



DEPARTMENT OF JUSTICE

Building Consensus: The International Competition Network's Merger Review Working Group

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Good morning. I am greatly honored to participate in this second conference of the International Competition Network, and extremely pleased to introduce the work of the ICN Merger Review Working Group. Under the outstanding leadership of its Chair (and our Principal Deputy in the Antitrust Division), Debbie Majoras, and its three dynamic and hardworking subgroup chairs, John Vickers, Dror Strum, and Randy Tritell, this Working Group continues to make major contributions to the ICN's work of substantive and procedural convergence in international antitrust.

Before I begin, I want to thank our host, Dr. Fernando Sanchez Ugarte, for providing us this wonderful venue in Merida. This city is an especially appropriate place to hold an ICN conference: nearly 80 years ago, one of our Supreme Court's seminal international antitrust decisions grew out of a prosecution, by one of my predecessors, of an international conspiracy to monopolize the sale of sisal, a natural fiber grown exclusively here in the Yucatan and used in making cordage and twine.¹ I am sure it was to emphasize to all of us the relevance of what we do in today's global economy that Fernando has arranged for us to have dinner tonight in a hacienda on a former sisal plantation, where clandestine meetings between aspiring monopolists from the United States and Mexico may well have occurred so many years ago.

The Work of the ICN

To return to the present, I propose briefly to address two subjects this morning: the accomplishments and future prospects of the ICN generally, and the particular accomplishments of the Merger Review Working Group. The ICN was founded only 20 months ago, by 16 antitrust agencies that wanted to form a new type of antitrust organization to promote consensus

¹ *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

on procedural and substantive convergence in antitrust enforcement. Since that time, ICN membership has grown to include 80 antitrust agencies from 70 jurisdictions in every corner of the world.

If you carefully observe the presentations at this conference, you will notice how many of these antitrust agencies have taken leadership roles in the work of the ICN: for example, the Capacity Building Working Group is co-chaired by agencies from the European Commission and South Africa; the Competition Advocacy Working Group is chaired by our Mexican hosts and has subgroup chairs from Mexico, Canada, France, and Israel; while the Merger Working Group is chaired by my agency, and its subgroups are led by agencies from the United Kingdom and Israel, and by the USFTC. Importantly, one of the things that has made the ICN work so well is the invaluable, hands-on assistance of many capable non-government advisers, particularly in the work of the Merger Working Group, and in the presentations at our annual conferences. As an enthusiastic supporter of the ICN, I want to extend my warmest personal thanks to all those here today who have contributed to the ICN's success, and particularly to our Chair, Konrad von Finckenstein, who has given a great deal of himself and his agency to place the ICN on a firm foundation.

People are starting to notice that the ICN *is* a success. The speed with which the ICN has produced quality consensus guiding principles and recommended practices on merger review, to take just one example, has pleasantly surprised people who are accustomed to the slower pace of consensus-building in other contexts. Even people who think in broader terms than antitrust -- yes, that is possible -- have begun to note the ICN's contributions. For example, Mike Moore, the former Director General of the World Trade Organization, recently recognized the mandate

of the ICN “to promote procedural and substantive convergence through inter-agency discussions,”² and contrasted the ICN’s unique role to that of the WTO.

This is not to say that the ICN has no problems. Many of us have a sense that, while we have developed shared views on what the ICN’s broad goals ought to be, we may be less certain about how to get there. In moving the ICN forward, there are several issues we must address. Even though we have done remarkably well in attracting members to the ICN, we need to increase the number of members, and particularly members from developing countries, who actually participate on a continuing basis in the ICN’s work. We also need to improve the number and diversity of non-government advisers who help ensure that our work product reflects and addresses the real issues posed by international antitrust enforcement; North American NGAs have played valuable roles in the ICN thus far, especially in the work of the Merger Working Group, but we need more NGAs from other regions. There is no question that we must do these things; we just need to determine how best to do them.

There are also some questions about how the products of ICN consensus-building should be implemented. Thus far, this issue has focused on the guiding principles and recommended practices endorsed by the ICN membership at the Naples conference, but as the ICN addresses new issues, it will arise in other areas as well. When the ICN was created in October 2001, the founding agencies emphasized that ICN recommendations would be aspirational, forward-looking, and non-binding, and that it would be left to governments to implement them voluntarily. The ICN’s theory has been, if I may presume to borrow a phrase from the great

² Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance* 154 (2003).

Mexican President, Benito Juarez, that the ICN should govern itself, not by force, but by reason.

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Our experience has been that agencies bring to ICN work a real openness to the ideas and experiences of others, and a willingness to question one's own traditional way of doing things, that is not so frequently observed in other fora. In my own agency, the process of developing recommended practices for merger review has required us to question repeatedly whether our procedures are as effective, fair, and efficient as we can make them. During the past two years in particular, the US agencies have taken steps to do just that; we certainly are not perfect, but we are constantly thinking of ways to do our work better, and our private antitrust bar frequently offers its own ideas for further improvement.

