# Introduction

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One may be forgiven for asking what exactly is the purpose of this book. What exactly is meant by competition law and development? There are a few possible answers to this question. The most obvious answer is that it is about competition law in developing countries. Given that the vast majority of the countries in the world are developing countries—after all, there are only thirty-four OECD (Organisation for Economic Co-operation and Development) countries—there is a serious dearth of attention to developing countries in the international and comparative competition law scholarship, much of which has been preoccupied with the United States and the European Union.

Competition law is a regulatory tool to improve societal well-being. Competition law is a regulatory response to a market-based organization of the economy. As such, competition law is the backstop to correct market malfunctions. The market malfunction central to competition law is the exercise of monopoly power. Competition law and policy work within the larger development context to create a more competitive environment.

Competition law and policy has the potential to play an important role in greater economic development through the creation of competitive markets in the developing world. Competition law enforcement promotes higher economic growth. As competition reduces entry barriers, incumbent firms can no longer be supported through monopoly rents.[1] As a result of competition,

firms become more efficient.[2] As trade and regulatory liberalization reduce some of the most obvious government barriers such as tariffs, the remaining government barriers—mixed government and private anticompetitive behavior—become more important concerns. These factors have made the implementation of effective competition law and policy more pressing. However, competition law does not operate within a vacuum. Competition law enforcement and broader competition policy that includes competition advocacy is a function of the prevailing economics and politics of any country at any given time.[3] In other areas of law the role of transplants and their effectiveness has been studied at great length. One question that this book asks is whether or not the competition law and policy transplant from Europe and the United States can "take" in the developing world or whether the developing world experience suggests a need for a different analytical framework.

There are reasons that developing countries may require a different analytical framework. The political and economic environment of developing countries often differs significantly from that of developed countries in ways that may have serious implications for competition law enforcement. The competition authorities and courts may lack the expertise or the resources to undertake sophisticated effects-based analysis. The importance of informal economy in these jurisdictions may challenge the usual understanding of the role of market definition and the assessment of market power. The business community may desire more clear-cut rules to facilitate compliance; such a need may be augmented by the lack of expertise in competition law in the domestic private bar. Corruption may be more prevalent in developing countries, which may undermine the impartiality of the enforcement agency and the courts. The domestic political system may be structured in such a way that independence of the enforcement agency from the executive branch of the government may be undesirable or perhaps unattainable. These considerations may bolster the case for legal rules that allow for less discretion and hence less room for arbitrary and politically influenced decision making by the enforcement agency.

The need to devote greater attention to developing countries is also justified by the changing global economic reality in which developing countries, especially China, India, and Brazil, have emerged as economic powerhouses. Together with Russia, the so-called BRIC countries have accounted for 30 percent of global economic growth since the term was coined in 2001.[4] China overtook Japan to become the second-largest economy in the world in 2010.[5]

According to the International Monetary Fund, China is expected to overtake the United States as the largest economy in the world in 2016.[6] In this sense, developing countries deserve more attention not because of any justifiable differences from developed countries in competition law enforcement, either in theoretical or practical terms, but because of their sheer economic heft. The role of state-owned enterprises in their economies also adds a further complication to the conceptual apparatus of competition law.[7]

It would be a gross omission in international competition law scholarship to ignore how competition law is formulated and enforced in jurisdictions accounting for such a significant share of the global economy. The importance of these markets may also impact the enforcement of competition law as these jurisdictions can hold up mergers or potentially have a different set of priorities for single-firm conduct. With greater resources, these countries may become more active in the provision of technical assistance to other countries in their respective spheres of influence. Already Brazil provides antitrust technical assistance to other agencies within Latin America.

What has attracted the most attention in particular is merger control in India and China and the treatment of the interface of intellectual property and competition in China. Given the importance of the Chinese and the Indian markets, nearly every multinational corporation has a substantial presence in both countries. This in turn means that every merger or acquisition involving these corporations that exceeds the notification thresholds under their respective merger control regimes must be reported to and approved by the Ministry of Commerce (MOFCOM) in China and the Competition Commission in India. In 2008, soon after the Anti-Monopoly Law came into effect, China's nascent merger control regime flexed its muscles when MOFCOM rejected Coca-Cola's proposed acquisition of Huiyuan, which was one of the largest fruit juice manufacturers in China. The treatment of the intellectual property–competition interface in China has similarly been subject to close scrutiny given the size of the Chinese domestic market and the country's weak record in enforcing intellectual property protection. Multinational corporations have expressed concerns that China will use competition law to encroach upon intellectual property rights.

