

Competition, Africa and the World: Development and Competition in Sub-Saharan Africa

Roots up, Top Down – Context, Community, and Intermediation in a Globalized World

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[Excerpts by Eleanor Fox from forthcoming book; please do not quote without permission;
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Introduction

This book explores a microcosm and a macrocosm and their relationship. The microcosm is the study of competition law and policy in nations of subSaharan Africa with a particular focus on Western Africa.¹ The macrocosm is the world, its globalization, and how competition law and policy are evolving towards international legal standards in the image of the most mature developed economies.

The book is a study of how competition law and policy is and might be implemented in low-income, resource-starved developing countries and an exploration of the significance of pro-market policy among the set of tools that may lift peoples out of poverty and bring countries into a global economic mainstream that could improve millions of lives. But it is also a study of the tension between international standards and local needs.

Developing countries face a dilemma. They need law and policy that fits their context and conditions. Yet they need or aspire to the benefits that derive from integration into the world community. The world community is in the process of developing international legal standards (such as: when is a merger anticompetitive; what dominant firm strategies are prohibited), and the international standards are largely derived from the market conditions and needs of the industrialized countries.

¹ Competition law (also called antitrust law) is the body of law that helps make markets work, free of monopolies and restraints. Competition policy is the surrounding policy that can – for example by advocacy before governments or legislatures – help preserve markets for the good of the people and free them from monopolistic restraints.

Thus, the dilemma for developing countries: adopt international standards or “grow” local standards? Are international standards universally fitting, or are international standards a cruel trick to tilt the playing field to the advantage of the powerful economies and their firms? Or does truth lie in both propositions – that the developed rules of competition law are (mostly) good for all nations of the world, but especially advantageous to developed economies? What should developing countries do? Should they decide what would be best for them if *they* were writing the rules for their country *and* the world? – then compare their first best choice with international standards and consider whether they gain more as world followers or local innovators? How can they answer these questions? It is not an easy task. The law is technical and complex. If developing countries lack resources, including well-trained teams of economists and lawyers with deep and broad knowledge and experience, how can they hope to make the necessary inquiries?

The burden of this book is to do just that. Amid claims by the developed world that developing countries should “do like we do; it is good for them,” this book attempts to understand a set of African countries, what they do and what can they be expected to do in terms of competition law and policy; to relate these realities and capabilities to what has become known as the “international standards” of competition law and policy, to try to understand the fit of developing country needs with developed country standards, and to propose a way forward in view of the imperfect fit that, as we report in this book, we find.

In Part I, the book begins with a statement on developing countries, economic development, and markets. It telescopes some of the most pressing impediments to development in developing countries, including economic and political conditions that suppress market competition. It

identifies competitive opportunity and open markets as major and necessary tools to achieve sustainable inclusive development.

Second, we want to give a picture of the macrocosm. The book describes the global landscape. Focusing on competition law and policy, it evokes the national origins of this body of law, its early ambitions to be a moral and political as well as an economic discipline, its internationalization, its technocrat-ization, and the on-going enterprises for formulation of international standards and convergence of the competition laws and practices of the more than 120 nations in the “antitrust family” of the world.

Third, the book reverts to the “microscope.” It looks closely at the competition laws of eight nations of West Africa and selected other African nations; how and why these laws were enacted; with what political and popular support; how they have been influenced by culture, by scarcity of resources, and by other elements of context. It asks: What are the particular problems in these nations that gave rise to the adoption of the competition law and that can be solved by that law and surrounding policy?

Fourth, the book describes regional regimes to which some or all of the selected nations belong and other regional cooperations in Africa. It considers the problems to which the regional regimes are addressed and that they might solve. It also identifies possibilities and challenges that might either frustrate or advance the usefulness of the regional regimes.

Part II of the book begins the normative analysis. Chapter 5 reflects on how the ambitions and capabilities of the set of developing countries studied, and the ambitions of “the globalists” who prioritize world integration and compatibility, fit together. Are more-or-less uniform global best practices fitting for this set of developing countries? Are there particular problems urgently faced by developing countries that are not faced by developed countries or that are not high on

their agendas? To the extent the answers are affirmative, how should these dis-connections be understood and resolved in the interests of recognizing both local needs and global imperatives? Chapter 5 lays the background for this comparison. Chapter 6 considers substantive law and its appropriate formulation for helping countries develop while recognizing the global context. Chapter 7 considers dealing with state-complicit acts, which include excessively anticompetitive acts of the state, or the state and its private partners, that undermine the market. Chapter 8 considers institutional arrangements, including court review and trustworthiness of the courts to rule efficiently, objectively, and with sufficient expertise. Chapter 9 asks: If the “standard” competition law were written from the experience base of developing rather than developed countries (thus, where markets do not work well, stable monopolies and state ownership proliferate, barriers are high and often not penetrable, huge masses of the people live below the poverty line), how would the standard law be drafted?

Chapter 10 reflects on the implications of all of the above for development, opportunity, and poverty alleviation in an increasingly globalized world.

PART I

Chapter 1 DEVELOPING COUNTRIES, ECONOMIC DEVELOPMENT AND MARKETS

Developing countries, especially lower-income developing countries with low and stagnant rates of growth, share certain characteristics and challenges. Huge portions of their populations – sometimes 40% to 50% – live below the poverty line. This means that the children do not have enough nutrition, they do not have access to clean water, they are starving, their minds are stunted by their challenged health, they do not have adequate shelter, they do not have access to decent education, their parents are likely not to have jobs, at least not in the formal sector.² If they beat the odds and generate inventive ideas with important commercial potential, they are not likely to get funding. If, again beating the odds, they are well qualified in mind and skill to enter the economic mainstream either as worker or entrepreneur, they are likely to be pushed back by individuals with privilege and connections.

This is a view from the individual up. The handicaps are reinforced by economic/political conditions from the top down. The markets are generally highly concentrated with high barriers to entry. State ownership, with privileges granted by the state, are pervasive. Government officials often exercise their power to grant market favors to friends and compatriots in privilege and corruption, sometime reducing to insignificance the channels open to market participation on the merits. Corrupt officials and vested interests poison the economic well. Compromised officials procure money for schools, housing projects, highways, and other infrastructures that are never built. They lavish money on construction projects for private gain and personal luxury. The people learn not to trust government and not to trust big corporations, which are

² Editorial, A Better Way to Fight Poverty, NY Times, May 5, 2005; OECD project.

known to exploit every opportunity to bolster and profit from their power and control and to keep the weak weak.³

What tools can help? What do the people and the countries need? We would divide the needs into four parts. First, there are direct needs that could be satisfied by provision of material goods and services: food, water, housing, clothing, schools, medicines and health care, energy, and infrastructure. Second, there are services that empower the people: teachers and training; information and communications technology. Third, there are concepts, however abstract in words, that directly address the material and empowerment needs without cultivating over-dependence on hand-outs;⁴ namely, markets and economic growth, and especially pro-poor growth. Fourth, there are values without which a society is likely to be restless, alienated and unstable: dignity and respect for the person, equity, and integrity of the system and its institutions, and thus an earned trust in the institutions and a sense that justice will be done. Mobility and opportunity are elements of equity and also may enhance the vibrancy of markets and thus increase growth.⁵

In this book we focus on the third aspect. Asked to identify the needs of developing countries, in particular their poorest populations, and what can be done to help, responders most often cite direct provision of necessities in the first two tranches: specific material bodily human needs, and education and training. More recently, responders add the following observation: In

³ See Catherine Boo, *Beyond the Beautiful Forever*s; Michaela Wrong, *It's Our Turn to Eat*; NYT Editorial, *A Better Way*, *supra*; David Lewis speech.

