Drafting competition law for developing jurisdictions: learning from experience

Michal S. Gal
*University of Haifa, mgalresearch@gmail.com*

Eleanor M. Fox
*NYU School of Law, eleanor.fox@nyu.edu*

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12 Drafting competition law for developing jurisdictions: learning from experience

Michal S. Gal and Eleanor M. Fox*

1 INTRODUCTION

How should one draft a competition law for a developing country? Is the project an easy job of mark-up, following the lead of mature jurisdictions? Or is it a complicated and thought-enlisting project that requires knowledge of the terrain, technical expertise, and a talent for synthesizing local market context with global rules and standards? This chapter argues for the latter.

Approximately half of all developing jurisdictions have a competition law, and more are considering enacting one.¹ Many enforce their laws, at least to some extent.² The laws should be seen in the larger context of competition policy.³ Competition law

* We would like to thank Tamar Indig and Alberto Heimler for excellent comments, Ran Hammer and Shiri Firstman for their excellent research assistance and the German-Israeli Foundation (GIF) for its financial support.


³ Competition policy is market policy, sometimes entailing repeal of unnecessary and perverse regulation and abolishing privileged status of favored firms. It includes but is much broader than competition law.
and policy reduce anticompetitive barriers and prevent exploitations and abuse. They ease the economic plight of people without power – those who are most vulnerable to inflated prices of necessities of life and to blocked market access. They can help to increase a nation’s economic growth and reduce poverty, and can play a role in distributing gains from trade more widely within society.

The colorful quote from Paul Godek misses the point entirely when he says: ‘Exporting antitrust ... is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs’. Markets that have at least a minimum level of operating markets and an operating legal system, with competition

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4 To give one example, in Togo, eliminating monopolistic commodity boards for coffee increased growers’ share of the value received per unit of exports from less than 30 percent to 80 percent. T. Akiyama, J. Baffes, P. Varangis and D. Larson, *Commodity Market Reforms: Lessons of Two Decades*, World Bank Regional and Sectoral Study (World Bank Publications, 2001).


law to protect them, help fill the starving man’s needs – putting bread on his table and opportunity under his belt. Other social policies work in tandem to address immediate human needs. 8

This chapter assumes the importance of competition and competition law, especially in societies that have persistently supported monopolistic structures and blocked the economic opportunities of the mass of people without power or connections. It explores which legal and institutional designs would best promote effectiveness and efficiency of the competition systems of developing countries at different levels of development. We consider which conditions must exist for a competition law to be successful (in the metaphor above: providing basic nutrition), and we focus on how to design a competition law most likely to take root and flourish in developing countries of particular characteristics. 9

The design of competition law for developing countries presents challenges. 10 One of the most important questions is, as we signalled above, whether developing

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8 See E.M. Fox, Imagine: Pro-Poor(er) Competition Law: The Role of Competition Law and Policy in Helping to Empower the Poorer Populations of the World (Paris, OECD, 2013), available at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)4&docLanguage=En; OECD, ‘Promoting Pro-Poor Growth: Key Policy Messages’ (2006), available at http://www.oecd.org/dac/povertyreduction/37852580.pdf; OECD, Growth and Poverty Reduction, n. 3 above, p. 33: ‘competition ... depends on a number of other framework conditions and policies to thrive and function properly. The conditions include the effective rule of law, a reasonably transparent and corruption-free government, adequately staffed and funded courts and police forces, a liberalised trade regime, the absence of anti-competitive regulation, and a certain degree of macroeconomic stability. The absence of any one of those conditions can undermine competition’s ability to work’.


jurisdictions can appropriately take a competition law (the legislation, the guidelines, the case law) ‘off the shelf’, for instance, the shelves of the European Union, the United States or South Africa, or whether developing countries should devise their own laws, drawing from existing models as appropriate. It has become common cause that, despite many shared goals and principles, no one size fits all.\textsuperscript{11} We ask: what is the most effective design of the legal and institutional components of competition laws in developing countries? How should their special characteristics come into play? Even within the universe of developing countries, what differences matter?

Most developing countries share several basic characteristics that are explored throughout this book, including scarce human and financial resources, malfunctioning markets, poor infrastructure, systemic poverty, cronyism and corruption. We build on these characteristics to propose a general framework for the design of competition laws in developing jurisdictions.

We begin the chapter by addressing the question of why or why not adopt an existing model of competition law. We open with a general analysis of the considerations that may counsel for the adoption of an existing, successful model versus a design to fit the nation’s unique characteristics (section 12.2). We then survey characteristics of developing countries that may inform the design of competition laws (section 12.3). We ask: How should these characteristics inform the design? The analysis first focuses on general implications, such as the level of complexity of the law (section 12.4) and the goals to be furthered by it (section 12.5). We then concentrate on specific areas of competition law, investigating how the special characteristics play out in formulations of law (sections 12.6 to 12.8).

\textsuperscript{11} Indeed, it seems that the world view has shifted from the expectation of achieving rather full harmonization of the competition laws of the world to a recognition of the need, also, for informed divergence. See e.g., ICN’s Vision for the Second Decade (2011), p. 6, differentiating between ‘areas where differences are relatively narrow …/ greater’, available at www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf.
illustrate our suggestions we analyze the experience of selected developing jurisdictions and also examine essential characteristics of three main models (US, South African and EU models). This analysis allows us to expose presumptions about how markets operate and how regulators act. Given our conclusion that the established models do not always fit developing countries’ characteristics, we proceed to conceptualize what would be a good competition law, or a sympathetic range of choices for good competition law, for developing countries of certain characteristics with regard to restrictive agreements, abuse of dominance, and mergers. The chapter closes (section 12.9) with an analysis of some of the ways that external forces can be harnessed to overcome some shortfalls of developing jurisdictions’ competition law.

2 BENEFITS AND LIMITATIONS OF LEGAL TRANSPLANTS

Competition laws are applied all over the world. While at their core they exhibit a high degree of similarity, variations abound on substantive and institutional aspects, and even on the specific goals to be furthered by them. Each jurisdiction should therefore decide whether it would like to follow another jurisdiction’s model, create its own, or adopt a mixture of both. As elaborated below, developing countries may face a more pronounced trade-off than developed jurisdictions.

The design of competition laws is affected by different motivations:12 on the one hand, a motivation to follow established laws whereby jurisdictions (mostly small, developing or young) benefit from transplanting and following the laws of large, developed jurisdictions with efficient and effective competition law regimes; on the other hand, the need to design a law that would fit the special characteristics of the jurisdiction. Indeed, a ready-made suit might look very beautiful on the hanger and might be very well made but it might not fit. As Fox noted elsewhere, ‘[l]egislation

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should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should, too.\textsuperscript{13}

Designing a competition law mandates each jurisdiction to decide which motivations are stronger, depending, \textit{inter alia}, on the jurisdiction’s trade ties and the effectiveness and level of sophistication of its enforcement system. Yet these motivations do not necessarily lead in different directions; rather, many parts of a competition regime may fit both the follower and the followed jurisdictions (e.g. applying strict rules and strong sanctions to prohibit cartels among competitors; prohibiting the abuse of a dominant position; adopting a ‘significant lessening of competition’ test as a benchmark for merger illegality). The challenge is to identify those instances in which the unique characteristics lead in a different direction and outweigh the motivation to follow established competition law regimes, and to design rules accordingly. Of course, a jurisdiction can decide to follow others on some aspects of the law and create its own rules on other issues.

**Benefits of Legal Transplants\textsuperscript{14}**

Strong motivations exist to follow the competition laws of other jurisdictions, even if the followed law does not completely match domestic conditions. These motivations, which are sketched briefly below, are generally stronger the less developed the jurisdiction.\textsuperscript{15}

Often following one’s law is voluntary, based on internal motivations. Adoption of ‘ready-made’ and pretested rules saves the costs of determining what content ought to be given to the law. Mongolia provides an interesting example: its attempt to redefine ‘cartel’ and ‘dominant position’ created uncertainties and carried the risk of controversies and enforcement problems. An UNCTAD peer review


suggested reformulation of these definitions while considering international experience and adhering to formulas that ‘have found broad international acceptance’.16

Moreover, benefits flow from the transplanted law’s application in its home jurisdiction: an established law has a long history of implementation, interpretation and academic discourse in its saddlebag, and such sources continue to flow with its ongoing application, thereby generally increasing legal certainty. Generally the larger the jurisdiction (and thus the faster the accumulation of decisions interpreting and applying its laws) and the more developed its competition law (and thus the more expansive and knowledgeable guidelines and scholarly articles interpreting it), the larger are such benefits. Furthermore, many of the discussions of competition laws in international forums (such as the OECD and the ICN) mostly focus on the laws of such jurisdictions (UNCTAD being an exception). The transplant can also help push through new concepts and ease their acceptance.

Additional benefits arise when we add trade to the analysis. One benefit is a reduction in the learning and compliance costs of firms wishing to trade beyond their jurisdiction, which, in turn, serves to create a more competitive environment.17 Legal transplants reduce the costs of domestic exporters of learning which competition law issues they might face in the followed jurisdiction. For the same reason, transplants may increase the incentives of foreign firms to import into the follower’s market, all else equal.18 Finally, transplants might better enable competition authorities to work


18 Of course, the content of the domestic law is also an important parameter. The stricter the law generally the higher the entry barriers it creates.
together towards joint solutions to cross-border issues. These considerations might explain, at least partially, the fact that Greenland and Faroe Islands, which are Danish political dependencies, have followed the Danish competition law.

Following another’s rules may also result from external pressures of foreign jurisdictions or international institutions. In some cases such pressure is subtle, and results from a wish to liberalize international trade or to create a common ground for understanding, applying and cooperating on issues of competition laws around the world. In other cases the adoption of certain competition laws serves as a requirement of trade or financial benefits. As Molino and Magen elaborate, diverse mechanisms exist for applying external pressure, from control and coercive intervention (e.g. competition law imposed under military occupation in Germany and in Japan after the Second World War), through conditionality under which the target country retains a degree of autonomous choice and follows a ‘rational bargaining logic of influence, emphasizing a utilitarian calculation’ (e.g. the World Bank’s conditionality of loans on the adoption of competition laws, or requirements in trade agreements), socialization (e.g. creating a learning platform, developing agreed-upon soft law and sharing examples through the ICN), to example, which is based on demonstration and emulation (e.g. exchange programs between authorities). Of course, these mechanisms can sometimes be complementary.

Oftentimes developing jurisdictions are more susceptible to the stronger forms of external pressures. This may result from a weaker bargaining position or even from a lack of experience and professionalism in competition law, which strengthens


21 For such agreements see e.g., Marcos, n. 9 above.

22 For the model’s application to competition law see T. Indig, The Obligations of Nations Engaged in Legal Norm-Creation of Weaker Jurisdictions: Competition Regimes as a Test Case (on file with authors, 2014).

23 See e.g., M. Fox, ‘Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries’ in J. Drexl et al. (eds), Competition Policy and Regional Integration in Developing Countries (Edward Elgar, 2012), p. 273.
the reliance on the experience and advice of others.\textsuperscript{24} Corruption may also affect the decision process. Yet external pressures do not necessarily imply an inadequate law, as the external body may wish to apply a law that deals effectively with the unique characteristics of the jurisdiction.

In practice, the competition laws of many developing jurisdictions are modeled on the basis of those of developed ones (mostly the European Union and the United States) and the competition rules and standards designed by international organizations, most notably the UNCTAD Model Law, although their interpretation and implementation may differ.\textsuperscript{25}

\textbf{Limitations of Transplants}

Legal transplants can be unsuccessful and even harmful if they do not deal effectively with the special characteristics of the following jurisdiction. Relevant characteristics include not only socio-economic ones but also the psychological effects of a law adopted as a result of external pressures, and the existing institutional conditions such as the level of economic analysis that can be performed at all levels of the decision-making process; the legal and practical tools at the decision-maker’s disposal to gather the relevant information; the legal weight given to a decision by an expert decision-maker; and political influences on the decision-maker. As a result, laws which may promote efficiency under certain conditions might instead lead to mistaken decisions under different conditions that would, in turn, reduce domestic welfare.\textsuperscript{26}

Another important parameter, which is sometimes overlooked, involves sequencing: the functioning of the market and its political economy at the time the competition law is enacted and enforced. An important difference exists between a

\textsuperscript{24} Indig, n. 22 above.


competition law which is supposed to ‘jump start’ the economy and one which is applied in a relatively functioning market system. The difference is not only in the perceived goals of the law, but also with regard to the obstacles it will likely face, including the level of recognition of the benefits of competition by competitors and consumers.27

Another parameter that should not be overlooked when determining whether a transplant is justified is the consciousness or leaning of the competition law which is considered to be followed. For example, US antitrust law today has a pro-freedom-for-business leaning. It is geared towards markets that function very robustly and without a history of state ownership. EU competition law, deriving from a common market, has a pro-open-market consciousness.28 The South African law has a pro-poor and pro-development leaning.29 These inherent leanings should be recognized and their effects and relevance analyzed before adopting transplants.

