

INTERNATIONAL COMPETITION NETWORK OPERATIONAL FRAMEWORK WORKING GROUP¹

REPORT TO THE STEERING GROUP

Executive Summary

The members of the Operational Framework Working Group (“OFWG”) achieved consensus with respect to a recommended new methodology for selecting future ICN Steering Groups. This methodology was approved by the current Steering Group at its February 12, 2003 meeting. The OFWG explored a number of options with respect to institutional issues but did not reach a consensus on recommending a specific course of action. Members of the group believe that further study of these issues is warranted and therefore recommend a renewal of the working group’s mandate.

A. Introduction

The ICN Operational Framework² was adopted in Naples on an interim basis with a view to establishing a working group to consider related outstanding issues, in particular, how to constitute the next Steering Group and how to fill perceived gaps in relation to the institutional and funding needs of the ICN.

With respect to the Steering Group, the Operational Framework states only that its members are to be “elected in odd-numbered years at the Annual Conference, to serve until the next election takes place.” The Operational Framework is silent on the method(s) through which the members of the Steering Group are to be chosen. The Working Group developed a process that sought to balance transparency and simplicity and ensure appropriate geographic representation on the Steering Group.

As regards the funding and institutional needs of the ICN, the network was established as a virtual organization, without financial obligations or a permanent secretariat, relying on the goodwill and voluntary input of Members and non-governmental advisors (“NGAs”). While the network’s virtual character has its benefits, it also has its constraints. Examples of the former include its flexible nature³ and facilitation of a Member-driven work program, while constraints include the inability to enter contracts or open a bank account.⁴ These latter constraints have implications for the work of the Fundraising

¹ Members of the Operational Framework Working Group are listed in Appendix A.

² A copy of which is attached in Appendix B.

³ See, for example, R. Hewitt Pate, “The DOJ International Antitrust Program — Maintaining Momentum,” Address at the American Bar Association Section of Antitrust Law 2003 Forum on International Competition Law, New York City (February 6, 2003).

⁴ See, for example, Mario Monti, “A Global Competition Policy ?” Address at European Competition Day, Copenhagen (September 17, 2002) and Konrad von Finckenstein, “Recent Developments in the International Competition Network,” Address at the American Bar Association Section of Antitrust Law 2003 Forum on International Competition Law, New York City (February 6, 2003).

Committee. For example, the ICN’s virtual nature precludes it from opening a bank account. Without a bank account, there is no formal mechanism through which the ICN can receive and disburse funds both to provide funding to Members from developing countries to attend ICN conferences and workshops and to support its ongoing activities.⁵

In addition, despite its virtual nature, administering the ICN requires a significant expenditure of time and funds associated with the “secretarial duties,” which are the responsibility of the Chair of the Steering Group. The OFWG recognizes that the Canadian Competition Bureau has spent a tremendous amount of personnel time and financial resources over the past 18 months in administering the ICN, including creating and maintaining the ICN website. The Working Group also recognizes that imposing such a burden on the Competition Bureau, or most other ICN Members, is not sustainable. Accordingly, ICN Members must devise a plan to share the burden equitably and to ensure adequate participation in the ICN by developing countries.

Options considered by the OFWG to rectify these concerns and constraints included identifying sustainable funding sources while maintaining the existing virtual structure, establishing a separate not-for-profit entity or foundation to support the activities of the ICN and developing an administrative relationship with an existing body (e.g., the World Bank, UNCTAD, or OECD) which could act as “trustee” or “administrator” on behalf of the ICN. In so doing, the Working Group was guided by respect for the basic tenets of the Operational Framework and a recognition that any funding mechanism should be sufficiently flexible to accommodate changes in the Chair of the Steering Group, the Annual Conference Host Agency, as well as membership on the Steering Group itself.

B. Selection of Future Steering Groups

Based on the recommendation of the OFWG, the following proposal was presented to the Steering Group:

Proposal Regarding Method to Constitute Future Steering Groups

The following is proposed draft language that could be inserted into the Operational Framework:

Steering Group Membership

The Steering Group shall consist of 15 members. In the event a member elects to leave the Steering Group, the Steering Group may choose to appoint a replacement to fill the vacancy until the next Steering Group is confirmed.

ICN Members designated to host an Annual Conference serve on the Steering Group until the next Steering Group confirmation following the year of their hosted conference.

⁵ As discussed in greater detail below, such funds could be derived from internal (e.g., ICN Members) or external (e.g., other governmental, non-governmental or other private sector) sources. It is acknowledged that these funding source raise a variety of institutional issues, discussed in Parts C and D.

The remainder of the Steering Group is comprised of members who serve two-year terms and are recommended by the outgoing Steering Group. Steering Group members are confirmed by consensus of ICN Members in odd-numbered years at the Annual Conference.

Any ICN Member, including a member of the outgoing Steering Group, may ask the outgoing Steering Group to be nominated to be on the next Steering Group. The outgoing Steering Group may also seek the interest of a particular ICN Member to offer its name as a candidate.

In making its recommendations, the outgoing Steering Group shall consider:

- That the Steering Group's membership should reflect the geographic diversity of ICN Members;
- Each nominee's degree of participation in ICN activities; and
- The desirability of confirming new Steering Group member(s) in each round.

