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William Blumenthal Reports from ICN Week in Brazil

William Blumenthal, chairman of the US Antitrust group of Clifford Chance LLP, is attending the International Competition Network meeting in Brazil as a non-governmental advisor. Every day this week, Bill will be providing his commentary on developments at the meeting.

Day 1, Monday 16 April

Dear all,

This marks my first dispatch from Brazil reporting on this week's annual meeting of the **International Competition Network**, a virtual organization of more than 100 competition law enforcement agencies from around the world. The ICN was founded in 2001 by 14 jurisdictions, led by the EU and US, who were seeking in the wake of their public dispute over GE/Honeywell to create a vehicle to foster greater consensus and cooperation among separate sovereigns. The organization has expanded substantially over the past decade, and its outputs are increasingly viewed as voicing a global consensus on competition law matters. It meets annually, and some of its subgroups hold additional periodic in-person workshops, but most of its activity is conducted through working groups that operate via email and telephone.

This year's annual meeting is to open Tuesday evening, April 17, and run through Friday, April 20. In addition to representatives of the member agencies, the meeting is attended by various Non-Governmental Advisors who have participated in the ICN working groups and who are invited by the host country on nomination from the NGAs' respective home jurisdictions.

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Following the pattern observed in recent years, several other organizations organize and sponsor separate conferences at the margins of the ICN meeting. The week began with a half-day session sponsored today (Monday) by the International Chamber of Commerce, a Roundtable on Competition Enforcement and Compliance (about which more below). Tomorrow will bring three additional conferences organized under the auspices of UNCTAD, of the International Development Research Center, and jointly by the International Bar Association and the Brazilian bar group IBRAC.

Today's ICC Roundtable was highlighted by two panels. Panel 1 addressed enforcement priorities for South American competition agencies. Panel 2 addressed company strategies to improve compliance. As I heard them, the key points were as follows:

1. In Panel 1 the interim head of the Brazilian competition agency CADE, Olavo Chinaglia, discussed priorities as Brazil prepares to transition to a new system of merger enforcement. Historically Brazil has had a non-suspensive system, under which mergers exceeding certain thresholds must be filed for government review, but may be closed while the review is pending. The reviews often last nine months, sometimes longer, but business is not materially affected since the deal proceeds in the interim. The new system, which takes effect in May, increases thresholds, thus subjecting fewer deals to a filing requirement, but it is suspensive: following the practice of the EU, US, China, India, and many other regimes, transactions within the scope of the Brazilian system may not close until Brazilian clearance has been received. Given the historical time frames for Brazilian review, many commentators have been concerned that the shift will unnecessarily impede the closing of innocuous deals. Chinaglia acknowledged the concern and said that CADE was putting in place a system to sort between simple and complex reviews and to clear simple mergers within 40 days. After the agency develops greater expertise, Chinaglia said, the objective will be to clear simple mergers within two weeks.

2. Turning to Panel 2 (on compliance), the discussion was quite contentious and involved the audience, including both governmental and non-governmental attendees. Key issues were whether penalties should be reduced in recognition of compliance programs (even if not wholly effective) and whether some compliance efforts were shams.

2a. Some government attendees in the audience expressed concern that some compliance programs were shams, sometimes intended to teach corporate personnel how to collude. That view was not endorse by the panel members, including EC and US government panelists.

2b. But the EC panelist, Carles Esteva Mosso, did argue that where a company was found to have violated law, no reduction in penalties should occur simply because a company had made a compliance effort. He offered several bases for the view: (i) Cartels in practice are almost always systematic with management involvement. He dismissed noncompliance by rogue employees as "mythical." (ii) The incentive structure should be focused on avoiding violation, yielding a 100% fine reduction. Incremental fine reduction of, say, 10% for simply having a program was less meaningful than eliminating fines through legality. (iii) Attempting to gauge effectiveness of compliance programs is difficult. There are too many sources of variability in company needs.

