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**The Design of Competition Law Institutions and the Global Convergence of Process
Norms: The GAL Competition Project**

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August 16, 2012

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ABSTRACT

This paper is an account of the institutions of antitrust enforcement and adjudication in nine jurisdictions, across six continents, and the four principal international bodies involved with issues of antitrust. It synthesizes nine studies that illuminate the inner workings of each of systems in the sample studied and it exposes their norms, all in the quest to determine whether there are global norms of procedure and process. The paper reveals that there are indeed common norms across very different institutional arrangements, most of which are currently embedded in the systems and some of which are aspirational.

This study is a counterpart to studies on the convergence of the substantive rules and standards of antitrust law. The paper observes an emerging "sympathy of systems" (as opposed to identity of systems) in which global process norms, along with substantive norms, play a critical role in forging the global coherence of a national network of competition law systems.

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KEYWORDS: Antitrust, enforcement, institutions, accountability, administrative law, international administrative law, due process, transparency, separation of functions, rule of law

JEL codes: K4, K21, K23, L40, L50, P50, H11

The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project

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I. The Birth and Evolution of the GAL Competition Project

In 2004 New York University School of Law launched a project that has become a new area of law: Global Administrative Law, known in the literature as GAL. Professors Richard Stewart and Benedict Kingsbury developed this concept against the backdrop of globalization, the shrinking borders between nations, and the rise of international systems of governance.

They asked: Were these international systems of governance accountable and legitimate? Were the procedures and outputs fair? transparent? predictable? Were the decision-makers sufficiently expert? Were the systems efficient? How should they be assessed? Are there benchmarks by which the new institutions of governance can be evaluated?

Some scholars have engaged with the problem by invoking “global constitutionalism”: rules from above. GAL attacks the problem from below.¹ GAL begins by reference to administrative

¹ See Benedict Kingsbury, Nico Krisch, Richard B. Stewart, and Jonathan B. Wiener, Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law, 68 *Law and Contemporary Problems* 1 (2005).

law: requirements of accountability and legitimacy as informed by more specific norms such as transparency, reason-giving by decision-makers, and rights of review. Many of the GAL projects work from the ground up to uncover the process norms embedded in a system, to observe how the norms are formulated and applied and how systems and their norms interact, with due respect to culture and context. This modus operandi does not presume a single best design or order. It reflects the aspiration, by knowledge, assessment, and increasing convergence of process norms and the institutional designs that reflect them, to improve global governance.

During its first five years, participants in the GAL projects studied areas of law in which the global space was occupied by global institutions with powers of rule-making and adjudication, such as trade law and environmental law. In 2010, the project list expanded to include national law with intertwined international implications, and GAL launched a project - the subject of this paper - on competition law. Although competition law is essentially national, the intense global nature of markets means that one nation's system affects its sister systems, and virtually every national system affects people and firms beyond its borders. Consider, for example, the proposed and aborted iron ore joint venture of Rio Tinto (UK) and BHP Billiton (Australia); or the practices of Microsoft, Intel, and Google; or the cartels in vitamins and lysene, all of which rippled around the world and were vetted in scores of nations.

In recognition of the deep interconnections, international institutions with a competition function have expanded their number and scope. The newest player is the International Competition Network, now comprising 120 competition authorities from 106 jurisdictions. An international law of competition was once on the World Trade Organization's notional agenda, and although it slipped from the agenda, it may resurface. In any event, WTO rules and

A description of the GAL project and links to numerous papers written under its aegis may be found at <http://www.iilj.org/GAL/GALNetwork.asp>.

initiatives deeply affect world competition, some more explicitly than others. The procedure/process/performance norms of the global institutions that bear on antitrust affect all citizens of the world.

Fortuitously, quite separately from the GAL project, the subject of procedure and process norms in competition law has become a prominent issue in the world competition community in the last several years. Christine Varney gave a speech early in her tenure as US Assistant Attorney General in charge of Antitrust devoted to process norms, particularly transparency,² and she initiated a project on the subject at the Organization for Economic Co-Operation and Development.³ Meanwhile, in Europe, issues of fairness of process in the context of the EU administrative and inquisitorial model began to take a high profile, particularly with the advent of very high fines in cartel and abuse cases that were likened to criminal punishment. The Lisbon Treaty, with the promise of accession of the European Union to the European Convention on Human Rights, has influenced the debate on what protections a guarantee of fundamental rights

² Christine A. Varney, Assistant Attorney General, US Dep't of Justice, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency (February 15, 2010), <http://www.justice.gov/atr/public/speeches/255189.htm>. See Rachel Brandenburger, Special Advisor, International Antitrust Division, US Dep't of Justice, International Competition Policy and Practice: New Perspectives?, King's College, London (October 29, 2010), <http://www.justice.gov/atr/public/speeches/70980.htm>.

For some years Bill Kovacic, drawing on work of Douglass North and Hernando de Soto, has identified institutional and performance norms as crucial to the effectiveness of competition authorities. See, e.g., William E. Kovacic, Rating the Competition Agencies: What Constitutes Good Performance?, 16 GEO. MASON L. REV. 903 (2009); William E. Kovacic, Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 BROOK. J. INT'L L. 403 (1997).

The OECD, ICN, and UNCTAD have undertaken projects on agency effectiveness. Their projects express and reflect notional best practices for increasing agency effectiveness.

³ See PROCEDURAL FAIRNESS AND TRANSPARENCY—2012 (OECD), http://www.oecd.org/document/20/0,3746,en_2649_37463_50235668_1_1_1_37463,00.html, summarizing the OECD's three roundtable discussions on transparency and procedural fairness held during 2010 and 2011.

demands. This debate, and the policy-making and litigation surrounding it, are now a central focus of attention in Europe and elsewhere. As more jurisdictions, especially developing countries, adopt competition laws, and yet others modernize their laws, the subject has special and immediate practical importance. The GAL Competition Project is thus especially timely.

In 2010, the authors of this chapter became co-directors of the GAL Competition Project. We chose a representative selection of jurisdictions by continent or region and stages of economic development, assembled teams from these jurisdictions, and prepared a common research template.⁴

The jurisdictions/institutions represented in the study and the team members are:

| | |
|-------------------------------|---|
| <i>Australia/New Zealand:</i> | Simon Peart, Freshfields Bruckhaus Deringer, London |
| <i>Canada:</i> | Michael Trebilcock and Edward Iacobucci, University of Toronto |
| <i>Chile:</i> | Santiago Montt and Francisco Agüero, University of Chile |
| <i>China:</i> | Xiaoye Wang and Jessica Su, Chinese Academy of Social Sciences |
| <i>Japan:</i> | Harry First, New York University, and Tadashi Shiraishi, University of Tokyo |
| <i>South Africa:</i> | Dennis Davis, Competition Appeal Court, South Africa, and Lara Granville, Norton Rose, Johannesburg |
| <i>United States:</i> | Harry First and Eleanor Fox, New York University, and Daniel Hemli, Bracewell & Giuliani, New York |
| <i>European Union:</i> | Ioannis Lianos, University College London, and Arianna |

⁴ The relevant part of the template is set out in an appendix to this chapter.

International institutions: Eleanor Fox, NYU, and Amedeo Arena, University of Naples.

Brazil and India, two notable fast-growing economies, are not included in the in-depth studies. The Brazilian competition system was reorganized after the country studies were complete, and India's law had seen virtually no enforcement at that time. Given the importance of these two jurisdictions, we include them in our country summaries, later in this chapter.

The members of the GAL Competition team drafted papers describing the institutional design of their country or jurisdiction, identifying the mandate of the competition authority therein, the norms embedded in the system for both rights of defense and institutional performance, and the trade-offs made (for example, more administrative efficiency versus more transparency or more rights of defense), and evaluating conformity with the list of notional norms in the template. For example, the due process norms in case-by-case decision-making include the opportunity to be heard and the open-mindedness of decision-makers; institutional performance norms include timeliness, expertise, transparency, and accountability. The full list is set out in the research template appended to this chapter. The group met for a workshop at New York University School of Law in February 2011 to discuss draft papers. The workshop was joined by Stephen Harris, now of Baker & McKenzie, as China expert to stand in for Xiaoye Wang and Jessica Su, whose obligations required them to remain in China.

The papers were revised in the light of vigorous discussions at the workshop and thereafter. This volume presents the papers, each of which is deeply factual and contextual as well as evaluative. This introductory essay provides an overview of the major cross-cutting themes in the papers, including major points of convergence and divergence, as well as the major normative

issues relating to institutional design and decision-making processes across the developed and developing world.

We can report that our country studies, and our study of the EU and the international bodies, demonstrate a remarkable degree of consensus on the basic procedural requirements and institutional performance norms of competition law institutions. Although the systems entail a range of approaches, we, as competition law scholars and lawyers, basically speak the same “language” and care about the same procedural/process values. There are some differences, which we are able to articulate within a common frame of reference. If the point of GAL is to take a ground-up approach towards revealing and nudging convergence of process norms, competition law globally seems well on its way to substantiating the project’s hypothesis.

We note the limits as well as the breadth of the project. As explained, we selected eight national competition law systems, the European Union, and four international institutions as the database for study. Perhaps this study will inspire an enlargement of the sample. Scholars will have no dearth of attractive and diverse candidates from which to choose, including Brazil and India (for which we provide summaries but no separate studies), Egypt, Indonesia, Kenya, South Korea, Mexico, Russia, Singapore, among many others.

As suggested we conclude, albeit within our sample, that the procedure/process norms can be fulfilled within a number of institutional designs. At the end of this chapter we ask: If this is so, what relevance has this work to the project of convergence of competition laws? Our answer is, it has high relevance. In a world of more than 100 national competition law systems and thus potential for high costs of system clashes, the sympathy of national systems to one another is a compelling objective. Convergence of procedure/process norms, which we observe herein, no

less than convergence of substantive law, enhances respect, regard, and legitimacy, and thus, the sympathy of nations.

II. Themes—A synthesis

We embarked upon this project without strong preconceptions of a best model for effective and procedurally fair systems. Fundamental design choices are, to an important extent, a function of a country's history and legal, political, and economic culture. We sought to identify specific shortfalls, on the one hand, and to identify choices likely to contribute to better performance and sense of legitimacy, on the other. In this spirit, we turn seriatim to institutional design, mandate of the agency, due process, and institutional performance.

A. Institutional design

At the start of the project we identified the three basic models: the bifurcated judicial model (the competition authority goes to court for enforcement), the bifurcated agency/tribunal model (the agency goes to a specialized tribunal for enforcement), and the integrated agency model (a commission within the agency makes the first-level adjudication). Among the nine national/regional jurisdictions studied there are examples or variants of each. Canada, South Africa, and Chile are examples of the bifurcated agency model; the EU, Japan, China, and US Federal Trade Commission are examples of the integrated agency model; and the US Antitrust Division of the Department of Justice (DOJ) exemplifies the bifurcated judicial model. India combines elements of the bifurcated agency model and integrated agency model. Australia and New Zealand combine elements of all three.

The studies reveal that, where courts are weak (as they are in many developing countries), the bifurcated or integrated agency/tribunal models have some significant advantages. On the other hand, where courts are strong, independent, honest, and efficient (as in the US), the bifurcated judicial model has some significant advantages. In jurisdictions adopting bifurcated agency/tribunal models, the South African, Chilean, and Canadian experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and economic expertise of a consistent and continuous nature. The Canadian experience demonstrates pitfalls of lack of such expertise.

Whichever model is chosen, cases go to court, whether immediately or ultimately. The studies reveal numerous problems with court systems including unacceptable delays and unknowledgeable jurists. In some jurisdictions, review of agency or tribunal determinations is *de novo* (South Africa) and in others review is deferential to fact-finding, at least normally and to some extent (European Union; US—appeals from the FTC). Concerns have arisen in both directions—too much intrusion by appellate courts (South Africa)⁵ and too little examination by appellate courts (the European Union)⁶—thus underlining the observation that there are costs, benefits, and trade-offs of both approaches, and feasible solutions are particular to the context.

Design includes many other factors. Is competition law located in a common law or civil law system? Is enforcement civil only or also criminal? Is there one federal enforcement body or more (as in China and the United States)? Is there a right of private enforcement, and how does

⁵ The South African law provides for *de novo* review of Tribunal decisions. This means that the Court of Appeal may substitute its judgment on facts for that of the Tribunal, and it often does. *See* South Africa country study, Chapter VII *infra*.

⁶ In the European Union, the General Court may set aside fact-finding by the European Commission only if the Commission has made manifest errors of assessment. Concerns of insufficient due process have led to proposals for more thorough appellate review.

private enforcement interact with public enforcement? The elements vary from jurisdiction to jurisdiction, with virtually all jurisdictions aspiring to efficient and effective enforcement subject to effective protection of rights, and subject to the context of the jurisdiction.

The status quo can include less-than-optimal institutions that may be politically difficult to dislodge. For example, observers of the US system note the jurisdictional overlaps of the Department of Justice Antitrust Division and the Federal Trade Commission, and some have emphasized attendant tensions.⁷ Some reformers propose abolishing the competition arm of the FTC or consolidating merger review in either the FTC or DOJ. In Europe, concern focuses on the combination of the functions of investigator, prosecutor, and judge. Some reformers have proposed spinning-off the EU Competition Directorate to create an agency obliged to bring cases before an independent court, although current proposals with traction are more modest.

