

# **Evolving Toward What?**

## **The Development of International Antitrust**

**Harry First\***

*“In the beginning ... the earth was unformed and void, and darkness was upon the face of the deep” – Gen. 1:1-2*

*“Always advance along the line of least resistance provided that it leads in approximately the right direction.” – Jean Monnet*

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## **I. Introduction**

The antitrust world was about to change in 1982, but we did not realize it. The occasion was a trip that *William Baxter*, then head of the Department of Justice Antitrust Division, made to Paris, during which he met with the head of the EC's Directorate-General for Competition. The reason for the meeting was a potential conflict between Europe and the United States with regard to the European Commission's pending investigation of IBM. *Baxter* had just

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dismissed the Justice Department's long-running monopolization litigation against IBM, viewing the case as being without merit and rejecting the imposition of any antitrust relief at all. His concern was that the Commission might order IBM to disclose computer interface specifications, a remedy that Baxter thought unwarranted.<sup>1</sup>

The IBM case showed where antitrust was heading. Computers and telecommunications links were soon to make the world more connected. IBM was an important global competitor, in the United States, in Europe, and in Japan, but the U.S. Department of Justice could no longer presume that it could control the antitrust environment in which U.S. business operated. Not only did the European Commission have a different view of antitrust law than did the United States at the time, but it was increasingly willing to assert that view to enforce antitrust law in ways that the United States might not. As *Baxter* said,

IBM operates in their markets, and they are entitled to have such substantive rules about competition as seem appropriate to them. And if they could localize the effects of what they do, I would regard that as a matter of appropriate sovereign action. But they can't localize the effects of these remedies. They are worldwide, and they are very damaging.<sup>2</sup>

Antitrust was internationalizing.

IBM may have shown where the antitrust world was heading, but we still do not know where it will end up. What we see today is a great deal of ferment, with various strands of substantive antitrust law intertwining in an effort to craft new institutional approaches to international antitrust, approaches that deal not only with possible conflicts but also with possible ways to improve the effectiveness of international antitrust enforcement. Today's ferment may seem somewhat chaotic, but that is not necessarily a bad characteristic. Indeed, efficient rules and institutions may very well emerge out of this chaos.

As the institutions of international antitrust enforcement take shape, a critical question will be the extent to which these institutions should be centralized. My overall view is that for a system of antitrust enforcement to remain dynamic, overcentralization must be avoided and some degree of chaos tolerated. Preferable to centralization would be a common law of international antitrust, with rules subject to reasoned analysis and with diverse institutions of antitrust enforcement to provide different enforcement perspectives.

The paper proceeds as follows. The first part (II) attempts to map the current institutions of antitrust enforcement. The second part (III) describes recent

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<sup>1</sup> See *Baxter Urges EC Competition Officials Not to Force Interface Disclosures by IBM*, 42 *Antitrust & Trade Reg. Rep.* (BNA) 278 (1982).

<sup>2</sup> *Ibid.*

efforts to put together new international antitrust enforcement networks. The third part (IV) discusses the evolving system of international enforcement against international cartels. The conclusion makes a modest prediction: the greatest problem for future international enforcement will likely be its very success.

## II. Mapping the Networks

It has become common to refer to the existence of a “network” of antitrust enforcers as a way of describing the connections that have been built up among independent antitrust enforcers who are attempting to coordinate their activities.<sup>3</sup> This coordination may occur with regard to general policy matters or in the pursuit of particular investigations or litigation. These networks are virtual and unstable. Some formal agreements or protocols may tie them together, but there is very little compulsion (outside of perceived self-interest) that requires any member of these networks to act “in network” on any particular matter, or, indeed, requires them to stay in network until a particular matter is concluded. In this sense the networks are not hierarchical. Enforcement power is distributed horizontally around the network, rather than being controlled vertically.<sup>4</sup>

There are two groups of networks, national and international. The three main national networks (based on the size of their economies) are shown in Table

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<sup>3</sup> See e.g., *Schaub*, Developments of European Competition Law, Speech Before Conference on Developments of Competition Law and Policy – European and National Perspective, April 19, 2002 ([http://europa.eu.int/comm/competition/speeches/text/sp2002\\_014\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2002_014_en.pdf)), at p. 6 (describing the Commission and Member States as “network members”); *Kolasky*, International Convergence Efforts: A U.S. Perspective, Address Before the International Dimensions of Competition Law Conference, Toronto, March 22, 2002 (<http://www.usdoj.gov/atr/public/speeches/10885.htm>), at 3-4 (noting that networks, rather than countries, are the “true architectures of the new global economy”; describing new International Competition Network as a “virtual network”); *First*, Towards an International Common Law of Competition, in: *Züch* (ed.), *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition*, 1999, p. 102-104.

<sup>4</sup> This description differs somewhat from *Kerber’s* description of a “multi-level system of jurisdictions.” See *Kerber*, *An International Multi-Level System of Competition Laws: Federalism in Antitrust* (this volume). *Kerber’s* description reflects, in part, differences between the European system and the U.S. system; the European Commission maintains more legal control over Member States’ enforcement efforts and has more clearly defined rules for allocating jurisdiction than does the United States with regard to state enforcement.

1.<sup>5</sup> The table takes some liberty with the concept of “agencies.” All U.S. states, and all European Union nations, are lumped together, ignoring the fact that each retains some degree of sovereignty over antitrust enforcement undertaken by their own agencies. Private litigants are also treated as an “agency,” even though they lack an explicit governmental function and have no organizational continuity. The table also omits the antitrust enforcement responsibilities that have been statutorily assigned to, or assumed by, sectoral agencies; this enforcement has traditionally been (and continues to be) an important aspect of antitrust enforcement.

<b>Table 1. Main National Antitrust Networks</b>	
Location	Agencies
United States	Department of Justice Antitrust Division Federal Trade Commission States (50) and Territories (5) Private litigants
Europe	European Commission Member States of the European Union (15) Private litigants
Japan	Japan Fair Trade Commission Public Prosecutor General Private litigants

What is particularly important about the networks in Table 1 are the connections among the agencies that create these national networks. A simplified effort to map the national network connections is set out in Table 2. Although these connections are more complicated than the table indicates, the table does provide a general sense of the variation among the three networks with

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<sup>5</sup> Table 1 is not intended to include all antitrust enforcement agencies. More than 90 countries now have domestic antitrust enforcement agencies, many of which (Canada and Australia are but two examples) are quite active.

regard to the extent of network interconnections and the number of participants in the network.<sup>6</sup> The U.S. system is the most dispersed; Japan's system is the most centralized, barely qualifying as a "network." Europe's system is in the middle, with a centralized agency that has more formal control over its network agencies than is the case in the United States and which has recently made an effort to devolve enforcement to Member States that maintain their own enforcement systems.<sup>7</sup> Only the United States makes significant use of private parties in the enforcement effort; private enforcement is much less prevalent in Europe and even weaker in Japan.<sup>8</sup>

National networks connect to form international networks. There are two types of international networks. One is the distributed type, similar in organization to national-level networks. The other type of network follows a more structured approach, using an organizational core or umbrella to connect the enforcement agencies.

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<sup>6</sup> For a fuller description of the relation between the EC and national courts and authorities, see *Kerse*, E.C. Antitrust Procedure, 1999 (4<sup>th</sup> ed.), p. 418-458. For an in-depth comparison of the Japanese and German systems, see *Haley*, Antitrust in Germany and Japan: The First Fifty Years 1947-1998, 2001, chapter 4. For a description of U.S. state enforcement, and the relation between state and federal enforcement, see *First, Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004 (2001).

<sup>7</sup> See *European Commission*, Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Articles 85 or 86 of the EC Treaty, OJ EC 1997 C 313, p. 3. A more sweeping effort has been proposed in the White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty ([http://europa.eu.int/comm/competition/antitrust/wp\\_modern\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf)). For discussion of the White Paper proposals, see *Korah*, An Introductory Guide to EC Competition Law and Practice, 2000 (7<sup>th</sup> ed.), p. 187-192; *Schaub*, Developments of European Competition Law, *supra* n. 3, at p. 5-7 (allocation of cases among Member States and the Commission).