This proposal is based on the following:

Hosting the annual conference is a significant commitment. The Host Agency will have a direct interest in the course of the ICN. Accordingly, the head of that Agency should be able to have a voice in influencing that course by being on the Steering Group. The duration is suggested so as to allow future Annual Conference Host Agencies to benefit from the knowledge and experience of the past Host. A certain continuity from year-to-year will also be ensured.

Nominations through the outgoing Steering Group will allow members to ensure a representative slate for the incoming Steering Group. No constraints are placed on ICN Members volunteering to be nominated to be on the Steering Group while, at the same time, the Steering Group may ask particularly well-qualified candidates to consider volunteering to be on the successor Steering Group if they have not yet done so.

Membership on the incoming Steering Group is confirmed by ICN Members at the relevant Annual Conference.

This "minimalist" approach, consistent with the remainder of the Operational Framework, provides the greatest flexibility in establishing future Steering Groups while ensuring that concerns of balance may be addressed adequately.

This proposal was approved by the Steering Group at its February 12, 2003 meeting.

It is anticipated that in Mérida, the OFWG will provide a brief overview of its work on this issue and explain the new selection methodology. This will take place at the same time as a new slate of Steering Group members is announced, and ICN Members will be asked to endorse both these matters.

C. Funding Issues

The ICN's institutional character was designed to be as virtual as possible, without a legal status or membership dues, in order to maximize participation by Members, encourage a free exchange of ideas and avoid becoming a bureaucracy-driven international organization. While these latter objectives have been achieved, they have come at a price.

Without a mechanism to share the burden among Members, the agencies of the Annual Conference Host and the Chair of the Steering Group have incurred disproportionate expenses. To illustrate the costs of this virtual network, the Working Group has set out below the direct and indirect costs associated with hosting ICN conferences and workshops and serving as Chair of the Steering Group.

If a means to offset some of these costs is found, this would broaden the number of Members who could afford to serve as Annual Conference Host or Steering Group Chair. Additionally, the ICN would be better situated to ensure participation at its Annual Conferences and workshops by Members from developing and developed countries alike.

One of the additional constraints associated with the virtual nature of the ICN is that it lacks a legal personality. This limits the network's ability to enter into contracts (e.g., to publish conference proceedings) and receive funds directly. This latter concern has raised issues for the Fundraising Committee and fundraising to date has been on an ad hoc basis of matching donors to donees.

The OFWG worked closely with the Fundraising Committee, given the implications of fundraising on the institutional issues at hand. Given the timing of the Mérida conference, it was decided that funding sources be identified both in terms of the short term (for Mérida) and long term (post-Mérida).

1. Funding Needs

The experiences of the inaugural Annual Conference Host and Chair of the Steering Group point to the heavy burden that such positions place on the related competition agencies.

For example, the conference in Naples cost the Italian Competition Authority approximately US\$220,000,⁶ although some funds (approx. \$40,000) were received from local institutions and foundations to help offset those expenses. In addition, numerous

⁶ Note that all dollar figures are listed in US dollars.

staff of the Competition Authority devoted significant time to organizing the conference.⁷ The Federal Competition Commission in Mexico expects to spend approximately \$300,000 on the 2003 Mérida conference, and the US DOJ spent approximately \$26,000 to host the Investigative Techniques merger workshop in Washington D.C. in November 2002.

According to the Operational Framework, the Chair of the Steering Group is responsible for the various “secretarial duties” of the Network. This has involved a significant commitment of both human and financial resources. With respect to the former, staff time is spent administering the ICN website, arranging Steering Group meetings and preparing minutes thereof, and preparing speeches for ICN-related speaking engagements.⁸ When personnel from the Competition Bureau are engaged in these tasks, much like when their counterparts were preparing for the annual conference and merger workshop, they are unable to do other agency-related work.

There are also significant direct financial costs involved with serving as Chair. The cost of operating the ICN website is not insignificant. While initial start-up costs of approximately \$13,000 were offset by a donation from the International Bar Association, the discussion forums and annual fees total approximately \$10,000. As noted elsewhere, the US DOJ has donated \$9,800 to assist in the redesign of the website. As the number of documents generated by the ICN continues to grow, so will the cost of maintaining and managing the website. In addition, the Chair of the Steering Group has incurred travel costs to attend several conferences to speak about ICN-related matters. Invitations to such speaking engagements may not have been accepted but for the Commissioner being the Chair of the Steering Group.⁹ It should be noted that other members of the Steering Group have given speeches promoting the ICN as well.¹⁰ Approximately \$15,000 was also spent on promotional items (e.g., flags, banners, displays), teleconference fees, and other miscellaneous items associated with the launch of the Network.

⁷ Two senior officers spent a total of four months and two administrative assistants spent a total of five months devoted to planning the conference in Naples.

⁸ Approximations of time (as a percentage of total time worked since the Canadian Commissioner of Competition became Chair of the Interim Steering Group to the present) devoted to supporting the Commissioner of Competition in his capacity as Chair of the Steering Group: Administrative Support - 30% of an Executive Officer, 40% of a Senior Officer, 40% of a Junior Officer, and 15% of an Administrative Assistant; Website Creation and Maintenance – 50% of an Electronic Communications Officer; Communications – 10% of a Communications Executive; and 10% of a Senior Communications Officer.