To the extent the transplant is a result of external pressures on the domestic policy-makers, an additional concern involves the psychological reactions of jurisdictions to following the laws of others. Indig elaborates this concern, building upon political psychology and behavioral economics.30 Her starting point is that the perception of a rule as legitimate by those to whom it is addressed exerts a strong pull to comply. Appraisal of rules as legitimate is based not only on the law’s inherent properties but also on its source and the processes through which it was adopted. For example, external pressures that led to the introduction of a competition law might generate strong negative reactions regardless of the law’s content. Indig exemplifies this point by analyzing the German and Japanese reaction to the competition law imposed after the Second World War.31

Accordingly, designing a competition law requires the determination of whether the benefits of a transplanted law (or parts thereof) outweigh its limitations. As argued below, the special characteristics of developing jurisdictions leave many of

27 Indig, n. 22 above; Dabbah, n. 10 above, p. 463.

28 Fox, n. 13 above.

29 Ibid.

30 Indig, n. 22 above.

31 Ibid.
the competition laws of large economies intact; yet in some cases the unique characteristics mandate legal changes.

3 BASIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: AN OVERVIEW

The first part of this book reviewed, in depth, the characteristics that many developing jurisdictions share. Accordingly, below we provide a broad-brush analysis of what we consider to be the characteristics that most affect the design of competition laws. Of course, there exists a wide variation among different developing jurisdictions, yet the majority share at least most of the characteristics briefly surveyed below.

The basic and most significant characteristic of developing countries is, of course, the low level of development of their markets. The most common definition of a developing jurisdiction is based on a crude yet simple test: the level of gross national income (GNI) per capita: once the level is below a certain threshold (which might in itself be debatable) the jurisdiction is considered to be a developing one. This definition and its current threshold captures almost half of the jurisdictions of the world and approximately two-thirds of the world’s population.\(^{32}\) GNI relates to competition both as an input and as an output: it indicates the purchasing capability of consumers which impacts the extent of potential competition, at least in some markets. At the same time, it partly results from the level of competition: competition pushes its participants to improve their productivity and efficiency and enhance innovation, processes which positively impact GNI levels. Accordingly, low levels of GNI serve as an indirect indicator that competition is limited.\(^{33}\) Yet focusing solely on GNI has drawbacks, given that it is a static measure, an aggregatory one (disregarding the distribution of wealth and productivity within the jurisdiction), and does not explore the sources and factors affecting the low level of productivity. Accordingly, attempts have been made to incorporate other factors into the definition. For instance, the United Nations Resolution regarding the criteria for the identification of the least developed countries (LDCs), requires the satisfaction of three criteria in order to be included in this category: low GNI, a human resource weakness criterion and an economic vulnerability

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\(^{33}\) Tamar Indig and Michal S. Gal, Chapter 3.
criterion. Indeed, we argue, following Indig and Gal, that in order to design a competition law for a developing jurisdiction it is not sufficient to recognize the low level of development of its markets. Rather, it is important to unveil the sources of such a low level in the short and in the long term, in order to design an efficient and effective law. Below we briefly survey some of the characteristics that have a significant effect on a low level of development across many developing jurisdictions and that should affect the design of competition laws.

**Economic Characteristics**

One economic characteristic, which is most relevant to our analysis, centers on the ideology and methodology of market control. Until quite recently many developing jurisdictions were planned economies, characterized by a high level of governmental intervention in their markets. The move towards a more market-oriented economy and the governmental control of privately-erected anti-competitive barriers to competition is a much more recent phenomenon, which in many jurisdictions is still in its transitional stages. Trade liberalization, privatization, deregulation, the endorsement of foreign direct investment and the active introduction of more advanced technologies for production have been part of this move. Such changes were often followed by the adoption of enabling laws, of which competition laws are an integral part, although only after the starving man has been given a healthy meal (e.g. contract law, property law, corporate law) to get him back on his feet. Accordingly, the stage of transition of the economy and the degree of assimilation of the free market principles and basic conditions are an important factor in introducing and applying a competition law.

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35 Tamar Indig and Michal Gal, Chapter 3.


Nonetheless it is important to emphasize that the market need not be fully functional for a competition law to be applied. Rather, the law itself can act as an important catalyst in creating conditions for competition, so long as the basic conditions exist (e.g. rule of law, a recognition of the role competition can play in the economy, some level of economic freedom to enter the market and compete). 38

Another important economic characteristic regards the height of barriers to trade, both natural and artificial, which affect the level of potential competition in the market. Natural barriers might be, for example, geographic (e.g. distance from trading partners); meteorological (e.g. extreme weather conditions), or geological (availability of minerals in the area). Artificial barriers to trade might be, for example, political (e.g. war with neighbors; protecting a pressure group or a large player); religious (e.g. restrictions on selling non-Kosher meat); or even part of industrial policy (e.g. protecting currently weak industries from being taken over by foreign firms, conditioning foreign direct investment on the transfer of modern technologies). Many developing economies suffer from high entry barriers into many of their markets. Indeed, these barriers are oftentimes the cause of their low level of development. While some are natural, many are man-made.

One of the most important barriers to trade in developing jurisdictions is their low level of physical infrastructure, which includes utilities (energy, water and sewage networks); transportation (roads, rails, ports and related services); and communication and information technologies (phone and Internet availability). As numerous studies have shown, a remarkable correlation exists between low levels of physical infrastructure and low levels of productivity. 39 As stated by the World Bank, ‘infrastructure [is] crucial for generating economic growth, alleviating poverty, and increasing international competitiveness’. 40 Poor infrastructure negatively affects many

38 See e.g., M. Gal, ‘The Ecology of Antitrust: Preconditions for Antitrust Enforcement in Developing Countries’ in P. Brusick et al. (eds), Competition, Competitiveness and Development: Lessons from Developing Countries (Geneva, UNCTAD 22, 2004).


component of firms’ business activity. For example, low-quality transport increases logistical costs, thereby limiting firms’ access to markets as well as wasting human capital on commuting. These impacts of poor infrastructure translate into barriers to competition for both domestic and foreign firms.

Another economic characteristic of many developing jurisdictions is the high level of economic vulnerability of their markets. In many developing jurisdictions agriculture constitutes a major part of production. This often implies a higher degree of economic vulnerability, due to natural disasters and to fluctuations in world market prices.

Finally, many developing economies are characterized by extreme inequality in the distribution of wealth and opportunity with virtually no mobility. Studies have shown that especially in least developed economies, most of the wealth is held by a small group within society, which generally controls both economic and political power.

Institutional Characteristics
While there exists a wide range of institutional characteristics across developing jurisdictions, they all suffer from a shortage in human and financial resources. For

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42 Evenett and Brooks, n. 5 above.


example, the Barbadian Commission stated that it faces major challenges due to the insufficiency of technical staffing to manage broad and varied technical agendas.\textsuperscript{45} These limitations are often intertwined: civil service salary structures often restrict agencies from recruiting and maintaining highly-skilled staff members.\textsuperscript{46} The effects of this characteristic on competition law, explored below, cannot be overstated.

Many developing jurisdictions suffer from additional institutional problems, which are also relevant to our analysis. One characteristic, especially of LDCs, regards the phenomenon of missing or deficient institutions, that are taken for granted in the industrialized world.\textsuperscript{47} To be operative, market activity must be supported by institutions such as financial institutions, economic laws and a functioning court system. Financial institutions, for example, provide opportunities for credit necessary for entering the market if the entrepreneur does not have much money of its own. The enforcement of contracts and of property rights by the courts enables market players to engage in long-term trading rather than in immediate bartering, without fearing that the other party would bail out after one side has performed his part of the agreement. Where courts do not function well (e.g. judges lack real understanding of the law or proceedings are extremely lengthy and uncertain), markets may find it hard to function.\textsuperscript{48} Another example focuses on the inefficiency of the executive branch, which characterizes many developing jurisdictions. One exemplary indicator involves the number of days it takes to establish a business in a given jurisdiction. The number

\textsuperscript{45} Ibid. pp. 27–8.

\textsuperscript{46} See e.g., APEC, n. 44 above, para. 2.9.11; CUTS, n. 44 above, p. 58; Republic of Kenya, Monopolies and Prices Commission: Annual Report 1998 (1999), p. 17.


is generally correlated with the level of development of the jurisdiction, although many jurisdictions are currently in the process of reform. The lower the level of such institutions (a problem known in the economic literature as the ‘missing institutions problem’), the less firms can rely on the market to supply services and the stronger the need to provide them internally.

**Political Characteristics**

Political characteristics add to and interact with the ones noted above. Political stability (which measures the probability that the government will be destabilized by unconstitutional or violent means) affects the ability of the government to commit to long-term changes in the market.

Corruption (which measures excessive patronage, nepotism, job reservations, favor-for-favor and too close ties between politics and business) is also a highly problematic characteristic of a large number of developing jurisdictions. In the World Bank Enterprise Survey relating to corruption, for example, developing economies were about four-fold overrepresented among the economies characterized with high corruption, relative to developed ones. Corruption distorts competition by raising the barriers faced by some market players regardless of their comparative advantages.

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51 Schwab, n. 48 above, pp. 412–16.


54 Ibid.
Social and Cultural Characteristics

An important characteristic which affects the enforcement of competition law, sometimes overlooked by scholars or simply dismissed as a ‘lack of a competitive culture’, involves the prevailing culture of competition. Indeed, in every market a web of prevailing business norms exists, with their own internal balances and borders of legitimacy, which the local community is used to, values and even prefers. Cross-cultural studies confirm that competitive values stand in conflict with certain cultural values of some communities.

Even the conception of competition may differ among cultures. As Dabbah notes, in many developing jurisdictions ‘the prevailing culture has been to understand competition as a means to “undermine” a rival not on the merit through legitimate means but rather through recourse to tactics and practices of defaming a rival or engaging in dishonest practices such as predatory pricing’. Hayward and Kemmelmeier note the tension between competition as ‘bringing out the best people by enhancing their efforts and creativity’ or competition ‘as a corrosive force that reduces us to antisocial beasts’.

Indig and Gal survey some examples of cultural differences that affect the competition culture, some of which are briefly surveyed here. An important cultural difference is created by the different weight given in different societies to competition

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57 See e.g., Bakhoun, n. 12 above.

58 Dabbah, n. 10 above.


60 Tamar Indig and Michal Gal, Chapter 3.
versus collaboration among market participants.\textsuperscript{61} Another difference is based on the level of risk that is assumed to prevail in the market. Societies accustomed to the confidence connected with planned moves and tighter control over occurrences deriving from intensive governmental involvement in the economy, might find it much less acceptable to lean on random unexpected market dynamics deriving from the inputs of profit-seeking random players.\textsuperscript{62} Another important tension involves the ethos a society adopts: being modestly satisfied with what one has while preferring a moderate life pace, versus sustained aspiration to achieve material improvements, characterizing western economies’ way of life.\textsuperscript{63}

4 GENERAL IMPLICATIONS
Let us now turn to some of the general implications that result from the unique characteristics of developing jurisdictions. The next sections then apply these general implications to specific areas of law.

Level of Complexity of Analysis
Resource scarcity has significant effects on competition law enforcement.\textsuperscript{64} Indeed, sufficient resources are the bedrock of efficient enforcement because they largely determine whether competition law is workable. The more effective the enforcement bodies are in detecting and sanctioning legal violations, the more instances of anti-competitive conduct will be prohibited \textit{ex post}. More importantly, the institutional

\begin{itemize}
\item \textsuperscript{62} See e.g., E. Craford, ‘The Harmonization of Law and Mexican Antitrust: Cooperation or Resistance?’ (1996) 4(2) \textit{Indiana Journal of Global Legal Studies} 407, 410 and 430.
\item \textsuperscript{63} Kasser \textit{et al.} examine the costs of the American Corporate Capitalism (ACC) system on people’s life, and conclude that the ACC’s ideology and institutions often conflict with pursuits such as helpfulness (caring about the broader world), intimacy (having close relationships with others), and personal freedom (feeling worthy and free). See Kasser, Cohn, Kanner, and Ryan, n. 56 above.
\item \textsuperscript{64} This section builds heavily on Gal, n. 26 above.
\end{itemize}
conditions of the enforcing bodies affect the expectations of economic actors and their incentives to engage in anti-competitive conduct in the first place. The higher the possibility of detection and sanctioning, the stronger the deterrence effects on market participants \textit{ex ante}, and vice versa.

Let us first focus on the effects of human resource constraints, both qualitative and quantitative, which characterize most developing jurisdictions. To be effective, decision-makers must possess the necessary skills to understand, analyze and apply effectively the legal rules in specific cases. This requires, \textit{inter alia}, adequate technical competence of the decision-maker in all stages of the enforcement process – from the investigative body until the final reviewing body.\textsuperscript{65} Assume, for example, that a case investigator does not understand the difference between oligopolistic coordination and cartelistic agreements. He might then be driven astray by the cartel parties; or, even more important for many developing jurisdictions, perhaps the investigator cannot differentiate between welfare-enhancing and welfare-reducing activities of trade associations or monopolists. Competition authorities thus need to employ lawyers, economists and investigators who are qualified to understand and apply competition law. An understanding of the law is also required from the reviewing body, whether a court, a ministerial committee or any other body.\textsuperscript{66}

The welfare costs involved in mistaken decisions might be significant and may extend beyond the direct effects on the conduct of the parties in a specific case. Such decisions might impact the incentives of other market players to engage in pro-competitive or neutral conduct if it was wrongly labeled as anti-competitive. Conversely, it might strengthen the incentives of market players to engage in anti-competitive conduct, if such conduct was found to be legal. Such decisions might also undermine the standing and reputation of the national competition authority (NCA), especially where it results in incompetent enforcement efforts such as the loss

\textsuperscript{65} Of course, other conditions are also relevant, including impartiality and procedural and evidentiary rules that allow the decision-maker to reach the necessary information. For the purposes of this analysis, however, we assume that all other conditions exist.

of many cases brought by it.\textsuperscript{67} Particularly in its early years, the NCA might be required to convince the courts, as well as the general public, that its cases are procedurally sound and substantively meritorious.\textsuperscript{68}

Human resource constraints might also lead to limited enforcement. The lack of skilled personnel implies a limited ability to readily identify offending practices, to respond within a reasonable time-frame to queries and complaints, to handle complex matters, and to engage in educative activities. Additionally, a study by the Asia-Pacific Economic Cooperation (APEC) reported reluctance in several developing jurisdictions to apply competition law due to a lack of experience in competition cases and the difficulty in dealing with cases that require economic judgment. A vicious circle has been created in which the courts never gain experience and cases are never brought.\textsuperscript{69} Also, absent adequate expertise, the NCA may not identify the need for legislative amendments and its weakness may also result in an undesirable balance between competition enforcement and other forms of regulation. Human resource constraints also affect the creation of a competition culture. Increasingly, it is recognized that NCAs play an important role in the promotion of a competitive environment by proactively influencing regulatory activities to ensure the rejection of unnecessarily anti-competitive regulatory measures. This advocacy role might even be more important in promoting competition than in the repression of anti-competitive behavior through competition law enforcement. Yet, if the NCA is not sufficiently staffed, this role will generally be one of the first to be harmed.\textsuperscript{70}

Let us now turn to the effects of limited financial resources. The performance of enforcement tasks generally requires a significant monetary investment. Accordingly, a resource shortage poses severe constraints on competition enforcement, particularly in \textit{ex officio} cases.\textsuperscript{71} It might thus prevent the enforcement

\textsuperscript{67} This concern assumes that the judiciary can reveal the mistakes of the authority, an assumption which might not always hold.