<sup>8</sup> See, e.g., *Lever*, Private Antitrust Enforcement in the European Community, in: *Jones & Matsushita* (eds.), Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA, 2002, p. 225 (English courts); *Seryo*, Private Enforcement and New Provisions for Damages and Injunctions in Japan, in: *Jones & Matsushita* (eds.), *supra* this note, at p. 255, 271 (15 private cases filed between 1955 and 1990). For an example of cooperation between public and private litigants in the United States, see *Kaplan*, Antitrust As A Public-Private Partnership: A Case Study of the NASDAQ Litigation, 52 Case West. Res. L. Rev. 111 (2001) (describing sharing of information between private plaintiffs and Department of Justice) (\$1.027 billion settlement).

**Table 2. National distributed network connections.**

Location	Agency	Connecting Agencies	Types of Connections
United States	Department of Justice/ Federal Trade Commission	FTC/Dep't of Justice	<ul style="list-style-type: none"> <li>• Formal liaison agreements</li> <li>• Statutory: generally overlapping</li> <li>• Joint projects, e.g. prosecutorial guidelines, hearings</li> </ul>
		States	<ul style="list-style-type: none"> <li>• Formal agreements, e.g. merger protocol</li> <li>• Working groups</li> <li>• Informal: case-by-case cooperation; joint criminal prosecution teams (with DOJ)</li> </ul>
		Private litigants	<ul style="list-style-type: none"> <li>• Informal: case-by-case cooperation</li> </ul>
	States	States	<ul style="list-style-type: none"> <li>• Formal cooperation through National Ass'n of Attorneys General, area investigations</li> <li>• Informal: case-by-case cooperation</li> <li>• Joint projects: prosecutorial guidelines</li> </ul>
		Dep't of Justice; FTC	<ul style="list-style-type: none"> <li>• Formal agreements, e.g. merger protocol</li> <li>• Working groups</li> </ul>

**Table 2. National distributed network connections.**

Location	Agency	Connecting Agencies	Types of Connections
U.S. cont.	States cont.	Private litigants	• Informal case-by-case cooperation, including joint litigation
	Private litigants	Private litigants	• Informal case-by-case cooperation (class action mechanism)
		Gov't agencies	• Informal case-by-case cooperation
Europe	EC	Member States	• Statutory (Regulations and Directives): division of responsibilities (e.g. merger control)
	Member States	EC	• Statutory (Regulations and Directives): division of responsibilities (e.g. merger control)
		Member States	• Formal: White Paper (1999) (proposed) • Informal? • Internal (various)
Japan	JFTC	Ministry of Justice	• Statutory (referral of criminal prosecutions)

Table 3 describes the connections that make up today's distributed international network. The table points to a number of important characteristics of these networks. First, network connections are both formal and informal; as a general matter, the informal connections revolve around case-specific matters and indicate a stronger connection.<sup>9</sup>

<b>Table 3. International distributed network connections</b>	
Agencies	Connections
EC/US <sup>10</sup>	<ul style="list-style-type: none"> <li>• Formal: bilateral cooperation agreements (1991, 1998); MLATs between U.S. and EU Member States</li> <li>• Informal, e.g. merger working group, bilateral meetings</li> </ul>
EC/Canada	<ul style="list-style-type: none"> <li>• Formal: bilateral cooperation agreement (1999)</li> <li>• Informal, e.g. case investigations</li> </ul>
EC/Japan	<ul style="list-style-type: none"> <li>• Informal: bilateral meetings</li> <li>• Formal: bilateral cooperation agreement (proposed)</li> </ul>
EC/EFTA countries	<ul style="list-style-type: none"> <li>• Formal: EEA Agreement, dividing enforcement responsibilities</li> </ul>
EC/Central & Eastern European Countries <sup>11</sup>	<ul style="list-style-type: none"> <li>• Formal: bilateral cooperation agreements (includes required adoption of compatible antitrust law)</li> </ul>

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<sup>9</sup> For a description of these informal connections at the staff level, see *Pitofsky*, Anti-trust Cooperation, Global Trade, And US Competition Policy, in: *Jones & Matsushita* (eds.), supra n. 8, at p. 53, 57 et seq.

<sup>10</sup> This combines the Department of Justice and the Federal Trade Commission. At the moment there are no active connections between the States and non-U.S. enforcement agencies. For U.S. agreements, see International Competition Policy Advisory Committee (ICPAC), Final Report, 2000, Annex 1-C, at iv-v n.8 (2000) (hereinafter: "ICPAC Report"). EC agreements are available at <http://europa.eu.int/comm/competition/international/bilateral/>.

<sup>11</sup> Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia:

<b>Table 3. International distributed network connections</b>	
Agencies	Connections
EC/ Mediterranean Countries <sup>12</sup>	• Formal: bilateral cooperation agreements (includes required adoption of compatible antitrust law)
EC/ Switzerland	• Formal: bilateral cooperation agreement
EC/Russia, Ukraine, Moldova, Kazakhstan	• Formal: bilateral partnership and cooperation agreements
EC/Mexico	• Formal: bilateral cooperation agreement (2000)
US/Japan	• Formal: bilateral cooperation agreement (1999) • Informal: bilateral meetings
US/Canada	• Formal: bilateral cooperation agreements (1984, 1995); MLAT • Informal, e.g. criminal investigations
US/Israel	• Formal: bilateral cooperation agreement (1999)
US/Australia	• Formal: bilateral cooperation agreement (1982, 1999 <sup>13</sup> )
US/Brazil	• Formal: bilateral cooperation agreement (1999)
US/Canada/Mexico	• Formal: NAFTA Agreement (1992)
US/EC/Canada	• Informal, e.g. merger investigations

Second, distributed networks today generally involve only two agencies, although there are some more complex connections involving multiple agencies. The bilateral quality of these connections likely reflects the additional complexities involved in adding jurisdictions to international networks, but it

<sup>12</sup> Agreements are currently in force with Israel, Morocco, Tunisia, Cyprus, and Malta.

<sup>13</sup> Agreement signed pursuant to provisions of International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6200-6212.

may also reflect the desire of the two dominant antitrust agencies (the U.S. and EC) to control the networks in which they operate. Third, the formation of these international networks is fairly recent; most of the agreements have been made during the 1990s.

An even more recent phenomenon is the formation of organizational networks. These networks are set out in Table 4.

<b>Table 4. International organizational networks</b>		
Name	Membership	Activities
International Competition Network (ICN)	52 countries	<ul style="list-style-type: none"> <li>• Develop guiding principles and best practices for voluntary adoption</li> </ul>
Organization for Economic Cooperation and Development (OECD)	30 countries	<ul style="list-style-type: none"> <li>• Policy dialogue and development of best practices recommendations</li> </ul>
United Nations Conference on Trade and Development (UNCTAD)	191 countries	<ul style="list-style-type: none"> <li>• Policy consultations</li> <li>• Development of model laws</li> <li>• Development of UN Resolutions</li> </ul>
World Trade Organization (WTO)	144 countries	<ul style="list-style-type: none"> <li>• Working group on the interaction between trade and competition policy (1996)</li> <li>• Formulation of general competition policy principles for eventual inclusion in GATT/WTO Agreement</li> </ul>

Although the activities of some of these organizational networks date back to the 1960s and 1970s,<sup>14</sup> the most substantial activity has been much more re-

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<sup>14</sup> See Winslow, The OECD's Global Forum on Competition and Other Activities, 16 Antitrust 38 (2001) (OECD Committee on Competition Law and Policy); Dhanjee,

cent. To understand better how these organizational networks are developing requires further elaboration of these recent events, to which the paper now turns.

