

THE INTERNATIONAL COMPETITION NETWORK AT TEN

THE INTERNATIONAL
COMPETITION NETWORK
AT TEN

Origins, Accomplishments
and Aspirations

Edited by

Paul LUGARD



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Paul Lugard (Editor)

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THE INTERNATIONAL COMPETITION NETWORK: ITS PAST, CURRENT AND FUTURE ROLE*

Hugh M. HOLLMAN** and William E. KOVACIC***

1. 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).¹ The new venture joined a field of multinational competition networks that already included the Competition Law and Policy Committee 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.²

* This Chapter was developed from a submission originally prepared for the American Society of International Law, International Economic Interest Group, 2010 Biannual Meeting Agenda, "International Economic Law in a Time of Change: Reassessing Legal Theory, Doctrine, Methodology and Policy Prescriptions," in partnership with the Minnesota Journal of International Law (Nov. 18–20, 2010).

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**** The authors would like to thank Rebecca Bianchi for her invaluable research assistance, as well as advice from Russell Damtoft, Elizabeth Kraus, Randy Tritell, and Maria Coppola. We also have benefitted from conversations with Sean Ennis, John Fingleton, Hillary Jennings, Frederic Jenny, Philip Marsden, Joe Phillips, Hassan Qaqayya, Ulla Schweger, and Jeremy West. Views expressed are the authors' alone and do not necessarily represent the views of the Federal Trade Commission, any individual Commissioner, or the ICN.

¹ See Federal Trade Commission, "U.S. and Foreign Antitrust Officials Launch International Competition Network" (Oct. 25, 2001) (press release announcing ICN's formation), available at www.ftc.gov/opa/2001/10/icn.shtm.

² See International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust, Final Report, 281–302 (2000) [hereinafter *ICPAC Report*] (discussing what a new international network of competition agencies could add to work already performed by existing bodies), available at www.justice.gov/atr/icpac/cover.pdf.

Given the scope of the existing networks and the effort needed to support them (most ICN founders also participated in the OECD, 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 has prospered. Today, as its tenth anniversary approaches, the ICN's membership has grown to 114 members, which collectively represent most of the world's jurisdictions with competition laws.³ The organization's efforts have yielded important contributions to the development of widely accepted international competition policy norms,⁴ and its annual meeting has become perhaps the single most important annual gathering of competition agency leaders. More broadly, 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.⁵

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, ICN's paramount goal is to facilitate convergence on superior approaches concerning the substance, procedure, and administration of competition law. To achieve this aim, ICN engages in projects that seek to (1) increase understanding of individual competition systems, including similarities and 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 ICN prides itself on having stronger capacity to promote broad adoption of global standards.

³ Interview with John Fingleton, Chair of the Steering Group of the International Competition Network (ICN), 25 *Antitrust* 71 (Fall 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 ICN members, as are the Competition Commission and the Office of Fair Trading from the United Kingdom. The most notable jurisdiction that has a competition law and is not represented in ICN is China, which has three national competition agencies (MOFCOM, NDRC, and SAIC). China presently 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 note 11 and accompanying text, China's participation in ICN is an important determinate of the organization's future success.

⁴ ICN's work is collected in International Competition Network, ICN Work Products Catalogue (Sept. 2010) [hereinafter *ICN Work Products*], available at www.internationalcompetitionnetwork.org/uploads/library/doc667.pdf.

⁵ Perhaps the best known work advancing this theme is Anne Marie Slaughter, *The New World Order* (2005).

ICN pursues convergence in 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, 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.⁶ 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 existing 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, more traditional intergovernmental organizations? 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 ICN interact with OECD, UNCTAD, and other multinational bodies involved in competition policy? And, perhaps most ambitiously, can ICN facilitate progress toward establishment of a mechanism for the application of international competition law, including the resolution of disputes? Our examination of the ICN's experience and our attempts to 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.⁷ 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 ICN and its members are to preserve institutional attributes that have worked well, to achieve a fuller integration of effort with 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 a system of global competition rules.

⁶ See, e.g., *ICN Work Products*, supra note 4, at 10 (setting out recommended practices developed by ICN's Merger Working Group); International Competition Network, A Statement of Achievements through April 2010, at 3–4 (Apr. 2010) (discussing impact of ICN's merger-related recommended practices), available at www.internationalcompetitionnetwork.org/uploads/library/doc630.pdf.

⁷ See infra notes 13–15 and accompanying text (describing ICN Second Decade initiative).

All of what we suggest must be accomplished amid extreme pressure upon agencies to reduce costs. We believe 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 U.S. Federal Trade Commission) that was one of the network's fourteen founding members and has participated actively in the design of network's programs and processes. We sketch the ICN's origins, but we emphasize experience with implementation. It required true insight to see the value of another multinational initiative to address policy concerns that already commanded the attention of OECD, UNCTAD, and the WTO. Once the commitment to form the ICN was made in 2000–2001, there was no inevitability 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.

2. CONVERGENCE: MEANING AND METHODS

To provide context for studying the ICN's experience, we first define “convergence” – the main objective that motivated 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 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.⁸ Variations in the economic conditions, history, legal process (e.g., civil law versus common law), and political

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* 314 (Xavier Vives ed. 2009).

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.⁹ 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 U.S. 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.¹⁰ These and other improvements in competition policy have occurred in a sequence of experimentation by which individual jurisdictions introduce reforms, gain experience, and 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 intergovernment 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 the effectiveness of competition policy as a form of global endeavour (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 improve 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

⁹ See *infra* pp. 77–78 and accompanying text (describing evolutionary character of competition law).

¹⁰ Kovacic, “Competition Policy in the European Union and the United States: Convergence or Divergence?”, *supra* note 8, at 323 (describing importance of 1982 DOJ merger guidelines and leniency policies introduced in 1990s).

