Competition Law in the developing world: The why and how of adoption and its implications for international competition law

DINA I. WAKED*

Developing countries face unique adoption processes, local circumstances, and concerns that makes their competition laws and enforcement practices distinguishable from more developed countries. This article analyses whether these are sufficient to argue for different laws that address different goals distinguishable from economic efficiency and consumer welfare.

1. INTRODUCTION

Over the last decade most developing countries have adopted competition laws that aim at preventing anticompetitive and monopolistic practices and that facilitate efficient competitive environments.[1] The motives to adopt these laws have varied. In some instances, rules have been adopted over the course of many years in response to local pressures, in order to mend behaviours imposing social costs on societies. In other instances, rules have been recommended as tools to achieve development. In yet other circumstances, they were imposed through treaties and international pressure. Most developing countries either adopted competition rules in response to recommendations of international institutions or because of various obliging treaties they signed.

In an attempt to benefit from the experiences of countries preceding them in enacting competition rules, newly adopting countries passed rules modelled on the legislations of developed countries. This mode of adopting competition rules does not always address local needs, legal institutions or general conceptions of the rule of law. However, the common denominator is that competition rules are essential to abolish undesirable practices that hamper progress, innovation, growth and development.

This article provides an in depth analysis of the phenomena of adoption of competition laws across the developing world. The reasons behind this heightened interest in competition law codification are examined to assess *why* countries adopt competition laws. Then the issue of *how* do they draft their legislation is tackled. Followed by an inquiry into whether developing countries need *different* laws than those adopted in the West. The following will summarise the different parts of the article.

---

* Dina Waked is an SJD Candidate at Harvard Law School and a Senior Teaching Fellow at the Department of Law, American University in Cairo.
I thank Einer Elhauge for supervising the work on which this article is based and for continuous discussion and support. I also thank Hani Sayed, David Gerber, an anonymous referee and the participants at the ICC Conference for valuable comments.
[1] The terms antitrust and competition law will be used interchangeably throughout the article.

The first part of the article explores the reasons why developing countries adopt competition laws. These reasons cover international pressures as well as promises of development associated with adopting these laws. The article investigates the correlation between competition law and development. A major justification for adopting these laws in the developing world is the extent to which such laws positively impact development. This is evident in the overwhelming literature and specifically the discourse at the World Trade Organisation (WTO) and Organisation for Economic Co-operation and Development (OECD) supporting a positive correlation between competition law adoption and development. Thus, the article examines the literature, empirical studies and WTO/OECD publications to analyse this correlation. However, despite this generally accepted positive correlation, the opposing literature demonstrates that this allegation is not uncontested.

The second part of the article assesses the distinctive nature of developing countries' encounter with adopting competition rules. The challenges they face and the unique nature of their legal culture are presented. This is followed with an inquiry into whether these unique circumstances suffice to argue that developing countries need *different* laws than those adopted in the West.

The argument is as follows: developing countries have not only unique circumstances that make the laws developed in the West impossible to enforce, but also, they need different laws that address different goals. These unique goals, that better address the needs and wants of developing countries, encompass various claims regarding redistribution, efficiency, promoting national champions, international competitiveness, import substitution, development, growth and innovation.

The third part of the article is dedicated to exploring an alternative way of utilizing competition law to address non-economic and/or social goals, particularly redistribution. The article presents the arguments for such an approach and illustrates how economic efficiency may actually be fortified with a Coasian deal[2] that not only takes both consumer and producer welfare into consideration but also introduces some elements of redistribution. Hence, this approach manages to combine many of the goals that are important for the developing world.

In the conclusion, the preceding analysis is linked to the debate surrounding international competition law and positions the role played by the developing world therein.

2. Developing countries adopt competition laws: Why?

The main factor that led to the widespread adoption process is the pressure of the WTO and other supranational bodies, particularly the European Union. However, developing countries were not only pressured to adopt these laws. They also believed the rhetoric of these supranational bodies and the writings of academics about the positive relationship between adopting and/or enforcing competition law and development. Competition law suddenly seemed like the missing element promising prosperity and growth. These two

[2] See Einer Elhauge and Damien Geradin; *Global Antitrust Law and Economics*; 1st ed.; Hart Publishing; 2007; 901. The article appropriates a new concept developed by Einer Elhauge termed "Consumer Trust" which deals with the following idea: "If the dollar gains to the merging parties exceed the dollar losses to consumers, the merging parties could devise some mechanisms to transfer enough of their gain to consumers to offset any losses to those consumers."

igniting forces are discussed below. Furthermore, the relationship between competition and development is analysed critically to present another side of the debate.

(A) PRESSURE BY SUPRANATIONAL BODIES

Competition laws have been regarded as an essential component of economic reform. This has been the case ever since competition laws were on the agenda of the negotiations to establish an International Trade Organisation (ITO) after WWII. Later, the General Agreement on Tariffs and Trade (GATT) endorsed the earlier provisions of the ITO on restrictive business practices in a "best-endeavour" clause.[3] However, the GATT does not impose specific provisions on the treatment of private restrictive business practices (RBPs).[4] Thus, the members of the WTO can freely adopt national competition laws as long as they do not infringe the principle of non-discrimination.[5] Moreover, the WTO deals with the actions of governments only and not of private parties.[6] The United Nations and the OECD continue to deal with the issue of competition law adoption in developing countries and they have adopted non-legally enforceable 'codes of conduct' to prevent anticompetitive practices.[7]

The new wave of amplified interest in adopting competition legislation in developing countries originated in the wave of neo-liberal reforms, which resulted in privatisation and liberalisation. The goals of these reforms were to end government monopolies and intervention in the economy. However, with the wave of privatisation, government monopolies were replaced by private monopolies yielding the same anti-competitive effects. Thus, adopting competition rules became a priority on the agenda of economic growth in many less developed countries. This is especially true for those countries that chose a competition-friendly policy as an ingredient in their broader development agenda. Some countries, however, continued to prefer concentration to competition, and hence had less of a drive to adopt competition laws of their own initiatives. To add to this heightened interest in adopting competition laws is the increased cross-border influences of anti-competitive practices.[8]

[3]Bernard Hoekman; 'Competition Policy and the Global Trading System: A Developing-Country Perspective'; (March 1997); 1735 The World Bank Policy Research Working Paper; 1.
[4]Bernard Hoekman and Petros C. Mavroidis, 'Economic Development; Competition Policy and the World Trade Organization'; (October 2002); 2917 The World Bank Policy Research Working Paper; 14.
[5]The General Agreement on Tariffs And Trade (GATT 1947) Article III *National Treatment on Internal Taxation and Regulation*, 5. (III. 4.The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.). For a variety of readings of the nondiscrimination provision see Einer Elhauge and Damien Geradin; *Global Antitrust Law and Economics* (2007); Chapter 8.
[6]Hoekman and Mavroidis; above note 4; at 19.
[7]Hoekman; above note 3; at 1. See also Cassey Lee; 'Model Competition Laws: The World Bank-OECD And UNCTAD Approaches Compared'; 96 Centre on Regulation and Competition, Working Paper Series.
[8]Paul Cook; 'Competition Policy, Market Power and Collusion in Developing Countries'; (December 2002); 33 Center on Regulation and Competition Working Paper Series; 3.

The role played by the WTO cannot be undermined in assessing the importance associated with competition laws on the development agendas of many countries. The General Council of the WTO created a Working Group in April 1997 on the Interaction Between Trade and Competition Policy. This Working Group has emphasised the need of developing countries to adopt competition rules in regard to the global merger wave underway and to the structural changes taking place in the developing countries themselves.[9] The reason why the WTO focuses on competition law adoption is the widely believed interaction between these policies and the expansion of free trade. Free trade needs are next to removal and liberations of barriers, the abolition of obstacles originating from private restraints like abuse of dominance, monopolisation, import cartels, horizontal and vertical restraints.[10]

The involvement of the WTO in the process of developing countries' competition legislation adoption is far-reaching. In some instances the WTO encourages developing countries to adopt US or EC type competition policies with allowance for time lags to be able to efficiently implement these rules. The WTO's continuous attempt to influence, encourage and facilitate the adoption of competition legislation in developing countries may also be explained by its aspirations of instituting universal competition policies under its umbrella. Moreover, its insistence that developing countries adopt rules similar to those in more developed countries can be explained by looking at the effects of global anticompetitive conduct with relation to trade. If laws adopted in developing countries were fundamentally different from those in the advanced world, the ability of the West to intervene when their interests are at stake as a result of anti-competitive practices in developing countries would be limited. To overcome these negative consequences the WTO is repeatedly encouraging harmonisation of the competition legislation as a first step towards the achievement of this goal. Whether this is a good or bad approach, from the standpoint of a developing country, is debatable and will be addressed in the latter parts of the article.

It is, however, important to note that the role played by the WTO in encouraging competition law adoption in the developing world is only part of a bigger picture where many constituents are involved. It would be simplistic to assume that the WTO is the only driving force pressuring the adoption of these laws, especially looking at the EU treaty conditionality that initiated the adoption of these laws in many countries.

