ECONOMIC DEVELOPMENT: THE CRITICAL ROLE OF COMPETITION LAW AND POLICY

VOLUME II

Competition Law and its Architecture

Edited by

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Economic Development: The Critical Role of Competition Law and Policy Volume II

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A Guide to the Readings and a Perspective on the Literature

Eleanor M. Fox and Abel M. Mateus

Introduction

Volume I presented the political economy framework for our study of the role of competition in economic development. Volume II presents the law and legal strategies for harnessing competition to advance development goals. As we see in the readings, the goals chosen by the various nations may include notions of fairness and justice as well as efficiency. The bundle of goals are commonly seen as synergistic in helping to lift up the developing countries and their peoples and to enhance the legitimacy of markets.

As reflected in Volume I, developing countries are not homogeneous. 'Bottom billion' countries[1] have different needs and prospects from the BRIC tigers – Brazil, Russia, India, and China. Nations have different demographics of poverty. They have different levels of infrastructure, trade, human resources, corruption, cronyism, good governance, peace, democracy, trustworthy institutions and rule of law – all of which influence prospects for effective competition law and policy as well as development.

Some articles included in this volume address a threshold question: Are developing countries (or some of them) not yet ready for competition law? As Paul Collier observes, an island of good market policy can have little effect in the sea of a failed state. Good competition law and policy needs the support of good institutions.

The collection in this book largely – but not entirely – by-passes the threshold question. Most of the chapters simply take on board the fact that competition laws exist in so many developing countries; assume or argue their virtues, and sometimes reference their costs. They ask both descriptive and normative questions: What are the recurrent types of anticompetitive practices that harm their nation? What are the governmental and business structures that give rise to the need for and usefulness of competition law and advocacy? Has globalization increased or diminished the need? How does the competition law of particular nations address their competition problems? Does it do so wisely and adequately, and with what shortcomings and challenges? Are there gaps in coverage or effectiveness of the law, and do developing countries have the capacity to fill them? Are there needs for supranational law or collaboration, and how can those needs be met? Are there characteristics of developing countries, or lesser or least developed countries, that may suggest that we in the developed world refocus the lens through which we see good antitrust law and good antitrust institutions?

Several authors begin their chapters with the plight of developing countries, the poorest and weakest of which are targets of anticompetitive practices launched from the shores of the developed world and as well are victims of cronyistic conduct by their own governments.

Authors in this volume generally ask: How can developing countries use competition law and advocacy to make their people better off?

The volume is organized along the following lines.

Part I is devoted to competition law and advocacy. Competition authorities have a dual role: (1) to enforce and illuminate the law, and (2) to be the voice for competition within the government even outside the bounds of competition law proper; thus, the advocacy role. Advocacy might variously involve convincing the government to lower trade and regulatory barriers, convincing the legislature to grant necessary powers to the competition authority, and publicizing the benefits of competition and the costs of its suppression. Chapters in Part I provide insight into the scope of the problem of suppressed competition in developing countries, insight into the nature of the practices that systemically victimize the peoples in these countries, and analysis of legal rules derived from or tailored to endemic problems and circumstances, such as scarce resources, both human and financial.

Part II deals with institutions. Strong, transparent, accountable, non-corrupt institutions are seen as critical to effective competition law and policy. Achieving this aspiration is one of the huge challenges of developing countries.

Part III addresses international architecture. Globalization has highlighted the plight and prospects of developing countries in the world. Transnational and international institutions promise synergies, and they provide fora for cooperation and opportunities for information and know-how. Blueprints have been proposed for global systems that could make the world, and developing countries, better off. The chapters in this section deal with existing and possible transnational systems, and as well they confront the practical realities that may limit their adoption.

Finally, Part IV turns inwards; it is more microscope than telescope. It presents experiences of selected countries at different stages of development; namely China, India, Chile, Mexico and Zambia. The country experiences add a critical dimension, for law and policy ultimately grow from ground up.

Part I Competition Law and Advocacy

A. Foundational perspectives – Are developing countries different?

In this section we present two papers, one by Eleanor Fox, professor of law and co-editor of these volumes, and one by Ignacio De León, professor of economics and first president of the Venezuelan Competition Authority. In one sense, these papers present vivid contrasts with one another, both descriptively and normatively. At the same time, they share enormous common ground.

The Fox chapter stresses the stacked deck facing developing countries. It discusses the need for a competition policy compatible with a policy for efficient, inclusive development, much in the spirit of the later Spence Growth Report (Volume I, supra). Fox argues for a contextual competition law/policy that will free markets both from repressive government and restrictive private barriers to opportunity and mobility.