What might the emerging competition regimes learn from more established ones? One would think that after 100 years, the goals of antitrust would be clear both in the United States and around the world. Unfortunately, this is not the case. Competition law systems (including the United States) may have a number of complementary or even contradictory goals.

Although for developed countries the main driving force of their competition law is the efficient allocation of resources, this is not always the case in developing countries where efficiency concerns may in more fundamental ways be at odds with goals such as employment, poverty alleviation, and the empowerment of previously marginalized groups. The transplantation of competition law to a developing country setting may raise challenges to the traditional understanding of competition law and its role/function in public policy.

A first-order question is whether competition is the best way to promote economic development. Some assert that productivity is the key to economic growth and poverty alleviation and that distortions and inefficiencies in product markets are the most significant impediment to productivity growth. It is through competition in open markets that economies attain gains in productivity and hence the best growth prospects. The key to economic growth is to get government out of the markets and let businesses do their work. If this view is correct, competition law enforcement and competition policy reforms will play a pivotal role in any growth strategy.

Detractors of this competition-primacy view argue that there are other strategies that are equally, if not more, effective in promoting economic growth. A number of academics point to the experience of the Asian tigers as examples of the successful deployment of industrial policy to achieve phenomenal economic growth.[8] The implementation of industrial policy in most cases will require a de-emphasis of competition law enforcement, as attested to by the experience of Japan between the 1960s and the early 1990s. The resolution of this debate and the role of competition in economic development in general have important implications for competition law development in developing countries.

The terms "economic growth" and "development" have been used interchangeably thus far. Not every development scholar, however, believes that the two are the same. Economic growth refers to an increase in GDP per capita. Its focus is on output or income growth. Development is generally given a broader meaning. Nobel laureate Amartya Sen famously argues that economic development should not be parochially focused on growth in income, but should aim to increase human capability so as to allow individuals to take advantage of life's opportunities and to fulfill their full potential.[9] Development should endeavor to increase the freedom of individuals to pursue their life goals. This freedom-based approach to economic development rejects the implicit premise of the growth-focused view that the best way to

achieve broad-based improvement in living standard is to increase social welfare and let the benefits trickle down along the social ladder.

The freedom-based approach also deviates from the growth-focused view by emphasizing the importance of education and health care. It is only through education, which can only be achieved in good health, that the poor can improve their quality of life. A singular focus on growth in GDP per capita would not suffice. This debate between economic growth and economic development has important implications for competition law enforcement. The compatibility between the fundamental assumptions of competition law and the growth-focused view should be apparent. Implementation of the growth-focused view would probably require few adjustments to competition law as it is practiced in the United States and the EU. If one were to subscribe to the freedom-based approach to economic development, however, one might need to incorporate in competition law analysis special considerations about the impact of competitive behavior on the poor's access to education, health care, and other essentials in life.

This book grapples with these themes and provides a number of viewpoints of what competition law and policy means in both theory and practice in a development context.

Chapters 1 through 5 are, in a sense, stand-alone chapters in that they do not directly speak to each other. Yet we find that this is exactly a problem with how different groups within the competition law and development debate view each other—within various intellectual silos. One view suggests an organic growth of competition law that is country specific given political and economic history and path dependency. As such, if one can create a set of best practices, it is not clear how to move countries to these best practices.

An alternative viewpoint suggests that there is a singular economic model that leads to development—the embrace of the market economy. Those economies that have embraced the market the most have been rewarded with greater growth and development. However, if the neoliberal view of the supremacy of market economy is correct, then the development of antitrust in the United States is an odd choice of a standard bearer of the market view. As a matter of institutional design, it would be folly to recreate the American competition policy system elsewhere given the various malfunctions of the U.S. approach, but it is precisely this approach that many advocate.

The expectation of policy makers and many academics is perhaps that developing world countries should not repeat the same mistakes that developed competition regimes have made. Many in the developing world, however,

take issue with this paternalistic approach. They wonder if it is even possible to hold such assumptions about the goals and practice of competition law and policy given that the larger political and economic systems of developing world countries differ significantly from developed world ones. Yet another approach is to think outside of the traditional competition law and industrial organization economics paradigm and to draw from development economics, a subfield of economics that historically has been marginal in competition law and economics debates. When taken holistically rather than as stand-alone chapters, this first set of chapters grapples with these tensions.

In Chapter 1, David Gerber addresses broad issues of competition law and development and convergence. Gerber examines the various assumptions behind the economics-based model of competition law. Two themes emerge in his chapter. The first shows that claims (primarily in the United States and in Europe) for some sort of convergence of competition law and policy lack well thought out and empirically supported assumptions about developing countries. The second notes a fundamental tension between the goals of economic development on the one hand and convergence as global policy on the other, given the state of play of competition law and policy discussions. In particular, the mechanisms for convergence are not well thought out given their inconsistency with domestic intentions and institutional realities.

