THE INTERNATIONAL COMPETITION NETWORK: COOPERATION AND CONVERGENCE IN COMPETITION LAWS

ULUSLARARASI REKABET AĞI: REKABET KANUNLARINDA ULUSLARARASI İŞBİRLİĞİ VE UYUMLAŞMA

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Abstract

In the last three decades, interest in competition policy has exploded. Over a hundred countries now have competition laws. More than twenty bilateral and multilateral cooperation agreements have been concluded on various aspects of competition, yet no binding multilateral competition regime has emerged so far. This article investigates the role of the International Competition Network (ICN), a virtual network of competition policy authorities, in promoting global cooperation on competition policy and encouraging convergence among national competition laws. The ICN's stated objective is to build consensus and convergence towards sound competition policy principles across the global antitrust community. The article makes the argument that the ICN has some advantages over bilateral, regional and multinational forums of cooperation on competition policy because its membership is inclusive, and because its informal, voluntary mode of cooperation facilitates consensus and cooperation. Moreover, by facilitating socialization among its members, it encourages convergence of national regimes towards practices recommended by the ICN. The article presents evidence from merger review procedures, which suggests that a degree of convergence of national merger review procedures is taking place thanks to ICN's work.

Keywords: *International Competition Network, International Cooperation, Multilateral Cooperation, Harmonization, Convergence.*

Öz

Son üç onyılda rekabet politikalarına ilgide bir patlama yaşandı. Seksenin üzerinde ülke bu süre zarfında rekabet kanunları uygulamaya koydu, ve

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rekabetin çeşitli alanlarında yirmiden fazla ikili ve çokuluslu işbirliği anlaşması imzalandı. Ancak henüz küresel alanda bağlayıcı ve çokuluslu bir rekabet rejimi ortaya çıkmamıştır. Bu makale, ulusal ve uluslararası rekabet kurumlarını sanal bir ağla biraraya getiren Uluslararası Rekabet Ağı'nın (URA) küresel alanda işbirliğini teşvik etmek ve ulusal rekabet kanunlarının uyumlaşmasını sağlamaktaki rolünü inceler. URA'nın amacı küresel alanda rekabet üzerine çalışanlar arasında iş ve fikir birliği ve uyumlaşma sağlamaktır. Makale, URA'nın rekabet alanında işbirliği sağlayan ikili veya bölgesel anlaşmalarla ve OECD, UNCTAD gibi kurumlarla karşılaştırıldığında bazı avantajları olduğu tezini savunur. URA'nın üyeliğinin geniş coğrafi kapsamı, rekabet politikası konusundaki tavsiyelerinin ülkeler tarafından iradeye bağlı olarak kabul edilebilmesi, ve esnek işbirliğini desteklemesi nedeniyle URA'nın şimdiye kadar rekabet politikalarında fikirbirliği ve işbirliğine olumlu etkileri olmuştur. Ayrıca, üye rekabet kurumları arasında sosyalleşmeyi sağlayarak ulusal rekabet politikaları arasında uyumlaşmayı teşvik etmiştir. Makale ayrıca URA'nın çabaları sonucunda, birleşme ve devralmaların kontrolü alanındaki ulusal uygulamalarda sınırlı da olsa uyumlaşma olduğuna dair kanıtlar sunar.

Anahtar Kelimeler: *Uluslararası Rekabet Ağı, Uluslararası İşbirliği, Çok Taraflı İşbirliği, Harmonizasyon, Uyumlaşma.*

INTRODUCTION

In the last three decades, interest in competition policy has exploded: over a hundred countries now have competition laws, more than twenty bilateral and multilateral cooperation agreements have been signed on various aspects of competition, and various international forums, such as Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Trade Organization (WTO) and International Competition Network (ICN) have been engaged in efforts to promote international cooperation on competition policy[1]. Increased globalization of markets has rendered the need for international cooperation on competition policy even more urgent today, but efforts at cooperation are by no means new. The earliest of these efforts began in the immediate aftermath of World War II, when the drafters of the Havana Charter of the failed the International Trade Organization sought to include competition rules into the Charter. More recently, in 1993, a group of competition scholars suggested a Draft International Antitrust Code which proposed minimum substantive standards for national antitrust laws and the establishment of an International

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Antitrust Authority. Yet attempts at establishing multilateral cooperation on competition policy have not born fruit. Instead, bilateral and regional competition agreements and informal cooperation efforts have emerged and multiplied, creating an environment dense with competition rules and institutions.

One among the many efforts at international cooperation is the founding of the International Competition Network in 2001. The ICN is a virtual network of competition policy authorities which seeks to "build consensus and convergence towards sound competition policy principles across the global antitrust community"[2]. With the rising volume of international economic interaction and the increasing possibilities for cross-border anticompetitive activity, competition authorities of the United States (US) and the European Union (EU), the two major players in the world competition scene, have explored ways to cooperate on competition policy. Among other strategies, the EU in the 1990s sought multilateral competition rules under the framework of the World Trade Organization, while the US seemed to prefer a non-binding form of cooperation. The ICN emerged under these conditions as a loose form of cooperation seeking soft convergence on competition policy issues among its diverse membership.

This article explores the extent to which the ICN has been effective in addressing the need for cooperation on competition policy at the international level. First of all, it evaluates the membership, the structure, and the working methods of the ICN in comparison with other cooperation efforts on competition policy at the international level such as bilateral, regional or multilateral frameworks. Second, the article evaluates the extent to which the ICN has achieved its stated aim of soft convergence of national competition policies. My argument is that while the ICN is a voluntary and non-binding organization, it nonetheless holds promise in addressing some of the competition related problems at the international level. Given the interests of the major economic actors, more formal and binding multilateral cooperation in competition policy matters seems unlikely at this time, and the ICN appears to be a feasible alternative. Second, in terms of promoting convergence among national competition policies, we present evidence that suggests a limited degree of soft convergence is taking place as a result of ICN's activity. The article's conclusion is that the ICN holds promise for promoting convergence, but the

[2] INTERNATIONAL COMPETITION NETWORK (2001), *Memorandum on the Establishment and Operation of the International Competition Network*, http://www.internationalcompetitionnetwork.org, Access Date: 15.01.2010.

extent of convergence in competition policy issues may be limited due to the distinct competition policy traditions of participating countries.

The rest of the article proceeds as follows. Section 1 discusses the motivations of the major economic actors for international cooperation on competition policy. It surveys the various alternative methods and venues of international cooperation, and evaluates their advantages and disadvantages. Section 2 discusses the potential of the ICN in addressing competition issues and generating soft convergence. It evaluates the available empirical evidence on convergence of national competition policies. The final section concludes.

