



April 21, 2010

Dear ICN colleagues,

At the ICN's 8th Annual Conference in Zurich, we agreed to engage in an outreach study: a self-assessment of the International Competition Network. As the ICN approaches its 10th year, we have an opportunity to meet the welcome challenges created by the expansion of the ICN's membership and work program. The purpose of the outreach study was to launch a series of endeavors that would help the ICN to identify better specific strengths and improvements needed to maintain the network's exceptional momentum for its second decade.

One aspect of the self-assessment was to examine the ICN in light of a growing academic literature. Commentators have discussed the development of international policy networks and considered how different approaches to governance influence the effectiveness of these networks. A second endeavor was for the ICN to study and learn from the experience of other international networks whose core membership consists of government bodies. A literature review accompanied by an executive summary, as well as a summary of non-member engagement by other networks is attached.

From that literature, we can make three general recommendations for the network's second decade.

1. Legitimacy and accountability. The ICN must press for meaningful engagement from a broad spectrum of members that includes newer agencies and NGAs. Individually, ICN members need to consider legitimacy at home, and create, as John Fingleton has suggested, a narrative about our work and its benefits.
2. Convergence. International networks are remarkably successful in achieving meaningful convergence around good practice, and the ICN is no exception. We need to continue studying and identifying superior standards.
3. Efficiency and dissemination. The ICN's project-based nature and lack of a formal secretariat presents challenges for maintaining institutional memory and risks burying some or all of the treasure trove of ICN work product. Efforts should be made to safeguard the internal memory, standardize terminology within existing work product, and promote the use and distribution of ICN work product.

These recommendations can serve as a starting point to set a future agenda for the network. But, since the ICN is a demand-driven institution, a key aspect of the outreach study is to continue to consult with a broad spectrum of members and NGAs. Accordingly, at this annual conference we will ask all of you to share your views about the ICN to inform planning for the network's second decade. During a dedicated breakout

session, moderators will ask you about the ICN's success and challenges, substantive topics, and operational issues. Also during that discussion we will ask you to complete a short survey that examines participation, barriers to participation, and appropriateness of ICN work product. We are most grateful for your participation and very much look forward to hearing your thoughts and recommendations.

Best regards,

William E. Kovacic
Vice Chair for Outreach

APPENDIX I
TRANSGOVERNMENTAL REGULATORY NETWORKS
LITERATURE REVIEW*

EXECUTIVE SUMMARY

1. The academic literature on transgovernmental regulatory networks (“TRNs”) points to a number of ongoing themes. In particular, the academic commentators describe how TRNs rest on the notion of disaggregated sovereignty, whereby domestic officials reach out to their foreign counterparts directly, instead of through state-to-state negotiation.
2. Relying on “soft power” based on persuasion and socialization, TRNs are characterized by flexibility and adaptability that dispense with the time-consuming formality of more traditional international organizations with large numbers of administrative staff and protocols.
3. Being well-suited to facilitating voluntary convergence, TRNs have led to the harmonization of antitrust laws with adaptability for local circumstances.
4. The voluntary nature of TRNs with their associated emphasis on adaptability appears to have quelled apprehension associated with regulatory coercion and the possible concomitant loss of sovereignty.
5. One of the keys to TRNs success is establishing a reputation for providing credible information, and the fact that members shift their roles from enforcers to the providers and guarantors of the quality of available information.
6. Some commentators believe that the voices of the major players or largest economies may be more influential within TRNs than those from the younger agencies or smaller economies as they have more resources—but there is considerable evidence to suggest that TRN leadership are aware of this danger and have demonstrated a resolve to include, involve and respond to all voices.
7. TRNs without a formal secretariat often have more direct interactions of top government officials at the highest level, but there are still considerable administrative tasks that are necessary to ensure the smooth functioning of each network, so they require staff support.
8. A challenge faced by TRNs is how to ensure the continuing frequent interaction of top level state officials with sufficient support so as not to detract from day-to-day responsibilities at their respective government agencies, while at the same time ensuring that all voices are heard.

* I am grateful to Maria Coppola, Hugh Hollman and Rebecca Bianchi at the Federal Trade Commission for their assistance in preparing these materials.

APPENDIX II DESCRIPTION OF ACADEMIC LITERATURE*

1. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 *Am. J. Int'l L.* 478 (2000).

- Emphasizes how the structure of institutions is important as they facilitate or retard the realization of substantive policy goals, and may entail costs that make specific institutional arrangements undesirable when balanced against the costs and benefits of alternative arrangements, or even the status quo.
- Likely costs for institutional arrangements are identified as including: (1) direct costs, (2) out-of-pocket costs, (3) opportunity costs, (4) system costs, and (5) political costs.
- Develops the point that institutions matter because they shape the very policies that they are presumed to implement, e.g., WTO is built largely on rules that restrain government behavior, not private conduct, which would likely result in less responsiveness to domestic competition concerns.

2. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Va. J. Int'l L.* 1 (2002).

- Describes the expansion of transgovernmental networks (“TRNs”) that are “transgovernmental” as they involve specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries; they are “networks” because the cooperation is loosely-structured and consists of peer-to-peer ties developed through frequent interaction rather than formal negotiation.
- At the center of transgovernmental theory is the notion of “disaggregated sovereignty” whereby domestic officials are reaching out to their foreign counterparts regularly and directly through networks, rather than through state-to-state negotiation.
- Supporters of TRNs contend that networks are flexible and adaptable, foster experimentation and innovation, dispense with juridical equality and time-consuming formality of traditional international organizations.
- The power at the center of such networks is primarily “soft power” whereby persuasion and attraction trump coercion and compulsion.
- But the development of TRNs, while significant, will not come at the expense of traditional tools of liberal internationalism such as

* Articles are listed in alphabetical order, and do not represent a comprehensive listing. If you believe that any articles should be added to this list, please forward them to Hugh Hollman at hhollman@ftc.gov.

multinational agreements; instead, there is synergy between the two forms of cooperation.