Dramatic changes may be difficult to execute especially at a mature stage of the institutions. Less dramatic adjustments may be the practical course, and might work better than a large reform whose own weaknesses may unfold only in time.⁸ Yet sometimes major reform seems wise and achievable, as appears to be so in the case of consolidation in Brazil.

⁷ See, e.g., Thomas Catan, *This Takeover Battle Pits Bureaucrat v. Bureaucrat*, *Wall Street J.*, April 12, 2011, quoting William Kovacic, then a Commission of the FTC. But compare US country study, Chapter VIII *infra*.

⁸ See John Fingleton, when Chief Executive of the Office of Fair Trading of the UK, regarding the UK Government's proposed consolidation of the UK competition authorities: "The OFT has long recognised the potential benefits of a merger between the OFT and the Competition Commission (CC), particularly the opportunity for improved consistency, more efficient use of resources and greater flexibility. That said, the current regime is widely accepted as already being impactful and effective, and reforms should therefore build on these strengths.

"Big systemic changes should only be introduced where they will clearly contribute to the promotion of growth in the economy, given the potential risks and costs involved and the time needed to bed such changes in. Generally, incremental reform is preferable. . . ." J. Fingleton, *The future of the competition regime: increasing consumer welfare and economic growth*, 25 May 2011, <http://www.of.gov.uk/news-and-updates/speeches/2011/1011>.

Some of the problems traceable to institutional design manifest themselves in due process and institutional performance, which we discuss below.

B. Mandate

The mandate of the competition authorities within our sample varies. All, of course, are charged with enforcing the competition law. Some authorities have consumer protection responsibilities (the US FTC, the Canadian Competition Bureau); others do not. Some function also as sector regulators (Australia). The Indian law prescribes a non-binding consultative mechanism between the Competition Commission and the sector regulators. Some systems authorize simultaneous competition and regulatory enforcement; some favor preemption by the regulatory regime. Where preemption does not occur, jurisdictions differ as to the scope of antitrust in regulated sectors.

With respect to the competition law mandate itself, degrees of consistency and predictability are influenced by the objectives of the law and how clearly they are articulated. A specific objective, such as consumer welfare or total welfare, constrains the discretion of the agency and tightens its focus, both in choosing priorities and evaluating particular practices and transactions. Regimes with a broader set of objectives, such as South Africa, China, and Japan in our project, face more daunting challenges in articulating clear and consistent rules of law.

C. Due process and rights of defense

In case-by-case decision-making, integrated agencies, such as the EU, Japan, China, and the US FTC in our project, raise systemic concerns that the integration of investigation, enforcement,

The UK is, however, in the process of a major consolidation of agencies.

and adjudicative functions create bias or lack of objectivity (“confirmation bias”),⁹ or the appearance of it, in the discharge of the adjudicatory functions vested in the agencies. At least in perception, integration of these functions may render the agencies “judges in their own cause.” There are avenues by which these concerns can be and have been addressed even within the integrated agency format. For example, the agency can sharply separate investigative and enforcement functions from the adjudicative functions through use of different personnel and through firewalls. The European system integrates prosecutor and adjudicator and applies a non-adversarial administrative tradition common in civil law jurisdictions. This approach trades off more rights of defense (for example, to cross-examine witnesses and to argue to decision-makers with no prior involvement in the case) for more efficiency and effectiveness in enforcement. The conformity of the system to notions of basic rights, especially as applied to high-stakes litigation, is being challenged in the European Union courts and may ultimately be taken to the European Court on Human Rights. The Human Rights Court thus far has upheld the consistency with human rights of systems featuring integrated agencies at least where the system offers robust appellate court review in cases that are not hard core criminal cases.¹⁰ Meanwhile, the European Commission has responded to concerns about systemic bias by strengthening the functions of the hearing officer, mandating transparency of intended fines and how they are calculated, and

⁹ Confirmation bias entails a person’s readiness to accept the version of a story that confirms his or her pre-existing beliefs. *See* Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, 27 *WORLD COMPETITION L. & ECON. REV.* 202, 215 (2004).

¹⁰ *See* A. Menarini Diagnostics, European Court of Human Rights, 27 September 2011; KME, Case C-272/09 P, European Court of Justice, 8 December 2011. *See* Wouter Wils, *EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, 27 *WORLD COMPETITION L. & ECON. REV.* 189, 203–6 (2011). *See* also the European Union study in this project, Chapter V *infra*.

extending state-of-play meetings to cartel cases.¹¹ A pending proposal would mandate more thorough rights of review in the European courts. Adversarial modes of adjudication may guarantee certain other rights of defense—such as the right to cross-examination of witnesses and the right to a full trial, which inquisitorial systems, common in civil law countries, do not normally offer.

We cannot conclude from our limited but fairly representative database that separation of prosecutorial and decisional functions, and the right to an adversarial trial including cross-examination, are currently global norms,¹² even if it may be argued that they should be.¹³ We personally share the view that separation of functions is normally desirable, particularly in cases where much is at stake. Where separation is not practical, the tasks of investigation and prosecution, and the task of drafting the decision, might be assigned to different individuals in order better to preserve the right to argue to an open mind. The separation of functions and the right to cross-examination increase in importance as the consequences of the violation become more severe.

Certain more particular shortcomings emerge in a number of our studies, both in civil law and common law systems.

Our studies include instances of failure to notify investigation targets at an early stage of the substance of the issues being investigated and the evidence being relied upon, and the failure to provide opportunities for affected parties to address the issues and evidence in a timely way prior

¹¹ See Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Fair process in EU competition enforcement, remarks at European Competition Day, Budapest, 30 May 2011, http://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html.

¹² The authors of the European Union study in this volume express their view that the litigation system of the European Commission fails to satisfy appropriate standards for rights of defense.

¹³ See European Union study, Chapter 9.

to formal adjudication of the issues. The jurisdictions generally agree that parties to a formal proceeding have the right to be fully apprised in a timely fashion of the allegations they face and the evidence being relied on to support them. What is full and what is timely is often a matter of debate.

In formal adjudicative proceedings, both inquisitorial and adversarial, there is consensus that decisions should be reasoned decisions and that these decisions should be made public, in the interests of transparency, predictability, and accountability. Courts may recognize different levels of robustness for rights of defense: a significant but comparatively lower level for civil/administrative cases, a higher level for cases imbued with some elements of a criminal action (for example, extremely high fines), and a very high level for unambiguously criminal prosecutions. There is consensus that formal settlements should be on the public record, along with supporting explanations or justifications. In a growing number of jurisdictions, provisional settlements are made public and interested parties have the opportunity to challenge the terms. If there is an outlying jurisdiction, it may be China; two of its three agencies need not publish their decisions (or judgments) determining adjudicated cases.

D. Agency performance

Various norms emerge across both inquisitorial and adversarial systems. These include timeliness of decision-making, predictability, expertise, transparency, independence, efficiency and effectiveness, and accountability. The jurisdictions embraced by our project exhibit a mix of strengths and weaknesses along these various dimensions. All appear to subscribe to the norms but some do not meet their aspirations. Again, China may be the outlier. The Chinese agencies are part of the state; independence is not to be expected; and the referent for consistency is party

policy, not autonomous rules of competition law—even though most outcomes are consistent with international practice.

Excessive delays, lack of predictability, and lack of consistency in decision-making plague several systems. Lack of legal and economic expertise is a recurrent problem. Shortfalls in expertise are especially likely in younger and resource-starved jurisdictions, and also in small economies without a critical mass of antitrust cases. Some jurisdictions suffer from lack of reasoned decision-making, lack of publication of decisions, and lack of independence from political interference at some or all stages—investigative, enforcement, and adjudicative. Political interference varies from rare to pervasive. Institutional arrangements that tend to ensure public accountability of the agency on a regular basis are generally recognized as a virtue. The strengths and weaknesses in performance do not divide neatly by basic regime type. The studies display general agreement about what the appropriate norms are in evaluating these systemic performance qualities.

E. Trade-offs

Jurisdictions make many and different trade-offs. The US, in enforcement by the DOJ, generally prefers more expansive rights of defense to more expeditious investigations and prosecution. The EU, in the context of an inquisitorial rather than an adversarial system, strikes a different balance. The competition agencies in our sample all recognize rights of confidentiality, although in some jurisdictions attorney-client privilege is quite limited. Protection of confidential documents and other information can mean less transparency, less effective enforcement, and barriers to private enforcement.

F. Appeals: Appellate tribunals and courts

All jurisdictions we studied provide a right of appeal, which is one of the universal rights of defense. Some jurisdictions allow a series of yet higher appeals. In this subsection on appeals we make the following observations:

1. A right of appeal to a panel of decision-makers who can set aside decisions based on error is a recognized right of defense. So too is this function a recognized vehicle for obtaining more clarity and thus more predictability of the law. Scope of review of fact-finding differs, with some court reviews limited to manifest error and others assigned de novo review. Particularly where there is a lack of separation of prosecutor and decision-maker, more in-depth review seems appropriate. On the other hand, an appeals process that entails in-depth review of all of the facts can lead to excessive delays and sometimes excessive reversals, and a rule of deference to an unbiased fact-finder who stays within a range of appreciation has merit.

2. In some jurisdictions, appeal lies to a specialized tribunal or court; in others to a general court. Our studies show that tribunals or courts denominated “specialized” are not necessarily composed of experts; that creation of a specialized tribunal or court does not ensure more expert decisions. Specialized tribunals or courts can add expertise, but they can also breed bias.¹⁴ Our studies make the related observation that, in many smaller and younger jurisdictions, and even some larger, mature ones such as Japan and Canada, so few cases reach the specialized tribunals that the members of the tribunal develop virtually no expertise on the job. This is especially the case for part-time members. Our studies and dialogue revealed a worrying incidence of reviewing jurists who were not sufficiently conversant with competition law analysis.

¹⁴ The United States has a specialized appeals court for patent and trademark issues: The Court of Appeals for the Federal Circuit. These cases often involve antitrust issues. The Federal Circuit tends to place protection of patents higher in the hierarchy than protection of competition.

3. In some jurisdictions the defendant has access to nearly endless appeals or other opportunities to tie up the case until the initial fact-finding is stale. In our workshop we discussed this phenomena as “undue process.”¹⁵ In South Africa, the potentially four-stage appeals process is too long. In Brazil, the Nestlé/Garota merger—prohibited by the competition tribunal, CADE, but consummated—has been on appeal for twelve years. Delay is a major concern in India, where the second and final appeal in competition cases lies with a notoriously overburdened court. In Mexico, defendants make liberal use of the amparo (habeas corpus-like injunction against an agency order), which can cause almost infinite delay. TelMex has escaped the Federal Competition Commission’s authority for a quarter of a century. Its parent and sister corporations América Móvil and Telcel may be following a similar path.¹⁶ Within our sample, there was also a worrying incidence of foot-dragging and delays in the courts.

4. In at least one case in our sample (South Africa), the Tribunal generally takes a teleological approach to the statute while the court takes a more technical lawyerly approach. The Tribunal has struck the balance in favor of more efficiency in performance (for example in terms of length of argument, number of witness statements) as well as in favor of more economic opportunity for market players in its substantive interpretations. The Appeals Court and the yet higher court have struck a different balance: more rights of defense and a narrower interpretation of the proscriptions of law. Moreover, the Appeals Court reviews the Tribunal’s fact-finding de novo. These factors have resulted in numerous reversals.

5. As the foregoing paragraphs demonstrate, the courts can undo what the agencies and tribunals have done, for better or for worse. While reversals may sometimes be justified, it is common

¹⁵ See Adam Samaha, *Undue Process*, 59 STANFORD L. REV. 601 (2006), for the coining of the term.

¹⁶ See América Móvil obtiene amparo, *México Noticias*—3 October 2011, <http://legislaciones.item.org.uy/index?q=node/3335>.

cause that agency decisions should never be compromised by excessive and unreasonable delay (see point 3), jurists who do not understand the case (see point 2), and even worse, corruption in the courts. Court ineffectiveness unravels agency effectiveness.

G. The International Institutions

The international institutions do not fit neatly into our four categories for analysis, but the existence of and prospects for these organizations are central to competition law and its future; therefore design, process, and procedure are likewise critical as applied to these institutions. Indeed, as noted at the outset of this chapter, international institutions were the initial subject of the overarching GAL project, whose founders addressed the concern that international institutions were proliferating without normative checks on processes and procedures.

GAL itself, by co-founder Professor Richard Stewart, has examined the WTO in view of GAL normative benchmarks.¹⁷

We included the WTO in the GAL Competition Project because of its distinct relation to competition policy. The WTO may be seen as a node in the world competition network; indeed, a central connecting node. National competition law systems are conceptually and notionally linked to the WTO, which to an important extent prohibits its member states from doing what national law prohibits its private actors from doing (impairing trade and competition). The WTO bridges half the gap.¹⁸

¹⁷ See Richard Stewart and Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law* (2009), New York University Public Law and Legal Theory Working Paper 166, http://lsr.nellco.org/nyu_plltwp/166.

¹⁸ The other half is not attended to. Private actors may, in most cases, restrain trade and competition if they hurt “only” foreigners, unless the victim nation has proscriptive law against these restraints (such as export cartels) and has practical power to catch them.