2c. The US government panelist, Liz Kraus from the FTC, described an agency practice that is not widely known. Where the agency, in conducting an investigation, learns that a company's compliance efforts had uncovered a violation and that the company had already ceased the conduct and put in place internal steps to prevent recurrence (all at the company's initiative, not as a response to the investigation), then the FTC will typically drop the investigation. Liz indicated that this applies only for civil violations, but that DOJ may have a different view for criminal violations.

That's the news from Day 1. More details tomorrow.

Regards,

Bill

Day 2, Tuesday 17 April

Dear all,

The ICN meetings kicked off Tuesday evening with an opening reception, but the key activities during the day were in the form of side meetings convened by other organizations at the margins of ICN. Many ICN attendees opted to attend none, preferring instead to visit the beach or engage in sightseeing, but the more studious were able to select among day-long programs offered by the IDRC or IBA/IBRAC or a shorter session offered by UNCTAD.

Most private practitioners opted for the IBA/IBRAC program, but I elected to follow the government representatives attending the IDRC program, and that's what I report on here.

IDRC is the International Development Research Center, a Canadian-funded program organized as a Crown corporation with the mandate of supporting research to aid international development and developing countries. It has had a competition mission for the past decade, and it has organized a pre-ICN event at the six most recent ICN annual conferences (including this one). Its focus is more heavily targeted than the ICN's at less developed countries, and participants are drawn mainly from emerging regimes. Some commentators have complained that its orientation has been more leftist and interventionist than developed countries would view as appropriate, but today's event had a theme on which most everyone could agree: the policy challenges posed by State-Owned Enterprises. More formally, the program was titled "The State as a Market Player or a Market-Power Broker?" For those of us interested in the issue, it was fascinating. I won't be comprehensive here -- that would be a very long report -- but let me provide some of the highlights:

1. The program began with opening remarks by Olavo Chinaglia, chairman of Brazil's host competition agency CADE. Chinaglia addressed Brazil's lengthy history with SOEs and the resulting effects on the current economy. He named some corporate names (which I won't repeat here out of discretion). And he offered one potential limiting principle (I'm not sure whether it was intended as such) on the appropriate role of the state: to set conditions for private competition and to fill gaps where the market will not provide, but (implicitly) not to venture further into state-provided commerce.

2. The next session was a keynote address, delivered by a Brazilian professor, Sergio Lazzarini. In introducing Lazzarini, the session chair (Phil Evans) noted that IDRC offers the prospect of enabling participants to exert soft power through networks. He referred to World Consumer Rights Day and its recent focus on asserted abuses in remittance transfers. (Though the intention was undoubtedly otherwise, the comment reminded some of us of our past concerns over the agitating potential of programs like IDRC and even ICN.) Lazzarini then delivered the keynote, which focused on the use by major corporations of stock cross-ownership and director interlocks to achieve "connectivity" and "power centrality" that facilitate broad control over economic interests by a limited few. Using Brazil as an example, he also named names (again omitted here for discretion). Thankfully, the concerns were not uniquely focused on the private sector and instead expanded to include state ownership as equally problematic, perhaps more so. Lazzarini observed that as states have privatized SOEs, they generally have not parted with 100% of their interests. Instead, they have dropped below majority ownership, but have retained minority stakes. When those are coupled with the connectivity and "good friends" that Lazzarini posits, the minority stakes enable governments to continue to exercise control, in a way held out to the audience as anticompetitive.

3. Eduardo Perez Motta, chairman of Mexico's competition agency, offered a useful recap of ICN's positions on SOEs. He noted three strands: (a) Advocacy for privatization and liberalization, together with the need for supporting competition institutions once privatization has occurred. (b) Law enforcement as applicable to SOEs as if they were private. (c) Effective advocacy post-privatization -- work on how to promote a framework for competition.