- The existence of a network will likely lead to jurisdictions seeking convergence that will allow deep and broader cooperation, with more powerful jurisdictions competing as the standard-setters within the network and weak jurisdictions importing those standards.
- An implication of network effects is that there is an inherent advantage to being the first-mover and establishing the dominant standard.

3. **Jörg Philipp Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence – Mapping a New Field for Global Administrative Law*, The University of Oxford Centre for Competition Law and Policy, Working Paper CCLP (L) 26, available at <http://denning.law.ox.ac.uk/competition/portal.php>.**

- Broad discussion of common procedural principles and organizational structures that could comprise an “International Competition Enforcement Law.”
- Notes that a peculiar characteristic of International Competition Enforcement Law is that it not only operates through or inside “networks” but that there is also explicit use of that term.
- Defines the term “network” as non-hierarchical or hardly-hierarchical cooperation forms that are located outside of usual forms of administrative cooperation.
- Compares the ICN with the European Competition Network (“ECN”) noting that common to both networks is that national or supranational authorities operate within each network, not the states to which they belong, but also explains that the ICN does not confine itself completely to a governmental perspective as the ECN regularly invites scholars and law firms to participate in its activities.
- Contrasts the ECN with the ICN in that the ECN is embedded in rigidly defined legal structures that can partly be explained by some of its tasks that concern questions about fundamental ranges of authority, the execution of investigations for other competition authorities, and control of those processes through the European Commission.
- The author observes that the convergence of comparative procedural law, unlike substantive law, has barely been researched.
- States that the ICN’s cooperation with emerging and developing countries in developing a number of guidelines and manuals would likely lead to the convergence of International Competition Enforcement Law, but that the convergence is stalled by the lack of norm clarity and the lack of global definitions about what purpose competition laws should serve.

4. **Anu Pilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *Stan. J. Int'l L.* 207 (2003).**
- Describes global governance as a constantly evolving discourse among multiple actors that needs to strike a balance between national sovereignty and international cooperation.
 - Divides global governance into three forms: (1) intergovernmental governance, which consists of states, represented by heads of state; (2) a transgovernmental level where lower-level government officials interact directly with one another and form TRNs; and (3) a transnational model reflecting the importance of global nongovernmental organizations and other non-state actors who shape policy preferences and regulatory agendas.
 - Networks are considered well-suited to facilitate cooperation and voluntary convergence, leading to harmonization of antitrust laws and allowing for policy experimentation with adaptability for local circumstances.
 - Views each form of global governance as complementary and constraining on one another, which creates an optimally balanced global governance regime.
 - Highlights apprehension associated with regulatory imperialism and that the use of the intergovernmental model alone would raise concerns about coercion and loss of sovereignty.
 - Concludes that regimes created through norms of reciprocity, trust and consensus are superior to regimes which advance the rule of law through regulatory imperialism.
5. **Eleanor Fox, *International Antitrust and the Doha Dome*, 43 *Va. J. Int'l L.* 911 (2003).**
- Distinguishes “horizontalists” and “internationalists”: Horizontalists contend that antitrust problems between nations can best be solved at a national/nation-to-nation level; Internationalists contend that global-level solutions are necessary to solve problems of externalities, legitimate jurisdiction, nationalistic incentives and cabined vision.
 - Discusses how national competition enforcement may not be sufficient for control of export cartels and other offshore anticompetitive restraints, or to legitimately or sufficiently pry open closed foreign markets.
 - Concludes that there are significant inadequacies in national-level-only solutions and that networks like the ICN should be seen as a compliment rather than an alternative to a global-level solution.

6. **Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *Stan. J. Int'l. L.* 283 (2004).**
- Compares evolving conception of sovereignty from Westphalian sovereignty, which is the right to be left alone, to exclude, and to be free from any external meddling or interference, versus a redefined sovereignty where governments cooperate with one another through international networks and institutions to accomplish through cooperation what they could only once hope to accomplish acting alone within a defined territory.
 - Observes that in today's society, states can no longer govern effectively by being left alone and by leaving other states alone, and that government networks illustrate this new sovereignty.
 - Networks exercise both hard and soft power, where hard power is a command power to induce others to change their position that works through rewards and threats. By contrast, soft power flows from the ability to convince others that they want what they want, which is no less powerful than hard power: it is simply a different kind of power.
 - Notes that in information networks, the ability to provide credible information and an accompanying reputation for credibility becomes a source of power.
 - But identifies the key to government by soft law and regulation by soft power is the shift of the core role of the state from enforcer to the provider and guarantor of the quality of available information.
 - Observes that networks can provide and guarantee the quality of the information possibly through a secretariat or information agency that facilitates the collection and transmission of information along the network.
 - Also observes that states step into roles to help empower individuals to solve their own problems within their own structures to facilitate and enrich direct deliberate dialogue.
 - In short, by becoming enrolled and enmeshed in global government networks; individual government institutions affirm their judicial, legislative and regulatory sovereignty.
 - Concludes that now that we are in a world in which sovereignty means the capacity to participate in cooperative regimes in the collective interest of all states, expanding the formal capacity of different state institutions to interact with their counterparts and the world means expanding state power.
7. **Anne-Marie Slaughter, *A NEW WORLD ORDER* (2004)**
- Sets out theories regarding the possible benefits of TRNs in improving global governance.

- TRNs described as possible solution to the “trilemma” of global governance, which is the need for global governance without excessive centralization and erosion of democratic control.
- TRNs avoid the “trilemma” as they keep substantive power largely in the hands of national-level official under, at least, indirect democratic control without being centralized in one organization while at the same time creating synergies that can lead to better policy and implementation.
- Two basic types of networks are identified: (1) horizontal networks that bring together regulators from parallel enforcement agencies, e.g., ICN; and (2) vertical networks that consist of agencies with similar missions but at various interrelated levels of government, e.g., judicial and regulatory structures of the EU.