The European Union has played a more active role in the competition law adoption process of developing countries, where 'some argue that today the EC competition law is the dominant model of competition law in the world.'[11] Treaties, such as the Accession Agreements signed by Eastern European countries to join the EU or the Euro Mediterranean Partnership Treaties signed by various non-European Mediterranean countries and the EU, oblige the signatories to adopt competition laws modelled on

[9] Ajit Singh and Rahul Dhumale; 'Competition Policy, Development And Developing Countries'; (November 1999); 7 T.R.A.D.E. Working Papers; 3.
[10] Damien Geradin; *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries*; World Bank Papers; 2004; 21.
[11] Seppo Reimavuo and Markus Händelin; 'Establishing a Credible Competition Authority – The Egyptian Case'; (March 2005); Trade Enhancement Prgramme A (TEP-A) Component 2 Egypt-European Association Agreement, 40 (unpublished report, on file with the author).

Article 81 and 82 of the EC Rome Treaty.12 One of the most comprehensive studies assessing the presence of 'laws on the books' suggests that 'the impetus for adopting antitrust laws appears related to the imposed guidelines of supranational bodies, in particular the requirements of the European Union.'[13]

(B) Competition law leads to economic development: Really?

The direct impact of adopting competition laws on prosperity, economic growth, and development is the reason furnished by international institutions for developing countries to enact these laws. This assumption is not uncontested and some literature supports the argument that competition law is not the cure to the malfunctions of these economies in need of reforms, but recommends instead removal of entry and exit barriers, rather than adoption of competition laws. These two stances will be addressed in turn.

I. Competition laws lead to economic development

As discussed, many developing countries have adopted competition laws in the last decades. This 'high level of interest suggests competition law is widely seen as a desirable and worthwhile economic policy.'[14] Competition policy has often been regarded as a building block of economic development. A paper of the WTO Working Group described that:

> The specific benefits that have been attributed to such policy include promoting an efficient allocation of resources, preventing/addressing excessive concentration levels and resulting structural rigidities, addressing anti-competitive practices of enterprises [...] enhancing an economy's ability to attract foreign investment and to maximise the benefits of such investment, reinforcing the benefits of privatisation and regulatory reform initiating and establishing a focal point for the advocacy of pro-competitive reforms and a competition culture. [15]

The same stance has been presented in various OECD publications. One of those based on a survey of OECD members and non-members asserts that:

> There are strong links between competition policy and numerous basic pillars of economic development. […] There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards. [16]

[12]See e.g. Euro-Mediterranean Agreement, Establishing An Association, E.C. - Egypt, June 25, 2001. Art. 34 of the Joint Declaration states that "while drafting its law, Egypt will take into account the competition rules developed within the European Union."
[13]Michael W. Nicholson; 'Quantifying Antitrust Regimes'; (February 2004); 267 FTC Working Paper; 18.
[14]John Preston; 'Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences'; (November 2003); DIFID Case Study for WDR; 2.
[15]World Trade Organization; Paper of 18 September 1998; WT/WGTCP/W/80.
[16]See Preston; *above* note 14; at 2.

Some countries have attested to the positive impact of adopting competition laws on economic development including Australia, Japan, Korea, Mexico and Peru. [17]However, limited studies have been conducted quantifying the effects of national competition laws on developing countries that adopted them. [18]One of the few empirical studies undertaken by Mark Dutz and Maria Vagliasindi (1999) assessing the effectiveness of competition policy across transitional economies finds 'a robust positive relationship between more effective competition policy implementation and intensity of competition as captured by economy-wide enterprise mobility.'[19]

It is argued that competition rules help sustain two of the fundamental ingredients to economic growth, namely competitive markets and a sound legal system.[20] Another study stresses the fact that the adoption of competition policy is positively correlated with the intensity of competition.[21]

An empirical study using multi-country regressions to explore the correlation between competition and growth rates found a strong correlation between the effectiveness of competition policy and growth.[22] This study also illustrated that the effect of competition on growth is more than that of trade liberalisation, institutional quality, and a favourable policy environment.[23] This, however, was found to be predominantly true for Far Eastern countries and less so for other developing countries. This stresses that the countries' level of economic development prior to adopting and implementing competition policy plays a significant role in the extent to which competition policy will positively affect economic growth.

Other proponents of the theory that adopting and enforcing competition laws will lead to development argue that competition rules are a precondition to the implementation of successful privatisation, especially if the goal of privatisation is not the substitution of government monopolies by private ones.[24] Similarly, another study concluded that liberalisation alone does not lead to development since 'non-tariff barriers to trade will replace tariffs that trade liberalisation removes because of the political power of rent-seeking special interest groups.' [25]

---

[17]*Above* at 6-9. For a detailed account of their confirmations of the positive correlation between adopting competition laws and development.

[18]*Above* at 6-9. For some examples of countries that provided papers stating how competition laws positively influenced their economic development; these countries include: Korea, Mexico and Peru.

[19]Mark A. Dutz and Maria Vagliasindi; 'Competition Policy Implementation in Transition Economies: An Empirical Assessment'; (2002); 13 OECD Global Forum on Competition; 9.

[20]Bruce M. Owen; 'Competition Policy in Emerging Economies'; (April 2005); 04-10 SIEPR Discussion Paper; 3.

[21]Maria Vagliasindi; 'Competition Across Transition Economies: An Enterprise-level Analysis of the Main Policy and Structural Determinants'; (December 2001); 68 European Bank Working Paper; 1.

[22]Aydin Hayri and Mark Dutz; 'Does More Intense Competition Lead to Higher Growth?'; (November1999); 2320 World Bank Policy Research Working Paper; 14.

[23]*Above* at 14.

[24]Jean-Jacques Laffont; 'Competition, Information, and Development'; (Boris Pleskovic and Joseph E. Stiglitz 'ed.'); in *Annual World Bank Conference on Development Economics*; 1998; 335. ("Privatisation and formal liberalisation are likely to lead to private monopolies, which will generate resources for interest groups apt to resist further development of authentic competition. Efforts to impose these reforms before a credible set of institutions—regulation, competition policy, financial regulation—has been designed will yield disappointing results.")

[25]A. E. Rodriguez and Mark D. Williams; 'The Effectiveness of Proposed Antitrust Programs for Developing Countries'; (1993-1994); 19 N.C. J. INT'L L. & COM. REG.; 212.

Some also suggest that having competition legislation will deter corruption in transition economies, where 'government bodies have tremendous power to affect the competitive process when they issue licenses, permits, franchises, and subsidies.' [26]When these economies adopt competition laws some of the powers of government officials will be curbed and their responsiveness to bribes in order to facilitate illicit economic privileges will be reduced.

Finally, the World Bank has developed a consensus that competitive markets are the most effective way of organising production and distributing goods and services.[27]

On the other hand, it is important to note that most of the above-mentioned studies test the correlation between *adopting* competition laws and development. This is drastically different from studying the relationship between *enforcing* the competition laws and development. The latter should be the measure used to ascertain whether competition laws lead to development or not. Studying enforcement instead of adoption will not necessarily lead to the same conclusions.[28]

II. Critique of competition policy as a means to development

The literature critiquing the adoption of competition laws as a means to development highlight several alternatives to competition policy as elements of reform. One of the common arguments is that trade liberalisation yields far greater prosperity than adopting laws to attack restraints of trade. The advocates of trade liberalisation argue that the mere removal of trade obstacles, such as tariffs and barriers to entry, will effectively discipline domestic producers in transition economies. They support the notion that '[f]ree trade is, consequently, the best antitrust policy.'[29] Also, the argument that '[f]ree trade stimulates wealth creation and development, and in a small country, it makes antitrust concerns largely irrelevant'[30] comes to the fore.

Hoekman and Mavroidis, supporters of this stance, argue that '[t]he implication of the empirical literature is that liberalisation […] is likely to have a much greater direct impact on competition than antitrust enforcement, especially in smaller economies. Importantly, trade and investment liberalisation and deregulation of entry barriers are not costly in administrative capacity and do not require the use of scarce technical expertise.'[31]

A study by Kee and Hoekman using cross-country, cross-industry time series panel data on the number of firms by industry (turnover), sales (market size), and import competition, as well as data on the adoption of competition law by countries, investigated the impact of competition law on estimated industry mark-up over cost. They found that competition legislation on its own has no mark-ups, while imports and lower entry barriers have a major

[26]William E. Kovacic; 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement'; (2001); 77 CHI.-KENT L. REV.; 296.
[27]Yuichiro Uchida and Paul Cook; 'The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination'; (June 2004); 72 Centre on Regulation and Competition Working Paper Series; 2.
[28]This measurement is not easily attainable. I am currently working on a way that this could be attained and used to study this relationship.
[29]Robert D. Cooter; 'Market Modernization of Law'; (1996); 16 INT'L REV. L. & ECON; 162.
[30]Paul E. Godek; 'One U.S Export Eastern Europe Does Not Need'; (1992); 15 REGULATION; 21.
[31]Hoekman and Mavroidis; *Above* note 4; at 8.

and statistically significant effect in reducing mark-ups. The effect of competition law was more statistically significant for larger economies.[32]

Another critique is that the limited public resources of transition economies would produce better outcomes if invested in initiatives improving the flow of goods, such as improvement of infrastructure that would give consumers more access to an increased amount of sellers.[33] Similarly, it is argued that economic policy and competition law enforcement divert the scarce resources away from more important priorities on the path to reform and development. The famous quotation by one of the fierce opponents to imposing competition laws in transition economies, Paul Godek, is worth noting: 'Exporting antitrust to Eastern Europe is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly he won't be able to eat what little there is available to him.'[34]

To further support the negative correlation between competition laws and development, it is argued that misapplying competition rules would hamper development of free markets.[35] This argument assumes that poorly enforced competition laws would discourage foreign direct investment (FDI), cross-border mergers and acquisitions, and trade in general.[36] It is argued that with respect to horizontal restraints, competition law enforcement decreases FDI in the case of cartel enforcement and increases FDI in the case of ending restricting practices by industry associations.[37] Similarly, this criticism amounts to the fear that competition policy will be a tool to provide disguised government control and hamper the growth of the fragile private sector.

