THE CHALLENGE OF SOVEREIGNTY AND THE MECHANISMS OF CONVERGENCE

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As international markets confront the jurisdictional reach of national competition authorities, the exercise of sovereign powers spills across national borders. A decision by enforcement authorities in Country A may affect not only their own citizens, but also citizens in Country B. The respective effects are not necessarily the same. They may even be fundamentally inconsistent.1

This phenomenon describes a classic form of externality, with accompanying distortions and inefficiencies. As more competition regimes are adopted, implemented, and funded around the globe, and as more authorities assert extraterritorial application of their respective laws, the problem is apt to grow more aggravated.

Unless national authorities are prepared to suffer the externality problem or to surrender sovereignty over their own affairs, they must find mechanisms to coordinate and ideally to converge. A number of possible mechanisms exist, but all have limitations, which are usually substantial. As described more fully below, the private sector can play an important role in fostering convergence towards sensible principles through advocacy of certain objectives in the continuing debate.

I. BACKGROUND: THE ICN AND THE LIMITS TO CONVERGENCE

At the moment the most promising forum for convergence appears to be the International Competition Network (ICN). Still less than three

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1 See infra notes 18–27 and accompanying text.
years old, it has expanded in membership, and its recommended practices, at least in the merger field, have begun to take on the role of de facto voluntary standards.  

Founded by fourteen jurisdictions in October 2001, the ICN now includes enforcement agencies from more than seventy jurisdictions as members. The organization does not operate with a permanent secretariat. Instead, it is guided by a steering group, and it conducts its activities through working groups that address competition issues on a project-by-project basis. As of the ICN’s most recent annual meeting, working groups were addressing mergers, capacity building, regulated sectors, and cartels, as well as ICN administrative matters, such as funding, membership, and operational framework. Many of the working groups conduct projects through subgroups.

From the perspective of promoting convergence, the ICN’s greatest success to date is generally regarded as the work product of the Notification and Procedures Subgroup of its Merger Working Group. The key documents take two forms: “Guiding Principles for Merger Notification and Review,” and several sets of “Recommended Practices for Merger Notification Procedures.”

The Subgroup’s “Guiding Principles for Merger Notification and Review” were adopted at the ICN’s first annual meeting, held in Naples, Italy, in September 2002. The principles express most of the positions that are the source of the tensions addressed in this article:

1. Sovereignty. Jurisdictions are sovereign with respect to the application of their own laws to mergers.

2. Transparency. In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.

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2 Jurisdictions that adopt new merger control regimes or modify existing ones now regularly point to their compliance with ICN recommended practices. Recent examples include Brazil and the EU.

3 The history of the ICN is summarized on the organization’s Web site. See http://www.internationalcompetitionnetwork.org/history.html.

3. **Non-discrimination on the basis of nationality.** In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.

4. **Procedural fairness.** Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.

5. ** Efficient, timely, and effective review.** The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.

6. **Coordination.** Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.

7. **Convergence.** Jurisdictions should seek convergence of merger review processes toward agreed best practices.

8. **Protection of confidential information.** The merger review process should provide for the protection of confidential information.

The Subgroup’s “Recommended Practices for Merger Notification Procedures” were considered by the ICN at each of its three annual meetings. At the initial Naples meeting the ICN endorsed recommendations with respect to three topics: Nexus to Reviewing Jurisdiction, Notification Thresholds, and Timing of Notification. At the second annual meeting, held in Merida, Mexico, in June 2003, the ICN clarified one provision of the Nexus recommendation and adopted additional recommendations with respect to four topics: Review Periods, Requirements for Initial Notification, Transparency, and Review of Merger Control Provisions. At the third annual meeting, held in Seoul, Korea, in April 2004, the ICN adopted additional recommendations with respect to four topics: Conduct of Merger Investigations, Procedural Fairness in Merger Review, Confidentiality, and Interagency Coordination. Interested read-
ers can find the text of the Recommended Practices, together with substantive Comments prepared by the Working Group that drafted the recommendations, at the ICN’s Web site.5