In the WTO study in this volume, we found that adjudication and performance norms are moderately well met by the WTO's reformed dispute resolution system. However, case resolution in the WTO is slow; expertise varies among the individuals chosen as panel members; and predictability of outcomes is only moderate. Rights of defense to introduce evidence and be heard are not a problem, but there is a tilt toward the more powerful nations both because of bargaining power at the outset (the nations negotiate the rules) and in view of the greater difficulties facing weaker nations in calling violators to account. If competition law should in the future become an independent competence of the WTO, the intensity of fact finding, the lack of rules of evidence, and the inexperience of panels in dealing with antitrust evidence are problems that will need to be addressed.

The Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the International Competition Network (ICN) are also bridging institutions. They have no rule-making or decision-making power; therefore many of the problems of due process are not relevant. Yet we are acutely aware that less formal institutions are becoming generators of soft law that may harden into world law. Thus we would emphasize the importance of a norm of inclusiveness of all stakeholders in agenda-setting and in the development of best practices, rules, and standards.

The OECD caters to developed countries; it reaches out to developing countries with its Global Competition Forums. The UNCTAD caters to developing countries. It includes all UN member countries in its meetings and conferences. The ICN, which is uniquely composed of competition authorities, not states, recognizes a special responsibility to include in working groups and in agenda-setting the competition authorities of the developing countries.

III. Summaries of Country/Jurisdictional Studies

In this section of our introductory chapter, we provide brief summaries of the studies of the competition law systems of eight nations, the European Union, and the relevant international institutions (drawn largely from summaries prepared by the authors of the chapters). It is divided into the four parts addressed by each study: 1) institutional structure, 2) mandate of the competition authority, 3) due process norms in case-by-case decision-making, and 4) institutional performance norms. We also provide brief comments on the new or consolidated competition law regimes in India and Brazil (which are not the subject of separate studies).

A. INSTITUTIONAL STRUCTURE

1. Australia and New Zealand

The primary enforcement agencies for competition law in New Zealand and Australia are the Commerce Commission (NZCC) and the Australian Competition and Consumer Commission (ACCC), respectively. Both agencies are structurally independent of government and, although they report to government and are subject to government oversight, they carry out their statutory functions free from government influence.

The New Zealand and Australian models have elements of the integrated agency, bifurcated judicial, and (in the case of Australia) the bifurcated agency models. The agencies are responsible for a) investigating breaches of competition law, b) taking enforcement proceedings to the courts of general jurisdiction (the High Court in New Zealand and the Federal Court in Australia), and c) undertaking first instance adjudications in merger control proceedings and in a variety of regulatory matters (for example in the telecommunications and energy sectors). In

relation to criminal cartel prosecutions, the ACCC shares responsibility with the Commonwealth Department of Public Prosecutions (CDPP). The ACCC undertakes criminal cartel investigations, and the CDPP prosecutes.

In New Zealand, enforcement proceedings (whether initiated by the NZCC or private parties) are heard by the High Court, often sitting with an economist as expert advisor. The High Court is also responsible for hearing appeals from NZCC determinations of merger control and regulatory matters. In Australia, enforcement proceedings (again, whether initiated by the ACCC or private parties) are heard in the federal courts but appeals from the ACCC's merger control and regulatory determinations are heard by the Australian Competition Tribunal—a specialist tribunal that sits in divisions comprising one federal court judge and two lay members. The Act specifies that the lay members' qualifications shall include expertise in economics, business, or public administration.

As a result of this hybrid structure, the investigative and enforcement functions are structurally independent from the adjudicative function in relation to enforcement proceedings, but the agencies combine investigative and adjudicative functions in relation to merger control and regulatory determinations.

Australia and New Zealand are common law countries with adversarial court systems. In New Zealand, the High Court is the trial court responsible for hearing competition matters, and two levels of appeal are available: to the Court of Appeal and then to the Supreme Court. In Australia, the Federal District Court is primarily responsible for competition matters,^{*} again with two levels of appeal: to the Full Federal Court and then to the High Court of Australia. On appeal, the level of deference accorded to the agencies' first instance decisions varies depending

^{*} Australia is a federal system, but responsibility for competition and trade practices matters lies primarily with the ACCC and federal courts.

on the nature of the decision challenged and the body hearing the appeal (for example a court of general jurisdiction or the Australian Competition Tribunal). Generally speaking, the courts in both countries defer to the agencies' expertise in complex economic issues—particularly in regulatory determinations. However, the Australian Competition Tribunal—itsself an expert body—accords less deference to the reasoning of the ACCC.

Private rights of action are available—for single damages and injunctions—and may be brought independently of (and before or after) agency-initiated proceedings. However, the agencies are the primary drivers of enforcement action due to the costs associated with private enforcement and the perceived effectiveness of the agencies' enforcement efforts.

2. Brazil

Brazil has recently released a new competition law (Law No. 12,529/2011), which brings important changes and developments for the enforcement of competition law in Brazil. The law came into force in May, 2012. We will address the old system and, where applicable, highlight the changes brought about by the new legislation.

Under the old competition law (Law No. 8,884/94), the institutional structure for competition enforcement in Brazil was based on a bifurcated agency model, and enforcement was carried out by three separate authorities. The Administrative Council for Economic Defense (CADE) was the enforcing authority, which had decision-making power regarding competition law matters. CADE was (and still is) structurally independent from other government bodies.

Investigations and case review prior to CADE's final decisions were handled by the Secretariat of Economic Law of the Ministry of Justice (SDE) and by the Secretariat of Economic Monitoring of the Ministry of Finance (SEAE). Formally, the competences of these

agencies were somewhat overlapping but, through time, the competences were fine-tuned to promote the efficiency of the system as a whole: SDE focused on investigations of anticompetitive conduct and handled the Brazilian leniency program, and SEAE focused on the review of merger control filings. These agencies prepared non-binding technical opinions on cases which were then forwarded to CADE for a final decision.

The new competition law inaugurates an integrated agency model. CADE will now consist of three bodies: (1) a Tribunal, with decision-making powers on all competition law matters, as in the old CADE; (2) a General Superintendence, with the investigative authority previously allocated to the SDE and the SEAE; and (3) a Department of Economic Studies, an auxiliary division responsible for the elaboration of technical opinions on complex economic issues. The SDE's Antitrust Division was abolished (the SDE will retain competences related to consumer protection, which were handled by the Secretary through a separate division under the old law) and the SEAE's competences related to competition law is now limited to advocacy functions before other government bodies.

3. Canada

While having a history dating back to its first competition statute enacted in 1889, Canadian competition law was largely moribund for most of its first century. Apart from cartel prosecutions, very few cases were brought, and even fewer were successful. The lack of vigor was largely attributable to the institutional framework. Fear of intruding on provincial jurisdiction over property and civil rights led the Federal Government to criminalize all forms of antitrust offenses, including mergers and monopolies. The burden of proof in criminal cases was very difficult to surmount. Moreover, decision-making by inexperienced criminal courts was widely

seen as a further obstacle to the development of effective competition policy. In the late 1960s, the Economic Council of Canada recommended sweeping reforms, which culminated in the passage of the Competition Act 1986. Under this Act, the Competition Bureau, headed by the Commissioner of Competition, may investigate criminal matters (principally cartels). It remits prosecutions of criminal cases to the Federal Director of Public Prosecutions. Such cases are heard in ordinary criminal courts. The Competition Bureau is charged with investigating the wide range of civilly reviewable practices now recognized in the Competition Act, that is, refusals to deal, resale price maintenance, exclusive dealing, tying, exclusive territories, abuse of dominance, and mergers. The Bureau may, and frequently does, negotiate settlements, often in the form of consent agreements which assume the force of a court order by their mere registration with the Competition Tribunal created under the 1986 legislation. The Tribunal comprises judges from the Federal Court Trial Division and lay members. Contested civil matters are heard before the Tribunal, which may issue cease-and-desist orders and under recent amendments impose administrative monetary penalties for abuse of dominance. This reflects a version of the bifurcated agency model. Private parties may sue in the ordinary courts for single damages for breaches of the criminal provisions, which now focus mainly on price fixing.

Canada is a common law jurisdiction and it has an adversarial system. Appeals lie from Tribunal decisions to the Federal Court of Appeal on matters of law and with leave on matters of fact or mixed law and fact. Further appeals on matters of law lie to the Supreme Court of Canada, with leave.

4. Chile

In Chile, the competition law authority is the National Economic Prosecutor's Office (NEPO). This is an independent agency subject to the oversight of the President of the Republic through the Ministry of the Economy. The agency is headed by the National Economic Prosecutor (NEP), who is appointed by the President for a term of four years, renewable once. The NEP has broad powers to investigate competition law infringements. For enforcement, the NEP presents cases to the Competition Tribunal (thus, a bifurcated agency model). The Competition Tribunal was created in 2004 as a specialized, independent jurisdictional entity, subject to the oversight powers of the Supreme Court in appellate proceedings. Its members are appointed as the result of a public competition process. The Tribunal is composed of a president and four other members. The president must be a lawyer, two other members must be lawyers, and two must be economists. In addition to rendering decisions in the case of competition law infringements and mergers, the Tribunal may issue regulations, which are binding on private parties; may propose to the President of the Republic the amendment of any law or regulation that the Tribunal deems to be contrary to competition law; and may issue special reports to sectoral regulators in rate-setting proceedings regarding the competitive conditions in the sector. The Supreme Court hears appeals from Competition Tribunal decisions, and is generally deferential to the Tribunal's fact-finding. Private parties, may also bring complaints before the Competition Tribunal. The NEPO and private parties may request an injunction from the Competition Tribunal. Successful NEPO and private plaintiffs may be awarded compensatory damages in civil tribunals. A private party may join a NEPO claim at the Competition Tribunal, and vice versa. Chile has a civil law model, but has increasingly withdrawn from an inquisitorial judicial system. However, the Competition Tribunal has retained some inquisitorial powers, which can be used both in competition law

infringement cases and merger reviews. Enforcement and decision-making are split between the NEPO and the Competition Tribunal.

5. China

China's Anti-Monopoly Law (AML) became effective in 2008. Potential violations are investigated, adjudicated, and sanctioned by three different enforcement agencies. The National Development and Reform Commission (NDRC) is responsible for price-related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly (abuses by state and local governmental bodies, including provincial blockages of trade across borders). The State Administration for Industry and Commerce (SAIC) is responsible for non-price related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly. It is noteworthy that, pursuant to Article 52 of the AML, the role of the NDRC and the SAIC in tackling administrative monopoly is marginal and is limited to making "suggestions" on the handling of the case to the relevant "superior authorities" of the alleged abusive governmental bodies. The Ministry of Commerce (MOFCOM) is responsible for enforcing the merger control regime. Above these three agencies is the Anti-Monopoly Commission (AMC), a high-level consultative and coordinating organ without law enforcement powers. The Office of the AMC has been formally set up within the MOFCOM. The AML provides that the enforcement agencies may authorize the corresponding organs at the provincial level to assume responsibility for anti-monopoly enforcement functions. The division of AML enforcement responsibilities among the three agencies, especially the division of price and non-price related matters between the NDRC and the SAIC, creates scope for frictions and conflicts. As well, the boundaries between the mandate of the NDRC, the SAIC,

and the MOFCOM and sectoral regulators are unclear, especially in connection with regulated industries, wherein state-owned enterprises may be protected by sectoral regulations. The independence of these agencies is limited by the fact that the AMC and the three enforcement agencies all fall under the oversight of the State Council of China (the country's highest executive body). To date, the AMC's role and practices as a consultative and coordinating body are unclear and require further observation.

Contemporary China is a civil law country. The legislature has the power to interpret the Constitution and statutes. The court system is divided into four levels: the basic people's court, the intermediate people's court, the higher people's court, and the Supreme People's Court. The Communist Party of China formally introduced the principle of "rule by law" in 1997. The court procedure is usually inquisitorial and is not bound by precedent. A court case is usually heard at two levels (the first instance trial and the appellate trial). A judgment rendered by the appellate court is final and enforceable. However, if any party is dissatisfied with the final judgment and meets certain statutory criteria, the party may apply to invoke a retrial procedure. The AML entitles individuals and entities to bring private actions to challenge anticompetitive conduct and to claim damages. The scope for private actions under the AML is wide, and stand-alone and follow-on litigation are both permitted. Damages and injunctive relief are available to plaintiffs suffering loss from anticompetitive conduct. Further rules on private actions pursuant to the AML are in the drafting stage.

6. European Union

The competition law provisions of the European treaty have remained unchanged since the Treaty of Rome was adopted in 1957. Now called the Treaty on the Functioning of the European

Union (TFEU), Article 101 prohibits agreements, concerted practices, and decisions of associations of undertakings that may affect trade between member states and have as their object or effect to restrict competition. Article 101(3) contains a legal exception for otherwise unlawful practices where they contribute to improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives, and do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Article 102 prohibits the abuse of a dominant position and lists a number of illustrative practices constituting abuse. Merger review was established in 1989 by regulation and was substantially reformed in 2004.

The European Commission is the body primarily responsible for the enforcement of these provisions. Member-state courts and competition authorities may also enforce Articles 101 and 102.

The European Commission is composed of twenty-seven commissioners, each appointed by a member country. One commissioner holds the portfolio for competition. Competition matters reside in the Competition Directorate, which is headed by the Director General of Competition. The Directorate is subject to the oversight of the European Commission. Case teams in the Competition Directorate investigate potential violations and review mergers.