8. **Ariel Ezrachi, *The Role of Voluntary Networks in Multinational Cooperation Over Merger Control*, 36 Geo. Wash. Int’l L. Rev. 433 (2004).**

- A “side-effect” of the increasing number of new competition regimes has been the increased complexity of approving merger transactions that underscores the need for cooperation at the multinational level to reduce the concomitant transaction costs.
- Supports a multinational framework with both binding and soft law initiatives.
- Binding agreements may provide general policy statements that promote common ground while soft law initiatives may provide a norm-generating vehicle that can offer a reference point for jurisdictions and offer a potential set of acceptable criteria.
- This approach may remedy the current friction at the multinational level and pave the way for a more comprehensive agreement on merger control in future.

9. **Anne-Marie Slaughter and William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 Harv. Int’l L.J. 327 (2006).**

- Describes a new model of international law, based upon the EU model of law, where focus is on direct engagement with domestic institutions rather than independent regulation above the national state.
- The future relevance, power, and potential of international law lies in its ability to strengthen domestic law institutions, backstop them where they fail to be effective, and compel them where they fail to act. Using international law to build the will and capacity of states to act domestically offers great opportunities to enhance the effectiveness of the international legal system.
- TRNs—such as the ICN—can play an important role in strengthening domestic governance. The power and effectiveness of transnational networks could be strengthened by explicitly recognizing the role of such

networks and the soft regulations they often produce. Hard law instruments could mandate the creation of transnational networks.

- Recognizes that the most significant danger inherent in these new functions of international law is the potential of national governments to co-opt the force of international law to serve their own objectives.
- Concludes that the European way of law uses international law to transform and buttress domestic political institutions and should serve as a model for how international law “will and must function” to address twenty-first-century international challenges.

10. D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L. J. 37 (2007).

- Addresses the problems in international antitrust with respect to mergers, cartels, and market access.
- Discusses theoretical tools to address the problems of antitrust, including the use of comparative institutional analysis to understand institutional choice and the cost-benefit analysis involved in making such a choice.
- Engages in a comparative institutional analysis to examine the participatory strengths and weakness of the institutions (the extent to which states can participate and how this affects the legitimacy of the institutions).
- Discusses the use of hard and soft law institutions and their application to the problems of international antitrust.
- Concludes that soft law institutions are less problematic and that the ICN is more effective than other soft law institutions.

11. Russell W. Damtoft and Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 Int’l Law. 137 (2009).

- Observes that real progress has been made through the ICN to bring divergent systems closer together without the need to intrude on sovereign control of national antitrust regimes.
- Describes past efforts to create global antitrust rules, especially the International Trade Organization and World Trade Organization, and that in lieu of a rule-based system, the idea of seeking to resolve conflict through convergence was explored.
- Identifies several fora for pursuing international antitrust convergence that were considered, including the Organization of Economic Co-operation and Development (“OECD”), United Nations Conference on Trade and Development (“UNCTAD”), and the ICN.
- Following the endorsements of FTC Chairman Timothy Muris, Assistant Attorney General for Antitrust Charles James, and EU Commissioner Mario Monti in October 2001, the ICN was launched.

- The central ICN objective is dialogue between nations to create convergence around sound competition policy principles across the global antitrust community.
- The ICN operates through working groups consisting of representatives of the member country antitrust authorities, international organizations such as the OECD and World Bank, and non-government advisors that focus on specific projects.
- The working groups function without a formal secretariat, communicating principally through conference calls and e-mail, and an annual meeting hosted by a member country.
- No rule-making function is exercised by the ICN, instead the ICN focuses on seeking consensus on recommendations or best practices, and national competition authorities decide whether and how to implement the recommendations.
- A number of tentative lessons have been learnt from the ICN experience:
 - Convergence-driven measures required more patience than rules-based approaches, but the potential for convergence to promote consistent antitrust laws has been demonstrated, especially in the merger area.
 - Consensus-based recommendations give every jurisdiction the opportunity to remain in control of outcomes that avoid 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 experiences of the network's members.
 - A network without a formal secretariat and operated as a member-driven group, can function effectively.
 - Participation by external stakeholders is essential to the success of an international competition network, not only to ensure additional expertise, but to increase the probability that national authorities will implement the recommended best practices.

12. Kris Dekeyser, et al., *Coordination Among National Antitrust Agencies*, 10 *Sedona Conf. J.* 43 (2009).

- Examines how national antitrust agencies within the EU and the US coordinate enforcement in their respective territories.
- Explains the role of the European Competition Network (“ECN”) in facilitating cooperation between the national competition authorities (“NCAs”) and EC; and the clearance process between the DOJ and FTC.
- Broad overview of multilateral competition treaty efforts and discusses specific bilateral agreements.
- The ICN is regarded as an example of a “bottom-up” approach that could lead to convergence in the long term and the development of a global

competition culture, possibly leading to codification at the international level.

13. **Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *Yale J. Int'l L.* 113 (2009).**

- Describes domestic constraints on regulators that limit cooperation in the presence of non-homogeneous effects on various participants that lead to challenges arriving at and enforcing agreements in TRNs, and notes the following limitations of TRNs.
 - The interests of domestic constituencies and political accountability of executive and legislative branches may “anchor” the choices of national regulators on specific issues, limiting the ability of global governance networks to influence domestic policy.
 - If national participants in national networks are actually accountable to domestic constituencies, then they may actually be considering policies with real distributional consequences that create different state interests, which may lead to a multiple equilibria and consensus problem.
 - International networks may be inadequate in dealing with some problems as they are unable to prevent non-compliance, and can be (mis)used as instruments of powerful states.
- The author describes his view of the progression of international antitrust interaction between Europe and the U.S. from “conflict” to “convergence” to “rivalry,” and notes the voluntary nature of commitments and lack abilities to transfer confidential business information in the U.S.-Europe MOU. He argues that the purpose of the MOU is to coordinate in cases only where parallel interest align, and notes that the substance of cooperation is “tailored to coordinate enforcement in many cases where interests coincide, while preserving a pressure valve for noncooperation where powerful domestic constituencies oppose it.”
- While the author notes the shortcomings of international networks in several examples, such as distribution and coercion in Basel I and a lack of convergence on substantive law issues in IOSCO, Verdier makes only “preliminary observations” about the ICN. He notes that the ICN has brought “significant momentum in the international antitrust world.” Unlike some other regulatory areas, antitrust is not conducive to fast rules because cooperation varies from case to case.
- Criticizes strong normative claims in favor of TRNs based on socialization theories of networks as complete because they are not sufficiently based on empirics and do not recognize the possibility of perverse outcomes such as self-aggrandizement.
- Observes that TRNs can be largely successful where state interests are largely aligned, such as collecting and disseminating reliable information,

developing best practices, and building regulatory capacity in developing countries.

