The International Competition Network 8th Annual Conference, hosted by the Swiss Competition Commission was held at the Kongresshaus Zurich on June 3 – 5, 2009. The conference, attended by more than 450 delegates, including representatives from more than 80 agencies and 130 non-governmental advisors (NGAs), was a notable success, marking nearly a decade of the ICN’s existence as a forum for discussion and dissemination of competition-related law and policy issues. The ICN members in attendance represented agencies from all continents, and included both newly-established competition authorities and those with longstanding experience. The program was organized around plenary sessions reporting on projects undertaken by five ICN Working Groups during the preceding year and topical issues, a special plenary session on Competition Law in Small Economies, a topic selected by the host Swiss Competition Commission, a panel devoted to the future of the network, and, finally, reports from the Working Groups and adoption of ICN work product, including recommended practices and future work plans. The ICN Working Groups include Advocacy, Cartels, Competition Policy Implementation (CPI), Mergers, and Unilateral Conduct. Following each plenary session, multiple breakout sessions were convened to allow the participants to discuss in greater detail legal and enforcement issues related to the respective plenary session.

During the conference, the following discussion topics, reports and recommended practices were presented:

**Advocacy Working Group**
- Market studies subgroup: reviewing experience and learning for the future
- Market studies showcase: reports from the Danish, Jamaican and Netherlands competition agencies
- Recommendations for further ICN work

**Cartel Working Group**
- Transitioning from an administrative to criminal enforcement regime
- Investigative techniques (revised chapters on searches & raids and leniency)

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1 This Report has been prepared by Beth Farmer, Professor of Law at Pennsylvania State University, Dickinson Law School and Kasturi Moodaliyar, Eskom Senior Lecturer in Competition Law at the University of the Witwatersand, Johannesburg, and the non-governmental advisors to the Swiss Competition Commission, Blaise Carron, Franz Hoffet, Patrik Krauskopf, Marcel Meinhardt, Silvio Venturi and Philipp Zurkinden

2 The Agenda is available at http://www.icn-zurich.org/Agenda.aspx

Competition Policy Implementation Working Group
• Institutional settings
• Remedies: design, monitoring and enforcement of sanctions

Merger Working Group
• Recommended Practices for Merger Analysis
• Initial notification information requirements
• Merger analysis in troubled economic times

Unilateral Conduct Working Group
• Distinguishing between pro-competitive and anticompetitive conduct in tying and discounting cases

Special Project
• Competition law in small economies

Plenary Session
• Interactive ICN: maximizing the beneficial effects of the network

Report Back, adoption of work and future work plans

PLENARY SESSIONS OF WEDNESDAY, JUNE 3, 2009

I. Opening of the Conference

Opening Address by Walter A. Stoffel

Chairman Walter Stoffel, chairman of the Swiss Competition Commission, welcomed the more than 450 honored guests, agency representatives, and nongovernmental advisors from 80 jurisdictions worldwide. He described Swiss history and culture, melding several languages and traditions, as a good model for the ICN, and previewed highlights of the upcoming program and cultural activities.

He identified three key concepts that are necessary to promote competition: open market economies, democracy and the rule of law. The ICN now has a global reach and provides a forum for discussion, consensus building and development of best practices for competition law and policy. The market economy produces the optimal allocation of resources and maximizes consumer welfare, which is the ultimate goal of competition law. Although ICN member agencies have individual priorities and may employ different analysis, competition law has evolved towards sound analysis and best practices in the past decade via the ICN process. Secondly, Mr. Stoffel acknowledged the important role of competition enforcement in a democratic society and rejected any suggestion that the current economic crisis is a result of these laws. Finally, he reminded the participants that equitable procedures are as important as sound analysis in competition enforcement. The Swiss legislature is currently considering competition law reform, which will include enhanced procedural transparency.
Mr. Stoffel concluded that the ICN stands for independence, accountability and transparency, and the 8th annual conference is an important step in its valuable endeavor.

*Welcoming Addresses*

*Ms. Doris Leuthard*, Federal Councilor and head of the Federal Department of Economic Affairs, welcomed the participants on behalf of the Swiss government and expressed appreciation to the Zurich canton, the Swiss Competition Commission and ICN officials for organizing the conference. She noted that the size of this meeting highlights the importance of global competition, trade and cross border cooperation. ICN has been a facilitator for competition agencies to develop a common language, comparable and transparent rules and establish ongoing formal and informal cooperation. She echoed Mr. Stoffel in observing that antitrust enforcement and reduction of protectionist state aid are especially important in times of economic distress. She concluded by congratulating all of the participants on their commitment to competition enforcement and encouraged all to enjoy their visit to Switzerland.

*Ms. Regine Aeppli*, president of the government of the Canton of Zurich, expressed the hope that the creative atmosphere of the Kongresshaus will have a positive effect on the forthcoming proceedings. Zurich, one of the foremost drivers of the European economic motor, has close links with the economies of many countries and also is the seat of major universities and corporate research headquarters. She congratulated the participants on their important work of protecting consumers and wished the ICN success in establishing a global culture of competition.

*Chair of the Steering Group David Lewis, Chair of the Competition Tribunal of South Africa*, expressed sincere appreciation for the warm welcome and briefly recounted some of the work of the past year, which he described as “remarkable, including great achievements, the result of tremendous efforts.” He extended special thanks to the Canadian Competition Bureau for its role as the ICN Secretariat, and especially for the work of Sheridan Scott, present at the conference. ICN membership currently exceeds more than 100 agencies from more than 90 jurisdictions.

Mr. Lewis then reflected on the future of the ICN. He noted that ICN has grown since its founding in 2001 with 15 member agencies and a limited agenda that focused on mergers and advocacy. Today, ICN has broadened its reach to include the full panoply of substantive and procedural competition law issues. The ICN output now includes both best practices and norms or soft law. Looking forward, Mr. Lewis urged the participants to consider the role of ICN on the international stage. He urged consideration of additional competition-related issues such as state aid, government procurement, regulation, and trade as potential appropriate additions to the ICN agenda. Finally, he commended ICN for welcoming diverse agencies from the developing world and emerging market economies and for incorporating the views of all. ICN is now a “dense network,” he concluded. Beyond the official work of ICN, he recognized the warm personal relationships created through ICN, which has enhanced the respect and ability of member agencies and NGAs to work well together.

**II. Advocacy Working Group Plenary Session**

*Introductory Remarks by John Fingleton*

*Dr. John Fingleton, CEO of the U.K. Office of Fair Trading*, described the two major projects of the Advocacy Working Group: market studies and a survey of ICN’s existing competition
advocacy work and current member practice. He stressed the important role market studies can play in competition advocacy efforts, and the suitability of addressing this topic within the ICN, given the network’s singular focus on competition and broad membership. He called for convergence or informed divergence in methodology, by way of knowledge sharing and capacity building among ICN members. He then introduced a showcase program, presenting recent market studies by the competition agencies of Denmark, Jamaica and the Netherlands.

A. Market Studies Showcase

Mr. Réne Jansen, a Board Member of the Netherlands Competition Authority (NMA), reported that the NMA has conducted studies in a variety of sectors, with a particular focus on health care, insurance and funeral services. The Netherlands health insurance sector was liberalized in 2006, allowing for private insurance. The NMA study sought to define geographic markets for health insurance and investigate consumer behavior to determine whether liberalization brought more effective competition. The survey revealed that 20% of consumers switched insurers after liberalization, but that competition could be further improved if more information on quality as well as prices was available to consumers. The sector study also revealed some buyer power following mergers.

The NMA study was undertaken in response to consumer complaints. This study revealed high concentration, high barriers to entry and little competition. The NMA concluded that the sector faces a moderate to high risk of anticompetitive behavior. The NMA published its findings and hopes that increased transparency will inform consumers and businesses, encourage reporting to the NMA of anticompetitive acts, and produce improvements in this and other associated sectors.

He concluded that sector studies are valuable to increase market transparency to consumers and firms, whether or not they reveal antitrust violations.

Mr. David Miller, Executive Director of the Jamaica Fair Trading Commission, reported that his agency has conducted sector studies in 13 basic food items, including bread and chicken. The studies were initially commissioned by a government minister who was concerned about high prices in market sectors with falling costs. The FTC chose not to use its formal investigative powers because that process is too lengthy. Instead, the FTC used questionnaires and obtained public information and data from market participants and the Jamaican consumer protection agency. Mr. Miller reported that the studies revealed that some input prices were, in fact, rising, and that the exchange rate was volatile, possibly explaining the retail prices in the sectors investigated. However, more research will be required to determine whether or not there is collusion in these sectors.

