

INTERNATIONAL COMPETITION LAW AND POLICY: A WORK IN PROGRESS

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I INTRODUCTION

Competition law and policy has evolved in significant ways both domestically and internationally over the past two decades. Internationally, the evolution of competition regulation has been driven by the intersection of two forces. First, business and commerce have continued to become more internationalised. This means that domestic economies are now highly interdependent; private business conduct occurring in one state can (and does) have profound effects in other states. Second, the number of countries adopting a competition law regime has expanded significantly. In the late 1980s, only 20 jurisdictions had a system of competition law. Today, this has expanded to over 100. Some very important economies — for example, India and China — have only recently acquired competition law regimes.¹ The various systems of competition law have numerous points of commonality, but also many points of divergence. These divergences occur at substantive, remedial and procedural levels.

The intersection of the two forces creates a problem of regulatory overlap. Any state substantially and directly affected by private, economic conduct — wherever occurring — has a legitimate interest in regulating that conduct because it has a legitimate interest in protecting the economic wellbeing of its citizens. This inevitably includes conduct that occurs beyond the state's territorial borders. In an interconnected world, it is not realistic to expect states to adopt a strict territorial approach towards protecting their legitimate economic interests. Thus, occasions of concurrent competition jurisdiction are continually being created. Because of regime diversity (both in competition law and, more generally, legal systems)² and because competition rulings are based on domestic considerations (that is, local welfare considerations, not the welfare of

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¹ See *Competition Act 2002* (India); *Anti-Monopoly Law 2008* (China). India's *Competition Act* did not become effective until 2007 and China's competition law regime became operational on 1 August 2008.

² See Hannah Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 *Virginia Journal of International Law* 251.

foreigners), these occasions of concurrent jurisdiction are often contested. The contest may be more or less willing depending on the circumstances.

Thus, the question raised is: how should these contests be mediated? If one imagines a spectrum of possibilities, then a unilateral solution lies at one end and a global competition agreement at the other. The unilateral solution involves expansive claims to extraterritorial jurisdiction vigorously and unilaterally applied. The only real exponent of this type of realist solution has been the United States. Even for a state as powerful as the US, however, the record of success has been patchy. In response to US jurisdictional expansionism, states have developed defensive measures that dilute its effect. Such measures include laws that prohibit cooperation with foreign authorities (for example, giving or supplying of evidence in US antitrust cases),³ laws that prohibit local firms from complying with certain foreign awards,⁴ and even laws that enable firms to claw-back damages paid pursuant to foreign competition awards.⁵ The lessons seem clear — while there is a compelling need to move away from a jurisdictional model based on territorial sovereignty, unilaterally achieving this in a hostile environment is fraught with difficulty.

At the other end of the spectrum lies a global competition agreement — a multilateral competition agreement with binding rules and some form of supranational enforcement mechanism. In the 1990s, the European Commission ('EC') envisaged something along these lines as a possible solution.⁶ The newly formed World Trade Organization, with its expansive range of trade-related

³ In the wake of the controversy surrounding the aggressive approach to extraterritorial jurisdiction adopted by the US Court of Appeals in *Re Uranium Antitrust Litigation* 617 F 2d 1248 (7th Cir, 1980) ('*Uranium Case*'), evidence-blocking laws were introduced in the United Kingdom, Australia, Canada, New Zealand and South Africa. See, eg, *Protection of Trading Interests Act 1980* (UK) c 11; *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976* (Cth) repealed and replaced by *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). By way of example, the *Protection of Trading Interests Act 1980* (UK) authorises the UK Secretary of State to prohibit a firm, carrying on business in the UK, from complying with foreign extraterritorial requests which harm the UK's trading interests. The Secretary of State may also prohibit the production of any documents or the furnishing of any commercial information that interferes with the jurisdiction of the UK or is otherwise prejudicial to the sovereignty of the UK.