\textsuperscript{68} Gal, n. 38 above, p. 37.

\textsuperscript{69} APEC, n. 44 above, para. 2.9.16.


\textsuperscript{71} ICN, n. 43 above, p. 22.
agencies from engaging in some activities which might have increased social welfare.\footnote{OECD, \textit{Competition Law and Policy in Chile: A Peer Review} (2004), available at: www.oecd.org/da/competition/34823239.pdf.}

Such financial and human resource constraints affect the desirability of transplanting laws of developed jurisdictions which do not face similar constraints. As our understanding of economics develops, generally the economic models become more complicated and require more nuanced, in-depth and fact-specific analysis of each specific case in order to minimize mistakes. The cost of such rules is increased demand on levels of competence and increased financial costs of application. In large, developed jurisdictions, application of complex rules often makes perfect sense, given the generally high level of expertise of the enforcement institutions and the resources at their command. But once we transplant such complex laws in jurisdictions with a much more limited ability to perform such analysis, mistakes will be significantly increased.

Accordingly, laws which may be efficient under certain institutional conditions might instead generate mistaken decisions under inferior institutional conditions and might even reduce domestic welfare.\footnote{In a study of 18 Eastern European countries that are newcomers to antitrust, Dutz and Vagliasindi found that the ‘Institutional Effectiveness’ variable showed the strongest impact on domestic competition. M. Dutz and M. Vagliasindi, ‘Competition Policy Implementation in Transition Economies: An Empirical Assessment’ (2000) 44 \textit{European Economic Review} 770.} Consider, for example, a rule that bases the proof of market power on an in-depth economic analysis of the conditions in the market, including the height of entry barriers. The application of such a rule requires economic expertise and would likely involve a costly exercise in the study of the market. Compare it to a rule which creates presumptions of market power based on market shares. The application of the latter might be much less demanding where markets are relatively easily defined. To determine the desirability of such legal presumptions the social planner would need to balance the effects of reduced administrative costs on enforcement, as well as the effects of a higher degree of predictability on market conduct, against the increase in mistakes that will result from a less nuanced analysis of market power. A monopoly definition based on a
legal presumption might therefore be justified in jurisdictions with limited institutional endowments, especially where entry barriers into most markets can be assumed to be high. Such a rule may also create a higher level of compliance by market participants, whose level of complexity of analysis might also not be high.

Along these lines, an UNCTAD Peer Review of Zimbabwe found that the competition law was formulated in too complicated and detailed a manner. The Review contended that this reduced the possibilities of enforcement as ‘real cases may fail to conform to the specificities of the legal provisions’. Thus, the Review advocated that Zimbabwe should adopt simple and clear provisions accompanied by guidelines in order to enhance legal certainty.74

Yet, except with regard to several relatively simple offenses (e.g. cartels among competitors), it is not an easy task to design a simple and clear rule, as it requires one to accept the fact that such a rule will lead in some cases to mistaken judgments. A developing country might thus sometimes need to decide whether a complex prohibition is better than no prohibition at all on those matters which cannot be simplified.

Scope of Application

Institutional endowments should also play a role in determining the scope of the application of rules. Merger regulation serves as a good example. A regulatory model based on ex ante notification and authorization is quite resource-consuming, given that the authority must review all mergers that meet the threshold. This might have spill-over effects on other areas of enforcement, given that the NCA generally has one pool of enforcement resources for all of its activities. Thus, some modifications might be necessary in order to create a more efficient enforcement system within the existing endowment. As elaborated below, the scope of merger review should be limited. An interesting question arises whether application fees might solve this financial problem, assuming that the fee could cover the resources needed for analyzing the merger application. The desirability of such a solution requires an in-

depth cost/benefit analysis of the effects such fees have, \textit{inter alia}, on the incentives of firms to engage in pro-competitive mergers.

Furthermore, the adoption and framing of a competition law should be analyzed in a broader context, including the other reforms to be adopted and the capacity of the jurisdictions to apply such reforms in parallel.\textsuperscript{75}

An important question regards the extra-territorial reach of the law. Empirical studies have shown that international cartels often target the most vulnerable countries, where they are more likely to wreak their harm with impunity.\textsuperscript{76} Some examples include the world vitamins cartel and the cargo and fuel oil cartels. Yet a practical question arises: can developing jurisdictions tackle these anti-competitive actions through their competition laws? Research has shown that rarely do they apply their laws to such conduct.\textsuperscript{77} In our view, it is essential to keep the door open for enforcement based on anti-competitive conduct that takes place elsewhere but creates significant harmful effects on one’s jurisdiction, for those cases in which the developing jurisdiction can indeed bring a case. Yet in those areas of competition law that may require \textit{ex ante} notification and certification (e.g. mergers or joint ventures), the law should apply, but there is good reason not to require notification and mandate the NCA to give its decision before the act can take place, especially where the parties are large international firms, except in rare cases in which it can be assumed that the developing jurisdiction can make a credible threat to prohibit the transaction. This point is elaborated below.

An interesting point with regard to the scope of application involves the choice of rules. Some developing jurisdictions adopt US or EU-style rules, while using discretion in applying such laws only in clear and easily provable cases,

\textsuperscript{75} See e.g., Kovacic n. 37 above.


thereby effectively reducing the scope of application of the law. While this solution may overcome some of the main problems of enforcement faced by competition authorities and courts, its downside is the level of clarity and certainty it creates for market players. Accordingly, should such a policy be adopted, we suggest also publishing guidelines on how the laws will actually be applied.

**Level of Transparency and Discretion**

The high level of corruption (an unfortunate characteristic of many developing economies) also affects the design of competition laws. One way to reduce corruption is by making it harder to exercise. It is much easier to make a tilted decision the broader the discretion of the decision-maker, and the lower the level of transparency. Accordingly, it is important to set, whenever possible, clear parameters for decisions that limit the decision-maker’s discretion whether to open an investigation and how to decide whether an offense was committed, and require him to elaborate how these are met in each case, in order to allow third parties to check their application. Following this recommendation might imply preferring clarity over preciseness and flexibility in some cases. This can be exemplified by the Armenian competition law which sets fines at fixed percentages of the offender’s turnover without any margin of discretion, in order to limit incentives for corruption. Yet this rigidity raises certain concerns with respect to the principle of proportionality.

Another partial solution for corruption focuses on the institutional features of the decision-maker: it might be better to have a college of decision-makers where stakes are high rather than an individual. The introduction of a new competition tribunal, staffed with newly appointed judges, instead of empowering existing courts

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78 Some scholars even argue that in some developing economies competition policy may do more harm than good, especially due to corruption. See H. Ergas, ‘Should Developed Countries Require Developing Countries to Adopt Competition Laws? Lessons from the Economic Literature (2009) 5(2) European Competition Journal 361.


which are known as suffering from corruption to hear competition law cases, might also limit corruption.

The importance of transparency and limited discretion, where not necessary to serve the goals of the law, can be exemplified by the Indonesian law. The law can be interpreted as granting the agency with ‘complete freedom to interpret the article as prohibiting all mergers and acquisitions regardless of effect’. UNCTAD evaluated this provision as ‘an illustration of ambiguous drafting leading to uncertainty and harm of the business environment, in turn undermining the objectives of Law’.

**Presumptions**

Competition laws, like many other legal rules, are based on presumptions which are designed to make the analysis more efficient. Below we explore three sets of presumptions that are affected by the unique characteristics of developing countries.

A first set of presumptions relates to the functioning of the market. This point is easily exemplified by US competition law, which is largely based on the presumption that markets work well and barriers are usually not significant. Predatory pricing, for example, is rarely prohibited because it is presumed that generally it will not be profitable for a monopolist to engage in such conduct, given that once he raises his prices entry will occur once again given that entry barriers are low in most markets. Yet such a presumption does not provide a useful default generalization of developing jurisdictions, given high entry barriers, repeat players and limited transparency in many of their markets. Rather, the correct presumption might be the opposite: that new entry is difficult and once it occurs it is extremely important not to nip it in the bud as it might not readily occur again in the near future. Similarly, the rule adopted in the United States that exclusionary conduct such as loyalty rebates often require proof that the foreclosed competitor was equally efficient is based on a presumption that absent harm to such a competitor, welfare will not be decreased. Yet the equally efficient requirement might be a poor way to test competitive effects and screen out bad cases in developing jurisdictions dominated by entrenched monopolies and high entry barriers. In such countries there may not be an equally efficient challenger and re-entry is typically more difficult, *inter alia*, because capital markets

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often work poorly, and new entrants are less likely to be lurking on the sidelines. An alternative approach to the ‘as efficient competitor’ rule would require the plaintiff to show, in addition to foreclosure disproportionate to defendant’s business needs, that the market would be worse off absent the enforcement.\textsuperscript{83} Another example of the presumption that markets work well if correctly incentivized can be found in the role given to private actions in competition law enforcement. Once again, reliance on private market participants might be more problematic in a developing jurisdiction given limited expertise and resources of such participants, especially in the formative stages of the law.

Another set of presumptions relates to the ability of market participants to calculate the costs and benefits of a certain action. Many rules in the European Union and the United States are based on the presumption that market participants will calculate correctly whether an action is profitable for them under existing market conditions. Accordingly, they will not engage in those actions that might have potential anti-competitive effects but an economic analysis indicates that they are not profitable for them. A direct result of this presumption is that the law should not interfere with such actions, because the market will regulate itself. A good example involves the single monopoly profit theory. Economic models show that it might not be profitable for a monopolist to foreclose a related market and dominate it because this will not necessarily increase its profits. Yet this economic logic might not be easily applied by unsophisticated monopolists. Furthermore, even if it is understood by some market participants, it might not be understood by others, who might then design their actions based on wrongful assumptions on how other market participants will behave.

A third set of presumptions relates to the capabilities of the enforcing institutions, both those directly related to competition law as well as other regulatory bodies that affect the operation of the market. Let us exemplify this with regard to the NCA. In most developed jurisdictions the presumption is that competition authorities enjoy a relatively high level of legal and economic understanding and sophistication and adequate human and financial resources to apply their laws. It is also presumed that welfare-reducing decisions generally do not result from corruption. As noted above, these presumptions cannot be applied in many developing jurisdictions.

\textsuperscript{83} Fox, n. 13 above.
Accordingly, it is of great importance to unveil the presumptions on which a competition law is based, in order to ensure that they fit well the characteristics of one’s jurisdiction. Such presumptions should affect, *inter alia*, the level of complexity of the law, burdens of proof, level of transparency and even the number of prohibitions to be applied.

The above analysis leads to the following conclusion: the presumption that the laws of developed jurisdictions necessarily fit the needs of developing jurisdictions is a problematic one. As many researchers observe, promoting conventional competition law doctrines has oftentimes created high costs. Of course, this does not imply that no laws should be transplanted from developed economies. Rather, there is a need to identify those rules whose presumptions fit developing economies.

**Priorities**

Given limited resources, developing jurisdictions must be even more cautious when determining their enforcement and advocacy priorities. A major consideration is what restraints most harm their populations, the removal of which would confer the most benefits. As Fox suggests elsewhere, developing countries’ experience suggests the answer: state and state-complicit restraints, which clog the pathways for initiative on the merits, sometimes almost fully, while reciprocally raising prices. Therefore, state and hybrid anti-competitive action should be treated as a matter of priority.

Competition laws generally apply, however, to private rather than public restraints. Yet, as Healey and Fox have shown, a surprising number of jurisdictions extend the reach of their competition laws to state actors and to some unduly anti-competitive state acts and measures. Learning from such experiences they suggest, *inter alia*, that the law should cover state-owned enterprises and state officials who facilitate illegal cartels or bidding rings by conduct outside the course of their duties and that state and local action defense to anti-competitive private acts be narrowly drawn.

