

# ECONOMIC DEVELOPMENT, POVERTY AND ANTITRUST: THE OTHER PATH

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“Technocrats may be inclined to ignore distributional issues, but no one else will.”

Harvard Institute for International Development, 1991<sup>1</sup>

## Abstract

Developed countries often insist that antitrust is only for efficiency and consumer welfare, and that any broader focus will protect small competitors and mire the economy in inefficiencies. Developing countries retort that *their* antitrust must also address issues of distribution and power.

This article contests the standard Western claim that if conduct cannot be shown to raise prices to consumers it must be efficient and should be beyond antitrust challenge. It also argues that developing countries need a broader standard than whether conduct decreases aggregate consumer or total wealth. Developing country antitrust should not be used to protect inefficient Davids against Goliath, but it may and should be used to *empower* Davids against Goliath by keeping open paths of mobility and access. Indeed, enhanced mobility tends to produce efficiencies in societies in which economic

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This article is dedicated to, and is in memory of, my dear friend, colleague and co-author, Lawrence A. Sullivan, a great humanist who always cared about the less fortunate people on this earth.

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1. REFORMING ECONOMIC SYSTEMS IN DEVELOPING COUNTRIES 3 (Dwight H. Perkins & Michael Roemer eds., 1991).

opportunity of masses of people has been suppressed. An antitrust law for developing countries that values mobility, access and efficient development of the economy, while not protecting small firms at the expense of consumers, is The Other Path of the title to this article. The article articulates principles, factors and strategies that give content to this other path.

## I. INTRODUCTION

This article is about competition, antitrust law, poverty and economic development.

It asks: What is the foundational perspective that should inform competition law in developing countries?

Important scholarship argues that context matters in designing and applying competition law and its supporting institutions for developing countries.<sup>2</sup> This literature commonly begins with the model of antitrust law of industrialized countries. It then asks what changes are warranted by context such as weak institutions, lack of funding, high barriers, and weak capital markets. This article takes a next step. It advocates the need for placing a developing country's antitrust in the broader context of development economics, and it asserts the relevance of the developing country's plight in the storms and bargains of world trade and competition.

Spokespeople for developing countries often express the need for an antitrust paradigm different from that of the developed world.<sup>3</sup> Spokespeople for the developed world tend to argue for universal norms,<sup>4</sup> which may apply differently when facts are different. Moreover, they commonly describe antitrust as "for efficiency."<sup>5</sup>

2. Ground-breaking work has been done by William Kovacic. E.g., William Kovacic, *Capitalism, Socialism, and Competition Policy in Vietnam*, 13 *ANTITRUST* 57 (1999); William Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *BROOK. J. INT'L L.* 403 (1997); William Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 *AM. U.J. INT'L L. & POL'Y* 437 (1996); William Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine and Zimbabwe*, 44 *DEPAUL L. REV.* 1197 (1995); William Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 *ANTITRUST L.J.* 253 (1992); William E. Kovacic & Robert S. Thorpe, *Antitrust and the Evolution of a Market Economy in Mongolia*, in *DE-MONOPOLIZATION AND COMPETITION POLICY IN POST-COMMUNIST ECONOMIES* 89 (Ben Slay ed., 1994).

3. See AJIT SINGH, *U.N. CONF. ON TRADE & DEV., COMPETITION AND COMPETITION POLICY IN EMERGING MARKETS: INTERNATIONAL AND DEVELOPMENTAL DIMENSIONS* (2002).

4. See, e.g., Makan Delrahim, *The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, Remarks at George Mason Law Review Symposium (Oct. 6, 2004), in 13 *Geo. Mason L. Rev.* 259 (2005) ("consensus-based antitrust enforcement is vital to global business and consumer welfare").

5. By one common formulation, antitrust is only for efficiency. One common formulation of the efficiency standard is that antitrust law should proscribe only that which disserves

This article takes a different starting point. It asks: If you were a policymaker in a country whose principal economic problem was deep systemic poverty, aggravated by corruption, cronyism, selective statism, weak institutions, and often unstable democracy,<sup>6</sup> what is the foundational perspective on which you would formulate your country's antitrust law? In particular, would you choose a foundational principle that trusts liberalization and free enterprise ("first model"), or would you choose a foundational principle that centrally takes account of the opacity, blockage and political capture of your markets, and includes some measure of helping to empower people economically to help themselves ("second model")? There are, of course, other formulations. There are also formulations within the formulations.<sup>7</sup>

The answer is not uncomplicated. Even if the second model might seem more legitimate to a developing economy in the abstract, the first model is a path well-traveled, and reinventing a path is difficult and costly.

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consumers and is inefficient, as judged by output limitation. Business conduct other than hard core cartels is presumed efficient; it is argued that, apart from cartels, the law should proscribe only conduct that has an output-limiting outcome and is not a legitimate business response to consumers.

There are alternative ways to regard efficiency and how to achieve it. One major alternative would focus on preserving the structure and forces of competition, positing that the process of competition is most likely to create incentives to compete and invent. Diversity and openness are thought to promote knowledge and experimentation and to function as a feedback mechanism that facilitates adaptation and dynamic change. See Wolfgang Kerber, *Competition, Experimentation, and Legal Rules and Institutional Framework* (Dec. 2, 2006) (unpublished manuscript, on file with author); see also Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371 (2002).

6. Mark Dutz and R. Shyam Khemani wrote on the "tyranny of predatory vested interests": These factors [high market concentration, high barriers to entry, high ownership concentration and weak corporate governance] tend to reinforce one another and give rise to inflexible, inefficient industrial and financial market structures. They also have adverse implications not only for fostering effective competition and competitiveness, but also for governance at both the state and corporate levels—and for the persistence of an anti-competitive nexus mutually supporting vested interests between incumbent firms and government, with some of the earned rents used to entrench market power by buying government favoritism. Since firms tend to be large in size and few in number, they have organizational and financial advantages in influencing legislation and regulation. MARK DUTZ & R. SHYAM KHEMANI, *COMPETITION LAW & POLICY: CHALLENGES IN SOUTH ASIA* 11 (2007).

7. For example, one mainstream perspective assumes that markets work well and that government interventions work badly (neo-liberal assumptions). At the other end of the continuum, analysts may acknowledge that market structures may be "skewed in favour of entrenched elites with inequitable distributions of wealth with social stratification drawn along racial or ethnic lines," a situation that competition law might exacerbate. TAIMOON STEWART, JULIAN CLARKE & SUSAN JOEKES, *COMPETITION LAW IN ACTION: EXPERIENCES FROM DEVELOPING COUNTRIES* iv (2007), available at [http://www.idrc.ca/en/ev-111677-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-111677-201-1-DO_TOPIC.html).

Moreover, the first model offers some clear and relatively simple rules without risking the costs of too much intervention and costs of excessive discretion by officials.

The article concludes by suggesting that reliance on markets is critical for economic welfare; that the neo-liberal principles that animate much of antitrust law in this age of “modernization”<sup>8</sup> are not necessary for efficiency and could run contrary to it; and that developing countries might wish to explore a path more sympathetic to their context.

This article is written at a time when “convergence” is repeatedly referenced as an imperative objective of antitrust in a globalized world. Convergence implies universal standards, or at least universal norms implemented in common ways. The phrase “universal standards” normally refers to the standards of the United States and Europe.<sup>9</sup> This article suggests that developing countries should nonetheless consider the benefits of their own perspective. It further suggests that substantial convergence can be achieved and will naturally occur even in the face of varying perspectives.

