

**CONFLICT, COOPERATION & CONVERGENCE IN INTERNATIONAL COMPETITION**

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I left the Federal Trade Commission in September of 1990. Conflict characterized much of the interaction among national competition authorities. Cooperation was the new, but largely unrealized, objective. Convergence would have meant precious little to anyone in the antitrust enforcement community.

Now, some fourteen years later, conflict among national competition authorities is rare. Cooperation is the order of the day. Convergence is not only in everyone's lexicon, but is taking place. In a relatively short period of time the international competition community has changed significantly. As we pause to reflect on the history of the Federal Trade Commission, I would like to review these three themes and offer thoughts on what the competition community might expect fourteen years hence.<sup>1</sup>

I. From the Beginning to 1990.

The 1986 Leeds Castle Conference well illustrates the conflict that characterized relations among competition authorities in the late 1980's. That May a meeting to discuss competition issues between the United States and the United Kingdom was held at Leeds Castle, Kent. Although such conferences today are too numerous to list, it was an unusual

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<sup>1</sup> See address of Ass't Attorney Gen. R. H. Pate, "Antitrust in a Transatlantic Context—From the Cicada's Perspective," Antitrust in a Transatlantic Context Conf., Brussels, June 7, 2004 for a view *17 years* hence (the cicada's life-cycle).

event at the time.<sup>2</sup> The United Kingdom was to be represented by the senior officials of the Office of Fair Trading (“OFT”) and others.<sup>3</sup> Then timely issues of extraterritoriality, “blocking” legislation, “claw-back” statutes,<sup>4</sup> and the like would probably be discussed. As the conference approached, the OFT was instructed by the Department of Trade & Industry (“DTI”) to stand-down. Senior representatives of the DTI rather than the OFT would represent the United Kingdom. As the *dramatis personae* changed, we learned that the OFT was not trusted by its ministry to adequately represent U.K. interests.<sup>5</sup> Evidently it was feared that the OFT officials would not “stand-up” to the American trustbusters on the issues of the day. Today, this story sounds silly. The U.K. is a strong member of the international competition community, and has

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<sup>2</sup> International competition policy was a fledgling subject. Even within the academy, it received little attention. Professors Barry Hawk at Fordham University and Eleanor Fox at New York University were two pioneers, and jointly dominated the university turf for a good many years. Wilbur Fugate and Kingman Brewster were two of the more prominent writers, but very little shelf-space was needed to house this library. Cf. W. Fugate, Foreign Commerce & the Antitrust Laws (1958), and K. Brewster, Antitrust & American Business Abroad (1976).

<sup>3</sup> The United States was represented by the Assistant Attorney General Douglas Ginsburg, the Legal Advisor to the Department of State Judge Abraham Sofaer and me in my capacity as Acting Chairman, together with agency staff and a few representatives from the private sector.

<sup>4</sup> Dean Robert Pitofsky has described and provided examples of such legislation:

Blocking statutes prevent or limit the ability of United States litigants to obtain information, witnesses, or documents located in countries with such statutes. *See, e.g.*, the United Kingdom's Protection of Trading Interests Act, 1980, ch. 11 (Eng.), *amended by* Civil Jurisdiction and Judgments Act, 1982, ch. 27, *and* Statute Law (Repeals) Act, 1993, ch. 50, Sch. 1, pt. XIV; Canada's Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 3 (1984) (Can.), *as amended by* Department of External Affairs Act, 1995, ch. 5, 1994-1995 S.C.; France's Law concerning the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information Law No. 80-538, 1980 J.O. 1799 (July 16, 1980); Australia's Foreign Proceedings (Excess of Jurisdiction) Act, No. 3 (1984) (Austl.), *as amended by* Foreign Judgments Act, No. 112 (1991); and South Africa's Protection of Business Act, No. 99, § 1 (1978) (S. Afr.), *as amended by* Protection of Business Act Amendment, No. 114 (1979), *and* Protection of Business Act Amendment, No. 71 (1984), *and* Protection of Business Act Amendment, No. 87 (1987).

Claw back statutes authorize citizens to seek and recover extra-compensatory damages paid to plaintiffs that have prevailed in United States litigation. *See, e.g.*, the United Kingdom's Protection of Trading Interests Act, 1980, ch. 11, §§ 5-6 (Eng.) *as amended*; Canada's Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, §§ 8-9 (1984) (Can.) *as amended*; and Australia's Foreign Proceedings (Excess of Jurisdiction) Act, No. 3, cl. 10 (1984) (Austl.) *as amended*.

Address of former FTC Chairman Robert Pitofsky, “Competition Policy in a Global Economy—Today And Tomorrow,” European Inst. 8<sup>th</sup> Annual Transatlantic Seminar on Trade & Investment, Washington, Nov. 4, 1998.

<sup>5</sup> Although OFT Director General Sir Gordon Borrie (now Lord Borrie) and OFT Director of Enforcement Martin Howe were antitrust believers, DTI had yet to be converted to the new faith.

a close working relationship with the U.S. authorities.<sup>6</sup> Times were different, and conflict was commonplace.<sup>7</sup>

There was little cooperation among national competition authorities. I cannot identify a single important case where there was serious multinational cooperation during my seven-year term as Commissioner.<sup>8</sup> But I can recall instances where there was a significant lack of cooperation—sometimes on the part of the U.S. authorities.<sup>9</sup>

As for convergence, I doubt that I had heard—or much less used—the term during my tenure in office. Indeed, it was not until 1990 that anyone began to take the idea very seriously. Conflict—yes; cooperation—no; convergence—not yet an idea.

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<sup>6</sup> After leaving the Commission I represented parties that were the subjects of U.S. criminal antitrust investigations. Whenever it would appear that the U.S. authorities wanted to investigate within the U.K., DTI could be counted on to lend a sympathetic ear to intimations that the American trustbusters were trespassing on U.K. sovereignty. By mid-1990's, times had changed. When I then turned to DTI in the hope that it would erect roadblocks, I found no sympathy.

<sup>7</sup> See Address by former FTC Chairman Timothy J. Muris, "Competition Agencies in a Market-Based Global Economy," European Foreign Affairs Review, Brussels, July 23, 2002 ("Cross-border competition issues mainly involved using blocking statutes and claw-back laws to blunt the reach of U.S. antitrust enforcement.")

The Laker Grand Jury and the Uranium Cases (*In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992 (10<sup>th</sup> Cir., 1977); *In re Uranium Antitrust Litig.*, 617 F.2d 1247 (7<sup>th</sup> Cir. 1980); *In re Uranium Antitrust Litig.*, 489 F.Supp. 1138 (N.D. Ill. 1979)) are just two examples of such conflict. Both presented issues of international conflict occasioned by public and private enforcement of U.S. antitrust laws.

<sup>8</sup> Charles Stark and Edward Glynn who headed the Antitrust Division's Foreign Commerce Section and the FTC's International Antitrust Division respectively at that time could probably recount instances of cooperation, some of it perhaps significant. But there was nothing compared with what routinely takes place today.

The Organization for Economic Cooperation & Development ("OECD") Competition Law & Policy Committee, together with its working parties, met in Paris several times a year. It accomplished some things, but its nickname "Organization for Excellent Cocktails & Dinners" was not without a ring of truth. In fairness there were very few countries that had meaningful competition regimes, and there was not really that much to say or do. The European Union did not even routinely attend, but that may say as much about the activism of the Commission as for the relevance of the OECD.

<sup>9</sup> *In re Institute Merieux, S.A.*, 113 F.T.C. 742 (1990), is an example of the latter. The case involved a merger of Canadian and French firms, neither of which had productive assets within the United States. Employing the effects test of jurisdiction and an actual potential competition merger theory, the FTC required the divestiture of a Canadian rabies vaccination business without even notifying—much less consulting with—the Canadian authorities. The Canadians were justifiably furious. It is inconceivable that such an event would occur today.