Fox observes that the current US paradigm for determining whether conduct is anticompetitive has narrowed in the direction of laissez faire in the last few decades, and argues that it may be

too limited for developing countries, with their much weaker markets and much larger problem of abuses by state monopolies and government-privileged dominant firms. She queries whether developed-country antitrust rules and standards may not be the best for developing countries. Sensitivity to context may require some simpler rules, informed not only by regard for efficient outcomes but also by the need to nurture incentives likely to enhance entrepreneurship, innovation and creativity of people without market power. Context may also suggest a greater need for intervention to open blocked markets. Noting that state restraints are often more debilitating than private restraints in suppressing entrepreneurial incentives, having reference to the work of Hernando de Soto, and drawing from the work of Bill Kovacic, she encourages competition agencies to take an aggressive role in advocacy to remove regulatory and other state barriers to competition, engagement, entry, participation and thus innovation.

The de León chapter argues that static price theory is a poor metric for determining what is anticompetitive; a notion that Fox shares. De León writes: '[T]he ultimate purpose of economic liberalization in transitioning and developing countries is promoting entrepreneurial creativity, innovation, and economic growth, all of which were stifled during previous decades of burdensome regulations, trade protectionism, and government dirigisme' (p. 42). '[T]he ultimate goal of competition must be connected to the development of competitiveness, innovation, and economic development' (p. 64). De León argues for strong advocacy, and he urges intervention against state restraints. Yet, quite differently from Fox, he argues for constraint in applying antitrust law to competitor collaboration (and implicitly to dominant firm conduct), which, he suggests, is likely to be the means to advance the search for knowledge; it is likely to be the spur to an evolutionary, knowledge-and-information-based market process. Drawing inspiration from Hayek and Schumpeter and invoking the context of Latin America, de León is concerned that antitrust law is dangerously likely to be applied to block creativity and innovation and to restore government dirigisme by the back door.

The reader may wish to read, also, Wolfgang Kerber, 'Competition, Innovation and Maintaining Diversity through Competition Law'.[2] Kerber, like de León, elaborates a theory of evolutionary economics, but, unlike de León, is sympathetic to antitrust interventions to protect the process of evolutionary learning.

In the vein of de León, the reader may also wish to read Lucas Sebastián Grosman, 'Piedras en el camino: una breve reflexión sobre el lugar de los consumidores y los competidores en la defense de la competencia',[3] arguing that Fox's proposal for an antitrust system copious enough to protect economic opportunity and mobility is bound to have a chilling effect on robust competition, especially in a context of little legal certainty and weak institutions.

B. Monopolies and Abuse of Dominant Position

Dominant firm abuses is one of the most fraught subjects of competition law. Jurisdictions experience the dominant firm problem differently, often depending on their state of development, their history of state ownership and control, the robustness or sluggishness of their markets, the trustworthiness of their institutions, and the embeddedness of disparity of wealth and opportunity. Accordingly, jurisdictions make different trade-offs between efficiency (e.g., allocative or productive) on the one hand, and equity on the other; they use different default presumptions as to what structure of the market or allocation of freedoms is most likely to produce efficiency, and they apply different perspectives on the probable costs and benefits of

government antitrust intervention. Consequently, perspectives range from the US nearly hands-off approach to unilateral conduct by dominant firms, in expectation that firms will do good and the market will punish them if they err or exploit, to distrust of dominant firms, in expectation that they will use their power to exclude emerging rivals and exploit the public.

In this section we include three articles. The first is by Michael Adam of UNCTAD and Simon Alder, then a student at the University of Zurich. Adam and Alder identify the sometimes conflicting factors and objectives that developing countries face. These include trade-offs within efficiency (is efficiency more likely to be produced by more rivalry or by greater expectation of profit?), and the quest for a less extreme maldistribution of wealth and opportunity. The authors then give historical, economic, legal and political background. They offer a wide range of examples of both facts and legal principles, in jurisdictions as diverse as Zambia, Kenya, Korea and Jamaica. They deal separately with state-created monopolies and national champions. In each case, Adam and Alder muster data from the various jurisdictions, giving the countries' own assessment of, for example, why they maintain state monopolies, why they have unilateral conduct laws and what methodologies they use to identify dominance.