Efforts to conform to the recommended practices remain voluntary among ICN members, and no member yet conforms to all of the practices. Because the practices reflect such a broad global consensus, however, they are beginning to take on substantial persuasive weight—with a role not unlike de facto voluntary standards—and they are having an effect. Over the past year the European Union, Ireland, Korea, Romania, and Russia have implemented legislative or regulatory changes to conform to certain recommended practices. Brazil has announced the consideration of legislative changes. Mexico and other jurisdictions have implemented internal process reforms.6 The recommended practices are still only skeletal, and more work is needed to put meat on the bones through greater specification and continued implementation. But as to procedural convergence in the merger field, it appears that the world has turned a corner.

Substantive convergence remains a greater challenge. For twenty-two years the U.S. Merger Guidelines have offered something of a template for substantive merger analysis, and they have bred success in at least one respect—there has been substantial diffusion of the construct of the “hypothetical monopolist” as a way to think about markets and mergers.7 As to other details of substantive analysis, though, we have seen little material convergence. If anything, the trend is the other way. New, discordant guidelines have been issued in the past eighteen months in the European Union, France, United Kingdom, and Canada.

The ICN’s Merger Working Group has an Analytical Framework Subgroup, which has collected and analyzed merger standards from jurisdictions around the globe.8 At least twenty-six jurisdictions now have merger

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5 See http://www.internationalcompetitionnetwork.org/recommendedpractices.html. The double-c in the word “recommended” was in the original URL.
8 See ICN MERGER WORKING GROUP: ANALYTICAL FRAMEWORK SUBGROUP, PROJECT ON MERGER GUIDELINES: REPORT FOR THE THIRD ICN ANNUAL CONFERENCE IN SEOUL (Apr.
guidelines, and no set is the same. Many of the differences are substantial. For example, what is the substantive standard—substantial lessening of competition, dominance, substantial impediment to effective competition, or something else?

Is market definition treated as an input into competitive effects analysis or an output of the analysis? To what extent is protection of competitors viewed as necessary to safeguard the competitive operation of markets? What is the implicit social discount rate—how does the jurisdiction think about mergers that will yield great efficiency benefits for two or three years, but with the effect that the newly merged efficient firm can underprice competitors and have the potential for owning the market eight or ten years out? How does the jurisdiction evaluate vertical and conglomerate mergers?

The substantive differences can affect the procedural convergence efforts. Arriving at a common premerger notification form, for example, is not realistic while different jurisdictions are applying different tests and seeking different information. And the substantive differences extend well beyond the merger field. Cartel behavior, for example, is treated as a criminal offense in some jurisdictions, but as a civil infraction in most and as an acceptable course of dealing in others. Bundling, exclusivity, and various forms of hard competition by leading firms are viewed differently in various jurisdictions.

9 Id. at 2.
10 See, e.g., Joint Comments of the ABA Section of Antitrust Law and Section of International Law and Practice on the [European] Commission’s Green Paper on the Review of Council Regulation (EEC) No 4064/89, at 13 (Mar. 29, 2002), available at http://www.abanet.org/antitrust/reports2002. The Green Paper indicated that the EC was considering replacement of its historical dominance test with a substantial lessening of competition (SLC) test. Retention of the dominance test would have had the advantage of preserving the precedential value of the extensive body of cases decided under the test. Movement to an SLC test would have had the advantage of conforming the EC to the general trend in other jurisdictions. The European Council of Ministers elected a third approach and instead adopted a test that asks whether the merger would “significantly impede effective competition . . . in particular as a result of the creation or strengthening of a dominant position.” See EC Ministers Clear Changes to Merger Control Regulation, 85 Antitrust & Trade Reg. Rep. (BNA) 626 (Dec. 5, 2003) (reporting on adoption of new test). The text of the regulation is available at http://europa.eu.int/comm/competition/mergers/legislation/regulation/#implementing.