The paragraph in the text does not describe every developing country. Moreover, some are better positioned and rising on the scale of success against corruption and towards good governance and trustworthy institutions. But the conditions presented characterize a sufficient critical mass to merit a focal point for this study.

⁴ Moyo, *Easterly*.

⁵ See *Growth and Poverty: The Great Debate* (CUTS 2011); *Should Competition Policy & Law be Blind to Equity?* *The Great Debate* (CUTS 2013). Of course, certain policies that enhance mobility and opportunity could involve trade-offs.

order to provide the people with the necessities of life, the countries need economic growth; in order to provide equity and efficient development, they need inclusive, sustainable economic growth.⁶ It has become common cause that developing countries want and need economic growth, consistent with needs for equity.⁷ Competition policy (market policy, including removal of anticompetitive restraints) – the third tranche – is a critical tool to help achieve development and growth.

How can competition policy help? The point can be illustrated by a project of the World Bank working together with the Competition Authority of Kenya toward the common goal of freeing up markets for the good of the people – buyers and ultimate consumers, and suppliers including farmers. Their work promises to alleviate poverty both by increasing entrepreneurial opportunity and by opening doors to the competitive forces that drive down prices. This particular project promises a panoply of other virtues as well – jobs, environmental conservation, crime reduction (by increasing job opportunities), peace among conflicting tribes (by their working together at flower-picking times in epicenters of violence), reducing extreme hunger, and controlling disease.⁸

This is thus a story of a virtuous circle, and it provides a good example of the dovetailing of a general mandate of the World Bank – making markets work for the poor – and the Kenyan Competition Authority’s specific mandate – applying competition law and policy to work for the people with a special focus on the poor.

⁶ OECD Reports.

⁷ See Dr. C. Rangarajan – Indian deputy to Prime Minister, “Growth cannot be chased at the cost of equity.” *Ashok Kumar/OneWorld South Asia*, May 2, 2013. But see George Priest.

⁸ Pyrethrum Growers Assn, advocate for legislation.

The World Bank searches for projects likely “to improve productivity and economic conditions in the world’s poorest countries.”⁹ The Competition Authority searches for opportunities to use competition law and policy for exactly the same ends. As told by Francis W. Kariuki, executive director of the Kenyan Competition Authority, he approaches his job aware that 43% of the people of Kenya fall below the poverty line, and more than 75% of the Kenyan workforce are farmers, mostly among the very poor. With these facts in mind, Kariuki searches for projects that will do the most to help the Kenyan poor. The Competition Authority and the World Bank identified the pyrethrum market. Extract from pyrethrum flowers is used to make an ideal pesticide – one that is environmentally friendly and does not leave a hazardous residue on crops. Kenya’s soil and climate conditions are particularly friendly to the growing of pyrethrum. These conditions produce the highest quality plant. Kenya was once the source of thousands of tons of the flowers a year and the flowers supported the livelihoods of some 200,000 Kenyan households. Kenya was the world’s leading supplier of the organic insecticide made from the flower. Then a law was passed creating the Pyrethrum Board of Kenya as the sole purchaser of the flowers and the sole processor and marketer of the extract. It required the farmers to sell their output to the Board. The Board delayed payment to the farmers and squeezed them on the price. Most farmers were forced to abandon cultivation of the crop. The industry declined. Kenya’s world share fell from 82% in 1980 to 4% in 2009.

The World Bank, identifying the competition authority as the strongest voice for competition within the government, turned to the Competition Authority of Kenya to help jettison the exclusivity privileges of the Pyrethrum Board. The Bank helped stakeholders draft legislation. The Competition Authority helped publicize the pent-up competition to stakeholders and legislators, highlighting the harms from the restraint of the market. In 2013, the legislature

⁹ GCR 23 April 2013, “Competition just one tool for developing economies, specialists say.”

adopted a law repealing the monopoly of the Board. This action is expected to improve the incomes of more than 40,000 farmers; to induce farmers to re-enter the market, to induce both domestic and foreign investment in the market, to lower the price of crops (by lowering the price of the critical input), and to offer, collaterally, all of the other benefits, environment included, catalogued above.

In this case the monopolistic restraint was a government restraint and progress required legislative action. Advocacy for repeal was a part of “competition policy.” Had the Board been a private monopoly, the Authority would surely have sought to bring it to account under the competition *law*. Competition law and competition policy deeply interact; they provide different tools to address substantially the same ills – unnecessary and unreasonable restraints of market competition. Competition law and policy, together, can help make markets work for the poor; they can help make markets work for development.

The competition officials must – and in our experience they usually do – choose their cases and projects carefully to reach these goals. They are fortunate when they get can enlist the committed help from the World Bank, as in pyrethrum. The competition authorities are much constrained by very scarce resources including a scarcity of trained experts. Moreover, the competition law principles “handed down” from the experienced developed country authorities and courts and presented as world standards are extraordinarily complicated and often require armies of experts to apply; complexity is another source of constraint. We will ask, as we proceed, Has the West over-complicated the law?

With these thoughts, we move to the world picture. What is happening in “world competition”? Is there such a thing as world standards? And if there is, are they the right ones

for poor, resource-starved developing countries with weak markets and high barriers to enter them, and only a handful of officials to enforce the law against well-resourced opponents?

Chapter 2

COMPETITION LAW AND THE GLOBAL LANDSCAPE – THE VIEW FROM ABOVE

We have thus far concentrated on developing countries. We turn now to the world. But in this context, what is “the world”? Here is what we portray in this chapter:

“Antitrust” grew from a small but potent seed in the United States. The United States developed a jurisprudence fitting to its then rapid industrialization and increasing disparities of wealth and power. Several critical turns came three fourths of a century ago and then a century later, when trade barriers fell, and then the Berlin Wall fell, creating global marketplaces and the prospect of an economically more integrated world. Meanwhile, U.S. antitrust changed from a body of law for economic democracy and an ally of the powerless to a body of law for consumers and “efficiency,” with the presumption that what business does is efficient. The law changed from social policy to economic technocracy, with applications requiring deeper and deeper technological expertise.

Following the lead of the United States and then the European Community, most of the nations of the world adopted antitrust or competition law. Competition officials in the U.S., the EU and other jurisdictions currently lead projects of convergence of the competition laws of the world, which as noted number more than 120. They discover or construct international standards; standards that all nations “should” adopt in order to attain coherency and achieve better delivery of goods and services in the world.

What are the international standards? Are they accessible and appropriate to developing countries? to low-income developing countries? If not, what to do?

In these next pages, we tell the “world competition” story at greater length. Then we revert to the set of developing countries on which we concentrate. At this later point, we

describe the competition authorities, the competition laws and their local context, in preparation for asking: What do these countries do and what can they be expected to do in maintaining a competition–law regime? How strong or weak is the developing country fit with the developed country paradigm? To the extent of dubious fit, what are the implications for economic coherence of the world? for world governance versus local governance? for a smoother world integration, that could in theory benefit all?

Antitrust law, now also known as competition law, originated (in its modern form)¹⁰ in the United States with the passage of the Sherman Act in 1890 as a response to the industrial revolution, the growth of giant enterprises and the growing disparity of wealth.¹¹ The Sherman Act is a “lean statute.” Its words are few. It prohibits agreements and combinations that unreasonably restrain trade, and monopolization and attempts and conspiracies to monopolize. The U.S. Congress left it to the courts to interpret the law. For nearly a century the U.S. courts interpreted the antitrust law to protect the weak from the strong, despite an increasingly vocal chorus of criticism, from mid-twentieth century on, identified with what became known as the Chicago School.¹² Until approximately the end of World War II, the United States, almost alone, exalted markets and freedom of competition as the way to promote economic democracy, to serve peoples’ needs and material desires, to empower entrepreneurs, and in general to provide political freedom and economic opportunity.

