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**Contribution
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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

IMAGINE: PRO-POOR(ER) COMPETITION LAW

The role of competition law and policy in helping to empower
the poorer populations of the world

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I. INTRODUCTION

One of the world's biggest economic problems is the plight of the poorest populations and the growing disparity of wealth combined with lack of mobility. Policymakers, scholars, and journalists¹ illuminate the dimensions of the problem, not only in terms of human dignity but also in terms of the corrosion of society by a festering alienation that sows seeds of the next Shining Paths.²

Poverty is a special problem in developing countries in which large masses of people live below the poverty line and most people live on less than \$2.00 a day.

To attempt to address the problem, the United Nations adopted the Millennium Development Goals in 2000, aiming to halve the number of individuals in deep poverty by 2015. We are moving along the path towards doing so; but still, more than one billion people live below the poverty line³ and nearly half the world lives on less than \$2.50 per day.⁴ The gains

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¹ See Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999); Paul Collier, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2008), Katherine Boo, *BEHIND THE BEAUTIFUL FOREVERS* (2012).

² See Hernando de Soto, *THE OTHER PATH* (1989).

³ See World Bank, Poverty Overview, <http://www.worldbank.org/en/topic/poverty/overview>.

cannot be grounds for sanguinity. We need significant sustainable improvements in addressing the poverty problem. How to create and anchor significant sustainable improvements?

A traditional answer is: more and better provision of food and nutrition, education, health care, housing, energy services, transportation, job and skills training, and the building out of infrastructure to get to jobs and markets; with good governance and rights protected by rule of law and institutions of justice. This paper argues that competition policy with a pro-poorer, pro-outsider consciousness is a necessary and equal partner in all of the above.

Every competition law has a consciousness or leaning. United States antitrust law, while once leaning *for* the underdog, today has a pro-freedom-for-business leaning.⁵ EU competition law, deriving from a common market, has a pro-open market consciousness. This essay asks: What is the pro-poorer perspective? What if competition laws were drafted and applied, and policy developed, with a pro-poorer consciousness? What would they be?

This essay considers the issue from the point of view of developing countries rather than poorer people across the world. It considers *poorer* people and outsiders, not just “the poor,” for there is not a competition law for the rich (and enabled) and a competition law for the poor; although law enforcers can and do set priorities to target necessity markets.

First, we look at context. What restraints most harm poorer populations, and removal of which would confer the most benefits? Developing countries’ experience suggests the answer: state and state-complicit restraints, which clog the pathways for initiative on the merits, sometimes almost fully, while reciprocally raising prices. Therefore, we treat state and hybrid anticompetitive action as a matter of priority.

⁴ See Global Issues, The Human Development Report (2012). See www.globalissues.org/article/26/poverty-facts-and-stats.

⁵ See Adam Liptak, Steady Move to the Right, New York Times, June 28, 2013, p. 1.

Second, we look at certain substantive rules and ask whether they may have a pro-poorer application. Third, we identify pro-poorer advocacy that is likely to be most fruitful, both nationally and internationally.

II. ALLEVIATING POVERTY AND UNLEASHING THE POTENTIALS OF THE POORER POPULATION: RESEARCH ON THE MULTIDIMENSIONAL SOLUTIONS

Where does competition law and policy stand in the hierarchy of possible solutions?

That is, where do “markets” stand?

UNCTAD and the OECD have both done valuable research on the problem of poverty, the disempowered poor, and the need for multidimensional interrelated solutions. Thus, we are told by the OECD’s monograph, *Promoting Pro-Poor Growth*:⁶

Rapid and sustained poverty reduction requires pro-poor growth, i.e. a pace and pattern of growth that enhances the ability of poor women and men to participate in, contribute to and benefit from growth. * * *

iv) **The vulnerability of the poor to risk and the lack of social protection reduce the pace of growth and the extent to which it is pro-poor.** The poor often avoid higher risk opportunities with potentially higher payoffs because of their vulnerability. In addition, the journey out of poverty is not one way and many return to it because man-made and natural shocks erode the very assets that the poor need to escape poverty. Policies that tackle risk and vulnerability, through prevention, mitigation and coping strategies, improve both the pattern and pace of growth and can be a cost effective investment in pro-poor growth.

v) **Policies need to tackle the causes of market failure and improve market access.** Well functioning markets are important for pro-poor growth. Market failure hurts the poor disproportionately and the poor may be disadvantaged by the terms on which they participate in markets. Programmes are needed to ensure that markets that matter for their livelihoods work better for the poor. . . . Policies to tackle market failure should be accompanied by measures aimed at increasing economic capabilities of the poor.⁷

⁶ Promoting Pro-Poor Growth, Key Policy Messages (OECD 2006).

