

**COMPETITION IN CONTEXT: THE
LIMITATIONS OF USING COMPETITION
LAW AS A VEHICLE FOR SOCIAL POLICY
IN THE DEVELOPING WORLD**

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I. INTRODUCTION

The number of countries that have adopted competition laws has grown exponentially over the past two decades. Of the over 100 nations that have adopted some form of competition law, three-quarters are in the developing world.¹

1. TAIMOON STEWART ET AL., INT'L DEV. RESEARCH CTR., COMPETITION LAW IN ACTION: EXPERIENCES FROM DEVELOPING COUNTRIES 4 (2007); Michael Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in

Various factors have contributed to the growing adoption of competition policies and laws, particularly in developing countries. In particular, globalization and its effects—such as cross-border mergers—have contributed significantly to the perceived need for competition laws.² Although some may believe that the effects of globalization are limited to the developed world, developing countries may be particularly susceptible to the market power of large international firms if not regulated.³

Further, a number of studies have concluded that strong competition policy and robust competition at the country level foster economic growth.⁴ Economic growth refers to a rise in national or per capita income that usually accompanies an increase in the production of goods and services.⁵ As such,

COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES 21 (2004); Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?*, 2008 WIS. L. REV. 269, 270 (2008); Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 SW. J.L. & TRADE IN AMS. 211, 214 (2006); Diane P. Wood, *Antitrust at the Global Level*, 72 U. CHI. L. REV. 309, 309 (2005); see William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 265–66 (2001) (discussing adoption of new competition statutes by over forty states since 1975 and twenty transitional states that are expected to do so in the next decade); Spencer Weber Waller, *Comparative Competition Law as a Form of Empiricism*, 23 BROOK. J. INT'L L. 455, 456 (1998) (discussing countries emerging from central planning).

2. Gal, *supra* note 1, at 23.

3. *Id.*

4. See, e.g., D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 125–26 (2009) (describing how empirical work positively associates robust competition at country level with growth); see also Kathryn McMahon, *Developing Countries and International Competition Law and Policy*, in INTERNATIONAL LAW, ECONOMIC GLOBALIZATION AND DEVELOPING COUNTRIES 252–53 (Julio Faundez & Celine Tan eds., 2010) (describing how absence of competition law could lead to the erosion of productivity and development benefits gained from trade liberalization).

5. DWIGHT H. PERKINS, ET AL., *ECONOMICS OF DEVELOPMENT* 12 (Jack Repcheck ed., 6th ed. 2006). Economic development is a broader term and encompasses other improvements that may affect a country, such as improvements in health, education, and aspects of human welfare. “Development is also usually accompanied by significant shifts in the structure of the economy, as more and more people typically shift away from rural agricultural production to urban-based and higher-paying employment, usually in manufacturing or services. Economic growth without structural change is often an indicator of the new income being concentrated in the hands of a few.” *Id.*

competition policy has become part of the emerging orthodoxy in economic growth policy.⁶ Competition law is a subset of competition policy. Generally, competition laws seek to guard against the creation and misuse of market power and also facilitate the functioning of the markets by curing artificial obstructions that market players create.⁷ In addition, enforcement of a competition law by an empowered competition authority helps in dismantling barriers to new business development and improving the availability of goods and services to poor populations.⁸ So at least in theory, a well-conceived competition law—as a part of an overall competition policy—may reduce barriers that reinforce economic disadvantage.

For these reasons, the adoption of competition laws has become one of the cornerstones of the liberalization and pro-market reforms sweeping through many developing countries. In particular, the neoliberal international development policies associated with the “Washington Consensus” embraced the enactment of competition laws in developing countries as part of its overall policy agenda.⁹ The Washington Consensus emerged in the 1990s and represents the set of ten policies that the U.S. government and international financial institutions believed were necessary elements of reform that all countries should adopt to increase economic growth.¹⁰ In emphasizing the importance of macroeconomic stability and integration into the international economy, the Washington Consensus took a neoliberal view of globalization and prescribed trade liberalization, privatization, and deregulation as the key

6. Simon Roberts, *The Role for Competition Policy in Economic Development: The South African Experience*, 21 DEV. S. AFR. 1 (2004).

7. Fox, *supra* note 1, at 211.

8. William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 WASH. U. J.L. & POL'Y 101, 103–04 (2007).

9. *supra* note 4, at 252.

10. *Trade, Foreign Policy, Diplomacy and Health: Washington Consensus*, WORLD HEALTH ORG., <http://www.who.int/trade/glossary/story094> (last visited Oct. 30, 2014); see Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from a Decade of Reform*, 44 J. ECON. LITERATURE 973, 973–74 (2006) (outlining the history of the Washington Consensus).

elements of its recommended development framework.¹¹ The International Monetary Fund (“IMF”) and the World Bank (jointly “Bretton Woods institutions”) implemented this framework through conditionality in developing countries; one such condition was almost always the adoption of a competition law.¹² Thus, some countries, such as Indonesia, adopted competition laws as a direct condition to receiving funds and rescue money from the IMF.¹³

Interestingly, the push for the enactment of competition laws in developing countries by Western nations and the Bretton Woods institutions may not have resulted in what these parties originally envisioned. Instead, a variety of competition laws have emerged that differ in many respects from those of Western, industrialized nations, particularly in their stated goals and objectives. Further, many developing countries have included factors to consider in analyzing mergers and conduct related to social policy objectives. By doing so, they argue that competition laws should respond to the particular historical and contemporary circumstances facing their countries.¹⁴ The inclusion of such public interest objectives and considerations has generated controversy and debate in the global antitrust and competition law community.¹⁵ Some even question whether

11. Fox, *supra* note 1, at 216; *Trade, Foreign Policy, Diplomacy and Health: Washington Consensus*, *supra* note 10; Roberts, *supra* note 6; McMahon, *supra* note 4; see Ratnakar Adhikari, *Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal*, in *COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES* 53, 53–54 (2004) (explaining that many least-developed countries are looking for ways to enact competition law in a development-friendly manner and, as a result, many have started their domestic reform measures (including privatization, deregulation, and financial sector liberalization) as a response to conditions of the Bretton Woods institutions).

12. *Trade, Foreign Policy, Diplomacy and Health: Washington Consensus*, *supra* note 10; see Kovacic, *supra* note 1, at 266 (describing how adoption of new laws in transition countries is a vital element in process of competition policy globalization).

13. Adhikari, *supra* note 11, at 55; Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 *HARV. INT'L L.J.* 579, 589 (2000); McMahon, *supra* note 4, at 252.

14. Fox, *supra* note 1; David Lewis, *Developing Countries and Competition*, *INT'L COMPETITION NETWORK* 2 (Sept. 10, 2013), <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/devco.aspx>.

15. Patrick Smith & Andrew Swan, *Public Interest Factors in African Competition*

developing countries should prioritize the enactment of competition laws or whether it would be preferable for these countries to focus on more urgent reforms.¹⁶

This Article first provides an overview of the Washington Consensus policies designed to facilitate competitive markets and explains how competition contributes to economic growth and development. After discussing why developing countries have enacted competition policies and laws—either by choice or as a condition to funding—the Article examines the objectives of competition laws that ultimately drive enforcement. This analysis begins by detailing the evolution of antitrust goals in the United States. The Article then discusses many developing countries' rejection of a Western approach to competition law in lieu of an approach that they believe better responds to their unique historical, cultural, and economic conditions. This alternative approach to competition law often encompasses the inclusion of industrial policy objectives and the promotion of the public interest.

To illustrate how these public interest considerations have been incorporated and enforced in developing countries' competition laws, this Article presents a case study of South Africa. The Article then briefly describes the trend of including public interest considerations in competition statutes in other Southern African countries, which frequently look to South Africa as a model.

After illustrating how public interest considerations may be developed and enforced, the Article highlights the arguments raised for and against the inclusion of public interest objectives and considerations in competition laws. Ultimately, this debate centers on the fundamental purpose of competition law. This Article acknowledges that there are persuasive arguments on both side of the debate but contends that the debate about the proper objectives of competition law has been too narrow. Developing countries have real development and social equity

Policy, AFR. & MIDDLE E. ANTITRUST REV. 1, 1 (2014).

16. See A.E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 212 (1994) (arguing that antitrust reform is not the most appropriate way to eliminate market power in recently liberalized countries).

concerns that should not be ignored. But instead of using competition law as a vehicle to address these other policy concerns, this Article argues that the goals of a competition law should remain narrow and that other industrial policy objectives should be addressed first through separate legislation.

The creation of complicated competition laws that require a skillful balancing of various public interest factors only adds to the burden of young, inexperienced competition authorities. Moreover, the inclusion of public interest objectives may even undermine the benefits that a competition law can bring to economic growth and development. This Article instead suggests that developing countries consider waiting to adopt competition laws until they have achieved a more advanced stage of development and recommends a staged approach that they might adopt to better meet their variant development and economic goals.

II. COMPETITION POLICY IN THE DEVELOPING WORLD

The majority of new competition laws emerging over the past few decades have been adopted by developing countries. Although there has been an active debate over what constitutes a “developing country,” this Article uses the term “developing country” broadly, as defined by the IMF: “emerging market and developing economies” are the 153 nations that are not classified as advanced economies.¹⁷

To fully understand the dynamics at play in the developing world, it is necessary to distinguish between competition law and competition policy. Competition policy refers generally to the range of government measures taken to influence the intensity of competition in national markets. These measures may include trade policies, measures directed to attract foreign investment, domestic business regulation, various privatization initiatives, and competition law.¹⁸ Competition law, a subset of

17. INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK: RECOVERY STRENGTHENS, REMAINS UNEVEN 158 (2014), available at <http://www.imf.org/external/pubs/ft/weo/2014/01/pdf/text.pdf>.

18. See Simon J. Evenett, *Links Between Development and Competition Law in Developing Countries*, in CASE STUDIES FOR THE WORLD DEVELOPMENT REPORT 2005: INVESTMENT CLIMATE, GROWTH AND POVERTY 1, 4, 6 (2003) (explaining how competition

competition policy, establishes the rules of competitive rivalry and constrains certain strategies employed by firms that may harm competition in the markets.

The competition policy approach advocated by many in the developed world entails enhancing competition in domestic markets by dismantling protective trade barriers and restrictive investment rules, creating an enabling domestic environment that facilitates foreign trade and investment.¹⁹ For some time, the dominant approach in development economics advocated generating as much wealth as possible and letting it “trickle down” to those less well off.²⁰ Increased trade and investment was seen as a means of generating such wealth. Over the past two decades, a number of developing countries have adopted this outward-oriented economic development strategy—either by choice or as a condition for aid.²¹ These outward-oriented economic development strategies, however, have stimulated a number of discussions over whether these market reforms of recent decades have set out the right path for economic progress.²²

A. Trade Liberalization

Trade liberalization is one of the foundational tenets of an outward-oriented economic development strategy. Trade liberalization is rooted in the belief that a reduction of tariffs and other trade barriers will promote imports that will then discipline producers’ market power to raise prices, stimulating competition in national markets.²³ Trade liberalization formed a key part of the Washington Consensus policy package of

law and its enforcement influence dynamic economic performance).

19. STEWART ET AL., *supra* note 1, at 3.

20. Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT’L L.J. 287, 345–46 (2000) (describing policies that generate wealth, such as privatization, liberalization of capital and regulatory restrictions, rationalization of property law regimes, simplification of commercial codes, and strengthening of commercial courts).

21. Adhikari, *supra* note 11, at 54.

22. See Kovacic, *supra* note 8, at 103 (explaining how the debate over market reforms in formerly planned economies has raised questions about competition law and its place in market reform).

23. Rodriguez & Williams, *supra* note 16, at 213.

reforms;²⁴ accordingly, it has figured prominently in World Bank and IMF proposals.²⁵

Conventional wisdom suggests that free trade by itself will prevent the accumulation of market power and that antitrust enforcement may be superfluous.²⁶ Many have recognized, however, that trade openness and liberalization alone will not necessarily result in more competitive markets or remedy all anticompetitive conduct.²⁷ As such, a trade liberalization/market access approach alone has limits.

For example, in developing countries, an important share of economic activity relates to non-tradable goods and services, such as electricity, other utilities, and financial and legal services. These goods and services are only marginally exposed to international competition.²⁸ Beyond the lack of exposure to foreign competition, the non-tradable sector of the economy may also remain uncompetitive because of domestic firm behavior. And increased trade cannot eliminate the possibility that firms may still collude with each other to fix output and prices.²⁹ Consequently, trade liberalization will not stimulate or protect competition in these non-tradable sectors.

In addition to failing to protect and stimulate competition in non-tradable sectors, trade liberalization policies also have not stimulated the expected increase in competition in tradable sectors because many firms affected by tariff reductions simply turn to rent seeking strategies.³⁰ Rent seeking is the

24. *Id.*

25. *Id.*

26. Craig W. Conrath & Barry T. Freeman, *A Response to "The Effectiveness of Proposed Antitrust Programs for Developing Countries"*, 19 N.C. J. INT'L L. & COM. REG. 233, 233–34 (1994).

27. Sokol, *supra* note 4, at 140; Gal, *supra* note 1, at 23; Rodriguez & Williams, *supra* note 16, at 209; *see* McMahon, *supra* note 4, at 252 (explaining that in the absence of competition law, productivity and development benefits from trade liberalization may be eroded by erection of domestic barriers to competition through cartels, structural division of markets, and abuse of monopoly power).

28. Gal, *supra* note 1, at 23; *see* Adhikari, *supra* note 11, at 78 (explaining that liberalized trade regime does not obviate the need for national competition policy because large part of least developed countries' economies are not in traded sectors).

29. Sokol, *supra* note 4, at 140.

30. Conrath & Freeman, *supra* note 26, at 234.

manipulation of the regulatory environment for personal gain. Businesses may engage in rent seeking by lobbying the government to impose nontariff barriers to protect their markets from competition, immunizing themselves from regulation, and cloaking their actions in government authority.³¹

In general, the domestic firms that employ rent seeking are those that previously benefitted from high tariffs and other government favoritism. Because these firms face low transaction costs in petitioning the government, they have little incentive to support an open, competitive market over the potential gains they may obtain by seeking rents through political action.³² Consequently, these new public restraints raise the cost of capital and create entry and exit barriers to other businesses.³³ They also hurt consumers—consumers pay the cost of the protection given to these businesses through higher taxes and/or prices to subsidize the restraints.³⁴

Finally, trade liberalization policies may disproportionately benefit a minority of the population. For example, in many developing countries, an economically dominant minority controls the sectors of the economy that are most attractive to foreign investors, such as finance, technology, industry, transport, and mining. Because an economically dominant minority may be better positioned to benefit from foreign investment, the majority of the population may experience few of the theoretical benefits of trade liberalization.³⁵

B. Competition Law as a Complement to Trade Liberalization

Unlike trade liberalization, competition laws can reach the non-tradable sectors of a nation's economy and may better protect a majority of the population by correcting market failures and obstructions. For instance, markets on their own

31. *Id.*; Sokol, *supra* note 4, at 119, 127; Rodriguez & Williams, *supra* note 16, at 215.

32. Rodriguez & Williams, *supra* note 16, at 220.

33. Sokol, *supra* note 4, at 122.

34. See Gal, *supra* note 1, at 31 (discussing regulatory capture where small groups with large per-capita stakes in a policy decide to organize and cause the government to regulate in ways that are against the public interest and consumers).

35. Chua, *supra* note 20, at 318.

cannot address structural problems, but competition law can cure artificial structural obstructions that market players create.³⁶ Thus, many view competition law as one of the key measures needed to support the proper functioning of the markets and the primary means of addressing a major form of market failure—the harmful exercise of market power.³⁷

Accordingly, trade liberalization serves as a complement to, not a substitute for, competition law.³⁸ Various studies have reinforced this view and shown that an effective competition law has an impact distinct from that of trade openness.³⁹ Because of this demonstrated impact, many strongly advocate that competition laws form a part of the central framework policies of developing countries.⁴⁰ And as discussed, the enactment of competition laws has been a key condition of many reform packages driven by the Washington Consensus.

C. *Contribution of Competition to Economic Growth and Development*

The emphasis on the stimulation and protection of competitive markets through competition policy derives from evidence demonstrating that competitive markets are a significant factor in the economic growth and development of a country. Competition policies typically affect developmental outcomes indirectly through effects on markets.⁴¹ But as previously explained, the benefits from trade reform, deregulation, and privatization may not be fully realized without the active and effective enforcement of a competition law.⁴² Thus, many consider the adoption of competition law as

36. Rodriguez & Williams, *supra* note 16, at 215; Fox, *supra* note 1, at 223.

37. STEWART ET AL., *supra* note 1.

38. ORG. FOR ECON. COOPERATION & DEV., OECD GLOBAL FORUM ON COMPETITION: COMPETITION POLICY AND ECONOMIC GROWTH AND DEVELOPMENT 7–8 (2002).

39. *Id.* at 6. Conversely, firms view cartelization and trade barriers as complements to one another. Even if firms have one, they may still want the other to better solidify and protect their market position.

40. ORG. FOR ECON. COOPERATION & DEV., *supra* note 38, at 7.

41. See Evenett, *supra* note 18, at 4 (explaining that investment decisions may be directly or indirectly affected by the developmental outcomes of national competition laws).

42. *Id.* at 6.

an essential component of a cluster of regulatory activities that constitute good governance, leading to economic growth and development.⁴³

Several factors illustrate why competition—achieved through competition policies—contributes to economic growth and development. First, competition generally stimulates investment. Strong evidence shows that competition law and policy provide incentives for both foreign and domestic investment.⁴⁴ Investors appreciate a stable regulatory environment in which they can be assured that their assets will be protected by law in the event of a dispute.⁴⁵ Adopting a competition law may signal to investors that investing in a country is attractive and safe.⁴⁶ Further, appropriate enforcement of a competition law adds transparency to a nation's commercial landscape and contributes to the predictability and stability of government policies and rule of law.⁴⁷ Foreign direct investment not only contributes to growth through the stimulation of competition but also enhances the competitiveness of domestic enterprises through the potential transfer of managerial skills and technology.⁴⁸

Second, greater competition increases firms' incentives to cut costs and improve productivity. When new firms may freely enter a market, the new entrants increase the pressure on incumbent firms to become more efficient to maintain their market share.⁴⁹ Thus, to remain in a competitive market, market players must constantly evaluate their product offerings and remain vigilant over their internal procedures, requiring constant streamlining of operations.⁵⁰ As a result, the less efficient firms will exit the market as the number of firms increase. Without the pressure from entrants to reduce costs and

43. STEWART ET AL., *supra* note 1, at 16–17.

44. McMahon, *supra* note 4, at 263; Evenett, *supra* note 18, at 8.

45. STEWART ET AL., *supra* note 1, at 16–17.

46. Rodriguez & Williams, *supra* note 16, at 216; *see* Chua, *supra* note 20, at 346 (arguing that developing countries should strive to maximize their appeal to domestic and foreign investors by establishing well-functioning efficient market institutions).