### III. Connecting the Networks

On September 14, 2000, *Joel Klein*, then Assistant Attorney General in charge of the Department of Justice Antitrust Division, delivered a speech in Brussels in which he indicated a softening in what had been viewed as the United States' opposition to internationalization of antitrust enforcement.<sup>15</sup> *Klein* referred to the increase in transborder mergers which had led to greater cooperation between the United States and the EC. Given the economic pressures for globalization, these mergers were only likely to continue. Referring to the work of the "International Competition Policy Advisory Committee" (ICPAC) that he had appointed, *Klein* endorsed one of its recommendations in particular, the establishment of a "Global Competition Initiative." As envisioned by ICPAC, this was to be a "new venue" where government officials, private firms, non-governmental organizations, and "others" could "consult" on competition law and policy.<sup>16</sup> *Klein* suggested that the movement toward this Initiative should be cautious and exploratory, but, in the end, "such a development is almost inevitable."<sup>17</sup> "We need ... to achieve a true global commitment to developing soundly based antitrust enforcement rules and procedures."<sup>18</sup>

The creation of a new venue for international discussion of competition matters raised three broad problems. The first was how such a "venue" would be structured. The second was what would be its mission. The third was how this venue would differ, in structure or mission, from those already in existence.

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UNCTAD and International Merger Control Convergence, 16 Antitrust 44 (2001) (describing UNCTAD's Restrictive Business Practices Code, adopted by UN General Assembly in 1980).

<sup>15</sup> See *Klein*, Time for a Global Competition Initiative?, Address at EC Merger Control 10th Anniversary Conference, Brussels, September 14, 2000: <http://www.usdoj.gov/atr/public/speeches/6486.pdf> (hereinafter: "Brussels Speech"). Compare *Klein*, A Note of Caution with Respect to a WTO Agenda on Competition Policy, Address Before the Royal Institute of International Affairs, November 18, 1996: <http://www.usdoj.gov/atr/public/speeches/jikspch.htm>.

<sup>16</sup> ICPAC Report, *supra* n. 10, at p. 282 (emphasis in original).

<sup>17</sup> *Klein*, Brussels Speech, *supra* n. 15, at 4.

<sup>18</sup> *Id.* at 5-6.

The ICPAC Report, and initial elaboration by the Department of Justice, provided some guidance on each of these issues. The Global Competition Initiative would be “inclusive” in its membership (that is, open to developed and developing countries).<sup>19</sup> It would be a “virtual organization,” with minimal (or no) dedicated staff, financially supported by participating institutions,<sup>20</sup> or, perhaps, by existing organizations such as the OECD, WTO, or UNCTAD.<sup>21</sup> ICPAC envisioned intergovernmental meetings (annually or semi-annually) in which antitrust officials could “exchange views and experiences” on a variety of issues, such as “anticartel enforcement, merger review, enforcement cooperation, analytical tools, technical assistance and other issues related to antitrust enforcement.”<sup>22</sup> The Global Competition Initiative would not be a “forum for the negotiation or implementation of international agreements.”<sup>23</sup> Working groups, devoted to particular issues, could report back their conclusions to the full group for debate.<sup>24</sup> The overall mission would be to see whether there was a “sense of convergence or consensus”<sup>25</sup> with regard to these conclusions. As *Douglas Melamed*, *Joel Klein*’s successor, put it: “The result ... would not be formal, binding rules”.<sup>26</sup>

As for how this Initiative would differ from the efforts of groups already in existence (or, indeed, why a new initiative was necessary at all), ICPAC drew attention to the drawbacks of the other approaches. The WTO is “centrally focused” on governmental restraints with trade effects; competition policy is not so narrow. Further, the WTO’s “traditional” mandate of rules negotiation, followed by dispute resolution, is not appropriate for competition issues “which need to be discussed broadly and in a consultative manner.”<sup>27</sup> The OECD, although important to competition policy, has a somewhat limited membership and has not “achieved much success in rulemaking or dispute settlement.”<sup>28</sup> UNCTAD, mentioned only briefly by ICPAC for its “productive programs on competition policy,”<sup>29</sup> is subsequently described as lacking a

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<sup>19</sup> See ICPAC Report, *supra* note 10, at 282.

<sup>20</sup> See *ibid.* The ICPAC Report does not mention private funding.

<sup>21</sup> See *Melamed*, Promoting Sound Antitrust Enforcement in the Global Economy, Address Before the Fordham Corporate Law Institute, October 19, 2000 (<http://www.usdoj.gov/atr/public/speeches/6785.pdf>), at 14 = *Hawk* (ed.), Proceedings of the Twenty-seventh Annual Conference of the Fordham Corporate Law Institute, 2001, p. 1.

<sup>22</sup> ICPAC Report, *supra* n. 10, at p. 282.

<sup>23</sup> *Melamed*, *supra* n. 21, at 14.

<sup>24</sup> See *id.* at 15.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> See ICPAC Report, *supra* n. 10, at p. 282-283.

<sup>28</sup> *Id.* at p. 283.

<sup>29</sup> *Id.* at p. 282.

mandate that would lend itself “to enhancing antitrust convergence on practical law enforcement issues.”<sup>30</sup>

The inconsistent treatment of the drawbacks of the existing institutions (they are deficient either because they adopt enforceable rules or because they do not) leads one to suspect that the main reason for embracing the Global Competition Initiative was strategic, an “anything but” strategy. Distributed international network enforcement, in which the United States had increasingly been engaged, was demonstration enough to U.S. antitrust policy makers that, as *Klein* said, further international cooperation is “inevitable.” A strategy of resistance to these developments would only leave matters in the hands of others, particularly the EC. Thus, the choice was for “anything but,” and, particularly, “anything but” the WTO, the institution preferred by the EC.

The EC initially gave the Global Competition Initiative a cool reception. One month before *Klein*’s speech, *Mario Monti*, Commissioner in charge of Competition Policy for the EC, said that he was “a little disappointed” that ICPAC had not recommended the creation “of a competition law framework at the WTO.”<sup>31</sup> *Monti* saw “no inherent harm” in the Initiative, but he argued that the Initiative would not provide a “genuine substitute” for the multilateral initiative that the EC preferred, an initiative that he saw as appropriately centered in the WTO. That multilateral initiative, *Monti* explained, had two aspects. First, a WTO framework agreement should be negotiated, but one which could realistically be achieved; it would be confined to three areas (core competition law principles, “cooperation modalities,” and developing countries). After the adoption of the framework agreement, further educational and analytical work would then be done within the WTO Competition Policy Committee, which would deal with more complex issues and devise “more elaborate mechanisms for cooperation.”<sup>32</sup>

Despite these previously expressed views, *Monti* spoke in Brussels the day after *Klein*’s speech and said that he “warmly welcome[d] the announcement.” An “opening to multilateralism in competition matters beyond the OCDE ... is a very important development ... .”<sup>33</sup> *Monti* specifically noted that

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<sup>30</sup> *Melamed*, supra note 21, at 10.

<sup>31</sup> *Monti*, Cooperation Between Competition Authorities – A Vision For the Future, Speech before The Japan Foundation Conference, Washington, D.C., June 23, 2000 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/234|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/234|0|RAPID&lg=EN)), reprinted in: *Jones & Matsushita* (eds.), supra n. 8, at p. 69, 82.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Monti*, The Main Challenges for a New Decade of EC Merger Control, Address at EC Merger Control 10<sup>th</sup> Anniversary Conference, Brussels, September 15, 2000 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/311|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/311|0|RAPID&lg=EN)).

the Initiative would cover “both substantive standards as well as procedures.”<sup>34</sup> “Now, more than ever, competition authorities across the globe must work together.”<sup>35</sup>

With the United States and the EC coming closer to agreeing on this “Initiative,” the next step was a meeting organized by the International Bar Association, held in England, at Ditchley Park, in February of 2001. For a decade the IBA had been a sponsor of the “Global Forum on Competition,” designed to build consensus among competition professionals around the world.<sup>36</sup> Drawing together 43 competition officials and professionals, from 20 enforcement agencies, plus the OECD, UNCTAD, and WTO, the resulting “brainstorming” session coalesced general support for what was now termed the “Global Competition Forum.”<sup>37</sup> In October of 2001 the new forum was officially launched, now under the name of the “International Competition Network.”<sup>38</sup>

The key components of the ICN remain close to the original vision articulated by ICPAC and the Department of Justice. It is not to be “a ‘bricks-and-mortar’ organization with a permanent secretariat or headquarters.”<sup>39</sup> It is

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid. *Monti* reiterated this view one month later. See *Monti*, European Competition Policy for the 21st Century, The Fordham Corporate Law Institute – Twenty-seventh Annual Conference on International Antitrust Law and Policy, New York, October 20, 2000 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/389|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/389|0|RAPID&lg=EN)) = *Hawk* (ed.), supra n. 21, at p. 257 (“particularly pleased” by the U.S. “opening to multilateralism in competition matters”).

