COMPETITION POLICY: THE COMPARATIVE ADVANTAGE OF DEVELOPING COUNTRIES

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I
INTRODUCTION

Most developing countries now have competition laws.[1] They, like all countries, face questions of design for their national laws and for their connection to the world.

This article argues, perhaps surprisingly, that developing countries have a comparative advantage in designing competition systems that are well adapted to their nations and to the modern world. Into the thick forest of enormous handicaps of developing countries,[2] this article shines a light on two points at which developing countries' incentives are better aligned than those of developed countries with positive development of the law. The sole burden of this article is to uncover these two points of light.

The subject can be separated into two parts: inward-looking—developing a sound national system, and outward-looking—developing a system for the connectivity of national markets to their regional and international environment. For the inward-looking phase, this article observes that developing countries are not constrained by path dependence in designing and implementing a competition law because their competition systems are sufficiently young and unformed. Without the baggage of law-on-the-books, these countries have a clear path to choose their overall goal for controlling market power and its abuses and the route to get there, informed as they wish by existing models. They have the unencumbered opportunity to build a system based on what conduct harms them the most. They can define important but elastic concepts such as "efficiency" in

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1. *See* Umut Aydin & Tim Büthe, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, 79 LAW & CONTEMP. PROBS., no. 4, 2016, at 2.

2. *See, e.g.*, Aditya Bhattacharjea, *Who Needs Antitrust? Or, Is Developing Country Antitrust Different? A Historical Comparative Analysis*, *in* COMPETITION LAW AND DEVELOPMENT 52 (D. Sokol, T. Cheng & I. Lianos eds., 2013) [hereinafter *Who Needs Antitrust?*]; *see generally* A.E. Rodriguez & Ashok Menon, *Understanding the Nature of Competition Agency Ineffectiveness*, 79 LAW & CONTEMP. PROBS., no. 4, 2016 (discussing hurdles developing countries face in implementing competition laws).

their own terms. In tailoring law to their needs, they have a flexibility unconstrained by path dependence.[3]

This article makes a similar but different claim regarding the outward-looking aspects of developing countries' competition regimes. The claim is even more dramatic: Developing countries are better incentivized than are developed countries to craft workable solutions at the trade-and-competition interface in both regional arrangements and the world system. The argument starts from the observation that a huge swath of their market problems are cross-border problems, and that law and norms would ideally be commensurate with the scope of the affected market. The developed world is straight-jacketed or blindered from addressing the problems that arise from the gap between global markets and national-only competition regimes. A century of strategies fueled by vested interests keeps vision at a national level. In contrast, developing countries cannot afford to ignore trade-and-competition problems. Whereas the United States (the principal developed country example used throughout this article)[4] functionally segregates the disciplines of trade and of competition and even cultivates their separateness,[5] developing countries feel the immediate impact of restraints on competition, trade, and investment—local and foreign, public and private—as one juggernaut.[6] They naturally develop integrated visions. For them, world connectivity requires an integrated vision.

To say that developing countries face better incentives than do developed countries to consider workable solutions does not mean that they will design and pursue the better solutions. They face severe hurdles. Not least are lack of resources and human capital, as well as the political and economic contexts of their nations, which often include deeply embedded corruption and lack of trustworthy institutions.[7] But the existence of hurdles does not detract from the fact of comparative advantage. This article is about the comparative advantages.

3. In keeping with its discrete confines, this article does not imply that developing countries are existentially free. Often they are saddled with histories of autocratic government, corruption, a privileged elite. *See, e.g.*, MICHELA WRONG, IT'S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLEBLOWER (2009) (portraying a tradition where the regime in power lavished corrupt benefits on their own). Merely, given all of their handicaps, they do not also have the baggage of scores of years of specific competition law in place. They are free of this baggage.

4. The United States' model is one of the two dominant models for antitrust in the world. It is not always in sympathy with the other dominant model, the European Union's. In matters of unilateral conduct, U. S. law is more permissive.

5. *See, e.g.*, I.M. Destler, *U.S. Approach to International Competition Policy*, *in* BROOKINGS TRADE FORUM 2006 395, 415–16 (2006).

6. Even their vested interests have a stake in supra-national norms that would limit multinational power.

7. *See* Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, *in* THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW 296, 304 (Michal S. Gal et al. eds., 2015).

II

DESIGNING NATIONAL LAW FIT FOR DEVELOPMENT

Developing countries are at many different stages of implementing competition law and policy. Some competition authorities, such as several in West Africa, are at earlier stages of development and may operate as ad hoc price control agencies when prices rise. Others are more mature and apply competition law principles credibly.[8] Many of these agencies are still young agencies working to make their law relevant to their economies and people.[9] Their law is still unformed or at least malleable.

This part is addressed especially to young agencies whose law is unformed or malleable. The message is: The competition authorities and their nations have a unique opportunity to design the path of their law. They have the opportunity to consider what is good for their country, which usually means the implementation of rules of law that promote sustainable inclusive development and prioritize concerns of the poor. They have the opportunity to consider the wheel that has already been invented (developed country law), as well as to ask their own foundational questions in constructing new trade and competition regimes.

Developed countries, too, of course, can change their laws to adjust to new environments, but path dependence makes change more difficult.[10]

Why should developing countries not just reproduce the wheel and simplify the flow of commerce in the world? The answer to the question requires reflection on economic law, its portability, and its fit.

