which seemed to derive from a view that the deal did not offer a 'net benefit' to Canada. Indeed, the only competition issues involved predisposed in favour of permitting the merger – the Canadian target firm was the leading member of an officially sanctioned export cartel from which the prospective acquiring firm undertook to exit. This action not only represents an overt departure from the competition principles that govern merger regulation, but it also probably prolongs the cartelisation of a product of vital economic and social interest – because it is a basic input in the production of fertiliser – to the developing world in particular.

This is not an isolated action. At the time of writing it appears that the Canadian government will apply the same criteria to a proposed merger between the London and Toronto Stock Exchanges. A columnist in the *Globe and Mail* (14th February 2011) writes that '(t)hanks to a mixture of history and happenstance, Canada treats a clutch of industries as national treasures. Think of banks, broadcasters, cable companies, newspapers, airlines and liquor stores' and he goes on to ask 'do we protect liquor stores to grab the profits or to control distribution of a potentially dangerous substance. Do we keep foreigners from owning our banks in order to protect consumers and borrowers, or for blatantly protectionist reasons?'

Nor is Canada the only country that allows these 'public interest', non-competition criteria to trump competition considerations. The US has in recent years blocked the acquisition of port operations by a foreign service provider. The South African Competition Act specifically builds a public interest evaluation into its merger review criteria. However the South African public interest criteria are well-known because they have been explicitly and publicly discussed, including at conferences of the ICN. I am not sure that this has, or should have, made the South African insertion of non-competition issues into merger decisions more acceptable, but the fact that it has been aired does mean that it has been understood by our colleagues in the rest of the world and by the lawyers who represent merging parties and who follow the work of the ICN, thus reducing the uncertainty that always attaches to a mix of competition and non-competition criteria.

That is the point. It is not to propose that the ICN engage in a public slanging match with the Canadian government. Much less is it to suggest that the ICN publicly criticise the Canadian Competition Bureau, arguably the national authority that has been most selfless and generous in its support for the ICN. It is to understand why what appears to be blatantly anti-competitive conduct is allowed to occur, apparently unimpeded, in the home of the world's oldest competition authority, and what should be done by other member agencies of the ICN to prevent this sort of conduct from infecting their own competition regimes.

This is the point of a network: to promote discussion, rather than to stifle it by the application of vacuous slogans. And, particularly in the current economic environment, the most urgent discussion concerns the interface between competition policies and laws, on the one hand, and trade, industrial and social policies, on the other. An advantage of not having the power to enter into binding international agreements – and there are clearly some manifest disadvantages that attach to this lack of formal power – is that the ICN is able to discuss anything, relatively unconstrained by narrow national interests. If we forego this advantage, we forego the greatest advantage of a 'soft convergence' network and we risk implicitly sanctioning anti-competitive conduct by governments that arise from the application of mercantilist national policies and practices.

The second set of questions that the ICN must pose itself are more inward looking and, has to some extent, already been discussed. Like any multinational body the ICN is made up of member agencies with distinctive histories and diverse resource bases. In circumstances like this the ICN must continually ask itself whether the weaker, the newer, the less well-resourced are given voice, are given the opportunity to participate and to be heard in the councils of the organisation. Here I think that the ICN is doing quite well. And it's no accident. From the first days of the ICN a number of young agencies from the developing world and the emerging market economies demanded a very active role in its work. They have chaired working groups, they have submitted papers to and participated in debates in working groups, they have hosted conferences and workshops and they have hosted and participated in the network's successful tele-seminars.

I use 'demanded' advisedly because had these agencies waited for an invitation to play an active role in the ICN, I believe that they would have suffered the marginalisation that characterises so many international institutions and that has so impaired the legitimacy and effectiveness of these institutions. By the quantity and quality of their contribution a clutch of developing country agencies in the ICN have won the respect and regard of their counterpart agencies in the developed world who have responded by treating them as equal members of the

ICN, thus avoiding the crippling conflicts and sclerosis that have bedevilled the work and impaired the legitimacy of many other multilateral institutions.

Certainly more can be done, however, there can be little doubt that the developing country's agencies, which have sought to participate, are fully fledged members of the ICN. The task now, as intimated above, is to ensure that all ICN members become fully conversant with the range of activities in which the ICN engages, precisely to enable those agencies that are, usually for want of resources and information, still marginalised. This will enable them to secure an avenue of participation and so the respect that each of them deserves.

None of this is to be taken lightly. Critical agencies like the IMF and the World Bank have begun to acknowledge the damage done to their credibility by the application of the unwritten rule that effectively circulates institutional power between Europe and the USA. We know how critical initiatives like the Doha development round have been torpedoed in large part because many of the members of the WTO do not believe that their voices are heard and that their concerns are adequately appreciated. The effectiveness of high level, but exclusive, networks like the G7 and even the G20, is questionable precisely because of their exclusiveness.

Such inclusiveness is important because in a variety of diverse fields, networks like the ICN are increasingly emerging as critical complements to the formal brick and mortar multinational agencies scattered around New York, Washington and Geneva. Freed from the business of negotiating binding treaties and the deadly hand of narrow political considerations, members of networks like the ICN are able to find each other through frank and robust discussion directed at solving common problems. The ICN is part of what one scholar – now a senior member of the US State Department – has dubbed the 'new world order', it is part of a new mode of international governance characterised by networks of professionals whose professionalism enables them to rise above their own narrow national interests.¹ The ICN must treat this responsibility with the seriousness and the courage that it demands.

This plea to engage in discussion, to persuade, to learn to appreciate the basis for divergence, to network, is often pejoratively labelled a 'talk shop', especially when contrasted with activities that lead to 'hard convergence', ie adherence to agreed practices. One would have thought that the infrequency with which anything approximating 'hard convergence' is actually achieved would have inspired the protagonists of greater harmonisation – especially if that is thought of as the process of securing greater 'harmony' – to concentrate on extracting more value

¹ Anne-Marie Slaughter, *A New World Order*, Princeton University Press 2004.

from talking, one that shifted it from a pejorative into a virtue. Certainly, the South African competition authorities have gained more, have become better competition enforcers and advocates, from all the ‘talking’ in networks like the ICN and the OECD than they have from the recommended practices that have flowed from these institutions.

This provides a neat segue into my concluding point. One of the great qualities of the ICN is that it is never entirely about institutions meeting. It is about meeting with individuals with whom living, working relationships have been established. These are relationships that inevitably arise, not from reading a paper drafted by a faceless secretariat, but rather by working directly with colleagues and building the trust and respect that joint work gives rise to. They are the sort of relationships that enable one to have the intense disagreements necessary to drive progress but that are immediately set aside when the next problem has to be confronted. This is what I have found to be most enjoyable and, especially in the international arena, unusual about the ICN. It has become a dense network, not merely of competition agencies, but of deeply committed individuals – and if that is to be regarded a ‘talk shop’ then I can only conclude that the world needs more of them.