47. STEWART ET AL., *supra* note 1, at 16–17.

48. Adhikari, *supra* note 11, at 79.

49. STEWART ET AL., *supra* note 1, at 4–5.

50. *Id.* at 14.

increase efficiency, productivity may be slow and fall short of its full potential.⁵¹

Finally, greater competition stimulates innovation in addition to process streamlining.⁵² To be competitive, firms must do more than just increase their productivity. They also must constantly evaluate their product and service offerings and think of new ways to serve consumers.

III. EXAMINATION OF COMPETITION LAW GOALS

As developing countries adopt competition laws as part of an overall policy package to try to stimulate economic growth and development, they have included objectives in their competition laws that industrialized or Western nations may not view as appropriate. The objectives of a competition law inform the law's implementation, enforcement, and application and affect outcomes.⁵³ The objectives of a country's competition law are especially important when analyzing conduct under a rule of reason analysis.⁵⁴ In addition, these objectives shape enforcement policy and priorities as well as assist courts in applying competition legal standards to ensure alignment with the objectives of the law.⁵⁵ Accordingly, the objectives of a nation's competition law—as understood by the enforcers, the judiciary, the business community, and the general public—can have a profound impact on the competition law's effect on markets and economic growth and development.

A. *Evolution of Antitrust Law Goals in the United States*

To best understand competition law and its purposes, it is helpful to review the historical evolution of competition law,

51. *Id.*

52. Evenett, *supra* note 18, at 6.

53. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 558 (2012); see H. Stephen Harris, Jr. & R. Ian McEwin, *Is East Asian Antitrust Different?*, 4 INT'L ANTITRUST BULL. 18, 18 (2012) (discussing differences between Asian and European countries regarding objectives, implementation, and perception of competition laws).

54. Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012).

55. Stucke, *supra* note 53.

which necessarily entails an examination of U.S. antitrust law. Since the beginnings of U.S. antitrust law, the United States has witnessed the rise and fall of various theories and doctrines. The forces of history, politics, and economics have shaped U.S. antitrust law into what it is today. The following section provides an overview of the various predominating schools of antitrust thought in the United States and how these schools have influenced the goals of U.S. antitrust law.

1. *Harvard School*

The Harvard School was the predominant school of antitrust thought from the 1940s to the mid 1970s and is associated with the economists Joe Bain, Edward Mason, Carl Kaysen, and Donald Turner.⁵⁶ The Harvard School adopted a more interventionist, structural approach to antitrust, resting on the belief that firms are more likely to engage in anticompetitive conduct when markets are concentrated.⁵⁷ When the Harvard School was at its peak in the United States, the courts and enforcement agencies typically presumed the illegality of any merger, joint venture, or agreement that allowed or resulted in firms obtaining, enhancing, or exercising market power,⁵⁸ which often resulted in protecting small businesses. Because of this presumption, plaintiffs had more success during the dominance of the Harvard School because they did not have to prove a complex set of economic facts.⁵⁹

The Harvard School has been criticized for failing to consider the effects on consumers and for lacking a limiting

56. Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 45 (2012); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, COLUM. BUS. L. REV. 1, 29, 31, 79 (2007); Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 348 (2007).

57. Crane, *supra* note 56, at 45; Piraino, *supra* note 56, at 348–49; see Christine A. Varney & Jonathan J. Clarke, *Chicago and Georgetown: An Essay in Honor of Robert Pitofsky*, 101 GEO. L.J. 1565, 1567 (2013) (describing Harvard School approach as “rigid, formalist, and somewhat incoherent”).

58. Piraino, *supra* note 56, at 346.

59. *Id.*

principle to restrain enforcement that harmed consumers.⁶⁰ On the other hand, some praised the high degree of certainty that the Harvard School approach offered to businesses.⁶¹ For example, by examining the structure of a market, businesses could easily determine if they might be at risk of violating the antitrust laws.

2. *Chicago School*

During the late 1960s and 1970s, the Chicago School of antitrust thought started to gain traction.⁶² The Chicago School originated with a 1966 law review article by Judge Richard Bork, who argued that Congress's one concern when it debated and passed the Sherman Act was economic efficiency and that there was no evidence of congressional intent to protect individual competitors against large firms' exercise of market power.⁶³ He then defined economic efficiency as wealth maximization, which he equated with "consumer welfare."⁶⁴

Judge Bork emphasized that the maximization of consumer welfare was the only legitimate goal of antitrust. But when Bork used the term "consumer welfare," he actually meant "total welfare."⁶⁵ To illustrate, Bork's approach to maximizing "total

60. Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 374 (2003); see Piraino, *supra* note 56, at 349, 357 (citing *U.S. v. Aluminum Co. of America*, which held Alcoa liable for monopolization even though their actions were beneficial for consumers, and *U.S. v. Philadelphia National Bank* that prevented a merger that would have had a beneficial impact on consumers).

61. Piraino, *supra* note 56, at 349–50.

62. Kovacic, *supra* note 56, at 21; Piraino, *supra* note 56, at 358; Ronald A. Cass, *Competition in Antitrust Regulation: Law Beyond Limits*, 6 J. COMPETITION L. & ECON. 119, 132 (2010).

63. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 193 (2008) (citing Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 39–43 (1966)); Piraino, *supra* note 56, at 350.

64. Piraino, *supra* note 56, at 350; see Kovacic, *supra* note 56, at 22 (describing Chicago School approach of attaining economic efficiency to be exclusive basis for design and application of antitrust law).

65. Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2199, 2204 (2013); see Piraino, *supra* note 56, at 350 (noting that Bork considered "consumer welfare" to mean wealth enhancements

welfare” involved a utilitarian calculus that accounted for both producer and consumer surplus.⁶⁶ In other words, under a total welfare approach, courts only ban those restraints that reduce society’s overall welfare, and the law will not be invoked unless a challenged practice decreases aggregate consumer and producer welfare.⁶⁷ Bork’s article was a significant driver of the economic revolution in antitrust that influenced the U.S. courts in the late 1970s and 1980s.⁶⁸

The Chicago School urged a more cautious approach to enforcement and retreated from the interventionist orientation of the Harvard School.⁶⁹ The Chicago School adopted a rule of non-intervention unless the market conduct was inefficient—that is, the alleged anticompetitive conduct conferred market power that was used to limit output and was not justifiable as an attempt to serve the market.⁷⁰ The Chicago School relies on the assumption that market forces over time will correct and punish monopoly conduct.⁷¹ In believing that markets will self-correct, the Chicago School presumes the rationality of market participants and views the likelihood and extent of market failures with skepticism.⁷²

including lower costs, reduced prices, and increased output of products and services).

66. See McMahon, *supra* note 4, at 266 (“The Chicago School goal of economic efficiency as ‘total welfare’ (whereby producer surplus and consumer surplus are maximised within a utilitarian calculus) and belief in ‘self-correcting markets’ are not appropriate to the different issues and problems facing developing and least-developed economies with conditions of highly concentrated markets and specially protected sectors . . .”).

67. Meese, *supra* note 65, at 2199; Fox, *supra* note 60, at 379.

68. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2405 (2013).

69. Kovacic, *supra* note 56, at 80; Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 *COMPETITION POL’Y INT’L* 59, 60–61 (2007) (describing Chicago School as advocating for a rule of per se legality); see Stucke, *supra* note 53, at 563 (describing Chicago School as viewing a limited role for antitrust and marginalizing antitrust’s political, moral, and social goals).

70. Fox, *supra* note 60, at 378. The Chicago School emphasizes avoiding false positives so as not to chill precompetitive conduct by creating a fear of government enforcement in rational economic actors. See Varney & Clarke, *supra* note 57, at 1568 (acknowledging that little or no data exists to support theory that false positives have a broad chilling effect on precompetitive behavior).

71. Varney & Clarke, *supra* note 57, at 1570.

72. Stucke, *supra* note 53, at 563.

The Chicago School also generally doubts the institutional capabilities of government. As such, the Chicago School advocates little prosecution other than “plain vanilla cartels and mergers to monopolies.”⁷³ It generally disregards vertical contractual restraints, vertical and conglomerate mergers, and most claims of monopolization.⁷⁴ In addition, the Chicago School tends to view the abuse of a dominant position as transitory and holds that monopolists should not be liable for engaging in conduct that is a natural consequence of their market power.⁷⁵ Defendants have thus prevailed more under the Chicago School because plaintiffs must prove adverse economic effects.⁷⁶ The Chicago School’s focus on efficiency and total welfare has led the U.S. Supreme Court to reject per se prohibitions of certain conduct once thought anticompetitive but now understood to be efficient.⁷⁷ Accordingly, many have criticized the Chicago School for making the outcome of cases more difficult to predict.⁷⁸

3. *Post-Chicago Schools*

Following the Chicago School, several other schools of antitrust thought have emerged that reflect the Chicago School’s doctrinal view of antitrust and that embrace economics as the mode of analysis.⁷⁹ The Neo-Harvard School is one example. Some say the Neo-Harvard School emerged when the previous Harvard School contingent underwent an “unacknowledged conversion experience” and abandoned their earlier interventionism.⁸⁰ This Neo-Harvard—or Modern Harvard School—has benefitted from

73. Kovacic, *supra* note 56, at 22 (quoting Judge Frank H. Easterbrook).

74. *Id.*

75. Brusick & Evenett, *supra* note 1, at 271; Piraino, *supra* note 56, at 360.

76. Piraino, *supra* note 56, at 346.

77. See Wright & Ginsburg, *supra* note 68, at 2407 (noting focus on economic welfare and effect that this Chicago School position had on the Supreme Court).

78. See Piraino, *supra* note 56, at 409.

79. Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 159 (2012); see Joshua D. Wright, *Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 249–50 (2012) (describing “Post-Chicago School” and “Neo-Chicago School”).

80. Crane, *supra* note 56; see Kovacic, *supra* note 56, at 33 (describing Donald Turner’s approach as becoming more cautionary as his career progressed).

the contributions of Phillip Areeda, Donald Turner, current Supreme Court Justice Stephen Breyer, and Herbert Hovenkamp.⁸¹

The Neo-Harvard and Chicago Schools share some similarities. Although the Neo-Harvard School takes a more interventionist approach than the Chicago School, both schools believe that consumer welfare and efficiency concerns should be the only goals of competition law.⁸² The two schools, however, do not necessarily define efficiency identically.⁸³ But both schools discourage consideration of non-efficiency objectives, such as the dispersion of political power and the preservation of opportunities for small enterprises to compete.⁸⁴ They also share the view that the social costs of enforcing antitrust rules involving dominant firm conduct too aggressively exceed the costs of enforcing them too weakly; consequently, both schools have advocated backing away from intervention where dominant firms are concerned.⁸⁵

Other schools of antitrust thought and variations on the Chicago School have also emerged, including the “Behavioral School.”⁸⁶ Most of these schools strive to correct some of the

81. Crane, *supra* note 56, at 45–46; Kovacic, *supra* note 56, at 14.

82. INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 32 (2007); see Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) (explaining that goal of pro-competition policy is to, “promote consumer welfare through efficient use and allocation of resources, the development of new and improved products, and introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use”).

83. Kovacic, *supra* note 56, at 34; Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

84. Kovacic, *supra* note 56, at 34–35.

85. See *id.* at 80 (noting that both schools favor a more cautious approach to intervention). The Neo-Harvard School is also known for preferring regulatory solutions to antitrust solutions and public enforcement over private enforcement. Crane, *supra* note 56, at 46.

86. See Wright, *supra* note 79, at 251–52 (“Dissatisfied with the mainstream antitrust jurisprudence that has emerged over the past several decades, some competition policy scholars and regulators have turned to behavioral economics to provide the intellectual foundation for a new, ‘behaviorally informed’ approach to competition policy.”); see also Crane, *supra* note 56, at 43, 46 (proposing a “Neo-Chicago School” and discussing “Post-Chicago School”); see also Varney & Clarke, *supra* note 57, at 1566–67 (arguing a “Georgetown School” of antitrust has emerged that fits core

Chicago School's overreaching and tend to prefer more expansive antitrust intervention.⁸⁷ In general, they regard the Chicago School's reliance on the perfection of the markets as overly simplistic and emphasize that markets in reality do not always function as perfectly as assumed.⁸⁸

B. Current Accepted Antitrust Goals in the United States

Although there is little consensus as to the goals of antitrust law in the United States, two goals in particular have emerged over the years that dominate modern academic and policy discourse: that of total welfare and consumer welfare.⁸⁹ Most antitrust scholars and practitioners in the United States endorse a consumer welfare standard,⁹⁰ but there has been substantial disagreement over what consumer welfare means. As explained, this ambiguity first arose when Judge Bork used the term "consumer welfare" to mean total welfare.⁹¹ The Supreme Court then quoted Bork in stating that the Sherman Act is a "consumer welfare prescription."⁹² But on various occasions, the Supreme Court has alternatively suggested either total welfare or consumer welfare as the correct standard.⁹³ Whereas total welfare weighs the overall surplus gained from an alleged anticompetitive act or merger, taking into account both producers and consumers, consumer welfare only considers the surplus consumers gain.⁹⁴ Thus, most scholars, judges, and

assumptions of Chicago School into market realities).

87. Crane, *supra* note 56, at 46; see Varney & Clarke, *supra* note 57, at 1567, 1585 (noting that the Georgetown School views antitrust as going beyond horizontal price-fixing and monopoly creating mergers).

88. Piraino, *supra* note 56, at 364.

89. Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497, 2498 (2013); Blair & Sokol, *supra* note 54, at 473 ("The goal of antitrust, as understood by economic analysis, involves a choice of either total welfare or consumer welfare.").

90. Meese, *supra* note 65, at 2201.

91. Blair & Sokol, *supra* note 54, at 473.

92. *Id.*

93. *Id.* at 474.

94. Blair & Sokol, *supra* note 89, at 2498; see A. Neil Campbell & J. William Rowley, *The Internalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?*, 75 *ANTITRUST L.J.* 267, 318 (2008) (describing the debate as to

enforcement officials endorse some variant of the consumer welfare standard.

The Chicago School and many economists favor the total welfare standard that considers the surplus of both producers and consumers.⁹⁵ This standard seeks to maximize society's aggregate welfare and ban only those practices that result in a less efficient allocation of society's resources and a reduction of society's overall wealth, ignoring distributional effects.⁹⁶ The total welfare standard relies on the presumption that practices that create market power and higher prices can nonetheless increase overall welfare by producing efficiencies that counteract the deadweight allocative losses resulting from enhanced market power.⁹⁷ Thus, those who argue that total welfare is the goal of antitrust generally do not advocate antitrust intervention unless the transaction is likely to diminish aggregate wealth.⁹⁸ The current enforcement of Section 2 of the U.S. Sherman Act largely falls within a total welfare approach.⁹⁹

Advocates of a consumer welfare standard, on the other hand, argue that the fundamental goal of antitrust is to protect consumers, not to increase the total wealth of society.¹⁰⁰ The consumer welfare standard seeks to ban those practices that reduce the consumer surplus and is agnostic about the efficient allocation of resources.¹⁰¹ Those advocating a consumer welfare approach note that competition law has a strong tradition of protecting the interests of consumers.¹⁰² Moreover, the goal of

whether to count efficiencies retained by producers or only efficiencies passed on to consumers).

95. A. Neil Campbell & J. William Rowley, *Proposals for Evolving the Patchwork of Domestic Monopolisation and Dominance Laws*, 12 *BUS. L. INT'L* 5, 43 (2011); see Blair & Sokol, *supra* note 89, at 2499 (arguing that total welfare, rather than consumer welfare, should drive antitrust analysis).

96. Meese, *supra* note 65, at 2204.

97. *Id.*

98. Fox, *supra* note 60, at 372.

99. Meese, *supra* note 65, at 2215, 2218.

100. See Kirkwood & Lande, *supra* note 63, at 192, 196, 243 (arguing Chicago School is incorrect on the merits and that neither Congress nor the courts have ever chosen efficiency over consumer protection when a tradeoff must be made).

101. Meese, *supra* note 65, at 2201–03.

102. Campbell & Rowley, *supra* note 94, at 318.

consumer welfare is the standard on which there is increasing international convergence.¹⁰³

Although the two goals overlap and are often indistinguishable, situations do arise when firm behavior may only violate one of the goals. And in these more complicated cases, it is critical to know which standard to apply when undertaking a rule of reason type analysis.¹⁰⁴

IV. DEVELOPING COUNTRIES' APPROACH TO COMPETITION LAW

A. *Distrust of Competition Policy and Law*

Despite the importance industrialized nations, non-governmental organizations ("NGOs"), and Bretton Woods institutions have placed on the adoption of competition policies in developing countries, the governments of developing countries have been hesitant to institute these competition policies for various reasons. One of the primary obstacles developing countries face is attracting and sustaining political support for the implementation of competition policies and law.¹⁰⁵ For example, if trade liberalization affects domestic economic performance, government officials may withdraw their support because any claims of duress caused by liberalization will be pinned on them. Even more, government officials of developing countries may seek to undermine any efforts that threaten to reduce their economic and political power.¹⁰⁶

Although competition is beneficial for all economic participants in the long run, it may create displacement in the short run. Competition laws in developing countries, at least in the short term, may threaten to preserve or widen inequality

103. INT'L COMPETITION NETWORK, *supra* note 82, at 9 (noting that thirty of thirty-three respondents did not specifically define consumer welfare and seem to have different economic understandings of the term).