Competition law is economic law. It is about markets and market failures. Economics must be generalized to make the law administrable. In competition law, economics is generalized to fit the character of the markets, both in view of how well the markets work to produce the goods and services people want and to serve other goals that markets serve, such as to provide an environment for business people to succeed on their merits.

In the United States, markets work quite well. Capital markets and venture capital are available to fund promising new ideas. There is not a history of statism and privilege. Entry and expansion to challenge incumbent economic power are relatively robust. There are few monopolies, and even fewer that are invulnerable

8. *See* Mor Bakhoum, Etude Sur La Révision du Cadre Institutionnel de Mise En Oeuvre des Règles Communautaires de Concurrence de l'UEMOA, Final Report, March 14, 2012, at point 2 and throughout.

9. See discussion below suggesting that the U.S. paradigm for its monopoly law, which privileges the dominant firm's freedom to act over a duty to avoid squeezing out competitors, may not work for the people of developing countries.

10. For example, Australia's competition law, adopted in 1974, amended in 2010, contains an outmoded provision on misuse of market power. For at least 20 years, policymakers have been seeking an amendment to bring the law in line with international standards by providing an effects test. Possibly, a pending bill to do so will finally pass. *See* Katharine Kemp, *Uncovering the Roots of Australia's Misuse of Market Power Provision: Is It Time to Reconsider?*, 42 AUSTRL. BUS. L. REV. 329 (2014). The fact that it is more difficult to change a path than to chart a course does not mean that reform does not occur. It occurs all of the time.

to challenge by good competitors. Inequality of economic opportunity is a national social and economic problem but not one acknowledged by the competition system. Lack of mobility is recognized in the denial.[11]

Trust in markets and distrust of government form the foundational base upon which U.S. antitrust rules and standards have been forged since the early 1980s. The rules and standards can be characterized as follows: There are strong rules against hard-core cartels, which are principally price-fixing conspiracies. There are standards to identify anti-competitive mergers, but few mergers are found anti-competitive and even fewer enjoined. Monopoly conduct is seldom found; U.S. courts worry more about possible harm to consumers from chilling investment if the court should condemn exclusionary conduct than about actual harm to consumers and feisty competitors if the court approves exclusionary conduct.[12]

In developing countries, the foundation is entirely different, and, in many respects, is the converse.[13] In general, markets do not work well. Most major businesses grew up as state-owned entities with an abundance of privileges.[14] Capital markets work poorly and often not at all for people without wealth and connections. Barriers to entry are high, in part due to the persistence of privileged monopolies. Severe poverty and corruption are the norm. Inequality of wealth, power, and economic opportunity is pervasive and often acknowledged as creating problems all disciplines of law must address. Personal mobility may be almost non-existent.[15]

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11. *See* Michael W. Kraus, Shai Davidai & A. David Nussbaum, *American Dream? Or Mirage?*, N.Y. TIMES (May 1, 2015), http://www.nytimes.com/2015/05/03/opinion/sunday/american-dream-or-mirage.html?_r=0 [https://perma.cc/BLM5-CWBY]; Eduardo Porter, *With Competition in Tatters, the Rip of Inequality Widens*, N.Y. TIMES (July 12, 2016), http://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html [https://perma.cc/UMZ4-N4F3]. While most American writers brush off the claim that antitrust and its lack of enforcement can be part of the equality/mobility problem, developing countries tend to explore the link. For example, the Fourth International Competition Conference of the BRICS countries in November 2015 featured the issue, "How competition policy interfaces with the policy challenges of inequality and inclusive growth." *See Competition and Inclusive Growth*, 4TH BRICS INT'L COMPETITION CONF., http://www.gov.za/speeches/4th-interntational-brics-competition-commission-conference-9-nov-2015-1532 [https://perma.cc/B5BA-55JW].

12. *See, e.g.*, Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 415 n.4 (2004). *See* Eleanor Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77, 80 (R. Pitofsky, ed., 2008) [hereinafter *Efficiency Paradox*].

13. *See* Aydin & Büthe, *supra* note 1, at 2; Bhattacharjea, *supra* note 2; Rodriguez & Menon, *supra* note 2, at 38.

14. *See* Santiago Levy & Michael Walton, *Equity, Competition, and Growth in Mexico: An Overview*, *in* NO GROWTH WITHOUT EQUITY? INEQUALITY, INTERESTS, AND COMPETITION IN MEXICO 1 (Levy & Walton eds. 2009); Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?*, 2008 WISC. L. REV. 269 (2008); Eleanor Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 SW. J.L. & TRADE AM. 211, 229–30 (2007).

15. *See* Levy & Walton, *supra* note 14, at 1; Brusick & Evenett, *supra* note 14; Fox, *supra* note 14, at 229–30.

The contrast holds a message: There is no reason to believe that the competition rules and standards that are good for America are good for developing countries. American rules *may* be good for developing countries, and many are. But the stark contrast of the economic realities in developing countries as compared with those in developed countries such as the United States is at least an invitation to question portability of Western law. Should the foundational stage be reset in some respects? The following subjects might inform the answer:

A. Formulating the goals of competition law and strategies to achieve them
B. Defining "efficiency"
C. Choosing a genre of economics: Chicago School? Post-Chicago? A third alternative?
D. Dealing with:
   1. State restraints
   2. Exclusionary practices
   3. Exploitation, especially severe exploitation by providers of necessities of life
   4. Fairness as a factor in determining what is anti-competitive
   5. Public interest as a trump over what is anti-competitive

The treatment of these subjects forms part of the foundation for competition law that fits development. In considering each of them, this article starts with the perspective of the United States and then asks what perspective developing countries might be likely to choose if they start with a clean slate and ask what would be good for them as they seek to grow a robust economy and legitimate framework of law.