4. Thomas Cheng of University of Hong Kong presented on SOEs in China. He noted the PRC's role for SOEs as a tool of national economic development. He also noted the related role of the Chinese Communist Party. As one example, maintaining the leading telecom providers as SOEs facilitates the government's role in censorship. His bottom line is that China's AML may be a palliative, but will not be a cure.

5. Joseph Wilson of the Competition Commission of Pakistan gave a wide-ranging paper, but I found it most noteworthy for some statistics linking airlines' employees/aircraft ratios to SOE status. In response to a question, he noted that the problem isn't SOE status as such. It's whether the government uses its ownership role for political interference (e.g., for jobs), and he said that the government contacts could be a competitive advantage or disadvantage or neutral, depending on circumstances.

6. Allan Fels, the former head of Australia's ACCC and now an academic, echoed a theme that I used to push when I was in government: If a company is truly a natural monopoly, it's not a suitable candidate for application of competition law, and an alternative form of regulation is needed. He focused on SOE public utilities and said that competition principles shouldn't be used if they're really natural monopolies.

7. The most interesting question of the day came from the floor: If one seeks to apply a principle of competitive neutrality to SOEs, how should that apply to dawn raids and fines? Can the competition agency really be expected to raid another state office?

8. Cesar Mattos, a Brazilian politician, gave an interesting talk about M&A analysis of SOEs. He relied on a paper I had forgotten, but now recommend on refreshed recollection, a 2003 paper by Sappington & Sidak in Antitrust Law Journal. The paper examines incentives and concludes that SOEs are less likely to be competitively conciliatory and more likely to be predatory towards rivals. That's to say, the main effects to worry about will be unilateral and not coordinated.

That was it for IDRC. It was a very good program. ICN then kicked off with registration and cocktails. Registration was a zoo, as always. This year's party favor consisted of ICN2012 flip-flops.

More detail tomorrow, when the program addresses advocacy and agency effectiveness.

Cheers,

Bill

Day 3, Wednesday 18 April

Dear all,

It's Wednesday of ICN week, the first full day of the official ICN sessions. After two days of side meetings arranged by other organizations, the remainder of the week turns to ICN itself. Unlike my two prior dispatches, which were prepared as end-of-day summaries, I'll be writing today as the events unfold. I'll still be transmitting the content as a single end-of-day dispatch, but it will be written in the present tense. Again, though, I'll just be noting highlights and major points, rather than compiling a

comprehensive play-by-play. The Wednesday sessions on the program are devoted to advocacy, agency effectiveness, and the ICN steering group.

The focus reflects the mission creep that has characterized the ICN over its decade-long lifetime. As originally envisioned, ICN's work was to be directed at furthering procedural and substantive consensus and convergence among member agencies. That's still a mission, to which the conference will turn on its second and third days when it examines mergers, unilateral conduct, and cartels. Increasingly, though, the ICN's missions have shifted to what might be characterized as the business of being a competition agency, with a heavy dose of boosterism. The advocacy mission highlights the role of members in advocating competition ideals in their respective jurisdictions -- basically, the role of competition agencies as bulwarks against statism and rent-seeking. The agency effectiveness mission highlights efforts to run members more effectively and efficiently, with such topics as HR practices and media relations. Both of those are worthwhile missions, and arguably advocacy is the most important of all missions served by competition agencies, but they have fewer direct implications for the legal standards applicable to the business community.

Highlights from the day:

1. John Fingleton from UK's OFT delivered his final address as Chairman of the ICN Steering Committee. He'll be stepping down from both the OFT and ICN roles in the coming months, after years on the job. He has been a thoughtful influence in guiding both organizations, and he'll be missed. A couple of details triggered by his ICN remarks:

1a. The ICN welcomed six new member jurisdictions this year: Malaysia, Papua New Guinea, Nicaragua, Botswana, Tanzania, and Comesa. Looking at the map of members, the coverage spans most of the globe. The only significant uncovered spaces are China and large patches of sub-Saharan Africa. China's agencies are likely to join ICN in the foreseeable future.

