

# COMPETITION LAW & POLICY IN DEVELOPING COUNTRIES: EXPLAINING VARIATIONS IN OUTCOMES; EXPLORING POSSIBILITIES AND LIMITS

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## I

### INTRODUCTION

More than one hundred and thirty countries or jurisdictions now have laws that seek to safeguard and foster market competition.<sup>1</sup> At a minimum, such competition laws prohibit agreements among supposed competitors to fix prices, divide markets, or in other ways avoid or undermine market competition.<sup>2</sup> Often, these laws go much further. Many additionally seek to constrain the exercise of market power of monopolies and dominant firms in the market for a particular good or service by authorizing regulatory interventions, at least when there is

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1. For a review of the literature and up-to-date analyses of the process of competition law diffusion, see Umut Aydin, *The International Diffusion of Competition Laws*, Paper presented at the Instituto de Ciencia Política, Pontificia Universidad Católica de Chile (June 19, 2015); Tim Büthe & Shahryar Minhas, *The Global Diffusion of Competition Laws: A Spatial Analysis*, Paper presented at the 6th Meeting of the UNCTAD Research Partnership Platform on Competition and Consumer Protection, Geneva (July 2015) (on file with the authors).

2. In the U.S. tradition, laws prohibiting anti-competitive behavior (from cartels to the abuse of dominance in a particular market) are also known as antitrust laws.

evidence of an abuse of such market power. Many also require advance approval of mergers, acquisitions, and joint ventures by a public regulatory agency to ensure that such transactions do not create monopolies or have other serious anti-competitive effects. A number of competition laws even establish a broader competition policy that authorizes competition agencies to engage in advocacy vis-à-vis society to establish a “culture” of competition—and vis-à-vis government entities at the national or subnational level to raise awareness of anti-competitive effects of laws, regulations, or administrative decisions and to urge legislative, regulatory, and other executive bodies to achieve public policy objectives in ways that are compatible with keeping markets competitive.

Many of today’s 130 plus competition law jurisdictions are newcomers—more than two thirds of them enacted their first competition laws within the past twenty-five years.<sup>3</sup> Most of these new competition law jurisdictions are developing countries, where conditions are hardly conducive to the successful implementation of pro-market legislation. A large number of them are poor or even very poor countries with few resources to support even the most promising public policies. Most exhibit high levels of both economic and political inequality; some still have autocratic regimes in which insiders use their political power to extract economic rents by restricting market entry; others have leaders who for their political survival depend upon the support of entrenched economic insiders. These conditions ensure powerful opposition to the meaningful implementation of any competition law. And many jurisdictions have enacted their first competition law or established a regulatory agency for its implementation while also attempting the difficult task of democratizing their political systems or liberalizing their economies.

Additional challenges arise from economic structures or expectations, held by elites and sometimes large parts of the population, that are antithetical to a market economy: In many of the new competition law jurisdictions, the state retains a large ownership stake in many industries or is still expected to guide outputs and inputs of the private sector. Moreover, in a number of these jurisdictions, corruption is rampant in the executive branch, and the judiciary is far from independent, contributing to generally poor rule of law and limited access to justice. And even before adding the regulation of market competition to the tasks assigned to their public administrations, many of the recent competition law adopters suffered from weak bureaucratic capacity.

Recent scholarship has called attention to many of these conditions. It has advanced our understanding of the serious challenges they present to the effectiveness of competition law and policy in developing countries.<sup>4</sup>

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3. Bütthe & Minhas, *supra* note 1. See also Tim Bütthe & Cindy Cheng, *The Effect of Competition Law on Innovation: A Cross-National Statistical Analysis*, in *A STEP AHEAD: COMPETITION POLICY FOR SHARED PROSPERITY AND INCLUSIVE GROWTH* 183–220 (Washington: World Bank & OECD, Conference ed. 2016) (detailing the timing and the often unfavorable context of competition law adoption).

4. See, e.g., ARMANDO E. RODRIGUEZ & ASHOK MENON, *THE LIMITS OF COMPETITION POLICY*:

Some young competition jurisdictions in the developing world, however, appear to have overcome these challenges. Though their records so far are short, some agencies seem to have succeeded in building substantial analytical capacity and establishing considerable autonomy. And in a number of cases, they appear to have become highly effective in dismantling private and public barriers to competition in their countries, contributing to development and other goals of these societies.<sup>5</sup>

A suitably implemented competition law and policy holds much promise. Competition is necessary for the tremendous potential benefits of a market economy to be achieved—including economic growth and innovation that leads to greater variety, increased quality, and/or lower price—and makes it more likely that those benefits are widely shared. At the same time, empowering a government agency to engage in highly consequential market intervention may leave everyone worse off if those powers are abused or exercised incompetently. So there is much at stake in understanding what makes competition law and policy effective. The articles in this symposium seek to explain the variation in trajectories after the initial adoption of a competition law, focusing on two questions:

First, why has the adoption of a competition law and the establishment of a competition agency succeeded in bringing into existence a regulatory agency with substantial analytical capacity and considerable capability to dismantle private and public barriers to competition in some countries, while in others it has largely failed to do so?