12 The gulf between the U.S. and the EC on the GE/Honeywell merger can probably best be understood in these terms.

Why are we not making faster progress? The impediments seem to consist of several related factors:

• *Proliferation of Competition Regimes.* The number of jurisdictions with competition laws and enforcement agencies has increased steadily, with especially pronounced growth since about 1990. The skill sets, sophistication, and cultural and economic environments of the agencies vary widely. As modern antitrust doctrine reminds us, coordinated interaction becomes more difficult as the number of participants and the disparities among participants increase.

• *Assertion of Sovereignty.* Virtually every jurisdiction insists upon recognition of its sovereignty. While comity principles may lead a jurisdiction to refrain for asserting powers in a particular case, those principles are clearly viewed as subordinate.

• *Assertion of Extraterritoriality.* After decades of resistance to the position of the U.S. courts, much of the world has now come around to embracing the extraterritorial application of their respective domestic competition laws.14 The legality of conduct is now widely assessed not by reference to the situs of the conduct, but rather by reference to the situs of the effect; and conduct having effects in multiple jurisdictions is tested against each of the jurisdictions’ laws.

• *Lack of Effective Coordinating Mechanisms.* The world has yet to develop institutional mechanisms that effectively achieve coordination and convergence among the many jurisdictions. This issue will be discussed in greater detail in Part II below.

This four-factored broth has a number of corrosive consequences. The most widely recognized is the imposition of costs, delays, and other burdens on the business community.15 Even more troubling, although less often addressed, may be the creation of externalities, which are also discussed in Part II.

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14 As to the U.S. position on extraterritoriality, see 2 ABA Section of Antitrust Law, Antitrust Law Developments 1115–32 (5th ed. 2002). As to foreign resistance to that position, see, e.g., id. at 1186–87 (blocking statutes limiting discovery), 1208–09 (reluctance to enforce U.S. judgments).

II. THE TENSION BETWEEN SOVEREIGNTY AND CONVERGENCE

A. In General

Where different jurisdictions have differing or inconsistent practices, what is the appropriate course to follow under ICN principles or within the ICN? The first ICN principle is a recognition of sovereignty—“Jurisdictions are sovereign with respect to the application of their own laws to mergers.” The seventh ICN principle is an exhortation for convergence—“Jurisdictions should seek convergence of merger review processes toward agreed best practices.” The relative placement of the two principles and their difference in tone probably is not accidental.

ICN is a voluntary organization, and compliance with or adoption of its recommendations is strictly at the option of the individual jurisdiction. The recommendations are beginning to receive recognition akin to international norms, such that jurisdictions that are out of line may feel moral suasion to conform. But neither the ICN nor any other body has a mechanism to compel convergence.

This is not necessarily bad. Even with recommendations that lack any enforcement power, ICN drafters face substantial difficulty in achieving consensus. While some of the recommended practices clearly advocate particular preferences, many are drafted in a manner that allows numerous systems to claim compliance, and some recognize the legitimacy of practices that would seem clearly suboptimal. As earlier recommendations take on a greater persuasive power and as new topics delve into practices as to which there is less global consensus, the drafting has become less sharp and more ambiguous. The stronger the force behind the recommendations, the greater the difficulty that the ICN will face in expressing positions with teeth.

Still, one must wonder whether some rebalancing of sovereignty and convergence objectives might not be warranted. Commentators have identified several mechanisms that deserve consideration.

B. A Taxonomy of Possible Convergence Mechanisms

According to one thoughtful commentary, the development of “protocols of cooperation” should be viewed as “the main problem raised by
globalization.”¹⁸ As Frédéric Jenny of the French competition authority recognized in a discussion addressing merger considerations:

   it is understandable that competition enforcers (for example in the context of the ICN) focus primarily on cooperation on trans-national mergers. Indeed, this type of transaction raises the most crucial problems for competition authorities in terms of operational sovereignty since there is a risk that, when several competition authorities examine the same transaction, they will arrive at contradictory decisions for entirely legitimate reasons (for example, because market conditions are not the same in different countries). In such cases, some of these decisions (for example to allow a merger) may become irrelevant because of contradictory decisions taken by competition agencies in other countries (such as to prohibit a merger). Competition officials are also extremely interested in convergence of national laws (particularly in the merger area) as a way to reduce the frequency of possible conflicts when several national authorities examine the same transaction.¹⁹