84 See e.g., De Leon, n. 55 above, pp. 36–7, 122–3; Fox, n. 13 above.

85 Fox, n. 13 above.

Another, more conventional, way to deal with state-imposed restraints is through competition advocacy: advocating both to the government and to the general public the advantages of eliminating state-imposed restrictions on competition, through examples of markets which were open to competition in the jurisdiction itself or in other jurisdictions.\(^87\) In Tanzania, for example, the Competition Commission faced a press campaign by the leading cement producers to impose duties of 35 percent on imports of cement, promising to save existing jobs (in inefficient plants). The high duties would have blocked purchases of cheaper and better quality cement from Pakistan and India. Countering the protectionist campaign, the Commission calculated and publicized how much the duty would cost the people in the road construction and housing sectors, in prices, in jobs, and in economic opportunity; and they won the ear of the President, who refused the duties.\(^88\) Indeed, competition advocacy, i.e. those activities conducted by the NCA that are related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, is, perhaps, the most significant task of NCAs in developing countries in the first stages of the opening up of their markets.\(^89\)

Priority should also be given to those markets that are the backbone of the economy (e.g. tourism in Caribbean states, agriculture). Another priority involves those markets that most affect the welfare of the population, with an emphasis on the weakest and poorest members of society.\(^90\) Here the focus should be on both the demand and the supply side, which often converge: markets that matter for the livelihood of citizens, both as consumers (e.g. basic goods such as oil, water, rice in Asia, corn in South America, infrastructure, cement and healthcare) and as workers (e.g. agriculture which in many poorer countries employs 50 to 80 percent of workers; financial services which enable those without initial funding to enter the market; and infrastructure markets including telecommunications that widen the pool of potential buyers). Setting priorities, assuring that the gains of antitrust enforcement get passed

\(^{87}\) As told by Francis W. Kariuki, Director General of the Competition Authority of Kenya.

\(^{88}\) As told by Godfrey Mkocha, when Director General of the Fair Competition Commission of Tanzania.

\(^{89}\) Gal, n. 38 above.

\(^{90}\) See also OECD, n. 5 above, p. 8.
on, and monitoring the targeted markets to assure that, post-enforcement, they behave competitively, are vitally important tasks.91

Finally, priority should be given to those cases which help further societal mobility, and thus further the goals of efficient inclusive development elaborated below.92 This often means focusing on market access issues which affect the ability of the weaker parts of society to take part and participate in the market on a larger scale than their current conditions allow them. Such cases might focus, for example, on opening up communications and transportation bottlenecks from disadvantaged areas. We should emphasize that protecting mobility and opportunity on the merits need not and should not imply protecting inefficient competitors from competition and handicapping efficient firms. Rather, as economic studies have shown, increasing such possibilities for market entry is one of the best pathways towards economic efficiency and growth in the long run.

Another set of priorities involves the mix of activities to be taken by the NCA: enforcement, advocacy, education, research. As Kovacic notes, the sequencing of such activities, which is based on a careful study of the existing conditions, is extremely important.93 Activities geared towards gaining public knowledge and acceptance of competition laws should be granted priority. Unmasking governmental activities that harm competition and welfare through advocacy and education is also highly important.94 Indeed, as delegates of NCAS in developing countries have recently argued, in an environment in which large, industry-dominating firms have solid political support, advocacy is often the most useful instrument for the competition policy authorities to influence government decisions.95 Both tasks can also be achieved by enforcement activities that are highly visible and understandable.

Exemptions

91 Fox, n. 13 above.

92 ‘Building a ladder of mobility from the lowest rung up to enable mobility, incentivize entrepreneurship, and stimulate innovation’: Fox, n. 13 above, p. 220; OECD, n. 5 above.

93 Kovacic, n. 37 above, p. 286.

94 Ibid.

95 OECD, n. 5 above, p. 7.
A related requirement focuses on the minimization of exemptions from the application of competition law, especially in those sectors that were identified above as those with priority. For example, a broad exemption for agriculture is disabling and disempowering.\(^\text{96}\) This is because developing nations have a particular need for a competitive market in agriculture, as producers, workers and consumers. Likewise, exemptions in the banking sector might make it more difficult for new competitors to access one of the most important inputs in business: credit.\(^\text{97}\) If an authority to exempt is nevertheless granted, attention should be given to the identity of those empowered to exempt. Optimally, it should be granted to those that are most immune to political economy effects, that do not represent contradicting self-interests and who are generally proponents of increasing competition.

**Remedies**

The characteristics of developing jurisdictions should also affect the potential remedies to anti-competitive actions.\(^\text{98}\) Of course, remedies should be structured such as to reduce economic incentives to engage in anti-competitive conduct. At the same time, excessive sanctions should also be avoided in order to avoid over-deterrence and harm to public conceptions of the fairness of the law. This can be exemplified by the scope of imprisonment for petty competition law violations (in Zambia for obstructing or delaying the NCA’s investigation or giving false or misleading information, and in Zimbabwe, for not notifying a merger).\(^\text{99}\) But these recommendations apply the world over. Beyond that, there is a greater need in developing jurisdictions to open private channels for recourse, in parallel to the actions of the NCA. To help poorer victims and others whose losses are a fraction of court costs, jurisdictions can incentivize those who might bring proceedings on their behalf. This implies class or representative actions, and also contingent lawyer fees or other inducements that are sufficiently high to incentivize such actions. The private course of action is important because of a combination of factors: the limited resources of the NCA; the risk of

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\(^{96}\) A provision authorizing certain cooperatives of small farmers can be important.

\(^{97}\) Fox, n. 13 above.

\(^{98}\) Ibid.

corruption; and the fact that NCAs might lack the stature to stand up to powerful offenders. Interestingly, foreign legal firms can help overcome these obstacles, by representing local consumers. The UNCTAD Peer Review relating to Mongolia\textsuperscript{100} advocated the strengthening of private suits for two additional reasons: it contributes ‘to the recognition and understanding of the law by broader categories of potential stakeholders’, and ‘it may facilitate the development of a private bar association specializing in antitrust cases in Mongolia, including cartel cases, and bring more skills to bear on such cases’. In the context of Kenya, it was noted that such suits strengthen public support for the regime: ‘[t]he ability of an affected consumer to win compensation for his or her losses is likely to encourage popular support for enforcement. This is likely to appeal to the general public as much as to the persons actually receiving the compensation’.\textsuperscript{101}

At the same time, especially in the formative stages of creating a competition culture, a risk arises that the law will be applied incorrectly in such private cases by courts who lack basic understanding of the competition law, and without the guidance or prior analysis of the NCA. Such rulings might, in turn, negatively affect the ability of the NCA to apply the law correctly in the future. Accordingly, it is essential that such cases be heard before a specialized court that has specific knowledge of the issues that characterize competition law cases or that such cases be limited to those areas of law in which rules are quite simple to apply (e.g. no excessive pricing cases where these cases are allowed), and that the NCA have standing in such proceedings, in order to allow it to present its views where it deems this important. Alternatively, general courts should only be empowered to hear cases based on simple competition rules, such as cartel offenses.

Now that we surveyed some of the general implications of the unique characteristics of developing jurisdictions on the optimal design of competition laws, let us now turn to their effects on some specific areas of law. This is the focus of the next four sections.

\textsuperscript{100} UNCTAD, Peer Review: Mongolia, n. 16 above, p. 22.

5 EFFECTS OF THE COUNTRIES’ CHARACTERISTICS ON THE GOALS OF COMPETITION LAW

The goal of competition law is an elusive concept. Deliberation on goals may involve three sets of questions:

(1) Substance: Why does this country want a competition law (apart from being told by trading partners or donors that they should have one)? What does it want the law to do for it? What can it expect the law to do for it?

(2) Strategy: What answers to the above questions will convince the legislature to adopt a competition law?

(3) Application: In applying the prohibitions contained in the existing competition laws, how should goals be taken into account? Who decides how to formulate or appreciate the goals? What is the relationship between the goals’ recitals at the beginning of the statute and the interpretation of the prohibitory provisions of the law?

To provide context, we begin with the range of goals commonly embraced by jurisdictions or a critical mass of them. Then we turn to developing countries’ characteristics that may be important to a country in choosing its goals. Then we return to the question sets above.

The most common goals of nations either in enacting or interpreting their competition laws in the twenty-first century are economic goals: efficiency, including static and dynamic, allocative, productive and dynamic; consumer welfare sometimes including consumer choice; total welfare; or protecting the competition process from the creation of private artificial barriers. These are overlapping concepts but choosing or weighting one or another can be meaningful in application of the law. All of them can be in the service of a larger goal: economic growth.

Also common are equity/economic goals: protecting small and middle-sized businesses from abuses; safeguarding economic opportunity for all, in some cases

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102 Efficiency and how to reach it is not a simple, single concept. One of the authors has suggested that one interpretation and application of ‘efficiency’ is sympathetic to the outsider and another is sympathetic to the insider. See E. Fox, ‘The Efficiency Paradox’ in R. Pitofsky (ed.), How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (2009), p. 77.
especially for historically excluded segments of society. In general, this is a goal of inclusive economic growth, with distributive effects that also serve efficiency in the long run.

Not uncommon are equity non-economic goals, such as protecting small players per se; protecting jobs; promoting the nation’s industries; promoting a greater spread of ownership to increase the stakes of historically disadvantaged groups of society (the latter being written, for example, into the competition laws of South Africa and Namibia).

How do the economic, institutional, political and cultural characteristics of developing countries elaborated above affect their choice of goals? First and foremost, and close to the heart of competition law, the characteristics of non-functioning markets (high concentration, high barriers to entry and extreme and persistent inequality in the ability to enter markets) indicate the need for a goal of making markets work. Developing countries, by definition, need economic development to make the people better off; economic development should lead to growth; efficient markets should lead to both. This means among other things a law tough against cartels and against stodgy monopolists’ use of power and leverage to heighten barriers to entry and exclude or marginalize any challengers.

Indeed, the very countries that need large ambitions in order to improve the lot of their people are also the countries that have the scarcest resources, the thinnest trained talent pools, and the poorest institutions to carry out the goals with reasonable speed and reasonable expertise. Some might argue that this suggests one goal only: efficiency, in the form of aggregate efficiency or aggregate consumer welfare. We disagree.

Equally important for developing jurisdictions is inclusive economic growth. Two main reasons point in this direction. First, this satisfies a need for legitimacy. The equity/economic goal – safeguarding economic opportunity (e.g. by rules against anti-competitive foreclosures of markets) and safeguarding freedom from coercion – may be so important to legitimacy that a pure aggregate wealth law may not take root. This is especially important in those developing economies in which a total welfare approach might prevent societal acceptance and disintegrate the social fabric because it would strengthen or maintain existing wealth disparities, especially where it
parallels a racial divide. As Chua has argued, the overlapping of class and ethnicity characteristics, which characterize many developing economies, mandate that the distributional effects of a market economy be taken into account. Otherwise, this may create instability in democracy, which could convert into an engine of potentially catastrophic ethno-nationalism. Indeed, in a recent OECD roundtable on competition and poverty reduction, delegates of competition authorities in developing jurisdictions argued that ‘the political credibility of the competition policy authorities depends to a large extent on how they are seen as contributing to poverty reduction and employment creation. It would be risky for them to state that their only target is combating harm to competition by producers, and that the impact of their efforts on poverty or inequality is irrelevant.’

Second, opportunity only to the already powerful means the country is not making efficient use of the talents and potential contributions of large segments of the population. The longer-run efficiency and economic performance of the country almost surely depends upon a more nearly open path of economic opportunity for the people. The converse is also true: promoting efficiency through limiting artificial barriers to entry into markets opens economic opportunity for the people. Accordingly, the current literature on development and growth stresses the importance of, not just development and growth, but inclusive growth.

inclusiveness; not just efficiency defined as increased aggregate wealth, but efficiency defined also in terms of enabling the masses of people to participate on their merits in the economic enterprise. Amartya Sen, albeit not writing about antitrust, makes the point analogically by arguing not just for growth but for equity within the growth paradigm.  

Thus, the goals of competition law may, in some cases, need to be broadened to include distributional effects, which may be an important factor in the social-welfare and market efficiency function. Indeed, in a macro long-term analysis the goals of efficient development and of inclusive development may often lead in the same direction. Where this happens, such goals should be furthered by the competition laws of developing countries. It should nonetheless be stressed that in order for inequality to be reduced, competition law should be one of several tools harnessed for advancing inclusiveness. Otherwise, loading this delicate task of


108 Maximization of aggregate total or consumer wealth may not always be in the interests of the poorer developing countries. Compare the argument of Prof. Ronald Dworkin (embracing utilitarianism, or the greatest good for the greatest number, which is effectively one person one vote) with the argument of Judge/Prof. Richard Posner (embracing wealth maximization, which is effectively one dollar, or peso, or ruble, or rand, or renminbi, one vote). See R. Dworkin, ‘Why Efficiency? A Response to Professors Calabresi and Posner’ (1980) 8*Hofstra L Rev.* 563; R. Posner, ‘The Ethnical and Political Base of the Efficiency Norm in Common Law Adjudication’ (1980) 8*Hofstra L Rev.* 487; See also J. Rawls, *A Theory of Justice* (Boston, NJ, Harvard University Press, 1971), pp. 150–61. Rawls argues that justice requires maximizing the utility of those who are worst off. As wealth maximization implies, the wealthier you are, the more weighted consumer sovereignty you have. Wealth maximization serves a function in terms of the GDP and competitiveness of nations; but utilitarianism may entail greater legitimacy for the non-powerful and the un-endowed. This is not an argument for abandoning aggregates weighted by wealth, but it may be relevant in considering choices. See also P. Mehta, ‘Should Competition Policy and Law be Blind to Equity: The Debate’, paper presented at the Third Biennial International Conference on ‘Competition Reforms: Emerging Challenges in a Globalising World’, summarizing and reproducing a web dialog among competition law experts.
changing the social fabric on the competition regime alone might be highly problematic and also affect the ability of the competition law to achieve its other goals. Finally, we acknowledge that this suggestion might sometimes require a more complex analysis of whether the goals of the law are served in a specific case, especially where considerations of social legitimacy are relevant. We thus suggest that only those cases that clearly further inclusive economic growth be allowed and that rules of thumb be created, wherever possible.