14. Eleanor M. Fox, *Linked-in: Antitrust and the Virtues of a Virtual Network*, 43 *Int'l Law*. 151 (2009).

- Explains how the ICN is an outstanding example of interaction among national authorities that has produced convergence in law and policy.
- Describes the failure of the WTO initiative, and the rise of the ICN as a “soft power” network.
- Attributes part of ICN success to ICN informality, its lack of a secretariat, antitrust-only agenda, noncontroversial initial agenda and lack of power to make enforcement rules.
- Critically notes that the ICN’s roots are only “virtual,” which are easily pulled up. The ICN’s success rests mainly on the shoulders of a continuous devoted leadership, as well as engaging and useful projects.
- Describes how the voices of the major players in the developed world are likely more influential than those of the undeveloped world, nonetheless, ICN leaders show consistent resolve to include, involve, and respond to all voices.
- The ICN is not considered sufficient, by definition, for antitrust global governance—nor was it intended to be—as the ICN limits itself to facilitating dialogue, mentoring, and nudging applications of national laws to be more alike.

15. D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 *Nw. U. L. Rev.* 1081 (2009).

- Focuses on how both external and internal dynamics shape the capacity of younger agencies to embark on antitrust in their jurisdictions.
- “Soft law” institutions are described as international governance mechanisms that improve the capacity of domestic antitrust agencies by ensuring international harmonization and the creation of antitrust norms based on best practices from around the world.
- Identifies the most prominent “soft law” international antitrust institutions as being the OECD, UNCTAD, and the ICN.
- Notes that the OECD and UNCTAD have an impact on younger antitrust agencies by organizing conferences, peer reviews, technical assistance missions, and reports.
- Observes that UNCTAD is more limited in its impact as its viewpoint often differs from other international institutions in which the developed world countries tend to shape the agenda.
- Identifies the ICN’s purpose as identifying, creating, and spreading antitrust norms to reduce the costs that make enforcement against anticompetitive conduct more difficult.

- Highlights that to improve agency capacity, the ICN tailors many of its work products to younger antitrust agencies that include the creation of enforcement manuals, reports on how jurisdictions address various types of conduct, workshops to improve investigation techniques, and meetings of enforcers and nongovernmental advisors to discuss report findings and agency priorities.
- Reports on an ICN survey undertaken in 2004 that consisted of a 1,000 plus questionnaire sent to its member agencies asking for a description of their experiences.
- According to the survey, Long Term Assignments (“LTAs”) by more experienced antitrust agency members were more effective than so-called Short Term Interventions (“STIs”) as the LTAs had longer to understand the true economic situation in the country, the larger political context, and a sense of the strengths and weaknesses of the agency and supporting institutions of the country’s antitrust system.
- Based on the survey’s findings, recommends that: (1) more resources are put into LTAs, (2) there is increased coordination between donors and recipients of technical assistance as it will be more effective if the requirements of such assistance are better understood by both donor and recipient, and (3) continue working on the nuts and bolts of everyday coordination as that improves the effectiveness of younger agencies.

16. Brendan Sweeney, *International Competition Law and Policy: A Work in Progress*, 10 Melbourne J. of Int. L. 1 (2009).

- Describes the evolution of competition policy over the last two decades, explaining that it has been very successful in norm convergence and avoidance of conflict.
- International networks, such as the OECD, UNCTAD, and ICN have engaged with each other and other relevant state and non-state actors to produce an outline of a global competition system.
- The networks have operated at three levels: (1) to produce a more thorough understanding of competition principles and norms with the object of building international convergence; (2) to provide technical assistance to enable states to build domestic capacity; and (3) to develop modalities for greater international cooperation and coordination.
- The dilemma of illegitimacy inherent in global government has arguably been avoided with a governance system that produces acceptable solutions to international problem while remaining within the paradigm of domestic rule-making.
- However, the horizontal networks that presently dominate the field may need to be supplemented by some vertical arrangements.
- For example, incentives for protectionism built into the system may require supranational oversight to ensure that commitments to non-discrimination are honored.

- Warns that there is no guarantee that many states that have introduced competition law in the last 15 years will continue to apply competition law principles, especially where the state is a major economic actor and when faced with severe economic crises.

17. John Fingleton, *Competition Agencies and Global Markets: The Challenges Ahead*, available at http://www.offt.gov.uk/shared_offt/speeches/2009/spe0909paper.pdf

- Examines the achievements of the ICN and suggests that the ICN reconsider its objectives and long-term vision.
- Identifies the key problems with the current system of national competition as:
 - Private anti-competitive behavior, i.e., cartels, abuse of unilateral market power, anticompetitive mergers, and other private restrictions on competition.
 - Public restrictions on competition, i.e., state restrictions on entry, protectionism, etc.
 - Different or inconsistent substantive standards and policies that give rise to a risk of “chilling” conduct that could be pro-competitive.
 - Duplicative and inconsistent procedures across national competition regimes that create additional burdens for business that are often passed on to consumers.
- Considers traditional methods of international cooperation based on comity as limited due to a number of inherent disadvantages:
 - Bilateral cooperation operates on a case-by-case basis and, therefore, is less reliable for new situations.
 - Comity principles may be insufficient as they may, for example, not be able to resolve a jurisdiction conflict where both countries believe they have the predominant interest.
 - Since comity principles require a jurisdiction to commit resources and effort to a requested action, jurisdictions may face conflicting priorities regarding issues of domestic importance, which may detract from their ability or willingness to apply competition law principles.
 - Comity is likely to be less successful where agencies are of unequal size or power as such agencies are less likely to frequently interact with one another or have a recurring need to rely on one another.
- Identifies the creation of a supra-national competition body as a potential solution, but points out that this may not be a feasible option as:
 - The centralization of decision-making power and coercive authority in a supra-national body could lead to fears of unduly curtailed liberty and unaccountability of decision-makers.