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, they 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 idiosyncratic reporting requirements or where notification obligations sweep in transactions with little connection to commerce within a jurisdiction. Where standardization simplifies the review process (such as by enabling the merging parties to use a common form to report a proposed deal to numerous authorities), convergence 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 20th century, few jurisdictions had competition laws, and still fewer had effective programs to enforce them.¹¹ As late as the mid-1970s, only Germany, the European Union (EU), and the United States had undertaken significant enforcement programs that commanded attention from business managers.¹² With the fall of the Soviet Union and the adoption of market-orientated reforms by countries previously committed to central economic planning, many nations enacted competition laws or revived older, dormant antitrust statutes. Today, at least 114 jurisdictions have competition laws.¹³

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 ICN, can promote broad adoption of superior techniques. Since 2001, ICN's leadership has formulated a strategy that suggests

¹¹ See William E. Kovacic, "Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy", 13 *GCR* 11 (Dec. 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 9th Annual Conference in Istanbul, Turkey (Apr. 27, 2010) [hereinafter *Second Decade Speech*], available at www.ofc.gov.uk/shared_ofc/speeches/689752/0410.pdf.

how the network can best promote convergence in a global environment that features a broad decentralization of authority and extensive experimentation.¹⁴

As articulated by agency officials who have played major roles in ICN's early development and subsequent operations¹⁵, 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 which embrace it to embody the standard in a treaty or other form of international obligation.

With this framework in mind, how can an international network such as 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 operation of individual systems. The ICN does this mainly by serving as a convenor that 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 jurisdiction 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

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, *Competition Agencies in a Market-Based Global Economy* (Brussels July 23, 2002) (Annual Lecture at the European Foreign Affairs Review) [hereinafter *EFA Speech*], available at www.ftc.gov/speeches/muris/020723brussels.shtm and Fingleton, *Second Decade Speech*, supra note 13.

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 ICN could encourage adoption of superior techniques. See, e.g., Muris, *EFA Speech*, supra note 14, at 2–3 (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 United States as a rough model for the work of the ICN. *Id.*

John Fingleton, the current Chair of the ICN's Steering Committee, is another 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 ICN can best serve the functions of education, consensus building, and implementation of superior techniques. See, e.g., Fingleton, *Second Decade Speech*, supra note 13.

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 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, 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, 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.¹⁶

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.¹⁷ They also can supply important contributions to the routine work of a network's committees or

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 Millennium: Toward Expanded Participation in Norm Generation and Norm Application", 32 *N.Y.U. Intl L. & Policy* 537, 541-42 (1999-2000).

¹⁷ See Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance", 18 *Mich. J. Intl. 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.

working groups – for example, by conducting research or preparing background papers.¹⁸

Where non-government advisors (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 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 ICN's members. 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 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).

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.

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 practice. On the other hand, the portfolio of a network with a greater indigenous capacity to perform policy research (e.g., 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 (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).

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.

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 below¹⁹, a demonstrated ability to provide visible results

¹⁹ See *infra* pp. 70–71 (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).

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.²⁰ 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.

3. ICN IN CONTEXT: THE MAJOR INTERNATIONAL COMPETITION NETWORKS

International networks have gained in prominence as a forum for discussion and cooperation on competition law. 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.²¹ Continuous interaction fosters commonly defined goals, and regulators focus more on shared agendas instead of more narrowly defined national interests.²²

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 OECD, UNCTAD, and the WTO.²³ We review the origins and characteristics of these organizations and compare them to the ICN.

²⁰ On the tendency of competition agencies to be measured by the volume and prominence of their cases, see William E. Kovacic, "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 (2010).

²¹ See Anu Piilola, "Assessing Theories of Global Governance: A Case of International Antitrust Regulation", 39 *Stan. J. Int. L.* 207-15 (2003).

²² Id.

²³ See *supra* pp. 51-52.

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 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, 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, ICN had to cope with product line repositioning and sometimes edgy resistance by OECD and UNCTAD. ICN’s business model presented special potential difficulties. ICN portrayed itself as the fast, agile, highly maneuverable fighter aircraft juxtaposed with OECD’s and UNCTAD’s slow, ungainly commercial transports. This compelled ICN to produce quick, visible results consistent with its institutional vision. By contrast, 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, OECD has the strongest capacity to generate in-depth policy research papers, yet 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, OECD has a better production facility, but 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.²⁴ As we discuss below, a major issue for the three networks is whether they can cooperate in ways that permit the realization of important complementarities.

To anticipate one of our conclusions²⁵, 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 ICN, OECD, and UNCTAD and eliminate the gains that could come from linking complementary capabilities among them.

4. OECD

Established in 1961, the OECD now has thirty-four member countries.²⁶ One of the OECD's most important characteristics is its membership criteria. Full participation in the organization is confined to countries from the developed world. Although 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.²⁷

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

²⁴ The authors are grateful to Sally Van Siclen for this observation.

²⁵ See *infra* pp. 90–91.

²⁶ Organization for Economic Cooperation and Development, History, available at www.oecd.org/document/25/0,3746,en_36734052_36761863_36952473_1_1_1_1,00.html.

²⁷ See *infra* pp. 75–76 (discussing ICN's membership criteria).

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.²⁸

Member countries hold decision-making authority for the OECD. As noted above, 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 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. 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.

OECD obtains its operating budget (in the current fiscal year, approximately 350 million euro) from member contributions. Member payments fund a secretariat of approximately 2500 staff²⁹, most of whom work at the organization's headquarters in Paris. Among other functions, the secretariat supports the committees and working groups. Many members of the Competition Law and Policy Committee (CLPC) secretariat previously have worked in government bodies in their home countries, and they give the OECD 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 attract criticism.³⁰ 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.³¹ The aversion to having ICN establish any form of traditional secretariat

²⁸ See Organization for Economic Cooperation and Development, Recommendation Concerning Effective Action against Hard Core Cartels (Mar. 25, 1998), available at www.oecd.org/documentprint/0,3455,en_2649_34685_44942291_1_1_1_1,00.html.

²⁹ See Organization for Economic Cooperation and Development, available at www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1,00.html.