⁷ The monograph continues:

Through its Development Assistance Committee (DAC) and its Network on Poverty Reduction (POVNET), the OECD has researched and recommended best practices in the panoply of interrelated sectors, including agriculture (which in many poorer countries employs 50-80% of workers and is a major source of GDP); infrastructure – housing and getting to market; information and communications technology; electricity, water, other energy; transportation including cross-border; employment and social protection; education and skills development; jobs and social protection; food security and nutrition; economic empowerment; and private sector development including competition policy to attack both private and public restraints.⁸

The documents generated by the OECD and its DAC stress the interfaces, the need for policy coherence, and the importance of working on all fronts at once to address not only the problem of the poor but the problem of all society when it ignores the poor and tolerates an increasing income gap without mobility.⁹ Scholars and researchers demonstrate that poverty alleviation and sustained economic development require a set of coherent policies that promote inclusive growth.¹⁰

*In tackling poverty, perceptions of policy dichotomies have been misplaced.... i) **Policies to tackle the multiple dimensions of poverty should go hand-in-hand.*** Poverty is multidimensional. Pro-poor growth will be strengthened by progress on the non-economic dimensions of poverty. More effective policies require a better understanding of these interdependencies. Perceptions of dichotomies (e.g. economic *versus* social policies) can be misplaced. The pace and pattern of growth have multiple determinants and consequences and each dimension nourishes (or holds back) the other. Progress on the income poverty Millennium Development Goal (MDG) facilitates progress on other MDGs and *vice versa*.

⁸ Anticompetitive restraints, both public and private, tend to hurt the poor disproportionately. Facilitating open market competition can substantially benefit pro-poor growth. See *Promoting Pro-Poor Growth: Private Sector Development* (OECD 2006), pp. 38-41.

⁹ See P. Collier, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2008), explaining how society puts itself at risk by ignoring “the bottom billion” and allowing the festering of extreme poverty and alienation.

¹⁰ See Daron Acemoglu and James Robinson, *WHY NATIONS FAIL* (2012), mustering evidence across nations and centuries that sustained growth can be produced only in regimes that value and practice inclusiveness; it can be

The above insights present the challenge of this paper: to construct a blueprint for a pro-poorer, pro-outsider system of competition law and policy and consider its merits in view of the essentially status quo alternative: What would that blueprint be?

B. What does Pro-poorer, Pro-outsider Competition Law and Policy Demand?

One approach to pro-poor antitrust is antitrust as usual but with a distinct priority for those restraints most harmful to the poor – price-raising cartels on necessities of life; infrastructure cartels; thus, restraints affecting bread, milk, sugar, corn or tortillas, cement, home and highway construction, and healthcare. Setting priorities, assuring that the gains of antitrust enforcement get passed on to the most needy, and monitoring the targeted markets to assure that, post-enforcement, they behave competitively, are vitally important tasks. This was a subject of the meeting of the Latin American Competition Forum in Santo Domingo in September 2012. Excellent examples of pro-poor priorities are also richly documented in a number of the submissions for the OECD Global Competition Forum in February 2013 and this UNCTAD Competition and Consumer Branch conference of Intergovernmental Experts. Is there more?

We have a guide. Seeking out actions and projects that can most help their masses of poor citizens is what the competition authorities in poorer developing countries do every day. Typically, they are intensely focused on tearing down barriers to economic opportunity and opening markets to competition. The most harmful acts they find typically involve the state, or the state and private elites. The offenses they tackle are not always “traditional” antitrust; they might be on the margins of what developed country agencies do because, for example, a principal culprit is often the state. The authorities do what they can.

produced only in societies whose institutions instill a sense of autonomy and legitimacy, as opposed to societies that nourish small groups of elites who extract wealth and trade in privilege. See also Collier, *supra* note 7; THE WORLD BANK GROWTH REPORT (Michael Spence, Chair of The Growth and Development Commission, 2006).

Thus, in Kenya, with 43% of the people below the poverty line, the competition commission identified and targeted a law granting a monopsony and monopoly to a state-owned board for the buying of ingredients and the production and sale of a major pesticide extract, putting 40,000 small farmers out of business. In partnership with the World Bank, the competition commission mustered the forces to repeal the monopoly.¹¹ In Tanzania, the competition commission faced a press campaign by the leading cement producers to impose duties of 35% on imports of cement, promising to save existing jobs (in inefficient plants) and promising to save the nation's economy. The high duties would have blocked purchases of cheaper and better quality cement from Pakistan and India. Countering the protectionist campaign, the commission calculated and publicized how much the duty would cost the people in the road construction and housing sectors, in prices, in jobs, and in economic opportunity; and they won the ear of the President, who refused the duties.¹² In West Africa, the competition authority of the West African Economic and Monetary Union discovered that the monopolist of cooking oil in Senegal had procured state measures to bar imports of palm oil from Côte d'Ivoire. The WAEMU competition authority intervened and required Senegal to repeal its restrictions. Meanwhile the government of Togo had signed an agreement with a private transport company that effectively prevented competitors from doing business in the country. The WAEMU competition authority directed Togo to recall the agreement, which it did.¹³

Authorities of developing countries often prioritize state-complicit anticompetitive restraints because those restraints hurt the most.

¹¹ As told by Francis W. Kariuki, Director General of the Competition Authority of Kenya.

¹² As told by Godfrey Mkocho, when Director General of the Fair Competition Commission of Tanzania.

¹³ As told by Amadou Dieng, Director of the WAEMU Competition Authority.

