

# The Emerging Principles of International Competition Law

CHRIS NOONAN

**OXFORD**  
UNIVERSITY PRESS

# Contents

<i>Table of Cases</i>	xix
<i>Table of Treaties and International Instruments</i>	xxxvii
<i>Table of Legislation</i>	xlvi
<i>Abbreviations</i>	xlix

## I. UNDERSTANDING AND RECONCILING NATIONAL INTERESTS

<b>1. Introduction</b>	<b>3</b>
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
<b>2 The Fundamental Forces Shaping International Competition Law</b>	<b>21</b>
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

2.3	The Costs of Cooperation and the Principle of Subsidiarity	30
2.3.1	The Concept and Implications of Subsidiarity	30
2.3.2	Sovereignty	31
2.3.3	Autonomy and Opportunism	33
2.3.4	Accountability and Responsiveness	34
2.3.5	Legitimacy of Decision-Making Processes	36
2.3.6	The Direct Costs of International Cooperation	38
2.4	The Forms and Facilitators of International Cooperation	40
2.4.1	Conditions that Facilitate Cooperation	40
2.4.2	Resolving Conflict by Reducing Transaction Costs and Assigning Entitlements	41
2.4.3	Options for a Multilateral Competition Law Regime	43
2.4.4	The Role of the WTO in International Competition Law	51
2.4.5	A New Institution to Coordinate Competition Law Cooperation	55
<b>3</b>	<b>The Inevitably Incomplete Convergence of Competition Laws</b>	<b>59</b>
3.1	An Overview of Competition Law	59
3.1.1	The Common Elements of Competition Laws	59
3.1.2	Objectives and Underlying Ideas	63
3.1.3	The Influence of Economics	69
3.1.4	The Relationship with Industrial and Regulatory Policies	72
3.2	Competition Law in Developing and Transitional Countries	73
3.2.1	The Adoption of Competition Laws by Developing and Transitional Countries	73
3.2.2	The Influence of Domestic Circumstances and External Influences on Competition Law	74
3.2.3	Competition Law and Development	76
3.2.4	Appropriate Institutions and Technical Assistance	79
3.2.5	Developing Countries and International Competition Law	81
3.3	The Inevitably Incomplete Convergence of Competition Laws	83
3.3.1	Distinguishing Proselytization from Problem Solving	83
3.3.2	Legal Transplantation	84
3.3.3	Dealing with Limited Knowledge of Foreign Laws	86
3.3.4	Conventions and Model Laws cannot Guarantee Uniformity	87
3.3.5	Intellectual Harmonization	89
3.4	A Marginally Cosmopolitan Conception of Self-Interest	89
3.4.1	General Organizing Principles are Missing from Most Proposals for WTO Competition Rules	89
3.4.2	The Influence of Ideas on International Relations	90
3.4.3	Competition Law and the International Distribution of Wealth	91
3.4.4	Global Consumer Welfare as the Guiding Principle	94
3.5	Conclusion	97

<b>4 The Limited Case for Harmonization to Protect Competitiveness</b>	<b>99</b>
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 <i>A Priori</i> 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
<b>5 International Competition Law in a Trade Policy Framework</b>	<b>139</b>
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

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
<b>6</b>	<b>Private Market Access Barriers</b>	<b>185</b>
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
<b>II. TRANSNATIONAL COMPETITION LAW</b>		
<b>7</b>	<b>Competition Law Jurisdiction under International Law</b>	<b>207</b>
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
<b>8</b>	<b>The Scope of Application of Competition Laws</b>	<b>223</b>
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	<i>Hartford Fire Insurance</i> 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 <i>Noerr</i> 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
<b>10</b>	<b>The Proper Scope of Transnational Competition Law</b>	<b>351</b>
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
 <b>III. THE INTERNATIONALIZATION OF COMPETITION LAW</b> 		
<b>11</b>	<b>The Competition Rules of the World Trade Organization</b>	<b>405</b>
11.1	Introduction	405

11.2	Obligations to Address Anticompetitive Conduct	405
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	418
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
<b>13</b>	<b>International Enforcement Cooperation and Judicial Assistance</b>		<b>493</b>
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	

<b>13.6 Coordinating Parallel Investigations</b>	<b>550</b>
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

<b>14 The Emerging Principles of International Competition Law</b>	<b>561</b>
--	------------

<i>Select Bibliography</i>	571
<i>Index</i>	619