⁴ See, eg, *Protection of Trading Interests Act 1980* (UK) c 11; *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29, s 8 (Canada); *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth). The latter also replaced the *Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979* (Cth) which was enacted during the *Uranium Case* dispute. Japan does not have specific legislation to block foreign competition law judgments, but it does have legislation which can be used to block foreign judgments against Japanese defendants that are contrary to the public order or good morals in Japan. It has been argued that this could be used to reject a request, for example, to enforce a treble damages claim: Seung Wha Chang, 'Extraterritorial Application of US Antitrust Laws to Other Pacific Countries: Proposed Bilateral Agreements for Resolving International Conflicts within the Pacific Community' (1993) 16 *Hastings International and Comparative Law Review* 295, 302.

⁵ See, eg, *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) s 10; *Protection of Trading Interests Act 1980* (UK) c 11, s 6. See generally Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69.

⁶ See Leon Brittan, 'A Framework for International Competition' (Address delivered at the World Competition Forum, Davos, Switzerland, 3 February 1992), introducing the notion of binding international competition rules. This notion was later supported by a group of competition experts convened by the EC: See EC, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules* (1995).

commitments and its system for resolving disputes, seemed to provide the perfect vehicle. Therefore, competition rules were put on the agenda at the WTO. In 1996, a WTO Working Group was set up to 'study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework'.⁷ The European Union's enthusiasm for a WTO competition agreement was supported by Japan and Canada.⁸ The US, on the other hand, was opposed to a multilateral hard law solution, particularly one that involved supranational dispute resolution. US authorities had a number of concerns, including fears that multilateral rules would be too interventionist, and that the occasion would be used to emasculate the anti-dumping rules. The US preference was for non-binding, bilateral solutions.⁹

US opposition meant that a WTO agreement was always going to be difficult to achieve. In the end, however, the attempt to graft global competition rules on to the WTO dispute resolution system failed not simply because of US opposition, but also because of opposition from the developing states. The developing states — disappointed at the failure of the WTO to deliver better access to developed markets and suspicious that the Singapore issues (which included competition policy) contained another *TRIPS Agreement*¹⁰ — insisted that competition policy be removed from the Doha Agenda.¹¹ Thus, negotiations for a multilateral competition agreement stalled.

In between the two extremes of unilateralism and a binding global competition agreement are a multitude of possibilities. One's view on the most appropriate solution depends, in part, on the nature of the problems requiring solution and, in part, on one's view of the nature of international governance.

⁷ Singapore Ministerial Declaration, WTO Doc WT/MIN(96)/DEC (13 December 1996) [20].

⁸ Eleanor M Fox, 'Competition Law' in Andreas F Lowenfeld, *International Economic Law* (2nd ed, 2008) 417, 460–2.

⁹ See Joel Klein, 'A Note of Caution with respect to a WTO Agenda on Competition Policy' (Speech delivered at the Royal Institute of International Affairs, London, UK, 18 November 1996). See also International Competition Policy Advisory Committee ('ICPAC') to the Attorney General and the Assistant Attorney General for Antitrust, US Congress, *Final Report* (2000) 266, 279. This view was maintained by the Bush Administration: see Charles James, 'Antitrust in the Early 21st Century: Core Values and Convergence' (Speech delivered at the Program on Antitrust Policy in the 21st Century, Brussels, Belgium, 15 May 2002); Claus-Dieter Ehlermann and Lothar Ehring, 'WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience' (2003) 26 *Fordham International Law Journal* 1505, 1514.

¹⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*') annex IC (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1869 UNTS 299; Edward M Graham, "'Internationalizing" Competition Policy: An Assessment of the Two Main Alternatives' (2003) 48 *Antitrust Bulletin* 947, 952.

¹¹ At the Ministerial Conference in Cancún (2003), no consensus could be reached on modalities for negotiations on competition policy and trade as required by the Ministerial Conference in Doha (2001). This effectively meant the end of competition policy as part of the Doha agenda: see Merit E Janow, 'Trade and Competition Policy' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) vol 1, 487, 501–2. In July 2004, the WTO General Council decided that the issue of competition policy 'will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round': see *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO Doc WT/L/579 (2 August 2004) [1g].