This section has provided background on the problem and its multidimensional and interrelated solutions, and urges that we learn from leadership in poorer developing countries. We turn now to specific considerations under competition law and then under broader competition policy.

III. WHAT PRO-POORER, PRO-OUTSIDER MEANS FOR COMPETITION LAW

1. Setting the stage

What does a pro-poorer, pro-outsider antitrust value? It values a free and open marketplace without privilege or favor. So, too, you will say, does all competition law/policy; but this value is especially critical for nations and market players without power and especially for those in societies ruled by a few privileged families or firms. Clogging the channels with privileged access especially hurts the outsider and keeps the poor poor. This essay will discuss means to keep “unclogged channels” in the sites.

2. The scope of the law: Does it reach the state?

It has often been observed that undue¹⁴ anticompetitive state acts are more damaging to competition than anticompetitive private acts, because the power of the state will not be eroded even by strong and creative competitors. Poorer jurisdictions in which the state’s presence in the market is pervasive and cronyism is rampant are especially likely to feel the freezing-out effect; good ideas for the marketplace by members of the uncredentialed masses may never be realized.

Deborah Healey, of the University of New South Wales Faculty of Law, and I are in the process of completing a research project under the auspices of the UNCTAD Research

¹⁴ States must of course be free to act in the interests of their citizens. Legitimate state acts might have anticompetitive by-products. “Undue” is a marker to signify a class of acts that are excessively and unjustifiably anticompetitive. See note 16 infra.

Partnership Platform on the extent to which national laws reach certain state and hybrid anticompetitive acts. We found a surprising number of jurisdictions whose laws extend their reach to state actors and thus beyond private offenders.

Competition laws can be drafted to reach some unduly anticompetitive state acts and measures, and competition policy can be enlisted to reach many others. Following is a list of principles that we derived from our study. They are presented below as normative principles. The easiest and most obvious come first. Those that follow are more difficult to obtain and implement. We have numerous examples of each in our paper, which is provided with the materials for the UNCTAD Research Partnership Platform.

- (1) The law should cover state-owned enterprises.
- (2) The law should cover state officials who facilitate illegal cartels or bidding rings by conduct outside of the course of their duties (such conduct being especially notorious in procurement).
- (3) If the law allows a state and local action defense to anticompetitive private acts, the defense should be narrowly drawn. It should not be available if the state action allows the private actor a choice to obey the competition law, and it should not be allowed if the state act or measure is void (for example, preempted).
- (4) If the law allows a lobbying defense for private acts designed to procure government action, the defense should be narrowly drawn. Although individuals must be allowed and invited to petition government, the defense should be lost if the petitioners use fraud or deception to achieve their ends.¹⁵
- (5) The law should empower the competition authority to challenge unduly anticompetitive state measures, or to invite the authority to identify such measures and trigger their challenge.
- (6) If the jurisdiction is a common market or a system of federal supremacy, the competition law combined with a federalism principle should embody the European Union principle requiring states to “disapply” state measures that frontally undercut the competition rules. Here is a statement by the European Court of Justice of the principle

¹⁵ Consideration should be given to disallowing the lobbying defense if it shields an otherwise illegal conspiracy among competitors. The right to petition may be sufficiently safeguarded by fully preserving the individual right.

that required Italy to disapply a statute creating a match-manufacturing cartel and requiring the Italian match competitors to carry it out:¹⁶

⁴⁵ . . . [A]lthough Articles [101 and 102 TFEU (prohibiting anticompetitive agreements and abuse of dominance)] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4 TEU], which lays down a duty [of Member States] to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.¹⁷

If the six principles above could be adopted and enforced, the bite of the competition law, for pro-poor and pro-all, would be significantly sharpened. Without these principles, state measures and acts can create a stranglehold on the space for competition.

3. Exemptions and other non-coverage

¹⁶ Further definition of what is an unduly anticompetitive state measure is necessary. One could start, for example, with disapplication of law that is a frontal assault on competition itself and not credibly required by public interest concerns such as crisis, as was the case with the Italian law that organized the match cartel that is the subject of the case from which the quotation is drawn.

¹⁷ The European Court continued:

⁴⁶ The Court has held in particular that Articles [4 TEU and 101 TFEU] are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

⁴⁷ Moreover, since the Treaty of Maastricht entered into force, the . . . Treaty has expressly provided that in the context of their economic policy the activities of the Member States must observe the principle of an open market economy with free competition . . . ***

⁴⁹ The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.

⁵⁰ Since a national competition authority such as the Authority is responsible for ensuring, inter alia, that Article [101 TFEU] is observed and that provision, in conjunction with Article [4 TEU], imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if . . . the [competition] authority were not able to declare a national measure contrary to the combined provisions of Articles [4 TEU] and [101 TFEU] and if, consequently, it failed to disapply it.

Conorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato, Case C-198/01, [2003] E.C.R. I-8055.

Pro-poorer law would minimize exemptions. Exemptions sometimes include agriculture, banking and other regulated industries, intellectual property, and (dealt with above) acts by the state.

