

Happy Birthday, ICN

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Happy Birthday, ICN,
from a fan who knew you when.

But don't lie on laurels bed.

You have lots of work ahead.

It is a pleasure to wish the ICN a happy birthday and many more.

I remember well when ICN was just a gleam in a few eyes.

I was a member of U.S. President Clinton's International Competition Policy Advisory Committee, launched in 1997, co-chaired by Jim Rill on the antitrust side and Paula Stern on the trade side, with Merit Janow as Executive Director.

This was a time when globalization was at new heights. Trade barriers were down. The Berlin Wall was down. E-commerce was in its infancy and was sparking instantaneous global outreach by business. The World Trade Organization was at a new height. The Appellate Body had been established just two years before and was operating under rules of process and procedure. The WTO became a focal point or possible prospective home for internationalizing world rules across many fields; trade and environment, trade and intellectual property, trade and labor, and, indeed, trade and competition. The intersections of trade and competition had become palpable. Lower barriers brought new frictions, as exemplified by the *Eastman Kodak-U.S.* and *Fuji Film-Japan* dispute. An array of interlocked public and private restraints kept Kodak marginalized in the Japanese film market. Silo thinking within silo institutions were a barrier to good solutions. In addition, merger law was a crazy quilt of divergent national premerger notification rules and substantive standards, and no one was in charge or even enabled or incentivized to see the big picture of harms and benefits world-wide.

The European Union pioneered an initiative for a global competition framework within the WTO. A WTO Working Group on the Interaction of Trade and Competition Policy was formed and did some excellent work. But detractors including from the United States and from developing countries had a litany of objections. The substantive provisions of the competition laws of the various nations widely differed. Developing countries, newly experimenting with competition law, lacked the capacity to bargain for a global framework that would work for them, and feared a plot of the West and the MNEs to steamroller their markets and staunch their own-business development. Americans had an opposite fear: concern that global rules would be reduced to the lowest common denominator, protecting small firms from competition, and concern that the system would be run by faceless, unaccountable, uninformed bureaucrats whom they could not trust. There was a standoff. By the end of the 1990s it was clear that the WTO competition project was not going to happen, to the joy and relief of the detractors. But still, globalization and the technological revolution had spawned a set of critical issues that needed attention and had no home.

This was the backdrop to the International Competition Policy Advisory Committee. What was the solution?

We now know that the answer – or a big contribution to it – was the International Competition Network. But we were back in 1997, contemplating the problem. The WTO project seemed to have no future, and in any event the prospect of binding rules and dispute settlement was seen as a problem. The OECD did valuable research work and facilitated cross-fertilization among its members; but its members were the developed countries. The UNCTAD was a valuable forum for developing countries. And in all three, the members were the nations; thus, the trade representative, not the antitrust chief, had the first seat. Trade

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representatives notoriously took protectionist positions and would bargain competition principles away. What was needed was a new, informal organization. It would be virtual and it would be voluntary. It would be “a new venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can consult on matters of competition law and policy. The Advisory Committee call[ed] this the ‘Global Competition Initiative.’” (Chapter 6, ICPAC Report, available on DOJ Antitrust Division website.) The GCI was the seed for ICN.

What was the motivation for ICPAC’s proposal of the GCI? There were two streams. One was: The WTO project was a big mistake, and the GCI would destroy it once and for all. But that was not at all my motivation. I proposed the GCI believing that we needed an international framework for global competition problems; the EU proposal was a worthy and progressive one; but the EU/WTO experiment was not proceeding. We had to confront the gap and we had to take into account the sovereignty critique. The answer became clear. We needed a roots-up project to meet a notional top-down concept. Roots-up was the other hand clapping. We needed a home for the expanding global issues. Nations’ laws had to grow on their own soil, like plants in a bell jar. In the bell jar with the notional competition-cosmopolitan dome, they would naturally converge and live more or less harmoniously.

Whichever motivation, at the beginning of the new millennium, GCI/ICN was just what the world needed.

ICN is a great success. The competition laws of nations are now closer together. There are important divergences, which are now much more transparent and better understood. The Working Groups are excellent. The conferences and workshops bring together competition authorities and NGAs from all over the world, giving mutual support to the members of the world’s competition family. Some points deserve attention in the agenda for the next decade, such as more dedication to highlighting the problems faced by developing countries and

more respect for circumstances that might call for variations in rules of law. I will concentrate on one particular call of the future.

ICN has succeeded; it is succeeding; it has made a great difference. But what if we ask the question anew today. What is lacking now? Is there anything that we need? How does ICN fit in the picture?

What is new is: Big Tech/Big Data have appeared on the horizon. They are bigger than countries, they are powerful, and they do both good that we want to nurture and bad that we want to control. Big pharma, too, is bigger. The pandemic has magnified the power and profits of both. Moreover, mega mergers are more “mega,” with the potential for negative externalities around the world. Further, the power and abuse problems we confront today are not just old-time antitrust. They challenge the limits of the words “monopoly” and even “dominance.” They spread into consumer protection, data protection, unfair competition, and speech. The problems are bigger than one discipline and bigger than one nation. Responses naturally involve not just antitrust enforcement and other case-by-case lawsuits but proposals for regulation, more and less invasive. We are confronted with triple-tiered crazy-quilt chess games and don’t know how to play them. Is there a framework for control that is coherent and good for the world? Is there a path to contemplate what that a wise framework would be? The issues cry out for a forum for conversation. ICN can be a motivating part of that conversation.

There is a sleeper part of the ICPAC Report. While ICN has been “antitrust all the time,” the ICPAC proposal was not. The GCI was intended to be “a home for addressing the entire global agenda.” (Report, Chapter 6.) It responded to the need “to deal with competition policy matters that either transcend national boundaries or that would benefit from more international attention.” *Id.* Areas listed for constructive dialogue included “frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world.” At that

moment, e-commerce was increasing competition and that was good. But the Report foresaw network effects “that could lead to a monopoly or concentrations on a global scale, with corresponding opportunities for abusive practices by a monopolist ...” “Competition agencies may need to pay particular attention to questions of open architecture and contestability.” The Advisory Committee thought we may need to “develop[] new channels of communication ... such as in the context of the proposed Global Competition Initiative, as well as using existing international forums, such as the OECD and the WTO”

To dust a page off the ICPAC Report, perhaps ICN should be instrumental in opening conversations with the OECD, UNCTAD, and a brainstorming group within the WTO to address the big global issues that are wandering around without a home.

Here is a birthday challenge for you, ICN, on this special 20th birthday:

Don't be complacent.

You are still nascent.