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

³¹ One of us (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 the OECD.

seems to stem from the fear that a replica of 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 its CLPC. The CLPC has served an important function as what some commentators have called a “convenor” – an institution that supplies a venue for institutions to improve their understanding of other systems and encourage cooperation.³² The CLPC provided the first significant post-World War II international forum for members 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.³³ 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.³⁴ To organize and support these activities, the CLPC draws upon a superb secretariat of administrators, researchers, and an ensemble of external consultants.³⁵ Member country rankings of the OECD's many committees routinely place the CLPC at or near the top of the ladder.³⁶

A significant element of CLPC's efforts to build a common base of experience and encourage adoption of superior techniques is the country review, also known as the peer review. In this exercise, a member country requests an examination of its competition systems, and a competition expert retained by CLPC prepares a detailed study.³⁷ The expert reviews published texts (statutes, implementing

³² See Kirsten Lundberg, *Convenor or Player?: The World Economic Forum and Davos* (Kennedy School of Government Case Study 1741.0; Apr. 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).

³³ See D. Sokol, “Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age”, 4 *Berkeley Bus. L. J.* 37, 47–48 (2007).

³⁴ These include 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, see www.oecd.org/oeedgroups2/.

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 Organization for Economic Cooperation and Development, Country Reviews, available at www.oecd.org/documentprint/0,3455,en_2649_34685_40379568_1_1_1_1,00htm. The experts who prepare the peer review studies often have extensive experience with this exercise and are skillful observers of competition policy students.

regulations, decisions, policy statements, guidelines) and conducts interviews with agency officials and observers outside the competition agency (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 gatherings, and officials from the agency under study respond to questions from the member countries.³⁸ Other competition policy networks – notably, UNCTAD – have emulated this practice and conducted their own series of peer reviews.³⁹

The OECD (and UNCTAD) peer reviews fall short of a completely uninhibited assessment of the examinee's agency and collateral institutions that affect the quality of a competition system.⁴⁰ 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 for a peer review that mercilessly exposed weaknesses in the agency and the larger framework of public administration. (Instructors who freely dispense failing marks often find their courses cancelled due to inadequate enrollment.) On the whole, newer agencies are relatively more welcoming of unvarnished criticism and regard the 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 peer reviews does not undermine the essential value of the exercises. Even with euphemisms and evasions, the peer reviews are valuable tools for identifying areas of improvement. The final report may soft-peddle system flaws, but the consultant ordinarily gives the examinee a candid spoken briefing that spares nothing. The very effort to prepare for and participate in a review usually causes a competition agency to reflect carefully upon its work and thereby can stimulate improvements. Finally, the published report's recommendations, albeit sometimes muted, about needed adjustments in

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 a 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 United Nations Conference on Trade and Development, Voluntary Peer Review Process (discussing UNCTAD's voluntary peer reviews on competition law and policy), available at www.unctad.org/Templates/Page.asp?intItemID=4163&lang+1.

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

legislation, organization, or resources can 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.⁴¹ In our conversations with representatives of countries that participate actively in 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 owing to their thoughtful, balanced analytical approach.

In some instances, CLPC programs foster consensus that generates formal OECD recommendations.⁴² 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.⁴³ OECD policy recommendations are non-binding. In a number of instances, member countries do not comply with OECD's recommendations.⁴⁴ 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 it cannot respond quickly and effectively to new, urgent concerns of its members. Nonetheless, OECD's prescriptions involving competition law and other areas of international economic policy (such as efforts to discourage

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 (1998), Recommendation of the Council Concerning Structural Separation in Regulated Industries (2001), Recommendation of the Council Concerning Merger Review (2005), Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations (2005), Guiding Principles for Regulatory Quality and Performance (2005), and Recommendation on Competition Assessment (2009), available at Organization for Economic Cooperation and Development, *Competition*, www.oecd.org/topic/0,3373,en_2649_37463_1_1_1_1_37463,00.html.

⁴⁴ See Sokol, *supra* note 33, at 47.

commercial bribery) have encouraged discussion about potential reforms and supported jurisdictions that are contemplating reforms.⁴⁵

Compared to ICN and UNCTAD, the OECD's relatively small, homogeneous membership of thirty-four developed countries leads to an easier building of consensus than in other settings, but this advantage is double-edged.⁴⁶ 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 underinclusive membership played a major part in the CLPC's initiation of the Global Forum on Competition (GFC) in the Fall of 2001.⁴⁷ The GFC enabled the CLPC to expand its access to a wide range of nonmember jurisdictions, especially transition economies. We cannot offer a rigorous proof for the proposition, but our discussions with OECD officials and OECD members suggest that potential competition from what eventually became the ICN also helped inspire the GFC's creation.⁴⁸ OECD also has established regional competition centers in Hungary and South Korea, in partnership with the national competition authorities in those countries⁴⁹, 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.

5. UNCTAD

The United Nations created UNCTAD in 1964 to help developing countries form and implement economic policy.⁵⁰ In the 1970s, UNCTAD suggested a "New

⁴⁵ The impact of the OECD's policy recommendations is discussed in *ICPAC Report*, supra note 2, at 281–300.

⁴⁶ See Konrad von Finckenstein, Commissioner of Competition, International Antitrust Cooperation: Bilateralism or Multilateralism, Joint Meeting of the American Bar Association Section of Antitrust Law & the Canadian Bar Association National Competition Law Section (May 31, 2001), available at <http://210.69.106.168/doc/Canada/Policy/1a.htm>.

⁴⁷ The GFC is described in Organization for Economic Cooperation and Development, Global Forum on Competition, available at www.oecd.org/competition/globalforum. The GFC usually convenes once per year at the CLPC's February meeting.

⁴⁸ 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 percent) for facilities and operations. The OECD lends its name and technical expertise to the ventures.

⁵⁰ See United Nations Conference on Trade and Development, *About UNCTAD*, available at www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1.