In many poorer and developing nations, more than half the people work in agriculture. The nations have a particular need for a competitive market in agriculture, both as producers and consumers. The farmers need inputs at a competitive price. The farmers are often exploited by big agribusiness and multinational buyers. A broad exemption for agriculture is disabling and disempowering.¹⁸ Moreover, a nation with a blanket exclusion would miss competitive opportunities for improving the lives of the poor and poorer.

Banking exemptions likewise can be seriously harmful. Notoriously, in developing countries with large masses of poorer people and a small percentage of elite who own most of industry, un-connected individuals with talent and good ideas often cannot get business loans or, if they do, they risk falling into traps of exploitation.¹⁹ State property laws, which affect the value of collateral, conspire to make loans to poorer entrepreneurs a risk that banks avoid. A combination of competition and property law reform may be needed to open access to capital. Moreover, a banking exemption from competition law that leaves regulation to a captured regulator can entrench monopolization and disempowerment.

In general, regulated industries and their relationship to competition law present a challenge to developing economies. All jurisdictions have to make decisions about the relationship between sector regulation and antitrust. The decision may be complicated because, on the one hand, overlap of the two regimes costs resources; but on the other hand, an antitrust

¹⁸ A provision authorizing certain co-operatives of small farmers can be important.

¹⁹ See *The Ugly Side of Microlending*, Bloomberg, Businessweek, Dec. 12, 2007.

exemption removes a watchdog and increases the risk of regulatory capture. If Mexico, for example, had assigned all authority over the Telmex/Telcel giant to the telecom regulator COFETEL, the public would never have seen the halving of cell phone prices following the settlement of a monopolistic abuse case prosecuted by the persistent Federal Competition Commission of Mexico.²⁰

Some, but not most, competition laws exempt intellectual property or aspects of it. Helpfully, exemptions do not often extend to *abuse* of IP rights. A full exemption can be particularly harmful in poorer countries whose people are plagued by diseases whose treatment requires high-priced drugs. The ability of competition authorities to prevent abuses that entail price-raising is a vital tool for the poor.

Much of modern technology including that used in computers, smart phones and other mobile phones incorporates intellectual property. Access to information and communication technologies is critical; it means access to business opportunity, at home and in the world. There is growing literature and experience on how mobile phone technology enables market information flows and financial transactions of cottage industries and isolated entrepreneurs, such as fisherman needing on-the-spot information of the market and migrant wage earners needing to transfer money to their families. Keeping modern technology within the reach of competition law is a critical pro-poor policy.

Extraterritoriality. Does the law reach off-shore acts that harm a nation's citizens? It is especially important that developing countries' competition laws reach off-shore conduct. Cartelists often target most vulnerable countries, where they are more likely to ply their harm with impunity. The many examples that underscore the importance of extraterritorial jurisdiction

²⁰ See <http://cfc.gob.mx/images/stories/Publicaciones/CFC%2010-2012.pdf>.

include the world vitamins cartel, the cargo and fuel oil cartels, and the Canadian/Russian potash export cartels. All of these cartels have seriously injured individuals in poor developing countries and have undermined the nations' prospects for engaging in the world economy.

The potash cartel is a notorious example of serious harm in developing countries where deterrence and compensation are beyond reach of the most vulnerable victims if their nation's law does not cover offshore acts or if the nation has no practical power to enforce. Potash is a major ingredient in fertilizer. Fertilizer comprises a large portion of the cost of crops. When farmers in sub-Saharan Africa pay monopoly prices for this input, tens of thousands of farmers cannot profitably produce their crops; their families can starve; businesses, which would succeed on the merits, are crippled.²¹

4. Procedure

When poorer individuals suffer anticompetitive injury, can they get justice? Often, they cannot. Systems tend to disfavor the poorer population. Especially in poorer countries that are run more by connections than merit, the poor do not have access to the system of justice.

This means that, for antitrust harms, it is especially important to open the channels for recourse. The two channels are public actions on behalf of the victims, and private actions by them or on their behalf. In some jurisdictions the competition authority may or must obtain monetary recovery to be distributed to the victims; but this is not usual. In many jurisdictions, private actions are allowed, but in many they are available only after the competition authority successfully proceeds; and in many jurisdictions that are under the political thumb of autocratic governments or simply lack the resources or stature to stand up to powerful offenders, the competition authority does not bring cases that should be brought. In many jurisdictions, there is

²¹ See, for effect of the potash cartel in India, Frederic Jenny, Global potash trade and competition, *The Economic Times*, November 25, 2010.

no provision for collective actions, contingent lawyer fees or other inducements, and there are no procedures or possibilities for obtaining the necessary evidence. In some jurisdictions there are especially high burdens of proof not only for proof of the violation but also for proof of causation and injury.

To help poorer victims and others whose losses are a fraction of court costs, jurisdictions can incentivize those who might bring proceedings on their behalf. This implies class or representative actions. While collective action mechanisms can be abused, the European debate has illuminated options to avoid abuses, as illustrated in recently proposed legislation to facilitate private actions in the European Member States.

5. Formulating and applying the law

Is there a pro-poorer, pro-outsider view of best principles of antitrust law (in addition to enforcement against the state, as discussed above)?

There *are* principles and perspectives that are more rather than less friendly to the poor and to people with no power.