Goals of non-economic equity (e.g. protecting inefficient small business) at the expense of better working markets is another matter. It is not uncommon for Preambles to competition laws to recite all possible equity and efficiency goals, leaving to enforcement authorities and the courts the task, if and where relevant to a particular specified offense, to work out priorities. For example, abuse of dominance might denote exclusions and exploitations by firms with power of people without power regardless of efficiency or aggregate wealth considerations. Their legislatures may determine that the law should pursue distributional equity even if it reduces efficiency. Of course, it is for the developing jurisdiction to decide. Yet it may be helpful for them to recognize and quantify the trade-offs. In our view, applying such goals at the expense of competition raises significant concerns. Giving non-economic distribution goals priority clashes, by definition, with the more important goals of inclusive growth. It is important to emphasize that in this group of goals we include only those that would not create inclusive growth in the long run. Otherwise, we consider them as belonging in the second group of equity/economic goals. Also, a host of institutional as well as democratic mandate issues arise: whether the NCA is the proper body to make decisions that are based on non-economic considerations.

Oftentimes in jurisdictions in which non-economic equity goals are also listed in the law, a question arises of what did the legislature mean. Indeed, the legislature appears frequently to list both efficiency and equity goals, and probably finds it not to its advantage to sort out what this combination means in practice. How, then, should
the goals be taken into account by the agency? By the courts? In our experience, agencies and courts have often ignored non-economic legislative goals, or found them not relevant to interpreting prohibitory language (which is most commonly argued when the prohibitory language is clear). The clash of goals is now largely determined by NCA members, informed by the guideposts that have evolved from years of dialogue in view of changing economic conditions, enforcement and policy statements, and court opinions. These observations suggest either a cynical view of legislative blueprints or a pragmatic, subjective and flexible view of goals. Nonetheless, we argue that there is a need to distinguish between Preambles which include a long ‘shopping list’ of goals, and cases in which non-economic goals have a clear historical or socio-economic linkage to the ideologies or realities of the specific nation. In the latter case, overlooking the clear intention to give such goals weight, even if not an absolute priority, may be problematic on a democratic level.

In closing this section, we argue that the basic goal should be to help make the markets work for the good of the people. The overarching goal should be seen as

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109 The UNCTAD Peer Review of Indonesia, which includes several conflicting objectives in the law (public interest, small business protection, efficiency, etc.), recognizes that: ‘balancing such objectives would be challenging, and different balances may result in inconsistent and unpredictable decisions’. Yet, it anticipates that ‘the evolving application of the law, within the legal culture and framework, economic environment and society’s characteristics, will shape and define its balance’. UNCTAD, Peer Review: Indonesia, n. 16 above, p. 3.

110 In the Nationwide Poles case the South African Tribunal opined that the prohibitory language of price discrimination was properly informed by the goals (of leaning in favor of small business). The Appeal Court reversed, stating that the prohibitory language was clear and did not allow a special concern for small business. Sasol Oil (Pty) Ltd v. Nationwide Poles CC (49/CAC/Apr05) [2005] ZACAC 5. In the United States, the founding goals of the law are regularly ignored. See, for example, the interpretation of the Robinson Patman Price Discrimination Act in Volvo Trucks, 546 US 164 (2006), in which Justice Stevens argued on dissent: ‘The exceptional quality of this case provides strong reason to enforce the Act’s prohibition against price discrimination even if Judge Bork’s evaluation (with which I happen to agree) is entirely accurate.’
efficient inclusive development.  

Fairness need not be irrelevant. Fair rules of the game linked to better working of markets are important. Protecting against significant unjustified exclusions by dominant firm strategies is a fair and economically sound objective. But protecting small firms from competition itself is anti-antitrust.  

Finally, it is important to emphasize that the law is fact-based. Factual situations are dynamic and unique. At least in common law countries, the law can be worked out case by case in the shadow of goals. The working out of the problems, one-by-one, in view of process, outcome and continuity, in pursuit of making markets work for the people, allows a continued practical adaptation and the evolution of the goals. Yet, once again, it is essential that such evolution occur within the confines set by the legislator, in order to ensure that corrupt decision-makers do not use this outlet to achieve private goals.

6  EFFECTS ON THE LAW AGAINST RESTRAINTS OF TRADE

Efficient application of laws against harmful agreements in restraint of trade is highly important for developing jurisdictions. Most importantly, addressing cartel behavior is a critical area of enforcement. As numerous studies have shown, cartels in developing countries increased price in the range of 10 to 45 percent. Studies have also shown that cartels are associated with low labor productivity and low incentives

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111 See also Bakhoun, n. 12 above.

112 If decision-makers should decide to apply their law to protect small businesses from efficient competition, that is not our recommendation but is not our choice. See e.g., P.T. Indomarco Prismatama (03/KPPU-L-1/2000), Commission for the Supervision of Business Competition, holding that the big supermarket had failed to observe the principle of economic democracy by failing to have regard to the interests of small-scale retailers in contravention of the recitals of the Competition Law and ordering it not to expand into traditional markets where it was facing small-scale retailers.

113 Kitzmuller and Martinez, n. 6 above.

to innovate.\textsuperscript{115} Cartel enforcement has been shown to effectively reduce such anti-competitive effects.\textsuperscript{116} One important type of cartels for developing jurisdictions to tackle is bid-rigging, which can significantly affect growth by increasing prices and reducing quality of large governmental projects designed to reduce entry barriers into the market (e.g. in transportation or telecommunication). \textsuperscript{117} Given inherent institutional limitations, it might make sense to take advantage of technical assistance programs in order to create clear guidelines for the NCA on how to detect bid rigging and create a ‘black and white list’ of conditions often set by trade associations and in cooperation agreements, to the extent possible. Another common type involves rules set by trade associations that significantly limit competition among members without offsetting benefits to social welfare.

In many developing countries the state sets up various boards, often made up mostly of competitors, and often empowered to be a sole buyer or a sole seller or both. These boards are often highly anti-competitive: typically, they put entrepreneurs out of work; they elevate the price of outputs; or they set ethical standards for whole professions that often create significant entry barriers; they often block the existence of markets in commodities. It is important that developing countries identify such boards, consider whether they are part of state action or merely private cartels; challenge them when they can be challenged under the competition laws, and advocate against them or their unnecessary anti-competitive transgressions. Indeed, the World Bank is currently working with poor developing countries to identify and advocate against the worst market blockages, some of which involve trade boards. For example, the Pyrethrum Marketing Board was identified by the World Bank and the Kenyan Competition Authority as falling within this category. They were successful


in getting legislation to limit the harmful effects of its monopoly/monopsony power.\textsuperscript{118}

At the same time, it is important for a developing jurisdiction to remember that not all agreements, even those among competitors, are necessarily anti-competitive. Rather, when the starting point is inefficient firms and missing or deficient market-supporting institutions, achieving long-term economic growth may require a careful combination of competition and cooperation.\textsuperscript{119} For example, the law should be flexible in allowing combinations of small firms to achieve efficiencies and synergies. An interesting attempt to clarify the cartel offense while leaving the door open to beneficial arrangements can be found in UK law.\textsuperscript{120}

Developing countries should also acknowledge the accepted wisdom regarding the effects of different types of agreements, and ensure their laws follow these economic findings. Indonesia provides an interesting example, as it reverses the common pattern of rule of reason and per se illegal treatment. An UNCTAD Peer Review found that ‘Unusually, it uses a rule of reason to evaluate some horizontal agreements typically judged under a per se rule in other jurisdictions, such as price fixing, market division and bid rigging ... This would seem contrary to the objectives of the law, not least by its chilling effect on the competition strategies of firms’.\textsuperscript{121}

An interesting question arises with regard to procedure. Two main systems exist around the world. Under the first, which was applied, for example, in the European Union until 2003,\textsuperscript{122} agreements in restraint of trade must be cleared \textit{ex ante} by the NCA. Under the second, which is prevalent for example in the United States...
and in the EU today, an agreement that distorts competition is treated as valid until the NCA or a court prohibits it. Developing countries differ in the model adopted. In many ways the issue of what is the best procedure for developing countries is similar to the question of whether to require merger notification and clearance, elaborated below. On the one hand, a pre-notification model allows the NCA to analyze the agreement and ensure, \textit{ex ante}, that its benefits outweigh its harms. Such decisions might be especially important in the formative stages of a competition law, especially if they allow the NCA to draw bright lines to be followed in similar cases. On the other hand, experience has shown that most agreements, especially secret ones with anti-competitive effects, are unlikely to be notified; that the costs and time of having an agreement approved might, in itself, block some neutral or pro-competitive agreements; and that analyzing all such agreements might take up a large part of the scarce resources of the NCA. 123 Accordingly, we suggest a middle ground, where only certain kinds of agreements, presumed to be the most problematic, such as trade boards, be subject to a pre-agreement notification and clearance requirement.

7 LAW AGAINST ABUSE OF DOMINANCE

In considering the abuse of dominance violation, we highlight the following characteristics which are especially prevalent in least developed economies: deep poverty; control of business by the state or a few elite families; endemic corruption; lack of rooted markets; long-term exclusion of large parts of the population from participating in the economic enterprise in any meaningful way; and very scarce human and capital resources.

We begin our analysis of the effect of these characteristics by positioning the offense – the abuse of single firm market power – on the map of common understandings of the offense and its importance in the antitrust arsenal. The US and EU models are by far the most emulated models in the world, although the EU is much more followed, at least with regard to the statutory language. Some more expansive models exist, especially in Asia, which often also prohibit abuse of relational market power.

The US conception of the offense, called monopolization, is, according to the precedents of its Supreme Court over the last decade, tightly limited. US law prohibits

use of near-monopoly power to obtain more power or to maintain it to the detriment of the market and consumers. It does not prohibit excessive pricing, partly because a high price is likely to attract more competition which, in turn, will reduce the price, thereby the market will self-correct.\(^\text{124}\) It almost never prohibits predatory low pricing because the test is difficult to meet.\(^\text{125}\) It almost never prohibits refusals to deal.\(^\text{126}\) If a monopolist handicaps smaller competitors, it is checked if this occurred as part of the market process, to ensure that the law does not handicap efficiency and chill incentives to invent and invest.\(^\text{127}\) As a result, to be considered illegal, exclusionary strategies must usually be proven to exclude firms that are equally efficient. Accordingly, under US law, plaintiffs must meet rigorous standards on all inquiries, starting with defining the market and proving monopoly power and also proving anti-competitive conduct.

The European Union offense is wider. First, proof of dominance is less demanding. If the putative dominant firm occupies half the market or more and the next largest firm has less than half its share, the firm is presumed dominant, subject to refutation.\(^\text{128}\) Second, excessive prices can amount to a violation (although proof is not easy and the offense was significantly limited by the European Commission’s actual practice).\(^\text{129}\) Third, the offense of abuse is regarded as one of the most serious offenses of competition law. The seriousness, and contrast with the United States, stems in part from the structure and historical growth of industry in the various


\(^{125}\) See e.g., *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 US 209 (1993). After the Brooke Group test was announced, plaintiffs seldom win. See e.g., *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

\(^{126}\) See e.g., Trinko, n. 124 above.


Member States of Europe. Many of the states were statist societies and the important businesses were state-owned. Firms typically reached their size and importance from privileges of the past, not by grass-roots invention and industriousness. The few firms typically blocked competition on the merits; they did not allow competition to grow. Moreover, in the EU, a main goal of the Treaties has always been to foster undistorted competition (not distorted by privilege and discrimination), and to foster a free flow of goods on the merits across state lines (within the EU). Openness and access have been main principles, not just of the competition law but of all Community policies.\textsuperscript{130}

Therefore is it not surprising that EU law pays special regard to the offense of abuse of dominance. EU competition law shows concern for distortive acts of state-owned or private firms. Dominant firms have special responsibilities not to trample on smaller firms.\textsuperscript{131} They often have responsibilities to deal. In recent years, however, at the Competition Directorate level, the authority has been much influenced by US concepts of efficiency, and often leans in the direction of the United States in tightening up standards so that, for example, excluded firms must be equally efficient (or sometimes potentially equally efficient) for a cause of action, e.g. for fidelity rebates, to lie.\textsuperscript{132}

We now come to what developing countries may need from the abuse of dominance violation. First, how significant is the violation to the functioning of the market, and thus how important is it for developing countries to have a strong and usable law, to counter the offense? And on the other hand, how dangerous is the abuse of dominance ‘weapon’? Is it likely to be used to coddle inefficient firms and thereby undermine the market?

\textsuperscript{130} In general, a value of open markets underlies the EU internal market free movement law: see Treaty on the Functioning of the European Union, Articles 34 and 35. See also A. Alemanno, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’, (2014) 39 European Law Review 72.