## II. 1990-2004

Change was in the air as I completed my term in 1990. There were major transitions associated with the demise of the Berlin Wall. The world's competition community faced important change too. I think I am safe in saying that my *international* experience at the FTC was not significantly different from that of my predecessors. My successors, on the other hand, have had a very different experience.

### A. A Reduction in Conflict.

One can attribute conflict to a variety of sources. U.S. invocation of the “effects test”<sup>10</sup> in the exercise of extraterritorial jurisdiction was certainly important. Very vocal opposition to the “effects” test was voiced from Sydney to Ottawa to London—and places in between. Foreign governments adopted laws and other policies designed to frustrate U.S. efforts to assert extraterritorial jurisdiction. Yet extraterritoriality was a bit of a whipping boy. The U.S. continues today to invoke the “effects test” to support its extraterritorial jurisdiction, and yet conflict has been dramatically reduced. The real source of conflict was that the American faith in antitrust was not shared. The exercise of extraterritorial jurisdiction by the United States simply highlighted the difference in attitudes. Today, however, competition policy is no longer an American commodity.<sup>11</sup> With the emergence of transnational antitrust, opposition to American

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<sup>10</sup> Discussion of extraterritoriality is beyond the scope of this article. For a summary discussion of the subject, see ABA Antitrust Section, 2 Antitrust Law Developments 115-30 (5<sup>th</sup> ed. 2002). *See also* Weintraub, *Globalization's Effect on Antitrust Law*, 34 N.E.L.Rev. 27 (1999).

<sup>11</sup> Former Assistant Attorney General Joel I. Klein put it this way:

Until the 1990's, a not infrequent reaction of foreign governments to news that the Antitrust Division was investigating the activities of international cartels that had extracted money from U.S. consumers' and businesses' pockets was to leap to the defense of “their” firms, accuse the U.S. of “extraterritoriality” tendencies in defending our consumers, threaten to invoke blocking statutes, and express astonishment that any country should even want to have pro-competitive laws, much less enforce them. Happily, the global environment in which we work today is radically different.

Address of former Ass't Atty. Gen. Joel Klein, “The Antitrust Division's International Anti-Cartel Enforcement Program,” ABA Antitrust Section, Washington, April 6, 2000. *See also* Fox, *Antitrust & Regulatory Federalism*:

extraterritorial jurisdiction has waned. Indeed, a large number of jurisdictions employ what looks very similar to the effects test.<sup>12</sup>

The emergence of an international enforcement community has accompanied acceptance of the need for competition policy. The OECD, together with meetings like the annual Fordham Corporate Law Institute, provided venues for interaction among members of this community. Put simply, the authorities know each other better today; they talk frequently. A shared belief in the importance of antitrust and the attendant relationships among enforcers have significantly diminished conflict.

Skeptics will focus on episodic conflicts between authorities.<sup>13</sup> Truth be told, conflict will never completely disappear. The United States itself has achieved a broad-based consensus on substantive antitrust,<sup>14</sup> yet U.S. courts often find themselves in disagreement when interpreting the very same statutory language.<sup>15</sup> The point is that conflict, while not eliminated, is much less common.

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*Races Up, Down & Sideways*, 75 *N.Y.U.L.Rev.* 101, 103 (2000) [hereinafter *Fox*] (“For many years, United States antitrust law... was the only significantly enforced competition law in the world. .... The adoption of competition laws in now fashionable throughout the world.”)

<sup>12</sup> *Fox* 105, citing Restatement (Third) of the Foreign Relations Law of the United States § 415 reporters’ note 9 (1987). The European Commission, for example, has embraced the “effects” test and Advocates General have supported that view. See R. Whish, *Competition Law* 436 (5<sup>th</sup> ed. 2003), citing XIth Report on Competition Policy (1981), the Commission’s decision in *Wood Pulp* OJ [1981] L 85/1 3 CMLR 474, and *Aluminum Products* OJ [1985] L 92/1, [1987] 3 CMLR 813 and the views of the Advocates General in *Dyestuffs*, Cases 48/69 etc. [1972] ECR 619, pp. 687-94, [1972] CMLR 557, pp. 593-609; and *Wood Pulp*, Cases 114/85 etc. *A. Ahlström Oy v. Commission* [1988] ECR 5193, p. 5227, [1988] 4 CMLR 901, p. 932. To be sure the Court of Justice has been able to sustain the application of Community jurisdiction without the need to explicitly embrace the “effects” test. Cf. D. Goyder, *EC Competition Law* 501 (4<sup>th</sup> ed. 2003).

<sup>13</sup> Differences between the U.S. and Commission authorities in the Boeing/McDonnell Douglas, GE/Honeywell and Microsoft matters are often cited examples.

For a study of divergent treatment, see ten Kate & Neils, *Antitrust in the U.S. and the E.U.: Converging or Diverging Paths*, 49 *Antitrust Bull.* 1 (2004), for a discussion of the litigation involving alleged abuse by British Airways of its competitor Virgin Atlantic Airways.

<sup>14</sup> This was not always so. See generally Calvani & Sibarium, *Antitrust Today: Maturity or Decline?*, 35 *Antitrust Bull.* 123 (1990), reprinted in 2 *The Antitrust Impulse* 605 (Kovaleff ed. 1994).

<sup>15</sup> Compare *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 315 F.3d 338 (D.C.Cir. 2003), abrogated in 124 S.Ct. 2359 (2004), on remand sub nom., *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2004 U.S. App. LEXIS 13431 (D.C. Ct. App., filed June 21, 2004), with *Den Norske Stat Oljeselskap v. HeereMac*, 241 F.3d 420 (5<sup>th</sup> Cir. 2001), and *Kruman v. Christie’s Int’l plc*, 284 F.3d 384 (2d Cir. 2002).

B. Nascent Cooperation Flowers.

Cooperation is very common—so common that the subject will be treated only briefly here. In a U.S. context, it is embodied in formal instruments including “soft” cooperation agreements,<sup>16</sup> but also mutual legal assistance treaties<sup>17</sup> and the International Antitrust Enforcement Assistance Act.<sup>18</sup> More importantly, cooperation has become part of the everyday fabric of national competition authorities’ *modi operandi*.

These developments were reflected in my own practice. Prior to coming to Ireland in 2002, it had become routine for me to sign confidentiality waivers permitting various authorities to talk among themselves and to work together when analyzing a merger. I recall providing witnesses for joint examination by U.S., Canadian and European case officers together during one of my last merger matters in private practice. Today, a large number of mergers under review by the Competition Authority in Ireland involve cooperation with one or more other competition authorities. Such cooperation is now the norm.

International cartel enforcement is so common that countless continuing legal education programmes have been devoted to educating counsel about this new environment.<sup>19</sup> Assistant Attorney General R. Hewitt Pate recently observed: “Now, we routinely share information and coordinate investigative strategies in our international cartel investigations....”<sup>20</sup> The combined raid by over 200 hundred officers of United States, Japanese, Canadian and European

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<sup>16</sup> These would include agreements with Germany, Australia, the European Union, Canada, Israel, Japan, Brazil and Mexico. These agreements are “executive” agreements, which, unlike treaties, do not supplant domestic legislation. *See generally* ABA Antitrust Section, *supra* note 10 at 1191-93.

Importantly, there are many such agreements between and among other States that do not involve the United States. The E.C., for example, has numerous such agreements with other countries. *See generally* First, Evolving Toward What? The Development of International Antitrust 32 in The Future of Transnational Antitrust—From Comparative to Common Competition Law 23 (Drexel ed. 2003).

<sup>17</sup> These treaties provide for cooperation in criminal investigations between the United States and foreign governments.

<sup>18</sup> 15 U.S.C. § 6201-6212 (2000). This statute permits the agencies to share confidential information and to use their investigative powers in aid of foreign competition authorities. The only existing agreement is with Australia. *See generally* ABA Antitrust Section, *supra* note 10, at 1194-95.