## II. THE CHOICE

Approximately one hundred nations in the world have adopted antitrust laws. Perhaps a quarter of these nations are developed countries. Yet other developing countries have not adopted antitrust laws; some are considering doing so.

By one perspective, all of these nations should adopt antitrust laws;<sup>10</sup> and all of these nations should adopt the developed world’s framework: free

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8. Both the United States and the European Union have launched commissions or projects to consider how competition law should be modernized. Moreover, in the United States, successive Supreme Court opinions have narrowed the purview of U.S. antitrust law. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, No. 06-480, 2007 WL 1835892 (U.S. June 28, 2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

9. This is the case even while the standards of the United States and Europe are changing, as institutions in both jurisdictions embark on “modernization” projects, and as the United States Supreme Court successively narrows the scope of the law. Yet with the economic rise of China and India, one might expect the American and Euro-centric center of gravity to shift, and to do so in ways not predictable today.

10. *Compare* A.E. Rodriguez and Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N. C.J. INT’L L. & COM. REG. 209 (1994) (arguing that antitrust law is largely inappropriate for developing countries and that the liberal effects of the law will be overwhelmed by interest-group politics procuring protection), *with* Craig W. Conrath and Barry T. Freeman, *A Response to “The Effectiveness of Proposed Antitrust Programs for Developing Countries,”* 19 N.C.J. INT’L L. & COM. REG. 233 (1994) (arguing that antitrust law and advocacy will benefit consumers).

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markets and antitrust in their service. Much like the developed countries, developing economies are riddled with cartels and other restraints that obstruct their markets and hurt their people. Globalization has lowered barriers and paved the way to the efficiency benefits from markets and, it is argued, liberalization and antitrust should work hand-in-hand to anchor these benefits.<sup>11</sup>

This paper argues that antitrust for developing countries must be seen in a larger context. The canvas includes the dire economic conditions of developing countries and the treatment they receive from the world community. Developing countries often see free-market rhetoric and aggregate wealth or welfare goals as inappropriate to their context because of the tendency of free-market policies to disproportionately advantage the already advantaged in every game played.<sup>12</sup>

This does not imply that antitrust for developing countries would or should look dramatically different from a developed country's antitrust. There are reasons why it might look much the same, as I develop below; but there are also reasons why the perspective might differ from the neo-liberal one that currently informs many antitrust laws of developed countries – a perspective that has “relatively little resonance for the great majority of the population that is poor.”<sup>13</sup>

### III. THE STACK OF THE DECK: A FEW SYMBOLS

In the mid-1990s, the symbol of globalization was both cast and burnished by a concept and epithet called the “Washington Consensus.”<sup>14</sup> The Washington Consensus prescribed deregulation, privatization, liberalization, clear property rights, and fiscal discipline. Following this

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11. Efficiency is usually seen as the measure of antitrust benefits. At this point I do not raise differences between consumer welfare and total welfare in measuring efficiency. I stress aggregate concepts – whether defined in terms of all consumers or all consumers and producers: Do the winners win more than the losers lose? And if so, should we disregard distributional consequences?

12. See Nancy Birdsall, *Inequality Matters: Why Globalization Doesn't Lift All Boats*, BOSTON REV., Mar.-Apr. 2007, at 7; Francis Fukuyama, *Keeping Up with the Chavezes*, WALL ST. J., Feb. 1, 2007, at A17; Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System—A Cosmopolitan Perspective*, 8 J. INT'L ECON. L. 363 (2005).

13. Fukuyama, *supra* note 12.

14. John Williamson wrote *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA*, the book that gave rise to the epithet, Washington Consensus. The book emphasizes the importance of reliance on market forces and sound fiscal and monetary policies for Latin American countries. The epithet became a generalized neo-conservative prescription. JOHN WILLIAMSON, *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA* (1990).

prescription, it predicted enhanced growth for the economies of developing countries.<sup>15</sup>

Citizens and advocates of the developing world quickly observed the other side of the coin. Globalization also tended to increase the disparity of wealth and opportunity to the harm of some of the poorest people.<sup>16</sup> In certain least developed countries it made many producers worse off as their exported commodities faced more competition in world markets, their value-added exports faced high tariffs,<sup>17</sup> and the prices demanded for value-added imports were often supra-competitively high.

15. See JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT*, 2 (2005); see also Dani Rodrik, *Feasible Globalizations*, in *GLOBALIZATION: WHAT'S NEW?* 196 (Michael W. Weinstein ed., 2005); Jeffrey D. Sachs, *Globalization and Patterns of Economic Growth*, in *GLOBALIZATION: WHAT'S NEW?* 214 (Michael W. Weinstein ed., 2005). All three sources contest or qualify the premises and efficaciousness of the Washington Consensus

16. See Anna Bernasek, *Income Inequality and its Cost*, N.Y. TIMES, June 25, 2006; cf. David Dollar, *Globalization, Poverty and Equality*, in *GLOBALIZATION: WHAT'S NEW*, *supra* note 15, at 96 (suggesting that opening up trade “has been a good strategy” for countries such as China, Mexico, and Uganda); *id.* at 97; but see Birdsall, *supra* note 12 (distinguishing good inequality, which incentivizes people who are able to respond to incentives and “is consistent with efficient allocation of resources,” from “destructive inequality [which] reflects privileges for the already rich and blocks potential for productive contributions of the less rich.”). Birdsall notes that while globalization has produced rapid economic growth in India and China, moving millions of people out of poverty, it has also left millions of the poorest, even in India and China, equally or worse off and has caused inequality to rise.

India is in persistent poverty: “[T]he increasingly common, business-centric view of India suppresses more facts than it reveals. Recent accounts of the alleged rise of India barely mention the fact that the country’s \$728 per capita gross domestic product is just slightly higher than that of sub-Saharan Africa . . . . Malnutrition affects more than half of all children in India and there is little sign that they are being helped by the country’s market reforms, which have focused on creating private wealth . . . . Feeding on the resentment of those left behind by the urban-oriented economic growth, communist insurgencies . . . have erupted in some of the most populous and poorest parts of north and central India [in districts that the government no longer effectively controls].” Pankaj Mishra, *The Myth of the New India*, N.Y. TIMES, July 6, 2006, at A1.

See also Pascal Lamy, Dir. Gen., WTO, *Making Trade Work for Development: Time for a “Geneva Consensus,”* Emil Noel Lecture, New York University School of Law (Oct. 30, 2006) (transcript available at <http://www.nyulawglobal.com/events/documents/emilenoellecturefall06.pdf>). Pascal Lamy recounts the bias in the prior trade rounds against developing countries. He notes the persistence of “economic colonization” and the developing countries’ “bitter” “potion” of intractable adjustment problems. Developing countries’ problems of adjustment to the onrush of free trade are particularly serious “because [trade openings] often hit larger parts of the population and because the countries have little capacity to handle the much needed accompanying policies to assist the victims of globalization.” *Id.* at 6, 7, 10. Moreover, developing countries usually lack safety nets, and lack of safety nets means that job loss causes severe hardship. Further, the promised benefits of market openings are harder to capture: the time and costs to market (e.g., trucking goods to a port) can overwhelm gains.

