

Intellectual Property, Competition Law and Economics in Asia

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PREFACE

This book presents papers presented to a conference held in Singapore in September 2009. The idea behind the conference was to examine the differences and similarities in the intersection between intellectual property and competition laws in Asia. The conference was divided into two sessions. First, eminent speakers were asked to provide a context to the interface from the perspective of the United States—the country with the most innovation and the most sophisticated jurisprudence dealing with the intersection. They were former Chairman of the United States Federal Trade Commission, Bill Kovacic, Judge Doug Ginsberg, until recently Chief Judge of the US Federal Court of Appeals for the DC Circuit in Washington and Greg Sidak and David Teece, long-time critics of the current approach to dynamic competition taken by competition law authorities.

Next, an economist was teamed up with a lawyer to write chapters on most countries in Asia. They were asked to outline the underlying economic and legal institutional background to the intersection in their particular country. This was to include background country economics—including a description of, and statistics on, industry structure, the amount spent on research and development, types of research, government policies towards innovation, industrial development policies, etc. Next, the competition law and intellectual property laws in each country were to be discussed and a description of how the intersection is dealt with by government (if at all), for example compulsory licensing. This was to be followed, where possible, with a discussion of how the intersection should be treated in that country. For example, the appropriate balance—does it make more sense to focus on dynamic or static efficiency given each country's level of development, institutional capacity, etc and the criteria used to determine the balance? Finally, authors were asked to make policy recommendations—including recommended changes to existing laws, how to deal with institutional aspects including limitations (eg training judges).

Country authors were given the freedom to determine the issues with which they would deal. Naturally, their choice depended on the extent to which the intersection had been examined by policy makers, regulators or courts, either in general or with respect to specific issues such as compulsory licensing or mergers. For many country authors this was the first time they had worked with an economist or lawyer. Sometimes difficulties arose as to the issues to be discussed, writing style, etc. However, this was anticipated. An important reason for the conferences was to make economists and lawyers more aware of each other's approach to competition law issues dealing with innovation. It is only through collaboration between economists and lawyers that competition law will improve economic outcomes.

I am grateful for the financial support provided by the Competition Commission of Singapore (CCS), the National University of Singapore (NUS), and Microsoft Corporation. My thanks in particular to the Chairman of the CCS, Mr Lam Chuan Leong, the Dean of the Law School at NUS, Professor Tan Cheng Han, and Mr Mike Yeh of Microsoft.

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Part 1: Setting the Scene

William E Kovacic has served on the Federal Trade Commission since January 2006, and served as Chairman from March 2008 until March 2009. Kovacic was the agency's General Counsel from 2001 through 2004, and he worked for the Commission from 1979 until 1983, initially in the Bureau of Competition's Planning Office and later as an attorney advisor to former Commissioner George W Douglas. Before he became a Commissioner, Kovacic was the EK Gubin Professor of Government Contracts Law at George Washington University Law School, where he began teaching in 1999. He had taught at the George Mason University School of Law since 1986, after practicing antitrust and government contracts law for three years at Bryan Cave's Washington, DC office. Earlier in his career, Kovacic spent one year on the majority staff of the US Senate Judiciary Committee's Antitrust and Monopoly Subcommittee. Since 1992, Kovacic has been an advisor on anti-trust and consumer protection issues to the governments of Armenia, Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Kazakhstan, Mongolia, Morocco, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe. Kovacic received a bachelor degree from Princeton University in 1974 and a law degree from Columbia University in 1978.

Douglas H Ginsburg has been a Judge of the United States Court of Appeals for the District of Columbia Circuit since 1986; he was Chief Judge from 2001 to 2008. He is also Visiting Lecturer at the University of Chicago Law School and Visiting Professor at University College London, Faculty of Laws. Judge Ginsburg was previously a Professor at Harvard Law School (1975–83); Director of the Office of Information and Regulatory Affairs, Office of Management and Budget (1984–85); and Assistant Attorney General in charge of the Antitrust Division of the US Department of Justice (1985–86). Judge Ginsburg is a graduate of Cornell University and of the University of Chicago Law School, where he was the Articles Editor of the *Law Review*. He serves on the Advisory Boards of *Competition Policy International*; the *Journal of Competition Law and Economics*; the *Journal of Law, Economics and Policy*; the *Supreme Court Economic Review*; the Law and Economics Center at George Mason University School of Law; and the Jevons Institute for Competition Law and Economics, University College London; as well as the *Harvard Journal of Law and Public Policy*; and the *University of Chicago Law Review*. He is a member of the American Law and Economics Association and of The Mont Pelerin Society.