<sup>19</sup> *See, e.g.*, ABA Advanced International Cartel Workshop, New York, Feb. 15-16, 2001.

<sup>20</sup> Pate, *supra* note 1.

authorities in eight countries at premises around the world on 12 February 2003 is an excellent example of the current state of cooperation.<sup>21</sup>

### C. The Genesis of Convergence.

Near the end of my term of office in 1990 the Bundeskartellamt hosted its semi-annual Cartel Conference in Berlin. Sir Leon Brittan (now Lord Brittan) took the occasion to suggest that the time was ripe to reconsider international antitrust convergence.<sup>22</sup> A moribund subject since the failure of the Havana Conference years earlier,<sup>23</sup> Lord Brittan initiated a discussion that became the subject of countless program sessions since.<sup>24</sup>

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<sup>21</sup> See Egge, Smith & Wright, "DEW Line," *The Deal* (July 3, 2003).

<sup>22</sup> Remarks of Lord Brittan, Cartel Conference, Berlin, June 19, 1990.

<sup>23</sup> See Final Act of the U.N. Conf. On Trade & Employment, Havana Charter For an International Trade Organization (1948). The conference had sought to establish an international organization that would address issues of multilateral trade. See generally Bilal & Olarreaga, *Competition Policy & the WTO: Is There a Need for a Multilateral Agreement?* 6 (Working Paper 98/W/02 European Inst. Pub. Admn.): "the Havana Charter...included a Restrictive Business Practices chapter...whose objective was to prevent business practices that restrain competition and adversely affect international trade. However the Havana Charter never entered into force due to the refusal by the US Congress to ratify it, probably of its fear of losing some of its sovereignty." [Citation omitted.] See generally American Bar Assoc. Report on the Internationalization of Competition Law Rules: Coordination & Convergence, available at <http://www.abanet.org/antitrust/convreport.html>.

<sup>24</sup> At about the same time, countries without antitrust regimes were beginning to show an interest. The OECD Competition Law & Policy Committee under the leadership of its former chairman Dr. Kurt Stockmann of the Bundeskartellamt hosted the first Global Forum meeting in Paris and invited representatives from many developing countries. A large number attended. As an outgrowth of that meeting Martin Howe of the U.K. and I, together with the representatives of other OECD countries provided assistance to Kenya in the establishment of its competition agency. On an official visit to the former Soviet Union in 1989 I met with several representatives of the Soviet government who were interested in talking about antitrust. Following my departure from the Commission, I was asked to join Commissioner Deborah Owen and others on a mission to provide technical assistance to Indonesia, which was considering the enactment of antitrust legislation. In the intervening years, there have been countless technical assistance missions, but these were among the very first.

Lord Brittan suggested the WTO as the vehicle,<sup>25</sup> but the idea enjoyed little real progress without the active cooperation of the United States. Such support was not forthcoming. Publicly the U.S. trumpeted the virtues of bi-lateral “soft” convergence. Former Assistant Attorney General Klein summed up the U.S. position in his “If It Ain’t Broke, Don’t Fix It” address to the 1999 Cartel Conference.<sup>26</sup> But there was another unspoken reason for the U.S. position. Unspoken was the U.S. fear that convergence would lead to “populist” antitrust divorced from economic underpinnings. Discussion of “competition” discussions within United Nations Conference on Trade & Development (“UNCTAD”) did not allay the American fears.<sup>27</sup> It had been a long way from the likes of *Von’s Grocery*<sup>28</sup> and *Schwinn*,<sup>29</sup> and there was little interest in returning. Too much was at risk.

Attorney General Janet Reno convened the International Competition Policy Advisory Committee (“ICPAC”) in October of 1997 under the leadership of former Assistant Attorney General James F. Rill and former International Trade Commission Chairman Paula Stern. The Committee’s Final Report highlighted the costs associated with divergent antitrust policies and

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<sup>25</sup> Address by Lord Brittan, “A Framework for International Competition,” Davos, Feb. 3, 1992. Indeed the issue was first seriously discussed in a WTO context. In 1993 a group of academics and competition practitioners (the so-called “Munich Group”) submitted a Draft International Antitrust Code to the GATT that proposed an international competition regime under the WTO. For a discussion of this history, see Jones, *Come the Millennium (Round)? Competing Visions of International Antitrust Policy in the European Union & the United States* in 2001 Fordham Corp. L.Inst. 31,33 (Hawk ed. 2001).

<sup>26</sup> Address of Assistant Attorney General Joel Klein, Cartel Conference, Berlin, May 9, 1999. See also Address of Assistant Attorney General Joel Klein, “A Reality Check on Antitrust Rules in the World Trade Organization, and A Practical Way Forward on International Antitrust,” OECD Conf. on Trade & Competition, Paris, June 30, 1999. Others within the U.S. enforcement community echoed these sentiments. See, e.g., Address of FTC Commissioner Orson Swindle before the 8<sup>th</sup> World Business Dialogue, “Between Competition & Cooperation—Changing Business-to-Business Relations,” Cologne, April 4, 2001.

<sup>27</sup> See generally Shenefield, *Coherence or Confusion: the Future of the Global Antitrust Conversation*, 49 Antitrust Bull. 385, 391 (2004).

<sup>28</sup> United States v. Von’s Grocery Co., 384 U.S. 270 (1966). In this case the Supreme Court sustained a finding that a merger between the third and sixth largest retail grocery chains in the Los Angeles metropolitan area was illegal, where the combined share of the two chains was approximately 7.5%.

<sup>29</sup> United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967). In this case the Supreme Court held that most non-price vertically imposed territorial restraints were *per se* illegal. Subsequently, the Court overruled *Schwinn* in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), and applied the Rule of Reason to such cases.

the need for greater convergence.<sup>30</sup> The U.S. business community, with much to lose from the return to Warren Court era competition policy, seemed among the forefront calling for greater convergence. The Report also recommended “that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy.”<sup>31</sup> Just before leaving office Assistant Attorney General Klein delivered an address, which many read to signal a change in policy had taken place.<sup>32</sup>

The International Competition Network was born October 25, 2001. In its short life it has accomplished much.<sup>33</sup> One of its initial efforts was the identification of “best practices” in the merger process.<sup>34</sup> The fruits of these labours are dramatic.<sup>35</sup> For example, the ICN Merger Working Group recognized the problem of jurisdictions that assert jurisdiction over transactions

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<sup>30</sup> See Final Report, International Competition Policy Advisory Committee (Feb. 2000). See also International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review (Sept. 28, 2002). See generally James, *Perspectives on the International Competition Network*, 4 *ABA Internat’l Antitrust Bull.* at <http://abanet.org/antitrust/committees/international/fallwinter01.pdf>, and Address of Commissioner Konrad von Finckenstein, Q.C., *International Antitrust Cooperation: Bilateralism or Multilateralism?*, American Bar Assoc., May 31, 2001.

There are now over one hundred competition regimes in the world today. Address of J. William Rowley, *Internationalization of Merger Review: Global Solutions Require Both Words and Actions*, CADE O Direito Da Concorrência EM Uma Economia Globalizada, Brasília, Nov. 28, 2002. Almost seventy have pre-merger notification procedures in place. Today there are sixty-eight jurisdictions with merger notification requirements. White & Case, *Worldwide Antitrust Merger Notification Requirements* (2003). I have written elsewhere about the problems associated with the spread of antitrust and the costs that imposes.

<sup>31</sup> Final Report, International Competition Policy Advisory Committee (Feb. 2000) [emphasis in the original].

<sup>32</sup> See Address by former Ass’t Atty Gen. Joel I. Klein, *Time for A Global Competition Initiative?*, EC Merger Control 10<sup>th</sup> Anniv. Conf., Brussels, Sept. 14, 2000.