Mr. Miller also offered useful recommendations on the methodology and organization of sector studies. First, there must be clear criteria to select sectors for study. Second, agency managers must determine the scope of the project and allocate necessary resources. Finally, the agency must create internal standards to ensure that the research is completed on a timely basis.

Mr. Kim Sparfund, Deputy Director General of the Danish Competition Authority, reported on a study of the taxi sector and offered advice on designing and completing a successful sector study. The environmental and finance agencies cooperated in this study and provided valuable support. The study revealed that the industry is subsidized, highly regulated, and that new taxi licenses are difficult to obtain. High retail prices and many vehicles that do not meet modern environmental standards were also concerns. As a result of the study, environmental regulations for taxis have been strengthened and tax regulations have been amended. Competition policies have not been altered, but the agency has established a continuing discussion with other ministries that have regulatory authority in the sector.

Director Sparfund recommended cooperation with other agencies during the course of studies in particular sectors, observing that diplomacy and alliances with other government ministries are important for effective studies.

Dr. Fingleton reaffirmed the importance of sharing information and the role the ICN can play as a vehicle for this type of contact, and moderated a panel discussion with Melanie L. Aitken, Interim Commissioner of Competition, Competition Bureau of Canada; Thula Kaira, Executive Director of the Zambia Competition Commission; Dhanendra Kumar, Chairman of the Competition Commission of India; and Anne Perrot, Vice Chair of the Autorité de la Concurrence, France, on their experiences with market studies.

Panelists agreed that market studies are important to build local capacity, gain expertise about important markets and to shape solutions to competition problems. Studies can be a useful complement to enforcement actions, and also are useful to provide information to other regulators and national and state policy makers. Market studies also educate consumers and market participants. The panelists strongly recommended following up on market studies to determine whether recommendations have been followed and competitive conditions in the market improve. In addition, the panelists suggested that it would be beneficial for ICN members to share information on particular industries or sectors with colleagues in other jurisdictions. Dr. Fingleton concluded by announcing that the Working Group is planning to prepare a manual on conducting market studies and invited other interested agencies to participate in this project.

B. Competition Advocacy Review and Update Subgroup

Eudardo Pérez Motta, President of the Mexico Federal Competition Commission, moderated the Advocacy Review and Update Subgroup panel with participants HackHyun Kim, Director General of the Korea Fair Trade Commission, David Anderson, NGA, and Vladimir Kachalin, Advisor to the Chairman of the Federal Antimonopoly Service of Russia. He described competition advocacy as an important part of the work of competition agencies. Advocacy can discourage inefficient regulation and promote competition. Advocacy may be directed to regulatory agencies, federal and local legislatures, executive branch officials and directly to consumers. Advocacy frequently takes the form of nonbinding opinions, but may also include

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binding opinions from agencies with authority to issue this type of opinion. Offering training seminars to members of the judiciary on antitrust and economic analysis is another effective method of competition advocacy. Competition advocacy may be used broadly to promote competition in the economy or may be directed to specific sectors of the market. He concluded that the Subgroup has found competition advocacy to be especially important in the telecommunications, transportation, energy and financial services sectors.

Mr. Kim recounted advocacy programs the KFTC undertook in 2008 in the aviation, telecommunications and financial services sectors. These projects included reviewing regulations and successfully recommending that unnecessary regulations be abolished or amended. The KFTC will make its sector studies, recommendations and the outcomes available to all ICN members.

Mr. Anderson agreed that competition advocacy is a useful tool to inform consumers and other potential plaintiffs of the harms anticompetitive conduct. Dissemination of information is necessary in light of trends towards private rights of action for antitrust plaintiffs. As a result, the private bar is increasingly active in bringing private antitrust cases. The claims in private actions vary by jurisdiction. He noted with concern that substantive law, procedure, and remedies continue to vary significantly among jurisdictions.

Mr. Kachalin recounted the Subgroup’s projects. First, competition advocacy is broadly defined to include all activity not directly related to law enforcement that is targeted to other stakeholders and governmental entities. The Group is in the process of gathering data on advocacy projects by ICN agencies. A questionnaire was distributed this year to which 32 ICN agencies responded. After the survey responses have been compiled and analyzed, the Working Group will recommend additional projects including updating ICN’s advocacy toolkit.

Wrapping up the plenary session, Dr. Fingleton emphasized that competition advocacy is one of the four pillars of effective competition enforcement in addition to cartels, mergers, and abuse of dominance enforcement. The flexibility of this fourth pillar enables agencies to deal with issues or industries that may not be immediately responsive to or otherwise particularly suited for law enforcement activities. Advocacy and market studies are particularly important if regulation has closed markets to effective competition. Advocacy broadly reinforces the value of competition by educating citizens and policy makers and can be especially important in recessionary markets, and for newer agencies.

III. Merger Working Group Plenary Session

A. Remarks on Recommended Practices for Merger Analysis

J. Robert Kramer, Director of Operations and Civil Enforcement for the U.S. Department of Justice, Antitrust Division summarized the three current projects of the Working Group: Recommended Practices for merger analysis, notification information requirements and a merger workshop held in Taipei in the spring 2009.

The current recommendations for merger analysis are on the issue of competitive effects. The group recommends that an effects analysis be forward-looking, fact-based and related to the
particular transaction under review. It should consider a variety of factors including, but not limited to, market shares. The Working Group prepared and posted on the ICN web site recommendations that summarize the main theories of unilateral and coordinated effects, identify relevant evidentiary factors, and discuss proper use of economic theory.\footnote{Proposed Recommended Practices for merger Analysis, prepared by the Merger Working Group, is available at http://www.icn-zurich.org/Downloads/Materials/ICN_MergerWG_Merger_RPs_Competitive_Effects.pdf}

The Notification and Procedures Subgroup surveyed 28 jurisdictions and prepared a summary of their initial information requirements and opportunities for flexibility in the content of merger notification.\footnote{The Information Requirements for Merger Notification, prepared by the Notification and Procedures Subgroup, is available at http://www.icn-zurich.org/Downloads/Materials/ICN_MergerWG_Notification&Procedures.pdf}

B. Merger Analysis in Troubled Times

Assistant Attorney General Christine Varney, U.S. Department of Justice, expressed her appreciation to the conference hosts and commented that Zurich has a long history of hosting international meetings, including a convention on free trade in 1291. She reviewed the history of the U.S. Merger Guidelines, jointly issued by the Justice Department and Federal Trade Commission since 1990. While the Guidelines seek to constantly improve substantive analysis and the speed of premerger review, the agencies still face challenges. First, the American antitrust agencies must work with other regulatory agencies that may have different policies and priorities. Second, the agencies must strive to apply sound merger analysis in weak as well as strong economic conditions. She then turned to an expert panel to discuss these merger issues.

The panel included Acting Director of the Turkish Competition Authority Ali İhsn Çagayan; Nadia Calviño, Deputy Director of DG Competition, European Commission; Yuji Kimura, Chief Investigator, Japan Fair Trade Commission; Director Alastair Mordaunt, U.K. Office of Fair Trading; and Stanley Wong, Director and Member of the Irish Competition Authority.

The first questions Ms. Varney posed to the panel asked whether, and in what circumstances, merger analysis should vary based upon economic conditions and competing goals of other regulatory agencies. Ms. Calviño reported that DG Comp has observed some decrease in the number of mergers notified and merging parties have argued that merger enforcement should be more lenient in the current economy. However, she affirmed that DG Comp has concluded that the merger regulation should be consistently enforced, though, clearly, all relevant and probative evidence should be considered. Appropriate economic analysis of mergers is necessary to guarantee the welfare of consumers, which remains the ultimate goal of competition enforcement. Though the economy currently presents difficult challenges, the agency has and should continue to apply consistent economic standards to proposed transactions.

Mr. Wong agreed that competition agencies should resist calls to apply non-economic standards. Agencies should also advocate competition and consult with other regulatory agencies to gather support for competition law enforcement.

Maintaining competitive markets is particularly important in challenging economic times, stated Mr. Mordaunt. Substantive merger analysis should not be diluted but agencies could streamline
the process, consider flexibility in deadline requirements, clarify what evidence must be produced and be available for consultation and informal advice.

