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COMPETITION AND POVERTY REDUCTION

Contribution from Ms. Eleanor Fox

-- Session I --

This contribution is submitted by Ms. Eleanor Fox (Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, United States) under Session I of the Global Forum on Competition to be held on 28 February and 1 March 2013.

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IMAGINE: PRO-POOR(ER) COMPETITION LAW

-- Contribution from Ms. Eleanor M. Fox* --

1. Introduction

1. What would the antitrust world look like through the eyes of lower and lowest income people; those without connections and power? What, then, would we choose as the key initiatives? That is the question I attempt to answer.

2. This essay proceeds in three parts. First, it introduces a perspective that is focused on helping low income people and outsiders. It observes that competition law and policy is one among several links in the chain, all necessary links, to empower the less and least well off.

3. Second, it examines the question: From the perspective of the poorer population and outsiders, what should a good competition law provide? In this second category it examines the reach of the law, including coverage of state acts. The perspective is equally sympathetic to all –richer and poorer; but it is especially critical to outsiders, who otherwise might be frozen entirely out of the market. The second category also includes access to courts and applications of competition law principles.

4. Third, the essay examines competition *policy*, as opposed to law, and considers priorities and initiatives from the point of view of empowering and helping the poorer population.

5. The essay treats pro-poor competition from the point of view of lower and middle/lower income countries, rather than the low-income population everywhere.

2. Pro-Poorer Competition Law and Policy

2.1 The Concept

6. Why pro-poorer? My remarks are not about how to focus competition law and enforcement priorities on consumer products and services most critical to low income people. They are about a more dynamic challenge: creating an environment; creating a competition system that is more sympathetic to people without power than to people with power and connections; more sympathetic to outsiders than to incumbents, especially incumbents upon whom privileges have long been showered. The approach is pro-poorer because the policy solutions are not addressed to a category – “the poor.” There is no such thing as competition law for the rich (well off; enabled) and competition law for the poor.

7. The larger enterprise is not only about the potentials of competition. If our object is to address poverty, we would see the market system as one of a handful of sister systems and efforts, the success of each being a necessary condition for enabling the disempowered. This includes education, health care, infrastructure, job opportunities, and availability of capital for good ideas, all in a context of good governance, and that must include absence of pervasive corruption. The house of opportunity,

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participation, and ultimately growth is built one small brick at a time. The entire system, if it pulls together, can improve the lot of the half of the world living in poverty.¹ All of the efforts together can help to close the gap.²

8. The OECD has done valuable work to research and publicize the problem of the disempowered poor and the need for multidimensional interrelated solutions. Thus, we are told by the OECD's monograph, *Promoting Pro-Poor Growth*.³

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

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

v) **Policies need to tackle the causes of market failure and improve market access. Well functioning markets are important for pro-poor growth.** Market failure hurts the poor disproportionately and the poor may be disadvantaged by the terms on which they participate in markets. Programmes are needed to ensure that markets that matter for their livelihoods work better for the poor. Policies to tackle market failure should be accompanied by measures aimed at increasing economic capabilities of the poor.⁴

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

¹ Almost 50% of the people of the world live on less than US \$2.50 per day. Global Issues, The Human Development Report (2012). See www.globalissues.org/article/26/poverty-facts-and-stats.

² See Michal Gal, The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries in *COMPETITION, COMPETITIVENESS AND DEVELOPMENT* (Brusick et al., eds. 2004), p. 20.

³ *Promoting Pro-Poor Growth, Key Policy Messages* (OECD 2006).

⁴ The monograph continues: *In tackling poverty, perceptions of policy dichotomies have been misplaced...*

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

economic empowerment; and private sector development including competition policy to attack both private and public restraints.⁵

10. The documents generated by the OECD and its DAC stress the interfaces, the need for policy coherence, and the importance of working on all fronts at once to address not only the problem of the poor but the problem of all society when it ignores the poor and tolerates an increasing income gap without mobility.⁶ Others, also, demonstrate that poverty alleviation and sustained economic development require a set of coherent policies that promote inclusive growth.⁷

11. All of this is an argument for constructing a blueprint for a pro-poorer, pro-outsider system of competition law and policy and at least examining such a blueprint against alternatives. The question we turn to is: What would that blueprint be?