- Supra-national organizations can be cumbersome and bogged down by procedural rules.
 - Past attempts to create a supra-national body in the competition law arena have been largely unsuccessful.
- Another suggested alternative is to rely on “major” jurisdictions to catch instances of private anti-competitive behavior.
 - But, not every major jurisdiction has extra-territorial enforcement powers, relying on foreign jurisdictions may be politically unpalatable, and it cannot always be assumed that the major jurisdictions would always act on international behavior that has a limited impact in their jurisdictions.
- Identifies competition networks as another alternative.
- Identifies four key benefits of competition networks in the current competition enforcement network:
 - They engender ‘socialization’ and thereby enhance trust and coordination between countries.
 - Networks provide a platform for mutual influence and support that can lead to policy coordination
 - Offer a means to coordinate action.
 - They are composed of national officials who are subject to the same accountability mechanisms that control national governments.
- In particular, the ICN has a number of attractive features: (1) it has a wide membership comprised of competition agencies that are directly responsible for the implementation of their national competition regimes; (2) the ICN benefits from the participation of non-governmental advisors; and (3) it is a virtual network so the work is carried out by members organization and not a formal secretariat.
- Concludes that competition networks offer the best means of promoting discussion of competition norms and policy and in providing agencies with the necessary support and tools that they may need to address potential competition harms.



APPENDIX III BACKGROUND DOCUMENT FOR NGA POLICY DISCUSSION

In 2009, the Vice Chair for Outreach committed to examine the experience of other international organizations' policies regarding non-member participation.¹

This document highlights the most relevant experience of a survey of international organizations.² This experience will inform the joint efforts of the Vice Chair for Outreach and the NGA Liaison to review ICN's NGA policy.

NGAs play an integral role in international organizations such as Asian-Pacific Economic Council (APEC), International Association of Insurance Supervisors (IAIS), and International Organization of Securities Commissioners (IOSCO).

Key findings based on the experience of these organizations:

- NGAs are admitted to the organization; they act as advisors, observers, etc. to the organization *as a whole*. In some cases, they may also advise working groups or specific projects.
- NGAs can apply or be invited in most organizations, and approval of their participation is centralized at the organizational level.
- Organizations admit NGAs to participate for a fixed period of time (although without term limits).
- Many organizations have dedicated committees to represent NGAs.
- Organizations have developed guidance documents for NGAs and for members regarding NGAs.³

Summary of Relevant International Organizations

APEC has a formal structure for NGA representation through a council (similar to OECD's BIAC) of business advisors and a consortium of academic and research institutions. In addition, at the working level, non-governmental actors may participate in working groups and expert groups as "guests." NGAs can apply or be invited by APEC secretariat or project ("forum") leaders, and participate for a three-year term. APEC has

¹ See Outreach Study Concept Paper, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc593.pdf>

² See Appendix IV for summary information for all of the organizations surveyed.

³ See, e.g., IMF's Guide for Staff Relations with Civil Society Organizations.

written guidelines for NGA participation which govern their application and approval process.

IAIS has NGA “observers,” representing industry associations, professional associations, insurers, consultants, and international financial institutions, who are involved in and comment on IAIS work product, and participate in IAIS seminars and conferences. They have a dedicated area of the website and access to [part of] the network’s databases. We need to examine IAIS more closely, as the organization’s mission, structure, and output are similar to ours.

In **IOSCO**, NGAs serve as affiliate members and participate in many aspects of the organization except for the leadership committees. NGAs apply to IOSCO for admission, with a recommendation letter from the applicant’s member country. Two governing committees must approve each applicant. All applicants, for membership and affiliate membership, pay a 10,000 Euro application fee and must sign the IOSCO MOU (committing to enforcement assistance and information exchange). We should engage in more research about IOSCO’s affiliate member outreach.

APPENDIX IV INVOLVEMENT OF NON-GOVERNMENTAL ACTORS BY INTER-GOVERNMENTAL ORGANIZATIONS

1. Asian-Pacific Economic Cooperation (APEC)

- APEC is known as an organization that has been particularly successful at formalizing interactions with non-governmental actors.¹
- *Structure of APEC*: APEC has 21 member economies who conduct the work of APEC through four committees. APEC is further divided into a number of sub-committees, experts' groups, working groups, and task forces.
- *Physical Structure*: APEC has a physical Secretariat located at: 35 Heng Mui Keng Terrace, Singapore 119616.
- *Funding*: APEC is funded by annual contributions from member economies. Total annual contributions to APEC are approximately five million US dollars.
- *Involvement of NGOs/NGAs*: To formalize the participation of non-governmental stakeholders, APEC created the APEC Business Advisory Council (ABAC). ABAC is composed of up to three high-level business representatives from each of APEC's 21 member economies. ABAC meets four times per year and annually meets with APEC economic leaders to present recommendations. ABAC also has a representative at APEC sectoral Ministerial Meetings, and advises APEC officials on business sector priorities and concerns throughout the year. At the working level, representatives from the private sector are invited to join APEC working groups and expert groups.² In addition to the business sector, APEC engages academic and research institutions through the APEC Study Centres (ASC) Consortium.
- *How do NGOs and NGAs get involved?* They may apply or be invited; participation is subject to written APEC guidelines.