After World War II, Germany adopted antitrust law to disperse power and anchor democracy, drawing from the roots of the anti-authoritarian Freiburg School.¹³ Several years

¹⁰ Canada, Kansas, cite Nicholas Green

¹¹ Heilbroner etc. See Handler.

¹² See Salop.

¹³ See David Gerber.

thereafter six European nations constructed the European Economic Community as an economics-based means for a lasting peace in Europe. The underlying Treaty of Rome incorporated competition law as a necessary underpinning of a common market. Enforcement of European competition law began in 1962 when enabling regulations were put into place; and little by little the European Union, now 28 nations, built up a robust body of competition law with a special focus on openness and access to markets and a special concern with controlling state-sponsored restraints¹⁴ – restraints that it had to counteract in order to form a sustainable common market.

The 1970s brought substantial economic change. Trade barriers were significantly lowered as a result of the Tokyo Round of the General Agreement on Tariffs and Trade (later the World Trading Organization). Multinational firms emerged. Prominent MNEs located plants wherever they could get the cheapest labor, without regard to local context and needs. They built factories, exploited the workforce (while creating jobs), and displaced local suppliers and competitors through vertical integration, low-price transfers to their own local subsidiaries, and price squeezes. They raised local firms' costs and chilled their inventiveness through restrictive terms in intellectual property licensing, exclusive dealing, and tying. Also, they commonly blocked the exports of their local joint venture to countries (including the United States) in which the MNE had other plants; they influenced politics in favor of anti-socialist policies (bolstering dictators such as Chile's Pinochet); and, when they found better economic opportunities, they

¹⁴ Such as dealing only with nationals when purchasing supplies for the state, and building state monopolies and national champions.

abandoned the country. So charged Jean Servan-Schreiber in *THE AMERICAN CHALLENGE*¹⁵ and Anthony Sampson in *THE SOVEREIGN STATE: THE SECRET HISTORY OF ITT*.¹⁶

The developing countries complained about these practices. On the antitrust side, they triggered talks under the aegis of the United States Conference on Trade and Development (UNCTAD), hoping to obtain world rules against MNEs' restrictive business practices. (Almost all of the practices complained of were then illegal per se under U.S. antitrust law if Americans were the targets). There were three groups: the industrialized countries, the developing countries and the communist block. The nations reached agreement by the end of the 1970s, and in 1980 UNCTAD promulgated the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (RBPs) (also known as the UNCTAD code). The United States signed the UNCTAD code – but not before bargaining for and obtaining the concessions it most wanted: multinational enterprises were not singled out as enforcement targets; state owned enterprises were included in coverage; transfer pricing (pricing within one firm) was excluded from coverage; all restrictive business practices could be justified as reasonable, and adherence to the set of rules was voluntary, not mandatory; there were no sanctions for breach. Ironically, 1980 was a turning point in U.S. antitrust law, as Ronald Reagan was elected President. The Reagan administration turned the dial of U.S. antitrust law almost 180 degrees.¹⁷ The antitrust concern that had animated U.S. antitrust for most of a century – to contain power and provide a better chance for the underdog – was transmogrified into a concern that antitrust not interfere with efficiency. U.S. antitrust became a blueprint for

¹⁵ Cite.

¹⁶ Cite.

¹⁷ This was apart from the persistently strong law against hard core cartels; principally, price-fixing.

freedom of even dominant firms, in the name of efficiency, as the United States turned its sights to competitiveness and economic power in the world.

In the 1970s, while the UNCTAD standards were still being debated, the world trading partners under the aegis of the GATT negotiated lower trade barriers and as a result world trade increased substantially. The technology and information revolution came on the heels of the trade reform. The winds of trade, innovation and competition put pressure on firms to be cost-efficient. In the United States the pressure was felt in steel, cars, and electronics, among others. These forces of international competition were part of the changed landscape that brought Ronald Reagan to office in the United States in 1981.

The next major transformative event came in 1989/1990: Communism had lost its grip. Masses of people in the Soviet Union and its satellite countries rebelled. Not only did they want political freedom; they wanted economic freedom. Russian communism's command-and-control economic system, which had promised a decent standard of living for everyone, had failed.

In 1989 the Berlin Wall fell, literally and figuratively. The falling of the Berlin Wall marked a major turning point. One by one, the post-communist countries adopted democratic political systems and market systems, albeit sometimes denominated socialist market systems to acknowledge a continuing commitment of the nation to a notion of equity. When the countries adopted democracies and market systems, they began to adopt the set of laws that democratic society's normally have. One of these was antitrust.

The falling of the Berlin Wall inspired scores of countries to adopt antitrust laws. Later events combined to trigger adoption of competition law by scores more countries including large numbers of developing countries. These later events included the successful conclusion of the Uruguay trade round in 1994, and the Asian financial "flu" of 1998 in the course of which the

International Monetary Fund and the World Bank insisted on loan conditionalities that included adoption of competition law.

Beginning approximately with the end of the Uruguay round and the ensuing birth of the World Trade Organization as the umbrella over the GATT, policy makers and civil society encountered a dilemma: Freer trade was encouraging competition, lowering prices, increasing availability of products, and increasing economic integration. Yet, for all of its benefits, freer trade threatened to impair other goals and values. It could mean more aggregate wealth but a more impaired environment; it facilitated exploitation of workers, especially the unskilled. It heralded less social policy, including thinner welfare nets.¹⁸ It facilitated world cartels and monopolistic practices across borders.¹⁹

Policy makers proposed linkages of many fields with trade law. The European Union proposed such a link for competition law. As European officials observed, competition law is national but transactions had become significantly international. The international impacts of business transactions seemed to require international principles of law; a conception of the whole market, not just isolated national markets. An international competition law could internalize externalities and minimize disparities among nations. Under an international conception, for example, Canadian potash producers would not be entitled to price-fix into Africa and U.S. multinationals would not be entitled to exercise muscles of dominance in Europe or South America. The EU's proposal began with building blocks of information-sharing and cooperation among the competition authorities, provision for technical assistance from developed to less-well-off nations, and a requirement that national competition authorities incorporate international norms of due process, transparency and non-discrimination. A second stage would see the

¹⁸ Rodrik.

¹⁹ Sussman.

adoption of consensus substantive principles such as those prohibiting cartels and abuses of dominance. Eventually world norms could include the full panoply of substantive principles and a mechanism for dispute resolution.

U.S. officials and the U.S. antitrust bar challenged the proposal. They opposed an international antitrust framework of any sort, and they especially opposed the WTO as the forum for a world antitrust agreement. U.S. Americans argued that world antitrust would mean lowering standards to the “lowest common denominator.” Nations around the world bargaining table would (it was argued) seek to protect their firms from the more efficient competition of outsiders rather than unleash world efficiency. Critics further argued that a world system would create a faceless, unaccountable bureaucracy run by a cadre of individuals who did not understand the nuanced technicalities of antitrust. They argued that the WTO was an inappropriate forum because it was run by trade officials, and trade officials bargain; they make concessions to national protectionism; whereas antitrust law is principled; it entails application of “pure” and cosmopolitan rules of law, such as: You must not agree with your competitors to fix prices.

Developing countries, too, opposed the European proposal, but for different and sometimes opposite reasons. They did not trust the West. They feared the imposition of a world aggregate efficiency paradigm without equity, and the loss of policy space.

In response, on successive occasions, the Europeans trimmed the sails of their proposal.

