A Report on the First Annual Conference of
The International Competition Network*

By Professor Eleanor M. Fox**

The first annual conference of the International Competition Network ("ICN"), held in Naples, Italy on September 28 and 29, was opened by co-chairs Giuseppe Tesauro, Chairman of Italy's Antitrust Authority and host of the conference, and Konrad von Finckenstein, Chair of the ICN Interim Steering Group and Canada's Commissioner of Competition. Representatives of 59 antitrust agencies and 50 non-governmental experts and stakeholders (called non-governmental advisors or "NGAs") came together in Naples to address merger review in a multi-jurisdictional context as well as the role of competition advocacy, and to advance the future work program of the ICN, including methods to empower competition agencies in developing countries. 1

Chairman Tesauro welcomed delegates to Naples, and introduced the conference agenda. He noted that by drawing such a diverse collection of antitrust officials to the event, the ICN had already achieved an important objective: becoming a key international forum for discussing international antitrust matters. Mr. Tesauro stated that the globalization of the economy requires the globalization of competition enforcement. He expressed his hope that the ICN will assist in the work of achieving procedural and substantive convergence among the world’s antitrust systems. In his remarks, Commissioner von Finckenstein discussed the evolution of the ICN, noting that the speed with which the ICN came together, at least in international terms, reveals the existence of a general consensus on the need for such an inclusive organization. He also reviewed the features which distinguish the ICN from other international fora dealing with antitrust issues, and addressed how the ICN complements, rather than duplicates, the work of those fora. In concluding his remarks, Commissioner von Finckenstein noted that, with the ICN, competition agencies from around the world finally have their own network dedicated solely to antitrust issues. He encouraged members and NGAs to participate in the working groups to help strengthen the network.

I Competition Advocacy

Presentations and discussion on competition advocacy raised challenges from three perspectives: the problems faced by antitrust agencies in combating government regulation that prevent the market from working; the problems faced by developing countries in garnering acceptance of competition as a value and in obtaining the resources and talent needed to enforce the law; and the problems faced by agencies in preserving the force of their own decisions as against jurists or ministers who may not fully understand competition law or may be captured by business and political pressures.

Speakers reinforced the values of competition and the importance of the independent status of the competition agency, often by poignant facts. In introducing the session, Timothy Muris,* The ICN Steering Group expresses its profound thanks to Professor Fox, Walter J. Derenberg Professor of Trade Regulation at New York University Law School, for serving as rapporteur at the conference in Naples and for her significant effort in producing this report.

** Professor Fox gratefully acknowledges the valuable input of ICN Steering Group members in drafting this report.

1 A list of those registered to attend the conference is available at www.internationalcompetitionnetwork.org/Naples_20Registrants.doc.
Chairman of the U.S. Federal Trade Commission, stated that advocates of competition have largely won the intellectual debate on the merits of competition, and are starting to win the policy debate as well. He cited the estimated $50 billion in consumer savings per year from deregulation of transportation in the United States, and said important gains have yet to be realized in health care and funeral services. Potential gains from persuading state and local governments to eliminate antitrust exemptions and licensing requirements will also be realized. Following these remarks, Dr. Fernando Sanchez Ugarte, Chairman of the Mexican Federal Commission on Competition and Chair of ICN's Advocacy Working Group, presented the group's report entitled "Advocacy and Competition Policy," and introduced F. Heftye Etienne, a Commissioner of the Mexican Federal Competition Commission, who provided an overview of the report. The report addresses the role of competition advocacy, political influences on advocacy, advocacy in developing countries, institutional settings which promote or hinder advocacy, and the international dimensions of advocacy. The report also describes the advocacy questionnaire sent to the members and synthesizes the 53 responses received, providing a snapshot of how ICN members focus their advocacy efforts.

