Contents

Table of Cases xix
Table of Treaties and International Instruments xxxvii
Table of Legislation xlv
Abbreviations xlix

I. UNDERSTANDING AND RECONCILING NATIONAL INTERESTS

1. Introduction 3
   1.1 The Scope of the Study 3
       1.1.1 The International Competition Law System 3
       1.1.2 The Inter-relatedness of International Competition
             Law Problems 4
       1.1.3 Comprehensive Coverage of International Business Activity 8
       1.1.4 Complex Solutions and Simple Organizing Principles 11
   1.2 The Terminology of the Internationalization of Law 12
       1.2.1 Internationalization and Transnationalization 12
       1.2.2 Cooperation and Coordination 13
       1.2.3 Harmonization 14
   1.3 The Structure of the Study 17

2 The Fundamental Forces Shaping International Competition Law 21
   2.1 The Almost Anarchical International Competition Law System 21
       2.1.1 The Nature of International Relations 21
       2.1.2 The Domestic Political Economy of National Interests 22
       2.1.3 National Security Interests may Trump
             Competition Concerns 25
   2.2 The Interests of States in Cooperation on Competition Law 27
       2.2.1 The Distinction between National and Global Welfare 27
       2.2.2 International Regulatory Competition Failures 28
       2.2.3 International Trade Theory 28
       2.2.4 Underlying Power Relations will Shape the
             Terms of Cooperation 29
Contents

4 The Limited Case for Harmonization to Protect Competitiveness 99

4.1 Introduction 99

4.1.1 The Competition to Upgrade Competitive Advantage through Competition Law 99

4.1.2 What is Fair Trade? 99

4.1.3 No A Priori Reason not to Apply International Trade Rules to Competition Law 104

4.2 Competition Law for a Competitive Advantage 107

4.2.1 The Competitive Advantages and Disadvantages Resulting from Competition Law 107

4.2.2 The Optimal Competition Law with Domestic Distortions and Non-Efficiency Objectives 115

4.2.3 Should Harmonization of Competition Law be Required on National Competitiveness Grounds? 118

4.2.4 Conclusion 120

4.3 Models of Regulatory Competition 121

4.4 Regulatory Competition in Practice 124

4.4.1 The Effect of Government Policies on Investment Decisions 124

4.4.2 Industry Support for Harmonization 125

4.5 International Regulatory Market Failures 127

4.5.1 A General Race to the Bottom is Unlikely 127

4.5.2 Regulatory Redistribution 129

4.5.3 Failure of Competition among Competition Law Providers 130

4.5.4 Mobility 131

4.5.5 Internalization of Benefits and Costs 132

4.5.6 Decentralization and Compatibility 135

4.6 Conclusion 137

5 International Competition Law in a Trade Policy Framework 139

5.1 The Interface between Trade Law and Competition Law 139

5.1.1 Introduction 139

5.1.2 Trade and Competition Law Interfaces 139

5.2 Competition Law within a Trade Policy Framework 143

5.2.1 Introduction 143

5.2.2 The Complementary Role of Competition Law in Trade and Investment Liberalization 144

5.2.3 Competition Law can Facilitate Trade Liberalization Processes 146

5.2.4 Competition Law in a Liberalized Trading Environment 148

5.2.5 Responses to Foreign and Multinational Anticompetitive Conduct 154

5.2.6 Competition Law is a Poor Tool for Strategic Trade Policy 167
Contents

5.3 Transnational Exclusionary and Predatory Conduct 171
  5.3.1 Application of Competition Law to International Predatory and Exclusionary Conduct 171
  5.3.2 Lax Competition Rules may Cause the Cross-Subsidization of Exports and Dumping 174
  5.3.3 Raising Rivals Costs and Market Access Barriers 178

5.4 Transaction and Compliance Costs 180
  5.4.1 Costs to Business Understanding and Complying with Multiple Legal Regimes 180
  5.4.2 Multiple Pre-Merger Review 182

6 Private Market Access Barriers 185
  6.1 Introduction 185
  6.2 Defining Structural Impediments 187
  6.3 Trade Arguments for Competition Law to Protect Market Access 188
  6.4 The Ambiguous Effects of Competition Law on Market Access 191
    6.4.1 The Welfare Effects of Eliminating Private Market Access Barriers 191
    6.4.2 Greater Enforcement Efforts could Reduce Imports 195
    6.4.3 The Need for Internal/External Consistency 198
  6.5 Conclusion 199