2.2 *What does Pro-poorer, Pro-outsider Competition Law and Policy Demand?*

12. One answer to pro-poorer antitrust is antitrust as usual but with a distinct priority for those restraints that harm the poor most – necessities of life; infrastructure cartels; thus, bread, milk, sugar, corn (or tortillas), cement, home and highway construction, and healthcare. Setting priorities and assuring that the gains get passed on to those in need is vitally important. This was a subject of the Santo Domingo meeting of the Latin American Competition Forum in September 2012. Excellent examples of pro-poor priorities are also richly documented in a number of the submissions for this forum. In this essay I concentrate elsewhere, casting the net in a different way.

13. I take a dynamic overview: What does pro-poorer competition law/policy entail by way of perspective or design? We could address two categories; one: low and lowest income developing countries, and two: the poorer populations of all nations. I consider here only the first. Many lessons from the first apply to the second.

14. My observations fall into three categories: 1) The reach and contours of the competition law, with particular regard to coverage of certain state anticompetitive acts, exemptions, and procedural vehicles to assure that the poorer/outside who suffer antitrust injury are beneficiaries not only in law but also in fact. 2) Formulation of substantive rules and principles. Is there a pro-outsider formulation? 3) Advocacy.

15. Before tackling these challenges, it is useful to note that we have a body of learning from which we can draw. Namely, what the authorities in poorer developing countries do. In my experience the competition authorities in poorer developing countries are intensely focused on alleviating poverty in their countries and lifting up the poorest people, both in terms of tearing down specific, observable barriers to

⁵ Anticompetitive restraints, both public and private, tend to hurt the poor disproportionately. Facilitating open market competition can substantially benefit pro-poor growth. See *Promoting Pro-Poor Growth: Private Sector Development* (OECD 2006), pp. 38-41.

⁶ See P. Collier, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2008), explaining how society puts itself at risk by ignoring “the bottom billion” and allowing the festering of extreme poverty and alienation.

⁷ See Daron Acemoglu and James Robinson, *WHY NATIONS FAIL* (2012), mustering evidence across nations and centuries that sustained growth can be produced only in regimes that value and practice inclusiveness; it can be produced only in societies whose institutions instill a sense of autonomy and legitimacy, as opposed to societies that nourish small groups of elites who extract wealth and trade in privilege. See also Collier, *supra* note 6; *THE WORLD BANK GROWTH REPORT* (Michael Spence, Chair of The Growth and Development Commission, 2006).

economic opportunity in their countries and in terms of providing essential goods and services at lower prices. They seek out the projects that are likely to have highest impact in this regard. Often, they find that the most harmful acts involve acts of the state or combinations of the state and private elites. The offenses they tackle are not always “traditional” antitrust; they might be on the margins because, for example, a principal culprit might be the state. The authorities take what action they can.

16. Thus, in Kenya, with 43% of the people below the poverty line, the competition commission identified as harmful to the millions of small poor farmers a law granting a monopoly to a state owned enterprise for the production of a major pesticide ingredient, and it mustered the forces to repeal the law.⁸ In Tanzania, the competition commission faced a press campaign by the leading cement producers to put duties of 35% on imports of cement in the name of saving jobs and the Tanzanian economy. This would have frustrated purchases of cheaper and better quality cement from Pakistan and India. The commission successfully countered the campaign by publicizing how much this duty would have cost the people in the road construction and housing sectors, in prices, in jobs, and in economic opportunity.⁹ In West Africa, the competition authority of the West African Economic and Monetary Union discovered that the monopolist of cooking oil in Senegal had procured state measures to bar imports of palm oil from Côte d’Ivoire. The competition authority required Senegal to repeal its restrictions. Meanwhile in Togo, the government had signed an agreement with a private transport company that gave it advantages that effectively prevented competitors from doing business in the country. The WAEMU competition authority directed the Togo government to recall the agreement, which it did.¹⁰

3. What Pro-Poorer, Pro-Outsider Means for Competition Law

17. With this background I return to the challenges. I do this by way of suggested propositions, for consideration.

3.1 *Setting the stage*

18. A pro-poorer, pro-outsider antitrust values a free and open marketplace without privilege or favor. So, too, you will say, does all competition law/policy; but this value is especially critical for those without power. Clogging the channels with privileged access especially hurts the outsider.