Jenny pointed to the “externality problems raised by the gap between the limited geographical area of jurisdiction of national competition authorities and the internationalization of markets.”²⁰ One might alternatively assert that “externality problems,” which are undisputed, have arisen from the broad assertion of jurisdiction of national competition authorities in internationalized markets.²¹ And one might observe that contradictory decisions are sometimes reached for reasons that appear less benign than merely differing market conditions.²²

Regardless of one’s characterization of the problem, a remedy would serve the public interest. Jenny and others have identified four possible solutions.

1. Reliance on Major Systems

   Borrowed from the work of Harry First,²³ the first approach would rely on major systems—most likely the United States and the European

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¹⁸ Frédéric Jenny, *Competition, Trade and Development Before and After Cancun,* in 2003 Fordham Corp. L. Inst. 631, 640 (Barry Hawk ed., 2004). The analysis was presented in the wake of the collapse of World Trade Organization negotiations at Cancun in September 2003, negotiations that included the possibility of adding a competition chapter within the WTO framework, and its focus (like the WTO’s) was principally on cartel issues. The analysis also applies to dominance and merger issues.

²⁰ Id. at 640.

²¹ See *supra* notes 14–15 and accompanying text.

²² See *supra* note 13. The dueling press releases cited there arise in the dominance context and reflect differing legal standards and policy judgments applied to a common set of facts.

Union—to police international anticompetitive practices. Under this approach, the enforcers with the greatest experience and resources would act unilaterally, but their actions would have the collateral benefit of protecting less developed jurisdictions. As both Jenny and First note, however, the approach would have important shortcomings. The first is that anticompetitive practices that affect other countries do not always affect the United States or the EU, precisely because the perpetrators avoid wrongdoing in jurisdictions with strict enforcement and focus their adverse efforts elsewhere. A second shortcoming is that the economies in the United States and EU are more fully developed and may support a larger number of competitors than less developed regions; a unilateral focus on the United States and EU may simply miss adverse effects elsewhere. A third shortcoming is that the jurisdiction of courts and enforcement agencies in the major systems may not be available to victims in other regions, thus depriving those victims of any recourse.

2. Voluntary Bilateral or Regional Cooperation

A second approach would rely on voluntary cooperation between competition authorities on a bilateral or regional basis. Examples of bilateral agreements include those between Canada and Chile and between Australia and Papua New Guinea. Examples of regional agreements include Mercosur, the Andean Community, Caricom, and Comesa. Jenny identifies several shortcomings in this approach, too. First, with only a handful of exceptions (such as those in the text here), governments generally enter into bilateral agreements only with other governments of a similar level of economic development. It therefore is rare to find bilateral agreements that span developed and developing countries. Second, bilateral and regional agreements generally provide for cooperation only when the parties have a mutual interest, and that condition is often unsatisfied. Third, neither bilateral nor regional agreements adequately address anticompetitive practices that are broadly transnational. Fourth, and most practically, the combinatorials of bilateral agreements are simply staggering—eighty jurisdictions would need to negotiate and implement more than 1500 bilateral agreements to achieve complete coverage.

3. Creation of Supranational Authority

The third approach would involve the creation of a supranational enforcement agency or the adoption of supranational law or both. Although this approach seems to have worked well in the context of the

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24 Jenny, supra note 18, at 643. Bilateral agreements to which the United States is a party are collected in Antitrust Law Developments, supra note 14, at 1192–93.
EU, it does not appear to be politically realistic as a comprehensive solution. The sharply differing levels of economic development around the world probably would prevent the attainment of consensus on particular practices, and the abandonment of national sovereignty implied by such an approach would be unacceptable to many jurisdictions (almost certainly including the United States).  