American officials sought to move the debate to another forum²⁰ and to shift the major world concern from abuse of dominance – as it was in Europe – to cartels, as it was in the United States; thus from equity to efficiency. They made a proposal in the OECD (Organization for

²⁰ See Braithwaite and Drahos, *Global Business Regulation* (2002) [on world regulation – strategy of shifting the forum].

Economic Cooperation and Development), which is an organization comprised of the industrialized nations of the world and has no enforcement powers. The United States' officials introduced a recommendation against cartels – which largely meant, against competitor price-fixing. The proposal, although watered down, became the Recommendation of the [OECD] Council concerning effective action against Hard Core Cartels, adopted in 1998. The recommendation states that “Member countries should ensure that their competition laws effectively halt and deter hard core cartels”; that their laws should provide for effective sanctions and should include adequate provisions for document discovery and cartel detection; and that the member countries should cooperate in detection of cartels and enforcement against them while safeguarding confidential information. “Hard core cartel” was defined to exclude anything the member country’s law exempts; but the recommendation advises that member countries continually examine their laws for undue exemptions and seek to eliminate them, and that they should make all exemptions transparent.

The adoption of the hard core cartel proposal and robust data showing the high cost to consumers of cartels helped to shift world priorities from monopolistic abuse to cartels. That the main problem of developing countries was monopoly, not cartels, went unnoticed. The proposal for an antitrust agenda in the WTO gradually lost momentum.

Meanwhile, the world was developing a consciousness of the plight of the poor in developing countries. The New York Times ran a series of articles, “Cultivating Poverty,”²¹ showing how [develop; add Oxfam]. Consciousness of the ills and hardships of these billions of people in poverty produced the Millennium Development Goals. [develop] How intertwined were the MDGs and the aspiration for an “economically efficient world”?

²¹ Cite NYT.

Meanwhile, on the market-and-competition front, two things occurred. In the United States, an international antitrust review committee (International Competition Policy Advisory Committee, or ICPAC) studied problems and solutions for international competition issues and recommended a new “virtual” forum (it would have no secretariat or bureaucracy and its recommendations would be entirely voluntary). It would be devoted only to antitrust issues (not trade and antitrust, as was proposed in the WTO), and it would be open to antitrust agencies of all nations; not to nations (as is the WTO, the OECD and UNCTAD), and not just to industrialized nations, as is the OECD. The ICPAC proposal became the International Competition Network (ICN), launched in October 2001 by 14 nations.

One month later the WTO held its ministerial meeting at Doha, Qatar and the ministers adopted an agenda for the next trade round – the Doha Declaration of November 14, 2001. This trade document recognizes that the developing countries had not shared equally in the gains from the prior trade negotiations, and declared that this round was to be the *Doha Development Round*. The Doha agenda contained three paragraphs on the interaction between trade and competition, “recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development” and the need of developing countries for enhanced technical assistance and capacity building, and proposing work of the WTO Working Group on the Interaction between Trade and Competition Policy²² to clarify “core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”²³

²² This Working Group was launched in December 1996 in Singapore.

²³ Paragraphs 23 to 25. The Doha agenda item was developed principally by European competition officials.

But the Doha antitrust agenda was not to see the light of day. The Doha round, which began in Cancun, faltered almost immediately. The United States and the European Union failed to offer sufficiently serious cuts in their agricultural subsidies, which greatly harm the developing world,²⁴ and this was the main item on the agenda. To help revive the negotiations, the nations agreed to remove several items, including competition law. The entire round nearly failed.²⁵

The fate of ICN was quite to the contrary. ICN blossomed. It now has 128 member competition authorities and numerous non-governmental advisers. Projects are under way on cartels, merger standards, technical assistance, regulated industries, and now the most challenging because of the most disparity – rules for unilateral conduct such as abuse of dominance. Through recommended practices, and many opportunities for personal interactions of officials and advisers throughout the world, convergence of law and analytical methodologies has occurred and is further occurring, and understanding and cooperation have increased. [But see the story of the recommended practice on the definition of “dominance”; the tuning out of the developing country voice.²⁶]

The center of the international competition conversation has shifted from the WTO to the ICN; from a more formal hierarchical structure to informal horizontal networking.

Presently we turn to a description of the economies and competition laws of the developing countries in our set, we ask what the competition authorities do, and what are their

²⁴ Cite Cultivating Poverty.

²⁵ [Near failure of Doha.]

²⁶ Eleanor Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 *International Lawyer* 151 (2009).

capabilities and capacities. First we give a thumbnail sketch of some principles and guidelines of competition law in the United States and the EU, and of ICN principles. [To do]

[[Cite Neal Stoll, NYLJ, re: US law and the models the experts introduce in court have gotten too complex even for the U.S. Get facts and figures on the booming business of antitrust-economic consultants; how the economist firms have globalized; the high demand and high price of the (necessary) economists.]

The pattern of competition law and its internationalization without international law is duplicated in almost all other areas of economic law where the law is national and transactions are significantly international. [E.g., securities, corporate, bankruptcy. (check) Cite Easterly, The Tyranny of the Experts.]

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Part II: A Normative Analysis

Chapter 5

PERSPECTIVES FROM FOUR STAGES OF DEVELOPMENT: WHAT IS NEEDED BY THE NATION, WHAT IS NEEDED FOR THE WORLD?

A. INTRODUCTION

We noted at the outset the tensions in the world between what is demanded by localism, especially in developing countries, and what is desired for globalism, especially by industrialized countries. In this chapter we place the local demands and the global aspirations into deeper context. We do this by identifying four clusters, and we consider what is the most fitting competition framework nationally and what is the most fitting competition framework internationally from the perspective of the nations in each cluster. This chapter assesses salient differences and postulates a workable framework from the point of view of the citizens of the world. In Chapter [9] we ask, To what extent would differences counsel different rules of law or different outcomes, and how can the threads of law be brought into a healthy synergistic alliance?

While we identify clusters, in fact, there is a continuum. By identifying clusters at four points, we are able to highlight significant qualitative differences in economies and their needs and capabilities that may call for different law and policies.

Three of the clusters are composed of nations in sub-Saharan Africa, and one is composed of the advanced industrialized countries. The three developmental clusters are: 1) least developed countries with the most resource-challenged competition authorities, such as Benin, Togo, Senegal,¹ and Swaziland, 2) somewhat more developed countries, such as Tanzania, Zambia and Mauritius, and 3) the yet more developed and indeed rapidly emerging economy for which we use the example of South Africa. South Africa's cohorts in the world include India and China. The developed countries represent a fourth cluster.

Taking an analogy from Isaiah Berlin's *THE FOX AND THE HEDGEHOG*, we visualize the clusters as three foxes and one hedgehog; it being recalled that the fox sees many alternative conceptions, and the hedgehog has one big idea or picture; thus, the perception of legitimate multiplicities, versus a unified picture. The hedgehog in this story is the developed world or at least those within it who advocate a strong view of convergence of substantive and procedural rules, standards and modalities. The hedgehog's conception is a regime of competition based on efficiency and consumer welfare (subject to selective derogations). The foxes are: the little (or least developed), the middle, and the big. The task of this chapter is to explore how each cluster views the world of competition law/policy in terms of restraints with the nation and in terms of restraints from the outside world.

¹ Benin, Togo and Senegal are members of the West Africa Economic and Monetary Union. The national authorities within WAEMU are required to transfer all competition enforcement authority to the Union. This factor holds back the healthy development of these authorities.

A usual approach in the literature is to start with competition law/policy as it exists in the mature jurisdictions of the world, more or less, to presume that in essence this law fits the world, and to ask (if one asks at all) what exceptions may be necessary to accommodate “outliers.” We start from a different vantage: local context and needs, roots-up. The chapter begins by addressing three sets of questions.