3.2 *The scope of the law: Does it reach the state?*

19. It has often been observed that undue¹¹ anticompetitive state acts are more damaging to competition and economic opportunity than anticompetitive private acts, because of the power of the state that will not be eroded by a better challenger. Poorer jurisdictions in which the state’s presence in the market is pervasive and cronyism is rampant are especially likely to feel the freezing-out effect; their good ideas for the marketplace never realized.

20. I am in the process of completing a research project with Deborah Healey of the University of New South Wales Faculty of Law under the auspices of the UNCTAD Research Partnership Platform on the extent to which national laws reach certain state and hybrid anticompetitive acts. We found a surprising

⁸ As told by Francis W. Kariuki, Director General of the Competition Authority of Kenya.

⁹ As told by Godfrey Mkocho, when Director General of the Fair Competition Commission of Tanzania.

¹⁰ As told by Amadou Dieng, Director of the WAEMU Competition Authority.

¹¹ States must of course be free to act in the interest of their citizens. Many of their acts will have anticompetitive by-products. “Undue” is a marker to signify a class of acts that are excessively and unjustifiably anticompetitive. See note 12 infra.

number of jurisdictions whose laws extend their reach beyond private offenders. To the extent that there are sensible provisions of competition law that can push back anticompetitive intrusions of the state, this is especially significant to opportunity and to legitimacy of competition law in nations with large poor populations. The state acts can smother economic opportunity. Therefore, this problem deserves a place of privilege on the agenda.

21. There are several fronts on which competition laws can be drafted to reach unduly anticompetitive state acts and measures. Following is a list of principles that can be derived from our study. They are listed below as normative principles. The easiest and most obvious comes first. Those that follow are more difficult to procure and implement.

1. The law should cover state-owned enterprises.
2. The law should cover state officials who facilitate an illegal cartel or bidding ring by inappropriate conduct outside of the course of their duties (conduct especially notorious in procurement).
3. If the law allows a state and local action defense to anticompetitive private acts, the defense should be narrowly drawn. It should not be available if the state action allows the private actor a choice to obey the competition law, and it should not be allowed if the state action is void (for example, preempted).
4. If the law allows a lobbying defense to private acts designed to procure government action, the defense should be narrowly drawn. Individuals must be allowed to petition government, but the defense should be lost if the petitioners use fraud or deception. Consideration should be given to disallowing the defense if it shields an otherwise illegal conspiracy with competitors, on the theory [if it is the case] that the right to petition would be sufficiently safeguarded by fully preserving the individual right.
5. The law should empower the competition authority to identify and challenge unduly anticompetitive state measures, or to trigger their challenge.
6. If the jurisdiction is a common market, or if it is a nation wherein acts of its states or provinces are subject to a rule of federal supremacy, the competition law combined with the federalism principle should embody the gist of the principle of European Union law requiring states to “disapply” measures that frontally undercut the competition rules. Here is a statement by the European Court of Justice of the principle that required Italy to disapply a statute creating a match-manufacturing cartel and assigning cartel duties to the Italian producers:¹²

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

¹² Further definition of what is an unduly anticompetitive state measure is necessary. One could start, for example, with disapplication of law that is a frontal assault on competition itself and not credibly required by public interest concerns such as crisis, as was the case with the Italian law that organized the match cartel that is the subject of the case from which the quotation is drawn.

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

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

⁴⁹ The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.¹³

22. If the six principles above could be adopted and enforced, the bite of the competition law, for pro-poor and pro-all, would be significantly sharpened.

