



**Symposium**  
**90<sup>th</sup> Anniversary of the Federal Trade Commission**

**Analysing Competition Policy**  
**Globally**

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## 1. INTRODUCTION

This paper applies a framework or model which is useful for analysing competition law and policy. It then makes some brief comparisons of different jurisdictions, and includes a brief discussion of consumer protection policies. The model is used to discuss some key issues concerning global competition policy.

There are typically three key questions concerning competition law and policy:

- What should be done (i.e. what would be of public value to the nation?)
- What may be done (i.e. what does the legislation permit or require to be done?)
- What can be done (i.e. what is administratively possible, given the resources and powers available to the regulator?)

A fourth question especially relevant to regulators grappling with the international dimension of competition law and policies is:

- What cooperation or “co-production” is required from others to achieve public value?

The framework or model is based on strategy models first developed in business schools but now applicable to the work of regulators, and public officials generally. I draw especially on the framework which has been developed by Professor Mark Moore<sup>1</sup> of Harvard’s Kennedy School of Government, a teacher at the Australia and New Zealand School of Government (ANZSOG).

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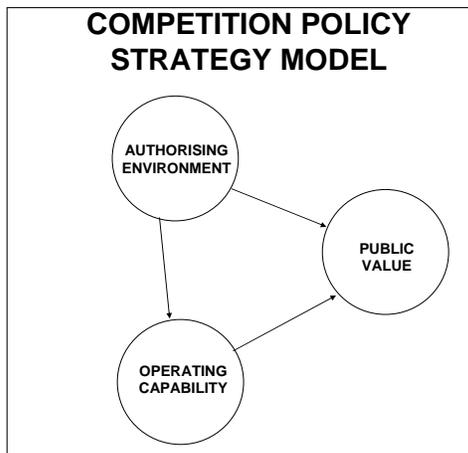
<sup>1</sup> See Moore, M., Creating Public Value: Strategic Management in Government, Harvard University Press, Cambridge, Massachusetts. 1995 I have also drawn on work by two other teachers at ANZSOG – Professor John Alford of ANZSOG and Melbourne Business School and Professor Hermann Leonard of the Kennedy School.

## 2. A MODEL OF COMPETITON REGULATORY STRATEGY

The key variables are:

- the value added to the public (public value)
- the operating capability. This includes the powers and resources of the regulator.
- the “authorising environment” i.e. the political environment which gives rise to values, legislation, regulation, court decisions, informal rules and other political requirements which govern the work of the competition policy.

This model is shown below:



*Figure 1 - Competition Policy Strategy Model*

### THE VARIABLES

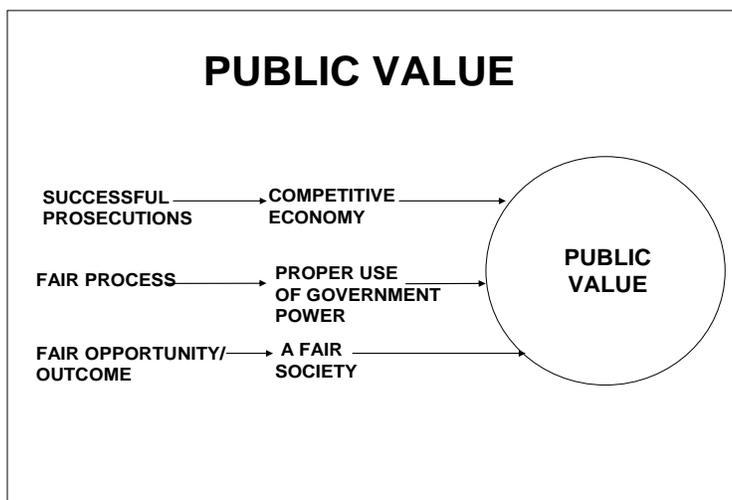
#### Public Value

- Public value is a concept which refers to the value to the community as a whole which may be created by government or private action. Public value is ultimately defined by citizens themselves.

- The contribution of the public agency is partly judged by its ‘output’. Public value also normally, however, depends upon some important additional factors including the fairness and quality of the process by which state power is used, (and also, often, by the fairness of the opportunities provided). Regarding process, the state confers considerable power on regulators and an important part of their contribution to public value is the proper exercise of that power, neither using it insufficiently nor excessively.

Public sector “output” is a concept that is more conceptually complex and difficult to measure than in the private sector where the value of output is determined by the market. Public output is usually evaluated by reference to its contribution to an outcome e.g. a competitive, more efficient economy with lower prices and better goods and services. There is the difficult question of how to assess the link between output and outcome.

Figure 2 suggests some of the elements which contribute to public value in the competition policy area.



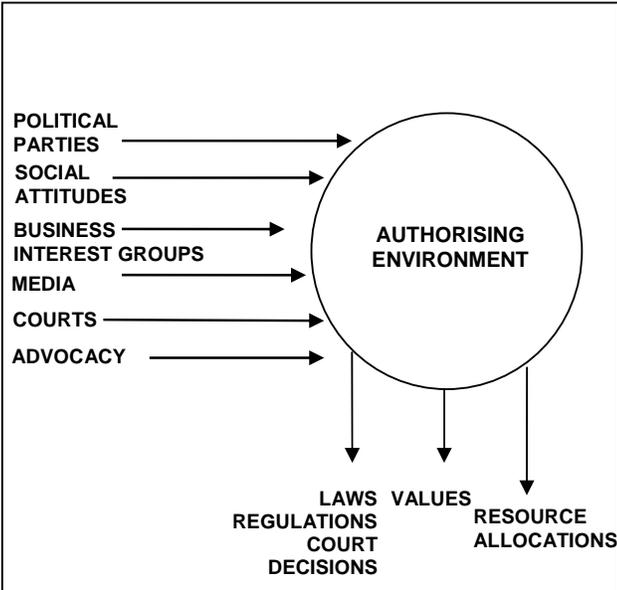
**Figure 2 – Public Value**

- The term “public value added” refers to the addition to or subtraction from the collective welfare of a country that results from a particular public policy or public institution. Value added can be increased by decreasing the amount of input per unit of output (e.g. by saving resources) or by increasing

the quantity or quality of output with a given amount of input. Some regulators may get locked into increasing value by reducing inputs ignoring that they can add value by increasing output quantity or quality. Or they focus on increasing output without regard to input cost, including cost to those regulated.