<sup>33</sup> The Third Annual Conference in Seoul was attended by 59 agencies from 49 jurisdictions. Ninety-six non-government experts also attended. See Evenett & Gal, *A Report on the Third Annual Conf. on the Internat’l Competition Network* (2004). For an excellent review of the ICN accomplishments, see Kraus & Coppola, *The International Competition Network: A Virtual Reality* [forthcoming 2004].

For a discussion of the history of the ICN and continued interest in the WTO, see First, note 16, *supra*.

<sup>34</sup> This involved three areas: investigative technique, analytical framework, and notification/procedures. The ICN has also focused on capacity building, advocacy and antitrust enforcement in regulated sectors. In Seoul the ICN decided to create a Cartel Working Group.

<sup>35</sup> For examples of the work of the Network in a merger context, see International Competition Network, *Recommendations of the Mergers Working Group* (2002) [hereinafter “*ICN*”]. For a list of the recommendations, etc., of the Mergers Working Group see <http://www.internationalcompetitionnetwork.org/mergers.html>. Cf. Blumenthal, *Toddling Towards Globalization of Merger Process: On the ICN at Naples*, *Antitrust Report MB 4* (Fall 2002).

having little or no nexus with the state and recommended that “[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction.”<sup>36</sup> The Group has also addressed issues of notification thresholds and timing.<sup>37</sup> The work of the Merger Working Group was important in the decisions of twelve jurisdictions to modify their processes<sup>38</sup>—including the EU’s recent decision to permit a notification prior to a definitive agreement and the elimination of the requirement that notification occur within seven days following the execution of the definitive agreement.<sup>39</sup> This is successful convergence taking place in “real time.”

The enlargement of the European Union on May 1, 2004, highlights additional convergence. As a condition to entry, the new accession states had to adopt competition regimes modeled on Articles 81 and 82 of the Treaty.<sup>40</sup> Whether these Member States otherwise would have opted for different competition laws cannot be said, but the adoption of laws in ten countries based on a single model is a significant step toward convergence even if a bit forced.

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<sup>36</sup> ICN 1. Moreover, “[m]erger notification thresholds should incorporate appropriate standards of materiality as to the level of ‘local nexus’ required for merger notification.” *Ibid.* It recommends that “determination of a transaction’s nexus...should be based on activity within that jurisdiction, as measured by...the activities of at least two parties to the transaction in the local territory and/or by...the activities of the acquired business [there].” ICN 2. The underlying predicate for these recommendations is that “notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned.” *Ibid.*

<sup>37</sup> Specifically it recommends that parties “should be permitted to notify proposed transactions upon certification of a good faith intent to consummate the proposed transaction.” ICN 4. In this regard the Recommendations note that jurisdictions vary a great deal as to when parties may file, and that convergence would be efficient. It is recommended that jurisdictions “that prohibit closing while the competition agency reviews the transaction or for a specified period following notification should not impose deadlines for pre-merger notification.” ICN 5.

<sup>38</sup> Kraus & Coppola, *supra* note 33. Sixteen jurisdictions in 2003, representing 25% of ICN jurisdictions with merger review, “have revised their merger laws or submitted legislative changes to their governments aimed at increasing conformity with the Recommended Practices.” *Supra* at 7. More recently, the Slovak Republic has amended its merger regulation to exclude a market share test for notification.

<sup>39</sup> See Proposed Council Regulation on control of concentrations between undertakings (Dec. 12, 2002). Ireland, too, has modified its process in response to ICN recommendations.

<sup>40</sup> See Jacob, *EEA & Eastern European Agreements with the European Community, 1993 Proceedings of the Fordham Corporate Law Institute: International Antitrust Law & Policy* 403, 426 (Hawk ed.).

Informal convergence is also taking place. Merger regulation within the European Union is much more akin to that within the North America today than it was a few years ago. The revised Merger Regulation<sup>41</sup> reflects this convergence.<sup>42</sup> The new standard of review reflects a better understanding of unilateral effects and the role of economic analysis is more prominent today.<sup>43</sup> New merger guidelines, which recognize the role of efficiencies and speak of consumer welfare, more closely look very similar to those of the United States.<sup>44</sup> Indeed, the abandonment of the notification regime is another example of soft convergence.<sup>45</sup>

D. Postscript: 1990-2004—The Larger Environment.

So where are we now? Conflict—rare; cooperation—the order of the day; convergence—in center stage.

These developments should be appreciated within a larger geopolitical transformation taking place at the same time. Throughout most of my term as Commissioner the world was largely divided between those who believed that markets worked and those who did not. Even within the West, dirigiste was well ensconced within the economic policies of many. With the fall of the Berlin Wall market economies began to sprout in new areas. Western democracies too reexamined the appropriate role of regulation within their economies. Whether or not causation

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<sup>41</sup> See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

<sup>42</sup> For a discussion of this convergence, see Verdouden, Bengtsson & Albæk, *The Draft EU Notice on Horizontal Mergers: A Further Step Toward Convergence*, 49 *Antitrust Bull.* 243 (2004).

<sup>43</sup> On July 16, 2003 the Commission appointed Professor Lars-Hendrik Röller as its first Chief Economist (Competition Directorate) signifying the increased importance the Commission attaches to economic analysis in competition cases. Commission Press release IP/03/1027 (July 16, 2003). See Address of Commissioner Mario Monti, “EU Competition Policy After 2004,” Fordham Annual Conference on International Antitrust Law and Policy, New York, October 24, 2003.

<sup>44</sup> Compare 1992 Depart. of Justice & F.T.C. Horizontal Merger Guidelines, at <http://www.ftc.gov/bc/docs/horizmer.htm>, with Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations among undertakings, at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c\\_031/c\\_03120040205en00050018.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf).

<sup>45</sup> See note 45 and accompanying text, *infra*.

ought be attributed to these larger forces, competition policy undoubtedly found more fertile ground from which to develop.

### III. Where Do We Go from Here?

Former Chairman Timothy J. Muris has observed that there are three phases in the process of convergence: (1) decentralized experimentation, (2) consensus building, and (3) adoption of agreed upon best practices by individual jurisdictions.<sup>46</sup> Experimentation has occurred. While consensus has not been fully achieved, great strides have been accomplished. We now appear to be in his third and final phase.<sup>47</sup> Should Chairman Muris have added a fourth: international enforcement?

The grand question is whether we will see the emergence of an international competition enforcement regime as some have advocated. Lord Brittan and Commissioner Monti have endorsed some, albeit as yet ill-defined, regime within the WTO.<sup>48</sup> Although these sentiments have not found fertile ground in the United States,<sup>49</sup> the idea is not without American supporters.<sup>50</sup> Professor Eleanor Fox has stated that “[t]here is a need for an international economic order in which at least some players are charged with responsibility to enhance the welfare of the entire community.”<sup>51</sup>

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<sup>46</sup> Muris, note 7, *supra* at 2.

<sup>47</sup> It might be more correct to say that we are in both the second and third stages.

<sup>48</sup> See note 25, *supra*, and accompanying text on Lord Brittan’s position. See Address by Commissioner Mario Monti, “A Global Competition Policy,” European Competition Day, Copenhagen, Sept. 9, 2002, for his views.

<sup>49</sup> See, e.g., ABA Antitrust Section, Comments & Recommendations before the U.S. Trade Representative on Competition Elements of the DOHA Declaration (200\_). Cf. Marsden, *infra* note 53.

<sup>50</sup> See, e.g., F. Scherer, Competition Policies in an Integrated World Economy (1994).

<sup>51</sup> Fox 120. Recognizing the need for an international remedy, Professor Fox nonetheless does not embrace a Havana Charter type solution. Rather she favours the adoption of an “over-arching principle [that] will rationalize and link the nearly one hundred national/regional competition systems of the world.” This would include a requirement that WTO members adopt measures to prohibit hard-core cartels and to meet standards for transparency, non-discrimination, and procedural fairness. See Fox, *International Antitrust & the Doha Dome*, 43 Va. J.Intl’l L. 911 (2003).