The European Commission, through the initiation of the Competition Directorate, investigates, enforces, and adjudicates all issues relating to competition law within its jurisdiction (hence, an integrated agency model). The case team writes the draft of the decision, albeit usually after a hearing and much vetting within the Competition directorate, Legal Service

for the directorate, and a committee of member-state experts. The Commission does not sit as an adjudicating body. Appeal lies to the European General Court, and further to the European Court of Justice on matters of law.

Private actions cannot be brought within the European Union adjudication system, but EU law requires that the member states have effective vehicles for private enforcement. The European Commission is currently consulting with stakeholders on the possibility of a framework directive that would set standards for member-state private actions.

EU law melds civil and common law. The adjudication within the EU system is administrative and inquisitorial.

7. India

India has a common law legal system. Its competition regime is governed by the Competition Act. The Act was passed in 2002. The government constituted the Competition Commission in 2003.

The original form of the Act allowed the Commission to prosecute and decide cases and did not require the chairman to be a lawyer. This institutional arrangement was challenged as unconstitutional for lack of separation of powers, and during the pendency of this challenge the government proposed to amend the Act to address *inter alia* the issue of lack of separation of powers. Accordingly, the Competition (Amendment) bill was introduced into the Parliament in September 2007. This bill was enacted and is now the governing law.

The Competition Amendment Act of 2007 rewrote much of the original legislation. The amendment separated the Commission into two independent bodies—the Competition Commission of India (Commission), an expert administrative body, and the Competition

Appellate Tribunal (Tribunal), an adjudicatory appellate body. The Commission may commence inquiries either on its own motion or on receipt of a complaint from any person, consumer, or their association or trade association or on reference from the central government or the state government or any other statutory body. The Commission is further assisted by the Director General of Investigation. The Office of the Director General is the investigative arm of the Commission. The Commission must refer all matters for investigation to the Director General. The Commission is not bound by the findings made by the Director General. The Commission may choose either to accept or reject the investigation report or issue fresh instructions to the Director General for carrying out further investigations.

The Commission consists of a chairperson and up to six other members who are required to have knowledge and professional experience of not less than fifteen years in the field of competition law and policy, economics, international trade, finance, commerce, etc. The appointment is made by the government on the basis of a recommendation made by a selection committee chaired by the Chief Justice of India.

The Tribunal discharges the appellate function. Any party aggrieved by an order of the Commission may appeal to the Tribunal. The Tribunal, after giving the parties an opportunity to be heard, may modify or set aside the order of the Commission. Parties aggrieved by the Tribunal's order may make a final appeal to the Supreme Court of India. The Tribunal consists of a chairperson and two other members. Tribunal members are required to have knowledge and experience of not less than twenty-five years in competition matters including areas such as economics, business, commerce, international trade.

Both the Commission and the Tribunal are structurally independent statutory bodies. However the Government may, subject to certain conditions laid down in the Act, (i) exempt a

class of enterprises from the application of the Act, (ii) issue directions to the Commission, and (iii) supersede the Commission. These provisions are meant to be an exception; not the rule.

The structure of the Indian competition law system is a mix of a bifurcated agency model and the integrated agency model. The Commission is vested with inquisitorial, investigative, regulatory, adjudicatory, and, to a limited extent, advisory jurisdiction. The Tribunal has appellate jurisdiction over the orders passed by the Commission.

8. Japan

Japan's Anti-Monopoly Act (AMA) was originally enacted in 1947 at the prompting of US occupation authorities. The Japan Fair Trade Commission (JFTC), which investigates and enforces potential violations of the Act, was designed to follow the model of the US Federal Trade Commission. At least with regard to civil enforcement, the JFTC structure follows the integrated agency model. The Commission investigates violations of the Act, proposes remedial orders and/or administrative surcharges (a form of administrative fine), holds adversarial hearings in disputed cases, and decides whether there is sufficient evidence to support a finding of a violation and the entry of an order. Hearing officers are JFTC officials but must be independent from the investigators. JFTC decisions can be appealed twice, namely to the Tokyo High Court and the Supreme Court. On appeal, the courts defer to JFTC decisions under a substantial evidence rule which binds the courts' fact-findings to some extent. Certain violations of the AMA can be prosecuted criminally, although hard core cartels (Unreasonable Restraint of Trade) are usually the only target. The JFTC has authority to investigate criminal violations, but not authority to prosecute. Where prosecutions are sought, cases are referred to the Public Prosecutor's office. Thus, for criminal enforcement, the JFTC reflects a version of the bifurcated

judicial model. The JFTC is administratively attached to the Cabinet Office, rather than being part of a separate Ministry. Under the AMA, the JFTC is statutorily guaranteed independence; its chairman and four commissioners are appointed by the Prime Minister with the approval of both houses of the Diet; and the chairman and commissioners serve for fixed terms.

Private parties can obtain injunctive relief and single damages for violations of the AMA. Private damage suits under the AMA cannot be filed until the JFTC enters a final and binding cease-and-desist order. Private damage suits are tried by a special panel of the Tokyo High Court rather than by a court of general jurisdiction. Plaintiffs seeking damage recovery can avoid the procedural restrictions of the AMA, however, by filing suit under the general tort provisions of the Civil Code. Private injunction suits can be filed with a court of general jurisdiction without any order of the JFTC. There are few successful suits brought under the AMA; most successful suits challenging anticompetitive behavior are brought under the civil code or other statutes relating to bid rigging in government procurement. Reform proposals presently being debated in Japan would eliminate the right to a JFTC hearing in contested matters, and the Tokyo District Court would review JFTC orders de novo, moving the Japanese regime in the direction of the bifurcated judicial model.

9. South Africa

South Africa has a common law legal system. Its current competition regime is just over a decade old and is based on the Competition Act 1998, which is administered by three institutions: the Competition Commission, the Competition Tribunal, and the Competition Appeal Court. The Commission is the investigative and enforcement authority with respect to complaints alleging anti-competitive conduct, which it can refer to the Tribunal for a decision.

Thus the investigation and enforcement functions are structurally independent from the first-level adjudication functions. The Commission has authority to approve or prohibit intermediary mergers and can recommend action on large mergers to the Competition Tribunal. The Commission is responsible for negotiating settlements with respondents in complaints proceedings, issuing advisory opinions, and granting exemptions from the Act such as for agreements that promote exports, small business, or the ability of historically disadvantaged persons to become competitive. The Competition Tribunal is an administrative tribunal composed of lay members drawn from a range of disciplines (economists, lawyers, accountants, but not judges). It is considered a tribunal of record, although not a formal court. The Tribunal is in effect the court of first instance in all competition matters. It adjudicates on, and provides remedies in respective complaints against prohibited practices, and assesses and adjudicates large mergers referred to it by the Commission. In some contexts, it acts as an appellate body in respect to issues over which the Commission has decision-making authority, such as the approval of intermediate mergers and the granting of exemptions from the Act. The Tribunal has extensive remedial powers, including prohibition of mergers, the imposition of injunctive relief, the levying of administrative penalties, and the ordering of divestiture.

Appeals from Tribunal decisions lie to a three-judge special competition panel of the Competition Appeal Court, which is a special division of the High Court. Only sitting judges may be appointed to the Court. Review proceedings may be instituted where there are alleged irregularities or improper conduct during the hearing process. The Competition Appeal Court also hears reviews. There is a possible further appeal to the Supreme Court of Appeal, and—if constitutional issues are raised—to the Constitutional Court. The appeal courts have not shied away from overturning the Tribunal's decisions, in respect of either fact-finding or legal issues.

Private enforcement actions (including actions for single damages, interim relief orders, and declarations) are available to complainants. An action for damages may be instituted once a right to such damages accrues, which is either on the date that the Tribunal makes a determination on the matter or on the date that any appeal process is concluded.

The South African model is thus a bifurcated agency model—a specialized investigation and enforcement authority that brings enforcement proceedings before a specialized competition tribunal for adjudication.

10. United States

The United States is a common law jurisdiction. The US enforcement system is complex. There are two major federal enforcement agencies and fifty state enforcement agencies, plus five federal districts or territories, and enforcement through private litigation. The state attorneys general can enforce federal antitrust law as well as state antitrust law when state residents are injured. The two US federal agencies are the Department of Justice Antitrust Division and the Federal Trade Commission. The former is a division of the executive branch; the latter is an independent regulatory agency. The Antitrust Division of the Department of Justice follows the bifurcated judicial model, investigating cases and bringing enforcement actions in federal courts of general jurisdiction. The Federal Trade Commission, consisting of five commissioners, follows the integrated agency model, with power to investigate and adjudicate cases internally, subject to subsequent appellate court review. The first level of adjudication within the agency occurs before an administrative law judge (ALJ). The ALJ's decision may be appealed to the Commission. The Commission's decision may be appealed to a federal appellate court. The appellate courts normally give deference to fact-finding by the Commission. They may overturn

fact-finding that is clearly erroneous. Appellate courts have full power to decide questions of law, including issues of statutory interpretation. They may give deference to mixed fact-and-law conclusions; and they may be guided by interpretations by the specialized agency of the law that it is charged with applying.

If the Federal Trade Commission wishes to enjoin conduct or a merger pending proceedings in the Commission, it must seek the injunction in a federal district court. To this extent, the FTC procedures have elements of the bifurcated judicial model. The standard applicable to the FTC in seeking a preliminary injunction (serious questions on the merits is sufficient to shift the burden to defendant to invoke equities) is lower than the standard applicable to the DOJ (reasonable probability of success and balance of the equities). This disparity has led to proposals to harmonize the standard. So, too, the significant level of overlap of jurisdiction of the two federal agencies, especially on mergers, has produced proposals for rationalization.

The Antitrust Division of the Department of Justice has power to prosecute criminal antitrust actions in federal courts of general jurisdiction. The FTC has only civil enforcement authority. State enforcement is handled by each state's attorney general and enforcement takes place exclusively through court litigation. Private antitrust suits for treble damages and injunctions may be brought in federal and state courts of general jurisdiction. The two federal antitrust agencies, which have overlapping formal jurisdiction in many areas of antitrust enforcement, notify each other of pending enforcement actions and have evolved informal agreements as to which agency should assume lead responsibility for reviewing mergers and non-criminal conduct cases in particular sectors or industries.

Appeals from federal appellate courts may be taken to the Supreme Court of the United States, but the Supreme Court has wide discretion to deny review. The United States has an

adversarial litigation system. In the Antitrust Division of the DOJ, the enforcement and decision-making functions are separated; in the FTC they are institutionally combined.

11. International

The international chapter deals with the following four institutions insofar as they are relevant to competition law: the World Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the International Competition Network (ICN).

The agreements under the aegis of the World Trade Organization contain few antitrust law rules, although virtually all provisions relate to competition by limiting state measures that restrict trade (and thus usually competition). Adjudicative functions within the WTO are entrusted to the Dispute Settlement Body. Complaints are made by member nations. Consultations ensue. If matters are not resolved, the DSB refers the complaint to a panel. A party may appeal on matters of law from a panel report to the Appellate Body, a standing body composed of seven individuals, one each for broad geographic areas of the world.

The dispute resolution panels receive evidence and hear argument, both written and oral. The panel submits an interim report to the parties; after taking account of feedback from the parties, it submits a final report. If there is an appeal, parties have a right to a brief hearing before the Appellate Body and they submit written briefs. Appellate Body reports are adopted by the DSB and are final unless the DSB decides by consensus not to accept the report.

The structure of the OECD, UNCTAD, and ICN is less relevant because these organizations have no rule-making or dispute resolution authority. The OECD is composed mostly of developed nations. It operates through committees including the Competition Committee. It

issues recommendations, sponsors peer reviews, and facilitates work product on common issues. Through its Global Forums, it reaches out to developing countries. UNCTAD is the principal arm of the United Nations General Assembly dealing with issues particularly relevant to developing countries. It maintains, and updates through commentary, a set of principles on competition policy that the UN nations originally adopted in 1980. Like the OECD, it sponsors peer reviews and it facilitates research projects. The ICN, unlike OECD and UNCTAD, is a roots-up virtual project on competition issues only; and its members are competition authorities, not nations. A number of private lawyers, economists, business people, and academics are non-governmental advisors and contribute to its work. ICN facilitates the sharing of knowledge on rules and processes of antitrust law and procedures; it derives and disseminates recommended practices, and it facilitates convergence of law and practice.

B. MANDATE

1. Australia/New Zealand

The stated objective of the competition legislation in New Zealand is to “promote competition in markets for the long-term benefit of consumers within New Zealand.” In Australia, the objective is to “enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection.” Competition policy in Australian and New Zealand is influenced strongly by policy in the United States and, to a lesser extent, the European Union. As a result, the focus is primarily on competition as a means to achieving efficient output and lower prices to consumers.

Both the NZCC and ACCC are responsible not only for traditional *ex post* competition law enforcement but also important areas of *ex ante* economic regulation, specifically access pricing and more general forms of price control in industries that are structurally incapable of workable and effective competition (mainly utilities industries). In addition, both agencies are responsible for enforcing consumer protection and fair trading rules.

2. Brazil

Both the old and the new Brazilian competition laws state the mandate as follows: the prevention and repression of violations against the economic order, guided by constitutional principles of free enterprise, free competition, social role of property, consumer protection, and repression of the abuse of economic power. Despite the reference to other principles, the authority's focus is on competition policy and its goal can be understood as the enhancement of consumer welfare. Consumer protection and fair trading in Brazil are handled by separate statutes and fall outside of CADE's competences.