International Economic Order,” which involved a series of proposals designed to shift the balance of economic power toward developing countries.⁵¹ One topic was restrictive business practices, which included the application of competition law.⁵²

These discussions led the United Nations to adopt in 1980 UNCTAD’s resulting proposal, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” (the “Set”).⁵³ 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 cooperation in this area.”⁵⁴ The Set was unanimously adopted, but due to its voluntary nature it did not have a legally binding effect.⁵⁵ Also limiting the impact of the Set was the reality that at the time many nations had no competition law, which meant that the Set was largely aspirational.⁵⁶

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.”⁵⁷

Although the Set has not served as a template for the broad adoption of antitrust prescriptions, it has served a useful function in providing a focal point for discussion and a stimulus for consideration of other approaches.⁵⁸ Moreover, in

⁵¹ See United Nations Conference on Trade and Development, *A Brief History of UNCTAD*, (describing history of UNCTAD), available at www.unctad.org/Templates/Page.asp?intItemID=3358&lang=1.

⁵² Id.

⁵³ Diane P. Wood, “The Impossible Dream: Real International Antitrust”, *U. Chi. Legal Forum* 277, 285–86 (1992). See, 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).

⁵⁴ United Nations Conference on Trade and Development, *Foreword, UNCTAD Guidebook on Competition Systems*, United Nations (2007).

⁵⁵ See Lianos, 15 *Tul. J. Int’l & Comp. L.* 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 See *id.* at 104.

⁵⁸ United Nations Conference on Trade and Development, 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 7 (Jan. 25, 2011) (describing views of UNCTAD participants about impact of UN Set), available at www.unctad.org/en/docs/trdrbpconf7d11_en.pdf.

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.⁵⁹ The IGE also conducts debates, roundtables and voluntary peer reviews modeled along the lines of OECD peer reviews.⁶⁰ There is a UN conference every five years to review the Set.⁶¹ 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 OECD or ICN events. To a large extent, UNCTAD remains the only significant forum through which a number of low-income countries that recently have enacted competition laws or are considering such measures 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 ICN or OECD.

The November 2010 meeting in Geneva also featured an example of the type of innovation that has emerged from the efforts of the 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 the international networks, the UNCTAD initiative is the first systematic effort to engage academics in the formulation and implementation of a 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.⁶² From the time of the UN's adoption of the Set through the 1990s, UNCTAD acquired a reputation for 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.⁶³ By contrast, in the past decade, we detect a shift away from this orientation toward a philosophy that encourages greater caution in

⁵⁹ See United Nations Conference on Trade and Development, *Intergovernmental Group of Experts on Competition Law and Policy*, available at www.unctad.org/Templates/Page.asp?intItemID=4068&lang=1.

⁶⁰ Id.

⁶¹ See United Nations Conference on Trade and Development, *United Nations Conference for the Review of the Set*, available at www.unctad.org/Templates/Page.asp?intItemID=4103&lang=1.

⁶² The concept of "soft law" is examined in Tadeusz Gruchalla-Wesierski, "A Framework for Understanding 'Soft Law'", 30 *McGill L.J.* 37 (1984-1985).

⁶³ Sokol, *supra* note 33, at 105.

competition law enforcement and accepts more readily analytical methods informed by modern industrial organization economics. Some members of UNCTAD's core "client base" – the less wealthy developing countries – have become members of ICN and have devoted progressively greater resources to ICN activities.⁶⁴ Others have expanded their investment in OECD through time devoted to attendance at the Global Forum on Competition and participation in regional events that OECD sponsors.⁶⁵

UNCTAD's efforts to define its place in a more crowded policy market points to a larger phenomenon in global competition policy. The emergence of ICN and other international initiatives confront many newer authorities with difficult resource choices.⁶⁶ 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 few events each year. Compared to ICN, 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 ICN and OECD – to improve the quality of their "product lines" to attract participation.

UNCTAD resembles OECD in that it can draw upon an expert secretariat to support its operations. Its core function today is to support UNCTAD's extensive technical assistance program. UNCTAD's competition policy secretariat has approximately ten professionals. Only a few of these positions are full-time appointments within the UN.⁶⁷ 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.

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 staffs, attendance at international events and participation in international networks involve major resource commitments – even if another institution is 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 or regional networks only.

⁶⁶ In addition to the 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.

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.

In principle, UNCTAD and OECD have access to large reservoirs of research and knowhow 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 knowhow. 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 accumulated OECD and UNCTAD knowledge and apply it effectively in formulating future programs is not an easy task. The press 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 also can envision considerable advantages to having these pools of knowledge combined and used to inform the standard-setting activities of all three major networks, especially ICN. There could be a division of labor in which OECD and UNCTAD serve as suppliers of inputs – e.g., detailed knowledge about past country experiences – that ICN can not easily generate on its own. Doing so would require a greater integration of effort among the three networks, and collaborate efforts to map out product lines, identify complementaries, and determine which institution is best suited to perform specific tasks that lead to convergence upon superior substantive standards, procedures, and administrative techniques.

6. 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.⁶⁸ 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.⁶⁹ The group favored, instead, the establishment of a worldwide competition code. It was

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

⁶⁹ See European Commission, Directorate-General IV, *Competition Policy in the New Trade Order: Strengthening Cooperation and Roles: Report of the Group of Experts [COM (95) 359 final]* (July 1995).

envisaged that states would apply the code under the auspices of the WTO.⁷⁰ These findings led the EC to propose the establishment of a working group on competition policy at the WTO's 1996 Singapore meeting.⁷¹

The WTO working group that was eventually established published several reports between 1998 and 2001.⁷² Those reports led to the WTO issuing a declaration at the WTO's Doha conference in 2001 positively encouraging the group's continuing work.⁷³ By the 2003 WTO ministerial conference in Cancun, the organization suspended the operation of the working group and dropped antitrust from its agenda in July 2004.⁷⁴

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 its own sovereignty, and expressed doubt that an agreement was even possible between members with diverse national interests.⁷⁵ 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.⁷⁶

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. An advantage that a restored working group would enjoy is seven years of experience in the form of ICN, OECD, and UNCTAD efforts to build consensus and convert consensus views into recommended standards.

7. ICN

Filling the gap for a soft law institution that included both developing and developed nations, the ICN evolved from suggestions by the International

⁷⁰ Gerber, *supra* note 68, at 103–04.