<sup>36</sup> See *Rowley*, IBA Facilitates Global Competition Law Convergence, 16 Antitrust 49 (2001). The IBA represents more than 180 law societies and bar associations throughout the world. Ibid.

<sup>37</sup> See id., at 50 n. 3; *Mitchener*, Regulators, Lawyers Plan Committee to Assist in Cross-Border Mergers, Wall St. J. (March 15, 2001), at A15 (“Big business has been pushing for such a committee, thinking it could lower the huge cost of pursuing mergers and acquisitions that cross dozens of national borders.”). For elaboration on the EC’s view of the Ditchley Park discussion, see *Monti*, The EU Views on Global Competition Forum, Address given at the ABA Meetings, March 29, 2001 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN)); *Schaub*, The Global Competition Forum: How it should be organized and operated, Speech at the European Policy Center, Brussels, March 14, 2001 ([http://europa.eu.int/comm/competition/speeches/text/sp2001\\_003\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2001_003_en.pdf)).

<sup>38</sup> In a speech delivered the same day, *Charles James*, Assistant Attorney General in charge of Antitrust, confusingly referred to it as the “Global Competition Network.” See *James*, Reconciling Divergent Enforcement Policies: Where Do We Go From Here?, The Fordham Corporate Law Institute – Twenty-eighth Annual Conference on International Antitrust Law and Policy, New York, October 25, 2001 (<http://www.usdoj.gov/atr/public/speeches/9395.pdf>).

<sup>39</sup> Compare *Schaub*, supra n. 37, at 8:

open to senior antitrust officials from developed and developing countries. Although “primarily” for government decision-makers, it will also seek input from the private sector. Its focus will be on proposals for “procedural and substantive convergence in antitrust enforcement” and it will not deal with non-antitrust issues, such as trade.<sup>40</sup> The ICN will develop non-binding recommendations which individual agencies will then have the option to implement voluntarily. “It will have no rulemaking or decision-making authority.”<sup>41</sup>

The announcement of the start of the ICN included an “interim steering group” of 14 enforcement jurisdictions, an interim chair of the steering committee (*Konrad von Finckenstein*, Commissioner of the Canadian Competition Bureau), and a schedule of annual conferences for the next five years (beginning in Italy in 2002).<sup>42</sup> Leading the agenda for the first conference is the merger control process, for which the ICN has announced an ambitious work program.<sup>43</sup> It has created a Merger Review Working Group (led by the U.S. Department of Justice), which has been further divided into three subgroups (notification and procedures, analytical framework, and investigative techniques) each with its own distinct membership and set of initial projects.<sup>44</sup> Particularly well-articulated is the work plan of the subgroup on notifications and procedures, which was able to submit to the September 2002 conference

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The Committee would need assistance and some sort of secretariat. The core members could – on a rotating basis – provide over a time period the logistics and the secretarial work required for the proper functioning of the Committee (they could also finance the organization of an annual conference during their rotation time). Secondment of officials between the agencies involved or the establishment of an executive bureau (or board) in the form of a troika composed by the agency “en exercise” and its predecessor/successor could ensure the necessary continuity.

<sup>40</sup> See *James*, supra n. 38, at 4 (describing ICN as “a results oriented network for anti-trust agencies from developing and developed countries to formulate and develop consensus positions on specific proposals for procedural and substantive convergence in antitrust enforcement”; it should not include trade issues or non-antitrust issues “that could reasonably be included under the rubric of ‘competition policy’”; it should be “all antitrust, all the time”).

<sup>41</sup> Press Release, Dep’t of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network, October 25, 2001 ([http://www.usdoj.gov/atr/public/press\\_releases/2001/9400.htm](http://www.usdoj.gov/atr/public/press_releases/2001/9400.htm)), at 3.

<sup>42</sup> The interim steering committee actually has 17 members, representing the 14 jurisdictions; two members are from the U.S., two from the EC, and two from France (one of whom, *Frédéric Jenny*, is the chairman of the WTO Working Group on the Interaction between Trade and Competition Policy). See <http://www.internationalcompetitionnetwork.org/steering.html>.

<sup>43</sup> The other topic is the competition advocacy role of antitrust agencies. See <http://www.internationalcompetitionnetwork.org/conference.html>.

<sup>44</sup> See <http://www.internationalcompetitionnetwork.org/wg1.html>.

recommendations relating to merger notification and a report examining the costs and burdens of multijurisdictional merger review.<sup>45</sup>

Barely mentioned in the initial announcement of the ICN was its relationship with the three other international organizational networks. *Charles James'* initial speech about the ICN did say that it was intended to "complement, not displace, other international efforts,"<sup>46</sup> but James was otherwise vague. *Monti* said that the aim was not to "duplicate or substitute valuable work that is carried out ... [by] organizations such as the WTO, UNCTAD or OECD,"<sup>47</sup> but did not indicate with any more specificity than *James* about how to avoid such duplication. A subsequent Justice Department speech characterized the three organizations as "fine venues," saying that the ICN "should seek to build on what these organizations have done and are doing, and not to duplicate it."<sup>48</sup> Indeed, officials from the OECD and UNCTAD similarly do not appear to have much of an idea of how they will interact with the ICN.<sup>49</sup>

Although each of the other networks is still active, perhaps the most rivalrous network to the ICN is the WTO. Since 1996 the WTO has been struggling to define a role with regard to competition issues. The EC has been a strong proponent of having an antitrust agreement adopted by the WTO, but when it was unsuccessful at the Seattle Ministerial Conference in 1999 it decided (in the words of Commissioner *Monti*) on "following a new approach" which would "focus initially on what can be achieved in the context of a short global round."<sup>50</sup> A revised EC proposal was submitted to the WTO in September of 2000, one week after *Klein* endorsed the "Global Competition Initiative" in his Brussels speech.<sup>51</sup> In its submission to the WTO the EC argued in favor of the adoption of a "multilateral framework agreement" with three general ele-

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<sup>45</sup> The recommendations and report are available at <http://www.internationalcompetitionnetwork.org/conference.html>.

<sup>46</sup> *James*, supra n. 38, at 4.

<sup>47</sup> *Monti*, supra n. 37, at 8.

<sup>48</sup> *Kolasky*, supra n. 3, at 9.

<sup>49</sup> See *Winslow*, supra n. 14, at 39:

The OECD Secretariat is often asked how the OECD Global Forum on Competition does or will relate to what is now called the International Competition Network (ICN). This is a fair question, but one that cannot be answered with specificity because it is unclear how the ICN will actually operate.

See also *Dhanjee*, supra n. 14, at 45 (noting "possible duplication" between the processes of other international fora and UNCTAD's work). Note that the interim ICN chair is also the Chair of the OECD's Working Party on International Cooperation.

<sup>50</sup> *Monti*, supra n. 31, at 81.