3. Canada

Section 1.1 of the Competition Act states (rather unhelpfully):

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

In addition to enforcing competition laws, the Competition Bureau also has a statutory mandate to investigate and enforce prohibitions against unfair or misleading consumer advertising or related practices. It has no *ex ante* regulatory powers. Some sectoral exemptions exist for agricultural and fishing cooperatives, and labor unions. More generally, the courts have evolved a Regulated Conduct Defense, which provides immunity for parties acting pursuant to validly enacted provincial or federal legislation or regulation where the conduct in question might otherwise constitute a violation of the Competition Act. The precise parameters of this defense have not been clearly resolved in the case law. In addition, the Competition Bureau has overlapping jurisdiction with a number of sectoral regulators in areas such as telecommunications, broadcasting, airlines, and railways, which has sometimes proven problematic, particularly with respect to merger review in these sectors, where the respective jurisdictions of the Competition Bureau and the sectoral regulators have not been clearly delineated.

4. Chile

The objective of Chile's competition law is "to promote and defend free competition in the markets." This objective has sometimes been criticized as vague and imprecise. Neither NEPO's nor the Competition Tribunal's mandates extend to consumer protection, which falls within the jurisdiction of a separate agency. There is potential for overlapping jurisdiction with sectoral regulators in a range of regulated sectors; sectoral regulators typically do not file claims or initiate consultations before the Competition Tribunal, except for energy and telecommunications issues.

5. China

The objectives of China's anti-monopoly law include promoting efficiency, encouraging free competition, safeguarding healthy development of a socialist market economy and the public interest, protecting the state-owned economy and small business, encouraging the expansion of domestic enterprises and scrutinizing foreign takeovers. No clear hierarchy has been established between these various objectives, and identification of broader non-competition goals may cause inconsistency in interpretation and enforcement of the AML. The AML also provides a statutory exclusion for the agricultural sector and sets out general exemptions for restrictive agreements. In addition, in relation to anticompetitive agreements, the AML also includes a sweeping clause that exempts "other circumstances as stipulated by law and the State Council." The boundaries between the jurisdiction of the three competition agencies and sectoral regulators are unclear.

6. European Union

The European Commission and major early decisions of the European Court of Justice have emphasized that the rationale for the competition provisions was the elimination of "distortions" within the internal market. Hence competition policy was historically conceived as advancing the goal of freedom of movement of goods, services, capital, and people within the European Union. Consumer or total-welfare rationales were not a central feature of the justifications for EU competition law. In recent years, EU treaty development has emphasized a range of economic and, more exceptionally, social objectives of the EU beyond completing the internal market, including protecting the competitive structure of the market, protecting the competition process, preserving and sometimes creating openness of markets and market access, and protecting the interests of consumers.

7. Japan

Japan's Anti-Monopoly Act aims to prevent anticompetitive conduct and thus to promote innovation and consumer welfare. It also regulates abuse of a superior bargaining position (ASBP), which provision in effect protects small- and medium-sized enterprises.

The JFTC formerly had power to enforce certain consumer protection legislation, but in 2009 this jurisdiction was ceded to the new Consumer Affairs Agency. The JFTC can apply the Anti-Monopoly Act to regulated industries absent explicit exemptions, of which there are relatively few. Rather strikingly (compared to other competition law jurisdictions), the JFTC also devotes considerable resources to policing low prices in Japan's economy, including bidding too low on public contracts. The JFTC provides expedited resolution of complaints of "unjust low sales prices" and provides formal and informal consultations for a high volume of cases in this context.

8. South Africa

The country's democratic transition from apartheid in the 1990s gave high priority to the redressing of economic inequality. The government chose competition law as one of the tools to achieve this. The new regime was mandated to use competition policy to address the failings of the old system and to promote the policy goals of employment and black empowerment. The Competition Act thus has an extensive and ambitious list of goals, which call on the authorities to balance both traditional competition concerns and public interest objectives. The Act embraces the goals of creating a free market and effective competition, but also incorporates uniquely South African elements, including addressing its exclusionary past by promoting participation of all citizens in the economy and promoting the fair distribution of ownership and control of markets among different racial groups. The preamble to the Act promotes the pursuit

of “an efficient, competitive economic environment, balancing the interests of workers, owners, and consumers and focused on development.” Marketing practices and consumer protection issues are not part of the jurisdiction of the competition authorities.

9. United States

The Sherman Act does not specify its purposes. It was applied for many years against loosely defined economic “power.” It is interpreted today to prohibit conduct and transactions that increase or maintain market power and hurt consumers.

In addition to its antitrust law enforcement agenda, the Department of Justice pursues an active competition advocacy role within the federal government, often providing its views to sectoral regulators. In some areas, the DOJ enjoys concurrent authority with sectoral regulators, and in some few other areas its enforcement authority is preempted by regulation. The Federal Trade Commission has a mandate to enforce the Federal Trade Commission Act. This is a broad mandate, which covers all of the anticompetitive conduct prohibited by the Sherman Act and the Clayton Act, and arguably a margin beyond (the FTC Act prohibits “unfair methods of competition”). The FTC also has a consumer-protection mandate—to prevent “unfair or deceptive acts or practices”—which is usually exercised quite separately from its competition authority.

10. India

The preamble of the Competition Act states that the statute has been enacted with a view towards the economic development of the country. The Commission is charged with preventing practices from having an adverse effect on competition, promoting and sustaining competition in markets,

protecting the interests of consumers, and ensuring freedom of trade of participants in markets in India. According to the Supreme Court of India, “The main objective of the Competition Law is to promote economic efficiencies using competition as one of the means of assisting the creation of [a] market responsive to consumer preferences.” The Act is applicable with equal force to government-owned enterprises and even government departments as well as private enterprises. The Act expressly excludes the sovereign functions of the government. There is potential for jurisdictional overlap between the Commission and the sector regulator. The Act provides a non-obligatory reference mechanism, requiring the sector regulator and the Commission to make a reference to each other on matters of mutual concern. Consumer protection issues are not within the jurisdiction of the Commission. India has an exhaustive consumer protection law that includes unfair and restrictive trade practices in its ambit.

11. International institutions

The mandate of the WTO is to move increasingly towards lower barriers to trade and, in that spirit, to set the rules of world trade by the members’ negotiation, by interpreting the rules, and by facilitating compliance with the rules. Compliance is triggered by member state complaints. Violations can be enforced by injured states, who may retaliate by imposing trade penalties on the violating state.

The mandates of the OECD, UNCTAD, and ICN are explained above in the section on Institutional Structure.

C. DUE PROCESS NORMS IN CASE-BY-CASE DECISION MAKING

1. Australia/New Zealand

Competition law in Australia and New Zealand (with the recent exception of the criminalization of cartels in Australia) is predominantly civil in nature. Within the court system, principles of due process and rights of defense are similar to those applicable in the United Kingdom or the United States, reflecting Australia and New Zealand's position as commonwealth countries and former British colonies. In relation to agency determinations, issues of due process are generally framed in terms of judicial review principles of natural justice, which require agencies exercising public powers to exercise those powers in a procedurally fair manner. Typically, this mandates the right to be heard in relation to a matter affecting one's interests, and the right to have adequate notice of reasoning and evidence relied upon by the decision-maker. Reflecting these principles, almost all agency decision-making in Australia and New Zealand is attended by extremely rigorous consultation processes with affected parties requiring that agencies i) advise the affected party of the proposals they are considering, and the reasoning and evidence they have considered in formulating the proposals; ii) provide an opportunity to comment on these proposals as well as the reasoning and evidence; and iii) give genuine consideration, free of pre-determination, to the affected parties' submissions.

In relation to investigations, parties have on occasion complained that the agencies' use of their investigative powers is harsh and oppressive, imposing massive costs and unreasonable deadlines in a manner allegedly unjustified by the circumstances of the investigation. However, practitioners interviewed for this study agreed that the current chairpersons of the agencies have taken steps to promote greater efficiency, timeliness, and reasonableness in the investigative process. The institutional arrangements of competition law in both countries strongly support the independence of the commissioners from political interference in case-by-case decision-making.

The legal principles governing penalties ensure proportionality of the penalty to the conduct by allowing courts to set penalties relative to a maximum figure based either on the commercial gain attributable to the infringement or the turnover of the infringer.

Rights of review and appeal vary, depending on the nature of the decision. Some practitioners and businesses in New Zealand have expressed dissatisfaction with the constraints on appeals from regulatory determinations, which exclude challenges to the merits of the agency's decision. With the recent criminalization of cartels in Australia, due process issues relating to rights of defense are likely to arise, given that the ACCC's investigative powers have traditionally been predicated on a civil rather than a criminal regime. For example, parties are not entitled to the privilege against self-incrimination in relation to testimony compelled by the ACCC, and thus the agency will have to determine how to use its powers in order to preserve the admissibility of evidence in subsequent criminal proceedings.

2. Brazil

Due process in competition law affairs is safeguarded in general by the Brazilian constitution and by principles of administrative law. Neither the old nor the new statute contains general due process rules. They do contain rules on practical matters such as deadlines pertaining specifically to procedures within the CADE.

The level of protection of constitutional rights applied to administrative and criminal procedures in general is very high. For example, parties cannot be required to produce evidence against themselves, even in administrative proceedings, and parties have the right of access to any information that may be used against them. In cartel investigations, this ultimately means

that parties are often granted access to documents at an earlier stage than available in other jurisdictions.

In the context of cartel cases, some issues of due process and rights of defense have been raised by targets of investigations under the old law. Respondents have, for example, challenged the presumption of truthfulness attributed to a party's confession in leniency cases, it being claimed that such presumption violates the principle of presumption of innocence. Also, more technical issues have been raised, such as the validity of foreign documents and evidence in international cartel cases. Criticism has also been directed to the length of time taken in cartel investigations. Most of the cases in which such issues have been raised are yet to be decided.

3. Canada

With respect to criminal prosecutions for violations of the Competition Act (now principally cartel cases), general procedural protections for defendants are considered adequate, given that these matters are tried in the ordinary criminal courts and are subject to the due process protections in the Charter of Rights and Freedoms. In civil matters, there have been concerns in the recent past over the Bureau's utilization of Section 11 orders under the Competition Act, available by ex parte application to the Federal Court, demanding production of classes of documents named in these orders. Specifically, concerns have arisen as to the breadth of these demands, not only with respect to immediate parties to transactions but also with respect to competitors, suppliers, and customers. Supplemental Information Requests (SIR) have been introduced in recent amendments to the Competition Act (similar to Second Requests under the Hart-Scott-Rodino Act in the US). These may substitute for Section 11 applications in merger

cases, and similar concerns about the potential for excessive frequency and scope of SIRs have been expressed.

Further concerns have been expressed relating to the inability or unwillingness of case officers within the Competition Bureau responsible for particular files or more senior officers to whom they report to isolate and communicate to the parties in a timely fashion the critical issues of concern to them in an investigation. Such early communication would permit the parties, again in a timely fashion, to address these concerns either by way of demonstrating that they are unwarranted or that remedial options may be available that effectively address them.

4. Chile

Enforcement action may be initiated before the Competition Tribunal at the request of the National Economic Prosecutor's Office, through a claim filed at the Competition Tribunal or by a lawsuit filed by a private individual. Once the Tribunal admits a complaint, it must notify the affected party, who may reply within a fifteen-day period or ask for an extension. After the term to reply to the claim has expired, the Tribunal may summon the parties to a conciliation hearing. If the Tribunal considers this not appropriate or if the conciliation procedure fails, it can set a twenty-day period for the submission of evidence. Once this period expires, the Tribunal must set the date and time of the public hearings, in which the parties' attorneys can submit pleadings. In the case of merger review, after the request for a merger review, the Tribunal opens the procedure with a decree published in the official gazette and on the Internet website of the Tribunal. The decree must be notified to NEPO, public authorities who are directly affected, and economic agents who are related to the matter, so that they may provide information and economic evidence before the Tribunal. Once the period expires, parties may evaluate the

recommendations that NEPO has made to the Tribunal and communicate their responses to it. After a period of fifteen days expires, the Tribunal may summon a public hearing so that those who provided information may express their opinion to the Tribunal. In all proceedings, decisions of the Tribunal, with the exception of the final ruling, are subject to challenge before the same Tribunal. All final rulings are subject to appeal to the Supreme Court, which hears such appeals in preference to other matters. While decisions of the Tribunal are not normally reversed by the Supreme Court, the Supreme Court's appellate jurisdiction is not entirely clear and its decisions are sometimes criticized as formalistic and unpredictable.