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

⁷² Gerber, *supra* note 68, at 104. Philip Marsden, "Competition Policy at the WTO", *Competition Law Insight* 6 (Nov. 2002); "Trade and Competition: Interview with Frederic Jenny", *Competition Law Insight* 3 (Nov. 2002).

⁷³ Gerber, *supra* note 68, at 104.

⁷⁴ *Id.*

⁷⁵ *Id.* at 105–06.

⁷⁶ *Id.* at 106–07.

Competition Policy Advisory Committee (“ICPAC”) formed in November 1997.⁷⁷ ICPAC researched international competition law and policy and reported its findings in February 2000.⁷⁸ The report advocated a soft law approach to international competition cooperation and proposed a Global Competition Initiative.⁷⁹ This led to the ICN’s formation in 2001.

ICN has strived to distinguish itself from other networks. One of its chief distinctive traits is the scope of its substantive agenda. As described above, antitrust is not the sole or principal concern of OECD, UNCTAD, or the WTO. By contrast, ICN emphasizes that it is the only international organization dedicated to “all competition, all the time.”⁸⁰ In the ICN, competition policy need not battle for resources amid the many pursuits that command attention in multifunction bodies such as OECD⁸¹ and UNCTAD, nor does antitrust live in the shadow of trade policy cast by the WTO.

ICN has espoused a single-minded focus on competition law, yet two developments lead one to ask whether ICN can sustain the purity of substantive vision over time. One force is the need to address matters that arise at the periphery of the antitrust universe has arisen in several prominent instances. 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, among other consequences, has

⁷⁷ International Competition Network, History, available at www.internationalcompetitionnetwork.org/about/history.aspx.

⁷⁸ International Competition Policy Advisory Committee, *Final Report to the Attorney General and Assistant Attorney General for Antitrust* (2000), available at www.justice.gov/atr/icpac/finalreport.htm.

⁷⁹ Id.

⁸⁰ ICN Factsheet and Key Messages, available at www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

⁸¹ 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 OECD) that purportedly 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 related 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.

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 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 ICN's competition-only focus is the diversity of policy tasks assigned to its members. A number of authorities are policy conglomerates: in addition to antitrust law, they enforce other statutes dealing with matters such as consumer protection and public procurement.⁸² Other systems assign the competition authority responsibility to proscribe "unfair competition" – a command that straddles the doctrinal boundary between traditional competition law and the fields of business torts and contract law.⁸³

ICN's membership also sets it apart from the other international networks that address competition policy. The member entities of OECD, UNCTAD, and WTO are governments, and the competition agencies which participate in these networks speak as representatives of their respective governments – a condition can require a competition agency to gain approval for its positions and initiatives from other ministries.⁸⁴ Within 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. 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.⁸⁵

⁸² David A. Hyman & William E. Kovacic, *Form, Function, and Performance: Toward a Theory of the Government Agency* (Feb. 2011).

⁸³ This is the case with the Section 5 of the Federal Trade Commission Act, which empowers the FTC to ban "unfair methods of completion" and "unfair or deceptive acts and practices." 15 U.S.C. Sec. 45 (1994). 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.

⁸⁴ 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.

⁸⁵ 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

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, ICN relies more heavily upon the contributions of NGs from academia, the business community, consumer groups, and the private bar.⁸⁶ 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.⁸⁷ 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.⁸⁸

To date, the principal contributions have been made by NGAs from the private sector. As noted above, this has raised questions within ICN about whether the network ought to engage academics, consumer groups, and think tanks more fully in its program.⁸⁹ A second issue about NGA participation is the selection process. For the most part, NGAs are nominated by their national competition authority (NCA).⁹⁰ 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.⁹¹

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, ICN has sought to separate itself from the OECD, UNCTAD, or the WTO, whose impressive physical headquarters house substantial permanent staffs. 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.⁹² Most discussions within

competition law, restrict the exercise of an unfair bargaining advantage in contractual relations.

⁸⁶ See *Fingleton Interview*, supra note 3, at 74–75.

⁸⁷ This is Kovacic's rough count based upon a comparison of the conference registration list and his observation of who attended the conference events.

⁸⁸ The contributions of NGAs are reviewed at www.internationalcompetitionnetwork.org. As suggested earlier, perhaps the most influential contributions of NGAs have occurred in the ICN's Merger Working Group.

⁸⁹ See *Fingleton Interview*, supra note 3, at 75.

⁹⁰ The NGA selection mechanism is set out at www.internationalcompetitionnetwork.org.

⁹¹ One of us (Kovacic) has observed the NGA selection process closely by reason of his position as the ICN's Vice-Chair for Outreach.

⁹² Some member contributions of time and personnel are substantial. Perhaps more than any other country, Canada has provided the closest approximation to a formal secretariat for ICN. For example, Canada's Competition Bureau has played a lead role in organizing the conference

the working groups take place via teleconference and e-mail, with occasional face-to-face gatherings.⁹³ One estimate by the Competition Directorate of the European Commission concluded that ICN conducts 90 percent of its work by email and teleconferencing.⁹⁴

Although ICN sees itself as a virtual network, the demands it faces in organizing its affairs are real. As the 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 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.⁹⁵ Work product consists of recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, databases, toolkits, and workshops.⁹⁶ 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.⁹⁷

ICN develops its work product in three stages. Firstly, a steering group identifies an issue in need of study. 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. In the third stage, the ICN working group presents its findings, and

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 a head of the Competition Bureau (Konrad von Finkenstein and Sheridan Scott) chaired the Steering Committee and when officials from other ICN members held this position.

⁹³ 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.

⁹⁴ See Chad Damro, "The New Trade Politics and EU Competition Policy: Shopping for Convergence and Cooperation", 13 *Eur Pub Pol* 867, 879 (2006).

⁹⁵ See Introduction to the International Competition Network, available at www.internationalcompetitionnetwork.org/uploads/vco%20toolkit%20introduction%20to%20icn%20april%202010%20complete.pdf.

⁹⁶ These materials are all freely available on the ICN website, see www.internationalcompetitionnetwork.org/.

⁹⁷ ICN News Release, International Competition Network Plans for the Second Decade, available at www.internationalcompetitionnetwork.org/uploads/library/doc615.pdf.