⁹ ICN-related speeches have been delivered by the Chair of the Steering Group at the Conference Board’s 2002 and 2003 Antitrust Conferences (New York City), Insight’s International Dimensions of Competition Law (Toronto), the IBA’s 6th Annual Competition Conference (Fiesole), Fordham’s 29th Annual Conference on International Antitrust Law & Policy (New York City), Atlas Information Canada’s Competition Law in Difficult Times (Toronto), and the ABA’s 2003 Forum on International Competition Law (New York City).

¹⁰ For example, William Kolasky delivered ICN-related speeches at several ABA events in Washington and the IBA’s Fiesole conference; Fernando Sánchez Ugarte spoke at an IBA event in Cape Town; and Jérôme Gallot addressed the Taiwan Fair Trade Commission’s International Conference on Competition Policies/Laws in Taipei.

Above and beyond these expenses are the costs associated with providing travel assistance to member agencies from developing and transition economies. It has been recognized that one of the distinguishing features of the ICN is that it includes members agencies from both developing and developed countries. In order to benefit from this diversity, there is a desire to have as many members attend the annual conferences and workshops as possible. For its inaugural conference, the ICN had requests for support from agencies of 17 developing countries, and it was able to fill 13 requests with public funds. The number of requests for assistance will likely continue to grow, as most potential members come from developing countries who will require some assistance to attend ICN conferences. To date, the ICN Fundraising Committee has played the role of “matchmaker” in pairing donors with donees. Some members have expressed concerns about the sustainability and efficiency of this approach.¹¹

Thus, in terms of direct costs, funds are required to operate the ICN website and if there is a desire to enhance the ability of members from developing countries to serve as Chair of the Steering Group or host an Annual Conference, having funds available to help defray these costs should be considered. Similarly, funds will routinely be required to offset travel costs for members from developing countries.

2. Funding Survey

The OFWG distributed a survey to all members of the ICN to canvass views on funding options. Members were asked whether their agencies face any legal or administrative constraints in donating money to fund ICN-related activities, and if so whether the type of donation made any difference; whether their agency faces any legal or administrative constraints in receiving and holding such funds on behalf of the ICN, and whether it mattered if the source of the funds was a public or private entity; and whether their agency was in a position to make such a contribution or attempt to arrange a contribution from another government agency. Views on a possible US\$200 conference fee to cover personal expenses (e.g., meals and refreshments) were also canvassed. It was suggested that these fees could also be used to address other ICN-related funding needs.

Thirty-three responses were received from members with economies and competition agencies at various levels of development. Eighty per cent of survey respondents indicated they faced legal or administrative constraints that would prevent them from providing money to fund ICN activities. The most frequent explanations were that the competition agency received its funds according to a legislative/parliamentary budgeting process. Such funds could not be used for purposes other than those specified when the funds were allocated/appropriated, and the agency had limited funds for its own purposes. A majority (63%) indicated that the nature of the contribution would make a difference to the agency’s ability to provide funds, with mandatory fees being easier to justify than discretionary ones. Several agencies indicated that mandatory conference fees could be paid out of existing funds.

¹¹ The Chair of the Fundraising Committee indicated that over the period October 2001 – September 2002, fundraising efforts consumed approximately 20% of the time of a Senior Executive and 20% of the time of a Staff Attorney in his agency.

Agencies were closely divided on whether they faced legal or administrative constraints in receiving funds from another government or government agency (50% yes, 46% no). However, more faced restrictions on receiving funds from private sector sources (56% yes, 30% no), with reasons ranging from concerns about conflict of interest to the agency having no separate bank account. As in the first question, many agencies were also precluded by statute from receiving funds from sources other than their central government. Several respondents indicated that the constraints could be overcome if the funds were paid to a third party or a special purpose account earmarked for ICN activities.

Eighty percent of respondents indicated that they could not make a voluntary contribution to help another agency attend the Mérida conference. However, four agencies indicated that they were prepared to offer assistance. Another seven agencies indicated their willingness to seek aid from another government agency.

With respect to conference fees to help offset costs for conference hosts, more than half of the respondents were open to such a proposition so long as it did not have the effect of discouraging developing country participation. Several agencies responded that if there were a fee, they either would not be able to attend, or they would have to reduce the number of people in their delegation.

Finally, a majority of respondents indicated that if they could make a contribution, it would have to be on a year-by-year basis rather than a multi-year, continuing basis.

Several key lessons can be drawn from the survey results: there was general acceptance of a small fee to offset conference expenses provided there is a mechanism to waive the fee for those unable to afford it, and any such fee should be structured as a mandatory fee, as it is easier for member agencies to justify mandatory fees (as opposed to voluntary payments) for budgeting or other purposes. The other key finding was that only 4 of 33 respondents indicated they were prepared to offer direct financial assistance to agencies in need of funds to attend the Annual Conference in Mérida, with 7 additional indicating that they were prepared to arrange for funding requests through another government agency. However, it is hoped that most of these four agencies will be prepared to find support for several beneficiary agencies. This highlights the need to find other sources of funding as there were 17 requests for funding to attend the conference in Naples, 12 of which were accommodated.