**The Authorising Environment**

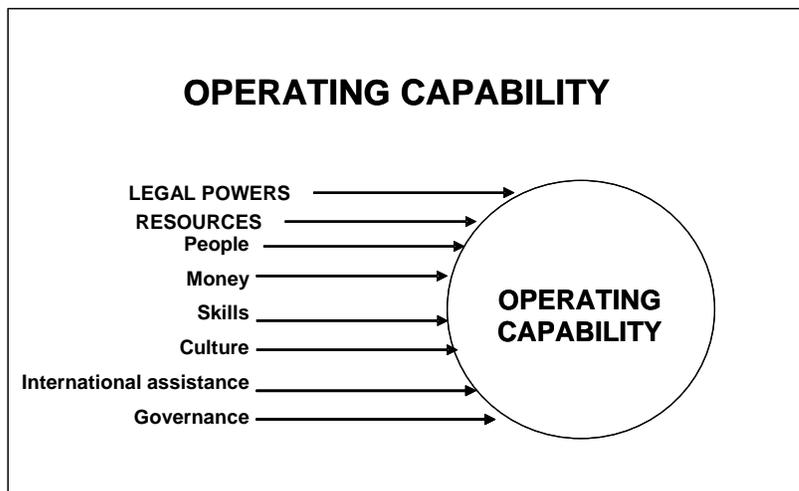
- The “authorising environment” refers to the sources of the values, laws, regulations, court decisions, budget allocations and unwritten rules which permit a competition regulator to act.
- The authorising environment is driven by interest group pressures, the media, social attitudes, political parties, the courts and so on. These factors are often unstable or changing, or the source of ambiguity, conflicting or ambiguous directives. Possible large and sudden changes in the mandate of a regulator need to be recognised in strategy analysis.



**Figure 3 – The Authorising Environment**

## Operating Capability

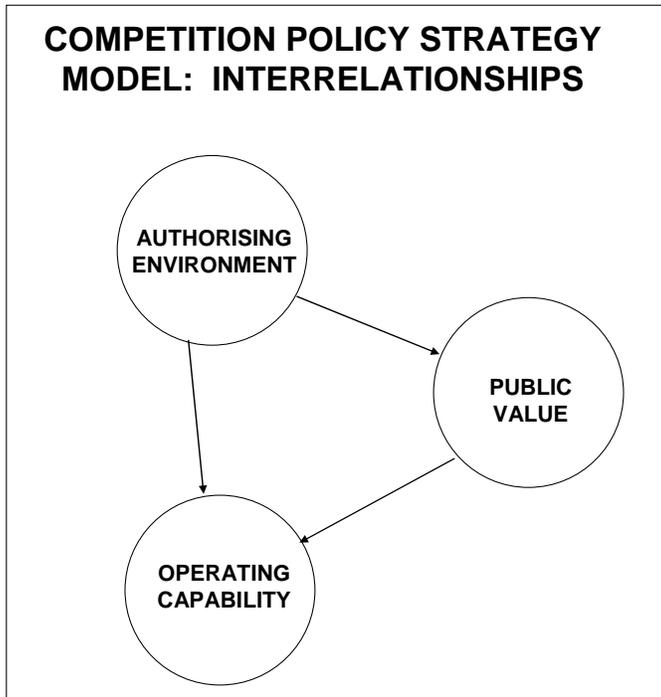
- Operating capability refers to the legal authority; physical, human and financial resources; governance, organisational structure and arrangements involved in carrying out the tasks of the regulatory authority.
- There are some economic policies where, once the law has been enacted, there is relatively little for the government to do e.g. a tax rate change. Competition law is quite different. Once the law has been enacted a plethora of activities must occur: the undertaking of investigations; decision making in the light of investigations; judicial processes including appeals; educational activities and so on. Operating capability is a large factor in its success.



*Figure 4 – Operating Capability*

## THE INTERRELATIONSHIP OF THE VARIABLES

If the three variables are in alignment, this is not necessarily cause for complacency e.g. the authorising environment may set a low public value on an important activity.



**Figure 5 – A Competition Policy Strategy Model: interrelationships**

However, more interesting is a misalignment. Misalignments tend to be unstable.

**Public Value Misalignment with Authorising Environment**

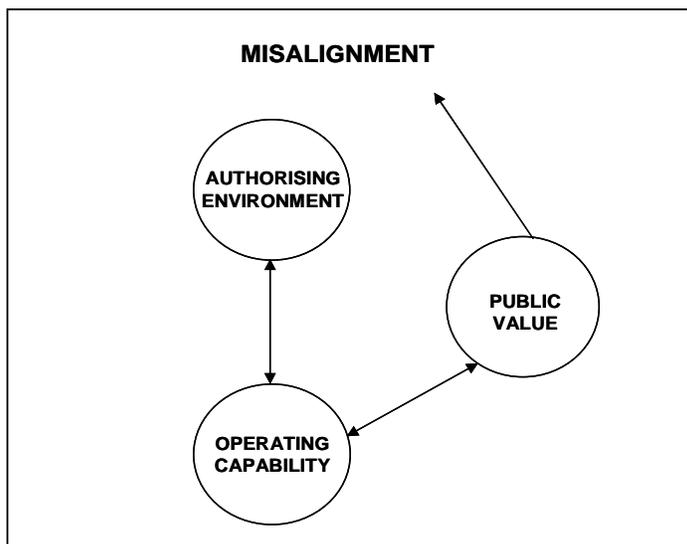
First, public value may be misaligned with the authorising environment. The vigour of the regulator in enforcing the law and achieving public value may upset interest groups that are important politically. This may have consequences – the government may weaken the law, reduce the resources of the regulator, alter its membership. Or the regulator may pull back on its activity. Or it may through advocacy bring the authorising environment into line with its expanded public value. If the regulator is independent, it has more ability to survive political tensions compared to otherwise.

In Australia in the early 1990s there was a low level equilibrium relationship centred on a low public value being achieved by competition law and policy. Efforts by the regulator to increase sharply the output of competition policy by more vigorous enforcement caused the public value to get out of line with the authorising environment. However, a vigorous program of publicity by the regulator had the

effect of altering the authorising environment and bringing its preferences more closely in line with the public value that was being achieved in practice by the regulator. Even so, there were and remain considerable tensions between public value and the authorising environment in Australia.

In the European Union there is strong support from the authorising environment for competition law, partly because the basic law is embedded in the treaty. There is not much possibility of, nor pressure for a fundamental change of European competition law. On the other hand, the authorising environment is not strong at national level within many parts of the European Union. This can lead to weak national laws and enforcement, and some pressure to weaken community law itself.