1b. John's vision for the ICN's activities in its upcoming second decade has four prongs: (i) handbooks for agency best practices, (ii) advocacy, (iii) convergence on substance and process, and (iv) greater international cooperation.

1c. John highlighted three projects that have been developed on his watch and will move forward over the next year: (i) developing standards and practices for more efficient investigative process, (ii) enhancing international enforcement cooperation, and (iii) educating agencies about more effective presentations to courts and judges. (The projects were the subject of break-out sessions later in the afternoon. See item 4 below.)

2. It's also the last ICN for Kazuhiko Takeshima, chairman of Japan's JFTC and longtime member of ICN's Steering Group. He'll be retiring when his JFTC term ends in September.

3. During the plenary panel on advocacy, Bruno Lasserre, president of France's Autorite, gave a presentation on compliance programs. The talk was accompanied throughout by one slide (projected on four screens) that said in large font: "Compliance programmes are money spinners for the legal profession." It's not clear whether the slide was directed principally at the private sector non-governmental advisors (the NGAs) or at the agency representatives. It may have been intended as a provocative topic for debate, but the debate didn't ensue, possibly for lack of time.

3a. To a North American, the focus on compliance programs has a distinctly European and Rest-of-World sound. (I would say the same about Monday's ICC panel.) We in the US and Canada don't speak of compliance programs the same way as ROW, largely because a culture of compliance has been hard-wired into the major corporations based in our jurisdiction for decades. Cartel behavior has been pursued as criminal for a half-century; and while compliance isn't perfect, violations are anomalies, and violators generally know that they're transgressing. We teach prohibitions against cartel behavior as part of high school civics classes. It's like driver ed. But ex-North America is clearly different. The culture of viewing cartelization as acceptable, even socially desirable, is too recent, and

penalties in many jurisdictions continue to reinforce old behaviors by treating cartelization as a civil delict. In those settings more formalized, competition-focused compliance training may be needed, and the delivery of compliance training has become a cottage industry. In North America, one only needs occasional reminders.

3b. The comparative need for compliance training in North America versus ROW also depends in part on differences in legal rules. The US approach to educating corporate personnel can be boiled down to a very simple message: "Don't fix prices or allocate markets with competitors. Everything else is presumptively lawful. If you have any doubts about what you're doing, call in-house counsel." The rules elsewhere, particularly as they're evolving before the EC, are more complex. They reach vertical conduct. They reach unilateral conduct. We in the US have those, too, but with a more permissive slant. The trend in European rules forces greater training, which imposes greater burdens on the business community and increasingly challenges the comprehension of ordinary non-lawyer personnel.

4.The afternoon program included break-out sessions devoted to the three upcoming projects that John Fingleton highlighted in his morning address, namely (i) investigative process, (ii) enforcement cooperation, and (iii) working with courts and judges. I attended investigative process. The project parallels work also being conducted at the OECD and other forums to examine due process and investigative methods and practices. It has been urged by the ICC, IBA, and other groups that have expressed concern about the adequacy of current protections in some jurisdictions. It is at an early stage within the ICN, but the range of potential topics includes investigative tools, procedures to conduct investigations efficiently, procedures to protect the rights of subject parties and third parties, mechanisms to grant fair hearing, mechanisms for internal agency checks and balances, other mechanisms to assure fair process, the use of economic teams and separate peer review to assure balanced analysis, protection of confidentiality while also assuring adequate transparency, and predictability of standards and outcomes. If successful, the analysis might lead to recommended practices. But the effort will unfold over at least a year, probably longer.

That's the news for Wednesday. More tomorrow.