Eric M Fraser is the Executive Director for Research at the Committee on Capital Markets Regulation in Cambridge, Massachusetts. He was a law clerk for Judge Douglas H Ginsburg of the United States Court of Appeals for the District of Columbia Circuit. Eric holds a BA in Physics from Pomona College; an MBA with High Honours from the University of Chicago Booth School of Business; and a JD with High Honours from the University of Chicago Law School, where he was awarded the John M Olin Prize in Law and Economics and was a Comments Editor of the *Law Review*, the John M Olin Scholar, a Bradley

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J Gregory Sidak is the founder and Chairman of Criterion Economics, LLC in Washington, DC and the Ronald Coase Professor of Law and Economics at Tilburg University in The Netherlands. He is an internationally recognised expert on antitrust, intellectual property, regulation of network industries, and complex economic litigation. Professor Sidak has testified as an expert witness in scores of proceedings before courts, regulatory commissions, international commercial arbitration panels, and committees of Congress. He has served in the US Government as both an economist and a lawyer. Professor Sidak has been a consultant to the Antitrust Division of the US Department of Justice, the Republic of Mexico, and the Competition Bureau of Canada, as well as to major corporations in North America, Europe, Asia, and Australia. Professor Sidak edits the *Journal of Competition Law & Economics* for the Oxford University Press and has written extensively on antitrust, intellectual property, and regulation. His books and articles have been cited by the Antitrust Division, the Federal Trade Commission, the Federal Communications Commission, the Supreme Court of the United States, the Supreme Court of Canada, the European Commission, the US Court of Appeals for the DC Circuit, the Supreme Court of California, and many other courts and regulatory commissions. Professor Sidak has taught at the Yale School of Management and the Georgetown University Law Center. He was educated at Stanford University and clerked for Judge Richard A Posner.

David Teece is Thomas W Tusher Chair in Global Business and since 1994, Director of the Institute of Management, Innovation and Organization (IMIO) at the University of California, Berkeley. He was co-editor and co-founder of *Industrial and Corporate Change*, and a member of the Editorial Board of *Long Range Planning*. He has been Chairman of LECG Corporation and a Member of the Board of Directors, The Atlas Group and Board of Trustees, Atlas Insurance Trust. His books have included *Managing Intellectual Capital: Organizational, Strategic, and Policy Dimensions* (Oxford, Oxford University Press, 2000) and *Antitrust, Innovation and Competitiveness* (Oxford, Oxford University Press, 1992) (with Thomas M Jorde, eds). He was identified by Accenture as one of the World's Top 50 Living Business Intellectuals and listed by Science Watch (November/December 2005) as one of the 10 most cited scholars worldwide in economics and business, 1995–2005. He has honorary doctorates from St Petersburg State University, Russia, the Copenhagen Business School, Denmark, and the Lappeenranta University of Technology, Finland. He has a BA and M Comm from the University of Canterbury in New Zealand and an MA and PhD in Economics from the University of Pennsylvania.

Part 2: Country Chapters

Australia

Bob Baxt is Partner with Freehills in Australia. Before that he was Chairman of the Australian Trade Practices Commission and prior to that, the Dean of the Monash University Law Faculty. Professor Baxt has been an advisor to governments and clients on the impact of the Competition Policy Reform Act 1995, the Trade Practices Act 1974 and related legislation. Professor Baxt was honoured in the Queen's Birthday Honours

Awards in 2003 by being awarded an Order of Australia for services to the law. He is also a Professorial Fellow at the University of Melbourne.

Henry Ergas spent a decade as a micro economist at the Organisation for Economic Co-operation and Development (OECD) in the 1980s and headed the Secretary-General's Task Force on Structural Adjustment, which concentrated on improving the efficiency of government policies in a wide range of areas. Since leaving the OECD, he has focused on competition policy and regulatory economics. He has been closely involved in dealing with regulatory issues in a range of industries, including telecommunications, electricity, aviation, surface transport, and financial services. He chaired the Intellectual Property and Competition Policy Review Committee for the Australian Government in 1999–2000, and was a member of the Prime Minister's Export Infrastructure Task Force in 2005 and of the Defence Industry Consultative Group in 2006. He is currently the Chairman of Concept Economics, an economics consultancy firm with offices in Canberra and Sydney. He is also an Honorary Professor in the Faculty of Economics at Monash University in Melbourne, and a Lay Member of the New Zealand High Court.

China

Michael Jacobs is Distinguished Research Professor of Law at the DePaul University College of Law. In 2000 he held the Fulbright Distinguished Chair for Italy. He has been practicing, teaching and consulting in the field of antitrust since 1972, and has written dozens of articles, book chapters and books on various aspects of the topic. During the past five years, his research and writing has focused on the intersection between intellectual property and antitrust. Since 2001, he has taught and consulted regularly in China, with government, academic, and judicial groups. He has advised the Australian Competition and Consumer Commission, and for the past 11 years has been a Special Counsel to the Sydney firm of Blake Dawson. Professor Jacobs is a graduate of Dartmouth College and the Yale Law School.

Xinzhu Zhang was deeply involved in the drafting process of the Chinese Anti-Monopoly Law and the pre-merger notification policy for the State Council and Ministry of Commerce (MOFCOM) of PR China. Dr Zhang also has advised governments and private companies on the market implications of regulatory reform. He has also consulted in a number of cases in the payment card industry, electricity industry, telecommunication industry, and various consumer products industries. He has a BS from Xiamen University, an MS from Shanghai Jiaotong University and a PhD from the University of Toulouse.