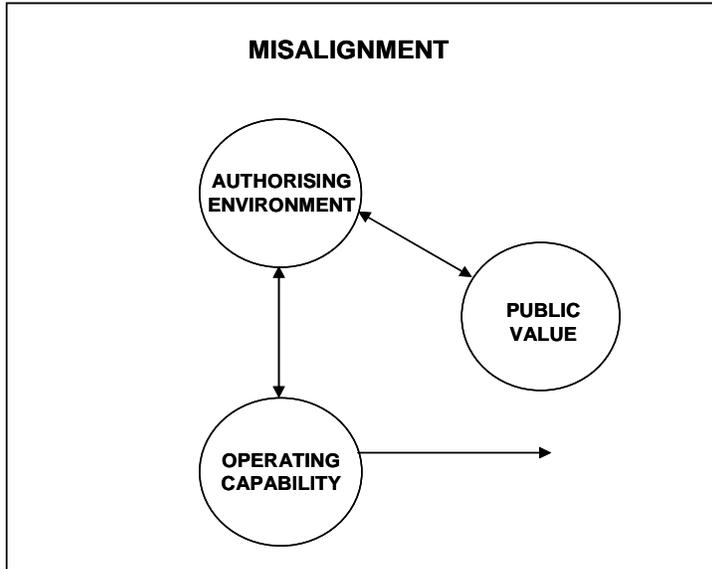
In the United States the three variables are usually in equilibrium at quite high levels. There are usually some tensions at the margin between the authorising environment and the other variables. There have been periods such as in the Reagan era when attempts were made by the authorising environment to reduce sharply the operating capability of public antitrust law enforcement.



**Figure 6 – Misalignment**

## Operating Capability Misalignment with Public Value

Another misalignment may be between public value and operating capability.



*Figure 7 – Misalignment*

In Australia resources have generally come into line with the needs of the regulator to achieve public value – though with a time delay. The expanded litigation output of the Australian Competition and Consumer Commission, for example, at first involved the achievement of higher output with given resources but in due course the government voted much higher resources to the Commission.

In the European Union the operating capability of the Commission has been a serious problem. It seems that the authorising environment simply will not make more resources available to an overstretched Commission. The Commission has sought to extract higher value from its limited operating capability by cutting back on relatively wasteful activities, especially the notification system. Modernisation has sought to do “more with less”.

In the United States there is some debate about whether having both a Department of Justice Antitrust Division and a Federal Trade Commission (FTC) is wasteful of resources but there is not a strong tide of feeling against this. The governance

system of the FTC probably restricts its contribution to public value. A somewhat wasteful feature of the US system (and many other countries) is the seemingly unnecessary system of premerger notification which ties up public and private resources quite heavily. Both the Australian and UK experience demonstrates that a system of formal premerger notification seems unnecessarily wasteful of resources. The law does not need to make notification compulsory. The many mergers which do not raise competition questions would then proceed at no cost. The existence of appropriate incentives – the threat of post-merger forced divestiture and of fines for anticompetitive mergers – ensures pre-merger notification of mergers that could harm competition.

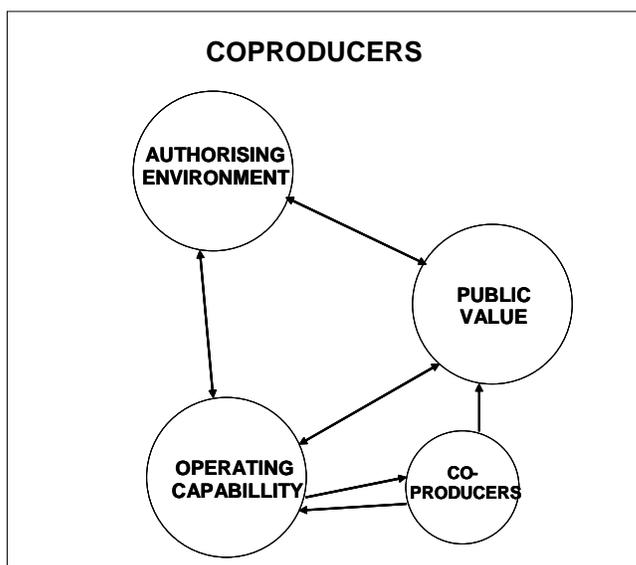
### **Co-Producers**

**Sometimes** those implementing the strategy receive help (or hindrance) from others in achieving desired outcomes, as shown in Figure 8. Co-producers of public value include business, consumers, the legal profession, the courts, regulators of other countries, international agencies, private litigants, state governments, other national regulators, other governments providing foreign assistance and/or cooperation and so on. In this paper we will focus on foreign governments as co-producers.

In Australia, the national government lacks constitutional powers to regulate intrastate economic activity conducted by unincorporated companies. It also lacks jurisdiction over state government owned public utilities. In 1995 co-producers of public value in the form of state governments conferred on the national government legal power giving it jurisdiction over all forms of business, including the professions, state utilities and agricultural boards.

In the European Union, the most important co-producers are national authorities. Their role has been stepped up as a result of modernisation. This helps address the problems caused by the resources – constrained European Competition Directorate.

In the United States coproduction is somewhat problematic. For the most part private enforcement adds to public value and can be a part substitute for public action when there are budget cutbacks. State governments are co-producers which some see as creating positive value whilst others see them as creating negative value. Likewise, in order to achieve public value, the competition regulator need to receive helpful cooperation from other regulators. As we shall see later, it also faces some difficulties in securing cooperation from international co-producers of value. A major challenge for the USA system is the limitations on public value as a result of difficulties with these co-producers. Managing the relationships – which for the most part are givens – in order to maximise value and minimise detriment are of continuing importance the USA agencies.



*Figure 8 – A Competition Policy Strategy model: co-producers*

## CONSUMER POLICY AND CO-PRODUCTION

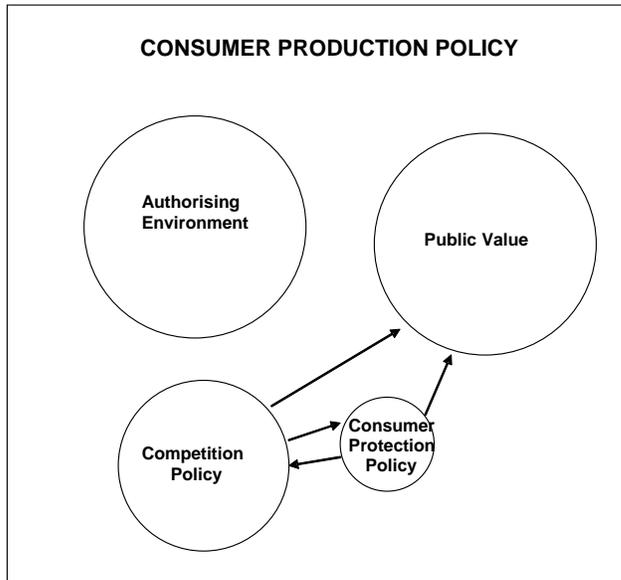
As shown in Figure 9, consumer protection policy and competition policy may be viewed as co-producers of value. Each assists the other. Consumer policy principally aims to ensure that consumers are not misinformed by deceptive and misleading conduct. This makes the exercise of choice work better, which is the least of competition, work better.