Minister Ilya Yuzhanov, of the Russian Federation Ministry for Antimonopoly Policy and Support of Entrepreneurship, then spoke of the virtues of the independent status of a nation's competition agency, stating that only real independence is a safe basis for competitive development. He also noted the merits of placing a range of functions within the competition agency so that competition officials can work directly to reduce state barriers, facilitate free movement of goods and services, instill competition into regulated markets, help elaborate laws governing natural monopolies, and promote consumer protection.

R. Shyam Khemani, Advisor to the Private Sector Advisory Services Department of The World Bank, then spoke of competition policy as a general economic framework policy, and linked competition, more open markets, more foreign investment, and increased transparency to higher economic growth, less corruption, and a better record of poverty reduction. Following, Alberto Heimler, Director of Research and Institutional Relations at the Italian Antitrust Authority, asked why it is that the case for competition is so difficult to make; and provided factors including the fragmented position of consumers as against the well financed and determined position of special interests in response to this question. According to Mr. Heimler, competition advocacy is critical; agencies should enlist their potential allies: consumers, academics, the press, etc.

Aiko Shibata, a Commissioner from Japan’s Fair Trade Commission, highlighted the 10% decrease in electricity rates over three years in Japan following the competition agency’s efforts to de-monopolize the industry, including by taking action against strategies by dominant firms to block entry.

George Lipimile, Executive Director of the Zambia Competition Commission, spoke of the daunting task of running a competition agency in a country wherein competition is considered the destroyer of local firms, government owns some 80% of business, noncompliance with competition law is the rule, and laws still control prices and discriminate against foreigners. He offered the following quotation to convey the status of competition law in developing countries: “Business is generally reluctant to comply with it, governments ignore it and in some cases do not know what it is and the public at large do not understand what it is all about.”

Claudio Monteiro Considera, the Secretary for Economic Monitoring at the Brazilian Economic Policy Secretariat (SEAE), and Elisa Oliveira, the Brazilian Secretary for Economic Law, spoke of political influence and corruption, and cited cases exemplifying how CADE's powers were
nearly obliterated by judicial order. Marco D’Alberti, a Commissioner of the Italian Antitrust Authority, concluded the panel’s formal presentations, discussing four points: the approach to advocacy; the objectives of advocacy; advocacy and decentralization; and concluded with specific suggestions for future action by the ICN with respect to the national and regional and the supranational dimensions of regulation.

Mario Monti, Competition Commissioner of the European Commission, on follow-up explained how, at the European Commission, competition is incorporated into all policies. He provided examples from electronic communications, telecommunications, energy and state aids to demonstrate the integral nature of competition policy. In addition, many participants voiced concern about weak agencies, powerful politicians, and judges unfamiliar with competition policy. Several interveners from developing countries cited instances in which their judiciary subverted or nearly subverted competition policy, sometimes as a result of corruption, sometimes because of lack of expertise. In one nation, the judiciary has questioned the competition commission’s basic power to prohibit anticompetitive agreements.

Interventions strongly supported the need for competition advocacy to overcome these hurdles, including advocacy to shore up the credibility of new competition agencies, advocacy to demonstrate how competition can serve a large range of economic objectives better than regulation, advocacy for a more open and transparent process of legislative reform, and working with the judiciary to increase their sophistication in competition matters. As one intervener put it, regarding the excessive exemptions from competition law: “We need hard advocacy and soft dialogue with the champions of exemptions.”

II Mergers: The Analytical Framework of Merger Review

This second session was devoted to the analytical framework for mergers, specifically, the language of legislation that specifies when mergers are to be proscribed. Commissioner Monti set the stage, against a background of analytical papers describing the standards applied in various nations’ laws (Australia, Germany, South Africa and the United States), and a scholarly paper comparing the standard of “dominance” with the standard of “substantial lessening of competition” (“SLC”).

