

GLOBAL COMPETITION:
LAW, MARKETS, AND GLOBALIZATION

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Global Competition: Law, Markets, and Globalization

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi

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New Delhi Shanghai Taipei Toronto

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Argentina Austria Brazil Chile Czech Republic France Greece

Guatemala Hungary Italy Japan Poland Portugal Singapore

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Published in the United States

by Oxford University Press Inc., New York

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First published 2010

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British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Data available

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India

Printed in Great Britain

on acid-free paper by

CPI Antony Rowe, Chippenham, Wiltshire

ISBN 978-0-19-922822-5

1 3 5 7 9 10 8 6 4 2

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Preface

The image that has propelled this book is both hopeful and disquieting (perhaps even frightening). In it, decision-makers in many parts of the world recognize the potential value of economic competition and increasingly seek to protect it from private restraints. There is growing awareness that transborder competition, in particular, can generate economic growth and the jobs, income and public and private resources that are important everywhere, but that are desperately needed by so many. The need to provide an effective legal framework for global competition has also become increasingly obvious, especially since the financial crisis of 2008. This is hopeful, and much experience and thought in many parts of the world can now be harnessed to develop effective national and transnational policies for protecting the competitive process and harnessing it to people's needs everywhere.

The disturbing part of the image is that those efforts often appear to have weak foundations. As a result, they may not produce the desired results, and in some cases they may even cause more harm than good. Political leaders and competition law officials often know little about prior competition law experience in other parts of the world or even in their own countries, and often they are not aware of the range of their policy options and the likely consequences of their decisions. This greatly enhances the risk of making decisions solely or primarily on the basis of either ideology or short-term political and economic power considerations.

The emergence of new forms of globalization since the early 1990s has made this situation increasingly precarious. Interest in and proclaimed support for competition law have surged, but there are questions about the basis for such support and about its depth. This creates a pressing need for scholars and decision makers to acquire firmer and deeper knowledge of relevant competition law experience on both the national and international levels, but myths and misunderstandings of these experiences often obscure their value and mask their relevance. Equally great is the need for effective use of a broad range of economic and other social science insights in developing competition law. Yet the full breadth and richness of thought applicable to these issues often remains unexplored and unused.

In the course of studying competition law experience and thought in many countries and on the international level, five puzzles or challenges have crystallized for me as central to global competition law development. My efforts to respond to them have shaped this book. As with all important puzzles, they are both fascinating and frustrating.

One is the inherent mystery of competition law itself – a form of law that interferes with the competitive process in order to maintain its vigor. Not unlike a

treatment for cancer, which seeks to eliminate cell growth that interferes with the operation of a biological organism, competition law targets forms of economic conduct that interfere with the effective operation of competitive markets. Both strategies must be designed not only to eliminate the harm, but also to avoid damaging the “healthy” components of the system. Devising effective strategies for doing this is difficult enough on the national level, but the difficulties increase significantly on global markets, where they are compounded by national interests—both public and private—and often tethered by modes of governance that have been developed for national contexts and that are not designed to function in a global context.

A second puzzle involves the role of the US in global competition law development. US antitrust law has long been at the center of the competition law world. It represents extensive experience and a remarkable reservoir of thought and learning. It is often proposed as a model for other countries to follow, and many assume that it should be the basis for thinking about competition law on the global level or that US power and influence will necessarily lead to this result. Yet US antitrust experience is unique. It has developed under legal and economic circumstances that rarely have much in common with those faced by others, either individually or in international contexts. This raises questions about the role it should play in the global context. The support of the US and the US antitrust community is indispensable for any global competition law project, but it is far from clear how this power and influence should be used. I have wrestled with this issue for decades, and I am convinced that the power of the US and the learning and expertise found within the US antitrust community can be employed in ways that support development of an effective and cooperation-based global competition law regime. I am also painfully conscious of the obstacles in the path of this kind of cooperative evolution.

Europe presents a different kind of puzzle, but it is no less central. I have spent many years studying the evolution and dynamics of competition law in Europe. One impetus for my book *Law and Competition in Twentieth Century Europe* (OUP, 1993, 2001) was the realization that the dimensions and patterns of European national competition law experience had not been recognized and that these experiences were often shrouded in myths and misunderstandings. As a result, decision makers everywhere were often unaware of the potential value and importance of European competition law experience. Although there have been successes in raising awareness of this experience, European competition law experience remains undervalued in much thinking about global competition law development. In particular, the experience of European countries since the Second World War in developing national competition law can be of exceptional value to states who now face similar issues in developing their own competition laws. Moreover, European experience in coordinating national and transnational competition law efforts is the most extensive laboratory we have for studying the dynamics of transnational competition law development.

A fourth challenge is to understand more clearly the dynamics of global competition as a process and the public and private institutions and relationships that will influence global competition law development in the twenty-first century. The scale and dimensions of global competition are not only unprecedented, but often beyond our capacity to understand them adequately, and the relationships between nation states, transnational institutions, and global governance networks of various kinds are evolving rapidly. Patterns are emerging in each of these spheres, but we are only beginning to grasp their measure. I have been struck by the relative lack of attention to these dynamics in discussions of transnational competition law. The two basic strategies under discussion pay little attention to them. Some advocate convergence of national laws as a response to the limitations of the current regime, but they frequently fail to identify how that process can be expected to work and fail to note that increasing similarity among some or even many systems in some substantive and procedural areas may do little to overcome the limitations of the jurisdiction-based system. Others focus on including competition law in a supranational institution—usually the WTO, but they sometimes fail to appreciate the continuing centrality of national borders in any view of global markets and their governance.

The final and in some ways most fundamental challenge is to reconcile the enormous potential of global competition with the need to harness that potential to the needs of all participants. Even before the crisis of 2008, critics of “globalization” decried the wealth distribution patterns that they associated with it. They claim that globalization primarily benefits “the West” and that much of the rest of the world seems to suffer more than it benefits from global competition. For these critics, it has widened the gap between rich and poor and allowed the rich to exploit the poor. Such criticisms have increased in the wake of the financial crisis, and there is little doubt that global competition has led to some of the harms of which it has been accused. Yet it is also clear that economic competition is usually the surest mechanism for supporting economic development and thus addressing the economic needs of both poor and rich. To obstruct the process appears, therefore, to be a misguided response to the problem. My search has been for ways of protecting competition while at the same time making it more responsive to the needs of people everywhere. In my view, this search must be based on a solid understanding of history and effective use of theoretical analysis, and my goal in this book is to contribute to this kind of understanding.