II NATURE OF THE PROBLEMS

Regulating international anti-competitive conduct requires that the nature of the conduct be considered. Anti-competitive conduct can be divided into the following categories:

- international price fixing cartels;
- export cartels;
- exclusionary conduct (whether unilateral or collusive) aimed at imports (market access);
- international single firm conduct (single firm conduct that has international effects); and
- international mergers (either transnational mergers or a national merger with significant transnational effects).

Each type of conduct has its own set of international problems. Consequently, the regulatory solutions applicable to each problem could be quite different.

The problem with the pursuit of international hard core cartels is that there is not enough enforcement of existing legislation. Although there are some definitional problems, these are largely marginal: most states agree that hard core cartels do significant harm and produce few benefits. Most states agree they should be proscribed. The problem is that not all states are in a position to prosecute these cartels to the extent required to deter their formation. The solution lies in capacity-building, mainly in the developing states; in sharing information, including evidence to convict the cartel members; and in recognising foreign judgments.

Export cartels and import cartels raise political economy problems not generally associated with international hard core cartels. There is often considerable political support for export cartels in particular. Export cartels — at least in their pure form — increase domestic producer welfare without reducing domestic consumer welfare. The adverse effects are exported. Even though import cartels are likely to reduce domestic consumer welfare, domestic producers are often quite adept at enlisting consumer support for their activities. Strategic trade theory even provides some theoretical support.¹² As a result, when a foreign state seeks to regulate export or import cartels located in another state, it is likely to face considerable opposition. Any solution to this problem must recognise these political difficulties. In many respects this issue reflects the trade dilemma. For this reason some commentators have suggested that despite the failure to introduce competition issues in the current round of trade talks, the

¹² Strategic trade theory suggests that under conditions where there are increasing returns to scale, a nation may act rationally by engaging in protectionist measures. See James A Brander and Barbara J Spencer, 'Export Subsidies and International Market Share Rivalry' (1985) 18 *Journal of International Economics* 83; Paul R Krugman, 'Is Free Trade Passé?' (1987) 1(2) *Journal of Economic Perspectives* 131. Paul R Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (7th ed, 2005) 262–3.

solution still resides in some connection with the WTO.¹³ For instance, it is doubtful that the European Community has completely abandoned hope of a multilateral agreement of some type to address import blockages.

The problem with the regulation of international mergers and international single firm conduct has more to do with policy (or substantive) differences, although there is often also a political element. In many cases, these differences may be ameliorated by tailoring local solutions. For example, a merger might be approved on condition that the merged entity divests some asset that causes local competition problems. In some cases, however, this will not be possible. In genuinely global markets it is quite possible that only one remedy can apply. Thus, if two or more states vie to regulate the merger, whichever state has the more restrictive merger policy and is able to apply its remedy becomes the de facto global regulator of that market. The US and the EC have faced-off in at least two mergers over the last decade. In both the Boeing/McDonnell Douglas merger and the General Electric/Honeywell merger, the EC sought to prohibit a merger between two US companies that US antitrust authorities had previously cleared.¹⁴ Both cases generated a fair amount of heat before being settled.

The *Microsoft Cases* present another example. The EC ordered Microsoft Corporation to disclose certain interoperability information to applications software developers.¹⁵ This order, upheld by the European Court of First Instance,¹⁶ went beyond what was, or is likely to be, ordered in the US.¹⁷ Assuming that Microsoft cannot limit the effects of that disclosure to Europe, then Europe has effectively adopted the role of regulator to the world — unless, of course, some other state wants to be even more interventionist and Microsoft is not in a position to just ignore that state. For example, the Korean Fair Trade Commission has indicated its willingness to impose its remedial solution on Microsoft — similar to the EC's — to the dismay of the US Department of Justice.¹⁸

Although international tensions over merger regulation are likely to be much more common than single firm conduct, merger regulation has the benefit of being largely in public hands. Generally, merger regulation lies in the exclusive domain of the competition authority — private parties are not permitted to seek injunctive relief. This makes it easier for international cooperation and

¹³ See, eg, Eleanor M Fox, 'Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy' (2003) 48 *Antitrust Bulletin* 355; Martyn D Taylor, *International Competition Law: A New Dimension for the WTO?* (2006); Brendan J Sweeney, 'Global Competition: Searching for a Rational Basis for Global Competition Rules' (2008) 30 *Sydney Law Review* 209. See also Joseph E Stiglitz, *Making Globalization Work* (2006) 203, who advocates 'global competition law and a global competition authority to enforce it'.

