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# The International Competition Network: Its Past, Current, and Future Role

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# The International Competition Network: Its Past, Current and Future Role

Hugh M. Hollman\* & William E. Kovacic\*\*

## I. INTRODUCTION\*\*\*

In October 2001, on the occasion of Fordham Law School's annual international antitrust conference in New York City, fourteen competition agencies announced the creation of the International Competition Network (ICN).<sup>1</sup> The new venture joined a field of multinational competition networks that already included the Competition Law and Policy Committee (CLPC) of the Organization for Economic Cooperation and Development (OECD), the Competition Law and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD), and an initiative under the World Trade Organization (WTO) to explore the preparation of an international system of competition law standards.<sup>2</sup> Given the scope of the existing networks and the effort needed to support them (most ICN founders also participated in the OECD,

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1. *U.S. and Foreign Antitrust Officials Launch International Competition Network* (Oct. 25, 2001), <http://www.ftc.gov/opa/2001/10/icn.shtm>.

2. See Int'l Competition Policy Advisory Comm. to the Attorney General: Antitrust Div., FINAL REPORT 281-302 (2000) [hereinafter ICPAC REPORT], available at <http://www.justice.gov/atr/icpac/finalreport.htm> (discussing what a new international network of competition agencies could add to work already performed by existing bodies).

UNCTAD, and WTO programs), it was reasonable to wonder whether the undertaking would be sustainable.

In major respects, the new network not only has survived but prospered. Today, as its tenth anniversary approaches, the ICN's membership has grown to 114 members, which collectively represent nearly all of the world's jurisdictions with competition laws.<sup>3</sup> The organization's efforts have yielded important contributions to the development of widely accepted international competition policy norms,<sup>4</sup> and its annual meeting has become perhaps the single most important annual gathering of competition agency leaders. More broadly, the ICN exemplifies the form of voluntary multinational collaboration that commentators have identified as a promising way to facilitate international ordering amid the global decentralization and diversification of economic regulation.<sup>5</sup>

The arrival of ICN's tenth anniversary offers an appropriate juncture to take stock of ICN's achievements, to consider why the ICN has succeeded thus far in many of its aims, and to ask what comes next. In general, the ICN's paramount goal is to facilitate convergence on superior approaches concerning the substance, procedure, and administration of competition law. To achieve this aim, the ICN engages in projects that seek to (1) increase understanding of individual competition systems, including similarities and

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3. Interview with John Fingleton, Chair of the Steering Group of the International Competition Network (ICN), 25 ANTITRUST 71 (2010) [hereinafter Fingleton Interview] (reviewing ICN membership data). ICN membership is available to national competition agencies. Thus, some jurisdictions with multiple agencies have more than one representative in the ICN. For example, the US Federal Trade Commission and the Antitrust Division of the US Department of Justice are both ICN members, as are the Competition Commission and the Office of Fair Trading from the United Kingdom. The most notable jurisdiction with a competition law and no representation in the ICN is China, which has three national competition agencies (MOFCOM, NDRC, and SAIC). China participates in the work of the OECD Competition Committee as an observer and is a member of UNCTAD. The Chinese agencies have not discussed their intentions concerning ICN membership. As mentioned below, see *infra* text accompanying note 113, China's participation in the ICN is an important determinant of the organization's future success.

4. See Int'l Competition Network, ICN WORK PRODUCTS CATALOGUE (Sept. 2010) [hereinafter ICN WORK PRODUCTS] available at [www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf).

5. For the best known work advancing this theme, see generally ANNE-MARIE SLAUGHTER, *THE NEW WORLD ORDER* (2004). For a useful review of the future path for these international endeavors, see David Ziring, *Three Challenges for Regulatory Networks*, 43 INT'L LAWYER 211 (2009).

differences among them, (2) identify and build consensus about superior practices, and (3) encourage individual jurisdictions to opt in to superior techniques. Other international networks make useful contributions toward convergence, but the ICN prides itself on having a stronger capacity to promote broad adoption of global standards.

The ICN pursues convergence with the expectation that if competition systems around the world opt in to superior techniques, they will achieve greater progress toward dismantling competitive restraints within single jurisdictions and across borders. In a number of areas, the ICN's effort to encourage greater convergence upon substantive norms, procedural standards, and operational techniques seems to have achieved its aims. To put the point cautiously, we have seen growth in the number of competition policy systems that embody the ICN's Recommended Best Practices.<sup>6</sup> However, the full extent of adherence to the network's recommended practices remains unclear.

In this Article we consider what comes next for the ICN. Where can it make the greatest contribution to the development of sensible international competition policy standards? Can the ICN be effective if it continues to exist in its current form as a purely virtual network, or will the institution acquire more of the attributes—for example, a formal, stand-alone secretariat—that one associates with older, intergovernmental organizations such as OECD and UNCTAD? How can the ICN best serve a large, diverse membership that features extensive variation with respect to national circumstances and experience with competition law? Could the ICN perhaps serve as the platform for the development of regional or multinational agreements? How should the ICN interact with the OECD, UNCTAD, and other multinational bodies involved in competition policy? And, perhaps most ambitiously, can the ICN facilitate progress toward the establishment of a mechanism for the application of international competition law, including dispute resolution? Our examination of the ICN's experience and our attempts to

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6. Int'l Competition Network, A STATEMENT OF ACHIEVEMENTS THROUGH APRIL 2010, 3–4 (Apr. 2010) (discussing impact of ICN's merger-related recommended practices), *available at* [www.internationalcompetitionnetwork.org/uploads/library/doc630.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc630.pdf) [hereinafter STATEMENT OF ACHIEVEMENTS]; *see, e.g.*, ICN WORK PRODUCTS, *supra* note 4, at 10 (setting out recommended practices developed by ICN's Merger Working Group).

answer these questions may assist other international networks of public bodies in deciding how to carry out programs in other fields of policy.

The ICN's current leadership is engaged in an intensive examination of the network's future.<sup>7</sup> We seek to inform discussion about the ICN's future by offering a way to think of its institutional characteristics, to assess its relative advantages by comparison to other multinational competition networks, and by proposing specific steps for the organization to consider going ahead. In our view, the challenges for the ICN and its members are to preserve institutional attributes that have worked well, to achieve a fuller integration of effort with the OECD and UNCTAD, to strengthen the network's capacity to identify and serve its members' needs, and to continue to set a foundation that could support the development of a system of global competition rules.

All of what we suggest must be accomplished amid extreme pressure upon agencies to reduce costs. The expansion of competition policy systems creates a special urgency to make these and similar investments that build an effective framework of international standards and cooperation, yet these infrastructure-like expenditures often are the first to go amid demands to curb public budgets.

To consider a course for the ICN's second decade, we focus mainly on the development and operation of the network since its creation in October 2001. In doing so, we write from the perspective of a government agency (the US Federal Trade Commission) that was one of the network's fourteen founding members and has participated actively in the design of the network's programs and processes. We sketch the ICN's origins, but we emphasize experience with implementation. It required true foresight over a decade ago to see the value of creating another multinational initiative to address policy concerns that already commanded the attention of the OECD, UNCTAD, and the WTO. Once the commitment to form the ICN was made in 2000–01, it was not inevitable that it would emerge as a useful instrument to improve global competition policy. Following the launch, skillful implementation counted for everything. Experience with the ICN's development since October 2001 supplies important lessons about the network's future.

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7. See *infra* note 15 and accompanying text (describing ICN Second Decade initiative).

## II. CONVERGENCE: MEANING AND METHODS

To provide context for studying the ICN's experience, we first define "convergence"—the main objective that motivated the ICN's creation and sustains its operations today. By convergence we mean the broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency. Administration encompasses the techniques a competition agency uses to organize its operations, set priorities, and evaluate its effectiveness.

Convergence as we see it does not anticipate the establishment of identical policies and enforcement mechanisms across the world's competition policy systems. Complete uniformity—which we associate with the term "harmonization"—is probably unattainable.<sup>8</sup> Variations in the economic conditions, history, legal process (e.g., civil law versus common law), and political science of individual jurisdictions are enduring sources of difference among competition systems.

Nor do we think the pursuit of absolute congruence to be desirable. As described below, the development of competition law is inherently evolutionary and experimental.<sup>9</sup> Since the first national legislation in Canada and the United States in the late nineteenth century, competition law standards have changed as a function of many forces, especially advances in industrial organization economics. Progress in implementation often takes place as individual jurisdictions test new approaches—for example, the substantive analytical framework introduced in the US Department of Justice (DOJ) Merger Guidelines of 1982 and the DOJ's leniency reforms of the 1990s, which supplied powerful incentives for cartel participants to inform the government of their illegal behavior.<sup>10</sup> These and other improvements in competition policy have occurred in a sequence of experimentation by which individual jurisdictions introduce reforms, gain experience, and

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8. This discussion draws upon the framework set out in William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in *COMPETITION POLICY IN THE EU: FIFTY YEARS ON FROM THE TREATY OF ROME* 314 (Xavier Vives ed., 2009).

9. See *infra* pp. 311–12 (describing the evolutionary character of competition law).

10. See ICPAC REPORT, *supra* note 2, at 87–163 (describing importance of 1982 DOJ merger guidelines and leniency policies introduced in 1990s).

assess results. Successful implementation induces other jurisdictions to emulate the reforms. To insist upon full uniformity across systems, or await unanimous approval before any single system undertook an innovation, would rob competition policy of a valuable source of continuing renewal and vitality. An objective we ascribe to the ICN and its two intergovernmental network counterparts is to realize the benefits of standardization without losing the useful innovation that comes from decentralized experimentation.

While we do not anticipate or prefer programs to achieve total congruence across systems, we see great value in spurring convergence as we described the concept above. Some standardization with respect to substantive standards, procedure, and administration serves two useful ends. Widespread adoption of superior practices improves the performance of individual jurisdictions (by moving them from weaker to stronger approaches) and increases the effectiveness of competition policy as a form of global endeavor (by increasing the capacity of competition agencies as a group, through individual initiative and cross-border cooperation, to deter harmful business conduct). This is the rough equivalent of the process in medicine through which broad acceptance of superior treatments or surgical techniques improves the quality of health within and across jurisdictions.

When better methods become available, society has a strong stake in their rapid and extensive adoption. To put the point in a negative form, there may be substantial harm if a jurisdiction persists in using manifestly inferior analytical approaches, procedures, or techniques for the administration of a competition agency. For example, adherence to badly conceived substantive tests not only can retard economic progress within a single jurisdiction, it can damage economic performance in other jurisdictions. If a country that applies an inferior approach is economically significant, companies doing business in global or regional trade may feel compelled to conform their practices to satisfy the demands of the single jurisdiction. These and other adverse spillovers give the larger community of nations a keen interest in the quality of the competition systems of individual countries.

Standardization also can reduce unnecessary costs associated with antitrust enforcement. Such costs can arise, for example, from subjecting mergers to multiple individual national reviews, where each involves needlessly idiosyncratic

reporting requirements or where notification obligations sweep in transactions with little connection to commerce within a jurisdiction. Standardization which simplifies the review process—such as by enabling the merging parties to use a common form to report a proposed deal to numerous authorities—can reduce the costs of commerce without diminishing the quality of regulatory oversight.

The potential benefits of convergence become more apparent as the complexity of global competition policy increases. For most of the twentieth century, few jurisdictions had competition laws, and still fewer had effective programs to enforce them.<sup>11</sup> As late as the mid-1970s, only Germany, the European Union (EU), and the US had undertaken significant enforcement programs that commanded attention from business managers.<sup>12</sup> With the fall of the Soviet Union and the adoption of market-oriented reforms by countries previously committed to central economic planning, many nations enacted competition laws or revived older, dormant antitrust statutes. Today, at least 112 jurisdictions have competition laws.<sup>13</sup>

To spur convergence across this multitude of systems requires an understanding of the process of regulatory standardization and a vision of how a network of competition agencies, such as the ICN, can promote broad adoption of superior techniques. Since 2001, the ICN's leadership has formulated a strategy that suggests how the network can best promote convergence in a global environment that features a broad decentralization of authority and extensive experimentation.<sup>14</sup>

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11. See William E. Kovacic, *Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy*, 13 GLOBAL COMPETITION REV. (2010) (reviewing trends in development of systems of competition law).

12. *Id.*

13. John Fingleton, *The International Competition Network: Planning for the Second Decade*, Address at the Ninth Annual Conference in Istanbul, Turkey (Apr. 27, 2010), available at [http://www.oft.gov.uk/shared\\_oft/speeches/689752/0410.pdf](http://www.oft.gov.uk/shared_oft/speeches/689752/0410.pdf) [hereinafter *Second Decade Speech*].