1. GOVERNING GLOBAL COMPETITION

1.1. Development of National Competition Laws

The first national legislation to deal with firms' anticompetitive behavior was enacted in the United States in 1890. For many years, competition laws existed only in a handful of industrialized countries. This changed in the aftermath of World War II. Immediately after the war, some Western European countries and Japan adopted competition laws, and since the 1980s, competition policies started to spread much more rapidly around the world. The number of countries with competition laws has grown from around twenty in 1980 to 107 in 2009[3]. A number of developments have spurred the proliferation of national competition laws. First, as many developing and post-Communist countries liberalized their economies and sought access to developed country markets, they were required to adopt competition laws as part of their obligations to gain membership in regional and international trade agreements. Second, some observers argue that many developing countries also came to believe that competition policy was beneficial for them, because they expected that it would make their companies more robust and better able to compete internationally[4].

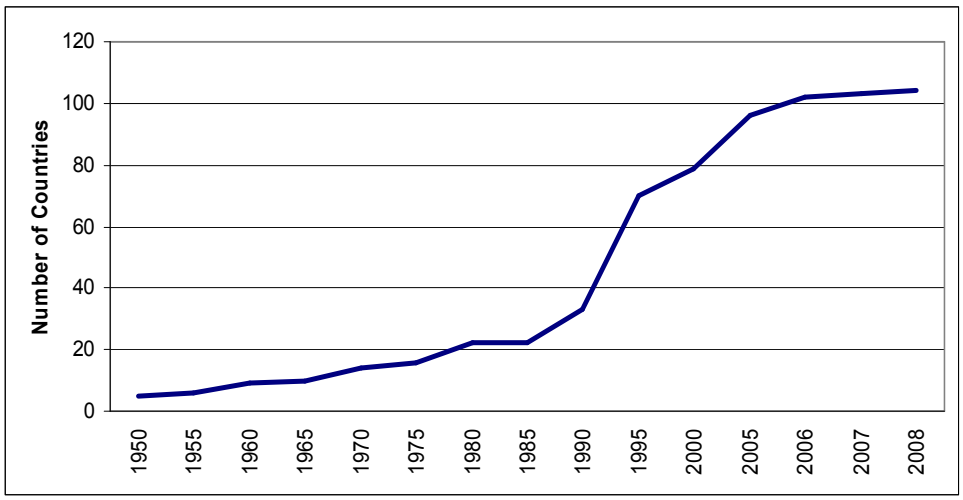
Figure 1 graphs the increase in the number of countries with competition laws in the world in the period 1950-2008. The graph demonstrates that competition law adoption dramatically increased in the late 1980s and the early 1990s. To some extent, this dramatic increase can be attributed to the implementation of market reforms in Central and Eastern European and former Soviet countries around this time. However, adoption of competition laws was

[3] Data collected by the author. Please see the sources listed in Figure 1.

[4] FOX, E.M. (2001), "Antitrust law on a global scale: Races up, down and sideways", D.C. Esty and D. Geradin (ed.s), in *Regulatory Competition and Economic Integration: Comparative Perspectives*, p. 349; and WEINRAUCH, R. (2004), *Competition Law in the WTO: The Rational for a Framework Agreement*, Neuer, Vienna, Austria p.42.

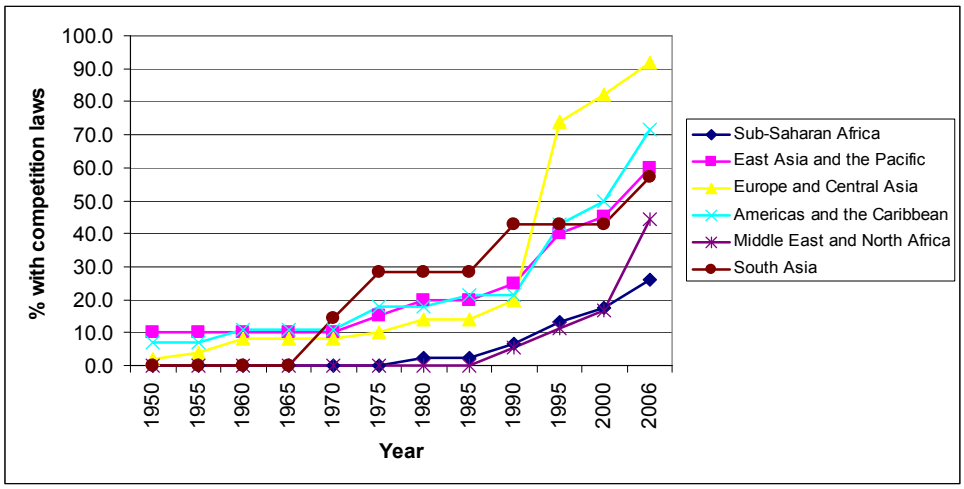
not limited to this region. As Figure 2 demonstrates, in most regions of the world, we can observe an upsurge in competition law adoptions in the 1990s. It is in Europe and Central Asia that we see the highest proportion of countries with such laws, followed by the Americas, East Asia and the Pacific, and South Asia. In all of these regions, more than half of the countries have adopted laws to protect competition. Middle East, North Africa and Sub-Saharan Africa are the regions in which competition laws have diffused the least, but even in Sub-Saharan Africa, a quarter of countries have adopted such laws. Competition law adoptions continued around the world through the 2000s.

Figure 1
Number of Countries with Competition Laws, 1950-2008



Source: Data collected by the author from various sources, including INTERNATIONAL BAR ASSOCIATION (2009), Global Competition Forum, http://www.globalcompetitionforum.org, Access Date: 01.02.2009; KRONTHALER, F. and J. STEPHAN (2007), "Factors accounting for the enactment of a competition law-an empirical analysis", *Antitrust Bulletin,* No:52(2), p. 137-168; PALIM, M.R.A. (1998), "The worldwide growth of competition law: an empirical analysis", *The Antitrust Bulletin,* No: 43 (Spring), p.105-144; UNCTAD (2007), *UNCTAD Guidebook on Competition Systems*, New York and Geneva.

Figure 2
Percentage of Countries with Competition Laws in Each Geographical Region, 1950-2006



Source: Same as Figure 1. The regional classification is based on World Bank geographical regions.