A. Goals And Strategies To Achieve Them

For the United States, the goal of competition law as most commonly stated is consumer welfare or efficiency, and the way to achieve it is to analyze conduct or transactions to determine whether they reduce output and consumer surplus.[16] Only if output will probably be reduced and consumer surplus thus decreased will the conduct or transaction be labeled anti-competitive.[17] Consumer surplus refers to the aggregate surplus of all consumers. It is considered irrelevant, for competition law, if the business practices in question benefit rich consumers more than poor consumers, or even if the rich gain at the expense of the poor. Using the Kaldor-Hicks principle,[18] if winners gain more than losers lose, the conduct is

16. *See* Fox, *Efficiency Paradox*, *supra* note 12.

17. The European Union has a broader view of goals, including market integration. It puts more stress on preserving the process of competition and thus on market access. *See* Eleanor Fox, *Monopolization and abuse of dominance: Why Europe is different*, 59 ANTITRUST BULL. 129 (2014).

18. *See, e.g.*, *Pareto Improvements and Kaldor-Hicks Efficiency Criterion*, RECKON,

efficient. If the winners are well off and the losers are poor and suffering from years of blocked opportunity, that is irrelevant. And if dominant firm strategies squeeze newcomers from the market by the power and leverage of incumbency, that is not an antitrust violation unless the conduct is likely to result in monopolization of a market with attendant lessening of aggregate consumer surplus.[19]

For developing countries, the overall goal is likely to be development, en route to a more robust economy and a better life for the people.[20] In keeping with the imperative to include the masses of people typically left out and left behind, both for humane reasons and for efficient sustainable development, the goal may be articulated as inclusive sustainable development. Distribution and human dignity matter. More nearly equal opportunity to contest markets on the merits is an objective—and usually an efficient one.[21]

How can a nation reach the goal of sustainable, efficient development through markets? It might approach the challenge by keeping markets open and accessible, while protecting both buyers and suppliers from abusive exercises of power.

B. What Does "Efficiency" Mean?

For purposes of antitrust, the United States defines efficiency in terms compatible with the goals statement above. Moreover, the antitrust rules and standards are based on various assumptions about efficiency, including: markets are generally robust and work well; market power is hard to get and keep; business firms generally act to please consumers because that is how they make their profits, and competition forces them to do so; mergers are generally efficient; vertical restraints (for example, restraints in the course of distributing products) are generally efficient; and law that prohibits exclusionary conduct and

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http://www.reckon.co.uk/open/Pareto_improvements_and_Kaldor-Hicks_efficiency_criterion [https://perma.cc/GSY2-FM64] (outlining the nature and limitations of the principle).

19. *See* Fox, *Efficiency Paradox*, *supra* note 12; Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 415 n.4 (2004).

20. This goal may take the form of enhancing GDP growth in general, enhancing performance in particular sectors, inducing inventiveness of national players, increasing competiveness abroad of national firms, sparking technologies that have external benefits to a large swath of the population (as in mobile money transfers), and any combination of these subjects. Such developmental goals, among others, are further discussed in Aydin & Büthe, *supra* note 1 at 7–8.

21. When masses of people have been denied the right to engage in markets, opening the gates to their entry is bound to result in productive new enterprise and thus increase the size of the economic pie (efficiency) as well as to expand the constituency of market actors (inclusive development, producing legitimacy). *See* ELEANOR FOX, "MAKING MARKETS WORK FOR PEOPLE" AS A POST-MILLENNIUM DEVELOPMENT GOAL (2015), http://unctad.org/meetings/en/Contribution/CCPB_7RC2015_HLRTCompSusDev_Fox_en.pdf [https://perma.cc/Y7BD-GHH8]. *See also* Bhattacharjea, *supra* note 2, at 52–53 (arguing that modern notions of development entail "expansion of human capabilities," and that antitrust in developing countries, if it is adopted, should prioritize issues "in sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture, and health care").

vertical restraints has a high probability of blocking efficiencies and protecting inefficient competitors.[22]

The economic realities of developing countries are materially different. Markets are not robust. Business is often state-owned and subsidized, and the beneficiary of numerous privileges.[23] Efficient market assumptions are inconsistent with economic reality. Opportunity for business to enter markets, survive, and grow is likely to be a basic ingredient of developing countries' routes to efficiency. Thus a grass-roots conception of efficiency and how to reach it may be quite different for developing countries on the one hand and (at least) for the United States on the other hand.[24]

C. What Genre Of Economics Is Most Fitting?

In implementing economic law, countries' officials and courts usually embrace one or another strand of economic thought. Each genre of economics has identifying characteristics in the antitrust space. Chicago School economics generally would rely on markets and shrink the scope for government intervention such as antitrust enforcement. In antitrust, Chicago School is closely associated with the goal of maximizing aggregate consumer welfare or efficiency, and doing so by letting markets work—even if they are concentrated markets with dominant firms. Proponents are committed to no antitrust intervention against conduct or transactions unless they decrease consumer surplus and are not justified by a good business purpose. Chicago School teachings substantially helped drive U.S. antitrust law to its current position of relative laissez-faire for all but hard-core cartels.