Second, what are the conditions under which competition law and policy are effective in contributing to broader goals, such as development, equality, or economic and political liberalization?

Prior to exploring these questions, we first address in part II the meaning of “success” and “effectiveness” for competition law and policy. This analysis structures the subsequent review of the literature because both impediments and conducive conditions are differentially harmful or helpful, depending on what we take to be the goals of competition law and policy. Part III then examines available explanations for variation in outcomes, summarizing what current scholarship considers the most important impediments to the effective implementation of competition law and policy in developing countries, but also scrutinizing the severity of these impediments. Part IV considers factors that

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THE SHORTCOMINGS OF ANTITRUST IN DEVELOPING AND REFORMING ECONOMIES (2010) (providing an incisive study of the challenges presented by recent competition law policy developments); ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (Michal S. Gal et al. eds., 2015); COMPETITION LAW AND DEVELOPMENT (D. Daniel Sokol, Thomas K. Cheng & Ioannis Lianos eds., 2013).

5. See William Kovacic & Marianela Lopez-Galdos, *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes* 79 LAW & CONTEMP. PROBS., no. 4, 2016 for a brief discussion of several successful cases (some also discussed in other articles in this symposium), as well as a discussion of why it is difficult to draw firm conclusions about the trajectory of a country's competition regime during the first twenty to twenty-five years.

should make a competition policy more likely to succeed, focusing on conducive domestic and international political conditions. It examines inter alia the importance and limits of political independence of competition agencies—an issue that is generally under-theorized in the existing literature. Here, we suggest that “embedded autonomy” may be preferable to formalistic independence. Part V provides a brief preview of the other essays in the symposium.

## II

### EFFECTIVENESS AND SUCCESS OF COMPETITION LAW AND POLICY: WHAT IS IT? HOW CAN WE ASSESS IT?

What constitutes “success”—and conversely, what constitutes “failure”—in the realm of competition law and policy? The answer to this question provides the lens through which competition law and policy are assessed. Yet, empirical work has tended to answer the question only implicitly, for instance by examining whether measures of competition law and policy have a significant positive impact on indicators of aggregate economic growth, inward foreign investment flows, democracy, or corruption.<sup>6</sup> Answering this important question only implicitly (and sometimes driven by data availability), however, is neither conceptually nor theoretically satisfying. Instead, answering the question explicitly and deductively must start with the goals of competition law and policy.

A complete review of the long-standing debates over the proper goals of competition law and policy is beyond the scope of this paper.<sup>7</sup> But a comprehensive review also is not necessary here. Instead, we begin by observing that scholars of competition law and policy generally agree that its goals are to foster competition whenever markets are used as an allocation mechanism<sup>8</sup> and to safeguard market competition against anti-competitive practices such as cartels and collusion and against the abuse of market power.

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6. See Serdar Dalkir, *A Quantitative Evaluation of Effectiveness and Efficacy of Competition Policies Across Countries*, in 2 *POLITICS TRIUMPHS ECONOMICS? POLITICAL ECONOMY AND THE IMPLEMENTATION OF COMPETITION LAW AND ECONOMIC REGULATION IN DEVELOPING COUNTRIES* 226 (Pradeep S. Mehta & Simon Evenett eds., 2009) (evaluating the effectiveness of competition laws by their impact on a country’s score on the World Economic Forum’s domestic competition index and levels of foreign direct investment inflows); Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, 9 *COMPETITION L. & ECON.* 593 (2013) (assessing the impact of competition laws on levels of GDP per capita, economic growth and levels of democracy); Jerg Gutmann & Stefan Voigt, *Lending a Hand to the Invisible Hand? Assessing the Effects of Newly Enacted Competition Laws* (Feb. 2014) (unpublished manuscript) (exploring the effects of competition laws on economic growth, investment, total factor productivity, and perceived levels of corruption).

7. For a recent collection, capturing many facets of these debates, see *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* (Daniel A. Crane & Herbert Hovenkamp eds., Oxford University Press 2013).

8. Many would add that the goals include promoting the use of markets over other modes of allocation, but we consider this a theoretically separate question. We also note Schumpeter’s classic insight that extreme levels of competition might eventually become detrimental rather than beneficial for, for example, innovation. For a discussion, see Bütthe & Cheng, *supra* note 3.

