The Development of International Networks in Antitrust

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I. Introduction

The global spread of antitrust has presented opportunities and challenges for consumers, businesses, and antitrust agencies alike. While the embrace of antitrust in jurisdictions from Albania to Zambia, and in countries as diverse as China, Russia, and South Africa, is a ringing endorsement of the power of free markets to enhance consumer welfare, it presents challenges that command more attention. As commerce increasingly spills across national borders, transactions and business conduct come under review in multiple jurisdictions. Fueled by a couple of high-profile conflicts, concern about multiple jurisdictions reaching inconsistent conclusions about the same conduct began to grow. With those concerns came calls to bring consistency to global standards. Proposals to create a global antitrust regime, however, failed to win a consensus. Those proposals involved ambitious efforts to create a new international antitrust order around commonly accepted norms. Such efforts were based on an overly optimistic view of the appetite for any such new order. As it became clear that there was little inclination to cede national sovereignty in this key policy area to an untested international body, the focus switched to a more modest outlook centered on a model of convergence within a network of national antitrust agencies, supported by international organizations and non-government advisors. Through the International Competition Network, real progress has been made in the effort to bring divergent systems closer together without the need to intrude on sovereign control of national antitrust regimes.

This article sketches out the path that has led us to where we are today. In Section II we consider the spread of antitrust that has given rise to calls for international coordination in this area. Section III looks to the benefits and challenges that resulted from this spread. The ultimately unsuccessful search for global rules is examined in Section IV. Section V discusses convergence as an alternative to global rules, and Section VI illustrates

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how that process took place in the international antitrust context through the International Competition Network (ICN). Finally, in Section VII, we address some of the lessons learned from the process.

II. The Global Spread of Antitrust

Until the mid-twentieth century, the United States was virtually the only nation in the world with an antitrust regime.¹ In the years following World War II, a handful of other jurisdictions began to follow suit, including Germany and Japan, as to which antitrust was seen as a tool to remedy the economic structures that had been perceived to support fascism.² This shift was not the immediate harbinger of a global embrace of antitrust, and indeed, a quarter century ago, any discussion of international antitrust would have focused on several well-publicized instances of conflict. This is embodied by the observation of Britain’s Lord Wilberforce in the House of Lords’ 1978 judgment in the uranium cartel litigation: “It is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack;”³ and by the transatlantic battle of injunctions surrounding the Laker Airways antitrust litigation.⁴ But as understanding of the benefits of competition and the harmful effects of anticompetitive practices grew, a trend towards the global embrace of competition principles began. By 1990, antitrust legislation had been adopted in several dozen jurisdictions, including the European Union, India, Brazil, South Africa, and Norway.

The floodgates opened after the fall of the Berlin Wall. The nations of the former Soviet Bloc, including Russia itself, recognized the importance of competition policy as a necessary tool if functioning market economies were to effectively supplant the command and control regimes imposed by communist rule. Likewise, many nations in Latin America recognized that competition policy would be needed to address the monopolistic market structures that had characterized that region. Today, competition legislation is pervasive. Over 100 jurisdictions are covered by competition legislation, either at the national or regional level. With the passage of China’s Antimonopoly Law in 2007,⁵ the list now includes almost all of the most significant economies in the world,⁶ as well as

¹. Sherman Antitrust Act, 26 Stat. 209-10 (1891) (codified as amended at 15 U.S.C. §§ 1-7 (2004)). In fact, the Sherman Act was preceded by Canada’s Act for the Prevention and Suppression of Combinations Found in Restraint of Trade, 1889 S.C., ch. 41 (Can.). Other jurisdictions, such as England, had common law principles on restraint of trade that also preceded the Sherman Act.


jurisdictions as small as Malawi, Barbados, Suriname, the Gambia, and Moldova. In the area of merger review, sixty-six jurisdictions have identified themselves to the ICN as having merger review regimes in place.7

III. Effects of the Global Spread of Antitrust

The enthusiasm with which antitrust doctrine has been embraced illustrates the perceived utility of antitrust to a market-organizing set of principles. Whether to promote economic efficiency, to counteract the historical effects of policies that encouraged monopolies, to promote economic integration, or to enhance consumer welfare, competition policy became an arrow in the quiver of economic reformers of all stripes. While the motivation for embracing antitrust varied, the consensus behind antitrust stretched across much of the global political spectrum.