4. Multilateral Agreement

The fourth approach would involve a multilateral agreement on competition. The proposed WTO agreement that failed at Cancun would have been one form of such an agreement, although other forums exist. Jenny clearly laments the outcome at Cancun and regards a WTO-based approach as having offered substantial promise. Others remain skeptical largely for fear that an initially limited multilateral agreement (particularly one administered by a powerful secretariat) could evolve into a supranational authority, could metastasize into doctrinal fields that were initially beyond its scope, and could expose sound law enforcement practices to potential political considerations.

The ICN, too, is a forum for multilateral agreement. Largely because it lacks a secretariat and a dispute settlement mechanism and an institutional history, it seems less fearsome. As a strictly empirical matter, it has had great success in achieving multilateral consensus in a time frame that (from the perspective of multijurisdictional diplomacy) must be viewed as a very short. Until another, better vehicle can be identified, it is probably the best hope for convergence.

III. THE ROLE OF THE PRIVATE SECTOR

A. In General

As policy makers from various jurisdictions meet to work out their many differences and thereby achieve convergence, one overhanging set of institutional issues is whether, to what degree, and by what means the private sector will be permitted to participate. Most multijurisdictional organizations provide for participation by so-called Non-Governmental Advisers (NGAs) or representatives of Non-Governmental Organizations (NGOs). The role to be accorded NGAs and NGOs can be a source of contention.

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25 First, supra note 23, rejects reliance on a supranational authority for the same reason.
26 Jenny, supra note 18, at 643–47.
All of the organizations through which competition agencies seek or might seek multilateral agreement recognize private sector participants, although through different models. The Organisation for Economic Co-Operation and Development (OECD) provides seats at the table (literally) for certain private sector groups, most notably the Business and Industry Advisory Committee (BIAC), subject to the frequently exercised right to exclude NGO representatives from the room. The WTO is more limited. Other than through receipt of amicus briefs from the private sector in dispute settlement matters, the WTO limits participation in formal sessions to representatives of member governments, observer governments, and the secretariat; NGOs generally participate by conducting advocacy and discussion with their respective governments.

The ICN was designed to be more open, although still subject to significant limits. Actual membership is “open to any national or multinational competition authority entrusted with the enforcement of antitrust laws.”

Broader participation is contemplated, however:

The ICN closely cooperates with and seeks input from existing international organisations (e.g., OECD, WTO, UNCTAD), associations and practitioners of antitrust law and/or economics, industry and consumer associations and members of the academic community. Participation of such non-governmental advisors enriches considerably the quality of the ICN’s discussions and work products.

NGAs participate to varying degrees in the working groups through which the ICN operates. The recommended practices discussed earlier are derived in substantial part from earlier recommendations prepared and circulated by BIAC and the International Chamber of Commerce (ICC). Numerous NGAs have regularly been consulted on the recommendations’ content, and a smaller group of NGAs has been instrumental in the drafting. Ultimate say, though, with respect to ICN principles, practices, recommendations, and other outputs is limited to member agencies. Membership on the steering committee, leadership roles in working groups, and the designation of projects are also limited to agency representatives. The agencies have also discussed whether the subject matter of certain projects is inherently unsuitable to NGA participation—the investigative methods subgroup generally involves NGAs only on an exception basis, and some agencies have advocated limiting the participation of NGAs in the new working group on cartels.

B. Three Models of NGA Participation

1. The Big Tent

Some in the private sector have criticized the ICN approach (and presumptively the WTO and OECD approaches) as insufficiently inclusive. According to this view, global convergence would be facilitated if one organization operated as a big tent in which all stakeholders—governmental and non-governmental alike—participated as co-equals. Organizational leadership would be shared, debates and discussions would be open, and the consensus that emerged would reflect the views of public and private sectors.