¹⁴ See generally James Killick and Axel Schulz, 'Horizontal and Vertical Mergers in the Reformed EC Merger Control' in Giuliano Amato and Claus-Dieter Ehlermann (eds), *EC Competition Law: A Critical Assessment* (2007) 435, 484–7.

¹⁵ *European Commission Decision of 24 March 2004 relating to a Proceeding under Article 82 of the EC Treaty* (Case COMP/C-3/37.792 Microsoft) [2004].

¹⁶ *Microsoft Corporation v Commission* (T 201/04) [2007] ECR II-3601.

¹⁷ See *US v Microsoft Corporation*, 253 F 3d 34 (DC Cir, 2001). On the US Microsoft case, see generally William H Page and John E Lopatka, *The Microsoft Case: Antitrust, High Technology and Consumer Welfare* (2007).

¹⁸ See Korea Fair Trade Commission, Republic of Korea, *The Findings of the Microsoft Case* (7 December 2005) 3–4 <http://ftc.go.kr/data/hwp/micorsoft_case.pdf> [sic].

coordination. The tendency in the case of single firm conduct, however, is to shift some of the regulatory burden to private parties. This is most notable in the US, where private actions have always been an important part of antitrust law,¹⁹ and also in the recent drive by the EC to promote private actions.²⁰

III MAPPING INTERNATIONAL RESPONSES TO COMPETITION ISSUES

Despite the failure at the WTO, international competition regulation exists and has done so for some time. As Andrew Guzman pointed out:

We already live in a world of international competition policy. Although no international institution or agreement governs the subject, firms doing business internationally face a de facto regime generated by the overlap of domestic regimes. The question, then, is not whether there should be an international competition policy, but rather whether the existing system is better than what might otherwise exist.²¹

What does the current system look like? With the failure of the WTO initiative to construct a multilateral approach to governance, international competition policy has followed a more fragmented path. Three separate strands of transnational development may be observed: policy convergence; technical assistance and capacity-building; and operational coordination. Networks have been important in each of these developments. These networks are constituted in different ways.²²

As previously mentioned, a truly significant number of states have now adopted competition laws. This has been a remarkable achievement in policy convergence. Most of these adoptions, however, have occurred in the past 15 to 20 years and, consequently, not too much more ought to be expected of this harmonisation trend in the short-term. Many states suffer from capacity constraints, which seriously affect the state's ability to enforce competition law; it may take many years to overcome these constraints. In some cases, for example in Indonesia, competition law was forced upon the state.²³ Only time will tell whether the law will stick. In this respect, Japan provides an interesting illustration. Competition law was forced upon Japan by the occupation forces in

¹⁹ On the role of private antitrust enforcement, see generally Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) 57–76.

²⁰ See European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (White Paper No COM/2008/165 Final, 2 April 2008). See also Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' (Speech delivered at the Harvard Club, New York, US, 22 September 2005); Neelie Kroes, 'More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate' (Speech delivered at the Conference on Private Enforcement in EC Competition Law: The Green Paper on Damages Actions, Brussels, Belgium, 9 March 2006) 4.

²¹ Andrew Guzman, 'The Case for International Antitrust' (2004) 22 *Berkeley Journal of International Law* 355, 355.

²² See, eg, Imelda Maher, 'Competition Law in the International Domain: Networks as a New Form of Governance' (2002) 29 *Journal of Law and Society* 111.