The consensus as to the benefit of market economics notwithstanding, the proliferation of antitrust legislation created an obvious potential for conflict among jurisdictions. While a broad consensus may form around the idea that price-fixing cartels are undesirable, or that exclusionary practices by monopolists are cause for concern, titrating specific antitrust enforcement actions to fulfill those goals is far from an exact science. Reasonable minds may differ as to the meaning of consumer welfare and what maximizes it. Such divergence of opinion may theoretically be disciplined by the application of well-reasoned economic principles. Even among established and sophisticated antitrust agencies, however, different conclusions can emerge from the same set of facts. For a fledgling agency, finding the appropriate level of enforcement is even more challenging and the dangers for consumers whose welfare it seeks to promote more acute.

Finding the appropriate level of enforcement lies at the heart of one of the principal challenges presented by the spread of antitrust regimes, namely achieving an appropriate balance between the risks of over-enforcement and under-enforcement of the law. Under-enforcement will do little to advance any goal of antitrust law, whether the goal is consumer welfare, economic integration, de-monopolization, or the promotion of efficiency. On the other hand, over-enforcement may chill the very sort of competitive behavior that competition laws seek to encourage because vigorous competition on the merits and anticompetitive exclusionary conduct may both seek to dominate or even annihilate competitors. Accurately distinguishing between the two requires a practiced eye informed by meticulous gathering of data and economic analysis. Yet to the extent that practiced eyes hold differing views, that distinction may exist primarily in the eye of the beholder. Consequently, conduct that may be encouraged under one approach to competition could be judged illegal under another. The resulting differences may well create regulatory hurdles for cross-border businesses.

Merger review offers the clearest example of the potential conflict presented by the existence of multiple sovereign competition regimes. Where a single transaction touches multiple jurisdictions, the merger review requirements of each jurisdiction must be observed. Depending on the nature of the transaction and the review regime in place, this necessity may lead to multiple time-consuming and expensive filings each requiring local

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expertise as to procedural and substantive detail. The blocking of the transaction by even one jurisdiction could potentially condemn the deal entirely. Thus, assuming that each jurisdiction is essential to the deal, the jurisdiction most likely to block the transaction may set the de facto standard across the board. Transactions not likely to survive the rigors of such multi-faceted review may never be undertaken given their likelihood of regulatory failure after substantial expenditure. Accordingly, where consumer welfare is not served by the blocking jurisdiction, this harm could spread to all jurisdictions that stood to benefit from the deal.

Fortunately, in practice this scenario rarely comes to pass. Antitrust agencies routinely and consistently cooperate in resolving merger cases under mutual review by multiple jurisdictions. The vast majority of these have been resolved successfully, and conflicting standards have imperiled only a handful of global mergers. When such divergences do occur, however, they attract such disproportionate coverage that they are often regarded as more frequent than is the case. The two cases in which conflict arose, Boeing/McDonnell Douglas (1997) and GE/Honeywell (2001) involved unusual vertical issues that led agencies in the United States and the European Union to reach different outcomes, are most commonly cited as evidence that antitrust on the global stage is in urgent and dire need of reform.

The Boeing/McDonnell Douglas case combined two of the three most significant manufacturers of jet airliners. Both the Federal Trade Commission (FTC) and the European Commission agreed that McDonnell Douglas had ceased to be an effective competitor and that the market was already, as a practical matter, a duopoly between Boeing and Airbus. While the FTC approved the deal, the European Commission objected because it feared that the merger would suppress competition by boosting Boeing's ties to the airlines and enabling Boeing to use McDonnell Douglas' defense research and development funds to enhance its commercial operations. These concerns reflected a basic difference between European Union and United States merger policy. The dispute was ultimately resolved by a European Commission order requiring certain of Boeing's contracts with airlines to be revised, which allowed the deal to proceed.


