



The American Antitrust Institute

Coordination Between ICN, OECD, UNCTAD, WTO, etc.: Do We Need a Summit?

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Overview of Organizations:

- Daniel Sokol began by asking Sheridan Scott to provide an overview of international antitrust organizations.
- Scott:
 - Many organizations – 17 or so – are interested in antitrust issues generally. However, these all have a core mandate that is something other than competition (*i.e.* trade, etc.)
 - Only 2 principal organizations have an antitrust mandate – the Competition Committee of the OECD and the ICN
 - OECD – Mandate has largely a policy focus. People sit on the committee as government representatives. They meet three times per year in Paris. Topics to be addressed are identified by a steering committee. They have a permanent secretariat and the materials they produce are subject to peer review.
 - ICN – Focused on pursuing procedural and substantive convergence and encouraging consistent competition policy. Members sit as agency representatives. People participate in working groups. Primary output is recommended practices.
 - OECD and ICN are viewed as complimentary organizations. There is significant overlap among individuals participating in the two, and they work together to coordinate among themselves and triage substantive issues to avoid organizational overlap/duplication of efforts.

Non-Governmental Advisers (NGAs):

- Sokol: Are the OECD and ICN getting enough non-governmental input?
- Scott:
 - ICN's likely reply to this question would be "to do what?"
 - In the merger context, they get lots of non-governmental participation from lawyers in private practice.
 - In the cartel context, you find that agencies are more reluctant to open doors and share techniques.
 - While the ICN does get a lot of NGAs, they are predominately lawyers. Consumers are underrepresented. They would also like to see more contributions from economists and academics. In addition, the geographic base of contributing NGA's

is primarily limited to North America and Europe. They would like to see the geographic base expand.

- OECD has very limited participation by NGAs.
- Khemani:
 - From World Bank (“WB”) perspective, goals are different. WB objective is broad-based economic growth and development through investment in the private sector. Competition law and policy (“CLP”) is viewed as just one of many instruments to achieve this objective.
 - WB does not have a dedicated CLP team.
 - WB does get a lot of input from NGAs. They solicit citizen opinions in the form of “citizen report cards,” which invite members of the community to comment on various issues, some of which include competition.
 - Various other methods as well. Khemani cited example in which WB gave \$10K to a consumer association in Costa Rica to collect field data regarding a government-sponsored near-monopoly in rice production (Costa Rica consumes significantly more rice than neighboring countries and the price for rice is higher). Very successful endeavor.

Legitimacy:

- Sokol: Criticism has been levied that “convergence” really means the U.S. and EU agree; everyone else beware. What can be done to foster the legitimacy of the convergence mission?
- Tritell:
 - Doesn’t buy that criticism.
 - Neither government is out to impose a hegemonious antitrust agenda.
 - Sees ICN and OECD as a way to give a seat at the table to those who want to participate. These are both consensus agencies.
 - For example, he recalls a small country objecting to a component of draft merger guidelines at one of the agencies, and the objection resulted in everyone going back to the table and re-drafting based on the objection. There is no steamrolling.
- Scott:
 - Agrees with Randy; this from the perspective of Canada, who’s economy is not on par with that of U.S. or EU.
 - Her experience has been that “the power of ideas is more persuasive than the exercise of power.” [not an exact quote]. The agencies are listening to the best idea and not who’s giving it.
 - Initially, smaller countries were reluctant to speak up because of lack of expertise and experience, but that has changed.
 - In terms of what contributes to legitimacy, governing structure goes a long way. Governance is important to the effectiveness of an organization. ICN is asking self, “Are the people who are steering the organization an appropriate reflection of the members?” This is a key concern. Each individual working group is now co-chaired by one representative from a developed country and one representative from a developing country, with both co-chairs on the steering committee. This helps foster legitimacy in the eyes of the members.
- Terry Winslow (sp.?) (audience member): the OECD has a global competition forum. It only meets once a year but it does reach a far wider audience.