²³ Introduction of a competition law was one of the conditions imposed on Indonesia by the International Monetary Fund in the wake of the Asian financial crisis of the late 1990s. See IMF, 'IMF Concludes Discussions with Indonesia', News Brief No 98/10 (8 April 1998) <<http://www.imf.org/external/np/sec/nb/1998/nb9810.htm>>; IMF, Indonesia, *Indonesia — Supplementary Memorandum of Economic and Financial Policies* (10 April 1998) <<http://www.imf.org/external/np/loi/041098.htm>>.

1948. Not being indigenous and, in many respects, contrary to the prevailing regulatory culture, Japanese competition policy struggled to survive through the 1950s and 1960s; most of the time it was but a vague silhouette in the shadow of industry policy.²⁴ Even now, whilst its survival seems assured, it is very much a Japanese version of competition policy, and not what was originally envisaged.

In addition, we should not expect competition laws to be uniform in practice, no matter how similar they look on the surface. Competition principles tend to be very broadly worded: their true meaning is only constructed through their interpretation and application to actual cases. States have different policy needs depending on their economic structure and level of development. Consequently, markets and other economic institutions are likely to develop in diverse ways. Similarly, we would expect competition policy to do the same. For example, it would be surprising if competition law developed along parallel lines in China and Singapore, both of which recently introduced competition laws for the first time.²⁵ Thus, even where competition policy is embraced, we should expect the shape of competition regimes to differ.

Finally, but no less importantly, states differ in their political economy and in their institutional choices. As a result, we should expect administrative and procedural differences between states. For example, the US relies much more heavily on the private sector to enforce its competition law than do other states; the European Community, on the other hand, puts a lot of trust in a very powerful regulator. The practice of competition law and policy is likely to develop differently in China and India, if for no other reason than the vast differences in their political, social and judicial structures.

Convergence has not simply been a domestic matter; competition regulators, practitioners and scholars have formed international networks that are now quite mature. The most important early network was the Competition Law and Policy Committee at the Organisation for Economic Co-operation and Development ('OECD'). The committee was made up of representatives from the national competition authorities of the OECD member states. Although its output over 30 years appears limited when compared with the more recent work done by the International Competition Network ('ICN'), the OECD has done important work on anti-cartel policy and mechanisms for international cooperation.²⁶

In its early years, the OECD committee had to operate in an environment that was quite different to that which has confronted competition networks during the first decade of the 21st century. Many economies — both in the industrialised and the developing world — relied significantly on government involvement: in these welfare states, competition policy was not a central regulatory tool. For

²⁴ See Harry First, 'Antitrust Enforcement in Japan' (1995) 64 *Antitrust Law Journal* 137, 142–5, arguing that Japanese authorities give a higher priority to protecting national economic interests than to protecting consumers.

²⁵ On competition policy for small economies, see Michal S Gal, *Competition Policy for Small Market Economies* (2003).

²⁶ See, eg, OECD Council, *Recommendation of the Council concerning Effective Action against Hard Core Cartels* (1998) Recommendations and Best Practices C(98)35/FINAL; OECD Council, *Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies* (1986) Recommendations and Best Practices C(86)65/FINAL.

those countries locked behind the iron curtain, competition policy was irrelevant. During the 1960s and 1970s, US antitrust law became so discredited among economic advisers that the Reagan Administration all but dispensed with it as a policy tool.²⁷ Until the 1990s, there was little known about private international cartels.

The international environment for competition policy changed radically in the 1990s. The iron curtain disappeared and Eastern European states embraced free markets with fervour. The EU required all potential members to have a competition law regime. In the West, welfare states were wound back. International trade received a shot of adrenalin with the successful conclusion of the *Marrakesh Agreement*. Communications and transport underwent dramatic changes that hastened the globalisation of business and commerce. In the US, the Clinton Administration announced that it would target private international cartels.²⁸ It soon became apparent that there was no shortage of these cartels, and they were doing even greater harm than anyone had expected.