In GE/Honeywell, the proposed merger would have combined a firm that manufactured aircraft engines and one that manufactured aircraft avionics. The U.S. Department of Justice saw no fundamental threat to competition and approved the deal with relatively minor divestitures. The European Commission, on the other hand, concluded that a combined firm would be so efficient that it could offer a combined package of engines and avionics priced so low that it risked pricing the competition out of the market. The deal was ultimately blocked, despite protests by the U.S. Justice Department and others that the market was sufficiently robust that competing engine and avionics manufacturers could be relied upon to develop competitive responses to the merger.

Significantly, there have been no such cases since then. These two cases, both of which are now over seven years old, constitute the universe of conflict between the U.S. agencies and the European Commission in the merger field. Despite a deep and growing practice of United States/European Union cooperation in merger cases that has resolved most cases under common examination in coordinated and cooperative fashion, these two cases generated a firestorm of commentary that fueled the perception that the United States and the European Union antitrust policy is awash in conflict.

IV. Efforts to Create Global Rules

In light of the potential for antitrust clashes to create ongoing obstacles to cross-border deals and concerns about cross-border effects of anticompetitive conduct, efforts to develop a global approach to competition policy are hardly surprising. Several proposals emerged to create a transnational regime, akin to that found in the international trade community in the form of the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and other instruments enforced through the World Trade Organization. These proposals ultimately foundered, largely over concerns that global antitrust rules would be unable to accommodate differences in substantive approach to antitrust, the amenability of transnational disputes over competition law to binding dispute settlement, and uncertainties as to whether developed and developing countries truly had common interests at heart.

A. International Trade Organization

In 1948, amid a flurry of new international economic organizations in the post-war period, a Charter for an International Trade Organization (ITO) was drafted. This Charter, also known as the Havana Charter, included international cartel provisions. Ultimately, however, the ITO was rejected by the U.S. Congress, in part because of the antitrust provisions. As Diane Wood reports, this rejection appeared as somewhat ironic.

given that the Americans were the greatest proponents for antitrust at the time. It was, in fact, this very commitment to antitrust, however, that lay behind the congressional rejection: "Congress was not ready to cede any antitrust jurisdiction to the international mechanisms established by the Charter, and furthermore, it found the language on restrictive business practices to be too weak, as compared with the prevailing U.S. standards on these matters."18

B. THE WORLD TRADE ORGANIZATION

Following a 1995 E.U. proposal, the World Trade Organization set up a Working Group on the Interaction between Trade and Competition Policy to consider, among other things, the integration of national competition laws.19 Among the proposals considered was a binding framework of international competition rules leading to comprehensive harmonization. This initiative led to significantly scaled back language in the Doha WTO Ministerial Declaration in November 2001. The Doha Declaration called for a commitment to "core" antitrust principles, enhanced cooperation between agencies, technical assistance, and continued work within the Working Group on the Interaction between Trade and Competition Policy to clarify core principles.20 Proposals for competition rules in the WTO were dropped, however, at the Fifth Ministerial Conference held in Cancun in September 2003.21

The initial efforts to deal with international antitrust concerns in the WTO stemmed from a model based on global rules. No consensus existed, however, for national antitrust systems to cede control to a trade-based system that was perceived by many as inherently less suited to the needs of national economies and legal systems than what was already in place at the national level and could lead to the undermining of prosecutorial discretion. Developing countries were concerned about their capacity to absorb and effectively implement competition rules. While the proposals contained in the 2001 Doha Declaration were less radical in substance, concerns persisted that the WTO was not an ideal institution within which to frame any global antitrust regime. The Report of the International Competition Policy Advisory Committee (ICPAC), issued in 2000, made clear its objections to any such plan.22 The ICPAC Report noted that while the WTO did have a legitimate role to play in certain aspects of antitrust law and policy, "not all competition policy problems are trade problems."23 In addition, the WTO's operational structure, with a focus on the negotiation of rules followed by dispute resolution, was considered ill-suited to the day-to-day needs of an antitrust agency, which were thought to require "to be discussed broadly and in a consultative manner."24 Moreover, the ICPAC Report noted the reluc-

18. Id. at 284.
21. See Bode & Budzinski, supra note 19, at 12.
23. Id. at 282.
24. Id. at 283.
tance of individual countries to surrender control of their antitrust systems to a supranational body, stating that "[o]nly a limited range of competition matters, if any, are likely to bear fruit in any organization that requires a binding commitment from nations."