Post-Chicago School abandons the Chicago School's assumptions that markets work very well, that private enterprise cannot amass meaningful economic power without government help, and that antitrust enforcement is likely to cause more harm than good. Driven by facts and evidence, not just theory, it is much more likely than Chicago School analysis to recognize market power and its use to increase market power. Post-Chicago antitrust economics has been a tempering force that supports more antitrust enforcement, but it still

22. European Union law does not adopt these assumptions. *See generally* Fox, *Monopolization*, *supra* note 17.

23. *See, e.g.*, R.S. KHEMANI, COMPETITION POLICY AND PROMOTION OF INVESTMENT, ECONOMIC GROUWTH, AND POVERTY ALLEVIATION IN LEAST DEVELOPED COUNTRIES 10–13 (2007), http://documents.worldbank.org/curated/en/397801468174885108/pdf/413340FIAS1Competition1Policy01PUBLIC1.pdf [https://perma.cc/39UF-4LPM]; Aydin & Büthe, *supra* note 1, at 2, 21–26; *see generally* William E. Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, 79 LAW & CONTEMP. PROBS. no. 4, 2016. *See also* Rodriguez & Menon, *supra* note 2, at 40.

24. *See* David J. Gerber, *Economic Development and Global Competition Law Convergence*, *in* COMPETITION LAW AND DEVELOPMENT 13 (Sokol, Cheng & Lianos, eds. 2013)*;* Eleanor Fox, *Competition, Development and Regional Integration: In Search of a Competition Law fit for Developing Countries*, *in* COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES 273, 274–86 (Josef Drexl et al. eds., 2012).

adopts the same consumer welfare/aggregate efficiency paradigm.[25] Many elements and insights of both Chicago and Post-Chicago are relevant to developing countries; but a country that wants efficient inclusive development is not likely to embrace either one as its sole guiding light. It may include openness and market access for people without power in its template of how to make markets work for its people.[26]

D. Dealing With:

1. State Restraints

The United States' substantive antitrust law does not cover acts of the State, no matter how anti-competitive, on grounds that the State is sovereign and that the question of State restraints is a political one to be dealt with by the democratic process.[27] U.S. business firms have grown from private initiative. The State never had a large role in the American economy. Neither the State as business actor nor abuse of state power to impair the market was ever a perceptible problem in the United States.

Developing countries have exactly the converse experience. Most or many of their economies were statist for years, and still are run by a handful of companies that are either owned or controlled by the State, or a handful of elite families with strong ties to the State. Many of these businesses remain monopolies even after privatization.[28] State and local government restraints, often interwoven with private restraints, hamper businesses from competing on their merits. This different economic history and its aftermath may suggest a greater need and thus a greater scope for competition law coverage. This imperative is in fact reflected in the law of a number of transitional and developing countries.[29]

25. *See generally* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 (2001).

26. *See* Fatsani Banda et al., *Key Debates in Competition, Capabilities development and related policies: Drawing the Link Between Barriers to Entry and Inclusive Growth* (Ctr. for Competition, Reg. and Econ. Dev., Working Paper No. 1, 2015), http://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55b87b2ee4b09cfa0b9da179/1438153518802/CCRED+Working+Paper+4_2015_BTE+Review+Paper+1+BandaRobbRobertsVilakazi.pdf [https://perma.cc/34J7-9TB7] (highlighting entry conditions and the innovation potential of the economically marginalized).

27. *See* Parker v. Brown, 317 U.S. 341, 353 (1943) (holding that acts of state officers are not subject to the Sherman Act); *see also* N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1110 (2015) (acknowledging Sherman Act immunity of the State when it exercises its sovereign powers). The European countries have a background of state intervention and European Union law may be a model for law controlling state anti-competitive measures. *See* Fox, *Monopolization*, *supra* note 17.

28. *See* Alexander Volokh, *Privatization and Competition Policy*, *in* COMPETITION AND THE STATE 15 (Chang, Lianos & Sokol eds., 2014); Brusick & Evenett, *supra* note 14, at 276; Eleanor Fox & Deborah Healey, *When the State Harms Competition—The Role for Competition Law*, 79 ANTITRUST L.J. 769, 772–73 (2014).

29. *See* UNCTAD RESEARCH PARTNERSHIP PLATFORM, COMPETITION LAW AND THE STATE VOL. 2, APPENDIX OF SAMPLE STATUTORY EXCERPTS (2015), http://unctad.org/en/PublicationsLibrary/ditcclp2015d6_en.pdf [https://perma.cc/BST6-MD73] (providing excerpts from competition statutes of China, Russia, Poland, Kazakhstan, Lithuania, Spain, and others).

