Keele Law Review, Volume 1 (2020), 42-59
ISSN 2732-5679

The Regionalisation of Competition Law, the Middle East and the International Competition Network (ICN): An Attainable, Not a Penrose, Triangle

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Abstract

The link between the Middle East, regional cooperation and the International Competition Network (ICN) has never been established, whether in the literature or the through the work of the ICN itself. In this regard, the present article attempts to demonstrate – using critical analysis – that the time has come for the ICN leadership and membership to recognise the importance of this link. The central argument of the article is that the ICN is well-placed, after twenty years of its existence, to open this new 'front' in its work. The article shows how doing so will result in a positive contribution to the development of competition law and policy in the Middle East region *as well as* serve the Network's interests and particularly those of the majority of its members who belong to corners of the world in which regional cooperation is clearly desired and desirable

I. Introduction

The International Competition Network (ICN) – the world's largest network of competition authorities – will soon be celebrating an important anniversary. Since its launch almost twenty years ago, the Network has secured a score of phenomenal successes which, frankly, no one at that time had anticipated would be possible to achieve over a relatively short period. Not only has the ICN broadened its base from the handful of its founding competition authorities to around 137-member competition authorities, its agenda became stretched in parallel, beyond merger control[1] and competition advocacy[2] – the Network's central pillars – to include the important areas of cartels, abusive unilateral conduct and effective enforcement (what the ICN refers to as 'agency effectiveness').

Judged by the large body of literature written on the ICN during the past two decades, there has never been any shortage of commentary – whether by academics, practising lawyers or competition enforcers – reflecting on what the Network's future endeavours

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[1] Merger control is the mechanism used by competition authorities to ensure that harmful mergers between business entities would not be implemented without proper scrutiny.

[2] Competition advocacy involves competition authorities promoting competition through championing competition standards and principles *vis-à-vis* all stakeholders, in particular governments and business firms, as well as conducting educational work seeking to enhance awareness of competition and its importance among different audiences, especially consumers. See M. Dabbah, 'Measuring the Success of a System of Competition Law' [2000] E.C.L.R. 369.

should include.[3] Interestingly, however, this commentary has devoted no attention to a major topic in the field of competition law, namely regional cooperation or the regionalisation of competition law. As a result, there is a gap in the existing literature on the ICN which the present article comes to bridge.

Regional co-operation – whilst never acknowledged or recognised by the ICN leadership or membership – is an articulation of the very ideas expressed in the ICN's mission statement,[4] according to which:

'The ICN's mission is to advocate the adoption of **superior standards and procedures** in competition policy around the world, formulate proposals for **procedural and substantive convergence**, and seek to facilitate **effective international cooperation** to the benefit of member agencies, consumers and economies worldwide.' (Emphasis added).

One needs to look no further than the most important and successful example of regional cooperation – the European Union (EU) competition law regime,[5] to see how it has resulted in: *superior standards and procedures in competition law and policy*; *procedural and substantive convergence and harmonisation* among very divergent national competition law regimes; and *effective cooperation* to the benefit of millions of European consumers and the domestic economies of all EU member states.[6] Regional cooperation in the EU has meant that many harmful practices (particularly international cartels and abusive conduct) *and* harmful merger operations, not to mention illegal state aid, have been possible to address. It would be reasonable and safe to assume that without this cooperation almost all of these practices would probably have escaped proper scrutiny.

This article has been inspired by three facts: the importance of regional cooperation in the field of competition law; the insufficient attention given to the Middle East notwithstanding the relevance of this cooperation to the region; and the lack of recognition – by both ICN leadership and membership as well as by policy-makers, scholars and practitioners – of the direct link between the ICN and regional cooperation. The article seeks to demonstrate that any attempt to connect these three facts is theoretically viable and practically attainable and certainly does not amount to drawing a Penrose triangle. In presenting this new idea, the article offers a critical assessment of the potential role the ICN can play in, and the vital support the Network can give to, promoting the regionalisation of competition law in the Middle East and around the world more widely. The central argument of the article is that the ICN is well-placed, after twenty years of its existence, to open this new 'front' in its work. Doing so, will serve the Network's objectives and the needs of the Middle East region, within which regional cooperation is desired and desirable. Such involvement,

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[3] For an excellent and comprehensive representative account of such literature, see P. Lugard, *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia, 2011).

[4] International Competition Network, 'International Competition Network' <www.internationalcompetitionnetwork.org> accessed 12 June 2020.

[5] The EU competition law regime is not the only European example to be mentioned. Other examples include: the European Free Trade Association (EFTA); the European Competition Authorities (ECA); and the Nordic Agreement on Cooperation in Competition Matters.

[6] The literature coving the EU competition law and policy, including their success, is vast. See generally L. McGowan and S. Wilks, 'The First Supranational Policy in the European Union: Competition Policy' [1995] Eur. J. Pol. Res. 14; A. Papadopoulos, *The International Dimension of EU Competition Law Policy* (Cambridge University Press, 2010); G. Amato, *Antitrust and the Bounds of Power* (Hart Publishing, 1997).

ultimately, will result in a unique contribution, which most likely will be welcomed by the competition law community globally.

The article is structured as follows. The following part, part II, gives an overview of regional co-operation. Part III highlights several aspects of regional cooperation which deserve attention. Part IV presents a 'case study' using the Middle East region. Part V assesses the role the ICN could play in realising the full potential of regionalisation. Finally, Part VI contains concluding thoughts.