V. Convergence as an Alternative

The absence of consensus about global antitrust rules, however, did not address the very real problems presented by the proliferation of antitrust laws and the potential for conflict between jurisdictions. In lieu of a rules-based system, the idea of seeking to resolve conflict through convergence began to be explored. Neither the idea of informal cooperation in the international sphere nor the idea of soft convergence were new, but combining the ideas created a powerful engine that could build a global consensus in a way that a rules-based system could not.

As former FTC Chairman Timothy Muris has pointed out, dissimilarities exist in many systems of law, yet progress is often achieved towards commonly accepted standards. Muris identified three stages of the process of convergence. The first stage is decentralized implementation, where different jurisdictions experiment with different processes and substantive standards. The second involves building consensus, where experts in and out of government study the results of the first phase and identify better approaches. The third stage is where individual jurisdictions opt in to better approaches, not from compulsion but out of recognition that the better approaches are superior. The law of contracts, for example, evolved through such a process.

Contract law in the United States was principally a creation of state common and statutory law. When most commerce was local, divergence was tolerable. With advances in communication, transportation, and the development of national commerce, those local differences began to function as barriers to trade. The second stage of the convergence process began in the 1930s through the efforts of the American Law Institute (ALI). The ALI, consisting of recognized legal experts who draft "restatements" of the law that identify general areas of agreement and consensus views about superior solutions to problems that some states addressed differently, published the first Restatement of Contracts in 1932. In the 1940s, the ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL) combined forces to study state commercial statutes. In 1954, the two bodies proposed a new Uniform Commercial Code (UCC). Eventually forty-nine states and the District of Columbia adopted a version of the UCC. Today, as Muris observes, differences among state contract laws in the United States are relatively minor:

25. Id.


27. Id.; § 1.


Several points from these contract and antitrust examples stand out. First, the standards emerged through decentralized experiments. The experience of the 50 states supplied the raw material for the Restatement and the UCC. Second, cooperation by government and non-government officials helped build the consensus about specific standards. ALI's work on the Restatement of Contracts and the similar work of ALI and NCCUSL on the UCC show how cooperation by experts in and out of government can identify superior standards. Third, the acceptance of the best practices took place voluntarily. No legal rule told judges to use the Restatement of Contracts. No legal command made state legislators embrace the Uniform Commercial Code. The standards gained adherents by the power of their intellectual vision and their success in implementation.31

The question thus became whether this process could work in the international antitrust area, and, if so, what would be the best forum for pursuing convergence. Several were considered.

A. ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT

The Competition Committee of the Organisation of Economic Co-operation and Development (OECD) was one of the first institutions to serve as a discussion forum about international competition issues. The OECD adopted its Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade in 1995 as a voluntary set of rules.32 Other initiatives have included the 1998 Recommendation of the Council Concerning Effective Action Against Hard Core Cartels.33 As Wood notes, "Over the years, the OECD has served on numerous occasions as a forum for member countries to find common ground with respect to competition law."34 For all its success, however, there are several limitations to the OECD as a forum for international antitrust. The OECD's thirty country membership represents the most economically advanced nations of the world and is limited to the remainder of the world only as occasional observers and as participants in specialized forums, such as the Global Forum on Competition and the Latin American Competition Forum. Moreover, membership in the OECD exists at the state level, and competition agencies participate only as part of national delegations that may represent other policy interests.

B. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

The United Nations Conference on Trade and Development (UNCTAD) includes a competition group that convenes an Experts Meeting on competition on a regular basis.