As I have worked with these themes and grappled with these challenges, I have become increasingly convinced that they represent not only obstacles, but also opportunities for fundamental improvements in the legal framework for global competition. A clearer picture of competition law development on both the national and international levels that also relates these two domains should help scholars, officials, and policy makers take advantage of these opportunities. Many others around the world who are concerned with their own economic futures are also likely to benefit from this presentation. The relationship between law and

global competition has a potential impact on everyone, and thus the incentives for improving it are immense. This potential has been my inspiration and motivation in writing this book.

This book is intended for all who seek information and insights into the roles of competition and law, especially competition law. The primary focus is on the global economy, but much of the book deals with national experiences, because the law that shapes global competition is still predominantly national (and EU) law. From the perspective of law's role and impact, therefore, the global economy consists of national economies. Moreover, national experiences will continue to shape the dynamics of transnational cooperation and coordination relating to the global economy, just as they are shaped by those efforts and by the global economy itself.

I expect scholars and students—particularly in the areas of law, economics, and globalization—to be particularly interested in the material. I am also confident that scholars and students in other areas of law as well as in social science and history will find value in the analysis and description. The analysis and information should also be of much practical importance to officials and judges everywhere who deal with competition law issues and issues of the global economy. They are the decision makers, and I am hopeful that many will find the book useful as they consider their decisions in this area. Legal practitioners will also gain much from the analysis and information included here. They influence the decisions that are made, and thus they play important roles in the evolution of competition law. Finally, the issues are so central to the development of global markets and thus to the future of countries everywhere that I expect those interested in these increasingly pervasive issues to find value in the material. I have consciously sought to present the material in a way that is accessible to those in each of these groups, but also rigorous and creative enough in its analysis to satisfy high academic and professional standards I can only hope that I have succeeded.

A project of this scope depends on assistance, information and insights from scholars, officials, lawyers and librarians in virtually every part of the world. I have been very fortunate in having received so much support and cooperation from so many. I regret that I cannot thank them all here. For those whom I do not mention here by name, I have tried to express my gratitude at other times and in other ways, and I thank you once again.

I must, however, express my gratitude here to some whose help has been particularly important and direct. Dean Harold Krent of Chicago-Kent College of Law has supported this project over the years in a variety of ways, and I am deeply grateful for his support. My colleagues Sungjoon Cho and Dan Tarlock and my former research assistant and now friend Andre Fiebig have provided insights, information and encouragement throughout the project. I would also be remiss in not thanking Ken Dam once more. His encouragement and support for my study of law, economics and their global interactions long ago helped to put me on the intellectual path that has produced this book, and his combination

of careful analysis with breadth of thought have always inspired me. The many US-based scholars in the communities of antitrust, comparative law, and international law who have given of their time, energies and insights in discussions of these topics or commented on earlier manuscripts are simply too numerous to name individually.

Among the many non-US-based scholars who have discussed these issues with me and whose insights have enriched this work in uniquely important ways, several deserve special mention: Ulf Bernitz, Wolfgang Fikentscher, Laurence Idot, Fritz Rittner, John Vickers and Steven Wilks in Europe; Xiaoye Wang in China; Mitsuo Matsushita, Tadashi Shiraishi and Iwakazu Takahashi in Japan; Michal Gal in Israel; and Mor Bakhoum in Senegal.

Several extended research visits have been invaluable in developing the issues here. In particular, I thank Anne-Marie Slaughter for supporting my participation in the Law and Public Affairs Program at the Woodrow Wilson School of International and Public Affairs at Princeton and Christoph Engel for supporting my research as a fellow of the Max Planck for Research in Collective Goods in Bonn. I also thank the law faculties at the following universities for hosting extended teaching and research visits that have been of exceptional value: Uppsala and Stockholm in Sweden, Munich and Freiburg in Germany, Meiji University in Tokyo, and the University of Pennsylvania, Northwestern University and Washington University in the U.S.

I have presented portions of the book at each of the above universities as well as at numerous conferences around the world, and I am grateful to the respective organizers of these conferences for providing such valuable opportunities.

Countless officials and former officials of competition authorities have graciously shared information about and insights into the thought, activities and methods of their institutions. Among these I must mention Stefan Amerasinghe, Ulf Böge, Paolo Cassinis, Claus-Dieter Ehlermann, Hiroshi Iyori, William Kovacic, Oh-seung Kwon, Bruno Lasserre, Philip Lowe, Mario Monti, Alexander Schaub, Giuseppe Tesaro, Randy Tritell and Akinori Uesugi.

The truly marvelous staff of librarians at Chicago-Kent College of Law has been tireless and uncomplaining in searching for obscure references, acquiring materials that are often difficult to acquire, and keeping track of the materials that they have acquired for me. In particular, Maribel Nash and Holly Lakatos have been superb as library liaisons. I will never be able to thank them enough for their care, persistence and tolerance.

Many research assistants have participated in the project, both in Chicago and in Europe. I cannot mention all of them, but three of them have been of such special value that I must express my gratitude here. Adam Kreis is not only a brilliant student, but a superb, careful and questioning research assistant. His help during the final year of work on the project has been of inestimable value. In addition, Emily Grande and David Pustilnik have provided excellent and thorough research support.

I am also fortunate in having had a truly extraordinary assistant during the final stages of manuscript preparation. Claire Alfus caught errors, foresaw problems, solved problems and deployed her exceptional powers of concentration and organization on behalf of the project. I have often been simply amazed by her effectiveness and persistence as well as by her warmth and generosity throughout the process.

At Oxford University Press, my gratitude goes especially to John Louth and Gwen Booth for supporting the process along the way, to Natasha Knight for so ably taking it through the final stages of publication, and to Benjamin Roberts for his masterful handling of the production process.

Finally, and most importantly, I thank my family. I am immeasurably grateful to them for their support of this project—for what they have done and, sometimes, for what they have not done. I think they know how much it has meant to me.

I have dedicated this book to Ulla-Britt—beyond words, over obstacles, above dreams.