II. An Overview of Regional Co-operation

Regional cooperation is an important form of cooperation in the field of competition law.[7] Considerable efforts have been made by several communities over the past two decades primarily seeking to develop competition law and policy regionally. Some form of regional cooperation has been attempted or exists within every region of the world: Africa;[8] Asia (including the Middle East);[9] Oceania; and the Americas and Caribbean;[10] this is in addition to Europe, the region with the greatest experience with regionalisation.[11] In some regions, other than Europe, impressive steps have been taken towards the 'crown-jewels' of regional cooperation: building a supranational competition law regime.[12]

The number of initiatives seeking to develop a regional approach to competition law and policy has been relatively high. These initiatives – like the regions within which they were started – are at different stages of economic, political, and social development. The fact that all world regions have devoted particular attention to regional competition law and policy is highly interesting. In the case of some regions, several of the member countries actually lacked *effective* competition law regimes and sufficient competition expertise domestically at the time those initiatives were unveiled.[13]

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[7] See generally *Regional Cooperation Agreements: Benefits and Challenges* (OECD, 2018); M. Dabbah, *International and Comparative Competition Law* (Cambridge University Press, 2010); D. Melamed, 'International Cooperation in Competition Law and Policy: What can be Achieved at the Bilateral, Regional, and Multilateral Levels' [1999] J. Intl. Econ. L. 423; Q. Tong, 'On the Regional Cooperation Mechanism of Competition Policy: A Comparative Research among APEC, NAFTA and EU' [2007] The International Law Review of Wuhan University 1; M. Gal, 'Regional Cooperation Law Agreements: An Important Step for Antitrust Enforcement' [2010] U. T. L. J. 239; F. Jenny, 'International Cooperation on Competition: Myth, Reality and Perspective' [2003] Antitrust Bull. 973.

[8] See the *Economic and Monetary Community of Central Africa* (CEMAC), the *Common Market for Eastern and Southern Africa* (COMESA), the *West African Economic and Monetary Union* (UEMOA or WAEMU), the *Southern African Customs Union* (SACU), the *East African Community* (EAC) and the *Southern African Development Community* (SADC).

[9] See the *Association of South East Asian Nations* (ASEAN), the *South Asian Association for Regional Cooperation* (SAARC), and the *Asia-Pacific Economic Cooperation* (APEC). Middle Eastern initiatives are discussed in detail in part 4 below.

[10] See the creation of the *Southern Common Market* (MERCUSOR), the *Andean Community*, *Caribbean* Community and Common Market (CARICOM), the *North American Free Trade Agreement* (NAFTA), the *Central America-Dominican Republic-United States Free Trade Agreement* (CAFTA-DR) and the various Latin American Free Trade Agreements.

[11] See notes 5 and 6 above and their accompanying text.

[12] See some of the examples mentioned above, such as COMESA competition law regime. See M. Elfar and M. Momtaz, 'Egyptian Competition Enforcement: Putting COMESA and LAS Cooperation into Practice' [2017] J. E. L. & Pract. 586.

[13] CUTS International 'Competition Regimes in the World: A Civil Society Report' (Report, 2006).

Broadly speaking, regional cooperation can take many forms. The *first* is where the cooperation is used as a 'forum' for consultation and experience sharing which would facilitate the building of effective domestic competition law regimes and support these regimes through technical assistance and capacity building channels. The *second* type revolves around achieving convergence and harmonisation – whether in substantive or procedural terms – among the domestic competition law regimes of the countries concerned. The *third* type of regional cooperation is considerably more ambitious and much more 'long term' and complex than the first two types: it involves adopting binding regional competition law to be enforced by a regional competition authority, whether exclusively or in a shared manner with the domestic competition authorities of the relevant member countries. These three types are not mutually exclusive and may be pursued simultaneously or successively within a given regional cooperation framework. This is demonstrated by the EU experience which has inspired all regional communities around the world in their pursuit of competition law cooperation.

Communities have differed in their reasons for developing competition law within a regional cooperation setting.[14] Broadly speaking, these reasons include: the fact that competition law is seen as complementary to rules on trade, which regional cooperation often, if not always, incorporates; the fact that it is considered to be a natural component of economic cooperation, which is usually sought when regional cooperation is opted for; the fact that there is, sometime, particular interest to enhance the status and importance of competition law domestically whilst ensuring harmonised standards at regional level; the fact that regional cooperation may help facilitate the provision of technical assistance between the different (participating) competition authorities and their capacity building; and the fact that regional solutions can be seen as necessary to address cross-border competition problems.

In relation to the last point in particular – as demonstrated so succinctly by the EU experience – regional cooperation (or more accurately the building of a regional competition law regime) can help achieve more effective competition law enforcement both domestically and regionally. This is particularly beneficial where cross-border anticompetitive behaviour, conduct or transactions have significant regional and international consequences or implications. In relation to some of these situations – most notably the regulation of cross-border merger operations – regional cooperation can have enormous benefits for business firms whether in terms of: reducing costs; enhancing legal certainty; creating similar regulatory environments among different countries; and minimising the risk of inconsistent findings by more than one competition authority.[15]

Notwithstanding the clear interest in pursuing regionalism around the world and the large number of regional initiatives launched over the years, pursuing regional

[14] Dabbah, note 7 above; M. Matsushita, 'International Cooperation in the Enforcement of Competition Policy' [2002] Wash. U. Global Stud. L. Rev. 463.

[15] One of the ways this is achieved is through using a one-stop shop principle, under which when a transaction is regulated at the higher regional level it will be excluded from the jurisdiction of competition authorities at the lower national level. See the existence and the operation of this principle under the merger Regulation, Regulation 139/2004 in the EU competition law regime.
For an account on the benefits of cooperation in the area of merger control, see J. Galloway, 'Convergence in International Merger Control' [2009] Comp. L. Rev. 179; OECD, 'Cross-border Merger Control: Challenges for Developing and Emerging Economies' (OECD, 2012).

cooperation in the field of competition law is a task fraught always with difficulties of both extrinsic and intrinsic nature.

Extrinsically, other than the need to have political will and agreement among the participating countries to engage in regional cooperation, many parts of the world where regional cooperation has been attempted face serious challenges, which tend to dominate both domestic and regional agendas. These challenges include bitter conflicts and regional tensions, poverty, and natural disasters and diseases.

Intrinsically, other than the fact that an interest must exist on the part of the domestic competition authorities of the relevant countries to cooperate, sufficient competition law expertise and resources must exist domestically and an appropriate portion of these will need to be devoted to building a viable regional cooperation framework.