2. Basel Committee

- The involvement of non-governmental actors in the Basel Committee appears to be limited and not formalized.
- *Structure of the Basel Committee*: Basel is composed of 27 member countries. The Committee's work is conducted through four sub-

¹ Anne-Marie Slaughter, *New World Order* 142 (2004) ("APEC ministers have managed to institutionalize input from leaders in the private sector in ways that few other networks have.").

² Asian-Pacific Economic Cooperation, http://www.apec.org/apec/about_apec/how_apec_operates/stakeholder_participation.html.

committees, some of which are further broken down into smaller working groups.

- Involvement of NGOs/NGAs: The Committee's website mentions the following interactions - "The Committee encourages contacts and cooperation among its members and other banking supervisory authorities. It circulates to supervisors throughout the world both published and unpublished papers providing guidance on banking supervisory matters. Contacts have been further strengthened by an International Conference of Banking Supervisors (ICBS) which takes place every two years."³ "In addition, the BIS organizes frequent meetings of experts on monetary and financial stability issues as well as on more technical issues such as legal matters, reserve management, IT systems, internal audit and technical cooperation. Though targeted mostly at central banks, BIS meetings sometimes involve senior officials and experts from other financial market authorities, the academic community and market participants."⁴

3. Financial Action Task Force (FATF)

- *Structure of FATF:* FATF is composed of 35 members (33 jurisdictions and 2 regional organizations); it also has 27 international and regional organizations that serve as Associate Members or Observers. FATF develops and promotes policies and monitors members' progress at implementing necessary measures.
- Involvement of NGOs/NGAs: FATF has been working recently to strengthen its relationship with the private sector.⁵ In September, 2009, FATF held the first annual meeting of the FATF Consultative Forum, which brings together FATF members and "private sector bodies across the globe." Members of the Forum can also interact through a secure website.
- How do NGOs get involved? International NGOs that have "a specific anti-money laundering mission or function" may write to FATF expressing interest in becoming an FATF observer. The criteria and process is explained in the FATF Policy on Observers.
- Attached: FATF Policy on Observers.

4. Financial Crimes Enforcement Network (FINCEN)

- There is no information on the FINCEN website regarding partnerships or interactions with non-governmental actors and this Network does not fit the model of ICN.

³ Basel Committee, <http://www.bis.org/bcbs/>.

⁴ Basel Committee, <http://www.bis.org/about/functions.htm>.

⁵ Financial Action Task Force, http://www.fatf-gafi.org/document/24/0,3343,en_32250379_32236879_44088152_1_1_1_1,00.html.

5. Financial Stability Board (FSB)

- *Structure of FSB:* FSB is composed of high-level representatives from national financial authorities in 24 countries. Twelve international organizations and standard-setting bodies are also listed as members. The FSB meets twice per year and holds regional outreach meetings with non-member financial authorities.⁶
- *Involvement of NGOs/NGAs:* The involvement of non-governmental entities appears to be very limited. However, FSB did recently publish a press release inviting feedback from stakeholders on the FSB's Principles for Sound Compensation Practices and their accompanying Implementation Standards.
- *Attached:* Press Release, FSB Launches Peer Review on Compensation and Invites Feedback from Stakeholders (Jan. 9, 2010).

6. G-20

- *Structure of the G-20:* The G-20 is the group of 20 Finance Ministers and Central Bank Governors from 19 countries and the European Union. The G-20 meets approximately once per year. The G-20 also conducts workshops, writes reports and case studies, and works closely with international organizations.
- *Involvement of NGOs/NGAs:* Involvement of NGAs in the G-20 appears to be limited. “[E]xperts from private-sector institutions and non-government organizations are invited to G-20 meetings on an ad hoc basis in order to exploit synergies in analyzing selected topics and avoid overlap.”⁷

7. International Association of Insurance Supervisors (IAIS)

- *Structure of IAIS:* IAIS represents insurance regulators and supervisors from approximately 190 jurisdictions. “Since 1999, the IAIS has welcomed insurance professionals as Observers. Currently there are more than 120 Observers representing industry associations, professional associations, insurers and reinsurers, consultants and international financial institutions.” The IAIS is governed by the following components: (1) the General Meeting of Members; (2) the Executive Committee and its committees and subcommittees; and (3) the Secretariat.
- *Physical Structure:* The Bank for International Settlements (BIS) hosts IAIS’ secretariat (mailing address: International Association of Insurance Supervisors, c/o Bank for International Settlements, CH-4002 Basel, Switzerland).

⁶ Financial Stability Board, <http://www.financialstabilityboard.org/about/mandate.htm>.

⁷ G-20, http://www.g20.org/about_what_is_g20.aspx.

- Funding: IAIS is funded by annual membership and observership fees. The observership fee for 2010 is 14,500 Swiss Francs.
- Involvement of NGOs/NGAs: Observers are not able to vote on IAIS matters, but they are allowed to attend General Meetings, which occur at least once per year. Observers also have the right to: (1) be involved in the official consultation procedure for IAIS insurance standards and textbooks and to make comments on draft IAIS standards and textbooks; (2) participate in IAIS seminars and conferences; (3) receive IAIS papers, publications, and periodicals; (4) have access to the observer area of the IAIS website; and (5) have access to the observer area of the Insurance Laws database.⁸ IAIS also holds an annual conference that may be attended by individuals who are neither Members nor Observers.
- How do NGOs and NGAs get involved? According to the IAIS By-Laws, two types of persons are eligible to become Observers: (1) “an international, regional or national organization, a component element of which has an interest in insurance supervision, regardless of whether the organization is directly responsible for insurance law or its administration;” and (2) “any other person, entity, or organization, private or public, with an interest in the business or supervision of insurance, and includes any company, association, educator, educational institution, or natural person.” These persons apply for membership by filling out the Observership Application Form. If approved by the General Meeting, the applicant is required to pay an annual fee.
- Attached: (1) International Association of Insurance Supervisors (IAIS) BY-LAWS; (2) Observership Application Form.