Participation:

- Sokol: This time of year, when grades come out, he often notes that his students who should be coming to talk to him – those in the bottom 30% of the class – never do. It's always the ones in the top 20% who want to talk about why they are not in the top 5%. What can be done to encourage participation among those who need to be participating?
- Khemani:
 - The knowledge gap and the lack of funding are the two primary challenges.
 - Direct financial assistance is one way to encourage participation.
 - Another way is to pair a developed country in a big brother role with a developing country through “twinning agencies” (?)
 - Holding meetings in different locations and having regional meetings also helps.
- Tritell:
 - It's one thing to have membership and make opportunities passively available. You have to be proactive.
 - The FTC has done focus groups, which have been helpful.
 - But there are real resource constraints. The U.S. feels them at our agency so you can imagine what it's like for the developing countries.
- Terry Winslow (sp.?) (audience member) – You have to find the people who are really interested in making it work. It doesn't have to be the head of the local agency. He had an experience with someone who spoke fluent English and went to a U.S. law school and she was so eager to learn everything she possibly could. Identifying these people and working with them is key – “the ones who will be proactive back.”
- Scott: ICN is right now very focused on regional networks. The languages can really be a meaningful barrier to participation and working on a regional basis helps. They are also doing things like providing written materials that can be reviewed in advance.
- Tritell: They are also giving more responsibility to the vice-chairs who have responsibility for working with developing countries.
- Jim (?) (audience member): in his experience the human interaction and the human relationships are absolutely key. Doors open once that trust and rapport is there.
- Scott: agrees very much with Jim.
- Tritell: also agrees. FTC is now doing staff exchange program which has helped foster those relationships. Noted that a woman from Korea (?) who is currently with the FTC as part of the staff exchange program was in the audience in the room.

Goals of Convergence:

- Sokol: How far can we really get with convergence?
- Scott:
 - There has been criticism of “soft convergence” – ‘So you have your recommended practices but so what?’
 - It's an issue of implementation. Workshops are so important to establishing human relationships, and these relationships are the most important tool for affecting change.
 - We need to go further in helping members advocate at home for ICN's recommendations. Need to ultimately influence the decision-makers who can bring about real changes.

- Should also work with businesses and make them advocates for ICN's recommended practices. The businesses tend to get the governments' ear.
- Tritell:
 - We won't ever have full convergence and who's to say we would ever want a single approach to antitrust.
 - Enhanced Comity – agencies across jurisdictions should try to evaluate where the center of gravity lies, with maybe the most interested party going first (where there's a direct conflict).
 - When you look at GE/Honeywell and Microsoft, it's tough. But when you have a situation where 90% of the effects are in one place, it might make sense.
 - And you often see informal deferral in this regard.
- Scott:
 - Agree with Randy. In Canada, they look at this issue of enhanced comity and if they think the impact on Canada is slight, and if, for example, the assets are located outside of Canada, they might “hop in the back seat” and ask the operative jurisdiction to think about Canada when they are determining remedies.
 - A big part of it is early, meaningful, robust communication. It's about trust.

Funding:

- Sokol: There's the implementation question. How do we pay for this?
- Khemani:
 - It's a problem.
 - A successful WB mechanism has been to create a multi-donor trust fund. WB gives seminars on why it's important to support CLP and the benefits conferred. WB has multiple trust funds.
 - ICN should work with donors in member countries (foreign aid companies) and try to approach it multilaterally.
 - WB also funds through loans. Sometimes they will put conditionalities (?) on loans as would any good bank.
- Scott:
 - It's extremely difficult.
 - ICN has thought about trying to partner with other organizations like the WB to see if it would be beneficial to both.

Any Questions?:

- Audience Member (unknown) – I was thinking of being the smart aleck and asking if we need a summit [given that the question on the agenda was not directly addressed].
- (Laughs)