I assume that we all want robust, efficient, dynamic markets, with players that are inventive. Such market prospects are good for the poor and outsiders. Indeed, competition on the merits often benefits the outsiders more than the insiders; there is no insider track, and a good competition law leans against power.²² My discussion of pro-poor/outsider principles is within this framework. In other words, I do not propose principles that would protect inefficient firms from competition. While some policymakers might argue for distributional efficiencies at the expense of allocative efficiencies, I do not do so.

²² This proposition is complicated by efficiencies and their treatment, for it may be the case that acts and transactions that produce productive efficiencies also produce (more) market power.

Below are eight areas or issues in which there can be a pro-poorer/outsider perspective, consistent with the objective of making markets work more efficiently:

1. *Discounting.* Poorer people need goods and services at lower prices. The freedom of sellers to discount is therefore especially important to the poor. Discounting has obvious efficiency properties. Firms are often tempted to suppress discounting, sometimes in the name of preserving professionalism (minimum fees for engineers, doctors or dentists); sometimes in the name of protection against free riding. A pro-poor perspective would give weight to the importance of the freedom of discounting.²³
2. *Market definition choices.* Market definition is a construct. It may help us understand whether a firm has market power. Often there are two or more good candidates for “the market.” In two cases among others, the South African Competition Tribunal faced the problem of market definition when interests of the poor were at stake. In one case, a narrower market would have protected the poor from a loss of an element of competition that they depended upon; namely, low-priced credit-giving furniture department stores. In another case, a narrower market (capitated managed care) would have preserved a promising niche for reducing the cost of low-end health care insurance and thereby bringing masses of the poor into health care coverage for the first time. In each case, the Tribunal opted for the choice that would have most helped the poor population. (In the health care case, the Tribunal’s decision was

²³ Regarding resale price maintenance, compare the dissenting opinion of Justice Breyer in *Leegin v. PSKS*, 551 U.S. 877 (2007) (giving weight to the value of discounting) with the majority opinion of Justice Kennedy (not giving weight to discounting).

reversed.)²⁴ A pro-poorer perspective would operate with consciousness of preserving pro-poor options.

3. *Leveraging, foreclosure and access violations.* In numerous cases, especially abuse of dominance cases, the decision-maker is faced with the choice between more market access for those without power and more freedom for firms with power. The US and EU *Microsoft* and *Intel* cases involved this choice. One or the other choice might produce a more efficient and dynamic market, but the answer might be indeterminate. Freedom to contest markets on the merits and not to be foreclosed from important segments by a dominant firm's use of leverage is a value that tends to favor those without power.²⁵
4. *"Efficient" foreclosures.* An emerging rule of law for exclusionary conduct such as loyalty rebates would require proof that the foreclosed competitor was equally efficient. Otherwise, it is said, the law would protect inefficient competitors. The "equally efficient" requirement might be a poor way to test competitive effects and screen out bad cases in poorer jurisdictions dominated by entrenched monopolies. Loyalty rebate programs are often if not usually devised by dominant firms threatened with unique competition by an inventive challenger; they are designed to stave off the challenge. The inventive challenger typically has higher costs than the monopolist.

²⁴ See David Lewis, THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT (2012), pp. 100-112, describing the *J.D. Group/Elerrine department store* and the *Prime Cure/Medicross* cases.

²⁵ Every case has its context, and there is a basic background question regarding the state of a nation's competition law. In the 1980s, the US law was rightly recalibrated in favor of freedom of firms to act because the law had gone too far to proscribe transactions that could not have harmed competition and might have been efficient.

In poorer developing countries, there may not be an equally efficient challenger.²⁶

Moreover, entry or re-entry is typically more difficult in developing countries.

Capital markets often work poorly, and new entrants are less likely to be lurking on the sidelines.

Still, the competition law should protect the market, not weak competitors. An alternative approach to the “as efficient competitor” rule would require the plaintiff to show, in addition to foreclosure disproportionate to defendant’s business needs, that the market would be worse off absent the enforcement. Moreover, in a private action, defendants can always defend that the plaintiff’s own ineptitudes caused the plaintiff’s injury.

5. *Excessive pricing violations.* Excessive pricing violations are a challenge. Agencies may not wish to second-guess normal pricing. They may condemn pricing “excessively” above costs, but what are “costs” and what is excessive? Poorer jurisdictions may need a relatively simple rule, or violations may be practically impossible to prove.

In the South African *Mittal* steel case,²⁷ Mittal, the successor to the state-owned and historically privileged firm ISCOR, was the only significant steel company in South Africa. It was “super-dominant.” Its competitors were located across oceans, and shipping costs were high. It sold steel at import parity price to manufacturers in South Africa, handicapping their South African customers’ competitiveness in world

²⁶ “Potentially equally efficient” is a standard sometimes used in the European Union.

²⁷ *Harmony Gold Mining Co. Ltd. v. Mittal Steel Corp.*, Case 13/CR/Feb04 (South African Competition Tribunal 2007), *rev’d*, 70/CAC/Apr07 (Court of Appeal 2009).

markets, while pricing its exports at the much lower world price. Mittal pegged large volumes of its steel for export and prevented the export-destined steel from being sold on the South African market.