Some forms of consumer protection, however, harm competition. They may restrict entry, for example through licensing and this may ultimately harm competition and consumers. In such situations, consumer protection policy is a co-producer of negative value.

From the perspective of consumer protection policy, competition policy is also a co-producer of value. It brings considerable benefits to consumers through preventing anticompetitive behaviour. Also the best solution to many problems perceived as requiring consumer protection regulation is actually the promotion of competition.

In the United States and Australia, but not the European community, consumer protection law enforcement at national level is integrated with competition law. This maximises the possibility of constructive coproduction. In Australia their coexistence in one entity has also enabled the regulator to gain general public recognition and support as the consumer's friend, building a stock of political capital that has helped carry it through unpopular merger decisions and periods of big business criticism.

A related organisational issue is whether consumer protection agencies should be independent prosecutors or adjudicative bodies? Should they also be national policymakers who propose consumer protection laws and policies, advise executive and legislative arms of government, and evaluate all laws and policies in terms of their effect on consumers. Do the functions complement one another or conflict? Is this bringing together too many functions in one body? If fragmented, is one left with too small a policy arm hindered by lack of size and market knowledge? In Australia, leaving national consumer protection policy in the hands of a small unit of a major Commonwealth Government department with other priorities has hindered policy development: the policy analysis has been done by an agency that is not close to or knowledgeable about market realities.



*Figure 9 – Consumer protection policy*

## THE USE OF THE FRAMEWORK

Much analysis of regulatory issues tends to focus on one variable only. For example, much discussion at conferences is about the potential public value of a particular action or policy and overlooks that there is no mandate for such a law from the authorising environment. Sometimes an ideal looking policy recommendation is unimplementable in practice and it would be better to build considerations of operating capacity into policy recommendations. Some discussions within regulatory bodies may focus entirely on what the authorising environment will permit, and would often benefit from a greater focus on public value. Yet other discussions within regulatory bodies focus entirely on operating capability, on what is possible, without considering public value or the authorising environment and may neglect that the authorising environment could agree to increasing the operating capability with changed laws or more resources if it was persuaded of public value. Some other problems are seen as insoluble by virtue of ignoring the role of the co-producers.

This model is a useful way of organising a comprehensive discussion about competition policy strategy. We now consider its application to global competition questions.

### **3. THE PUBLIC VALUE FROM CURBING INTERNATIONAL ANTICOMPETITIVE BEHAVIOUR**

#### **a) Introduction**

This part of the paper focuses on whether there would be prima facie public value from policies that address international aspects of anticompetitive laws and behaviour.

Generally speaking, globalisation has positive effects on promoting competition, in widening consumer choice, and opening up new business opportunities. However, it can be associated, in some cases, with anticompetitive behaviour on an international scale.

#### **b) Global Cartels**

There appears to have been a sharp increase in the extent of global cartel activity, or at least in its detection, in the past few years. This is, seemingly ironically, partly because of the impact of trade liberalisation. Liberalisation is generally good for competition, but it tends to put pressure on firms that have dominated particular local markets. Facing international competition for the first time, some tend to get together with producers in other countries, who also face similar pressures from liberalisation, to divide up world markets and to agree on prices and output.

Global cartels harm consumers and business customers, have undesirable effects on resource allocation, and rarely have offsetting efficiency or other benefits. There would be public value both at domestic and global level from their removal

**c) Global Mergers**

In recent times there has been a spectacular increase in the extent of international merger activity. These mergers may add to global economic efficiency and/or they may detract from competition.

From another perspective, more multinational firms are becoming exposed to merger review processes applied by national competition authorities. Some 90 countries currently have competition laws; more than 60 countries have premerger notification.

For the most part, global mergers are not anticompetitive and pose no major challenge to the global economy's competitiveness. Indeed, in many cases, they enhance competitiveness and improve economic efficiency by creating more efficient arrangements for international business transactions. They mostly reflect simple commercial logic and do not harm competition. Nevertheless some global mergers may stultify competition. Just as with global cartels, some firms in different countries that were previously largely protected from competition by trade and investment barriers face competition between themselves for the first time and may seek to merge.

It is therefore important that there is scrutiny about global mergers.

The policy requirements are more complex than with respect to cartels. Mergers are not necessarily harmful and therefore not to be unnecessarily blocked. They may be economically beneficial with the consequence that policy should aim to minimise regulatory obstacles. On the other hand, harmful mergers should be blocked.

There would seemingly be public value in introducing international elements into merger law.

**d) Market Power**

The abuse of market power is a key issue for competition policy. It has an international dimension as the Microsoft case has shown. As with merger law, there is a difficult balance to achieve between curbing anticompetitive behaviour and not curbing behaviour that may look anticompetitive but that is in fact procompetitive.

**e) Trade and Competition**

The essence of the trade and competition debate is first that trade policy liberalisation can be frustrated by failures in the enforcement of competition policy. For example, supposing a country liberalises trade, allowing a potential flow of imports following the reduction or elimination of trade barriers. The benefits to consumers of this liberalisation can be defeated by restrictive practices in the liberalising market. For example, retailers in the liberalising market may reach agreement with manufacturers in the home market not to accept imports. Entry into that distribution sector may be difficult. Trade policy liberalisation in such

cases can clearly be frustrated by failures to enforce competition policy properly, eg, if the regulator does not exist or fails to take action to stop anticompetitive practices. Second, it is important to note the reverse relationship. Trade policy can be highly anticompetitive. For example, nearly all forms of import protection whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests. Trade policy can be usefully regarded as an area of competition policy that has gone badly wrong! It is important that the debate about the damaging effect on trade of failures in competition law enforcement be balanced by recognition of the damaging effects on competition and consumers of trade restrictions. Third, it is important to note in this debate that there is another important variable which may be at work – regulation. Very often it is government regulation rather than failures in the enforcement of competition law that are the true obstacle to imports, to effective trade liberalisation and to competition. For example, in the example above about blocked imports, laws restricting the distribution sector may prevent the newly entering foreign firm from establishing its own distribution outlets.