Former Assistant Attorney General John Shenefield presents the alternatives:

Should there be a convergence upon a single global antitrust law, enforced by a single supranational antitrust enforcement authority; should we instead be content with 100-plus different antitrust laws, each with a slightly different approach; or is there in fact a third way, blending the efficiencies of some degree of harmonization of competition laws with the benefits of retaining different approaches suited to different economies and different cultures?<sup>52</sup>

Which will it be?

Although the United States is active promoting convergence in the working groups of the ICN and elsewhere, I see nothing that leads me to conclude that the overall approach by the U.S.—without regard to the Administration—is likely to change in the short term. Since U.S. participation is probably a necessary, but insufficient, ingredient, the question of whether a world antitrust order will emerge strikes me as a very premature inquiry. Perhaps it will, but not within the next fourteen years.<sup>53</sup>

Rather the next two decades will continue to present challenges. Four—two substantive and two process oriented—are discussed below.

#### A. Differences in creed.

While there has been much consensus building, consensus has not been established. When comparing substantive issues between Europe and North America, there is little disagreement today on cartel policy.<sup>54</sup> The same could be said for the world generally. The

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<sup>52</sup> Shenefield, *supra* note 27, at 386.

<sup>53</sup> Shenefield thinks that “perfect convergence”—an international antitrust order—is not only a pipedream but also a bad idea. “The...goal of perfect convergence—coming to the same substantive point from different directions—is an illusion. It can never happen; it will never happen; and even if it could happen, it would in all probability be a bad thing.” Shenefield, *supra* note 27, at 388. *Cf.* Marsden, “WTO Decides First Competition Case—With Disappointing Results,” *Competition Law Insight* (May 2004).

<sup>54</sup> Admittedly there are significant differences in legal processes. Some jurisdictions criminalize hard-core cartel conduct; others do not. Some employ a *per se* rule illegality; others do not. Some use a judicial process, while

treatment of mergers, while less homogeneous than cartels, is very similar.<sup>55</sup> There are non-trivial differences in the treatment of vertical restraints, but nothing of great moment.<sup>56</sup> Only in the area of single firm behaviour are the differences more dramatic.<sup>57</sup>

These differences range from the special duties owed by firms with market power to the treatment of price predation. Focusing on the latter,<sup>58</sup> U.S. law requires that a plaintiff establish that the defendant sold below cost.<sup>59</sup> While the Supreme Court has not ruled definitively on the appropriate price/cost test,<sup>60</sup> there is a consensus that some articulation of the Areeda-Turner test, *i.e.*, price below average variable cost,<sup>61</sup> is appropriate. Importantly, U.S. law also requires that the plaintiff establish that the defendant be able to recoup the costs of the predation.<sup>62</sup>

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others employ an administrative model. These differences are not insignificant, but they do not detract from the fact that there is a broad based consensus on the substantive treatment of cartels.

<sup>55</sup> A comparison of the U.S. and European Union merger guidelines illustrates broad areas of consensus. Although there are other differences, the principal area of conflict involves the different attitudes toward “portfolio” effects. *See generally* Emch, “*Portfolio Effects*” in *Merger Analysis: Differences Between EU and U.S. Practice & Recommendations for the Future*, 49 *Antitrust Bull.* 55 (2004).

<sup>56</sup> For example, European law is much more skeptical about resale price maintenance than the U.S. While the practice is technically *per se* illegal in the U.S., the courts, probably recognizing the wobbly underpinnings of existing case law, have erected significant barriers to a successful claim. *Compare* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), with Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (rejecting the view that a court may properly infer duality when a supplier terminates a discounting buyer-reseller after receipt of complaints from that buyer-reseller’s competitors) and Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (holding that there must be an agreement as to a specific price or price level in order to state a cause of action).

<sup>57</sup> *See* Kolasky, *What Is Competition? A Comparison of U.S. & European Perspectives*, 49 *Antitrust Bull.* 29 (2004). *See also* Address of OFT Chairman John Vickers, European Assoc. for Research in Industrial Economics, Berlin, Sept. 3, 2004.

<sup>58</sup> For a discussion of the former, see Gal, *Monopoly Pricing As an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 *Antitrust Bull.* 343 (2004).

<sup>59</sup> *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

<sup>60</sup> 509 U.S. at 223 n. 1 (“Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost.”)

<sup>61</sup> *See generally* Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697 (1975).

<sup>62</sup> 509 U.S. at 224 (“[A] prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect ...of recouping its investment in below cost prices....”).

Intent is not important.<sup>63</sup> Read together, a predatory pricing plaintiff faces not insubstantial hurdles in an American federal courtroom.<sup>64</sup>

European law and that of some other jurisdictions are more concerned about predatory pricing. For example, in AKZO v. Commission<sup>65</sup> the Court of Justice found that prices above average variable cost could still be predatory if accompanied by an intent to eliminate a competitor. In doing so, the Court rejected the Areeda-Turner test. (The Commission below had concluded that prices above average total cost could be predatory if there was evidence of predatory intent!)<sup>66</sup> Professor Richard Whish notes that the case is predicated “on the ‘smoking gun’ variant of intention.”<sup>67</sup> As for recoupment, the Court noted its relevance in AKZO but declined to require its proof. In Tetra Pak International SA v. Commission<sup>68</sup> the Court expressly rejected a requirement of recoupment.<sup>69</sup> This is about as far as one can get from the current U.S. view.

Here again change may be in the air. Former Assistant Attorney General William J. Kolasky, not a reticent critic, has recently noted that the Commission appears to be moving away from an intent-based test and towards one of incremental costs.<sup>70</sup> This writer too is cautiously optimistic. Focusing again on predatory pricing, U.S. law was wobblier than that of the European Union not that many years ago. The legacy of Utah Pie Co. v. Continental Baking Co.,<sup>71</sup> suggesting an average total cost standard, enjoyed a long ride in the United States.<sup>72</sup>

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<sup>63</sup> See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7<sup>th</sup> Cir. 1989).

<sup>64</sup> Former Commissioner Mary Azcuenaga criticized this writer’s assertion that a meritorious predatory pricing case was akin to a unicorn saying, instead, that a white tiger was a better analogy. I take the Commissioner’s point.

<sup>65</sup> Case C-62/86 AKZO v. Commission [1991] ECR I-3359, [1993] 5 CMLR 215.

<sup>66</sup> OJ [1985] L 374/1, [1986] 3 CMLR 273.

<sup>67</sup> R. Whish, *supra* note 12, at 705.

<sup>68</sup> Case C-333/94 P Tetra Pak International SA v Commission [1996] ECR I-5951, [1997] 4 CMLR 662.

<sup>69</sup> This may be more of a difference in form than substance since a firm must be dominant under E.U. law before issues of predatory pricing can arise under the rubric of abuse of dominance. Dominant firms always may be able to recoup losses associated with predatory pricing. See Vickers, *supra* note 57 at 7.

<sup>70</sup> Kolasky, *supra* note 57, at 50.

<sup>71</sup> 386 U.S. 685 (1967).

The evolution of U.S. antitrust law from an intent/rules based system to one grounded in industrial organization economics took a generation.<sup>73</sup> But there was nothing particularly American about that development as the dismal science does not respect flags nor frontiers. Seeds sowed within the academy by Aaron Director and others sprouted and took hold.<sup>74</sup> While economics has come late to European competition enforcement, it has come. Over time it will have the same effect.<sup>75</sup>

#### B. Who gets the efficiencies?

One area of increasing convergence is the recognition of efficiencies in competition analysis—particularly in the area of mergers and joint ventures. Yet, this may pose a hidden opportunity for conflict. A contemporary Irish case serves as an example.<sup>76</sup> In that matter the parties argued that the Competition Authority ought not challenge a proposed joint venture because efficiencies outweighed any competitive losses associated with the proposal. Irish competition law, like Article 81 of the Treaty, requires efficiency pass-through to the benefit of

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<sup>72</sup> Critics of the European Union’s treatment of “portfolio effects” in merger cases should remember that it was the United States Supreme Court that affirmed the decision of the Federal Trade Commission using a similar analysis in *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967), and that the U.S. had been plowing the antitrust furrows for 77 years at the time of that decision.