The existence of such hurdles means that fields such as competition law many times end up being pushed not to the *fore* but to the *background* in regionalisation efforts; occasionally, similar fate may be encountered at domestic level as well.[16] It must be appreciated, therefore, that a long distance lies between formulating an idea of regional cooperation and converting this idea into a fruitful initiative. Even if it were assumed that this distance would eventually be covered, realising coherent and practicable competition *enforcement* within a regional framework is a highly challenging task. Among other things, it would be important to have in place practical mechanisms to ensure that the regional framework and the domestic competition law regimes of the relevant countries would operate in harmony by supporting each other and preventing clashes, whether in the outcomes of cases or at policy formulation level. Similarly, careful efforts should be made to avoid the domestic regimes undermining the regional framework and vice versa. This requires the existence of an appropriate system defining the relationship between the regional and domestic level as well as between the national competition law regimes of the countries concerned.

III. Particular Aspects of Regional Co-operation Deserving Attention at Present

Every regional cooperation in the field of competition law globally would benefit from appropriate support, fresh input, and further development. Even in the case of the EU competition law regime, it is perfectly possible to propose – theoretically and practicably – ways in which the regime and its network of competition authorities, the European Competition Network (ECN), could be improved further whether in substantive or procedural terms.

The room for improvement is particularly generous and such improvement is mostly necessary among regional communities of the developing world. These form the greater majority of the ICN membership. Many competition authorities in these regions, which are young institutions, face considerable challenges, whether in the form of: lack of suitable expertise and/or financial resources; insufficiently developed rules and procedures; or wider political constraints.

[16] See generally M. Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' [2010] W. Comp. L. & Econ. Rev. 457.

The present article identifies several aspects of regional cooperation which deserve attention, and which need improvement in order to help the relevant communities benefit from (more) meaningful cooperation. Admittedly, a list of such aspects can never be exhaustive since it is always possible to identify further aspects, though these are likely to be exclusive to individual communities. The aspects discussed below are relevant to almost all regional cooperation initiatives in existence around the world.

1. Lack of clear direction

Most of the regional efforts launched have in essence been attempts to identify directions in which regional cooperation could be pushed. Much of what has been achieved as a result of these efforts could be considered to have been largely *exploratory* in nature and shows a degree of uncertainty among the participating countries or competition authorities in relation to what can be realistically expected. This can be seen in light of how considerable hopes were attached to a number of regional initiatives when these were first introduced; though for a long time little progress was made in practice.[17] In the case of some initiatives, resources have been wasted because of endless discussions on how these initiatives should be revised.[18]

The lack of clear direction has resulted in a noticeably heavy borrowing from the EU experience by virtually all regional communities around the world with hardly any attention given to any other regional experience. Some of the communities have set themselves extremely over-ambitious goals to achieve in a few years what took European nations over 70 years to achieve in their EU cooperation (and probably would be correct to say what the EU continues to achieve until the present time).[19]

It is good for different regional communities to be inspired by the EU experience. It would also be correct to argue that it is necessary for these communities when seeking regional cooperation to consult and learn from this experience. Nonetheless, one should be aware that it has been neither suitable nor useful for different regional communities to attempt an almost 'copy' and 'paste' exercise when consulting the EU experience. The circumstances and history of the relevant regions often differ significantly from those of the European region. It is always worth remembering that the experience the EU has had in the field of competition law – like its experience in all other fields – has been very much 'European', inspired by historical events and conditioned by developments unique to EU member states.[20] Interestingly, it is possible to identify a paradox when studying the position of those regional communities, which have opted to copy the EU experience. On the one hand, by following the EU model these communities have opted for a far-reaching form of regionalism. On the other hand, the countries within these communities have been very reluctant to surrender part of their economic sovereignty and to transfer competence to the regional level (as has been the case with the EU).[21]

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[17] See for example the ASEAN cooperation, note 9 above. See P. Porananond, *Competition Law in the ASEAN Countries: Regional Law and National Systems* (Kluwer, 2018).
[18] Both the Middle East and Africa regions are examples in point.
[19] *ibid*.
[20] See A. Weitbrecht, 'From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law' [2008] E.C.L.R. 81.
[21] The Arab League initiative, discussed in the following part, is an example in point. In relation to the EU, one must acknowledge that some of the founding member states reluctantly accepted the limitation of sovereignty and some of them have questioned, and continue to, question the whole legitimacy of limitation on their sovereignty. See F. Bignami (ed), *EU Law in Populist Times* (Cambridge University Press, 2020).

Pursuing cooperation in the different regions – especially those within which, at the relevant time, domestic competition laws did not exist or had not reach a sufficiently advanced level – reveals an openness or acceptance of a 'top-down' approach. This is a significant point to note since it means an opportunity does exist for input from a higher level such as the ICN and for guidance to be offered at this level which the relevant countries and their competition authorities are likely to welcome, especially when they lack clear direction in their cooperation efforts. These input and guidance can help these countries and their competition authorities achieve the necessary clarity on the direction in which their regionalisation efforts should move as well as how they should approach 'foreign' experiences (mostly, the EU experience) and use these experiences in a coherent and useful manner.

2. Harmonisation

Regionalisation efforts around the world show an express desire by many communities to achieve harmonisation of competition rules. However, even with a most comprehensive regional approach to harmonisation, full success cannot be guaranteed if major discrepancies exist between the domestic competition laws and policies of the relevant countries; not to mention discrepancies in the wider legal, political, and economic environments of those countries. Looking at all of the countries which are members of regional communities or organisations, it is obvious that significant differences exist between them and this is bound to make any harmonisation initiative considerably hard. Moreover, the countries within one and the same community may be at different stages of economic development and may enjoy varying degrees of economic and trade strengths. Any attempt to achieve harmonisation – regardless of the mechanism used in this case – is likely to result in one or a small group of countries 'dominating' the process and this is likely to trigger objection on the part of other countries. This highlights the need for these countries to learn how harmonisation should be pursued and in parallel how to engage in convergence among their domestic competition law regimes.

3. Division in competence

The different regional communities seem to lack the necessary understanding and tools to deal with all questions concerning the exercise of jurisdiction and the likely problems following the exercise of such jurisdiction by regional authorities.[22] These questions concern, among other things: the division in competence between the regional level and national level; the exact role to be fulfilled by regional authorities especially in the arena of enforcement (for example whether they will have the ability, and if so how, to access and gather information in actual cases from firms operating in the different countries); and the necessary safeguards needed to have in place to deal with a possible expansion of the workload of regional authorities to an extent that they are no longer able to handle such workload (for example, whether in this case national competition authorities may become involved).