104. Blair & Sokol, *supra* note 54, at 474.

105. Thula Kaira, *Developing Countries and Competition*, INT'L COMPETITION NETWORK 3 (Sept. 10, 2013), <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/devco.aspx>.

106. William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197, 1204 (1994).

rather than promote mobility. Consequently, many governments of developing countries view competition policies and law as not adequately addressing distributional issues and, in fact, exacerbating them.¹⁰⁷ In addition, legislators in developing countries do not usually think about efficiency, so claims of enhancing efficiency may fall flat.¹⁰⁸ As such, developing countries often see free-market rhetoric and aggregate welfare goals as inappropriate to their context. Similarly, many in developing countries fear that competition policy will encroach the pursuit of development objectives and constrain government officials' ability to achieve these other policy objectives.¹⁰⁹ Developing countries also worry that such competition policies—particularly the liberalization of markets—may expose their small- and medium-sized enterprises to foreign competition.¹¹⁰

Initial government support for competition policy is just one aspect of whether a competition policy, and competition law specifically, may succeed in a developing country. The process of introducing and implementing a competition law itself also faces significant obstacles.¹¹¹ For example, drafting a competition law bill and ushering it through the legislative process may face strong opposition by powerful businesses that gain rents by engaging in anticompetitive conduct. These businesses may seek to undermine the effectiveness of the legislation by advocating that provisions that are perceived to be against their interests be removed and lobbying for the inclusion of exceptions and exemptions to protect their interests.¹¹² Even if the legislative body ultimately adopts the competition law, there may still be a lack of political will in enforcing the law after its passage.¹¹³

107. Fox, *supra* note 1, at 220; see McMahon, *supra* note 4, at 257 (noting that developing and least developed countries have other priorities, such as access to water and an adequate standard of living).

108. Fox, *supra* note 13, at 593.

109. Adhikari, *supra* note 11, at 53; see Gal, *supra* note 1, at 27 (discussing resistance of many developing countries to adopting and implementing competition laws because of a fear that they may harm the furtherance of goals that are crucial to country's economic development or social values).

110. Adhikari, *supra* note 11, at 57.

111. STEWART ET AL., *supra* note 1, at 26.

112. *Id.*

113. *Id.* at 27.

B. Rejection of Western Approach to Competition Law

The developing countries that have adopted competition laws have mostly drawn from the competition laws of the United States, Canada, and the European Union.¹¹⁴ Janet Steiger, the former chairwoman of the U.S. Federal Trade Commission, acknowledged this trend, describing antitrust law as “largely an American-made product” and one of her country’s most successful exports.¹¹⁵ Some, however, believe that the antitrust initiatives proposed by antitrust experts in developed economies are inadequate, if not inappropriate, for most developing economies.¹¹⁶

Although the experience of mature market economies in designing and applying competition law can be instructive for developing countries, that experience may not be wholly transferable. Given the economic realities, many have argued that there are a number of limits to the Western antitrust framework when applied to developing countries.¹¹⁷ First, Western antitrust systems benefit from substantial financial resources, wide availability of expertise in economics and law, broad acceptance of administrative safeguards, and well-established market processes.¹¹⁸ Second, antitrust laws typically function well in economies with supportive infrastructure composed of non-corrupt and well-funded institutions.¹¹⁹ Third, the laws in developed countries typically address situations with complex and technologically advanced business structures and an array of formal market institutions, which is not the case in most developing countries.¹²⁰ And finally, some believe that a U.S.-style competition policy may favor well-organized interest groups and large corporations—in effect, exacerbating the

114. *Id.* at 7.

115. Rodriguez & Williams, *supra* note 16, at 211.

116. *Id.* at 231.

117. Fox, *supra* note 1, at 219.

118. Kovacic, *supra* note 1, at 302. *But see* Roberts, *supra* note 6, at 5 (noting that a U.S. style competition policy, drawing on large numbers of lawyers and economists, is not an optimal use of scarce expertise).

119. Fox, *supra* note 1, at 219.

120. STEWART ET AL., *supra* note 1, at 7.

preexisting wealth disparity.¹²¹ As a result, if developing countries adopt the laws of Western and industrialized nations, there may be a disconnect between the legal provisions adopted and the economic realities of the developing countries.¹²²

Because of this potential disconnect, many developing countries have expressed a need for an antitrust paradigm different from that of the developed world.¹²³ As such, developing countries have adopted competition policies and laws that they believe better fit their country-specific circumstances. They also have resisted international convergence of competition laws efforts. For instance, the World Trade Organization (“WTO”) placed the idea of a global competition law on its agenda as one of the Singapore issues.¹²⁴ But in 2003, negotiations broke down at the Ministerial Conference in Cancun, and the WTO’s General Council abandoned the idea in August 2004.¹²⁵

Many attribute the breakdown of the WTO convergence talks to the opposition voiced by developing countries.¹²⁶ Developing countries expressed concern about the model of competition that the agreement would impose on them and questioned how institutional models of competition law enacted over long periods in globalized and developed economies would translate to their markets.¹²⁷ African countries, in particular, were vocal. At the Southern and Eastern African Trade, Information and Negotiations Institute Workshop (“SEATINI”), African nations questioned whether the WTO was the right

121. Roberts, *supra* note 6, at 5.

122. STEWART ET AL., *supra* note 1, at 7.

123. Fox, *supra* note 1, at 212–13; see *Mondi Ltd. v. Kohler Cores & Tubes* 2003 (1) CPLR 25 (CAC) at 14 para. 48 (S. Afr.) (“[C]are must be taken before an uncritical borrowing of traditional anti-trust economic theories, as developed in the United States of America, encrust the process of interpretation of our Act.”); see also Nam-Kee Lee, Chairman, Korea Fair Trade Comm’n, *Korean Economic Development Policy Lessons: The Shift from Industrial to Competition Policy*, (July 3, 2002), <http://ftc.go.kr/data/hwp/200207.doc>. (“[I]t would not be well advised to suggest that developing countries adopt the same level of competition policy as developed countries, when their markets are not as mature and business not as competitive”).

124. McMahon, *supra* note 4 at 253.

125. *Id.* at 253–54.

126. *Id.* (noting that the United States never fully endorsed the negotiations).

127. *Id.* at 257.

venue for a competition agreement.¹²⁸ Specifically, the non-discrimination policy caused concern because it could have prevented these African countries from imposing duties on essential utilities to achieve distributional outcomes, and they wanted the autonomy to apply a more contextual, flexible approach to competition law.¹²⁹ These countries publicly espoused their understanding of the purpose of competition policy:

Our understanding of competition policy, from the development perspective, is that there is a need for government to assist and promote local firms so that they can survive, be viable and develop despite their present relative weakness, so that they can successfully compete with foreign firms and their products.¹³⁰

It is not just developing countries, however, that question the appropriateness of adopting a competition framework from a mature market economy. Many scholars and other NGO actors also encourage developing countries to consider establishing competition laws and frameworks better suited to their developmental needs and the realities of their specific markets.¹³¹ Instead of wholly importing Western laws, they instead argue that competition laws should respond to a particular country's historical and contemporary circumstances, as well as the specific contextual problems that need resolution.¹³² They discourage "rote application of Western legal models in ways that fail to account for crucial differences in local circumstances" and instead advocate for an internal approach to lawmaking that originates from within the country.¹³³ A "bottom-up" approach such as this entails identifying and understanding

128. S. & E. Afr. Trade, Info. & Negotiations Inst., *Recommendations from the Sixth SEATINI Workshop Held in Arusha from 2-5 April, 2003*, 6 SEATINI BULL. 1, 1, 7 (2003) [hereinafter SEATINI] (noting that countries at the workshop included Angola, Kenya, Lesotho, Malawi, Mozambique, Tanzania, Uganda, Zambia, and Zimbabwe).

129. McMahon, *supra* note 4, at 258.

130. SEATINI, *supra* note 128, at 7.

131. Fox, *supra* note 1, at 235; *see generally* Evenett, *supra* note 18 (representing an article researched by an NGO analyzing the particularities of competition law in developing countries).

132. Fox, *supra* note 1, at 224; Lewis, *supra* note 14, at 2.

133. Fox, *supra* note 1, at 224; Kovacic, *supra* note 1, at 280.

customs and norms that promote market processes.¹³⁴ By engaging in lawmaking from within, the resulting law may have the strongest prospects for adoption and implementation, particularly if based on the recommendations of indigenous experts and commands their support.¹³⁵

C. Emergence of Competition Laws that Respond to Specific Historical, Cultural, and Economic Conditions

Because of this distrust of Western competition policy and law, many developing countries have chosen to incorporate non-traditional objectives in their competition laws based on their unique history, culture, social, and market conditions.¹³⁶ Thus, the objectives of a developing country's competition law may reflect the historical context in which the legislation was developed and the political processes in which economic welfare values were balanced against populist impulses to protect small businesses.¹³⁷

The emergence of competition laws based on the historical, economic, and cultural conditions of a country is not a new phenomenon. Competition laws in the United States, Canada, and the EU have been shaped and re-shaped to address changing economic realities over time.¹³⁸ The historical jurisprudence of

134. Kovacic, *supra* note 1, at 280.

135. Kovacic, *supra* note 106, at 1216.

136. Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1088 (2004) (reviewing AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003)); see Waller, *supra* note 1, at 459 (explaining that foreign countries prefer to pick only those parts of U.S. and EU law that will serve their unique needs instead of adopting one of these models in their entirety.).

137. INT'L COMPETITION NETWORK, *supra* note 82, at 9; Campbell & Rowley, *supra* note 95, at 5; William Kovacic, *Developing Countries and Competition*, INT'L COMPETITION NETWORK 40 (Sept. 10, 2013), <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/iccurriculum/devco.aspx> ("If we ask whether there is some element of politics in the implementation of competition law, that's like asking if there is oxygen in the air."); Campbell & Rowley, *supra* note 95, at 8 (discussing how legislative texts developed at different times and in context of different domestic, political, cultural, and macroeconomic conditions have resulted in different legal regimes); see Blair & Sokol, *supra* note 89, at 2501 (explaining how history and politics, rather than efficiency, explain divergent antitrust systems).

138. STEWART ET AL., *supra* note 1, at 7; see *Leegin Creative Leather Prods. v.*

U.S. antitrust law reflects a more interventionist posture in cases involving large versus small competitors.¹³⁹ The U.S. Congress passed the Robinson-Patman Act in 1936¹⁴⁰—a time in which chain stores, such as grocery and drug stores, were emerging. Many in the United States saw the growth of chain stores as a threat to smaller retailers. Consequently, Congress sought to address and eliminate the competitive advantage these larger stores wielded.¹⁴¹ In the 1970s, however, the United States began retreating from these intervention-oriented policies, largely because of the influence of the Chicago School.¹⁴² The U.S. Supreme Court and lower court decisions then began to reflect this new approach to antitrust law by focusing on efficiency and the generation of aggregate wealth, rather than fairness or rivalry.¹⁴³

Because of the dominance of the Chicago School in the United States in the late 1970s and 1980s—and its continued influence today—even advanced, industrialized nations diverge on the proper goals of competition law.¹⁴⁴ The EU, for instance, focuses more on preserving rivalry and safeguarding the competitive process by preventing foreclosure.¹⁴⁵ The EU historically has not focused on promoting efficient outcomes and total welfare.¹⁴⁶ Accordingly, EU competition law reflects a more

PSKS, Inc., 551 U.S. 877, 899 (2007) (“Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade evolve to meet the dynamics of present economic conditions.’”).

139. Campbell & Rowley, *supra* note 94, at 275.

140. Daniel J. Gifford & Robert T. Kudrle, *The Law and Economics of Price Discrimination in Modern Economies: Time for Reconciliation?*, 43 U.C. DAVIS L. REV. 1235, 1263–64 (2009).

141. *Id.*

142. Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago* 76 U. CHI. L. REV. 1911, 1911 (2009) (reviewing HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008)).

143. Gifford & Kudrle, *supra* note 140, at 1269.

144. Cao, *supra* note 136, at 1088–89; *see* Gifford & Kudrle, *supra* note 140, at 1272–73 (describing gaps in U.S. and EU policies after 1970s antitrust revolution in the United States, but noting that some claim gap is narrowing).

145. McMahon, *supra* note 4, at 267.

146. *Id.*; *see* Campbell & Rowley, *supra* note 94, at 275 (describing EU as being strongly sensitive to protection of competitors, reflecting idea of social responsibility of

distributive bent and emphasizes the preservation of choice for consumers.¹⁴⁷ The EU also utilizes a more regulatory approach and includes excessive pricing as an abuse of dominance law theory.¹⁴⁸

Moreover, the United States and EU apply different thresholds in their competition analyses. For instance, U.S. jurisprudence focuses on the “substantial lessening of competition” while the EU system focuses on “significant impediment[s] to competition.”¹⁴⁹ Accordingly, the United States seemingly applies a higher threshold for finding harm to competition. But even within the United States itself, various jurisdictions apply different standards and interpret the goals of antitrust slightly differently.¹⁵⁰

D. Characteristics of Developing Countries Leading to Customization of Competition Laws

To better understand why many developing countries have rejected a Western approach to competition law, it is necessary to briefly examine the historical and economic conditions in developing countries that have led them to tailor their laws to their country specific circumstances. To begin, the markets in developing countries are often much less dynamic and open than markets in developed countries.¹⁵¹ To illustrate, even if a developing country has undertaken some trade liberalization, it may still have other trade barriers in place, such as tariffs, quotas, or infant industry protection. These trade barriers

dominant firms). *But see* INT’L COMPETITION NETWORK, *supra* note 82, at 31 (noting the European Commission’s response to ICN which stated that competition, “should not be used to protect or support specific firms or industries”).

147. Blair & Sokol, *supra* note 89, at 2502.

148. Campbell & Rowley, *supra* note 94, at 336. In the United States, competition laws are generally not seen as regulatory but rather operate indirectly by preventing and curing impediments to the effective functioning of the markets. *Id.*

149. Francis N. Botchway, *Mergers and Acquisitions in Resource Industry: Implications for Africa*, 26 CONN. J. INT’L L. 51, 74 (2010).

150. *See International Antitrust Issues, Hearing Before the Antitrust Modernization Comm’n*, 109th Cong. 4–5 (2006) (prepared statement of Eleanor M. Fox, Professor, New York University School of Law) (discussing differences in the Eleventh and Third Circuits’ application of antitrust laws).

151. Fox, *supra* note 1, at 229.

ensure that markets remain small and insulated.¹⁵²

Not only are developing countries' markets typically small, but they also suffer from high levels of concentration. A small number of firms often dominate the various sectors of the economy.¹⁵³ These concentrated markets allow dominant firms to create high entry barriers and achieve and maintain a monopoly position.¹⁵⁴ Further contributing to the difficulty of entry, potential competitors face limited access to capital as well as restrictive controls on the formation of new businesses and the introduction of new ideas in the marketplace.¹⁵⁵ In addition, developing countries may adopt tax policies that set extremely high tax rates on business earnings.¹⁵⁶ Labor laws also burden new businesses by severely restricting the ability of an employer to adjust the size of the work force, which may discourage companies from expanding capacity and pursuing new business development.¹⁵⁷

The state also typically plays a large role in the markets of developing countries, with many countries exhibiting a strong past of state ownership of key enterprises. The state may either act directly as the owner of state monopolies or indirectly through the close links it has developed with national champions that it seeks to promote. In particular, the state typically dominates public services and utilities, such as telecommunications, public transportation, electricity, and water supply.¹⁵⁸ The state's presence in infrastructure utilities

152. See Brusick & Evenett, *supra* note 1, at 276 (noting that many poor countries are either island or landlocked and do not have efficient transportation infrastructures); see also McMahon, *supra* note 4, at 265–66 (linking small and fragmented markets in developing countries to the dominant status of the state).

153. RICHARD CHANCE, INT'L COMPETITION NETWORK CONFERENCE, THE CHALLENGES FACING COMPETITION AUTHORITIES IN DEVELOPING COUNTRIES: A BUSINESS PERSPECTIVE 8 (2003).

154. Sokol, *supra* note 4, at 140.

155. Brusick & Evenett, *supra* note 1, at 276; McMahon, *supra* note 4, at 266; see Kovacic, *supra* note 8, at 108, 112 (discussing transitional economies).

156. Kovacic, *supra* note 8, at 111–12.

157. Kovacic, *supra* note 1, at 305.

158. See Brusick & Evenett, *supra* note 1, at 277, 293 (claiming that autocratic governments usually increase possibility of economic growth and foster social conditions which lead to political liberalization); see also *Natural Monopolies*, ECONS. ONLINE,

allows it to negotiate favorable contracts for the provision of services, or to not even pay for these services at all in some circumstances.¹⁵⁹ In instances where the state no longer owns key enterprises, the state continues to have a strong presence in, or at least a lingering influence over, the enterprises.¹⁶⁰ This “[g]overnment intervention in the marketplace [often results in distorted] prices and resource flows from socially efficient levels.”¹⁶¹

Although many formerly state-owned enterprises may have undergone privatization, the state monopolies may now simply be private monopolies.¹⁶² Further, the privatization process itself is often corrupt, with transfers of wealth typically going to those who are wealthy enough to bid and bribe.¹⁶³ And when essential facilities, such as transport and financial services, are privatized, the incumbent firms may refuse to allow competitors to use the essential facilities or impose excessive fares for such services.¹⁶⁴

Even with the privatization of enterprises, developing countries will likely still experience top-down planning and control by a single-party.¹⁶⁵ This top-down planning by a single party frequently results in systemic political corruption, often in

http://www.economicsonline.co.uk/Business_economics/Natural_monopolies.html (last visited Oct. 26, 2014) (explaining that governments tend to regulate essential services, such as water supply, electricity, gas, and other public utility industries).

159. McMahon, *supra* note 4, at 265. The state may also heavily intervene in the competitive process, such as in the selection process of bidding for public works and other contracts.

160. *See id.* at 258, 265 (reasoning that state’s strong presence in the public service industry gives them leverage to intervene in bidding process and awarding of contracts for public works); Lewis, *supra* note 14, at 3 (indicating that many previously or currently state-owned enterprises in South Africa have abuse of dominance issues and competition problems).