On another level, it is argued that aggressive competition law enforcement in a transition or developing economy might lead to the reduction of acceptable contracting which in turn will reduce the total number of contracts that is detrimental to investment.[38] 'Taken as a whole, antitrust as practiced in the developed world may have adverse effects on a reform policy in the developing world, and may stunt growth.'[39]

Last but not least, the literature opposing the correlation between competition law adoption and economic development is not free from the traditional critique postulated by those who criticise the policy of competition laws in general. The supporters of this view claim that '[t]oo often the antitrust suits [...] were brought by or on behalf of inefficient competitors against their deservedly more successful rivals.'[40] The followers of this school

[32]See Hiau Looi Kee and Bernard Hoekman; 'Competition Law and Market Discipline: A Cross-Country, Cross-Industry Analysis'; (2002); World Bank, mimeo.
[33]Laffont; *Above* note 24; at 256.
[34]Godek; *Above* note 30; at 21.
[35]Paul E. Godek; 'A Chicago-school Approach to Antitrust for Developing Economies'; (Spring 1998); 43 ANTITRUST BULL.; 274.
[36]Laffont; above note 24; at 264.
[37]Simon J. Evenett; 'Links Between Development and Competition Law in Developing Countries'; (October 2003); Case Studies for the Development Report 2005: Investment Climate, Growth and Poverty; 8.
[38]A.E. Rodriguez and Malcolm B. Coate; 'Limits to Antitrust Policy for Reforming Economies'; (1996); 18 HOUS. J. INT'L L.; 317.
[39]*Above* at 357.
[40]Richard Posner; '100 Years of Antitrust'; (June 29, 1990); WALL ST. J.; at A12

of thought argue that the competition laws reduce competitiveness, since the monopolies they oust are in effect increasing output and leading to the reduction of general prices.

According to some economists setting perfect competition as the ideal market structure is an impossible target, and leads to the elimination of competition and innovation undertaken by the entrepreneurs, which benefits consumers. 'Attempts to base antitrust judgments on [these models] necessarily leads to economically absurd cases with harmful social consequences'.[41]

'The entire antitrust system,' writes Armentano, '—allegedly created to protect competition and increase consumer welfare—has worked, instead, to lessen business competition and lessen the efficiency and productivity associated with the free-market process. Like many other governmental interventions, antitrust has produced results that are far different from those that were allegedly intended.'[42] However, the advocates of this line of thought have not proven their conclusions empirically nor have they achieved the abolition of competition laws anywhere.

Those advocating a lesser critique still do not support the adoption of a full-fledged comprehensive competition legislation in developing countries. They would endorse the prohibitions on naked trade restraints but not on complex issues such as abuse of dominance, mergers, vertical restraints and price discrimination.[43] Those are represented by the discourse of the Chicago School. The minimalist Chicago School view of competition law 'seems to favour little other than prosecuting plain vanilla cartels and mergers to monopoly.'[44]

From the above, one cannot ascertain the relationship between competition and development. Both sides of the spectrum have valid arguments. However, the reality is that most countries of the world have adopted these laws. Therefore, the next part of the article will focus on the developing countries and analyse the challenges they face to adopt these laws. It will also assess whether these challenges are sufficient to argue for specifically tailored laws for developing countries.

3. Developing countries' encounter with competition law

(A) Challenges faced by developing countries in adopting competition rules

Developing countries are generally reluctant to adopt competition rules. This stems from various challenges they face in adopting these rules. At the outset, enacting competition legislation is not considered a priority on their reform agendas. This is due to the high cost and low returns associated with adopting these rules compared to other reform-oriented policies, such as removing trade restrictions. The costs are related to the

---

[41] See Dominick T. Armentano; *Antitrust and Monopoly: Anatomy of a Policy Failure*; John Wiley & Sons Inc.; (1982).

[42] *Above*

[43] Laffont; *above* note 24; at 256.("Although even more desirable in developing countries, the U.S.-type competition policy with its armada of lawyers and economists is not affordable or even implementable. The design of a body of simple and transparent rules for developing countries, in particular for horizontal collusion and abuse of dominant position, remains, I believe, a worthy task.")

[44] Frank H. Easterbrook; 'Workable Antitrust Policy'; (1986); 84 MICH. L. REV.; 1701.

need to acquire, reform, or implement lacking administrative apparatuses, effective judiciary and appeal systems, independent investigating authorities, expertise, people with technical and legal skills, etc.

One of the critical challenges that face developing countries is the high level of government interference in the economy. This includes government-erected barriers to enter or exit the market,[45] government monopolies, the various forms of subsidies granted by governments to loss-making enterprises,[46] and government politicisation of the administrative authorities in force of applying and enforcing the competition rules. In most developing countries, governments play an active role in regulating and setting bureaucratic measures to be followed by firms to enter or exit the market, resulting in many instances in rigid barriers that cannot be surpassed.[47] This in turn leads to rent-seeking behaviour, cronyism, corruption and favouritism. The economy is enmeshed in a 'Kafkaesque maze of control'[48] where large family owners often use their influence to limit competition and obtain finances from the government to alter the game in their favour.

To add to these challenges is the lack of data collection, especially necessary to define market shares. This is furthered by the lack of effective Statistic Offices of the public administration that may provide these kinds of information.[49]

Also, most of these countries lack a reliable administrative enforcement system and a qualified independent judiciary, which can enforce the adopted models of competition rules.[50] Also, the process of adjudicating is slow and in some cases almost a decade can pass before a ruling is final.

Higher levels of concentration, arguably the most powerful challenge for countries wanting to adopt a competition law, persist in developing and small nations. Developing countries have higher levels of concentration than those in industrialised countries.[51] Few firms dominate many sectors and produce the majority of output. This reality necessarily stands in the way of adopting and enforcing a competition law, especially one that is not favourable towards high concentration levels. The reasons for these high levels of concentration are numerous. They include mainly high barriers to entry and exit. Also, low demand or purchasing power in these countries necessarily leads to lowering the number of firms than can efficiently operate in these markets.[52] In other words, for firms to operate efficiently, i.e. be able to exploit minimum efficient scale of production, they need high concentration levels to offset this low demand. This leads to firms operating at sub-optimal levels, where they are not capable of reaching economies of scale.[53]

---

[45] Cook; *above* note 8; at 13.
[46] Vagliasindi; *above* note 21; at 2.
[48] Jagdish Bhagwati; *India in Transition: Freeing the Economy*; Oxford: Clarendon Press; (1993).
[49] Reimavuo and Händelin; *above* note 11; at 5.
[50] Owen; *above* note 20; at 1.
[51] Cook; *above* note 8; at 15.
[52] See Michal S. Gal; 'Size Does Matter: The Effect of Market Size on Optimal Competition Policy'; (2000-2001); 74 S. CAL. L. REV.; 1445. (She argues that because of the low demand and the need for firms to achieve minimum efficient scale of production (MES) to be able to operate efficiently (at lowest cost), the market will not be able to support more than a few number of firms).
[53] *Above*

Furthermore, concentration levels are also high because of technological backwardness in these countries. A firm specialised in a newly developed technology entering these markets will by default occupy a large market percentage.

Moreover, because many developing countries used to be state-run economies, many sectors are still occupied by government monopolies. The new wave of privatisation and liberalisation only meant that these state monopolies are being sold to private entities that still maintain the monopoly status of the former government-run enterprises. These and other factors, mainly concerned with the political economy[54] of these countries, result in higher concentration levels in developing countries. Not only are concentration levels high, but the lack of merger regulation in some developing countries also works toward increasing these concentration levels even further.[55] Also, elasticity of supply is lower in developing countries, given the prevalence of scale economies and entry barriers. This lowers the constraints that the potential entry places on a firm that tries to raise its prices above marginal cost. Hence, the making of lower market shares sufficient to infer dominance.[56]

These are but some of the challenges that developing countries face to effectively implement their newly adopted competition legislation. These are also often used to argue that developing countries need different laws than the West.[57] To what extent these local concerns and challenges require drafting fundamentally different competition laws is addressed in the following part of the article.

(B) Do developing countries need specifically tailored laws?

Competition policy 'assumes large number of participants in all markets, no public goods, no externalities, no informational asymmetries, complete markets, no natural monopolies or, more generally, convexity of technologies in addition to full rationality of economic agents, a benevolent court system to enforce contracts, and a benevolent government with lump sum transfers to achieve any desirable redistribution. Developing economies are of course very far from this ideal world, and the policy question 'Should competition be encouraged in developing countries?' must be raised in a more realistic framework.' [58] (Emphasis added).