But what does this mean concretely? What steps should be taken in pursuit of these general goals and how might we measure whether those goals have been achieved? Deriving specific operational objectives or measures of success from the general goals of competition law and policy is difficult. Part of the difficulty arises from the lack of a precise, widely agreed-upon definition of “market competition,” even in economics, despite the centrality of the concept to that discipline, which generally prides itself on its near-universally shared priors.<sup>9</sup> We therefore structure the discussion in the remainder of this part of the paper around more specific operationalized objectives of competition law and policy, namely: (a) efficiency, (b) human development, (c) private sector rivalry, (d) rivalry vis-à-vis the state, (e) a distinctive “culture of competition,” and (f) economic and political freedom.

### A. Efficiency

Under the influence of the Chicago School and its strictly economic approach to antitrust/competition law and policy, maximizing consumer welfare became in the late 1970s and early 1980s the predominant operational goal of competition law and policy in the United States—and, after some time and to a variable extent, in many other countries, too.<sup>10</sup> Consumer welfare as the ultimate, rhetorically emphasized goal, however, quickly gave way to efficiency as the actual operational goal.<sup>11</sup> Efficiency as a proxy for consumer welfare simplifies the required economic analysis, but can only be justified as long as the assumption can be maintained that efficiency gains will be passed on to consumers—sufficiently so that the expected efficiency gains for consumers will

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9. See Stephen Martin, *Globalization and the Natural Limits of Competition*, in THE INTERNATIONAL HANDBOOK OF COMPETITION 4, 5–11 (Manfred Neumann & Jürgen Weigand eds., 2d ed. 2012) (documenting diverse definitions of competition in the economics literature, such as rivalry, absence of barriers to entry and exit, as a selection mechanism, and as the absence of monopoly); Paul J. McNulty, *A Note on the History of Perfect Competition*, 75 J. POL. ECON. 395 (Aug. 1967) (discussing the difference—and fundamental incompatibility—between Adam Smith’s view of competition and the definition of perfect competition developed and refined by nineteenth and twentieth century economists); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (Feb. 1957) (giving a historical account of the definition of competition, and arguing for the necessity of the concept to evolve with economic theory); John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1, 3, 4–7 (Jan. 1995) (noting that competition has taken on various meanings and interpretations, and discussing the historical development of the concept). The more readily understood notion of perfect competition is too idealized to be analytically useful here, as it would render any deviation from an economy of atomistic individuals impermissible, which would imply trying to prohibit or prevent all institutionalized relationships between economic actors, even though such institutions are crucial for any economy with a substantial division of labor, because they provide for stability and predictability beyond individual transactions. See, e.g., Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (Nov. 1937); VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001).

10. DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION, 142 (2010).

11. This occurred already in the early works by Chicago School proponents, such as Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. ECONOMICS 7, 12, 30 (1966).

more than outweigh the expected risk of consumer welfare losses.<sup>12</sup> Efficiency as an operational goal of competition policy therefore requires careful consideration of whether and to what extent firms have incentives to pass on their efficiency gains.<sup>13</sup>

Efficiency as the operational goal implies prioritizing punishing and preventing the anti-competitive practices that cause the greatest efficiency losses. It has been widely understood to call, above all, for antitrust enforcement against cartels, especially price-fixing and market-allocating agreements among ostensible competitors. Such anti-competitive agreements so clearly result in efficiency losses that many countries' competition laws make them per se violations<sup>14</sup> with a trend toward increased criminalization.<sup>15</sup> Beyond antitrust enforcement against clearly anti-competitive horizontal agreements, however, efficiency as an operational goal requires often complex economic (and political-economic) analyses to distinguish practices and transactions that should be punished or prevented from practices and transactions that seem anti-competitive but might in fact yield efficiency gains.<sup>16</sup>

The Chicago School's claim that efficiency maximization is, or should be, the only legitimate operational goal of competition law and policy remains contested in many countries<sup>17</sup>—including even the United States.<sup>18</sup> The claim that efficiency

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12. Efficiency gains usually accrue to producers, for example, from greater economies of scale in the case of mergers. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 927, 929, 942–944 (Apr. 1979).

13. Strikingly, this need for considering the political-economic strategic incentives is still often ignored in antitrust analyses, even though a reduction in market competition reduces exactly these incentives—as readily shown by game theory, which has otherwise become a staple of competition analysis.

14. Evidence that a cartel agreement existed is thus sufficient for finding participating companies in violation of the law, without any need for an enforcement agency to provide an analysis of the economic effects.

15. See Gregory C. Shaffer, Nathaniel H. Nesbitt & Spencer Weber Waller, *Criminalizing Cartels: A Global Trend?*, in *COMPARATIVE COMPETITION LAW* 301, 302 (John Duns, Arlen Duke & Brendan Sweeney eds., 2015).