31. Second Muris Speech, supra note 26, § I,
UNCTAD's efforts resulted in the adoption by the U.N. General Assembly in 1980 of the Set of Multilaterally Agreed Equitable Principles and Rule for the Control of Restrictive Business Practices (The Set).\textsuperscript{35} The Set includes a number of well-recognized principles of antitrust law, but the process has not resulted in its gaining widespread acceptance as a source of international antitrust law. Like OECD, membership in the United Nations is reserved for states, and agencies participate, if at all, as part of national delegations. UNCTAD is broadly inclusive in that virtually all nations are members of the United Nations, and developing nations that are not OECD members are full participants. Its meetings, however, are heavily populated by resident diplomats who are not well-versed in competition issues, and much of the work product is driven by a professional secretariat.

C. INTERNATIONAL COMPETITION NETWORK

The ICPAC Report in 2000 recommended the establishment of a new movement called the Global Competition Initiative, "to create a home for addressing the entire global competition agenda."\textsuperscript{36} As explained in the ICPAC Report, "[t]he point of this proposed Global Competition Initiative would be to foster dialogue among officials along with broader communities to produce more convergence of law and analysis, common understandings and common culture."\textsuperscript{37} While the ICPAC Report addressed some of the issues that the envisioned Global Competition Initiative would tackle,\textsuperscript{38} it was accepted that the agenda would be "driven by the interests of the participating governments."\textsuperscript{39}

In 2001, the International Bar Association brought together representatives of antitrust authorities from around the world at Ditchley Park, England where the idea of a body such as the Global Competition Initiative was discussed.\textsuperscript{40} In October 2001, following the endorsements of FTC Chairman Muris, Assistant Attorney General for Antitrust Charles James, and Commissioner Mario Monti, the International Competition Network (ICN), modeled on the Global Competition Initiative, was launched on the margins of the Fordham International Competition Law Conference.

The ICN currently lists 103 antitrust authorities from across the world as members.\textsuperscript{41} The objectives of the body are to allow for "a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community."\textsuperscript{42} Some aspects of its governing structure were partially informed by a consumer protection enforcement network, known today as the International Con-

\textsuperscript{35} See Wood, supra note 17, at 285-86.
\textsuperscript{36} See ICPAC Report, supra note 10, at 281.
\textsuperscript{37} Id. at 284.
\textsuperscript{38} Namely, the deepening of positive comity; best practices; government exemptions and immunities; multinational merger control; "frontier subjects" such as e-commerce; collaborative analysis; dispute resolution; and technical assistance. Id. at 284-88.
\textsuperscript{39} Id. at 285.
\textsuperscript{40} See Bode & Budzinski, supra note 19; See also, J. William Rowley, The Internationalization of Merger Reviews: Towards Global Solutions, Intern'l Competition Network, First Annual Conference (Sept. 28-29, 2002), http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/rowley_icn_naples.pdf.
\textsuperscript{41} Intern'l Competition Network, ICN Membership Contact List (January 2008), http://www.internationalcompetitionnetwork.org/pdf/ICN_Contact_List.pdf.
sumer Protection Enforcement Network, in which the FTC participated along with other national authorities that had shared competition and consumer protection responsibilities. The ICN operates through working groups consisting of representatives of the member country antitrust authorities, international organizations such as the OECD and the World Bank, and non-government advisors that focus on specific projects. These working groups function without a formal secretariat, communicating principally through conference calls and e-mail and meeting at an annual meeting hosted by a member country. Importantly, the ICN does not exercise any rule-making function. Rather, "where the ICN reaches consensus on recommendations, or 'best practices', arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate." ICN work product usually takes the form of recommended practices, reports, and manuals.

VI. The ICN as a Convergence Success Story

In its relatively short lifespan, the ICN has been extraordinarily successful as a forum in which experts, from both inside and outside governments, have worked together to develop consensus about superior practices. Many of these are finding their way into national legislation and procedural functions. Equally significant, it has served as a forum for competition agencies leaders and staff to meet and build the kind of individual connections that facilitate day-to-day cooperation.

The participation of non-government advisors has been critical to the success of the ICN. Obtaining buy-in from the private sector, the principal "customer" of competition legislation in the first place, is essential. Non-government advisors participate in all aspects of the ICN's work alongside its members.