5. China

The Anti-Monopoly Law (AML) and the accompanying regulations have set up basic procedural rules for the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC). In December 2010, effective in February 2011, the NDRC and the SAIC issued further procedural rules relating to the leniency program and imposition of fines. The AML and the accompanying regulations do not require the NDRC and the SAIC to publish their enforcement decisions. To date, the NDRC and its local bureaus have made several decisions on cartels and abuse of dominance, but the NDRC has not published any decision in full; public announcements are made instead. These announcements contain only general descriptions of facts and of the sanctions imposed and do not provide any reasoning. In November 2011, the NDRC confirmed that it opened an investigation on China Telecom and China Unicom, two giant state-owned telecom enterprises, in relation to their alleged abusive behavior of charging Internet service providers discriminatory network access fees in order to squeeze out competitors. Until early 2011, no official enforcement action pursuant to the AML

was reported to have been undertaken by the SAIC or its local bureaus. However, the SAIC stated that it had started to investigate complaints that it and its local bureaus had received and that it had investigated and prevented violations in seventy-nine cases involving restrictive competitive behavior in the first quarter of 2009 alone. Given the lack of published decisions or announcements, it remains unclear whether these cases were informally settled or closed under the SAIC's formal decision rules and whether the SAIC's decisional practices complied with the prescribed procedural rules. In January 2011, it was reported that a concrete manufacturers' association was penalized for market allocation by the SAIC's local bureau in Jiangsu province. In July 2011, the SAIC's local bureau in Guangdong province investigated and handled local governments' administrative monopoly conduct in relation to global positioning system services for motor vehicles.

The MOFCOM, which is responsible for the AML merger control regime, is subject to the same procedural rules as those applicable to the NDRC and the SAIC pursuant to the AML. In addition the MOFCOM is required to publish in a timely fashion decisions that prohibit or conditionally approve mergers, although publication of unconditional clearance decisions is left to the MOFCOM's discretion. By March 31, 2012, the MOFCOM had promulgated a series of AML implementing regulations in relation to merger control and had published thirteen merger decisions, including one prohibition decision (the Coco-Cola/Huiyan decision) and twelve conditional approvals. Although the MOFCOM has demonstrated its improved transparency by including more detailed facts in its merger decisions, to date, all of the MOFCOM's published decisions are still relatively light in the reasoning provided.

Although private enforcement is allowed under the AML, the AML does not contain any detailed rules of procedures for seeking damages, evidentiary rules, or guidelines for determining

compensation. Apart from the generally applicable rules set out in the civil procedure law, China's courts have been carefully developing private litigation rules pursuant to the AML. Since 2009, the Supreme People's Court has been drafting judicial interpretations on private suits brought under the AML. It issued draft interpretations for public comment in April 2011. It is expected that the interpretations will be finalized shortly. Once issued, the interpretations are expected to provide more certainty and predictability to litigants and to enhance private enforcement of the AML. To date, a number of claims have been filed with the courts but in no case has the plaintiff won.

6. European Union

The issue of appropriate due process norms in case-by-case decision-making in EU competition law is currently a matter of vigorous debate. At its inception, competition law within the EU was largely conceived as an administrative function constituting one aspect of the larger executive functions vested in the European Commission by the Treaty of Rome. In many ways, this conception of the Commission's functions, in the competition area, was also consistent with the civilian traditions of the six original signatories to the Treaty of Rome. However, a concatenation of factors has cast due-process issues into sharp relief in recent years. First, the escalating level of fines imposed by the Commission in cartel and abuse cases has led some stakeholders and commentators to view Commission proceedings in these contexts as akin to criminal or quasi-criminal proceedings, warranting the kind of procedural protections associated with criminal proceedings. Second, the Treaty of Lisbon (2009), which last amended the Constitutive Treaties, adopted the protection of fundamental rights as one of its objectives, and the European Convention on Human Rights has been increasingly influential in European Court of Justice

judgments on due process rights. The EU's candidacy for membership in the Convention reinforces this trend.

Several due-process issues have been raised. First, the nature of the Competition Directorate as an integrated agency that undertakes investigative, enforcement, and adjudicative functions has raised concerns of at least the perception of bias in adjudication. Second, EU competition law is not criminal law (despite possibilities of very high fines) and thus there is no right against self-incrimination. Moreover, lawyer-client privilege is defined by the civil law rule, which does not protect communications with in-house lawyers. Third, the hearing process is criticized. It follows civil law procedures, with the record resting primarily on written material submitted by the Commission, the parties, and interested third parties. The oral hearing is short, intended to clarify certain disputed matters. The proceeding is inquisitorial rather than adversarial and thus there is no right of the defense lawyers to cross-examine witnesses. The Commission has taken steps and proposes yet more steps to strengthen the independence and range of responsibilities of the Hearing Officer in these proceedings, but the Hearing Officer's role is still largely confined to ensuring procedural due process and otherwise resolving procedural issues. The Hearing Officer has no substantive decision-making authority. The Commissioners, who make the ultimate Commission decisions, do not attend the hearing.

The fourth concern regards the scope of appeal. Affected parties have rights of appeal from Commission decisions to the General Court. Fact-finding can be set aside if it is manifestly erroneous. In some cases the General Court appears to give a more thorough review of factual issues, but this is not mandated. The courts can and do interpret the law. Thus, appeals provide only limited ability to challenge substantive and technical aspects of Commission decisions. More robust court review has been suggested by the Commission. This proposal is pending.

Fifth, following the enactment of the Modernisation Regulation in 2003, enforcement of EU competition law was, to an important extent, decentralized, and powers devolved to national competition authorities (NCAs) of member states, subject to the possibility that the Commission itself might decide to pursue a matter. Much substantive and procedural convergence has occurred among the NCAs, but substantial differences persist. Due process rights accorded by different member NCAs may significantly diverge. Parties have asserted that a risk of double jeopardy may arise in the prosecution of complaints involving the same set of facts that are pursued simultaneously or sequentially by different NCAs and possibly by the Commission itself. However, care is usually taken to assess fines based only on effects within the court's own territory.

Many of the challenges to due process in the EU are made by individuals accustomed to the adversarial, common law system.

7. India

The Competition Act and the regulations made thereunder establish the framework for proceedings before the Competition Commission of India and the Competition Appellate Tribunal. The Act requires the Commission and Tribunal to follow the principles of natural justice. The Supreme Court has interpreted the doctrine of natural justice to include (1) no-one should be condemned or deprived of his right, even in quasi-judicial proceedings, unless he has been granted the right to be heard, (2) affected parties have the right of adequate notice, and (3) courts including quasi-judicial bodies are required to deliver reasoned orders.¹⁹ The competition

¹⁹ The concept of reasoned order/speaking order under the Indian legal system is similar to the provision contained in the Section 8 of the Administrative Procedure Act. Section 8 of the said Act reads, “All decisions (including initial, recommended and tentative decisions) shall include a statement of findings

authorities are expected to ensure compliance with these principles. Article 14 of the Indian Constitution is considered the guardian of the principle of natural justice. Article 14 declares that “The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India.” The right of equality before law is a fundamental right under the Indian Constitution.

The Competition Act requires that the Commission shall, on receipt of reference or information or on its own knowledge, form an opinion whether or not there exists a *prima facie* case for issuance of a direction to the Director General of Investigation. At this stage the Commission is not required to issue a notice to either the informant or any other person. Once the Commission receives the report from the investigating authority, it must forward a copy of the report to all parties concerned with the investigation and must provide a right of hearing to the parties prior to arriving at any conclusion. Once the proceeding before the Commission is concluded, the parties have the right to appeal to the Tribunal, as long as the order is appealable under the Act. The Tribunal must give notice to the parties and thereafter conduct a hearing and, as it may deem fit, confirm, modify, or set aside the order of Commission. The final appeal from the order of the Tribunal lies with the Supreme Court of India.

In the cases concerning anticompetitive agreements or abuse of dominance, the Commission may issue a cease-and-desist order and impose a penalty not exceeding 10 percent of the average turnover during the preceding three years from the date of the order. In cartel cases the Commission-imposed penalty can be the higher of either up to 10 percent of the turnover or three times the amount of profit derived from the cartel agreement. The Commission may also order the division of an enterprise in a dominant position if it has abused its dominance. In cases of

and conclusions and the reasons or basis thereof, on all material issues of fact, law or discretion presented on the record.’’

combinations that are likely to have an appreciable adverse effect on competition in India, the Commission may either prohibit or condition the combination.

8. Japan

The JFTC has almost never issued an official order in connection with a merger case. Rather, through a system of informal pre-merger consultations, it is thought that the JFTC has deterred some mergers and achieved some restructuring in others to meet its competition concerns. Before a new framework for the merger review process took effect in July 2011, many stakeholders criticized the informal consultation system for lack of transparency and exclusion of third-party viewpoints. With respect to non-merger cases, the current investigatory system has been criticized for exclusion of attorneys for respondents at the interrogation phase of investigations and the lack of attorney-client privilege. As well, as noted above, there have been criticisms of the internal hearing processes conducted by the JFTC both for perceptions of biases, and proposals are under consideration to require hearings in contested matters before the Tokyo District Court.

As to proportionality of remedies, the JFTC's surcharge orders against cartels raise concerns about their constitutionality in light of the possibility of double jeopardy, given that a hardcore cartel may also be subject to a criminal fine. Because a surcharge is nondiscretionary in order to avoid unconstitutionality, the system has prevented the JFTC from exercising flexibility in penalty setting and enforcement. In addition, the surcharge must be linked to actual turnover in the relevant market. However, in the case of international market division agreements, where foreign companies promise not to sell in Japan, they may not have to pay a surcharge because

they do not generate any actual turnover in the Japanese market, which may lead to under-deterrence.

9. South Africa

The South African Constitution states that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” However, balancing fair administrative action protections with the goals of the Competition Act has been a difficult challenge. The designers of the South African competition laws system wanted the institutions to reflect the goals of equality and accessibility espoused in the Act. In an attempt to avoid legalizing the competition process, the Act enjoins the Tribunal to conduct itself informally. The Tribunal is not required to follow High Court procedures in its detailed rules regarding pleadings and evidence. The Tribunal is also granted inquisitorial powers. Nonetheless, competition law in South Africa has been largely “legalized” and lawyers expect competition proceedings to run like High Court proceedings. This results in a conflict of expectations—the Competition Tribunal is not bound by the formalities observed in court proceedings, and the competition authorities aim to achieve administrative efficiency. On the other hand, the firms involved in competition proceedings are centrally concerned with the fair procedure protections to which they are accustomed in standard civil litigation.

There has been significant dissatisfaction on the part of targets of investigation in relation to the procedures followed by the Competition Commission, including the initiation of industry-wide cartel investigations without identifying the particular targets of investigation ultimately named in the referral to the Tribunal. There have also been a number of court applications for the Commission to identify more clearly the conduct that forms the basis of the alleged

contravention, and to make available documents evidencing the contraventions alleged in the referral.

In terms of proportionality of remedies to violations, under the Act a penalty may not exceed 10 percent of a firm's annual turnover in the preceding financial year, and the Act lists factors to be taken into account: the nature, duration, gravity, and extent of the contravention; the loss or damage suffered as a result of the contravention; the behavior of the respondent; the market circumstances in which the contravention took place; the level of profit derived from the contravention; the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and whether the respondent has previously been found in contravention of the Act. Most penalties have been determined through the conclusion of Consent Agreements with the Commission rather than through the imposition of fines by the Tribunal. The Commission's approach to settlement is not entirely transparent and it has no fining guidelines.

10. United States

Parties are informed at a relatively early stage by either of the two federal antitrust agencies of their concerns and are afforded the opportunity to present their views. At the Department of Justice, the parties normally are granted the opportunity to meet with the reviewing officials at each successive stage of the investigation, except that, before criminal indictment, meeting with the Assistant Attorney General is rare. In criminal cases, the grand jury process imposes special rules of secrecy, preventing DOJ attorneys from sharing certain information with the parties. At the FTC, the parties meet with and are informed by the staff, and normally have a chance to meet with all commissioners.

For DOJ matters, and FTC matters before the courts, the parties receive all of the protections of federal courts, which are substantial. They have the right to introduce and contest evidence and the right of cross-examination, except that criminal defendants may not get full information as to informants in the interest of confidentiality. Criminal defendants are entitled to heightened protections, including the privilege against self-incrimination, the right to a speedy trial, and the right to proof beyond a reasonable doubt. For civil trials, speed varies. Complex monopoly cases have been known to take several years, although the very complex Microsoft trial took only five months.

At the FTC, in administrative proceedings, the respondent is entitled to discovery and to an evidentiary hearing with examination and cross-examination. The system has been criticized for unacceptable delays. To expedite matters, on occasion the FTC has appointed one of its own commissioners as administrative law judge, but this response has generated concerns about the appearance of partiality because the commissioners vote on whether proceedings should be brought in the first instance, and they later sit as judges in the case. Moreover, there is recurrent criticism that the integrated agency model is itself in tension with the right to an impartial decision-maker.

Remedies are generally proportional to the violation. Criminal remedies are keyed to the monetary harm caused by the violation, and are subject to the constraints of the federal Sentencing Guidelines.

11. International institutions

WTO procedural rules are relatively clear. There is transparency and fairness. The publication of reports has helped to transform the dispute settlement process from one of diplomatic facilitation to one of reasoned adjudication generally of a high quality.

There is in general adequate opportunity to be heard, full notice of the allegations, adequate notice of the evidence relied on, and time to prepare. There is a right of appeal to the Appellate Body.

But panel members for dispute settlement are chosen from a large roster of experts, and also in view of the lack of *stare decisis*, expertise and predictability may vary.

Timeliness, also, is a problem. The dispute resolution process may take a considerable amount of time.

The insulation of decision-makers from external influence and their open-mindedness has been questioned. It has been alleged that panel members may be linked to or influenced by lobbies and special interests and that there may be discrimination against developing countries. The rules of conduct on dispute settlement attempt to prevent potential conflicts of interest; they require each panel and Appellate Body member to comply with a self-disclosure requirement and they contain a subsequent disclosure procedure.