16. Such analyses are required because efficiency as the goal of competition policy implies allowing firms to invoke efficiency gains not only for, for example, vertical agreements with ambiguous welfare effects (such as between a producer and a distributor or retailer), but also as a defense for transactions that may appear prima facie anti-competitive, such as horizontal mergers. See David J. Gerber, *Adapting the Role of Economics in Competition Law: A Developing Country Dilemma*, in *ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* 248, 251 (Michal S. Gal et al. eds., 2015).

17. This contestation has been documented inter alia by MAHER M. DABBAH, *INTERNATIONAL AND COMPARATIVE COMPETITION LAW*, *passim* (2010); Gerber, *supra* note 16, at 205–269.

18. See, e.g., Eleanor M. Fox, *The Efficiency Paradox*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 77, 79–80 (Robert Pitofsky ed., 2008) (criticizing the narrow view of efficiency adopted by the Chicago school for suppressing innovative challengers, and paradoxically stifling efficiency); John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 89 (Robert Pitofsky ed., 2008) (arguing that congressional intent and recent case law point to protecting the welfare of consumers as the primary goal of antitrust, rather than efficiency).

gains should be generally available as a defense for anti-competitive structures or practices is similarly contested. It is not necessary, however, to accept these claims in order to accept efficiency maximization or efficiency gains as *one* operational goal of competition law and policy.

Accepting increased efficiency as an operationalized goal of competition law and policy implies that increases in production efficiency, allocation efficiency, or dynamic efficiency can serve as measures of success—insofar as the increases are attributable to competition law and policy.

## B. Economic And Human Development

Many scholars and practitioners argue that increasing efficiency must not be the only goal of competition law and policy—and that this goal might even be misguided for relatively poor countries that are still in the early stages of industrialization, maintain large agricultural sectors, and use few post-industrial services. To be sure, protecting inefficient producers may only postpone painful yet ultimately necessary adjustments at a potentially substantial loss in economic welfare. Exposing inefficient producers to more efficient competitors without limits or assistance, however, amounts to a kind of shock therapy that can cause unnecessary losses of income and productivity—problems exacerbated by the minimalist or entirely absent welfare states in many developing countries.<sup>19</sup> Such shock therapy can intensify poverty and inequality and may even reduce the number of competitors to the point of reducing the overall level of competition in the economy. Moreover, if it brings about massive socio-economic dislocation, a purely efficiency-oriented policy risks undercutting the political support for pro-market reforms, even if those reforms promise substantial long-term benefits. Accordingly, a number of scholars argue that developing countries should be free to use competition law and policy to pursue their varying economic and non-economic developmental needs.<sup>20</sup>

Including economic growth and development among the goals of antitrust is appealing, and all else equal, a developing country should surely implement its competition laws in ways that foster rather than delay or impede development. Growth and development as such, however, are usually too far removed from specific policymaking decisions to yield operational guidance for competition agencies.<sup>21</sup> Moreover, aggregate economic growth as a measure of competition

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19. See NITA RUDRA, GLOBALIZATION AND THE RACE TO THE BOTTOM IN DEVELOPING COUNTRIES: WHO REALLY GETS HURT? (2008); Erik Wibbels, *Dependency Revisited: International Markets, Business Cycles, and Social Spending in the Developing World*, 60 INT'L ORG. 433, 438, (2009) (documenting the underdeveloped social safety net in many developing countries).

20. Some also point out that during the early decades of their competition laws, today's industrialized countries used those laws in pursuit of a wide variety of goals. See, e.g., Aditya Bhattacharjea, *Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis*, in COMPETITION LAW AND DEVELOPMENT 52, 53 (D. Daniel Sokol, Thomas K. Cheng & Ioannis Lianos eds., 2013).

21. See Simon J. Evenett, *Would Enforcing Competition Law Compromise Industrial Policy Objectives?*, in COMPETITION POLICY AND DEVELOPMENT IN ASIA 47 (Douglas H. Brooks & Simon J.

policy success is problematic given the considerable uncertainty around any point predictions from even sophisticated contemporary models of economic growth, which would constitute the counterfactual no-competition-policy baseline against which growth in the presence of competition policy would need to be assessed.<sup>22</sup> We therefore turn to two more specific proposals for implementing a pro-development competition policy.