17. RALPH KAPLINSKY, *GLOBALIZATION, POVERTY AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE* 57 (2005).

Moreover, while talking the talk of liberalization, developed countries often liberalized where convenient and resisted liberalization where inconvenient. This has been particularly true in the case of agriculture, where developing countries often have significant comparative advantage. Industrialized countries flooded African markets with deeply subsidized cotton, displacing and threatening the livelihoods of African farmers who produced cotton at two-thirds of the importers' cost.<sup>18</sup> Thus, even though developed countries gave millions of dollars for development<sup>19</sup> and insisted that the poor should work to help themselves, they continued to block opportunities for efficient but poor foreign producers who attempted to help themselves by competing on the merits.<sup>20</sup> Journalist Martin Wolf calls this phenomenon the "Hypocrisy of the Rich."<sup>21</sup>

Persistent world-game strategies tend to keep the advantaged on top and the disadvantaged on bottom.<sup>22</sup> For this, there are several symbols. One is "Seattle."<sup>23</sup> Seattle evokes the memory of the riots that opposed the prospect of freer trade under the aegis of the World Trade Organization ("WTO") without giving the usual losers a significant voice; the losers are those who consistently get an unfair and meager share of the gains from trade unleashed by globalization and liberalization.

In the wake of Seattle and subsequent flash points, the greatest economic problem in the world – deep systemic poverty and its link to inequality – could no longer be pushed to the margins. Nearly twenty percent of the world's population lives on less than one dollar a day, and in sub-Saharan Africa this figure rises to more than forty percent.<sup>24</sup> Persistent poverty reduces the physical and mental capabilities of large populations.<sup>25</sup> It saps the work force and productivity in the poorest nations, undermining their promise of efficiency (no less, humanity). It increases spending on

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18. See MARTIN WOLF, *WHY GLOBALIZATION WORKS* 212-218 (2005).

19. See William Easterly, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

20. Competition on the merits is competition that is based on cost and quality.

21. See WOLF, *supra* note 18; see also Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973 (2006) [hereinafter *Goodbye Washington Consensus*].

22. See Birdsall, *supra* note 12.

23. See, e.g., JOSEPH STIGLITZ, *THE ROARING NINETIES: WHY WE'RE PAYING THE PRICE FOR THE GREEDIEST DECADE IN HISTORY* 238 (2003) (identifying the Seattle meeting as the occasion for "the backlash against globalization" and as a "civil demonstration of a magnitude that had not been seen in more than a quarter century").

24. A dollar a day is a translation of income levels based on a measure called "purchasing power parity." See KAPLINSKY, *supra* note 17, at 27-30.

25. See, Editorial, *A Better Way to Fight Poverty*, N.Y. TIMES, May 5, 2005, at A34.

health care, which decreases savings and investment.<sup>26</sup> Moreover, income inequality breeds corruption.<sup>27</sup> It activates a spiral that leads to more economic and political inequality.<sup>28</sup>

In the year 2000, the heightened global concern with poverty produced the United Nations' Millennium Development Goals (MDGs). The MDGs aspired to halve the percentage of the world's severely poor by 2015. We are halfway there by years but not by performance, although rates of extreme poverty are falling, especially in Asia.<sup>29</sup>

Most of the specified strategies for reaching the anti-poverty goal are in the nature of benefits and public goods—health, school meals, education, infrastructure, debt forgiveness.<sup>30</sup> This paper, however, will focus on MDGs and markets.<sup>31</sup> “MDGs” is a gripping symbol.

It is fair to ask: Have we met a clash of symbols?

This paper argues:

1. Market tools are a very important part of the panoply of tools needed to address world poverty and should be used liberally. These market tools include market-freeing measures that reduce prices. They also include antitrust priority-setting that targets conspiracies that raise the price of staples, such as milk, bread, transportation and utilities, helping the poor<sup>32</sup> as well as those who are better off. Moreover, as observed by

26. Bernasek, *supra* note 16.

27. See Charles W. Calomiris, *Capital Flows, Financial Crises, and Public Policy*, in GLOBALIZATION: WHAT'S NEW 36 (Michael W. Weinstein ed., 2005); William Easterly, *The Rich Have Markets, the Poor Have Bureaucrats*, in GLOBALIZATION: WHAT'S NEW 170 (Michael W. Weinstein ed., 2005).

28. As one economics professor from Harvard observed, with greater wealth comes greater political influence: “If the rich can influence political outcomes through lobbying activities or membership in special interest groups, then more inequality could lead to less redistribution rather than more.” Bernasek, *supra* note 16 (quoting Edmond Glaeser).

29. U.N., Millennium Development Goals Report 2006 (2006).

30. See The Secretary-General, *Report of the Secretary-General: Road Map Towards the Implementation of the United Nations Millennium Declaration*, U.N. GAOR, 56th Sess., U.N. DOC. A/56/326 (Sept. 6, 2001).

See SIMON J. EVENETT, COMPETITION AND THE MILLENNIUM DEVELOPMENT GOALS: NEW “EVIDENCE” FROM OFFICIAL SOURCES (2006) (stating that the policy makers do not see a strong link between competition and the Millennium Development Goals [hereinafter “MDGs”] and other indicators of development although these links exist), available at <http://www.evenett.com/working/CompandMDGs200206.pdf>.

31. I do not argue that antitrust should become poverty law. Rather, I argue that antitrust for developing countries that ignores poverty and maldistribution risks 1) being a hostile law that does not command legitimacy and does not take root, or 2) inducing, to fill the gap, an unfair competition law that has no market consciousness as a rudder.

32. See WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 61 (2000), available at [www.worldbank.org/prem/poverty/wdrpoverty/report/ch4.pdf](http://www.worldbank.org/prem/poverty/wdrpoverty/report/ch4.pdf).

Lower agricultural prices can of course hurt poor farmers. This is a cost of competition and markets. It is a relatively short-term cost that even poor societies should probably choose to bear

Professor Simon Evenett, “the conceptual arguments and available empirical evidence by and large support[] the view that promoting inter-firm rivalry enhances the dynamic economic performance of developing economies.”<sup>33</sup>

2. At the same time, outside of the area of cartels, there are limits to the modern Western antitrust framework, especially when applied to developing countries and populations mired in poverty. For macroeconomics, the limits of the neo-liberal approach have been well-documented.<sup>34</sup>

The deck is stacked in favor of those on high rungs of the ladder in skill, education, capital, and mobility; it is stacked in favor of those who live in an economy with a supportive infrastructure, composed of non-corrupt and well-funded institutions.<sup>35</sup> Moreover, certain modern versions of industrialized countrys’ antitrust, and even qualified versions that recognize the weaknesses of institutional structures and markets, focus only on the allocation of resources and the size of the pie. The guiding concern is that inefficient anticompetitive practices may cause the pie to shrink, even while it is posited that non-cartel acts almost never cause the pie to shrink.<sup>36</sup> Proponents of this perspective on aggregate efficiency or wealth do not grapple with deontological questions of power and how opportunity is distributed. They normally presume that an antitrust approach on the distribution of opportunity and wealth will shrink the size of the pie and

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for a better future; but they may find it difficult to do so; and the political power of farmers might prevail over consumer choice.

33. SIMON J. EVENETT, U.K.’S DEP’T FOR INT’L DEV., *LINKS BETWEEN DEVELOPMENT AND COMPETITION LAW IN DEVELOPING COUNTRIES* (2003), available at <http://www.evenett.com/reports/dfidpaper.pdf>; see also Ana Maria Alvarez, Simon J. Evenett & Laurence Wilse-Samson, *Anti-Competitive Practices and the Attainment of the Millennium Development Goals: Implications for Competition Law Enforcement and Inter-Agency Cooperation*, in *IMPLEMENTING COMPETITION-RELATED PROVISIONS IN REGIONAL TRADE AGREEMENTS: IS IT POSSIBLE TO OBTAIN DEVELOPMENT GAINS?* 60 (2007).