3. Sources of Funding: Short Term Options

The basic short-term funding option is to match ICN Members requiring assistance with donors indicating a willingness to fund participation in ICN activities. This is the model the ICN used to obtain funding for participation in the Naples Conference. By this model the ICN handles no funds but only helps Members to obtain funds directly from donors.

The operation of the matching model involves essentially three steps. The first is to collect requests by ICN members needing assistance. The second is to identify potential donors. For Naples, the Fundraising Committee compiled an extensive list of possible

donors, including multinational bodies such as the World Bank and national foreign assistance bodies. The Fundraising Committee then contacted all of these institutions to describe the ICN and its objectives and to solicit help in funding participation by less developed countries. The third step is to match individual donors with specific ICN Members.

Three separate groups provided funding for the Naples conference: (i) national foreign assistance organizations; (ii) national competition agencies; and, (iii) regional competition authorities. Multinational organizations did not provide funding for this event.

The success of the matching model could be enhanced by having ICN Members from less developed countries encourage donors to make the ICN one element of routinely funded activities. Many donors have missions within countries in which there are ICN Members in need of travel assistance. Donors usually develop assistance plans in a cycle covering several years or more. These plans vary considerably in the flexibility they afford donor program officers to improvise in allocating funds. As a general matter, prospective conference attendees could increase their prospects of receiving donor funds for ICN activities by approaching their donor country representatives and indicating their interest in having ICN participation made a continuing effort of capacity building related to economic reform. Efforts by prospective funding recipients would be coordinated with the ICN Fundraising Committee as the Committee makes its own proposals to the donors.

4. Sources of Funding: Long Term Options

The following options were discussed by the Working Group. Each may raise particular issues regarding the institutional structure of the ICN, which must be kept in mind when examining Part D of this Report. For example, if funds are raised, some members were of the view that there must be a mechanism to receive, hold and disburse the funds, whether that be through a trust fund or separate ICN bank account. Thus, these options complement the institutional options and are not to be considered alternatives thereto.

(a) *Private sector sponsorships*

Sponsorships to defray conference/workshop costs or travel costs for Members from developing countries were discussed. In return, these organizations might receive recognition in conference/workshop materials. Funds could either be paid directly from the donor to the recipient (a competition agency from a developing country in the case of defraying travel costs) or to the conference host (or directly to the service provider) to sponsor a dinner or lunch. As highlighted in the funding survey, however, some member agencies face constraints in receiving funds from third parties. As a result, if the ICN were to establish an intermediary organization (e.g., partnering or establishing a not-for-profit corporation to support the activities of the ICN) to receive the funds from the private sector and disburse the funds to member agencies, this could alleviate possible concerns about undue influence or conflicts of interest vis-à-vis the private sector. However, other respondents indicated that they could not participate in an

intermediary organization that received funds from the private sector. This reflects a need for some flexibility and perhaps several methods of receiving funds.

It was also recognized that guidelines would need to be established to identify eligible donors, the type of events that could be sponsored (e.g., should enforcement-related events such as the Merger Workshop on Investigative Techniques be free from sponsorship), and caps on the value of the contribution. There is a potential to receive funds from other interested parties for other, non-conference related purposes. For example, a portion of the cost of setting up the ICN website was defrayed by a contribution from the IBA.

(b) *Conference Fees*

Another option discussed by the Working Group was to have conference attendees each pay a certain amount to help defray conference costs. This could be used for certain basic expenses such as meals or attendee travel. As with the other funding suggestions, Working Group members were mindful of the impact of such fees on Members from developing and transition economies, and it was acknowledged that a methodology would need to be established to determine eligibility for a fee waiver. It was also suggested that NGAs could pay a fee to attend the conference, and the merits of having the same fee, or a higher fee, were discussed. Some Working Group members felt that NGAs should not be treated differently from ICN Members; others felt that charging a substantial fee to NGAs may create an incentive to invite more NGAs, which could disrupt what was seen by some as the appropriate balance between Members and NGAs at the Naples conference. In addition, in the event NGAs were charged a fee, it was suggested that some mechanism be developed to waive fees for certain NGAs (e.g. academics, those from non-profit organizations, those from developing countries, and those who had already made significant contributions to the work of the ICN during the year).¹²

(c) *Voluntary Contributions from Members*

Acknowledging that the Canadian Competition Bureau has incurred a disproportionate amount of the administrative costs to date, the US DOJ agreed to provide on an ad-hoc basis a sum of money designated to assist with the ICN website (Canada suggested that this was an identified area of need) and will also offer the services of a paralegal based in their offices to assist with ICN matters.

¹² Language could be added to this effect to the Operational Framework: “Conference hosts may, with the approval of the Steering Group, seek to collect per capita fees from conference attendees to offset some portion of the costs related to the conference. Each year, the Annual Conference Planning Committee will be responsible for making recommendations to the Steering Group regarding the amount and the use of such fees, as well as a protocol to provide for fee waivers from Members or NGAs from developing or transition economies. The ACPC shall also consider whether to waive the fees for NGAs who have made significant contributions to the work of the Working Groups.

Due to the budgetary appropriations process in the US, however, DOJ could not commit funds for future years. The US encouraged other members to examine their abilities to contribute money or in-kind offers of services.

