Competition Law and Policy in the Developing World

By Alexander Spano*

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Competition Law and Development is the second book in the new series Global Competition Law and Economics edited by D. Daniel Sokol, Thomas K. Cheng, and Ioannis Lianos and published by Stanford University Press. This volume provides “a number of viewpoints of what competition law and policy means both in theory and practice in a development context.” The reasons for devoting greater attention to developing countries are factual; as the editors note, developing countries now constitute the vast majority of countries in the world. Furthermore, global economic reality demonstrates that developing countries—especially China, India, and Brazil—have emerged as economic powerhouses. As such, competition law has become a global phenomenon.

Various rationales explain the proliferation of competition law in developing countries. First, developing countries with emerging market economies recognize that competition law and policy can play a major role in accelerating economic transition and development. In addition, developing countries often consider competition law as not only a tool to foster market efficiency, but also an instrument to check the market behaviors of large foreign corporations in recently privatized sectors of the national economy. Finally, the enactment of competition statutes is also the result of free trade agreement terms or membership to international organizations. For instance, most members of the United Nations (UN) subscribe to the UN Set of Principles and Rules on Competition containing “substantive possible elements for a competition law.” Furthermore, for countries like Cambodia and China, accession to the World Trade Organization has brought additional pressure to implement competition law.

In deciding which competition model better fits their domestic context, developing countries study solutions adopted under other competition law systems, especially those adopted in the United States and the European Union (EU). Given the number of provisions borrowed from Western jurisdictions, competition codes in developing countries can often be considered a legal transplant shaped in the mold of Western...
Because of their limited experience with competition law, developing countries gain numerous advantages by borrowing terminology and notions from Western jurisdictions. Developed countries have a longer tradition in this area, and the resulting competition legislation has proven to be successful in establishing and maintaining a competitive market environment. In particular, the enactment of comprehensive competition laws has allowed the United States and the EU to achieve integrated and flexible markets where economic actors are free to compete on merits; developing countries want to emulate these results. Thus, careful study of Western models has been very useful for developing countries when assessing the potential relevance and viability of foreign solutions to their particular circumstances. Ultimately, the use of well-known terminology also enhances the perceived legitimacy of developing countries’ competition laws at the international level.

One question that *Competition Law and Development* addresses is whether the legal transplant of competition policy and law from the United States and the EU has been successful, or whether the experience of developing countries suggests a need for a different analytical framework. The competition law system of each country differs substantially with respect to its tradition, goals, and procedures. And the enactment of competition law is often the result of a long and tortuous process reflecting internal divisions and political compromises. Furthermore, competition law experiences different evolutionary phases closely correlated with the domestic economic context. Certainly, although no competition law system is universally applicable, a longer tradition results in greater experience and effectiveness when applying competition law in concrete cases. Thus, competition agencies in developing countries are likely to face challenges similar to those previously addressed by their counterparts in developed countries.

Moreover, despite differences in the economic and political context between developed and developing countries, there is a general consensus regarding the type of practice competition law should regulate or prevent. For instance, competition law should prevent firms from entering into anti-

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competitive agreements, whether horizontal or vertical. Firms with a dominant position in a given market should also be prohibited from abusing their market power by implementing exclusionary practices with the purpose or the effect of preventing market competition from other firms. Finally, competition law should regulate mergers and acquisitions (M&A) that may have an anti-competitive effect by favoring collusion or leading to a monopolistic status or dominant market position.

Again, however, different competition law systems can conceivably pursue different goals. Developing countries, given their limited experience and competition law culture, do not necessarily consider economic efficiency or consumer welfare as the primary goals of their competition law regimes. Rather, developing countries often perceive competition law as an instrument to pursue a multiplicity of objectives, including public and industrial policy goals.

One pertinent example is merger policy. Generally speaking, M&A serve a variety of objectives such as achieving economies of scale, improving industrial structures, and enhancing firm competitiveness. But by having the potential to affect market structures, M&A may restrict competition and reduce the number of competitors. In this regard, M&A rules are unanimously recognized as a vital part of modern competition law systems. In developing countries, however, concerns about national security and excessive foreign ownership and the willingness to promote small and medium domestic enterprises also play a major role in merger policy either explicitly or implicitly. In this sense, the transplant of competition law in developing countries seems to raise challenges to the traditional understanding and role of competition law and policy.