The second piece, by Philippe Brusick and Simon Evenett, must be seen against a background of claims, often by US Americans, that the only egregious private restraint is a hard core cartel and that single firm conduct, even by dominant firms, is likely to be efficient and procompetitive.[4] Brusick, former head of Competition and Consumer Policies at UNCTAD, and Evenett, professor of international trade and economic development at St Gallen, Switzerland, ask: Should developing countries worry about abuse of dominant power? Their answer (like the quite different article of Adam and Alder) is Yes. The authors state both the theoretical and the evidentiary case. They compile extensive evidence of abuses of dominance, especially in Latin America, sub-Saharan Africa and southeast Asia.

Brusick and Evenett explain the characteristics that make developing countries prone to abuse. They catalog, in particular, abuses by state-owned monopolies and recently privatized firms. Well aware, however, of political realities, they reference the problem of vested interests in concluding: 'injecting the discipline of competition and limiting the exercise of market power into economies where vested interests have strong links to policy makers is unlikely to be easy ... ' (p. 294).

Third, we include David Lewis' essay, 'Chilling Competition'. David Lewis was the first chairman of the Competition Tribunal of South Africa and is the immediate past chair of the Tribunal; thus, he led the body in its formative years. The Lewis paper takes its place in a larger debate, telescoped above. In the larger debate, the multinational business community questions whether dominant firm abuses are a problem. They assert that *antitrust challenges* to large firm conduct are a much bigger problem than private abuses of power. They contend that antitrust lawsuits are commonly triggered by inefficient rivals seeking protection, and they argue that antitrust lawsuits and prospects of them, not dominant firm strategies, chill competition.

One forum for this debate is the International Competition Network (ICN). The ICN has an ongoing project on unilateral conduct. The first step in condemning conduct as an abuse of dominance is proof that a firm is dominant. Thus, the first item on the ICN agenda of its unilateral conduct project was how to assess dominance. For example, is proof that the putative dominant firm has a large market share sufficient for the plaintiff's prima facie case? In the ICN working group, voices in the negative prevailed. High market shares do not necessarily signal dominance. Many factors are relevant.[5]

David Lewis offers a different perspective. In the article included in this collection, he argues that the likelihood and consequences of anticompetitive antitrust intervention are 'vastly exaggerated', and that the likelihood and consequences of the authorities' failing to challenge anticompetitive unilateral conduct are 'significantly understated'. Lewis shows why this is especially the case in countries with certain historical and structural features such as pervasive historical state ownership, privilege and suppression of merit-based competition. Failures to challenge anticompetitive abuses perpetuate the suppression of competition. John Fingleton and Ali Nikpay similarly argue that, where markets are sluggish, costs of non-intervention are more likely to outweigh costs of intervention.[6]

C. Cartels

Hard core cartels (also called cartels herein) are agreements among competitors to fix prices, divide markets, rig bids or otherwise stop competing. To keep the cartel from self destructing in the face of outsiders' competition, cartel members often erect roadblocks or facilitate boycotts.

In the developed world, cartels are commonly regarded as the most heinous anticompetitive conduct, robbing buyers and ultimately consumers of many millions of dollars each year. How directly and substantially do cartels impact developing countries? Is the international cartel problem also of central concern to developing countries?

Pioneering empirical work has been done in this area by Valerie Suslow, Margaret Levenstein, Simon Evenett and John M. Connor. A seminal paper by Suslow and Levenstein points out that, before the last decade, the research on cartels and developing countries addressed how much developing countries' commodities cartels harmed the developed world. Suslow and Levenstein turn the telescope around. The authors report that, in 1997, developing countries imported $51.1 billion in goods from industries internationally cartelized during the 1990s, an amount greater than all foreign aid to developing countries that year.[7] Their work is readily accessible and we do not include it in this volume, but we suggest it to the reader.

We do include a chapter by Frédéric Jenny, and another by John Connor.

Frédéric Jenny is professor of economics, judge of the Court de Cassation of France and chairman of the Competition Committee of the OECD. In his chapter, Jenny observes: 'Much to the chagrin' of competition officials, 'there are no convincing macroeconomic studies demonstrating the existence of a positive and strong correlation between the intensity of competition law enforcement and the rate of economic growth (in developed or developing countries)' (pp. 110–11). Nonetheless, says Jenny, there is an available line of inquiry that can shed light on the correlation. He refers to the line of reasoning initiated by Levenstein, Suslow and Evenett. Jenny presents a compelling mass of anecdotal and empirical evidence of anticompetitive practices in the developing world. Reporting data from countries as disparate as Peru, Brazil, Egypt, Zambia and Cambodia, Jenny finds that 'the results are stunning with respect to the scope and importance' of the anticompetitive practices revealed (p. 113).