In 2001, as a result of a recommendation made by an enquiry conducted by the US Department of Justice, the ICN was established.²⁹ It was fully supported by the European Commissioner for Competition and by the International Bar Association.³⁰ The ICN is made up of domestic and international competition authorities. Starting with 14 members in 2001, it quickly grew to its present size with over 100 members. This may be contrasted with the OECD's membership which is limited to the industrialised states. Unlike the OECD where competition is just one area of policy concern among many, the ICN is dedicated solely to competition policy issues.³¹ It has no central office and no secretariat; its agenda is guided by a 15 person steering committee, the members of which serve a two year term; work is done by a series of working groups; and a conference is held annually. Input is sought not only from members but also from other interested state and non-state actors, as well as international institutions such as the OECD and the United Nations Conference on Trade and Development ('UNCTAD'). Decisions, however, are made solely by members. The ICN has so far produced

²⁷ Robert Pitofsky, 'Introduction: Setting the Stage' in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* 235 (2008) 5. Private enforcement (important in the US), of course, was not affected by the government's attitude. See Hovenkamp, above n 19, 60–1.

²⁸ Robert E Litan and Carl Shapiro, 'Antitrust Policy in the Clinton Administration' in Jeffrey Frankel and Peter Orszag (eds) *American Economic Policy in the 1990s* (2002) 435, 437.

²⁹ See ICPAC, *Final Report*, above n 9. According to the ICN website, 'ICPAC called on the US to explore the creation of a new venue — a "Global Competition Initiative" — where government officials, private firms and non-governmental organisations could consult on antitrust matters': ICN, *History* <<http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history>>. ICPAC recommended that this Global Competition Initiative be directed toward 'greater convergence of competition law and analysis, common understanding, and common culture': ICPAC, *Final Report*, above n 9, [285].

³⁰ The International Bar Association was responsible in February 2001 for convening a meeting of competition officials and practitioners to discuss the feasibility of a global competition initiative. See ICN, *History*, above n 29.

³¹ On the role of the ICN, see Oliver Budzinski, *The Governance of Global Competition* (2008) 142; Oliver Budzinski, 'The International Competition Network: Prospects and Limits on the Road towards International Competition Governance' (2004) 8 *Competition and Change* 223; D Daniel Sokol, 'Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age' (2007) 4 *Berkeley Business Law Journal* 37.

an impressive list of guidelines and best practices on issues such as pre-merger notification, merger regulation and conducting cartel investigations.³² More recently, it has turned its attention to single firm conduct.³³ These guidelines and best practices are non-binding and member states are free to use them as they wish.

While the ICN has undoubtedly been a success, its achievements should be seen in perspective. Freed from some of the shackles binding the OECD Committee and operating in a much more receptive environment, it is perhaps not so surprising that the ICN has been able to achieve what it has. Whether it can continue that level of cooperation and whether its guidelines will ultimately result in domestic convergence may be tested by the current financial and economic crisis. Additionally, the ICN is not institutionally structured to solve all the problems of international competition. For example, the ICN has no mechanism for addressing issues of protectionism.

The ICN has also had a role in capacity-building. One of its working groups is dedicated to 'Competition Policy Implementation' and aims 'to identify key elements that contribute to successful capacity building and competition policy implementation in developing and transition economies'.³⁴ At the request of newly formed competition agencies, the ICN runs partnership and consultation programs designed to make available to less experienced agencies the experience, expertise and learning of mature agencies.

The role of capacity-building is shared by other organisations, notably UNCTAD. UNCTAD has provided capacity-building workshops in developing and transitional economies. Every year it hosts the Intergovernmental Group of Experts on Competition Law and Policy 'for consultations on competition issues of common concern to member States and informal exchange of experiences and best practices, including a Voluntary Peer Review of Competition Law and Policy'.³⁵ While the UN has been, and continues to be, involved in the development of competition principles (especially in the developing and least

³² See, eg, ICN Mergers Workgroup, *Implementation of the ICN Recommended Practices* (2005); ICN Mergers Workgroup, *Merger Notification and Procedures Template — Australia* (2005); ICN Cartels Working Group, *Co-operation between Competition Agencies in Cartel Investigations* (2006); all available from <<http://www.internationalcompetitionnetwork.org>>.