14. The strategy we refer to here is an amalgam of views expressed by members of the ICN Steering Committee from the first years of the network's establishment to the present. Two particularly formative statements are Timothy J. Muris, Chairman, Fed. Trade Comm'n, *Competition Agencies in a Market-Based Global Economy*, Address at the Annual Lecture of the European Foreign Affairs Review (July 23, 2002), available at [www.ftc.gov/speeches/muris/020723brussels.shtm](http://www.ftc.gov/speeches/muris/020723brussels.shtm) [hereinafter *EFA Speech*] and Fingleton, *Second Decade Speech*, *supra* note 13.



As articulated by agency officials who have played major roles in the ICN's early development and subsequent operations,<sup>15</sup> international standardization in competition law is likely to unfold in three stages. The first is continuing, decentralized experimentation as individual jurisdictions test different substantive rules, analytical methods, procedures, and administrative techniques. The second stage is the identification of superior practices. In the third stage, countries voluntarily opt in to superior practices. General satisfaction with a particular standard may create a willingness by nations to embrace the standard and to embody within a treaty or other form of international obligation.

With this framework in mind, how can an international network such as the ICN promote the adoption of superior standards? The ICN convergence strategy has four basic elements. The first is to increase understanding of the origins and operations of individual systems. The ICN does this mainly by serving as a convenor which engages its members—through its annual conference, through workshops, and through regular teleconferences—in regular discussions about existing practice within jurisdictions. This process illuminates similarities in substantive analysis and procedure across jurisdictions and deepens awareness of the sources of differences.

Fuller understanding of system similarities and differences sets the foundation for ICN's second contribution, which is to identify superior practices. Some approaches may readily stand out as superior once nations understand their application and grasp their effectiveness. Consensus about other practices may come about only after a longer process of discussion.

The quality of consensus depends heavily on the methods

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15. Two agency leaders stand out. One is Timothy Muris, who chaired the US Federal Trade Commission from June 2001 to August 2004. Muris committed substantial FTC resources to the ICN's development and supplied an influential conceptual framework for understanding how the ICN could encourage adoption of superior techniques. *See, e.g.*, EFA Speech, *supra* note 14 (describing ICN's possible contributions to the identification of superior practices). A professor of contract law and competition law, Muris pointed to the development of the Uniform Commercial Code in the US as a rough model for the work of the ICN. *Id.* John Fingleton, the current Chair of the ICN's Steering Committee, is a second major source of thinking about the possible contributions of the ICN. Through initiatives such as the ICN Second Decade project, Fingleton has been instrumental in identifying ways in which the ICN can best serve the functions of education, consensus building, and implementation of superior techniques. *See, e.g.*, Second Decade Speech, *supra* note 13.

used to achieve it. One major determinant of the perceived quality of consensus is the breadth and intensity of participation by the network's members. A network's value as a source of widely-accepted standards increases as the number of participating jurisdictions grows. To fulfill its intended role, the ICN requires broad participation by competition agencies from well-established market economies and transition economies alike. The imperative to achieve inclusive membership raises a dilemma. Most of the resources (notably, the time of top management and skilled staff) to support a network's operations ordinarily reside in older, more experienced, and better funded agencies. Without the resource commitment of the wealthier jurisdictions, the ICN would collapse.

At the same time, the magnitude of contributions (and, implicitly, control) by older, wealthier competition systems may raise doubts among less experienced and less wealthy jurisdictions that the network truly serves their interests. Based on other experiences in international relations, weaker states may see the multinational network as simply another venue in which more powerful nations trample them.<sup>16</sup>

A second issue concerns participation by non-government advisors (NGAs) who come from academia, companies, consumer groups, economic consultancies, and law firms. NGAs can improve the quality of a network by, among other ways, providing information that public officials lack and in assisting in the implementation of standards proposed by the network.<sup>17</sup> They also can supply important contributions to the routine

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16. In discussing the development of international norms in other areas of public policy, Professor Julie Mertus puts the point this way: "[P]owerful state and nonstate leaders from western countries overpower their nonwestern counterparts at world conferences. These leaders use their positions of authority in already-established transboundary networks to set the agenda, and they use their access to language and diplomacy skills to work that agenda to serve their own interests." Julie Mertus, *Considering Nonstate Actors in the New Millenium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL. 537, 541-42 (2000).

17. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 274-75 (1997) (discussing potential benefits of NGO involvement in international organizations). For example, one form of knowledge uniquely within the hands of business enterprises and their advisors is information about the costs of complying with multiple merger reporting requirements. Another illustration is the information that academic researchers have assembled in the course of studying the process of international cooperation and convergence in various fields of public policy.

work of a network's committees or working groups—for example, by conducting research or preparing background papers.<sup>18</sup>

Where NGAs participate in a network's proceedings (as they do extensively in the ICN), attaining a suitable mix of perspectives among such advisors is important. A network must see to it that its work is not captured, or seen to be captured, by specific external constituencies. In our own discussions with ICN competition agencies (especially from transition economies), we have heard recurring concerns that the ICN must increase participation by non-private sector NGAs—such as academics or officials of consumer groups—to balance the representation of NGAs from companies or law firms.

The third step is to monitor and assess the extent of opting-in by the ICN's members. The ICN's effectiveness ultimately depends upon how fully its members integrate the network's recommendations into their operations. Achieving broad agreement upon recommended practices, by itself, does not ensure that such standards become embedded in the practice of individual jurisdictions. This requires monitoring and continuing encouragement to coax members to apply the standards in practice.

The fourth step is to promote interoperability across systems with respect to characteristics that remain dissimilar. Even with arduous efforts to achieve convergence, substantial differences across competition systems are likely to persist. Notwithstanding these differences, it is important to devise inter-agency links that facilitate routine communication and the treatment of conduct under examination by multiple authorities.

In pursuing the strategy set out above, progress toward widely accepted standards will be easier to achieve in some areas than in others. Agreement on superior methods for effective management (e.g., the value of disclosure practices that reveal the agency's intentions and reasons for enforcement decisions) may be easier to attain than agreement on some substantive liability tests. Within the range of substantive standards, a network is likely to find broader agreement about

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18. Our view is that the ICN Merger Working Group would have achieved dramatically lower levels of productivity without the participation of private sector NGAs, especially lawyers experienced in counseling firms in cross-border transactions.

the hazards of some forms of business conduct (e.g., collusive schemes involving rival suppliers) than others (e.g., the treatment of claims of improper exclusion by dominant firms).

In light of these differences, a successful network is likely to have a diversified portfolio of projects. The mix is likely to include forward-looking exercises that analyze important economic phenomena or developments in economic or legal theory, on the one hand, and efforts to distill theory and experience into specific recommendations about substantive standards, procedures, and administrative practices, on the other hand. On the other hand, the portfolio of a network with a greater indigenous capacity to perform policy research (e.g., the OECD) is likely to contain a greater number of projects and reports that examine conceptual concerns or formative economic conditions in detail.

One complication in assembling a portfolio of projects that suits a network's members arises from expansions of membership. As a competition policy network grows, it may be difficult to pick topics that command broad interest across the network. Fissures may emerge on the basis of regional differences (e.g., competition agencies in the island economies of the Caribbean may have needs that are alien to the landlocked nations of Central Asia) or wide gaps in experience.<sup>19</sup> In addition to, or as a substitute for their participation in the large, multinational networks, some countries might choose to focus resources competition initiatives undertaken in the context of regional networks such as ASEAN, CARICOM, and COMESA.

Across networks, we can expect variation in the proportion of endeavors that emphasize theory or practice, universal matters or more localized concerns. Despite these differences, all networks share a common aim. All will invest significant effort in providing a steady flow of tangible outputs. These can include studies that shape thinking about a specific topic or recommendations about standards. Generating a stream of "deliverables" accomplishes several ends. For purposes of convergence, these outputs build the structure of standards that provide focal points for opting in by the network's members.

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19. Older, wealthier agencies may want to discuss the latest developments in merger simulation while a new agency may want to explore how one begins to create a team of economists.

A network's outputs can vary in their significance and need not be uniformly path-breaking. Some measures, however, must be seen to be significant. A network is akin to a movie studio that must produce a certain number of commercially successful films to sustain its operations. For a competition policy network, the equivalents of major commercial "hits" enable the network also to turn out "indie" projects that have real substantive merit but do not yield massive box office revenues.

The very process of turning out recommendations also can inspire future effort. As described more fully below,<sup>20</sup> a demonstrated ability to provide visible results induces network members and NGAs to invest resources in the future. Deliverables provide the network's major investors with a visible return on their commitment of resources. Multinational competition networks are voluntary endeavors, and each network must compete to obtain effort from its members. Competition agencies (and the political appointees who often head them) typically feel strong pressure to devote resources to immediate operational needs, such as the prosecution of cases.<sup>21</sup> Especially in conditions of resource austerity, investments in building an infrastructure of international relations will tend to be seen as an appealing target for the budget cutter's ax.

These conditions sharpen an agency's desire to scrutinize the yield from its investments in international networks. A competition authority that is dissatisfied with the output of a network is likely to disinvest by proposing that its government cut financial support for the network, by reducing the involvement of top level officials, by curbing the allocation of staff to network projects, or deciding not to attend network functions at all. NGAs make similar calculations in deciding whether to provide time to the network's endeavors.

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20. See *infra* pp. 287–88 (discussing how the willingness of member countries to invest effort in ICN, OECD, and UNCTAD depends partly on their perception of the capacity of these networks to deliver useful products).

21. On the tendency of competition agencies to be measured by the volume and prominence of their cases, see William E. Kovacic, *The Digital Broadband Migration and the Federal Trade Commission: Building the Competition and Consumer Protection Agency of the Future*, 8 J. TELECOM. & HIGH TECH. L. 1, 10–14 (2010).

## II. THE ICN IN CONTEXT: THE MAJOR INTERNATIONAL COMPETITION NETWORKS

International networks have gained in prominence as forums for discussion and cooperation on competition law. The ICN's approach to addressing international competition law issues is relatively flexible, informal, and non-binding. This allows countries to participate without committing to specific changes in law or policy.<sup>22</sup> Continuous interaction fosters commonly defined goals, and regulators focus more on shared agendas instead of more narrowly defined national interests.<sup>23</sup>

In this section, we situate the ICN in the landscape of other international organizations that have played important roles in the development of international competition policy standards. Before the ICN's formation, the most important international networks for competition policy were the OECD, UNCTAD, and the WTO.<sup>24</sup> We review the origins and characteristics of these organizations and compare them to the ICN.

One basic characteristic of the three currently active competition networks—ICN, OECD, and UNCTAD—warrants emphasis. In major respects, they are rivals. They are public policy joint ventures whose principal “shareholders” are largely the same. The major shareholders are the agencies (or governments) that supply the bulk of a network's budget or otherwise play a central role in determining a network's effectiveness. They exercise this role by deciding to send top management to important network events and to assign highly capable staff to participate in the network's activities. Every year, a competition agency decides how much to invest in each network: to increase resources, to reduce participation, or to sustain existing levels of effort—in effect, to buy, sell, or hold shares in the venture.

Individual networks prosper or decline according to their ability to attract resources from their main shareholders. Without a critical mass of effort by agency leaders, a network becomes a meeting place for agency staff who lack the status to speak authoritatively for their institutions. Moreover, if agencies downgrade the quality of staff assigned to perform

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22. See Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 215–16 (2003).

23. *Id.*

24. See ICPAC REPORT, *supra* note 2, at 33–39.

research and draft network documents, the network's work product visibly suffers. Each network knows that its days are numbered when top management disengages and withdraws top quality staff from network activities.

In the framework of the multinational competition networks, the ICN's position in 2001 posed some significant risks. As is the case with new entrants in commercial markets occupied by a handful of seemingly entrenched incumbents, the ICN had to cope with product line repositioning and sometimes edgy resistance by the OECD and UNCTAD. The ICN's business model presented special potential difficulties. The ICN portrayed itself as the fast, agile, highly maneuverable fighter aircraft juxtaposed with the OECD's and UNCTAD's slow, ungainly commercial transports. This compelled the ICN to produce quick, visible results consistent with its institutional vision. By contrast, the OECD and UNCTAD each enjoyed an established and, in many cases, loyal installed base of members and therefore had more margin for error. A large commercial airliner can glide for a considerable distance if its engines shut down. Turn off the engines on a fighter aircraft, and it glides like a two-car garage.