The absence of rules of evidence in decision-making can be a problem, and it may become a more significant problem if antitrust should become a WTO competence. The panels lack sophistication in handling and evaluating evidence. The DSU does not include any express rules concerning burden of proof, although the AB has clarified that the party that asserts a fact is responsible for proving it. As noted, lack of *stare decisis* may create problems of predictability. Still, well-reasoned reports are likely to be followed in subsequent similar cases, and reasoning contained in unappealed panel reports tends to provide guidance.

Implementation and remedies may be problematic. A successful complainant is not awarded compensation for harm or reimbursement of expenses; it must help itself by imposing retaliatory trade sanctions on the violator. Developed countries with big markets are at a distinct advantage, and effectiveness of sanctions is a special problem for less powerful members.

In the OECD, UNCTD, and ICN, there is no case-by-case decision-making.

D. Institutional performance norms

We focus here on systemic performance characteristics, such as timeliness of decision-making, expertise, predictability, transparency, and accountability.

1. Australia/New Zealand

There is a relative paucity of competition litigation in Australia and in New Zealand, and thus limited guidance from the case law on a range of important procedural and substantive questions. Moreover, traditionally, the NZCC and the ACCC did not articulate their interpretations of the law in the form of enforcement guidance or policy papers. Therefore it was difficult to know how the agencies would approach various kinds of trade practices and economic issues. More recently, the agencies have been more forthcoming with guidelines, both substantive and procedural. Concerns over predictability remain acute with respect to allegations of abuse of dominance.

With respect to timeliness, historically agency investigations and enforcement proceedings have been extremely protracted (especially in abuse of dominance cases), with some investigations dragging on for years with little apparent progress. The current chairpersons of the agencies have made this concern a priority, and the NZCC has committed itself to ensuring that

investigations progress to proceedings or are closed within a year. Regulatory determinations are also extremely lengthy, in part because of the extensive and successive consultation procedures that are followed.

In terms of the other institutional performance norms investigated as part of this study—accountability, expertise, sufficiency of investigative and sanctioning powers, transparency, and public participation—the NZCC and ACCC perform at a high level. Both are viewed by practitioners and business as credible and generally high-performing agencies.

2. Brazil

Historically, timeliness has been one of the most serious problems in competition law enforcement in Brazil. Under the previous competition law, there was no pre-merger clearance, review was ex post, and the review often extended for long periods of time after the closing of a deal. This procedure impaired the effectiveness of the authority, as they had to deal with the issue of “unscrambling the eggs” in cases where remedies were required. Alternatively, the authorities issued injunctions imposing hold separate obligations on the merging parties. In any case, due to the extended review time frames, this imposed excessive costs on both the companies, which had to maintain separate structures and delay realization of synergies, and the authorities, which had to monitor compliance with complex obligations. The new pre-merger review system addresses these problems. The procedures limit the time frame available for merger review and make the proceeding more predictable as a whole. The new system will require more trained personnel and, generally, efficiency in vetting the mergers.

As to anticompetitive behavior, investigations have also tended to take a significant amount of time (often longer than four years), thus imposing costs on both investigated parties and the

authority. It is yet to be seen whether the integrated agency model introduced by the new competition law will increase expedition in this area of enforcement. With respect to expertise in deciding merits, it is important to stress that CADE has come a long way since the enactment of Law No. 8,884/94. The authorities' repeated handling of similar questions has contributed to a positive learning curve over the years and officials now have a comparatively high level of expertise.

Certain procedures may require attention. An example is cartel settlements, a procedure introduced in 2007. There is a lack of consistent benchmarks for the negotiation of these agreements and a lack of consistency in the level of pecuniary contributions (in Brazil, amounts paid in the context of settlements cannot be regarded as fines). Thus, the outcome of these negotiations has been unpredictable, deterring potential settling parties from approaching the authority with a view to settle. It is yet unclear how the new law might impact issues such as this, but the adoption of the new regime presents an opportunity for more guidance, clarity, and predictability.

3, Canada

A widely held concern in Canada relates to the current bifurcated Bureau-Tribunal structure. The Competition Tribunal, at least in contested cases, has often engaged in highly protracted adversarial proceedings, leading to most matters' being settled within the Bureau. In addition, there are serious concerns as to whether the Tribunal has been able to bring substantial expertise to bear on its deliberations, given the mixed-to-weak quality of many lay member appointments, as well as the lack of specialized expertise on the part of most judicial members. Some commentators believe that these concerns can be most effectively addressed by creating a three-

to five-member Competition Commission with full investigative, enforcement, and adjudicative authority (an integrated agency model), subject perhaps to an appeal on matters of law or mixed law and fact to the Federal Court of Appeal.

With respect to the Competition Bureau, its independence is not seriously questioned, although some commentators believe in this respect that it would be better constituted as a separate statutory agency rather than housed within a government department (Industry Canada).

With respect to accountability, there have been concerns in many quarters that the registration of Consent Agreements in merger cases with the Competition Tribunal, and enforcement thereof as orders of the Tribunal without review, is undesirable and that little public scrutiny of the agreement is possible given the skeletal nature of the agreements. This is exacerbated by a perception that the Bureau provides no or inadequate technical backgrounders or competitive impact assessments by which the broader public can evaluate the appropriateness of such orders or other settlement arrangements. The Bureau reports annually to Parliament on its past year's activities, current priorities, and future priorities.

With respect to expertise, concerns have been expressed regarding the lack of consistent input from senior experienced economists in the Bureau's investigative and enforcement activities.

With respect to timeliness of decision-making within the Bureau, concerns have been expressed as to the protracted nature of Bureau decision-making in many cases, and some observers favor legislated deadlines as opposed to merely internal service deadlines, in order to focus and discipline the Bureau's activities.

4. Chile

After the 2005 constitutional reforms that established as a norm the transparency of all state decisions, the right to information has been a key issue for competition law bodies; it has even been a hallmark of their behavior. NEPO has a website where some of its decisions are made public. The Competition Tribunal has created and improved its website, making accessible to the general public on a timely basis all its files and decisions.

NEPO has consulted with the public on some of its draft guidelines. The Competition Tribunal has also adopted a policy of public consultations with regard to some of its internal regulations, which must be observed by lawyers in litigating before the Tribunal.

A survey undertaken of users of the competition law system in Chile reveals that respondents consider that the performance of both NEPO and the Competition Tribunal have been improving with respect to issues such as transparency, expertise, public consultation, and predictability. Timeliness in concluding investigations within NEPO remains a concern, with some investigations dragging on for three years or more and some merger reviews taking a year or more.

With respect to expertise, the Competition Tribunal's mixed composition, jurisdiction, and appointment procedures have proven to be generally successful. Levels of expertise within NEPO seem somewhat more mixed and satisfactory levels may turn on which case officer has been assigned a given file.

The nature of the Supreme Court's appellate jurisdiction with respect to appeals from competition tribunals is somewhat unclear, and some concerns have arisen as to the level of expertise that members of the Court bring to competition appeals before it.

5. China

As noted earlier, neither the NDRC nor the SAIC is required to publish decisions or to provide reasons for its decisions. While the MOFCOM is required to publish its merger review decisions that prohibit or conditionally approve proposed mergers, it is not required to publish unconditional merger clearances or to provide detailed reasons for its decisions.

With respect to public accountability, the competition law regime reflects broader issues with China's current administrative law system because of the concentration of legislative, executive, and adjudicative functions. For example, as regards the enforcement of the anti-monopoly law, the budget allocated to the AML enforcement is not publicly available.

With respect to expertise in the three competition agency, there appears to be very limited legal expertise and even less economic expertise among employees of the NDRC and the SAIC. The MOFCOM has recruited some PhD economists to its staff.

6. European Union

In order to enhance predictability and transparency in decision-making, the European Commission regularly publishes guidelines indicating its approach to various competition law issues, typically following a consultation process initiated by the release of draft guidelines. The Commission has established an informal "peer review" mechanism as a result of which panels of DG Competition and Legal Service officials oversee draft decisions. With respect to expertise, the Competition Directorate created the office of chief economist a decade ago. The chief economist and his team gives economic guidance to case teams from the early stages of proceedings, as well as to the Director General. The chief economist and the growing support group of economists have greatly enhanced the level of economic expertise of the Commission.

With respect to timeliness of decision-making, complaints have been made of protracted investigations in non-merger matters. The Commission recently adopted internal guidelines to address this concern.

As to external accountability, the Commission reports to the European Parliament every year on the outcomes of its competition policy and enforcement activities, thus providing a review of whether the objectives identified in the plan have been attained. An Advisory Committee on Restrictive Practices and Dominant Positions, composed of representatives of national competition authorities, is consulted on all draft decisions of the European Commission.

In addition, the Economic and Social Committee, an advisory body representing various social groups, such as employers, trade unions, consumers, and small and medium undertakings, comprises a specific section dealing with single market, production, and consumption, including competition policy. The Committee may be consulted on legislative proposals by the Commission, the Council, and the European Parliament or may issue an opinion on its own initiative. The Committee also issues an opinion every year on the Commission's Annual Report on Competition Policy. Two committees at the European Parliament oversee the Commission's activities in the area of competition policy: the Committee on Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs. The European Parliament also adopts each year a resolution on the Commission's Annual Report on Competition Policy and comments on all proposals of the European Commission.

The European Ombudsman is empowered to receive complaints on alleged instances of maladministration and to open an inquiry if the complainant has advanced sufficient evidence of facts that have not been or are not the subject of legal proceedings. On occasion, the ombudsman has noted concerns with aspects of the Commission's proceedings.

7. India

The Supreme Court of India has opined that “The scheme of the [Competition] Act and the Regulations framed thereunder clearly demonstrates the legislative intent that the investigations and inquiries under the . . . Act should be concluded as expeditiously as possible. The various provisions [of the Act] and the Regulations . . . direct conclusion of the investigation/inquiry or proceeding within [a] ‘reasonable time.’” The concept of ‘reasonable time’ thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade.”²⁰

The Supreme Court has directed that the Director General of Investigation should take not more than forty-five days to submit investigation reports to the Commission and in all the cases where the Commission exercises its jurisdiction to pass interim orders, the Commission must pass the order expeditiously and in all cases within sixty days. In the cases of mergers or combinations, the Act provides that the no notifiable combination shall come into effect until the earlier of (1) 210 days from the valid receipt of notification, or (2) the date Commission approves the combination. However, under the Combination Regulations, the Commission has committed to endeavor to pass an order or issue a direction within 180 days. Further, the CCI shall within thirty days of receiving valid notice, form a *prima facie* opinion as to whether or not the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India.

Both the Commission and the Tribunal are required to publish their orders, which must be reasoned orders. The orders must appear on the website of the respective authorities. The Commission also publishes an annual report highlighting activities undertaken during the year

²⁰ Writ Petition (civil) 490 of 2003; Brahm Dutt v. Union of India.

under review. The Act empowers the Commission to make regulations consistent with the Act. The Commission has from time to time notified various regulations to carry out the purpose of the Act.

The Commission is accountable to the Parliament. The Commission is required to submit an annual report and statement of its activities to the Parliament. The Parliament may, on the receipt of a report, issue suitable directions to the Commission. The annual budget of Commission must be approved by the Parliament.

Indian competition law enforcement is relatively young and thus far only a limited number of cases have been dealt with by the Commission and the Tribunal. It is too early to make an objective assertion on issues such as transparency in the decision making process or in policy formulation and elaboration.

8. Japan

The JFTC is a large agency roughly the size of comparable competition agencies in the US and EU. It appears to investigate most cases efficiently. It has, however, encountered more difficulties with international cartels, where cases can take from two to five years to complete. The JFTC's merger reviews depended heavily on pre-merger informal consultations. Although the Commission claimed to complete these consultations within the thirty-day period required by its operations manual, in practice they took far longer. As noted above, a new legal framework took effect in July 2011.

With respect to expertise, JFTC commissioners are not required to have expertise in competition law. Chairmen have generally been alumni of the Ministry of Finance. Usually one commissioner has been a former Secretary General of the JFTC. JFTC staff are career employees

and are hired and retained on a seniority basis. Historically and currently, there have been few qualified lawyers or economists with advanced training at the JFTC.

With respect to transparency, the JFTC has issued guidelines in many areas, which have provided important guidance on its enforcement policies in the light of the lack of formal adjudications and case law.

With respect to accountability, the JFTC is accountable to the Diet in a number of ways: budget approval, appointments of commissioners, presentation of an annual report, and answering Diet member inquiries regarding specific enforcement decisions. The JFTC is also accountable to the courts, but the lack of formal decisions and the lack of party appeals to the courts have limited judicial review to minimal levels.

9. South Africa

With respect to timeliness of dispositions, the Commission has been relatively successful in concluding merger reviews expeditiously. It has also recently published new service standard commitments that reflect this policy. There is much more concern with the pace of decision-making in complaint proceedings in non-merger matters.

With respect to expertise, it has been a challenge for the Commission to attract and retain professional staff that can deal effectively with complex competition issues, given that their counterparts in the private sector are invariably well paid and have a depth of experience. The Tribunal has the necessary expertise to perform its role and the permanent members of the Tribunal are well-respected. While the Competition Appeal Court is composed of sitting members of the provincial divisions of the courts, the judges volunteer to serve on this court

because of a particular interest or expertise in competition law and therefore can be expected to be relatively well-qualified and to develop a greater expertise in the area over time.