---

[54]What is meant here are forms of barriers to entry, especially bribes or licenses and permits, required to enter the market.

[55]Michal S. Gal, *Competition Policy for Small Market Economies*; Harvard University Press; (2003);196. ("Despite its admitted regulatory importance, until recently merger control has been absent from the competition laws of most small economies. […] many small economies instead opted for no merger control. This policy was based on the assumption that leaving merger control to the market would produce more efficient results than the absolute value of competition approach. […] This trend has changed profoundly since the mid-1980s as many small economies have added merger control to their competition policies.")

[56]*Above* at 64.

[57]For a similar analysis see Michal Gal's writing. She argues that the distinctive nature of "smallness", which is characterised by high industrial concentration, high entry barriers and sub-optimal levels of operation, justifies that these small nations adopt competition laws different from the advanced world.

[58]Laffont; *above* note 24; at 237.

Based on the above, one can argue that the unique conditions and challenges these countries face require their competition laws to address their local needs. It is well established that in order for obeying laws to become less costly, moral and social norms need to align with state law.[59] If this is the case, then abiding the law will not only be out of respect and fear, but also social condemnation.[60] This mode of the rule of law facilitates economic development. The role of law in a society can only be understood by looking at its cultural and political environment,[61] in order to prevent the failure of legal reforms.[62]

Mere transplantation of laws does not properly address the legal culture of each country. A demand for these transplanted laws must exist for them to be effective, and also to ensure that the legal institutions needed to enforce them would develop.[63] The existence of demand is based on two conditions, namely that the law is adapted to the local environment and that the population is familiar with its basic legal principles. If these conditions are present, then demand for the law will exist and institutions to enforce it will develop.[64] If, on the other hand, these conditions do not exist then the enforcement of the law will be inefficient. I argue that in addition, the general level of economic development plays a major role in a country's aptitude to enforce the diffused laws.[65]

One of the focal problems with this diffusion of law movement is put forward in the following quotation:

> Where law develops internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.[66]

---

[59]Robert D. Cooter; 'The Rule of State Law and Rule-of-Law State: Economic Analysis of the Legal Foundations of Development'; (1997); 105 Berkley Program in Law and Economics Working Paper Series; 192.

[60]*Above*

[61]*Above* at 193-201. This is empirically tested in a study the author conducts where he explores the relationship between state law, effective law, and economic development by using a model of social norms that explains how the internalisation of norms strengthens people's willingness to punish violators informally.

[62]Anthony Ogus; 'The Importance of Legal Infrastructure for Regulation (And Deregulation) in Developing Countries'; (June 2004); 65 Centre on Regulation and Competition Working Paper Series; 4.

[63]Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard; 'Economic Development, Legality, and the Transplant Effect'; (2003); 51 AM. J. COMP. L.; 168.

[64]*Above* at 169.

[65]This is especially relevant when talking about enforcement of competition laws.

[66]*Above* at 189. ("Our empirical analysis offers strong support for these propositions. Receptive transplants, i.e. those that adapted the imported law, or had a population that was familiar with it show legality ratings that are statistically no different from those of origin countries. Countries without similar predispositions, i.e. unreceptive transplants, perform much worst. These countries suffer from the transplant effect.")

The meaning of a transplanted rule does not survive the journey from one legal culture to the other since 'the deep structures of law, legal cultures, legal mentalities, legal epistemologies, and the unconsciousness of law as expressed in legal mythologies, remain historically unique and cannot be bridged.'[67]

Other arguments for developing countries to tailor their competition laws to their own need state that the competition policies of the advanced world are not appropriate for their current development stage.[68] It is often argued that if developing countries adopt competition policies followed by the advanced world they would not be able to implement them. Developing countries adopt the language of modern Western competition law models without an effective enforcement bureaucracy, and even if it exists it is understaffed and subject to political constraints.[69]

Advocating for different competition laws in the developing world is not only based on the different local circumstances but more importantly on the different goals these laws should address in these countries. This will be dealt with in detail in the following part of the article. However, despite the conclusion that developing countries require laws that address different issues and goals than those of the advanced West, one can easily conclude that the reality is different.

The reality is that most developing countries adopt laws that do not address their particular conditions. 'One size fit all' models of competition laws have developed that are adopted across the world.[70] Studies looking at competition laws on the books of many countries conclude that the laws enacted in the developing world are quite similar to those adopted in the developed countries.[71] This is ascertained from studies allocating scores to the presence of key features of competition in national laws. In other words, these studies measure the breadth of the overall competition law. Such scores, denoted 'Scope Index' in Hylton and Deng's study[72] or 'Antitrust Law Index' in Nicholson are strikingly similar between developed and developing countries. For example, in Nicholson[73] the highest score (21) is given to the US, followed by Ukraine (20), then Turkey (19), then Belgium, Latvia, Poland and Romania scoring 18. The 'Scope Index' shows similar results, where the highest score of 25 is allocated to Australia, Barbados, Belarus, Malawi, and the US. These are followed by a score of 24 allocated to each of Hungary, Korea, and Kyrgyzstan. A 'Scope Index' score of 23 is given to Indonesia, Mexico, Spain, Ukraine, UK, and Uzbekistan.

Based on these findings, one can conclude that the laws on the books are relatively similar in the developed and in the developing world. One can also conclude that the scope of the law does not differ depending on the developmental status of a country. If Malawi's

[67]Gunther Teubner; 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences'; (January 1998); 61 THE MODERN L. REV.; 14.
[68]Singh and Dhumale; *above* note 9; at 9.
[69]Owen; *above* note 20; at 1.
[70]Gal; *above* note 52; at 1441. ("The main factor that creates the need to tailor competition law to economic size is that competition law generally consists of "fit all" formulations that are designed to best achieve the goals of the law in each category of cases to which they apply […].")
[71]Keith N. Hylton and Fei Deng; 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects'; (2006); BU Univ. Working Paper Series L. & Econ. 06-47. And Michael W. Nicholson; 'Quantifying Antitrust Regimes'; (February 2004); 267 FTC Working Paper.
[72]Hylton and Deng; *above* note 71.
[73]Nicholson; *above* note 13.

law is, in terms of breadth, as developed as the US competition law, it is enough to show that advanced laws are simply transplanted without much change to fit local circumstances, questioning the assumption that laws are enacted to address unique concerns. These results fortify the holding that developing countries model their laws on those adopted in the West. This of course is leaving out enforcement of the law, which assumingly is where the real difference resides.[74]

(C) Different goals for developing countries

Similar to other studies dealing with developing countries and competition law, this article is arguing that the developing world needs different laws because of different goals that these laws should address in their respective nations.[75] However, this article is arguing that 'for efficiency' considerations that prevail in the West may not be the best alternative for the developing countries. The latter's competition laws might want to consider distributional issues. This is a rather new proposition alien to competition law concerns; however, it may be gaining momentum in writings about development and competition.[76]

Furthermore, few jurisdictions consider promotion of fairness and equality criteria as one of the objectives of their laws. One of the often-cited examples is South Africa, which states that its competition law considers a 'broader range of considerations including the promotion of a more equitable spread of ownership as well as the 'interests' of workers.'[77] Moreover, some jurisdictions consider that non-competition goals may be taken into account when it serves the public interest.[78]

[74]This is an assumption that I am invested in studying by quantitatively and qualitatively measuring competition enforcement in the developing world. This is part of a bigger project underway to be able to really understand the role of competition law in third world countries.

[75]According to the members of the ICN who took part in the questionnaire for the ICN Unilateral Conduct Working Group for the 6th Annual Conference (2007) countries consider 10 different goals/objectives for their competition laws. These are: ensuring an effective competitive process, promoting consumer welfare, maximising efficiency, ensuring economic freedom, ensuring a level playing field for small and medium size enterprises, promoting fairness and equality, promoting consumer choice, achieving market integration, facilitating privatisation and market liberalisation, and promoting competitiveness in international markets. The first 3 listed goals are the most important goals for most jurisdictions, with the rest only mentioned by some jurisdictions and not others. See International Competition Network; 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies'; prepared by The Unilateral Conduct Working Group; Presented at the 6th Annual Conference of the ICN; (Moscow, May 2007); available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives%20of%20Unilateral%20Conduct%20May%2007.pdf (hereinafter ICN Report).

[76]This statement may be rebutted based on the claim that distributional issues are already part of the consumer welfare criterion adopted in most countries as the "for efficiency" consideration that competition law is aiming to achieve. Consumer welfare standards neglect the efficiencies realised to producers, e.g. cost savings, and in this regard may be considered to be a distributive decision to not consider the interest of the producers. At the same time when the consumer welfare standard is taken to mean both allocative and productive efficiency then this decision regarding distribution is neutralized. Nevertheless, the decision to weigh in producer gains (productive efficiency) in a consumer welfare standard is often neglected and appears only when a country has selected a total welfare approach. See *Commissioner of Competition v. Superior Propane Inc.;* 2000 Canada Comp Trib 16 (4 April 2002).

[77]ICN Report; *above* note 75; at 18.

[78]ICN, Report, sputa note 75; at 31. The following jurisdictions recognise some non-competition goals: Australia, France, Israel, Jamaica, Korea, Pakistan, South Africa, and Switzerland.