What is needed is a three-way debate about the relationship between trade, competition policy and regulation, rather than a debate that is focussed too narrowly on trade protection and failures in competition law and enforcement. There is public harm from anticompetitive behaviour or trade laws or regulators that prevents free trade from working well. It is this debate which has given rise to negotiations about competition policy in the context of world trade negotiations.

f) **Intellectual Property Laws**

Intellectual property laws are an interesting example of the interaction of trade, competition and regulatory laws. Intellectual property law has in some cases been captured by the interests of producers in countries which are net exporters of intellectual property. In particular, the statutory restrictions on parallel imports under copyright law have enabled massive unjustified price discrimination between countries, have hindered and distorted competition, and imposed draconian restrictions on international trade.<sup>2</sup>

Although there is no relevant international treaty, most countries have enacted laws which effectively prevent retailers from freely importing, for purposes of retailing, products with copyright attached to them such as CDs, books, computer software programs, pharmaceuticals and quite often a range of other copyrighted (and in some cases) patented products. Generally the laws state that no one can import a copyrighted product for the purposes of resale without the approval of the holder of the copyright owner (which approval is not normally given). There is usually no restriction on individuals importing products for their own use as long as they do not resell. This is a very substantial regulatory restriction on international trade. (Note, that it should be distinguished from commercial arrangements which may establish exclusive distribution arrangements). The restriction confers exclusive

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<sup>2</sup> *Having regard to their far-reaching effects it is surprising that they are not discussed in work by the Chicago law and economics movement, including the latest work by Landes and Posner (The Economic Structure of Intellectual Property Law (Harvard University Press 2003)).*

rights, in some cases monopoly rights, to import certain products. Often the markets are narrow and the general climate of competition in them is affected by the import restrictions. Massive international price discrimination has occurred as a result. Whilst there may be some areas of market failure or market imperfection in relation to distribution, (e.g. free riding on promotional efforts by the copyright owner), they do not seem sufficient to justify the restrictions. As to market failure that would arise from the copying of products based on intellectual property, these problems are overcome by the existence of copyright laws which prohibit copying by non-owners. There seems to be no case, once a product is released on the market validly in accordance with copyright law, for there to be regulatory restrictions on its international distribution, especially restrictions of this magnitude. There does not seem to be a valid case for the restrictions based on the view that the restrictions facilitate price-discrimination that rewards creativity, discovery and invention. Issues of piracy are best dealt with by appropriate sanctions.<sup>3</sup> Nor does the slowly increasing effect of international internet purchasing by a growing minority of consumers alter the argument of principle, nor the harm to domestic retailers.

Intellectual property laws provide some examples of legislative restrictions on international trade that unnecessarily harm competition. There would be value in their abolition.

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<sup>3</sup> See Allan Fels and Jill Walker, "The Market for Books and the Importation Provisions of the Copyright Act", University of Melbourne Law Review, 1990.

**g) Public Value from Curbing Anticompetitive Behaviour**

Clearly there is considerable public harm for each country and for the global economy from foreign anticompetitive laws and behaviour. Prima facie there would be public value from appropriate competition policy in this area. We next consider whether sufficient public value can be achieved by countries acting alone. If not how far will the authorising environment go in permitting the required additional actions? What operating capacity is available and required to achieve public value? What can co-producers in the form of foreign regulators and policy makers contribute? And are there significant misalignments, of potential public value and the authorisation environment and operating capacity?

**Go it alone: Competition Policy at Domestic Level**

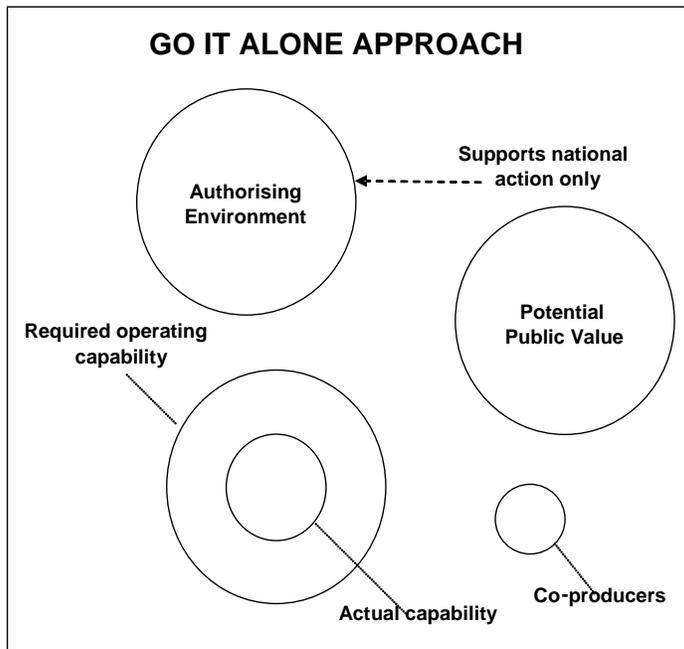
The effective application of competition law by individual countries goes some of the way to dealing with some of the international problems we have identified. Acting unilaterally a country may end the harmful behaviour, or that part of the behaviour that affects it. Moreover, to a degree it can benefit from the actions of other jurisdictions without taking any or much action of its own. When the USA and/or the European Union, for example, break up a cartel or block a merger this usually puts an end to them globally. Also, other countries can fairly easily follow-up to ensure there are adequate fines and compensation - if their laws allow it

Extraterritorial application of laws can encounter significant practical difficulties and can be counterproductive in reducing cooperation in other countries, and in actually triggering blocking laws and actions (as happened in the Westinghouse case).

A country that goes it alone is normally limited in investigating, preventing and punishing offshore anticompetitive behaviour in foreign countries and laws harming it, including behaviour that harms its own exports and foreign investment, and in preventing laws and government actions in other countries that harm it. e.g. the OPEC cartel.

Figure 10 assumes that the authorising environment supports national action only. This is a realistic assumption for the many countries that do not have cooperation agreements with other countries. There is often resistance to such agreements from the authorising environment, often driven by businesses who fear that the reciprocal action which might be required against them as part of a cooperation agreement with another country, would be harmful. Figure 10 suggests that the actual operating capability of a country that goes it alone is less than is needed to achieve the desired public value. It may be partly assisted by the co-production of value by other countries but this is less than might be achieved by explicit cooperation: this is shown by a small coproduction circle.