The Commissioner placed the merger-standards debate in perspective, stressing that it is far more important to uphold the purpose of competition law and to resist private interest and political pressures to deviate from the law’s goals. He stressed that both formulations – dominance and SLC – share the same fundamental concern: the use of market power and its ultimate effect on consumer welfare. He noted that the similarities between the tests are far greater than are the differences. For jurisdictions that allow public interest as a justification for anticompetitive mergers, he strongly recommended that any public interest criteria should be clearly spelled out in the law and that they should be transparently and predictably applied. Cautioning “that merger control [should] not become an overtly political or protectionist tool,” he suggested that “the ICN, by enhancing the sense of belonging, will help all agencies to resist those pressures.”

The appropriateness of public interest (or non-competition related) criteria and the relative merits of the SLC and dominance tests were discussed by a panel consisting of: John Vickers, Director General of the UK Office of Fair Trading and Chair of the Analytical Framework Subgroup; Ulf Böge, President of the German Federal Cartel Office; David Lewis, Chairperson of
John Vickers concentrated his presentation on consumer and efficiency goals, highlighting the U.K. reform which moved from a public policy standard to the substantial lessening of competition standard. David Lewis defended the public interest criteria used in South Africa’s law, particularly its affirmative action in favor of the long excluded black majority, as necessary and important in the context of his country’s experiences. He noted common carve-outs exist in many regimes, including sectoral carve-outs for media and banking, and deference to factors such as the impact of a merger on employment in some jurisdictions. He argued the case for a single agency – the competition agency – to take account of non-competition public interest considerations (and to do so after completing the competition analysis), to ensure that any public interest trade off will be made by a body convinced of the merits of competition. Other speakers and interveners were more skeptical of a role for public interest in the competition law, and some preferred a model entrusting the public interest decision to a minister who is politically accountable for his or her actions.

In lively dialogue, possible differences with respect to the choice between the SLC standard and the dominance standard for mergers were discussed. Richard Whish emphasized the limits of the “dominance” test, which, he argued, connotes one dominant firm, or, at least a duopoly or a tight oligopoly tacitly colluding as if it were one dominant firm. He explained that some anticompetitive mergers cannot be captured by the dominance standard, and proposed that the language of the European Merger Regulation be changed to prohibit mergers that substantially lessen competition. Others disagreed with the need for changing the Merger Regulation’s substantive test.

Ulf Böge argued that the aim of merger control is to prevent market power that substantially hinders or eliminates competition. He stated that there is no significant difference in the SLC and dominance tests, and that, in Germany, oligopolistic dominance has been sufficient to catch mergers that harm competition. Speakers also pointed out that the jurisdictional clashes that have occurred or nearly occurred (GE/Honeywell, Boeing/McDonnell Douglas) did not result from the different formulations of the standard but from different analyses of what sufficiently weakens competition.

One intervener questioned why the choice must be made between SLC and dominance, and suggested that jurisdictions might usefully choose language that mirrors what they do: proscribe mergers that “significantly increase market power to the detriment of consumers.”

Debra Valentine’s remarks focused on a different subject within the realm of merger analysis, namely, the treatment of efficiencies. She noted that in the United States efficiencies are generally treated as part of the competitive analysis rather than as a justification for a merger that is anticompetitive. This issue of the appropriate treatment of efficiencies was also a point of discussion and debate, with views ranging from support for the treatment of efficiencies in the competitive-effects phase of the analysis to the treatment of efficiencies as an offset or trump to a competition-lessening merger. Various speakers acknowledged the difficulties in assessing efficiencies. One intervener suggested that the balance between competition and the public interest is easier to manage than the balance between competition and efficiency.