A recent article by Eleanor Fox is one of the first elaborate attempts to explore this idea.[79] Basically, the proposition is to expand the reach of competition laws to be part of a broader developmental agenda that aims at economic development. By doing that, competition law may be used as a tool, not to protect producers or local champions, but to facilitate development. This is not only essential because development is the more pressing issue for third world nations, but because a competition legislation that merely focuses on economic efficiency tends to entrench a political economy that favours the ruling elite and discriminates against the masses. A neo-liberal framework of competition law will do little to help these countries develop.[80] Its effect will be no different than those achieved with liberalisation, privatisation, and globalisation – namely, a widening gap and more disparity of wealth.[81]

It is often argued that competition law should not concern itself with developmental or redistributional goals – it is a law about fostering competition at the end of the day.[82] Redistribution issues and other development policies should be left to government action specifically tailored to address such issues. Nevertheless, developing countries often have benevolent governments that fail at introducing or implementing such policies. Taxes are evaded and subsidies are slowly being lifted under the rubric of privatisation and liberalisation, leaving the masses at a loss. Laws are transplanted from the West with promise of prosperity, competition law being no exception, and leading to nothing more than entrenchment of local structures of cronyism, statism, corruption, and income inequality. Therefore, a mere attempt at using such a law, even if only theoretically, to undo such maladies should not be discarded at once.

> Market tools are a very important part of the panoply of tools needed to address world poverty and should be used liberally. These market tools include market-freeing measures that reduce prices. They also include antitrust priority-setting that targets conspiracies that raise the prices of staples, such as milk, bread, transportation and utilities, helping the poor as well as those who are better off.[83]

Using competition law as a market tool to address social concerns, as outlined in the quotation above, can take one of two forms. Both are extremes not alien to competition law debates in general.

---

[79]Eleanor M. Fox; 'Economic Development, Poverty, and Antitrust: The Other Path'; (July 2007); 13 SOUTHWESTERN J. OF L. & TRADE IN THE AMERICAS; 211.

[80]Above at 105. ("This does not imply that antitrust for developing countries would or should look dramatically different form a developed country's antitrust. There are reasons why it might look much the same,[…]; but there are also reasons why the perspective might differ form the neo-liberal one that currently informs many antitrust laws of developed countries – a perspective that has "relatively little resonance for the great majority of the population that is poor.")(Quotation from Francis Fukuyama; 'Keeping Up with the Chavezes'; (February 1, 2007); Wall St. J.; at 7).

[81]Above at 106.

[82]This has been the trend since the Chicago School influence on competition law. Robert Bork in his famous *The Antitrust Paradox* (2nd ed., 1993) argues that "[..] the goal [of antitrust law] is maximum economic efficiency to make us as wealthy as possible. The distribution of that wealth or the accomplishment of non-economic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases." (p.427). However, this does not negate the fact that prior Supreme Court decisions in the US have attempted to address the issue of redistribution in competition cases. An example critiqued by Bork for doing that is Brown Shoe (1962) where the Court admitted the value of small-business welfare into the adjudicative process.

[83]Fox; *above* note 79; at 109.

One side of the spectrum is arguing for more competition in order to allow younger and smaller firms access to the market. This would lead to lower prices and benefit the poorest of the population. In addition, increased entry into the market creates automatic redistribution away from big firms to smaller ones. This is the argument of the Darwinian competition advocates. These advocates are mainly concerned with allocative efficiency considerations that manifest lower prices.

At the other end of the spectrum are those who argue for higher levels of concentration, which allow firms to invest in R&D, provide more employment opportunities, and benefit society in the long run by fostering growth and innovation as supported by the Schumpeterian competition advocates. Here redistribution can either work through government policies specifically addressing distributive taxes or other deals between firms and consumers.[84] The efficiency that directs competition law is one based on productive dynamic efficiency and not only allocative efficiency.

Each of these sides of the argument will be addressed in turn.

I. Darwinian Competition Advocates[85]

For the followers of this camp competition is all about increased market players that will push prices down to perfect competition levels. In other words, they are more concerned with static allocative efficiency considerations. Their antitrust policy is a rather strict one; fiercely opposing cartels, monopolistic practices, and abuse of dominance that prevents dominant firms from using their power and leverage to fence out powerless firms.[86] This policy would also warrant a strict law against mergers that create or reinforce the power to exploit and to exclude.

The idea is to allow competition law 'to build a ladder of mobility form the lowest rung up to enable mobility, incentivize entrepreneurship, and stimulate invention.'[87] The mechanisms for this 'ladder' approach are as follows: First, the market should be freed. This means tearing down barriers to free market participation. These barriers arguably lead to favouritism that allows powerful insiders to protect their friends at the expense of the public and at the particular expense of the poor.[88] Second, competition law should be used to create a marketplace that gives firms, including smaller and younger firms, a fair chance to compete on the merits of their product, free from artificial and unnecessary foreclosing restraints by powerful firms.[89]

> The evils of monopoly have long been recognised. These include, inter alia, higher prices and lower output levels than under competitive conditions (allocative inefficiency), X-inefficiency, and the costs of rent seeking behaviour. Under an oligopolistic structure, the actions of rivals impinge directly on each other. […] Such behaviour has many adverse effects on productivity and resource allocation: prices are likely to be above costs.[90]

[84]One such "deal" is developed below under the title Consumer Trust.
[85]This term is used in Patrick Rey; 'Competition Policy and Economic Development'; (September 1997); 14; available at dei.fr/doc/by/rey/competition.pdf. (The Darwinian model recommends that the increase in competition will force competing firms to innovate in order to survive.)
[86]Fox; above note 79; at 119.
[87]Above at 111.
[88]Above at 113.
[89]Above at 114.
[90]Gal; *above* note 52; at 1449.

Empiricists also find themselves more easily located within this camp. Many empirical studies on whether competition or concentration provides better tools for growth conclude that competition has the greater effect.[91] One of the most cited empirical studies includes one of 640 UK companies that concluded that the more competition the higher the levels of total factor productivity growth. This is because competition exerts downward pressure on costs, encourages efficient production and innovation.[92]

What is important to proponents of this strand of analysis is the effect that competition has on marginal cost. Perfect competition, in economic terms, is a state of the market where prices are set to equal the marginal cost of firms. In other words, prices are set by the intersection of the demand and the marginal cost curves.

The social ramifications of this competition policy would be achieved through strictly prohibiting any increases in prices. Any attempts at concentration will be discouraged to guarantee that prices, especially for important subsistence goods, will stay competitive. Also, redistribution will be a by-product of opening up the markets to more competitors. Small firms entering the market will be allocated a part of the pie that used to be confined to benefit the entrenched elites. In a way, competition allows redistribution away from big firms to smaller and younger ones entering the market. This creates a form of redistributive justice by ensuring that no one firm alone can reap the benefits of serving the market and that all firms have an equal opportunity to compete.[93]

II. Schumpeterian Competition Advocates

Those in this camp believe that some sort of concentration is required to achieve growth and development. They argue for a competition policy that is more accepting of higher levels of concentration. They would also argue that mergers resulting in dominance

[91]Some of these studies include: Mark A. Dutz and Maria Vagliasindi; 'Competition Policy Implementation in Transition Economies: An Empirical Assessment'; (2002); 47 European Bank for Reconstruction and Development. John Preston; 'Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences'; (November 2003); DIFID Case Study for WDR. Aydin Hayri and Mark Dutz; 'Does More Intense Competition Lead to Higher Growth?'; (November 30, 1999); 2320 World Bank Policy Research Working Paper. Maria Vagliasindi; 'Competition Across Transition Economies: An Enterprise-level Analysis of the Main Policy and Structural Determinants'; (December 2001); 68 European Bank Working Paper. Frank B. Cross; 'Law and Economic Growth'; (2001-2002); 80 TEX. L. REV. 1737. Bruce M. Owen; 'Competition Policy in Emerging Economies'; (April 2005); 04-10 SIEPR Discussion Paper. Yuichiro Uchida and Paul Cook; 'The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination'; (June 2004); 72 Center on Regulation and Competition Working Paper Series.

[92]See Stephen J. Nickell; 'Competition and Corporate Performance'; (August 1996); 104 J. POL. ECON.; 724. He presents with empirical evidence that competition, measured either by increased number of competitors or by lower levels of rents, is associated with higher rates of total factor productivity growth.

[93]Gal; *above* note 52; at 1451.