161. Rodriguez & Williams, *supra* note 16, at 220.

162. David Lewis, Chairperson, Competition Tribunal of S. Afr., Address at the Organisation for Economic Co-operation and Development Global Forum on Competition: The Objectives of Competition Law and Policy 3 (2003) (S. Afr.); STEWART ET AL., *supra* note 1, at 37; McMahon, *supra* note 4, at 264–65.

163. Chua, *supra* note 20, at 310–11.

164. *See* Brusick & Evenett, *supra* note 1, at 284 (referencing situations where incumbent firms have refused to allow competitors access to other essential facilities and/or impose excessive prices for their services).

165. J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT’L L.J. 1, 41 (1995).

the form of rigged elections and bribery.¹⁶⁶ As such, the economic and government elites may be intertwined.¹⁶⁷

On a macro level, globalization also has had a profound impact on developing countries. Although globalization has arguably lowered trade barriers and paved the way for many nations to derive efficiency benefits from markets, some argue that globalization ignores the need for protections and guarantees against deterioration in standards of living, healthcare, labor, and social security.¹⁶⁸ Because globalization and the growth of capitalism emphasize unrestricted market forces, globalization has the potential to increase the disparity of wealth and opportunity.¹⁶⁹ This may be particularly problematic for developing countries that are characterized by widespread poverty and lack strong, accountable institutions capable of administering a regulatory welfare state.¹⁷⁰ Moreover, developing countries may be particularly susceptible to the effects of international cartels because they tend to be “price takers” on world markets and have little buyer power.¹⁷¹ These international cartels also likely know that developing countries have fewer resources to dedicate to competition law enforcement.¹⁷²

E. Inclusion of Public Interest Considerations in Objectives and Analysis

Instead of shying away from adopting competition laws out of a fear that other policy options may be restricted, many developing countries attempt to strike a balance between the potentially conflicting objectives of the government and

166. Chua, *supra* note 20, at 313.

167. Gal, *supra* note 1, at 32.

168. Fox, *supra* note 1, at 215, 223; Oloka-Onyango, *supra* note 165, at 7 n.30.

169. See Fox, *supra* note 1, at 216 (arguing that globalization tends to stack deck against developing countries and those who are least able).

170. See Chua, *supra* note 20, at 309–10 (maintaining that large disparity of wealth in developing countries exists, which along with their insufficient funds, makes it harder to administer a regulatory welfare system). Tax and transfer programs often don't exist in developing countries because there is usually not enough to tax and no one who can be trusted to transfer. *Id.* at 213, 223.

171. McMahon, *supra* note 4, at 259.

172. Fox, *supra* note 1, at 233.

competition law.¹⁷³ In doing so, most developing countries gravitate more towards the EU model of competition law as their starting reference because they see it as better suited to their economies.¹⁷⁴ As discussed, the EU model protects the openness and access of markets and the right of market actors to not be fenced out by dominant firm strategies.¹⁷⁵

Although many developing countries gravitate towards the EU model, they tend to go even further than the EU in protecting market actors and ensuring a level playing field. As such, a competition law framework has emerged in numerous developing countries that incorporates various non-economic factors.¹⁷⁶ By incorporating these non-economic factors, these countries seek to use competition law as a tool to meet both its competition law and industrial policy objectives.¹⁷⁷ Industrial policy objectives often include selective economic and social policy goals, such as distributive justice or employment concerns.¹⁷⁸ The incorporation of industrial policy objectives into a competition law might be seen as a convenient mechanism for

173. Adhikari, *supra* note 11, at 58.

174. Eleanor M. Fox, *Antitrust in No One's World*, 27 *ANTITRUST* 73, 73–74 (2012); McMahon, *supra* note 4, at 268.

175. Fox, *supra* note 60, at 392; McMahon, *supra* note 4, at 268. *But see* Fox, *supra* note 60, at 404 (noting that European analysis involves more microeconomics than it previously did and is increasingly likely to credit efficiency aspects of conduct and transactions).

176. *See* VANI CHETTY, *THE PLACE OF PUBLIC INTEREST IN SOUTH AFRICA'S COMPETITION LEGISLATION: SOME IMPLICATIONS FOR INTERNATIONAL ANTITRUST CONVERGENCE* ¶ 3 (2005), available at <http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper.pdf> (explaining that in many developing countries, non-competition factors have been incorporated into competition legislation in form of public interest objectives).

177. *See* Lewis, *supra* note 162, at 6–7 (“The textbooks will continue to find this inelegant, but the real world demands it.”).

178. *See* Gal, *supra* note 1, at 28 (citing specifically South Africa as an example); *see also* Lewis, *supra* note 162, at 6–7. Some developing countries may use competition laws as a form of industrial policy favoritism for local producers and consumers. Campbell & Rowley, *supra* note 94, at 337. Industrial policy is founded in the belief that the government is better positioned to choose winners and losers than the markets. The reach of industrial policy objectives typically goes beyond market interventions to address market failures. Lawrence J. White, *The Role of Competition Policy in the Promotion of Economic Growth* 9 (NYU Ctr. for Law & Econ., Working Paper No. 08-23, 2008).

the correction of historical imbalances.¹⁷⁹

The inclusion of industrial policy objectives—or public interest considerations—in a competition law may take a variety of forms. For example, the law may contain provisions to “help bring discriminated-against or left-out majorities into the economic mainstream.”¹⁸⁰ Or, the laws may seek to protect small and medium enterprises and ensure equal business opportunities.¹⁸¹ The inclusion of these public interest factors in competition laws typically appears in the objectives of the statute itself or in the provisions pertaining to analysis of mergers, exemptions, or certain business practices.

1. *Objectives of the Competition Statute*

Generally, public interest considerations most frequently appear in the purpose or objectives of the competition statute. Although the United States has taken a narrow view of the goal of antitrust law, other countries and scholars view the potential goals of antitrust as numerous and contend that the goals of any antitrust system may change over time.¹⁸² Developing countries in particular have cited the operation of competition law throughout the history of the United States and of other developed countries in support of their right to formulate goals more conducive to their state of development.¹⁸³ In doing so,

179. CHANCE, *supra* note 153.

180. See Fox, *supra* note 13, at 580 (citing laws of South Africa and Indonesia); Cao, *supra* note 136, at 1093 (citing law of Indonesia).

181. Harris & McEwin, *supra* note 53, at 19; see Adhikari, *supra* note 11, at 71 (“[A]lthough the role of SME’s may not be that important in terms of generating export revenue, their contribution in terms of providing employment opportunities is enormous. If we expose such enterprises to foreign competition, the vital nerve of the national economy may collapse. Therefore, it is necessary to shield these enterprises for a temporary period so that they could be brought up to speed and face competition from large domestic as well as foreign enterprises at a later stage.”). By protecting small and medium enterprises, the law reflects the belief that the marketplace should give firms, including smaller and younger firms, a fair chance to compete on the merits of their product. Fox, *supra* note 1, at 223–24.

182. Blair & Sokol, *supra* note 89, at 2504; see Gal, *supra* note 1, at 28 (acknowledging that primary goal of competition law is enhancement of economic efficiency but arguing that there is no inherent limitation in the law to furtherance of broad industrial policy and socio-economic objectives).

183. McMahan, *supra* note 4, at 258 (discussing that priority given to detection and

developing countries argue that the goals that prevail in one jurisdiction may not necessarily be as important in others and have thus tried to avoid a “one size fits all” approach to competition law.¹⁸⁴

The International Competition Network (“ICN”) has conducted surveys of jurisdictions around the world to identify the various goals that have been included in competition laws. The surveys reveal that many countries’ competition laws include both traditional economic competition goals as well as non-competition public interest goals.¹⁸⁵ Interestingly, ICN respondents generally disagree over what constitutes a competition goal and what constitutes a non-competition goal.¹⁸⁶

Even beyond distinguishing among the types of goals, many countries hold differing views as to whether competition goals should encompass other non-traditional competition goals, such as protecting small businesses.¹⁸⁷ When surveyed about their goals in the unilateral conduct context, thirteen competition agencies responded that their unilateral conduct provisions were not intended to pursue non-competition goals.¹⁸⁸ Eight agencies, however, responded that certain non-competition goals may be taken into account in deciding unilateral conduct cases, but that such cases are generally the exception.¹⁸⁹

The cited objectives of unilateral conduct laws were numerous and included: (1) ensuring an effective competitive process; (2) promoting consumer welfare; (3) maximizing

prosecution of cartel activity is only a recent occurrence in developed countries other than the United States).

184. Stucke, *supra* note 53, at 567–68; Adhikari, *supra* note 11, at 79 (stating that there is no “universal” law that fits every country and that it is largely a subjective issue that depends on a number of factors); see STEWART ET AL., *supra* note 1, at 7 (acknowledging that admittedly little research has been performed to understand differences in how competition functions in developing economies as opposed to industrialized economies).

185. See Stucke, *supra* note 53, at 567 (citing economic goals, such as the promotion of competition and economic efficiency, along with non-economic goals, such as promoting consumer welfare and guaranteeing equal conditions for all enterprises).

186. INT’L COMPETITION NETWORK, *supra* note 82, at 32.

187. *Id.*

188. *Id.* at 31.

189. *Id.* at 31.

efficiency; (4) ensuring economic freedom; (5) ensuring a level playing field for small- and mid-sized enterprises; (6) promoting fairness and equality; (7) promoting consumer choice; (8) achieving market integration; (9) facilitating privatization and market liberalization; and (10) promoting competition in international markets.¹⁹⁰ Of these goals, almost all of the responding competition agencies cited ensuring an effective competitive process as an objective in its own right and/or as a means to achieve other goals.¹⁹¹ The vast majority of respondents also cited two other goals: the promotion of consumer welfare and the maximization of efficiency.¹⁹² Most respondents, however, did not specifically define consumer welfare and not surprisingly appear to hold different understandings of the term.¹⁹³ The U.S. agencies responded that the promotion of consumer welfare and the organization of the free market economy are the only goals of the U.S. antitrust laws, arguing that social objectives are better pursued by other instruments.¹⁹⁴

Many Western competition scholars and practitioners support the position of the U.S. agencies, and regard other non-economic objectives as falling outside the proper purview of competition law.¹⁹⁵ Yet, as previously discussed, the evolution of U.S. antitrust law reflects other goals beyond total or consumer welfare. The legislative history of the Sherman Act and other antitrust laws suggest such “populist” goals may have been considered and that there were a number of social and political reasons for limiting business size and preserving large numbers of small businesses.¹⁹⁶ For example, the enactment of the Sherman Act and the amendment of Section 7 of the Clayton Act in 1950 reflected Congress’s concern with the disappearance

190. Stucke, *supra* note 53, at 567.

191. INT’L COMPETITION NETWORK, *supra* note 82, at 2.

192. *Id.* at 5.

193. *Id.* at 9; see Stucke, *supra* note 53, at 571–72 (explaining that consumer welfare can mean different things to different people and may include different social, political, economic, and moral values).

194. INT’L COMPETITION NETWORK, *supra* note 82, at 31.

195. Harris & McEwin, *supra* note 53, at 19.

196. Turner, *supra* note 82, at 798.

of small independent entrepreneurs and their displacement by massive corporations.¹⁹⁷ These concerns were reflected in the approach of the early Harvard School, which advocated protecting firms without market power.¹⁹⁸

2. *Merger Regulation and Exemptions*

Merger regulation serves as another area in which developing countries have included public interest, or industrial policy, considerations in their competition laws. For example, in merger review, the competition law may instruct the competition authority to consider certain public interest factors in deciding whether to approve a merger or acquisition.¹⁹⁹ Moreover, some developing countries may use public interest grounds in merger review to justify the creation and promotion of “national champions.” These countries believe that certain firms should be allowed to grow large enough so that they may better compete with foreign firms in domestic markets or internationally as “national champions.”²⁰⁰ In fact, some countries have tried to promote national champions by excluding merger control regulation altogether in their laws.²⁰¹

To justify the permissive scrutiny given to national champions, developing countries argue that their domestic firms cannot achieve international competitiveness without achieving economies of scale, which they claim means allowing a firm

197. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1058–59 (1979) (noting that there are many other indications in legislative history of antitrust laws that antitrust laws were designed to preserve competition and not to create procedural protection for distributors or income redistribution). This concern was also reflected in the enactment of the Robinson-Patman Act in 1936. *Id.* at 1059.

198. See Piriano, *supra* note 56, at 346, 349 (discussing early courts’ presumption of illegality of any merger, joint venture, or agreement that allowed a firm to obtain, enhance, or exercise market power).

199. The inclusion of non-economic considerations is just one aspect of the differing approach developing countries have taken in reviewing mergers. Some have argued that the threshold in terms of market share for merger notification should be set higher in developing countries than in developed countries. This argument reflects the belief that the yardsticks used to evaluate proposed mergers in developed and large economies should not be applied to smaller, developing economies. STEWART ET AL., *supra* note 1, at 24.

200. *Id.* at 38; Brusick & Evenett, *supra* note 1, at 287.

201. Brusick & Evenett, *supra* note 1, at 286–87.

to gain and maintain a dominant position in the market.²⁰² It is not self evident, however, that economies of scale in small or developing nations will always require highly concentrated markets.²⁰³ Further, a fair portion of economic activity in developing countries relates to the non-tradable sector—such as electricity, water, telephone, and financial services—where foreign trade has not disciplined the markets. As a result, applying permissive scrutiny to mergers or allowing concessions under the law with the goal of promoting “national champions” may very well lead to the protection of inefficient monopolies.²⁰⁴

In addition to merger review, developing countries have created broad exemptions under their competition laws that frequently allow the consideration of public interest factors. In India, for example, the central government may exempt classes of enterprises from the application of the Competition Act if the government deems it necessary in the public interest or interest of national security.²⁰⁵ Similarly, Morocco allows exemptions at the discretion of the competition authority when the purpose is to improve small to mid-sized enterprises management or marketing by farmers of their products, assuming such practices produce a “net public benefit.”²⁰⁶ Some developing countries may use exemptions as another way to promote national champions by allowing firms to exercise market power under the law.²⁰⁷

The use of exemptions based on public interest considerations has raised concerns in the global competition law community. Many believe that these exemptions reflect public policy objectives that cannot be reconciled with the promotion of competition.²⁰⁸ They fear that the application of exemptions and

202. See STEWART ET AL., *supra* note 1, at 24 (noting that research shows that such an approach must be nuanced and that non-tradable services sector is particularly vulnerable to abuse of dominance).

203. McMahon, *supra* note 4, at 259.

204. *Id.*; Brusick & Evenett, *supra* note 1, at 287.

205. India Competition Act, No. 12 of 2003, INDIA CODE § 54(a) (2003); Terry Calvani & Karen Alderman, *BRIC in the International Merger Review Edifice*, 43 CORNELL INT'L L.J. 73, 123–24 (2010).

206. STEWART ET AL., *supra* note 1, at 25.

207. McMahon, *supra* note 4, at 258.

208. INT'L COMPETITION NETWORK, *supra* note 82, at 27.

immunities may render the competition law ineffective and that the benefits that a competition law may bring to a country will be lost.²⁰⁹ In addition, exemptions may be the direct result of regulatory capture and rent seeking, whereby a weak competition authority adopts policies or allows exceptions for various interests, which can impede the development of fully competitive markets.²¹⁰ Not only has the broad use of exemptions stimulated a debate about whether competition laws should include such other “populist” or public interest goals, but it also raises the broader question of what model of competition law, if any, is appropriate in developing countries.²¹¹

V. CASE STUDY OF SOUTH AFRICA

South Africa serves as one of the best examples of a developing country that has incorporated public interest considerations in a competition law.²¹² South Africa was one of the first countries to include industrial policy objectives in its competition law and did so in an effort to remedy the economic and welfare effects resulting from the apartheid legal regime. By global standards, South Africa has been fairly successful in its competition enforcement initiatives; a number of cases illustrate how such public goals and factors have been applied in practice.

A. *Apartheid in South Africa*

Apartheid was the national policy in South Africa for more than forty years.²¹³ Under apartheid, a small white minority governed and owned almost all of the business enterprises, while the law barred non-whites from most segments of the

209. Fox, *supra* note 1, at 231–32.

210. McMahon, *supra* note 4, at 259; STEWART ET AL., *supra* note 1, at 27.

211. See, e.g., INT’L COMPETITION NETWORK, *supra* note 82, at 27 (discussing how use of exemptions may conflict with goals of competition law); McMahon, *supra* note 4, at 265 (noting that a model based on U.S. antitrust is not appropriate).

212. See Sasha-Lee Afrika & Sascha-Dominik Bachmann, *Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India—A Comparative Overview*, 45 INT’L LAW. 975, 976–77, 992 (2011). Again, although many would debate whether South Africa is a “developing country,” this Article has adopted a broad definition of “developing,” as defined by the IMF.

213. Fox, *supra* note 13, at 583.

economy.²¹⁴ The state also played a significant role, both as producer and regulator, and apartheid policies built several important industries under state ownership.²¹⁵ Over time, South Africa's trading partners—and the world at large—began to reject the policies adopted by the South African government and refused to engage with it.²¹⁶

South Africa's isolation from the rest of the world was compounded by trade protection policies and exchange controls, which constrained local firms' ability to grow beyond South Africa.²¹⁷ Consequently, successful South African firms had no other option but to invest their returns in other sectors of the South African economy because they could not access foreign markets,²¹⁸ leading to the growth of diversified conglomerates that effectively dominated the South African economy.²¹⁹ This conglomerate structure also resulted in the formation of a number of holding companies that exercised effective control over subsidiaries with extremely low ownership stakes.²²⁰

In many ways, apartheid led to the creation of two economies in South Africa, and many question whether South Africa is actually economically underdeveloped.²²¹ Unlike much of the rest of Africa, South Africa began the process of industrialization over a century ago after the discovery of diamonds and gold, which is exemplified today by its roads, railways, hospitals, and other infrastructure.²²² But during apartheid, the South African economy operated under a dual

214. *Id.*; see also CHANCE, *supra* note 153, at 3 (explaining that apartheid was detrimental to the interests of the vast majority of the South African population).