The three existing competition networks can be seen as suppliers of complementary policy products. Their varied organizational forms and functions lend themselves to different product lines. As discussed more fully below, these product lines sometimes overlap (creating a degree of head-to-head competition between networks). The products also can be complementary. Of the three networks, the OECD has the strongest capacity to generate in-depth policy research papers, yet the ICN and UNCTAD arguably have greater ability to disseminate policy work by reason of their more inclusive membership policies. In the research and analysis dimension of network performance, the OECD has a better production facility, but the ICN and UNCTAD have superior distribution networks. In still other areas—such as the production of teaching materials to train new competition agency staff—it is evident that collaboration between two or more networks might enable them to assemble products or bundles of services whose quality exceeds that which any single network can attain on its own.<sup>25</sup> As we discuss below, a major issue for the three networks is whether they can cooperate in ways that permit

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25. The authors are grateful to Sally Van Sichen for this observation.

the realization of important complementarities.

To anticipate one of our conclusions, we see ways in which the three networks can prosper and make important contributions to convergence upon superior competition policy standards. We also can imagine that the centrifugal forces of rivalry for resources and recognition that beset the networks could frustrate the realization of this vision. If the ventures and their common owners cannot overcome such tensions, the decline or outright demise of one or more of the three competition policy networks is conceivable. Such a development would deprive the global competition community of the benefits of rivalry-driven experimentation that occurs today in the ICN, the OECD, and UNCTAD and eliminate the gains that could come from linking complementary capabilities among them.

To orientate the discussion for this section, in Table I below we have laid out in a simplified form the characteristics of three of the major networks: the ICN, the OECD, and UNCTAD.

TABLE 1: THE MULTINATIONAL COMPETITION POLICY NETWORKS

Network	Competition Policy: Status	Membership	Principal Products	Secretariat and Facilities	Member Interaction
OECD CLPC	Unit of large, diversified parent body	Governments : economically developed states, plus observers	Research, peer reviews, standards, technical assistance, toolkits	Full-time secretariat in Paris HQ; two regional centers	Meetings three times annually in Paris
UNCTAD Competition Group	Unit of large, diversified parent body	Governments : no screening based on level of economic development	Standards , peer reviews, technical assistance	Full-time secretariat in Geneva HQ	Annual Meeting in Geneva
ICN	No parent body; sole focus is competition law & policy	Competition agencies: no screening based on level of economic development	Standards , practical guides and toolkits, workshops for member	Virtual body: no physical headquarters or dedicated secretaries	Annual Conference; telephone conferences; leadership convenes at OECD Paris meetings

Table 1 captures several important features of the networks. It helps identify key respects in which we can model the networks as rivals, and it is a start to mapping out complementarities that could provide useful areas for future cooperation among the networks.



### A. THE OECD

Established in 1961, the OECD now has thirty-four member countries.<sup>26</sup> One of the OECD's most important characteristics is its membership criteria. Full participation in the organization is confined to countries from the more economically developed world. Although the OECD has taken a number of measures to engage less developed economies, this limitation served as an important reason for the creation of the ICN, which readily made membership available to all jurisdictions with a competition law and a mechanism for its enforcement.<sup>27</sup>

The OECD supports economic growth and development among its members through a variety of programs. It monitors, analyzes, and publishes reports on macroeconomic trends and microeconomic policy developments. Its chief operational units consist of approximately 250 committees, expert groups, and working groups that provide members with regular opportunities to discuss issues of economic development and regulatory policy. On a number of occasions, the work of the committees has helped catalyze the formation of a broad-based international consensus about major policy issues such as the establishment of antitrust programs to combat cartels.<sup>28</sup>

Member countries hold decision making authority for the OECD. As noted above, the OECD's members are governments. Officials from individual government agencies or departments conduct the business of committees and working groups. The freedom of these officials to maneuver and express their views in these settings is not uninhibited, for they serve within the OECD as representatives of their governments, not merely as spokespersons for their own institutions. Member countries usually assign an ambassador (and a substantial support staff) to the OECD. It is common for a representative of the country's OECD embassy staff to observe meetings of committees or working groups, especially if sensitive issues are on the agenda.

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26. *History*, ORG. FOR ECON. COOPERATION AND DEV., [www.oecd.org/document/25/0,3746,en\\_36734052\\_36761863\\_36952473\\_1\\_1\\_1\\_1\\_00.html](http://www.oecd.org/document/25/0,3746,en_36734052_36761863_36952473_1_1_1_1_00.html) (last visited Mar. 6, 2011).

27. See INT'L COMPETITION NETWORK, ICN FACTSHEET AND KEY MESSAGES 5 (Apr. 2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf> (discussing ICN's membership criteria).

28. See Organization for Economic Cooperation and Development [OECD], *Recommendations of the Council Concerning Effective Action Against Hard Core Cartels* (Mar. 25, 1998), available at <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.

When the OECD speaks as an institution and makes policy recommendations, its views carry the force of its member governments. Because it is a body of governments and takes decisions by consensus, however, the path to reaching a recommendation can be long and tortuous.

The OECD obtains its operating budget (in the current fiscal year, approximately €350 million) from member contributions. Member payments fund a secretariat staff of approximately 2500;<sup>29</sup> most staff work at the organization's headquarters in Paris. Among other functions, the secretariat supports the committees and working groups. Many members of the CLPC secretariat previously have worked in government bodies in their home countries, and they give the OECD the in-depth substantive expertise and capacity to prepare first-rate reports on a wide array of policy issues. Although the OECD's CLPC secretariat is a great source of analytical strength, the size and deliberateness of the OECD's bureaucracy as a whole sometimes attracts criticism.<sup>30</sup> The perception of the OECD administrative machinery as unduly ponderous is a major reason for the ICN's insistence that it is a virtual network unencumbered by physical structures or a large, permanent staff.<sup>31</sup> The aversion to having the ICN establish any form of traditional secretariat seems to stem from the fear that a replica of the OECD's substantial Paris campus and a laborious pace of operations soon would follow.

The OECD began to address antitrust issues soon after its creation in 1961 when it formed the CLPC. The CLPC has served an important function as what some commentators have called a "convener"—an institution that supplies a venue for institutions to improve their understanding of other systems and encourage cooperation.<sup>32</sup> The CLPC provided the first significant post-World War II international forum for members

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29. See OECD, *Who Does What, available at* [http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761791\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html).

30. The CLPC is a sub-unit of the Directorate for Financial and Enterprise Affairs, which is one of twelve OECD directorates.

31. Kovacic participated extensively in discussions about the organization and management of ICN in its first years and recalls the determination of many ICN members to avoid giving the new network institutional attributes resembling those of OECD.

32. See Kirsten Lundberg, *Convener or Player?: The World Economic Forum and Davos*, 1741.0 KENNEDY SCH. OF GOV. CASE STUDY 1 (2004) (discussing how the World Economic Forum, by convening meetings of experts, established an international policy network and helped set an agenda of policy issues for consideration by leaders in academia, business, and government).

to collect information on antitrust topics, to meet regularly to discuss their experiences, and to build a network of relationships that strengthen cooperation among different jurisdictions.<sup>33</sup> The CLPC's structure today reflects the increasing complexity of competition policy and the global expansion of competition law systems. The Committee houses two working parties and various outreach programs—notably, the Global Forum on Competition—devoted to competition issues.<sup>34</sup> To organize and support these activities, the CLPC draws upon a superb secretariat of administrators, researchers, and an ensemble of external consultants.<sup>35</sup> Member country rankings of the OECD's many committees routinely place CLPC at or near the top of the ladder.<sup>36</sup>

A significant element of CLPC's efforts to build a common base of experience and to encourage adoption of superior techniques is preparation of studies known as country reviews or peer reviews. In the peer review, a member country or OECD observer requests an examination of its competition system, and a competition expert retained by CLPC prepares a detailed study.<sup>37</sup> The expert reviews published texts (e.g. statutes, implementing regulations, decisions, policy statements, guidelines) and conducts interviews with agency officials and observers outside the competition agency (e.g. academics, business associations, consumer groups, other government bodies, and the private bar). The consultant presents the peer review at one of the CLPC's regular

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33. See Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 47 (2007).

34. See *On-Line Guide to OECD Intergovernmental Activity*, OECD (Mar. 6, 2011), <http://webnet.oecd.org/OECDGROUPS/BBodie/ListByNameView.aspx?book=true> (including the Competition Committee, the Global Forum on Competition, the Working Party No. 2 on Competition and Regulation, and the Working Party No. 3 on Co-operation and Enforcement).

35. Some members of the CLPC secretariat are full time employees with the rough equivalent of civil service tenure. Others have shorter-term contracts ranging from six months to three years. In still other cases, staff are seconded by and funded by OECD member governments. Many CLPC consultants have served previously as members of the secretariat staff.

36. Periodic reports provided to the CLPC "Bureau"—the name given to the committee's governing board—indicate that OECD members routinely give the CLPC superior evaluations.

37. See *Country Reviews*, OECD, <http://www.oecd.org/competition/countryreviews> (Mar. 6, 2011). The experts who prepare the peer review studies often have extensive experience with this exercise and are skillful observers of competition policy.

gatherings, and officials from the agency under study respond to questions from member countries.<sup>38</sup> Other competition policy networks—notably, UNCTAD—have emulated this practice and conducted their own series of peer reviews.<sup>39</sup>

As written, the OECD (and UNCTAD) peer reviews fall short of being a completely uninhibited assessment of the quality of the examinee's competition system.<sup>40</sup> For example, if the examiner finds the agency's top managers to be inept, or the national courts to be corrupt, the peer review report will not quite say so. The pulled punches are understandable. Only a competition agency (or, in the case of government-based organizations such as OECD and UNCTAD, a government) with the highest degree of self-assurance would volunteer to participate in a peer review that mercilessly exposed weaknesses in a reviewed agency or the larger framework of public administration. An analogy would be academia, where instructors who freely dispense failing marks often find their courses cancelled due to inadequate enrollment. On the whole, newer agencies are relatively more welcome to unvarnished criticism and regard peer review as an opportunity to improve their operations. Older systems are more thin-skinned and likely to see peer review as a potential threat rather than an occasion to learn and grow.

The airbrushing in published peer reviews does not undermine the essential value of such exercises. Even with euphemisms and evasions, peer reviews are valuable tools for identifying areas of improvement. The final written report may soft-peddle system flaws, but the consultant ordinarily gives the examinee a candid spoken briefing that spares nothing. The

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38. In one sense, the label of "peer review" is a misnomer. As used in academic and scientific circles, a peer review usually entails an assessment of one researcher's work by other researchers who are expert in the field. In the CLPC, the principal examiner is a single expert consultant whom the committee retains. The examinee's true peers—other competition agencies—participate in the review only by asking questions at the committee session at which the consultant presents her findings. OECD member competition systems do not perform their own study of the examinee, and their questions frequently are scripted by the expert consultant or the OECD secretariat. The questions posed by the panel of other competition authorities are not shared with the examinee before the formal session.

39. U.N. Conf. on Trade and Dev., *Voluntary Peer Review Process*, (Mar. 6, 2011), [www.unctad.org/Templates/Page.asp?intItintI=4163&lang+1](http://www.unctad.org/Templates/Page.asp?intItintI=4163&lang+1) (discussing UNCTAD's voluntary peer reviews on competition law and policy).

40. The discussion here is based on Kovacic's experience with the OECD and UNCTAD peer review processes.

very effort to prepare for and participate in a review usually causes competition agencies to reflect carefully upon its work and thereby can stimulate improvements. Finally, the published report's recommendations about needed adjustments in legislation, organization, or resources, albeit sometimes muted, can nevertheless lend influential international support for suggested reforms. Notwithstanding the limitations discussed here, the OECD peer reviews supply an informative perspective on the development of competition policy systems over the past twenty years.

The peer review is one significant element of a portfolio of CLPC mechanisms that facilitate convergence upon superior substantive concepts and procedures. The regular CLPC meetings permit members to share experiences, identify strengths and weaknesses of existing enforcement approaches, and discuss new developments in economic and legal theory affecting competition law.<sup>41</sup> In our conversations with representatives of countries that participate actively in the ICN, OECD, and UNCTAD, many have said that OECD provides the best forum for in-depth exploration and debate concerning substantive policy issues. The CLPC secretariat prepares background papers for most sessions of the committee and its working parties. Members regard these research studies as a valuable resource, due to their thoughtful, balanced analytical approach.