On the above facts and in view of an available non-intrusive remedy, the South African Competition Tribunal found that Mittal had violated the competition law by excessive pricing. The remedy was: Mittal would be forbidden to bar the export-designated steel from sale in South Africa. The Appeal Court reversed and held that the plaintiff must prove that the home price was substantially above cost, in view of specific language of the Act. Nonetheless, the Appeal Court declared the above facts sufficient to shift the burden of going forward to the defendant.

The Tribunal's formulation was a progressive one that would have made a potentially unmanageable case manageable. Its formulation and remedy were both pro-market and pro-outsider.

6. *Buyer power.* Suppliers in poorer developing countries are more likely to be victims of exploitative buyer power than are suppliers in developed countries. Developed countries may adopt consumer welfare as their goal; but poorer developing countries may prefer to take account of all market harms, not just consumer welfare harms. Small farmers are particularly vulnerable to harm from monopsonistic purchase and distribution practices and mergers creating buyer power, as documented in Zambia and Côte d'Ivoire,²⁸ and to buying cartels, as in tea, sugar and tobacco in Malawi.²⁹

²⁸ See Thula Kaira, *The Role of Competition Law and Policy in Alleviating Poverty – The Case of Zambia*, at 133 (exploitation of out-grower farmers by ginners in Zambia, at 150-57); Bruno Dorin, *From Ivorian Cocoa Beans to French Dark Chocolate Tablet: Price Transmission, Value Sharing and North/South Competition Policy*, at 237 (exploitation of cocoa farmers by chocolate makers in Côte d'Ivoire, *passim* and 306-10), both in *THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS* (H. Qaqaya and

Jurisdictions with most jobs and businesses in the agricultural sector may especially need to take serious account of buyer power.

7. *Intellectual property.* The world is in the throes of IP/competition battles. The poorer population may be better served by more competition and less protection of intellectual property. This is so in the two areas of current debate: pharmaceuticals and generic competition, and information technology.

As for pharmaceuticals, the poorer population is in great need of cheaper medicines. Much lower prices are usually provided by the generic segment. An issue of current debate concerns brand-name infringement litigation against generic makers who enter the market, and ensuing settlement of the litigations in which the brand patent holders pay millions of dollars to the generic to stay out of the market for a term of years. Both the EU and the US are developing rules to prevent “pay for delay” while allowing legitimate settlements.³⁰

Communication and information technologies are also caught in the storm of controversy between more IP protection or more competition law protection. Holders of patents essential to work a standard, such as a smart phone’s connection to a web service provider, who have agreed to grant licenses for a reasonable fee, have been suing for injunctions against infringers who are willing and ready to pay a reasonable

G. Lipimile, eds., UN 2008). See also Promoting Pro-Poor Growth: Agriculture, Annex 3.A1, Spotlight on Global Value Chains – Does it Mean Shutting out Small Producers? (OECD 2006).

²⁹ See CUTS (Consumer Unity and Trust Society, India) (2003), *Spine Chilling Experiences of Anti-Competitive Practices in Malawi*.

³⁰ See *FTC v. Actavis, Inc.*, U.S. Sup. Ct. June 17, 2013; *Lundbeck*, European Commission, June 19, 2013.

fee.³¹ Here, too, the poorer and the outsiders are more in need of competitive markets than rules of law protecting intellectual property. We have noted above the unique empowerment that access to communication and information devices confers.

Still, the law must protect incentives to invent. If developing countries excessively appropriate pharmaceutical patent rights, the inventing firms will be less willing to invest in cures for diseases unique to these countries. Pro-poor formulation of rules of law must consider the trade-offs between low prices and incentives to invent.

8. *Simpler rules.* For poorer developing countries, human resources and capital resources are scarce. The competition authorities do not have teams of lawyers and economists ready to identify and analyze reams of documents and construct scores of models and studies. If simpler, reasonably accurate rules exist, less well- financed authorities need them. Some simple rules are available. For example resale price maintenance by firms with market power could be presumed illegal unless justified, as in the EU and much of the world. The *Mittal* rule of the South African Tribunal, noted above for price-parity excessive pricing by super-dominant firms, commends itself also. A per se rule or near per se rule against hard core cartel agreements is widely accepted. Some per se or near per se rules can be constructed in the other direction; for example, per se legality for certain sustainable low pricing behavior.

Many rules and regulations of the mature antitrust jurisdictions are too technical and too complex to suit poorer, resource-starved jurisdictions, which should be

³¹ See *Samsung v. Apple* (U.S. International Trade Commission, June 4, 2013). In the European Union, a Düsseldorf court has sought a preliminary ruling from the EU Court of Justice in a case brought by Huawei.

encouraged to experiment, transparently, to construct simpler rules and standards fit for their capabilities and contexts.