While members alone make decisions as to the adoption of recommended practices or other work product, all decision-making within the ICN is by consensus. This ensures that no one powerful group of members can force smaller members to adopt recommendations against their will. The process creates incentives for inclusion and cooperation among members.

Projects addressed by the ICN are selected by its members and have included work on mergers, cartels, single-firm conduct, competition policy implementation, competition advocacy, enforcement in regulated sectors, and telecommunications, among others. The following is a brief examination of some of the ICN's key projects:

A. Mergers

The first major area tackled by the ICN is in the area of merger notification and procedures. Since the passage of the Hart-Scott-Rodino Act in the United States in 1976, over seventy countries have adopted pre-merger notification regimes. However, their procedural requirements diverged substantially. In some countries, for example, notification was voluntary, while in others it was mandatory. In some, firms seeking to merge must

44. About ICN, supra note 42.
first obtain affirmative permission to merge; in others, such as in the United States, a
merger can proceed without affirmative approval so long as notification has taken place,
and the requisite waiting periods have expired.45 In yet other countries, firms were free to
merge at any time but risked the specter of divestiture should approval later be denied. In
some countries, the time within which an agency was required to make a decision was
fixed by statute, while in others, decisions could be delayed for an indefinite period. The
quantity of information demanded varied, as did the degree of subjectivity needed to re-
spond to questions posed by the competition agency. Perhaps most significantly, some
jurisdictions required that the transaction have a nexus to their jurisdiction, and others
required notification when only one party had a local nexus, and the transaction itself had
no connection to the reviewing jurisdiction.

In response to these and other concerns, the ICN undertook a detailed project to study
the merger notification and procedures of its members and to formulate recommended
practices for its members to follow. In 2002, the ICN unanimously approved a set of
Guiding Principles, which was followed in 2003 by a set of Recommended Practices, cov-
ering such matters as the required nexus to the reviewing jurisdiction, the timing of re-
view, the clarity of notification thresholds, and requirements for initial notification.46
Significantly, the ICN Guiding Principles and Recommended Practices do not alter, or
even address, any of the differences between jurisdictions. They simply identify a better
way forward.

Many of these provisions have been transposed into national legislation. The fact that a
particular policy has won the imprimatur of a consensus group of virtually all of the
world’s antitrust agencies is a powerful endorsement, and it is certain that the ICN’s rec-
commendation has carried weight with national legislators that no one nation, individual,
or blue ribbon panel of experts would have. The majority of ICN member countries with
merger review regimes in place have adapted their national systems to conform with the
Recommended Practices. Recent amendments to Germany’s Act Against Restraints of
Competition47 provide a concrete example of how the Recommended Practices are helping
to effect change. These amendments, part of a general legislative attempt to reduce un-
necessary bureaucracy, draw upon the ICN’s Recommended Practices to introduce a dual
domestic turnover threshold to replace the current single party threshold.48 Among
others, Costa Rica, Belgium, India, Brazil, and Portugal have adopted or are considering
legislation that would bring their legislation in line with the Recommended Practices.

In addition, merger work at the ICN has included the development of recommended
practices for substantive merger analysis; the publication of a Merger Guidelines Workbook

46. Intern’l Competition Network, Guiding Principles for Merger Notification and Review Procedures
and Recommended Practices for Merger Notification and Review Procedures, http://www.internationalcom-
47. Third Act on The Reduction Of Bureaucratic Barriers In Particular Regarding Medium-Sized Enter-
prises (Third Medium-Sized Enterprises Relief Act), Mar. 17, 2009.
48. See Andreas Weitbrecht & Susanne Zuehlke, Germany Overview, in THE EUROPEAN ANTTTRUST
REVIEW 2009 (Global Competition Review 2008), http://www.globalcompetitionreview.com/reviews/10/sec-
tions/42/chapters/451/germany-overview/.
has also been issued together with an *Investigative Techniques Handbook*, setting up a web-site with merger templates and legislation for each jurisdiction, and other projects.\(^49\)