In some instances, CLPC programs foster consensus that generates formal OECD recommendations.<sup>42</sup> The OECD has published influential recommendations and best practices related to the appropriate treatment of specific business practices, the relation of competition policy to other forms of government regulation, and the means for cooperation among competition authorities.<sup>43</sup> The OECD policy recommendations

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41. The CLPC meets in Paris three times annually—usually in February, June, and October. In the months before each session, members receive a call for papers on topics to be considered by the CLPC working parties and in the committee's plenary sessions. These requests typically elicit a substantial number of contributions which collectively provide comparative perspectives on substantive policy issues and a detailed compendium of enforcement experience.

42. See Sokol, *supra* note 33, at 47.

43. See, e.g., *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, Org. for Econ. Co-op. and Dev. Council C(98)35/FINAL (May. 14, 1998), available at <http://www.oecd.org/dataoecd/39/4/2350130.pdf>; *Recommendation of the Council Concerning Structural Separation in Regulated Industries*, O.E.C.D. C(2001)78/FINAL (Jun. 16,

are non-binding. In a number of instances, member countries do not comply with the OECD's recommendations.<sup>44</sup> Nor does the OECD process move expeditiously. Many OECD projects have proceeded at an extremely deliberate pace. This lends the impression (and, sometimes, reveals the reality) that the OECD cannot respond quickly and effectively to new, urgent concerns of its members. Nonetheless, the OECD's prescriptions involving competition law and other areas of international economic policy (such as efforts to discourage commercial bribery) have encouraged discussion about potential reforms and supported jurisdictions that are contemplating reforms.<sup>45</sup>

Compared to the ICN and UNCTAD, the OECD's relatively small, homogeneous membership of thirty-four developed countries leads to an easier building of consensus, but this advantage is double-edged.<sup>46</sup> The lack of significant input from the developing world can limit the perspective that informs OECD recommendations and, in the eyes of nonmembers, makes its prescriptions less attractive. Our discussions with OECD officials indicate that concerns about under-inclusive membership played a major part in the CLPC's establishment of the Global Forum on Competition (GFC) in the fall of 2001.<sup>47</sup> The GFC enabled the CLPC to expand its access to a wide range of nonmember jurisdictions, especially to transition economies. We cannot offer a rigorous proof for the proposition, but our discussions with OECD officials and OECD members

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2003), available at <http://www.oecd.org/dataoecd/24/49/25315195.pdf>; O.E.C.D., *Recommendation of the Council Concerning Merger Review*, O.E.C.D. C(2005)34 (Mar. 23, 2005), available at <http://www.oecd.org/dataoecd/3/41/40537528.pdf>; O.E.C.D. Competition Comm., *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (Oct. 2005), <http://www.oecd.org/dataoecd/1/33/35590548.pdf>; O.E.C.D. Competition Comm., *Guiding Principles for Regulatory Quality and Performance*, (Apr. 2005), available at <http://www.oecd.org/dataoecd/19/51/37318586.pdf>; *Recommendation on Competition Assessment*, O.E.C.D. C(2009)130 (Oct. 22, 2009), available at [http://www.oecd.org/document/10/0,3746,en\\_2649\\_37463\\_44080714\\_1\\_1\\_1\\_37463,00&&en-USS\\_01DBC.html](http://www.oecd.org/document/10/0,3746,en_2649_37463_44080714_1_1_1_37463,00&&en-USS_01DBC.html).

44. See Sokol, *supra* note 33, at 47.

45. See ICPAC REPORT, *supra* note 2, at 281–300 (discussing the impact of the OECD's policy recommendations).

46. See Konrad von Finckenstein, *International Antitrust Cooperation: Bilateralism or Multilateralism?*, JOINT MEETING OF THE ABA SEC. OF ANTITRUST L. & THE CAN. BAR ASSOC. NAT'L COMP. L. SEC. (May. 31, 2001), available at <http://210.69.106.168/doc/Canada/Policy/1a.htm>.

47. See generally, *Global Forum on Competition*, O.E.C.D., [www.oecd.org/competition/globalforum](http://www.oecd.org/competition/globalforum) (last visited May. 12, 2011) (introducing the Global Forum). The GFC usually convenes once per year at the CLPC's February meeting.

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suggest that potential competition from what eventually became the ICN also inspired the GFC's creation.<sup>48</sup> OECD also has established regional competition centers in Hungary and South Korea, in partnership with the national competition authorities in those countries,<sup>49</sup> and it sponsors a Latin American Competition Forum, which hosts events for countries in that region. These centers provide platforms for conducting seminars and training programs for neighboring countries, including non-OECD members.

## B. UNCTAD

The United Nations created UNCTAD in 1964 to help developing countries form and implement economic policy.<sup>50</sup> In the 1970s, UNCTAD suggested a "New International Economic Order," which involved a series of proposals designed to shift the balance of economic power toward developing countries.<sup>51</sup> One topic was restrictive business practices, which included the application of competition law.<sup>52</sup>

These discussions led the United Nations to adopt in 1980 UNCTAD's proposal, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set).<sup>53</sup> The UN described the Set as establishing "broad principles and rules encouraging the adoption and strengthening of competition legislation and policies at the national and regional levels, and at promoting international

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48. The OECD's leadership and the CLPC management team were aware of discussions in the late 1990s and early 2000s about the need for a new international network to include more of the world's competition agencies. They knew that a reason offered for establishing a new network was OECD's restrictions on membership. The CLPC convened its first GFC meeting in Paris shortly after the announcement of ICN's creation.

49. For the centers in Hungary and South Korea, the host country county competition agencies provide most of the funds (over 90%) for facilities and operations. The OECD lends its name and technical expertise to the ventures.

50. See generally, U.N. Conf. on Trade and Dev., *About UNCTAD*, <http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1> (last visited Mar. 13, 2011).

51. See U.N. Conf. on Trade and Dev., *A Brief History of UNCTAD*, <http://www.unctad.org/Templates/Page.asp?intItemID=3358&lang=1> (last visited Mar. 13, 2011) (describing history of UNCTAD).

52. *Id.*

53. See Diane Wood, *The Impossible Dream: Real International Antitrust*, U. CHI. LEGAL F. 277, 285-86 (1992); see also, e.g., Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 TUL. J. INT'L & COMP. L. 415, 422 (2007).

cooperation in this area.”<sup>54</sup> The Set was unanimously adopted, but due to its voluntary nature it did not have a legally binding effect.<sup>55</sup> Also limiting the impact of the Set was the reality that at its time of establishment many nations had no competition law, which meant that the Set was largely aspirational.<sup>56</sup>

Due in part to its nonbinding nature, the Set has not evolved into the source of international competition law that its creators envisioned. To a number of observers, the compromises embedded in the Set’s preparation also robbed the document of an important element of analytical persuasiveness and thus impeded broad acceptance. The Set has encountered recurring criticism that its provisions are too vague and represent the “lowest common-denominator work product.”<sup>57</sup>

Although the Set has not served as a template for the broad adoption of antitrust prescriptions, it has proved useful in providing a focal point for discussion and being a stimulus for consideration of other approaches.<sup>58</sup> Moreover, in the context of conferences and meetings convened by UNCTAD, the Set and its periodic annotation have supplied an important basis for continued international discussion about competition law and policy issues. An Intergovernmental Group of Experts (IGE) meets yearly to discuss approaches for improving cooperation and convergence on competition issues.<sup>59</sup> The IGE also conducts debates, roundtables, and voluntary peer reviews

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54. U.N. CONF. ON TRADE AND DEV., UNCTAD GUIDEBOOK ON COMPETITION SYSTEMS, *at*i, UNCTAD/DITC/CLP/2007/2 (2007), *available at* [http://www.unctad.org/en/docs/ditcclp20072\\_en.pdf](http://www.unctad.org/en/docs/ditcclp20072_en.pdf).

55. *See* Wood, *supra* note 53, at 429 (recognizing that the Set does not have binding legal effect, but arguing that it may contribute to customary international law on the subject).

56. *See* Sokol, *supra* note 33, at 48.

57. *Id.* at 104.

58. *Report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF.7/11, at 7 (Jan. 25, 2011), *available at* [http://www.unctad.org/en/docs/tdrbpconf7d11\\_en.pdf](http://www.unctad.org/en/docs/tdrbpconf7d11_en.pdf) (describing views of UNCTAD participants about the impact of UN Set).

59. *See* U.N. Conf. on Trade and Dev., *Intergovernmental Group of Experts on Competition Law and Policy*, <http://www.unctad.org/Templates/Page.asp?intItemID=4068&lang=1> (last visited Mar. 13, 2011). These meetings tend not to attract the top leadership from the competition agencies of the UN’s members. *See* Russell W. Damtoft & Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT’L LAWYER 137, 145 (2009) (UNCTAD’s competition meetings “are heavily populated by resident diplomats who are not well-versed in competition law.”).



modeled along the lines of OECD peer reviews.<sup>60</sup> There is a UN conference every five years to review the Set.<sup>61</sup> The most recent five-year review, conducted in Geneva early in November 2010, reveals that UNCTAD reaches an audience of developing countries that do not participate in the OECD or ICN events. To a large extent, UNCTAD remains the only significant forum through which a number of low-income countries that have recently enacted competition laws or are considering such measures may engage in international discussions about competition policy. This attribute gives UNCTAD an important, unique capacity to support the development of competition policy in nations with few, if any, links to the ICN or OECD.

The five year review held in November 2010 featured an example of the type of innovations that have emerged from the efforts of competition policy networks to respond more effectively to the needs of the members. UNCTAD used the meeting to launch a new network of academic advisors to assist in identifying worthy projects and to provide comments on the existing UNCTAD competition agenda. Among international networks, UNCTAD's initiative is the first systematic effort to engage academics in the formulation and implementation of a competition network's program. Among other consequences, the academics' network can help UNCTAD augment its research and analysis capabilities through a loose joint venture with external parties.

Over time, "soft law" institutions like the ICN and OECD may eclipse UNCTAD's competition policy program.<sup>62</sup> From the time of the UN's adoption of the Set through the 1990s, UNCTAD acquired a reputation for expressing antagonism to analytical perspectives that caution against various forms of antitrust intervention or that assign preeminence to economics as a basis for formulating a more intervention-minded program.<sup>63</sup> By contrast, in the past decade, however, we detect a shift away from this orientation toward a philosophy that encourages greater caution in some forms of competition law enforcement and accepts more readily analytical methods

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60. *Id.*

61. See U.N. Conf. on Trade and Dev., *U.N. Conference for the Review of the Set*, <http://www.unctad.org/Templates/Page.asp?intItemID=4103&lang=1> (last visited Mar. 13, 2011).

62. Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30 MCGILL L.J. 37 (1984-85) (examining the concept of "soft law").

63. See Sokol, *supra* note 33, at 105.

informed by modern industrial organization economics. Some members of UNCTAD's core "client base"—the less wealthy developing countries—have become members of the ICN and have devoted progressively greater resources to ICN's activities.<sup>64</sup> Others have expanded their investment in OECD through time devoted to attendance at the Global Forum on Competition and participation in regional events that the OECD sponsors.<sup>65</sup>

UNCTAD's efforts to define its place in a crowded policy market points to a larger phenomenon within global competition policy. The emergence of the ICN and the establishment of competition policy projects within the context of regional initiatives confront new authorities with difficult resource choices.<sup>66</sup> Many new agencies lack the resources to assign more than one or two persons to focus on international relations, and their budgets can support travel to a few events each year. Compared to the ICN, the OECD and UNCTAD have relatively greater capacity to generate funds to support travel by less wealthy competition agencies to their meetings. Even when a new agency receives full financial support to attend an international event, it must decide how much time of its small staff to commit to these endeavors. This constraint has forced UNCTAD—as well as the ICN and OECD—to improve the quality of their "product lines" to attract participation.

UNCTAD resembles the OECD in that it can draw upon an expert secretariat to support its operations. UNCTAD's competition policy secretariat is located on the UN's Geneva campus, and its core function today is to support UNCTAD's extensive technical assistance program. UNCTAD's competition policy secretariat has approximately ten professionals. Only a

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64. For example, in this group we would include countries such as Zambia, which has been an important participant in ICN activities.

65. For weakly funded agencies with small staff, attendance at international events and participation in international networks involve major resource commitments—even if other institutions are paying the costs of accommodation and transport to the foreign event. In a small, underfunded office, the person assigned to handle international liaison matters is likely to have other responsibilities as well. Time spent in international liaison activities comes at the expense of performing other duties. Such agencies may decide to participate in one or two international/regional networks only.