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Contents

<i>List of Abbreviations</i>	xvii
1. Law, Competition, and Global Markets	1
A. Law and Global Competition	2
B. Protecting and Embedding Competition: Roles for Competition Law	4
C. Beyond the Jurisdictional Regime: Reconsidering Competition Law for Global Markets	6
D. Convergence and Commitment as Strategies?	9
E. Some Objectives	10
F. Plan	11
 PART I. SOVEREIGNTY AS THE FRAMEWORK FOR GLOBAL COMPETITION 	
2. Global Competition Law: A Project Conceived and Abandoned	19
A. Setting the Stage: Law and Competition in the 1920s	21
B. A Global Competition Law Project Emerges: the World Economic Conference of 1927	24
C. Shaping a Global Response to International Cartels	31
D. Initial Successes Followed by Depression and War	36
E. The Project Revived and Abandoned: the Havana Charter Episode	38
F. Looking Forward: the Legacies of a Twice Abandoned Project	52
3. Sovereignty as a Solution: Extending the Reach of National Laws	55
A. Jurisdiction and the Sovereignty System: Basic Components	57
B. Competition Law and the Extension of Sovereignty	60
C. Responding to US Jurisdictional Assertiveness	66
D. Unilateralism and Self-restraint	68
E. Sovereignty, Jurisdiction, and Power	74

4. Globalization and Competition Law: Conflict, Uncertainty, and the Promise of Convergence	79
A. The Market Turn: National and Global Dimensions	81
B. Domestic Responses: Competition Law (Almost) Everywhere	85
C. Proliferating Competition Laws: Uncertainty, Conflicts, and Paradoxes	89
D. Dimensions of the Scissors Paradox: Europe, the US, and the GE/Honeywell Conflict	95
E. The WTO and Multilateral Coordination: Another ‘Failure?’	101
F. Bilateral and Regional Coordination	108
G. Settling for Convergence as a Strategy	111
H. Global Competition and the Limits of Sovereignty	116

PART II. DOMESTIC EXPERIENCE AND
GLOBAL COMPETITION LAW

5. US Antitrust Law: Model and Lens	121
A. Foundations of US Antitrust Law	122
B. The ‘Classical’ Antitrust System (Before 1975)	124
C. Transforming US Antitrust: the Law and Economics Revolution	139
D. Looking at US Antitrust: US Antitrust as a Model	151
E. US Antitrust Experience as a Lens: a Leader’s Perspective	156
F. Power and Uniqueness: the Ironies of US Antitrust Leadership	158
6. Competition Law in Europe: Market, Community, and Integration	159
A. Distorted Images of European Competition Law Experience	162
B. The Early Development of Competition Law in Europe	163
C. National Competition Law and the Evolution of a European Model: 1945–2004	165
D. Competition Law and European Integration: 1958–2004	181
E. ‘Modernizing’ European Competition Law: Institutions, Ideas, and Power	187
F. Substantive Modernization: Towards a ‘More Economic Approach’	192
G. Relating the Two Forms of Modernization	198
H. European Experience and Global Competition Law Development	202

7. Globalization, Development, and ‘Other Players’: Widening the Lens	205
A. Competition Law and the Developmental State: Japan	208
B. Competition Law and Development: the South Korean Variant	219
C. Competition Law and China’s Socialist Market Economy	223
D. Latin America: Power, Ideologies, and the Competition Law Idea	236
E. Developing Country Themes: Sub-Saharan Africa	248
F. Canada and Australia: Bridges and Models	258
G. Varieties of Competition Law: Goals, Norms, Languages, and Experience	262
H. ‘Other Players’ and Global Competition Law Development: the Value of Widening the Lens	269

PART III. COMPETITION LAW AS A
TRANSNATIONAL PROJECT

8. Convergence as Strategy: Scope and Limits	273
A. Deep Globalization as Context: Deeper, Broader, and More Complex Competition	274
B. Implications for Transnational Competition Law Development	279
C. Convergence: Definitions and Dimensions	281
D. Convergence Mechanisms: Predicting the Voluntary Decisions of National Actors	283
E. Convergence as a Global Competition Law Strategy	286
F. Convergence and the Limits of Unilateral Jurisdictionalism	290
G. Convergence: Potential and Roles	292
9. Reconceiving Competition Law for Global Markets: Agreements, Commitments, and Pathways	293
A. The Potential Value of Multilateral Agreement	295
B. Forms and Dimensions of Multilateral Agreement	298
C. Maximizing the Potential Value of Obligations	300
D. Time and Commitment: a Commitment Pathway?	304
E. The Commitment Pathway Idea and Global Competition Law Debates	315
F. Prospects: Sources of Support and Resistance	321
G. Potentials and Opportunities of Multilateral Agreement	324

10. Global Competition and Law: Trajectories and Promises	327
A. Global Competition Law: Interwoven Trajectories	328
B. Developing Global Competition Law: Impetus and Obstacles	334
C. Adapting Competition Law to Deep Globalization	339
D. Constitutional Choices: Competition, Community, and the Potential of Commitment	342
E. Concluding Comments: Law, Competition, and Borders	344
<i>Bibliography</i>	347
<i>Index</i>	391

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List of Abbreviations

ACCC	Australian Competition and Consumer Commission
Am J Comp L	American Journal of Comparative Law
Am J Intl L	American Journal of International Law
Am J Leg Hist	American Journal of Legal History
Am Law Inst	American Law Institute
AML	Antimonopoly Law
Antitrust Bull	Antitrust Bulletin
Antitrust L J	Antitrust Law Journal
Australian Bus L Rev	Australian Business Law Review
Berkeley J Int'l L	Berkeley Journal of International Law
BDI	Bundesverband der deutschen Industrie (German Federation of Industry)
BGBI	Bundesgesetzblatt (Germany Federal Statutes)
BGH	Bundesgerichtshof (German Federal Supreme Court)
Brit J Pol Sci	British Journal of Political Science
Brit YB Intl L	British Yearbook of International Law
BUL Rev	Boston University Law Review
BYUL Rev	Brigham Young University Law Review
Canadian J Econ	Canadian Journal of Economics
CASS	Chinese Academy of Social Sciences
CCP	Chinese Community Party
CECP	Cimite Préparatoire de la Conférence Economique Internationale (Preparatory Committee for the International Economic Conference)
CEI	Conférence Économique Internationale (International Economic Conference)
CGT	Confederation general des Travailleurs (France)
Chi J Int'l L	Chicago Journal of International Law
Chi-Kent L Rev	Chicago-Kent Law Review
Cir	Circuit
Col Bus L Rev	Columbia Business Law Review
COMESA	Common Market for Eastern and Southern Africa
Comm Mkt L R	Common Market Law Review
Comp Pol Int'l	Competition Policy International
Competition Law Intl	Competition Law International
Conn J Intl L	Connecticut Journal of International Law
Cornell L Rev	Cornell Law Review
Cornell Int'l L J	Cornell International Law Journal
DePaul L Rev	DePaul Law Review
Dev Pol Rev	Development Policy Review
DG Comp	Directorate General for Competition (EU)
DIAC	Draft International Antitrust Code (or Munich Draft Code)