The European Commission will advise its delegations around the world in countries with ICN Member agencies of the ICN conference and developing and transition countries can apply for assistance directly from their local Commission delegation.

Italy noted that one option consistent with this approach, and which already occurs to some extent, is for the Chair to share the workload with other members of the Steering Group (or other ICN Members generally). For example, invitations to speaking engagements have been shared with the Vice-Chairs, and the US DOJ will be assuming some responsibilities for the ICN website. Italy encouraged members of the OFWG to devise a list of other functions that can be shared in order to more evenly distribute the duties of the Chair. This could also be accomplished with little or no change to the Operational Framework.

(d) *Subscription fees*

Another option discussed was to have Members fund the ICN directly via subscription fees. The working group discussed the possibility of having Member agencies pay a fee proportional to their budget. In order to account for those Members who may be unable to pay any form of dues, some members of the working group suggested that such dues be voluntary. The funding survey indicated that Members had mixed views on dues, with a majority indicating that they would be better positioned to contribute if the dues were of a mandatory rather than voluntary nature, while others indicated that they would be unable to pay regardless of the nature of fee. Of course, establishing the possibility of membership dues, even if of a voluntary type, requires that the institutional issue is solved and that there is an entity that is able to collect funds on behalf of the ICN.

D. Institutional Options

As discussed above, for the ICN to be able to receive, hold, and disburse funds, it must have some form of legal identity. Its current virtual nature means that it is unable to hold any property, enter into contracts, or open a bank account at present. For example, the ICN website, its primary communications vehicle, is owned and operated by the Canadian Competition Bureau, not the ICN.

Set out below are the options examined by the Working Group.

1. Options Considered

(a) *Administrative Relationship with an Existing Multi-lateral Institution*

(i) Overview

A proposal to develop a relationship with an existing multilateral body (e.g., UNCTAD, World Bank or OECD) to maintain a trust account or otherwise serve as an administrator on behalf of the ICN was discussed. Any funds raised by the Fundraising Committee or donations from ICN Members (or other sources) could be held in an account by that body on behalf of the ICN. This option would allow the ICN to have a means to receive, hold and disburse funds. Based on informal discussions with representatives of these organizations, fees ranging from 0-30% of the funds under administration would be charged by the organization.

A separate, but somewhat related proposal was made that the ICN suggest to the OECD that it hold its Global Forum on Competition (“GFC”) conferences either immediately prior to or following ICN annual conferences. This would allow Members from developing or transition economies who receive funding to attend GFC meetings to also attend the ICN conference.

(ii) Views of the Working Group

Some members were receptive to the notion of an administrative relationship, as it would provide a mechanism to receive, hold and disburse funds without creating a separate ICN infrastructure. However, some concerns were raised over what conditions the administrative “partner” might impose. For example, would the ICN require some form of legal status (which it does not have) to enter into such an arrangement with the partner? Would the Steering Group retain control over the fund? Would there be any conditions on the use of the funds (e.g., the funds should not be earmarked solely for technical assistance)? Would it be possible for the focus of the ICN to remain the same? Furthermore, the level of the administration fees charged by the partner and the services that would be provided in return for such a fee should be taken into account. Finally, it would be important to know what kind of auditing would be required.

In addition, questions were raised as to the kind of decision-making protocols that would be required and the turn-around time between a request for a disbursement and receipt of the funds. Of primary concern is that any funds would have to be available only to the ICN, and not other groups under the aegis of the administrative partner.

Despite initial expressions of interest from two potential administrative partners, neither was prepared to enter into such an arrangement with the ICN at this time. However, the OECD has indicated that it might be prepared to collaborate with the ICN in administering funds on its behalf.

Several members of the working group discussed this possibility with representatives of the OECD Secretariat. They appear willing to open a budgetary line in support of ICN activities that would receive funds on behalf of the ICN. They would administer those funds in accordance with a general framework agreed upon as between themselves and the Steering Group. Funds would only be disbursed with the approval of the Steering Group (or some subset thereof as

indicated in the framework). Internal OECD auditing procedures would apply with the result that funds can only be spent in accordance with the terms agreed upon with the Steering Group. Finally, representatives of the OECD Competition Committee indicated that they would be willing to absorb the initial administrative costs of performing these services on behalf of the ICN. However, they indicated that this issue might have to be revisited in the event there is a significant expansion in the workload.

Discussion of this possibility was limited to funding/reimbursing travel expenses of ICN Member agencies. Having the OECD as a potential partner may also raise issues if it is contemplated that it would disburse funds on behalf of the ICN to support other ICN activities (e.g., contractual issues). Such issues were not canvassed during preliminary discussions and may be a significant impediment if the OECD were to conclude that it was not prepared to accept such legal responsibility. As such, if this OECD relationship is pursued, it would not necessarily resolve all of the issues related to the ICN's lack of a legal identity.

While there are still many questions to resolve with regard to this option, members of the working group believe that it merits further exploration.