John Connor, a professor of industrial economics, is a prolific researcher, empiricist and writer on the proliferation of international cartels, their price effects, and the relationship between sanctions and deterrence. Connor identifies the inadequacy of sanctioning systems in the common quest for deterrence. Thus, he says, in the chapter we include in this volume: 'The phenomenon of historically high and highly-touted monetary sanctions imposed on international

cartels in the past decade is obscuring major deficiencies in world anti-cartel efforts' (p. 322). In a number of articles, Connor relates his research to competition law systems of various parts of the world. The chapter included in this volume references not only the three jurisdictions credited with the most effective anti-cartel enforcement – the United States, the European Union and Canada – but applies his work to Latin America.

The evidence amassed by all of the authors above shows that cartels – international, cross-border and domestic – seriously and persistently harm the peoples of developing countries. Moreover, developing countries are often targets of international and off-shore cartels precisely because the country is ill equipped to enforce the law against them in meaningful ways. In large part as a result of the work of Jenny, Evenett, Connor, Levenstein and Suslow, international and local communities now understand the immensity of antitrust harms occurring every day in developing countries, and the conversation has turned from: Where is the problem? to How can we solve it? Numerous countries, including developing countries, have adopted leniency programs, designed to encourage cartel members to come forward and expose their cartels in return for amnesty. Policy makers in many nations are considering criminalizing the cartel violation and the possibility of jail, while others ponder the appropriateness of criminal penalties to their culture, as well as the effectiveness of due process safeguards in their country, and some express concern that raising the offense to a criminal level might unduly increase the authorities' burden of proof.

Part II Institutions

We turn in section D to institutions. It is now well accepted that, in adopting and applying a system of law, institutions centrally matter. Douglass C. North crystallized this principle in his seminal work, Institutions, Institutional Change and Economic Performance (1990). North asks why some societies perform far better than others. He contrasts institutional structures that induce investment in education and reward industriousness with very different institutional structures in many developing countries:

> Now if I describe an institutional framework with a reverse set of incentives [i.e., not investment in education, industriousness and adaptability] ... , I will approximate the conditions in many Third World countries today as well as those that have characterized much of the world's economic history. The opportunities for political and economic entrepreneurs are still a mixed bag, but they overwhelmingly favor activities that promote redistributive rather than productive activity, that create monopolies rather than competitive conditions, and that restrict opportunities rather than expand them. They seldom induce investment in education that increases productivity. The organizations that develop in this institutional framework will become more efficient – but more efficient at making the society even more unproductive and the basic institutional structure even less conducive to productive activity. (p. 9)

North cautions:

> Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules. In a zero-transaction-cost world, bargaining strength does not affect the efficiency of outcomes, but in a world of positive transaction costs it does and given the *lumpy* indivisibilities that characterize institutions, it shapes the direction of long-run economic change. (p. 16)

Does neoclassical economics help to identify and solve the problem? It has made a significant contribution to models explaining increase in output at the margin given the existing stock of capital; but, says North, 'surely this neoclassical formulation has begged all the interesting questions' (p. 133). The neoclassical formulation depends on the existence of an assumed incentive structure. 'To attempt to account for [differential performances of economies] ... without making the incentive structure derived from institutions an essential ingredient appears to me to be a sterile exercise' (p. 134).

North's insistence on the centrality of institutions is echoed in several essays, articles and reports in Volume I, particularly by Spence, Khemani and Rodrik. Those chapters (1, 2, 3, 4 and 8 of Volume I) bear rereading.

In this section, in the spirit of North, we present two chapters. The first is by William Kovacic, commissioner of the US Federal Trade Commission. The Kovacic article is a classic in examining institutional foundations for legal/economic reform in transition and developing economies. As Kovacic observes, transitional economies confront difficult choices, such as how to allocate scarce human resources and scarce political capital. Jurisdictions must set and follow basic priorities, which include establishing property and contract rights and building the institutions that support them. They need, especially, a well-functioning judiciary, honest and transparent government administration, university training of specialists and regulatory frameworks.

Kovacic explores the claim of a link between democracy, economic growth and freer markets. He then turns more centrally to competition law and policy and asks what should be the place of antitrust enforcement on the nation's agenda. (It does not necessarily merit a place at the top). He surveys the literature and arguments for and against early incorporation of antitrust law, including arguments for only limited antitrust powers at the start, depending on the context. Echoing Khemani (Volume I, supra) and de León, Kovacic explains how the competition agency can be an 'institutional counterweight' to resist 'efforts to sabotage market-oriented reforms' (p. 291).