William Kolasky, a Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice and Chair of the ICN Mergers Working Group, observed in closing the discussion that some substantive and procedural convergence has been achieved, and reiterated that the value of competition is to promote efficiency.
III Mergers: Guiding Principles for Merger Notification and Review and Recommended Practices for Merger Notification Procedures

The merger process discussion was introduced by Deborah Platt Majoras, a Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, who presented facts and perspective on the “multijurisdictional merger thicket.” As she noted, roughly 65 nations require merger review. They have different timing and informational requirements and often arbitrary deadlines. In many cases it is unclear whether notification thresholds are triggered by a particular merger in a particular jurisdiction. Often jurisdictions require notification of mergers that lack a substantial nexus to the jurisdiction. At the same time, more than 90% of transactions in the United States are cleared promptly because the absence of competition problems is apparent, and most of the remainder are eventually cleared as well. The filing process is costly in terms of both direct transaction costs and delay. The acknowledged challenge is to achieve the benefits of review while avoiding unnecessary costs. The aim of the working group is to try to reach consensus on principles that will achieve this balance, paving the way for the agencies to follow up and implement the recommendations where feasible.

The Chair of the Mergers Notification and Procedures Subgroup, Randolph Tritell, Assistant Director for International Antitrust at the U.S. Federal Trade Commission set out the group’s work in more detail, noting the draft report that was produced on the costs and burdens of merger notification, as well as the web links and merger template projects. He characterized the guiding principles and recommended practices as the heart of the subgroup’s work.

Attorney Joseph Winterscheid of McDermott, Will & Emery (U.S.) then described the costs and burdens project, and Norman Manoim of the South African Competition Tribunal presented the web links and template projects. The web-based projects feature links on the ICN website to member agencies. The projects contemplate that each jurisdiction will post its merger laws and related materials on dedicated merger web pages and will present its filing and notification requirements in a standard, easy-to-access format developed by the subgroup (the template), and that the ICN website will provide links to these merger web pages and templates.

Mr. Tritell then presented the eight proposed Guiding Principles for Merger Notification and Review: 1) Sovereignty of each jurisdiction in the application of its own laws; 2) Transparency of the jurisdiction’s policies, practices and procedures, including identity of the decision maker, standard of review, and basis for adverse decisions; 3) Non-discrimination on the basis of nationality; 4) Procedural fairness in coming to an adverse decision, including informing the parties of factual and other bases for concern, affording them the opportunity to express their views, providing review before a separate adjudicative body, and allowing third parties who believe they would be harmed by anticompetitive effects to express their views; 5) Efficient, timely and effective review, allowing enforcement agencies to obtain the information they need, but without imposing unnecessary costs; 6) Coordination by enforcement agencies reviewing the same transaction; 7) Convergence of merger review processes to agreed best practices; and 8) Protection of confidential information.

Götz Drauz of the EC Merger Task Force then detailed the three Recommended Practices for Merger Notification Procedures. The first recommended practice (IA) provides for “an appropriate nexus with the jurisdiction concerned.” As specified in IB, “appropriate nexus” contemplates standards of materiality as to the level of local nexus required, so that transactions unlikely to have appreciable anticompetitive effects will be screened out. Recommendation IB advises that
worldwide revenues or assets (as opposed to sufficient sales or assets in the territory) should not be a sufficient trigger, and that the required local sales and assets of an acquired party should be limited to those of the business being acquired. Paragraph IC states that nexus should be measured by the local activities of at least two parties to the transaction, or in the alternative “by reference to the activities of the acquired business in the local territory” where the threshold is sufficiently high so as to ensure that notification will not be required for transactions lacking a potentially material effect on the local economy.

Recommendation II provides for clear and understandable notification thresholds based exclusively on objectively quantifiable criteria (sales and assets, not market share), and on information readily accessible to the merging parties.

Recommendation III provides that jurisdictions permit parties the flexibility to notify at an earlier date than many jurisdictions currently allow – i.e., upon certification of a good faith intent to consummate the transaction. Moreover, under the third recommendation, jurisdictions that prohibit the closing of the transaction until after agency review should not impose filing deadlines. Such practices would allow parties to facilitate coordination of multi-jurisdictional filings.

Questions for the panel were fielded by Commissioner Ross Jones of the Australian Competition and Consumer Commission, first about the guiding principles, and thereafter about the recommended practices.