Mr. Kimura of the JFTC concurred that agencies should continue to apply sound merger analysis. He cautioned, however, that agencies should expect to receive more failing firm claims from merger participants.

The Turkish Competition Authority confirmed that failing firm arguments have increased recently. Mr. Çaglayan identified multi-jurisdictional mergers as a challenge for some competition agencies. He emphasized the need for communication and sharing of information among agencies in these transactions, whether or not there are divergences in substantive or procedural requirements.

Ms. Varney next asked the panelists to discuss particular elements of substantive merger analysis that are especially difficult in economic downturns. There was general agreement that current market shares may be less reliable and less predictive of future power, and that a history of rivalry may not necessarily predict future rivalry. However, it was observed that market sectors are affected differently by economic difficulties so it is difficult to generalize.

The panelists rejected changing the requirements for the failing firm defense. Calls for special treatment of particular industries should be rejected. Indeed, the panel noted that maintaining competitive industries is even more important during economic downturns than in strong economies. Vibrant competitive market sectors are necessary to facilitate consumer welfare at the end of economic difficulty. Finally, agencies were advised to learn from past economic crises in other jurisdictions and other markets.

Finally, the panel discussed remedies in merger cases. Ms. Calviño explained that most notified mergers are cleared or approved with a remedy and only rarely is a transaction notified to DG Comp prohibited. On the remedies side, DG Comp prefers to order a structural remedy in the form of divestiture to a suitable buyer. Mr. Mordaunt agreed and added that firms are often willing to offer suitable remedies to avoid second phase proceedings. A sound buyer may be more difficult to identify in declining economy, but that is a remedies issue and should not drive the substantive merger analysis.

IV. Special Project: Competition Law in Small Economies

Moderator Walter Stoffel introduced this year’s Special Project, an assessment of competition law in small economies. Representatives from the Swiss Competition Commission and the Israel Antitrust Authority took the lead in organizing and researching this topic with contributions from a number of other ICN members. This project follows up on an OECD study, which had found that small economies face unique issues in enforcing competition law. The unique ICN data base and broad list of member agencies enabled the drafters to contribute to understanding whether “small” economies diverge from larger jurisdictions for the analysis and enforcement of competition laws.

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The first task for the Special Projects Working Group was to define “small economies.” Then, a survey was constructed to determine whether the respondent agencies agreed or disagreed that the size of their economy was relevant to their review of proposed mergers, anticompetitive agreements or abuse of dominant positions.

Twenty-four agencies representing a global cross section responded to the survey. An Executive Summary of the survey, its findings, and the member agencies which responded is available on the ICN web site. Mr. Stoffel stressed that the goal of this project was research and dissemination of information for the ICN members, and not the development of “best practices for small economies,” even if such a concept can be satisfactorily defined.

Mr. Stoffel then introduced a panel to report on the survey and summarize the responses. They included three ICN members; Ronit Kan, Director General of the Israel Antitrust Agency, Charles Webb, Executive Director of the Jersey Competition Regulatory Authority, and Alberto Heimler, Adviser to the Italian Competition Authority; as well as two NGAs: Philip Marsden, Director of the British Institute of International and Comparative Law, and Professor Michal Gal, University of Haifa and the NYU Center for Law and Business.

The authors of the survey provided an overview of the key issues in the Executive Summary:

1. defining “small” economies is challenging and the survey respondents had varying views on the proper definition;

2. Small and large economies share the same competition objectives, namely protecting and promoting consumer welfare and the competitive process. However, open trade policies are generally believed to be somewhat more important to facilitating competition in small economies;

3. there was no consensus on whether the size of an economy affects antitrust analysis of “agreements.” The respondents split on whether or not there tend to be a larger number of oligopolies in small economies;

4. the role of business associations is important in economies of all sizes;

5. a minority of respondents thought that dominance may be more of a problem in smaller economies and that a somewhat different legal analysis may be appropriate;

6. the majority of respondents thought that merger analysis should be consistent notwithstanding the size of the economy. Some stated that the size of an economy could affect market conditions and therefore have some impact on the outcome of a merger investigation, for example, efficiency gains may be more plausible in a smaller economy, or the risk of coordinated effects may be somewhat more plausible;

7. finally, the survey did not reveal definite conclusions but collected a large amount of valuable data and will serve as a starting point for further discussions.
Director General Kan addressed the difficulty of defining “small” economies. She pointed out that the “size” of the market in terms of population may be an incomplete definition if there is considerable cross-border commerce. Instead, she recommended consideration of whether an economy is effectively an “island” or isolated market. This determination should consider factors such as ease of cross-border trade, culture, and language. Standard substantive economic analysis should be applied to competition problems, but the nature of the market, including ease of entry and potential competition, could affect outcomes in small economies.

Executive Director Webb acknowledged that Jersey is a small economy by any definition. He agreed with Director General Kan that the isolation of an economy is highly relevant to assessing the state of competition and whether an economy can be considered to be “small.” Cross-border commerce can diminish or eliminate adverse competitive effects of concentrated markets in small economies. Therefore, he contended that the size of an economy should not affect assessment of dominance. He affirmed that consumer welfare is the goal of competition law in small and large economies. However, market size may be relevant to the question of whether or not a firm has abused its dominant position. The availability of substitutes may be more limited, barriers to entry may be higher, and there may be a risk of excessive pricing under European law. Dominant firms created by the state may be the only firm in the market and may be able to abuse their dominance by foreclosure in small economies. Finally, he stated that small economies must consider a variety of remedies, including regulation for single-firm markets.

Mr. Heimler contributed insights on the characteristics of small economies. Personal relationships and interlocking directorates may cause greater competitive concerns in small economies that can support fewer firms, than in large economies with many competitors. He saw no need for different substantive analysis based on the size of an economy, but recommended that agencies in these jurisdictions be alert to strategic behavior by firms. Merging firms may threaten to exit a small economy if the transaction is prohibited or seek to delay notifying small states until after they have obtained approval in a large jurisdiction. The threat of exit is largely theoretical, he concluded, but small jurisdictions may consider requiring local divestitures to cure local anticompetitive effects while approving a global merger.

Mr. Marsden commented on enforcement against global cartels. Isolated economies with few competitors may be seriously harmed by cartel behavior. Therefore, cooperation and sharing of information among the affected jurisdictions is beneficial. He also recommended use of leniency to conclude the investigation with speed and restore competition without delay. Remedies for global cartels may also be difficult to enforce against foreign firms. He recommended enhanced cooperation, and global and regional networks among ICN members to facilitate these important cases.

Ms. Gal agreed that the definition of “small” economies should take into consideration cross-border competition. Expanding markets beyond national borders may strengthen competition and enhance consumer welfare. She also recommended regional cooperation to allow small jurisdictions to combine resources and promote a stronger competition culture, and observed that such regional networks are developing. Finally, she agreed with Mr. Marsden that global cartels harm large and small economies, but small jurisdictions may have resource constraints that limit their ability to prosecute very large cases. However, deterrence requires disgorgement of all
illegal gains. Recognition of foreign judgments should be considered as a possible solution to this problem.

Mr. Stoffel thanked the panel and invited comments from the floor. Representatives from large and small jurisdictions shared their experiences and offered comments on this important special project.

PLENARY SESSIONS OF THURSDAY, JUNE 4, 2009

V. Cartel Working Group

Cartel Subgroup 1: Transitioning from an administrative to a criminal regime.

*Scott Hammond, Deputy Assistant Attorney General, U.S. Department of Justice,* was the moderator for this subgroup. He indicated that there were 29 members who contributed to Subgroup 1. The majority of the members have either criminal sanctions in their jurisdictions or they are adopting or actively considering it. Australia for example, is on the verge of adopting criminal sanctions, and Brazil, who had criminal sanctions since 1991, has been recently building up their criminal enforcement. The subgroup participated in telephone conference calls, talking about their experiences, issues, and shared their views. Administrations that have criminal sanctions have dealt with issues regarding improving the transparency of the procedures as well as how a competition authority develops strong partnerships with public prosecutors. There is a concern that in jurisdictions where there is a transition from administrative penalties to criminal sanctions, the prosecuting authorities may not have the same dedication as the competition authorities and may not make these cases a priority.