1.2. Bilateral, Regional and Multilateral Cooperation on Competition Policy

In addition to the rise in the number of national competition regimes, the number of bilateral and regional agreements on competition policy has also been on the rise. Competition authorities came to realize that national competition laws alone are no longer sufficient for maintaining competitive domestic markets, since economic openness provides opportunities for companies to engage in anticompetitive practices across borders. For instance, the number of cross-border acquisitions and mergers has escalated dramatically in the 1980s[5]. Since 1990, mergers have typically accounted for between one third to one half of all Foreign Direct Investment (FDI) flows, and by 1999 cross border mergers amounted to 80 % of all FDI flows[6]. Thus, states are no longer able to enforce merger control with domestic competition legislation alone.

[5] CAMPBELL, A.N. and M.J. TREBILCOCK (1997), "Interjurisdictional Conflict in Merger Review", L. Waverman, W. S. Comanor and A. Goto (ed.s), in *Competition Policy in the Global Economy*, p.89.
[6] DAMRO, C. (2006), *Cooperating on Competition in Transatlantic Economic Relations*, Palgrave Macmillan, Basingstone, Hampshire and New York, US, p.7-8.

Furthermore, international mergers often engage the attention of anti-trust authorities in several countries, which raises the transaction costs for merging parties that are required to file applications and meet the conditions of various jurisdictions. It is now common for multinational mergers to be notified in five separate jurisdictions[7], and in some cases the merger may have to be notified in up to 25 jurisdictions[8]. "Significant inefficiencies arise for internationally competing enterprises because of multiple reviews of alleged anticompetitive behaviors and arrangements"[9], and conflicting decisions of different competition authorities lead to international frictions and create legal uncertainties for the companies involved[10]. In order to address the inefficiencies and conflicts arising from the multiplication of national competition regimes, major economic powers have engaged in efforts to cooperate on competition policy matters. The consequence has been the emergence of a large number of regional and bilateral agreements on competition policy in the last three decades.

Internationally, efforts to establish global competition regime started as early as 1947, with the draft provisions of the International Trade Organization (ITO) which included measures on restrictive business practices. These rules were included in the Havana Charter of the ITO against the backdrop of the 1930s, when international cartels had been widespread and were perceived to have been damaging to the world economy[11]. However, the Havana Charter was never ratified by the U.S Congress and never entered into force. The Congress opposed the Charter in part because of its competition provisions: ceding authority to an international organization on competition matters was not deemed desirable, and the language of the provisions on restrictive practices was found too weak[12]. Thus, attempts at creating an international competition regime were shelved at that time. Multinational efforts to forge cooperation did not pick up again until briefly in the 1960s -which were unsuccessful- and then

[7] GRIFFIN, J.P. (1999), "What Business People Want from a World Antitrust Code", *New England Law Review,* No: 34(4), p.39.
[8] CALVANI, T. (2003), *European Competition Law Review,* No: 24(9), p.416.
[9] BODE, M. and O. BUDZINSKI (2005), "Competing Ways towards International Antitrust: The WTO versus the ICN ", *Marburg Economics Working Paper,* No:03-2005, Marburg, Germany, http://ssrn.com/abstract=888682, Access date: 21.01.2010, p.5.
[10] DJELIC, M.-L. and T. KLEINER (2006), "The International Competition Network: moving towards transnational governance", M.-L. Djelic and K. Sahlin-Andersson (ed.s), in *Transnational Governance: Institutional Dynamics of Regulation*, p.293.
[11] WOOLCOCK, S. (2007), "International Competition Policy and the World Trade Organization", Paper Prepared for *The LSE Commonwealth Business Council Trade Forum, South Africa,* http://www2.lse.ac.uk/internationalRelations/centresandunits/ITPU/ITPUindexdocs.aspx, Access date: 01.03.2009, p.2.
[12] WOOD, D.P. (1992), "The Impossible Dream: Real International Antitrust", *The University of Chicago Legal Forum,* p.284.

much later at the Singapore WTO Ministerial meeting in 1996. In the meanwhile, bilateral venues became significant for cooperation on competition policy.

The first bilateral agreement on competition was signed between the United States and Germany in 1976, followed by an agreement between the US and Australia in 1982. Bilateral agreements on competition became more significant and widespread in the late 1980s and 1990s. Most significantly, after a long history of discord, the EU and the US signed a bilateral cooperation agreement on competition policy in 1991. Both the US and the EU claim extraterritorial application of their competition laws, which had in the past led to frictions between them. The Bilateral Agreement seeks to address anticompetitive business activity that occurs outside the jurisdiction of one party, but adversely affects the interests of that party[13]. It emphasizes the practice of mutual notification by competition authorities during the initial decision-making process, and stresses consideration of the effects of enforcement activities on the other party. The Agreement also introduces 'positive comity,' a principle that allows one competition authority to request formal consideration of their national interests by a foreign counterpart[14].

The Positive Comity Agreement (PCA) followed in 1998, and encouraged competition authorities in one jurisdiction to request that their foreign counterparts conduct competition investigations on their behalf. The Administrative Arrangements on Attendance, concluded in 1999 is a non-binding effort to allow competition authorities to attend certain stages of each others' investigations on a case-by-case basis. According to Chad Damro, these three bilateral agreements, along with increased contacts between the competition authorities of the EU and the US -the European Commission's Directorate- General Competition and the US Department of Justice and the Federal Trade Commission's Antitrust Division-has led to more cooperative relations between the EU and the US on competition policy issues[15].

The EU and the US also concluded bilateral agreements with third parties on competition policy. The EU has formal bilateral agreements with Canada and Japan, association agreements with potential accession candidates (e.g. with some Balkan countries), and inter-agency agreements, such as that

[13] Damro 2006, p.13.
[14] COMMISSION OF THE EUROPEAN COMMUNITIES, (2008) *Competition Policy: Bilateral Relations*, Brussels, Belgium, http://ec.europa.eu/comm/competition/international/bilateral/usa.html, Access Date: 10.03.2008. See also Damro 2006, p.13.
[15] Damro 2006.

with Korea. Furthermore, the EU cooperates with other countries in competition policy matters through free trade agreements or economic partnership agreements, such as through the trade agreement with Mexico, the partnership agreement with Russia, and EU-Mediterranean association agreements with Morocco and Tunisia[16]. The US has bilateral agreements on competition policy with Australia, Brazil, Canada, Israel and Japan[17]. Through these bilateral agreements, the competition authorities involved have achieved significant degrees of cooperation both on specific cases and on broad policy coordination. For instance, the EU competition authorities cooperated with their counterparts on important cartel cases such as the international vitamin cartel, including the planning and coordination of dawn-raids on the companies under investigation[18].