Diss	Dissertation
ECJ	European Court of Justice
EU	European Union
Eur Comp J	European Competition Journal
Eur Comp L Rev	European Competition Law Review
Eur Compet L Annual	European Competition Law Annual
Eur L J	European Law Journal
FCO	German Federal Cartel Office
FDI	foreign direct investment
Fordham Corp L Inst	Fordham Corporate Law Institute
Fordham Intl L J	Fordham International Law Journal
FTAIA	Foreign Trade Antitrust Improvements Act of 1982
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
Geo Mason L Rev	George Mason Law Review
Geo Wash L Rev	George Washington Law Review
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Law against Restraints of Competition)
Harv Intl L J	Harvard International Law Journal
Harv L Rev	Harvard Law Review
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
Hastings L J	Hastings Law Journal
Hous L Rev	Houston Law Review
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IDRC	International Development Research Centre
IFI	International Financial Institutions
ILM	International Legal Materials
IMF	International Monetary Fund
Iowa L R	Iowa Law Review
Intl Bus Lawyer	International Business Lawyer
Intl Law	The International Law
Intl Lawyer	The International Lawyer
Int'l Org	International Organization
IPU	Inter-parliamentary Union
ITO	International Trade Organization
J Competition L & Econ	Journal of Competition Law & Economics
J Competition L & Pol	Journal of Competition Law & Policy
J Dev Stud	Journal of Development Studies
J Econ Lit	Journal of Economic Literature
J Econ Perspectives	Journal of Economic Perspectives
J Eur Pub Pol	Journal of European Public Policy
J Jap Stud	Journal of Japanese Studies
J Law & Econ	Journal of Law & Economics
J Intl Econ L	Journal of International Economic Law
J World Trade	Journal of World Trade

J World Trade L	Journal of World Trade Law
JFTC	Japanese Fair Trade Commission
JORS	Journal Officiel de la Republique du Senegal
Journal of Eur Econ His	Journal of European Economic History
KFTC	Korean Federal Trade Commission
Lat Am Res Rev	Latin American Research Review
Law & Pol'y Intl Bus	Law and Policy in International Business
League of Nations Pub	League of Nations Publication
L'OMC	L'Organisation mondiale du commerce (World Trade Organization)
Loy U Chi L J	Loyola University of Chicago Law Journal
Loy Consumer L Rev	Loyola Consumer Law Review
Marq Intell Prop L Rev	Marquette Intellectual Property Law Review
METI	Ministry of Economy, Trade and Industry (Japan)
Mich L Rev	Michigan Law Review
Minn J Global Trade	Minnesota Journal of Global Trade
MITI	Ministry for International Trade and Industry (Japan)
MRFTA	Monopoly Regulation and Fair Trade Act 1980
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission
New Eng L Rev	New England Law Review
NIEO	New International Economic Order
Northwestern J Intl L & Bus	Northwestern Journal of International Law & Business
Notre Dame L R	Notre Dame Law Review
NYU Law and Economics	NYU Center for Law, Economics and Organization working papers
NYU L Rev	New York University Law Review
OECD	Organization for Economic Cooperation and Development
OJ	Official Journal of the European Union
Or L Rev	Oregon Law Review
Pac Rim L & Pol J	Pacific Rim Law & Policy Journal
PCIJ	Permanent Court of International Justice
Penn St L Rev	Penn State Law Review
RBPC	Restrictive Business Practices Code
Rev Ind Org	Review of International Organizations
RGBI	Reichsgesetzblatt (pre-World War II German statutes)
RTA	regional Trade Agreement
S Cal L Rev	Southern California Law Review
SA	societe anonyme
SAIC	State Administration for Industry and Commerce (China)
San Diego Int'l L J	San Diego International Law Journal
SDI	Strategic Development Initiative

Sedona Conf J	Sedona Conference Journal
Set	UNCTAD's 'Set of Principles and Rules on Competition'
SIEPR	Stanford Institute for Economic Policy Research
SII	Strategic Impediments Initiative
SMEs	Small to Medium-sized Enterprises
SMU L Rev	Southern Methodist University Law Review
SOE	State-owned Enterprises
Stan L Rev	Stanford Law Review
Sup Ct Rev	Supreme Court Review
TCL Group	Trans-Atlantic Competition Law Group
Temp Int'l & Comp L J	Temple International and Comparative Law Journal
Tex L Rev	Texas Law Review
Theor Soc	Theory and Society
TRIPS	Trade-related Aspects of Intellectual Property Rights
Tul L Rev	Tulane Law Review
U Chi L Forum	University of Chicago Legal Forum
U Chi L Rev	University of Chicago Law Review
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U Pa L Rev	University of Pennsylvania Law Review
US	United States Reports
U S C.	United States Code
UEMOA	Union Economique et Monetaire Ouest Africaine (West African Economic and Monetary Union)
UNCTAD	United Nations Conference on Trade and Development
UNICE	Union of Industrial and Employers' Confederation of Europe
US	United States
US-Mexico L J	United States-Mexico Law Journal
USTR	United States Trade Representative
Utah L R	Utah Law Review
Va J Int'l L	Virginia Journal of International Law
Va L Rev	Virginia Law Review
WAEMU	West African Economic and Monetary Union
Wall St J	Wall Street Journal
Wash U Glob Stud L R	Washington University Global Studies Law Review
Wash U Global Leg Stud Forum	Washington University Global Legal Studies Forum
Was U J Law & Policy	Washington University Journal of Law and Policy
WEC	World Economic Conference
Wm & Mary L Rev	William and Mary Law Review
World Comp L & Econ R	World Competition Law and Economics Review
WTO	World Trade Organization
Yale L J	Yale Law Journal

Law, Competition, and Global Markets

Global markets have become a center of attention virtually everywhere. What makes fuel or food so expensive? Why are plants closing? Is it possible to improve global economic relations and, if it is, would this help to reduce the political turmoil that has proliferated in many areas? Global competition is central to these and many other front page questions. Financial crises, food shortages, and similar events have focused attention on global economic interdependence, revealing the extent to which not only economic prosperity, but also basic human needs and rights depend on how global markets operate. This is as true for the US and Europe as it is for countries in Asia, Africa and elsewhere.