<sup>51</sup> See *WTO*, A Multilateral Framework Agreement on Competition Policy, Communication from the European Community and its Member States of September 25, 2000, WTO Doc. WT/WGTCP/W/152, ([http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm)).

ments.<sup>52</sup> First would be an agreement on “core principles of competition law and policy,” which would require each member state to have a competition authority “endowed with sufficient enforcement powers,” non-discrimination on the basis of nationality, transparency, due process, and a prohibition of “hard-core” cartels.<sup>53</sup> Second would be “cooperation modalities,” both “case specific” cooperation and more general exchanges of information, including “voluntary ‘peer reviews’ of members’ competition policies.” Third would be “specific support for competition institutions in developing countries.” Gone was any mention of the WTO’s dispute settlement procedures, which had been part of earlier proposals.<sup>54</sup>

The EC proposal was supported by a “broad group of countries,”<sup>55</sup> with an ambiguous response by the United States.<sup>56</sup> After further development and

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<sup>52</sup> The proposal is set out as an Annex to the submission, *id.*, at 13.

<sup>53</sup> *Id.*, at 7:

Without wishing to suggest a legal definition, hard-core cartels are generally understood to be agreements among actual or potential competitors involving price fixing, bid rigging, output restrictions or customer allocation and market divisions. Such horizontal agreements have a clear trade distortive effect and are considered as a serious breach of most competition law regimes.

<sup>54</sup> See *Petersmann*, Competition-oriented Reforms of the WTO World Trade System – Proposals and Policy Options, in: *Züch* (ed.), *supra* n. 3, at p. 54-55 (discussing earlier EC proposals). Japan, which made a submission a week after the EC, suggested that there was a consensus on an agreement on core principles similar to those articulated by the EC (although stated somewhat more broadly) and on the need for information exchange, but it did recognize that the WTO’s dispute settlement mechanism might be invoked if the Agreement were violated. See *WTO*, Communication from Japan of September 29, 2000, WTO Doc. WGTCP/W/156 ([http://www.wto.org/english/tra-top\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tra-top_e/comp_e/comp_e.htm)), at 4:

How should the WTO discipline Member countries when they violate the Agreement? In the case where the dispute settlement mechanism of the WTO is used, it would be useful to consider whether the existing provisions concerning the scope of the dispute subject to the mechanism, together with the provisions regarding countermeasures (to be taken in the event that DSB’s recommendations are not implemented) should be amended.

<sup>55</sup> *Anderson & Jenny*, Current Developments in Competition Policy in the World Trade Organization, 16 *Antitrust* 40, 42 (2001).

<sup>56</sup> In a pre-Doha press release, the United States Trade Representative said:

- In competition policy, U.S. trade and anti-trust authorities recognize the significance of the issue. Therefore, we are working to understand more clearly what the EU seeks, and are discussing with the EU how it can accommodate the concerns of the United States and other countries.
- The United States can see merit in adherence to core competition principles of transparency, non-discrimination, and procedural fairness. We also can support consultative and capacity building efforts to help countries develop modern competition policy that promotes efficient, effective, and dynamic markets.

debate by the WTO Working Group on the Interaction between Trade and Competition Policy,<sup>57</sup> the WTO, at the Doha Ministerial Conference in November 2001, decided that negotiations will take place on a multilateral framework after the next Ministerial Conference in 2003 (with a projected completion date of 2005).<sup>58</sup> The Working Group was instructed to clarify the three prongs of the EC proposal before the 2003 Conference; and still to be worked out are the “modalities of negotiations” with regard to the framework (meaning, “how the negotiations are to be conducted”).<sup>59</sup>

The decision at Doha may have marked a “significant milestone toward the possibility of negotiations on a multilateral agreement on competition policy in the WTO,”<sup>60</sup> but it did not by any means establish the WTO as a “live”

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- What is not clear to us, however, is how competition obligations based on the core principles should be assessed; for example, the important question of how dispute settlement might operate or whether other forms of oversight such as peer review might be more satisfactory.
  - The United States believes that there is a need to be flexible in the face of developing countries’ questions and concerns.

Statement of U.S. Trade Representative *Zoellick*, U.S.-E.U. Efforts to Launch a Global Round of Trade Negotiations, July 17, 2001 (<http://www.ustr.gov/releases/2001/07/01-54.pdf>).

<sup>57</sup> See e.g. *WTO*, Report on the Meeting of 22-23 March 2001, Note by the Secretariat, *WTO Doc.WT/WGTCP/M/14* ([http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm)).

<sup>58</sup> See *WTO*, Ministerial Declaration adopted on November 14, 2001, *WTO Doc. WT/MIN(01)/DEC/1* ([http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min-decl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min-decl_e.htm)), at para. 23-25.

<sup>59</sup> See *Doha Declaration Explained* (unofficial explanation) ([http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm)). For a “post-Doha” statement of the EC’s views, see *Monti*, *A Global Competition Policy?*, Speech given on European Competition Day, Copenhagen, September 17, 2002 ([http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/02/399/0|RAPID&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/399/0|RAPID&lg=EN&display=))) (WTO agreement should provide for cooperation among enforcement authorities, pay attention to the “development dimension,” and include agreement on “core principles, considered to be transparency of rules, non-discrimination on the basis of nationality, “fair procedural rules and judicial review” and “a commitment to prohibit hard core cartels which are the worst form of antitrust violation”).

<sup>60</sup> *Anderson & Jenny*, *supra* n. 55, at 43. Some commentators are less sanguine. See *Marsden*, *Tune In To The International Competition Network – Not the WTO – For Practical Advances in International Antitrust*, December 2001 ([http://linklaters.com/in\\_competition/200112.htm](http://linklaters.com/in_competition/200112.htm)), describing EC as “increasingly desperate” to get competition rules on the WTO table; characterizing many of the provisions of the declaration as “innocuous and hortatory,” desired by the EC as a way “to get momentum on

antitrust enforcement network. Indeed, even the scaled-down ambitions of the current framework will take some time to be realized. Nevertheless, there is an assumption among countries involved in the WTO process that a framework agreement will be achieved,<sup>61</sup> although there is still opposition from some countries that appear to be particularly concerned about the extent to which such an agreement might prevent them from engaging in industrial policy that promotes their home industries.<sup>62</sup> There is also a belief that the current limited framework agreement is not the end of the process, but just a first step to a larger role for the WTO.<sup>63</sup>

Of course, the ICN is not a live network at the moment either. Both networks are nascent. For now, it is unclear how they will develop, how they will relate to the other two established organizational networks, and whether all four will survive in any meaningful sense. Perhaps even more importantly, it is unclear whether the growth of these organizational networks will interfere with, or complement, the distributed international networks which are currently operating. These networks are providing important benefits for international antitrust enforcement, but they are extremely virtual and are readily subject to disruption if serious conflicts, political or legal, emerge.

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something” in the hope that subsequent negotiations will turn to more significant items on its traditional agenda.

<sup>61</sup> See Notes of UNCTAD Regional Seminar on Competition Policy & Multilateral Negotiations at Hong Kong, 16-18 April 2002, in email to author from “cutsjpr” <cuts.jpr@cuts-india.org>, April 27, 2002:

... the participants generally expressed their overall views on competition at the WTO. It was quite clear from their statements that most of them has already accepted negotiations on competition as imminent and preparing accordingly. Only India believes that they could and should block any negotiations on competition at the WTO. Even Pakistan which is not so enthusiastic about competition at the WTO is looking at the issue with an open mind.

<sup>62</sup> See e.g., *WTO*, supra n. 57, para. 41, p. 17-18 (remarks of Philippines, Hong Kong), para. 64, p. 25-26 (remarks of India). See also *WTO*, A WTO Competition Agreement and Development, Communication from the European Community and its Member States of July 3, 2001, WTO Doc. WT/WGTCP/W/175 ([http://www.wto.org/english/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/comp_e.htm)), at 4 (reviewing concerns about a conflict between an antitrust agreement and industrial or development policies; states that “WTO Members would therefore be free to decide which exclusions they wish to maintain, whether these relate to the protection of small and medium enterprises, certain sectors or other policy matters”).

<sup>63</sup> See UNCTAD Notes, supra n. 61 (“Philippe Brusick [of UNCTAD] ... emphasized that although the WTO at present is talking about only three core principles and voluntary cooperation, once an agreement is reached it is likely to play much bigger role in the future.”).