34. See, e.g., STIGLITZ, *supra* note 23, at 228-240; Rodrik, *Goodbye Washington Consensus*, *supra* note 21.

35. See Lamy, *supra* note 16; Birdsall, *supra* note 12.

36. See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP* (“Trinko”), 540 U.S. 398 (2004); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 (1988). In *Trinko* the Court said: “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” *Id.* at 407.

make even the poorest worse off. Developing countries, however, may disagree.<sup>37</sup>

By contrast, the Millennium Development Goals are centrally *about* distribution.<sup>38</sup> Achieving the goals is perceived to be central to the well-being of the developing world and indirectly, all the world. This article argues that if policy is to be friendly to economic development, it must look dire poverty in the eye.<sup>39</sup> This means not only harnessing market forces to keep prices competitive; it also means building a ladder of mobility from the lowest rung up to enable mobility, incentivize entrepreneurship,<sup>40</sup> and stimulate invention.<sup>41</sup> It implies a consciousness about not expanding the moat between rich and poor, the enabled and the powerless. The mobility imperative<sup>42</sup> applies to economic policy. In particular, it applies to competition law and policy. If competition law in developing countries threatens to widen or preserve the inequality moat rather than build the mobility ladder, there is a serious question whether free-market competition law beyond anti-cartel law<sup>43</sup> should be advocated for the developing world.

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37. See Ajit Singh, *Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals* (paper presented at the fifth session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 2-4, 2004), available at <http://www.networkideas.org/feathm/aug2003/MCP.pdf>; STEWART ET AL., *supra* note 7.

38. This is so even though allocative measures are likely to have a positive effect on the plight of the severely poor by reducing the price of necessities provided by market actors.

39. This was the tenet of the faltered Doha Development Trade Round. See Lamy, *supra* note 16.

40. See Mark Dutz, Janusz Ordovery & Robert Willig, *Entrepreneurship, Access Policy and Economic Development: Lessons from Industrial Organization*, 44 *European Econ. Rev.* 739 (2000).

41. The ladder metaphor is also used in JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 73 (2005).

42. See DUTZ & KHEMANI, *supra* note 6, at 6 (“By helping to lower public . . . and private barriers to entry and [removing] restraints to trade, competition law and policy can help create opportunities for broadly based participation in the economy.”).

43. Anti-cartel law responds to both the neo-liberal and liberal sentiments: neo-liberal because it removes barriers to efficiency; liberal because it responds to sentiments of fairness and fair rules of governance; i.e., that markets should be governed by impersonal forces and not by a few powerful people.

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#### IV. THE COMPETITION CHALLENGE

##### A. Introduction

We put poverty at the center of our concerns. Related is the “left behind” or marginalization problem. We assume that developing countries, on the whole, wish to become part of the increasingly integrated world economy with the hope of increasing their economic opportunities, generating higher rates of profit and growth, and inducing a higher rate of investment in their countries.

Do all nations want to follow this path of globalization and integration? Becoming a part of the world market system may entail a dramatic shift, with the fear of homogenization and loss of community.<sup>44</sup> This essay is focused on nations that choose the more integrated route, as do most nations today.

It is hard for the advantaged to put poverty and inequality at the center of our concerns. It is hard because we are drawn ineluctably to the models of law that we know and not because we resist the challenge; we are drawn to imagine that our sun is the center of the universe. From this perspective, we would propose the model we know, modified slightly to take account of flawed capital markets, to make competition law friendlier to developing countries. This approach is often taken, and this is a problem that must be examined.

Assuming that developing countries choose to increase economic interconnection, we should ask: First, to what extent will competition and the market help developing countries develop efficiently for the good of their people? Second, to what extent will antitrust law help? Third, if antitrust law, what form of antitrust law?

##### B. To What Extent Will Competition and the Market Help?

Freeing up the market has been shown to hold great economic benefits for developing and transitional countries. The converse approach to freeing the market, command-and-control, so ill served Russia and Eastern Europe that it fell of its own weight.<sup>45</sup>

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44. See CHINUA ACHEBE, THINGS FALL APART (1962).

45. A third option – among others along the continuum – is a combination of competition and industrial policy. Some commentators argue that industrial policy in Japan and Korea put those nations on a sound footing before they fully exposed their businesses to the winds of competition. Others observe, however, that vibrant competition within the borders of both nations

Hernando de Soto, in *The Other Path*, eloquently demonstrates the benefits of tearing down barriers to free market participation. He catalogued and studied the barriers, such as dense licensing requirements, that kept the poorest Peruvians outside of Peru's market system, relegating them to their own informal economy. Alienated by the exclusion and their dismal lives, many joined the terrorist Shining Path. To counter the Shining Path and its destructive forces, de Soto proposed another path ("el otro sendero"): tearing down the barriers to participation in the recognized economy; giving people hope and chance; enabling the poor to participate in markets on their merits. *The Other Path*<sup>46</sup> is a blueprint for building the ladder of mobility. It envisions a society that values mobility; that opens the door to inclusion, from the poorest up; and it proposes to do so for pragmatic reasons of building a better society.

The counter viewpoint – hospitality to government control and indifference to the plight of the excluded – blocks the market through excessive regulation, privilege, and cronyism. The powerful insiders protect their friends at the expense of the public and often at the particular expense of the poor. This was the story of Telmex in Mexico. Owned by a crony of presidents, Telmex was guaranteed a monopoly price for incoming cross-border telecom connections; but the monopoly price was guaranteed at the expense of poor Mexicans who migrated to the United States for work and whose telephone life-line was to Mexico.<sup>47</sup> As for small new

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co-existed with government-managed external competition; and these commentators credit the countries' successes to the market and not to its suppression. See Working Group on the Interaction between Trade and Competition Policy, *Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, ¶¶ 168-257, WT/WGTCP/W/228 (May 19, 2003), available at [http://www.jmcti.org/2000round/com/doha/wg/wt\\_wgtcp\\_w\\_228.pdf](http://www.jmcti.org/2000round/com/doha/wg/wt_wgtcp_w_228.pdf); see also Singh, *supra* note 37 (developing countries often query whether they should follow the model of Japan and Korea).

Free markets are regarded with some skepticism by the new left in several South American countries, wherein the populace complains that it has not seen the benefits of liberalization. The economic, social and political reforms in Latin America beginning in 1980s had not delivered their promises of economic growth and there was resentment among the people because the reforms had not reduced poverty and inequality. This produced a populist shift towards socialism, returning more power to the state and rolling back whatever achievements were made. See Jorge Castañeda, *Latin America's Left Turn*, FOREIGN AFFAIRS, May-June 2006, at 28.

46. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

47. Not only do the poor suffer from prices that are too high, but they suffer from suppressed growth. "[T]he rest of the country suffered from [Telmex's] favored position. In a modern age when businesses need low-priced, high-quality telecommunications to compete in a global economy, Mexican growth has borne the cost of Mr. Slim's privilege. Any genuine effort to help the poor necessarily requires more healthy competition, starting in the telecom market." See Mary Anastasia O'Grady, *A Telecom Monopoly Cripples Mexico*, WALL ST. J., Feb. 10, 2006, at A19.

