

IMAGINE: PRO-POORER COMPETITION LAW

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Paris 28 February 2013
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outline

- ▣ I Introduction
- ▣ II The Concept
 - A multidimensional response to poverty
 - Horizontal and vertical
- ▣ III What pro-poorer, pro-outsider competition law and policy demand
- ▣ IV Competition Law
- ▣ V Competition Policy
- ▣ VI Conclusion

I. Introduction

- ▣ The concept of pro-poorer, pro-outsider competition law and policy
- ▣ The multidimensional approach
 - Horizontal
 - ▣ All policies pull together:
 - Education, health, infrastructure
 - Vertical
 - ▣ A continuum: the outsider, the poorer, the poor

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II The Focus of This Presentation

- ▣ Not on priorities, although that is really important
- ▣ Not on poorer populations everywhere
 - but on developing nations
- ▣ In terms of:
 - ▣ 1) The **reach** of the competition law
 - ▣ 2) The **formulation** of competition law principles
 - ▣ 3) The special **thrust** of competition policy

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A body of knowledge?

- ▣ How do we think about what poorer developing countries' competition authorities should do to help their poor(er) populations?
- ▣ We ask them
- ▣ We observe what they are doing
- ▣ This is what they do every day
- ▣ Lessons from
 - Kenya
 - Tanzania
 - West Africa

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III. What Pro-Poorer Means for Competition LAW

- ▣ 1 Setting the stage: Free and open competition **without privilege or favor**
- ▣ 2 Scope of the law – state anticompetitive acts?
- ▣ 3 Exemptions and non coverage
- ▣ 4 Procedure: can the poor(er) get recompense?
- ▣ 5 Formulating the law
 - Is there a pro-poorer, pro-outsider perspective?

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2. Scope – Reaching state acts

- ▣ Project with UNCTAD Research Partnership
- ▣ Five principles
 - The law should cover SOEs
 - The law should cover complicit state officials
 - Esp. in procurement bidding rings
 - When private parties use state action as a shield
 - narrow the defense
 - Empower the competition authority to trigger a challenge to unduly anticompetitive state legislation
 - Use a robust preemption doctrine to trump state measures that affront the competition system
 - Absolutely necessary for common markets

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3. Exemptions and non-coverage

- ▣ Minimize exemptions
 - Worry about restraints in agriculture, banking
- ▣ Regulated industries
 - Worry about capture and favoritism
- ▣ Intellectual property
 - Importance of competition in medicines, technology
- ▣ Off-shore acts
 - Potash as example of need to reach offshore acts
 - so as not to handicap efficiency of developing world
 - This is a big input into fertilizers needed by poor farmers

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4. Procedure

- Stopping harmful anticompetitive practices; compensating for harms
 - Is the law fair to the poor in fact as well as in law?
 - **Access to justice**
 - Poorer populations often do not have access to justice

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5 Is there a pro-poorer, pro-outsider view of best principles?

- **There is often a perspective that is more rather than less friendly to the poorer**
 - (and can be good for total welfare too)
- A first step is raising consciousness
 - So often arguments for one rule or another are in equipoise
 - Something tips the balance
 - A pro-poorer advocate will ask: Is this rule more pro-outsider or more pro-establishment?

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Five pro-poor modalities

- 1 A principle of freedom to discount
- 2 Choices for market definition
 - when preserving a segment is esp. important to the poor
- 3 Leveraging, foreclosure and access violations
 - Loyalty rebates: Was the victim equally efficient?
- 4 Excessive pricing
- 5 Buyer power
- 6 Intellectual property and medicines and technology
- 7 Simpler rules

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IV. What Pro-poorer means for competition POLICY

- **ADVOCACY** –
 - a greater priority vis-à-vis enforcement than in mature jurisdictions
- 1. **Against** anticompetitive acts of one's state
 - Analyze the measures, advocate against unnecessarily restrictive measures
 - Border restraints, regulatory restraints
 - The OECD toolkit
 - ICN project on analyzing regulation



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Competition policy – Advocacy FOR

- ▣ 2. Fair (and efficient) international obligations
 - Not to impose or allow export cartels
 - Compare The Basel Convention on Hazardous Waste
 - If your neighbor doesn't want the hazardous waste, you cannot ship it there
 - This is politically difficult but still
 - A pro-poorer competition policy would not/could not lose sight of this hole in the world system that systematically harms and disempowers the poor
 - Home of price-fixers who export their crime should be authorized to help in discovery against the criminals

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CONCLUSION

- ▣ COMPETITION IS PRO-POORER POLICY
 - Free and open markets without privilege or favor empowers worthy outsiders and insiders alike
- ▣ All barriers – public and private - that stand in the way of the poorer populations' helping themselves
 - through efficient participation in the market are wise targets for competition law and policy
- ▣ A first step is **consciousness**; ask: What is the pro-poorer perspective, and consider it

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