215. COMPETITION COMM'N & COMPETITION TRIBUNAL, UNLEASHING RIVALRY 2 (2009); Trudi Hartzenberg, *Competition Policy And Practice In South Africa: Promoting Competition for Development*, 26 NW. J. INT'L L. & BUS. 667, 683 (2006).

216. CHANCE, *supra* note 153, at 3.

217. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 2; Hartzenberg, *supra* note 215, at 684; CHANCE, *supra* note 153, at 3.

218. CHANCE, *supra* note 153, at 3; Hartzenberg, *supra* note, 212 at 683.

219. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 1–2; CHANCE, *supra* note 153, at 3.

220. Hartzenberg, *supra* note 215, at 684.

221. Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 66–67 (1998).

222. *Id.* at 66.

structure: the white population operated in a formal economy with developed infrastructure while the non-white population's economic activity was predominantly informal.²²³ The dual nature of the national economy created extreme disparities of wealth, and the discriminatory policies ensured that the indigenous majority only benefitted partially, if at all, from any developments.²²⁴ Further, the introduction of free market conditions did not dissipate the market dominant minority's control but actually exacerbated the white minority's dominance to the detriment of the black majority.²²⁵

B. Political Background Leading to Adoption of South Africa's Competition Act

The apartheid regime came to an end with South Africa's first democratic elections in 1994.²²⁶ When the African National Congress ("ANC") took power in 1994, it initiated a number of economic reforms, including a reassessment of South Africa's competition challenges and the efficacy of the existing law.²²⁷ Prior to independence, the Maintenance and Promotion of Competition Act No. 96 of 1979 served as South Africa's competition law.²²⁸ It was widely accepted, however, that the Competition Board's enforcement of the Maintenance and Promotion of Competition Act was ineffective.²²⁹

The ANC, upon taking power, sought to create and sustain an adaptive economy characterized by growth, employment, and equity.²³⁰ Addressing the extent of market power and

223. STEWART ET AL., *supra* note 1, at 17.

224. Cao, *supra* note 136, at 1082–83; Fox, *supra* note 13, at 583.

225. Cao, *supra* note 136, at 1082–83.

226. CHANCE, *supra* note 153, at 3.

227. CHETTY, *supra* note 176, at 4.

228. Roberts, *supra* note 6, at 5. Before this Act, competition policy was encompassed in the Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955). *About Us*, COMPETITION COMM'N S. AFR., <http://www.compcom.co.za/about> (last visited Oct. 13, 2014).

229. Roberts, *supra* note 6, at 7; *see About Us*, *supra* note 228 (discussing the wide recognition that technical flaws in the Maintenance and Promotion of Competition Act prevented effective application of competition law on both substantive and logistical grounds).

230. CHETTY, *supra* note 176, at 4.

concentration became a key issue of the overarching policy debate, and competition policy became a key component of the 1994 Reconstruction and Development Programme.²³¹ Many in South Africa viewed competition law as a mechanism to change the excessive concentrations of private economic power underpinning the apartheid regime.²³²

Through the Department of Trade and Industry, the ANC outlined several strategies for effective transformation of the country, which were incorporated into different legislations.²³³ The Department tabled its proposed guidelines on competition policy in November 1997 in a 37-page document titled “Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development” (“Proposed Guidelines”), which the Cabinet approved and released for public comment.²³⁴ These Proposed Guidelines attempted to reconcile the application of competition policy within the national policy objectives of competitiveness and development.²³⁵ Paragraph 2.4.12 of the Proposed Guidelines exemplifies the country’s focus on broader social and industrial policy objectives:

Competition policy seeks to incorporate the interests of consumers, workers, emerging entrepreneurs, and other corporate competitors and to protect the ability of our large corporations to penetrate international markets, just as we allow foreign investors to do business in South Africa in the interests of enhancing overall efficiency and growth.²³⁶

As these Proposed Guidelines show, developmental concerns—such as addressing poverty and unemployment—were as much a part of the competition policy discussion as was the promotion of competition and economic efficiency.²³⁷ It became

231. COMPETITION COMM’N & COMPETITION TRIBUNAL, *supra* note 215, at 2; *see About Us*, *supra* note 228 (discussing the evolution of competition policy in South Africa).

232. Lewis, *supra* note 162, at 2.

233. CHETTY, *supra* note 176, at 4.

234. DAVID LEWIS, ENFORCING COMPETITION RULES IN SOUTH AFRICA: THIEVES AT THE DINNER TABLE 24, 26 (2013).

235. *Id.* at 26.

236. *Id.* at 28.

237. Hartzenberg, *supra* note 215, at 668. Many were also concerned about limiting

clear that a competition law would only be politically possible if it addressed public interest concerns that reflected the specific development challenges entrenched by the previous era.²³⁸ Thus, any discussion of economic efficiency had to be tempered by a strong emphasis on development.²³⁹ Everyone involved in the negotiation process also recognized that no major piece of socio-economic legislation would pass muster without incorporating job creation and black economic empowerment into the overall objectives of the policy and statute.²⁴⁰ In addition, powerful interest groups sought to defend their particular interests and lobbied for protections of those interests in the law.²⁴¹

The Proposed Guidelines served as the basis for further negotiations with the National Economic Development and Labour Council ("NEDLAC"), a statutory body comprised of representatives from government, organized labor, organized business, and the community.²⁴² Once tabled at NEDLAC, the Proposed Guidelines underwent a process of consultation and negotiation.²⁴³ NEDLAC subsequently concluded an agreement on competition policy in May 1998.²⁴⁴ A bill was then sent to the Cabinet, which then proceeded through the parliamentary process.²⁴⁵ Parliament passed the Competition Act (Act No. 89 of 1998) in September 1998.²⁴⁶ The inclusion of social and industrial policy objectives in South Africa's Competition Act generated much controversy in the international competition community.²⁴⁷

the discretionary power of the competition authority, which led to the separation of powers among three different institutions and to the establishment of institutions independent of the government. Roberts, *supra* note 6, at 7.

238. Hartzenberg, *supra* note 215, at 667.

239. *Id.*

240. LEWIS, *supra* note 234, at 109.

241. Lewis, *supra* note 162, at 4.

242. LEWIS, *supra* note 234, at 30; *About Us*, *supra* note 228. Competition policy had already been placed on NEDLAC's agenda at its inception in 1995. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 11.

243. LEWIS, *supra* note 234, at 24.

244. *About Us*, *supra* note 228.

245. LEWIS, *supra* note 234, at 24.

246. *About Us*, *supra* note 228.

247. LEWIS, *supra* note 234, at 109; *see* COMPETITION COMM'N & COMPETITION

C. Public Interest Factors in South Africa's Competition Act

In crafting South Africa's Competition Act, the legal drafters drew heavily from the Canadian competition legislation for merger control and the Australian competition legislation for prohibited practices.²⁴⁸ But as discussed, the Competition Act also attempted to balance economic efficiency concerns with broader socioeconomic equity and development priorities.²⁴⁹ The Explanatory Memorandum accompanying the Act stated that the overriding objective of competition policy is the promotion of competition in order to advance economic efficiency, international competitiveness, and adaptability as well as the market access of small, medium, and micro-enterprises ("SME"), creation of new employment opportunities, and the diversification of ownership in favor of historically disadvantaged South Africans.²⁵⁰ Accordingly, South Africa saw the more even spread of ownership and SME promotion as important to ensuring long-term, balanced sustainable development.²⁵¹ These industrial objectives feature strongly in the Preamble of the Competition Act as well as other provisions relating to exemptions and mergers.

For example, Section 2 of the Competition Act states that the "purpose of *this Act* is to promote and maintain competition in the Republic" and then lists the various objectives of the law, including:

- (c) to promote employment and advance the social and economic welfare of South Africans;

TRIBUNAL, *supra* note 215, at 10 ("I recall the horror with which the public interest test was greeted by outside observers. The idea that a merger could be prohibited by a competition authority on public interest grounds was anathema to them. Yet ten years later this section seems much less threatening and indeed, at time when foreign governments are invoking the public interest to block transactions, it hardly seems that exotic." (quoting Norman Manoim, Chairperson, Competition Tribunal of S. Afr.)); Roberts, *supra* note 6, at 7.

248. Roberts, *supra* note 6, at 7.

249. Hartzenberg, *supra* note 215, at 669; Campbell & Rowley, *supra* note 94, at 278; see Gal, *supra* note 1, at 28 (noting the public policy concerns addressed by South Africa's competition law).

250. CHETTY, *supra* note 176, at 5.

251. Hartzenberg, *supra* note 215, at 670.

- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.²⁵²

These overarching objectives illustrate that South Africa's concerns extended beyond simply efficiency and consumer welfare. Instead, South Africa believed that the Competition Act could contribute to increasing employment, ensure SMEs compete on equal footing, and promote ownership among "historically disadvantaged persons." Section 3(2) defines "historically disadvantaged persons" as the "individuals, associations, juristic persons of individuals who before the 1993 Constitution were disadvantaged by unfair discrimination on the basis of race."²⁵³

In addition to the objectives listed in Section 2 of the Competition Act, the law also incorporates public interest factors when considering an exemption application. Under Section 10, the South African Competition Commission may exempt an agreement or practice if the agreement or practice meets certain objectives, including the promotion of the ability of small business, or businesses controlled or owned by historically disadvantaged persons, to become competitive.²⁵⁴ Other factors relevant for exemption include the promotion of exports, changes in productive capacity necessary to stop a decline in an industry, and the economic stability of a particular industry.²⁵⁵

Public interest considerations also play a significant role in merger review. As part of its merger analysis, the Commission must determine whether the merger "can or cannot be justified on substantial public interest grounds."²⁵⁶ Section 16(3)

252. Competition Act 89 of 1998 § 2 (S. Afr.).

253. *Id.* § 3(2).

254. *Id.* §§ 10(1), 10(3).

255. *Id.* § 10(3); Section 10 does not limit the length of the exemption. *Id.* § 10.

256. *Id.* § 16(1)(a)(ii); Daniela Mariotti, *South African Merger Remedies: What*

describes the public interest grounds that the Commission must consider, including the effect on (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and (d) the ability of national industries to compete in international markets.²⁵⁷ The Commission's analysis of a merger under Section 16(1) involves first determining whether or not the merger is likely to substantially prevent or lessen competition.²⁵⁸ If it appears that there may be a substantial prevention or lessening of competition, the Commission must then determine whether efficiencies or pro-competitive gains offset any lessening of competition.²⁵⁹ And finally, before approving or rejecting a merger, the Commission must consider the effect on the public interest.²⁶⁰ Accordingly, in any merger that the Commission reviews, the Competition Act requires it to consider certain public interest factors.

In addition to the Commission's merger review, the Competition Act permits the Minister of Trade and Industry to participate as a party in any notifiable merger proceedings in order to make representations on public interest grounds.²⁶¹ The Minister may make these public interest representations at any stage in the merger proceedings—before the Competition Commission, the Tribunal, or the Competition Appeal Court.²⁶² The Competition Appeal Court has held that the Competition Act does not exclude others from also intervening in merger proceedings.²⁶³

Have We Learnt in the Last Ten Years?, 6 COMPETITION L. INT'L 55, 56 (2010).

257. Competition Act 89 of 1998 § 16(3) (S. Afr.).

258. *Id.* § 16(1).

259. *Id.* § 16(1)(a).

260. *Id.*; LEWIS, *supra* note 234, at 76, 88; see CHETTY, *supra* note 176, at 8 (discussing *Anglo American Holdings v. Kumba Resources* in which the Tribunal held that use of "otherwise" in Section 12A(1)(b) meant that public interest evaluation must be undertaken regardless of outcome of overall competition analysis).

261. Competition Act 89 of 1998 § 18 (S. Afr.); CHETTY, *supra* note 176, at 12.

262. Competition Act 89 of 1998 § 18 (S. Afr.).

263. CHETTY, *supra* note 176, at 12. The Competition Appeal Court granted the Industrial Development Corporation, a statutory body whose primary function is to foster economic development pertaining to black owned businesses, to intervene in *Anglo South Africa Capital v. Industrial Development Corp. of South Africa*. *Id.* at 11. In

Two particular public interest considerations have played a greater role in the Commission and Competition Tribunal's merger review and analysis: employment impact and promotion of black economic empowerment ("BEE").²⁶⁴

1. *Employment Impact*

To ensure the participation of labor unions in any employment discussions surrounding a merger, the Competition Act requires the merging parties to notify labor unions of the merger. Specifically, Section 13(2) obligates parties of notifiable mergers to provide a copy of the merger notice to any registered trade unions or, if no registered trade unions exist, to the employees concerned.²⁶⁵ Although the trade unions' engagement with competition authorities was more limited in the early days of the Competition Act, trade unions and employees have become increasingly more involved in merger negotiations.²⁶⁶

Because employment has been a significant policy concern in South Africa, a number of mergers have been approved with conditions aimed at minimizing job losses.²⁶⁷ In assessing the

allowing the intervention, the court held that the common law test for *locus standi* is not applicable to merger proceedings, reasoning that they are not adversarial in nature and unlike ordinary litigation. *Id.* at 12.

264. LEWIS, *supra* note 234, at 109.

265. Competition Act 89 of 1998 § 13A(2) (S. Afr.); see COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 30–31 (discussing how the Tribunal insists that merging parties disclose confidential employment information, such as in the Unilever PLC/Unifoods merger in 2002).

266. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 30–31. In *Unilever PLC v. Competition Commission*, the Tribunal found that there were some negative effects on employment but that it could not understand the full extent of the effect until after the sale. Thus, as a condition for approving the merger, the Tribunal imposed an obligation on the merging parties that they must consult with the unions once they reached an agreement with the proposed buyer of the divested assets. See *Unilever PLC v. Competition Comm'n of S. Afr.*, 2002 ZACT 15 (CT) paras. 42–43 (S. Afr.) ("In our view the most significant right that the Competition Act extends to employees and their unions is the right to timeous information with respect to potential employment impact of a merger. However, there is little doubt that, having received the information, the most powerful channel available to the unions to address employment related issues arising from the merger is the Labour Relations Act or private collective bargaining agreements where they exist.").

267. *E.g.*, Press Release, Competition Comm'n, Kansai's Acquisition of Freeworld Approved with Conditions (Apr. 19, 2011), available at <http://www.compcom.co.za/assets/>

employment impact of a merger, the competition authorities generally allocate greater weight to employment losses suffered by relatively immobile unskilled workers than to losses suffered by skilled employees who may more easily find alternative employment.²⁶⁸ If a merger results in the loss of jobs, the parties may be subject to a cap on merger specific retrenchments.²⁶⁹

In the merger of Metropolitan Holdings and Momentum, for example, the merging parties initially estimated that the merger would result in a loss of approximately 1,500 jobs.²⁷⁰ The affected labor union argued against the merger because the parties had failed to justify the job losses.²⁷¹ Although the Tribunal found no basis for competition concerns, it concluded that the merger could not be justified on public interest grounds.²⁷² Accordingly, the Tribunal approved the merger subject to a two-year moratorium on any merger-related retrenchments.²⁷³

The Tribunal's analysis in Metropolitan Holdings clarified its approach to public interest considerations. In its reasoning, the Tribunal explained that, once it had been established that

Uploads/AttachedFiles/MyDocuments/Press-release-Acquisition-of-Freeworld-by-Kansai.pdf (noting commitment not to retrench any Freeworld employees for three years); *Multichoice Subscriber Mgmt. (Pty) Ltd./Tiscali (Pty) Ltd.*, 2005 ZACT 23 (CT) para. 82 (S. Afr.) (approving a merger subject to the condition of limiting job losses, which arose out of an agreement between the merged entity and its employees as part of collective bargaining). *But see DB Invs. SA/De Beers Consol. Mines Ltd. & De Beers Centenary AG*, 2001 ZACT 20 paras. 38, 40 (finding that, although merging parties were prepared to commit that the transaction would not result in any change to employment conditions or job losses in relation to De Beers employees, no employment concerns were raised by transaction because merger would result in an increase in shareholding in De Beers and would leave actual operational structure unchanged).

268. LEWIS, *supra* note 234, at 117.

269. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 32 (noting that the Tribunal is generally reluctant to set caps independently so it instead obliges firms to respect retrenchment figures originally communicated to unions). In the Telkom merger, the Tribunal made approval of the transaction conditional on the acquiring facilities management company not retrenching any of the transferred Telkom employees for 20 months and on Telkom not retrenching any of its employees for 20 months. LEWIS, *supra* note 234, at 119–20.

270. *Metro. Holdings Ltd. v. Momentum Grp. Ltd.*, 2010 ZACT 87 (CT) para. 79.

271. *Id.* para. 63.

272. *Id.* paras. 56, 65.

273. *Id.* para. 64; *see* LEWIS, *supra* note 234, at 117 (noting that the condition did not apply to retrenchment of senior management).

the merger would cause a substantial loss in jobs, merging parties must satisfy two criteria for the merger to be approved unconditionally: (1) a rational process was followed to arrive at the determination of job losses, and the reason for the losses are rationally connected; and (2) an equally weighty public interest justifies the loss and is cognizable under the Act to counter the public interest consideration of preventing employment loss.²⁷⁴ So although the parties in Metropolitan Holdings may have demonstrated that the employment loss would lead to substantial efficiency gains, there was no countervailing public interest justifying the loss.

The merger of Tiger Brands and Ashton Canning Company in 2005 went beyond limiting merger-specific retrenchments and included a novel remedy aimed to help those who would lose their jobs because of the merger. Before the Competition Tribunal, the Commission argued that the merger would adversely impact employment, with a loss of 45 permanent jobs and 1,000 seasonal jobs.²⁷⁵ The Tribunal accepted the Commission's argument and concluded that the merger would have a substantially negative effect on employment and thus the public interest.²⁷⁶ As a result, the Tribunal imposed conditions relating to the retrenchment of employees. But the Tribunal also stipulated that the merged parties must create a 2 million Rand fund for the purpose of training persons who lost their jobs.²⁷⁷

The more recent Walmart/Massmart merger in 2011 demonstrates that employment considerations still weigh heavily with the Competition Commission and Tribunal, and that the competition authorities of South Africa may seek to protect employment even when the merger raises no competition concerns. In the Walmart/Massmart merger, the Commission

274. *Metro. Holdings Ltd. v. Momentum Grp. Ltd.*, 2010 ZACT 87 (CT) para. 70; LEWIS, *supra* note 234, at 120–21.