1. What market restraints and abuses hurt the nation and its peoples the most? We limit our inquiry to those restraints and abuses that might usefully be caught and remedied by competition law or addressed by competition policy asserted by the competition authority, and we divide the inquiry into two categories: a) restraints within the state including those that are state or local government generated, and b) restraints within the world or outsider-generated.
2. What are the available pathways to solution?
3. What are the most significant limitations that might prevent the competition authority from successfully challenging these restraints, at least in the near term? Do these practical limits influence the scope, perspective and ambition of the competition law?

We note that the three sets of questions have a normative as well as positive content. What counts as a “most serious market restraint” depends upon what the nation wants from its market system. Only efficiency, or also equity? Only efficiency, or growth and development? Only growth, or inclusive growth? We will see that nations representing each set of clusters may have somewhat different perspectives. The developing countries want development. They are likely to want efficient inclusive development in order to achieve a combination of growth and a sense of personal freedom and autonomy.² The developed nations are likely to want competitiveness in the world and global economic hegemony. These differences in value hierarchies are often overlooked. More commonly it is postulated: Markets are for “efficiency,” and “efficiency is efficiency.”

We will see presently that the “worst” restraints confronting the least developed countries and those confronting the developing countries are different; nonetheless, that the worst restraints confronting developing countries are truly most market-disabling from any view of efficiency; and that the nations facing these restraints are also least well equipped to tackle them, presenting an overwhelming challenge to least developed countries before they can begin to play in a ball park staked out as “competition law/policy” by the developed world.³ This might suggest the need for a more empathetic approach in helping to construct a competition law/policy appropriate to least developed nations and therefore more likely to help pull them up into a more functional market economy. It also suggests that huge changes in governance, rule of law, and

² See Amartya Sen.

³ See A. E. Rodriguez and Ashok Menon, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (2010).

the competitive environment in the nation might have to occur before its competition authorities can make more than a ripple of difference in enabling markets.

We shall now describe the clusters, and then identify their perspectives on the three sets of questions.

B. THE CLUSTERS

1. The first cluster comprises the least developed countries. Paradigmatically, the country has severely impaired markets, often as a result of years without a market economy. Often it has a background of command-and-control. Typically, the economy is dominated by state or recently privatized monopolies in the major sectors, and the SOEs are recipients of subsidies, exclusive rights and a multitude of non-transparent privileges. Otherwise, the economy may be owned by a few families. Corruption is high and pervasive. Poverty and disparity of wealth are high and systemic. Opportunity and mobility are low. There is a very small pool of talent on which to draw for government enforcement agencies. Financial resources are scarce. Political pressures on government officials to favor “friends of the President” are high. The competition authorities are staffed by no more than a handful of people. They have no chief economist. The courts are slow, inefficient and corrupt, and the judges are untrained in market and economic concepts. There is a lack of rule-of-law; that is, there are not ascertainable principles of law transparently applied. The competition authority spends a critical mass of its time regulating prices. If the authority has a consumer function, it devotes a healthy share of its resources to attacking deceptive practices. If it has a “fair competition” function, it devotes a healthy share trying to prevent big firms from bullying small players. The competition authority is on the whole not corrupt and not captured by the firms that might become the targets of the law, although it is often frustrated by its impotence to challenge the most serious abusers of economic power.
2. The second cluster has many of the same burdens (and all of the same virtues) but the nations in the cluster have advanced economically to a perceptibly higher level and the disabilities are somewhat less debilitating. The nations have a qualitatively higher GDP and average income. They have less poverty. They may have a promising growth trajectory. They, too, are starved for resources, but still they are able to assemble competition offices with a critical mass of trained or rapidly learning staff. They may have a chief economist, often well trained.
3. The third “cluster” is a group of one – South Africa. With all of its challenges -- corruption, poverty, inequality and persistent marginalization-- the South African competition regime is as close to a gold standard as there is in sub-Saharan Africa; at least for a middle income country.

4. In the fourth cluster are the developed countries, led in particular by the EU and the U.S.
[more description]

C. FOUR PERSPECTIVES

1. THE FIRST CLUSTER – *THE LITTLE FOX*

Question 1 – What are the Most Significant Market Problems?

What can the first cluster do and hope to achieve, in competition law and policy, to improve the functioning of markets for the good of their people? What restraints need the most attention? What are the most harmful restraints that keep the markets from working and that are plausible subjects of competition policy?

a. Restraints within the nation

There is little doubt that the restraints most harmful to this cluster are state acts and measures and other restraints in which the state or state officials are complicit, as developed in Chapter __. State and local government restraints typically squeeze the space for competition on the merits; they block the most productive channels for economic opportunity and mobility – the escape routes from poverty – even while they set the stage for corruption, harming consumers and other users of public goods such as roads, housing, medicines and food. [cite the cooking oil and transportation cases dealt with by the WAEMU Commission in the chapter on regional integration.] Public goods are most heavily relied upon by the poor. See David Lewis, [OECD paper].

Therefore it is imperative for this cluster to explore the extent to which the competition law (and not just advocacy) can reach unnecessarily anticompetitive state and local government acts. [cite chapter infra; possible model provisions of law infra] This means that inclusion of SOEs in the coverage of the law is a priority. Anticompetitive unilateral conduct of SOEs is likely to be a principal category of violation.

Of the universe of state-complicit restraints, some may be venal (a state officer may be bribed to write procurement specifications that can be filled only by his buddy, or to grease the wheels of a procurement bidding cartel. [cite examples from Fox/Healey state Article] Others may reflect the doling out of sinecures to friends, or may simply be the product of un-knowledgeable bureaucrats, as might have been the case in the creation of the Pyrethrum Marketing Board in Kenya, which threw tens of thousands of poor farmers out of jobs, raised prices geometrically, and destroyed Kenya's thriving internal and export market for this environmentally-favored pesticide. [cite Francis Kariuki]

State-imposed border barriers and excessive delays of goods at the border are among the worst restraints. Senegalese cooking oil does not flow into the Ivory Coast except at an extortionate price, and Gambian groundnuts do not move into Senegal except, likewise, at an extortionate price.

While these problems may be classified as “state sovereignty” and trade problems and thus separated from competition problems, the point here is not the category to which they are traditionally assigned. It is, rather, that these are most serious market obstructions and, if they are not alleviated, the role of the competition authority can be entirely diminished. The area within its mandate may be too circumscribed to make much of a difference. If debilitating state and trade restraints can be addressed in some significant measure, the competition authority has a serious chance of making a difference.

There are of course also the more traditional egregious harms. These can include serious market-blocking acts of dominant firms and cartels – often involving recidivist culprits as in cement, sugar, and poultry; and mergers can facilitate cartels and create monopolies. Developing countries, more than developed countries, are likely to find serious restraints in creation of buyer power, global chain exploitation and exclusion, and other foreclosing vertical restraints, not just because they might directly raise prices but because they tend to exclude or perpetuate exclusion of the unprivileged masses from the right to try.⁴

Identifying the restraints that are the most debilitating for the society entails not only a judgment on the economic quality of the restraint but also identification of the class of victims. In first-cluster countries where 50-70% of the people may live below the poverty line and some 70% may earn their livelihood from agriculture, almost all of whom are very poor, restraints in the agricultural sector that deprive the farmers and small processors of their freedom to compete on the merits are among the worst for society.

b. Restraints from the world

The cluster-one nations are targets for anticompetitive practices in the world. Cartels targeted at them often involve basic and necessary goods such as pesticides (potash) for crops, and vitamins. The cartels are illegal in virtually every member of the antitrust family of the world. Yet the first-cluster nations are likely to be harmed without recourse, for the competition authority and the victims nearly always lack the resources to press the case against the offshore suppliers, much less the ability to exact penalties of a size that might deter repetitions of the offenses.