4. Sub-regional cooperation

In various regions, countries have opted for building 'sub'-regional cooperation, which represents a longer route for establishing a wide regional framework, including one with a competition law dimension. This appears to have been used as an alternative to

[22] See UNCTAD, 'The Attribution of Competence to Community and National Competition Authorities in the Application of Competition Rules' (Report, 2008).

pursing such framework directly. Examples of sub-regional cooperation in fact exist in the Middle East.[23] This can be seen in the case of: the Gulf Cooperation Council (GCC);[24] the Agreement for the Establishment of a Free Trade Zone between the Arabic Mediterranean Nations (Agadir);[25] the Greater Arab Free Trade Area (GAFTA) which effectively has rendered Agadir somewhat redundant;[26] and even the Arab League, discussed in part 4 below.

It is doubtful that sub-regionalisation is viable for the purposes of consensus building and for achieving wide regional cooperation. Doubts exist that introducing competition law in sub-regional initiatives will prove workable or helpful whether in the short or long terms. In some parts of the world, countries have been highly reluctant to subscribe to the idea of sub-regionalism (especially the idea of creating a sub-regional competition authority).[27] Sub-regionalism may prove to be problematic if the overall objective of the countries concerned is to achieve harmonisation in the competition law regimes of *all* countries in the region.

5. Overlap in membership

The issue of sub-regionalisation has triggered an interesting situation of overlap in membership in which some countries are parties to more than one regional community. Among other things, this situation causes confusion and raises wide speculation over whether a given country found in a cross-membership position will give priority to one community over another and, consequently, whether it will favour the competition law framework of one community over that of another.

It is probably correct and safe to assume that an overlap in membership is bound to dim the prospects for achieving proper and meaningful regionalisation and is likely to lead to failure in turning the declared objectives of the relevant communities into a reality. The likelihood of failure is enlarged considerably due to the overambitious goals some of these communities set for themselves.[28] This calls for clarification of the relationship, and definition of the interplay, between regional communities whose memberships overlap. Suitable illustrations can be found around the world which highlight the need for such clarification and definition.[29] Equally, suitable illustrations

[23] It should be noted that the Middle East is not an exception here since other examples can be found in the rest of the world. See Dabbah, note 7 above.
[24] The GCC is made of the following Arab Gulf countries: Saudi Arabia, Kuwait, United Arab Emirates, Bahrain, Qatar and Oman.
[25] Agadir nations include Egypt, Jordan, Morocco and Tunisia.
[26] GAFTA members include Bahrain, Egypt, Iraq, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, and the United Arab Emirates.
[27] See for example the views expressed by some Mercosur countries; see OECD, 'Competition Law and Policy in Brazil: A Peer Review' (Report, 2005).
[28] Suitable illustration of can be found
[29] Other than the example of the Arab League and Agadir/GAFTA within the Middle East referred to in the previous section, a particularly good example showing the need for clarification of the relationship between regional communities where an overlap in membership exists, concerns the relationship between the Caribbean Community (CARICOM) and the Organisation of Eastern Caribbean States (OCES). The Competition Commission of CARICOM has jurisdiction in cases with cross-border effects. However, the interplay between it and the proposed OCES Competition Commission (OCC) has not been defined.
For a discussion on the Caribbean experience, see J. Molestina, *Regional Competition Law Enforcement in Developing Countries* (Springer, 2019).

also exist which prove that, when such clarification and definition are secured, this will lead to positive outcomes.[30]

It should not be surprising in light of this – and notwithstanding the significant regionalisation efforts made by many countries and their competition authorities over the years – that regional cooperation in the field of competition law has not, on the whole, achieved its full potential. This perhaps obvious conclusion makes it both necessary and interesting to ask how could one best support these efforts so that this potential can be attained?

This is where this author believes the ICN has a role to play. The present article will address this role in part 5 below. Before doing so however, the article offers a suitable case study of regional cooperation in the following part.

IV. The Middle East

The choice of the Middle East region as a case study was made because – among all world regions – the Middle East suffers from the hardest conflicts, the deepest divisions and the most extreme of political and religious sensitivities and tensions.[31] In many ways, it is the one region which desperately needs regional cooperation in all arenas, especially economic and political ones; as well as being the one region within which, normally, people would least expect any form of regional cooperation.[32] In relation to competition law, expectations were never high that competition law could develop and flourish in Middle Eastern countries even when such countries formally adopted domestic competition rules. Furthermore, the Middle East has received almost no attention within international competition law circles. In light of this, making any kind of progress in the field of competition law and more importantly pursuing regional cooperation in the field is remarkable, unique, and warmly welcome. For our purposes, the region is an apt case study. This view becomes strengthened when the Middle East is compared with other regions, which – although have their fair share of difficult challenges and problems – have seen significant progress in the areas of domestic and regional competition law. Africa is one such region to compare to the Middle East.

1. Geographical delineation

When discussing the Middle East, it would be important, regardless of the issue at hand, to, first, give a geographical definition. In the context of the present article, this is important not least because, from an ICN's perspective, a rigid Asian/African division appears to be followed in relation to the Middle East.[33]

A (never settled) debate has evolved for many years now over this definition and where exactly Middle Eastern geographical boundaries should be drawn. This debate has spanned different academic, political, and diplomatic circles. This author does not intend to contribute to this debate on this occasion but rather to offer a definition, which is neutral and hopefully free from controversy. According to this definition, the

[30] The most high-profile example is the relationship between the EU and EFTA within the European Economic Area framework.

[31] See generally M. Dabbah, *A Promising Middle East* (Contento, 2014).

[32] See generally C. Harders and M. Legrenzi (eds.), *Beyond Regionalism? Regional Cooperation, Regionalism and Regionalization in the Middle East* (Routledge, 2016).