66. In addition to large international networks, various regional bodies are seeking to increase their competition policy programs. These include older regional networks such as ASEAN and CARICOM, as well as new endeavors such as the African Competition Forum.

few of these positions are full-time appointments within the UN.<sup>67</sup> UNCTAD relies heavily on short-term (six months or less) renewable contracts. UNCTAD's custom is to renew these agreements, but their short nominal duration and the lack of guarantees about renewal impede the recruitment and retention of capable staff.

In principle, UNCTAD and OECD have access to large reservoirs of research and know-how that each institution has accumulated over time. The two networks have assembled a substantial body of reports, peer reviews, internal reports on field work, and other data dealing with the development of competition policy in many countries. Some of this material is in the public domain (e.g., peer reviews), but a great deal of information either is held internally or comes in the form of unwritten know-how. UNCTAD staff who have supervised or conducted technical assistance programs have an especially broad and deep perspective on the design and implementation of capacity building projects.

To assimilate the body of knowledge accumulated by the OECD and UNCTAD and apply it effectively to formulate future programs is not an easy task. The pressure to prepare for the next meeting or complete the next report tends to deflect attention away from the mining of the historical information base and the application of past work to new endeavors. We suspect there are considerable gains to be had for each network in making more effective use of what it has learned. We can also envision considerable advantages to having these pools of knowledge combined and used to inform the standard-setting activities of all three major networks, especially the ICN. There could be a division of labor in which the OECD and UNCTAD serve as suppliers of inputs (e.g., detailed knowledge about past country experiences) that the ICN cannot easily generate on its own. Doing so would require greater integration of effort among the three networks as well as a collaboration of efforts to map out product lines, identify complementarities, and determine which institution is best suited to perform specific tasks that lead to convergence upon superior substantive standards, procedures, and administrative techniques.

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67. As described to us by UNCTAD officials, this pattern reflects more general efforts by the UN to cope with budget constraints by reducing the number of full-time employees in favor of more flexible and often renewable short-term arrangements.

## C. WTO

Created in 1994, the World Trade Organization appeared to be a promising forum to house a multinational competition law regime. Karel van Miert, the European Commissioner for Competition, appointed a group of 'wisemen' to draft recommendations on the subject.<sup>68</sup> The group issued a report in 1995 encouraging the strengthening of bilateral cooperation, but they explained that convergence and cooperation strategies would likely be insufficient.<sup>69</sup> The group favored, instead, the establishment of a worldwide competition code. It was envisaged that states would apply the code under the auspices of the WTO.<sup>70</sup> These findings led the EC to propose the establishment of a Working Group on the Intersection between Trade and Competition Policy at the WTO's 1996 Singapore meeting.<sup>71</sup>

The WTO working group that was eventually established published several reports between 1998 and 2001.<sup>72</sup> Those reports led the WTO to issue a declaration at the WTO's Doha conference in 2001, positively encouraging the group's continuing work.<sup>73</sup> At the WTO's Fifth Ministerial Conference in Cancun in 2003, the organization suspended the operation of the working group and dropped antitrust from its agenda.<sup>74</sup>

Similar to the criticism leveled at the UNCTAD Set, a number of observers have suggested that a WTO agreement on competition law would provide only a minimum set of competition standards that would lead to nothing more than compliance with those minimum standards. Some jurisdictions also were concerned that the WTO enforcement body would infringe on their own sovereignty, and expressed doubt that an agreement was even possible between members with diverse

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68. David J. Gerber, *Is Reconciliation Possible? The U.S.-European Conflict over the Globalization of Antitrust Law: A Legal Perspective*, 33 *NEW ENG. L. REV.* 123, 129 (1999).

69. See EUROPEAN COMMISSION, *COMPETITION POLICY IN THE NEW TRADE ORDER: STRENGTHENING COOPERATION AND RULES—REPORT OF THE GROUP OF EXPERTS* (1995).

70. See DAVID J. GERBER, *GLOBAL COMPETITION* 103–04 (2010) [hereinafter *GLOBAL COMPETITION*].

71. See ICPAC REPORT, *supra* note 2, at 262–63.

72. See *GLOBAL COMPETITION*, *supra* note 70, at 104; see also Philip Marsden, *Competition Policy at the WTO*, 1 *COMPETITION L. INSIGHT* 6 (Nov. 2002); *Trade and Competition: Interview with Frederic Jenny*, 1 *COMPETITION L. INSIGHT* 3 (Nov. 2002).

73. *Id.*

74. *Id.*

national interests.<sup>75</sup> Opposition also came from many developing countries who thought that a competition agreement enforced through the WTO would reflect US, European and Japanese interests aligned to force open developing world markets to foreign firms.<sup>76</sup>

There remains the possibility that the WTO could revive its working group on competition law and direct the group to return to the task of devising a framework for international competition law.<sup>77</sup> One condition that could support the revival of the WTO working group is the increase since 2004 in the number of transition economies with competition law systems (e.g., China and Egypt) and the significant retooling of older mechanisms in emerging markets (e.g., India and Pakistan). An advantage that a restored working group would enjoy is seven years of experience in the form of the ICN, OECD, and UNCTAD efforts to build consensus and convert consensus views into recommended standards.

#### D. ICN

Filling the gap for a soft law institution that included both developing and developed nations, the ICN evolved from suggestions by the International Competition Policy Advisory Committee (ICPAC) formed in November 1997.<sup>78</sup> ICPAC researched international competition law and policy and reported its findings in February 2000.<sup>79</sup> The ICPAC report advocated a soft law approach to international competition cooperation and proposed a Global Competition Initiative.<sup>80</sup>

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75. *Id.* at 129–37.

76. *See id.* at 134–38.

77. *Id.* at 129–30

78. *History*, INTERNATIONAL COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/about/history.aspx> (last visited Mar. 5, 2011). Two especially informative discussions of the ICN have been prepared by experts who played roles in ICPAC and its recommendation that inspired ICN's formation. Professor Merrit Janow, who served as staff director for ICPAC and was the principal author of the group's report, in 2002 authored an account of the possible future relationship between ICN and the WTO's competition working group. *See* Merrit Janow, *Observations on Two Multilateral Venues: The International Competition Network (ICN) and the WTO*, in INTERNATIONAL ANTITRUST LAW & POLICY: 2002 FORDHAM CORPORATE LAW INSTITUTE 49 (Barry Hawk ed., 2003). Professor Eleanor Fox, who served as an ICPAC member, has prepared the best single review of the ICN's formation and subsequent operations. *See* Eleanor M. Fox, *Linked In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAWYER, 151 (2009).

79. ICPAC REPORT, *supra* note 2.

80. *See generally id.* (advocating the soft law approach to international

This led to the ICN's formation in 2001.

The ICN has strived to distinguish itself from other networks. One of its chief distinctive traits is the relatively narrow scope of its substantive agenda. As described above, antitrust is not the sole or principal concern of the OECD, UNCTAD, or the WTO. By contrast, the ICN emphasizes that it is the only international organization dedicated to "all competition, all the time."<sup>81</sup> In the ICN, competition policy need not battle for resources amid the many pursuits that command attention in multi-function bodies such as the OECD<sup>82</sup> and UNCTAD, nor does antitrust live in the shadow of trade policy cast by the WTO.

The ICN has espoused a single-minded focus on competition law, yet two developments lead one to ask whether the ICN can sustain the purity of this substantive vision over time. One force is the need to address problems that arise mainly in other policy domains yet have important competition policy implications. For example, the financial crisis that began in 2008 has stimulated far-reaching debates about the very efficacy of the market system and the value of competition as an ingredient of economic policy. Competition agencies must confront the direct and indirect effects of the crisis, which,

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competition cooperation).

81. ICN Factsheet and Key Messages, INTERNATIONAL COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf> (last visited Mar. 5, 2011).

82. OECD provides an example of the difficulties that a competition network housed within a multi-function institution faces in defining and sustaining a program. In recent years, we have observed how the OECD secretariat has pushed its committees—including the CLPC—to commit resources and meeting time to overarching projects (called "horizontal" initiatives within the OECD) that seek to link the work of the entire OECD committee structure and permit the organization to hold itself out as leading an integrated analysis of specific economic phenomena or policy issues. One recent initiative has involved the implementation of low-carbon technologies and less environmentally disruptive strategies for achieving economic growth. The OECD secretariat has pressed its committees to develop programs and convene meetings concerning this "green growth" initiative. The CLPC devoted part of its October 2010 meeting to considerations of how competition policy might relate to the implementation of green growth strategies. The OECD secretariat's push for committee participation in its horizontal initiatives could lead the CLPC to devote more time to matters with an attenuated connection with the competition policy responsibilities of its members. At some point, this allocation of effort could blur the identity of the CLPC and lead members to reconsider the intensity of their commitment to CLPC activities. *OECD Work on Green Growth*, ORG. FOR ECON. COOPERATION AND DEV., [http://www.oecd.org/document/10/0,3746,en\\_2649\\_37465\\_44076170\\_1\\_1\\_1\\_37465,00.html](http://www.oecd.org/document/10/0,3746,en_2649_37465_44076170_1_1_1_37465,00.html) (last visited Mar. 5, 2010).

among other consequences, has inspired calls for a relaxation of traditional antitrust controls on mergers and collaboration among competitors. This is but one area in which a network such as the ICN must devote some time to the treatment of pressing topical issues that arises at the boundaries of the competition policy system.

A second factor that could blur the ICN's competition-only focus is the diversity of policy tasks assigned to its members. A number of competition authorities are policy conglomerates: in addition to antitrust law, they enforce other statutes dealing with matters such as consumer protection and public procurement.<sup>83</sup> Other systems assign the competition authority responsibility to proscribe "unfair competition"—a command straddles the doctrinal boundary between traditional competition law and the fields of business torts and contract law.<sup>84</sup> Such measures focus attention on defining the boundaries of what forms of behavior "competition law" encompasses. Law enforcement within jurisdictions that apply these hybrid commands can create pressure for an expansion of what behavior falls within the concept of competition law.<sup>85</sup>

The ICN's membership also sets it apart from the other international networks that address competition policy. The member entities of the OECD, UNCTAD, and WTO are governments, and the competition agencies which participate in these networks speak as representatives of their respective governments—a condition that can require a competition agency to gain approval for its positions and initiatives from

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83. David A. Hyman & William E. Kovacic, *Form, Function, Performance, and the Assignment of Regulatory Duties: Toward a Theory of the Public Agency* 44–50 (Feb. 2011) (manuscript on file with author Kovacic).

84. This is the case with Section 5 of the Federal Trade Commission Act, which empowers the FTC to ban "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45 (2006). Ambiguity about the reach of this measure is evident in the FTC's settlement in *N-Data* (FTC 2007) which treated an episode of post-contractual reneging as an unfair method of competition and an unfair act or practice. *FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S.*, U.S. FED. TRADE COMM'N, <http://www.ftc.gov/opa/2008/01/ethernet.shtm> (last visited Mar. 6, 2011).

85. The ICN's custom is to allow the host of the network's annual conference to place a topic of its choice on the meeting agenda. At the 2008 conference in Kyoto, the Japan Fair Trade Commission convened a panel to discuss the application of statutes that, in the guise of competition law, restrict the exercise of an unfair bargaining advantage in contractual relations.

other ministries.<sup>86</sup> Within the ICN, the member competition authorities have relatively greater freedom to express their views as antitrust bodies. There is less looking over the shoulder out of concern that the competition agency's views might contradict the preferences of other public institutions within their governments. The ICN stands apart from its multinational network counterparts in the degree to which it engages non-government advisors (NGAs) in its work. Compared to its main international counterparts, the ICN relies more heavily upon the contributions of NGAs from academia, the business community, consumer groups, and the private bar.<sup>87</sup> NGAs participate directly in the deliberations of the ICN's working groups and in the network's conferences and workshops; more than 100 NGAs attended ICN's 2010 annual conference in Istanbul.<sup>88</sup> NGA contributions have been indispensable to the accomplishments of some ICN projects—such as the Merger Working Group—and it is doubtful that the network could function on such a large scale without extensive NGA participation.<sup>89</sup>

To date, the principal contributions have been made by NGAs from the private sector. As noted above, this has raised questions within the ICN about whether the network ought to engage academics, consumer groups, and think tanks more fully in its program.<sup>90</sup> A second issue about NGA participation is the selection process. For the most part, NGAs are

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86. The discussion of competition law and trade policy provides an example. Suppose the CLPC schedules a roundtable on the impact of anti-dumping mechanisms on domestic competition and asks members to submit papers on their national experiences. A competition agency will know that other major voices in government—especially those responsible for the execution of trade-related policy—will not look favorably upon a paper that documents how anti-dumping controls can shelter domestic firms from foreign competition and raise prices to domestic consumers. Because it appears on behalf of its government (and therefore must speak for a composite of departmental views), the agency is likely to either decline to provide a paper and thereby sidestep a controversial issue, or to write a watered-down paper that reflects the preferences of the government's trade bodies.