While complimenting the subgroup on its enterprise, a European practitioner queried its limits: the principles fix a baseline that all jurisdictions accept; jurisdictions can go above the baseline; but since voluntariness is emphasized, they can also go below it. As to the first principle, sovereignty, he questioned whether there are not international principles that limit sovereignty.

A representative of a consumers group noted the absence of reciprocal obligations on the part of the merging firms, and proposed that the principles should apply only to the extent that companies commit in good faith to timely disclosure of their relevant merger data.

An attorney from Brussels, noting that the principles do nothing to reduce the number of filings, suggested that the sovereignty principle be balanced by a clause permitting nations or their states to transfer the power to require notification to the national or supranational level. Others queried whether review must be in a court, and why the basis of prohibited discrimination should be limited to nationality.

Subgroup members responded to the concerns and undertook to consider the suggestions as they go forward.

With regard to the recommended practices, interveners commented on Practices IC (jurisdictional nexus), IIB (quantitative data for notifications), and IIIB (deadlines).

Mr. Finn Lauritzen, Director General of the Danish Competition Authority, expressed concern that the IC limitation would prevent his commission from efficiently pursuing some troubling mergers encountered in his jurisdiction: acquisition by the leading domestic firm of its most important potential competitor, which is often a foreign-based firm. He proposed to amend IC by adding the words “or the acquiring” to the last clause, so that local nexus would be recognized if there was an appropriate level of sales or assets “of the acquired or the acquiring business in the
territory.” A legal academic from Israel suggested that the gap be filled by counting both “actual and foreseeable” territorial sales of the parties to the merger, thus picking up the anticipated sales of the potential competitor that becomes the acquisition target.

Subgroup members responded that they had considered this problem and had decided not to include the out-of-jurisdiction firm’s sales or assets as a basis for sufficient nexus. The overall problem, they said, is that notification nets sweep too widely. They pick up too many non-problematic mergers. The subgroup therefore decided to stay away from inclusion of a foreign acquisition target, even though such a firm could be (but usually will not be) a potential competitor. In many jurisdictions, the potential competition merger could still be picked up and vetted by the agency, they said, outside of the mandatory notification process.

With respect to Recommendation IIB, subgroup members explained that the critical need for notification thresholds is certainty and clarity, which would be undermined by market share criteria as triggering criteria.

The subgroup explained Recommendation IIB on grounds that agencies do not need filing deadlines when they satisfy their interests by suspending the deal; and elimination of the deadline would give parties greater flexibility to coordinate multi-jurisdictional filings. Several speakers noted that jurisdictions which employed both filing deadlines and suspensive effects are contemplating eliminating, or have already eliminated, the filing deadline.

Several practitioners commended the subgroup for its work on the guiding principles and recommended practices, and for making such significant progress in achieving consensus within the subgroup in such a short period of time.

IV The Future Work Program

The Chairman of the Korea Fair Trade Commission, Nam-Kee Lee, opened the session on the future work program. He canvassed topics suggested for the future attention of ICN. Noting that some topics can be too vague, too difficult, or too particular to one or two countries to attract the broadest basis for engagement, he suggested three factors for selecting the future agenda: 1) The project should encourage exchange of views among the developed and developing member countries, 2) The topic should be of interest to as many countries as possible, and 3) The project should be practical and likely to yield tangible results in the near future.

Representatives of the Advocacy and Mergers Working Groups presented their proposed 2003 work plans. William Kolasky, Chair of the Merger Working Group, noted that the ICN’s success depends on maintaining momentum, and he encouraged all participants to be involved in the work of the working groups. Mr. Kolasky introduced the chairs of the Notification and Procedures, Analytical Framework, and Investigative Techniques Subgroups.