#### **IV. Evolving International Antitrust Enforcement: Cartel Prosecutions**

The growth of these international enforcement networks raises fundamental questions. To what use will these international antitrust enforcement networks be put? How will they add to the enforcement efforts of national agencies and networks? Can they function even without an international agreement on substantive antitrust principles?

To some extent these questions are already being answered. As I have argued elsewhere, over the past decade we have begun to have significant international antitrust enforcement, even in the absence of an international agreement on antitrust principles.<sup>64</sup> The leading edge of this enforcement is directed against cartels, with criminal prosecutions seeking fines and imprisonment and with civil litigation seeking damages. This enforcement has mostly been a unilateral effort by U.S. enforcers, although other countries have joined the effort, with criminal prosecutions and civil treble-damage litigation being brought in U.S. courts. The U.S. government, acting through the Department of Justice, has obtained substantial criminal fines against U.S. and non-U.S. corporations, even securing the imprisonment of non-U.S. corporate executives (albeit for relatively short periods).<sup>65</sup> Civil recoveries by private litigants have also been substantial.<sup>66</sup>

Although this cartel enforcement could be done even in the absence of any network connections, the existence of the international network has obviously assisted the development of international cartel prosecutions, in the least by helping the Justice Department to obtain information from cartel participants outside the jurisdictional reach of the United States.<sup>67</sup> But there are other ways in which the network makes anti-cartel enforcement more robust.

One way is by spreading the consensus in favor of such enforcement, thereby establishing an international norm that price-fixing cartels are economically

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<sup>64</sup> See *First*, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 *Antitrust L.J.* 711 (2001).

<sup>65</sup> See *id.* at 715-717 (sentences of six non-U.S. executives in the vitamins cartel ranged from three to five months). These sentences are below recent average practice for Sherman Act violations. See *First*, *Business Crime: Cases and Materials*, Supp. 2002-2003, at 12 (Table 2) (for six years, 1996 through 2001, annual average jail sentences ranged between 8.0 months and 16.2 months).

<sup>66</sup> See *First*, *supra* n. 64, at 718-720 (vitamins and lysine cartels).

<sup>67</sup> See *Stark*, *Improving Bilateral Antitrust Cooperation*, in: *Jones & Matsushita* (eds.), *supra* n. 8, at p. 81, 85 (describing “continuous” cooperation with Canada on criminal enforcement); compare *id.* at p. 87 (lack of MLAT has hampered coordinated criminal enforcement with EU).

harmful. This norm has gained considerable support over the past decade; international consensus was much less clear before that.<sup>68</sup> The acceptance of this norm increases the likelihood of greater penalties being imposed on international cartels<sup>69</sup> and increases the likelihood that national agencies will prosecute local cartels more vigorously (as has been the case with the EC, for example<sup>70</sup>).

Another way in which network members assist international antitrust enforcement is by bringing complementary (“follow-on”) litigation that permits the imposition of penalties for the harm done by international cartels in non-U.S. markets. This is another pattern that has developed recently in international cartel prosecutions, where other jurisdictions build on the work done by the Justice Department and bring significant prosecutions against the same cartels in their home jurisdictions. Paradigmatic of this development has been the vitamins litigation, where the U.S. investigation was followed by prosecutions in Canada and the EC, resulting in record fines in both jurisdictions.<sup>71</sup>

<sup>68</sup> See e.g. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980) (describing background of litigation against international uranium cartel); Antitrust & Trade Reg. Rep. (BNA), No. 935 (1978), at A16-A18 (reaction to antitrust litigation against non-U.S. ocean shipping and uranium companies).

<sup>69</sup> See Federal Sentencing Guidelines Manual, United States Sentencing Commission § 2R1.1 (hereinafter: “Sentencing Guidelines”): [http://www.ussc.gov/2001guid/2r1\\_1.htm](http://www.ussc.gov/2001guid/2r1_1.htm) (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). Background:

These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.

<sup>70</sup> See *Hofheinz*, EU Accuses Auction Houses of Running Price-Fixing Cartel, Wall St. J. (April 22, 2002) (filing of Statement of Objections following 28-month investigation; EC cartel prosecution of cartels in 2001 yielded €1.84 billion [\$1.64 billion] in fines against 56 companies, greater than the total fines levied in previous 45 years).

<sup>71</sup> For Canadian fines, see *First*, supra n. 64, at 718 and n. 25. The fines are broken down by defendant in *Levenstein & Suslow*, Private International Cartels and Their Effect on Developing Countries, Background Paper for the World Bank of January 9, 2001, World Development Report 2001 (<http://www.unix.oit.umass.edu/~maggiel/WDR2001.pdf>), at 78 (Table 9). For the EU, see Press Release of November 21, 2001, Commission Imposes Fines on Vitamin Cartels (€55.22 million fine [\$755.2 million] imposed on eight companies; Hoffmann-La Roche fined €462 million [\$407.9 million]). Total U.S. fines in the vitamins cartel prosecutions, for corporations and individuals, amounted to \$906.45 million. See *First*, supra n. 64, at 714-717.

The development of complementary litigation parallels the behavior of national networks in the United States, where state and private enforcers use such litigation to secure compensation for victims that federal enforcers traditionally have not sought.<sup>72</sup>

There are inherent limits, of course, to the distributed international network. For one, each agency in the network is still subject to jurisdictional restrictions. The near-complete demise of restraints on extraterritoriality has lessened this problem, but, inevitably, there will be cartels whose efforts will lie outside the jurisdiction of any effective enforcement agency.<sup>73</sup>

Even for those international cartels that can be reached jurisdictionally, in the absence of complementary litigation single-state prosecution will likely under-deter violators and under-compensate those harmed by the violations.<sup>74</sup> U.S. law is instructive in this regard. Criminal fines in the United States in cartel cases are based on a percentage of the volume of commerce done by each conspirator-defendant “in the goods or services affected by the violation.”<sup>75</sup> Although the guidelines that determine sentencing in federal criminal prosecutions are silent on whether sales outside the United States can be taken into account,<sup>76</sup> the recent large fines obtained by the Justice Department appear to have been limited to domestic sales.<sup>77</sup> Calibrating fines to economic

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<sup>72</sup> See *First*, *supra* n. 6, at 1012 et seq., 1039 et seq.

<sup>73</sup> It is difficult to say how many such cartels exist or how significant they are. For one of the few examples of international cartels not prosecuted by the U.S., but prosecuted by the EC, see *Levenstein & Suslow*, *supra* n. 71, at 40-50 (seamless steel tube cartel; EC fines in excess of \$100 million imposed on four European and four Japanese steel manufacturers; United States apparently not affected because U.S. antidumping tariffs kept U.S. prices above market levels).

<sup>74</sup> This is apart from the general problem of under-deterrence and under-compensation that is likely true for all antitrust cases. See *Lande*, Are Antitrust “Treble” Damages Really Single Damages?, 54 Ohio St. L. J. 115 (1993) (arguing that awarded damages are unlikely to be more than single-damages).

<sup>75</sup> Sentencing Guidelines, *supra* note 69, §2R1.1 (b).

<sup>76</sup> Although the EC can impose fines for cartel behavior up to 10 percent of the party’s previous year’s worldwide turnover, see *Kerse*, *supra* note 6, at 315, neither Regulation 17 nor the Commission’s Fine Guidelines specifically cover “worldwide” turnover. See Council Regulation 17/62/EEC, First Regulation implementing Articles 85 and 86 of the Treaty, art. 15(2), 1962 O.J. (L 13) 204; Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty, 1998 O.J. (C9) 3.

<sup>77</sup> This limit is sometimes stated explicitly, but not always. Compare Letter to Hon. Susan Illston from United States Department of Justice, Re *United States v. Hoechst AG & Bernd Romahn*, CR 99-0144 SI, June 10, 1999, at 2 (fine based on sorbates sales in the United States) (plea agreement) with United States Department of Justice U.S.S.G. §8C4.1 Motion for Departure and Memorandum in Support, *United States v.*

harm is intended to achieve more optimal deterrence; fines that ignore substantial harms or benefits will be less than optimal. As for imprisonment, this remedy has obvious jurisdictional bounds, although the Justice Department has been surprisingly successful in getting non-U.S. defendants to come to the United States to serve prison sentences.<sup>78</sup>

Criminal remedies are only part of the remedial scheme for international cartel behavior. More significant, at least in monetary terms, is private treble-damage litigation. Here, too, U.S. law is instructive. Although the private remedy is more highly developed in the federal courts in the United States than it is in other jurisdictions, its use in the United States has an important potential limit. That limit involves the right of litigants to obtain damages from international cartels for purchases that occur outside the United States.