*Graeme Samuel, Chairman of the Australian Competition and Consumer Commission,* spoke about the Australian experience and issues facing the ACCC, who have criminalized serious hard core offences. The ACCC has an MOU with the prosecuting authority. In the United Kingdom they have to prove ‘dishonesty’ on the part of the offender. In Australia, the ‘dishonesty requirement’ was included in earlier drafts, but they have learned from experiences in other jurisdictions, that the ‘dishonesty’ element would make it difficult to prove a case. Rather, they added the ‘intent’ element instead.

Some of the challenges have been to elevate the standard of evidence obtained and establish a relationship between the ACCC and the Prosecuting Authorities. The ACCC conducts the investigation and gives the evidence to the prosecutor. The prosecutor decides whether to go ahead with the prosecution or not. The two authorities have an ‘open-trust’ relationship. Prosecutors have put a team in the ACCC for a two year period to receive cross-training on legal and economic competition issues. The ACCC have also put team members in the prosecuting authority for cross-training on aspects such as how to gather criminal evidence, etc.

Mr. Samuel emphasized that when the ACCC takes a decision to pursue a criminal investigation they do so without any diversion. Only if there is no evidence to make a case, would they unilaterally decide not to prosecute. The case can then be open to civil prosecution if warranted.
If there is a civil litigation that is successful, it is likely that the prosecutor will then prosecute based on the fact that there is a likely chance of success and that it is in the public interest.

*Ms. Ana Paula Martinez, Director, Secretariat of Economic Law of the Ministry of Justice Brazil,* gave great insight to the operations in Brazil, in that the civil and criminal prosecutions can run in parallel. In terms of the criminal sanction, only the individual is prosecuted and can receive a sentence of up to 5 years imprisonment. The administrative penalties could be against an individual or a corporation. The criminal sanctions were enacted in 1991, but were too broad and as a result, were not used. However, through policy statements, the enforcement of those provisions has been narrowed, and used more effectively.

The Brazilian authorities have made cartels a priority, and have criminalized cartels to ensure deterrence, and are now using sophisticated evidence gathering techniques such as wire tapping, and using the services of Interpol. The public prosecutions are done at the Federal level as well as in each of Brazil’s 27. Because it is sometimes difficult to co-ordinate activities between the states, they have chosen one state namely, Sao Paulo, as a base. Sao Paulo prosecutors have also created a special anti-cartel unit and a dedicated forensic laboratory. They are trying to replicate this in the rest of Brazil. The challenge is in prioritizing this in each of the 27 states, and this is being done by trying to convince the states that it is important to prosecute cartel activities.

Other activities planned by the Brazilian competition authorities are:

- They have also convinced the President to have an ‘anti-cartel day’, and have begun a campaign where brochures have been handed out, especially at airports.
- They are also going to have a 4 hour class on cartels in the Police Academy.
- There is also a plan to launch a "national ICN" and put together administrative and criminal authorities and to host annual meetings and workshops.

The authorities have also been busy with the cartel convictions. 29 people were sentenced under criminal sanctions. Between 2003-2006 the authorities served 30 warrants of arrest. Last year (2008) they served 107 warrants.

Mr. Hammond reiterated that Brazil is the blueprint on how to transition from administrative to criminal sanctions. Their focus on training, public awareness and on the ‘anti-cartel day’ shows strategy to cover all the bases for effective enforcement.

Mr. Samuel also mentioned that in Australia where there are separate authorities dealing with the investigation and prosecution, a cultural trust between the ACCC and the prosecuting authority has been successfully established, cross-training between the police/prosecutors and the ACCC has been developed and a MOU which sets out formal terms of the relationship between the prosecuting authority and the ACCC, particularly with regard to immunity proceedings has been drafted. The Government has also given the prosecuting authority a special budget allocation for criminal prosecutions.

Mr. Samuel noted a number of challenges of the transition from administrative to criminal sanctions, namely:

a) the psychology that white collar criminals don’t deserve jail.
b) Small businesses may be at risk. However the ACCC made it clear that only serious hardcore cartel activities will be prosecuted.

c) Questions were raised as to whether the ACCC should have authority to pursue a civil or criminal case. The prosecuting authorities have an internal good public interest test to determine whether to prosecute or whether the ACCC should issue an administrative penalty.

d) ACCC will not negotiate down from a criminal to a civil prosecution.

e) The ACCC have issued a guideline which is in draft and which will be published, once finalized.

Mr. Hammond emphasized that it is imperative that competition authorities receive cooperation from the prosecuting authorities.

_Bruno Lasserre, President, Autorité de la Concurrence, France_, remarked that the French competition authority has completed a major reform which was largely based on ICN practices and insight. Some of those reforms were:

a) a single independent enforcement agency;

b) a single independent one-stop shop for merger review;

c) advocacy;

d) modernized competition tool-kit;

e) pro-active, vigorous cartel busting unit

f) judges can send individuals to jail for up to 4 years. This however, remains underused.

Their track record did not suffer while this reform took place, however, Mr Lasserre pointed out that criminal enforcement must be improved and it must work alongside the civil enforcement (and not against it) which will make it more robust.

He also articulated that a free-market economy does not equal democracy. Fines are not enough and jail sentences will be an enormous deterrent for cartel activity. What was required was:

a) enhanced outcomes rather than disincentives;

b) Putting criminal legislation on the French agenda;

c) Afford individuals maximum procedural consistency and transparency. Any discretion is counterproductive.

d) Having criminal law is not enough, if there is no dedication from public prosecutors and judges.

e) Judges should be trained in competition matters and be specialized.

**Cartel Subgroup 2: Investigative Techniques**

_Mr. John Pecman, Acting Senior Deputy Commissioner of Competition, Competition Bureau, Canada_, spoke of the complex strategies in cartel investigations such as transitioning from an administrative to a criminal regime, and obtaining international corporation as well. He also mentioned the success of the cartel workshop in Portugal and the subgroup’s revisions to the Anti-cartel Enforcement Manual.
Ms. Monique Van Oers, Director, Netherlands Competition Authority, addressed whether they should use administrative tools or criminal tools. In the Netherlands they have administrative sanctions against individuals and corporations. However, after uncovering the wave of bid rigging cases in the construction industry from 2004-2006, which involved high-level management, this gained a reaction from authorities to criminalize cartel activity.

Mr. Simon Williams, Senior Director, U.K. Office of Fair Trading, said that the UK’s decision to use criminal and civil sanctions was not primarily based on the available tools, since the tools are similar under both regimes. The OFT can do their own criminal investigation and can also ask the police to assist because the police have the power to arrest individuals and an early arrest can be a means to encourage early cooperation.

Mr. Kirthikumar Mehta, Principal Adviser, European Commission, DG Competition, said that EC competition law does not contain criminal sanctions against companies. He also mentioned that cross-border investigations were increasing. Having the same leniency application process may open inter-agency co-operation. In all jurisdictions, in preparation of raids, there is a risk of alerting the parties. Therefore there is a need for clear dividing lines between civil and criminal cases if investigations are conducted in parallel.

Mr. Williams noted the challenges where the EC was investigating under Article 81 and a member state was conducting its own investigation under its domestic criminal regime. These challenges were successfully overcome in the Marine Hose case where two agencies investigated using separate sets of powers even involving two separate raids on the same addresses. Both agencies were able to obtain the material needed while maintaining that separation.

Mr. Mehta also spoke of the resources available to member state agencies to conduct the investigations. Dawn raids have huge cost implications. One of the least costly evidence gathering methods is to send out a compulsory information request. It also depends on whether the member state has a leniency application procedure and whether they have time and money to investigate further. The EC can act ex officio in leniency applications and enable co-operation with other agencies. They also take into account the impact of the company’s conduct being publicly exposed and can demand more information from the leniency applicant before engaging in a dawn raid. Even those with no criminal exposure have the incentive to apply for leniency and their information will be protected. Co-operation can be maximized if the EC protects their submission.

Ms. Monique van Oers also emphasized that sound co-ordination allows the possibility of information exchange between authorities. A proper legal basis to exchange information is required and detailed records or logs should be kept to prevent misunderstandings. In the Netherlands for example, the public prosecutor investigating a company used its power to conduct wire-tapings. In this example, the NMA was also investigating the same company. It was possible for the public prosecutor to pass on their information to the NMA. The company disputed this evidence. However, the NMA conducted its own investigation without undue influence and they did not want to appear as leading the prosecutors’ investigation.
Success of information exchange is maximized when it is bilateral. This is not so in the Netherlands. The NMA can receive information, but it can’t give it to another authority. They would ideally like to exchange information but cannot do so especially with leniency applications.