Randolph Tritell described plans to continue work on the web links and template projects, tackle more areas of recommended practices, work on implementation of the guiding principles and recommended practices, and monitor what is being done by jurisdictions to bring their practices into line with the principles and practices.
John Vickers of the analytical framework of merger review subgroup expressed plans to compile and analyze existing merger guidelines, catalogue similarities and differences, examine how efficiencies are treated around the world, and consider developing ICN proposed model guidelines.

Menachem Perlman of the Israeli Antitrust Authority, Chair of the Subgroup on Investigative Techniques, reminded delegates of its plans to hold a workshop in Washington, D.C., on November 21-22, which will be a means to train competition officials in the most effective ways to investigate and review mergers. He also reported that the subgroup will begin to develop an investigative techniques manual.

For the Advocacy Working Group, Fernando Sanchez Ugarte outlined proposed work on: 1) The on-line information resource center, for which the group is compiling information that may be demanded by different competition authorities, including lists of experts in various specialties, bibliographies of books and articles, lists of courses in competition law, and seminars, conferences and workshops; 2) Compiling model advocacy provisions, and possibly developing a model statute giving the competition agency the power to advocate competition policy; 3) Compiling sectoral studies that reflect experiences of member countries in undertaking major sectoral reform, identifying successes and failures of that reform, and analyzing how competition advocacy might tend to avoid the failures; and 4) Developing a toolkit on practical techniques for conveying the competition message to the public and to major players who influence public opinion, so that the benefits of competition are better understood.

Philip Lowe, Director General of the Competition Directorate of the European Commission, spoke to the proposal to create a new working group on capacity building and competition policy implementation. He related the advocacy mission to the special challenges in developing and transition countries. The first task, he said, is to identify what the relevant conditions are - e.g., private monopoly, public monopoly, too much or too little regulation; and then to consider what support the particular authority needs to introduce and implement free market structures. The group envisions advocacy tailored to the country concerned; relevant to its state of economic development, social and societal concerns, and its own objectives. The advocacy group proposes to provide a framework for technical assistance, sensitive to the needs of the country, and plans to develop an inventory and toolkit to allow the country to follow the path tailored to its needs. This unique role for ICN – not as a provider of technical assistance but as an information provider and facilitator of appropriate technical assistance – was echoed by a number of speakers.

Discussion ensued on advocacy, capacity building, and, in general, the future work of ICN. Interveners expressed a mix of optimism, pessimism, ideas, and offers of cooperation to advance the projects. Representatives of several organizations – including bar associations, chambers of commerce, UNCTAD and the OECD, and consumer groups – noted synergies between ICN and their organizations, and expressed the desire to cooperate with ICN.

Several interveners observed that wide embrace of competition policy cannot be assumed. Treasury and trade departments sometimes question the value of competition policy. Business and investors often want a monopoly. People may fear privatization. The advocacy task requires making the factual, intellectual and political case for competition policy and law, building up stakeholders that support competition policy, and developing and strengthening institutions that surround not only the agencies but also the universities and research work. As David Lewis of South Africa stated, we “cannot parachute [competition] in from the outside and then depart, without
institutions in the developing countries to continue the work.” These sentiments were widely supported.

Other suggestions were: to form small communications groups to get the competition message out; include on a future agenda analysis of substantive areas wherein we observe divergences, such as the meaning of dominance and the effects of vertical restraints; to be more successful in raising funds to facilitate participation of developing countries, consider partnering with foundations and developing a legal existence; work on the relationship between the competition agencies and the judiciary, and consider how to facilitate an increase in the sophistication of judges in handling competition problems; with reference to capacity building, explicitly consider small economies, which often have almost no resources, and consider recommendations on prioritization of advocacy tasks – what should the agency focus on first?; consider how far one should go in challenging regulation, knowing that going too far could undermine support for competition.