With respect to predictability, the Commission's approach to its task is reasonably predictable in the sense that it must investigate all complaints lodged with it and analyze all mergers that are notified. Nevertheless, because of resource constraints it has had to prioritize certain aspects of its work. The Commission regularly communicates these priorities to the public. The breadth of the goals of competition policy in South Africa places inherent limits on predictability in the application of the law.

With respect to transparency in policy formulation or elaboration, there is a dearth of guidelines issued by the Commission indicating how it will apply the law. Indeed, it has issued no substantive enforcement guidelines.

With respect to public consultation and participation in policy formulation and elaboration, the Competition Tribunal has sought to encourage participation by interested stakeholders. For instance, merger rules require notifying the Minister of Trade and Industry* of the merger and the trade unions that represent a significant proportion of the employees of the merging parties. Interventions are generally encouraged by the Tribunal if the intervenor can demonstrate that it has a significant interest in the manner.

With respect with transparency of reasons for decisions, decision-making power is to a large extent *de facto* in the hands of the Commission, due to the large number of settlements in competition investigations. The Commission publicizes settlement agreements widely in the media and publishes press releases on its website. In addition, the settlement agreements themselves have to be confirmed by the Tribunal and are accessible on the Tribunal's website

* Officially, the Competition Commission now falls under the jurisdiction of the Department of Economic Development.

once confirmed. It is more difficult to obtain information regarding discontinuances, non-referrals, or decisions not to refer the matter.

With respect to public accountability, the Minister of Trade and Industry appoints the Commissioner and Deputy Commissioner based on qualifications and experience in law, economics, commerce, industry, or public affairs. The Commission has an annual performance agreement with the Department and is responsible to the Minister. Despite these links to the government, the decision-making independence of the Commission seems widely accepted. The Competition Act requires the Commissioner to prepare and submit an annual report to the Minister of Trade and Industry, including audited financial statements and a report of activities undertaken in terms of the functions set out in the Act, and a statement of progress achieved during the preceding year towards realization of the purposes of the Act. The Commissioner is periodically called on to report directly to Parliament.

The Competition Tribunal's members are nominated by the Minister of Trade and Industry and appointed by the President of South Africa. The members' tenure, like that of the Commissioner, is five years. The members of the Competition Appeal Court, who are High Court judges, are appointed by the President on the advice of the Judicial Service Commission, for a fixed but renewable term of ten years.

10. United States

Regarding operational efficiency, major issues center around merger review: first, the agencies must decide which one will review a given merger; second, both agencies face challenges in resisting excessive requests for documents and information from the parties to the transaction. The FTC faces challenges in timely decision-making in its administrative adjudication process.

The FTC sought to address this problem in 2009 with rule changes that established tighter timetables. The adoption of case-management rules by the judiciary has substantially improved timeliness of judicial adjudication.

Both agencies rate well on expertise. They both employ and retain substantial staffs consisting of lawyers, economists, paralegals, and administrative personnel; they both employ a considerable number of PhD-level economists. The statutory provisions for appointing FTC commissioners and the head of the Antitrust Division do not specify qualifications. The quality of FTC commissioner appointments has sometimes attracted criticism. Despite the initial design of the FTC as an agency expert in the problems of business, economists and business executives have been sparsely represented among commissioners. Expertise of FTC administrative law judges has also been a concern because these initial decision-makers often have little or no expertise in areas of FTC enforcement. The DOJ relies on the courts, and the FTC does so to a lesser extent. Both agencies, state attorneys general, and private parties may litigate in courts, which are generalist courts. Although issues of judicial expertise on technical antitrust matters could in theory be a problem, this does not seem to be of acute concern in a US context.

Transparency in policy guidance and decision-making is high. Both agencies issue detailed public guidelines, policy statements, and reports that describe their approach to applications of the law. Both agencies have procedures for public comment on proposed settlement agreements. DOJ court settlements are also subject to judicial review before being entered as judicial decrees. When the agencies decide to take no action on notified mergers, they occasionally release closing statements.

Outcomes are predictable to a reasonable degree, given margins of discretion for both fact-finding and applications of law; and accountability to the relevant stakeholders is good.

11. International institutions

For the WTO, we refer to the International entry on Due Process Norms, above.

The OECD. Members have good access to agenda setting. Transparency is excellent. The output of the Competition Committee is evaluated by the members of the committee every other year; the budget allocated by the OECD is based on the output of the particular committee as compared with the output of other committees, thus tending to assure accountability.

Responsiveness and level of activity have accelerated with the advent of the ICN into the circle of “competitors” dealing with the issues of antitrust in a global economy. Expertise, as reflected in reports and peer reviews, is very high. The level of research on cutting edge issues is impressive. Global Forums and other meetings, focused on issues of greatest importance to the members, provide an important venue for interaction and result in documentation that is a valuable resource.

The UNCTAD. The UNCTAD is largely secretariat-driven; the agenda is controlled by the secretariat. The work product increasingly reflects significant expertise. Recent peer reviews have been written by volunteers from member states who have substantial expertise. Significant work of the competition branch centers around the UN Set on Competition Policy, which dates back to the end of the 1970s (adopted in 1980). Its language is not entirely contemporary but cannot be changed without reopening a process for a new consensus. The gap is bridged by updating commentary on the principles of the Set. The competition branch of the UNCTAD sponsors cutting-edge research. It runs a well-received program of capacity building in Latin America, and is an important forum for convening developing (and developed) country competition officials and thus facilitating a developing country competition community.

The ICN. On all counts, performance and process are excellent. The ICN is engaged in a process of self-assessment to assure that it is responsive to its members' wants and needs and that it moves in directions desired by its members. If participation in agenda-setting and first-draft authorship fall mainly to individuals in the developed world (as it does), that is because the agencies in many developing nations have few human and monetary resources to devote to the ICN, given more urgent priorities.

IV. Concluding Reflections

We can conclude, at a level of generality, that the jurisdictions studied in this volume aspire to achieve effectiveness in competition law enforcement while assuring fair process; they wish to be and to be perceived to be legitimate, and they strive to be accountable. All three of the institutional design models identified at the outset of this introductory essay (the bifurcated judicial model, the bifurcated agency model, and the integrated agency model) can achieve these ends. The jurisdictions studied show variations, within a range, as to the specific requirements of due process. Jurisdictions strike different balances between agency effectiveness and rights of defense. Also, they achieve different levels of effectiveness. For example, several systems in our sample suffer from protractedness of proceedings and lack of sufficient expertise in decision-making, but most seem to aspire to a higher standard, and, in any event, increasing transparency of shortfalls through global competition journalism, published peer reviews, and word-of-mouth may produce gentle pressure to address the weaknesses.

We began this project with the notional norms in our template, reproduced in the Appendix to this chapter. As noted, the jurisdictional studies tend to confirm that these norms do exist within most competition law systems, although China may value independence and transparency

differently from other jurisdictions in our study. Based on the limited sample of jurisdictions covered in this volume, we are comfortable in our tentative observation tending to verify as global the institutional and process norms identified in our template, while recognizing substantial scope for variation in institutional design choices bearing on their vindication. The variation reflects a complex set of context-specific factors—historical, cultural, political, and the forces of path dependency once a particular regime matures and becomes entrenched in a country’s broader institutional matrix.²¹ Thus, while we perceive the emerging outlines of a global consensus on certain core institutional and decision-making norms in competition law, local choices as to their instantiation will continue to exert significant influence and constrain the potential for full substantive and procedural convergence of competition law regimes.

In a world in which business transactions and practices increasingly transcend national borders in their scope and effect, there is obviously increasing potential for conflict among nations in applying their domestic competition laws.²² Impressive progress has been made in promoting the convergence of competition law doctrines as they apply to the three major substantive pillars: arrangements among competitors, abuse of dominance (or monopolization), and mergers. Most recently, distinct progress has been made through the International Competition Network (ICN). Even so, as the legal realists taught us many decades ago, there will often be substantial divergence between law on the books and law on the ground. In the competition law context, one would predict that variations in the design of investigative, enforcement, adjudicative, and appellate institutions, and the decision-making processes that

²¹ See Mariana Prado and Michael Trebilcock, “Path Dependence, Development, and the Dynamics of Institutional Reform,” (2009) 59 *University of Toronto Law Journal* 341.

²² See, e.g., Richard Epstein and Michael Greve, eds., *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (Washington, DC: American Enterprise Institute, 2004).

they employ, are likely to produce divergences in policy or decisional outcomes even if the substantive legal framework is largely congruent across jurisdictions. To date, most efforts at promoting convergence of competition laws across jurisdictions have focused on substantive doctrine. To a much lesser extent have they focused on differences in institutional design and decision-making processes.

Might our project on global process norms play a role in the larger project for convergence despite the fact that our conclusions do not suggest a need for convergence of institutional design in order to fulfill the procedure/process norms?²³ We think it does, for the following reasons.

Transparency alone is a vital ingredient in attaining meaningful substantive convergence, in understanding and respecting substantive divergences, and in building bridges in the case of divergences. Moreover, the commonality of the procedure/process norms and the aspiration (or nudging) of nations to fulfill them is an important ingredient in the enterprise to maximize the sympathy of systems. The very fact of common process norms is likely to increase the respect of each nation and its people and firms for the decision-making of each other nation. Respect and regard²⁴ not only produce more harmony but are likely to work in the direction of more convergences.

Institutions and the decision-making processes that they employ are not cast in stone, and critical self-reflection on their adequacy, informed by insights from relevant comparative experience, hold significant promise for reducing the more severe or dysfunctional forms of

²³ One exception is the view of some that the inquisitorial system does not fulfill due process norms particularly in cases that might result in very high fines. If the suggestion is that civil law systems should be converted into common law systems, we do not agree. But we do observe that the lively discussion of the due process issue within the European system has led to more convergent appreciation of the requirements of the norm of due process; the European Commission has implemented additional safeguards and has proposed yet others.

²⁴ See Christine Varney, note 2 *supra*; Rachel Brandenburger, note 2 *supra*.

conflicts between or among competition law regimes in a business environment where many transactions and arrangements tend to be less local and more global in their effects. Our hope is that this project will contribute to this process of self-reflection and comparative cross-fertilization. Thus, this project may be seen as a step towards redressing the imbalance between the study of substance and the study of procedure as we work towards greater sympathy among the competition systems of the world.

Appendix

The Template—Outline of Elements Addressed in the Jurisdictional Studies

The following outline guided authors of the jurisdictional chapters.

History

Describe briefly the historical evolution of competition law institutions in your jurisdiction.

Structure

Briefly describe the contemporary structure of competition law institutions in your jurisdiction.

We suggest reference to the three basic models: i) the bifurcated judicial model, where a specialized competition investigation and enforcement authority brings enforcement proceedings before the courts for adjudication; ii) the bifurcated agency model, where a specialized competition investigation and enforcement authority brings enforcement proceedings before a separate specialized competition tribunal for adjudication; and iii) the integrated agency model, where a single agency is responsible for investigation, enforcement, and adjudicative functions, normally with rights of review in the courts. Your jurisdiction may, of course, have variations on and mixtures of the above.

Mandate and boundaries of the competition authority

What is the mandate of the competition investigation and enforcement authority in your jurisdiction, both in terms of objectives and scope? (For example, as to scope: Does the mandate extend to consumer protection? regulated industries?). What are the stated objectives of competition policy? How are these objectives articulated? (For example, statutory recitals and text, guidelines, policy statements.) To what extent are there carve-outs or exceptions for particular industries or arrangements? To what extent is the authority also responsible for adjacent or flanking policies; for example, intellectual property, foreign direct investment review, consumer protection, price regulation in monopolized industries? Where industry-specific regulators also exist, how are the jurisdictional boundaries between the competition agency and these industry-specific regulators determined?

Procedural Characteristics

To what extent do the procedural characteristics or practices of competition agencies in a selected jurisdiction reflect the following procedural norms?

1) Due process norms in case-by-case decision-making

For example:

- a) In particular cases, the opportunity to be heard, timely and full notice of allegations, adequate notice of evidence relied on, adequate time to prepare a defense.
- b) Independence of decision-makers from external influence or direction in the application of the law to particular parties or transactions.
- c) Open-mindedness of first-level decision-makers on findings of fact based on sufficient evidence and free of incentives other than objective fact-finding.
- d) Equality before the law: non-discrimination in the application of the law.
- e) The rights to challenge critical agency determinations before an independent reviewing body or court.
- f) Proportionality of remedies to violations.

2) Institutional performance norms

For example:

- a) Timeliness of dispositions.
- b) Expertise in determinations.
- c) Sufficiency of investigative and sanctioning powers.
- d) Reasonable predictability in application of law.
- e) Transparency in policy formulation or elaboration (through, for example, enforcement guidelines).
- f) Opportunities for public consultation and participation in policy formulation and elaboration.

- g) Transparency of reasons for decisions including major settlements or discontinuances.
- h) Public accountability mechanisms for general agency functioning, including personnel and budgetary decisions, and periodic reviews of appropriateness of legislative mandate and agency effectiveness.

Critical Evaluation

Where, in your view, these norms have not been fully realized, is this because:

- a) the norms are not recognized;
- b) the norms are recognized but trade-offs between or among norms have been made;
- c) the norms are recognized but agencies have exhibited certain deficiencies or faced particular impediments to their realization?

What are the options for improvement? What are your suggestions for improvement?