In addition to trying to lead by example, US antitrust officials take appropriate opportunities to publicize and explain the ICN's work, and to urge the international antitrust community to take part in and advance that work in deed as well as in word. Nor are we alone in this regard. The European Commission and the Brazilian antitrust agencies are engaged in very significant reforms of their respective merger review processes, some of which they have attributed to lessons learned in the ICN. Not by force, but by reason: that is how the ICN can most effectively enhance procedural and substantive convergence.

The Work of the Merger Review Working Group

This brings me to my second subject, the work of the Merger Review Working Group. This working group was created to address issues arising from the fact that roughly 65 jurisdictions around the world have now enacted merger review laws and merger notification

³ Benito Juarez ("Nothing by force, everything through law and reason"), *quoted in* T. Fehrenbach, *A History of Mexico* (1973).

regimes in one form or another. In a world where many transactions are reviewed by many antitrust agencies, the risk of procedural and substantive conflicts (especially with respect to large transactions) increases dramatically. Of course, this risk is of concern to the international business community. But it also concerns many antitrust agencies, including my agency, whose goal is to preserve competition, and not inadvertently to derail or deter procompetitive or competitively neutral transactions. In order to be effective and sustainable in today's world, merger enforcement must be grounded in sound processes and sound substantive principles.

Accordingly, the Merger Review Working Group has three subgroups, each of which focuses on a particular enforcement issue of practical consequence to agencies: 1) notification and procedures; 2) analytical framework; and 3) investigative techniques. I will briefly review each one in turn.

Last year, the notification and procedures subgroup submitted to the Naples conference, and the ICN membership adopted, eight Guiding Principles for merger notification and review: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely and effective review; coordination; convergence; and protection of confidential information. Adherence to these Guiding Principles will make the merger review process more efficient and effective, while reducing uncertainty and delay on merging firms. This subgroup also submitted, and ICN members endorsed, three Recommended Practices, concerning nexus to reviewing jurisdiction, notification thresholds, and timing of notifications. In contrast to the broad language of the Guiding Principles, these Recommended Practices articulate a detailed ICN consensus on sound merger processes, which each agency should use as a baseline for measuring the quality of its own practices.

During the past year, the 14 antitrust agencies that comprise the notification and procedures subgroup have spent a great deal of time and thought on refining the Recommended Practice on nexus to reviewing jurisdiction, as directed by the Naples conference, and on drafting four new proposed Recommended Practices concerning review periods; requirements for initial notification; transparency; and review of merger provisions. During the next two hours, you will learn in detail about these new proposals. I hope you will agree with me that if, as some have said, the Recommended Practices endorsed last year were “low-hanging fruit,” Randy Tritell’s subgroup has, through great effort, gone higher up on the tree and plucked some very attractive fruit this year.

As befits the ICN’s preference for avoiding formulaic approaches to its mission of enhancing consensus in antitrust enforcement, the analytical framework subgroup has done its work in quite a different way from that chosen by the notification and procedures subgroup. Last year, a small group of officials from ICN agencies produced a series of papers intended to serve as a baseline for comparing and contrasting existing analytical frameworks for merger review. John Vickers then created a concise, but very rich, discussion paper examining basic issues involved in choosing a particular substantive framework. This year, the subgroup has built on its previous work by explaining the analytical frameworks of a dozen different members, through analyzing their existing or proposed merger guidelines. More particularly, the subgroup has enlisted five multinational teams of NGAs to draft papers on five subjects – coordinated effects, unilateral effects, market definition, efficiencies, and market entry, respectively -- that are accompanied by an overview paper. The results, to be discussed later this morning, are a series of very interesting -- often stimulating -- working drafts that have been submitted to this

conference for comments, with completion scheduled in the next few months.

Finally, the investigative techniques subgroup has responded to an urgent need perceived by many ICN agencies to identify ways to maximize the effectiveness of limited enforcement resources. This subgroup has followed yet another path for effective results. In its first year, the subgroup sought to establish a baseline for future work by circulating a comprehensive questionnaire (to which 31 agencies replied), and by conducting a two-day workshop on investigative techniques, which was held in Washington last November. The workshop covered subjects such as the role of economists and economic data, developing reliable evidence, and private sector perspectives, and was quite successful, attracting 100 staff-level antitrust officials from 41 agencies around the world. Based on the favorable agency reactions to the workshop, the subgroup will hold other workshops in the future.

This subgroup also is drafting a manual on investigative techniques, which will reflect the experiences of the ICN membership, and in particular the ten agencies that currently participate in the subgroup. Here in Merida, the subgroup will present the initial portions of this manual for review and comment; these papers cover the current state of investigative tools used by agencies, methods for developing reliable evidence, and the role of economists and economic data in merger investigations.

The Merger Review Working Group's efforts combine process with substance, broad concepts with practical details, and persistence with deep perception. The Group is a model of the what the ICN should be. I will now ask Debbie Majoras to introduce the subgroup chairs, so that the real work of this morning can get under way. Thank you for your attention.