3.3 *Exemptions and other non-coverage*

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

24. In many poorer and developing nations, more than half the people work in agriculture. They need a competitive market in agriculture, both as producers and consumers. The farmers need to get inputs at a competitive price. The farmers may be constantly exploited by big agribusiness or multinational buyers. Although all exploitation is not and should not be illegal, a broad exemption for agriculture would be disabling and disempowering.¹⁴

25. Banking exemptions likewise can be seriously harmful. Notoriously, in developing countries with large masses of poorer people and a small percentage of elite, un-connected individuals with talent and good ideas cannot get business loans. State property laws, which affect the value of collateral, combine to make poorer entrepreneurs a risk that banks avoid. A combination of competition and property law reform is needed to enable access to capital. Moreover, a banking exemption that leaves regulation to an often-captured regulator can add to monopolization and disempowerment.

26. Regulated industries in general present a challenge. All jurisdictions have to make decisions about the relationship between sector regulation and antitrust. The decision is not always easy because, on

¹³ The European Court continued:

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

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

¹⁴ However a provision authorizing certain co-operatives of small farmers can be important.

the one hand, overlap of authorities costs resources, but on the other hand, relinquishing antitrust authority might mean playing into the hands of a captured regulator. If Mexico, for example, gave all authority over the Telmex/Telcel giant to the telecom regulator COFETEL, the public would never have seen the halving of cell phone prices following the settlement of a monopolistic abuse case.¹⁵

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

28. Much of modern technology including that used in computers and smart phones likewise incorporates intellectual property. The poorer segment of the population desperately needs access. Access to information and communication technologies means access to business opportunity at home and in the world. Keeping modern technology within the reach of competition law is a critical pro-poor policy.

29. Extraterritoriality – Does the law reach off-shore acts that harm a nation’s citizens? It is especially important that developing countries’ competition laws reach off-shore conduct. The many examples that underscore the importance of extraterritorial jurisdiction include the world vitamins cartel, the world cargo and fuel oil cartels, and the Canadian/Russian potash export cartels. All of these cartels have seriously injured individuals in poor developing countries.

30. The potash cartel also injures the economy of developing countries and poorer nations’ prospects for engaging in the world economy. The potash cartel is a notorious example of serious harm that would be beyond reach of the most vulnerable victims if their law did not cover offshore acts. Potash is a major ingredient in fertilizer. Fertilizer comprises a large portion of the cost of crops. When farmers in sub-Saharan Africa pay monopoly prices for this input, tens of thousands of farmers can no longer profitably produce their crops; their families can starve; businesses, which would succeed on the merits, are crippled.¹⁶

3.4 Procedure

31. When poorer individuals suffer anticompetitive injury, can they get justice? Often, no. Systems tend to disfavor the poorer population. Especially in poorer countries that are run more by connections than merit, the poor do not have access to the system of justice.

32. This means that, for antitrust harms, it is especially important to open the channels for recourse. The two channels are public actions on behalf of the victims, and private actions by or on their behalf. In some jurisdictions the competition authority is tasked with obtaining monetary recovery to be distributed to the victims; but this is not usual. In many jurisdictions, private actions are allowed, but in some they are available only after the competition authority successfully proceeds; and in many jurisdictions that are under the political thumb of autocratic governments or simply lack the resources or stature to stand up to powerful offenders, the competition authority does not bring cases that should be brought. In many jurisdictions, there is no provision for class or representative actions or contingent lawyer fees. In some jurisdictions there are especially high burdens of proof not only of the violation but also of causation and injury.

¹⁵ See <http://cfc.gob.mx/images/stories/Publicaciones/CFC%2010-2012.pdf>.

¹⁶ See, for effect of the potash cartel in India, Frederic Jenny, Global potash trade and competition, The Economic Times, November 25, 2010.

33. To help poorer victims and others whose losses are a fraction of court costs, jurisdictions can incentivize those who might bring proceedings on their behalf. This implies class or representative actors. It is true that the class action mechanism can be abused; the European debate has illuminated many options to avoid abuses.