Bhattacharjea, drawing on the broader notion of human (rather than “just” economic) development, suggests that competition law enforcement and policy in developing countries should focus on “sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture [and its inputs] and health care.”<sup>23</sup> And he argues that developing country agencies should initially focus on disclosing and alleviating concrete *local* impediments to the operation of competitive markets. Such a strategy is promising because it: allows new agencies to build technical capacity by solving relatively tractable problems; enables them to build popular support for competition policy through actions that yield clear benefits for domestic market participants; and gives the agency time to develop transgovernmental linkages with their counterparts in other countries before going after the transnational cartels that often ruthlessly target developing countries.<sup>24</sup> These arguments suggest that the sectoral composition and geographic distribution of implementation and enforcement efforts may serve as initial measures of success, until it becomes possible to assess whether reductions in local distortions and benefits for the poor are indeed materializing.

Fox goes further, both in conceptualizing development as an operational goal of competition policy and in suggesting specific foci for competition policy implementation. Pointing out that severe inequalities in education and access to capital create highly consequential barriers to entry, she suggests that a competition policy that seeks to foster equality of opportunity to partake in the market and share in its benefits must include measures to overcome such inequality or at least its effects.<sup>25</sup> From this perspective, competition law and policy are successful if they contribute to actual increases in market participation from previously marginalized or excluded segments of the population, and could

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Evenett eds., 2005) (noting the difficulty of deriving policy guidance based on agreeing that competition policies should be “pro-growth”).

22. See P.A.M. Jacobs & Simon van Norden, *Why Are Initial Estimates of Productivity Growth So Unreliable?*, 47 J. MACROECONOMICS 200 (2016); V.V. Chari, Patrick J. Kehoe & Ellen R. McGrattan, *New Keynesian Models: Not Yet Useful for Policy Analysis* (Nat’l Bureau of Econ. Research, Working Paper No. 14313, 2008).

23. See Bhattacharjea, *supra* note 20, at 53.

24. *Id.* at 61.

25. Eleanor M. Fox, *Competition, Development, and Regional Integration: In Search of a Competition Law Fit for Developing Countries*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES 273, 275, 281–83, 285 (Josef Drexl, et al. eds., 2011).



be considered at least partly successful to the extent that they measurably reduce the barriers to entry.

### C. Unleashing Rivalry In The Private Sector: Identifying Impediments And Fostering Competition

Now consider “unleashing rivalry”<sup>26</sup> in the market as an objective in itself. This widely acknowledged goal of competition law and policy may be worth pursuing even for a jurisdiction that lacks the enforcement capability to ensure efficiency gains or a positive contribution to economic or human development in each particular case.

Before a competition agency can try to punish or prevent anti-competitive practices through law enforcement or other measures, it needs to identify or detect such threats. This ability to identify impediments to market competition should be treated as conceptually and practically distinct from the ability to remove or reduce such impediments. As Nelson noted in his incisive comment on Posner’s depiction of the Chicago School of antitrust thought: “[i]t may be easier to identify warts than to perform surgery that does not leave scars or have other nasty side effects.”<sup>27</sup>

Identifying impediments to market competition requires capacity building<sup>28</sup> to allow the competition agency to undertake the necessary economic, legal, and possibly political analyses. This capacity is crucial because merely undertaking and publishing the market analyses and disclosing deficiencies in market competition may go a long way toward unleashing rivalry in the private sector before any resources have been devoted to competition law enforcement.<sup>29</sup> Where information about profitable business opportunities is not readily available, merely identifying industries where prices exceed competitive levels, for instance, can unleash rivalry because it will encourage market entry by economic agents seeking profitable opportunities.<sup>30</sup> Where market entry is prevented by seemingly prohibitive structural impediments—such as when bottlenecks in the distribution network render an otherwise competitive industry oligopolistic—explicitly identifying the barriers to entry encourages technological or political innovation to overcome them.<sup>31</sup> And where market

26. We borrow the term from the title of a 2009 report: COMPETITION TRIBUNAL SOUTH AFRICA & COMPETITION COMMISSION SOUTH AFRICA, UNLEASHING RIVALRY: TEN YEARS OF ENFORCEMENT BY THE SOUTH AFRICAN COMPETITION AUTHORITIES (2009), <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf> [<https://perma.cc/E5HJ-UDRF>].

27. Richard R. Nelson, *Comments on a Paper by Posner*, 127 U. PA. L. REV. 949, 952 (1979) (cautioning that “this does not mean that a steady alert and occasional operation are not called for”).

28. See *infra* part IV, for further discussion of what such capacity building entails.

29. See *infra* part II.D for a discussion of policy priorities when market analyses identify laws, regulations, or the actions of public bodies as the key impediments to competition.

30. The same logic applies, a fortiori, if a competition agency’s analyses can pin-point the specific stage(s) of a given product’s value chain that are the main source of the supra-competitive prices.