\textsuperscript{132} See e.g., C-549/10P \textit{Tomra v. Commission}, ECJ (19 April 2012).
In our view, availability of the abuse of dominance prohibition is one of the most important weapons in the antitrust arsenal of developing countries to open up closed markets and thus help make markets work where they have never worked before; where business has been tied up in privilege and cronyism and dominant firms have blocked paths of the masses of people. Past and lingering statism and privilege, and the fact that businesses have grown by favoritism not merit, point to the need for a strong law, friendly to enforcement.133 Whereas US law is especially concerned with false positives, with too much antitrust intervention lest inefficient firms will be protected from competition itself, developing countries may be more worried about false negatives, worried that dominant firms have for too long been protected from the forces of competition and that people/firms with no power have often been excluded from entering markets and competing on their merits. Whereas the United States seldom sees a monopoly and much more often sees cartels, developing countries often see monopoly in nearly every important sector of business.134 And whereas US law may have the luxury of deferring to a regulatory agency when the monopoly resides in a regulated sector, thus decreasing further the scope for application of antitrust, developing countries more often experience capture in regulatory agencies and may sometimes be better off with the voice of a competition authority than the protection of a regulatory agency.

We note below seven areas in which elements of an abuse violation might be crafted sympathetically to developing countries to make their markets work more effectively and thus to better position the country on the path to inclusive growth and development.

(1) *Proof of dominance.* Proof of dominance can be an exacting and cost-consuming task. Yet where a firm has a very large share of a market and this share has been stable over many years, the law can develop or acknowledge a simple rule, presuming market or monopoly power and possibly shifting the burden to the defendant to show it does not have power. One does not want a rule so flimsy that large firms are constantly condemned and handicapped with duties despite no real market power or market harm. The jurisdictions will not want to chill good hard


134 Ibid.
competition. But this does not mean that presumptions should be forsaken where they make sense and where they may be necessary to make the law practically enforceable. Also, given the inherently high barriers of developing jurisdictions, such a presumption can be economically justified.

(2) Market definition choices. The market usually has to be defined before market power is assessed. Market definition is a construct. It may help us to understand whether a firm has market power. It should be used in a way which is sensitive to different groups of buyers, where relevant. In two cases among others, the South African Competition Tribunal faced the problem of market definition when interests of the poor were at stake. In one case, the choice of a narrower market would have protected the poor from a loss of an element of competition that they depended upon; namely, low-priced credit-giving furniture department stores. In another case, the choice of a narrower market (capitated managed care) would have preserved a promising niche for reducing the cost of low-end healthcare insurance and thereby bringing masses of the poor into healthcare coverage for the first time. In each case, the Tribunal opted for the choice that would have most helped the poor population (albeit in the healthcare case, the Tribunal’s decision was reversed). Developing countries might be well served, in terms of both development and legitimacy, by a perspective sympathetic to the poor population, considering low-cost choices as a market on its own where appropriate and economically justified.

(3) Discounting. Poor people need goods and services at lower prices. Moreover, systemically clogged markets can be shaken alive by discounting. The freedom of sellers to discount is therefore especially important to the poor, and dominant firms’ blocking the channels for discounting can be an especially harmful offense. Discounting has obvious efficiency properties. Firms are often tempted to suppress discounting, sometimes in the name of preserving professionalism (minimum fees for engineers, doctors or dentists); sometimes in the name of protection against free riding. A pro-poor and development perspective would give

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135 See David Lewis, describing the J.D. Group/Ellerine Department Store and the Prime Cure/Medicross cases, D. Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act* (Jacana Media, 2012), pp. 100–112.
weight to the importance of the freedom of discounting. At the same time, of course, where discounting harms competition in the market without offsetting social welfare justifications (e.g. predatory pricing), it should be prohibited.

(4) Leveraging, foreclosure and access violations. In numerous cases, especially abuse of dominance cases, the decision-maker is faced with the choice between more freedom for firms with power to choose their consumers and more market access for those without power. Both choices might produce more efficient and dynamic markets, under certain conditions. In the United States, for example, more weight is given to the first consideration, based, inter alia, on the assumption that limiting access will maintain firms’ incentives to create unique products; create incentives for competitors to seek other ways into the market; and that dominant firms have limited incentives to foreclose access by efficient firms and leverage their power into other markets given the single monopoly profit theory. These assumptions cannot be so strongly applied in developing countries. Where the potential for dynamic efficiency is low given a low level of human resources and technological knowledge, a rule that puts much emphasis on the ability of market players to increase dynamic efficiency may not enhance social welfare. Likewise, where the level of understanding of the market’s intricacies is low, the single monopoly theory might not seem an obvious way for maximizing profits, especially if entrenched monopoly positions must be given up. Accordingly, in developing jurisdictions more weight should be given to the ability of outsiders to contest markets on the merits and not to be foreclosed from important segments by a dominant firm’s use of leverage. Such an emphasis tends to expand the opportunities of entry into the market of those without power and to enliven stodgy monopolized markets and therefore is more sympathetic to the mission of competition law in developing countries.

(5) ‘Efficient’ foreclosures. As noted above, an emerging rule of law in the United States and to a lesser extent in the EU for some types of exclusionary conduct,

136 Regarding resale price maintenance, compare the dissenting opinion of Justice Breyer in *Leegin v. PSKS*, 551 US 877 (2007) (giving weight to the value of discounting) with the majority opinion of Justice Kennedy (not giving weight to discounting). A vibrant well-functioning economy has more luxury to ignore the value of discounting as an instrument to incite competition.

137 See e.g., *Trinko*, n. 124 above.
such as loyalty rebates, requires proof that the foreclosed competitor was equally efficient. This rule is based on the assumption that otherwise the law would protect inefficient competitors and thereby reduce social welfare. The ‘equally efficient’ requirement might be a poor way to test competitive effects and screen out bad cases in poor jurisdictions dominated by entrenched monopolies. In poorer developing countries, there may not be an equally efficient challenger. Moreover, entry or re-entry is typically much more difficult in developing countries. Capital markets often work poorly, and new entrants are less likely to be lurking on the sidelines. As a result, the inclusive efficiency analysis should compare the no-entry situation to the entry situation based on presumptions of how markets in developing countries actually work.

(6) *Buyer power*. Suppliers in poor developing countries are more likely to be victims of exploitative buyer power than are suppliers in developed countries. Developed countries may adopt consumer welfare as their goal; but poor developing countries may prefer to take account of all market harms, not just consumer welfare harms. Small farmers are particularly vulnerable to harm from monopsonic purchase and distribution practices and mergers creating buyer power, as documented in Zambia and Côte d’Ivoire. Jurisdictions with most jobs and businesses in the agricultural sector may especially need to take serious account of buyer power.

(7) *Simpler rules*. We have already referred to the need for simpler rules. For poor developing countries, human resources and capital resources are extremely scarce. The competition authorities do not have teams of lawyers and economists

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138 *See Tomra v. Commission*, n. 132 above.

139 ‘Potentially equally efficient’ is an alternative sometimes used in the European Union.

ready to identify and analyze reams of documents and construct scores of models and studies. If simpler, reasonably accurate rules exist, less well-financed authorities need them. Some simple rules are available. For example, resale price maintenance and non-trivial tying by dominant firms could be presumed illegal unless justified, as in the EU and much of the world. Some per se or near per se rules can be constructed in the other direction; for example, per se legality for certain sustained and sustainable low pricing behavior.

How far should simplicity trump accurateness? Mongolia provides a fascinating example.\textsuperscript{141} Mongolian law treats unilateral abuse of dominance (apart from limited exceptions) as a per se violation, instead of applying an effect-based analysis. An UNCTAD Peer Review supports this approach on a temporary basis. As competition law enforcement is relatively young in Mongolia, such an approach aims ‘to eliminate the most evident and harmful violations by establishing them and applying the necessary sanctions and remedies’, by making it easier for the competition authority to establish the violation and defend it in court. This is especially true when violators may have more resources and expertise than the young authority. An effect-based approach may ‘facilitate the case for the largest violators companies, which have sufficient funds to hire experienced foreign lawyers to defend them. It would make it even more challenging for less experienced [authorities’] staff to prepare adequate arguments’. Yet the report stresses that in the longer perspective an effect-based approach would be more desirable in order to avoid over-deterrence.

Many rules and regulations of the mature antitrust jurisdictions are too technical and too complex to suit poorer, resource-starved jurisdictions, which should be encouraged to experiment, transparently, to construct simpler rules and standards fit for their capabilities and contexts. Otherwise they may be straight-jacketed into a law that is non-functional because the authority does not have the resources to apply it.

In sum, we have shown that the particular characteristics of developing countries may call for a special appreciation and formulation of the law of abuse of dominance; and we have confined most of our analysis to a formulation for efficient development of the country.

\textsuperscript{141} UNCTAD, \textit{Peer Review: Mongolia}, n. 16 above, pp. 18–19.
Merger policy is an important tool for limiting privately-erected artificial barriers to competition. Its unique qualities, mainly the fact that it is applied *ex ante* in order to prevent external changes in market structure which harm social welfare, and the fact that it is the most effective tool in a competition law’s toolbox for limiting oligopolistic coordination, serve to explain its adoption around the world. Yet the question is whether the level of development should affect optimal merger law, or whether optimal merger policy is a ‘one size fits all’. As this section attempts to show, while many rules may be optimal for all jurisdictions, developing jurisdictions’ unique characteristics should affect some aspects of merger law. It is worth noting that most of our observations apply, with almost equal force, to joint ventures, although the legal provisions might be different.

Some things do not change, such as the applicability of the SLC test, adopted by most jurisdictions around the world and suggested in the UNCTAD Model Law. Another example involves the failing firm defense, which might more frequently be provoked in developing jurisdictions, especially in transitional periods towards a more market-oriented economy that dramatically increase their exposure to competition. If applied correctly, that is only in cases in which if the merger did not occur the assets would exit the market causing a welfare loss greater than the one provoked by the merger, and ensuring that no less anti-competitive solution exists, then the level of development of the country should not alter its application.

**Relatively Simple Rules**

The limited human and financial resources which characterize competition agencies in most developing jurisdictions, as well as the low level of economic sophistication of most market players leads to two effects. The first is that *merger laws should be relatively simple to apply* and not require a very high degree of sophistication. Yet, in contrast to the two other pillars of competition law (restrictive agreements and abuse

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142 This section is based, in part on Gal, n. 12 above.


144 Correa and Aguiar, n. 66 above.
of dominance) the problem of applying complex rules when market players are not sophisticated is less severe in jurisdictions which adopt a pre-merger notification system. This is because, as long as the thresholds for notification are clear, the legality of the merger will be determined *ex ante* by the NCA, and does not mandate the parties to perform the analysis themselves, although their level of certainty in the approval of the merger will still be high. Of course, the issue of the level of sophistication of analysis that can be performed by decision-makers still remains.

One method to simplify merger policy is by adopting clear legal presumptions with regard to the economic effects of mergers. Even if these might not lead to the perfect outcome in all cases, they may provide clarity and a relatively good answer in most cases. Such rules will be beneficial so long as the price of mistaken presumptions is lower than without them. A related question arises: if the jurisdiction has limited human resources, then who will determine the optimal content of such presumptions? In jurisdictions in which such expertise is missing, the best solution is often to involve experts from other jurisdictions, possibly through technical assistance, or to learn from the experience of other jurisdictions in similar situations.

**Merger Notification?**

An important practical issue focuses on the adoption of a pre-merger notification system. Some developing economies, including Algeria, Argentina, Brazil and Thailand, require *ex ante* notification. A notification system allows the NCA to respond in a timely manner to external changes in market structure that might significantly impede competition for a very long time, rather than attempt to ‘unscream the eggs’ once an anti-competitive merger was discovered. The advance notice of proposed transactions also recognizes that NCAs have limited resources to monitor all business transactions, and no not have the ability to detect mergers that take place under the radar of the public eye.\(^{145}\) Moreover, where corruption is a problem, requiring the NCA to respond to all mergers beyond a given threshold provides some level of relief against decisions not based on social welfare.

On the one hand, analyzing all requests for mergers is highly time- and resource-consuming and might harm proactive enforcement efforts that deal with the

other two pillars of competition law. In Serbia, for example, merger review absorbed more than 80 percent of the NCA’s working capacity.\textsuperscript{146} As a result, a growing number of developing economies adopt a system of voluntary notification, whilst giving the NCA the power to investigate potentially anti-competitive mergers and to apply remedies in order to limit their anti-competitive effects. This model was adopted, \textit{inter alia}, in Costa Rica, Chile, Ivory Coast, Venezuela and Panama. In our view, a combination of the two models might be the best solution: requiring notification only above a very high threshold\textsuperscript{147} or in markets that have a significant effect on the economy, while enabling all other mergers to request clearance and enabling the NCA to impose remedies that relate to the merging firms’ conduct in the domestic economy \textit{ex post}.

Another consideration involves the credibility of the NCA, which is especially crucial in younger regimes. As pointed out in an UNCTAD Peer Review with regard to Armenia,\textsuperscript{148} to the extent that a mandatory pre-merger notification is required but actually mostly ignored, it adversely weakens the authority.

\textbf{Mergers of International Firms}

Another interesting and practical issue is whether developing countries should regulate the \textit{mergers of foreign firms} that affect their own jurisdiction. Undoubtedly, such mergers can have a significant impact on the economy, yet the real issue is the ability of the developing jurisdiction to change the course of such a merger. Not all developing jurisdictions are alike; rather, they can be differentiated in accordance with the size of the demand in their market. Whilst large, developing jurisdictions such as Brazil and India generally represent a large number of consumers in most markets, thereby creating a credible threat to block foreign mergers that affect their jurisdiction, small developing jurisdictions generally cannot create a similar threat.\textsuperscript{149} This is reflected, for example, in the fact that large foreign firms tend to submit


\textsuperscript{147} UNCTAD, \textit{Peer Review: Indonesia}, n. 16 above.