3.5 *Formulating and applying the law*

34. Is there a pro-poorer, pro-outsider view of best principles of antitrust law?

35. There are principles and perspectives that are more rather than less friendly to the poor. I assume here that we all want robust, efficient, dynamic markets, with players that are inventive. Such market prospects are good for the poor and outsiders. Indeed, competition on the merits often benefits the outsiders more than the insiders; there is no insider track. My discussion of pro-poor/outsider principles is within this framework.

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

1. *Discounting.* Poorer people need goods and services at lower prices. The freedom of sellers to discount is important. It has obvious efficiency properties. Private firms are often tempted to suppress discounting even absent hardcore cartels, sometimes in the name of preserving professionalism (minimum fees for engineers, doctors or dentists); sometimes in the name of protection against free riding. A pro-poor perspective would give weight to the importance of the freedom of discounting.
2. *Market definition choices.* Market definition is a construct. It may help us understand whether a putative violator of the law has market power. Often there are two or more good candidates for “the market.” In two cases among others, the South African Tribunal faced the problem when interests of the poor were at stake. In one case, a narrower market would protect the poor from a loss of competition that they depended upon; namely, low-priced credit-giving furniture department stores. In another case a narrower market would preserve a promising niche to reduce the cost of low-end health care insurance and bring masses of the poor into health care coverage for the first time (capitated managed care). In each case, the Tribunal opted for the choice that would most help the poor population. (In the health care case, it was reversed.)¹⁷
3. *Leveraging, foreclosure and access violations.* In numerous cases, especially abuse of dominance cases, the decision-maker is faced with the choice of more market access for those without power versus more freedom for firms with power. The US and EU *Microsoft* and *Intel* cases involved this choice. Freedom of access, or freedom to contest markets on the merits and not to be foreclosed from important segments by a dominant firm’s use of leverage, is a value that tends to favor those without power.¹⁸

¹⁷ See David Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act* (2012), pp. 100-112, describing the *J.D. Group/ElleRe department store* and the *Prime Cure/Medicross* cases.

¹⁸ Every case has its context, and there is a basic background question regarding the state of a nation’s competition law. In the 1980s, the US law was rightly recalibrated in favor of freedom of firms to act because the law had gone too far to proscribe transactions that could not have harmed competition and might have been efficient.

4. *“Efficient” foreclosures.* An emerging rule of law for conduct such as loyalty rebates would require proof that foreclosed competitors were equally efficient. Otherwise, it is said, the law would protect inefficient competitors. The “equally efficient” requirement might be inappropriate in poorer jurisdictions dominated by entrenched monopolies. Loyalty rebate programs are often if not usually devised by dominant firms threatened with unique competition by an inventive challenger and are designed to stave off the challenge. The inventive challenger typically has higher costs. In poorer developing countries, there is virtually never an equally efficient challenger.¹⁹ Moreover, entry or re-entry is often difficult. Competitive capital markets seldom exist, and a next new entrant is unlikely to be lurking on the sidelines. An older approach in the US may provide a more sympathetic and efficient standard in this context: defendants may defend that the plaintiff’s own ineptitudes caused the plaintiff’s injury.
5. *Excessive pricing* by jurisdictions that proscribe it. Poorer jurisdictions with very limited enforcement resources may need relatively simple rules to allow effective enforcement. In some cases and contexts, a simple rule that is also a good proxy is available, while in the absence of a simple rule, the violation may be practically impossible to prove. Thus, realistically, the choice is between a simple rule and toleration of violations. In the South African *Mittal* steel case,²⁰ Mittal, the successor to the state-owned and historically privileged firm ISCOR, was the only significant steel company in South Africa. It was “super-dominant.” It sold steel at the import parity price to manufacturers in South Africa, handicapping their competitiveness in world markets, while pricing its exports at the much lower world price. Mittal pegged large volumes of its steel for export and prevented the “export steel” from being sold on the South African market. The Competition Tribunal held that the above facts constituted illegal excessive pricing in South Africa. It so held in a context where there was an available non-intrusive remedy against Mittal: Don’t bar the export-designated steel from sale in South Africa. The Appeal Court reversed, given the particular language of the Act, and held that the plaintiff must prove that the home price was substantially above cost; but nonetheless it declared that the above facts were sufficient to shift the burden of going forward to the defendant. The Tribunal formulation was a progressive formulation that would have made potentially unmanageable cases manageable.
6. *Buyer power.* Suppliers in poorer developing countries are more likely to be victims of exploitative and disabling uses of buyer power than are suppliers in developed countries. Developed countries may adopt consumer welfare as their goal; but poorer developing countries may prefer to take account of all market harms, not just consumer harms. Small farmers are particularly vulnerable to harm from monopsonistic purchase and distribution practices and mergers creating buyer power, as documented in Zambia and Côte d’Ivoire,²¹ and to buying cartels, as in tea, sugar and tobacco in Malawi.²²