⁴ See Kim Them Do book manuscript.

Question 2: What are the pathways to solutions?

The competition authority might well be powerless to challenge the most severe restraints – those by the state, or state-complicit. Possibly, the legislature might grant the competition authority power to challenge some state acts, as a number of jurisdictions have done. Also the agency might be entrusted with power to conduct market studies to locate the worst restraints and advocate for their removal.

As for “outsider” restraints, the legislature might vest the authority with effects jurisdiction so that it could in theory sue off-shore actors targeting the nation. Meanwhile, in regional common markets (see Chapter ..), the nations can collaborate with neighbors for their common good, and, very significantly, can invoke the power of the regional regime power to discipline anticompetitive state acts with cross-border effects – a category virtually always included in the law of common markets.⁵

In theory, some of the problems of global restraints could be alleviated by an international regime. A favorable international regime would at least require nations to prohibit firms from doing to foreigners what they would not do to themselves; thus to prohibit world-consensus wrongs such as hard core cartels. At least, it would require offenders’ countries to aid in discovery of evidence and share its fruits.

Question 3. What are the most significant limitations in addressing the major restraints?

We have seen that the most significant restraints emanate from the state or from vested interests or cronies through the state, or are generated off shore. These are the most difficult market obstructions to topple, because of political pressure and the “wages” of politics, and lack of practical power even if the tools for enforcement are in place. In addition, even for the most traditional restraints, the set of national characteristics that identify the cluster conspire against effective enforcement: the scarcity of human and financial resources; weak institutions; lack of rule of law; no competition culture and no trust in markets. The people are accustomed to price setting by the state when prices rise “too high”; they expect this intervention; they have no faith that they can sit back and wait for the market to work – in general or after a break-up of cartels. How to move the people from a trust in price-control to a trust in markets – when they have had no reason to trust markets? This will be a long process. It will take resources, litigation and policy-reform successes, well publicized examples of success, and strong and determined leadership. Even more so, it will take time, resources and a favorable climate to challenge the market-strangling government restraints. The multifaceted

⁵ The law of the European Union is the model. See Fox/Healey, *When the State Harms Competition—The Role for Competition Law*, Antitrust L.J. (forthcoming). [Provide examples from WAEMU and COMESA.]

limitations combine to affect the scope, perspective and ambition of the competition law and policy that cluster-one nations adopt and try to implement. One must account for the limitations when one considers: What is possible today in strengthening the cluster-one nations' competition law and policy?

2. THE SECOND CLUSTER – THE MIDDLE FOX

The paradigm nation of the second cluster is qualitatively more developed, has access to more resources, and has stronger institutions than the first.

Developing a competition culture is still a huge challenge, but it is taking root. The people are beginning to observe how freeing up markets can help them and so are becoming more trusting in markets, at least sufficiently so that the “competition law” agenda is not dominated by price control. This trend is observable in countries such as Zambia and Mauritius, both of which are situated in cluster two.

In the second cluster the development of a more sophisticated competition law and policy is observable. A great source of learning is peers from other nations. Economically more advanced neighbors provide meaningful lessons and insights, and the growing communities of regional associations are also providing this function. One example of such learning is the training and collaboration that the South African competition Commission conducts with other competition authorities. See article by Kasturi in the book on regional integration and competition policy. Much learning comes from the international competition community and much from developed countries, which have incentives to share, explain, and teach their modes of operation and analysis.

The facility of cluster-two countries for connecting with and learning both from neighbors from the international competition community is greater than that of cluster one. As expertise in the nation's competition authority grows, the authority's comfort zone of deeper interaction with the international competition community grows.

A critical mass of the competition authorities in second-cluster nations such as Zambia, Mauritius and Tanzania have been peer reviewed by UNCTAD at their request. Participation in UNCTAD's voluntary peer review program signals three positive points that give cluster two a more solid connection with market-based progress: 1) the request for a peer review usually signals a level of competition development in the country and the confidence of the competition authority. 2) The competition authority invariably profits from the process and the outcome. The reviewers typically recommend a variety of reforms, big and small, and the authorities typically use the recommendations to good advantage in seeking, for example, important new enforcement powers. 3) The nations may be hoisted onto a new

track of increasing integration with the world community; an upward spiral of learning, contributing and developing.

a. Restraints within the nation

The kinds of restraints within the nation that hurt the people and economy the most are generally the same as for cluster one, and the structural conditions of the economy are commonly quite the same, with highly concentrated markets often controlled by the state or by a few families or businesses. The likelihood of success in challenging the restraints is somewhat greater, albeit still daunting.

b. Restraints from the world

The restraints in the world that harm second-cluster countries are exactly the same as those that harm the first cluster. Second-cluster countries are somewhat better placed to develop mechanisms to protect themselves – for example, by combining forces against international offenders to get their fair share of compensation for harms, and perhaps at some point to be strong enough to impose penalties that will create credible deterrence. But that point may be a long way off.

Question 2: What are the pathways to solution?

The pathways are similar to those possibly available to cluster one. Further, as we have reflected above, benchmarking is more available. The ability to be peer-reviewed and to implement the peers' recommendations can be an important segue into a more fully market-based competition law.

Question 3: What are the most significant limitations in addressing the major restraints?

The limitations are similar to those of cluster one but less so. Markets are more appreciated. Pathways to development are more solid. Still, the limitations seriously influence the scope, perspective and ambition of the competition law and policy.

3. THE THIRD MARKER – SOUTH AFRICA

As we move up the development ladder to South Africa we note that wholly private restraints share equal ground with public restraints. There is more space for private firm competition, although development of the market has been badly skewed by apartheid. Still, a large portion of market-related problems derive from state-owned enterprises and their progeny. This means that a large portion of cases fall into the category of abuse of dominance.

Because in South Africa there are more working markets than in the nations of the first two clusters, there is less need to create markets before competition can exist. But, because of apartheid, there is a special need to bring historically excluded people into markets.

Question 1: What are the most significant market problems?

a. *Restraints within the nation*

As in most of the developing world, state-owned entities and their progeny impose and maintain some of the worst obstructions to competition. The constantly reinforced non-competitive structure of markets remains a challenge.

The fact that South Africa has more markets than the first two clusters means that cartel cases and merger cases take a higher place on the agenda, and the case docket may look more like that of the developed jurisdictions. Still, the historical powerful few – state-owned dominant firms and beneficiaries of apartheid – take constant advantage of opportunities to ring-fence the market and make it practicably impenetrable to meritorious challengers.

Like the first two clusters, South Africa aspires to inclusive development. This means that exclusionary practices whether by single or joint conduct may warrant a higher place on the agenda than in the developed world.

Some of South Africa's mandate to help the historically disadvantaged people can be fulfilled by enforcement priorities; thus, prioritizing markets with high impact on the poor, such as bread, grain and cement.

b. *Restraints from the world*

The world restraints that hurt South Africa are identical with those that harm the nations in the first and second clusters. But South Africa is in a better position to defend itself against world restraints, through proceedings by both the Commission and private victims. And South Africa is in as good a position as any to organize a consortium of injured sub-Saharan African states.⁶ This does not diminish the need for home nations of offshore offenders to discipline the offenders at the source; for still, like pollution, the problem is most efficiently and effectively stemmed at its source.

Question 2: What are the pathways to solution?

The pathways to solution are virtually the same as for cluster two.

⁶ This potential project has not been implemented.

Question 3: What are the most significant limitations in addressing the major restraints?