* * *

All of the above suggested choices have efficiency properties. They are at least within the margins of indeterminacy as to what is efficient or, more precisely for competition law, what set of incentives is most likely to generate a more efficient and robust economy.³²

IV. IV. WHAT PRO-POORER, PRO-OUTSIDER MEANS FOR COMPETITION *POLICY*

We have looked above at competition *law*. We turn now to competition *policy*, carried out through advocacy by the competition authority.³³

Competition advocacy is the last of the triumvirate addressed by this paper – the first being competition law *enforcement* against state acts and measures; the second, competition law enforcement against private firm acts. The third rounds the circle: There are numerous state or hybrid anticompetitive measures that unreasonably block markets causing special harm to the poor or poorer populations; acts or measures that are not caught by the law. These may be

³² Antitrust is said to pursue maximization of aggregate total or consumer wealth. This measure may not always be in the interests of the poorer population and outsiders. Compare the argument of Professor Ronald Dworkin (embracing utilitarianism, or the greatest good for the greatest number – which is effectively one person one vote) with the argument of Judge/Professor Richard Posner (embracing wealth maximization – which is effectively one dollar, or peso, or ruble, or rand, or renminbi, one vote). See Ronald Dworkin, *Why Efficiency?*, 8 Hofstra L. Rev. 653 (1980); Richard Posner, *The Ethical and Political Base of The Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980). See also John Rawls, *A THEORY OF JUSTICE* (1971): Justice requires maximizing the utility of those who are worst off. *Id.* at 150-61.

As wealth maximization implies, the wealthier you are, the more weighted consumer sovereignty you have. Wealth maximization serves a function in terms of the GDP and competitiveness of nations; but utilitarianism may entail greater legitimacy for the non-powerful and the un-endowed. This is not an argument for undoing the system we have, but it may be relevant in considering choices; for example, whether to prefer firms' freedom to discount or firms' freedom to protect against free riders.

³³ Also important is the authorization of developing countries to undertake market studies. Studies of markets that appear not to be working well may produce valuable information that may lead to prosecution or legislative remedies.

subjects of advocacy by the competition authority – identifying restraints; mustering the evidence and offering the analysis of why they should be removed, and finding allies to work together for their removal. In developing countries, restraints of this sort are particularly damaging, excluding and disabling.

The Mexican Competition Commission has highlighted the importance of competition advocacy, not just for Mexico but also for similarly situated developing countries.

[A]dvocacy is an essential part of a competition agency's toolkit, especially in jurisdictions where markets still have shallow roots and competition is a newfangled concept struggling to hold its own against state intervention and rent seeking. The Mexican case is a good example, for several reasons:

First, in spite of the past two decades' far-reaching economic liberalization, the Mexican economy still suffers under the legacy of the state-led, corporatist economic policy that held sway for at least sixty years before that, and which lingers in vast pockets of anticompetitive regulation and all too frequent distrust of market mechanisms in Government, Congress, the Judiciary, and the general public.

Second, these conditions tend to be concentrated in services that have a horizontal impact on the rest of the economy, such as telecommunications, transport, energy, and financial services. Trade liberalization in the 80s and 90s brought market discipline to those sectors of the Mexican economy where competition from abroad was a factor; but in non-tradable sectors--for example the services mentioned above--this impulse to modernize regulation and adapt to market conditions was absent, thus yielding a dual economy that holds back competitiveness and harms consumers in downstream markets (i.e., most of the economy).

Third, advocacy, when it is successful (for example through the removal of artificial barriers to entry or market distortions), allows structural changes to competitive dynamics, shifting incentives permanently and across the board, instead of relying on the case-by-case threat of competition enforcement. ...³⁴

We consider advocacy in two categories: First, advocacy against restraints by and within a nation's own government; these are the restraints referred to in the passage above. Second,

³⁴ Angel Lopez Hoher, Competition Advocacy in Mexico: Lessons from the Past Decade, Competition Policy International, Aug. 27, 2012.

advocacy to improve the international environment so as to protect against or seek to correct international and foreign restraints that harm the nation.

1. Advocating against restraints by and within the nation

At the outset of this paper we identified excessively restrictive state restraints and the extent to which competition laws do and might reach such restraints. A far larger number of restraints are likely to be unwise and unnecessary to meet public ends but not facially excessive and (even if excessive) not caught by the competition law or some combination of competition and free movement law. A challenge to them must lie in persuasion; and persuasion must be based on facts and analysis.

A critical avenue for advocacy concerns the country's regulatory laws. Regulation is often excessive and harmful to consumers, albeit also often supported by vested interests. The International Competition Network (ICN) has launched a project under the aegis of ICN's Advocacy Working Group to identify methodologies for assessing the pro- and anti-competitive effects of specific regulations.³⁵ This may be a first step towards developing a template for unwise anticompetitive regulation, and then advocating against it.

A second important target is state-owned monopoly boards for buying and selling commodities, which typically not only squeeze the sellers and exploit the buyers but squeeze out entrepreneurial opportunity. The pyrethrum board in Kenya, referenced above, is a good example both of the problem and the competition policy challenge.

A third important avenue for competition advocacy is against certain of the nation's trade laws, such as antidumping laws. These measures are typically heavily supported by vested

³⁵ See also OECD (Competition Assessment Toolkit, www.oecd.org/daft/competition/competitionassessmenttoolkit.htm), providing a method for identifying unnecessary regulatory restraints on the market.

interests; but as the example from Tanzania shows, “the market” can sometimes win. Ironically, the competition authorities of many small developing countries have much more authority to advocate against protectionist trade laws than do competition authorities in many mature developed nations.