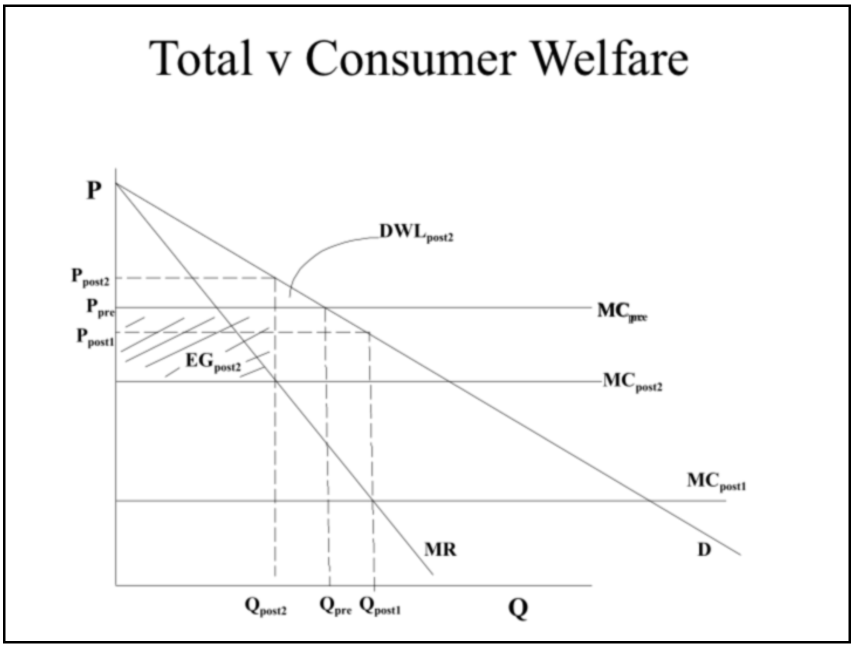
should not be prohibited just because of the market percentage the merged firm will occupy. The ideological underpinnings of this camp are rooted in the writings of Joseph Schumpeter.[94] Schumpeterian competition policy rests on the argument that dynamic efficiency is more important than static allocative efficiency and hence is more tolerant towards higher levels of concentration. Monopoly powers are therefore not considered a threat, as the monopolist would be encouraged to invest in R&D and advance innovation.[95] In this framework, laws that stand in the way of monopoly creation are considered inefficient.

Seeing that growth and development are priority targets for third world nations, many writings about the latter and competition law choose this camp as the model more suitable for these countries. Thus, they would argue that dynamic efficiency is more important from a developmental perspective.[96] Monopoly rents are invested in lowering cost functions and might result in lower prices and higher output than what would result under perfect competition. [97]Price wars reduce profits and thus, decrease the amount of investment. A combination of cooperation and competition between firms, which is referred to as 'optimal degree of competition'[98], rather than maximum competition achieves this dynamic efficiency that should be regarded by developing countries as the purpose of competition policy.[99] Hence, the competition policies adopted by developed countries are not often suitable for the developing world due to the fact that 'the attention to allocative efficiency and lower prices that underlies competition policy in developed countries may be too narrow and static from a development perspective.'[100]

The advocates of higher concentration levels are hence mainly arguing that the efficiencies realised by firms might outweigh the damage suffered by consumers, especially when the concentrated firm is able to pass on its efficiencies. In this regard, as mentioned earlier, they focus more on dynamic productive efficiency rather than static efficiency.

[94]Joseph A. Schumpeter; Capitalism, Socialism and Democracy; 3rd ed.; Harper Perennial Publication; (1984).
[95]Of course this assumption has been refuted by many, using the arguments put forward by the Darwinian advocates above, but predominantly by Kenneth J. Arrow. See Kenneth J. Arrow; 'Economic Welfare and the Allocation of Resources for Invention'; in Philip Mirowski, Esther-Mirjam Sent (eds); Science Bought and Sold: Essays in the Economics of Science; University of Chicago Press; 2002; 165. This has led many involved in this debate to contrast Schumpeter against Arrow. E.g. see Jonathan B. Baker; 'Schumpeter vs. Arrow: How Antitrust Fosters Innovation'; (June 2007); SSRN; available at http://ssrn.com/abstract=962261.
[96]J. S. Metcalfe et al.; 'Economic Development and the Competitive Process'; (December 2002); 36 Centre on Regulation and Competition Working Paper Series; 24.
[97]This may be the case seeing that the monopolist sets prices at the intersection of the marginal revenue and the marginal cost curves. When monopoly rents are invested in lowering the cost functions (or innovation leads to cost reduction) the now downward shifted cost function's intersection with the marginal revenue curve may result in lower prices and higher output than under perfect competition. This, however, depends on the slopes of the demand curve and accordingly the marginal revenue curve. It also depends on the magnitude of the downward shift of the cost function. See graph 1 for an illustration.
[98]Metcalfe et al.; *above* note 96; at 14.
[99]A critique for this assumption is made by Elhauge and Geradin; *above* note 2; at 1109. ("[F]irms in developing nations can improve productive efficiency simply by copying techniques already used in developed nations, whereas firms in developed nations can improve productive efficiency only by innovating to create new techniques. One might thus think that competition to increase productive efficiency over time will, if anything, be more important in developed nations.")
[100]Metcalfe et al.; *above* note 96; at 24.

By doing so they favour a total welfare approachto competition policy, rather than a consumer welfare approach as understood to mainly focus on lower prices, i.e. marginal cost reductions and not fixed cost reductions. The benefits of the former approach are illustratively explained in the following graph.

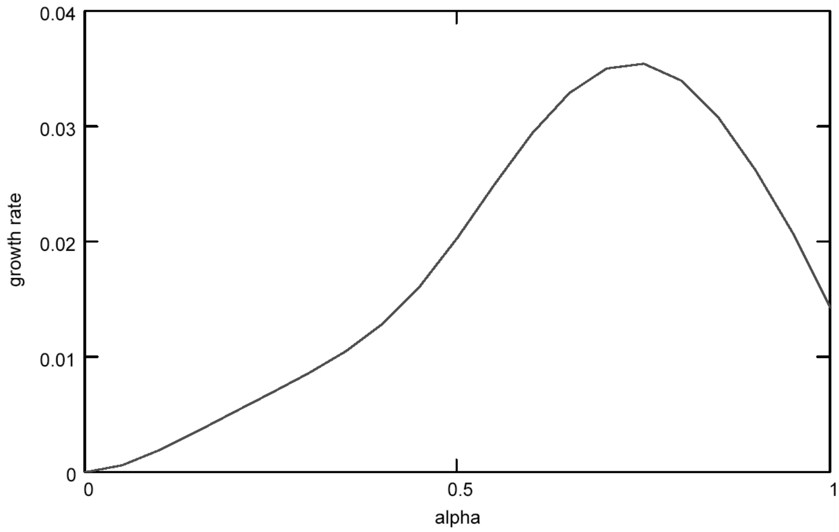


Graph 1
Source: Elhauge and Geradin

When the monopolist invests his monopoly rents in lowering the marginal cost curve to MC_{post1}, the price is reduced to P_{post1} (which is lower than under perfect competition at P_{pre}) and the quantity is increased to Q_{post1} (which is higher than under perfect competition at Q_{pre}). However, it is important to note that had the monopolist only reduced the cost to MCpost2 and not to MCpost1, price would have still been higher and quantity lower than under perfect competition ($P_{post2} > P_{pre}$; $Q_{post2} < Q_{pre}$).

This graph argues that a firm enjoying a monopolist position may be able to transform its cost reduction to lower prices and higher output, which is to the benefit of consumers. This position is, according to the graph, only reachable when the cost functions are lowered sufficiently, which is often only possible when monopoly rents are invested in R&D and innovation. This is the Schumpeterian assumption explained economically. However, what the Schumpeterian advocates neglect is that when cost curves are not reduced 'sufficiently' (i.e. not reaching MCpost1) consumers are still worse off paying higher prices and market output is reduced. Here, the argument for distributive taxes and other means to generate redistribution come to the rescue. The next part of the article incorporates into this model a mechanism that allows for distribution without relying on government taxes to undo the harms suffered by consumers.

Similarly, arguing that higher levels of concentration is not necessarily bad for society is supported by the famous inverted U-shaped graph developed by Aghion et al.[101] This graph illustrates that at the two extremes of minimal competition and perfect competition growth rates are low. Growth rates increase to a certain degree of competition after which more competition is associated with lower levels of growth. With respect to competition law, this graph shows that perfect competition is not desirable and thus over-enforcement of competition law is not advisable. It presents the benefits of lax enforcement and acceptance of certain levels of concentration, which leads to less than perfect competition and hence higher levels of industry growth. However, it also delineates the difficulty in striking a balance between under-enforcement and over-enforcement, the potential increase in growth is forgone in the former and the growth rate is negative in the latter.



Graph 2
Source: Aghion et al

[101]Philippe Aghion, et al.; 'Competition and Innovation: An Inverted U Relationship'; (2002); 9269 NBER Working Paper; 57. In this graph α (alpha) is a parameter used to measure the degree of product market competition in each industry (it corresponds to a standard measure of competition). $\alpha = 0$ defines the minimal degree of competition and $\alpha = 1$ is the case of Bertrand competition between undifferentiated products, which results in perfect competition when the two firms have the same unit cost. On the other axis, the average rate for the productivity growth of the industry (growth rate)(g) equals the product of the frequency of "frontier innovations" and the (log) size of innovation. It is calculated as follows: $g = (2\_{0}n_0 + \Sigma \ \_{k}n_k) \ln \gamma$.

Another reason why developing countries are thought to benefit from higher concentration levels is that the realities of their markets support only few firms. This is, as explained above, a widespread phenomenon in developing countries. It would be a futile attempt to try to undo this market structure. Openness to trade and other attempts at lowering entry and exit barriers may play a big role, however the lower demand and supply that prevail in these countries cannot be instantaneously changed with the adoption of a competition law. Hence, concentrated industries are tolerated (at least in the short run).