31. In Kenya, for instance, large numbers of dairy farmers, including tens of thousands of smallholder milk producers, should ensure a highly competitive market for milk and related products. See, e.g., STELLA WAMBUGU, LILIAN KIRIMI, & JOSEPH OPIYO, PRODUCTIVITY TRENDS AND

competition is thwarted by deliberate anti-competitive practices—such as when a nationally dominant firm abuses and maintains its market power by threatening price wars against any new market entrants—public disclosure might, like a naming-and-shaming strategy, encourage self-correction, or at least discourage others from engaging in similar anti-competitive conduct.

Accepting “unleashing rivalry” and hence the identification of impediments as a fundamental operational goal of competition law and policy implies that capacity building itself may initially be a sensible measure of a competition policy’s success. But in line with Kovacic and Lopez-Galdos’s notion of competition agency lifecycles, different metrics are required later.<sup>32</sup> Once an agency has attained the requisite analytical capacity, the actual conduct and publication of analyses identifying impediments to market competition (and estimating the material consequences) should serve as the measure of effectiveness, particularly in an agency’s first decade or two. Only once such practices are well-established would it seem reasonable to assess a competition agency’s pursuit of unleashing rivalry by examining whether or not potential market entrants actually enter the market when it is profitable to do so.

#### D. Unleashing Rivalry Vis-à-Vis The State: Changes In Law And Public Policy

As important as it is to unleash rivalry in the private sector, it is often “the state [that most] harms competition,”<sup>33</sup> including through its rules governing markets, ad hoc policy decisions, preferential conditions for state-owned and directed enterprises, and government-granted monopolies. And as Fox and Healey point out, such problems are especially prevalent in developing countries.<sup>34</sup>

Competition advocacy targeting anti-competitive laws and public policies is increasingly recognized as a distinct but very important part of competition policy.<sup>35</sup> As defined by the International Competition Network, advocacy refers

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PERFORMANCE OF DAIRY FARMING IN KENYA (2011). But milk processing facilities are few and far between, creating a severe bottleneck in conjunction with technological constraints such as a lack of a stable electricity supply in many rural areas and a transportation infrastructure that is sufficiently weak that, for many farmers, only one processing facility is within realistic reach. Diederik de Boer & Jackson Langat, *Dairy Clustering in Kenya*, in DIGGING DEEPER: INSIDE AFRICA’S AGRICULTURAL, FOOD AND NUTRITIONAL DYNAMICS 113, 129, 131, 133 (2013). This has allowed three processors to dominate the formal market for pasteurized milk. As a result, Kenyan consumers continue to pay substantially more for pasteurized milk than consumers in neighboring countries even while the dominant processors have pushed down the prices they pay to producers by twenty-five percent over the last few years. Muchemi Wachira, *Farmers Want Dairy Board to Set Prices of Raw Milk*, BUS. DAILY AFR. (Feb. 27, 2014), <http://www.businessdailyafrica.com/Corporate-News/Farmers-want-dairy-board-to-set-prices-of-raw-milk/-/539550/2224552/-/t5ls7sz/-/index.html> [<https://perma.cc/3S58-WG9V>]

32. See generally Kovacic & Lopez-Galdos, *supra* note 5 (suggesting an agency’s effectiveness should be measured using different metrics at different points in its “lifecycle”).

33. Eleanor M. Fox & Deborah Healey, *When the State Harms Competition: The Role for Competition Law*, 79 ANTITRUST L. J. 769, 775–95 (2014).

34. *Id.*

35. Marco Botta, *Does the EU Competition Law Model Satisfy the Needs of the Emerging Economies? Lessons from the Countries Without a “Carrot”*, in FRAMEWORK FOR ECONOMIC

to “activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”<sup>36</sup> In developing countries, advocacy vis-à-vis legislatures and parts of the executive branch with rulemaking or market-regulating powers should therefore be particularly important.

Accepting the importance of advocacy vis-à-vis the state or governmental bodies as a key element of competition policy in developing countries implies that the conduct of well-prepared advocacy work targeting public actors might already be considered an indication of agency success. In fact, during a competition regime’s initial stages, if its competition law originally did not permit advocacy, the mere incorporation of provisions allowing or prescribing advocacy work—or the legislature’s decision to allocate additional resources for advocacy—may initially serve as a measure of success. Once an agency is well established, success should be measured according to the actual reduction of governmental impediments to market competition.<sup>37</sup>

#### E. Fostering a Culture Of Competition

There are no markets in the Hobbesian “state of nature” where clubs are trumps.<sup>38</sup> Markets in which arm’s-length, voluntary transactions coordinate behavior well enough to foster sustained economic development require a dense web of supportive formal and informal social institutions. Such institutions usually take a long time to develop<sup>39</sup>—an insight that underpins Rodriguez and Menon’s argument for why even well-implemented antitrust laws are likely to fail in many developing countries.<sup>40</sup> Among those supportive social institutions is arguably a “culture of competition,” which, following the ordo-liberal idea that