II. TRANSNATIONAL COMPETITION LAW

7 Competition Law Jurisdiction under International Law 207
  7.1 Introduction 207
  7.2 International Law Limits on National Jurisdiction 209
    7.2.1 Jurisdiction in International Law 209
    7.2.2 Types of Jurisdiction 211
    7.2.3 Public and Private Competition Law Actions 213
  7.3 Bases of Jurisdiction 215
    7.3.1 The Territorial Principle 215
    7.3.2 The Nationality Principle 218
    7.3.3 Other Principles 221
  7.4 Summary 221

8 The Scope of Application of Competition Laws 223
  8.1 Contrasting Approaches to Jurisdiction 223
  8.2 The United States Antitrust Laws 224
8.2.1 Historical and Statutory Context 224
8.2.2 Judicial and Administrative Jurisdiction 227
8.2.3 The Traditional Territorial Analysis 230
8.2.4 The Development of a New Jurisdictional Principle in the Post-War Period 231
8.2.5 The Formulation of a Rule to Balance between US and Foreign Interests 237
8.2.6 Hartford Fire Insurance and Afterwards 244
8.2.7 Non-Import Commerce and the Foreign Trade Antitrust Improvements Act 247
8.2.8 Merger Cases 269
8.2.9 Forum Selection and the Application of Foreign Law 270

8.3 The European Union Competition Law 273
8.3.1 The Economic Entity and Implementation Doctrines 273
8.3.2 The Scope of Application of the Merger Regulation 277
8.3.3 The Application of Competition Law to Export Commerce 279
8.3.4 The Limited Role for Comity 281
8.3.5 Private Competition Law Action in National Courts 282
8.3.6 Summary 284

8.4 The Japanese Antimonopoly Law 285
8.4.1 Introduction 285
8.4.2 Judicial Competence 285
8.4.3 Service 287
8.4.4 Import Commerce Jurisdiction 287
8.4.5 Export Commerce Jurisdiction 291
8.4.6 Declining Jurisdiction in Exceptional Cases 292
8.4.7 Applying Foreign Law 293
8.4.8 Summary 294

8.5 Conclusion 295

9 International Competition Law Defences 299
9.1 Introduction 299
9.2 Sovereign Immunity 300
9.2.1 Outline and Justification for Sovereign Immunity 300
9.2.2 Sovereign Immunity in United States Antitrust Actions 303
9.2.3 Sovereign Immunity in Other Countries 309
9.2.4 Conclusions 311

9.3 Acts of State 312
9.3.1 The United States Act of State Doctrine 312
9.3.2 Treatment of Foreign Acts of State Outside the United States 326

9.4 Foreign Sovereign Compulsion 329
9.4.1 Foreign Sovereign Compulsion in the United States 330
9.4.2 Foreign Sovereign Compulsion in Other Countries 334
9.4.3 The Appropriate Scope of the Foreign Sovereign Compulsion Defence 337
9.5 Petitioning Immunity and Foreign Governments 341
9.5.1 The Noerr Doctrine 341
9.5.2 Petitioning Immunity in Other Countries 345
9.5.3 The Case for Extending Immunity to Petitioning Foreign States 346
9.6 Conclusion 348

10 The Proper Scope of Transnational Competition Law 351
10.1 Competition Law in Conflict of Laws Theory 351
10.2 The Case for Proportionality in Extraterritoriality 351
10.2.1 Competition Law Jurisdiction and Multi-State Considerations 351
10.2.2 Rejecting Territorial Jurisdiction as the Exclusive Basis for Competition Law Jurisdiction 353
10.2.3 Matching Jurisdiction to Policy Interests 355
10.2.4 Relevant Effects in the Effects Doctrine 365
10.2.5 Fairness and Legitimacy 370
10.3 Reducing Concurrent Jurisdiction 371
10.3.1 Comity is not a Legal Rule that could Reduce Concurrent Jurisdiction 372
10.3.2 The General Absence of a Hierarchy of Jurisdictional Bases 373
10.3.3 Balancing Tests and Choice of Laws Methods 373
10.3.4 International Competition Law Defences 377
10.4 Improving the Management of Concurrent Jurisdiction 392
10.4.1 Difficulty of Agreeing on the Comprehensive Allocation of Competition Law Jurisdiction 392
10.4.2 States Need Principles to Guide Unilateral Adoption of Cooperative Conflicts Rules 394
10.4.3 Operationalizing Forum Selection as an Alternative to Jurisdiction Restriction 395
10.4.4 Extraterritorial Criminal Competition Law Actions 398
10.4.5 Private Competition Law Suits 399
10.4.6 Bilateral Multilateralism 401
10.5 Conclusion 402