[33] See the ICN's divisional map used in identifying and listing different ICN members, available at: ICN, 'Members' (Internationalcompetitionnetwork.org) <www.internationalcompetitionnetwork.org/members> accessed 12 June 2020.

'Middle East' is taken to include the following countries: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, United Arab Emirates and Yemen. Obviously, in certain quarters, these selected countries are referred to geographically as the 'Middle East and North Africa'.[34] However, there are many uniting factors justifying grouping all of these countries together as Middle Eastern ones, most notably in terms of culture, language and religion.[35]

2. Notable developments

Competition law exists in the majority of Middle Eastern countries.[36] Judged objectively, various Middle Eastern countries have been making highly notable efforts, instituting domestic competition law regimes and building 'portfolios' of effective enforcement.[37]

Regionally, the most significant competition law development has been the drafting of a set of *Arab Competition Regulations* which were prepared within the framework of the League of Arab States.[38] The *Regulations* essentially take the form of a 'competition law', the provisions of which have been informed by three sources: EU competition law; the competition laws of Arab countries which at the time had enacted domestic competition legislation; and UNCTAD's *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*. The declared aim of the *Regulations* is to protect and encourage competition and to supervise monopolistic practices for the purposes of increasing economic activity. The *Regulations* apply to collusion, abuse of dominance and harmful mergers, though acts involving the sovereign or the exercise of prerogatives of public powers and/or the exercise of public tasks and activities fall outside the scope of the *Regulations*.[39]

Drafting the *Regulations* was a major step towards creating some form of regional cooperation mechanism in the Middle East.[40] The *Regulations* are not intended to have the binding force of the law and therefore their role is to serve as a set of guidelines for the member states to follow for the purposes of adopting domestic competition laws or modifying their existing laws in line with the wording and spirit of the *Regulations*. They provide that enforcement should be handled by domestic competition authorities,[41] which, according to the *Regulations*, should be established

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[34] As noted in the previous paragraph, the ICN appears to be one example according to its divisional map. See *ibid*.

[35] The author has discussed elsewhere this question of geographical definition and such factors. See M. Dabbah, *Competition Law and Policy in the Middle East* (Cambridge University Press, 2007).

[36] World Bank Group, 'Promoting Fair Competition in the Middle East and North Africa' (Report, October 2019).

[37] Examples of these efforts exist across the region, including within: Turkey, Tunisia, Morocco, Saudi Arabia, Jordan, Israel, Qatar, and Kuwait, among others.

[38] The League came into existence in 1945 and aimed to coordinate the economic affairs of its members, which are Arab countries. It is the oldest attempt to achieve regional cooperation in the Middle East.

[39] See Article 3 of the *Regulations*.

[40] A detailed set of explanatory notes was also drafted. This set of explanatory notes is intended to serve as an accompanying document to the *Regulations* for the purposes of explaining the different provisions in the *Regulations* and their application. Both the *Regulations* and the explanatory notes need final approval of the League prior to their implementation.

[41] Under Article 2 of the *Regulations*, an authority is defined as the competent body with responsibility to implement and enforce the *Regulations* in accordance with the internal rules in operation within each member state.

in each member state and be armed with a wide range of powers and responsibilities enabling them to effectively enforce domestic competition laws.[42]

The decision to draft the *Regulations* as a set of guidelines followed a lengthy debate, which focused on whether the *Regulations* should serve as a blueprint for an enforceable regional competition law at the Arab League level. At the time this debate emerged, a dissimilar position to the present one had existed throughout the Arab world, namely that competition law was absent from the vast majority of Arab countries.[43] Admittedly, opting for the regional regime option would have been problematic. Apart from the fact that this option represents an ambitious attempt requiring political approval at the level of heads of states (which was not possible in the case), the *domestic* competition issues of Arab countries outnumber those with cross-border element. The regional model would not have addressed such domestic problems effectively or comprehensively. Furthermore, at the time, there was lack of sufficiently robust and widespread competition culture in all Arab countries and to a large degree insufficient recognition of competition or even an understanding of it. A regional model would have contributed very little to spreading such culture given the daunting task a regional competition authority would have faced when attempting to deal with a large number of local economies and markets. The regional model would not have, thus, been an appropriate substitute for having domestic competition law regimes become established in the different countries.

Nonetheless, one should acknowledge the merit to the regional regime option as argued by its proponents. The intention was to avoid a situation where some Arab countries would, through delaying the enactment of domestic competition rules, eventually derail the creation of a regional competition law regime. Such a regime was seen as desirable in the case of the Arab world and beneficial for the purposes of addressing all types of competition problems. Additionally, those proponents argued that – by choosing this option – it would have been possible to guarantee that the same rules and standards would prevail throughout the Arab world as opposed to a situation where different domestic rules and standards would have to be 'adjusted' to a common approach at a later stage. This was largely a pragmatic approach adopted by the supporters of the regional regime option. Clearly, those supporters had anticipated divergences between the *Regulations* and future domestic competition laws of member countries. Admittedly, such divergences are possible to identify when considering the competition law regimes in existence within Arab countries at present (which did not exist at the time the *Regulations* were drafted). For example, the provisions of the *Regulations* on enforcement are markedly different from some of those regimes. The *Regulations* themselves acknowledged the potential for divergences in this regard; hence the reason why the provisions contained in Chapter 4 of the *Regulations* provide that they do not prejudice the right of each member state

[42] See Chapter 4 (Articles 12-23) of the *Regulations*. Among the powers listed in Article 12 are: conducting investigations (including searches); reviewing notified concentrations (mergers); engaging in competition advocacy and building a culture of competition; cooperation with foreign competition authorities; preparing annual reports to be submitted to the relevant bodies or persons in the country; and making decisions. Other provisions in Chapter 4 worth noting are those dealing with issues such as the expertise and qualifications of individuals to be appointed as competition officials (Article 13), the obligation on officials to observe confidentiality in internal agency proceedings (Article 22) and the obligation on those officials to avoid conflict of interest (Article 21).