In grappling with these and other themes, the editors gather a high-profile team of contributors with substantial experience in the area of competition law. The variety and diversity of their positions greatly add to the volume by offering different perspectives on such issues. In Chapter 1, David Berger addresses economic development and global competition law convergence issues. Gerber examines a pivotal assumption of global convergence strategy: namely, that most countries will voluntarily embrace the economics-based model of competition law. Two main themes emerge from Gerber’s analysis. First, claims (primarily in the United States and in Europe) for competition law convergence are often based on inadequately supported assumptions about developing countries. The second theme highlights the fundamental tension between the goal of economic development and the strategy of global competition law convergence. Specifically, Gerber notes that academic literature pays little attention to reducing this tension, at least in part because of excessive reliance on convergence as the only available strategy for improving the legal framework for transnational markets.

Ioannis Lianos, Abel Mateus, and Azza Raslan’s initial argument in

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Chapter 2 is that the economic principles underpinning development policies have been dissimilar from those enshrined in competition law. On the one hand, traditional competition law and economics scholars have paid too little attention to the valuable theoretical and empirical contributions of development economics. On the other hand, development economists have traditionally considered the neoclassical price theory-inspired competition law as hostile to the goal of economic growth. A better interaction between development economics and competition policy is now possible. The authors assert that the rebalancing, since the 1990s, of both development economics and competition economics toward growth may favor the establishment of a sustained dialogue between competition scholars and development economists, leading to a more suitable approach to competition law for developing countries.

In Chapter 4, Thomas Arthur argues that competition law convergence around the U.S. model is arduous for developing countries. Although these countries can learn much from the U.S. competition law doctrine, Arthur asserts that this framework should not be replicated abroad and concludes with lessons for developing countries from the U.S. experience. For instance, developing countries should adopt a more efficient system of competition law enforcement. Further, Arthur emphasizes that the establishment of a predominantly market economy is not incompatible with governmental efforts aimed at promoting economic development. Finally, the creation of effective legal and political institutions represents a prerequisite for substantial competition law enforcement. Without an adequate legal and political infrastructure, any competition law regime may do more harm than good. In the words of the author: “This may be the most important lesson from the American antitrust experience.”

George Priest explicitly admits that the ambition of Chapter 5 is purposively provocative and conflicts with one the central theses of a number of chapters in the book. Priest argues that much of the debate on the creation or application of competition law in developing countries is mainly influenced by the view that, because the economic conditions in these countries profoundly differ from those in developed countries, the competition law systems of the former should also be different. Priest challenges this line of reasoning by presenting what he calls an “absolutist” view of competition law. He believes that a century of study and application of competition law have proven the existence of a set of principles that, if effectively implemented, maximizes consumer welfare, enhances economic growth, and reduces poverty. Thus, in Priest’s absolutist view, competition law should be substantively harmonized around the world “because there is a single-best defined competition law

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14 George L. Priest, Competition Law in Developing Nations: The Absolutist View, in COMPETITION LAW AND DEVELOPMENT, supra note 1, at 79.
Chapters 6 and 7 examine a number of institutional issues related to competition law and development. Abel Mateus argues in Chapter 7 that, although competition law has been implemented in more than 100 countries around the world, its enforcement has also encountered major obstacles in developed countries. In particular, Mateus examines the role enforcement should play in different policy regimes, the role international organizations should have in the largest competition policy framework, and how European Commissions should push for a spread of the *acquis communautaire* in competition policy around its neighbor countries. In addressing these issues, Mateus’s analysis offers a series of empirical findings coupled with theories on how to facilitate the enforcement of competition law. The author identifies a set of factors restricting the effectiveness of a competition law regime: (1) vested interests that dominate economic policymaking, either through legal or illegal means; (2) inefficient public administration and regulatory systems limiting the capacity and effectiveness of public bodies including national competition agencies; and (3) inefficient judicial systems that preclude sanctions for violating competition law.