It was suggested that one way of addressing the difficulties encountered in securing funds for ICN Members to travel to Naples would be to hold the ICN conference adjacent to GFC meetings since many ICN Members receive funds from the OECD to attend the GFC meetings. Because ICN conferences are hosted in different locations each year and future venues have already been selected, it was proposed that the ICN suggest to the OECD that it schedule its GFC meetings adjacent to ICN events. Members of the working group believed the idea merits exploration but raised some concerns about the need to maintain separate identities for both the ICN and the GFC. Indeed, this concern was expressed more generally in respect of "partnering" with the OECD. For example, what is the risk that the ICN "brand name" would be diminished through an arrangement that involves such close ties with the OECD?

(b) *Not-for-Profit Corporation*

(i) Overview

Another option considered by the Working Group was the creation of a legal entity that could be used to support the functions of the ICN by receiving, holding, and disbursing funds for ICN activities while addressing concerns raised by some members of the Steering Group that they not be part of any corporate structure.

To facilitate discussion, a Canadian model was examined, not because Canada was considered to be a "natural" jurisdiction of incorporation, but principally for the sake of convenience to examine in concrete terms how such an organization could be established in a manner that is flexible enough to respond to the concerns

raised by members of the working group. Other jurisdictions may well be worth considering. Indeed, if the Steering Group considers this to be an option worth pursuing, it would be desirable to identify and examine a short list of options from other jurisdictions.¹³

The Working Group discussed a not-for-profit corporation without share capital established by way of Letters Patent under Part II of the *Canada Corporations Act*. A not-for-profit corporation carries on specified objects without pecuniary gain to its members. The objects of such an entity (hereafter referred to as “ICN Support Corp.”) could be “to support the goals and activities of the International Competition Network by receiving, holding, and disbursing funds on its behalf.”

The corporation could be comprised of members who elect a board of directors to carry on the business of the corporation. Under Canadian law, there would have to be a minimum of one member and three directors at all times. Members of the Steering Group (or their staff) could serve in those positions, as they need not be filled by Canadians. Personnel would also be required to serve as officers of ICN Support Corp. (the same people can be both directors and officers). Personnel in these positions would not receive any compensation or have their expenses reimbursed.

Because of the desire to operate the corporation with a minimal infrastructure, it was suggested that only the minimum number of people required by law to operate the corporation be involved. As such, not every member of the Steering Group would need to be involved directly in the operation of the ICN Support Corp. However, the Steering Group would retain *de facto* control over all spending and expenditures would be restricted to those which support the ICN’s activities and are approved by the Steering Group.

To allay the concerns of some members of the Steering Group, the by-laws could only permit ICN Support Corp. to receive money from public (e.g., government or other not-for-profit) sources. Further, ICN Support Corp. would not be active in raising money for the ICN, as that would remain the responsibility of the ICN Fundraising Committee. However, funds raised by the Committee could be deposited in a bank account held by the ICN Support Corp. Accordingly, in practice ICN Support Corp. would be used merely as a mechanism to establish a legal identity and thereby open a bank account to handle incoming and outgoing funds. Finally, under Canadian law, the Support Corp. would require an auditor (although that person need not be a professional auditor, so long as they prepared financial statements in accordance with generally accepted accounting principles on a consistent basis and unanimous consent of the members was obtained). In

¹³ Members suggested that one way forward is to examine organizations in their own jurisdictions to determine how they are structured with a view to one of them serving as a model for the ICN. For example, the US is examining the International Network for Environmental Compliance and Enforcement and the EU offered to examine the UNEP Dams and Development Project. Universities or think tanks were also suggested as possible models, or administrative “partners,” although this option was not extensively discussed.

the event a professional audit firm is retained, the associated annual cost would be approximately \$2,000 to \$3,300).

(ii) Views of the Working Group

The Working Group was unable to reach a consensus on this option. Some members believed that this option offered the greatest control and flexibility over funds raised, at a low cost, at the same time as creating a legal identity through which the ICN could enter contracts and hold property, intellectual or otherwise (e.g., trademark in ICN logo, any copyrights in ICN speeches or work product if desired, and other items such as flags and banners). It was noted that the OECD option would only be a second-best solution in this particular regard. This option would offer a more long-term solution to the funding/institutional mechanism needs while leaving the core of the Network unaltered. In addition, some members expressed support for the proposal if the existence of such an entity would facilitate the raising of funds for ICN activities.

However, other members expressed doubts about the ability of personnel from their agencies to participate as an officer or director of the ICN Support Corp. For example, some face legal or administrative constraints (e.g., conflict of interest guidelines) which preclude staff from participating in such ventures. In addition, certain members expressed concern over the complexity of the proposal, although it was noted that any proposal to enhance the institutional structure will likely result in some additional infrastructure and as such this should not be a determinative factor.

One additional concern raised involved the potential legal liability for ICN Support Corp. At present, the draft by-laws of ICN Support Corp. contemplate that directors and officers would be protected from typical liabilities associated with being a director or officer under the terms of a typical directors and officers insurance policy to be paid out of the funds of the corporation. However, further assessment is warranted if this option is pursued.

(c) *Status Quo*

As noted above, the option of maintaining the status quo and remaining a virtual organization, with no legal identity or permanent infrastructure, has both benefits and constraints. Some members of the working group who support maintaining the current structure recognize that there is room to improve with respect to exploiting funding opportunities and sharing costs in a more equitable manner (e.g., the costs associated with being Chair of the Steering Group). Members who advocated this view also raised concerns that adopting a greater institutional structure could undermine the unique benefits of the existing virtual structure without necessarily resolving the funding issues discussed by the Working Group. However, some members who advocate institutional change indicated that underlying their desire for a more permanent structure is the concern that without such a structure the ICN may lose momentum.