Japan

Steve Harris practises antitrust law with Baker and McKenzie in Washington and has had considerable experience, including class actions and cartel and merger investigations, before US and international courts and agencies. He also represents financial institutions in complex regulatory and commercial litigation. Steve has extensive experience in Asia and serves as the Firm's Asia competition law coordinator. Steve is editor-in-chief and co-author of the two-volume treatise *Competition Laws Outside the United States*, published by the American Bar Association. He has served as the international officer of the ABA Section of Antitrust Law, as well as a member of its Council, as vice chair of the Inter-Pacific Bar Association, and as a member of the International Bar Association Competition

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Hiroshi Ohashi is Associate Professor at Graduate School of Economics and Graduate School of Public Policy, University of Tokyo. His areas of research include empirical industrial organisation and international trade policy. Dr Ohashi previously taught at Sauder School of Business, University of British Columbia, Canada, and held a visiting associate professorship in Ludwig-Maximilians-Universität München, Germany. He is also a chief researcher at Competition Policy Research Center at Japan Fair Trade Commission, a Faculty Fellow at the Research Institute of Economy, Trade & Industry, and a Head Research Officer at the National Institute of Science and Technology Policy in the MEXT. He holds a PhD in Economics from Northwestern University, and an MA and BA from University of Tokyo.

India

Vinod Dhall set up the Competition Commission of India from its inception in 2003 and was, until recently, the single member and its Acting Chairman. Prior to that he was Permanent Secretary to the Government of India's Department of Company Affairs. He has a law degree from Delhi University and a Masters degree in Mathematics from Allahabad University. He has also edited a book *Competition Law Today* (Oxford, Oxford University Press, 2007).

Augustine Peter is currently Economic Adviser with the Ministry of Commerce and Industry, Department of Commerce, Government of India. He is a member of the Indian Economic Service (IES) and has post graduate degree qualifications in Economics from Indian and UK universities. He specialises in areas such as Competition Policy, Multilateral Trade and Investment, with experience spanning over 30 years in banking and in various economic departments of government as well as in the United Nations Industrial Development Organization (UNIDO). He understands and speaks English, Hindi and French. Views expressed are personal.

Indonesia

Ningrum Sirait is Professor of Law, University of North Sumatera in Medan, Indonesia. Since 1989, she has lectured in both undergraduate and graduate subjects in the Law School, including competition law, contract law, corporation law and consumer protection. Professor Sirait has written extensive articles (both in Indonesian and international journals) and several books in the area of competition law. She has been a visiting researcher and scholar in Germany under a DAAD scholarship and given talks at various international seminars in Singapore, Hong Kong, Germany and Washington DC. Professor Sirait obtained her Master's degree from the University of Wisconsin in the United States in 1996 where her major field of study was economic law. She completed her Doctoral degree in 2003 at the University of North Sumatera with a dissertation in competition law, receiving a Fulbright Fellowship to help her finalise her dissertation.

Cento Veljanovski established and is Managing Partner of CASE Associates, London. He has been a director/partner of several management and economics consulting firms and on the board of listed public companies. The *Global Competition Review* 2006 survey voted

Cento one of the most 'highly regarded' competition economists. He has over 30 years' experience assisting lawyers and companies in responding to investigations by the European Commission under articles 81 and 82 of the EC Treaty, and the EC Merger Regulation, national competition authorities, national regulatory authorities, and in court proceedings in EU Member States and other countries in Europe, Australia, New Zealand and North America. He has been advisor to the Microsoft Monitoring Trustee on the pricing of protocols under commitments set out in the EC *Microsoft* (2004) decision. Cento has degrees in economics and law (BEc (Hons), MEc, DPhil) and is an associate member of the Chartered Institute of Arbitrators (ACI Arb). After a short period at the Australian Federal Department of the Treasury, Cento held a Research Fellowship at the Centre for Socio-Legal Studies at Oxford University. He has also held academic positions at the University of London, Monash University (Australia), York University (United Kingdom), and Universities of Toronto, New York, and Miami.

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His book, *Patent Misuse: An Empirical Study*, will be published by Edward Elgar in 2011. His articles have been published in leading IP law reviews and books in the US, Europe and Asia. His recent publications include the chapter in this book, an essay, 'Post-eBay: A Brave New World?' (*European Intellectual Property Law Review*, 2010), and an article, 'Misconduct in Standard Setting: The Case for Patent Misuse' (*IDEA: The Intellectual Property Law Review*, 2011). The latter article won the grand prize in the 2009 International Essay Writing Competition of the International Association for the Advancement of Teaching and Research in Intellectual Property ('ATRIP'). Daryl delivered the paper at ATRIP's annual meeting in Stockholm in 2010.

Daryl has graduate law degrees from Stanford University and the National University of Singapore ('NUS'). He also has undergraduate degrees in law from NUS as well as another in economics and management from the London School of Economics. Previously, Daryl was in private practice at the IP & Technology Department of Allen & Gledhill LLP, Singapore's largest law firm. Daryl was a residential scholar at the Max Planck Institute for IP, Competition and Tax Law and later at the Queen Mary IP Research Institute.

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South Korea

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