8. International Commission of Jurists (ICJ)

- The structure of this organization does not readily apply to the ICN.
- Structure of IAIS: The ICJ is composed of sixty eminent jurists who represent the different legal systems of the world. The International Secretariat is responsible for conducting the work of the ICJ.
- Involvement of NGOs/NGAs: “In carrying out its work, the International Secretariat benefits from a network of autonomous national sections and affiliated organizations located in all continents.”⁹

9. International Monetary Fund (IMF)

- *Structure of IMF*: IMF currently has 186 member countries. IMF’s work is primarily conducted by its management team and 17 staff departments. IMF has approximately 2,400 staff members.

⁸ International Association of Insurance Supervisors, <http://www.iaisweb.org/index.cfm?pageID=29>.

⁹ International Commission of Jurists, http://www.icj.org/rubrique.php?id_rubrique=11&lang=en.

- Physical Structure: IMF has two headquarter buildings located less than a block apart (700 19th Street NW, Washington, DC 20431 and 1900 Pennsylvania Ave NW, Washington, DC 20431).
- Funding: “The IMF's resources come mainly from the money that countries pay as their capital subscription when they become members.”
- Involvement of NGOs/NGAs: IMF “engages on a regular basis with the academic community, civil society organizations (CSOs), and the media. IMF staff at all levels frequently meet with members of the academic community to exchange ideas and receive new input. The IMF also has an active outreach program involving CSOs. IMF management and senior staff communicate with the media on a daily basis. Additionally, a biweekly press briefing is held at the IMF headquarters, during which a spokesperson takes live questions from journalists.”¹⁰ IMF also publishes transcripts of conference calls and town hall meetings with civil society organizations. IMF used to publish an IMF Civil Society Newsletter; this has been replaced by an IMF and Civil Society page on their website. IMF publications further detail how IMF engages civil society organizations.
- Attached: (1) Factsheet: The IMF and Civil Society Organizations; (2) Guide for Staff Relations with Civil Society Organizations; (3) IMF Policy Discussion Paper, The IMF and Civil Society Organizations: Striking a Balance.

10. International Network for Environmental Compliance and Enforcement (INECE)

- *Structure of INECE*: INECE’s organizational structure has four components: (1) Executive Planning Committee; (2) Secretariat; (3) Partners; and (4) INECE Participants. The Executive Planning Committee is the governing body of INECE and is composed of up to 30 individuals, from diverse geographical regions, who represent governments, international organizations, and NGOs. “The INECE Secretariat provides technical, administrative, publications, and communications support for Executive Planning Committee functions and helps to implement the INECE work program.”¹¹ INECE Partners are regional networks, NGOs, international organizations, and inter-governmental organizations that have missions and activities related to INECE’s work. “INECE participants include government/public officials and representatives of NGOs and International Organizations in functions or positions with potential to advance environmental compliance and enforcement of domestic environmental laws who wish to participate in or benefit from INECE products, activities, or expertise.”

¹⁰ International Monetary Fund, <http://www.imf.org/external/about/collab.htm>.

¹¹ International Network for Environmental Compliance and Enforcement, <http://www.inece.org/overview/structure.html>.

- Physical Structure: INECE appears to have a small office, physically located in Washington, DC (mailing address: Office of the INECE Secretariat, 2300 Wisconsin Avenue NW, Suite 300B, Washington, DC 20007). INECE has very limited staffing; it is an informal partnership that depends on the involvement of enforcement and compliance practitioners. “Core staffing” is provided by the United States Environmental Protection Agency and the Inspector General for the Environment in the Netherlands' Ministry of Housing, Spatial Planning and the Environment.
- Involvement of NGOs/NGAs: NGOs are involved at every level of INECE. INECE has more than 4,000 members from more than 150 countries, who represent international organizations, governmental agencies, and non-governmental organizations. Individuals and organizations are instructed to contact the Director of the INECE Secretariat to learn how to participate.

11. International Organization of Securities Commissioners (IOSCO)

- *Structure of IOSCO*: IOSCO is divided into the following components: (1) President’s Committee – composed of the Presidents of member agencies; has four regional sub-committees; (2) Executive Committee – currently has 19 members, including the chairs of each of the sub-committees and nine ordinary members who are elected by the President’s Committee; the Executive Committee also has two sub-committees; (3) General Secretariat; and (4) SRO Consultative Committee.¹² There are three categories of membership: ordinary, associate, and affiliate.
- Physical Structure: IOSCO appears to have 15-20 employees located at: C/ Oquendo 12, 28006 Madrid, Spain.
- Funding: IOSCO is financed by annual membership fees. The annual fee is currently 10,100 Euros.
- Involvement of NGOs/NGAs: There are currently 65 self-regulatory organizations (SROs) and international organizations that serve as affiliate members of IOSCO and participate on the SRO Consultative Committee (SROCC). Affiliate members are not allowed to vote or serve on the President’s Committee or Executive Committee.
- How do NGOs get involved? NGOs can apply for affiliate membership. As part of the application, NGOs must provide a description of the applicant and its mission, as well as a recommendation letter from the ordinary member from the applicant’s country (if applicable).
- Attached: Applications for Membership

12. Organization for Economic Co-operation and Development (OECD)

- *Structure of OECD*: OECD has 30 member countries and is organized into three components: (1) The Council; (2) Committees; and (3) OECD

¹² International Organization of Securities Commissioners, <http://www.iosco.org/about/index.cfm?section=structure>.

Secretariat. The Council includes one representative from each member country plus the European Commission. There are approximately 250 committees, working groups, and expert groups, composed of senior officials from national agencies and administrations. The Secretariat includes 2,500 staff who support the committees and carry out the work of OECD.