87. See Fingleton Interview, *supra* note 3, at 74–5.

88. This is Kovacic's rough count based on a comparison of the conference registration list and his observation of who attended the conference events.

89. See INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org> (last visited Mar. 6, 2011). As suggested earlier, perhaps the most influential contributions of NGAs have occurred in the Merger Working Group.

90. See Fingleton Interview, *supra* note 3, at 75.



nominated by their national competition authority (NCA).<sup>91</sup> This gives NCAs the ability to filter out prospective NGAs on various grounds unrelated to their expertise in competition law. For example, we are aware of instances in which it appears that a potential NGA has failed to gain approval from its NCA because the NCA believed the candidate had been insufficiently supportive of the NCA's program.<sup>92</sup>

Another distinguishing characteristic of the ICN is that it has strived to operate as a "virtual" network. The ICN neither employs a permanent staff (i.e., there is no counterpart to the OECD or UNCTAD secretariat) nor owns facilities to perform its managerial and organizational tasks. In this respect, the ICN has sought to separate itself from the OECD and UNCTAD, whose impressive physical headquarters house substantial permanent staffs.<sup>93</sup> In place of a formal secretariat, ICN relies on its members to contribute the time of their staff, who form working groups in which NGAs also participate.<sup>94</sup> Most discussions within the working groups take place via teleconference and e-mail, with occasional face to face gatherings.<sup>95</sup> One estimate by the Competition Directorate of the European Commission concluded that the ICN conducts 90% of its work by email and teleconferencing.<sup>96</sup>

Although the ICN sees itself as a virtual network, the demands it faces in organizing its affairs are real. As the

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91. See *Operational Framework*, INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/about/operational-framework.aspx> (last visited Mar. 7, 2011) (outlining the NGA selection mechanism).

92. Kovacic has observed the NGA selection process closely by reason of his position as the ICN's Vice-Chair for Outreach.

93. See *e.g.*, *supra* note 35 and accompanying text for description of personnel and facilities of OECD.

94. Some ICN members have contributed substantial time and personnel. Perhaps more than any other country, Canada has provided the closest approximation to a formal secretariat for the ICN. For example, Canada's Competition Bureau has played a lead role in organizing the conference calls that supply a vital means for the deliberations of the ICN's governing body, the Steering Committee. Canada has served this function both when heads of the Competition Bureau (Konrad von Finkenstein and Sheridan Scott) chaired the Steering Committee and when officials from other ICN members held this position.

95. For example, most meetings of the ICN Steering Group take place by telephone. The group also meets face-to-face at the ICN annual meeting and at the margins of the OECD CLPC meetings in February, June, and October.

96. See Chad Damro, *The New Trade Politics and EU Competition Policy: Shopping for Convergence and Co-operation*, 13 J. EUR. PUB. POL'Y 867, 879 (2006) (describing how the ICN conducts its work).

administrative and management tasks of the network increase, it is fair to ask whether this virtual system of organization—which relies on the larger, better funded competition agencies to fulfill secretariat-like functions—will be adequate to support the ICN. There is reason to question whether the ICN can sustain a high level of activity without taking steps that establish a closer equivalent to a dedicated secretariat.

The range and detailed work product that the ICN has developed in just under a decade is impressive—especially when you consider that all its participants have other day jobs. Achievements have been made in many areas, including merger review, anti-cartel enforcement, unilateral conduct, competition advocacy, and competition policy implementation.<sup>97</sup> Work product consists of recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, databases, toolkits, and workshops.<sup>98</sup> At the most recent annual conference alone, the ICN issued, among other things, recommended practices for merger analysis on market definition and failing firms, a report on refusals to deal, and outlined plans for a virtual training program.<sup>99</sup>

The ICN develops its work product in three stages.<sup>100</sup> Firstly, a steering group identifies an issue in need of study.<sup>101</sup> Next, a working group is established to study the issue and, through the course of that study, identifies the aspects of the issue that are suitable for convergence and sets out the best path to a more effective regulatory outcome.<sup>102</sup> In the third stage, the ICN working group presents its findings, and ICN members begin to implement the suggested practices.<sup>103</sup> To facilitate the adoption of suggested practices, the ICN develops templates, manuals and any other materials to assist implementation.<sup>104</sup>

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97. See *User Guide*, INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/uploads/vco%20toolkit%20introduction%20to%20icn%20april%202010%20complete.pdf> (providing an introduction to the structure and work of the ICN).

98. See generally INT'L COMPETITION NETWORK, *supra* note 89 (making the ICN work product freely available on their website).

99. *ICN News Release: International Competition Network Plans for the Second Decade*, INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/uploads/library/doc615.pdf> (last visited Mar. 7, 2011).

100. Sokol, *supra* note 33, at 111.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

Compliance with recommended procedural practices should be amenable to effective measurement. Routine monitoring of progress toward acceptance of what the ICN has identified as superior techniques is important to determine whether the network is fulfilling the objective that most strongly inspired its formation. Systematic comparisons between the ICN standards and individual national experience can enhance convergence as agencies become aware of differences between their procedures and consider what is working. A huge step forward involves enhancing the procedural best practices of competition agencies and to assist convergence by measuring progress. The fact that two or more countries have similar competition law systems, however, does not necessarily reduce the probability that each will account for different policy factors despite substantial similarity in their procedures.<sup>105</sup>

As noted above, competition law is an inherently evolutionary field whose development depends heavily upon advances in learning in other academic disciplines, especially industrial organization economics.<sup>106</sup> Today's superior methods promise to be displaced by a continuous process of decentralized experimentation in which individual jurisdictions test specific approaches, evaluate results, and adopt refinements of existing substantive standards and procedures.<sup>107</sup> For purposes of convergence, this requires a mechanism that entertains the testing of new techniques, facilitates the identification of improvements in the status quo, and thereby supplies a focal point for voluntary opting-in by individual jurisdictions.

One possible means to this end is to improve the disclosure of agency information that illuminates the basis for agency decision making.<sup>108</sup> By making the rationale for agency

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105. For example, the adoption of common procedures for reporting proposed mergers would not ensure the refusal of competition agencies to consider policy factors unrelated to the maximizing of competition, such as the protection of what a nation perceives to be a strategic industry.

106. See generally William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000) (examining the influence of developments in industrial organization economics on US competition law and policy).

107. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 400–02, 472–76 (2003) (reviewing the evolutionary and experimental features of competition policy).

108. The development of a widely accepted methodology for reporting enforcement activity would provide a more informative perspective on the work of any single agency and would facilitate comparisons across

decisions more observable, we can test more accurately the extent of convergence upon the ICN's suggested standards. Superior disclosure practices also will cast more light on subtle assumptions or shrouded policies that may drive agency decisions. Improving procedural practices, therefore, could spur greater convergence upon superior techniques in old and nascent competition law regimes, alike.

In these and related endeavors, the ICN to this point has attracted considerable effort from its members, many of whom also participate in the OECD or UNCTAD, or both. Why do competition agencies around the world work arduously to develop recommended practices, toolkits, and other materials that are freely available to other agencies? Commentators have struggled with this question ever since the formation of the ICN and other so-called Transnational Regulatory Networks (TRNs) that involve specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries.<sup>109</sup> This question has also led them to express doubts about the ICN's future.<sup>110</sup>

One reason why the ICN has enjoyed success is the novelty of competition law for most nations.<sup>111</sup> Since they are new to competition enforcement, new market-based systems are looking for guidance. Rote copying of another nation's laws is not enough to establish an effective system of one's own.<sup>112</sup>

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agencies. See William E. Kovacic, Hugh M. Hollman, & Patricia Grant, *How Does Your Competition Agency Measure Up?*, EUROPEAN COMP. J. (forthcoming 2011).

109. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 1–7 (2002); Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 132–39 (2009).

110. See Lawson A.W. Hunter & Susan M. Hutton, *Global Competition Initiative: A "Headless Horseman?"—and the Canadian Intellectual Property Enforcement Guidelines: Convergence in Action (But Be Careful What You Ask For....)*, in CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 25, 25 (Barry E. Hawk ed., Juris Publishing 2001); *U.S. and Canadian Antitrust*, in CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 45, 47–57 (Barry E. Hawk ed., Juris Publishing 2001).

111. See Kovacic, *supra* note 8, at 314–15.

112. An examination of the text of a statute says nothing about the process of interpretation and application that give meaning to the text's operative terms. A first time reader of the Sherman Act might be inclined to think that the measure's seemingly categorical ban on contracts in restraint of trade forbids any agreement that curbs the freedom of its parties. 15 U.S.C. § 1 (2006). Since all contracts commit their parties to a course of action and breaches are punishable by damages, one could conclude that the Sherman Act bans all contracting. The text does not indicate that courts concluded that

Effective enforcement in any one system builds upon an accumulation of experience and knowhow. Instead, new agencies are striving to learn about the practical realities of antitrust enforcement and policy choices, which often are accessible through one's own experimentation or through dialogue with more experienced agencies. The ICN provides a highly practical forum for discussion and the requested guidance.

Another major advantage, especially for the more mature competition agencies, is cooperation among agencies and convergence in antitrust policy. Cooperation between agencies on cross-border cases reduces the risk of suboptimal enforcement where an agency otherwise is unable to obtain evidence from its counterpart competition authorities. Such cooperation also can diminish the number and degree of inconsistent outcomes when individual jurisdictions reach different conclusions about the same practice.<sup>113</sup> As mentioned earlier, the concept of the ICN evolved directly from recommendations of the International Competition Advisory Committee that was formed in 1997 by then US Attorney General Janet Reno and Assistant Attorney General for the Antitrust Joel Klein—the same year that the McDonnell Douglas/Boeing case exposed a rift between the EU and US competition agencies.<sup>114</sup>

### III. INTERACTION WITH OTHER NETWORKS

The ICN's presence has had an important effect on the operation and management of other multinational networks.

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the prohibition applies only to agreements that unreasonably restrain trade. Kovacic & Shapiro, *supra* note 106, at 44–53.

113. Greater cooperation—through information sharing and discussion of enforcement theories—reduces the likelihood of conflict by ensuring that agencies operate from the same basic body of factual assumptions and by facilitating a process through which conceptual concerns are examined and tested.

114. See FTC, [1997–2001 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 24, 295 (July 1, 1997) (closing the investigation into the Boeing/McDonnell Douglas merger but observing that “[t]here has been speculation in the press and elsewhere that the United States antitrust authorities might allow this transaction to go forward . . . and the United States . . . needs a single powerful firm to serve as its ‘national champion.’”). On July 30, 1997, the European Commission concluded that Boeing had a dominant position which would be strengthened by the merger but ended up clearing the merger on the basis of significant commitments by Boeing. Case IV/M.877, *Boeing/McDonnell Douglas v. Commission*, 1997 O.J. (L 336) 16.

Its arrival in 2001 has helped inspire important elements of product repositioning by the OECD and UNCTAD.

As suggested below,<sup>115</sup> the ICN in many respects is a rival to the OECD and UNCTAD. The three networks resemble joint ventures that have largely overlapping, but not identical, ownership. The chief owners of each venture are identical—the relatively wealthy jurisdictions with well-staffed competition agencies and active enforcement programs.<sup>116</sup> Like investors considering the content of their financial portfolios, these agencies decide each year about how to invest their foreign relations resources: to the ICN, OECD, or UNCTAD; to regional programs with competition policy components, such as ASEAN; to bilateral relationships with major commercial partners; or to technical assistance projects with less experienced competition authorities. The wealthy jurisdictions are the main source of commitments—such as attendance by top officials at regular network meetings, submission of high quality written contributions for policy discussions—that determine the success of each network's programs.

The decisions made by less wealthy jurisdictions also can be important. The multinational ventures exhibit network effects: their value to each member increases as the number of participants grows. By expanding attendance at regular functions and increasing the range of represented interests, broader participation by transition economies boosts the network's attractiveness.<sup>117</sup> Because poorer jurisdictions have fewer resources to commit to international matters, a decision to participate heavily in one network may mean that the agency ignores the others.