ICN members begin to implement the suggested practices. To facilitate the adoption of suggested practices, the ICN develops templates, manuals and any other materials to assist implementation.⁹⁸

Compliance with recommended procedural practices should be amenable to effective measurement. Routine monitoring of progress toward acceptance of what 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.⁹⁹

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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² By making the rationale

⁹⁸ Sokol, *supra* note 33, at 111.

⁹⁹ For example, the adoption of common procedures for reporting proposed mergers would not ensure that competition agencies refuse to consider policy factors unrelated to the maximizing of competition, such as the protection of what a nation perceives to be a strategic industries.

¹⁰⁰ The influence of developments in industrial organization economics upon US competition law and policy is examined in William E. Kovacic & Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking", 14 *J. Econ. Persp.* 43 (2000).

¹⁰¹ The evolutionary and experimental features of competition policy are reviewed in William E. Kovacic, "The Modern Evolution of U.S. Competition Policy Enforcement Norms", 71 *Antitrust* 377, 400–02, 472–76 (2003).

¹⁰² A lack of disclosure by an agency about their operating practices hampers the development of a consistent way to evaluate the agency. This renders it difficult to compare observations of agency performance over time, and, accordingly, it can be difficult to make improvements or evaluate the efficacy of any attempted agency improvements. This can only be to the eventual

for agency decisions more observable, we can test more accurately the extent of convergence upon 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, 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.¹⁰³ This question has also led them to express doubts about the ICN's future.¹⁰⁴

One reason why the ICN has enjoyed success is the novelty of competition law for most nations.¹⁰⁵ 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.¹⁰⁶ 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

detriment of competition agencies, and ultimately to consumer welfare that competition agencies are supposed to protect. In addition, developing a common evaluation methodology will allow agencies to more effectively determine their success in implementing their competition policies and may also lead to a re-evaluation of what are considered best practices.

¹⁰³ Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", 43 *VA J. Int'l L.* 1 (2002); Pierre-Hugues Verdier, "Transnational Regulatory Networks and Their Limits", 34 *Yale J. Int'l L.* 113 (2009).

¹⁰⁴ See Lawson Hunter & Susan Hutton, "Global Competition Initiative: A 'Headless Horseman?'" in *International Antitrust Law & Policy: 2000 Fordham Corporate Law Institute* ch. 3 (Barry Hawk ed., 2001); U.S. and Canadian Antitrust (Panel Discussion), in *International Antitrust Law & Policy: 2000 Fordham Corporate Law Institute* 45-59 (Barry Hawk ed., 2001).

¹⁰⁵ See Kovacic, *supra* note 8, at 314-43.

¹⁰⁶ 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. Sec. 1. 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 what courts soon concluded that the prohibition applies to agreements that unreasonably restrain trade. Kovacic & Shapiro, *supra* note 100, at 43-45.

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.¹⁰⁷ As mentioned earlier, the concept of ICN evolved directly from recommendations of the International Competition Advisory Committee that was formed in 1997 by then U.S. 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.¹⁰⁸

8. INTERACTION WITH OTHER NETWORKS

ICN's presence has had an important effect on the operation and management of other multinational networks. Its arrival in 2001 has helped inspire important elements of product repositioning by OECD and UNCTAD.

As suggested above¹⁰⁹, ICN in many respects is a rival to 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.¹¹⁰ Like investors considering the content of their

¹⁰⁷ 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.

¹⁰⁸ See FTC Statement, CCH Trade Reg. Rep. [1997 – 2001 Transfer Binder] § 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... as 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. See *Boeing/McDonnell Douglas*, Case IV/M877, OJ L 336/16 (Dec. 8, 1997).

¹⁰⁹ See *supra* pp. 61–62, 69–72 (describing how ICN's creation has affected programs of OECD and UNCTAD).

¹¹⁰ Among the most noteworthy jurisdictions in this category are Australia, Brazil, Canada, the European Union, Germany, Japan, Mexico, South Korea, the United States, and the United Kingdom.

financial portfolios, these agencies decide each year about how to invest their foreign relations resources: to 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.¹¹¹ Because poorer jurisdictions have the 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 provide a more attractive bundle of services. The rivalry among the networks at times has been intense. The establishment of ICN drew scorn from some OECD and UNCTAD officials, some of whom lobbied their constituencies to forego participation in ICN.¹¹² The entry of ICN into the international network market also caused 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 achieved a division of labor that emphasizes complementary aspects of their programs and deemphasizes possibilities for substitution among them.

¹¹¹ 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, 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, ICN attaches great importance to seeing China join the network.

¹¹² One of us (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 ICN would undermine OECD by diverting the attention of OECD members away from the CLPC and by discouraging nonmembers from participating in OECD outreach events.

9. 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 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.

The certainty of future conflicts, even with apparent success in promoting convergence, raises the question of whether the discussion about global competition policy should include consideration of a binding international antitrust dispute resolution mechanism.¹¹³ 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.¹¹⁴ 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.¹¹⁵ An agreement could reduce the risk of jurisdictional conflict and resolve conflicts that arise.¹¹⁶ In addition, without an agreement, states' interests will not align sufficiently to resolve conflicts that arise.¹¹⁷

¹¹³ As mentioned above, commentators have pointed to the non-binding nature of the UNCTAD Set as one reason for the Set's failure to become the international competition code that its creators envisioned. Wood, *supra* note 53, at 287.

¹¹⁴ Louis Sohn's vision of how progress toward international agreement proceeded in small, incremental steps and depended on a long-term process of engagement is described in Thomas Buerghental, "Louis B. Sohn (1914–2006)", 100 *Am. J. Int'l L.* 623, 625–26 (2006).

¹¹⁵ See Eleanor Fox, "Antitrust and Regulatory Federalism: Races Up, Down, and Sideways", 75 *NYUL Rev* 1781, 1785–86 (2000).

¹¹⁶ See Andrew Guzman, "Is International Antitrust Possible?", 73 *NYUL Rev* 1501 (1998).