The process of global economic integration promises much to many. Its potential for improving human welfare is immense. Global markets create opportunities to buy, sell, and work; they reduce costs of production and waste; and they direct assets to their 'highest and best' uses. They can also promote democracy, contribute to political stability, enhance individual freedoms and support human rights. The promise is universal. It is addressed to all. It is attractive, and few are indifferent to its allure.

Yet the promise is also vague and often ephemeral. It is accompanied by much uncertainty about the extent of its benefits, who is likely to receive which benefits, and when the promised gains might be realized. Few doubt that global competition produces wealth for some, but many do not see benefits for themselves. Global markets do not distribute their benefits evenly—either among recipients or over time. At various times, some individuals, groups, societies, and communities become more prosperous, sometimes dramatically so, while others receive little or nothing and can only wait for the process to provide benefits to them.

Many not only doubt that they will receive benefits from global competition, but also fear its consequences, and see global markets as more likely to harm than to benefit them. One set of fears is economic. Individuals and communities can lose at the hands of global competition. Those who lose jobs, opportunities and the capacity to pay for goods and services find little solace in the claim that the process may, in an abstract sense, benefit global economic welfare. A second set of potential harms is social and political. Many note the increased social and

class tensions between those who benefit and those who do not, and they fear the political destabilization and repression that often follow these economic problems. Even more basically, some decry the transfer of control over their destinies to ever more distant political and economic actors and the disruption and disadvantage that sometimes follow from this loss of control.

Perceptions of the competitive process are at the core of these conflicting views of global competition. For both those who fear and those who praise competition, the process itself—its language and logic—often takes on a devotional aura and inspires quasi-religious claims of certitude. For both groups, competition often appears overwhelming—a process with its own logic, its own demands, and its own power to bestow benefits and cause harm. Its seemingly inexorable logic etches its promises and threats sharply. Some see this as a source of predictability and confidence. For others, the sharp edges of the logic appear menacingly insistent. Global competition appears to many to be immune from control, except perhaps by a major power such as the US that has the economic leverage and political power to apply its national laws to conduct outside its borders. Otherwise it seems to answer only to itself and to follow its own agenda.

These two perspectives on global competition—confidence in its benefits and fear of its harms—will compete for the minds of people and the policies of states and institutions for the foreseeable future. This tension poses a central issue for the future of the planet—to what extent can the benefits of global competition be secured and the circle of its beneficiaries expanded while at the same time maintaining the political support necessary to nurture the development of global markets? Without support from those who view it from both perspectives, global competition is not likely to flourish, and its potential benefits may be both limited and fragile.

A. Law and Global Competition

Law enables, promotes, and shapes competition, and how it performs these tasks for global markets will be critical to their development. ‘Competition’ is an abstract idea. It refers to a process of economic exchange, but institutions make competition possible and shape its form and intensity. Laws can make markets work more effectively and enhance their value, but they can also impair their effectiveness. They can soften and moderate the impacts of markets on societies and groups, but they can also intensify them. The shape and effectiveness of these relationships are key factors in determining the extent to which competition can deliver on its promises, and they hold the potential for both enhancing the benefits of markets and generating support for them.

Laws perform two basic functions in relation to markets. One is to provide ‘background’ rights and obligations. For example, laws establish rights to property and enforce rules governing contracts. This role is necessary for markets to

function effectively. They enable participants to calculate the risks and opportunities of transactions and courses of conduct, and they provide both stability for investments and incentives that enable competition to flourish. In this sense, they 'construct' markets and enhance their productive capacity. I will refer to this as law's 'constructive' function.

A second basic function is to provide conduct norms for markets and thereby relate markets to both those who participate in them and those who are affected by them. These norms represent a community's claims on the conduct that affects its members. I call this law's 'embedding' function. It is part of law's original task of tying communities together. It provides a means by which those affected by conduct can influence those whose conduct affects them, and this, in turn, is the basis for creating and maintaining political support for competition. Law's processes of agreement, cooperation and norm-setting provide a means by which individuals and groups can reconcile competing demands, interests, and expectations. They create a fabric of norms, practices, and understandings that structure the way markets operate, influence the outcomes they produce, and shape consequences for those affected by them. By identifying and enforcing conduct standards for market participants, law proclaims and represents a group's values and interests and symbolizes its desired relationship to the market.

Both functions must be performed effectively in order for competition to develop its potential. Law's role in enforcing contracts, securing property rights and anchoring competitive freedoms provides the incentives and the stability necessary for economic development. Its role in embedding competition in society generates acceptance of market principles and develops political support for the rights and obligations that support the competitive process.

In the domestic context, the relationship between law and markets is direct. Market actors are generally aware of the legal norms applicable to their conduct, and they can generally assess the consequences of violating them. Those who create or enforce laws typically have or can readily acquire information not only about those who are subject to the laws, but also about their conduct and its likely effects. Those who are affected by markets are, at least potentially, in a position to hold both political and economic decision makers responsible for the consequences of their decisions.

When we turn to global markets, however, the relationship between law and the market looks very different. Global markets are not clothed, as local and national markets are, in a fabric of political institutions, laws and cultural understandings of what is permissible economic conduct. In general, the laws that are applied to global markets are not themselves global—or even transnational! Instead, the *laws of individual states* govern *global markets*. In this legal regime, law does not perform an integrative or embedding function. It often has the opposite effect—it creates borders and concomitant tensions and conflicts. Moreover, those who are affected by global markets typically have little opportunity to influence the conduct that affects them. The influence of a state's

conduct norms on global competition depends on the political and economic influence of the state itself, which means that there are great disparities in the capacity of states to influence conduct on global markets.

