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

In major respects, the new network not only has survived but prospered. Today, as its tenth anniversary approaches, the ICN's membership has grown to 114 members, which collectively represent nearly all of the world's jurisdictions with competition laws.[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, the ICN exemplifies the form of voluntary multinational collaboration that commentators have identified as a promising way to facilitate international ordering amid the global decentralization and diversification of economic regulation.[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, the ICN's paramount goal is to facilitate convergence on superior approaches concerning the substance, procedure, and administration of competition law. To achieve this aim, the ICN engages in projects that seek to (1) increase understanding of individual competition systems, including similarities and

3. Interview with John Fingleton, Chair of the Steering Group of the International Competition Network (ICN), 25 ANTITRUST

II. CONVERGENCE: MEANING AND METHODS

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

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

Nor do we think the pursuit of absolute congruence to be desirable. As described below, the development of competition law is inherently evolutionary and experimental.[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 US Department of Justice (DOJ) Merger Guidelines of 1982 and the DOJ's leniency reforms of the 1990s, which supplied powerful incentives for cartel participants to inform the government of their illegal behavior.[10] These and other improvements in competition policy have occurred in a sequence of experimentation by which individual jurisdictions introduce reforms, gain experience, and

8. This discussion draws upon the framework set out in William E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, in COMPETITION POLICY IN THE EU: FIFTY YEARS ON FROM THE TREATY OF R

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

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

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

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

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

The potential benefits of convergence become more apparent as the complexity of global competition policy increases. For most of the twentieth century, few jurisdictions had competition laws, and still fewer had effective programs to enforce them.[11] As late as the mid-1970s, only Germany, the European Union (EU), and the US had undertaken significant enforcement programs that commanded attention from business managers.[12] With the fall of the Soviet Union and the adoption of market-oriented reforms by countries previously committed to central economic planning, many nations enacted competition laws or revived older, dormant antitrust statutes. Today, at least 112 jurisdictions have competition laws.[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 the ICN, can promote broad adoption of superior techniques. Since 2001, the ICN's leadership has formulated a strategy that suggests how the network can best promote convergence in a global environment that features a broad decentralization of authority and extensive experimentation.[14]

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

12. Id.

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

14. The strategy we refer to here is an amalgam of views expressed by members of the ICN Steering Committee from the first years of the network's establishment to the present. Two particularly formative statements are

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

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

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

The quality of consensus depends heavily on the methods

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

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

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

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

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

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

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

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

The very process of turning out recommendations also can inspire future effort. As described more fully below,[20] a demonstrated ability to provide visible results induces network members and NGAs to invest resources in the future. Deliverables provide the network's major investors with a visible return on their commitment of resources. Multinational competition networks are voluntary endeavors, and each network must compete to obtain effort from its members. Competition agencies (and the political appointees who often head them) typically feel strong pressure to devote resources to immediate operational needs, such as the prosecution of cases.[21] 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.

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

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

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

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

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

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

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

22. See Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN

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

In the framework of the multinational competition networks, the ICN's position in 2001 posed some significant risks. As is the case with new entrants in commercial markets occupied by a handful of seemingly entrenched incumbents, the ICN had to cope with product line repositioning and sometimes

the realization of important complementarities.

To anticipate one of our conclusions, we see ways in which the three networks can prosper and make important contributions to convergence upon superior competition policy standards. We also can imagine that the centrifugal forces of rivalry for resources and recogn ition 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

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

The OECD obtains its operating budget (in the current fiscal year, approximately €350 million) from member contributions. Member payments fund a secretariat staff of approximately 2500;[29] most staff work at the organization's headquarters in Paris. Among other functions, the secretariat supports the committees and working groups. Many members of the CLPC secretariat previously have worked in government bodies in their home countries, and they give the OECD the in-depth substantive expertise and capacity to prepare first-rate reports on a wide array of policy issues. Although the OECD's CLPC secretariat is a great source of analytical strength, the size and deliberateness of the OECD's bureaucracy as a whole sometimes attracts criticism.[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 the ICN establish any form of traditional secretariat seems to stem from the fear that a replica of the OECD's substantial Paris campus and a laborious pace of operations soon would follow.