Regards,

Bill

Day 4, Thursday 19 April

Dear all,

Thursday's program at the ICN turns to doctrinal issues, with sessions on mergers, unilateral conduct, and settlements. At most ICN annual conferences, sessions of this type consist of reports on working group activities over the prior year and receipt and approval of working group papers, handbooks, recommendations, and other deliverables. They sessions are largely pre-scripted. That's all to say, the day is usually pretty dry. But today we'll see. The deliverables under discussion were posted to the ICN website last week; they're available at www.internationalcompetitionnetwork.org.

The noteworthy items from the day's discussions:

1. The settlement panel touched on consensual resolutions for all classes of antitrust violations, but as often happens, it consisted largely of war stories. Those were nominally offered for illustrative purposes, but as also often happens, the broader lessons were largely obscured.

1a. The most interesting comments, which went beyond war stories, came from Jacques Steenberger

of Belgium's Competition Authority, whose comments addressed merger settlements and raised three issues: First, without suggesting an answer, Jacques neutrally asked whether merger settlements should be limited to restoring the status quo or whether, instead, they might go further to enhance competition relative to pre-merger levels. Second, he expressed concerns about taking settlements too early in the merger review process. He observed that early settlements tend to be broader settlements, broader than would be deemed necessary after a more comprehensive but lengthy investigation; and he suggested that such broader settlements were not in the interest of the merging companies or of the public. Third, he suggested that it may be appropriate to rethink attitudes towards structural versus behavioral settlements. He acknowledged that behavioral settlements can pose monitoring difficulties, but he said that the most successful settlements in Belgium had been behavioral in nature.

1b. One of the war stories carried a lesson that wasn't obscured, but was quite troublesome. I won't name the speaker or his agency, but the presentation was intended to demonstrate the proposition that if the case law doesn't support an intervention that the agency would like to pursue, the agency can nonetheless sometimes coerce a settlement (my words, not the speaker's) by using its investigative powers and the associated capability to impose burdens, and it should consider trying to do so. A particular coerced settlement was offered as a successful war story. That sort of conduct happens, even in major jurisdictions, but it's not a practice followed by responsible enforcers. Seeing the settlement held out with endorsement, rather than as an example of unsound practice, sent the wrong message to emerging regimes.

2. ICN will be launching a Curriculum Project, with videos intended to provide education on basic competition law enforcement principles. The outputs will be directed largely to new agencies, but will also be available to the public. Some of the early videos have been posted in the past year on the ICN website, and illustrative snippets of videos were played in a 15-minute sampling. They're probably too detailed for corporate training, but they'll be useful for a range of other purposes, including training of junior practitioners in law firms.

3. The unilateral conduct plenary session consisted of a hypothetical case in a role-playing exercise, the main point of which was to illustrate that the right cost tests will vary depending on one's theory of adverse competitive effect. Most of the discussion occurred in break-out sessions that followed. Those sessions served as stark reminders of the breadth of the gaps across jurisdictions in the unilateral conduct field. For example, whereas the US agencies average about one monopolization case a year, Belgium indicated that more than half of its workload is dominance cases. There may be explanations relating to the size of jurisdiction, nature of local commerce, and pattern of local sectoral regulation, but the difference was striking, and other jurisdictions can fall at either pole or anywhere in between. Similarly, the discussion served as a reminder that the world's competition agencies have adopted common terminology, but that the words have different meanings in different jurisdictions. Although standards may sound similar, they can prove to be quite different when the meaning of words is unpacked.

OK -- as predicted, it was a pretty scripted day. Read the deliverables on the ICN site. Tomorrow, cartels and wrap-up.

Bill

Day 5, Friday 20 April

Dear all,

The ICN Brazil annual conference concludes today with sessions on cartels and future work. The program runs only half a day, so highlights are likely to be limited:

1. On cartels: More war stories. Cartels are bad; they're often associated with bribery, fraud, and corruption. Stop the presses! Sorry -- maybe some of the jurisdictions represented here really did need reminders.

2. In the summary of break-out sessions held over the course of the conference, the discussion noted that the agency effectiveness working group had addressed HR practices, with a particular focus on the pros and cons of having revolving door between the agencies and the private sector.