High levels of industrial concentration may be a necessary evil in order to achieve productive efficiency. Accordingly, a small economy should not pursue a policy that views high concentration level as undesirable per se. This is so because consolidation may eventually lead to the achievement of economies of large scale. The drawback is of course higher levels of concentration, which might lead to firms charging prices much above costs, which in turn decreases allocative efficiency. Competition policy should thus strive to strike the optimal balance between structural efficiency and competitive vigour so that firms may operate at efficient scales and pass at least some of the benefits of greater efficiency on to consumers. Competition policy in a small economy should, thus, aim to minimise the undesirable economic effects of concentrated market structures and support the dynamic, long run market forces that lead to more efficient market structures. […]

> Sometimes high concentration levels resulting from a merger will be sufficient reason for blocking it. Yet, concentration measures alone are not a good guide for competition policy for small economies. Rather, measures of levels of concentration should be balanced with productive efficiency considerations dictated by market size.[102]

> Concentrated market structures might need to become further concentrated to achieve minimum efficient scales. On the one hand, an aggressive stance toward mergers might prevent desirable efficiency-enhancing mergers from taking place while entrenching existing inefficient market structures.[103]

Finally, the advocates of higher concentration defend their position by arguing that this competition policy would allow developing countries to protect their 'national champions' and hence, be able to better compete on international markets.[104] Those arguing for encouraging national champions are by default arguing for laxer competition laws in developing countries – at least with respect to those national champions. The argument goes as follows: If the local producers are to compete in international markets, they should be given some slack in the local enforcement of competition laws. This often requires that the laws should either allow for export cartels or discriminatory enforcement against companies considered to be national champions.

The followers of this competition policy framework have a harder time defending their position in terms of social or redistributive justice. The common response these advocates of high concentration levels would give is that 'achieving and maintaining a balance

[102]Gal; above note 55; at 55 – 56.

[103]*Above* at 195. A critique of this theory is put forward in Elhague and Geradin; *above* note 2; at 1108. ("[It does not] make much sense to adopt any categorical presumption that economies of scale will require high concentrations in markets within small or developing nations and low concentration in larger developed nations or global market. A market maybe small, but have few economies given how the product is produced, or any economies of scale may not be relevant to the alleged anticompetitive activities. A nation may be large and developed, yet the relevant market within it may be quite small in any given case. Or a market may be large and even global. And yet have economies of scale that justify high concentration levels. […] In short, economies of scale and increased concentration levels do not really justify laxer antitrust policy in small nations rather than having similar antitrust rules in every nation whose criteria include the relevance of economies of scale, entry barriers, and market concentration levels to any particular market and alleged anticompetitive conduct.")

[104]Canada and South Africa recognise this argument as a valid objective of their competition law. See ICN Report; above note 75; at 20.

between permitting firms to be large and integrated enough to enjoy scale economies, as well as numerous enough to ensure effective rivalry, is challenging.'[105] Therefore, they prefer to leave the redistributive concerns to other government policies such as taxation and social insurance or welfare systems that are designed for that purpose, and through which redistribution is more directly observed or monitored by the voters to whom government is responsible. [106] The next part of the article attempts to devise such a mechanism under the rubric of competition law. It is a theoretical possibility that might be appealing to developing countries that prefer the Schumpeterian rhetoric to the Darwinian models.

4. Redistribution under competition law

The argument for concentration and mergers to dominance rests on the assumption that these have certain efficiencies. [107]However, the problem is that these efficiencies are seldom transferred to the consumers. [108]This is especially true when the merged entity's efficiencies are of the kind that reduces fixed costs and not marginal costs. Merger efficiency considerations have been solely focused on reductions in marginal cost rather than fixed cost. This is due to the economic theory supporting the claim that reductions in marginal cost are passed on to consumers in the form of lower prices. On the other hand, reductions in fixed cost are not obviously transferable to consumers in a way that would increase consumer welfare. However, this latter claim may be rebutted on the following grounds.[109]

First, if firms are setting their prices as a function of fixed cost, i.e. if firms set their prices using full cost pricing,[110] then the reductions in fixed cost may be passed on as lower prices to consumers in the long run. However, it may also be the case that a decrease in fixed cost will only mean that the firm will prefer to increase its rate of return instead of passing on these gains as lower prices to consumers. Second, fixed cost savings may be a result of improvements in innovation (dynamic efficiencies), which in turn may lead to improvement in quality by the merged firm, and it may also cause rival firms to react with lower prices and/or higher quality products. [111]Third, reductions in fixed costs may lead to a reduction in entry barriers and hence to expansion.[112]

Paying attention to fixed cost is not a novel proposition seeing the developments underway in merger law that are actively seeking to include fixed cost reductions in the efficiencies considered by the proposed mergers. This is still a proposition, however it may

[105]Gal; *above* note 52; at.1441.
[106]Gal; *above* note 55; at 204.
[107]See the graph 1 above.
[108]Except for the situation when the monopolist (or concentrated firm) lowers its cost function sufficiently to an extent that result in lower prices and higher output than under perfect competition (see graph 1 above).
[109]See Robert N. Rubinovitz; 'Acquisitions that create Efficiencies: Merger Analysis and the Treatment of Reductions in Fixed Costs'; (Spring 2008); NERA Economic Consulting: Antitrust Insights.
[110]*Above* Full cost pricing means that the prices are set so that the markup of price over marginal cost covers the fixed costs of the firm and provides the firm with a satisfactory rate of return.
[111]*Above* at 4.
[112]*Above* at 3.

be gaining momentum in writings calling for merger law amendments particularly in the US.[113] Recent DOJ and FTC decisions and statements attest to the importance of considering fixed cost reductions as part of the efficiencies realised by a merger.[114]

The pillar of this proposition rests on the fact that the outlook of competition law should not be one focusing on the short run, but one that is 'forward looking and dynamic.'[115]

> […] Fixed cost efficiencies become relevant once a longer time frame is considered because costs that are fixed in the short term are not fixed when considered over a longer time horizon. […] Thus, depending on the time frame and the amount of incremental output that is relevant, costs that appear to be fixed cost should properly be viewed as marginal cost, in which case a reduction in these 'fixed' costs should be given greater weight than is often the case.[116]

However, despite the above analysis it is still often very difficult to ascertain whether these reductions in fixed costs will be passed on to the consumers. The realisation of these efficiencies is delayed and more difficult to predict. Hence, the following is an attempt to install a mechanism that will commit the firms to transferring these realised dynamic efficiencies to the consumers. The following part of the article will address this mechanism, and its foreseeable critiques, in detail.

The idea is rooted in the proposition that competition law should aim at maximising the aggregate benefit to society, which in some cases may come at the expense of specific goals.[117]

(A) The Functioning of the Mechanism

First, let developing countries accept mergers to dominance and allow for higher levels of concentration to exist. This means that mergers are to be assessed under a total welfare standard and not a consumer welfare one. The reasons for that are as follows:

> (1) Given the concentrated nature of most markets in small economies, a policy that required high standard of proof of no negative effect on consumer welfare may well lead to market stagnation of oligopolistic structures that not only charge supra-competitive prices but do not achieve productive efficiency. The total welfare approach will thus reduce productive and even dynamic inefficiencies.

---

[113] See Antitrust Modernization Committee; 'Report and Recommendations'; (April 2007); section I.B at 49; available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf. See also William J. Kolasky, Prepared Remarks; 'FTC/DOJ Joint Workshop on Merger Enforcement Panel on Efficiencies/Dynamic Analysis/Integrated Analysis'; (February 2004); available at http://www.usdoj.gov/atr/public/workshops/docs/202670.pdf.

[114] See US Department of Justice; 'Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirus Satellite Radio, Inc.'; (March 24, 2008); available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm. See also 'Statement of Chairman Timothy J. Muris in the Matter of Genzyme Copr./Novazyme Pharmaceuticals, Inc.'; available at http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf.

[115] Rubinovitz; *above* note 109; at 3. See also ICN Report; *above* note 75; at 9. (Mentioning the Netherlands response which states that "competition law should not solely concentrate on short term price/output issues but should also [maintain] a dynamic perspective taking due account of innovation.")

[116] Rubinovitz; *above* note 109; at 3.

[117] Gal; *above* note 55; at 48.

> (2) The consumer welfare approach may conflict with the goal of enhancing the international competitiveness of domestic firms.[118]

A disclaimer to start: This proposition does not argue for a permissible law that allows for abuse of dominance. On the contrary, it allows for a rule of reason assessment of the mere possession of a dominant position. All abusive conduct, especially horizontal agreements, should continue to be strictly banned. The only difference this article proposes is a more accepting law of dominance (especially because of the nature of developing countries) that factors in a process of redistribution.

> Given that many industries are already concentrated, mergers should be evaluated not against a benchmark of theoretically competitive conditions, but rather against the rational market structure options in the specific market setting. Presumption of anticompetitive effects based on high levels of concentration, which almost always produce strong predispositions toward the condemnation of mergers in concentrated markets, should be rejected and much more emphasis should be placed on efficiency considerations.[119]

The functioning of this redistributive process is arguably as follows. If a merger would increase total welfare, but not consumer welfare then a Coasian deal would be struck to guarantee an increase in consumer welfare.[120] In other words, if the gains to the merging parties exceed the losses to the consumers, then the merging parties could devise a mechanism that transfers enough of their gain to consumers to offset any losses they suffered.[121]

One possibility would be for the merging parties to commit not to raise the prices or lower the output post mergers. The problems this might lead to are deterioration of quality.[122] Also, the pre-merger prices may be high already, hence not a suitable benchmark for assessment. A remedy could be an assessment of the competitive price and a commitment by the firms not to increase prices above this benchmark. This is arguably hard to commit to seeing as demand might change necessitating a response in changing prices.