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telecom companies in Mexico, the entrenched system deprived them of the right to price-compete against Telmex for incoming calls.<sup>48</sup>

Thus, not only does globalization tend to stack the deck against developing countries and those who are least able (least educated, skilled and monied, and lacking infrastructure) to ride the wave of globalization's opportunities;<sup>49</sup> but globalization also allows cronyistic governments to block upward mobility and entrench the condition of the poor.

Antitrust can help. But what form of antitrust?

### C. Antitrust

#### (1) What Form of Antitrust?

Antitrust law is a subset of competition policy. Liberalization helps to open markets so they can work. In the vision of de Soto, liberalization tears down barriers, especially those barriers facing the people who are the least well off. It invites these often alienated individuals into the economic system, giving them hope, dignity and self worth.

Antitrust law cures artificial obstructions market players create on the market. But nations disagree on the types of acts that constitute an artificial obstruction. Are they only acts that shrink the size of the pie, decrease aggregate wealth, and are allocatively inefficient?<sup>50</sup> Or are they also acts that block the channels of mobility and which keep worthy actors down and moats wide?<sup>51</sup> If the latter, obstructions can be seen in more human terms and perhaps antitrust policy and its language can be better aligned with efficient development.<sup>52</sup>

There is good reason why mobility factors should play a role in the antitrust laws of developing countries. The marketplace should give firms, including smaller and younger firms, a fair chance to compete on the merits of their product, free from artificial and unnecessary foreclosing restraints

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48. See Eleanor Fox, *The WTO's First Antitrust Case – Mexican Telecoms: A Sleeping Victory for Trade and Competition*, 9 J. OF INT'L ECON. LAW 271 (2006).

49. See Lamy, *supra* note 16.

50. It is important for an antitrust agency to identify and target anticompetitive acts that shrink the pie. I do not imply the contrary.

51. See Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371 (2002).

52. Protecting mobility and opportunity on the merits need not and should not imply protecting inefficient competitors from competition or handicapping efficient firms. See Eleanor Fox, *We Protect Competition, You Protect Competitors*, 26 WORLD COMPETITION 149 (2003); see also DUTZ & KHEMANI, *supra* note 6.

See Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986), for a discussion as to the power of metaphor.

by powerful firms. Empowerment to engage in markets free of unnecessary business restraints is the counterpart to de Soto's vision of empowerment to engage in markets free from unnecessary government restraints. Undue market restraints, whether public or private, retard efficient development. They may also harm allocative efficiency and surely do not advance it. To the extent that "efficiency" as the goal of antitrust implies disregard of distributional values, it may not be the centerpiece that developing countries would choose.

## (2) Assessing the Local Problems Before Adopting Law

Law-making should come from within, not without. Legislation should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should, too.<sup>53</sup> Therefore it is important to take stock and to assemble the facts: Who within the country is harmed by what practices? How can the harms be prevented? And at what cost?

Professors Jenny and Evenett, and Consumers Unity & Trust Society under the leadership of Pradeep Mehta, have done noteworthy work to build the databases that answer these questions. The data show:

Seller cartels target basic necessities, including staples of diets. In Peru, poultry farms and their trade association conspired to eliminate competitors and prevent entry. In Zambia, the dominant producer of day-old chickens required the biggest buyer to stay out of the production market, and the buyer agreed to the requirement.

Evidence of buying cartels is rampant. This includes cartels that exploit small farmers and producers such as coffee producers in Kenya and Latin America, cotton, tea and tobacco growers in Malawi, milk processors in Chile, and fish processors near Lake Victoria.

Cartels, boycotts, and non-compete agreements have been detected and prosecuted in the milling and baking, milk and sugar markets. Beer mergers in highly concentrated beer markets threatened to exploit buyers in Namibia, Turkey, Malawi, Kenya and Tanzania.

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53. The two clauses need a link. Does the outsider claim that the law is needed to solve negative externalities visited on the outsider, as in pollution: Your smokestacks are polluting us? Does the outsider claim that its businesses pay a cost and to be fair the insider's businesses should pay the same costs? Does the outsider claim: If only you will make your laws like ours, our businesses will find it easier to make more money in your backyard? Or is the outsider altruistic; a paternalistic good Samaritan: We know this is good for you; we "offer" it to you. See Daniel Berkowitz, Katharina Pistor & Jean Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. L. REV. 165 (2003), for a discussion of the problems of legal transplants when the law is not adapted to the country's conditions.

In Kenya, owners of minivans sought monopolies over lucrative routes and teamed up with criminal gangs, not only overcharging but also terrorizing the population. Also in Kenya, the fertilizer manufacturers organized a secret bidding cartel in their tenders to the government by buying authority, which impoverished the farmers who needed an increasing number of supplies.

In many countries, numerous vertical agreements have tied up scarce channels of distribution.

In Turkey, the two dominant telecommunication firms had sole control of the infrastructure necessary to provide national roaming capability for GSM mobile telephone service and refused to allow access to would-be new entrants. Typically, dominant firms have been found to deny small firms access to essential facilities such as telecom and electricity infrastructure.<sup>54</sup>

Press stories add to the data daily. In Mexico, half of the people live on \$4 or less a day, and many survive on tortillas and beans. From December 2006 to January 2007, the price of corn soared, and the price of the tortilla rose by 35 cents a pound. The *New York Times* reported: "The crisis has hit hardest for the poorest Mexicans, who may spend more than a quarter of their daily salaries on tortillas."<sup>55</sup> It has displaced poor tortilla makers, who have lost up to forty percent of their business, since the people are compelled to buy and eat less. While the price shock came first from extraneous causes, the giant Mexican tortilla makers took advantage of the

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54. See Frederic Jenny, *Anticompetitive Practices in Developing Countries: Lessons from Empirical Evidence* (May 23-24, 2005) (unpublished paper presented at First National Competition Seminar, Amman, Jordan) (on file with author); Frederic Jenny, *Anti-Competitive Agreements: Meaning and Examples*, CARIBBEAN DIALOGUE, July-Sept. 2004, at 1 (anticompetitive practices in Trinidad and Tobago, Kenya, Lebanon, Indonesia and other smaller economies; Kovacic, *supra* note 2; Alvarez, Evenett and Wilse-Samson, *supra* note 33. The latter chapter documents numerous other specific restraints in health, education, financial services for low-income earners, infrastructure and housing, and food. *Id.* at 65-77. See also *Pulling Up Our Socks* (Consumer Unity and Trust Society Centre for Competition, Investment & Economic Regulation, Rajasthan, India), Feb. 2003 (report based on the 7-Up Project analyzing competition problems in seven developing countries – Kenya, Tanzania, Zambia, South Africa, Sri Lanka, Pakistan and India); PRADEEP S. MEHTA & NITYA NANDA, *COMPETITION POLICY, GROWTH AND POVERTY REDUCTION IN DEVELOPING COUNTRIES*, <http://www.competition-regulation.org.uk/conferences/southafrica04/mehta&nanda.pdf> (last visited June 30, 2007). For examples of abuse of dominance violations in Latin American countries, see Russell W. Pittman and Maria Coppola Tineo, *Abuse of Dominance Enforcement under Latin American Competition Laws*, March 2006, available at SSRN: <http://ssrn.com/abstract=888186>.