According to the summary, the debate yielded no conclusion. Operating as I do in a jurisdiction with an active revolving door, I regard it as a strength of the US system, and I urge it on others. My experience is than it makes for both a stronger agency and a stronger private sector. The agency gains expertise on real business practices, and it learns that curious conduct is often explained by innocuous factors and not by venality. The private sector similarly gains a better insight into why regulators think and act as they do.

3. The summary of the merger working group break-outs asserted the proposition that while merger review should include economic analysis as a tool, other considerations should not be excluded. I had heard similar thoughts on Day 4, but I thought at the time that I must have been misconstruing what was said. Evidently I hadn't, but the implication of the sentiment is fearsome. If economic analysis is simply a subset of acceptable considerations, what else comes in? Non-economic factors? That's a bottomless pit, from which I thought we had escaped. Perhaps not, at least outside my home jurisdiction.

4. The plenary session formally adopted the deliverables that had been proposed for the conference.

5. After three years as chair of the ICN steering group, John Fingleton stepped down from that role and welcomed the new chair, Eduardo Perez Motta of Mexico. The 2013 conference will be held in Poland, and 2014 in Morocco.

A few concluding remarks:

1. Brazil deserves tremendous credit for a well-handled event. The meetings ran smoothly and uneventfully. Most notably, one could sense the austerity, and I say that as a good thing. Over the past decade ICN has become something of an arms race among host jurisdictions to offer banquets, elaborate "cultural segments," and other very pricey components. While those are enjoyable for the attendees, the net effect has been to place the prospect of hosting beyond the financial means of most jurisdictions (including many developed western countries). Brazil offered a different model -- a basic conference, with lunches but no dinner banquets and no costly frills. The expensive format traced to the very first ICN conference, held in Naples in the fall of 2002. The event was based in an old fort in the harbor. As participants walked into the main meeting hall, we were greeted with large signs bearing the logos of the leading Italian banks, to whom the government had turned for sponsorship. Their funding supported a fine dinner at an offsite monastery, as well as other events. The next year's Mexican program included a multimedia extravaganza at the Mayan ruins and a dinner at a hacienda. Korea the following year rented a theater for a night of local arts. And so forth. While the private viewing of Topkapi Palace arranged for attendees at ICN Istanbul was memorable and much appreciated, the new austerity model rolled out this year by Brazil is probably more sustainable, and it's probably good for ICN's future options.

2. On a lighter note, I'll also recognize the logo that Brazil designed for the event. Subtle, handsome, tasteful. Take a look at the ICN site. The lightly-rendered lines are a shadowed image of the Christ the Redeemer statue, one of Brazil's landmarks.

3. Let me wrap up with a further word on ICN's mission creep, to which I alluded on Day 3. In conversations with agency representatives over the past few days, they noted that shift in focus has been deliberate and considered. Basically, ICN is increasingly in the technical assistance business. That's a worthwhile mission -- with more than 100 competition agencies around the globe, and many

of them still learning on the job, the world will be better off if the new regimes receive training, offering some hope that they won't replicate the errors that older regimes made in antitrust's earlier days. And the fashioning of training materials of course requires the recognition of some minimal acceptable norms. But the ICN's original efforts to foster convergence of standards seems to be getting pushed aside. That mission is difficult and contentious, and it is yielding to an approach that identifies a limited set of consensus recommendations, but otherwise adopts the equivalent of moral relativisim -- "we can agree to disagree," and "all systems' views are worthy over a wide range." With 100+ regimes, many of which are growing and only beginning to flex their muscle, and with most asserting extraterritorial jurisdiction over global commerce, the lack of a mechanism to attain economically sensible standards of broad application is a recipe for anarchy. One hopes ICN will again step up and, if not, that OECD or WTO or some other multilateral vehicle will step in.

I end on that happy note. It has been an interesting week.

Your faithful correspondent,

Bill