¹⁹ “Potentially equally efficient” may be the standard in the EU, but “potentially” also may be difficult to prove.

²⁰ *Harmony Gold Mining Co. Ltd. v. Mittal Steel Corp.*, Case 13/CR/Feb04 (South African Competition Tribunal 2007), *rev’d*, 70/CAC/Apr07 (Court of Appeal 2009).

²¹ See Thula Kaira, *The Role of Competition Law and Policy in Alleviating Poverty – The Case of Zambia*, at 133 (exploitation of out-grower farmers by ginners in Zambia, at 150-57); Bruno Dorin, *From Ivorian Cocoa Beans to French Dark Chocolate Tablet: Price Transmission, Value Sharing and North/South Competition Policy*, at 237 (exploitation of cocoa farmers by chocolate makers in Côte d’Ivoire, *passim* and 306-10), both in *THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS* (H. Qaqaya and G. Lipimile, eds., UN 2008). See also *Promoting Pro-Poor Growth: Agriculture*, Annex 3.A1, *Spotlight on Global Value Chains – Does it Mean Shutting out Small Producers?* (OECD 2006).

²² See CUTS (Consumer Unity and Trust Society, India) (2003), *Spine Chilling Experiences of Anti-Competitive Practices in Malawi*.

7. *Intellectual property.* The world is in the midst of ongoing battles of competition law versus intellectual property protection. At least on the margins of the current litigations, the poorer population may be better served by more competition law and less protection of intellectual property. This is especially so regarding questionably valid intellectual property as in “pay for-delay”; that is, infringement settlements under which producers of generic medicines accept large sums of money to stay off the market for a period of years. The poorer population is in great need of cheaper medicines, which are usually provided by the generic segment.

Communication and knowledge technologies are also caught in the storm of controversy between more IP protection or more competition law protection. Here too, the poorer and the outsiders are in great need of competitive markets.

This is not to ignore the argument that less IP protection may induce less investment in research and development. We can continue to learn from this on-going debate.

8. *Simpler rules.* We know that, for poorer developing countries, human and capital resources are very scarce. The competition authorities do not have teams of lawyers and economists ready to identify and analyze reams of documents and construct scores of models and studies. If there are simple rules that are good proxies, they need them. Some simple rules are available. For example resale price maintenance by firms with market power could be presumed illegal unless justified, as in the EU and much of the world. The *Mittal* rule of the South African Tribunal noted above, commends itself. And of course a per se rule or near per se rule against hard core cartel agreements is widely accepted. Some per se or near per se rules can be constructed in the other direction; for example, per se legality for certain low pricing behavior. In any event, the rules and regulations of the mature antitrust jurisdictions are too technical and too complex for poorer, resource-starved jurisdictions and we do a disservice by suggesting that they must be adopted and implemented by all nations in order to meet “international standards.”

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

38. The subject of efficiency from the vantage of the poorer populations requires one further observation. In antitrust we claim to pursue maximization of aggregate total or consumer wealth. Is this the measure most in the interests of the poorer population and outsiders? It is not so clear. We might compare the argument of Professor Ronald Dworkin (embracing utilitarianism, or the greatest good for the greatest number – which is effectively one person one vote) with the argument of Judge/Professor Richard Posner (embracing wealth maximization – which is effectively one dollar, or peso, or ruble, or rand, or renminbi, one vote).²³ As wealth maximization implies, the wealthier you are, the more weighted consumer sovereignty you have. Wealth maximization serves a function in terms of the GDP and competitiveness of nations; but utilitarianism may entail greater legitimacy for the non-powerful and the un-endowed. This is not an argument for undoing our system, but it may be relevant on the margin; for example, in considering whether to prefer firms’ freedom to discount to firms’ freedom to protect against free riders.