[43] At that time, various Arab countries – notably Saudi Arabia, Egypt, Jordan, United Arab Emirates, Kuwait and Qatar – had not adopted domestic competition law; only Algeria, Morocco and Tunisia had domestic competition legislation.

to determine the nature, composition and operation of its domestic competition authority.[44]

Any future *formal* adoption and implementation of the *Regulations* can make an important contribution on several fronts, ranging from providing a common ground to which all domestic competition law regimes of Arab countries would be linked, to opening a new chapter in competition law and policy in the Arab world and the Middle East more generally. The mere existence of the *Regulations* in a draft form has placed competition law and policy firmly on the regional map in the Middle East. Obviously, any formal adoption and implementation of the *Regulations* depend on the political support individual countries are willing to offer and the ability of existing Arab competition authorities to work together. Neither can be taken for granted. This in itself is an indication towards the potential role a third party or platform – such as the ICN – could perform especially in assisting Middle Eastern competition authorities on the regional cooperation front.

V. The Role of the ICN

In light of the discussion above – and with the clear desire by various world communities, including the Middle East, to establish regional cooperation – this part will consider why and how the ICN could offer valuable support and input as part of a future role to promote regionalisation.

1. Suitability

The central 'thesis' of the present article is that the ICN is suitably positioned to help different regional communities, particularly the Middle Eastern community and its competition authorities, explore cooperation fully; do so in an effective, efficient and meaningful manner; and reap the benefits of such cooperation. A contribution by the ICN is likely to be well-received and it should, ultimately, make a material difference in the entire landscape of regional competition law and policy.

As noted in part 1 above, the regionalisation of competition law reflects the very essence of the ICN. The topic therefore fits perfectly and naturally within any future ICN agenda. In making this statement, this author believes that the question, curiously, is not whether the ICN should take up this new challenge and become involved in promoting regional cooperation. Rather, the question is why the ICN has not done this until now, especially when regionalism is inherent within it. The latter is evident from the way the Network presents its membership base and from its use of a divisional map, which is clearly regional in orientation, [45] as well as in light of how the Network conducts its activities, especially its various events. This shows that – while the ICN's outlook is 'international' – it is somewhat sensitive to the regional dimension of competition law and policy. Whether the ICN leadership or membership are aware of this, however, is unclear, though it would not be unreasonable to believe that such regional sensitivity is likely to have been more inadvertent than intentional.

2. Characteristics and operation

The ICN's special characteristics and method of operation place it in a unique, if not ideal, position to pursue the regionalisation of competition law as part of its future endeavours. Launching the ICN was a novel development. For the first time,

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[44] See Article 23.

[45] See notes 33 and 34 above.

competition authorities from around the world were brought together to discuss and share ideas in a meaningful way on their difficulties and problems in addressing international competition issues and to seek ways in which they may improve their domestic regimes and achieve convergence between their procedural and substantive rules.[46]

The work of the ICN has been of particular orientation and focus, determined by the objectives of the project(s) at hand. This has enabled the Network to achieve important consensus among a highly divergent membership, which brings together mature and young, developed-economies and developing-economies competition authorities from around the world. Over the years, the ICN has developed two key advantages, namely: *credibility* of output due to the large number of competition authorities engaged in its work; and the *incentives* it offers to competition authorities to implement its recommendations and best practices. The ICN's pragmatism and its largely neutral stance helped it tremendously in securing these two advantages. In fairness, no other international initiative is a match for the ICN. For example, if one looks at the Organisation for Economic Cooperation and Development (OECD) or the United Nations Conference on Trade and Development (UNCTAD) – arguably the closest ICN's peers – it is easy to see how such comparison favours the ICN. Whereas the OECD lacks a sufficiently broad membership base, UNCTAD – whilst enjoying a broad membership base – does not provide sufficient incentives to all countries and their competition authorities to implement its output. This is due to the fact that this output is often seen as too general and more academic than practical in nature.

The ICN has been remarkably imaginative in its treatment of the challenges facing competition law enforcement in a globalised economy. Its work has focused on areas in which convergence and harmonisation among different competition law regimes are considered to be possible and desirable to achieve. The ICN has always proceeded on the basis of a realistic and appropriately ambitious agenda which is guided by the need to achieve consensus. The Network's *modus operandi* – using the model of steering and working groups – has enabled competition authorities, regardless of age and level of expertise, to both 'teach' and 'learn'.

3. Strengths with shortcomings

The characteristics and way of operating enjoyed by the ICN have helped its membership achieve an unprecedented level of wealth of competition expertise, an impressive 'know-how' in forging cooperation and handling technical assistance and capacity building activities, and a vastly rich experience with the concept and tool of competition advocacy. These assets are of major value to the regionalisation of competition law. At the same time, they reveal a shortcoming in the work of the ICN. The tool of competition advocacy offers an interesting illustration in this regard.

From the point of view of regionalisation, there is wide scope for developing and operating a proper competition advocacy mechanism within the different regional initiatives. Such mechanism sits comfortably within a regional setting and can easily serve as a 'centre of gravity'. A regional use of competition advocacy gives it *context*. This can only help the competition authorities of the relevant countries build a competition culture and competition law agendas which suit their own circumstances

[46] See M. Todino, 'International Competition Network the State of Play after Naples' [2003] W. Comp. L. & Econ. Rev. 283.

whilst ensuring harmony between competition law and developments in the domestic and regional arenas.

When considered carefully, each region of the world has its own special features and circumstances, both within and outside competition law, which distinguish it from other regions. The Middle East, which served as a case study in part IV above, is a good example. Not only the commonalities of language, religion and culture of the Middle East do not exist elsewhere, the politics of the region are also unrivalled.[47] Within the 'Middle Eastern competition law space', two points in particular are crucial to highlight.

First, the experience of various countries in the Middle East with the concept of competition has been interesting. Other than competition has been considered as both a means to an end *and* as an end in itself throughout the region,[48] it has been conditioned by a regional mentality of 'Middle Eastern style' which is one of *Modarabah* as opposed to *Monafasah*.[49] The former is a type of *negative* competition according to which the goal is always to undermine rivals through all means possible. *Monafasah*, on the other hand, is a form of *positive* competition in line with understood meanings in competition law, namely 'winning' on the merit by striving for the custom of people through legitimate means. The prevalence of a mentality of *Modarabah* remains in existence in the region even with almost all countries having adopted competition law. This highlights the need to facilitate a cultural transformation.