275. *Tiger Brands Ltd./Langeberg Foods Int'l.*, 2005 ZACT 82 (CT) para. 132 (S. Afr.). The Food and Allied Workers' Union also objected to the merger and said that it would result in a loss of 10–15% of permanent employees and 15–20% of seasonal employees. *Id.* para. 138.

276. *Id.* para. 143.

277. *Id.* Annex A (5). The merged entities would have the discretion to determine how much each affected employee will be allocated. *Id.* Annex A (7).

and Tribunal found that the merger did not raise any competition concerns.²⁷⁸ Yet, the Tribunal approved the merger subject to conditions dealing with employment and local procurement concerns.²⁷⁹ The Tribunal stipulated the following conditions: the merger could not result in merger specific retrenchments for two years; new employment opportunities must give preference to retrenchments made just prior to the merger hearing; the merged entity must honor existing labor agreements; the merged entity must recognize the largest representative union; and the merged entity must establish and fund a program for the development of South African suppliers.²⁸⁰ The Walmart/Massmart decision led some to question whether the competition authorities' activism illustrates that public interest considerations may be abused and used as a means to achieve other results that go beyond their intended purpose.²⁸¹

2. *Promotion of Black Economic Empowerment*

The promotion of BEE also has featured prominently in merger control in South Africa.²⁸² Black economic empowerment is a term commonly used in the South African market and by the South African government as an instrument to promote transformation for the historically discriminated black

278. *Walmart Stores Inc. v. Massmart Holdings Ltd.*, 2011 ZACT 41 (CT) para. 22, 26–27 (S. Afr.).

279. *Id.* para. 128.

280. *Id.* para. 1; Smith & Swan, *supra* note 15, at 2. On appeal, the Competition Appeal Court actually strengthened the conditions imposed on the merging parties. *Minister of Econ. Dev. v. Competition Tribunal*, 2012 ZACAC 2 (CT) paras. 48–49 (S. Afr.).

281. See LEWIS, *supra* note 234, at 128 (“[T]he Walmart fiasco has been a sharp wake-up call. It bears out the caution advocated by those who warned us of the potential abuse of the public interest provisions when employed by an executive power that has little respect for regulatory independence of competition, and that is determined to use the public interest test as a lever to attain ill-considered industrial policy objectives, even when the attainment of those objectives is directly in conflict with consumer interests.”).

282. See, e.g., *Coleus Packaging (Pty) Ltd./Rheem Crown Plant*, 2003 ZACT 7 (CT) para. 1 (S. Afr.) (approving merger despite Commission’s recommendation to prohibit, subject to condition that South African Breweries Limited would dispose of at least 40% of issued capital in Coleus to a black empowerment partner within two years).

population.²⁸³ The consideration and promotion of BEE has weighed heavily in several merger hearings and is generally invoked when the merging parties argue that the anticompetitive effects of their proposed merger are mitigated by its promotion of BEE.²⁸⁴

In the Shell South Africa and Tepco Petroleum merger in 2001, the Commission recommended conditional approval of Shell's proposed acquisition of Tepco, which was owned and controlled by a holding company of historically disadvantaged investors.²⁸⁵ The Commission imposed conditions designed to ensure that control, or at least partial control, of Tepco remained in the hands of historically disadvantaged persons and that Tepco continued to exist as a separate entity.²⁸⁶ The Tribunal, however, rejected the Commission's conditions. The Tribunal found that these conditions discriminated against a black-owned company whereas a white-owned firm would not have been constrained and forced to hold on to an asset that no longer served its purpose.²⁸⁷ In particular, the Tribunal was critical of the condition that Tepco must continue to exist, stating "[e]mpowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine."²⁸⁸ Further, the Tribunal noted that the economic problems of Tepco, the entity to be acquired, likely threatened the economic viability of the historically disadvantaged holding company, so the decision to sell was likely commercially prudent on its part.²⁸⁹

283. CHETTY, *supra* note 176, at 10. Various industry charters in South Africa also have set out ownership ratios meant to promote black economic empowerment. A study of the effect of these charters in three South African industries revealed that BEE measures are increasing the ownership of businesses to persons who were previously excluded from these sectors. STEWART ET AL., *supra* note 1, at 18.

284. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 31.

285. *Shell S. Afr. (Pty) Ltd./Tepco Petroleum (Pty)*, 2002 ZACT 13 (CT) paras. 7, 9, 39–40 (S. Afr.).

286. *Id.* para. 40.

287. LEWIS, *supra* note 234, at 115.

288. *Shell S. Afr. (Pty) Ltd./Tepco Petroleum (Pty)*, 2002 ZACT 13 (CT) para. 42 (S. Afr.).

289. *See id.* para. 49 ("We would however go further and insist that even if Tepco had been a company in perfect health, the Commission should be extremely careful

The Tribunal did not stop there. In its decision, it also emphasized that the Commission's role does not involve second-guessing commercial decisions of "that element of the public that it is enjoined to defend, particularly where no threat to competition is entailed."²⁹⁰ The Tribunal explained that the role played by the competition authorities regarding the public interest is "at most, secondary to other statutory and regulatory instruments"—such as the Employment Equity Act and the Skills Development Act—and warned the Commission not to pursue its public interest mandate in an overly zealous manner.²⁹¹ Interestingly, the Tribunal's admonishment of and warning to the Commission in the Shell/Tepco merger seems to contradict the position the Tribunal adopted more recently in the Walmart/Massmart merger.

Despite the seemingly prominent role public interest factors have played in the assessment of mergers in South Africa, the competition authorities repeatedly emphasize that the practice of considering public interest factors has never resulted in the prohibition of a merger.²⁹² The competition authorities point to the structure of the Competition Act itself, noting that the evaluation of whether a merger will prevent or lessen competition occupies the primary position, and that the public interest test is given secondary consideration.²⁹³ In fact, South

when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such an investor.”).

290. *See id.* para. 51 (“To constrain the capital raising options of firms owned by historically disadvantaged persons in this way not only condemns these firms to the margins of the economy and the margins of those sectors in which it believes it is best able to make a significant mark, it also lays the Commission open to a change of paternalism.”).

291. *Id.* para. 58.

292. *Sasol Ltd./Sasol Oil (Pty) Ltd.*, 2006 ZACT 15 (CT) paras. 528, 548 (S. Afr.) (prohibiting merger because found would result in substantial lessening of competition in relevant markets and that Sasol Oil's commitment to sell a share of merged entity to a BEE group would occur whether or not merger was approved); *see* LEWIS, *supra* note 234, at 76 (noting that, in practice, the consideration of public interest factors rarely proved to be challenging to a merger); *see also* Mariotti, *supra* note 256, at 59 (noting that as of 2010, public interest factors had never resulted in prohibition of a merger, though authorities have imposed conditions on parties to address public interest concerns).

293. Roberts, *supra* note 6, at 7–8 (“It is evident that economic efficiency is the overriding principle.”); CHETTY, *supra* note 176, at 14.

Africa's competition authorities almost seem to boast that they have never approved or rejected a merger based solely on public interest grounds. Instead, they claim they have made their decisions in limiting the negative impact of mergers by imposing conditions in lieu of outright rejection.²⁹⁴

Despite these claims, public interest considerations have played at least some role in the rejection of certain mergers, even if it is not the sole reason the merger was rejected.²⁹⁵ Further, the Commission has generally placed more emphasis on public interest factors than the Tribunal, and several mergers likely would have been rejected or conditionally approved based on public interest factors if the Tribunal had not changed or removed the Commission's conditions. For instance, in Wesbank's acquisition of Barloworld's Industrial Machinery Finance Book, the Commission did not find that the transaction would substantially lessen or prevent competition yet still imposed the condition that Barloworld retain the right to facilitate financing if its customers were unable to secure financing from other financial institutions.²⁹⁶ Many of Barloworld's customers were SMEs and businesses controlled or owned by historically disadvantaged persons.²⁹⁷ In imposing the condition, the Commission was concerned that other financial institutions did not have the specialized divisions to provide the particular type of financing these businesses required and that their interest rates would be higher and credit policies not as

294. See COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 24; see also Campbell & Rowley, *supra* note 94, at 278 n.53 (referring to David Lewis's remarks at the ICN 2007 Annual Conference); CHETTY, *supra* note 176, at 14 (noting that incorporation of provisions promoting employment and BEE have not been a bar to date in obtaining merger approval since decisions "are ultimately based on sound economic analysis").

295. See, e.g., COMPETITION COMM'N, NOTIFICATION TO PROHIBIT THE TRANSACTION INVOLVING: BONHEUR 50 GENERAL TRADING (PTY) LTD & KOMATILAND FORESTS (PTY) LTD 3, 9 (2004) (stating that South African Competition Commission prohibited merger because it would substantially prevent or lessen competition, public interest concerns did not justify the anti-competitive effects, and it would have negative effects on employment, small businesses, and industrial sector); see CHETTY, *supra* note 176, at 9–10 (discussing *Nedcor/Stanbic* case in which Commission gave weight to public interest concerns).

296. *Wesbank/Indus. Mach. Fin. Book*, 2004 ZACT 55 (CT) at 1 (S. Afr.).

297. *Id.* at 3.

flexible.²⁹⁸ The Tribunal, however, found the Commission's condition to be vague and approved the merger unconditionally, finding that the transaction did not raise any public interest issues.²⁹⁹

3. Case Prioritization

Although the restrictive practices and abuse of dominance provisions of South Africa's Competition Act do not specifically provide for a public interest test, the consideration of public interest factors still affects case prioritization. For instance, in 2007, the Commission adopted a prioritization framework in which it would direct resources to cases and complaints based on three criteria: (1) potential impact of conduct on low-income consumers; (2) alignment with the government's broader economic policy objectives; and (3) likelihood of conduct being anticompetitive.³⁰⁰ By presenting this framework, the Commission implicitly introduced public interest considerations into its conduct enforcement. In addition, the inclusion of public interest factors in the statute's objectives allow the competition authorities to consider such public interest factors when analyzing conduct while still operating within their statutory scope.

Although South Africa's competition regime has been in operation for over fifteen years, South Africa's economy is still characterized by high levels of concentration and the lingering effects of many years of isolation from global markets.³⁰¹ Some speculate that trade liberalization may have contributed to continued concentration in many economic sectors, with

298. *Id.*

299. *Id.* at 1, 4.

300. Smith & Swan, *supra* note 15, at 2.

301. Mariotti, *supra* note 256, at 55 (stating after many years of isolation, some markets in South Africa are characterized by high levels of concentration); CHANCE, *supra* note 153, at 3–4 (discussing the country becoming increasingly isolated and protectionist in addition to being characterized with concentrated sectors dominated by one to two players); COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 2 (noting that ownership concentration has declined substantially over the past fifteen years, but merger activity and prohibited practices cases suggest that many markets are still highly concentrated); Roberts, *supra* note 6, at 2 (noting that control of the four main conglomerate groups declined in 1998 but started to reverse again).

inefficient firms being taken over or closing down.³⁰² South Africa also has seen vertical integration in the supply chains of many industries, particularly those involving food, construction, intermediate industrial products, and telecommunications.³⁰³ Moreover, although the participation of historically disadvantaged persons in the South African economy has grown since the end of apartheid, many black South Africans still face significant obstacles in economic participation, as demonstrated by an unemployment rate nearing 30% among black South Africans.³⁰⁴ Given the high levels of unemployment, it is unsurprising that the majority of the population still lives in poverty and lacks basic services.

The realities of the current South African economy bring to mind the warnings issued during the early days of South Africa's Competition Act. Several in the international community cautioned against placing too high of expectations on the Competition Act and its ability to change the terms of economic participation in favor of the historically repressed black majority.³⁰⁵ So although South Africa's competition law may be seen as somewhat successful—in terms of merger regulation and a few restrictive practices cases—the Competition Act likely has fallen short of many South African policy makers' expectations of meeting other industrial policy goals.

D. Competition Law in Other Southern African Countries

South Africa was one of the first countries in Southern Africa to adopt a competition law. Other countries in Southern Africa have followed suit and similarly incorporated public

302. Roberts, *supra* note 6, at 2.

303. COMPETITION COMM'N & COMPETITION TRIBUNAL, *supra* note 215, at 2.

304. *South Africa: Fool's Gold*, ECONOMIST (Apr. 27, 2013), <http://www.economist.com/news/briefing/21576655-black-economic-empowerment-has-not-worked-well-nor-will-it-end-soon-fools-gold>.

305. See Fox, *supra* note 13, at 588 ("If expectations are high that the new competition law will visibly change the terms of economic participation in favor of the historically repressed black majority in South Africa, they are likely to be unfulfilled; the stated purposes of the competition law could give false hope."). Chua, *supra* note 20, at 314 (noting that South Africa is one example in which many black South Africans hoped that the new government would ensure that they could live like white people following the end of apartheid).

interest considerations into their competition laws in various forms. This section briefly describes how other countries in Southern Africa have attempted to address their historical imbalances and development challenges through competition law.

1. *Overview of Southern Africa*

Throughout the Southern Africa Development Community (“SADC”) region, poverty has been one of the principal development challenges.³⁰⁶ In addition to widespread poverty, countries in Southern Africa are characterized by relatively high levels of income and resource inequality, which has been attributed to various factors, such as the impact of a colonial legacy, reform programs, and apartheid policies.³⁰⁷ The high level of inequality also may have been exacerbated by the existence of market dominant minorities—often colonial-origin white minorities—that exist in many Southern African countries, including Angola, Namibia, South Africa, and Zimbabwe.³⁰⁸ Where an ethnic minority is economically dominant over an impoverished ethnic majority, a country’s development process may be critically impacted.³⁰⁹ Consequently, in formulating laws, African legislatures pay careful attention to equity interests, as illustrated in the competition laws that have emerged.³¹⁰

2. *Public Interest in Other Southern African Competition Laws*

Many other African jurisdictions have followed South Africa’s lead and included provisions for public interest factors in their respective competition statutes, though these provisions, and the weight given to them, vary in formulation and scope.

306. See SANUSHA NAIDA & BENJAMIN ROBERTS, CONFRONTING THE REGION: A PROFILE OF SOUTHERN AFRICA 47 (Mike de Klerk ed., 2004) (noting that some estimate that SADC must increase and sustain economic growth rates between 6–8% a year to reduce poverty significantly).

307. *Id.* at 25.

308. Cao, *supra* note 136, at 1048–49.

309. See *id.* at 1048–49, 1083–84.

310. Botchway, *supra* note 149, at 78.

Botswana, Malawi, Namibia, Swaziland, Zambia, and Zimbabwe have included some form of public interest consideration as part of their competition legislation.³¹¹

For example, like South Africa's law, Namibia's Competition Act includes public interest factors in the objectives of the statute as well as in considering mergers and exemptions.³¹² Until Namibia achieved independence in 1990,³¹³ it was part of South Africa and, consequently, subject to the apartheid regime. As a result, BEE and promotion of historically disadvantaged persons also features prominently in its competition law.³¹⁴ The Chief Executive Officer of Namibia's Competition Commission has stated that he sees BEE as a "vital and essential tool to encourage the process of wealth and employment creation through balanced opportunities for all Namibians to partake into a broad based economic transformation and development."³¹⁵ Employment considerations and the promotion of SMEs have also played a part in Namibia's consideration of mergers.³¹⁶ In

311. Smith & Swan, *supra* note 15, at 1; Competition Act of 1996 §§ 31(1)–(2), 32 (Zim.); Botchway, *supra* note 149, at 74, 77 (discussing other countries that have taken from hybrid principles of South Africa's system in providing for equity and national development); Lewis, *supra* note 14, at 4 (noting that Botswana also has provisions to ensure citizen economic empowerment but recognizing that the process may conflict with traditional aspects of competition law).

312. See Competition Act No. 2 of 2003, §§ 2(c)–(f), 28(3), 47(1) (Namib.) (stating the purpose of Act is to enhance and safeguard competition, promote employment, encourage historically disadvantaged people to participate in the economy, among other reasons, and Commission is required to consider how the agreement relates to competitiveness and public interest in determining an application for exemption or whether to approve a merger).

313. *History of Namibia: The Independence*, NAMIB.INFO, <http://www.namib.info/namibia/uk/history/independence> (last visited Oct. 20, 2014).

314. See Competition Act No. 2 of 2003, §§ 2, 28(3), 47(1) (Namib.) (stating purpose of Act is to promote employment and advance social welfare, and Commission must take into account effect on historically disadvantaged persons in considering whether to grant an exemption).

315. Mihe Gaomab II, *Black Economic Empowerment in Namibia and Its Relation to the National Economy*, NAMIB. ECON. SOC'Y 5 (2005).

316. See, e.g., Competition Act No. 2 of 2003, § 47(2)(e) (Namib.) (stating that Commission may take into account extent to which proposed merger will affect employment); Smith & Swan, *supra* note 15, at 2 (citing Elgin Brown and Hamer Group merger in 2012 in which Commission ordered no retrenchments for two years, and Tribunal's remedies for 2011 Wal-Mart/Massmart merger included no retrenchments for

addition to considering the public interest in merger review, the Namibian Competition Commission must consult with the Minister of Trade on any matter that is of great economic or public interest.³¹⁷

Botswana, Kenya, Malawi, Zambia, and Zimbabwe also take public interest considerations into account in some form when conducting a merger review.³¹⁸ Similarly, in the Common Market for Eastern and Southern Africa (“COMESA”), public interest grounds may be used to justify an otherwise anticompetitive merger.³¹⁹ In Zambia, Botswana, and Kenya to some extent, public interest considerations may be used to justify an exemption for an otherwise anticompetitive agreement.³²⁰ Botswana also includes public interest as part of an overall balancing assessment in potential abuse of dominance cases.³²¹

two years, recognition of existing labor agreements and representative trade unions, and development of domestic supplier activities); Hage Geinob, Minister of Trade & Indus., Statement About the Wal-Mart/Massmart Merger 4–5 (Mar. 15, 2012) (confirming Commission’s decision and amending conditions to also include honoring existing labor agreements, recognizing representative trade unions, and establishing a program of activities for domestic supplier development); *NACC Gives Provisional Thumbs-Up for EBH Merger*, NAMIBIAN (July 23, 2012), <http://allafrica.com/stories/201207230966.html> (discussing Namibian Competition Commission approval of a merger between DCD-Dorbyl and Elgin Brown and Hamer Group Holdings).