Bilateral agreements tend to be the easiest form of cooperation because interagency trust and monitoring is easiest when only two parties are involved. "However, a patchwork of differing bilateral arrangements would introduce complexities and anomalies, would be cumbersome when dealing with conduct which extends beyond a particular bilateral pairing, and would fail to capture the full potential benefits of widespread multilateral harmonization"[19]. Campbell and Trebilcock similarly argue that in the case of merger control, the co-existence of bilateral regimes may lead to interjurisdictional conflict between the rules and their enforcement when the merging companies are located in different jurisdictions, or have significant market power in multiple jurisdictions[20]. The shortcoming of bilateral and regional agreements in harmonizing merger review is that "they capture only a portion of the trade of the member countries. As a result, system frictions with external trading partners remain a problem-indeed, they may even increase"[21].

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[16] LOWE, P. (2006) "International Cooperation between competition agencies: Achievements and challenges", Speech at the 4th Seoul International Competition Forum, Seoul, Korea, http://ec.europa.eu/comm/competition/speeches/text/sp2005_021_en.pdf, Access Date: 05.09.2009. See also Commission 2008.

[17] MARSDEN, P. (2003), *A Competition Policy for the WTO*, Cameron May, London, UK, s.24-25

[18] Lowe 2006; and COMMISSION OF THE EUROPEAN COMMUNITIES (2004), *EU Competition Policy and the Consumer*, Office for Official Publications of the European Communities, Luxembourg, p.2. In 2001, the European Commission fined eight companies, including Hoffman-Roche, for their participation in cartels designed to eliminate competition in the vitamin sector. The fines amounted to more than Euro 800 million.

[19] BAKER, D.I., A.N. CAMPBELL, M.J. REYNOLDS and J.W. ROWLEY (1997), "The Harmonization of International Competition Law Enforcement", L. Waverman, W. S. Comanor and A. Goto (ed.), in *Competition Policy in the Global Economy: Modalities for Cooperation*, p.447-448.

[20] Campbell and Trebilcock 1997.

[21] Campbell and Trebilcock 1997, p.114.

The limitations of national, bilateral and regional agreements highlight the need for multilateral cooperation on competition policy. Multilateral cooperation is advantageous because greater jurisdictional coverage increases the potential magnitude of benefits available from cooperation. However, the likelihood of achieving a far-reaching agreement on competition policy decreases as more jurisdictions become involved, given the diversity of objectives, laws and enforcement mechanisms in different countries[22].

There are a number of multilateral forums in which countries have attempted to address international competition issues. The OECD has been involved in producing non-binding recommendations in competition policy enforcement since the 1960s. Various committees within the Organization have produced reports and recommendations on different aspects of competition policy over the years, such as recommendations on methods of cooperation between its members, exchange of confidential business information and hard core cartels. The OECD approach has emphasized soft convergence on competition laws and their enforcement, and steered clear of any implication that uniformity among nations and a world competition policy agency is the goal[23]. The OECD Competition Committee may be a particularly efficient forum for cooperation, since its membership is limited to developed economies that share broadly similar principles and culture of competition. This has allowed the OECD members and the working groups to discuss the possibility of convergence over some core competition issues, without overt attempts at harmonization. However, the limited membership of the Organization prevents any agreement reached here from being perceived as legitimate by developing countries[24].

Another non-binding multilateral forum is UNCTAD. The initial involvement of UNCTAD in the area of competition policy came about due to the vacuum created by the failure of the proposed International Trade Organization[25]. In 1980, UNCTAD adopted a Code on Restrictive Business Practices. The impetus for action on restrictive business practices mostly came from the developing countries in the late 1970s, which raised concerns about possible anticompetitive behavior by multinational companies and these countries' limited capacities to discipline such abuses[26]. These principles reflect the broad political spectrum of the members of the United Nations, and respect

[22] Baker et al. 1997, p.449.
[23] DOERN, B.G. (1996), "The Internationalization of Competition Policy", B. G. Doern and S. Wilks (ed.), in *Comparative Competition Policy: National Institutions in a Global Market*, p.316.
[24] Campbell and Trebilcock 1997.
[25] Doern 1996, p.312.
[26] BENSON, S.E. (1980), "UN Conference on Restrictive Business Practices", *The American Journal of International Law,* No: 74(2).

the need for preferential treatment for developing countries[27]. They include principles of good conduct for enterprises including transnational corporations, which reflect the interest of developing countries. Cooperation in UNCTAD has produced the most detailed official multilateral agreement on business practices; however, the non-binding nature of the agreement detracts from its effectiveness. According to some observers, the Code nonetheless has played a significant role in expediting the adoption of competition policies in the developing countries, which flocked to UNCTAD in the 1980s to learn more about the operation of competition policies[28].

Limited effectiveness of these non-binding multilateral cooperation efforts have led policy-makers and scholars to turn to the General Agreement on Tariffs and Trade/World Trade Organization as a possible forum for cooperating on competition policy. In the early 1990s, a group of competition scholars-predominantly European, and particularly German, but also US and Japanese-formed a working group which published a Draft International Antitrust Code (DIAC)[29]. The DIAC proposed a competition code of minimum standards to be incorporated into the GATT and to be enforced in domestic jurisdictions. The enforcement of the Code was to be supported by an International Antitrust Agency, which would monitor compliance and act as dispute resolution body. The ambitious nature of the proposal drew significant criticism from scholars and policy-makers in the US, and received only lukewarm support from the Europeans[30].

Around the time that DIAC was published, the EU officials were developing an EU position on internationalization of competition policy. It was Sir Leon Brittan, the Commissioner responsible for competition policy in the EU that revived the call for international cooperation on competition policy enforcement in the World Economic Forum in Davos in 1992[31]. Despite objections from the US Department of Justice about bringing antitrust issues into a binding multilateral forum, the US finally announced that it would go along with other countries to begin a modest work program on competition policy[32]. In the 1996 Singapore ministerial meeting of the WTO, a working

[27] Doern 1996, p.312.
[28] SELL, S.K. (1995), "Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice", *International Organization,* No:49(2), p.317-318.
[29] DREXL, J. (2003), "Do we need "courage" for international antitrust law? Choosing between supranational and international law principles of enforcement", J. Drexl (ed.), in *The Future of Transnational Antitrust-- From comparative to common competition law*.
[30] GERBER, D.J. (1999), "The US- European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective", *New England Law Review,* No:34(4), p.127-128.
[31] Marsden 2003, p.55.
[32] Marsden 2003, p.57-58.

group on competition was set up with the task of studying the interaction between trade and competition policy. From 1997 until 2004, the Working Group on the Interaction between Trade and Competition Policy met three times a year to exchange ideas and identify areas of agreement and dissent[33]. However, in July 2004, the WTO General Council decided that the issue of competition policy "will not form part of the work program set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round," and ended the activity of the working group[34].