B. Protecting and Embedding Competition: Roles for Competition Law

One form of law that is specifically intended to shape market conduct is ‘competition law’ (also known as ‘antitrust law’). Competition laws are intended to protect the process of competition from restraints that can impair its functioning and reduce its benefits. When effectively implemented, they can play important roles in supporting the competitive process and thereby maximizing the benefits it can provide. They are the central subject of this book.

Competition law can both contribute to the efficiency of markets and embed them in society. It can aid efficiency by increasing incentives to compete and eliminating obstacles to innovation and expansion. It can engender support for markets by relating market conduct to those affected by it. It creates, symbolizes and embodies ties between markets and the societies in which they operate. In particular, it can promote competition as a value, and it can influence the distribution of economic gains by encouraging or discouraging particular forms of competition.

Most national legal systems (as well as the EU) have competition laws. Specific goals and methods of implementing goals differ, and there is great variation in the intensity of political and cultural support behind such laws, but the underlying goal of combating restraints on competition is the same. In the US and Europe, in particular, but also increasingly in other countries, these laws have come to play important roles in economic, political and legal life.

For global markets, however, there is no competition law that can perform these functions. The norms of competition are provided by those legal systems that have sufficient economic leverage or political power to enforce their laws outside their borders. In practice, this means that the US (and, to a lesser extent, the EU) provide and enforce transnational competition law rules. Other states seldom have either the economic leverage or the political power to apply their laws outside their own borders. This incongruous situation results from the vast disparities in power between the US and most other countries and from the US role in the global economic and political systems since the Second World War. It is more likely, however, to foster conflict than promote efficiency on global markets, and its potential to create resentment toward competition may exceed its potential to support it.

Without an effective legal framework for global competition, anti-competitive conduct may impair the efficiency of markets, thereby depriving people

everywhere of the economic resources and opportunities such markets can generate, especially for those who are in greatest need of them. Moreover, where the rules for conduct on global markets are provided and enforced by a single powerful state or group of states, this may generate suspicion and even hostility toward those markets from those who have no voice in this process.

The need for a more effective legal regime for combating anti-competitive conduct on global markets is high. One reason is that anti-competitive practices are well entrenched in many countries, in part because there has been little or no effective competition law enforcement in the past. Moreover, anti-competitive conduct on such markets is often difficult to detect and to deter. Finally, competition law's embedding function—ie relating markets to society—is often needed to counteract skepticism about competition in populations in which cultural and political support for competition is weak.

The regime of what I call 'unilateral jurisdictionalism' authorizes states to apply their own laws to conduct outside their territory under certain conditions—without the obligation to take the interests of other states into account. It represents a default position that is used in the context of transnational competition law because a regime specifically designed to protect global competition has yet to be developed. However, it is not well-suited to providing an effective framework for global competition. It is based on principles that evolved long ago to perform very different and specifically political functions. Moreover, the national (ie basically US) laws that are applied are not designed to operate in a global context. They have been developed for use in domestic markets, and they reflect the needs, interests, and values of the states in which they operate rather than the needs and characteristics of global markets. Unilateral jurisdictionalism also has limited capacity to deter anti-competitive conduct on global markets, and it encourages jurisdictional conflicts without providing an effective means of resolving them. Finally, it produces a murky, haphazard and uncertain patchwork of norms, interests, institutions, and procedures that does not provide a predictable framework for economic decision making on global markets but that may often even impede the development of global competition rather than enhance and protect it. Finally, this regime can do little to support domestic competition law development.

This arrangement does, however, provide advantages for those few jurisdictions that have sufficient economic leverage or political power to apply their laws transnationally, because it allows them to write the rules of global competition and to apply them in their own national institutions. For example, the political influence and economic leverage of the US have often allowed it successfully to impose its laws beyond US borders, and US firms have often benefited from that capacity. Most states are, however, either too small or too politically weak to apply their national laws effectively to conduct beyond their own borders. Not surprisingly, this does little to engender support for global markets in these countries.

The 'deep' globalization of the twenty-first century magnifies the limitations of this jurisdictional regime. As global markets expand in scale and depth, the losses that result from anti-competitive conduct also increase. Moreover, increases in the number of states that have competition laws and take them seriously combine with the growing intensity of enforcement efforts to increase the probability and potential intensity of conflicts among jurisdictions. As long as conflicts are few and minor in importance, the conflict-generating tendency of unilateral jurisdictionalism may be overlooked, but as these conflicts become more frequent and more costly, they will attract increasing attention and concern.

The limitations of the jurisdictional regime have not gone unnoticed, and efforts have begun to address some of them. The most important of these efforts was initiated in the late 1990s, when European leaders—with support from Japan and a few developing countries—sought to introduce competition law into the then newly-created WTO. Lack of support from the US and from key developing countries doomed these efforts, but the episode has framed the discussion of competition law on the global level since then. It has led many to abandon the idea of multilateral agreement for protecting competition and to seek solutions in greater convergence among competition law systems and in bilateral and regional agreements. As we shall see, these strategies also have serious weaknesses, and their potential for dealing with the problems and potentials of globalization may be limited. To be sure, some convergence has occurred, and bilateral and regional agreements have made some progress, but neither approach represents an adequate basis for long-term global competition law development. Neither addresses the fundamental weaknesses of the jurisdictional regime, and bilateral and regional agreements can add to the complexity and cost of operating in that regime.

C. Beyond the Jurisdictional Regime: Reconsidering Competition Law for Global Markets

Deficiencies in the jurisdictional regime, evolving relationships among states, and changes in the structure of competition itself, call for a fundamental reconsideration of competition law on the global level. Moreover, widespread concern about the consequences of global competition creates both an opportunity and an impetus to pursue new directions for global competition law development.

This requires asking basic questions. Global markets provide a context for competition law that differs in important ways from the contexts in which the jurisdictional system has operated in the past. They thus call for an analysis that takes these features into account and frames the issues in relation to them. We will examine the forces that confront efforts to protect global competition in the twenty-first century.

Our subject is the relationship between two fundamental human enterprises—the economic and the legal—that are operating in these new contexts. The

economic enterprise seeks profit from effort, skill and investment, while the legal enterprise seeks order, responsibility, and the development of potential among members of a community. Ideally, the benefits that these two enterprises can produce are linked. The predictability and order that law can provide are necessary for markets to flourish, while economic successes support law's role in providing order, facilitating social and economic relationships, and developing the potential of community members. These issues have long been discussed, but we have only recently begun to analyze them in the context of global markets.