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

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29. See OECD, Who Does What, available at http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html.

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

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

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

to collect information on antitrust topics, to meet regularly to discuss their experiences, and to build a network of relationships that strengthen cooperation among different jurisdictions.[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 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 to encourage adoption of superior techniques is preparation of studies known as country reviews or peer reviews. In the peer review, a member country or OECD observer requests an examination of its competition system, and a competition expert retained by CLPC prepares a detailed study.[37] The expert reviews published texts (e.g. statutes, implementing regulations, decisions, policy statements, guidelines) and conducts interviews with agency officials and observers outside the competition agency (e.g. academics, business associations, consumer groups, other government bodies, and the private bar). The consultant presents the peer review at one of the CLPC's regular

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

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

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

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

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

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

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

In some instances, CLPC programs foster consensus that generates formal OECD recommendations.[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] The OECD policy recommendations

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are non-binding. In a number of instances, member countries do not comply with the 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 the OECD cannot respond quickly and effectively to new, urgent concerns of its members. Nonetheless, the OECD's prescriptions involving competition law and other areas of international economic policy (such as efforts to discourage commercial bribery) have encouraged discussion about potential reforms and supported jurisdictions that are contemplating reforms.[45]

Compared to the ICN and UNCTAD, the OECD's relatively small, homogeneous membership of thirty-four developed countries leads to an easier building of consensus, but this advantage is double-edged.[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 under-inclusive membership played a major part in the CLPC's establishment of the Global Forum on Competition (GFC) in the fall of 2001.[47]

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

B. UNCTAD

The United Nations created UNCTAD in 1964 to help developing countries form and implement economic policy. [50]

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 its time of establishment 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 proved useful in providing a focal point for discussion and being a stimulus for consideration of other approaches.[58] Moreover, in the context of conferences and meetings convened by UNCTAD, the

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 the OECD or ICN events. To a large extent, UNCTAD remains the only significant forum through which a number of low-income countries that have recently enacted competition laws or are considering such measures may engage in international discussions about competition policy. This attribute gives UNCTAD an important, unique capacity to support the development of competition policy in nations with few, if any, links to the ICN or OECD.

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

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

60. *Id.*

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

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

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

C. WTO

Created in 1994, the World Trade Organization appeared to be a promising forum to house a multinational competition law regime. Karel van Miert, the European Commissioner for Competition, appointed a group of 'wisemen' to draft recommendations on the subject.[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 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 the Intersection between Trade and Competition Policy at the WTO's 1996 Singapore meeting.

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.[77] One condition that could support the revival of the WTO working group is the increase since 2004 in the number of transition economies with competition law systems (e.g., China and Egypt) and the significant retooling of older mechanisms in emerging markets (e.g., India and Pakistan). An advantage that a restored working group would enjoy is seven years of experience in the form of the ICN, OECD, and UNCTAD efforts to build consensus and convert consensus views into recommended standards.

D. ICN

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

75. Id. at 129–37.

76. See id. at 134–38.

77. Id. at 129–30

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

79. ICPAC REPORT, supra note 2.

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

This led to the ICN's formation in 2001.

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

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

competition cooperation).

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

82. OECD provides an example of the difficulties that a competition network housed within a multi-function institution faces in defining and sustaining a program. In recent years, we have observed how the OECD secretariat has pushed its committees—including the CLPC—to commit resources and meeting time to overarching projects (called "horizontal" initiatives within the OECD) that seek to link the work of the entire OECD committee structure and permojects (d(.02 371(n0P9.e(h9.5())(D .n)0]Tc 4(ct1).4(mpeti9.38a(.0nhor)7.4d(."m -.t]TJ 7T41

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

A second factor that could blur the ICN's competition-only focus is the diversity of policy tasks assigned to its members. A number of competition authorities are policy conglomerates: in addition to antitrust law, they enforce other statutes dealing with matters such as consumer protection and public procurement.[83] Other systems assign the competition authority responsibility to proscribe "unfair competition"—a command straddles the doctrinal boundary between traditional competition law and the fields of business torts and contract law.[84] 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]