2. Exclusionary Practices

In the United States, many large firms, even dominant firms, engage in practices such as tying, exclusive dealing, loyalty rebates, and refusals to deal that have an exclusionary effect but also, arguably, may protect firm efficiencies and may benefit some consumers. Under U.S. competition law, as currently interpreted, it is hard to prove that exclusionary practices harm consumers, and not so hard to establish that the practices have consumer/efficiency benefits.[30] Practices that have an exclusionary effect on rivals are often not impugned under U.S. antitrust law unless they exclude an equally efficient competitor and have no significant efficiency justifications.[31]

In developing countries, usually there *is* no competitor as efficient as the dominant firm. Under U.S. principles, entrepreneurs with great ideas, even ones that have been accepted in the marketplace, might be fenced out of markets by dominant firm strategies with impunity.[32] U.S. law is especially concerned with avoiding errors of antitrust intervention.[33] Developing countries might prefer to prioritize the task of keeping markets open to the new blood and ideas that might infuse it.

3. Exploitation, Especially Severe Exploitation by Providers of Necessities of Life

In the United States, the antitrust law does not condemn simple exploitation—charging an excessive price. The market is expected to correct this problem (the high price, it is hoped, will attract new entry), and the prospect of an antitrust authority or court acting as price regulator is abhorred.[34]

Elsewhere in the world, a large number of competition laws prohibit excessive pricing.[35] In developing countries, the prospect of people dying for lack of affordable drugs is more feared than the prospect of court error of intervention.[36] Thus, in the United States, the hedge fund operator Shkreli could, with antitrust impunity, buy producers of life-savings drugs and raise the price 5000%, from

30. *See, e.g.*, Pac. Bell Telephone Co. v. LinkLine Comm. Inc., 555 U.S. 438 (2009) (holding price squeeze of independent firm by dominant, vertically integrated firm lawful); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008) (holding rebates by dominant firm to its large customers based on their fidelity in buying almost all of their needs from the dominant firm lawful).

31. *See Pac. Bell Telephone*, 555 U.S. 438; *Cascade Health Solutions*, 515 F.3d 883.

32. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 243 (1993) (Stevens, J., dissenting) (decrying exoneration of a major tobacco company's year-long below-cost pricing campaign targeted at the inventor and marketer of low-priced unbranded cigarettes).

33. *See Pac. Bell Telephone*, 555 U.S. at 457 (reflecting concern that antitrust enforcement will chill aggressive competition).

34. *See* Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

35. *See* Jörg Philipp Terhechte, *Excessive Pricing and the Goals of Competition Law*, *in* THE GOALS OF COMPETITION LAW 371, 374–76 (Daniel Zimmer ed., 2012).

36. *See* GENERIC PHARMACEUTICALS: NOTE BY SOUTH AFRICA, OECD DIRECTORATE FOR FIN. & ENTERPRISE AFF. COMPETITION COMMITTEE 3–5 (2014), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)68&docLanguage=En [https://perma.cc/NKN3-LR37] (discussing Hazel Tau v. GlaxoSmithKline, regarding the excessive price for AIDS/HIV drugs during the AIDS crisis in South Africa).

$13.50 to $750 a pill.[37] In most developing countries, that strategy would be outright illegal.

4. Fairness as a Factor in Determining What is Anti-Competitive

In the United States, fairness is neither a recognized goal nor a permissible consideration of the antitrust law.[38] Rather, the law is about efficiency. Application of elements of fairness, it is feared, will protect inefficient small business and raise prices to consumers. Thus, fairness is at war with antitrust.[39]

To many developing countries the deep problem of fairness cannot be avoided. Business, society, and the law have been unfair to the poor and to the left-out and unconnected majority for many years. Injustices need to be righted, for efficiency and for humanity. Competition law cannot do everything, but at least it can provide an environment in which the left-out population has a fair chance to compete and smaller producers are not exploited by exercises of market power. Developing countries are looking for ways to make their law responsive to and alleviative of poverty, inequality, and past injustices of exclusion from economic life. Whereas U.S. antitrust law leans towards protecting the dominant firms and their strategies on the assumption that intervention is inefficient,[40] developing countries may prefer a strategy of keeping a clear path for the outsider—a route that has strong efficiency properties and is fair as well.

5. Public Interest as a Trump Over What is Anti-Competitive

U.S. antitrust law does not admit consideration of "the public interest," on grounds that public interest is an amorphous concept and likely to detract from efficiency. What is in the public interest can vary with the decision maker. Discretionary use of the factor, it is thought, muddies the waters of "pure" antitrust, and is likely to bring inefficiencies into the law and harm consumers.[41]

In many developing countries, such as South Africa and many sub-Saharan African countries, disregarding public interest is not an option. Without room to account for the public interest, for example in protecting jobs and empowering the formerly excluded and disadvantaged black population, there would be no

37. Although the United States has no antitrust provision against excessive pricing, the Federal Trade Commission opened an investigation into the matter. *See* Nate Raymond & David Ingram, *Exclusive: U.S. FTC probes Turing over drug prices Shkreli's lawyer says,* REUTERS (Jan. 22, 2016), http://www.reuters.com/article/us-usa-crime-shkreli-idUSKCN0V026V [https://perma.cc/VV7P-S3DU].

38. *See* David J. Gerber, Fairness In Competition Law: European and U.S. Experience, Presentation at Conference on Fairness and Asian Competition Laws 4 (Mar. 5, 2004), http://archive.kyotogakuen.ac.jp/o_ied/information/fairness_in_competition_law.pdf [https://perma.cc/8F3M-9TVL].

39. *Id.*

40. *See* Pac. Bell Telephone Co. v. LinkLine Comm. Inc. 555 U.S. 438, 451 (2009); Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004). *See generally* Eleanor Fox, *Efficiency Paradox*, *supra* note 12.