2. Advocating for a modest international obligation

The poorer developing countries are the most vulnerable targets of international restraints that hold back the economic growth of their countries. Despite frequent exhortations from the West that it wants the peoples of developing countries to be enabled to help themselves, the Western countries pick and choose their targets of liberalization. Often, they cling to protection and subsidy where it hurts developing countries the most.³⁶ The West hands out more money in aid to developing countries than the developing countries’ people would generate for themselves and their families by engaging in markets on the merits if the West dismantled its tariffs, anti-dumping laws, and subsidies affecting developing countries.³⁷ The West proclaims that export cartels from their shores are not their problem; the victims can sue the offshore cartelists. But the poorest nations do not have the resources to do so. Moreover, as in pollution, stemming the offense at its source is most efficient.

These problems suggest a positive agenda of advocacy. The European Union has proposed a helpful framework,³⁸ which could have been implemented in the context of the WTO

³⁶ Martin Wolf, *Why Globalization Works* (2004). See passage, *Hypocrisy of the rich*, pp. 218-18. See New York Times series, *Cultivating Poverty* [about 2001].

³⁷ Wolf, *supra*. See Jasmin Malik, U.S., EU Cotton Subsidies Cost Africa \$250 Million a Year, Says New Report, <http://www.ecouterre.com/u-s-eu-cotton-subsidies-cost-africa-250-million-a-year-says-new-report> (Nov. 19, 2010).

³⁸ Working Group on the Interaction between Trade and Competition Policy, World Trade Organization, *Communication from the European Community and Its Member States*, WT/WGTCP/W/184 (Apr. 22, 2002). The Working Group has been disbanded.

and can also be conceived as a stand-alone project. In the spirit of the EU proposal, countries can and should have regard for the harms they cause, especially to developing countries, and especially when developed country's nationals are the violators of clear and shared principles of antitrust law (i.e., the law against hard core cartels). If legislative jurisdiction is the problem, the developed countries can and should revise their laws, extending jurisdiction so as to make hardcore export cartels from their shores illegal.³⁹

We can draw inspiration from an environmental convention; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.⁴⁰ 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 trading nations could adopt this model for hardcore export cartels, which are the hazardous wastes of antitrust.

Also, regarding cartels aimed at outsiders, the developed countries could amend their antitrust laws to provide jurisdiction for the discovery of documents and testimony from suspects and others privy to the facts of the outbound cartels. This could include subpoena power when the developed country's citizens are the alleged victimizers of developing countries.

The antitrust family of nations have gone a long way to cooperate with one another on enforcement. The OECD, ICN, and UNCTAD are important forces and fora for cooperation. Regional fora in Africa, Latin America and Asia, and the BRICS, likewise facilitate cooperation, as do multitudinous bi-lateral agreements; but the bi-lateral agreements are largely between

³⁹ 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; see also Special Committee on International Antitrust, ABA Antitrust Section, The Special Committee's Report 83-90 (Sept. 1, 1991).

⁴⁰ Mar. 22, 1989, 1673 U.N.T.S. 125.

developed country pairs. Cooperation is particularly needed by poorer and developing countries, which face extraordinarily scarce resources and whose poor populations are often the targeted victims. Extra steps in this direction – among like-situated developing countries, and among developed and developing countries – hold the promise to help the poor.

CONCLUSION

This essay has explored the core and bounds of competition law and policy in terms of pro-poorer law and policy. It argues:

- (1) Competition is a vital pro-poor, pro-poorer policy. Access to markets free from artificial restraints and vested interests empowers outsiders and tends to enhance mobility, fostering inclusive development. Lower prices of necessities obviously help the poor. To be sure, competition law and policy (markets) cannot do all of the work. There are other necessary conditions, including food, health, education, housing, infrastructure and access to capital, good governance and rule of law. All of these conditions and policies need to be pursued in global partnership; they create a virtuous circle.
- (2) There *is* a pro-poorer perspective on competition laws, procedurally and substantively. Four principles of action, among others, emerge from the discussion above.
 - (i) Target state and hybrid restraints that create a stranglehold on markets, to the extent the law allows, and draft the law with these targets in mind.
 - (ii) Assure procedural vehicles to make the justice system accessible to the poorer population.
 - (iii) When the opportunities for simpler but sound rules arise, authorities and courts should take them, lest we create a paradox that recompense for antitrust

- offenses is a luxury of the better off. (iv) Within the range of possibilities for seeking efficient and dynamic markets, apply the perspective that is more pro-poor and less pro-insider.
- (3) There *is* a pro-poorer perspective on competition *policy*. (i) Develop programs to identify and advocate against excessive and unnecessary anticompetitive state restraints, especially those that create a stranglehold on economic opportunity.
- (ii) Advocate for world norms to oblige nations to stem and rectify the antitrust harms they cause. And of course (3) (which I have left to other participants in this round table) Prioritize restraints in markets most essential to the daily lives, health and well-being of the poorer populations.