1. Perspectives

Several perspectives guide our analysis. The first focuses on the relationships between the national and the transnational dimensions of competition law. The intertwining of the two is seldom pursued systematically, but here it will be central. National competition law experience structures the lenses through which national commentators and decision makers view transnational issues. Similarly, experience at a global level increasingly colors how national decision makers define and pursue national competition law goals.

Second, our analysis looks at law as a process rather than merely a set of norms. Statutes and cases are important for many purposes, and much of the discussion of global competition law development focuses on them, but they are only part of our concern. Competition law history is filled with statutes that have little or no importance because they are neither implemented nor supported, and thus a focus on the formal law by itself is of limited value. We here seek insights into how competition law has worked in practice and into the dynamics of its development.

We view markets the same way—as social processes. They are economic institutions, of course, but they are created and maintained by legal, political, and social institutions. Markets are relationships of exchange, but institutions make markets possible, influence their efficiency and the value of transactions on them, and shape their consequences for society. Markets thus depend on political and social acceptance of competition, confidence in the rules and institutions that support it, and respect for the economic freedoms it embodies.

The relationship between these two processes—law and markets—takes on increasing prominence and new shapes in the context of global competition law development, because there it involves numerous sets of institutions that structure markets in a variety of ways. A central question throughout this investigation will be 'how do particular legal forms, institutions and decisions benefit and support—or, as the case may be—interfere with that relationship?'

Finally, time is a prominent perspective in this investigation. Both markets and competition law evolve, and the dynamics of their evolution need to be at the center of analysis as well as of policy thinking. Global competition is particularly susceptible to significant and rapid change, because it crosses political borders.

This influences the conditions of competition in many ways, and these influences change as the interests and preferences of national powerholders and stakeholders change. A basic weakness of much thinking about global competition law has been the relative lack of attention to this time dimension.

2. Tools and materials

I use these perspectives to develop tools for analyzing competition law on global markets. The global context differs fundamentally from national contexts, and thus we need tools designed to analyze it. In this context, law continues to be primarily national, and markets continue to be shaped by national legal systems, but both law and markets intertwine across borders.

This calls for an interdisciplinary approach that integrates theoretical insights from law, economics, political science and other social sciences with analysis of competition law experience at both the national and transnational levels. This combination of theory and experience yields analytical force and weight that is often missing from discussion of these issues.

Theory is indispensable. It permits abstraction and can be wielded to identify effects that are immersed in complexity and rapid change and that may otherwise be difficult, if not impossible, to identify. It also identifies incentives for anti-competitive conduct and thus directs norm-setting and implementation strategies. Theory can also be used to recognize, analyze, and, in some cases, to quantify the potential costs of those strategies. Finally, theoretical analysis provides language that can be used to grasp more effectively the issues involved and to discuss, pursue, and share information and insights in productive ways.

We use theory drawn from several sources. Legal theory analyzes the dynamics of legal regimes and, in particular, the ways in which legal institutions process and apply economic knowledge. Comparative law theory identifies differences among competition law regimes as well as some of the implications of those differences. Social science theory plays roles in virtually every aspect of the study. Economics, political science, and the sociology of markets are particularly prominent. Economics is central, not only because competition law is about the protection of an economic process, but also because the role of economic analysis in antitrust law is of fundamental importance (and often highly contested).

Experience provides the materials from which the analysis is derived and to which it is applied. We will look at transnational experience in order to understand the factors that influence the dynamics of global competition law relationships. National competition law experience provides insights into the factors that have influenced the evolution of competition law over time and those that have shaped the relationships between national and transnational developments. We examine the evolution of antitrust law in the US, because it plays a central role in the operation of competition law on the global level and because it exerts

significant influence on competition law thought and decisions around the world. European competition law development is also particularly important, in part because many European national regimes have developed recently and under circumstances similar to those that many newer competition law systems face in the twenty-first century, but also because the process of European integration is the most prominent example of large-scale competition law coordination. We will also look at the competition law experience of newer players whose experience is less extensive, but whose importance for the future is central.

We examine the experiences, expectations and needs of all who participate in the global economy or are affected by it. National experiences influence developments on the transnational level, and global developments condition, in turn, the operation of national competition law systems. This optic thus captures both the global aspects of national experience and the national aspects of global experience. It focuses on the dynamics of interaction between the two.

Those who are generally critical of globalization also have a place in this analysis. Although the 'anti-globalization' literature seldom pays attention to competition law, its criticisms of global competition can significantly influence the effectiveness of efforts to protect it. They can undermine support for competition law development, and they deserve consideration in fashioning policy in this area.

D. Convergence and Commitment as Strategies?

There are two basic approaches to combating anti-competitive conduct on the global level. One is based on convergence. It accepts the existing jurisdictional mechanism and expects national competition law systems to align with each other in ways that improve it. We analyze convergence as a strategy and assess its potential. The analysis suggests that a convergence strategy can produce some benefits, but that it cannot adequately address many of the key issues of competition law for global markets.

A second strategy is based on multilateral agreement. We examine the potential value of agreement as a strategy and the factors that are likely to influence its effectiveness. Such a strategy goes beyond the jurisdictional regime and creates obligations on states to combat anti-competitive conduct on global markets. It thus responds to the pressures and incentives of globalization by entering new territory. Our analysis concludes that an agreement-based strategy has the potential to address the main weaknesses of the jurisdiction-based regime and that it has much potential value for developing a more effective global competition law regime.

This analysis also suggests, however, that traditional forms of agreement are not likely to be adequate to the challenge. We thus outline a particular kind of agreement that is specifically adapted to the needs of long-term global competition law

development. I refer to it as a “commitment pathway” strategy. In it, states *commit to a process* rather than merely agree to be members of an institution or to accept a particular set of rules. Here, the time dimension is not an afterthought, and it is not captured with the line ‘this will take time’. Instead it is at the core of the strategy and essential to its effectiveness.

This concept builds on three basic facts. One is widespread recognition of the potential value of combating anti-competitive conduct. Most states and commentators agree that competition law can have value for them by deterring conduct that reduces the benefits that competition on global markets can provide. A second recognizes that there are significant differences in views about the contents and functions of competition law and that efforts to require rapid and radical change are not likely to be successful. Concern about being required to make such rapid changes may explain much of the unwillingness of states to agree to a global competition law regime in the past. The third fact is that under these circumstances the alignment of interests necessary to secure an effective global competition law regime can only be developed over time.