41. *See* Harry First & Eleanor Fox, *Philadelphia National Bank, Globalization, and the Public Interest*, 80 ANTITRUST L.J. 307, 319–28 (2015).

competition law; the legislature would not have enacted it.[42] Developing countries therefore might choose to include a public interest factor in their law, and many do. To address the problem of discretionary bounds that attend a public interest component, countries that include the component can specify what counts as a public interest and can provide a transparent process for vetting public interest claims.[43]

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These eight differences of perspective are not minor; they are notable.[44]

In sum, developing countries have the unencumbered opportunity to follow their own path; to adopt law that is suited to them, that is most likely to take root, and most likely to help them fulfill their goals. They are well positioned to design and follow a path suitable to economic development in the twenty-first century, taking into account the demands of openness and inclusiveness.[45]

III
DESIGNING REGIONAL AND GLOBAL NORMS

The world is in need of economic coherence. Competition law is national law, but the problems it addresses are global. There may be more than 130 national competition systems,[46] and systems may collide. Other disciplines of law are brought into coherence with international frameworks, often under the aegis of the World Trade Organization;[47] but the nations have thus far resisted an international framework for competition.[48] The substantial failure of the WTO

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42. For South Africa, see DAVID LEWIS, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT 40–43 (2012). Moreover, as Aditya Bhattacharjea points out, developing countries generally "lack unemployment and social security benefits. Without such safety nets, it is difficult for policy makers and judges to privilege economic efficiency to the complete exclusion of concerns about unemployment, which is an inescapable consequence of vigorous competition." Bhattacharjea, *supra* note 2, at 58.

43. *See* First & Fox, *supra* note 41, at 350–51 (recommending specificity and transparency).

44. For analysis regarding how these fundamental differences in perspective might inform the formulation of competition law, see Eleanor Fox, *Competition, development, and regional integration: in search of a competition law for developing countries*, *in* COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES 273 (Josef Drexl et al. eds., 2012).

45. *See* Ronald Inglehart, *Why Equality Will Likely Make a Comeback*, FOREIGN AFF., Jan.–Feb. 2016 at 2, 10 (arguing that increasing inequality of wealth and opportunity accruing to the benefit of small elites, and increasing discontent of the masses in view of precarious employment futures, may mobilize popular majorities to reduce inequalities). *See also* Francois Bourguignon, *How the Rich get Richer as the Poor Catch Up*, FOREIGN AFF., Jan.–Feb. 2016 at 11, 15 (detailing the growing inequality of wealth within nations, despite reductions in global inequality as certain large developing countries grow their own elites, and suggesting means to close the gaps; otherwise "disenchanted citizens will misguidedly resist further attempts to integrate the world's economies").

46. Aydin & Büthe, *supra* note 1, at 2.

47. *See* Richard Samans et al., *Strengthening The Global Trade and Investment System in The 21st Century*, E15 INITIATIVE (Jan. 2016), http://e15initiative.org/publications/executive-summary-synthesis-report-full-report/ [https://perma.cc/3KFQ-9EKT].

48. *See* Eleanor Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, E15 INITIATIVE (2015), http://e15initiative.org/publications/antitrust-without-borders-from-roots-to-codes-to-networks/ [https://perma.cc/5Q8R-ZJV8].

Doha trade round signals low expectations for movement towards a competition agenda in the WTO in the foreseeable future. Regional agreements and collaborations are regarded as the hope for coherence.

A. Regional Norms

The developed world, and particularly the United States, has little incentive to include enforceable competition obligations or trade-and-competition bridges in regional agreements. The United States likes its own competition law; it has no trouble enforcing its law even against foreigners; and it does not want its antitrust principles eroded at a supra-national bargaining table, which could vote to protect smaller competitors from efficient competition.[49] The competition provisions in regional agreements that include the United States are thus far thin and not enforceable.[50] The North American Free Trade Agreement of 1994 provides an example. The Agreement includes a competition chapter, which expressly required further work by the three nations—the United States, Canada, and Mexico.[51] No report or recommendations were ever submitted. The nations could not even agree to prohibit export cartels within North America. Nor could they agree to abolish their antidumping laws and substitute predatory pricing rules, just within the three-nation area. Why? The United States, for one, gets little economic benefit from competition chapters in regional agreements that it cannot get for itself[52] and it has no incentive to lay down its strategic arms.[53]

The story is entirely different for developing countries. They have many competition problems they cannot solve alone. Their incentives align with the construction of regional agreements, especially with like-minded neighbors.

There are six market-restraint problems that developing countries face and that regional agreements with similarly situated neighbors can significantly help to resolve. Some of them overlap.

The first is economies of scale in enforcement. Each economy may be too small to finance and staff a robust competition authority on its own. Banding together may help to close the resource gap if member states are willing to commit sufficient resources to the pool.

The second is strength in numbers. Each country alone may lack the practical power to resist anti-competitive acts launched from abroad, or to call the perpetrators to account. Together, but not alone, developing countries might be able to induce developed countries to share documents critical to proving a case,

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49. *Id.*

50. The United States supports a competition chapter in regional agreements, but without an enforcement mechanism.

51. *See* North American Free Trade Agreement, 32 I.L.M. 289, Art. 1504 (1993).