A second and more workable possibility, developed by Einer Elhauge, is to allow firms to create some sort of consumer trust.[123] This trust is funded out of the merging firms' gains that are not transferred to the consumers. For example, if the efficiencies lower the merging firms' fixed costs but not their marginal costs, in this case the consumer trust is funded out of the firms' reduction in fixed costs. This is then transferred to the consumers. By doing that, the reduction in fixed costs is converted into a reduction of marginal costs. [124]

The idea sounds appealing, however, its functionality depends on transaction costs of operating such a mechanism being lower than the net efficiency gains of the firms. Below are attempts at creating such a mechanism that might satisfy this condition.[125]

---

[118]Above at 203.
[119]Above
[120]This idea is set forth in Einer Elhauge and Damien Geradin; Above note 2; at 901.
[121]Above
[122]Above
[123]Above
[124]Above
[125]Although I did not propose the "Consumer Trust", any shortfalls in the suggested logistics and mechanisms of its application are my responsibility.

(B) MECHANISM FOR MERGERS

Let us look at the following example dealing with a merger. Two companies agree to merge creating a dominant position after the merger. It is foreseeable that the merged entity will increase its prices. The merging firms, however, argue that the merger will have long-run benefits that will ultimately trickle down to consumers. The merger will allow the merging firms to invest in R&D and be able to compete on an international front. Also, the efficiencies include long-run cost reductions. Hence, in the long-term consumers will benefit. Ordinary competition policy would prohibit such a merger because of its adverse consequences on consumers today. The prohibition of the merger will assure that the firms will not obtain a dominant position, yet will also forgo the probable benefits that may accrue in the long-term. The mechanism introduced above would work as follows.

The merger will be allowed to go through. This will nevertheless allow the merged entity to increase prices. This will not be prohibited. However, the competition authority will decide what the competitive price should have been. This may be the price pre-merger or the price of other firms selling similar products in a competitive market. Then, the authority will allow the merged entity to raise the prices only if every purchaser of the product sold will be given a coupon with the difference between the current price and the but-for price (the latter will be decided by authority as explained). [126] The consumers can only cash in their coupons after a certain time. The competition authority, upon consulting with the merging firms, will set this time. The idea is that the merged firm may be allowed to harm consumers in the short-run, only to achieve their promised efficiencies in terms of lowering their cost-curves in a pre-set time frame, and then be required to give back to the consumers the realised efficiencies to offset their harms. So, this means that each product sold would come with a coupon to be cashed at a later time. Once this grace period elapses consumers will cash their coupons. At this moment their harm will be offset.

It is important to note that the merger is to dominance and not to monopoly. The mechanism devised above can only operate when the merger is to dominance, so that consumers, who cannot afford the product, even with the coupons repayable later, can buy the product elsewhere.

This mechanism can be understood to function as follows. Through the consumer trust, consumers become de facto shareholders who are owed dividends at a certain time. Or, they become creditors who are owed their loans back at a certain time. The mechanism can also be devised to allow for interest payable on every coupon received. If the firm fails to pay back its so-to-speak debts to the consumers, then the competition authority may liquidate the firm and use the sold assets to repay the consumers. This will be a driving force for the merged entity to achieve the promised efficiencies.

[126] Of course inflation needs to be factored into the assessment of the but-for price and should be considered when assessing the value of the coupon. The coupons could be devaluated by the increase in inflation.

The benefits of such are threefold. First, the firms will be able to undertake their merger and realise their efficiencies. This will allow the firms to achieve dynamic efficiencies when they invest in R&D and innovate. Second, the merger will allow the firms to compete in international markets, which is often a major concern in developing countries. Third, consumers will benefit in the long-term. Also, they will benefit as workers who may have more work options at the merged firm.

(C) Critique of the Mechanism

One of the obvious critiques is the problem associated with the administrability of this mechanism. However, a specialised entity such as the competition authority or even a specifically created institution would be able to monitor the firms' compliance. Consumers can resort to this institution to claim non-compliance. Hence, compliance need not be monitored by the institution upon its own initiative and may rely on consumer complaints as red flags.

Nevertheless, a further critique is that it is difficult to imagine this mechanism working effectively in developing countries, especially if one takes on a public choice critique of the latter's bureaucracies. In response to that critique one can relax the assumptions regarding corrupt officials, rent seeking employees, and inexperienced bureaucrats to distance the analysis from a public choice framework. Also, one can argue that subjecting the consumer trust to stricter court review, or allowing the private non-governmental sector to run the trust, or letting consumer unions manage its implementation might make the trust workable even in the developing world.

Another critique is that concentration increases barriers to entry that should be factored in when the authority is investigating the but-for price.[127] However, concentration is already high in these countries and a law that aims at ending all forms of concentration is a rather futile one. Lowering other barriers to entry should be a top priority and making use of the current concentration levels through this mechanism would amount to further benefits.

Moreover, other arguments challenging the idea of the trust are based on the assumptions that consumers want lower prices *now*, and that merger efficiencies are seldom realised. This might be a valid critique but would depend on the particular facts of every case. A case-by-case economic analysis of the probabilities of achieving the efficiencies and the cost-reductions that may affect long-run prices once these efficiencies come into effect compared to lowering prices now, must be undertaken to ascertain the validity of these assumptions.

One of the main concerns with this scheme would be the setting of the but-for price. However, any merger review necessarily undertakes such investigation when assessing the consumer welfare to be impacted by the merger.

[127] When assessing the impact of the increased barriers to entry, the competition authority in charge of the trust might want to consider the competitors that have suffered reductions in sales or market exit as a result of the merged entity. These firms might be eligible for some form of compensation or subsidiary payable from the trust.

(D) Mechanism for dominance

The second example deals with a dominant firm that is alleged to have abused its dominance by raising prices. Mere dominance is not a competition law concern. However, abuse of such conduct is what competition law is dealing with. The theory is not permissive, as outlined above, of abuse of dominance except in terms of price increases. Again, the competition authority may allow this increase to take place if the dominant firm subscribes to a repayment program as outlined above. The authority upon investigating the harm may allow the firm to persist in its consumer-harmful conduct if consumers are to benefit from the alleged efficiencies that the firm may achieve by maintaining its dominant position.

Basically, this repayment model transforms the outlook of competition law from being concerned with snap-shot of the short-run to take the long-run efficiencies into consideration. This gives firms a chance to invest and innovate and at the same time assures that consumers are not harmed. This long-term dynamic approach to competition law might be more suitable for developing countries under the premise that they prefer to follow a Schumpeterian model to competition law. Whether this suggested redistribution model could be put into practice is highly questionable. The extent to which it offers a realistic mechanism cannot be settled theoretically. It is, however, interesting to debate ideas regarding redistribution under the umbrella of antitrust laws, especially in developing countries.

5. Conclusion

This article has outlined some of the recurring themes that developing countries encounter with competition law. These countries face unique circumstances when confronted with adopting these laws. They are in many ways no longer free to choose whether to adhere to a competition law regime or not. They end up adopting laws that are not always tailored to address their local conditions. However, they still have ample space to enforce these laws in a way that 'fits' their unique environments and markets.

One of the pressing issues they face is whether to allow for dominance or not. In either case, this article has illustrated tools that can be incorporated into their enforcement schemes to achieve broader developmental goals. Whether these are concerned with dynamic efficiency, lower prices, or redistribution – developing countries have an arsenal of tools to choose form. The only important finding is that developing countries need to address such concerns. Following the path paved by the developed world may not allow them the opportunity to address these issues.

This conclusion needs to remain a top consideration especially amidst current debates about homogenisation and calls for a unified international competition regime. The move by developing countries to abort discussions on international competition law at Doha signals their strong objection to such a homogenisation attempt. [128] Whether this move is justifiable or not is debatable.

[128] At Doha, Qatar in November 2001 negotiations for an agenda on international competition law were once again commended. The Doha Declaration came to mandate clarifications of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels." The discussions were aborted and the Declaration fell through because the developing nations united to oppose it.

All that is important to note is that in a way it attests to the conclusions of this article. Namely, that the developing countries are not ready to adhere to a model of competition law that mirrors a Western path.

Their need to regulate international cartel activity is a pressing concern[129]; yet, their opposition signals a finding that their freedom to explore with competition law and to set their own policies and goals are more important.

[129]See Margaret Levenstein and Valerie Y. Suslow; 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy'; (2004); 71 ANTITRUST L. J.; 801. The authors' main argument is that in many cases international cartels sell to markets in developing countries, but prosecution and civil litigation in those countries have been rare. So, developing countries are harmed the most because of the lack of an international regime to prevent the anticompetitive effects of these cartels. These cartels are made up of producers in industrialised countries. Their members are large multinational corporations. There has been limited response from countries to these cartels. To assess the effects of these cartels on developing countries, the authors calculate the imports of "cartel-affected" goods, and find that the developing countries in 1997 imported $51.1 billion in goods from industries that saw international cartel activity at some point during the 1990s.