In Chapter 2, a companion to Chapter 1, Ioannis Lianos, Abel Mateus, and Azza Raslan sketch a parallel intellectual history of development economics and competition. Their starting point is that the economic principles underpinning development policies have been different from those enshrined in competition law. Hence, traditional competition law and competition economics scholars have ignored so far the important theoretical and empirical contributions of development economics. Yet development economists have also viewed for some time the neoclassical price theory–inspired competition law as antithetical to the objective of economic growth they valued, with the consequence that their policy suggestions undervalued the importance of competition for economic development. However, the authors remark that the focus since the 1990s of both development economics and competition economics on growth and institutions opens the door to a more dialectical interaction between competition scholars and development economists that could greatly contribute to the emergence of a competition law paradigm that better fits developing countries' concerns.

In Chapter 3, Aditya Bhattacharjea questions also the assumptions behind today's competition law convergence by undertaking a historical analysis of

the development of competition law around the world. He reviews the history of competition law in a number of jurisdictions to illustrate that the actual reasons for adoption of competition laws in most industrialized countries were rather different from some sort of efficiency standard, as were the objectives that influenced their interpretation and enforcement for several decades. The second part of his chapter examines how much the experiences of developing world countries are different from those of the developed world countries that preceded them in the establishment of competition law systems.

In Chapter 4, Tom Arthur suggests limits for competition law convergence around the U.S. model. His detailed account provides historical analysis of the developments that shaped the U.S. competition law system, a system that he argues is not something that should be replicated abroad, given a number of flaws of the U.S. institutional design. He suggests that a number of lessons could be learned from the U.S. experience. The first and most important lesson from this experience for a developing country is the adoption of a more efficient mode of competition law enforcement than the U.S. system. Second, the American experience with competition law is not a useful guide for keeping government interventions to a reasonable level. For developing countries that lack a mature legal infrastructure similar to the United States, the third lesson is that effective legal and political institutions must precede significant competition law enforcement. Indeed, he argues that without such institutional support a competition law regime may do more harm than good, as the competition law system may become yet another form of institutional rent seeking.

In contrast to the previous authors, George Priest (Chapter 5) offers what he terms an "absolutist" view of the importance of the market as the default institution for effective economic growth and development. The competition law absolutist view rejects multiple intellectual approaches and purposes with respect to competition law. Instead, Priest proposes that competition law should be harmonized substantively because there is a single best-defined competition law to improve societal welfare. This law is based on market-based principles that will not be overwhelmed by local political discontent with market-based policies. In this sense, the absolutist critique should have equal policy salience among "developed" countries in Europe and North America as among more developing countries.

Chapters 6 and 7 address some of the institutional issues at play in competition law and development. In Chapter 6, Vivek Ghosal examines three issues. The first is a question of institutional design: should a developing

country establish a competition authority that covers the full range of enforcement activities or an agency with a more limited agenda, such as cartels? In answering, Ghosal draws upon the economics of production (scale and scope). Ghosal then addresses agency independence. In doing so, he uses models of regulatory behavior under political and interest group dynamics to address how and when competition agencies can achieve independence to reduce distortions of optimal enforcement-related decision making. In the final part of his chapter, Ghosal addresses optimal agency size, using data from a selected sample of developed and developing countries. One important conclusion of this chapter is factual—Ghosal has discovered a paucity of standardized data and important conceptual problems behind data definitions across competition agencies. These data limitations impact a number of assumptions regarding competition agency development.

Offering some empirical findings to go along with some theorizing on how to facilitate effective competition enforcement, Abel Mateus (Chapter 7) finds that a number of factors restrict the effectiveness of a competition enforcement regime: (1) vested interests that dominate economic policy making, either through legal means (party financing, lobbying, influence in the nomination of the government, senior officials, or the council of the national competition authority [NCA]), or illegal means (corruption, abuse of public authority, or cronyism); (2) inefficient public administration and regulatory systems that limit the capacity and effectiveness of public bodies, including the NCA; and (3) inefficient judicial systems that preclude the sanctioning of violations of the competition law.

Chapters 8 through 13 address particular policies that competition systems around the developing world undertake. Regarding cartel policy, D. Daniel Sokol and Andreas Stephan (Chapter 8) note that while enforcement of anticartel laws has the potential to benefit consumers in developing countries, enforcement has been spotty. They identify how developing world competition agencies can best prioritize cartel enforcement. With limited resources and institutional challenges that are distinct across countries, no one area of emphasis is without its risks. However, they suggest a mix of domestic cartel enforcement focused on high-impact sectors (in terms of media awareness) where cartel members are not politically powerful and a similar strategy involving government procurement. International cartel enforcement should play a lesser role, as should cartels with a lower media impact, as developing a procompetition culture is a building block to more successful cartel enforcement across the economy.