¹¹⁷ See Robert D. Anderson & Federic Jenny, "Current Developments in Competition Policy in the World Trade Organization", 16 *Antitrust* 40, 41 (2001).

The concept of a multinational agreement has attracted considerable attention from policymakers, practitioners, and scholars throughout the period since World War II. 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.¹¹⁸ 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 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.

10. 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.¹¹⁹ 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.¹²⁰ The second wave followed the Great War that had taken its toll on the European economies by reducing production levels, incomes and living standards.¹²¹ In the midst of this economic uncertainty, businesses sought to reduce their risk levels by entering into private agreements with their competitors or potential competitors to regulate their conduct or prices. 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 worker’s jobs.¹²²

International cartelization was a prominent issue at the World Economic Conference of May 1927, an event that attracted representatives from fifty

¹¹⁸ *ICPAC Report*, supra note 2, at 255–71. Wood, supra note 53.

¹¹⁹ David J. Gerber, *Global Competition* 19 (2010).

¹²⁰ *Id.* at 23–24.

¹²¹ *Id.* at 38–39.

¹²² 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”, in *Competition Laws in Conflict* 177–79 (Richard A. Epstein and Michael S. Greve Eds. 2004).

countries.¹²³ 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 calls to bring cartels under some form of control.¹²⁴ Discussions regarding cartels turned out to be the most contentious of the conference. This led to a difficulty in drafting language and delays in recommendations on the cartel issue.

At the time, European experience with antitrust and cartels was limited.¹²⁵ Germany was the only major European country that had significant competition law experience.¹²⁶ The US had the most experience at the domestic levels and had an outright ban on cartel agreements. 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. Many at the Conference disfavored the US approach of outright prohibition.¹²⁷ Moreover, Europeans tended to view the US antitrust system an ill-considered system that allowed industrial concentration and encouraged mergers despite its prohibition of competition restraints. 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.¹²⁸

The Conference's final recommendation on cartels did not establish an international competition law or supervisory mechanism for international cartels. 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 effects and publish information on harmful effects.¹²⁹ Despite failing to

¹²³ Martin Hill, *The Economic and Financial Organization of the League of Nations* 47 (1946).

¹²⁴ Seven of the Conference commissioned seven reports that dealt specifically with cartels: Gustav Cassel, *Recent Monopolistic Tendencies in Industry and Trade* (CECP), (League of Nations Pub 1927) II 36; Eugene Grossman, *Methods of Economic Rapprochement* (CECP) 24(1), (League of Nations Pub 1926) II 69; Clements Lammers, *Review of Legislation on Cartels and Trusts* (CEI) 35, (League of Nations Pub 1927) II 33; D H MacGregor, *International Cartels* (CECP) 93, (League of Nations Pub 1927) II 16; William Oualid, *The Social Effects of International Industrial Agreements* (CECP 1926) 94; Paul De Rousiers, *Cartels and Trusts and Their Development* (CECP) 95, League of Nations Pub (1927) II 21; and Karl Wiedenfeld, *Cartels and Combines* (CECP) 57(1), League of Nations Pub (1926) II 70.

¹²⁵ Gerber, supra note 119, at 27.

¹²⁶ David J. Gerber, *Prometheus Bound* (2001) (analyzing development of Germany's competition policy system).

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ League of Nations, 'Report and Proceedings of the World Economic Conference' (paper presented at the World Economic Conference held in Geneva, 4–23 May 1927) 146–8; CEI 46 II: League of Nations Pub (1927) II 52.

formalize a response to cartels, this development was a huge first step toward an international response to issues presented by a global economy.¹³⁰

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 law – associated with market-oriented economic policy. Countries were less inclined to consider global cooperative solutions, as evidenced by US initiatives during the Great Depression.¹³¹ 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. Nonetheless, there was another international effort to promote global competition law following the 1927 League of Nations conference at the 27th Conference of the Inter-Parliamentary Union in 1930.¹³² This organization was based on the belief that national legislators could work together to solve common social problems and foster international peace.¹³³ The delegates called for states to develop a set of competition law principles to be enforced internationally. 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.¹³⁴ Nonetheless, the concept of an international competition law was not to be forgotten.

11. THE HAVANA CHAPTER

Apart from being major destabilizing events, the Great Depression and Second World War demonstrated the power of 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.¹³⁵ The increased role of government and the increase in

¹³⁰ There was increased realization that solutions to international economic problems must be considered beyond the nation state and required global legal mechanisms.

¹³¹ For example, the US increased its tariffs in 1930, a measure which led many other countries to follow suit.

¹³² Gerber, *supra* note 119, at 24.

¹³³ See Interparliamentary Union, *The Interparliamentary Union from 1889 to 1939* (Lausanne 1939).

¹³⁴ Gerber, *supra* note 119, at 36–38.

¹³⁵ *Id.*

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, which was a system of international institutions that would provide a framework for the global economy once the war ended.¹³⁶ Institutions envisaged included the World Bank, the United Nations, the GATT, and the International Monetary Fund ('IMF').¹³⁷ Also part of the discussions were plans to create an international institution to improve commercial relations and lead to the reconstruction of global trade that had suffered during the Global Depression and Second World War. The resulting institution, created by the "Havana Charter" agreement, was the International Trade Organization ("ITO").¹³⁸

As part of the Bretton Woods program, the US circulated a draft proposal for an international trade organization.¹³⁹ 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."¹⁴⁰ There were two parts to the proposal. The first was a collection of principles envisaged 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.¹⁴¹ The proposal went further than just setting forth a set of principles; it also contemplated the establishment of an international organization to enforce those principles.

In response to the US proposal, the United Nation's Economic and Social Council created a committee consisting of seventeen members that included more 'underdeveloped' countries to discuss and develop the US proposal.¹⁴² Despite

¹³⁶ Detlev F. Vagts, "International Economic Law and the American Journal of International Law", 100 *Am. J. Int'l L.* 769, 774–76 (2006).

¹³⁷ See John Braithwaite & Peter Drahos, *Global Business Regulation* 97–98 (2000).