Secondly, a common policy approach exists among different Middle Eastern countries. This approach revolves around the twin pillars of heavy intervention by the state in the marketplace *and* giving domestic competition rules a social 'orientation'. In particular, there is an interest throughout the region to *regulate* the prices of certain commodities as well as the behaviour of powerful firms in the market. Such a 'competition-regulation' model is normally unlikely where there is increasing reliance on the market mechanism and a growing belief in the desirability of competition—as has been the trend around the Middle East in recent years. The approach clearly shows that Middle Eastern countries have been reluctant to relinquish their control of their domestic markets. As a result, these countries seem interested in reaping the benefits of competition without a readiness to accept its possible ramifications, such as a possible increase in prices to reward additional innovation and investment on the part of firms or the difficulties heated rivalry may create for some market players, whether inefficient or small firms. It would be fair to say that competition has not been embraced fully throughout the Middle East. This is notwithstanding the many declared statements by some national governments and competition authorities on its importance.

These points show – not only the vitality and importance of competition advocacy – but also the need for contextual, region-specific approach when engaging in competition advocacy both at the level of promoting it and at that of practicing it.

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[47] See generally M. Dabbah, *A Promising Middle East* (Contento, 2014).

[48] On the one hand, a declared goal of the competition law regimes of these countries is to have competition in the domestic economy. On the other hand, in practice competition has been treated as a tool to achieve a variety of objectives, ranging from economic efficiency and the maximisation of consumer welfare to ensuring economic development and sustainable growth. This applies to all countries in the region without exception. See Dabbah, note 35 above.

[49] *Modarabah* and *Monafasah* are Arabic terms.

Without such an approach, any competition advocacy initiative or effort is likely to be of limited relevance or benefit. The ICN experience shows this.

As noted in the introduction, competition advocacy was one of two pillars on which the ICN stood at the time of its launch. Today, the *ICN Advocacy Group* – which handles the ICN competition advocacy 'portfolio' – is a large group with over 70 ICN members and over 130 non-governmental advisors. The *Group* has conducted various activities, including publishing advocacy reports, over the years. Arguably, but for the purposes of the present article at least, the most important output by the *Group* has been *Competition Culture Project Report* (2015).[50] Nonetheless, this output reveals a shortcoming in the work of the *Group* and the ICN as a whole. This author has no particular desire to be overly critical of the *Report* especially with him being a supporter of the ICN and its involvement in competition advocacy activities. However, it is difficult to see the value of the *Report* both after almost 15 years of such involvement *and* in general, not least with it being based on 'estimates' given by far less than half of ICN members.[51] Whilst, in fairness, the *Report* could have served a purpose in 2002 when the ICN began to execute its agenda, in 2015 the *Group* should be producing more concrete and analytical output, which presents competition advocacy as a 'problem-solving' tool whilst offering a *regional* road-map for different world communities. The emphasis is put on 'regional' in this case not because the present article deals with regionalism but because – at such advanced stage of ICN existence – the regional level is the most appropriate level of all three possible levels for doing so (i.e. the domestic, regional and global levels). On the one hand, offering a road-map at the lower national level is not feasible because of the extremely wide ICN membership base. On the other, using the higher global level will mean that this road map will largely be of general and superficial nature.

What is said here regarding the need for a contextual, region-specific approach to the topic of competition advocacy, is also applicable in relation to other topics of competition law, whether those of technical assistance and capacity-building, convergence and harmonisation or agency effectiveness. In simple terms, such an approach is the most effective means available to promote competition law and policy within a given community, in particular where the desire is to do this at domestic and regional levels. The *OECD Latin American and Caribbean Competition Forum* (LACCF) amply demonstrates this.[52] This *Forum* has enabled its participants – who are senior officials from countries in the region and the OECD as well as selected international experts – to discuss on an annual basis issues of competition policy that are of interest to these countries and to do so in a concise and precise fashion. The work of the *Forum* shows how following a contextual, region-specific approach leads to concrete benefits. Many of the major successes Latin American (and more recently Caribbean nations) have scored in the field of competition law are, in a significant part, attributed to the *Forum*. A simple comparison between the Latin American and Caribbean competition and competition law landscapes *before* and *after* the Forum's

[50] ICN , 'Competition Culture Project Report' (ICN Advocacy Working Group, 2015) <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_CompetitionCultureReport2015.pdf> accessed 15 June 2020.
[51] According to the *Report*, 48 members participated in the survey conducted.
[52] See OECD, 'Latin American and Caribbean Competition Forum' <www.oecd.org/competition/latinamerica> accessed 13 June 2020.

launch in 2003 (and its expansion to the Caribbean region in 2015) would support this.[53]

Whilst the *LACCF* has been a remarkable achievement on the part of the OECD, the ICN is in an even more favourable position than the OECD to become involved in regionalisation efforts. There is no reason to doubt that such ICN involvement would not be certain to match, if not most probably exceed, the success of the *LACCF*. If anything, the *LACCF* should inspire and motivate the ICN leadership and membership to follow suit in other regions of the world. African, Middle Eastern or wider Asian communities would certainly benefit from a future region-specific approach by the ICN. Having said that, this author does not argue that the ICN should launch its regionalisation efforts across all these communities at the same time. Whilst theoretically this would not be an impossible task for the ICN to fulfil (in light of the nature and size of its membership and its formidable capabilities), it would be more sensible for the ICN to focus on one region as a starting point.

The present article used the Middle East as a case study in part 4 above for the reasons given in that part. These reasons should qualify the region to be the first to benefit from ICN attention. This author is fully aware that many people might consider suggesting or choosing the Middle East as a candidate region for exploring regionalisation comes with a high probability of failure. Any fear of failure in this case is understandable and it is not without validity. It is difficult to dismiss such fear when, for example, one considers the idea of establishing a supranational competition law regime in the Middle East or of making *all* countries within the region sit around the same table. Having said that, it is important to recognise that a great deal of regionalisation of competition law can always be achieved below the threshold of a supranational competition law regime, and that regionalisation does not have to involve forcing people, whether politicians or competition officials, to sit around the same table.[54] It can be achieved in a variety of other ways.