55. James C. McKinley Jr., *Cost of Corn Soars, Forcing Mexico to Set Price Limits*, N.Y. TIMES, Jan. 19, 2007, at A12.

situation “hoarding supplies to drive prices up even more,” according to Mexican officials.<sup>56</sup>

Mexico’s monopolies thrive even under the free market regime of President Calderon. Jorge Castañeda, Mexico’s former foreign minister, wrote: “The monopolist control of practically every walk of Mexican life is in place . . . .” Huge monopolies that exclude and exploit dominate the country – in oil, electricity, telephone – fixed line and mobile, television, cement, banks, bread, and tortilla production.<sup>57</sup>

The case of Mexico is not unique to the developing world. It is typical.

In sum, the people of developing countries are impacted by cartels and monopolistic practices. These practices include those that raise consumer prices and input prices to their businesses, which exclude or build hurdles to their outputs, and foreclose domestic suppliers. They do so by all means: coercive practices such as boycotts, covenants not to compete, price manipulation, and predation. They shore up their power to do so by mergers. Anticompetitive practices are rife in areas of physical and business necessity, such as milk, soft drinks, beer, chicken, sugar, cotton, paper, aluminum, steel, chemicals (for fertilizer), telecommunications including mobile services, cement and other construction materials, transportation including trucking, shipping, and port access, industrial gases, banking, insurance, coal and electricity. Many of the practices are local, many are facilitated by the government, and many others are offshore, resulting in inbound restraints.

### (3) A Perspective

Let us suppose that we are policymakers who live and work in a developing country and we have at heart the welfare of our fellow citizens. Half of our fellow citizens live in abject poverty. A third of the citizens are farmers. We have extractive natural resources. We have a thin manufacturing industry with potential for growth. We have cotton and lumber. Our people are extraordinary craftspeople. Most of our people do not have enough food to eat. State-owned monopolies dominate our infrastructure industries. The education system is poor. Disease and corruption are rampant. A decade ago in an expanding economy we glimpsed possibilities to move up the ladder so that at least our children could have a better life. After opening our markets, the richest two percent have yet better lives. A fraction of others who have had sufficient

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56. *Id.*

57. Jorge Castañeda, *Mexico Needs to be Freed from Unhealthy Monopolies*, *FIN. TIMES*, Feb. 5, 2007, at 13.

education and training now fortunately participate in opportunities opened by globalization, including opportunities from outsourcing. But the overwhelming majority of our people have seen no gains. They see a bigger wealth gap: no ladder and a wider moat.<sup>58</sup>

What do we want?

Of course we want more food, medicine, necessities at lower prices, education and training, and infrastructure. We want a better chance to fend for ourselves; to participate in the economic enterprise; to have the opportunity to make a living. Do we need and want antitrust? And if so, what type of antitrust? We want to explore what antitrust can do for us, assuming that we have enough money and trained people to staff the office and enforce the law.

We conclude that antitrust law can help – if we can obtain sufficient funding and access the necessary information to find and prosecute cases; if we can get jurisdiction over the violators, who may be offshore; if we legally and practically have sufficient enforcement power, and if the agency's reasoned decisions will be upheld by courts within a reasonable period of time. Antitrust can deter the practices catalogued above, and in doing so it can empower people to participate in the market on their merits.

Assuming that we want antitrust, what kind of antitrust do we want?

We have looked at the anti-cartel law of industrialized countries. We find it strong and attractive in principle although we worry about our ability to prove cartel agreements even when we are confident they exist.

For monopolization and abuse of dominance, we will look at the United States' recent monopolization cases.<sup>59</sup> We see that U.S. law has a narrow scope for dominant-firm violations: It is not concerned with excluded competitors. It is in theory concerned with consumers who are overcharged. Yet it tends to strike the balance in favor of freedom for dominant firms on the theory that the incentives of dominant firms are aligned with consumer interests, and antitrust duties discourage firms from inventing and investing.<sup>60</sup>

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58. See Lamy, *supra* note 16. There may be gains but they are not perceived by the majority of the poor; and the gains are unequally distributed to the well-off or the otherwise (e.g. educationally) advantaged.

59. See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

60. See R. Hewitt Pate, *The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct*, in 2003 INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE, Chap. 12, p. 195 (Barry Hawk ed. 2004) (supporting the minimalist approach).

*Verizon v. Trinko*<sup>61</sup> illuminates the perspective that non-intervention against the dominant firm is the best prescription for economic welfare. Verizon was the incumbent local telephone service provider in Northeastern United States, and it owned elements of the local telephone loop, which connected long distance calls to the local area. When competition among local telephone service providers became technologically feasible and economical, the United States deregulated the market and invited local competition into each geographic area. Rivals entered. They needed access to the local loop, which a federal statute required the incumbent to assure. Verizon, however, wanted to keep its own customers from defecting to the new entrants. Therefore it made sure that it would give better service by interrupting its rivals' access to the local loop.<sup>62</sup> The Supreme Court held that this conduct did not violate antitrust laws.<sup>63</sup>

In part, the issue of the case was whether Verizon violated antitrust laws by using the leverage it had over the local loop to gain advantages over its new competitors. Verizon was not likely to re-monopolize this local market, which had just been opened to competition. It was argued on behalf of the plaintiffs that Verizon's strategic manipulations by many "small" acts, such as disrupting local loop connections, "threatened [the rivals] with 'death by a thousand cuts.'"<sup>64</sup> This is a metaphor sometimes used in civil rights cases to describe the thousands of every day slights that keep the marginalized marginalized.

To the invocation of this metaphor, the U.S. Supreme Court replied:

[T]he identification of [a thousand cuts] would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation . . . .<sup>65</sup>

Thus the Court held that a dominant firm's use of leverage to gain advantages in, but not to monopolize, the local telephone market was not an antitrust violation. "Mere" leveraging by a monopolist that will not lead to a new monopoly is not of U.S. antitrust concern.

61. 540 U.S. 398 (2004).

62. The Court assumed these alleged facts to be true because the case before the Court arose on Verizon's motion to dismiss the complaint.

63. The Court would have preferred to leave the problem to the regulatory agency, and to the regulatory statute, which prohibited the conduct, but the statute declared that antitrust law was not preempted. Therefore, by necessity, the Court's opinion went beyond the regulated industry context. The Court expressed a general principle of non-interference with the monopolist's freedom of action.

64. Brief for the State of New York et al. as Amici Curiae, in Support of Respondent at 10, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

65. *Trinko*, 540 U.S. at 414.

But for developing countries, the answer might be different. Death by a thousand cuts is a reason *for* antitrust accountability, not against it. "A thousand cuts" by the powerful against the powerless describes the constant fate of the peoples of developing countries.

In formulating antitrust law in our developing country, we may not want *Trinko* law. We want a law against cartels, monopolistic practices, and abuse of dominance that prevents dominant firms from using their power and leverage to fence out powerless firms. We want a law against mergers that create or reinforce the power to exploit and exclude (if we have enough resources to do the job and our enforcement powers reach the mergers that hurt us). Moreover, we want a strong law that reaches restrictive and market-blocking acts and anticompetitive practices that the state sponsors or facilitates—problems that are exponentially greater in developing countries than in, for example, the United States.