1.3. The US and EU Authorities' Approaches to International Cooperation on Competition Policy

As mentioned above, the strongest objections to cooperation in the WTO on competition policy came from the US authorities. Anti-trust authorities in the US are concerned that multilateral efforts would lead to a competition code that represents lowest-common denominator, and would thus weaken US policy[35]. They also see multilateral cooperation as an infringement on sovereignty, and potentially an obstacle to the extraterritorial application of US antitrust laws[36].

Over time, US anti-trust authorities came to acknowledge the difficulty of competition policy approaches that rely solely on national laws and bilateral cooperation agreements[37]. Extraterritorial application of US antitrust rules encounters frequent legal and practical obstacles, particularly in cases in which the companies involved do not have any legal presence in the US. Often the key documents and witnesses are located abroad, out of reach of the evidence-seeking authority[38]. For example, in 1994, a US court dismissed a criminal case which had been brought by the Department of Justice against General Electric, a

[33] Marsden 2003, p.60.
[34] WORLD TRADE ORGANIZATION (2008), *Competition Policy: History*, http://www.wto.org/english/tratop_e/comp_e/history_e.htm#julydec, Access Date: 12.03.2008.
[35] WOOD, D.P. (2004), "Cooperation and Convergence in International Antitrust: Why the Light is Still Yellow", R. A. Epstein and M. S. Greve (ed.), in *Competition Laws in Conflict*, p.185-186.
[36] US policy-makers emphasize that bilateral and regional agreements and ongoing efforts on multilateral cooperation do not prevent the possibility of rigorous extraterritorial application of US antitrust laws. See KLEIN, J.I. (1996a), "International Antitrust: A Justice Department Perspective", B. E. Hawk (ed.), in *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy*, p.11-19.
[37] PITOFSKY, R. (1996), "International Antitrust: An FTC Perspective", B. E. Hawk (ed.), in *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law and Policy*, p.6.
[38] RILL, J.F. and C.S. GOLDMAN (1997), "Confidentiality in the Era of Increased Cooperation between Antitrust Authorities", L. Waverman, W. S. Comanor and A. Goto (ed.), in *Competition Policy in the Global Economy: Modalities for Cooperation*, p.166; Weinrauch 2004, p.93.

Swiss affiliate of De Beers and two foreign nationals for conspiring to raise the price of industrial diamonds. The Court reasoned that much of the cartel behavior took place in Europe and the evidence was beyond the reach of the Department of Justice[39]. In addition, it may be difficult to craft meaningful remedies in antitrust cases when foreign companies have no assets within the territory of the US[40].

Antitrust authorities in the US also gradually realized the limits of bilateral cooperation agreements. The US has successfully cooperated with its largest trading partners though bilateral agreements. One significant obstacle to continued reliance on bilateral agreements, however, is the issue of exchange of confidential business information in the context of such agreements. In the past, bilateral agreements did not allow for exchange of such information. The Clinton administration and the US Congress realized the limits this has imposed on the possibility of obtaining evidence in antitrust cases involving foreign companies, and passed the International Antitrust Enforcement Assistance Act (IAEAA) in 1994[41]. The Act gives explicit authority to the US antitrust agencies to negotiate bilateral antitrust cooperation agreements through which they can exchange evidence on a reciprocal basis with foreign antitrust agencies, and to assist each other in obtaining evidence located in the other's country.

The US has already concluded such an agreement with Canada, and is working on agreements with other countries and the EU. However, such agreements require explicit authorization in the laws of other countries for such exchange of information, and adequate safeguards for protecting confidential information. In addition, Zanettin and Ehlermann point out that small countries have been skeptical of such agreements to share information between their antitrust agencies and the US, because they fear that such agreements would create imbalances between the countries[42]. The fear is that requests from the US under such agreements would outnumber the small country's requests, and complying with them would monopolize the time and resources of the smaller competition authorities. Over time such an agreement would almost exclusively benefit the US[43]. Therefore, US' attempts at concluding bilateral cooperation

[39] KLEIN, J.I. (1996b), *A Note of Caution with Respect to Competition Policy on the WTO Agenda*, Speech Delivered at the Royal Institute of International Affairs, November 18, Chatham House, London, UK; Weinrauch 2004, p.94.
[40] Weinrauch 2004, p.94.
[41] Klein 1996b.
[42] ZANETTIN, B. and C.-D. EHLERMANN (2002), *Cooperation between antitrust agencies at the international level*, Hart, Oxford, UK, p.131-134.
[43] Zanettin and Ehlermann 2002, 131.

agreements that allow for such exchange of information have not had the desired results.

The limits of extraterritorial application of national laws and of bilateral agreements, and its reluctance to negotiate binding multilateral agreements has led the United States to pursue other means of international cooperation on competition issues. One such initiative was proposed by the International Competition Policy Advisory Committee of the US (ICPAC), which brought together a group of policy-makers and scholars in 1997 to examine international competition policy issues. In its final report published in 2000, ICPAC argued that developing a comprehensive set of multilateral competition rules administered by a new supranational agency was "not only unrealistic but also unwise"[44]. It suggested that as an intergovernmental trade forum, the WTO should remain focused on its primary role and competence, and the work carried out in its Working Group on the Interaction between Trade and Competition should remain deliberative and educational.

To address issues of international competition policy, ICPAC suggested the creation of a "Global Competition Initiative," a non-binding, new venue where government officials, as well as private firms and nongovernmental organizations can exchange ideas and work towards common solutions to competition law and policy problems[45]. This document reflected the type of multilateral effort that the US was willing to make on internationalizing competition issues: one that fosters "dialogue directed toward greater convergence of competition law and analysis, common understanding and common culture," and that does not require a new international bureaucracy and funding[46]. The emergence of the ICN followed from these recommendations.