III. THE INTERNATIONALIZATION OF COMPETITION LAW

11 The Competition Rules of the World Trade Organization 405
11.1 Introduction 405
11.2 Obligations to Address Anticompetitive Conduct
   11.2.1 The Havana Charter 405
   11.2.2 GATT Consultations on Restrictive Business Practices 407
   11.2.3 GATS Consultations on Restrictive Business Practices 409
   11.2.4 Telecommunications 410
   11.2.5 Private Bodies with Delegated or Self-Regulatory Powers 415

11.3 Exceptions to General Rules to Address Anticompetitive Conduct: TRIPS 415

11.4 Obligations not to Encourage or Compel Anticompetitive Conduct
   11.4.1 Controlling Government Encouragement of Anticompetitive Conduct 418
   11.4.2 State Trading Enterprises 422
   11.4.3 Import Monopolies 423
   11.4.4 Service Industry Monopolies 424
   11.4.5 Market Access for Services 425
   11.4.6 Agreement on Subsidies 426
   11.4.7 Non-Violation Complaints 427
   11.4.8 Situation Complaints 432

11.5 Rules Limiting National Competition Laws 432
   11.5.1 Taming Aggressive Unilateralism in Competition Law 432
   11.5.2 The Effect of the Antidumping Agreement on Competition Law 444
   11.5.3 The Effect of the National Treatment of Goods Obligation on Competition Law 448
   11.5.4 Prohibited Discrimination between Services through Competition Law 455
   11.5.5 Prohibited Discrimination in Relation to Intellectual Property Rights through Competition Law 456
   11.5.6 Non-Discrimination as a Core International Competition Law Rule 457
   11.5.7 Mutual Recognition and Most Favoured Nation Obligations 460

11.6 Conclusion 460

12 Dispute Settlement and Enforcement 463

12.1 Introduction 463

12.2 Private Party Participation in International Competition Law Dispute Settlement 464
   12.2.1 Panel Proceedings Initiated by Non-Governmental Organizations 464
   12.2.2 Application of International Competition Law in National Courts 466
### 12.2.3 Participation of Non-Governmental Organizations in Proceedings 468

### 12.3 Supervision of Competition Law and Enforcement 471
- 12.3.1 The Constitution of the Panel 471
- 12.3.2 Information Gathering and Analysis 471
- 12.3.3 Reviewing Competition Law Actions 477
- 12.3.4 Remedies 484
- 12.3.5 Disputes over Jurisdiction 487
- 12.3.6 Other Dispute Settlement Options 488

### 12.4 Conclusion 491

### 13 International Enforcement Cooperation and Judicial Assistance 493

#### 13.1 Remaining Problems and Solutions 493

#### 13.2 The Evolution of Competition Law Cooperation 494
- 13.2.1 The Types of Enforcement Cooperation Agreement 494
- 13.2.2 Conflict Avoidance and Soft Cooperation 496
- 13.2.3 Competition Law Disciplines in Free Trade Agreements 510

#### 13.3 Foreign Assistance in Investigation and Analysis 517
- 13.3.1 Introduction 517
- 13.3.2 Exchange of Confidential Information under Enforcement Cooperation Agreements 518
- 13.3.3 Limitations on the Power of National Authorities and Courts to Investigate Conduct Abroad 519
- 13.3.4 Opposition to Unilateral Foreign Investigations and Discovery 524
- 13.3.5 The Limitations of Mutual Legal Assistance Treaties 526
- 13.3.6 International Antitrust Enforcement Assistance Act 528
- 13.3.7 Integration of Trans-Tasman Investigation and Discovery into Domestic Regimes 533
- 13.3.8 Conclusions 533

#### 13.4 Recognition and Enforcement of Competition Law Judgments 534
- 13.4.1 Recognition and Enforcement of Foreign Judgments 534
- 13.4.2 Blocking and Clawback Statutes 536
- 13.4.3 Obstacles to International Agreement 537
- 13.4.4 The Enforcement and Recognition of Trans-Tasman Competition Law Judgments 538
- 13.4.5 Potential Conflict between Competition Law Remedies 541

#### 13.5 Positive Comity 544
- 13.5.1 The Concept of Positive Comity 544
- 13.5.2 The Experience under the EC–US Agreement 545
- 13.5.3 Refining and Strengthening Positive Comity 548
Contents

13.6 Coordinating Parallel Investigations 550
  13.6.1 Coordination of Investigations under the EC-US Agreement 551
  13.6.2 United States Antitrust Federalism 553
  13.6.3 Intra-European Union Coordination 554
  13.6.4 Prerequisites for Improving Coordination of Investigation and Enforcement 555
  13.6.5 Choosing a Lead Jurisdiction 558

14 The Emerging Principles of International Competition Law 561

Select Bibliography 571
Index 619