\textsuperscript{148} \textit{Ibid.}, p. 14.

\textsuperscript{149} Gal, n. 77 above.
notifications based on data they use to file with other jurisdictions, not giving the small ones the time of day.\(^{150}\) It is also reflected in the conduct of such jurisdictions: the merger of Western Digital and Viviti Technologies, which affected competition in many developing countries in Asia, was only reviewed by China.\(^{151}\) Of course, what is relevant is the size of the specific market which is relevant to the specific merger: if demand in a certain market is large in absolute terms even in a small jurisdiction (e.g. because it is used as a main input in many of their domestic products) then that jurisdiction might be able to create a credible threat in the specific market. Only in such cases, in which there is a real possibility of preventing the merger or significantly changing its world-wide conditions, should the developing jurisdiction require advance notification. To identify such instances, a list of relevant markets and firms that fall within the above category should be created and published. Even then, where jurisdictions share common concerns regarding an international merger, developing countries may follow the lead of the large, developed jurisdictions, which have more resources and powers to deal with such mergers. Cross-border cooperation may also be advised.\(^{152}\) In all other cases, it is suggested that the jurisdiction apply a *post-merger review* to international mergers, which accepts the fact that the merger will be consummated regardless of its effects on the developing jurisdiction, and then attempt to reduce the anti-competitive effects of the merger within its jurisdiction by imposing conditions on its domestic operation.

**Effects of Missing or Highly Deficient Institutions**

The missing institutions problem produces interesting implications for merger policy: if the market does not supply the basic legal and financial institutions necessary for a functioning trading system, then the justification for allowing firms to supply such functions internally in order to overcome the jurisdiction’s deficiencies is

\(^{150}\) Singapore states that in international merger cases involving foreign firms, data specific to their country is often not provided and parties target clearance from larger jurisdictions.


\(^{152}\) *Ibid.*
strengthened. This consideration, which conforms with the Coase theorem, is absent from most developed markets, yet should be taken into account when shaping merger policy in developing jurisdictions that suffer from the missing (or highly deficient) institutions problem. Of course, this is a second-best solution, the first-best solution being the creation of a basis for a functioning market. Also, given the potential negative effects of the merger once the missing institutions problem is solved, such considerations should also be taken into account.

**High Aggregate Concentration Levels**

Another characteristic of many developing jurisdictions, not surveyed so far, which often results from the missing institutions problem, involves high levels of aggregate concentration, whereby a small group of economic entities control a large part of the economic activity through holdings in many markets (hereinafter ‘conglomerates’). High levels of aggregate concentration raise special welfare issues. Conglomerates can create positive effects on the economy. The substantial resources and varied experience of conglomerates, as well as their economies of scale and scope (e.g. distribution, marketing, billing, etc.) often enable them to enter markets more readily than other firms, especially when entry barriers are high. Moreover, their vast financial means and diversified holdings portfolios enable their business units to tap into a larger pool of retained earnings, thereby enabling them to take more risk in product development programs or in entry into new markets and increase their ability to overcome short-term financial obstacles. Where governments and market institutions do not function well, conglomerates may allow firms to overcome such obstacles.

At the same time, high levels of aggregate concentration raise significant competitive concerns. Aggregate concentration might increase the instance of oligopolistic coordination in and across markets. Given their current and potential multi-market contact, conglomerates are often likely to create a reciprocal status quo, thereby not entering each other’s market or not engaging in aggressive competition in

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153 Based on Gal, n. 12 above.

154 Such issues often also plague small jurisdictions, regardless of their level of development.
markets in which they potentially compete. Conglomerates might also create strong deterrence for the entry or expansion of competitors which are not related to another conglomerate into their markets. Another major concern is a political economy one: given their size and economic impact, large conglomerates may well attempt to translate their economic power into political power in order to create, protect and entrench their privileged positions. Furthermore, often the public is highly affected by such conglomerates, through employment or savings or as suppliers and consumers, a fact which implies that such conglomerates might be considered ‘too big to fail’ and be protected by the government from competitive forces that might erode their power and harm the public in the short term. Competitive forces are further stifled when conglomerates also control major financial institutions. All these factors lead to what is known as the ‘entrenchment problem’.

High levels of aggregate concentration should affect merger policy. Clearly, a merger of two or more conglomerates can significantly increase aggregate concentration levels. Additionally, a merger among firms controlled by such conglomerates may raise anti-competitive concerns by leading to interdependent cooperative conduct between the parties that extends beyond the specific market. The danger is especially high when the merged entity constitutes a significant part of the business of one or more of the conglomerates, as it should not be expected that parties that share much of their economic interests in one market will compete vigorously as before in another.

Accordingly, mergers should be analyzed through a wider lens, which takes account not only of the effects of the merger in the specific market, but also its effects on other markets in which the parent or holding companies of the parties to the merger operate. Indeed, it might be the case that a merger has neutral or even positive effects in the market in which the specific merger takes place, yet negatively affect the economy by dampening of potential competition between conglomerates. This wider-lens approach should affect the analysis of mergers among conglomerates or

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155 See e.g., R. Morck (ed.), *Concentrated Corporate Ownership* (Chicago, IL, University of Chicago Press, 2000).

firms controlled by them, whether or not they have horizontal or vertical relationships. Of course, this policy prescription does not necessarily lead to a complete limitation of conglomerate mergers, especially given economies of scope that such conglomerates can realize, but it does require a much wider analysis of such mergers’ effects. This wider-lens analysis is also relevant to the acquisition by a conglomerate of a new firm and even to mergers between firms not belonging to a conglomerate that would allow them to better compete with it.

One basic condition for performing such an analysis is that the merger regulation empower the decision-maker to analyze the merger in a wider context so that the analysis is not focused solely on the effects of the merger in the specific market in which the merging parties operate.

Of course, applying merger policy to regulate aggregate concentration is not without its costs or limitations. One question to ask is whether it can deal effectively with all the issues raised by a conglomerate-dominated market structure. Indeed, other policy tools that go beyond merger policy might also be needed in order to deal with the problems enumerated above as well as others (e.g. when the conglomerates are based on a pyramidal structure which allows the exploitation of shareholders at the lower levels of the pyramid). 157 For example, developing economies which suffer from a very high degree of aggregate concentration which stifles competition in their economies should consider making changes to such a structure regardless of merger activity. Also, widening the lens introduces a higher level of complexity into the law, which generally should be avoided in developing jurisdictions. One method to limit such complexity and create clarity is to set clear guidelines on when aggregate concentration concerns should be deemed relevant.

**Weight of Wider Industrial Policy Considerations**
Another issue that is highly relevant to developing jurisdictions’ merger policy involves the weight to be given to *wider industrial policy* or *socio-economic*

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**considerations** that go beyond each specific firm or market in merger analysis.\textsuperscript{158} Indeed, many developing jurisdictions incorporate a wider set of considerations in their merger laws. Such considerations include, *inter alia*, financial stability, the protection of national champions, industrial policies, the promotion of employment, and increasing the ownership status of historically disadvantaged persons. As UNCTAD observes, while many of these public interests are important, they are not strictly related to competition, and usually entail trade-offs.\textsuperscript{159}

In our opinion, while it is important to choose carefully those considerations that might dominate competitive considerations in the specific market, some of them might actually increase productivity and growth. The following is a telling example: as stressed in the economic literature, one of the most important ways to develop an economy is the adoption and assimilation of new production technologies. An important way that such technologies can be transferred is through a merger of a foreign firm with a local one, for local production needs. The benefits of such technological transfer often go beyond the merging firms, as positive spillovers occur.

Likewise, in developing jurisdictions the goal of promoting long-term production and dynamic efficiency should be center stage, even at the cost of some harm to allocative efficiency in the short term.\textsuperscript{160} As Singh and Dhumale argue, the optimal degree of competition for developing countries might require a combination of competition and cooperation, rather than maximum competition, in order to promote long-term economic growth. Where the market is not sophisticated, governmental assistance might be required for rationalization and efficient production. They provide a simple illustration: it may be legitimate for a developing country to allow large domestic firms to merge so that they can go some

\textsuperscript{158} Institutional as well as democratic mandate issues arise: whether the NCA is the proper body to make decisions that affect the economy in many inter-connected ways. Accordingly, some countries place the ability to allow a merger based on broader public policy considerations on a higher ranking governmental body (e.g. Algeria). This consideration is beyond the scope of this chapter.

\textsuperscript{159} UNCTAD, *Peer Review: Indonesia*, n. 16 above.

\textsuperscript{160} Singh and Dhumale, n. 119 above.
way toward competing on more equal terms with multinationals from abroad. Indeed, high degrees of concentration may sometimes be a necessary intermediate stage for development, before an industry grows stronger and attracts new players. At the same time, allowing high levels of concentration which are necessary for development requires putting a stronger emphasis on other tools of competition law, to ensure that the next step – the entry and expansion of new firms – is not prevented due to privately-erected artificial barriers.

Another important socio-economic consideration centers on inclusive growth, which is nowadays often recognized as an important promise of the market system. As noted, this goal is especially important where there is an increasing income gap without mobility. Yet, this consideration should not be based exclusively on short-term effects but rather should also incorporate long-term ones. The Kenyan experience provides an interesting example. In Kenya, the merger evaluation criteria state that a merger will be considered as disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labor-intensive technology. In our opinion, this is a high problematic requirement. While short-term employment considerations should not be disregarded, such a rule can hold back long-term productivity and growth. This is also a good example of our reservation as to incorporating in the antitrust analysis pure social goals that impede economic ones.

**Back to Basics: Is Merger Policy Really Necessary?**

So far we assumed that merger policy can have a positive impact on developing jurisdictions. Let us now expand a bit on this important assumption. The need for merger regulation has come into question more often than the two other pillars of

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161 *Ibid.*; see also A. Bullard, ‘Competition Policies, Markets Competitiveness and Business Efficiency: Lessons From the Beer Sector in Latin America’ in *Competition, Competitiveness and Development: Lessons from Developing Countries* (Geneva, UNCTAD, 2004), p. 143, for an example of a merger in the beer industry that enhanced competition.

162 See P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can be Done About It* (Oxford University Press, 2007), explaining how society puts itself at risk by ignoring ‘the bottom billion’ and allowing the festering of extreme poverty and alienation.

competition law, and indeed it is often the last to be adopted even in developed economies. A major reason is institutional: the limited capacity of the NCA to deal with mergers. Yet as noted above, this does not necessarily imply no merger policy at all, but rather a carefully structured lean and relatively simple regulation, which will justify the investment. Furthermore, not prohibiting mergers, in turn, might increase the need to spend more resources on the enforcement of other types of anti-competitive act more than the introduction of a merger review.

Another reason, often raised to justify a no intervention policy, focuses on the effect a merger policy might have on the ability of firms to grow and compete freely, as well as on the creation of large ‘national champions’ that would enable domestic firms to produce more efficiently and better compete in world markets. Jamaica, for example, did not adopt a merger policy based on the view that the law should not prevent companies from undergoing restructuring or merging with others in order to grow and survive in Jamaica’s newly open and free market environment. The answer to such concerns is quite straightforward: merger policy should be synergetic with industrial policy. Where consolidation and strengthening of domestic firms is needed to increase development in the long run, such considerations should play a part in the merger trade-off. Furthermore, in the absence of regulatory controls, such large firms are likely to exercise their market power domestically, and without the discipline of competition in their domestic markets might also fail to become more competitive in international markets, to the ultimate detriment of domestic consumers and eventually to the development of the economy as a whole. Also, prohibiting cartels but not regulating mergers might lead to a circumvention of the former by engaging in inefficient mergers. Furthermore, as Lipimile observes, experience in developing countries such as Zambia, Zimbabwe and Malawi that have undergone privatization has shown that foreign firms tend to take over competing domestic firms, thereby monopolizing the market and not necessarily benefitting the local


economy. Finally, as Correa and Aguiar note, it is quite unclear why the creation of internationally competitive firms requires the existence of domestic monopolies. One missing link in this argument seems to be an explanation of how domestic monopolies would obtain the ability to compete in open global markets. Against this hypothesis, a growing body of empirical evidence suggests that domestic competition fosters innovation and that economies of scale are better obtained in selling to global markets. In sum, the unique characteristics of developing jurisdiction should generally not affect the adoption of merger review, but rather the shape it takes.

9 EMPLOYING EXTERNAL FORCES TO ONE’S BENEFIT

When internal solutions are not applicable or are inefficient due to institutional, political, social or other factors, external forces might sometimes be harnessed to developing jurisdictions’ benefit. This section briefly explores such possibilities.

One potential solution involves the establishment of a legally binding global competition authority having proper representation of all jurisdictions and charged with prohibiting anti-competitive practices in the world economy. The international authority would be empowered to scrutinize and prohibit mega mergers and international cartels and deter international firms from abusing their dominant positions. Such proposals have unfortunately not bloomed into actual agreements, and the chances of their adoption in the near future are not high. Thus, we shall concentrate on two more realistic options.

Regional Agreements

As elaborated elsewhere, regional agreements, especially those which involve joint competition enforcement and education through a central competition law authority

166 Correa and Aguiar, n. 66 above.

167 See e.g., Singh and Dhumale, n. 119 above; D.J. Gerber, Global Competition: Law, Markets, and Globalization (Oxford University Press, 2010).