The European Union, in contrast with the US, has been a strong supporter of a multilateral approach to competition policy cooperation. Starting in the mid-1990s, the EU Commission sought multilateral cooperation on competition policy in addition to pursuing bilateral agreements (with the US, Canada and Japan among others). This reflected the EU's desire to prevent aggressive extraterritorial application of the US law, and additionally, its wish to diffuse its own competition policy to its neighborhood and trading partners. In 1995, an expert group commissioned by Karel van Miert, then the EU's Competition Policy Commissioner, published a report emphasizing that the EU should adopt a parallel approach of deepening its bilateral efforts and working

[44] International Competition Policy Advisory Committee 2000, p. 272.
[45] International Competition Policy Advisory Committee 2000.
[46] International Competition Policy Advisory Committee 2000, p.29.

towards a multilateral framework on competition principles[47]. The Report suggested that the geographical coverage of such a multilateral framework should initially include the industrialized economies, but in the long run seek to broaden to include developing countries as well. Due to the broad membership of the Organization and the complementary relationship between trade and competition policy, the Commission suggested the WTO as the institution best suited to house such an agreement[48]. When this approach was rejected by the US International Competition Policy Advisory Committee, the Competition Commissioner Mario Monti expressed his disappointment[49]. The EU supported the establishment of the International Competition Network, but did not see it as an alternative to the involvement of the OECD or WTO in competition policy.

2. THE ICN AND TRANSNATIONAL GOVERNANCE OF COMPETITION

2.1. Membership, Working Methods and Structure of ICN

The ICN was established in 2001 with thirteen countries and the EU among its founding members. The founding document states that "ICN will provide antitrust agencies from developed and developing countries a stronger and broader network for addressing practical competition enforcement and policy issues."[50]. ICN's membership, which is made up of national and multinational competition authorities, grew quickly from fourteen in its founding to 60 by the time of its first conference in Naples in 2002, and up to 107 in 2009. The ICN is open to the participation of what is called non-governmental advisors, such as representatives of law firms, academics and non-governmental organizations.

The original and unique aspect of the ICN is that it is an international forum devoted solely to competition issues. While other organizations like the UNCTAD and the OECD tackle competition as one among many different issues, the ICN is devoted solely to competition. The ICN is a virtual organization that does not have a permanent secretariat or headquarters. It conducts most of its work by e-mail, teleconferences and webinars. The ICN has Working Groups organized by different themes, and holds an annual meeting in a different country every year.

[47] COMMISSION OF THE EUROPEAN COMMUNITIES (1995), *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules (Report of the Group of Experts), COM (95) 359*, Brussels, Belgium.
[48] Weinrauch 2004, p.158.
[49] Weinrauch 2004, p.159.
[50] Quoted in Djelic and Kleiner 2006, p.298.

The ICN has several advantages compared to other venues for international cooperation on competition policy matters. First of all, the ICN's broad membership is an advantage over other venues such as the OECD. While the OECD has issued recommendations and identified best practices on various aspects of competition policy, because its membership is limited to developed countries, its recommendations have not always found an audience among developing countries. Second, because the ICN is an organization that has an exclusive focus on competition policy, it is preferable for national competition authorities over other venues such as the WTO, OECD or UNCTAD. For instance, national competition authorities hesitate sharing power with trade authorities in the WTO who are not experienced in competition policy matters[51]. And if multilateral cooperation in the WTO were to be pursued, "a new department consisting of competition policy experts would have to be set up, requiring a lot of effort and costs[52]. Thirdly, the informal and voluntary nature of cooperation in the ICN allows it to work more efficiently. The ICN members' relative insulation from political pressures and from linkages with other issues when working in the ICN may help them focus on problem solving on competition issues only, and may facilitate reaching consensus.

Yet cooperating on competition policy under the ICN does have some limitations. Since it is not a rule-making authority and can only make recommendations which the members voluntarily adopt and implement, it may not have a strong regulatory "bite". Some authors suggest that ICN is inferior to formal multilateral solutions in terms of reducing jurisdictional conflicts and of efficiency[53]. Moreover, even if the membership is broader and more open than the OECD, the ICN still risks being dominated by the more established competition authorities and US law firms acting as non-governmental advisors, which leads Djelic and Kleiner to conclude that the competition 'gospel' there is unlikely to diverge too much from US antitrust tradition[54]. Raustiala similarly argues that the convergence occurring in transnational regulatory networks often will favor dominant economic actors, because they tend to be the 'first movers' in regulation and have the soft power to influence other states in these networks[55].

[51] Graham reports that such was the case with officials in the European Commission. GRAHAM, E.M. (2003), "Internationalizing" competition policy: an assessment of the two main alternatives", *Antitrust Bulletin,* No: 48(4).
[52] Bode and Budzinski 2005, p.16.
[53] Bode and Budzinski 2005.
[54] Djelic and Kleiner 2006, p.305.
[55] RAUSTIALA, K. (2002), "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law", *Virginia Journal of International Law,* No: 43, p.69.

The risk that the ICN "will stay an initiative focused on topics of exclusive interest to a small group of developed countries" is real, and "if this were the case, the ICN would retain very little interest"[56]. The current make-up of the ICN and its Working Groups show that this has to some extent been the case. For instance, out of the five current Working Groups of the ICN-advocacy, agency effectiveness, cartel, mergers and unilateral conduct-officials from the US competition authorities lead two, an EU Competition official leads one, and the remaining two are headed by officials from Russia and Turkey. Of the three vice chairs, one is from the US, one from Japan and the third is from Mexico. In the 15-member Steering Committee, in addition to officials from the US, Canada, Australia, European countries and the EU officials, there are members from Russia, Mexico, Brazil, Turkey and South Africa. The current make-up of the ICN shows that while the organization retains diversity of membership, Western developed countries and a few emerging economies get disproportionate representation in its leadership positions. Fox demonstrates with anecdotal evidence that in a few cases where the different needs and approaches of industrialized and emerging economies clashed in ICN negotiations, industrialized countries for the most part got their way[57].

2.2. Socialization and Soft Convergence in the ICN

The ICN's stated aim is to "build consensus and convergence towards sound competition policy principles across the global antitrust community"[58]. The founding of the ICN reflects the US policy-makers' confidence in the strategy of convergence to solve the problems emerging from international competition issues. For instance, Joel Klein, the former Assistant Attorney General for the Department of Justice Antitrust Division, frequently emphasized that "a culture of competition will emerge out of discussing of competition law issues among competition law authorities, and growing awareness of the benefits of a competition-based system and this culture of competition will lead to greater convergence among competition law systems"[59]. Similarly, former chairman of the Federal Trade Commission Robert Pitofsky emphasizes the significance of informal convergence by 'learning'[60].