317. Competition Act No. 2 of 2003 § 16(1)(g) (Namib.).

318. Smith & Swan, *supra* note 15, at 1; Competition Act No. 17 of 2009 § 59(2) (Bots.); Competition Act No. 12 § 46(2) (Kenya); Act No. 43 of 1998 § 38(1)(b) (Malawi); Competition and Consumer Protection Act No. 24 (2010) §§ 27(1)(e), 31 (Zam.); Competition Act of 1996 §§ 32(1), 32(4)(b), 32(5) (Zim.).

319. See *COMESA Competition Regulations as at December 2004*, 17 No. 12 OFFICIAL GAZETTE, Art. 26(4) (2004), available at http://www.comesa.int/attachments/article/26/2012_Gazette_Vol_17_Annex_12.pdf (discussing that consideration includes facilitating entry of new competitors into existing markets). COMESA comprises nineteen member states. Tamara Dini & Bowman Gilfillan, *COMESA: Overview*, GLOBAL COMPETITION REV. (2014), available at <http://globalcompetitionreview.com/reviews/59/sections/204/chapters/2307/comesa-overview>.

320. Competition Act No. 17 of 2009 § 32(1) (Bots.) (Commission may grant exemption if it brings benefits such as the promotion of technical or economic progress and employment or advancement of national interests among others); Competition Act No. 12 § 26(3) (Kenya) (Authority may consider whether contributes to promotion of exports, promotion of economic or technological progress, or other benefit to public); Competition and Consumer Protection Act No. 24 (2010) § 19(2) (Zam.) (stating Commission may consider granting an exemption if promotion of SMEs).

321. See Competition Act No. 17 of 2009 § 30(2) (Bots.) (stating Authority may

Zimbabwe's competition law specifically provides for the consideration of public interest factors not only in the merger context, but also when determining whether to prohibit or allow restrictive practices or monopolies. In evaluating whether a restrictive practice, merger, or monopoly is "contrary to the public interest," the statute instructs the Commission to "take into account everything it considers relevant in the circumstances," which includes "facilitating the entry of new competitors into existing markets."³²² Further, a restrictive practice or monopoly may be justified if terminating the practice or monopoly may have an adverse effect on unemployment or cause a reduction in exports.³²³ Zimbabwe's statute also illustrates how a country may seek to promote national champions through competition law by allowing a monopoly to continue if the monopoly (a) "through economies of scale" has resulted in more efficient use of resources, (b) is deemed necessary "for the production, supply or distribution of any commodity or service in Zimbabwe," or (c) is necessary "to enable the parties to it to negotiate fair terms for the distribution of a commodity or service."³²⁴

VI. DISCUSSION

The inclusion of public interest considerations has stimulated considerable debate in the global competition law community.³²⁵ As discussed, developing countries in particular have rejected the traditional U.S. antitrust goals that have been heavily influenced by the Chicago and Neo-Harvard Schools. Instead, these countries have attempted to draft laws that they argue better respond to their particular historical and cultural background. They view competition law as another tool that may

weigh other considerations in determining whether an abuse of dominant position has occurred, including advancing national interests, enhancing competitiveness of SMEs, and enhancing development of the economy).

322. Competition Act of 1996, § 32(1) (Zim.).

323. *See id.* § 32(2), (5) (discussing restrictive practices and monopolies as contrary to public interest unless the Commission is satisfied that termination would have an adverse effect on unemployment or the trade or business).

324. *Id.* § 32(5)(a), (b), (d).

325. Evenett, *supra* note 18, at 5.

assist it in remedying past injustices and contributing to economic growth and development.

Although competition policies, and competition law specifically, may contribute to economic growth and development, it is unclear whether this remains true when such laws incorporate industrial policy objectives—which is the case in many developing countries. Moreover, the inclusion of public interest considerations in competition law raises a number of other questions. For instance, do the competition authorities of developing countries have the capacity and resources to conduct detailed, nuanced analyses that require weighing not only economic goals but also other industrial policy objectives? Have developing countries placed too much emphasis on the potential of the competition law to solve many, if not all, of its economic problems? Would it be preferable, and more effective, to leave industrial policy concerns to other regulators and laws?

This section first examines the arguments made for and against the inclusion of public interest considerations in competition laws and discusses why the inclusion of such considerations may be important in assessing the impact of a competition law on an economy. The discussion then details the problems and challenges competition authorities in developing countries face. When a developing country has passed a competition statute incorporating social interest considerations and industrial policy objectives, these challenges grow exponentially. Not only must competition authorities overcome the typical operational and bureaucratic challenges of a new authority, but they also must enforce complicated competition statutes, requiring highly sophisticated analysis and judgment calls that would be difficult for even the most experienced competition regimes. Given these challenges, it will be preferable in most instances for developing countries to adopt a narrower and more deliberate approach to competition law—one that leaves industrial policy objectives to other laws and regulators and delays competition enforcement until the competition authority is better equipped to understand and enforce an economics-based law.

A. Arguments for Inclusion of Public Interest Considerations

Many countries that favor including public interest considerations in their competition laws argue that traditional Western antitrust goals—particularly aggregate welfare or efficiency goals—are not appropriate for their context because these goals fail to grapple with questions regarding the distribution of power and opportunity.³²⁶ These countries, and others who support their position, accuse the opposition of advocating an antitrust analysis divorced from reality.³²⁷ They view the United States as out of step with the rest of the world's competition community and locked into a narrow vision driven by microeconomic theories.³²⁸

Many attribute the narrow view of much of the U.S. antitrust community to the influence and dominance of the Chicago School. These critics argue that Chicago School antitrust is not conducive to the different issues and problems facing developing countries, such as highly concentrated markets, significant barriers to entry, and specially protected sectors.³²⁹ Moreover, they see the Chicago School's simplifying assumptions of self-correcting markets composed of rational, self-interested market participants as contributing to the sacrifice of other political, social, and moral values.³³⁰ These critics emphasize that economics is not a value-free science insulated from normative

326. Fox, *supra* note 1, at 219–20; Chua, *supra* note 20, at 311 (noting that version of market capitalism being exported to the developing world does not include redistributive institutions of kind that have helped mute effects of capitalism in the West).

327. See Stucke, *supra* note 53, at 611 (“Antitrust officials who warn about social, moral, and political values polluting antitrust analysis are not arguing for sound competition analysis. They argue for an antitrust analysis divorced from reality, a world occupied by self-interested profit maximizers, unconcerned about finances and trust, in markets without transaction costs and property rights.”).

328. Waller, *supra* note 1, at 455.

329. McMahon, *supra* note 4, at 266–67; see Michal S. Gal, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. CAL. L. REV. 1437, 1441, 1447 (2001) (arguing that small economies need a specially tailored competition policy because they face different welfare maximization issues than larger ones and economic paradigms on which competition policies are based in large economies do not necessarily apply to small ones).

330. See Stucke, *supra* note 53, at 556 (describing antitrust during past policy cycle in United States as “rel[ying] on an incomplete, distorted conception of competition”).

judgments; instead, they note that individuals do not consistently behave as neoclassical economic theory predicts, as demonstrated by empirical behavioral economics.³³¹

Accordingly, many scholars encourage developing countries to adopt competition laws that better respond to their particular economic conditions, rather than importing competition laws wholesale from other jurisdictions.³³² In doing so, they argue that nations have the right to choose what policy objectives they hope to achieve, such as the equitable distribution of opportunity, and that these other goals may be more important than efficiency.³³³ The inclusion of considerations surrounding mobility and opportunity reflects the belief held by many developing countries that firms, particularly smaller and younger firms, should have a fair chance to compete on the merits of their product, free from artificial and foreclosing restraints by powerful firms.³³⁴ The supporters of public interest considerations also emphasize that a mixed approach—while potentially creating costs in loss of efficiency—may help with societal and political acceptance.³³⁵ However, among those who

331. *See id.* at 608–09 (“Thus, any competition policy, in a world with humans, transaction costs, coercion, and informational asymmetries is built on the normative judgments of legal and informal institutions. In turn, principles of ethics, morals, and fairness, rather than compromise, can strengthen a market economy.”). Even some scholars who oppose the inclusion of public interest factors contend that “factors other than strictly economic concerns should be taken into account” in a competition analysis, arguing that “an exclusively economic approach reflects an unrealistically optimistic view of the certainty introduced by that kind of analysis.” Pitofsky, *supra* note 83, at 1060 (arguing that legislative history of antitrust requires taking into account non-economic factors, such as concentration of economic power). The ICN has not opposed the use of public interest or other non-competition factors in merger reviews, specifically, but has taken the position that such considerations should be made transparent. Campbell & Rowley, *supra* note 95, at 45.

332. STEWART ET AL., *supra* note 1, at 20; *see* Fox, *supra* note 1, at 224 (arguing that law-making should come from within and legislation should respond to particular contextual problems).

333. *See* Fox, *supra* note 13, at 593 (discussing right of nations to adopt goals such as equitable distribution of income, which may be more important than efficiency).

334. Fox, *supra* note 1, at 223–24.

335. *See* Gal, *supra* note 1, at 28 (explaining adoption of a purist approach in developing countries may “prevent societal acceptance and disintegrate the social fabric”); STEWART ET AL., *supra* note 1, at 22 (arguing that it is possible to embed non-economic aims in a competition system and that achieving the two aims, competition

support including social or industrial policy considerations in a competition law, some acknowledge that such factors may only be appropriate for a limited period and that the law may need to be revised as the markets develop and the need for such provisions lessens.³³⁶

B. Arguments Against Inclusion of Public Interest Considerations

In response to those favoring the inclusion of public interest considerations, an equally vocal contingent argues that competition laws should avoid such considerations.³³⁷ In general, those opposed to the inclusion of other policy objectives contend that competition law should focus on maximizing economic welfare.³³⁸ And even those who acknowledge that economic concerns should not exclusively control argue that a number of non-economic concerns do not play a useful role in antitrust enforcement, such as protection of small businesses, special rights for distributors to have continued access to supplier's products or services, and income redistribution.³³⁹

In arguing that competition law should avoid including other non-economic policy objectives, many point to the oft-repeated maxim that the primary function of antitrust law is to protect and promote the competitive process, not individual competitors.³⁴⁰ Admittedly, preserving the competitive process

and non-economic, need not conflict).

336. See STEWART ET AL., *supra* note 1, at 22 (“[I]t is important that these be viewed as special measures contingent on previous market failures, to be reviewed as markets develop and the need for such provisions is lessened. There may be costs as well as benefits associated with their implementation, for instance inefficiencies may be encouraged which may become less warranted as markets develop over time.”); Gal, *supra* note 1, at 28.

337. See, e.g., Blair & Sokol, *supra* note 89, at 2505 (preferring antitrust system to be “technocratic in the sense that antitrust be defined narrowly to examine only those issues that are purely within antitrust’s ability to be measured and understood using industrial organization as the basis for economic analysis”); Gal, *supra* note 329, at 1452 (arguing social goals should be given little weight in formulating competition policy in small economies); Turner, *supra* note 82, at 798 (“[I]t is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules.”).

338. Campbell & Rowley, *supra* note 95, at 7, 44.

339. Pitofsky, *supra* note 83, at 1059–60.

340. Campbell & Rowley, *supra* note 94, at 269, 275; Turner, *supra* note 82, at 798.

may be at the cost of less efficient, small businesses.³⁴¹ But if the antitrust laws were to discriminate in favor of small businesses, other values may be compromised—that is, the maintenance of conditions of equality of opportunity for all businessmen through limitations on the range of private discretion.³⁴² By preserving a competitive system, through antitrust enforcement, small businesses will in theory be protected against the unfair tactics employed by larger companies to gain advantages unrelated to superior skill or efficiency.³⁴³

Those who disagree with the inclusion of industrial policy objectives also emphasize that competition law is not a useful tool by which to try to obtain economic equality, and that it is not well suited for achieving employment or other economic or social policy objectives.³⁴⁴ They stress that any income redistribution that could be achieved through antitrust channels is likely trivial. Instead, they contend that “there are better mechanisms for achieving distributive effects,” such as sector regulation.³⁴⁵ Because sector regulation has broader goals than antitrust, they argue that it “is better suited [than competition law] to address the political tradeoffs” between law and policy.³⁴⁶ As such, they note that it is preferable to have different pieces of legislation that separately addresses each objective rather than

341. Pitofsky, *supra* note 83, at 1059.

342. *Id.*

343. *Id.*; see Kovacic, *supra* note 8, at 105 (discussing how increased competition, removal of artificial barriers to entry of new entrepreneurs, and expansion of small enterprises can benefit economically disadvantaged).

344. See Campbell & Rowley, *supra* note 95, at 44 (“There is widespread [albeit not universal] acceptance that competition laws should focus on the maximization of economic welfare, that they are not well suited for achieving employment or other economic or social policy objectives, and that attempts to infuse amorphous ‘public interest’ considerations into competition law standards create serious uncertainty, which may chill investment and pro-competitive initiatives.”); Kirkwood & Lande, *supra* note 63, at 198, nn. 19–20 (citing ROBERT H. BORK, *THE ANTITRUST PARADOX* 91, 111 (1993), in which he stated that “income distribution effects of economic activity should be completely excluded from determination of antitrust legality” and rejected concerns of small business welfare); Fox, *supra* note 13, at 580, 593 (explaining that “those who promote antitrust law as a means of achieving efficiency have seriously criticized using antitrust as a means of achieving equality.”).

345. Blair & Sokol, *supra* note 89, at 2505.

346. *Id.* at 2505.

one that confuses the various issues.³⁴⁷

In addition to sector regulation, other mechanisms, such as direct subsidies, taxation, and welfare programs, may better address social policy concerns.³⁴⁸ Accordingly, some recommend that the competition authority find allies to help compensate those who lose out from competition in the short run. For example, a country's Ministry of Labor could assist by creating programs to re-skill and retrain employees who lose their jobs.³⁴⁹ And there are even those who contend that competition laws should not try to address distribution issues because "inequality is good for incentives and therefore good for growth."³⁵⁰

Beyond competition laws' limitations in achieving other objectives, many point to the inherent tension that results when considering public interest factors alongside economic factors in a single evaluation, arguing there is no clear way to balance the competing goals.³⁵¹ They emphasize that including both competition and industrial policy in a competition law will create inconsistencies in objectives, requiring the competition authorities to determine which objective should prevail in a given case.³⁵² Moreover, such tension in objectives will likely create uncertainty among private actors and other regulated sectors.³⁵³ Such uncertainty may possibly chill investment and

347. Frederic Jenny, *Developing Countries and Competition*, INT'L COMPETITION NETWORK 22 (Sept. 10, 2013), <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/devco.aspx>.

348. Pitofsky, *supra* note 83, at 1060.

349. See Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LIT. 1615, 1656 (1999) (noting other means to achieve equality, including increased access to education that may narrow differential between skilled and unskilled workers).

350. *Id.*, at 1615. However, some development economists argue that greater equality in developing countries may be a condition for self-sustaining growth, and empirical studies have found "a negative correlation between the average rate of growth and a number of measures of inequality." *Id.*

351. Smith & Swan, *supra* note 15, at 3.

352. White, *supra* note 178, at 9; Gal, *supra* note 329, at 1451; Fox, *supra* note 13, at 593; see INT'L COMPETITION NETWORK, *supra* note 82, at 22 (citing Canadian Federal Court of Appeal that explained that multiple objectives cannot always "be served at the same time, nor are all necessarily consistent").

353. INT'L COMPETITION NETWORK, *supra* note 82, at 22. Industrial policy interventions typically try to address income redistribution and do not deal with

pro-competitive initiatives.³⁵⁴

The mingling of potentially conflicting objectives also may undermine the effectiveness and efficiency that competition policy and law can bring to an economy.³⁵⁵ The pursuit of other non-economic goals may broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects. By increasing uncertainty in the law's application, businesses may be discouraged from engaging in conduct that promotes efficiencies not easily recognized.³⁵⁶ Those against the inclusion of non-economic factors also emphasize that the economics-based welfare standards that predominate in the United States "have led to greater predictability in judicial and agency decision-making, allowing businesses to better determine whether their actions are within the confines of the law."³⁵⁷

Further, some note that the inclusion of public interest considerations or industrial policy objectives could actually hurt a country's growth and development goals. For instance, the pursuit of wealth dispersion and promotion of small firms at the expense of efficiency could be costly to an economy, as inefficient firms will remain in the market. By preventing producers from realizing cost savings that accompany efficient production, consumers will likely be harmed.³⁵⁸ Misguided antitrust policy, as well as the poor design and application of competition laws, may also discourage trade and foreign investment.³⁵⁹

Those against the inclusion of public interest considerations also caution against placing too high of expectations on what competition policy and law may accomplish, observing that "[c]ompetition policy is not a magical cure-all for anything that ails an economic system."³⁶⁰ Through the incorporation of a wide variety of non-economic objectives and factors in a competition

spillovers, externalities, and information asymmetry. White, *supra* note 178, at 11.

354. Campbell & Rowley, *supra* note 95, at 44.

355. *Id.* at 44–45.