²³ See Ronald Dworkin, *Why Efficiency?*, 8 Hofstra L. Rev. 653 (1980); Richard Posner, *The Ethical and Political Base of The Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980). See also John Rawls, *A THEORY OF JUSTICE* (1971): justice requires maximizing the utility of those who are worst off. *Id.* at 150-61.

4. What Pro-Poorer, Pro-Outsider means for Competition Policy

39. We have looked above at competition *law*. We turn now to competition policy, carried out through advocacy.²⁴

40. Competition advocacy is extremely important for developing countries. It is particularly important for the reasons expressed by Angel Lopez Hoher, quoted below, and for these reasons it probably deserves a greater portion of the competition authority's budget in developing than in developed countries. Lopez Hoher says, regarding Mexico:

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

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

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

Third, advocacy, when it is successful (for example through the removal of artificial barriers to entry or market distortions), allows structural changes to competitive dynamics, shifting incentives permanently and across the board, instead of relying on the case-by-case threat of competition enforcement. ...²⁵

41. We might consider advocacy in two categories: first, advocacy against restraints by and within one's own government; second, advocacy to improve the international environment so as to protect against or seek to correct international and foreign restraints that harm the nation.

4.1 *Advocating against restraints by and within one's own state*

42. We spoke above about harmful and excessively restrictive state restraints, and the extent to which competition law might reach such restraints. A far larger number of restraints are likely to be unwise but not facially excessive. A challenge to them must lie in persuasion. The restraints might be of any dimension; they might be wholly domestic, or they might be cross-border. Examples include the Kenyan, Tanzanian, and West African incidents above. All of the incidents testify to the zeal of developing country competition authorities who seek out those restraints that cause the most harm to their people, especially their poorest people.

²⁴ Also important is the authorization of developing countries to undertake market studies. Studies of markets that appear not to be working well may produce valuable information that may lead to prosecution or legislative remedies.

²⁵ Angel Lopez Hoher, Competition Advocacy in Mexico: Lessons from the Past Decade, Competition Policy International, Aug. 27, 2012.

43. One of the most important avenues for competition advocacy is against one's own country's trade laws; especially antidumping laws. These measures are typically heavily supported by vested interests; but as the example from Tanzania shows, "the market" can sometimes win. Ironically, the competition authorities of many small developing countries have much more authority within their systems to advocate against protectionist trade laws than do competition authorities in many mature developed nations.

44. A more modest but also vitally important avenue concerns the country's regulatory laws. Regulation is often excessive and perverse, albeit also often supported by vested interests. The ICN has taken an important step in organizing a project under the aegis of the Advocacy Working Group to identify methodologies for assessing the pro- and anti-competitive effects of specific regulations.²⁶ This may be a first step towards developing a template for unwise anticompetitive regulation, and then advocating against it.

4.2 *Advocating for a modest international obligation*

45. The poorer developing countries are the most vulnerable targets of international restraints that hold back the economic growth of their countries. Despite frequent exhortations from the West that it wants the peoples of developing countries to be able to help themselves, the countries pick and choose their targets of liberalization, often clinging to protection and subsidy where it hurts developing countries the most.²⁷ The West hands out more money in aid to developing countries than the developing countries lose from disempowerment by reason of the West's tariffs, anti-dumping laws, and subsidies,²⁸ let alone export cartels. The West proclaims that export cartels are not their problem; the harmed nations can sue the offshore cartelists. But the poorest nations do not have the resources to do so. Moreover, as in pollution, stemming the offense at its source is most efficient.