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[56] TODINO, M. (2003), "International Competition Network: The State of Play after Naples", *World Competition,* No: 26(2), p.301.
[57] FOX, E. (2009), "Linked-In: Antitrust and the Virtues of a Virtual Network", *The International Lawyer,* No: 43 (Spring), p.169-171.
[58] INTERNATIONAL COMPETITION NETWORK (2010), *About the ICN*, http://www.internationalcompetitionnetwork.org/about.aspx, Access Date: 25.01.2010.
[59] Quoted in Gerber 1999, p.132, fn.22.
[60] PITOFSKY, R. (1999), "Competition policy in a global economy - today and tomorrow", *Journal of International Economic Law,* No: 2, p. 410.

According to Gerber, US commentators' confidence in convergence stems from their belief that there is an identifiable and objectively verifiable "better way" for antitrust law and policy, and that this better way tends to be similar to or identical with US antitrust law[61]. This is also consistent, Gerber argues, with aspects of the US legal experience, as during the last two decades US law and economics scholarship has challenged the intellectual underpinnings of the US antitrust law. The rise of the Chicago School approach to antitrust and its replacement of the earlier antitrust approach in the US, according to Gerber, is an experience that the US policy-makers and commentators believe would be replicated internationally. Hence, policy-makers and scholars in the US perceive convergence through bilateral cooperation and informal, non-binding multilateral forums such as the ICN to be the appropriate method to solve antitrust issues at the international level.

Why should we expect the ICN to lead to convergence among competition policies of its members? Scholars working in the field of International Relations, especially those following institutionalist and constructivist theories, expect soft convergence to happen through socialization in international institutions. We can define socialization as "the process by which actors acquire different identities, leading to new interests through regular and sustained interactions within broader contexts and structures"[62]. How do international organizations (IOs) and transnational regulatory networks (TRNs)[63] such as the ICN act as sites and promoters of socialization? First, IOs and TRNs can shape behavior by creating material incentives for states to behave in particular ways, for instance, by providing material rewards for correct behavior or penalties for incorrect behavior. This is not likely to be the mechanism of convergence in the ICN -and indeed in most TRNs- which has voluntary membership and does not command material sources to reward or punish its member states.

Second, by creating familiarity, iterated face-to-face social interactions, IOs and TRNs create conditions conducive for persuasion and convergence around norms generated by the organization[64]. Persuasion "involves changing minds, opinions, and attitudes about causality and affect (identity) in the

[61] Gerber 1999, p.133.

[62] BEARCE, D.H. and S. BONDANELLA (2007), "Intergovernmental Organizations, Socialization, and Member-State Interest Convergence", *International Organization,* No: 61(04), p.706.

[63] SLAUGHTER, A.-M. (2004), *A New World Order*, Princeton University Press, Princeton.

[64] JOHNSTON, A.I. (2001), "Treating International Institutions as Social Environments", *International Studies Quarterly,* No: 45(4), p.498.

absence of overtly material or mental coercion"[65]. According to Johnston, the actor in such a social environment "weighs evidence, puzzles through 'counterattitudinal' arguments, and comes to conclusions different from those he/she began with; that is, the 'merits' of the argument are persuasive, given internalized standards for evaluating truth claims"[66]. We can expect repeated interactions, frequent exchange of information, and attempts at reaching consensus about issues among the members of the ICN to create an environment conducive to such persuasion.

Third and finally, IOs and TRNs as social environments allow convergence through "the distribution of social rewards and punishments"[67], in other words, through social influence. According to Johnston, identification with a group creates social pressures to conform as the actors are motivated to maximize their status and reputation as norm-abiding actors[68]. This type of socialization is more effective the clearer the consensus about what 'good' behavior looks like, and the more clearly the institution "makes acting a particular way public and observable"[69]. To the extent that the ICN's members have strong consensus about certain competition policy principles, and to the extent that the organization facilitates information-sharing about members' behavior, we can expect this third mechanism of socialization and convergence to occur in ICN.

Among these three ways of promoting convergence, the ICN seems to hold promise especially with regard to the second and the third. As a loose network organization based on voluntary membership, it lacks the resources to reward or punish its members materially. However, the ICN can promote convergence through persuasion and social pressures on its members to conform to the organization's norms. Officials from different national competition authorities work together in an informal setting on a regular basis in ICN's Working Groups and interact at its annual conferences, and thereby develop familiarity with one another. ICN allows for the sharing of experiences and information, and for deliberations on various principles of competition policy in an environment relatively isolated from political pressures and the complications of other economic issues. Fox argues that "in the WTO the mere prospect of committing their nations seemed to make the representatives

[65] Johnston 2001, p.496.
[66] Johnson 2001, p.496.
[67] Johnson 2001, p.499. Goodman and Jinks also discuss a similar mechanism of socialization, which they term 'acculturation'. See GOODMAN, R. and D. JINKS (2004), "How to Influence States: Socialization and International Human Rights Law", *Duke Law Journal,* No:54, p.621-703.
[68] Johnson 2001, p.499-502.
[69] Johnston 2001, p.501-2.

reluctant to talk freely about solutions to common problems"[70]. Moreover, antitrust authorities who lacked a table of their own before[71], "know each other better today; they talk frequently. A shared belief in the importance of antitrust and the attendant relationships among enforcers has significantly diminished conflict"[72]. The fact that ICN "is all competition, all the time" helps actors divorce competition issues from other national considerations such as trade politics, and judge various arguments on their merits[73].

The ICN may also prove effective in promoting convergence because it can create social pressures on its members. The ICN issues recommendations if its members reach a consensus. The implementation of its recommended practices is voluntary, but there is likely to be social pressure to adopt recommended practices. Since the ICN's recommendations clarify what the "good" behavior is in that area, and since actions conforming to ICN recommendations are publicly observable, we can argue that actors are likely to feel social pressures to adopt ICN recommended practices.

Direct evidence on convergence of national competition policies within the ICN is sparse, however there are indications that some convergence is happening. One of the important areas in which ICN works is the issue of mergers. Mergers are included in the ICN's work because their notification, investigation and approval are one of the most problematic issues of competition at the international level. The increasing number of cross-border mergers, the rising number of different national regulations to which the proposed mergers may be subjected to, and the frictions that some of the international merger cases created (such as the Boeing-McDonnell Douglas and G.E. Honeywell mergers) makes the issue of mergers a priority for international cooperation. The ICN has a Working Group on mergers, which has subgroups on different aspects of merger control such as Merger Notification and Procedures subgroup and Merger Investigation and Analysis subgroup.