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DEVELOPMENT IN EU EXTERNAL RELATIONS 2251, 2262 (Karolina Podstawa & Laura Puccio eds., 2012); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT’L L. 403, 450 (1997); William E. Kovacic, *The Role of Non-Litigation Strategies: Advocacy, Reports and Studies as Instruments of Competition Policy*, in HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 541, 542 (Philip Marsden ed., 2006); Armando E. Rodriguez & Malcolm B. Coate, *Competition Policy in Transition Economies: The Role of Competition Advocacy*, 23 BROOK. J. INT’L L. 365, 367–69 (1997).

36. ADVOCACY WORKING GROUP, ADVOCACY AND COMPETITION POLICY 25 (2002), <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf> [<https://perma.cc/23ZN-8URS>].

37. Keeping in mind that the appropriate counterfactual for assessing any reduction should be the level of such impediments that would have been observed in the absence of competition advocacy which may or may not be a situation we actually get to observe.

38. See THOMAS HOBBS, DE CIVE (1642); THOMAS HOBBS, LEVIATHAN (1651) (introducing his notion of the state of nature).

39. See generally JERRY F. HOUGH & ROBIN GRIER, THE LONG PROCESS OF DEVELOPMENT: BUILDING MARKETS AND STATES IN PRE-INDUSTRIAL ENGLAND, SPAIN, AND THEIR COLONIES (2015).

40. See generally A.E. Rodriguez & Ashok Menon, *The Causes of Competition Agency Ineffectiveness in Developing Countries*, 79 LAW & CONTEMP. PROBS., no. 4, 2016.

competition is foundational to a market economy, may be defined as a broad-based consensus that competition is both generally beneficial and normatively desirable.<sup>41</sup>

Historical analyses of the development of EU competition law and policy often emphasize the fostering of such a culture of competition as one of the EU Commission's most important contributions to reducing pervasive cartelization and collusion.<sup>42</sup> U.S. regulators and private sector practitioners with a long time horizon similarly tend to mention creating and maintaining such a culture as an important contribution of U.S. antitrust law and policy.<sup>43</sup> To be sure, the European Commission's ability to foster a competition culture in local business communities might have depended upon local legal institutions and bureaucratic capacity that are lacking in many developing countries.<sup>44</sup> But such practical impediments, discussed in part III below, do not invalidate the goal.

As a practical matter, accepting fostering a culture of competition as a goal of competition law and policy implies engaging in advocacy targeted towards the society at large. It may also call for at least a minimum level of actual enforcement to signal that the rules are meaningful.

In the early years of a new competition regime, merely engaging in targeted and appropriate advocacy might be considered a sign of success. But ultimately, changes in the expectations of, and normative dispositions toward, market competition, if they can be attributed to the competition authority's efforts, should be the key measure of success in creating a culture of competition.

## F. Economic And Political Freedom

Economic resources can almost always be used to gain influence—in the market and beyond. It is therefore hardly surprising that the inherently political character of highly concentrated economic power has been central to debates over competition law and policy from the beginning. That high concentrations of economic power are inimical to economic and political freedom was a prominent theme in Senate debates over the bills that eventually became the U.S. Sherman

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41. See FRANZ BÖHM, WALTER EUCKEN & HANS GROSSMAN-DOERTH, *THE ORDO MANIFESTO OF 1936* (1936), reprinted in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 254, 265 (Daniel A. Crane & Herbert Hovenkamp eds., 2013) (arguing for the centrality of competition to a market economy, not just for achieving economic efficiency but also for preserving economic and political freedom).

42. See, e.g., Stephen Wilks, *Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement*, 3 EUR. COMPETITION J. 415 (2007) (arguing that the development of a competition culture has been a crucial component of the success of the European Commission and the European Competition Network).

43. Author's not for attribution interviews, in Washington, DC (Mar. 27, 2015). See also TONY A. FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990* (1992) (arguing that antitrust emerged as a response to the rise of big business, yet also became a political and cultural value shaping business strategies and culture in the United States and Great Britain).

44. See Josef Drexler, *Economic Integration and Competition Law in Developing Countries*, in *COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES* 231, 243–46 (Josef Drexler, et al. eds., 2011).

Act of 1890.<sup>45</sup> Moreover, as most explicitly articulated by ordo-liberal competition law and policy scholars and practitioners,<sup>46</sup> if economic power is political power, some restrictions on market concentration may be of fundamental importance for the compatibility of political democracy and a market economy.<sup>47</sup>

Safeguarding economic and political freedom as an operational goal has not received much attention in the literature on competition law and policy in developing countries, but may be particularly pertinent because many of them have only quite recently made the transition to democracy. It underscores the continued importance of (some) structuralist market analysis and suggests that competition policy may need to be attentive to the broader contextual factors that affect the extent and ease with which economic power can be transformed into political power.