V Perspectives of Non-Governmental Advisors

A panel of non-governmental advisors comprised of James Rill of Howrey Simon Arnold & White LLP (via satellite from Washington, D.C.), David Tadmor of Caspi & Co. (Israel), Calvin S. Goldman of Blake, Cassels & Graydon LLP (Canada), Peter Plompen of Philips International B.V. (Netherlands), and Abbott (Tad) Lipsky of Latham & Watkins (U.S.) complimented the work of the ICN and suggested ways for the private sector to foster stronger links with it. They complimented particularly the efforts towards transparency, nondiscrimination, and protection of confidential information. Some speakers suggested more work be done on substantive tests with a view towards greater convergence, including merger and intellectual property law, work on hard core cartels, and further development of best practices.

David Tadmor expressed the special concerns of developing countries regarding the costs of merger analysis, and also the difficulties faced by developing countries in having any impact on multinational enterprises (MNEs) that are negatively affecting their markets. He suggested that the ICN consider advocating regional and interregional groupings so that developing countries can make their voices heard when MNEs harm their markets.

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2 Charles A. James, Assistant Attorney General of the United States Department of Justice Antitrust Division, joined Mr. Rill live via satellite. He expressed his regret at being unable to attend the conference, and noted that determining how to address multijurisdictional enforcement issues will be the main challenge for antitrust officials in the future.

3 J. William Rowley of McMillan Binch (Canada) provided written remarks but was unable to attend the panel presentation.
NOTE: THE REMAINDER OF THE CONFERENCE WAS OPEN TO MEMBERS (AGENCY REPRESENTATIVES) ONLY; THUS, IT TOOK PLACE IN THE ABSENCE OF NON-GOVERNMENTAL ADVISORS.

There followed break-out sessions for members only. At these sessions, the participants took part in small-group discussions of all major issues of the meeting.

VI Work Program and Issues for Review and Adoption

Leaders of the break-out sessions provided feedback from the various small groups. There was consensus on the proposed Guiding Principles for Merger Notification and Review, and members officially adopted them. The eight principles are: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely and effective review; coordination; convergence; and confidentiality.

Ross Jones provided feedback from the Notification and Procedures break-out sessions, noting that in the future the subgroup will consider additional Recommended Practices. The members endorsed in principle the three proposed Recommended Practices for Merger Notification Procedures, which would require a sufficient jurisdictional nexus, objective and understandable thresholds, and flexibility of the parties to make early notification, with the understanding that the subgroup would further discuss one of the sub-practices to jurisdictional nexus and add new practices to be presented for adoption at the next annual conference.

As with the future work plan for the Notification and Procedures Subgroup, the work plan of the Analytical Framework Subgroup was discussed in order to incorporate the feedback received during the break-out sessions. John Vickers reported that, for most jurisdictions, the methodology for appraising public interest (non-competition criteria) is not a top priority, but this subject could be addressed in the future. Likewise, in view of the broad consensus about what merger policy should be, the relative merits of the dominance versus SLC test was not considered a priority for the ICN. Treatment of efficiencies is important, he said, although in only a small fraction of cases do competition and efficiency claims arguably collide. He noted three approaches of jurisdictions to efficiencies in merger analysis: 1) wrap efficiencies analysis into competitive effects analysis, 2) consider that sufficient efficiencies could override harm to competition in a proper case but impose strict burdens of proof, and 3) do not, under any circumstances, allow efficiencies to justify an anticompetitive merger. He noted two different views on whether ICN should study efficiencies further: 1) do not take the project forward, and 2) take it forward but as a small scale project. The Subgroup recommended the latter. Its work plan proposal is to take forward the guidelines project (see above), and a small scale project on efficiencies, for the second annual ICN conference to be held in Mexico in June, 2003. The Subgroup’s work plan was approved, as were those of the other working groups (the details of which were discussed above).

The members established a new working group on Capacity Building and Competition Policy Implementation, to be co-chaired by the European Union and South African agencies. Philip Lowe described its mission as including building the case for effective competition in developing countries, advocating the need for independent competition authorities, advocating methodologies
for building the institutions necessary to support the competition mission; considering whether regional institutions should be encouraged; considering how to bring the competition message to the business community and civil society; considering how the authority might attract sufficient funding and staffing; and developing methodologies for the above tasks useful to national authorities and appropriate to their stage of development.