Mr Mehta mentioned that the EC has a close co-operation with the ECN and has an anti-cartel network. Co-ordination with EC countries was specific and procedural lines are distinct without overlap. After the investigation there is no exchange of information and demarcation is clear.

Mr. Williams concluded that there was a clear message from the UK’s experience on leniency: to try to make a clear link between administrative leniency for the company and criminal immunity for the employees and office holders of that company.

VI. Unilateral Conduct Working Group Plenary Session: Distinguishing Pro-competitive from Anticompetitive Conduct

A. Introductory Remarks by Randy Tritell

Randy Tritell, Director, Office of International Affairs (U.S. Federal Trade Commission), speaking on behalf of FTC Chairman Jon Leibowitz, stressed the importance of ICN as a unique forum for competition enforcers to work together on common issues, and in particular the role of the Unilateral Conduct Working Group (UCWG) in fostering understanding in this particularly complex area of competition policy. In the past working year, the UCWG issued reports addressing how competition agencies address Tying and Bundled Discounting and Single-Product Loyalty Discounts and Rebates. He also mentioned the first workshop of the UCWG in spring 2009 in Washington, D.C., which was a great success. He highlighted the cooperation between the two U.S. sister agencies especially after the Section 2 Report of the DOJ was withdrawn and mentioned the unique authority of the U.S. Federal Trade Commission to scrutinize conduct that does not reach the level of the Sherman Act, stating that the Commission is looking to make greater use of this authority.

B. Panel on "Distinguishing Pro- From Anticompetitive Conduct: The Fine Line Between Aggressive Competition and Anticompetitive Foreclosure in Tying and Discounting Cases"

Markus Lange, Head of International Section, Bundeskartellamt, mentioned significant developments since the establishment of the UCWG. Besides the discussion in the U.S. (Section 2 Hearings) the EU Commission’s paper on its priorities for applying Article 82 to exclusionary conduct deserved attention. Markus Lange pointed out that, according to the latest survey of the UCWG, there are, all in all, rather few, but some very high-profile antitrust cases concerning tying, bundled and single-product loyalty discounts. The EU recently issued the Intel decision with a record fine. Also, the Commission's Microsoft decision was upheld by the European Court of First Instance.

Simon Roberts, Chief Economist, South African Competition Commission, said that generally such practices do not raise competition concerns. This is different when firms hold substantial market power and such conduct may protect their position. Agencies have to establish the likely
effects based on a genuine theory of harm and proper consideration of the evidence. It is efficient to intervene only in a small number of cases because the resources are typically scarce. He does not see any potentially chilling effects of intervening in high-profile cases.

_Shlomi Parizat, Chief Economist, Israel Antitrust Authority,_ pointed out that the main contender for a "unified approach" is foreclosure analysis. Except for tying, the price-cost test is broadly accepted. There is however no single test for all cases. Agencies went from per se illegality through the Chicago School approach to an actual situation trying to settle in the middle. He also pointed out that it is difficult to provide for any meaningful safe harbors in the field of tying and discounting. Mr. Parizat also stated that presumptions are no good either, although they still can be found in a couple of countries. Mr. Parizat stated that presumptions are better used to shift burdens rather than to create a per se prohibition. He concluded by stating that technical tying, individualized loyalty rebates, and bundling by “pure” monopolists deserve close antitrust scrutiny.

_Damien Neven, Chief Economist, European Commission DG Comp,_ stated that the as-efficient competitor test is a useful analytical tool. He advocated a dynamic approach of the constraint exercised by seemingly less efficient competitors and found that in practice the contestable share could be estimated. He also pointed out that the Intel case relied not only on quantitative analysis, but also on qualitative evidence. He added that there is broad consensus among economists with respect to the relevant framework of analysis as far as tying and bundling are concerned (and against a per se rule). The area of loyalty rebates is more difficult. Finally, he acknowledged that an inefficient entrant being foreclosed is not "a bad thing" for consumers.

_Jorge Padilla, NGA, LEGC Consulting,_ highlighted that the right approach in balancing positive and negative effects on competition is to qualitatively assess their likelihood and likely magnitude on the basis of cogent evidence. Hereby, there is a need to take into account actual and likely effects which have to be differentiated from capable effects. On the other side, a quantitative balancing of effects is oftentimes impossible because simulating long-term price effects is complex and quantifying the consumer welfare benefits even more complex.

_Renata Hesse, NGA, Wilson Sonsini Goodrich & Rosati,_ stated that use of price/cost test in balancing the positive and negative effects of specific conduct is a good way to get a sense of consumer harm. If used alone, there is a risk to fail detecting anticompetitive conduct. It can however provide safe harbors if applied rigorously. Generally, you need to rely also on qualitative analysis.

VII. Competition Policy Implementation Working Group

A. Subgroup 1

_Olavo Chinaglia, Commissioner, Administrative Council for Economic Defence, Brazil,_ moderated the Agency Effectiveness and Compliance panel with participants _Philip Lowe, Director General, European Commission, DG Competition, Maria Coppola, Counsel for International Antitrust, U.S. Federal Trade Commission,_ and _Baris Ekdi, Competition Expert, Turkish Competition Authority._
Mr. Chinaglia first recalled the findings of last year which were presented in Kyoto, Japan, and were dedicated to how the agencies set their objectives. One of the major findings was that the agency’s effectiveness depends not only on the quality of its decisions but also on its ability to effectively manage its workload and priorities, optimally allocate resources, and retain talent. In the 2008-2009 ICN year, the work of the Competition Policy Implementation (CPI) Working Group experienced a growing recognition among participants: no fewer than 37 agencies from 36 jurisdictions as well as 28 NGAs responded to the various questionnaires addressed to them. This year, the CPI Working Group began the second phase of its effectiveness work on the analysis of the relation between the definition of priorities and resource allocation, and the effectiveness of competition agencies' decisions, with a focus on compliance with agency decisions. The goal was to define how institutional aspects may affect the effectiveness of a competition agency. While there is no one-size-fits-all solution for the effectiveness of an agency, mainly due to the various cultural and economic contexts in which the agencies function, there are some points of convergence.

Mr. Lowe stressed that there is considerable agreement about certain elements that can make the work of an agency effective. One of the key factors for agencies is to set a clear strategy as a basis for prioritizing their tasks. A working plan has to be adopted and regularly reviewed in order to set clear priorities. Even if there are legal constraints forcing agencies to mandatorily review certain cases, the setting of priorities is still a necessary task to achieve effectiveness. In relation to this requirement, an agency needs to be able to react in a time-sensitive way, to be flexible in re-allocating its resources among different parts of its organization and to be capable of responding quickly to new situations. In addition, ex post evaluations of the achievements are a very important tool to measure an agency's effectiveness. Finally, accountability is a central aspect for effectiveness: there needs to be a transparent decision making and communication is essential.

Ms. Coppola said that it was important for competition agencies to learn from the business and the management consulting world and apply "best practice" to their activities.

Mr. Ekdi stated that anticompetitive behaviour will not stop because an agency exists or selects the right cases. One should distinguish between the agency’s effectiveness, i.e. the agency doing the right things, and the agency’s efficiency, i.e. the agency doing the things right.

Mr. Lowe stressed the importance not only of establishing objectives for an agency but also of concrete planning to implement the strategy defined into case and policy work. This requires a regular review of any new initiative, which is going to involve a fair amount of resources. Bringing a case is not always the best way to solve a problem. An agency should be free to have a preliminary look at a complaint and to decide whether it should bring a case or not. In order to make this choice, it needs to have set clear objectives beforehand.

Moderator Chinaglia cited the example of Brazil where the three agencies enforcing competition law tried to coordinate their work in order to optimize the use of resources.

Mr. Ekdi explained that the first idea in Turkey was to deal with every single case. This objective was not manageable and failed. It was then recognized that prioritization is essential, included through the creation of a strategic planning unit within the agency.
Ms. Coppola confirmed this statement. She stressed that consumers, as the main beneficiaries of an agency's action, are in fact a very diverse group with various interests and suffer from collective action problems. As a result, the agency can not rely on the beneficiaries to discipline the agency or drive its focus. The agency needs to engage in self-discipline and to prioritize and evaluate its work.