The limitations are still severe, but qualitatively less so. Big pockets of power, privilege and corruption, resource limits, and shortfalls in governance chill aspirations. Still, competition culture is diffusing, and the people are learning – through Commission outreach and good journalism – what competition law and policy can do for them.⁷

4. THE FOURTH CLUSTER: THE DEVELOPED WORLD, LED BY THE EUROPEAN UNION AND THE UNITED STATES (TWO WINGS OF A LARGE AND DIVERSE CLUSTER)

The fourth cluster is the developed nations. These nations/jurisdictions are industrialized. Some, the United States in particular, have had a liberal economy from the inception. Corporations that have grown to a large size have done so largely by being “good” – creative, responsive, efficient. Markets exist and work; there is no basic problem to create markets. The talent pool is deep. Whatever resource constraints exist in the antitrust authorities, they are small compared with the constraints in the developing country clusters. The two federal competition agencies each employs hundreds of competition professionals (approximately 600), including dedicated economists who are among the best trained in the world. The judiciary is strong and basically well trained and honest. To be sure, the nation suffers from serious corruption, poverty, inequality, unemployment, lack of mobility, triumphs of vested interests, and dysfunctions in democracy. But still, there is so much healthy working of markets, such deep incentives to innovate, such feisty pro-consumer and anti-corruption activism, and so high a level of rule of law and transparency that the bite of corruption and dysfunction is minor compared with that encountered in developing countries.

The European Union is the other pillar on which we focus in this fourth cluster. Its competition model is the most imitated in the world. The structural market characteristics in the internal market are more diverse than in the United States because the EU is composed of 28 sovereign nations. The great disparities of the original six members states’ political economy arrangements, and the European goal of creating one common market, led at the birth of the European Community to its reinvention of competition law to constrain state, private, and hybrid anticompetitive acts, to create and open markets, and to purge the markets of vested interests, nationalism and discrimination. Although the structural disparities are now much reduced, the open-market, non-discrimination motivations have always been at the heart of the European project.

It is worth noting that the US and the EU, along with Japan, South Korea and a handful of other developed countries (each of which has its own unique characteristics and aspirations) are

⁷ See David Lewis, *THIEVES AT THE DINNER TABLE: ENFORCING THE COMPETITION ACT* (2012).

homes to the biggest multinational enterprises in the world; and that multinational enterprises would generally profit from common world rules and standards.

Question 1: What are the most important market problems?

a. Restraints within the jurisdiction

What are the most important market problems that might usefully be caught by anti-trust/competition policy? In the United States the answer commonly given is private cartels. While monopolistic practices were high on the agenda until more than half a century ago, this priority became muted in view of a trumping concern that antitrust enforcement would coddle small inefficient firms, protect them from efficient competition, and handicap the “best.” The targets of US antitrust are almost entirely private firms, most often pursued for engaging in cartels, with sporadic cases targeting anticompetitive market acts of state (of the US) and local entities. The authorities’ clear priority is enforcement. They devote some resources to competition advocacy against excessive and unnecessary regulation. They do not engage in market advocacy against trade restraints, which is vested in other hands.

As for abuse of dominance (“monopolization”), there is a reluctance to bring such cases for fear that the enforcement will chill good hard competition, usually by the dominant firm, and protect inefficiencies of small and middle-sized firms. Abuses by privileged state-owned enterprises has not been a problem over time because state ownership has always been minimal.

The EU answer to the question is different. Abuses of dominance, and especially those of state-owned enterprises and, separately, abuses that restrain cross-border competition, are at the top the agenda. The EU law targets even certain state *measures*. In addition the law reaches all of the usual subjects of competition law: other abuses of dominance, cartels, other competitor agreements, vertical restraints, and anticompetitive mergers. In the last two decades, the EU has replaced formalistic rules with effects-based rules and appointed a chief economist and a large and expert team of economists, moving the law in some respects closer to that of the US.

The big point is that the biggest market restraints and impediments faced by developed countries, and especially by the United States, have nowhere near the dimensions and gravity of the impediments faced by the least developed countries. The developed countries have basic working markets.

b. Restraints from the world. What harms to the interests of cluster-four nations derive from acts and conditions outside of the nation or jurisdiction?

We see at once that this is a very different question when asked of developing countries and when asked of developed countries. For simplicity (and because they are the two major models for the world) we will remain limited to the United States and the EU.

Unlike the developing country clusters, neither the US nor the EU is harmed by regimes in which home nations of offenders pay no regard to their out-bound acts. Both jurisdictions have doctrines of extraterritorial reach of their law as necessary to protect their citizens, and they have the power to apply their law to off-shore actors. The offenders generally want to do business in the jurisdiction that seeks to discipline them and so they have the incentive to comply with its law.

The US/EU “harms” are totally different. They may be described as the costs of the disparity of systems, including more aggressive foreign enforcement that impinges upon their own enforcement and (merger) clearance efforts, and complaints by one nation against initiatives of another regulating firms domiciled in the first. Thus, they have an interest in worldwide harmony of rules and outcomes. The US and the EU express their concerns in different ways. The US is concerned that “its” corporations be able to do business smoothly around the world, without excessive regulation from outside and thus without extra costs that might diminish their firms’ performance and undercut incentives to innovate. The EU concern is often phrased in cosmopolitan terms, fitting to an economic community. Business is transnational; solutions to problems derived from their abuses should be transnational.

Both US and EU officials generally agree with the following propositions: The worldwide application of more or less common rules and principles is likely to increase business certainty, decrease over-enforcement, and thus increase the flow of business around the world, increasing the size of the world economic pie, and diminishing international confrontations that threaten trade wars. A crazy-quilt of different rules for different countries, more or less aggressive, is seen as hampering trade, competition, efficiency, and economic welfare.

Question 2: What are the pathways to solutions?

The developed nations have led the effort, especially in the context of the International Competition Network, to cure the harms of system inconsistencies by nurturing convergence. Moreover, bilaterally, and particularly in cases such as mergers of common interest, developed nations have reached very high levels of cooperation with other developed jurisdictions.

Question 3: What are the most significant limitations in addressing the major harms?

For restraints within the country or jurisdiction: No significant handicaps prevent these jurisdictions from addressing the harms. The nations have sufficient resources. Of course problems exist, and in response, law is reformed from time to time; but sufficient solutions are available.

For outsider/world restraints and harms: There are challenges, but no serious obstacles. Extraterritorial application of domestic law is generally sufficient to address offshore inbound restraints. As for systems clashes, work is in progress to decrease divergences and increase the convergences in the world. There are gaps in the law because law is national only (with small

exceptions in the WTO). But the developed nations do not generally view the gaps as their problem.

D. IS THERE A “BEST” COMPETITION WORLD ORDER?

We now ask what organization of competition systems of the world would be most felicitous from the vantage of each cluster. And finally, we ask how we might consolidate the perspectives for a world conception.

We shall by-pass the possibility of a full global competition agreement for the world centered in the WTO, because of the impossibility of such a project in most of our readers’ lifetimes in view of the trade bargaining dynamic that nearly killed the Doha Development Round. The alternative to a world framework competition agreement (and theoretically a complement for a future framework agreement) is convergence. This section focuses on the project of convergence. Here we begin with the outlook of the developed world.

1. CLUSTER 4

What regimes or organization of competition systems would be most felicitous from the viewpoint of the developed countries?