¹³⁸ Havana Charter (March 1948), Final Act of the United Nations Conference on Trade and Employment for an International Trade Organization 1, available at www.worldtradelaw.net/misc/havana.pdf.

¹³⁹ Vagts, *supra* note 136.

¹⁴⁰ US Dep't of State, Proposals for consideration by an international conference on trade and employment (Dec. 6, 1945) 1–2.

¹⁴¹ *Id.*

¹⁴² See Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* 79 (2005). 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 U.S.

the Soviet Union not participating and many concessions made to the developing countries, 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, 1948.¹⁴³ This was the last piece of a major project to further develop several existing international organizations.¹⁴⁴ Most countries waited for the US to ratify the convention before doing so themselves. They considered the US as essential to the success of the ITO, without whose contribution the ITO would be an empty shell.¹⁴⁵

The US Congress was responsible for taking the next step on the way to establish the ITO. Congress would have to ratify the agreement to authorize the US to participate.¹⁴⁶ On April 28, 1949, President Truman submitted the Charter to Congress for their approval.¹⁴⁷ 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 already casting the ITO as a capitalist plot.¹⁴⁸ As a result, it appeared that fewer nations than originally hoped would participate in the ITO. With this 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 benefits of a wide membership.

US domestic politics also changed significantly. In 1946, the Republican Party gained control of the Congress for the first time since Franklin Roosevelt's election in 1932. Republicans in this period tended to be more protectionist than their Democrat counterparts and generally took a skeptical view of core elements of the Democratic Party's foreign policy program. 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. This development, along with the outbreak of the Korean War in 1950 and continuing struggles with the Soviet Union, elevated the reinforced the containment of communism as the chief foreign policy priority of the US.

Owing to these and other changes in the US and abroad, Wilsonian ideals of international collaboration, which had underpinned the development of post-

¹⁴³ See William A. Brown Jr, *The United States and the Restoration of World Trade* 10 (1950).

¹⁴⁴ See Braithwaite & Drahos, *supra* note 137 at 97–98.

¹⁴⁵ Gerber, *supra* note 119, at 46.

¹⁴⁶ See William Diebold, "The End of the ITO" in *16 Essays in International Finance* 1–37 (Princeton 1952).

¹⁴⁷ See Brown, *supra* note 143, at 10.

¹⁴⁸ See Gerber, *supra* note 119, at 46.

war international organizations, appeared out of step with an increasingly ideologically divided world – especially a world divided between the polar opposites of capitalism and communism. The Truman administration realized that Congress would not accept the ITO proposal, and it withdrew the measure from consideration December 1950.¹⁴⁹ 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.”¹⁵⁰ No significant attempt to establish an international competition law would take place until four decades later.

The Havana Charter episode is often cited as an example of the rejection of international competition law by the US and the rest of the world. Judge Diane Wood’s view is that the US objected to the Havana Charter because “the antitrust rules of Chapter Five [of the Havana Charter] were not adequate for the United States, and that the rest of the world was not yet ready to embrace a serious antitrust regime.”¹⁵¹ While it is true that a global competition law 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.

12. 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 well over 100 countries represents an important change in the enabling conditions for a global system of antitrust rules.

¹⁴⁹ See Susan Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* 5, 127 (1996).

¹⁵⁰ *Id.*, at 127.

¹⁵¹ See Diane P. Wood, “The Internationalizations of Antitrust Law: Options for the Future”, 44 *DePaul L. Rev.* 1289, 1296 (1995).

As we discussed previously, the wide acceptance of competition policy substantive standards, procedures, and institutions seems to occur in three stages.¹⁵² The first step is decentralized experimentation within individual jurisdictions. The second stage is the identification of best practices or techniques, and the third stage is individual jurisdictions voluntarily opting in to superior norms. It is only now with the continuing acceptance of the ICN's best practices and policies, along with those of the OECD, UNCTAD and WTO efforts, that countries are beginning to consider the transition from the second to third stage: opting in to superior norms.¹⁵³ The developing world's suspicion that competition law is a disguise for the developed world's globalization efforts is 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.

With this gradual acceptance that there are objective best practices for competition agencies, 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 principles that all nations now accept. As before, the ultimate question is whether the world has achieved 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, ICN may prove to be the most effective convergence vehicle. This possibility stems from the breadth of its membership (an advantage over OECD), its members' status as agencies rather than governments (an advantage over 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 OECD and UNCTAD). 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, ICN is better positioned to focus its resources on achieving this end.

We would imagine that 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

¹⁵² William E. Kovacic, "Extraterritoriality, Institutions, and Convergence in International Competition Policy", 97 *Am. Soc. of Int. L* 309 (2003).

¹⁵³ ICN, Summary of Achievements, *supra* note 6.

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 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.

13. CONCLUSION: ICN IN ITS SECOND DECADE

We close by emphasizing what we see to be three major focal points for the International Competition Network 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 OECD and UNCTAD.¹⁵⁴ 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. OECD and UNCTAD conduct voluntary peer reviews to provide a more objective evaluation of various competition agencies.¹⁵⁵ 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.¹⁵⁶ The Global Competition Law Review also has a ranking system but their methodology seems to be largely based on the level of activity of each agency, and not application and acceptance of competition law best practices.¹⁵⁷

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 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.

¹⁵⁴ The importance of evaluation as way to assess the effectiveness of international organizations is emphasized in Helen V. Milner, "Globalization, Development, and International Institutions: Normative and Positive Policy Perspectives", 3 *Perspectives on Politics* 833, 848–49 (Issue No. 4, Dec. 2005).

¹⁵⁵ See supra pp. 65–66 (discussing OECD and UNCTAD peer reviews).

¹⁵⁶ See www.oecd.org/department/0,3355,en_2649_34603_1_1_1_1_1,00.html.

¹⁵⁷ See www.globalcompetitionreview.com/surveys/survey/376/Rating-Enforcement/.

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 by the promulgation, through 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- but 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 effort is to identify and make use of complementarities with 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. Amid enormous pressures for governments and their competition agencies to reduce costs, a failure to take this step could lead to the demise or 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. The ICN network may be virtual, but the problems of financing and management that it faces are unmistakably real.