VII Reports on Other Issues

Reports were presented on various special issues. Konrad von Finckenstein discussed the future operational framework for ICN; William Kovacic, General Counsel at the U.S. Federal Trade Commission, discussed fund-raising efforts and strategies for future needs; Philip Lowe recounted the now-completed work of the NGA working group which examined the interaction between members and non-governmental participants; Joseph Seon Hur, Director General of the Korea Fair Trade Commission’s Competition Policy Bureau, reported on the success of the ICN in attaining membership from 75 of the world’s estimated 92 jurisdictions with competition agencies; and Menachem Perlman provided further details of the forthcoming investigative techniques workshop.

The members reflected on the ICN’s operational framework. The composition of the Interim Steering Group was continued until the second annual conference in Mexico, and as a result will now be known as the Steering Group. Konrad von Finckenstein will continue as its Chair. A working group co-chaired by the Italian and Canadian agencies was charged with making recommendations on modalities for election of the next Steering Group at the conference in Mexico. This working group is also to address concerns about the lack of a mechanism through which ICN can raise and disburse funds to support its ongoing operations. Several members emphasized that the group must be mindful of the fact that the ICN was established – by design – as a virtual organization, without a permanent secretariat or financing, relying on the goodwill and voluntary input from its members and participants.

The members approved ICN’s continued interaction with international organizations such as the WTO, OECD, and UNCTAD, while maintaining its distinct characteristics as a network, not an international organization.

William Kovacic, who chairs the ICN fund-raising committee, reported on past fund-raising activities, future needs, and models for funding approaches. He reported that ICN had requests for support from agencies of 17 developing countries, and it was able to fill 12 requests with public funds. The working group spoke with 68 organizations with a view to raising funds, and generally found an “austerity environment,” including a resistance to writing checks to organizations that are not formal entities, and a concern that any contribution would siphon funds away from other important projects.

Mr. Kovacic laid out three funding approaches: 1) a facilitation model: ICN as a matchmaker, with funds going directly from donor to recipient; 2) an intermediary model: ICN would be more involved; it would collect, deposit and disperse funds and create an endowment, and 3) a partnership model: ICN would form a partnership with organizations such as OECD and UNCTAD and rely on their infrastructure for financing. The working group proposes to decide what path to recommend by the meeting in Mexico.

In the discussion which followed, it was suggested that it is important for ICN to have additional funding in order to finance participation in ICN by representatives of agencies in
developing countries and perhaps others, to cover the costs of its activities, and in general to preserve ICN’s independence. The view was expressed, however, that it is also very important not to be beholden to the private sector.

Regarding its interaction with non-governmental advisors, it was agreed that ICN will consider: 1) how the academic community can be better represented, 2) how a good geographic balance of NGAs can be achieved, and 3) how practitioners and consumer organizations can be better involved.

The above work is to proceed with a view to the next annual conference, to be held in Mexico in 2003. It was announced that, in addition to the sites of 2004 in Korea, 2005 in Berlin, and 2006 in South Africa, the 2007 conference will be held in Russia.

VIII Conclusion

The meeting was concluded with the enthusiasm with which it began. Commissioner von Finckenstein noted that the events of the previous two days demonstrated that the ICN model works. Bringing together competition agencies from around the world on an equal basis created a unique dynamic; not being constrained by formal, enforceable obligations fostered a remarkably productive exchange of ideas between agencies. Chairman Tesauro congratulated members on their considerable achievement of reaching agreement on general principles for merger procedures in such a short time.

The interim work of the working groups had visibly borne fruit. Their work products were either adopted or endorsed and carried forward for continued refinement. The sense of community among the participants was high, giving anchor to newer members of the competition community and providing momentum for expanding and deepening cooperation and convergence.