The neutrality of the ICN and its various capabilities, coupled with the clear interest in regionalisation among Middle Eastern countries, are key assets for making an *ICN Middle East Initiative* not a myth, nor a dream but a realistic prospect. In this author's view, these assets allow for a generous margin of imaginative tools to be developed effectively. It is obvious that these countries are unable to pursue regionalisation meaningfully on their own as can be seen from the Arab League experience, which reveals how – even with a 'brotherhood' link – cooperation can easily stall. An ICN involvement is certain to make a difference especially when a pragmatic approach will be followed and when competition authorities within the region will see that this involvement shows the necessary sensitivity towards their needs and circumstances and that it comes to serve their sole benefit. The chances that every single competition authority in the region, whether one already in existence or conception, will take a regional ICN initiative seriously are high.

Recently, the United Nations Economic and Social Commission for Western Asia (ESCWA), UNCTAD and the OECD decided to launch a *Competition Forum for the Arab World*. It is understood that the first (annual) *Forum* meeting took place in January 2020. Whilst it is a welcome development that the OECD in particular has decided to focus on the Middle East as part of its work, the launch of the *Forum* does not render an *ICN Middle East Initiative*, as proposed here, irrelevant or unnecessary.

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[53] See in general I. De Leon, *Latin American Competition Law and Policy* (Kluwer, 2001).

[54] See part 2 above for the different types of regionalisation.

As a matter of fact, this development strengthens the case for an ICN involvement. The following five points in particular should be made in this regard.

First, the *Forum* seems to lack sufficient clarity in terms of its exact goals. Nor does the *Forum* appear to have concrete ideas which are directly linked to the competition law experience of Arab countries.

Secondly, although it is launched as an Arab world initiative, the *Forum* does not have a regional dimension in the shape of ideas or plans for regionalisation of competition law. As such, the *Forum* is easily distinguishable from the proposed *ICN Initiative*.

Thirdly, the Forum appears to lack the necessary participation of key Arab countries, including: Qatar; United Arab Emirates; Saudi Arabia, the most important Arab country and, arguably, the most important Arab competition law regime. It is in fact rather intriguing and controversial that the agenda for the *Forum*'s first meeting does not include any consideration of the competition law experience of these countries, especially that of Saudi Arabia.

Fourthly, that agenda appears to be highly theoretical and academic in nature with hardly any practical orientation due to the decision to address issues such as: competition and economic development; institutional design; competition and private sector development; partnership for development; and public procurement. The current stage/state of competition law development within Middle Eastern countries, including Arab ones, requires a far more practical approach and consideration of 'issues of the moment' in competition enforcement. It is this approach and issues which are of interest and relevance for the region and its countries and in turn for the competition authorities of those countries. The kind of topics featuring on the *Forum*'s agenda are ones which would have been suitable for the region and the Arab world perhaps at the turn of the century. It is difficult to see how it could ever be useful at present to engage competition authorities of the relevant countries in a debate on such topics when their needs and interests dictate otherwise. These needs and interests are more along the lines of the ICN output and the practical work conducted by the OECD as part of its Competition Committee and LACCF.

Fifthly, this point follows directly from the previous one and it comes to explain the academic approach and nature of the *Forum*. The *Forum* and its agenda appear to reflect the outlook and orientation of ESCWA and UNCTAD which are closer to theory than practice. It seems quite obvious that the *Forum* is led more by ESCWA (and UNCTAD) and that by the OECD. It is understandable, thus, that the *Forum*'s agenda is of such nature.

VI. Concluding Thoughts

Every good reason exists for celebrating the ICN and its achievements as the Network reaches an important milestone of twenty years of existence. Any assessment of what has been achieved during this time – which is conducted objectively and in an overall manner – is bound to be highly favourable. It is hoped that the present article would be seen as a modest attempt confirming this. Equally, however, it is hoped that the ICN leadership and membership will use such an important occasion not for a 'pat on the back', but for serious 'head-scratching' over what the ICN's future agenda should include.

The ICN is widely considered the best forum within which competition authorities from different economies and world regions can interact deeply and fruitfully. A large

number of these authorities view the ICN as the most significant aspect of their international operations and cooperation. The ICN enjoys a well-established and highly credible position globally as a *network of competition authorities*. As the ICN turns twenty, the question that should be posed, genuinely and seriously, is how the ICN community – which is in effect the global competition law community at large – could ensure that such position is maintained and possibly strengthened in the future.

In discussing the regionalisation of competition law, the present article selected the Middle East as a suitable case study not only to make the analysis conducted above concrete, but also to bring the topic of regionalisation and the region to the attention of the ICN leadership and membership. When looked at through comparative lenses – unlike all other regions in the world – the Middle East has been the only region which has not received any serious attention from the global competition law community. Yet, especially in recent times, many competition law practitioners have been experiencing, first-hand, the importance of competition law and policy in the region and the ambiguities, complexities and difficulties of handling competition law matters in different Middle Eastern countries.

The article sought to make the case for a future ICN role in regional cooperation and for this role to follow a contextual, region-specific approach. There are strong incentives for involving the ICN in regionalisation efforts based on its characteristics and strengths which would qualify the ICN to perform the role of a 'coordinator' beyond being a network of competition authorities. This is the kind of role that will be most effective for a third party to play in the Middle East region. The ICN as a coordinator in this case will be yet another way for the Network to give an imaginative response to a major international challenge in the field of competition law. An awareness of the value of this potential role and the topic of regionalisation on the part of the ICN leadership and/or the vast majority of the Network's membership (for whom regionalisation is in fact material), *is* an opportunity for the Network to prove that it is indeed the champion of: superior rules and standards; convergence; and international cooperation—exactly as expressed in the ICN's mission statement as referred to in the introduction to the present article. This will also prove how fitting it is that the ICN's chosen mantra is 'All Competition, All the Time' and that this mantra could possibly become at some point: 'All Competition, All the Time, *All over the World*'.