³³ See, eg, ICN Unilateral Conduct Working Group, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws — Recommended Practices* (2008); ICN Unilateral Conduct Working Group, *State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws — Recommended Practices* (2008); all available from <<http://www.internationalcompetitionnetwork.org>>.

³⁴ ICN, *Competition Policy Implementation* <<http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/competition-policy-implementation>>.

³⁵ UNCTAD, *Competition Law and Policy* <<http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&lang=1>>.

developed economies),³⁶ this aspect of its role is subordinate to the work done by the ICN and the OECD.³⁷

Cooperation at the operational level is more fragmented. Because states are very reluctant to share information, competition authorities face severe limitations in their ability to engage in coordinated activities.³⁸ The contacts built up through membership of the ICN and other networks are useful in disseminating ideas and information in general, but not specific operational information. There are a number of treaties concerned with mutual legal assistance in criminal matters, however, competition law is not regarded as criminal in many states; for example, the European competition provisions do not impose criminal liability.³⁹ Competition provisions and mutual obligations to cooperate also appear in a number of bilateral trade agreements, however these commitments are invariably non-binding. Although non-binding, they formalise (albeit on a bilateral basis) informal arrangements and contacts that may arise out of mutual membership of the ICN and other international organisations. Importantly, these bilateral arrangements generally include (with respect to competition policy) commitments to non-discrimination, transparency and domestic implementation. Finally, a number of industrialised states have entered into dedicated bilateral competition cooperation agreements.⁴⁰ These non-binding agreements authorise domestic competition agencies to use negative and positive comity principles to facilitate cooperation in the international space. Overall, the networks constructed by these various arrangements have managed to produce a workable level of operational cooperation and coordination, particularly in relation to international cartels (where cooperation and coordination are especially needed).

An important element of cooperation is competence allocation. Which state should regulate a global merger? Which state should regulate Microsoft? Negative comity — that is, deferring to a foreign state's greater interest in a matter — has some part to play, but it is a rather imprecise tool. There is no universally accepted set of criteria for determining how negative comity should operate. For this reason, a number of commentators have suggested that the

³⁶ See *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, GA Res 35/63, UN GAOR, 35th sess, 83rd plen mtg, UN Doc Res/35/63 (1980) ('UNCTAD Principles'), reaffirmed by UNCTAD, *Review of All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN Doc TD/RBP/CONF.5/15 (2000).

³⁷ The UNCTAD Principles were marginalised by the western economies because UNCTAD was perceived to be dominated by the second and third world states: see Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (2002) 1151–7.

³⁸ Aside from the EU, other regional competition regimes include the Andean Community and the Caribbean Community.

³⁹ Individual member states, however, are free to impose criminal liability. See, eg, the *Enterprise Act 2002* (UK) c 40 s 190, which provides for gaol sentences up to five years for cartel offences.

⁴⁰ See, eg, *Agreement between the Government of the United States of America and the Commission of the European Communities regarding the Application of Their Competition Laws*, [1995] OJ L 95/47 (signed and entered into force 23 September 1991); corrected at [1995] OJ L 131/38; *Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws*, [1998] OJ L 173/28 (signed and entered into force 4 June 1998).

concept of enhanced comity may provide a useful basis for allocating jurisdiction.⁴¹ According to the principle of enhanced comity, jurisdiction should be allocated to the state whose competition regime is best equipped to enforce any sanctions or remedies. To date, however, the notion of enhanced comity has not been built into any international competition law institutions. The ICN has largely avoided this issue and it is doubtful that competence allocation is an appropriate topic for the ICN.⁴²

IV CONCLUSION

International competition policy has come a long way in the past two decades. If norm convergence and avoidance of conflict are the main measures of success, then it has been very successful. The trench warfare that characterised some of the conflicts in the 1970s and 1980s is no longer apparent. Although conflict still occurs (for example, the Boeing/McDonnell Douglas merger), the international mechanisms in place to ameliorate the fallout have worked tolerably well. These mechanisms appear to correspond well with the liberal world of transnational governance as described by Anne-Marie Slaughter.⁴³ Domestic competition authorities have engaged with each other and with other relevant state and non-state actors in a variety of formal and informal networks to produce the outline of a global competition system. The networks have operated at three levels — first, to produce a more thorough understanding of competition principles and norms with the object of building international convergence; second, to provide technical assistance to enable states to build domestic capacity; and, third, to develop modalities for greater international cooperation and coordination. By apparently constructing a governance system that produces acceptable solutions to international problems while remaining within the