Kovacic then reviews common initial conditions in transitional and developing countries and explores their implications for law design, implementation and technical assistance. In concluding remarks he observes that 'issues of institutional capability deserve far greater attention in designing laws and timing their application' (p. 315).

Abel Mateus, co-editor of these volumes, professor of economics and immediate past president of the Portuguese Competition Authority, contributes a different but complementary perspective on institutions. His chapter is informed by three strands of contributions: (1) models of the political economy of development that incorporate the effects of interest groups and vested interests; (2) decision theory suggesting the appropriateness of different legal regimes depending on the extent to which the objectives of the regime will be subverted by (for example) corruption and cronyism, calibrated with the level of damages necessary to make the enforcement system pay off in the face of the subversion; and (3) the level of the jurisdiction's institutional development charted according to a composite index of governance and government capture. Using these calibrations, Mateus proposes three developmental levels of competition law regimes. At level 1, a nation should not have competition law at all; at level 2, the nation is ready for a simple set of clear rules; and at level 3, the nation is ready for more nuanced rules and principles of law and a system of remedies to match.[8]

Part III International Architecture

Three phenomena are at play. First, national enforcement systems are limited, not only by the gaps that constrain effective governance of a nation's own internal market, but also by forces exerted by international trade and competition. Cross-border effects, and the appreciation of problems as world problems, have naturally led to designs for global collaborations and world systems.[9]

In the 1990s, the international competition dialog turned to a possible global system in the context of the World Trade Organization (WTO). Many detractors emerged, in the name of sovereignty and fear of bureaucracy. They argued for soft convergence as a substitute.

Second, small and developing countries faced different problems. They were so small and so short of resources that they struggled to construct even credible national enforcement. They could hardly hope for effective enforcement to counter foreign acts that hurt their citizens. Was regional cooperation and perhaps regional integration an answer?

Third, consciousness rose about the pervasiveness of dire poverty and its impact in forestalling the poorest countries' quest for growth. It became common cause that the gains of the successive trade rounds disproportionately benefited the developed nations. Moreover, it was noted that the immense and growing disparity between rich and poor, combined with the stagnation of the poorest nations, fed into the terrorist agenda. Dialog turned to the place of poverty on the world trade agenda, giving rise to initiatives including the Millennium Development Goals.[10] Should the WTO confront the global maldistribution of the benefits of trade?

Robert Anderson and Frédéric Jenny, in their chapter on 'Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy', draw from their experience on the WTO Working Group on the Interaction between Trade and Competition Policy. (Jenny was chairman of the Working Group; Anderson was a counselor in the WTO Secretariat.) The Working Group was in operation from 1997 to 2004, when it was discontinued after competition was jettisoned from the Doha Development Round trade agenda.

The Working Group produced a wealth of information, including submissions by many developing countries on numerous trade and competition issues. The submissions and discussions led to the insights presented in the Anderson/Jenny chapter. The central theme of the chapter is 'the fundamental complementarity of competition policy, trade liberalization and domestic economic reform, and their importance for development' (p. 61).

The Anderson/Jenny chapter analyzes the relevance of competition policy for developing countries, and considers applications of law as well as advocacy. It articulates arguments in favor of competition policy in the WTO. As well, it notes the reservations expressed by developing countries, in particular that a world agreement would limit their policy space and development strategies. The authors proceed to analyze why the fears identified with a multilateral system are not likely to materialize. Finally, the authors consider the Doha proposals for a multilateral competition framework (now in abeyance).

For a dissenting point of view, see Ajit Singh, 'Multilateral Competition Policy and Economic Development: A Developing Country Perspective on the European Community Proposals'.[11] Singh argues that a liberal, open-market competition regime is against the interests of developing countries at this stage of their development. He observes that the advanced countries

used market-protecting instruments at earlier stages, and argues that developing countries are entitled to those opportunities now. Singh commends to developing countries industrial policy along lines implemented by Japan and Korea in their earlier stages of development, along with competitor cooperation and government–business cooperation. He proposes a multilateral agreement limited to the anticompetitive conduct and mergers of the world's largest multinational corporations.