46. Developing countries might pursue a positive agenda of advocacy. In more propitious times the European Union proposed a helpful framework,²⁹ which could have been implemented in the context of the WTO but could also be implemented as a stand-alone project. In the spirit of the EU proposal, countries can and should have regard for the harms they cause, especially to developing countries, and especially when developed country's nationals are the violators of clear and shared principles of antitrust law (i.e., cartels). The developed countries can and should revise their laws, extending jurisdiction so as to make hardcore export cartels illegal.³⁰

47. We can draw inspiration from an environmental convention; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.³¹ Under the Basel Convention, if a

²⁶ See also OECD (Competition Assessment Toolkit, www.oecd.org/daft/competition/competitionassessmenttoolkit.htm, providing a method for identifying unnecessary regulatory restraints on the market.

²⁷ Martin Wolf, *Why Globalization Works* (2004). See passage, *Hypocrisy of the rich*, pp. 218-18.

²⁸ Wolf, *supra*.

²⁹ Working Group on the Interaction between Trade and Competition Policy, World Trade Organization, *Communication from the European Community and Its Member States*, WT/WGTCP/W/184 (Apr. 22, 2002). The Working Group has been disbanded.

³⁰ See Eleanor Fox, *Testimony Before the Antitrust Modernization Commission, Hearing on International Issues in Washington, D.C.* (Feb. 15, 2006), *available at* www.AMC.gov; *see also* Special Committee on International Antitrust, ABA Antitrust Section, *The Special Committee's Report 83-90* (Sept. 1, 1991).

³¹ Mar. 22, 1989, 1673 U.N.T.S. 125.

signatory country prohibits import of hazardous wastes, all other signatories must make the shipment of hazardous wastes to that country illegal. The trading nations could adopt this model for hardcore export cartels, which are the hazardous wastes of antitrust.

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

49. The antitrust family of nations have gone a long way to cooperate with one another on enforcement. The OECD, ICN, and UNCTAD are important forces and fora for cooperation. Regional fora in Africa, Latin America, and Asia likewise facilitate cooperation, as do multitudinous bi-lateral agreements. Cooperation is particularly needed by poorer and developing countries, which face extraordinarily scarce resources and whose poor populations are often the targeted victims. Extra steps in this direction will help the poor.

5. Conclusion

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

1. Competition is a vital pro-poor, pro-poorer policy. Access to markets free from artificial restraints empowers outsiders and tends to enhance mobility, fostering inclusive development. Lower prices of necessities obviously help the poor. But competition law and policy cannot do all of the work. There are other necessary conditions: food, health, housing, infrastructure and access to capital – which in turn are unlikely to be provided without good governance and rule of law. The multidimensional synergies create a virtuous circle.
2. What do poorer populations and outsiders need the most in terms of good competition law? First, access to markets means not being frozen out by the pervasive restraints that attend statism and cronyism and those that are bound to result from wide exemptions. This problem is not unique to the outsider population but it is so critical to empowerment and inclusive development that it may rise to first place on the agenda. Second, there *is* a pro-poorer perspective on competition laws, procedurally and substantively. Three guides, among others, emerge from the discussion above. (i) Thought should be given to procedural vehicles that make the justice system accessible to the poor. (ii) It is important to seek out simpler rules that make economic sense and that avoid the need for armies of lawyers and economists. When the opportunities for simple rules arise, authorities and courts should take them, lest we create a paradox that recovery for antitrust offenses is a luxury of those who are better off. (iii) How to get efficient, innovative and dynamic markets is indeterminate with a range, and, within this range, there is a perspective that is more pro-poor and less pro-insider. That perspective values open markets, rivalry, and freedom of firms to charge sustainably low prices.
3. What do the lower-income nations need the most in terms of good competition policy? First, domestic: Advocacy against unwise anticompetitive state restraints, especially in areas likely to attract popular support and where success is within reach. Second, international: Advocacy for rules or norms to oblige nations to help stem or rectify the harms they cause.

51. Pro-poorer competitive law and policy is not a magic bullet to alleviate poverty. It is one of panoply of policies that promise to open more channels and deliver better outcomes, little by little. As with all proposals there are difficulties of implementation and there are trade-offs. It is timely to debate them.