<sup>73</sup> R. Posner, *Antitrust Law* vii-ix (2d ed. 2001).

<sup>74</sup> See generally Posner, *The Chicago School of Antitrust Analysis*, 127 *U.Penn. L.Rev.* 925 (1979).

<sup>75</sup> It is persuasively argued that the U.S. was a more fertile ground than Europe by virtue of the greater interaction between government agencies, the academy and the private sector. See Niels and ten Kate, *Introduction: Antitrust in the U.S. and the EU—Converging or Diverging Paths?*, 49 *Antitrust Bull.* 1, 17 (2004).

Some may argue that the increased importance accorded economics will not necessarily lead to consistency since there are divisions within the discipline. This focus on “Chicago school,” “post-Chicago school” and the like is much overdrawn. Economics is a discipline with a canon of accepted thought. While there may be differences as there are in any science, it is not a broad church where “anything goes.” Application of sound economics will bring consistency.

<sup>76</sup> *The Competition Authority v. Beef Industry Development Society Ltd.*, No. 2003-NO. 7764P (Irish High Court).

consumers.<sup>77</sup> When pressed to identify the consumer benefits, the parties observed that foreign non-Irish consumers were the likely beneficiaries.<sup>78</sup>

From a purely economic world perspective divorced from political boundaries, the national identities of the beneficiaries may make little difference. This argument did not dissuade the Irish Authority from initiating litigation, from which one might conclude that efficiencies must accrue to the benefit of Irish consumers. This potentially difficult issue, while not prominent today, will become more important in the future.<sup>79</sup> It may hinder discussions about international merger analysis.<sup>80</sup> Unlike other issues, this one may be much more difficult to resolve.

#### B. Modernisation: convergence in reverse?

Devolution in Europe associated with Modernisation,<sup>81</sup> which became effective on May 1, could undercut convergence within the European Union. One of the principal features of

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<sup>77</sup> Competition Act, 2002, § 4(5).

<sup>78</sup> The Competition Act, 2002, provides an “efficiencies” defence in cases involving concerted action including certain mergers. Section 4(5), Competition Act, 2002. The law requires that agreements “having regard to all relevant market conditions, contributes to improving the production or distribution of goods or...services to promoting technical or economic progress” can avail themselves of the defence if *inter alia* “consumers [obtain] a fair share of the resulting benefit....”

<sup>79</sup> *Fox* 119-125. Professor Fox note that when “Mannesmann and Italmimpiante, the last two producers of seamless steel pipes appropriate for oil drilling in less-developed countries, planned to merge, neither they nor their home nations...had the incentive to protect China and the rest of the buyer market, and the buyer markets did not have the practical ability to protect themselves from the monopolization.” *Fox* 121.

<sup>80</sup> A different, but related, issue involves the imposition of other costs on the citizens of one country in a transaction where the efficiencies are likely to accrue to the citizens of other countries. Consider the closing of redundant distribution facilities in one country with the attendant loss of employment, etc., where the beneficiaries are stockholders and customers located elsewhere. Prior to assuming my duties in Ireland I entered into an agreement with the South African competition authority under which my client agreed not to make any employee redundant as a condition of merger approval.

<sup>81</sup> *See* Council Regulation 01/03. The genesis of Modernisation is twofold. First, the Commission’s experience granting exemptions under Article 81 has not been a spectacular success. Exemptions under Article 81(3) were as scarce as hens’ teeth and about as difficult to obtain. Although companies relied without prejudice on “comfort letters” in lieu of exemptions, the business community was not comfortable with this informal approach. Second, the prospect of a much larger Union meant the task would become even more daunting. (Recall that in 1962 there were only six Member States and they had precious little antitrust experience.)

Modernisation is the devolution of some antitrust competence to Member States.<sup>82</sup> Some of the cases that previously were handled by Brussels will be handled by the Member States. European enforcement is undergoing not inconsequential decentralization.

Modernisation is predicated on parallel competence: each Member State retains the power to investigate matters properly within its jurisdiction. Thus investigations may be mounted by a single Member State, multiple Member States or the Commission. This obviously presents opportunities for divergence. Critics of Modernization suggested that devolution would bring problems commonly associated with the American federal experience and that these ought to be avoided.<sup>83</sup> The unitary system previously lodged in Brussels would be spun out in part to twenty-five national competition authorities.

The architects of Modernisation were mindful of this problem. Two safeguards were created. First, Member States and the Commission will coordinate their enforcement within the European Competition Network (“ECN”) to insure both an efficient utilization of resources and consistency. From the initial allocation of a case through to remedies, it is envisioned that the ECN will provide a coordinating function.<sup>84</sup> To minimize this problem, coordination is imperative.<sup>85</sup> Second, and more importantly, Brussels retains the “trump card”<sup>86</sup>—a power that

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<sup>82</sup> The other is the abandonment of the notification system. Under that system, it was conventional to file an application seeking review by the Commission. With the demise of that system, undertakings will have to self-assess competition issues. While both the Federal Trade Commission and the Antitrust Division make provision for advisory opinions and business review letters respectively, *See* 16 C.F.R. § 1.1-1.4 (2001), 28 C.F.R. § 50.6(8) (2001), *see generally* ABA Section of Antitrust Law, *supra* note 10, at 704-05, they have never played the role of Article 81(3) exemptions or “comfort letters” in Europe. (Indeed, the U.S. advisory opinions and business review letters have played scarcely any role at all.) Self-assessment has been the “bread and butter” of many American antitrust counselors. It will become much more important in Europe as lawyers undertake their own legal analysis and risk assessment rather than consult the oracle in Brussels.

<sup>83</sup> *Cf.* Joshua, “Flawed Thinking About Price Fixers,” *Fin. Times* (Aug. 3, 2001).

<sup>84</sup> The working of the Network is predicated on communication. The Regulation provides that Member States will apprise the Competition Directorate when commencing their “first formal investigative measure.” This notification also is designed to insure that Brussels knows what is going on in the Member States, and can intelligently exercise its supervisory powers. By the same token, Brussels will inform Member States of its investigations. Thus, consultation between the Commission and Member States will take on added significance. Presumably the role of the Advisory Committee will be enhanced as a result of the need for greater coordination among Member States and the Commission.

<sup>85</sup> Coordination will not be easy and brings a new set of problems to the forefront. Effective coordination will require the sharing of confidential information among the ECN. Maintaining confidentiality among a large number

their colleagues at the Antitrust Division and the Federal Trade Commission in Washington sadly do not have. These two features will not eliminate conflict, but they can—if implemented properly—minimize the opportunities to diverge.<sup>87</sup> Nonetheless, devolution of what was a centralized power to twenty-five jurisdictions will present challenges.

### C. American federalism: Poster child for bad policy?<sup>88</sup>

The virtues of convergence are not universally accepted. The decentralization of competition enforcement within the United States, while subject to criticism from many quarters, shows no sign of rationalization.

U.S. lawyers have not been bashful about criticizing the costs associated with the internationalization of merger enforcement.<sup>89</sup> Non-U.S. lawyers, however, quickly point out that their American colleagues have little right to complain. As one European lawyer recently observed:

The American process is daft! U.S. lawyers complain about having to notify an American transaction in Romania, but force me to vet a deal between two European

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of entities poses a challenge; *ní scéal é ó tá a fhios ag triúr é*. The success of the ECN will depend in no small measure to its ability to keep secrets. There is evidence of breaches within the pre-May 1, 2004 smaller Union. *See, e.g., Tokae Carbon Co. Ltd. v. Commission*, T-236/01(CFI 2004) ¶436.