Private litigants suing in U.S. courts under the Sherman Act have had a mixed record of success in obtaining damages for injuries caused by sales outside the United States. In the early 1970s a number of foreign governments brought suit in the United States against six pharmaceutical manufacturers for damages arising out of “foreign sales” of broad spectrum antibiotic drugs, whose prices the defendants had allegedly fixed.<sup>79</sup> In *Pfizer v. Government of India*<sup>80</sup> the Supreme Court upheld a foreign government’s right (as a “person”) to sue for damages under U.S. antitrust law.<sup>81</sup> In so holding the Court accepted the policy argument that failure to allow recovery would diminish the deterrent and compensatory purposes of antitrust relief,<sup>82</sup> but the Court’s

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*F. Hoffman-LaRoche*, filed May 20, 1999, at 2 (specifying \$3,283,961,484 volume of commerce affected, but not indicating whether non-U.S. sales are included). The volume of commerce of Roche’s vitamins sales as specified in the Departure Memorandum is well below world estimates. See *Connor*, *Global Price Fixing: Our Customers are the Enemy*, *Studies in Industrial Organization*, 2001, p. 336 (\$28 billion total estimated global sales for all conspirators) (Table 12.2).

<sup>78</sup> See *supra* n. 65.

<sup>79</sup> In re *Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971). Suits were brought by India, Iran, the Philippines, Spain, South Korea, West Germany, Colombia, Kuwait, and the Republic of Vietnam, for their own purchases and on behalf of several classes of foreign purchasers of antibiotics. See *Pfizer Inc. v. Government of India*, 434 U.S. 308, 309-310 n.1 (1977).

<sup>80</sup> 434 U.S. 308 (1977).

<sup>81</sup> See 15 U.S.C. § 15 (a) (treble-damages right granted to “any person” injured in his business or property by virtue of an antitrust violation).

<sup>82</sup> See *Pfizer v. Government of India*, 434 U.S. at 314-315 (1977) (U.S. consumers are benefited if potential antitrust violators take into account “the full costs of their conduct”; persons doing business in the United States and abroad should not be “tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home”).

holding did not explicitly consider whether there was any jurisdictional problem in suing for “foreign sales.”<sup>83</sup> Legislation enacted after *Pfizer*, however, narrowed the jurisdictional reach of U.S. antitrust laws with regard to “trade or commerce with foreign nations”<sup>84</sup> and the Supreme Court has subsequently given hints of seeing a narrower purpose in the antitrust laws.<sup>85</sup>

As a result of these developments more recent U.S. court decisions have held that suits for damages occurring outside the United States must allege a causal connection between the conduct within the United States and the injuries sustained outside the United States. For these courts, where a party has purchased price-fixed goods outside the United States, it is not enough to prove that an international cartel existed, which fixed prices both inside and outside the United States, and that the market is an international one. Given the language of the Foreign Trade Antitrust Improvements Act, there must be conduct occurring inside the United States that “gives rise” to the damages outside.<sup>86</sup> So, for example, in a suit against the graphite electrodes cartel (whose participants had paid nearly \$300 million in U.S. criminal fines), non-U.S. firms that had purchased more than \$230 million worth of graphite electrodes were precluded from suing for damages because their purchases had not been invoiced in the United States.<sup>87</sup> A similar result has been reached in litigation involving the vitamins cartel and the heavy lift barge services cartel.<sup>88</sup>

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<sup>83</sup> *Id.* at 319 (“We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff.”).

<sup>84</sup> See Foreign Trade Antitrust Improvements Act of 1982, 15 USC § 6a.

<sup>85</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (U.S. antitrust laws “do not regulate the competitive conditions of other nations’ economies”) (dictum).

<sup>86</sup> See 15 U.S.C. § 6a (limiting the Sherman Act, when applied to foreign commerce, to conduct that has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, where such effect “gives rise” to a Sherman Act claim).

<sup>87</sup> See *Ferromin Int’l Trade Corp. v. UCAR Int’l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001). The court permitted suit for \$18 million worth of electrodes that were invoiced in the United States but delivered to the plaintiffs outside the United States, without regard to where the electrodes were manufactured. See *id.* at 706.

<sup>88</sup> See *Den Norske Stats Oljeselskap As v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001) (worldwide bid-rigging and market allocation of heavy lift barge services to oil and gas drilling platforms; plaintiff owner of North Sea platform; held: no jurisdiction) (defendant had paid \$49 million fine in U.S. prosecution), cert. denied, 122 S. Ct. 1059 (2002); *Empagran S.A. v. F. Hoffman-La Roche, LTD.*, 2001 U.S. Dist. LEXIS 20910 (D.C. Cir. 2001) (vitamins cartel; suit by foreign corporations domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia, and the

Not all U.S. courts agree with this view of the law. In *Kruman v. Christie's Int'l PLC*, a private treble-damage class action involving price-fixing by the art auction houses, Sotheby's and Christie's, the Court of Appeals for the Second Circuit allowed suit by participants in auctions held outside the United States. Accepting the allegation that the auction market is worldwide and that the prices of auction services in the United States and abroad are inextricably linked, the Court of Appeals refused to find that Congress intended to deprive foreign plaintiffs of a right to sue. All that U.S. law demands is that the defendant's conduct have a direct, substantial, and reasonably foreseeable effect on a domestic market:

If it is true, as the plaintiffs allege, that the domestic price-fixing agreement could only have succeeded with the foreign price-fixing agreement, then the foreign agreement certainly had an anticompetitive effect on the domestic market.<sup>89</sup>

From an international antitrust policy point of view, the result in *Kruman* is clearly preferable. Studies indicate that international cartels likely cause substantial economic injury worldwide, both in developed and developing countries.<sup>90</sup> If cartel participants in international markets are able to overcharge businesses and consumers in those countries with impunity, they might find cartel participation profitable even if they are required to pay damages in the United States.<sup>91</sup> And, of course, victims in non-U.S. jurisdictions suffer the harm of the overcharges without the ability to obtain compensation unless their own jurisdictions provide for such remedies.

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Ukraine; alleging purchases for delivery outside the United States; held: no jurisdiction).

<sup>89</sup> *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 401 (2d Cir. 2002).

<sup>90</sup> Compare *Evenett & Levenstein & Suslow*, International Cartel Enforcement: Lessons from the 1990s, World Economy at 1 (forthcoming) (estimating more than \$30 billion annual worldwide turnover in affected products for twenty cartels where sales data are available) ([http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID265741\\_code010403580.pdf?abstractid=265741](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID265741_code010403580.pdf?abstractid=265741)), with *Levenstein & Suslow*, *supra* n. 71, at 12 (for 16 international cartels, the total value of "cartel-affected" imports to developing countries was \$81.1 billion, which made up 6.7% of all imports to developing countries and is equal to 1.2% of their combined GDP), and *Connor*, *supra* n. 77, at 553 (Table 19.5) (estimating \$39 billion in global sales of lysine, citric acid, and vitamins cartels).

<sup>91</sup> *Evenett, Levenstein, and Suslow* argue that where cartels operate in multiple markets, the gain from cartelizing any single market can exceed the profits in that market alone because it increases the ability of the cartel to punish cheaters through a multi-market response. This means that if fines are to deter multi-market cartels, they must be higher in any single market than the gains from that market alone. See *Evenett & Levenstein, & Suslow*, *supra* n. 90, at 17.