Even before 2004 when the Working Group was disbanded, the star of world antitrust had dimmed. Opposition was led both by the United States, which feared loss of sovereignty, and developing countries, which feared imposition of Western rules. A proposal was made for a counter-enterprise – a grass-roots, virtual cooperation of the competition authorities of the world, with no power to make or impose rules, much less to enforce them, and with the aspiration to converge law and process through voluntary interaction. This virtual, networking organization was formed. It is the International Competition Network, or ICN. The formation, evolution and work of the ICN are explored in the chapter by Eleanor Fox, 'Linked-In'. The chapter not only discusses the birth of the ICN, but describes how recommended principles and practices emerge in the context of the ICN. The author hypothesizes that, despite the absolute openness and inclusiveness of the ICN, in view of the scarce resources and thus the infeasibility of deep participation by developing countries, the principles and practices that emerge may tend to be those most fitting to the mature, developed economies.

Meanwhile, even during the debate on a competition agreement in the WTO, developing countries entered into, and they continue to enter into, free trade and regional trade agreements (RTAs) with a competition dimension. RTAs with competition provisions are multiplying. In a 2005 study, the OECD concluded that 47 such agreements had been recently concluded, 36 percent of which were between developing countries.

Competition provisions in RTAs are generally adopted as flanking protections to prevent market-opening undertakings from being undermined by anticompetitive agreements. Even so, can RTAs be a useful vehicle for developing countries' overcoming size and resource problems in competition law enforcement? RTAs may provide a trade-and-competition framework that can support competition law systems on their own bottom.[12] Many nations have ambitious plans for regional competition systems through RTAs. However, coordination problems are difficult and few such systems are yet operational in a meaningful sense.[13]

We include in this section an essay by Simon Evenett, who asks: What can we learn from competition provisions in developing countries' RTAs about their interest in a multilateral competition agreement? Evenett explores the competition clauses in RTAs of developing countries and their content. Do they include abuse of dominance? Special and differential treatment? dispute resolution? Or only non-discrimination, due process, transparency and voluntary cooperation? Do developing countries obtain or resist competition clauses in their RTAs, and would resistance tend to explain their opposition to the multilateral agreement that might have evolved from the Doha agenda? Evenett examines these questions, analyzes the data, and urges caution in drawing lessons from developing countries' RTAs about their level of enthusiasm for a multilateral system.

The final entry on international architecture is Joel Trachtman's article on a poverty agenda within a world institution such as the WTO. Trachtman identifies poverty as 'the overwhelming moral, economic, legal and political issue facing us' (p. 3). Trachtman quotes Thabo Mbeki, then president of South Africa, who described the distribution of wealth in the world as 'global

apartheid'. Global apartheid, says Trachtman, locks people into a position of poverty, inequality and disenfranchisement. Even while it is liberalizing and thus should be opportunity-increasing, the world trade system perpetuates global apartheid. Trachtman explores both ethical and selfish foundations for embedding redistributive policies in the WTO, and proposes how this effort might proceed.

Trachtman's article is not about competition policy. But the analysis and message are highly relevant to competition policy, at least equally with, for example, environmental policy; and perhaps more so, since competition rules themselves can advance opportunity, mobility and access to markets. Freedom from tariffs and duties fits tightly into both a pro-competition and a pro-poor agenda. The Trachtman article raises consciousness about the urgency to 'dismantle the barriers that form "global apartheid"'.

Part IV Selected Country Experiences

In the last section, we present studies anchored in competition problems of selected countries; namely, China, India, Chile, Mexico and Zambia.

As globalization deepens, many eyes are on the BRIC countries – Brazil, Russia, India and China. Their competition regimes, or revised regimes, are young, and all four nations are on the cusp of dynamic economic change. They are rising players in the world economy. They are seen as leaders among developing or transitional countries, engaging in the world economic system and using the world system to enhance their growth and development. In view of the fact that the BRIC countries – in particular China – are changing the world economic landscape, the question is asked: Do they or will they offer a new model of competition law/policy for developing countries or even the world? What is such a model likely to be?

We present here chapters on two of the BRIC countries – China and India. Brazil's competition regime has been treated in a number of other articles and documents.[14] A peer review of competition law and policy in Brazil by the Organization of Economic Cooperation and Development is also available.[15] For Russia, too, an OECD peer review is available.[16]

We include in this section a paper by Giacomo Di Federico on the new antimonopoly law of China. The chapter is written from a European perspective, and helpfully so, because important aspects of the text and concept of the Chinese law are drawn from the European Treaty. This is so not only regarding much of the substantive law but also regarding the relationship between free competition and free trade within China.

Di Federico's paper presents, first, the background of China's political economy, and it reflects on the sometimes uneasy fit between China's form of government and pure competition principles. He identifies the Chinese Anti-Monopoly Law (AML) as 'an admirable synthesis (in substantial and procedural terms) of the struggle between marketplace needs and the socialist regime' (p. 251). Yet, he worries about the conflicting pulls and opportunities for non-transparent use of discretion by the Chinese authorities. Di Federico derives his observations from a close analysis of the law and its institutions. He makes numerous observations and suggestions about the challenges that lie ahead.