These jurisdictions are highly integrated into world competition and commerce, and they see their economic futures in these terms, despite some lapses into nationalism. They value convergences towards one set of rules and standards, more or less, for the world. This is particularly so for the jurisdictions that define the goal of competition law as consumer welfare or efficiency; for in theory there may be one set of rules and standards that will most inexorably increase aggregate economic welfare or world consumer surplus, or (more accurately for the US) proscribe behavior likely to decrease these sums. We just have to apply “sound economics,” it will be said, and we will “get it right.” There is one right or best set of rules (thus, the hedgehog), and it is “ours.”⁸

2. CLUSTER ONE

Would cluster-one countries embrace a strategy of convergence of substantive law and some procedures, if they had the resources to do so? Not likely. They may in many cases choose to follow US/EU laws (the notional standard-setters) because they believe the formulations are good for them, or in order to attract foreign investment and integrate their economy more fully into the world economy and thereby increase their chances for growth and a better standard of living for their people; but there are no particular benefits to them that would justify

⁸ A common set of rules and standards does not imply that there would be no conflicts. Some jurisdictions would have different market characteristics; they may have higher barriers; thus the same analysis may yield different results. Still, adherence to common rules and standards would lower the incidents of conflicts, hard and soft.

the idea of single “correct” antitrust standards. Lack of unity of nations’ law is not a harm to developing countries.

Cluster one countries and their peoples are not normally stakeholders in multinational corporations, which would, under unitary rules, save the significant costs of maneuvering through numerous disparate systems of law. The proportion of benefits that might trickle down to cluster one countries would not be perceptible. And indeed they might worry that the standard to which the law would be hinged would be a Western standard that might not be well fitted to their economies.

But if there were to be convergence and if, suspending disbelief, we hypothetically endow the cluster-one countries with the power to decree that their rules are world rules, would they do so? Not likely. They are not likely to presume that their rules are right for all countries of the world. Different context, conditions, capabilities and aspirations may indicate different rules and standards. Cluster-one countries want and need development and inclusive development; they need to jump-start opportunity and mobility where enterprise by all but an elite has been stifled, most people live in poverty, and systemic corruption and cronyism entrench the status quo. It is likely to be obvious to them that developed countries do not want or need the same thing. Thus, the little fox.

3. CLUSTER TWO

How meritorious is a world convergence project through the eyes of cluster-two nations? The answer is similar to that for cluster one. But cluster-two nations are likely to choose to adopt more of the rules of the mature jurisdictions because they are likely to find that more of those rules are good for them.

Through the eyes of cluster two, is there one right or best set of antitrust rules and standards? Would they, if they could, decree that their rules and standards are best for the world and the world should adopt them? Again, not likely. They too see clearly, from their experience, the impact of context on law and its application. Thus, the middle fox.

5. CLUSTER THREE

How meritorious is a world convergence project through the eyes of a middle-income developing country on an upward trajectory; a country with access to expertise but still with huge problems of poverty, exclusion, corruption, business concentration, and privilege? Cajoled convergence still would not be favored. Law that mirrors the West would probably attract more foreign investment. But South Africa can adopt what it wants of “international” rules and standards while preserving its choices. It understands, for example, that multinational businesses and the nations from which they hail would profit from a general world standard that rejects non-competition public interest considerations in merger analysis. But South Africa marches to its

own drummer. It *has* a public interest standard. Its law embeds a somewhat different mix of values and objectives – even though case outcomes usually coincide with those of the West.

Through the eyes of marker three, is there one right or best set of competition rules for the world? Would cluster-three policymakers, if they could, decree that their standards are best and the world should adopt them? Again, we answer: no. The terrains are too different. Cluster three is likely to choose eclecticism. Thus, the third fox.

E. CONSTRUCTING THE BIGGER PICTURE

1. Working towards what?

We have seen four perspectives, based on four levels of development. We have suggested that the crazy-quilt world needs a “dome,”⁹ loosely to guide coherence. It is in the interests of all to nudge the competition systems (and others) into sympathy with one another; a planetary system in the universe.

The developing countries’ needs suggest a world perspective that would give them the space to work towards their country’s development; space for modalities, agendas and pace of progress that would enable them to raise their peoples’ standards of living and integrate the nation into the world economy on terms that will enhance and not flatten the talents of their peoples; that will include them in the global economy and not replace them by the global economy. The combination of developing country needs and developed country aspirations suggests a world system with moving parts that both seeks common norms and respects diverse value hierarchies. The object is the synergistic alignment of the developing and developed country needs and aspirations, rules and standards, under the common dome.

2. Laying the lines for synergistic alignment – the first step

A first step on the path is listening to the four voices or at least the three most distinct: the least developed, the credibly emerging, and the developed. Thus, the first step involves appreciation for the diversity of conditions, values, ambitions, and possibilities for better-working markets with law to constrain its excesses, in view of context.

We leave our suggestions for bridges and pathways to sympathetic alignment to Chapter ... below. In this chapter we have shown the complex diversity of the developing countries of sub-Saharan Africa, each cluster with its own set of issues, ambitions, limitations and possibili-

⁹ See E. Fox, *International Antitrust and the Doha Dome*, 43 Va. J. Int’l L. 911 (2003).

ties for tackling the major competitive restraints that hurt their people. We chart some of our findings below. We use three clusters instead of four, for simplicity.

	Goals and aspirations	Biggest restraints	Biggest handicaps in attacking the biggest restraints
Cluster 1	Development Lifting up the poorest Inclusiveness Fair opportunity to compete Protection against abuses of market power Efficiency	By the state, SOEs, and “friends of the state” Abuses of dominance that barricade markets	No resources No trust or respect except as setter of prices and arbiters of bullying No trust in markets No markets Poor institutions
Cluster 3	Development and competitiveness	State, hybrid, private	Scarce resources, etc. As above but more likely to overcome the handicap
Cluster 4	Competitiveness Economic hegemony	US - cartels EU – also: the State abuse of dominance cartels	Finding better ways to cooperate in the world – staving off interference with own enforcement

	Is it important to consider public interest including distribution, jobs, sustainability of SMEs?	Does the competition authority have capacity for sophisticated economic analysis?	Do severe lack of resources and mandate for public interest imply legitimacy of rules and standards different from the developed world?
Cluster 1	Yes	No	Yes
Cluster 3	Yes, as constrained by rule of law	Yes	Yes
Cluster 4	US, EU - No	Yes	US – no EU – (?)

Biggest priority/mandate/concern:	Create and open markets	Avoid too much enforcement because it might chill effective competition
Cluster 1	Yes, high urgency	No, the contrary
Cluster 3	Yes	No, the contrary
Cluster 4	US – no EU - yes	US - Yes

F. CONCLUSIONS

We derive three major conclusions from this chapter.

1. Cluster one and cluster four countries are so far apart in terms of
 - a. the most serious market restraints that must be addressed before competition can work,
 - b. the character of the market, of institutions, and of governance, and
 - c. resources, experience, capacity and expertise of the authority

that one could hardly imagine competition law standards equally fit for the first and for the fourth clusters, even if standards especially designed for each would bear a large resemblance.

2. First cluster competition agencies face extreme challenges. The good that they do for markets is tightly circumscribed. They *can* do good, particularly in advocacy, and their role can be vital for the future of markets in their country, but they alone cannot lead their nations out of economic dysfunction, stagnation, and other persistent ills that set the economic environment. They are cabined by their systems.

3. The most appropriate global conception is a framework that facilitates the synergistic alignment of the several autonomous threads of rules and standards. Such a world order does not impugn the project of convergence. Quite the contrary, common norms are necessary to the concept of the dome, and to coherence in the world. The framework gives space to developing countries and indeed all countries to develop, grow, and continually adjust their law to markets. A formula for competition law in the world based on “efficient markets” in developed societies in which markets generally work and exclusion of the masses is not a systematic problem effectively leaves behind more than half the world.