How might our evolving system of international antitrust enforcement deal with this problem? One approach is a unilateral one. The United States, as the network enforcer with the most expertise in private litigation, should use its forum to greatest advantage. There is no inherent jurisdictional limitation on U.S. courts giving damages for non-U.S. sales of products whose prices are fixed in international markets, nor is there any constitutional limitation on including worldwide harm in estimating criminal fines.<sup>92</sup> Whether through judicial decisions like *Kruman*, or modifications of U.S. law if necessary, antitrust enforcement will be more effective if participants in international cartels are made to compensate all of their victims.

It is difficult to see how other countries would be disadvantaged by such an arrangement (unless, of course, they prefer to shield their cartels from antitrust liability). Buyers from international cartels resident in other countries can hire counsel and bring suit in the United States (as did India and the other countries that were buyers in the *Pfizer* litigation). Surely, an effective forum in the United States is preferable to no effective forum at all.<sup>93</sup>

A second solution would be for all countries to adopt domestic antitrust laws under which injured parties can obtain damages. This is a more multilateral approach. In some sense it is hard to quarrel with this solution. Indeed, to some extent this approach is now being followed, at least judging by the increase in adoptions of antitrust law in the 1990s. But there is a long way from the adoption of an antitrust law to having an effectively functioning set of remedies for cartels, particularly private remedies. Japan and a number of European countries have long permitted private suits for antitrust violations, for example, but in none of these countries is there substantial private antitrust litigation against cartel behavior.<sup>94</sup>

A third solution is to replace the network of enforcers with a centralized supra-national authority. This proposal is not a live policy option at the moment, but it would, at least, solve the question of jurisdictional reach.

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<sup>92</sup> Taking account of worldwide impact in calculating fines, however, is a potential problem under U.S. sentencing law, which permits fines of twice the gain or loss from the offense unless the imposition of such a fine “would unduly complicate or prolong the sentencing process.” See 15 U.S.C. § 3571 (d).

<sup>93</sup> Cf. *Levenstein & Suslow*, supra n. 71, at 8, noting that there has been ... little activity on the part of developing country governments or developing country consumers to respond to these [international] cartels even after they have been shown to exist. ... The lack of action in response to these cartels also appears to hold true of private parties in developing countries, who have, with only a few exceptions, apparently not actively sought civil remedies against cartel participants to the extent that consumers in western, industrialized countries have.

<sup>94</sup> See supra n. 8.

It is easy to imagine the operational problems that such a centralized agency might have, but the U.S. experience points to a more fundamental objection. A networked antitrust enforcement system is actually stronger than a centralized one. Although today's network of enforcers might seem unduly decentralized and *ad hoc*, the evolving relationships have given enforcement agencies in different countries the ability to respond to the need for antitrust enforcement based on each agency's perceived enforcement benefits and costs. Different parties in the network have different capabilities; the current system allows agencies to seek their comparative advantage. On the national network level in the United States, for example, this evolution has led the federal agencies to specialize in criminal prosecutions and matters with significant national or international economic impact. It has led the States to focus on obtaining monetary compensation for their citizens injured by antitrust violations, as well as to focus on cases with more clearly local impact (even if those cases also have national or international dimensions).<sup>95</sup> Putting this on the international level, it might lead countries with resource limitations to focus mostly on complementary public enforcement, along with some localized restraints, and leave private damages litigation to the courts of other countries.

A major concern with the spread of antitrust enforcement regimes, indeed, *Baxter's* concern with EC enforcement in the IBM litigation, is that this spread increases the chance for conflicting approaches. This is, no doubt, true, as shown in the merger disputes between the U.S. and the EC in *Boeing/McDonnell Douglas* and *GE/Honeywell*. Disputes are not necessarily bad, however. Again, U.S. experience is instructive. In the 1980s the federal government and the states had different views of merger enforcement.<sup>96</sup> Since that time both groups changed their views to some extent and those differ-

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<sup>95</sup> This has not always been the division. See *Flynn*, Federalism and State Antitrust Regulation 252 (Table 1) (1964) (35.49 percent of Department of Justice complaints and indictments involved essentially local restraints between 1957 and 1962). Despite a historical lack of interest in monetary recoveries, both the Department of Justice and the Federal Trade Commission are now showing more interest. See U.S. Department of Justice, Press Release of October 23, 2001, New Jersey Food Company Executive Ordered to Serve Jail Time And to Pay Restitution for Rigging Bids to the NYCBOE ([http://www.usdoj.gov:80/atr/public/press\\_releases/2001/9368.pdf](http://www.usdoj.gov:80/atr/public/press_releases/2001/9368.pdf)) (reporting the granting of orders of restitution in excess of \$20 million in criminal bid-rigging cases involving New York City Board of Education); Federal Trade Commission, Remedial Uses of Disgorgement, Request for Comments, December 19, 2001 (<http://www.ftc.gov/os/2001/12/disgorgefrn.htm>) (seeking comment on proposal that FTC seek disgorgement "or other forms of monetary equitable relief" for antitrust violations).

<sup>96</sup> See *Abrams & Constantine*, Dual Antitrust Enforcement in the 1990s, in: *First & Fox & Pitofsky* (eds.), *Revitalizing Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy*, 1991, p. 484, 491 et seq.

ences have diminished (even if they have not vanished). Distributing the power of antitrust enforcement over the U.S. network helped insure that better policies emerged, through consensus rather than mandates, and left open the ability of some agencies in the network to take up the slack when others faltered. It is a lesson learned in U.S. antitrust enforcement and one that an international system would do well to heed.

## **V. Conclusion: Evolving Toward What?**

This paper has attempted to map the international antitrust enforcement network that is now emerging. Two types of networks are described. One is a distributed network, much like the national enforcement networks, in which national enforcement authorities are connected together through a mixed system of formal agreements and informal working arrangements. The other is a centralized network, in which enforcement authorities are linked to some central core.

The paper describes the recent effort to put together centralized networks, particularly the effort by the United States to construct the International Competition Network and the effort by the EC to put together a network under the auspices of the World Trade Organization. Both efforts are nascent, in the sense that neither network is yet functioning. The ICN now appears to be more geared to solving enforcement problems, particularly the enforcement problems of established national agencies. This is shown by its beginning with merger issues, something of most concern to large corporations engaged in cross-border acquisitions. The WTO network appears to be more aimed at internationalizing antitrust, with a particular emphasis on developing countries.

The paper then explores the evolution of network enforcement in the area of international enforcement of greatest success to date, the prosecution of international cartels. Even with recent successful prosecutions by U.S. government and private enforcers, and the efforts of other countries, the current system still likely under-deters these cartels and under-compensates victims. One suggestion is for the United States to exercise its jurisdiction to the fullest extent possible under U.S. law. Another suggestion is to spread public and private enforcement to other agencies in the network (and add new nations to the network). Whether such enforcement would be cost-effective should be a choice made by individual countries; to some extent it may be better to leave to the United States its comparative advantage in this type of litigation, particularly when it comes to obtaining private damages. These two approaches are complementary in a networked enforcement system. They are superior to

having some sort of international enforcement authority with international jurisdiction. Not only is such an authority politically unlikely, this approach suffers from the weakness of centralization. A distributed international enforcement network, by contrast, retains the possibility of differing views. It insures against misplaced consensus.

The major challenge for the evolving networks will not be conflict but success. As these networks become more robust, leading to increasing criminal sanctions and consumer recoveries, and preventing more mergers, there will surely be a stronger effort by the targets of these enforcement efforts to control enforcement. Arguing conflicting obligations and excessive recoveries, business interests will seek limits on enforcement. This is now happening in the United States, with the increasing success of the national enforcement network.<sup>97</sup> The more centralized the networks become the easier it will be to capture them. Indeed, this may be the most compelling reason for keeping international networks deconcentrated.

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<sup>97</sup> See *Denger & Arp*, Does Our Multifaceted Enforcement System Promote Sound Competition Policy?, 15 *Antitrust* 41 (2001) (arguing that civil damage exposure “can be large, diverse, and unpredictable” and that the lack of integration of criminal and civil enforcement may undermine enforcement goals).