To attract participation by wealthy and poorer countries alike, the multinational networks compete with each other to

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115. See *infra* note 118 and accompanying text (describing how the ICN's creation has affected programs of the OECD and UNCTAD).

116. Among the most noteworthy jurisdictions in this category are Australia, Brazil, Canada, EU, France, Germany, Japan, Mexico, South Korea, US, and the UK.

117. This is perhaps most evident in the case of transition economy jurisdictions that presently have large economies or are experiencing growth rates that are rapidly increasing their economic significance. Such countries have acquired, or soon will attain, considerable ability to influence cross-border commerce through the implementation of their own competition laws. For example, the ICN would be considerably weaker if India and South Africa, both of which have substantial economies and important competition regimes, were not members. For the same reason, the ICN attaches great importance to seeing China join the network.

provide a more attractive bundle of services. The rivalry among the networks at times has been intense. The establishment of the ICN drew scorn from some the OECD and UNCTAD officials, some of whom lobbied their constituencies to forego participation in the ICN.<sup>118</sup> The entry of the ICN into the international network market also caused the OECD and UNCTAD to change their product offerings. In both groups, one observed a higher tempo of work and stronger efforts to ensure that new programs reflected the preferences of members. Both groups became more demand driven—a positive outcome of new entry. The initial period of relatively acute rivalry has abated, and the three organizations have taken initial steps toward a division of labor that recognizes complementary aspects of their programs and deemphasizes possibilities for substitution among them.

#### A. CONVERGENCE POSSIBILITIES, SHORTCOMINGS & SOLUTIONS

It is useful to consider how much the ICN's convergence-related initiatives, as well as the contributions of other multinational networks, will reduce conflicts among jurisdictions with respect to the treatment of specific matters. We would expect broad, voluntary opting in to substantive and procedural standards to decrease conflicts. Widespread adoption of similar analytical methods and procedures should serve in many instances to guide competition agencies in matters to the same result. At the same time, it is hard to imagine that convergence inspired by the ICN or other multinational networks will suffice to eliminate transnational conflicts. Jurisdictions with similar competition regimes, shared analytical methods, and consistent procedures sometimes will reach different outcomes owing to variations in application.

Even with apparent success in promoting convergence, the certainty of future conflicts raises the question of whether the discussion about global competition policy should include consideration of a binding international antitrust dispute

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118. Kovacic recalls the atmosphere at the OECD's October 2001 meeting, which followed shortly after the ICN's launch earlier that month. Key officials in the CLPC leadership and secretariat expressed deep concern that the ICN would undermine the OECD by diverting the attention of OECD members away from the CLPC and by discouraging nonmembers from participating in OECD outreach events.

resolution mechanism.<sup>119</sup> As Louis Sohn and other international law scholars have observed, voluntary cooperation and voluntary acceptance of recommended practices can supply a foundation for the establishment of binding, treaty-based obligations.<sup>120</sup> The ICN might define its role as facilitating convergence among competition law systems as a necessary evolutionary step from soft law to hard law—towards the formation of a multinational competition law agreement with binding provisions.

The concept that soft law evolves into hard law has logical appeal. Global problems would seem to require global solutions.<sup>121</sup> An agreement could reduce the risk of jurisdictional conflict and resolve conflicts that arise.<sup>122</sup> In addition, without an agreement, states' interests will not align sufficiently to resolve conflicts that arise.<sup>123</sup>

The concept of a multinational agreement has attracted considerable attention from policymakers, practitioners, and scholars throughout the period since World War II.<sup>124</sup> Consideration of a framework of international competition law has taken place in a number of fora, including the United Nations, the General Agreement on Tariffs and Trade (GATT), the WTO, the OECD, and UNCTAD.<sup>125</sup> Despite these discussions, no international treaty on competition issues has been signed. There are bilateral and regional agreements but, despite numerous attempts, no binding multilateral agreement. While countries often agree on the idea of a multinational competition agreement, the ultimate lack of success in actually

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119. See Wood, *supra* note 53, at 286–87 (demonstrating the non-binding nature of the UN Set as one reason for the Set's failure to become the international competition code that its creators envisioned).

120. Louis Sohn believed progress toward international agreement proceeded in small, incremental steps and depended on a long-term process of engagement. Thomas Buergenthal, Note, *Louis B. Sohn (1914–2006)*, 100 AM. J. INT'L L. 623, 625–26 (2006).

121. See Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1785–86 (2000) (stating nations have considered transnational rules in light of growing international trade).

122. See generally Andrew Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998) (advocating for an international agreement on antitrust issues, even though it is unlikely such an agreement could occur).

123. See Robert D. Anderson & Frédéric Jenny, *Current Developments in Competition Policy in the World Trade Organization*, 16 ANTITRUST 40, 41 (2001) (articulating that antitrust conflicts will continue to arise and that there will be difficulty resolving these issues because of national interests).

124. See, e.g., Wood, *supra* note 53.

125. ICPAC REPORT, *supra* note 2, at 255–71.



forming a multinational agreement has often had more to do with geopolitical factors and timing than countries disagreeing with the need for a multinational agreement.

### 1. Earlier Attempts at a Global Competition Law

Early attempts at forming a global competition law focused primarily on eliminating the harms of international cartels that were prevalent during the early 20th century.<sup>126</sup> Transnational cartelization developed in waves in response to two major destabilizing events in the late 19th and early 20th centuries. The “Great Depression” of the 1870s and 1880s led to first wave of cartelization.<sup>127</sup> The second wave followed the Great War that had taken its toll on the European economies by reducing production levels, incomes and living standards.<sup>128</sup> In the midst of this economic uncertainty, businesses sought to reduce their risk levels by agreeing with their competitors or potential competitors to coordinate their production or prices.<sup>129</sup> At the time, cartels were not perceived as necessarily damaging to consumer welfare. To the contrary, they were considered as a useful mechanism for achieving a more effective international order by rationalizing economic development, reducing overproduction, and improving the stability of workers’ jobs.<sup>130</sup>

International cartelization was a prominent issue at the World Economic Conference of May 1927, an event that attracted representatives from fifty countries.<sup>131</sup> While the objective of the conference was to identify and remove obstacles to international trade, such as tariffs, the most recent wave of cartelization following the Great War led to widespread debate about the issue of cartelization.<sup>132</sup> Discussions regarding cartels turned out to be the most contentious of the conference.<sup>133</sup> This led to difficulty in drafting language and delays in generating

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126. GLOBAL COMPETITION, *supra* note 70, at 24.

127. *Id.*

128. *Id.*

129. *Id.* at 23.

130. Diane P. Wood, *Cooperation and Convergence in International Antitrust: Why the Light Is Still Yellow*, in *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* 177, 178 (Richard A. Epstein & Michael S. Greve eds., 2004).

131. MARTIN HILL, *THE ECONOMIC AND FINANCIAL ORGANIZATION OF THE LEAGUE OF NATIONS* 47 (1946).

132. The Conference commissioned seven reports that dealt specifically with cartels. GLOBAL COMPETITION, *supra* note 70, at 27 n.23.

133. *Id.* at 30 & n.37.

recommendations on the cartel issue.

At the time, European experience with antitrust and cartels was limited.<sup>134</sup> Germany was the only major European country that had significant competition law experience.<sup>135</sup> The US had the most experience at the domestic level and had an outright ban on cartel agreements.<sup>136</sup> Nonetheless, the US influence was limited as it was not a member of the League of Nations, and US representatives only participated at the Conference as observers.<sup>137</sup> Many at the Conference disfavored the US approach of outright prohibition.<sup>138</sup> Moreover, Europeans tended to view the US antitrust system as an ill-considered system in that it allowed industrial concentration and encouraged mergers despite its prohibition of competition restraints.<sup>139</sup> Much of the generally negative view of competition law centered on a general lack of confidence in government, which colored the assessment of anti-cartel proposals.<sup>140</sup>

The Conference's final recommendation on cartels did not establish an international competition law or supervisory mechanism for international cartels.<sup>141</sup> The Official Report described the establishment of an international judicial regime for cartels as impossible due to divergences in enforcement between countries and general objections to such a system, but the Conference did call for the League to collect information on international cartels, investigate their consequences and publish information on harmful effects.<sup>142</sup> Despite failing to formalize a response to cartels, this development was a major first step toward an international response to issues presented by a global economy.<sup>143</sup>

The economic crash of 1929 sent many of the world's economies into a downward spiral. The global depression seemed to discredit reliance upon market processes and discouraged consideration of mechanisms—such as competition

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134. *Id.* at 36.

135. *Id.*; see generally DAVID J. GERBER, PROMETHEUS BOUND 266–333 (2001) (analyzing development of Germany's competition policy system).

136. GLOBAL COMPETITION, *supra* note 70, at 27, 35.

137. *Id.*

138. *Id.* at 35.

139. *Id.* at 35–6.

140. *Id.* at 36.

141. *Id.* at 30.

142. GLOBAL COMPETITION, *supra* note 70, at 30.

143. *Id.* at 37–8.

law—associated with market-oriented economic policy. Countries were less inclined to consider cooperative global solutions, as evidenced by US initiatives during the Great Depression.<sup>144</sup> This was confirmed when the US increased its tariffs in 1930, which led to many other countries following suit and further contributed to the Great Depression.<sup>145</sup> Nonetheless, following the 1927 League of Nations conference, there was another international effort to promote global competition law at the 27th Conference of the Inter-Parliamentary Union in 1930.<sup>146</sup> This organization was founded on a cosmopolitan faith that governments working together could improve the human condition.<sup>147</sup> The delegates called for states to develop a set of enforceable international competition law principles.<sup>148</sup> This was likely the last initiative to develop an international competition law before the Great Depression and Second World War put an end to cooperative international solutions.<sup>149</sup>

## 2. The Havana Chapter

Apart from being major destabilizing events, the Great Depression and Second World War demonstrated the power of big government. In the US, the government played an active role in righting the capsized economy and its role significantly increased during the New Deal. The massive government-directed mobilization during the Second World War also demonstrated both the power and capability of government institutions. The expansion of the state's role in the economy also drew strength from scholars, such as John Maynard Keynes, who challenged concepts of neoclassical economics that favored relatively free markets to solve unemployment in favor of more active government intervention in the economy through fiscal policy.<sup>150</sup> The increased role of government and the

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144. Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L L. 769, 775 (2006).

145. GLOBAL COMPETITION, *supra* note 70, at 38. US domestic economic policy from 1933 through 1935 also favored measures, such as the efforts undertaken by the National Recovery Administration to set industry wide codes that suppressed rivalry, that suppressed competition. See ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966).

146. GLOBAL COMPETITION, *supra* note 70, at 38.

147. *Id.* at 38 & n.58.

148. *Id.* at 38.

149. *Id.*

150. *Id.* The expansion in the United States of intervention by the

increase in forces that transcended national barriers seemed to call for governments to cooperate to form global solutions.

With this mindset the US and its allies conceived the Bretton Woods program during the Second World War. The program built upon a system of new international institutions that would provide a framework for the global economy once the war ended.<sup>151</sup> These institutions included the formation of what would become the World Bank and the International Monetary Fund (IMF).<sup>152</sup> Also part of the discussions at Bretton Woods were plans to create an international body to improve commercial relations and foster the reconstruction of global trade that had suffered during the Great Depression and Second World War. The resulting institution, created by the so-called Havana Charter, was the International Trade Organization (ITO).<sup>153</sup>

As part of the Bretton Woods program, the US circulated a draft proposal for an international trade organization.<sup>154</sup> The proposal suggested that countries should “join in an effort to release trade from the various restrictions which have kept it small. If they succeed in this they will have made a major contribution to the welfare of their peoples and to the success of their common efforts in other fields.”<sup>155</sup> There were two parts to the proposal. The first was a collection of principles to constitute a government code of conduct that focused on four areas: government interference with trade (e.g., tariffs and quotas), cartels, government commodity agreements, and national treatment of foreign investment.<sup>156</sup> Going further than just setting forth a set of principles, the second part of the plan contemplated the establishment of an international organization to enforce those principles.<sup>157</sup>

In response to the US proposal, the UN Economic and Social Council created a committee consisting of seventeen

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government in the economy is documented in ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987).

151. See generally Vagts, *supra* note 144, at 774–76.

152. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 97–98 (2000).

153. Havana Charter for an International Trade Organization, Mar. 24, 1948, available at <http://www.worldtradelaw.net/misc/havana.pdf>.

154. GLOBAL COMPETITION, *supra* note 126, at 43.

155. *Id.* at 44 n.66.

156. *Id.* at 44.