In Chapter 9, Barak Richman combines competition law enforcement with contractual rights. It has become conventional wisdom that effective competition policy is a necessary ingredient to economic development. But competition policy, he argues, should be secondary to the more pressing priority of securing contract rights, and sometimes competition policy is at odds with the priority of securing contract rights. This is because, in underdeveloped legal systems, cartels are sometimes necessary to enforce contracts. When courts and other public instruments are unable to reliably enforce contracts, private ordering systems often arise to mobilize a group of affiliated merchants to direct coordinated punishments against parties who breach contracts. Yet such coordinated punishment is akin to a group boycott that normally invites antitrust scrutiny. His chapter focuses on this tension between the well-understood harms of group boycotts as restraints on competition and the unappreciated benefits of group boycotts as a procompetitive solution to court failures.

Cartel violations also require effective remedies. In Chapter 10, Harry First examines two parts of the U.S. competition system in the area of remedies—private treble damages and criminalization and incarceration of antitrust violators. First argues that, although most other countries do not embrace these remedies as fully as the United States, these two remedies would be useful in other countries. He offers some case studies of the export of these remedies abroad.

Competition advocacy plays a significant role in economic development as government-imposed restrictions on competition may be just as significant, if not more so, than private barriers. In Chapter 11, Allan Fels and Wendy Ng argue that general advocacy—the traditional method of competition advocacy—has significant limitations, particularly in developing countries. They propose an alternate approach to competition advocacy, which they term a "comprehensive national competition policy" approach. This approach (Australian in design) has been incorporated by the OECD in its Competition Policy Assessment Toolkit. They analyze the experience of national competition policy in Australia and elsewhere and its relevance for developing countries.

In Chapter 12, Ariel Ezrachi notes that structural changes in competition law enforcement globally have broader impact for the developing world. The unilateral enforcement approach has been supplemented by cooperation across agencies at bilateral, regional, and multinational levels. These cooperative systems (whether binding or voluntary) have increased convergence and

coordination of competition enforcement across national competition systems. Yet, as Ezrachi points out, cooperation cannot override the domestic nature of competition enforcement. In this sense, domestic enforcement may not properly account for the totality of effects. This in turn may lead to suboptimal enforcement. Ezrachi explores this phenomenon through the lens of "transfer of wealth." He suggests that unless remedied, under-enforcement may yield a transfer of wealth across jurisdictions. As such, Ezrachi argues that effective domestic competition enforcement along with long-arm jurisdiction may remedy under-enforcement elsewhere.

In Chapter 13, on the intellectual property–antitrust interface, Thomas Cheng argues that developing countries require different approaches from those commonly advocated. The nature of different approaches is not merely as between developed and developing countries. Rather, developing countries' approaches need to differ from each other based on their stages of economic development, per capita income, and technological capacity. Indeed, Cheng suggests that it may make sense to adopt industry-specific approaches within a single competition system.

Chapters 14 and 15 provide country-level case studies of how complex in practice competition law and development is. In Chapter 14, David Lewis offers a ten-year retrospective on the implementation of competition law in the South African context. The experience has been mixed but has had some significant positive developments. In the first decade the South African competition authorities focused on private anticompetitive conduct. To continue enforcement in this area, Lewis argues, the South African authorities must aggressively assert their jurisdictional exclusivity in the private sphere. Lewis also suggests that the second decade must focus on confronting public anticompetitive conduct. Yet, as he notes, the transition from combating the former to the latter is fraught with difficult political challenges.

The implementation of competition law can be messy given legal, economic, and political factors that come into play. In Chapter 15, Rahul Singh provides a case study of clashing interests that have been implicated in the rollout of India's merger control regime. He suggests that the economics of merger control regulation is a bundle of contradictions (partly due to interest-group lobbying). On the one hand are the relatively high jurisdictional monetary thresholds required for the applicability of the merger control, and on the other hand is the nascent government proposal to subject all pharmaceutical merger cases (irrespective of the jurisdictional monetary thresholds) to the Competition Commission of India's notification and approval process.

This case study of implementation of merger control in India illustrates the type of problems that many young competition regimes have in implementing not only merger control but competition law more broadly.

Overall, this book fills a gap in the extant literature by identifying conceptual issues with competition law and development, exploring areas for focus and change, and offering cautionary tales in both developed and developing world contexts on the limitations of existing institutions and enforcement for bettering the lives of consumers around the world.

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