A country that goes it alone therefore does not unlock the full public value that could occur from curbing international anticompetitive behaviour. Its actual operating capacity, and the contribution by coproducers, falls short of the required public value.



*Figure 10: Go it alone approach*

### **Convergence**

Convergence refers to the spread of best practice from one country to another. The phenomenon is significant. Sixty years ago one country had antitrust law. Today there are many. Convergence has been greatly aided by the work of the OECD and other international organisations, and more recently by the ICN and by the USA, the EU and many others in regard to technical assistance and help with capacity building.

Convergence is not the result of any international agreement. It is caused by education, the spread of market ideology, and a recognition of the harm from anticompetitive behaviour. Convergence is closely connected to the existence of strong networks of like-minded competition law officials eager to share and disseminate their values and experiences.

Convergence encounters relatively few difficulties in the authorising environment from which officials come. It enhances the contribution of coproduction to public value. However, its contribution is also limited. It has not, at this stage, led to the full adoption of such laws in many countries. In any case it principally serves to strengthen and improve domestic competition laws. It does not directly take up the challenges of anticompetitive foreign laws and behaviour.

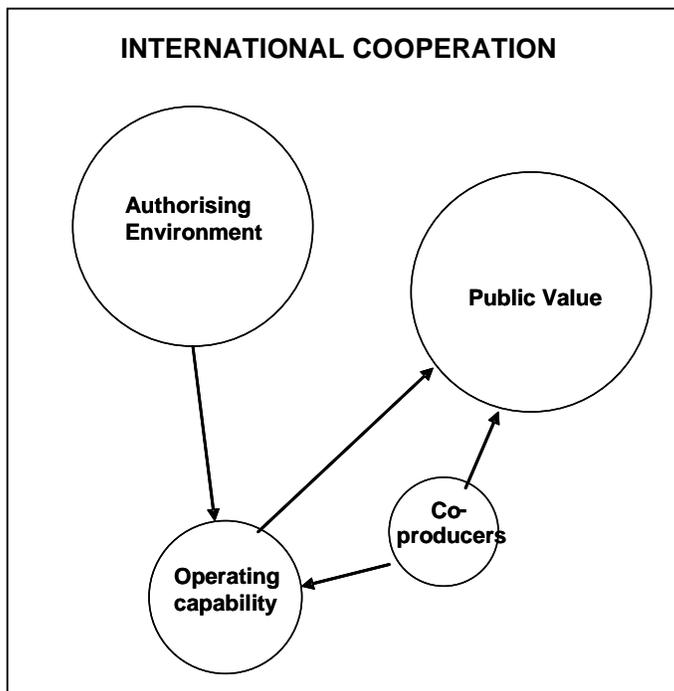
### **Domestic Policy and Cooperation with other Jurisdictions**

Cooperation between jurisdictions takes many forms. It may be bilateral or involve several countries or more. It may range from a limited memorandum of agreement to try to cooperate as far as the existing law permits, perhaps with consultation, staff exchanges and training, exchanges of publicly available information, technical assistance and contributions to capacity building to a serious, substantial, legally binding agreement such as that between Australia and the United States. In some cases the agreement may be part of a wider trade agreement.

Cooperation agreements in the field of competition law got off to a late start compared with tax, securities, money laundering and other fields but in recent times there has been very significant broadening and deepening of cooperation, particularly in relation to cartels and mergers.

The extension of these agreements, although clearly encountering some resistance from the authorising environment – in turn influenced by business interests – seems to have become more acceptable over time to the authorising environment.

They harness the power of co-producers to add to public value as show in Figure 11.



**Figure 11: International cooperation**

A major issue is how to make cooperation work well. In all fields of modern government the need for agencies to cooperate with other organisations to see higher public value achieved – with agencies in their own or other governments, at the same or different levels of government; with business, with NGOs and so on – is a major challenge. There is now a considerable body of public administration learning concerning the challenges and best methods of collaboration in these situations.<sup>4</sup>

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<sup>4</sup> Professor Eugene Bardach, [The Theory and Practice of Interagency Collaboration](#). Brookings Institution Press, Washington DC 1988 is an example. Professor Bardach of University of California, Berkeley also teaches at the Australia and New Zealand School of Government.

A number of elements may contribute to successful collaboration. The authorising environment attitude to the law is one. If good laws facilitating cooperation are enacted this creates the preconditions for success. Then there must be shared objectives and beliefs, the development of a coherent, comprehensive, workable strategy, appropriate cooperative working arrangements, resource commitments and so on. One of the key features of successful cooperation include shared values and common education and common working methods, much of which is the result of convergence and strong networking between the players. These are powerful factors in the world of antitrust law, and make cooperation relatively effective. Shared professional values of competition regulators may overcome narrow national considerations.

Regulators wishing systematically to achieve additional public value need to devote efforts to improve the management of their cooperation with overseas regulators and governments. (As an aside, a similar comment can be made about working cooperatively with other parts of government, especially other regulators such as utility regulators in areas such as communications, energy, water and transport). It is not just a matter of debating who has the greatest competence to deal with matters and recommending appropriate legislation. It is also important to accept the allocation of responsibilities, whatever they are, and to make them work well to maximise the benefits of co-production. This is an important priority.

There is at a general level reasonable support from the authorising environment for cooperation, but territorial struggles, different national interests and cultural and doctrinal differences between regulators can impose some limits.

There are limits on what has been and can be achieved by agreements. On the one hand the two most important jurisdictions – the USA and the EU – are cooperating much more closely and must be encouraged to do so in the most productive way. On the other hand, there remain difficulties in the authorising environments of many countries and many countries have not made agreements, and others have made agreements of little substance. There are hardly any information sharing or cooperation agreements between developed and developing countries, largely because there is no benefit for developed countries. Many agreements, such as the advanced agreements between Australia and the United States contain opportunities for countries to opt out on national interest grounds and do not cover all issues e.g. mergers in the Australia – USA agreement. No other country has signed the IAEEA, with the USA. Agreements depend upon the willingness of the agencies to make them work. They do not address issues concerning exempt export cartels, nor legislative restrictions on competition (although some elements of this are creeping into bilateral free trade agreements). So cooperation agreements are partly held back by the authorising environment. Consequently as Figure 11 suggests the co-producer addition to domestic operating capability from cooperation still falls short of what is required to achieve full public value.

### **Multilateral Approaches**

Beyond cooperation arrangements, there is a range of multilateral cooperative arrangements, agreements and proposed agreements such as the WTO, OECD and ICN arrangements.