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

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

84. This is the case with Section 5 of the Federal Trade Commission Act, which empowers the FTC to ban "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45 (2006). Ambiguity about the reach of this measure is evident in the FTC's settlement in N-Data (FTC 2007) which treated an episode of post-contractual reneging as an unfair method of

other ministries.[86] Within the ICN, the member competition authorities have relatively greater freedom to express their views as antitrust bodies. There is less looking over the shoulder out of concern that the competition agency's views might contradict the preferences of other public institutions within their governments. The ICN stands apart from its multinational network counterparts in the degree to which it engages non-government advisors (NGAs) in its work. Compared to its main international counterparts, the ICN relies more heavily upon the contributions of NGAs from academia, the business community, consumer groups, and the private bar.[87] 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.[88] 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.[89]

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

86. The discussion of competition law and trade policy provides an example. Suppose the CLPC schedules a roundtable on the impact of anti-dumping mechanisms on domestic competition and asks members to submit papers on their national experiences. A competition agency will know that

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

The range and detailed work product that the ICN has developed in just under a decade is impressive—especially when you consider that all its participants have other day jobs. Achievements have been made in many areas, including merger review, anti-cartel enforcement, unilateral conduct, competition advocacy, and competition policy implementation.[97] Work product consists of recommended practices, case-handling and enforcement manuals, reports, legislation and rule templates, databases, toolkits, and workshops.[98] 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.[99]

The ICN develops its work product in three stages.[100] Firstly, a steering group identifies an issue in need of study.[101] 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.[102] In the third stage, the ICN working group presents its findings, and ICN members begin to implement the suggested practices.[103] To facilitate the adoption of suggested practices, the ICN develops templates, manuals and any other materials to assist implementation.[104]

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

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

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

100. Sokol, supra note 33, at 111.

101. Id.

102. Id.

103. Id.

104. Id.

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

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.[106] Today's superior methods promise to be displaced by a continuous process of

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

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

One reason why the ICN has enjoyed success is the novelty of competition law for most nations.[111] 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.[112]

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

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

110. *See* Lawson A.W. Hunter & Susan M. Hut110(p59.7eh.4718 0 TD -.0012 TcTD -.0er)7(re-Hugue)6.orks and

resolution mechanism.[119] 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.[120] The ICN might define its role as facilitating convergence among competition law systems as a necessary evolutionary step from soft law to hard law—towards the formation of a multinational competition law agreement with binding provisions.

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

The concept of a multinational agreement has attracted considerable attention from policymakers, practitioners, and scholars throughout the period since World War II.[124] 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.[125] Despite these discussions, no international treaty on competition issues has been signed. There are bilateral and regional agreements but,

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law—associated with market-oriented economic policy. Countries were less inclined to consider cooperative global solutions, as evidenced by US initiatives during the Great Depression.[144] 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.[145] Nonetheless, following the 1927 League of Nations conference, there was another international effort to promote global competition law at the 27th Conference of the Inter-Parliamentary Union in 1930.[146] This organization was founded on a cosmopolitan faith that governments working together could improve the human condition.[147] The delegates called for states to develop a set of enforceable international competition law principles.[148] 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.[149]

2. The Havana Chapter

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

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

145. GLOBAL COMPETITION, *supra* note 70, at 38. US domestic economic

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

With this mindset the US and its allies conceived the Bretton Woods program during the Second World War. The program built upon a system of new international institutions

appeared inappropriate for a world divided between the ideologies of comm

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

The ICN, OECD, and UNCTAD appear to have increased convergence around competition law norms and practices, and they have capacity to make further progress in the future. Of the three, the ICN may prove to be the most effective convergence vehicle. This possibility stems from the breadth of its membership (an advantage over the OECD), its members' status as agencies rather than governments (an advantage over the OECD and UNCTAD), and its greater emphasis on practically-oriented projects to identify and embody consensus views in the form of recommended practices and related norms

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

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

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

178. The importance of evaluation as way to assess international organizations' effectiveness, specifically for developing countries, has been emphasized in Helen V. Milner,

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

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

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

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