The next six chapters examine a series of policies undertaken by competition law regimes in developing countries around the world. In Chapter 8, Daniel Sokol and Andrea Stephan focus on cartel policy in developing countries. Their analysis begins by arguing that the effective enforcement of anti-cartel rules has the potential to increase consumer welfare in transitional economies and to improve the competitiveness of their domestic markets. Following this line of reasoning, Sokol and Stephan identify how competition agencies in developing countries can best prioritize cartel enforcement. Illustrating a series of challenges that transitional economies face in this area, the authors contend that with limited resources and institutional challenges, no one area of emphasis is without risks. However, they suggest prioritizing a mix of domestic cartel enforcement on high-impact sectors (in terms of media awareness) and similar strategies involving government procurement.

Competition advocacy represents a critical aspect of a competition agency’s role, particularly in developing countries. In Chapter 11, Allan Fels and Wendy Ng review the traditional model of competition advocacy and examine its relevance to and limitations in developing countries. In light of the limitations of the traditional advocacy approach, the authors propose what they term a “comprehensive national competition policy” approach. This new concept of competition advocacy, Australian in design, has been incorporated by the Organization for Economic Cooperation and Development (OECD) in its Competition Policy Assessment Toolkit. The authors discuss the Australian experience with national competition policy and its relevance for developing countries. Although Fels and Ng find it necessary to rethink the traditional approach

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15 *Id.* at 81.
to competition advocacy, what a new approach might actually entail undoubtedly requires further research and consideration.

Ariel Ezrachi argues in Chapter 12 that global structural changes in competition law enforcement have a wider impact in developing countries. Cooperation across competition agencies at bilateral, regional, and multinational levels has supplemented the unilateral enforcement approach. These cooperative frameworks, whether binding or voluntary, have increased convergence, coordination, and facilitation of competition enforcement across national competition regimes. However, in the author’s view, cooperation cannot override the domestic nature of competition enforcement. When faced with cross-border activity, domestic enforcement may sometimes fail to account for the totality of effects; suboptimal enforcement is likely to be the outcome of this situation. From a “transfer of wealth” perspective, Ezrachi argues that unless remedies are used, under-enforcement may favor a transfer of wealth around countries. Therefore, effective domestic competition enforcement along with long-arm jurisdiction may offer a solution to under-enforcement elsewhere.

Chapter 14 and 15 offer two country case studies on the complex relationship between competition law and development. More than ten years have passed since the implementation of competition law in South Africa, and David Lewis details this experience in Chapter 14. The author suggests that if the first decade of South African competition law focused on tackling private anticompetitive conduct, the second decade must now focus on confronting public anticompetitive conduct. Yet, Lewis notes that competition law enforcement will struggle to thrive in a policy environment hostile to competition. Competition authorities must therefore aggressively assert their jurisdictional exclusivity in the private sphere as well.

And finally, Rahul Singh presents a case study of merger control implementation in India. After discussing the historical evolution of India’s merger control system, Singh then focuses on the politics of corporate lobbying and its impact upon the Indian merger control regime. Examining a number of merger precedents at the Competition Commission of India and interpreting the underlying philosophy of these precedents, Singh concludes that “India’s new merger control implementation is a mess and it will take some time to work out its poor design.” The Indian experience offers an interesting example of the type of problems that competition law regimes in developing countries encounter when implementing merger control and competition law more broadly.

All in all, Competition Law and Development is a first-class piece of scholarship. By mapping the various challenges that developing countries face in enacting and enforcing competition law, the book achieves its stated goal:

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[F]illing a gap in the extant literature by identifying and discussing 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 exiting institutions and enforcement for bettering the lives of consumers around the world.17

As the volume makes clear, developing countries have certainly made great progress in the area of competition law. Yet, despite this progress, the application of new competition rules inevitably encounters several obstacles, and their effectiveness also depends on the implementation of other institutional and legal reforms. Expected challenges relate to issues pre-dating the enactment of competition law: the ongoing process of economic transition that developing countries pursue. Thus, although competition law and policy certainly represent a stimulus to accelerate economic reforms and establish a competitive market environment, this should not be seen as an isolated step. Without an adequate legal and institutional infrastructure, the ambitious market reform initiatives of developing countries may not achieve their desired success.

17 Competition Law And Development, supra note 1, at 11.