After World War II the Havana Charter proposed an international trade organisation be established and that it should be accompanied on the competition side by multilateral regulation and review of restrictive business practices. However this was dropped following opposition by the US Congress which was concerned about the impact on US domestic sovereignty.

The OECD was later involved in a number of agreements which encouraged policies that blocked international anticompetitive behaviour but these were essentially not binding and not enforceable.

Another recent development has been the inclusion of competition related provisions in various GATT/WTO agreements. These include: the agreement of technical barriers for trade; provisions regarding surveillance of state trading enterprises; a general agreement on trade and services; the TRIPS agreement; the agreement on government procurement; the TRIMS agreement. These are significant, though ad hoc, developments.

Regarding the issues of the interaction of trade and competition policy discussed earlier, much of the intellectual input into this subject is coming from the OECD but the World Trade Organisation (WTO) has established a working group discussing issues about the interrelationship between trade and competition policy. During the deliberations of this group a number of proposals were put up for the establishment of a multilateral agreement. The European Union in particular made a far reaching proposal. This was opposed by the United States and a number of developing countries. Eventually the EU put up a compromise proposal. Its elements included:

- a commitment by WTO members to a set of core principles regarding the application of competition law and policy, including transparency, non-discrimination and procedural fairness in the application of competition law and/or policy.
- a parallel commitment by member governments to the taking of measures against hardcore cartels.
- the development of modalities for cooperation between member states on competition policy issues. These would be of a voluntary nature, and could encompass cooperation on national legislation, the exchange of national experience by competition authorities and aspects of enforcement.
- a commitment to ongoing support for the introduction/strengthening of competition institutions in developing countries in the framework of the WTO and in cooperation with other interested organisations and national governments.
- the establishment of a standing WTO Committee on Competition Policy which would administer the proposed agreement and act as a forum for ongoing exchange of national experience, the identification of technical assistance needs and sources for such assistance etc.<sup>5</sup>

Despite the generality and softness of this proposal, concern arose on the part of some countries about the possible role of the WTO dispute settlement mechanisms

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<sup>5</sup> Frederic Jenny, "Competition, Trade and Development Before and After Cancun", Fordham Corporate Law Institute 30<sup>th</sup> Annual Conference on International Antitrust Law and Policy.

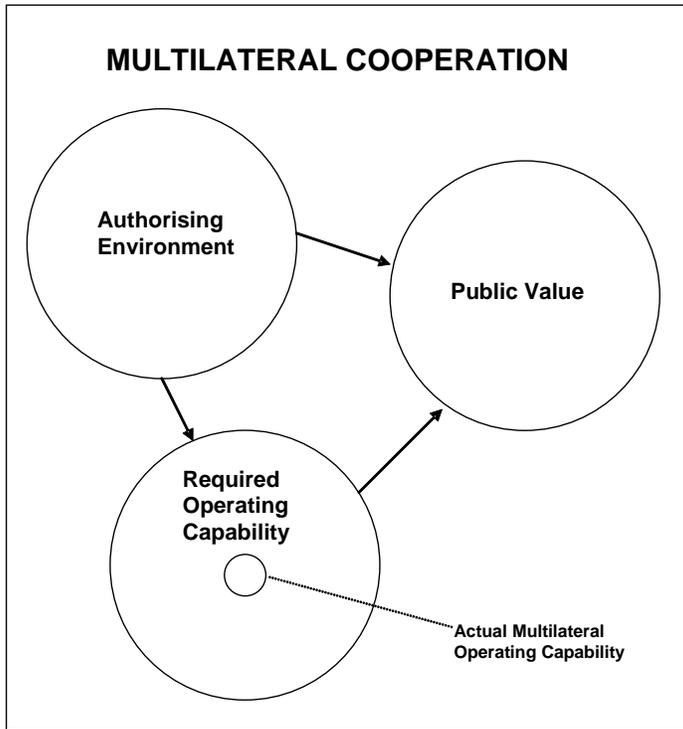
in the framework, with some countries opposed even to limited application of the mechanisms, though others supported this. The proposal was effectively abandoned at Cancun. Since Cancun progress has been stalled and no one expects much if any progress to be made (the most recent meetings appear to have effectively decided there will be no progress on trade and competition other than perhaps some further study). A number of states are not in agreement with any form of multilateral agreement. The most important driver of this seems to be fear of a loss of sovereignty. In short, there is a severe problem with the authorising environment of many countries, even for a very limited multilateral agreement.

Recently there have been important steps taken in establishing an International Competition Network (ICN) and in establishing a Global Competition Forum at the OECD. These complementary events are being driven by a number of factors. Regarding the International Competition Network (ICN), the USA was uncomfortable with the idea of the WTO having decision making powers in relation to competition questions and was keener on a separate initiative. The European Union also supports the idea of a global competition initiative such as the ICN. Both support the OECD. The OECD, for all its valuable work, is seen as having some limitations because its membership does not include major developing countries (although they now participate in its Global Competition Forums and some are observers at its other meetings) and it is an organisation made up of governmental representatives only. Accordingly discussions about taking an initiative which would extend beyond the OECD or the WTO but be complementary to them led to the creation of the ICN.

The ICN focuses on antitrust issues only; it consists of enforcement agencies, not government departments; it has an emphasis on convergence; it directly includes developing countries as members; its work on mergers has harnessed a large private sector input and has had some impact on national practices. It is a project oriented, consensus bound, informal network. So far it has been highly productive but its focus has mainly been on improving global merger processes with some useful work on advocacy, technical assistance and capacity building in developing countries.