Since the article was published in 2009, a major case cited by Di Federico has been decided. China prohibited the proposed merger of Coca Cola and Huiyuan, China's big juice company (note 46 of the article). The competition authority, MOFCOM, cited harm to competition as

the basis for the prohibition, although by modern international standards applied to this conglomerate merger, the competitive (consumer) harm was not apparent. In a second case, AQSIQ, cited in the article at note 56, suit was brought for abuse of administrative power by a state administrative agency. The agency required consumer product manufacturers to subscribe to the product authentication service of its own subsidiary, rather than that of competitors. The Chinese court dismissed the suit on grounds that the statute of limitations had run. The court held that the statute of limitations runs from the date the abuse begins. Thus in all cases of long-standing administrative abuse, the statute of limitations has run long before any victim has the opportunity to press a challenge. The resolution of both cases seems to confirm the concerns of Di Federico.

But there is also reason for optimism. China's antitrust enforcement authorities are in touch with, and are continually seeking knowledge from, antitrust authorities and experts in many jurisdictions around the world. In formulating its rules and regulations for mergers, for example, China is adopting international perspectives and standards. The merger authority MOFCOM has shown a high degree of activity and interest in multijurisdictional mergers with a Chinese dimension. China is now one of the several major jurisdictions to which merging parties pay heed.

Much has been written on the Chinese antimonopoly law, both in the run-up to its adoption and in the aftermath. A useful reference is volume 75 of the *Antitrust Law Journal*, issue 1, 2008, containing articles by Rodney J. Ganske, H. Stephen Harris, Jr, Huang Yong, Bruce M. Owen, R. Hewitt Pate, Sun Su,Wang Xiaoye, Wen Xueguo, Wu Zhenguo, Zheng Wentong and Eleanor Fox. The article by Huang Yong, 'Pursuing the Second Best', welcomes the competition law despite its flaws. Commenting on China's new mission to enforce competition policy in the face of traditions that may not align with a first best solution, Huang invokes the words of the late premier Deng Xiaoping: 'crossing the river by feeling for the stones'.

India is the other BRIC country represented in this volume. We include the article by Aditya Bhattacharjea. Bhattacharjea (like Huang for China) wrote his article before the new competition law became effective. As he states in his note preceding the article, enforcement under the new law has barely begun and the issues he identifies in his article have yet to be resolved.

India's Competition Act replaces its 1969 Monopolies and Restrictive Trade Practices Act (MRTPA). Bhattacharjea takes a critical look at the new act. He reviews the history under the MRTPA (which was largely an unfair competition act); he notes decisions under that act that attempted to enforce fair business conduct at the expense of competition, and he worries that the deficiencies of the past might haunt the future. But India and its new competition commission are positioning themselves firmly in the international community of antitrust. Vinod Dhall and others take an optimistic view that India will apply modern, pro-competition standards.[17]

The chapter on Chile reflects yet a different culture. In their chapter, 'Building Trust in Antitrust: The Chilean Case', Elina Cruz and Sebastian Zarate delve into the cultural background of Chile. They describe the impact of liberalization (starting in 1973) on the national psyche, and the motivation of Chileans to protect freedom of competition even against the efforts of the competition enforcers themselves. Thus, the general mistrust in the antitrust system. See also a theoretical basis for mistrust expressed in the De León article, supra.

Cruz and Zarate argue that distrust, combined with an institutional design that has allowed Chilean Supreme Court jurists to second-guess the specialist tribunal, has led to weak and

inadequate enforcement against competitor collusion. They offer proposals for building trust in Chilean antitrust.

Thus far we have not yet examined sector regulations, and we do so now. Sector regulation has a critical link with competition policy. Indeed, in many developing countries, sectoral regulation may be a first home for competition law and policy; that is, antitrust provisions and considerations may first appear in regulatory statutes. However, sectoral regulation may be used perversely to reward and privilege the insiders.