Mr. Lowe came back to the distinction between effectiveness and efficiency. He emphasized the impact-related character of the effectiveness that aims at achieving what the public expects from an agency, whereas efficiency is an output-related concept aiming at achieving the best possible results with restricted resources.

Mr. Ekdi recognized that the competition agencies are very often monopolists in applying competition rules: they have no rivals challenging their work. As a result, they need to have an internal control in order to check the effectiveness of their decisions. If agencies’ work is not effective enough, then there is a risk that it will cause welfare-chilling effects.

Mr. Lowe also stated that there is also competitive pressure coming either from the regulators or from the legislator. As a result, agencies' work has to be effective.

Moderator Chinaglia insisted that effectiveness cannot be analyzed in the short term. It is important to examine whether remedy orders are obeyed by the parties and whether a certain decision has produced the desired effects on the market.

In order to assess the impact of decisions, Mr. Lowe first insisted on the importance of imposing the remedies devised by the agency. Secondly, the impact of the agency’s activity needs to be assessed. This encompasses on the one hand the analysis of individual cases, e.g. whether merger remedies were correct or whether they lead to type I or type II-errors. On the other hand, the general communication, the guidelines or the regulations issued by an agency shall also be part of the assessment. For instance, sector enquiries are a good means to analyze the impact of a regulation or a set of regulations.

Ms. Coppola referred participants to the FTC's self-assessment initiative led by Commissioner William Kovacic. The initiative was a year-long study of agency effectiveness, involving consultations with agencies and NGAs around the globe. Key findings of the assessment are available in the study's final report, as well as in presentations by Commissioner Kovacic, such as "Rating the Competition Agencies: What Constitutes Good Performance?".

Mr. Ekdi mentioned a similar World Bank project on agency self evaluation and stated that this could become a routine procedure for decisions taken by the Turkish authority in the future.

Moderator Chinaglia mentioned other themes - such as which are the structural patterns of an effective agency, how shall agency staff be organized in order to reach effectiveness, how shall investigative and adjudicative powers be allocated in order to reach effectiveness - that will be discussed during the break-out sessions.

11 http://www.ftc.gov/ftc/workshops/ftc100/index.shtm
12 http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf
In their final statement, the four panellists made the following comments:

Mr. Lowe mentioned that the ICN should have a major focus on agencies’ effectiveness and efficiency. This requires that the agencies exchange information about planning, prioritization, case-management systems, investigative techniques, that they share best practices about recruitment, retention and motivation of the staff, about the methodologies to assess the impact of their actions, as well as about the use of communication strategies to complement the case enforcement.

Ms. Coppola pitched to focus in the short-term on prioritization within agency effectiveness.

Mr. Ekdi also pointed out prioritization as one of the key elements to achieve effectiveness.

Moderator Chinaglia concluded by saying that agencies all want to reach the stated objectives, but they need to do it step by step. As a suggestion, the focus shall be first on strategic planning and prioritization. One of the means to achieve these goals could be to provide agencies not with definite solutions but with tip-sheets.

At the end of the session, Mr. David Lewis, Chairman of the Competition Tribunal of South Africa and ICN Steering Group Chair, highlighted that this appearance at the ICN would be the last one for Mr. Lowe as an official of DG Competition. Mr. Lewis thanked Mr. Lowe for his extraordinary contribution to the ICN, to the field of competition in general and to all individuals he has worked and engaged with in the last years.

A. Subgroup 2

Mr. Russell Damtoft, Associate Director, Office of International Affairs, U.S. Federal Trade Commission, reported about the work of the second subgroup of the CPI Working Group dedicated to experience sharing among ICN members. He recalled that part of the mandate of the CPI Working Group was to find mechanisms to facilitate the sharing of experiences between more experienced agencies with newer agencies. Various partnership programs were implemented during the last years, some with more success than others.

A first effort was to develop a pair of programs. The first was a partnership program that paired up newer agencies with more experienced ones. Some of these were successful and others were not. The difference between the more and less successful ones seemed to depend on the degree to which both parties invested in building a good working relationship. The second program was a consultation program that provided for a panel of experts from a variety of agencies to be available to consult with case handlers from newer agencies. While this was found to be a good idea, it was not much used, perhaps due to the lack of personal contact.

The next effort was the establishment of a series of global telephone conference calls that allowed case handlers to discuss questions of mutual interest. A film clip of such a call was shown at the annual meeting at Kyoto last year. These were quite successful. A lesson learned from this experience was that there is value in exchanges among agencies at similar levels of development as well as between more and less experienced agencies. While this initiative continues to have high participation and positive feedback, two significant limitations have emerged: first, there are
timing issues, since the phone calls take place at inconvenient times for several agencies; secondly, there are language issues for those who are not fluent in the language of the call.

The CPI Working Group also examined the use of an on-line approach to information sharing in order to replicate the success of the telephone conference calls. Mr. Damtoft mentioned that the CPI Working Group referred to this initiative as a "discussion forum".

A test run was conducted shortly before this year's annual conference. The pilot combined aspects of the teleseminar and an online forum. William Kovacic of the FTC opened with an oral presentation on agency effectiveness, a summary of which was posted on the forum as he spoke. Questions could be asked orally, which were also posted on the forum; or they could be posted online, in which case they would be repeated on the telephone. Other questions and answers could be posted online after the oral presentation ended. Excerpts from the forum were shown, highlighting the sign-in process and the confidentiality notice as well as the interventions themselves. This was very successful, although it may be that by trying to combine the forum and the teleseminar, the organizers tried to do too much.

VIII. Interactive ICN: Maximizing Network Effects

A. Introduction

The final plenary session was a forward-looking discussion of the future of ICN, and called on a group of experts for their experiences and recommendations on ways to carry on the mission of the International Competition Network. Moderator Phillip Collins, Chairman of the U.K. Office of Fair Trading, reported that the Chair and Vice Chairs for Advocacy and Implementation and Outreach sought to follow through on the outreach issues presented at the 7th Annual Conference in Kyoto. The group held a series of focus groups with a cross section of ICN members to assess the network’s past successes and solicit recommendations for future activities. Approximately 25% of ICN members were invited to participate and 20% actually took part in the group discussions.  

The focus groups addressed eight issues:
1. facilitation of technical assistance,
2. facilitation of confidential discussions/contacts/distribution lists through secure intranet or blog among members,
3. improving the sharing of publically available decisions, cases, and speeches among agencies on the ICN website,
4. promoting regional sharing of experiences among agencies in certain geographic/regional areas and/or with similar economic conditions,
5. developing possible advocacy role/voice for the ICN as appropriate,
6. developing an educational toolkit on the benefits of competition and markets,
7. providing a forum for discussion/debate of “hot issues over the horizon” (such as the financial crisis) at a panel at the Annual Conference and/or through other informal sessions, and

14 A separate focus group was held with NGAs, but not in time to include findings in the presentation at the annual conference.
8. balancing resources between “core” ICN work product (through working groups) and discussion of macro/cutting-edge issues.

Moderator Collins then turned to the question of how to proceed in the future and introduced the panel of three Vice Chairs, three members of smaller or newer agencies, and Prof. Eleanor Fox, an NGA who has followed the ICN since its formation.

B. Panel Discussion

Kazuhiko Takeshima, ICN Vice Chair of Advocacy and Implementation and Chairman of the Japan Fair Trade Commission, began the discussion by detailing recent projects with the goal of generating and circulating work products and promoting their use. These projects have been undertaken in several areas, specifically including the following:

1. an ICN support system to provide assistance to interested newer agencies on the scope and content of ICN work product. The support has taken a variety of forms including conference call discussions and pairing newer agencies with more experienced partners for ongoing consultation. Among specific topics discussed have been market definition, enforcement and leniency programs.

2. an Advocacy and Implementation Network (AIN) has been established to provide assistance to members,

3. future initiatives and activities include (a) continuing the support system with the expectation of increasing its availability to more agencies, (b) broadening the distribution of work product among ICN agencies, and (c) participating in regional forums and technical assistance workshops.

Eduardo Pérez Motta, Vice Chair of International Coordination and President of the Federal Competition Commission of Mexico, praised the ICN for its technical expertise on competition issues and competition advocacy projects. Recent initiatives in international coordination have included strengthening relationships with international organizations and following up with discussions on competition matters. He reported on close consultations with the World Bank, which has appointed a competition policy expert. Representatives of the World Bank and other organizations attended this ICN meeting and further cooperation is planned with UNCTAD, the IADB and Latin American regional organizations.