An organization with such a structure might have a useful role in promoting convergence. As a substitute for the ICN, however, or as a proposal for reposturing the ICN, this model has two important deficiencies. The first is that the agencies need their own clubhouse. Agencies from many jurisdictions have substantial distrust of the private sector, and they are reluctant to speak candidly if NGAs will overhear. The second deficiency relates to credibility of the organization’s outputs. One of the primary reasons for the success of the ICN merger recommendations in influencing the practices of various agencies around the world is the perception that the recommendations are standards promulgated by governments for governments. If the recommendations were perceived as having been formulated by the private sector as a co-equal, they would have substantially less persuasive force. The ICN recommendations bear substantial similarity to the earlier BIAC/ICC recommendations to the OECD, but the latter set never gained comparable traction.

2. The Golden Doorman

A second model of NGA participation involves the use of a gatekeeper who has access to the clubhouse and through whom all other private sector participants must pass. This is the OECD’s approach, with BIAC serving as gatekeeper. Since there is a single spokesman, the private-sector contribution to the discussion is offered in one voice, without the chaos or cacophony or inconsistent positions that might arise if NGAs spoke through multiple channels.

And that, of course, is precisely the deficiency in the model as well. Policy issues can be complex, and various private sector groups often have differing views. Channeling private sector input through a single gatekeeper filters out much of the nuance and deprives the policy makers of the benefits of debate. It can also be affirmatively misleading if the chosen gatekeeper holds views that are unrepresentative. In light of these deficiencies, the gatekeeper model was quite deliberately eschewed...
for the ICN by its founding agencies—“Diversity in private sector participation, like diversity in our membership, is crucial in allowing a wide range of views and experiences to be shared and taken into account when developing ICN recommendations.”

3. The Ladder

A third model looks like a ladder in that it involves two sets of coordination relationships with cross-links—governments coordinate with other governments, NGOs coordinate with one another, and NGOs coordinate with those governments with which they have particular relationships. This is largely the model in force at the WTO—when U.S. private-sector groups wanted to express views for consideration in connection with the Cancun negotiations, they presented those views to the U.S. Trade Representative (with copies to other U.S. agencies), rather than to the WTO or its secretariat.

As a practical matter, this model is probably the most accurate depiction of the actual workings of the ICN. Lacking a secretariat or street address, the ICN has no central body to which to send comments. NGOs can feed into working groups, and they do. But most of the coordination is government-to-government and NGO-to-NGO, with individual NGOs following up with agency personnel with whom they have a working relationship. If an NGO had wished to pursue a position for consideration in Seoul, for example, waiting until the Annual Meeting would have been too late. An NGO can try to contribute through the chair of a working group, but the more likely means for success are (a) to advocate the position before one or more interested agencies and (b) to contact other NGOs to advocate that they do likewise.

This model has obvious inefficiencies. To function properly it requires a lot of coordination and numerous, possibly redundant communications. From the private-sector perspective the biggest deficiency is that important NGO-to-NGO links have not yet been established—there is no central clubhouse (such as what the ICN affords the government side), and most NGOs simply don’t know who to call other than in a handful of leading jurisdictions and in their own. (The ABA Section of Antitrust Law’s International Officer post, for example, is only three

31 See, e.g., ABA Doha Comments, supra note 27.
32 As a virtual organization, the ICN can be contacted through its Web site. Communications directed there will be transmitted to the appropriate working group or member agency.
years old, and most foreign bars and industry groups do not have a comparable slot.) A further deficiency is that competition law is so new in many jurisdictions that no private-sector NGO with interest and competence in the field has yet emerged. Thus, the cross-link from NGO to government in those jurisdictions is non-existent, limiting the opportunity for advocacy on which the model is premised.

C. Suggested Core Objectives for NGO Advocacy

As the private sector considers steps it might take to reduce multijurisdictional inconsistencies and foster convergence, several big-picture objectives stand out. Other commentators might supplement this list or shift the priorities, but the following seem to qualify as core objectives:

Identifying and acknowledging the sources of multijurisdictional inconsistencies. This objective begins with a recognition that current difficulties arise from the combination of proliferation of competition law regimes, broad assertions of extraterritoriality, and the absence of reliable coordinating mechanisms (the extreme version of which would be a supranational authority). If reduction of multijurisdictional inconsistencies is truly a goal, possible steps that should be considered include some strong medicine that directly addresses the elements of that combination:

• Limiting further “proliferation” (and associated implications for capacity-building),
• Limiting and reducing assertions of extraterritoriality,
• Identifying possible coordinating mechanisms, and
• Reducing externalities from enforcement activities.