Our example in this area is drawn from Mexico and the regulation of telecommunications. We include the essay of Rafael del Villar, 'Competition and Equity in Telecommunications', which is a chapter in the compelling book edited by Santiago Levy and Michael Walton, *No Growth Without Equity*?[18] Levy and Walton set the stage for their book with an important essay on the link between inequality and low growth, illustrated by the history, politics and performance of Mexico. They make the important observation that 'market failures hurt those with lower incomes more, and institutions and policies dominated by the rich will not correct market failures because they have no incentives to do so' (pp. 16–17). They explain by example 'how unequal power and influence shape economic institutions in ways that lead to outcomes that are both inequitable and a source of slow growth' (p. 17). Levy and Walton postulate that Mexico faces a 'growth-equity puzzle' – a high-inequality and low-growth equilibrium. Their book is devoted to analyses and ideas to help solve the puzzle.

The del Villar essay, which provides rich empirical detail, nicely illustrates possibilities to produce positive change in policy design and implementation, in the spirit of Levy and Walton. It describes the Mexican telecommunications industry, the fact of Mexico's privatization before regulation, and the ways in which the design of the regulation opened the system to regulatory capture. According to del Villar, the procedure for and the sequencing of the privatization sabotaged the capacity of Mexico's competition and consumer protection laws to protect the public from the exploitative abuses that followed. The sabotage is most unfortunate because the competitive functioning of telecommunications is crucial to both equity and efficiency. Del Villar suggests possibilities for counteracting the Mexican telecommunications monopoly.

The reader may be interested also in a companion chapter on telecommunications reform by Roger Noll,[19] and in the account by Eleanor Fox of the case against Mexico for violating WTO antitrust prohibitions by facilitating a Telmex-led cartel that raised the cost of terminating cross-border calls into Mexico.[20]

The final chapter is devoted to sub-Saharan Africa – one of the poorest parts of the world. Thulasoni Kaira, director of the Zambian Competition Commission, contemplates the role of competition law and policy in alleviating poverty in Zambia.

Kaira undertakes the ambitious task of examining whether and how competition policy can alleviate poverty. The project of poverty alleviation would have to be accomplished, he says, in one of three ways: by creating wealth, as through efficiencies; by creating jobs, as through new entry; and by reducing prices, as through competition. 'Where competition enforcement efforts do not lead to these results, then the existence of this law should be questioned' (p. 136).

Kaira turns specifically to Zambia. He asks: Where are the extreme poor, and why is there still extreme poverty despite strong progress towards macroeconomic stability?

Some 80 percent of the extreme poor in Zambia work in agriculture and related industries. What can help them the most? Kaira finds an answer to this important question, drawing not

only from his educated instinct but from surveys: the remote poor need infrastructure. They are disadvantaged and exploited by the high cost or impossibility of getting to market. Bid-rigging and collusive tendering on road construction projects are endemic. Competition law enforcement and advocacy can help. Road construction is just one of the many examples that Kaira identifies – others being drawn from the cotton, horticulture and floriculture, poultry, beef and tobacco industries. In each of his examples, Kaira pinpoints means by which competition policy can provide an effective remedy against exclusions and exploitations, including opportunistic uses of monopsony power by large multinationals against the poorest segments of the population; for example small farmers. He commends tools for opening channels for better information and transparency, and access to modern technology.

Whether competition policy can really contribute to poverty alleviation in Zambia remains debatable, Zaira says; yet his entire article exudes not only the hope but the conviction that it can.

Conclusion

The articles included in this volume present some contrasting perspectives. In particular, in developing countries, how much antitrust law intervention against private power is wise? How applicable are international standards and priorities, and at what stage of development?

But the larger message is not the differences but the common ground. Competition law/policy has the potential to play a critical role in enhancing economic development. Developing countries' economies and peoples are gravely harmed by practices, both from off-shore and on-shore, both by their own governments and private actors, that are anticompetitive by any definition of that word. Vested interests do what they can to preserve their privileges. Weak institutions conspire against positive change. What can break the barriers to healthy competition? Inspiration, perseverance and perhaps some luck in the political economy environment. Critical ingredients include information, knowledge, know-how and a decent prospect of institutional reform. As the articles in these volumes show, paths to reforms are being identified and opened, and competition authorities in developing countries around the world are rising to the challenge.

Notes

1. See Paul Collier, Volume I, Chapter 9.
2. Drexl et al. (2010).
3. Grosman (2007).
4. See also Grosman (2007).
5. See Recommended Practices for Dominance/Substantial Market Power Analysis, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf. See also Bernard (2009) and Bourgeois (2009).
6. Fingleton and Nikpay (2009).
7. See Levenstein and Suslow (2004). See also Evenett et al. (2002).
8. See also, for institutions of antitrust and a suggested simple design of substantive law for transitional countries, Fingleton et al. (1996).
9. Beginning in the 1970s, the United Nations Conference on Trade and Development (UNCTAD)