(RJCAs), carry much promise to overcome some of the main competition law enforcement problems faced by developing jurisdictions. It is therefore not surprising that such agreements can be found all over the world.\textsuperscript{169}

RJCAs can significantly reduce resource constraints by enabling jurisdictions to pool together scarce resources to reach economies of scale in enforcement activities (investigations, enforcement), as well as in competition education, advocacy and training. In some situations RJCAs may provide the only viable solution for enforcement, given severe resource constraints. Furthermore, RJCAs can assist developing countries in applying their laws to multinational entities, by increasing leverage through the aggregation of consumers across member states and creating a critical mass.\textsuperscript{170} The creation of a new authority, at the regional level, may also be an efficient way to overcome deep rooted limitations of existing authorities, including corruption, inefficiency and bureaucratic obstacles.

RJCAs can also reduce public choice limitations. Political pressures from interest groups are especially significant for developing jurisdictions, since economic power in such countries tends to be more concentrated in the hands of a few, whether private or state-owned enterprises. Such interests might trump public welfare considerations. A joint authority can alter some of the effects of well-organized pressure groups on decision-makers in adopting a competition law, since a push towards regionalization creates internal and external pressures for adopting a competition law. This is especially true if competition law is part of a wider

\textsuperscript{169} Americas: MERCOSUR (the Southern Common Market); in the Caribbean: CARICOM (the Caribbean Community); in Africa: COMESA (Common Market for Eastern and Southern Africa), WAEMU (West African Economic and Monetary Union), ECOWAS (the Economic Community of West African States), SEACF (Southern and Eastern Africa Competition Forum), CEMAC (Economic and Monetary Community of Central Africa), SACU (Southern African Customs Union), EAC (the East African Community) and SADC (the Southern African Development Community); and in Asia: ASEAN (Association of South East Asian Nations).

agreement on trade. Also, once created, the aggregation of different incentives in a regional authority, which is one step removed from each member state, reduces the ability of a domestic group to exert pressures on the legislator or regulator to change the regulatory environment. Finally, once the framework is agreed upon, it is much more difficult to change than a domestic law, even if it harms the interests of strong groups in some member states. The RJCA might therefore work as a commitment mechanism which allows members to create binding commitments of compliance that will be enforced beyond the term of the current government that signed the commitments. Such a commitment mechanism is especially important in those jurisdictions characterized by short-lived governments.171

An additional factor that often plays a role in developing countries’ low enforcement levels involves the weakness of their competition culture. Most consumers in WAEMU (West African Economic and Monetary Union) countries, for example, prefer similar prices for competing products, in order to make choices easier, over lower but different prices. An RJCA can create economies of scale in educational and in advocacy activities. To sum, RJCAs have a potential to supply a collective good that may significantly enhance the welfare of all jurisdictions involved.

Yet as experiences indicate, most RJCAs have not realized their potential. Rather, most do not justify their costs of creation and some even create negative welfare effects on their member states.172 What, then, are the obstacles to the successful realization of RJCA’s potential benefits? Some obstacles relate to the ability to reach an agreement and maintain its benefits over time, which are inter-connected: the ability to enforce the agreement, once created, will affect the incentives to commit to it in the first place. The fact that the agreement involves a

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171 See also Dabbah, n. 10 above, p. 465.

long-term commitment in a changing environment rather than a one-shot game, increases the difficulties, since commitment should be continuous.\textsuperscript{173}

\textit{Differences in competition cultures} create additional obstacles. For example, in the SADC (Southern African Development Community), members follow different competition law models, mostly based on models in their donor countries or on their members’ unique goals. South Africa, for example, includes a public interest goal of strengthening previously weakened groups of society. Such a goal is less relevant to other member states. Yet such differences should not necessarily inhibit an RJCA as most competition laws are based on core principles which are common to all models. Prohibition of cartels that limit competition without offsetting benefits to society is but one example.

Another important obstacle involves \textit{collective action problems}. For example, committing to an RJCA often creates a sequencing problem of supply of the goods promised (funding, changing one’s laws, supplying information, enforcing, etc.). First-movers face considerable uncertainty in their investment and commitment, which might be eroded by other members if they do not meet their commitments. This, in turn, creates a significant risk at the formative stages of the RCA that might lead jurisdictions to be more reluctant to commit to an RCA. One possible solution involves monitoring and imposing sanctions on member states that do not comply. Another solution involves the strengthening of external and internal pressures to create incentives to comply.

Obstacles relate to the ability of potential member states to overcome internal impediments to committing to an RCA that can increase their social welfare and to enforcing it. Such obstacles might be legal, political or economic. They might result from real threats to welfare (e.g. political economy constraints of interest groups), or from perceived threats (e.g. misconceptions of the effects of competition). They might be specific to competition law or general (e.g. a high hurdle on the ability to commit to any international or regional agreement).

One such obstacle relates to the \textit{limits such an agreement places on the sovereignty} of member states to decide all competition law cases surfacing at their shores. Another relates to \textit{past experiences}: an existing competition law which is

applied inefficiently can create a vicious circle. This is the situation in some ANDEAN countries: the fact that several countries have competition laws that have not brought benefits to consumers, created skepticism with regard to the benefits that an RJCA can bring. Yet the alternative (generally not dealing with such issues at all) might be more problematic. A significant obstacle involves finding the right formula that would serve the interests of all member states and create an agreement which is Pareto-optimal to all members. Yet this obstacle can be reduced, inter alia, by jointly enforcing only those cases which further the interests of all countries involved, such as the pursuit of regional or international cartels, and leaving others outside the scope of the agreement.

Should such obstacles be overcome, regional agreements hold an important potential to overcome the main impediments that plague developing jurisdictions in the enforcement of their competition laws. RJCAs can also strengthen the voice and stature of developing countries in international settings.174

**Technical Assistance**

Technical assistance and capacity building in shaping and applying developing jurisdictions’ competition laws is quite commonplace. Significant financial and human resources are assigned by donors to raise the capacity and effectiveness of NCAs in developing jurisdictions.175 Such programs have an important role to play in building developing jurisdictions’ institutional capabilities of applying its competition laws.

Technical assistance is designed to enhance the individual and institutional capacities of developing countries’ competition agencies to pursue more effective

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174 See Gal, n. 168 above.

antitrust casework and policy. Such assistance can take many forms. For example, advisors may spend an extended time period working in the developing country, with the NCA; assistance can be given to the authority on a discrete set of issues such as on a specific case; short training programs to judges and the NCA’s personnel may be provided, to improve case handling or competition advocacy, including investigative techniques, gathering evidence, performing analyses, developing litigation methods, and managing evidentiary issues; or personnel from developing jurisdictions can spend some time working at a NCA in a developed jurisdiction, learning and experiencing its methodologies in order to create or strengthen institutional learning. Sokol and Steigert identify three stages for potential technical assistance: the initial set-up phase, assisting in achieving tactical success and assisting in making strategic advances.

Such assistance carries an important promise for developing countries. It may assist agencies in resolving design issues and understanding competition law norms that are applied elsewhere around the world. It may also strengthen the NCA’s methodologies and level of sophistication in applying its own laws.

While such programs carry important potential, studies have shown that too often they are not very effective. The OECD noted that ‘while a few countries have done well, donor efforts in many countries have produced little to show’. The transfer of knowledge may not work if the recipient agency lacks an adequate set of skills or capacity. More complex cases can easily be pushed aside by the more ‘measurable’ and simpler tasks that can be shown to donors. Also, the involvement of donors is not always welcome, especially in the set-up stage, given hostility towards intervention.

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177 Ibid.

178 Sokol and Steigert, n. 176 above.

179 Nicholson, Sokol and Stiegert, n. 175 above.


181 Nicholson, Sokol and Stiegert, n. 175 above.
Most importantly for our analysis, technical assistance might fail to achieve its goal if it is not attuned to the special needs and characteristics of the specific jurisdiction. Surveys show that short-term programs are often more limited in their effects, because assistants do not have sufficient time to comprehend the true economic situation, strengths and weaknesses of the agency.\textsuperscript{182} As Kovacic notes, to be effective, assistance must be attuned to the pulse of a given country.\textsuperscript{183} Macro-economic factors, political economy concerns, the level of corruption, cultural elements and the overall legal system are all factors that should be taken into consideration when tailoring the technical assistance framework.\textsuperscript{184} Indeed, Sokol and Stiegert observe what Hirschman termed ‘the visiting economist syndrome’, according to which the lack of background on the domestic politics and economics lead to suggesting ‘practices based on the system that they know’.\textsuperscript{185} Awareness and genuine willingness are necessary but not sufficient conditions for success. The challenge is partly in overcoming the advisor’s tendency to use known legal templates and only change them at the margin, which sit well with his knowledge, experience and beliefs.\textsuperscript{186} Stiglitz submits that encouraging local forces to create the best arrangements to their well-known, self-experienced circumstances may result in better prescriptions.\textsuperscript{187} Of course, an important condition is the existence of local forces that have the ability to carry such tasks. Accordingly, for technical assistance to work well it is essential that the unique characteristics of the jurisdiction be recognized and taken into account.

One of the most important contributions that external technical assistance can make is to help establish a permanent knowledge base within the domestic legal academy, so that not only judges and officials but also private lawyers will enjoy a high-level and geographically accessible educational framework to gain and update

\textsuperscript{183} Kovacic and Eversley, n. 44 above.
\textsuperscript{184} Nicholson, Sokol and Stiegert, n. 175 above.
\textsuperscript{185} Sokol and Stiegert, n. 176 above.
\textsuperscript{186} Fox, n. 13 above; Indig, n. 22 above.
their expertise in competition law. Thus, in the longer run, the recommendation regarding simplified rules, which is actually a pragmatic compromise, could be altered.

An important way to make good use of technical assistance is by enlisting the assistance of experts from developed and experienced jurisdictions in specific cases, especially in the formative stages of creating a competition culture and building the reputation of the competition agency. It is often of high importance that a young agency make a strong case for its first cases. Inexperience in handling competition cases might stand in the way of achieving this important task. Technical assistance may play an important role here as well.

10 CONCLUSION
As this chapter has shown, a jurisdiction’s developmental stage affects its competition law. Having canvassed the qualities and characteristics that characterize many developing countries, we derived principles and approaches that, in our view, take context into account and fit these characteristics. These principles and approaches are not carbon copies of the law that has grown up to fit the developed economies.

Development affects goals. Developed economies with already functioning markets can afford to focus solely on efficiency and disregard distributive effects, based on the assumption that the markets are generally free and open and that competition itself will create positive distributive effects. This assumption is so far from reality in developing jurisdictions that it cannot wisely be applied. A more productive focus is on the efficient inclusive development of markets, giving weight to distributive concerns as part of the long-term development of the economy. Developing jurisdictions cannot afford to disregard distributive concerns for economic, political and social reasons. As a result of developing countries’ goals and context, the mix of competition and cooperation, and the attention merited to concerns for uses of power and leverage, might differ from developed economies’ modalities.

Development also affects substance and procedure. This chapter suggested principles and approaches that are efficient for developing countries in their quest for development and growth, taking into account their unique starting points. A main

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188 See e.g., Fox, n. 13 above.
characteristic is that the authority cannot confidently trust the self-correcting powers
of the market, given inherent market failures and market access issues. Another is the
limited capability of the enforcers and courts to apply complex laws.

Consequently, none of the models applied in developed economies provides
the best fit for developing countries. The US model is geared towards markets that
function very robustly and without a history of state ownership. The United States has
a strong and effective model against hard-core cartels, but transferability of the model
depends, in part, upon the receiving jurisdiction’s amenability to criminal
enforcement. US law against monopolization is quite non-interventionist, based on
the assumption that market forces achieve an efficient outcome, an assumption far too
removed from reality in developing jurisdictions. The EU model may be regarded as a
better fit for some developing countries, given its strong emphasis on openness and
access. EU provisions that control anti-competitive state acts also provide an
important model that developing countries may need and US law does not offer. But
the competition authority’s guidelines and regulations are often complicated. The
details may be more than optimal for developing countries, and the perspective not
entirely aligned with a developing country needs. Accordingly, it is not enough to
provide developing jurisdictions with a longer time-frame within which to match
Western-like competition laws. Rather, their developmental needs require a
competition law that is tailored in some respect to their unique characteristics.

Models that were designed for a developing economy have advantages but
even they might be most useful as a source to be consulted than as the law. South
Africa is a middle income developing country and shares many of the characteristics
of developing countries we have identified. However, the pro-poor and pro-
development features of its competition law have not stood up robustly in the courts;
they are not doing the job for which they were intended. Finally, the UNCTAD model
is not and was not intended to be sufficiently specific to become a law, and does not
provide a set of clear and easily enforceable rules to guide business and enforcers.

Still, these models have value for developing jurisdictions. Developing
jurisdictions can benefit from the many parts of existing models, substantive as well
as procedural, that are not sensitive to the level of development. Developing countries
may be well advised not to lock themselves in tightly to any one model, but, rather,
learn also from the experiences of other developing jurisdictions and create a law that
is right for them.
It may be surprising that even after several decades of experience with competition laws in developing jurisdictions there are still no good models sensitive to the country characteristics, although some jurisdictions’ formulations provide interesting solutions. There is a job to be done by international organizations, and by academics who assist developing jurisdictions, in creating models flexible enough to take account of the characteristics, and sufficiently lean, simple, transparent and friendly to enforcement.

When external and internal forces push for the adoption of an off-the-rack law, it is tempting to counsel flexibility of interpretation and application by the competition authority and the courts in order to mold the law to the characteristics of the country. But this course is problematic. It could create space for favoritism, reduce the clarity of the law, and produce inefficient rules when decision-makers lack expertise. These dangers counsel investment in deriving legal standards from context. It is hoped that this chapter has contributed to this important endeavor.