157. *Id.*

members that included more “underdeveloped” countries to discuss and develop the US proposal.<sup>158</sup> Despite the lack of participation by the Soviet Union and the many concessions made to the developing countries,<sup>159</sup> the committee prepared a draft. This led to a meeting in Havana in 1948 where the final agreement was to be negotiated. Fifty-seven countries attended the conference, and fifty-three countries ended up signing the so-called Havana Charter in March, 1948.<sup>160</sup> This was the last piece of a major project to further develop several existing international organizations.<sup>161</sup> Most countries waited for the US to ratify the convention before doing so themselves.<sup>162</sup> They considered the US as essential to the success of the ITO, without whose contribution the ITO would be an empty shell.<sup>163</sup>

The US Congress was responsible for taking the next step on the way to establish the ITO because Congress would have to ratify the agreement to authorize the US to participate.<sup>164</sup> In April 1949, President Truman submitted the Charter to Congress for its approval.<sup>165</sup> By 1949, however, the political climate, which had led to the establishment of the other organizations conceived in the Bretton Woods program, had changed. On the eve of a new decade, many believed that the clash in political ideologies between the Soviet Union and US would dominate foreign relations. Along these lines, the Soviet Union was ideologically opposed to the capitalist ITO.<sup>166</sup> As a result, it appeared that fewer nations than originally hoped would participate in the ITO. With this in mind, it seemed to make little sense for the US to subject itself to the jurisdiction of an international organization if it were not to realize the

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158. The members of the committee were Australia, Belgium-Luxembourg Economic Union, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Netherlands, New Zealand, Norway, Union of South Africa, Soviet Union, UK, and US. *Id.* at 44 n.68. See generally PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 79 (2005).

159. GLOBAL COMPETITION, *supra* note 126, at 44 n.68, 45.

160. See WILLIAM A. BROWN, JR., *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* 10 (1950).

161. See BRAITHWAITE & DRAHOS, *supra* note 152, at 97–98.

162. GLOBAL COMPETITION, *supra* note 70, at 46.

163. *Id.*

164. See generally William Diebold, Jr., *The End of the ITO*, in 16 *ESSAYS IN INTERNATIONAL FINANCE* 1, 1–37 (1952).

165. See BROWN, *supra* note 160, at 10.

166. GLOBAL COMPETITION, *supra* note 70, at 46.

benefits of a wide membership.<sup>167</sup>

US domestic politics had also changed significantly. In 1946, the Republican Party gained control of the Congress for the first time since Franklin Roosevelt's election in 1932.<sup>168</sup> Protectionist Republicans generally took a skeptical view of core elements of the Democratic Party's foreign policy program.<sup>169</sup> In 1948, the Democrats retook the Congress by a thin, insecure majority. The following year, China became a communist state under Mao Tse Tung's leadership.<sup>170</sup> This development, along with the outbreak of the Korean War in 1950 and continuing struggles with the Soviet Union, reinforced the containment of communism as the chief foreign policy priority of the US.<sup>171</sup>

Owing to these and other changes in the United States and abroad, Wilsonian ideals of international collaboration, which had underpinned the development of post-war international organizations, appeared out of step with an increasingly divided world—especially a world divided between the ideological poles of capitalism and communism. The Truman administration realized that Congress would not accept the ITO proposal, and it withdrew the measure from consideration December 1950.<sup>172</sup> No significant attempt to establish an international competition law would take place until four decades later.<sup>173</sup>

The Havana Charter episode is often cited as an example of the rejection of international competition law by the United States and the rest of the world. Judge Diane Wood has observed that the US objected to the Havana Charter because its antitrust rules “were not adequate for the US, and that the rest of the world was not yet ready to embrace a serious antitrust regime.”<sup>174</sup> Although a global competition law

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 47.

171. *Id.*

172. See SUSAN ARIEL AARONSON, *TRADE AND THE AMERICAN DREAM: A SOCIAL HISTORY OF POSTWAR TRADE POLICY* 5, 130 (1996).

173. Professor Susan Aaronson's research about the ITO negotiations attributes the ITO's demise to “changing international circumstances, party politics, special-interest opposition, and Truman Administration ambivalence.” *Id.* at 5.

174. Diane P. Wood, *The Internationalization of Antitrust Law: Options for the Future*, 44 DEPAUL L. REV. 1289, 1296 (1994–95).

appeared inappropriate for a world divided between the ideologies of communism and capitalism, nations with market-based economies were favorably disposed to the concept. Nonetheless, the development of two separate systems of economic activity—one based on markets and the other with the state as the principal actor—led to the abandonment of efforts to develop a multilateral framework for global competition. It was only with the fall of the Soviet Union in 1991 that the vision of an international competition law seemed possible once again as more countries began to participate in the global market.

### 3. ICN: Possible Foundation for International Rules

Past attempts to develop a multilateral competition law agreement have failed because they were premature in the sense that only a relative minority of the world's nations relied heavily on market-based economic systems, and still fewer of these had established competition systems. The widespread acceptance of market processes and the creation of competition laws in nearly 120 countries represents an important change in the enabling conditions for a global system of antitrust rules.<sup>175</sup>

As we have discussed elsewhere, the wide acceptance of competition policy substantive standards, procedures, and institutions seems to occur in three stages: decentralized experimentation within individual jurisdictions, identification of best practices or techniques, and voluntarily opting in to superior norms by individual jurisdictions.<sup>176</sup> It is only now with the continuing acceptance of the ICN's best practices and policies, along with those of the OECD and UNCTAD, that countries are beginning to consider the transition from the second to third stage: opting in to superior norms.<sup>177</sup> The developing world's suspicion that competition law is simply another means for the developed world to achieve its own global economic aims may be dissipating. Transition economies appear to have greater confidence that competition agencies, working through multinational organizations, can identify, adopt, and apply superior competition law norms in ways that promote economic development.

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175. Wood, *supra* note 130, at 178.

176. William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC. INT'L L. PROC. 309, 311 (2003).

177. See, e.g., STATEMENT OF ACHIEVEMENTS, *supra* note 6.

With gradual acceptance of the view that there are superior practices concerning the substance, process, and administration of competition law, there is an increased likelihood that countries may decide to opt into a multilateral agreement to achieve the benefits associated with a global agreement on widely accepted principles. As before, the ultimate question is whether the world has arrived at that point. Is there a set of competition norms and best practices that are globally accepted and may supply the basis for an international agreement on competition law?

The ICN, OECD, and UNCTAD appear to have increased convergence around competition law norms and practices, and they have capacity to make further progress in the future. Of the three, the ICN may prove to be the most effective convergence vehicle. This possibility stems from the breadth of its membership (an advantage over the OECD), its members' status as agencies rather than governments (an advantage over the OECD and UNCTAD), and its greater emphasis on practically-oriented projects to identify and embody consensus views in the form of recommended practices and related norms (an advantage over the OECD and UNCTAD). The ICN's leadership also has developed a more complete vision of how convergence might unfold. By thinking more systematically about convergence and making convergence the network's chief priority, the ICN is better positioned to focus its resources on achieving this end.

We would imagine that the ICN best practices and related recommendations can serve as a precursor for future steps to convert voluntarily adopted standards into binding commitments. The establishment of universal substantive commands could take place in a stepwise manner, beginning with prohibitions on cartels. We also would expect that the ICN network can continue to serve as a vehicle, in addition to the work of the OECD and UNCTAD, for developing consensus positions that become the platform for a progression that begins with voluntary opting in and may extend to binding commitments.

#### IV. CONCLUSION: ICN IN ITS SECOND DECADE

We close by emphasizing what we see to be three major focal points for the ICN in the coming decade. The first is to build on its past successes and continue to pursue the identification and adoption of best practices with respect to



substantive standards, procedures, and the administration of competition agencies. We envision expanded efforts to evaluate the degree of convergence in practice around the ICN's competition law norms and standards established by the OECD and UNCTAD.<sup>178</sup> The ICN's recommendations are not binding; no member country is obliged to adopt an ICN recommendation. It is often unclear how much ICN members are complying with its recommendations in practice. The OECD and UNCTAD conduct voluntary peer reviews to provide a more objective evaluation of various competition agencies.<sup>179</sup> These reviews are valuable, but their findings sometimes downplay particularly controversial issues lest countries conclude that participation in a review will expose them to excessively damaging criticism. The Global Competition Review also has a ranking system but its methodology seems to be largely based on the level of activity of each agency, and not application and acceptance of competition law best practices.<sup>180</sup>

Possibly a better approach for encouraging convergence is to build upon reputational and peer pressure. Nations could be grouped depending on which competition norms they have opted to apply in their competition law regimes. This might be extended to include a form of nonbinding arbitration in which panels consisting of representatives of competition agencies offer opinions on disputes brought before them. The continuation of contacts facilitated by the ICN, its working groups, its workshops, conferences, and annual meeting, helps build the level of trust and understanding that is necessary for countries to commit themselves to participate in this or similar forms of dispute resolution.

It may also be possible to rank the competition law regimes according to the norms they apply and their success in actually putting them into effect. The exact mechanism could vary but the goal should be to establish an objective means to evaluate competition agencies. Measurement efforts also might advance

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178. The importance of evaluation as way to assess international organizations' effectiveness, specifically for developing countries, has been emphasized in Helen V. Milner, *Globalization, Development, and International Institutions: Normative and Positive Perspectives*, 3 *PERSP. ON POL.* 833, 848–49 (2005).

179. See *supra* notes 36–39 and accompanying text (discussing OECD and UNCTAD peer reviews).

180. *Rating Enforcement*, GLOBAL COMPETITION REV., available at <http://www.globalcompetitionreview.com/surveys/survey/376/Rating-Enforcement/>.

by the promulgation, through the ICN, of common data reporting methods by which competition authorities would classify and disclose information about the prosecution and resolution of cases. Only through such objective evaluation will it become clear the extent to which jurisdictions are converging around a set of competition norms and processes; it will also assist in identifying exactly which norms and processes are considered best practices and those that are actually being applied. If convergence is evident, then the next attempt at a multilateral agreement on those principles and processes will face much greater prospects for success than it has in the past.

A second desirable focal point for future ICN efforts is to identify and make use of complementarities with the OECD and UNCTAD. This should begin with an exercise that takes stock of the characteristics and capabilities of all three institutions and maps out areas of existing and potential complementarity. This will provide a basis for the networks to identify areas in which collaboration will improve their collective effectiveness. The networks might strive to see how the vast reservoirs of knowledge accumulated within OECD and UNCTAD, embodied in reports, studies, and the experience of the secretariats of these bodies, can be applied by all three networks in the formulation of standards and the sharing of knowhow across competition agencies. We see great advantages from greater integration of effort, and we see dangers if such integration is not forthcoming. Amid enormous pressures for governments and their competition agencies to reduce costs, a failure to increase the realization of complementarities could lead to the demise or contraction competition programs within one or more of the existing networks.

The third frontier of future work is to examine and refine the ICN's operational framework and determine whether its structure and operational forms are adequate to support its current and future programs. ICN's founders correctly perceived that the modern revolution in communications technology would permit ICN to operate effectively without the outlays for bricks and mortar and an elaborate secretariat that supported the establishment and growth of OECD and UNCTAD.<sup>181</sup> In a rough sense, ICN has formed the public

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181. See Kai Raustiala, *The Rise of Transnational Networks Conference*, 43 INT'L LAWYER 205, 207 (2009) (discussing the role of new communications technology in spurring the development of modern transnational networks of economic regulatory agencies).

administration equivalent of the e-commerce business model that has enabled modern companies to leapfrog traditional brick and mortar distribution systems.

We salute the ICN's inventiveness in building a strong substantive program and realizing the possibilities for innovation in the design and operation of a modern international network of public agencies. We also see the major administrative challenges that lie ahead. The absence of highly visible physical facilities and a larger permanent secretariat, coupled with the much professed commitment to maintain a virtual existence, has masked the full dimensions of the demands associated with the ICN's operations. The ICN network may be virtual, but the problems of resources, financing, and management are unmistakably real. This is especially so for an organization whose continued success will require it to undertake still more ambitious programs, and whose past achievements have raised expectations for future accomplishment.

ICN's tenth anniversary will be a good occasion to take stock of what the operation of the network costs today and is likely to cost in the future. This exercise will identify the magnitude and sources of effort—by ICN members and NGAs—that sustain the network today and will be needed for it to carry out its plans for the future. The quality of this mundane budgeting and planning exercise will be no less important to the ICN's second decade than its wise selection and implementation of a substantive agenda.