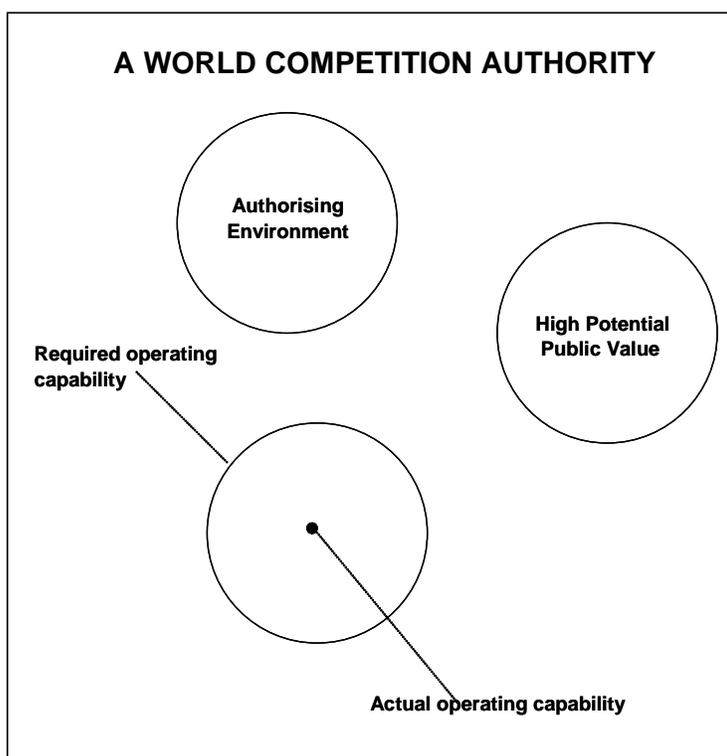
In terms of our model, multilateral arrangements receive very limited support at all from the authorising environment and as a result their operating capability is very slight relative to what would be needed for the delivery of maximum global economic welfare through the promotion of competition. There are few signs at present that there will be significant progress at this level in this and the next decade.

Our conclusion is that the ICN and the OECD can contribute some useful work but there are major limitations. The authorising environment does not favour significant output. This is shown in Figure 12.



**Figure 12 – Multilateral cooperation**

There is no realistic possibility of there being a world competition authority in the next few years at least but if it were somehow to develop the likelihood is that it would be a body with no real authority and with a kind of lowest common denominator approach to the adoption of competition principles and their enforcement. Thus, the authorising environment would establish a body with no operating capability. This can be represented diagrammatically (figure 13):



**Figure 13: A World Competition Authority**

There is one further point. If we distinguish between formal cooperation arrangements – such as reflected in treaties, binding agreements and the like – and informal cooperation arrangements such as those occurring at the ICN and OECD and through networking the latter often make a greater contribution.

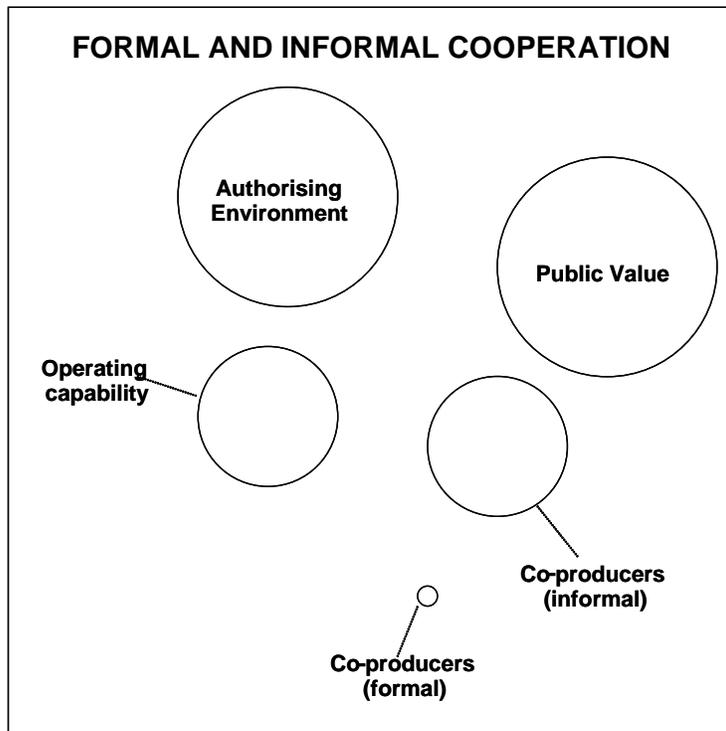
Thus WTO progress in a formal multilateral agreement on trade and competition has occurred at a snail's pace. The ICN, on the other hand, has seen fairly high informal progress on merger process. The ICN has, thus far, effectively harnessed the support of business and law firm co-producers but an interesting challenge lies ahead as it turns its attention to cartels where the private sector will play a lesser role than in mergers.

The OECD has also contributed heavily but this again occurs largely in the absence of formal agreements and a willingness of governments to support informal approaches.

There are differences between the OECD and the ICN. These are not so much in participation. The OECD Global Forum on Competition attracts a similar attendance to the ICN Annual Meeting. Rather the OECD is based on government representation, which usually includes regulators and key policy officials, whilst the ICN is based on regulators but not other government officials. The ICN is virtual and attracts a large work contribution from member countries voluntary papers, whilst the OECD has a productive secretariat and considerable country contributors.

The key point is that the ICN and OECD by informal means are making some progress, but only in the context of voluntary approaches and strong shared values and professional approaches.

Figure 14 suggests that formal co-production may actually yield less public value than informal co-production.



*Figure 14: Formal and Informal Cooperation*

### **A Comprehensive World Competition Approach**

The focus of the paper has largely been on traditional antitrust enforcement. However, a wider global perspective takes into account all forms of activity, especially legislative and regulatory, that limit competition.

Trade law continues to be a disappointment and may be appropriately viewed as an area of competition policy that has gone wrong. One needs to look no further than agriculture, dumping law, and some of intellectual property law to see how far there is to go. An OECD study showed that most successful antidumping actions would have failed if the antitrust approach to predatory behaviour had been applied.

In these areas of policy the difficulty is not operating capability. There is no need for any operating capability to replace trade laws. It is just a matter of passing laws. The difficulty is with the authorising environment.

#### **4. Conclusions**

It seems obvious that in an era characterised by ever increasing degrees of economic interaction between countries with ever greater activity on the part of multi national firms, with global cartels and global market power, that some kind of international effort is needed to deal with some of the problems. National governments alone cannot deal with all global problems. Business is becoming increasingly organised on a global scale but competition policy is still largely organised on a national basis. There is no international regulator to combat the cartels which means the regulators of all countries must work in some kind of cooperative fashion.

Not only is it clear from the preceding discussion that more steps need to be taken by the authorising environment to develop greater operating capability to deal with global forms of anticompetitive conduct, but it is also clear that there are some areas in which business would benefit from the adoption of a global approach e.g. improved processes for dealing with multi-jurisdictional mergers.

At this stage, international cooperation, mostly bilateral, is the most productive way to proceed.

Finally, the debates about international elements of competition law and policy can be filtered in to the wider debate about globalisation. This debate is usually unduly simple. The supporters of globalisation welcome it uncritically while the critics see it as harmful. The perspective of competition policy is that globalisation can be of public value providing it is well regulated by an internationally based competition law. This will require the support of the authorising environment and the development of an adequate operating capacity.