Are we not worried that our law will handicap the efficiencies of the dominant firm and thereby harm our own consumers? This was not the problem in the forefront of our minds. Inclusiveness as a value can enhance efficiency. Enforcement that might tend to undermine efficiency can be guarded against by limiting principles.<sup>66</sup>

## V. OBSERVATIONS ON THE DESIGN OF APPROPRIATE LAW

Developing countries face countless dilemmas and opportunities in formulating their substantive principles. Some are telescoped above. Here are six:

1. Developing countries face markets that are much less dynamic and open than markets in developed countries. Moreover the markets are pock-marked by state intervention and control. Whether the intervention is through state measures, state-owned enterprises, or enterprises licensed or privileged by the state, these enterprises are likely to run on principles of privilege, preference, and cronyism.<sup>67</sup> These factors have major implications regarding error costs. If the competition agency is relatively independent, resourced, and capable, more intervention, especially against

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66. For example, we might choose a principle that must not harm consumers through antitrust *enforcement*.

Law that protects the openness of markets and access of market players on the merits does not inherently protect inefficiencies; and law that ignores the values of openness and access can protect the power of the dominant firm. See Eleanor Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 UTAH L. REV. 799 (2006).

67. See DUTZ & KHEMANI, *supra* note 6.

market-blocking and discriminatory action<sup>68</sup> by state-owned or state-privileged enterprises, might promise more gains and fewer costs than abuse-of-dominance intervention in developed economies.<sup>69</sup>

2. Most developing countries have insufficient resources to run their competition offices. They are short of staff, especially staff members who are economics experts. This suggests that brighter-line rules might be needed, whether they tip in the direction of more or less aggressive enforcement. The kind of analysis suggested, for example, by the U.S. Supreme Court in *California Dental Association*,<sup>70</sup> might be too complex and of uncertain application. Yet the focused analysis suggested by Justice Breyer's dissenting opinion – relying on experience and theory that rules against advertising discounts raise prices – might prove more appropriate.<sup>71</sup>

3. Apart from the observations above, each nation must make important decisions regarding the degree of antitrust intervention. It faces conundrums. For example, excessive pricing, especially after price controls are removed, may be a pressing problem, especially on the price of necessities. But easily-triggered antitrust intervention may lead to price control by another name and undermine the effort to prime markets. Low, especially below-cost, pricing might seriously threaten local firms and undermine their chance to take root. But intervention against low pricing deprives the people of one of the most important benefits of competition. Moreover, whether the low price is truly below cost might be difficult or impossible to ascertain. The nation might want to avoid intervening against low pricing.

4. A legitimate abuse-of-dominance law would be copious enough to prohibit unjustified foreclosing restraints, without the need of a plaintiff to prove output effects across the whole market. But as a corollary, law that seriously respects the right of the underdog to compete on the merits should also seriously respect the right of an alleged violator to prove: My conduct responded to consumers and served the market.

5. While there is high value to a nation in formulating its own law, nations will also appreciate the benefits of following a blazoned path.

68. I refer to discrimination in favor of cronies and against outsiders.

69. See John Fingleton, *De-Monopolizing Ireland*, in EUROPEAN COMPETITION LAW ANNUAL 2003: WHAT IS ABUSE OF DOMINANT POSITION? 53, 65 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2006); see also John Vickers, Competition Law and Economics: A Mid-Atlantic Viewpoint, The 10th Burrell Competition Lecture (Mar. 19, 2007) (explaining that historically monopolized economy and weak “self-righting mechanisms” may require more interventionist policies towards abuse of dominance).

70. *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999) (holding that dentists' rules against the advertisement of price discounts and quality do not inevitably lessen the output of dental services, and that probability of output limitation must be the subject of detailed inquiry).

71. *Id.* at 782.

Anchoring new law in existing jurisprudence promises greater legal certainty and other efficiencies. If one adopts “dominant” law, one need not reinvent the wheel. One can take account of international norms while enhancing the ease of foreign investment. The challenge is to understand when foreign law is appropriate law and when it is not.<sup>72</sup>

6. For efficiency and growth, developing countries need always to adjust to the changing dynamics of markets and competition. All principles and rules should be consistent with the imperative of flexibility and adjustment and should avoid the temptation to try to hold back the tide.

## VI. CORRELATIVES

The perspective suggested above concerns antitrust proper – the substantive rules and principles. A number of additional considerations and conditions are necessary to make the law useful and meaningful.<sup>73</sup>

First, exemptions must not be overly broad. Antitrust operates only within the area carved out for it. Exemptions and immunities, including untouchable market actors who may be favored by the state, can so shrink this area as to lose most of antitrust law’s promised benefits. In that spirit, including within the coverage of antitrust law regulated industries and state

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72. This is a challenge that South African law explicitly embraces. *See Mondi Ltd. & Kohler Cores and Tubes v. Competition Tribunal, Competition Appeal Court*, 2003 (1) CPLR 25(CAC) (S. Afr.).

Gesner Oliveira and Cinthia Konichi Paulo add the following differences and concerns that developing countries must take into account when implementing competition law: 1) the large informal sector, which does not comply with law and may lead to overestimation of market power; 2) the size of the market, which for Brazil is a medium-sized economy with many prominent multinationals; 3) the magnitude of expected efficiency gains, which often are larger for transitional than developed economies; 4) precariousness of the infrastructure; 5) higher transaction costs, which can prevent new entrants from contesting quasi-monopolies; and 6) more severe political market failure. “In sum, developing countries have more competition problems and fewer resources.” Gesner Oliveira & Cinthia Konichi Paulo, *The Implementation of Competition Policy in Developing Countries: The Case of Brazil* (May 2006) (prepared for the workshop, *The Development Dimension of Competition Law and Policy: Economic Perspectives in Cape Town, South Africa*).

73. These considerations and conditions have been well articulated by others. *See, e.g.*, William Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOKLYN J. INT’L L. 403 (1997); William Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); Clive S. Gray, *Antitrust as a Component of Policy Reform: What Relevance for Economic Development?*, in REFORMING ECONOMIC SYSTEMS IN DEVELOPING COUNTRIES 404 (Dwight H. Perkins & Michael Roemer eds., 1991); R. Shyam Khemani, *Competition Policy and Economic Development*, POLICY OPTIONS, Oct. 1997, at 23, available at <http://www.irpp.org/po/archive/oct97/khemani.pdf>.

enterprises that operate in a commercial capacity can be significantly advantageous to developing countries. Often the industries most important to the people are regulated and each is dominated by a state-owned monopolist. These industries include infrastructure industries such as energy, communications, and transportation. Exclusion of the market actors from antitrust is not only a recipe for cronyism and exploitation;<sup>74</sup> it is a recipe for a tiny antitrust domain.<sup>75</sup>

Second, the competition agency must be as independent as possible, free from political interference, lest the government and its politicians commandeer antitrust and confine it to a not-too meaningful realm.

Third, institutions: Ideally, the agency should be well-funded and sufficiently staffed with educated and trained personnel. The leaders and staff should not be corrupt. Appellate channels should be provided. These institutions, too, should be staffed by well-qualified and non-corrupt individuals. Due process should be assured in all proceedings. The workings of the institutions should be transparent and their agents accountable. Indeed, well-functioning institutions are more important to trade and competition than is the convergence of the laws of various nations.<sup>76</sup>

Fourth, advocacy: Competition advocacy is a critical tool. Commonly, the most serious restraints are government measures, often procured by vested interests. Moreover, “corporate elites . . . [tend to] resist policy reforms . . . .”<sup>77</sup> The competition agency can play an important role in calling attention to anticompetitive and unproductive state measures and their costs to society. It should probably be the nation’s “strongest public voice on promoting competition and articulating the competition perspective.”<sup>78</sup>

74. See Fox, *supra* note 48.

75. Likewise, antitrust should not be crowded out by protectionist measures that serve the entrenched interests. See Dennis Davis & Eleanor Fox, *Industrial Policy and Competition – Developing Countries As Victims and Users*, in 2006 INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM CORPORATE LAW INSTITUTE, Chap. 8, p. 151 (Barry Hawk ed. 2007).