Mr. Motta discussed a future project on the agricultural sector and sub-Saharan Africa involving market studies, advocacy, and active cooperation with regional organizations in Africa. There are also plans underway to seek funding for technical assistance from bi-lateral and multi-lateral organizations. He anticipated convening a focus group to identify needs and recommend particular projects.

U.S. Federal Trade Commissioner William E. Kovacic, Vice Chair for Outreach, remarked on ICN’s significant accomplishment in a short span of eight years. The Network has produced

impressive work product and fostered strong human relations but faces challenges going forward. To address these, the past year the vice chairs engaged in a process of self-assessment using focus groups of ICN members and NGAs. Moving forward, they will review the development of networks and creation of soft law over the past 60 years and investigate subject-related networks including those devoted to environmental protection and health and safety issues.

The future of ICN will require the network to accommodate the growing membership and diversity of agency size, history and expertise. His goal is to expand and deepen participation of ICN members and broaden the group of NGAs to include experts from a wide variety of jurisdictions and backgrounds. Self assessment will be an ongoing project. Finally, effective outreach requires use of a variety of tools to distribute more effectively ICN’s work product, including better mechanisms for communication.

Tommy Deza Sandoval, Legal Advisor, Sala de Defensa de la Competencia, Peru, represented a relatively new agency. He recommended that ICN undertake to provide assistance to member agencies, especially the newer commissions. Useful assistance would cover the range of agency responsibilities from organization and priority-setting to procedure and substantive analysis to assistance with regulatory and legislative reform. Secure discussion networks and distribution of recent developments are options to facilitate sharing of needed information and cooperation among ICN members. Finally, Mr. Sandoval suggested that the definition of technical assistance be extended to include practical support such as funding of internships, market studies, competition advocacy and training programs for staff members.

Chairman Chuan Leong Lam, Competition Commission of Singapore, representing an agency established in 2005, reported that competition law enforcement is relatively recent in the region. Speaking as a representative of a new agency, he offered four suggestions for ICN assistance. First, competition law and policy are new concepts. New agencies must persuade the public of the benefits of competition and establish a competition culture in order to be effective. Toolkits containing practical information and real examples would be useful to demonstrate the value of the agency’s work and gain public support. Second, he requested that ICN conferences cover a broader variety of subjects and facilitate conversations on several themes. For example, an annual session could be scheduled on a cutting edge topic such as global business cycles or behavioral economics. Third, he joined other speakers in supporting regional discussion forums. For example, the regional organization ASEAN has recently established a forum on competition policy for ASEAN members. ICN would be an effective base to sponsor a number of such regional forums under the global ICN umbrella. Fourth, competition and violations now cross borders, so multi-agency cooperation is critical to effective enforcement. The personal relationships and contacts established among ICN members are a good basis for cooperative enforcement. In addition to these informal relationships, he recommended that ICN consider other mechanisms to facilitate inter-agency cooperation in general or on particular matters.

David Miller, Executive Director of the Jamaica Fair Trading Commission, highlighted the benefits of technical assistance offered by a variety of international organizations including the IADB, EU, USAID, and World Bank. ICN has special expertise in competition matters, and he recommended that ICN consider providing even more in terms of technical assistance. Specifically, producing and distributing best practices and other materials have been valuable resources. In the area of human resources, he suggested that regional networks to facilitate sharing information among peers could be established and inquired whether a list of experts
could be generated so newer agencies could contact them with questions and requests for information. Finally, he agrees with other panelists that the resources of the virtual network could be used even more effectively by creating online discussion forums, blogs, and identifying points of contacts in the member agencies with particular experience or expertise. He suggested that the full ICN may be productively supplemented by establishing smaller ICN working groups organized by region, economic similarity, or current focus on a particular market sector or substantive matter.

Professor Eleanor Fox, a Non-Governmental Advisor and professor of law at New York University Law School, directed her comments to two areas, one descriptive and one a prospective recommendation for future developments. First, she noted that the ICN charter has always been dedicated to competition matters and the organization’s practice is based on sharing of information among equal agency members. As a result, ICN has not been sidetracked by non-competition issues and has been able to focus its resources on competition law and policy. Prof. Fox believes that this has been a successful strategy and that merger and cartel investigations and cases in many jurisdictions are more efficient and effective because of ICN’s contribution. The ICN “roots up” rather than “top down” approach to information-sharing has been successful, but she recommended further efforts to bring in new voices from developing agencies.

Her specific recommendations for future work plans related to “gaps and overlaps.” “Gaps” refers to voids in competition oversight caused by state action or protectionism and can harm consumer welfare as well as small or developing economies. “Overlaps” include actions against the same defendant(s) by more than one agency. She recommended that ICN consider whether gaps and overlaps are problematic and, if so, to examine potential remedies. Finally, Prof. Fox reflected on the value of convergence, affirming that it is an important value, but respectful discussion and deference to divergence should be a part of future ICN process.

Mr. Collins then moderated a discussion among the panelists on the following topical questions:

1. Is there a way to minimize gaps and overlaps? How should ICN approach divergences?
2. What can ICN do to facilitate relationships among ICN members and NGAs? How can ICN optimize the efficiency of the virtual network? Should regional forums be added to the network?
3. How should we make the ICN work products as useful and available as possible?
4. How should ICN set priorities for the future? Should ICN strive to respond to important topical issues such as the economic crisis?

The moderator encouraged ICN members to contribute their views on the broad subject of ICN network effects and future plans. The following themes emerged:

1. The various working documents, toolkits, reports, templates and workshops are valuable. They should be continued and efforts should be made to make ICN work product widely available. Additional technology, such as internet discussion forums, was recommended.

2. Regional networks may facilitate discussion of common issues, create trust and collaboration, permit staff to participate and enable a competition culture to be developed. The opportunity to
participate in ICN projects motivates agency staff and allows agencies to contribute to the network.

3. ICN could contribute to promoting agency organization and effectiveness by providing assistance, including on planning and priority setting, and sharing expertise.

4. The ICN practice of collecting data, analyzing and identifying areas of convergence produces valuable material for use by competition agencies. These statements of convergence also establish international competition norms. Mr. Randy Tritell, Director of the U.S. Federal Trade Commission Office of International Affairs, related the experience of the Unilateral Conduct Working Group in drafting recommended practices in the controversial area of defining dominance. Despite differing approaches among the working group’s members, they were able to reach consensus on normative analytical principles. However, recognizing the differences, the group held a panel at the annual conference that encouraged debate, and will hold teleseminars on contentious issues designed to deepen discussion and understanding rather than agree on a document. Thus, the ICN can both find common ground and enhance understanding of differences.

At the conclusion of the plenary discussion, the panel added their final comments. Prof. Fox remarked that the ICN is the envy of networks for its effectiveness and work products. The ICN agencies are the guardians of the world antitrust system. Chairman Takeshima commented that sharing of information and expertise will become even more important as the ICN matures and trust among agencies deepens. Advisor Sandoval concurred and noted that cooperation will facilitate antitrust enforcement. President Pérez Motta affirmed the regional network idea while supporting ICN’s ongoing projects. Commissioner Kovacic summed up the comments noting that much work remains to be done. Finally, Chairman Miller, concluded the discussion by reminding the ICN members and the NGAs to take advantage of their mutual expertise, and thanked the panel for their thoughtful contributions.

IX. Report Back, Adoption of Work and Future Work Plans

Mr. David Lewis, Chairman of the Competition Tribunal of South Africa and ICN Steering Group Chair, called on leaders of the Working Groups to report on the break-out sessions held during the conference, work plans and recommended practices.

Merger Working Group

Report Back

The Merger Working Group held six breakout sessions. Following up on the plenary session, four small groups delved more deeply into merger analysis in troubled economic times. There was general agreement that the current economic challenges are widely felt globally, but that competition agencies should continue to apply sound economic analysis and focus on their primary task of promoting competition and consumer welfare. Established substantive analysis should not be weakened and competition advocacy continues to be important in this economy. The participants expected that allegations of failing firm defenses may increase, and they must be evaluated based on the evidence in each particular case. Merger remedies, including divestitures, may be more complex to structure and take more time to resolve.
Two sessions were devoted to merger notification procedures. The Notification & Procedures Subgroup’s summary of the initial notification information requirements of 28 jurisdictions was distributed and is available on the ICN web site.\textsuperscript{16} There was overall consensus that notification requirements should be limited to information that is necessary for appropriate evaluation of the issues. Flexibility in the production requirements and timing was recommended.

