Developing countries, markets, and the coronavirus: two challenges

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I. INTRODUCTION

I write here of two challenges born of the coronavirus and its effects on developing countries’ markets. For the first challenge, I examine a world picture of nationalism. For the second challenge, I reveal a hidden opportunity for developing countries’ competition authorities. I start on a large canvas.

In good times, the developed countries get richer and the developing countries get better off but share very unequally in the gains. In bad times, the developed countries protect themselves, developing countries bear the biggest brunt, and the divide grows.

Thus it is in the time of coronavirus. ‘Just as the world requires collaboration to defeat the coronavirus – [scientists, researchers, and manufacturers joining forces across borders] – national interests are winning out.’ ‘At least 69 countries have banned or restricted the export of protective equipment, medical devices or medicines . . .’.¹ ‘The parties with the deepest pockets will secure these vaccines and medicines, and essentially much of the developing world will be entirely out of the picture.’² As examples, President Trump ordered American companies that produce protective face masks abroad to stop supplying the non-American market and to redirect their sales to the USA. Trump’s trade adviser, Peter Navarro, proposes to force American healthcare providers to buy their protective equipment and medicines only from US suppliers. 3M, a US producer of masks abroad, responded to the president’s mandate to ‘sell American’ that compliance would endanger health workers in Latin America and Canada, who were due to receive deliveries of its masks.

The United Nations Conference on Trade and Development reports that the coronavirus crisis has pushed us quickly and deeply into a digital world, pushing the workforce into working from home, the teachers and students into teaching and learning remotely, and buyers and sellers into transacting online; but not everyone

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¹ PS Goodman and others, ‘A New Front for Nationalism: The Global Battle Against a Virus,’ The New York Times (New York, 10 April 2020).

² Ibid, quoting Professor Simon Evenett.
“Inequalities in digital readiness hamper the ability of large parts of the world to take advantage of technologies that help us cope with the coronavirus pandemic by staying at home”, said UNCTAD’s technology and logistics director, Shamika Sirimanne. “This situation has significant development implications that cannot be ignored. We need to ensure that we do not leave those who are less digitally equipped even further behind in a post-coronavirus world.” UNCTAD highlights the vulnerability of the least developed countries, where only one in five people use the Internet, and in developing countries in general where less than 5 per cent of the population buy goods or services online.

Meanwhile, on the ground, competition authorities in developed and developing countries do what they can and must facilitate the supply and delivery of food, medicines, supplies, and services. They facilitate business combinations necessary to increase supply and avoid shortages, publish guidelines stating when they will not intervene, announce sunsets, and, when they can, offer consultations electronically and offer guidance and expedited treatment. Some of the agencies, developing and developed, announce new approaches to old rules, explaining the flexibility of their existing law (thus, stating that all that needs to be done to meet the crisis can be done within existing law). Other authorities announce that they will approve collaborations that lessen competition as necessary to meet the crisis and that they will temporarily waive compliance as necessary. The first group might fuzz the borders of what is harm to competition. The second group might need to confront questions of their own power to waive the law, or they may merely be exercising prosecutorial discretion while possibly leaving collaborators exposed to private suit to enforce the law.

Developing countries may have a comparative advantage (ironically, as I will explain, and small in the scheme of things) in the following respect: they or many of them, and significantly more than developed countries, have a built-in option or requirement in their competition laws to take account of public interest considerations. In a number of developing countries’ competition statutes, the public interest is one consideration in determining whether an agreement or merger is lawful. In some of the statutes, the competition commission may grant an exemption to an agreement or transaction in the public interest. In clearing transactions as good for the public interest, however, developing countries’ competition authorities have not been particularly assiduous in distinguishing anticompetitive from procompetitive transactions, or weighing up the public interest benefits against the anticompetitive harm.

So, here are my two challenges.

II. THE CHALLENGE TO DEVELOPED COUNTRIES

The first challenge is addressed to developed countries. It is about nationalism. My challenge is in the form of advice: do not lightly abandon the free market rules of trade to protect your own citizens, especially in the face of great harms to more vulnerable peoples. Rather than embrace parochialism, nurture a vision of community. Not only is it good for you; it is less damning to the world. Of course, there are hard questions. A country is charged with protecting the welfare of its citizens. But the

3 The COVID-19 Crisis: Accentuating the Need to Bridge Digital Divides (UNCTAD 6 April 2020).
mindset of nationalism as a policy rather than an exception is poisonous. The USA should not have told 3M to stop exporting face masks. (3M compromised and settled.) The proper route was to produce more masks. It should not require its healthcare providers to buy local. The salience here is that the nationalism of the developed world and indeed the entire world exasperates the economic as well as health and safety challenges of the developing world and, along with the big tech gap that the virus widens, sets back the cause of development.

III. THE CHALLENGE TO THE COMPETITION AUTHORITIES OF DEVELOPING COUNTRIES

The second challenge is to developing countries. It is different in kind. It may be a lot to ask something extra of developing countries’ competition authorities in this time of stress when they are stretched, especially thin and wanting in resources, but a small and discrete extra step will help them and their communities in both the short and longer terms. Here is the advice: in granting clearances, exemptions, or other approvals in this emergency, make the effort to analyse whether the transaction is good or bad for competition, and if it harms competition, whether it is needed in the public interest and why. Unlike many developed countries, you (the developing country authorities) do not have to bend your law. You can, without somersaults, follow a principle of truth in enforcement and truth in clearance, because your law allows you to weigh and prioritize the public interest. This clarity will go a long way in shoring up the transparency, predictability, and legitimacy of your law. It will legitimate your mission as truly trying to make the market work, applying antitrust where business power co-opts the market, and (in an emergency), relaxing antitrust where neither the free market nor antitrust will work or will work fast enough to deliver to the people the critical goods they need. I avoid discussing here public interests apart from the crisis, a category that would likewise profit from clarity.

IV. CONCLUSION

In sum, I make two challenges. First, developed countries, which have overwhelming advantages and constantly use them to steer the economic ship to their advantage, should not do market harm to developing countries. Nationalistic trade restraints set the developing countries back unfairly and inefficiently in their constant efforts to bridge the divide. Secondly, developing countries have a discrete comparative advantage (in a sea of disadvantages) in applying the law of emergency. Because their laws usually authorize consideration of public interest factors, the developing countries can call it like it is. They can admit to approving a buyers’ cartel when buyers of scarce supplies need not be pitted against one another in procuring scarce equipment. They can call a producers’ cartel when rivals must combine to allocate tasks and markets to fill a critical need. Or they can call it a short-term risk-sharing collaboration to provide emergency supplies that cannot be produced quickly enough by competition; not designed to increase market power (although it might), and likely to provide competitive prices but because of promises and in spite of power. If the
developing countries’ competition authorities defend their conclusions and keep records of their principles of competition law under conditions of emergency, they will do a public service for themselves and for antitrust.

Taking up the two challenges will shine a light on a dark stretch of days.