76. See Roumeen Islam & Ariell Reshef, *Trade and Harmonization: If Your Institutions Are Good, Does it Matter If They Are Different?* (World Bank, Policy Research Working Paper No. 3907, 2006). The choice in developing countries, however, is often a grim choice. The quality of institutions cannot be expected to approach the ideal.

77. DUTZ & KHEMANI, *Competition Law & Policy*, *supra* note 6, at 12.

78. *Id.* at 28. Dutz and Khemani noted:

[E]ffective competition advocacy can help create an environment where, over time, enforcement strengthens the role of markets by reducing government interventions and concomitant regulatory burdens. Thus advocacy may not just be a complement to enforcement, but an essential first step in expediting full, effective competition. Given that competition authorities typically lack sufficient political capital and reputation in their early years, and that policy-generated obstacles to competition are often maintained

More generally, education and adequate health care are *sine qua non*s of effective participation in the economic system.

These are difficult requirements to fulfill. If crucial elements are missing, the country might choose not to adopt antitrust at all.

## VII. THE DEVELOPED COUNTRY'S DUTY OF COOPERATION

Developing countries are hurt by international cartels and practices and are vulnerable to them. The violators know that developing countries have few resources to devote to antitrust (if any, after they serve other human priorities). Offshore firms direct exploitative practices at developing countries, often by acts taken and agreements made on their home shores.<sup>79</sup>

These anticompetitive practices launched from distant shores are likely to be beyond the practical reach of developing countries. To solve this problem, the European Union ("EU") has proposed a helpful framework,<sup>80</sup> which could be or could have been implemented in the context of the WTO, but could also be implemented as a stand-alone project.

In the spirit of the EU proposal, developed countries with mature antitrust laws can and should help developing countries, especially when the developed country's own nationals are the violators of clear and shared principles of antitrust.<sup>81</sup> The developed countries can and should revise their laws, extending jurisdiction so as to make hardcore export cartels illegal.<sup>82</sup>

An environmental convention provides a model. This is the Basel Convention on the Control of Transboundary Movements of Hazardous

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by support from powerful vested interests, initial advocacy efforts should focus on public restraints whose removal is subject to less debate, or [on projects] that directly benefit entrepreneurs, exporters, and other stakeholders who can be counted on to provide strong backing and support. Special attention should be paid to initiatives that directly or indirectly benefit as broad a base as possible. *Id.* at 28-29.

79. See Frederic Jenny, *Globalization, Competition and Trade Policy: Issues and Challenges*, in *TOWARDS WTO COMPETITION RULES 3* (Roger Zäch, ed., 1999).

80. Working Group on the Interaction between Trade and Competition Policy, World Trade Organization, *Communication from the European Community and Its Member States*, WT/WGTC/W/184 (Apr. 22, 2002).

81. It has been estimated that for 19 selected products, the value of cartel-affected imports to developing countries in 1997 was \$51.1 billion, and that the price of these imports by reason of the price-fixed overcharge was elevated by at least 10 percent. Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 *ANTITRUST L.J.* 801, 813-16 (2004).

82. See Eleanor Fox, Testimony Before the Antitrust Modernization Commission, Hearing on International Issues in Washington, D.C. (Feb. 15, 2006), available at [www.AMC.gov](http://www.AMC.gov); see also Special Committee on International Antitrust, ABA Antitrust Section, *The Special Committee's Report 83-90* (Sept. 1, 1991).

Wastes and their Disposal,<sup>83</sup> which the United States has signed. Under the Basel Convention, if a signatory country prohibits import of hazardous wastes, all other signatories must make the shipment of hazardous wastes to that country illegal. The United States and other developed countries could and should adopt this model for hardcore export cartels, which are the hazardous wastes of antitrust.

Failing that, the United States and other developed countries should amend their antitrust laws to provide jurisdiction for the discovery of documents and testimony from knowledgeable people. This should include subpoena power when the developed country's citizens are the alleged victimizers of the people of developing countries.<sup>84</sup>

In antitrust law and enforcement, in the absence of international law, the world demands a cosmopolitan vision and a willingness by developed nations to accept responsibility for the harms they cause. The evolving case law of the United States does not demonstrate this vision and it does not reflect generosity of spirit. Instead it shows a retreat and puts the United States on a track towards solipsism and Balkanization.<sup>85</sup>

#### VIII. NETWORKS

Networking is the new world order.<sup>86</sup> Antitrust networks exist.<sup>87</sup> They tend to be dominated by developed nations because developed nations' experience is deeper and longer; they are likely to be heavier users of networks,<sup>88</sup> and they have more resources – people and money – to devote to the project. As a result, the agendas tend predominantly to reflect the interests of developed countries.<sup>89</sup> Developing nations need their own

83. Mar. 22, 1989, 1673 U.N.T.S. 125.

84. Fox, *supra* note 82.

85. See F. Hoffmann-La Roche Ltd. v. Empagran, 124 S. Ct. 2359 (2004) (holding that foreign buyers in worldwide conspiracy cannot invoke U.S. antitrust laws unless they are harmed by the effect in the U.S.); Intel Corp. Microprocessor Antitrust Litigation, 452 F. Supp. 2d 555 (D. Del. 2007) (holding that U.S. plaintiff complaining about worldwide anticompetitive strategies of U.S. defendant cannot invoke defendant's foreign acts).

86. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFFAIRS 183 (Sept.-Oct. 1997).

87. See D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 41 (2007), also available as a working paper, Univ. of Wis. Legal Studies Research Paper No. 1034. See text at notes 178-94, 287-92.

88. *Id.*, text at notes 226-29.

89. For example, the International Competition Network's first project was convergence of procedures for pre-merger notification – an issue of concern to multinational corporations. Subsequent projects have stressed substantive merger standards and coordination of cartel procedures. Technical assistance for developing countries is, however, also on the agenda. See

networks to explore their own interests more centrally. Regional trade groupings can serve as a platform for this objective.<sup>90</sup> And a world-wide developing-country network on competition law would be useful.<sup>91</sup>

Developing nations themselves are diverse. They share certain characteristics and do not share others. The situation and characteristics of India are not the same as those of Benin. Communications and cross-fertilizations through the network can begin to sort out the differences as well as to crystallize the commonalities.

## IX. CONCLUSION

Developing countries deserve an antitrust law that fits the facts of their markets and responds to their condition and needs. They deserve a law so designed and so characterized that their peoples will embrace it as sympathetic and legitimate rather than reject it as foreign.

If there is an appropriate symbol for a developing country's antitrust, it is not neo-liberalism, which may imply a widening moat. It is the rising ladder. Antitrust can be seen as the complement to Hernando de Soto's *The Other Path*.

The antitrust law of developing countries is likely to incorporate the lion's share of the developed country's antitrust principles. In doing so, it will embody a different set of default presumptions about how well markets work while incorporating a mandate and perspective of inclusiveness. Developing countries have a choice.

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International Competition Network Home Page, <http://www.internationalcompetitionnetwork.org> (last visited June 30, 2007).

90. See U.N., Implementing Competition-Related Provisions in Regional Trade Agreements: is it possible to obtain development gains? (2007).

91. UNCTAD, which is not a network, has specific regard for the interests of developing countries and competition law is one of many missions.