⁴¹ Enhanced comity is a soft law approach to harmonising outcomes in cases of concurrent jurisdiction. The American Bar Association refers to three principles of enhanced comity: non-binding deference to a jurisdiction with a greater interest; avoidance of inconsistent remedies; and coordination of multiple proceedings: see Section of International Law of the American Bar Association, *Comments in Response to Antitrust Modernization Commission Request for Public Comment regarding International Topics Submitted by the Section of International Law of the American Bar Association*, 11–12 <http://govinfo.library.unt.edu/amc/public_studies_fr28902/immunities_exemptions_pdf/050901_ABA.pdf> at 19 May 2009. See also Budzinski, *The Governance of Global Competition*, above n 31, 165, 199–200.

⁴² Cf Budzinski, *The Governance of Global Competition*, above n 31, 147, who argues that competence allocation lies at the heart of the ICN. The closest the ICN has come to the issue of jurisdiction is to set out recommendations for pre-merging reporting. The recommendations provide that there should be a sufficient nexus between the regulating state and the proposed merger. See ICN Merger Workgroup, ICN, *Recommended Practices for Merger Notification Procedures* (2003) <<http://www.internationalcompetitionnetwork.org/media/archive0611/mnprepractices.pdf>>.

⁴³ Anne-Marie Slaughter, *A New World Order* (2004). A plausible case might also be made that the history of international competition policy demonstrates the ability of powerful parties (the US and the EU) to shift the competition debate around to suit their own purposes. If this is correct, then international competition ‘governance’ may be described just as convincingly in neo-realist terms.

paradigm of domestic rule-making, competition authorities have arguably avoided the dilemma of illegitimacy inherent in global government.⁴⁴

However, it is not yet certain that the existing system has produced acceptable solutions. The horizontal networks that presently dominate the field may need to be supplemented by some binding vertical arrangements. For example, the incentives for protectionism built into the system may require supranational oversight to ensure that commitments to non-discrimination are honoured. Further, in a world beset by severe economic crisis, domestic politics may place an unbearable strain on an international merger system that relies on notions of comity and rational discourse.⁴⁵

Finally, will competition law survive in the many states that have introduced it over the past 15 years? There are no guarantees. The implementation of competition principles in many transitional economies — where the state is still the major economic actor — remains problematic.⁴⁶ The same may be said of those developing economies that were compelled to adopt open markets and competition laws as the price of assistance from institutions such as the IMF. The discrediting of the Washington Consensus — the driving idea behind the creation of these competition regimes — and the current global crisis may mean that the temptation for some of these states to back away from market-driven economic ordering becomes overwhelming.⁴⁷

Despite remarkable advances over the last two decades, international competition law must still be regarded as very much a work in progress.

⁴⁴ Ibid 8. Cf Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks' (2005) 118 *Harvard Law Review* 1255, 1301, who argues that network governance over time erodes respect for democracy and democratic accountability. See also the critique of network governance by Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34 *Yale Journal of International Law* 113.

⁴⁵ Where political interest is high, the agency characteristic of network participants may prevent a network solution. Alternatively, a network solution may raise serious legitimacy issues about the network itself.

⁴⁶ Vietnam is an example of such an economy. On transplantation, see John Gillespie, 'Globalisation and Legal Transplantation: Lessons from the Past' (2001) 6 *Deakin Law Review* 286.

⁴⁷ On the history of the Washington Consensus, see, eg, John Williamson, 'A Short History of the Washington Consensus' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (2008) 14; Joseph E Stiglitz, 'Is There a Post-Washington Consensus Consensus?' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (2008) 41.