52. For example, it can enjoin an off-shore merger and it can stop an off-shore cartel. The offenders will comply with its commands because they want to do business in the U.S. market.

53. It might, however, derive foreign policy benefits, as the proposed Trans-Pacific Partnership demonstrates. *See, e.g.*, Bernard K. Gordon, *Trading Up in Asia: Why the United States Needs the Trans-Pacific Partnership*, FOREIGN AFF., July–Aug. 2012, at 1717.

and perhaps even to convince the countries at the site of the offense to prohibit their firms from price-fixing in developing countries.

Third is voice to articulate developing countries' common cause. Without some unity there is no developing country perspective; merely, there are many fragmented voices barely audible in the global conversation. Each developing country alone cannot convincingly assert a developing country perspective, but all would profit by doing so, in a world in which developed countries argue that the world needs common standards and that the standard should be theirs.[54]

Fourth is information and region-wide understanding of the facts. A regional authority or watchdog may be better positioned to detect and fit together the puzzle of restraints that transcend borders.[55] It can take a view from the top that better sees, understands, and accounts for all harm and benefits, wherever they fall. The more inclusive vision may enable more focused and more powerful advocacy to tear down internal border barriers, by raising the discourse to the community level and calculating the costs of border restraints.[56]

Fifth, like the European Union, an economic community can surmount parochialism within its internal market, prohibiting discrimination in favor of a country's own national enterprises, and prohibiting states from imposing undue restraints in the internal market. State and private restraints are two sides to the same coin; community illuminates this truth.[57]

Sixth, as exemplified by the European Union, the community is often an economic market, and enforcement and remedy orders are much more efficient and effective on a market-wide basis as compared with a fragmented one. An effective remedy in competition cases must often be region-wide.

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54. Thus, the developing country view lost out in the International Competition Network discussions that led to formulating recommended practices for proof of substantial market power. *See* Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L L. 151, 170 (2009) (reporting how the ICN rejected large market share as a proxy for economic power and endorsed the need for complex proof). David Lewis, then chair of the South African Competition Tribunal, made the argument (as paraphrased): that developing countries cannot bear a heavy burden of proof at this first stage of proceedings against an apparently dominant firm; that authorities should be able to use market share as a proxy for market power; and that a rule requiring complex economic evidence and analysis to determine whether a firm with a high market share was indeed dominant would tend to put beyond the ability of developing countries' competition authorities the power to challenge the persistent monopolistic conduct that blights their economies. *Id.*

55. *See* Frederic Jenny, Competition Enforcement in Testing Times: Beyond the National Level, Pre-ICN Forum on Competition and Development (June 2, 2009) (presenting evidence of a cross-border market division among beer firms in East Africa), http://slideplayer.fr/slide/5195747/.

56. *Cf.* Paolo Cecchini et al., THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET (1988) (summarizing results of research project on the "Costs of Non-Europe"). To some extent the World Bank and the African Competition Forum try to play this role. *See* World Bank Group and African Competition Forum, Breaking down barriers: unlocking Africa's potential through vigorous competition policy (July 2016), http://documents.worldbank.org/curated/en/243171467232051787/Breaking-down-barriers-unlocking-Africas-potential-through-vigorous-competition-policy [https://perma.cc/HGD7-A5E4].

57. *See* Fox & Healey, *supra* note 28, at 791–93 (describing the European Union's integral approach to hybrid state and private restraints; the law condemns both private cartels and the state's facilitation of them).

Regional entities can become nodes in the larger network of the antitrust family. These larger units might eventually provide stepping stones to broader regional frameworks or possibly even establish norms or modules for a global one.

B. Global Norms

Designing global norms is yet a greater challenge. The world needs coherence, and developed and developing countries alike would profit from an objectively reasonable system based on a model of connectedness, and one that is reasonably free of parochial national interests. Such a model would contemplate more nearly open markets consistent with WTO norms. It could prohibit world consensus wrongs, such as hard-core cartels and clear monopolistic exclusions, subject to justifications that would allow policy space for developing countries. For mergers, it could provide a clearinghouse for notification of large multinational mergers, a right of harmed nations to be heard and of smaller, powerless nations to have their antitrust harms identified and prevented in the country of the merging parties. For all matters, it could provide a process by which competition authorities can obtain documents in the home country of putative offenders, a process for victims of adjudicated wrongs to get redress from offshore wrongdoers, and, in general, transparency.[58] These rules and modalities are likely to enhance world welfare.

Consider the case of the United States. The United States has no incentive to embrace such a model because it would be giving up power and gaining almost nothing. It can protect itself without a global project; it does not need international competition law. It has a strong system for document discovery and a strong system for victim recovery. In cases of offshore restraints that hurt U.S. competition, it has the legal and practical tools and powers to stop bad conduct and even offshore mergers. Moreover, the United States, like most developed countries, has the flexibility to retain selective illiberal trade restraints (subsidies and tariffs that often deprive developing countries of their best routes to efficient production and sale) as and when they choose.[59]

Developing countries are vulnerable. They cannot easily protect themselves from the multitude of off-short restraints that hurt them. International cartels are the chief culprits. Developing countries benefit from developed country enforcement when enforcement is good for the developed countries, but there is no such benefit when the developing countries are the target; and they often are.[60]

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58. *See* Fox, *Antitrust Without Borders*, *supra* note 48; Eduardo Perez Motta, *Competition Policy and Trade in the Global Economy: Towards an Integrated Approach,* ICTSD: THE E15 INITIATIVE (2016), http://e15initiative.org/publications/competition-policy-trade-global-economytowardsintegrated-approach/ [https://perma.cc/NL92-QQQN]; Ralf Michaels, *Lending Out Antitrust,* 79 LAW & CONTEMP. PROBS. no. 4, 2016, at 246 (identifying a compatible solution: redress in the courts of the offenders). *See also* Bhattacharjea, *supra* note 2, at 64 (making a similar proposal while noting that U.S. law has "effectively foreclosed" this approach).