**B. Cartels**

The battle against cartel activity forms a universally-accepted central role in antitrust enforcement. The work of the ICN cartel working group has included the publication of an *Enforcement Techniques Manual* setting out generally accepted forms of enforcement in the area. The working group also holds annual cartel enforcement conferences where antitrust authorities have the opportunity to build networks between enforcers and to share best practices.\(^50\)

**C. Unilateral Conduct**

While there is significant international consensus about the scope and purpose of cartel and merger enforcement, consensus about anticompetitive unilateral conduct—known as monopolization in the United States and abuse of dominance in most other jurisdictions—lags behind within the international antitrust community. The reason is because competition—which antitrust laws seek to promote—produces losers as well as winners. It can be difficult to distinguish between vigorous competition in which one competitor promotes offerings that consumers want at lower prices and anticompetitive exclusionary conduct. Some jurisdictions place greater scrutiny on the conduct of dominant firms than others. Some jurisdictions address perceived abusive conduct by firms that have achieved a monopoly position, while others, including the United States, concern themselves only with conduct through which monopoly power is gained or maintained. The work for the ICN to tackle in this area is therefore particularly important yet challenging. These efforts have resulted in recommended practices regarding the concept of dominance, and reports on the objectives of unilateral conduct laws, predatory pricing, single brands/exclusive dealing, and state-created monopolies.\(^51\)

**D. Competition Policy Implementation**

The ICPAC Report in 2000 envisioned a possible technical assistance role for the new body that became the ICN. While the ICN has stopped short of providing technical assistance to newer agencies, it has recognized the importance of the work and issued a detailed report defining the problem of capacity building. The ICN also conducted a detailed empirical study of technical assistance projects, with an eye to learning what had worked and what had not, and issued a set of findings related to technical assistance.


There have also been more focused efforts at assisting new agencies, such as a partnership program among more experienced and less experienced agencies and ongoing monthly calls among case handlers to allow for a sharing of experience between newer and more experienced agencies.52

VII. Lessons Learned

The continuing success of the ICN relative to other efforts to deal with antitrust regulation in the international arena points to some tentative lessons:

• Convergence-driven measures may have required more patience than a rules-based approach, but the record in the merger areas shows the potential for convergence to promote consistent approaches to antitrust law.

• Consensus-based recommendations give every jurisdiction the opportunity to remain in control of outcomes, with the result of avoiding threats to national sovereignty.

• A network that includes regular contact among managers and line staff of counterpart national agencies makes it more likely that the network's output will be informed by the actual experience of the network's members. The contacts gained through the network carry over to enforcement work, which results in greater communication and coordination in actual cases.

• A "light" network, operating as a member-driven group of government agencies without the support of a formal secretariat, can function effectively.

• Careful work must be taken to build consensus among members and external stakeholders (non-government advisors) to reach results that will ultimately achieve buy-in through changes to national legislation and practices.

• Participation by external stakeholders is essential to the success of an international competition network, not only as a means of securing additional expertise in the field, but by assuring that the work of the network will be bought into by national authorities and other decision-makers.

To be sure, challenges remain. The opportunity to participate in the network has not been firmly grasped by all. While developed competition agencies participate regularly, and many developing agencies participate in the ICN's day-to-day work, obtaining full participation by all remains a work in progress. The ICN has been fairly successful in obtaining buy-in for its work product by its members. The imprimatur of the ICN has also enabled its members to advance domestic changes in legislation consistent with its work product. Challenges remain, however, in seeking implementation of its recommendations by many external bodies, including legislators or regulators.

VIII. Conclusion

The theory of transnational networks is the subject of a growing literature that considers international cooperation in antitrust matters, together with cooperation models in the

areas of securities and environmental law, to be among the best examples of how transnational networks may operate in practice. While the International Competition Network was not born out of a desire to test the theory of transnational networks in practice, it effectively illustrates what an effective transnational network can achieve. When the globalization of commerce transformed international antitrust from a theoretical concept to a real problem, the practical limits of solving the problems through formal international law obstructed progress. A voluntary network of competition agencies, with active participation by non-government advisors, has been able to pursue a course of convergence where superior practices are identified and individual jurisdictions opt in.