Other issues will emerge in connection with analysis of this objective. One prominent example is how to balance or offset differing effects in different jurisdictions.

Encouraging the spread of “free markets” and enhancing the role of the “private sector.” This objective reflects a judgment that a successful competition regime requires institutions that support free markets and a vibrant private sector. Too many jurisdictions endorse competition in concept, but remain suspicious of free markets and distrustful of the private sector; and too many perpetuate institutions that impose excessive transactions costs and undue regulation. Possible steps in furtherance of the objective include the following:

• Channeling capacity-building (e.g., by asking capacity to do what?),
• Encouraging the development of private-sector institutions,
Advocating a reduced role for regulatory bodies and greater consideration of private-sector views.\textsuperscript{33}

Refocusing the rhetoric. This objective seeks to shift the focus of multijurisdictional debate. In major multilateral organizations in which the agencies participate, discussion focuses principally on the potential adverse effects of market power and of bad acts by the business community. One consequence is a policy bias towards rules and recommendations that yield excessive burden and false positives. The convergence effort—and the particulars of the multijurisdictional standards that emerge from that effort—would be enhanced if the rhetoric were also to take adequate account of the following considerations:

- Administrability,
- Externalities from enforcement,
- Risk of exposure to rent-seeking (and even capture),\textsuperscript{34}
- Effects on capital markets and investment decisions,
- Role of private sector in free markets.

Developing and enhancing relationships among private sector NGOs. This objective reflects the advocacy model described above in the discussion of the “Ladder.” The model is probably the best reflection of actual practices in most multijurisdictional policy contexts. The pieces of the model relating to the private sector are subverted by the failure to coordinate among NGOs and the absence of NGOs in some jurisdictions. Possible steps in furtherance of this objective include the following:

- Encouraging the development of private bar competence in less developed jurisdictions,
- Cataloguing and enhancing existing relationships among private sector groups,
- Establishing new relationships among private-sector groups, and

\textsuperscript{33} Jurisdictions that are developing capacity would benefit from full consideration of the views of Hernando de Soto, see \textit{The Mystery of Capital} (2000); \textit{The Other Path} (1990), and similar commentators. See also infra note 34.

\textsuperscript{34} Through its Regulated Sectors Working Group and the advocacy activities of its Capacity Building Working Group, the ICN has identified the anticompetitive consequences that often flow from regulatory capture and rent-seeking. The chairman of Germany’s competition enforcement agency offered particularly thoughtful remarks on this issue at a program that immediately preceded the ICN’s third annual conference. See Dr. Ulf Böge, State-Imposed Restrictions of Competition and Competition Advocacy, Remarks Before Opening Session of the 2004 Seoul Competition Forum (Apr. 20, 2004).
• Considering the formation of a “virtual private network” to mirror the ICN.

IV. CONCLUSION

Few nations are prepared to surrender their sovereignty to any multilateral organization currently or prospectively operating in the competition field. Even with that limitation, the ICN has made substantial progress in establishing credibility as a forum for setting de facto voluntary standards to govern merger notification and procedures. The standards are often general and only minimally prescriptive, and the culture of the organization is such that its leaders would avoid some of the key terms I have used here, such as “govern” and “standards.” As a mechanism for encouraging multijurisdictional convergence, though, nothing better currently exists, and nothing better is on the horizon.

The private sector has an important role to play in the convergence effort. The institutional mechanisms defining that role are not yet fully specified. If convergence towards sensible policies is to occur, the major Non-Governmental Organizations need to do more in coordinating their advocacy, fostering private sector groups in jurisdictions with emerging competition policies, and refocusing policy considerations on certain factors that are not yet given adequate weight.