An important output produced by the Merger Notification and Procedures subgroup is a set of non-binding Guiding Principles and Recommended Practices for Merger Notification and Review Procedures. The Guiding Principles provide a "roadmap" for agencies developing and revising their merger regimes and create convergence towards best practices in light of

[70] Fox 2009, p.158.
[71] Fox 2009, p.158.
[72] CALVANI, T. (2005), "Conflict, Cooperation and Convergence in International Competition", *Antitrust Law Journal,* No: 72(3), p.1131.
[73] International Competition Network 2010.

the experiences of public and private sector representatives[74]. Some of the Recommended Practices include extensive detail and therefore prescribe norm-conforming behavior in a specific manner[75]. The working group even compiled a list of conforming language from competition laws and regulations in an Implementation Handbook. As a consequence of these efforts, 34 ICN members had made conforming changes to their merger review regimes by 2006, up from 23 members the year before and eight the previous year[76]. Moreover, about 60 % of the members reported that they have either made or were planning to make changes that incorporated ICN's recommendations.

The adoption of ICN recommendations are not limited to countries with more recent anti-trust legislation and enforcement agencies. We observe norm-conforming behavior in the founding members with strong anti-trust tradition such as the EU and the US as well. For instance, Neelie Kroes, the former Competition Commissioner of the EU said that when the Commission's Directorate-General Competition revised its merger review regulations in 2004, it ensured that the new procedures are fully in line with the ICN recommendations[77]. Damro argues that the US officials similarly acknowledge pursuing convergent policies as a result of ICN's policy promotion. The ICN also states in its progress reports, for instance, that in keeping with the ICN's Recommended Practice on Transparency, the U.S. antitrust agencies "have made significant efforts to increase transparency in merger review by issuing in appropriate cases public statements upon closing of investigations. In a substantial departure from past practice, the U.S. agencies now may offer a reasoned explanation for clearance decisions that set a precedent or represent a shift in enforcement policy or practice"[78].

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[74] MARTIN, C. (2005), "Contribution to the Panel Avoiding Potential Enforcement Clashes in Trans-border Merger and Dominance Cases" in *Insight Conference*, Montreal, Canada, June 16, http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/Speech1877.pdf/$FILE/Speech1877.pdf, Access Date: 24.02.2010.

[75] ROWLEY, J.W. and A.N. CAMPBELL (2005), "Implementation of the International Competition Network's Recommended Practices for Merger Review: Final Survey Report on Practices IV-VII", *World Competition,* No: 28(4), p.537.

[76] MARTIN, C. (2006). "Report From Cape Town - The Fifth Annual ICN Conference", *Speech at Insight International Competition Law Conference,* Toronto, Canada, May 15-16th, http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02100.html, Access Date: 26.02.2010.

[77] DAMRO, C. (2009), "The EU and Transatlantic Convergence: Setting a Joint Agenda in Competition Policy", *Scottish Jean Monnet Centre Working Paper Series,* No: 1(2), p.15.

[78] INTERNATIONAL COMPETITION NETWORK (2006), *A Statement of Mission and Achievements until May 2005*, Annual Conference, Bonn, Germany, http://www.icn-bonn.org/ICN_Mission_and_Achievements_Statement.pdf, Access Date: 01.25.2010, p.7.

We should be cautious not to overstate the potential for soft convergence on aspects of competition policy in the ICN, however. In addition to the limitations of the ICN as a multilateral forum discussed above, there may also be natural limits to the degree of convergence that may be attained on competition policies. For instance, even in an area where interactions are intense and many pressures for convergence exist, such as in the European Union, convergence among the national competition policies of the EU countries has been relatively slow and incomplete[79]. The ICN itself "takes the view that any attempt at wholesale harmonization [of competition policies] would do injustice to the great diversity of the economic, institutional, legal and cultural settings prevalent in the home jurisdictions of its member agencies"[80]. Fox argues that ICN "has picked the low-hanging fruit," and the problems ahead of it now are more controversial and harder to solve[81]. As the ICN delves into issues on which there is less global consensus, it will become more difficult to draft sharp, unambiguous and specific recommendations which can encourage compliance[82].

Moreover, even if convergence were possible, it is not clear that this is desirable. For instance, Frederic Jenny, the former president of *Conseil de la Concurrence de France*, argues that Western-style anti-trust laws proved not to be the most relevant ones in transition economies, and that local political considerations, legal traditions and development levels could make retaining divergence among competition policies a more desirable option[83].

CONCLUSION

Globalization of markets has increased the need for regulation of international anti-competitive activity. National competition agencies are increasingly aware that national sovereignty has shrunk on some aspects of competition policy[84]. As a consequence, national, regional and multinational authorities have sought ways to cooperate more extensively over competition policy issues. The International Competition Network is a product of the thinking that multilateral and non-binding forms of cooperation can provide effective solutions to

[79] AMATO, G. (1997), *Antitrust and the Bounds of Power*, Hart Publishing, Oxford, UK; DUMEZ, H. and A. JEUNEMAÎTRE (1996), "The Convergence of Competition Policies in Europe: Internal Dynamics and External Imposition", S. Berger and R. Dore (ed.), in *National Diversity and Global Capitalism*.

[80] International Competition Network 2006, p.2.

[81] Fox 2009, p. 173.

[82] BLUMENTHAL, W. (2004), "The Challenge of Sovereignty and the Mechanisms of Convergence ", *Antitrust Law Journal,* No: 72(4), p.273.

[83] JENNY, F. (2003), "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin,* No: 48(4), p.986.

[84] Todino 2003, p.290.

problems of competition at the international level. It is an innovative virtual organization and a good example of a transnational governance network, a form of governance which has raised optimism among experts[85].

This article has explored the advantages of the ICN over other forums of cooperation on competition issues in the international arena. It concludes that while the ICN has many advantages over other venues such as the OECD, UNCTAD or the WTO, there are limitations to its effectiveness in solving international competition problems. While its membership includes both developed and developing countries, the US and the EU (and its member states) are represented disproportionately in its leading positions. For developing countries, it might create resentment if the ICN is perceived as catering to the needs of a small group of developed countries. Second, the voluntary nature of compliance with ICN recommended practices detract from the effectiveness of its work. Available evidence shows that national competition authorities have started to act in conformity with its recommended practices, but more systematic evidence is needed to evaluate its effectiveness. Finally, the article also sought to evaluate the potential of the ICN to create soft convergence, a goal that its founding members had set for the ICN. The argument of this article is that while the ICN holds significant promise in encouraging socialization among its members and thus convergence over some aspects of competition policy, there may be natural and fundamental limits to the degree of convergence that can be achieved in competition policy.

[85] SLAUGHTER, A.-M. (2000), "Governing the Global Economy through Government Networks", M. Byers (ed.), in *Role of Law in International Politics*, p.177-205.

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