- Physical Structure: OECD has a physical headquarters located at: 2, rue André Pascal, 75775 Paris Cedex 16, France.
- Funding: OECD is funded by its membership countries. The fee for each country is determined by a formula based on the size of each member's economy.
- Involvement of NGOs/NGAs: OECD has formal connections with business and labor organizations through two committees: the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC). More generally, “[t]he OECD has co-operative activities with civil society through consultations with committee members, workshops and forums.”¹³ OECD also occasionally publishes a civil society newsletter (2-5 per year). Most communications with NGOs are coordinated through OECD's Public Affairs Division. Additional information regarding OECD's interactions with civil society can be found in the attached documents.
- *Attached:* (1) OECD Information Disclosure; (2) OECD Policy Brief, *Civil Society and the OECD*.

13. Trans Atlantic Consumer Dialogue (TACD)

- This organization is not easily applicable to ICN because it is not an inter-governmental organization.
- Structure of TACD: The TACD consists of: (1) a Steering Committee; (2) Policy Committees; (3) Special Task Forces; and (4) the Secretariat. The Steering Committee has seven members representing consumer organizations in the United States and Europe. There are six policy committees and task forces that are co-chaired by consumer organization representatives from the United States and Europe.¹⁴
- Physical Structure: The TACD Secretariat is situated within the Office of Consumers International, located at: 24 Highbury Crescent, London N5 1RX, United Kingdom.
- Involvement of NGOs/NGAs: TACD membership consists of 51 EU and 28 US consumer organizations.

¹³ Organization for Economic Co-Operation and Development,
http://www.oecd.org/about/0,3347,en_2649_34495_1_1_1_1_1,00.html.

¹⁴ Trans Atlantic Consumer Dialogue,
http://tacd.org/index.php?option=com_content&task=view&id=45&Itemid=48.0

14. United Nations Global Compact

- The structure of the UN Global Compact does not readily apply to ICN.
- Structure of the UN Global Compact: Governance functions are shared by seven entities: (1) Global Compact Leaders Summit; (2) Local Networks; (3) Annual Local Networks Forum; (4) Global Compact Board; (5) Global Compact Office; (6) Inter-Agency Team; and (7) Global Compact Donor Group. The UN Global Compact has more than 7,700 corporate participants and includes stakeholders from more than 130 countries.
- Physical Structure: The UN Global Compact has a small staff that works out of the UN's New York office.
- Involvement of NGOs/NGAs: Businesses are welcome to join the Global Compact by pledging to uphold ten principles. “[C]ivil society and other non-business organizations can participate through a number of Global Compact engagement mechanisms, including Policy Dialogues, Learning, Local Networks and Partnership Projects.”¹⁵ The UN Global Compact website details ways that businesses, civil society, academic institutions, business associations, labor organizations, and cities can participate.¹⁶
- How do NGOs get involved? Organizations can become participants in the Global Compact by writing a Letter of Commitment and completing the online registration form.
- Attached: Sample Commitment Letter for Non-Business Organizations.

15. World Bank

- *Structure of the World Bank*: The World Bank has 186 member countries that are represented on the World Bank's Board of Governors. This Board meets annually, and delegates duties to 24 Executive Directors. The World Bank is involved in tens of thousands of donor-funded projects around the globe.
- Physical Structure: The World Bank headquarters are located at: 1818 H Street NW, Washington, DC 20433. The World Bank has more than 10,000 employees located in more than 100 offices worldwide.
- Involvement of NGOs/NGAs: The World Bank has worked with NGOs since the 1970s. In the 1980s, the World Bank and NGOs established the NGO-World Bank Committee, which met regularly to discuss various World Bank programs and policies. In the 1990s, the World Bank adopted civil society participation action plans, and civil society specialists were hired to work in various World Bank offices. “Today the World Bank consults and collaborates with thousands of members of Civil Society Organizations (CSOs) throughout the world, such as community-based organizations, NGOs, social movements, labor unions, faith-based groups,

¹⁵ United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/faq.html>.

¹⁶ United Nations Global Compact, <http://www.unglobalcompact.org/HowToParticipate/index.html>.

and foundations.”¹⁷ The World Bank publishes a monthly electronic newsletter for CSOs called the Civil Society Engagement eNewsletter. The World Bank has also written numerous policies and reports regarding interactions with civil society. The most relevant documents are attached.

- Attached: (1) Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations; (2) Improving World Bank—Civil Society Engagement; (3) GP 14.70 – Involving Nongovernmental Organizations in Bank-Supported Activities.

18. World Trade Organization (WTO)

- *Structure of WTO:* The WTO has 153 member governments. All major decisions are made by consensus of the membership as a whole. The WTO has the following hierarchy: (1) the Ministerial Conference – the highest authority at the WTO, meets at least every other year; (2) the General Council – the second level in the hierarchy, conducts the work of the WTO between ministerial conferences; (3) the third level consists of three councils representing different areas of trade, six committees, and two subsidiary bodies; (4) other subsidiary bodies and committees complete the hierarchy. Member governments make up the membership of all levels in the WTO hierarchy.
- *Physical Structure:* The WTO is physically located at Centre William Rappard, 154 Rue de Lausanne, 1211 Geneva 21, Switzerland, and has 625 Secretariat staff.
- *Involvement of NGOs/NGAs:* “The WTO maintains extensive institutional relations with several other international organizations; there are some 140 international organisations that have observer status in WTO bodies. The WTO also participates as observer in the work of several international organizations. In all, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, standard-setting, and technical assistance and training. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continues to evolve so as to assist Members in the operation of their economic policies.”¹⁸
- *How do NGOs get involved?* NGOs can request observer status on specific WTO committees (see attached guidelines).
- Attached: WT/L/161, Annex 3, Observer Status for International Intergovernmental Organizations in the WTO (1996).

¹⁷ World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20092185~menuPK:220422~pagePK:220503~piPK:220476~theSitePK:228717,00.html>.

¹⁸ World Trade Organization, http://www.wto.org/english/thewto_e/coher_e/coher_e.htm.