356. Turner, *supra* note 82, at 798.

357. Wright & Ginsburg, *supra* note 68, at 2406–07.

358. Gal, *supra* note 329, at 1451 (assuming cost savings would be transferred to consumers).

359. Kovacic, *supra* note 1, at 288 n.66.

360. White, *supra* note 178, at 28.

law, officials may incorrectly assume what antitrust can achieve and be disappointed when it fails to live up to expectations.³⁶¹ And although competition policy plays an important role in economic growth, it is just one component. Other factors also contribute to growth and development, such as enhancing entrepreneurship and innovation, enforcing the rule of law, and drafting sensible tax and educational policies.³⁶² As Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit has noted:

Many foreign laws contain broad statements of purpose that (literally construed) appear to place the entire weight of economic success, social equity, and international status on the back of the competition law. Perhaps at one time the U.S. antitrust laws also carried this burden. But for the last thirty years or so, there has been a broad consensus in the United States that antitrust is the body of law targeted at business practices that harm economic welfare The model antitrust code should state that this is the sole purpose of competition law. If other objectives such as promoting local employment, preserving small business, or ensuring fair business practices were included, the law would lose important predictability³⁶³

Finally, those arguing against the inclusion of public interest objectives emphasize that “economics-based antitrust law [does serve social and political goals] to a substantial extent by preventing agreements, mergers, and monopolizing conduct that tend to eliminate or reduce competition without yielding economic benefits.”³⁶⁴ A healthy competitive environment promotes lower prices, higher output, and better range of quality.³⁶⁵ The pursuit of other goals, however, may in fact “injure consumer welfare by interfering with competitive pricing,

361. Rodriguez & Williams, *supra* note 16, at 216.

362. White, *supra* note 178, at 7.

363. Wood, *supra* note 1, at 316 (citation omitted).

364. Turner, *supra* note 82, at 798.

365. Smith & Swan, *supra* note 15, at 3 (arguing that standard competition test encompasses several public interest factors and thus does serve public interest via focus on consumer welfare).

efficiency, and innovation.”³⁶⁶

C. Examination of Competition Law in Developing Countries

To understand how the inclusion of other social policy objectives in competition laws of developing countries may affect interpretation and enforcement of the law, it is necessary to examine the current state of competition law in many developing countries. In addition to the unique characteristics identified in Part IV.D that have led many developing countries to adopt competition laws that aim to meet other development goals, developing countries suffer from a variety of other problems that may impede the successful implementation and enforcement of competition policy and law. First, for example, many developing countries do not have a competition culture. In contrast to most Western or industrialized nations, competition may not be a value that is important to society. As a result, developing countries likely will need to expend more effort to explain the value of competition to the business community. The lack of competition culture is exacerbated by the fact that many consumers—the main beneficiaries of competition law enforcement—cannot be easily educated on the benefits of competition law enforcement and thus will rarely support or fight for it.

Second, institutional weakness is a chronic problem in developing countries.³⁶⁷ Developing countries generally face institutional difficulties in enforcing laws, and competition laws are no exception. For instance, in several Latin American countries, competition laws have existed for some time, but the competition authorities have done little to reduce anticompetitive behavior.³⁶⁸ Inadequate resources, both human and financial, compound the weakness of enforcement institutions.³⁶⁹ Many competition authorities do not have sufficient resources to run

366. Turner, *supra* note 82, at 798.

367. STEWART ET AL., *supra* note 1, at 8.

368. Gal, *supra* note 1, at 26.

369. Bert Foer, *Developing Countries and Competition*, INT’L COMPETITION NETWORK 8 (Sept. 10, 2013), <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/devco.aspx>.

their offices or compensate their staff.³⁷⁰ As a result, competition authorities may not be able to attract the skills and expertise they require because they pay lower salaries than those available in the private sector.³⁷¹ These young authorities then suffer from high turnover and loss of staff to the private sector and abroad.³⁷²

Those staff members who do remain at the competition authorities often lack the requisite substantive knowledge of the law and do not possess the necessary capabilities in terms of information gathering and analysis.³⁷³ The universities of many developing countries do not even offer courses in competition law and may only begin to do so after the competition law has been in operation for a number of years. In addition to a foundational knowledge in competition law, it is imperative to not only have attorneys on staff with litigation experience but also knowledge of other substantive areas of law, including administrative law and civil procedure.³⁷⁴ Further, to complement legal assessment and enforcement, competition law requires high-level economic analysis that aids in detecting and analyzing the effects of business conduct.³⁷⁵ Accordingly, persons administering the law must understand the context and rationale of business behavior while also being able to apply the law and economic theory.³⁷⁶ Even the best of competition laws cannot be applied without adequate human resources, which includes a staff of sufficient size and adequate technical competence that many of these young authorities lack.

Thus, competition authorities require a considerable degree of skill and competence to address the complex issues that come before them. Otherwise, the enforcement results may miss the

370. Fox, *supra* note 1, at 230; Adhikari, *supra* note 11, at 61; Chilufya Sampa, *Developing Countries and Competition*, INT'L COMPETITION NETWORK 4 (Sept. 10, 2013), internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum/devco.aspx; STEWART ET AL., *supra* note 1, at 29.

371. Adhikari, *supra* note 11, at 61; STEWART ET AL., *supra* note 1, at 29.

372. STEWART ET AL., *supra* note 1, at 29.

373. Gal, *supra* note 1, at 37; Roberts, *supra* note 6, at 14.

374. Gal, *supra* note 1, at 37; Brusick & Evenett, *supra* note 1.

375. *Id.*

376. CHANCE, *supra* note 153, at 12.

point or even be anticompetitive. Many developing country authorities are often unable to handle their caseload because they lack qualified staff and resources.³⁷⁷ The lack of qualified human resources may lead to underenforcement of the laws and undermine the standing and reputation of the competition authority.³⁷⁸

Third, if competition cases proceed to court for trial or review, there is a high probability of flawed interpretation of the law by judges who are not specialized in economics or competition law.³⁷⁹ Complicated competition laws that include various non-economic policy objectives may aggravate the potential for judges to misinterpret the law and issue decisions with little or no grounding in international competition law principles. This bad law will then affect future enforcement cases and may take years to overturn.

Finally, developing countries face a host of other problems—including corruption, political interference, small markets, excessive bureaucracy, lack of transparency, extensive regulatory capture by regulatory groups, and weak professional and consumer groups—that may negatively affect successful implementation and enforcement of competition law.³⁸⁰

D. Developing Countries Should Avoid Public Interest Considerations and Proceed Deliberately in Adopting Competition Laws

This section addresses whether developing countries should include public interest considerations and industrial policy objectives in their competition laws, and also answers the broader question of whether developing countries should even adopt competition laws. As discussed, many developing countries feel that they need to include public interest or industrial policy objectives in their competition laws to better address their historical background and current stage of development. They believe that inclusion of these other social

377. Adhikari, *supra* note 11, at 61; Brusick & Evenett, *supra* note 1.

378. Gal, *supra* note 1, at 37.

379. Brusick & Evenett, *supra* note 1, at 279.

380. Gal, *supra* note 1, at 36; Foer, *supra* note 369, at 8.

objectives will help the law gain political support and ensure the law's passage. Yet, as detailed above, the inclusion of such objectives can create market uncertainty and actually undermine the very development goals that the policy objectives supposedly advance. In addition, because the law gives discretionary power to the competition authorities, there is a high likelihood that the competition authority will adopt inconsistent positions, further undermining what the law seeks to accomplish.

Further, as previously discussed, many developing countries struggle with building institutional capacity and securing the necessary human and financial resources to adequately enforce competition laws. The inclusion of social policy objectives thus makes the job of young, inexperienced competition authorities significantly more difficult. Instead of applying straightforward tests rooted in achieving consumer or total welfare, competition staff members must employ a complicated competition analysis that even the most sophisticated of antitrust scholars and practitioners would find difficult. Because most competition authorities in developing countries lack the requisite educational background as well as in-house expertise to mentor and teach new staff members, enforcing a complicated competition law becomes an almost impossible task. And once the public and business community sees that the competition authority is struggling with its mandate, the competition authority quickly loses any credibility it may have generated, making future enforcement efforts an uphill battle.

South Africa serves as an interesting example. To remedy the effects of apartheid and boost economic growth and development, South Africa included public interest considerations in its competition law. Although its law incorporates these other social policy objectives, South Africa has repeatedly emphasized that these considerations are secondary to economic analysis. If this is truly the case, it is not clear why such factors need to be included at all. Instead, it seems preferable to limit the scope of the competition law and include social objectives in other sectoral regulation. Nevertheless, the Walmart/Massmart merger in South Africa reminded the business community and world at large that the South African competition authorities still retain the power to

consider other factors, contributing to the uncertainty of how the South African Competition Act will be enforced in the future.

With the considerations discussed in the previous section in mind, it is unsurprising that some have questioned whether the enactment of competition laws should be a priority for developing countries. In addition to capacity problems, they argue that focusing on implementing and enforcing a competition law may distract from other more urgent reform priorities.³⁸¹ Moreover, the creation of a competition law system may “wrongly divert attention from the development of other institutions” and laws.³⁸² Accordingly, the inclusion of competition policy on developing countries’ economic reform agendas has stimulated controversy over the years.³⁸³

Furthermore, instituting effective competition regulation may be a luxury that most developing countries do not have, as it presupposes a functioning economic and political environment that is conducive to business activity. Consequently, competition rules likely will fail if not placed within market conditions favorable to competition more generally. The development of such market conditions may occur through adoption of an overall competition policy, which may require the restructuring of government utilities, privatization, implementation of competitive neutrality between public and private enterprises, and enactment of sector-specific regulation in areas of market failure. Without these market reforms, enforcing a competition law will likely have little effect and could be a waste of resources that could be better allocated elsewhere. As such, adopting a competition law may be warranted only after a country has made considerable progress towards market reforms.

Even with market conditions supportive of competition in place, the socio-economic ideology and acceptance of competition policy has an important role in shaping the competition landscape. The introduction of public interest considerations into competition laws, however, indicates that many developing

381. McMahon, *supra* note 4, at 257.

382. See Kovacic, *supra* note 8, at 103 (discussing questions raised about competition law and its place in market reform).

383. Kovacic, *supra* note 1, at 286.

countries may still distrust competition policy and its potential benefits. And many do not believe in the economic theory underlying competition law—that is, competitive markets result in low prices, quality goods and services, and innovation. As a result, competition law will be limited in its ability to change market conditions and behavior without a supporting belief in pro-market reforms. These beliefs shouldn't just be theoretical but should be reflected in other policy tools that serve to create a competitive environment.

Similarly, it is “imperative that [the] government truly and consistently accepts the principles of competition in all . . . spheres: the judiciary, executive, and legislature.”³⁸⁴ For competition policy and law to be successful, governmental barriers to competition must be eliminated. Those jurisdictions that have adopted a competition law without a real conviction and belief in a competitive system—or where competition policy clashes with other industrial development policies—have seen few successes.³⁸⁵ But in countries that have shown a more substantial commitment to market reforms, such as in Chile and Mexico, competition law has achieved greater success.³⁸⁶

E. Recommended Way Forward

There are valid concerns about the ability of developing countries to successfully implement and enforce competition laws. Resource constraints as well as a lack of a competition culture and acceptance of market reforms hinder successful implementation. Beyond the capacity and cultural restraints, this Article also described the myriad problems that developing countries face. Moreover, implementation and enforcement may be further complicated by the inclusion of other industrial policy objectives and social interest considerations.

Generally, much of the debate regarding the inclusion of

384. Gal, *supra* note 1, at 27.

385. *See id.* at 26 (citing several Latin American countries that have competition laws enacted years ago but countries were not receptive towards ideas and values ingrained in competition policy).

386. *See id.* (noting that political and social commitment to market reforms in Argentina is more ambivalent and other priorities prevail so competition authorities have been less successful).

public interest factors stems from disagreement over the fundamental purpose of competition law, with scholars and practitioners generally divided into two camps: those who believe competition law should focus only on achieving economic objectives (typically applying an economics-based total welfare standard), versus those who favor a broader mandate for competition law that addresses industrial policy and public interest considerations as well.

As this Article has described, there are persuasive arguments on both sides, but ultimately the debate itself has been too narrow. Beyond the dispute over the proper objectives of competition law is the question of what is most effective for developing countries' growth and prosperity. Recognizing that many of these countries have real development concerns and past injustices to remedy, this Article suggests that it may be preferable for a country to address its other, more urgent reform priorities directly, before turning to competition law. By addressing these other reforms first—and in their own pieces of legislation—a competition law will likely have a better chance at success. For this reason, it is not recommended that developing countries try to achieve everything on their reform agendas through a competition law. The creation of complicated competition laws that require a skillful balancing of various public interest factors creates further hurdles that developing countries must overcome. Including such other industrial policy objectives may even result in impeding, not promoting, economic growth and development.

Those developing countries that have not yet adopted competition laws would benefit from proceeding in the following manner.³⁸⁷ First, before even introducing a competition law, countries should ensure that their universities offer courses in competition law and economics.³⁸⁸ Ideally, such courses would be a part of the curriculum for at least several years prior to enactment of the law. By offering courses in the principles of

387. For those developing countries that already have adopted a competition law, they may wish to consider amending their approach.

388. To offer courses in competition law, the university will most likely need to bring in visiting professors from other countries who possess the substantive knowledge and experience required to effectively teach such a course.

competition law before a specific law comes into force, there will be university graduates who have an understanding of the underlying legal and economic theory who can assist in the law's implementation, enforcement, and defense.

Second, before the competition authority begins its operations, the government should hire and send the employees of the competition authority to other competition authorities around the world for training. Ideally, it would be best to send them to different jurisdictions, so that they may bring back an array of perspectives and experiences. Although many competition authorities around the world currently send employees to other authorities for training, they tend to do so only after they have been in operation for some time, and even then they typically only send one or two persons. This Article instead encourages competition authorities to take a more proactive approach to training. In addition, law firms defending those before the competition authority also would be wise to send their associates and partners to firms in jurisdictions with competition law for training. Without effective and knowledgeable counsel representing and defending those before the competition authority, the law will not achieve its full potential.

Third, for the law itself, it is recommended that the legislature first pass a competition law that is simple in form, perhaps limiting its scope initially to cartels and large mergers. It may even be preferable to implement the competition law in parts to allow the authority to focus on the most egregious forms of behavior, or the largest mergers, before moving on to the more nuanced conduct and mergers that require more in-depth analysis. Many industrialized country experts have recommended giving preference to actions against cartels and competition advocacy over measures to tackle monopolization or abuse of dominance.³⁸⁹ Although detailing the priority that

389. Brusick & Evenett, *supra* note 1, at 272 (arguing unwise to dismiss concerns about abuse of dominance in developing countries); Fox, *supra* note 1, at 220 (discussing how even those who acknowledge possible benefit of public interest factors acknowledge that if competition law "threatens to widen or preserve inequality moat rather than build the mobility ladder, there is a serious question whether free market competition law beyond anticartel law should be advocated in the developing world."). Some have said

should be given to competition law provisions is beyond the scope of this Article, competition law will likely have the greatest chance of success if the scope is not too broad. Moreover, the law should avoid incorporating other industrial policy objectives; those objectives are better served by sectoral regulation. Because competition law and other sectoral regulation will inevitably cross paths in the future, the competition authorities should try to develop relationships with these sector regulators from their inception so that each authority may best understand the role and purpose of the other.

In addition, many have encouraged developing countries to adopt bright line rules.³⁹⁰ Particularly where developing countries do not have strong government institutions—considered a prerequisite for the implementation of comprehensive competition policy—they should have fewer and simpler competition rules that are more likely to be enforced.³⁹¹ This will require announcing clear criteria that will trigger investigations and cases. Without clear criteria, the law may lead to business uncertainty and undermine the competitive market process.³⁹² Clear criteria also aid the competition authority itself. Although developing countries have avoided the laws of Western nations, for the reasons detailed in Part IV, they do not need to reinvent the wheel and may instead anchor their laws to existing jurisprudence that may bring greater legal certainty and other efficiencies.

If the law includes public interest considerations, it likely will be subject to varying and potentially inconsistent interpretations. Moreover, private actors and firms do not know what steps they may legally take and still be within the bounds of the law. As such, firms may refrain from taking potentially growth and development enhancing actions for fear they may

that three types of competition law have the greatest effect on the investment climate in developing countries: (1) measures to prosecute and deter bid rigging; (2) measures to review mergers and acquisitions, particularly those requiring mandatory prenotification; and (3) measures to ensure that entry by new firms is feasible in sectors where privatization has taken place. *See* Evenett, *supra* note 18, at 12.

390. Fox, *supra* note 1, at 230.

391. Adhikari, *supra* note 11, at 85.

392. Campbell & Rowley, *supra* note 95, at 44–45.

violate the law.

By limiting the initial scope of the competition law and presenting clear criteria for enforcement, the law enforcement obligations of the competition authority will be more consistent with institutional capacity.³⁹³ Only once the competition authorities have the requisite educational background and experience should the legislature amend the law to encompass a wider range of conduct and mergers. By implementing the law piecemeal, the competition authority will be better equipped to directly participate in the legislative process and lend its expertise to the legislature in drafting future amendments.

Finally, understanding the limitations of competition law enforcement is often no less important than understanding its benefits.³⁹⁴ Many developing countries seem to view competition law as a cure-all for anything that ails its economic system.³⁹⁵ Countries should better understand the purpose of competition laws—and its limits—and address other economic failings through sectoral regulation.

VII. CONCLUSION

Those who argue for the inclusion of public interest factors in competition law may correctly assert that the antitrust laws of Western nations are inappropriate to developing countries. But it does not necessarily follow that competition laws should incorporate public interest factors and strive to achieve other industrial policy objectives and distribution goals through a competition law. These distribution and development concerns are important in their own right and will have a better chance at being achieved if separated from the competition law and incorporated into other legislation and regulation. By doing so, the competition law also will have a greater likelihood of

393. STEWART ET AL., *supra* note 1, at 20; see Adhikari, *supra* note 11, at 85 (arguing that even if a development dimension is included in a competition policy that it “does not mean that the government should use [those] measures on a permanent basis for all sectors/areas.”).

394. Gal, *supra* note 1, at 45 (discussing how to increase social acceptance of idea that advocacy should not just focus on informing society about benefits of competition law but also on its limitations).

395. White, *supra* note 178, at 28.

protecting the competitive market conditions that will lead to greater economic growth and development. And before even introducing a competition law, developing countries should be at a more advanced stage, both from an economic development and educational perspective.

This recommended path—that advocates adopting competition laws progressively and avoiding the inclusion of public interest considerations—will best ensure that developing countries achieve their full range of development objectives.