<sup>86</sup> *See*, Art. 11 (6); 16 of Council Reg. No. 1/03. The Regulation envisions several situations where the Community can take the case and displace national authorities. The Commission will be best placed to handle a matter in several situations. First, the Commission is best placed to act if there is a Community interest that requires a Community decision to develop Community-wide policy. Second, it is presumed that the Commission will act where the case involves four or more Member States. Third, the Commission is best placed to act if there is a danger of inconsistency within the Union. Moreover, the Commission may divest a national authority of its competence in a particular case. Council Reg. 01/03, Art. 11. The Regulation envisions such divestiture only when there is a danger of conflicting decision between or among Member States, a conflict with Community law, or the Member State proceedings are taking more time than warranted. Whether or not actively exercised, the mere existence of this power should enhance the efficiency of the Network.

<sup>87</sup> Lord Brittan has suggested that divergence may be a virtue, and that a certain amount of experimentation could have desirable effects. Remarks of Lord Leon Brittan, Herbert Smith Competition Conf., London, March 5, 2004.

<sup>88</sup> I have discussed these issues elsewhere. *See* Calvani, *Devolution & Convergence in Competition Enforcement*, 24 *European Comp. L.Rev.* 415 (2003), from which some of this discussion is taken.

<sup>89</sup> *See, e.g.*, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law & Practice To the International Competition Workshop Group on Mergers (Feb. 2002); American Bar Assoc. Section on Antitrust Law, Report on Multijurisdictional Merger Review Issues Presented to the International Competition Policy Advisory Committee, May 17, 1999; McDavid & Marshall, Global Review Regimes, *Nat'l Law J.* (Sept. 25, 2001).

companies before antitrust regulators not only in Washington, but also in state offices in Santa Fe, Des Moines, Albany, Tallahassee, Austin, Portland, Seattle and Sacramento.

This problem is not limited to mergers as anyone familiar with the government's prosecution of Microsoft<sup>90</sup> can attest.<sup>91</sup> This is mad!<sup>92</sup> The virtues of convergence have seemingly escaped notice in America.

The problem is exacerbated by virtue of the different analytical modes brought to bear by the states.<sup>93</sup> Criticism has ranged from the OECD internationally<sup>94</sup> to ICPAC domestically.<sup>95</sup>

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<sup>90</sup> See United States v. Microsoft Corp., 231 F. Supp. 2d 144, 150-51 (D.D.C. 2002), for a procedural history of the case.

<sup>91</sup> See, e.g., Hahn, & Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J.L. & Pub. Pol. 877, 892-905 (2003), for a discussion of the state role in the Microsoft Case. Rifts and discontinuities exist throughout the case law. For example, the federal authorities take the view that cooperative advertising predicated on the dealer using the recommended retail price (or no price at all) does not violate the proscription against minimum resale price maintenance. See, e.g., In re Advertising Checking Bureau, 93 F.T.C. 4 (1979); see also Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs-Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057, at 41,722 (FTC May 21, 1987). This view seems consistent with the modern case law. See, e.g., In re Nissan Antitrust Litigation, 577 F.2d 910 (5<sup>th</sup> Cir. 1978), cert. denied, 439 U.S. 1072 (1979). The states attorneys general, or at least spokesmen for their antitrust task force, take another view. See, e.g., remarks of former New York deputy attorney general Pamela Jones Harbour, ALI-ABA Antitrust Issue in Product Distribution, Orlando, Jan. 21, 1999; remarks of former Maryland assistant attorney general Michael Brockmeyer, ALI-ABA Antitrust Issue in Product Distribution, March 4, 1993.

<sup>92</sup> "The costs associated with this system have been well documented." O'Connor, *supra*, citing Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 Antitrust 29 (Summer 2001), and Burns, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust 34 (Summer 2001); cf. Lande, *When Should State Challenge Mergers: A Proposed Federal Balance*, 35 N.Y.L.Schl. L.Rev. 1047, 1063-66 (1990).

<sup>93</sup> States implement their laws pursuant to merger guidelines that differ materially from those administered at the national level. The states consistently take a more aggressive stand than the national authorities, defining product and geographic markets more narrowly, downplaying the prospect of post-merger entry into the market, and refusing to consider efficiencies as a factor offsetting increased concentration."

Ginsburg & Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 Antitrust L.J. 219, 220 (2000). The problem is further exacerbated by the fact that the states sometimes adopt inconsistent policies among themselves. For example, the states took inconsistent views of the proposed acquisition of Arco by British Petroleum with Alaska supporting the position of the parties while California and others opposed the merger. Cf. In re BP Amoco plc, No. C-3989 (F.T.C., 2000).

<sup>94</sup> The OECD has recognized and criticized American antitrust federalism. "[M]any different regulators... profess to be implementing competition policy. .... This diffusion of power... may weaken the focus of competition policy. With so many entities claiming some competence over competition policy, the two national government enforcement agencies enjoy less authority and policies are more uncertain. Duplication and second-guess are virtually inevitable. Resources expended on co-ordination could be better applied to analysis and enforcement." OECD, *The Role of Competition Policy in Regulatory Reform*, ¶ 125, Regulatory Reform in the United States (1999), reprinted as Wise, *Review of United States Competition Law & Policy*, 1 OECD J. Comp. L. & Policy 9 (1999).

<sup>95</sup> Similarly ICPAC treated the issue in its final report:

Judge Richard Posner and others have observed that the different modes of analysis may be a function of the state attorney generals' political constituencies.<sup>96</sup> The issue is important because the states effectively trump national policy since the parties—absent litigation—will be bound by the most interventionist enforcement entity's assessment.<sup>97</sup> The U.S., far from having a sensible antitrust regime, leaves much to be desired.<sup>98</sup>

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Overlapping responsibilities for merger review in the United States also warrant consideration.... A decision by the DOJ or the FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. .... Because shared power may generate inconsistent policy approaches within a single jurisdiction, it can make efforts at global harmonization and cooperation more difficult. In addition, it imposes additional uncertainty as to timing and outcome and further increases transaction costs.

U.S. Dept. of Justice, International Competition Policy Advisory Committee Final Report 147 n. 52 [“ICPAC”]. The Report states: “The states have challenged mergers at thresholds more stringent than those applied by federal authorities, have given decisive effect to concentration data, and used their enforcement power to block business restructurings that would reduce employment within their borders. Indeed, National Association of Attorneys General, *Horizontal Merger Guidelines* (1993), reprinted at 4 Trade Reg. Rep. (CCH) ¶13,406, consider non-competition factors, including the need to protect small local businesses. As a result the Committee concluded:

the overlapping review in the United States is more often than not a defect of the U.S. system and that a more rational or sensible approach would be to give exclusive federal jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to the DOJ and FTC.

*Ibid.* While this conclusion was not unanimous, even those dissenting agreed: “Other Advisory Committee members agree that the federal antitrust authorities are better positioned to conduct antitrust merger review. These members, however, recommend creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.” *Ibid.* See Kovacic Submission, at 21-23; see also ABA Int'l Antitrust Law Committee Members Submission, at 7-12 (the policies of the National Association of Attorneys General (NAAG) toward mergers are more restrictive than the policies of the federal antitrust agencies). Further, criticism has been levied that states opting out of the federal-state protocol have issued burdensome information requests calling for all documents provided to other states (that is, all HSR material) plus additional requests. See, e.g., Testimony of Phillip A. Proger, ICPAC Hearings (April 22, 1999), Hearings Transcript, at 70.”

<sup>96</sup> See, R. Posner, note 73, *supra* at 281. Ginsburg & Angstreich conclude: “At bottom, the states are more likely to be concerned with a merger’s local impact upon jobs, and may also be influenced by concern for a local competitor; neither consideration enters into the calculus at the national level.” Ginsburg & Angstreich, *supra* note 93. For a more detailed discussion of the political component in the state enforcement merger agenda, see Comment, *Why States Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 *Emory L.J.* 337 (1999). There the author examines several mergers where the state authorities apparently acted at the behest of local political interests. See also Hahn & Layne-Farrar, *supra* note 91, at for an in-depth discussion of these issues in the context of the Microsoft Case.