The status quo option was not the subject of extensive discussion among the members of the working group, but will likely serve as the default position given the lack of consensus within the group. Some members felt that, while recognizing the current limitations of the model, other benefits outweighed these constraints.

E. Conclusion

The Operational Framework Working Group is pleased to have reached a consensus on a methodology to select future Steering Groups. With respect to the various institutional options considered, members of the Working Group have not yet reached a consensus with respect to recommending a course of action to the Steering Group.

While the Working Group has identified possible sources of funds for the ICN's activities, both internal and external, as often as not these sources raise the question of whether an institutional structure is needed to maximize these opportunities.

With regard to an administrative relationship with the OECD, while the Working Group was unable to address some of the issues raised by this proposal it was decided that it does merit further consideration.

With regard to the establishment of a not-for-profit legal entity to support the activities of the ICN, some members of the Working Group felt that it provided a long-term solution which would allow the ICN to maintain its existing focus and allow the Steering Group to have control over the funds received and disbursed. It would also result in the creation of a formal legal identity through which the ICN could indirectly, if it so desired, enter contracts and hold property. However, some members of the Working Group still have some questions about the modalities of such an option, including their ability to participate under such a model. While the OFWG examined a Canadian model, in the event that the mandate of the Working Group is renewed, other jurisdictions that offer suitable legal frameworks should be examined in addition to further study of the Canadian model.

Given the desire to deepen its study of institutional alternatives and to develop recommendations to the Steering Group on funding sources and modalities, the Operational Framework Working Group recommends that the Steering Group renew the Working Group's mandate and provide direction to explore the most promising of these options (administrative relationship with the OECD, and some form of legal support entity), together with evaluating their relative merits vis-à-vis the status quo.

Appendix A

Members of the Operational Framework Working Group

Co-chairs: Italy & Canada

- Australia
- Croatia
- Cyprus
- European Commission
- France (DGCCRF)
- Germany
- Japan
- Kenya
- Pakistan
- Romania
- Slovak Republic
- South Africa
- Switzerland
- United States (DOJ & FTC)
- Yugoslavia

Appendix B

INTERNATIONAL COMPETITION NETWORK INTERIM OPERATIONAL FRAMEWORK

Adopted September 29, 2002

Naples, Italy

Membership

Members of the International Competition Network are competition agencies entrusted with the enforcement of competition laws that have acceded by letter to the "Memorandum on the Establishment and Operation of the International Competition Network" or were members of the Interim Steering Group. Where a single jurisdiction has more than one competition agency, each may be a Member.

Steering Group

Mandate

The Steering Group:

- guides the work of the ICN by identifying subjects of potential interest to Members and considers proposals for projects aimed at leading to non-binding general guidelines or "best practices" recommendations;
- establishes, designates the leadership and recommends the composition of Working Groups to carry out projects approved by the ICN at its Annual Conference;
- reviews and approves a work plan for each project devised by the responsible Working Group;
- prepares and circulates agendas and documents for conferences and meetings of the ICN to Members; and
- approves the agenda of, and non-Member participants in, the Annual Conference, on the advice of the Annual Conference Planning Committee.

~~Membership~~ Steering Group Membership*

~~The Steering Group is comprised of a maximum of fifteen Members of the ICN. Representation on the Steering Group is intended to reflect the geographic range of ICN Members.~~

* "Steering Group Membership" section to be confirmed by ICN Members in Mérida, Mexico, June 23-25, 2003.

~~Commencing in 2003, members of the Steering Group are elected in odd-numbered years at the Annual Conference to serve until the next election takes place. The Steering Group shall consist of 15 members. In the event a member elects to leave the Steering Group prior to the next election, the Steering Group may choose to appoint a replacement to fill the vacancy until the next election. Steering Group is confirmed.~~

~~The Head of the Annual Conference Host Agency participates in the Steering Group on an ad hoc basis for the period during which they are providing logistical support to the ICN.~~

~~Meetings ICN Members designated to host an Annual Conference serve on the Steering Group until the next Steering Group confirmation following the year of their hosted conference.~~

~~The remainder of the Steering Group is comprised of members who serve two-year terms and are recommended by the outgoing Steering Group. Steering Group members are confirmed by consensus of ICN Members in odd-numbered years at the Annual Conference.~~

~~Any ICN Member, including a member of the outgoing Steering Group, may ask the outgoing Steering Group to be nominated to be on the next Steering Group. The outgoing Steering Group may also seek the interest of a particular ICN Member to offer its name as a candidate.~~

~~In making its recommendations, the outgoing Steering Group shall consider:~~

- ~~• that the Steering Group's membership should reflect the geographic diversity of ICN Members;~~
- ~~• each nominee's degree of participation in ICN activities; and~~
- ~~• the desirability of confirming new Steering Group member(s) in each round.~~

Meetings

Members of the Steering Group meet in person immediately after each Annual Conference at the location at which the Annual Conference is held to elect a Chair from among Steering Group members and to conduct other business as appropriate. The Steering Group meets in person or virtually as frequently as warranted to consider the progress of Working Groups and the status of ongoing Projects.