With these givens, we sketch the outlines of a strategy in which states commit to a shared pathway, ie to a set of short-term and long-term goals together with a set of implementing strategies and plans. The objective of such a strategy would not be to establish a full set of norms and institutions to which all participants must adhere at a specific time and on the same conditions, but to *coordinate* commitments in ways that propel all participants along a pathway toward a more effective global competition law regime. Such a strategy can both support the economic potential of global competition and embed it into political and social institutions in countries everywhere.

E. Some Objectives

This book has four basic objectives. One is to present competition law for global markets as a distinct subject. Previous discussions of transnational competition law have typically treated it as an appendage to some other agenda. Many, probably most, commentators have seen it as a trade liberalization issue or, even more narrowly, as a market access issue. During the last decade, this has usually meant viewing it as a WTO issue. Effective analysis requires, however, that competition law on the global level be seen as a distinct area of law with its own history, problems, issues and forms of analysis. Until recently, there was little need to view it this way, but its increasing prominence and the increasing complexity of the context in which it operates make it necessary.

A second objective is to probe the development of thought and institutions that have sought to protect global competition and to identify and assess the forces that have shaped it and are likely to influence its development in the future. This is particularly important, because images of that development are

often distorted in ways that impede effective thought about the problems and impair the potential for developing responses to them. Putting global competition issues in context requires thinking about context in ways that are still uncommon. It requires looking at both national and transnational competition law developments and relating them to each other. Each affects the other, and recognizing the points of interaction is essential for effective analysis. The interests, norms and institutions that constitute the legal regime for global competition are formed and transmitted in this interplay, and as the interaction changes they will also change.

Our third main objective is to analyze the dynamics of transnational competition law and to develop insights into how competition law operates on the global level. We identify the factors that influence decisions in this arena, including economic and political interests and incentives, institutions, and patterns of conduct and thought. Perceptions of experience and values based on experience often shape thinking about global competition law issues, and we try to reveal them as well.

A fourth objective is to use these tools and experiences to assess strategies for global competition law development. We ask fundamental questions about the benefits and costs of global competition law strategies, and we analyze their potential effectiveness as well as their political and intellectual support. The focus here is on developing the right questions as much as it is on answering them. In doing this, we examine the lenses that are applied to these issues as well as the interests that shape them.

I hope that the analytical tools and perspectives developed here may be of value not only in the context of competition law, but also in other areas in which law relates to economic globalization. Global markets will increasingly demand legal responses. Areas such as the environment, financial markets, and foreign investment often present issues that are similar to those with which we deal here.

F. Plan

The book consists of three parts. They are closely related, but each also stands on its own and can be read independently of the others. The first part examines competition law on the transnational level, analyzing its evolution from the initial perception that international cartels represented a global harm to the jurisdictionally-tethered responses to such harms that have emerged in the context of globalization. Chapter two examines efforts to respond to these harms during the 1920s and then again in the wake of the Second World War. The idea that law could be used to protect global competition was a remarkable development of the 1920s, and it was given worldwide support after the Second World War, only to be blocked by the eruption of the Cold War. Chapter three analyzes the evolution of a jurisdiction-based approach during the second half of

the twentieth century, when a global response was unthinkable because of the bipolar division of the world. During this era, the US took responsibility for dealing with threats to global competition. US law and institutions provided the basic rules for transnational competition law, and this created interests, expectations and attitudes that remain very much in place in the early years of the twenty-first century. The fourth chapter trains a lens on developments since the fall of the Soviet Union, during which competition law for global markets has again become a prominent and controversial issue. The number of states with competition laws has increased, as has the intensity of enforcement in many of them. The conditions of globalization have led to a growing awareness of the limitations of the jurisdictional system, but they have not yet led to fundamental changes in that system.

Part II examines national and EU competition law experience, with emphasis on the ways in which national experience has shaped transnational developments and global forces have shaped domestic experience. Experience with competition law has been largely national, and national institutions and decision makers will long determine the future of competition on the global level. Domestic experience thus structures thought about how competition law might or should work on the global level, and it shapes the interests and expectations of those who make decisions in this area. In order to assess issues of global competition law, we need to understand those experiences, because they are intertwined with transnational dynamics.

Chapter five examines US antitrust law experience and its influence on thought, expectations and interpretations of competition law around the world. That experience has long been central to international competition law. Many countries have turned to US law in shaping their own competition law decisions, and US competition law thinking has influenced the thinking of scholars, administrators and political decision makers virtually everywhere. It has not always been viewed positively, but it has always been recognized as important. US experience has also been the lens through which US officials, scholars and practitioners have viewed competition law in other countries and on the global level, and as such it has shaped their policies and decisions.

In the succeeding chapter, the focus is on Europe, which is particularly important for two reasons. One is that European national competition law systems have developed under circumstances that were often similar to those faced in many countries that seek to develop competition law in the twenty-first century, and thus it is valuable in identifying the issues and obstacles they face. The other is that for decades European national competition laws have been developing within the context of European integration, and this experience highlights key issues in the development of competition law for global markets.

Chapter seven then focuses on countries in which competition law is either relatively new or relatively less developed. These countries will largely determine

the fate of transnational competition law efforts, because competition law for global markets will require their support. We look with varying levels of intensity at the competition law experiences of Japan, Korea, China, Canada and Australia in their own right, and we look at patterns in Latin America and Sub-Saharan Africa.

The third part of the book probes policy issues—in particular, the factors that are relevant to fashioning a strategy for global competition law development. There is widespread agreement that the current competition law regime for global markets has many weaknesses, but there is much uncertainty about how to improve it. In this part we draw on the preceding sections of the book to analyze the two main strategies for developing competition law on the global level. Chapter eight examines convergence as a response, ie the idea that increases in similarities among competition law systems throughout the world will significantly improve the current regime and make fundamental changes and multilateral agreement unnecessary. In chapter nine, we look at the basic alternative to this convergence strategy—namely, a strategy based on multilateral agreement. Finally, I offer for analysis and comment a conception of multilateral agreement that I call a ‘commitment pathway.’ In my view, the book’s analysis supports pursuing this strategy. Chapter ten then ties together the preceding sections of the book and draws some wider conclusions.

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