**Future Work Plans**

The annual Merger Workshop was held in 2009 in Taiwan. The Working Group plans to draft additional Recommended Practices for Merger Analysis and to hold teleconferences during the year on merger issues.

**Recommended Practices**

The Recommended Practices for Merger Analysis on Competitive Effects was adopted unanimously.\textsuperscript{17} These benchmarks deal with competitive effects analysis, including both unilateral and coordinated effects. The Merger Working Group materials, including recommended practices, toolkits and workbooks, and documents related to the merger notification project are all available on the ICN web site.\textsuperscript{18}

**Unilateral Conduct Working Group**

**Report Back**

The Unilateral Conduct Working Group presented reports and Tying and Bundled Discounts and Loyalty Discounts and Rebates and held six breakout sessions for discussion of issues raised at the plenary session and a series of hypotheticals. A variety of substantive issues including the “as efficient competitor” model, the role of intent, efficiencies, and remedies were debated by the attendees.

**Future Work Plans**

The Working Group plans to post collected case summaries on tying and bundled discounts and single-product loyalty discounts and rebates on the ICN web site. The Working Group plans to continue its work on the analysis of unilateral conduct by examining additional types of conduct, to be determined following discussion at the conference. \textsuperscript{19} Topics to address could include refusal to deal, exploitative abuses, excessive pricing, and margin squeezes. In the coming year, the Working Group also will facilitate discussion of issues that arise in analyzing unilateral conduct through teleseminars, including a possible teleseminar on remedies in unilateral conduct cases. A variety of materials, reports and recommended practices concerning unilateral conduct has been collected on the ICN web site.\textsuperscript{19}

\textsuperscript{17} The Recommended Practices are available at: http://www.icn-zurich.org/Downloads/Materials/ICN_MergerWG_Merger_RPs_Competitive_Effects.pdf
\textsuperscript{18} http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers
\textsuperscript{19} http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct
Competition Policy Implementation Working Group
Report Back


The CPI Working Group held five breakout sessions devoted to diverse subjects including institutional settings, compliance with remedies and sanctions, evaluation of the agency’s impact on consumers, assessment of technical assistance, and proposals for new on-line forums to share information. The Institutional Settings group discussed the need for agencies to prioritize, methods of assessing agency work and effectiveness, and shared information on recent statutory developments. The Compliance session focused on implementation of remedies. Among other things, attendees discussed the option of sharing compliance monitoring with other regulatory agencies to promote cooperation and use their own resources efficiently. Evaluation of agency decisions and market monitoring skills were shared among participants of one breakout session. Finally, the Technical Assistance and New Projects sessions reviewed new technological options to provide information, expertise and materials to ICN agencies, including by taking advantage of new technologies including on-line discussion forums and blogs.

Future Work Plans

The Working Group – renamed and refocused as the Agency Effectiveness Working Group – has adopted short and long-term plans for future projects. Within the next year, members will undertake strategic planning, prioritize among a list of projects, and increase document delivery to ICN member agencies. Longer term projects include conducting research on agency structure and common practices, and drafting and distributing recommended practices or an organizational manual for agencies. Key words to describe the group’s future plans are “knowledge, human resources, communication, and accountability.”

Advocacy Working Group
Report Back

Six breakout sessions were conducted by the Advocacy Working Group. Several sessions were devoted to market studies and competition advocacy. The discussions covered the purposes, process, and evaluation of advocacy. Other breakout sessions offered ICN agencies the opportunity to report on their own experiences and offer recommendations.

Future Work Plans

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20 This Report is available at http://www.icn-zurich.org/Downloads/Materials/ICN_CPIWG_Report-for-OIB.pdf
21 The 45-page Report, including contributions from 37 agencies, is available at http://www.icn-zurich.org/Downloads/Materials/ICN_CPIWG_Report_on_the_Agency_Effectiveness_Project.pdf
22 The CPI web site, including its vision statement and prior projects is available at: http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/competition-policy-implementation
Upcoming work plans may include teleseminars on advocacy and updating the on-line tool kit. In addition, the Working Group plans to compile a best practices handbook including, but not limited to, the use of market studies and competition advocacy. Materials related to the Advocacy Working Group, including its future work plan, market studies project and review and update project are all detailed on the ICN web site.  

Cartel Working Group Report Back

Six breakout sessions met following the Cartel Working Group plenary session. Three covered the transition from a civil enforcement regime to one that includes criminal sanctions. Two sessions discussed methods to maximize the incentives for potential defendants to report criminal behavior and cooperate, including effective leniency programs, and other means to increase detection of cartel behavior. A final session dealt with international cooperation in investigations, including conducting searches. These topics: criminalization, an investigative tool kit and leniency; are connected by the overall subject of maximizing deterrence and assessing the role of the prosecutor. The sessions were complemented by NGA participants, who provided information and views from the private perspective.

Future Work Plans & Announcement of the 10th Annual Cartel Workshop

Future plans include presentation of teleseminars on several different topics and updating additional chapters in the anti-cartel enforcement manual.

Mona Yassine, Chairperson of the Egyptian Competition Authority, thanked the ICN and host Swiss Competition Commission for an excellent meeting. The Egyptian agency is relatively young, established by 2005 statute, with substantial amendments adopted in 2008. The Authority has been active in anti-cartel enforcement, and prevailed in a recent case involving a cement industry cartel, which produced the highest penalty in Egyptian court history. She invited the attendees to the 10th Annual Cartel Workshop, which will be held in Cairo, Egypt on Oct. 27-29, 2009. Workshop topics will include investigative techniques and discussion of a hypothetical cartel case.

The Working Group presented revised and updated chapters of the Anti-Cartel Enforcement Manual on Searches, Raids and Inspections, and Leniency. The ICN members approved the working plans and revised chapters without objection.

X. Closing Ceremony

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23 http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/advocacy
24 The toolkits and other materials produced by the Cartels Working Group are available at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/cartels
25 The Anti-Cartel Enforcement Manual is available at: D:\files\pdf\ICN_CartelWG_Subgroup2_Searches_Raids_and_Inspections_Chapter.pdf
Walter Stoffel, Chairman of the Swiss Competition Commission and host of the 8th Annual ICN Conference, expressed sincere appreciation to all who had helped to make the conference possible: the staff of the Swiss agency, members of the ICN secretariat, the event organizer, technicians and staff. He also thanked the attendees for participating and sharing their views and expertise. He congratulated the participants on the accomplishments of the past year and during the conference, which included adoption of Recommended Practices for Merger Analysis on Competitive Effects; an ongoing inter-agency dialogue on ideas to improve agency effectiveness; reports on unilateral conduct addressing tying and bundled discounting, and single product loyalty discounts and rebates; a survey of ICN members’ approach to market studies and support for competition advocacy; and updated chapters of the Anti-Cartel Enforcement Manual on Searches, Raids and Inspections, and Leniency.

Mr. Lewis announced that the Dutch Competition Authority (NMA) has agreed to host the 2011 ICN conference in The Hague. He reported that the new ICN Steering Group had met and selected Dr. John Fingleton, Chief Executive of the U.K. Office of Fair Trading, to a 2-year term as chair of the Steering Group.

Dr. Fingleton thanked Mr. Stoffel and the Swiss Commission for an excellent conference, and offered sincere appreciation to Sheridan Scott and David Lewis, the past chairs of the Steering Group.

He briefly described the history of ICN, pointing to its successes in establishing an inclusive community that is committed to working together and seeking convergence. He then discussed the challenges of globalization and urged the member agencies to work together on cross-border, regional and global competition issues. He identified four issues as priorities for the second decade of ICN: continuity, longer term vision, governance and inclusiveness, and agency effectiveness. Finally, he noted that ICN has achieved significant success in a short period of time, increased international cooperation, and promoted competition enforcement to the benefit of consumers. He encouraged ICN members not to rest complacently on this success, but instead challenge ourselves to do better through a balance of continuity and innovation and change.

Zurich, 30 September, 2009

27The text of Dr. Fingleton’s address is available at: http://www.internationalcompetitionnetwork.org/media/library/ICNclosingspeech.pdf