Meetings of the Steering Group are called by the Chair or by any five Steering Group Members. The quorum for meetings of the Steering Group is established at eight members.

Chair

The Chair is responsible for:

- ~~Chairing~~chairing meetings of the Steering Group;
- co-Chairing the Annual Conference with the Head of the Annual Conference Host Agency;
- undertaking the necessary secretarial duties of the ICN;
- preparing and distributing the minutes of Steering Group meetings to members of the Steering Group;
- acting as the depositary for information regarding the operation and activities of the ICN;
- the general conduct of the affairs of the ICN where not otherwise specified to be within the responsibility of any Group or Committee.

Working Groups

Working Groups are comprised of such representatives of Members and other participants as the Working Group Chair may appoint. Any Member wishing to contribute to the work of a Working Group may do so. Such appointments endeavour to reflect the geographic range of ICN Members.

Working Groups, to the extent possible, operate on a consensus basis. To the extent that a consensus cannot be achieved, Working Groups identify in their reports the different views held by members and the relative support of members for the differing views. Working Groups determine the nature and ambit of their responsibilities within the mandate specified by the Steering Group. However, any decisions involving financial obligations are taken only by the Steering Group.

The Chairs of the Working / Subgroups may invite the assistance of anti-trust experts on issues falling within the remit of their respective groups.

Cooperation with other international bodies working in the same field

The ICN seeks close cooperation on anti-trust issues with other international bodies working in the same field, such as in particular the WTO, UNCTAD, and the OECD.

The Steering Group may invite these or other international bodies working in the same field to designate representatives to contribute to any ICN activity on the same terms as non-governmental advisors.

Non-Governmental Advisors

The ICN will involve anti-trust experts from the relevant consumer, business and academic constituencies as well as from the legal profession.

These experts will be invited to participate in the ICN either in their capacity as representatives of associations invited by the Steering Group, or in a personal capacity based on their individual authority and expertise in the field of anti-trust. They are expected to contribute to the work carried out by the ICN with respect to any matter, including :

- potential projects or particular aspects of projects;
- issues and factors to be considered by the Steering Group, a Working / Subgroup or the Annual Conference Planning Committee
- information, expertise and resources;
- potentially helpful contact persons; and
- the draft work product of Working / Subgroups, including recommended best practices and guidelines.

Members may seek information and expertise on ICN-related issues from non-governmental advisors of their own choice.

Non-governmental advisors in any ICN activities are generally expected to bear their own expenses in relation to such activities.

Non-governmental advisors shall refrain from making statements on behalf of ICN, and from misrepresenting their activities in relation to ICN.

Annual Conference

Planning and Coordination

Annual Conference planning and coordination is managed each year by the Annual Conference Planning Committee, comprised of:

- a representative of the Host Agency of the next Annual Conference (Chair);
- the Chair of the Steering Group;
- the Chairs of Working Groups;
- a representative of the previous year's Host Agency;
- a representative of the following year's Host Agency; and
- such other Members as may be appointed by the Chair of the Committee.

The Committee prepares a draft agenda and a tentative list of participants for the Annual Conference to be submitted to the Steering Group for approval.

Participation

The Steering Group, acting on its own initiative or on a proposal made by a Chair of the Working / Subgroups, will ask the Host Agency to invite to the Annual Conference

- representatives that have been designated by international bodies working in the same field mentioned above, or by any other international body invited by the Steering Group;
- anti-trust experts representing a balance of geographic origins and backgrounds that have been designated, upon invitation by the Steering Group, by associations of the consumer, legal and business constituencies; as well as other anti-trust experts selected on the basis of their individual expertise and authority, in particular from the academic community.

The number of anti-trust experts to be invited from each of these groups to the Annual Conference is determined by the Steering Group within the limits indicated by the Annual Conference Planning Committee.

The Host Agency may nominate for participation in the Annual Conference a limited number of special guests.

Agenda

The Annual Conference agenda is structured to focus on:

- reports from, and progress within, Working Groups; and
- the future work program of the ICN.

Language of the ICN

English is the interim working language of the Steering Group, Working Groups, ICN web-site infrastructure and the Annual Conference.

The language of written contributions to the work of the ICN are at the discretion of the contributor of such material. Any related translation costs are borne by the contributor.

If a sufficient number of members ask for other working languages, the question will be examined by the Steering Group.

ICN Web-site

Modifications to the web-site, including the addition or deletion of content material, are approved by the Chair of the Steering Group or by the Chair of a Working Group, as the case may be, after consultation with members of the relevant Group. Chairs give advance notice of such modifications to Group members. Modifications are deemed to be approved by Members in the absence of any indication to the contrary.

Enquiries generated from the ICN web-site are routed to designated contact persons within the Chair's office, Working Groups or to the ICN Webmaster as appropriate.

The ICN will establish an electronic registry of anti-trust experts on the ICN web-site for self-inscription which will be open to all anti-trust experts who are willing to contribute to the work of the ICN.

A public email distribution list will be set up via the ICN web-site to disseminate to interested members of the public ICN documents such as approved work plans of the Working / Subgroups, or other material authorised by the Steering Group Chair.

Draft