59. *See* MARTIN WOLF, WHY GLOBALIZATION WORKS 212–18 (2004).

60. *See* Pradeep Mehta, *Airline Cartel Fines Could be Better Used*, FIN. TIMES (Oct. 16, 2007),

Although the United States functionally separates its trade from its competition policy, and thus can shy away from an international competition framework while benefiting from a global trade regime, developing countries do not have that luxury. Especially in smaller developing countries, the worst restraints are usually integral, public and private, which means that they need a regime that controls state and private anti-competitive acts beyond their borders.[61]

Because a fair cosmopolitan community is so important to successful development of developing countries, and because developed countries are largely content with the way it is, developing countries have stronger incentives to facilitate a world architecture.[62]

IV
CONCLUSION

Developing countries are encumbered by countless disadvantages. In the midst of all of their sometimes insurmountable challenges, this article has uncovered two bright but hidden truths. First, path dependence. Mature competition jurisdictions have the baggage of an entrenched path, which is sometimes inflexible even in times of global change. New competition jurisdictions do not have this baggage. Developing jurisdictions with unformed competition law are well positioned to take advantage of this insight. They are free to address their own needs and need not be seduced to transplant law tailored to markets very different from their own. Most principles of law of developed jurisdictions are compatible with developing countries' needs, but some are not, and some issues critical to developing countries' own competitiveness, such as state-related dominant firm restraints, may go ignored. Second, the trade-and-competition interface. Developed economies with large

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http://www.ft.com/intl/cms/s/0/282bf10c-7b82-11dc-8c53-0000779fd2ac.html#axzz42RR6zE24 (explaining that developing country victims are often unable to recover compensation); Pradeep Mehta, *Singed by the Potash Cartel*, HINDU BUS. LINE (Sept. 17, 2013), http://www.thehindubusinessline.com/opinion/singed-by-the-potash-cartel/article5138520.ece [https://perma.cc/GDQ9-UYRH] (describing the potash cartel's devastating impact on developing countries).

61. An example is the potash export cartel stemming from Canada and hurting especially farmers in Africa, for potash is a main ingredient of fertilizers they need. The cartel was endorsed by the government of Canada in support of the province Saskatchewan. Mehta, *Singed by the Potash Cartel*, *supra* note 60; Michael Trebilcock, *Cartel Hypocrisy: Canada opposes export cartels while protecting the Canpotex potash cartel*, FIN. POST (Sept. 30, 2010), http://business.financialpost.com/fp-comment/cartel-hypocrisy [https://perma.cc/YX4Q-DAHN]. The World Bank reports that "Global export cartels increase the final price of K ([potassium] fertilizers in Sub-Saharan Africa by 29%." WORLD BANK GROUP, BREAKING DOWN BARRIERS: UNLOCKING AFRICA'S POTENTIAL THROUGH VIGOROUS COMPETITION POLICY xii (2016), http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf [https://perma.cc/3PQK-E853]. See this World Bank Report generally for examples of combined government or government-supported and private restraints.

62. Of course this does not mean that developing countries have sufficient incentives to promote a world project. They do not. Their level of net incentives is much stronger for embracing regionalism among like countries than for championing a global framework.

markets, in particular the United States, have little interest in connecting the world by a coherent trade-and-competition system. The system as it is, with the division between trade and competition, and with national-only law that is indifferent to external harms, suits them. But developing countries, especially small developing countries, are harmed every day by a poisonous mix of cross-border state and private restraints. Moreover, developing countries are the usual victims of foreign-originating anti-competitive acts. Finally, regional agreements among similarly situated neighbors can offer something especially important to developing countries—a trade-and-competition community that would break down barriers and significantly increase competitiveness, without the worry of exploitation by an over-sized partner. To be sure, large developed countries can also gain in the competition space from regional agreements, but economically they stand to gain less. For all of these reasons, with regard to the discrete two points of light of this article, incentives of developing countries are better aligned with positive policy than are the incentives of developed countries.

The existence of good incentives does not guarantee or even suggest that developing countries will design the regional or global architecture of the future, let alone craft a national competition law most fitting for them. The comparative advantages have a very soft underbelly: overwhelming comparative disadvantages. The very vulnerability and interdependence that could produce a fairer, less privileged, more connected world also bespeak the essential weaknesses that keep developing countries in check; weaknesses that include not only lack of resources and reliable institutions but also capture by their own vested interests and paralysis by their eternal fears of exploitation by powerful trading partners.

Perhaps, however, exposing the two comparative advantages, as this article has done, might serve a purpose. It might open minds to the opportunity for developing countries to embrace a competition law that fits them, and it might spur the developing country competition leaders to make the case for a better architecture for regional collaboration and world coherence from the vantage of less powerful nations.