<sup>97</sup> See generally Address of FTC Chairman Timothy J. Muris, *Merger Enforcement in A World of Multiple Arbiters*, Brookings Inst., Washington, Dec. 21, 2001.

<sup>98</sup> The American federalist antitrust regime is not without its defenders. See O’Connor, *Federalist Lessons for International Antitrust Convergence*, 70 *Antitrust L.J.* 413 (2002). His argument is two-fold. While acknowledging the costs associated with state enforcement, he asserts that there are two compensating factors that justify state involvement. First, state enforcement deters under-enforcement. Second, such enforcement generates more case law leading to a more “rapid” evolution of antitrust jurisprudence. As a result, O’Connor concludes that “concurrent [state] enforcement is a strength, not a weakness, of the American system of antitrust enforcement.” Other than the view held by some that the federal authorities ought to bring more cases, there is no real evidence of under-enforcement at the federal level. While O’Connor cites a few instances where the states have prevailed where

What is to be done? Judge Richard Posner has suggested that states antitrust enforcement rights be limited,<sup>99</sup> but acknowledges that legislation is necessary to accomplish this.<sup>100</sup> Absent support by the state attorneys general community,<sup>101</sup> any reform proposal would be dead on arrival in Congress. Clearly the situation within the U.S. undercuts its ability to call for more rational approaches abroad.<sup>102</sup> One of the biggest challenges to American competition policy is to find a solution for this problem.

Can state interests be persuaded to support reform? Other federal systems seem able to administer a rational allocation of jurisdiction. In Germany the Bundeskartellamt is responsible for national enforcement while the Länder are responsible for “intra-state” cases. Unlike the U.S. states attorneys general, the Länder have no right to broader enforcement. But federal preemption in the United States, while theoretically possible, seems politically unlikely given the

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federal authorities elected not to prosecute, it is not self-evident that federal enforcement is (or was) less than optimal. The fact that some defendants settle state litigation does not establish that the litigation is meritorious. Even if it were, Type II error will always characterize efficient enforcement regimes. The question should be whether the enforcement level is optimal, not whether Type II error is completely absent. The same point ought to be made with reference to O’Connor’s argument that more case law aids in case law development. The more appropriate question is whether there is insufficient litigation to generate an optimal level of case law. Again, there is no evidence to support the view that more is necessarily better. But, as O’Connor concedes, there *is* evidence that state enforcement imposes real cost.

<sup>99</sup> R. Posner, *supra* note 73, at 281. He argues that they generally “‘free ride’ on federal enforcement [and] are excessively influenced by interest groups that may represent a potential antitrust defendant’s competitors.” R. Posner, *supra*, citing Comment, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Laws of Merger*, 48 *Emory L.J.* 337 (1999). He continues: “This is a particular concern when the defendant is located in one state and one of its competitors is another and that competitor, who is pressing his state’s attorney general to bring suit, is a major political force in that state.” *Ibid.* See also Posner, *Antitrust in the New Economy*, 68 *Antitrust L.J.* 925, 940-41 (2001).

Others have taken similar positions. See, e.g., Bell, *States Should Stay Out of National Mergers*, 3 *Antitrust* 37 (Spring 1989) and Interview of Timothy J. Muris, Advisors to Presidential Candidates Differ on Most Aspects of Enforcement, 55 *Antitrust & Trade Reg. Rep. (BNA)* No. 1382, at 448 (Sept. 15, 1998). Recently one commentator has called on the Antitrust Modernization Commission to create a national competition policy by preempting state antitrust laws. See Ewing, “Will the New Antitrust Modernization Commission Have the Courage to Tackle Real Issues?” Matthew Bender *Antitrust Report* 20 (Summer 2003).

<sup>100</sup> Opponents of legislative reform will doubtless fly the “federalist” flag. Posner discounts such arguments: “This is a genuine downside of federalism. The federal government, having a larger and more diverse constituency, is, as James Madison recognized in arguing for the benefits of a large republic, less subject to takeover by a faction. I am not myself inclined to make a fetish of federalism.” *Ibid.*

<sup>101</sup> This acronym stands for the National Association of Attorneys General and *not* the National Association of Aspiring Governors as some have suggested!

<sup>102</sup> This was recognized by the Attorney General International Competition Policy Advisory Committee in its Final Report. “The United States also may have difficulty encouraging foreign governments to cure imperfections in their competition policy rules and procedures unless it first addresses the institutional complexity of the U.S. system.”

political clout of the state attorneys general. The Australian federal system is quite similar to that of the United States, in that the states there, like those in the U.S. and unlike Germany, have “interstate” jurisdiction. There, however, the states have ceded their antitrust jurisdiction to the federal government in return for certain veto rights over federal antitrust policy.<sup>103</sup>

Could a similar agreement be brokered here? Difficult, but perhaps not impossible. More modestly, the OECD has suggested that the federal and state authorities informally allocate cases depending on whether they are intrastate or interstate transactions.<sup>104</sup> Perhaps this poses an opportunity? Unfortunately a solution to the problem necessarily involves the loss of both power and revenue, and politicians (particularly those with ambitions for higher office) seldom find either attractive.<sup>105</sup> On the other hand, Professor Robert Lande suggests that such a solution is feasible among reasonable people acting in good faith.<sup>106</sup> Nonetheless, these issues pose opportunities for U.S. officials and it remains to be seen whether they are up to the challenge.

#### IV. Conclusion

The international competition environment today is vastly different from that at the end of my term in 1990. Today conflict among competition authorities is rare. Antitrust is no longer an American idea. There is a broad-based consensus that competition policy is important.

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<sup>103</sup> See Address of ACCC former chairman Allan Fels, *The Australian Experience in Competition Policy: Compare & Contrast*, IBA Meeting, Cancun, Oct. 1, 2001.

<sup>104</sup> The OECD Report suggested that “[a] logical division of responsibility would have local officials deal with local problems, while national officials dealt with national ones.” OECD, *supra* note 94 at ¶ 134. It goes on to note, however, that “US law does not require that division of labour.” It concludes: “At best, clarity and predictability are undermined when a major federal-level enforcement effort...is second-guessed by a group of local enforcement officials bringing a separate, similar, and simultaneous lawsuits. *Ibid.* See also Lande, *supra* note 92, where the author proposes that federal and state officials issue joint guidelines under which they would allocate cases among themselves.

<sup>105</sup> Although perhaps dressed in the guise of federalism, the opponents of change are more likely motivated by the fear of loss of power and revenue. The ability to block or extract valuable concessions from merger parties is no small benefit to officials who seek higher office. Money also speaks. Today the states routinely charge parties for the privilege of being investigated. These monies are often used to fund the antitrust mission of the office.

<sup>106</sup> Lande, *supra* note 92, at 1090.

Although differences characterize the world's competition regimes, there is more in common than there are differences. Convergence is taking place.

Since I would not have accurately predicted today's international competition environment in 1990, I hesitate to prognosticate today. Nonetheless, it seems safe to say that consensus will continue to develop—particularly as economics becomes more important in the analyses of national and regional competition authorities. Convergence, using the “best-practices” model of the International Competition Network, will likely continue to flourish.

The late Dr. Wolfgang Karste, former President of the Bundeskartellamt, used to refer to the international enforcement community assembled for Cartel Conferences in Berlin as his “competition family.”<sup>107</sup> While a bit of an overstatement at the time, it is likely to become much more of a reality in the coming years.<sup>108</sup>

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<sup>107</sup> See Address of Bundeskartellamt President Ulf Böge, Bonn, May 18, 2003.

<sup>108</sup> Whether the family will show signs of becoming dysfunctional remains to be seen. And like real families, *ní h-aithne go h-aontíos*.