Table 1.1 summarizes the discussion above. It serves as a basis for thinking more systematically about both well-known and less-analyzed impediments to effectiveness and success, further discussed in part III.

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45. See LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, PART I: THE ANTITRUST LAWS 61–364 (Earl W. Kintner ed., 1978) (“This bill is a step in the right direction, and if it shall the beginning of the end of this system of conspiracies and combinations it will be hailed as the dawn of genuine freedom, and if it is not so constructed as to accomplish this purpose, I hope that the Senate will so amend it as to make it effective” (p. 77 (citing 20 CONG. REC. S3458 (statement of Sen. Jones))); “If the concentered [sic] powers of this combination are intrusted [sic] to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities” (p. 117 (citing 21 Cong. Rec. S2457 (statement of Sen. Sherman)))).

46. See, e.g., FRANZ BÖHM, COMPETITION AND THE FIGHT AGAINST MONOPOLIES: AN EXAMINATION OF THE LEGAL RIGHT TO ECONOMIC CONTESTATION AND OF THE LEGAL UNDERPINNINGS OF THE CONTEMPORARY ECONOMIC ORDER (1933); Franz Böhm, *Democracy and Economic Power*, in CARTEL AND MONOPOLY IN MODERN LAW: REPORTS ON SUPRANATIONAL AND NATIONAL EUROPEAN AND AMERICAN LAW 25 (1961); WALTER EUCKEN, ECONOMIC POWER AND ECONOMIC ORDER: EUCKEN’S LONDON LECTURES ON ECONOMIC POLICY AND TWO ESSAYS ON ANTI-MONOPOLY POLICY (2001).

47. See Alexander A. Kirshner, *Legitimate Opposition, Ostracism, and the Law of Democracy in Ancient Athens*, 78 J. POL. 1094, 1097–1101 (2015) (discussing the Ancient Athenian practice of ostracism, which Kirshner categorizes as an “anti-monopolistic” institution, introduced as part of the Kleisthenic reform to safeguard Athenian democracy and repeatedly used against citizens who, having amassed a “kingly fortune” in Athens’ market economy, were seen by the citizens as a threat to democratic governance; ostracism was the practice of banning a person from the city state for ten years based on an annual ballot). See also Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646–648 (Feb. 1998) (drawing parallels between competitive markets and democratic politics, and arguing for judicial intervention when dominant political parties adopt measures to entrench their position, like dominant firms in markets).

**Table 1.1**  
**Defining and Measuring Competition Policy Success**

| <b>Operational Goal</b>                     | <b>Implementation (Policy Priorities)</b>   | <b>Possible Measures of Effectiveness and Success*</b>   |
|---|---|--|
| Efficiency                                  | <ul style="list-style-type: none"> <li>• Antitrust enforcement against (punishment and prevention of) anti-competitive practices that cause clear and substantial efficiency losses</li> <li>• Implementation guided primarily by economic analysis</li> </ul>  | <ul style="list-style-type: none"> <li>• Increases in production efficiency</li> <li>• Increases in allocation efficiency</li> <li>• Increases in dynamic efficiency</li> </ul>  |
| Development:<br>Economic & Beyond           | <ul style="list-style-type: none"> <li>• Targeting competition law enforcement/policy for maximum potential benefits to the poor</li> <li>• Targeting local distortions of market competition</li> <li>• Addressing inequality as impediment to market entry</li> </ul>                                 | <ul style="list-style-type: none"> <li>• Sectoral and/or geographic focus of competition law/policy implementation</li> <li>• Reduction in local distortions and actual benefits for poor and previously excluded/marginalized</li> <li>• Long-term: Improved capacity for market entry by indigenous entrepreneurs</li> </ul>         |
| Unleashing Rivalry<br>in the Private Sector | <ul style="list-style-type: none"> <li>• Building market-analytical capabilities for identifying impediments to competition in the private sector</li> </ul>  | <ul style="list-style-type: none"> <li>• Capacity building as such (initially)</li> <li>• Long-term: Identifying and publicizing impediments to market competition, incl. anti-competitive structures and behavior</li> </ul>  |
| Unleashing Rivalry<br>vis-a-vis the State   | <ul style="list-style-type: none"> <li>• Competition advocacy targeting legislative bodies and the parts of the executive branch with rulemaking or market-regulating powers</li> </ul>   | <ul style="list-style-type: none"> <li>• Legislative authorization and funding for advocacy work vis-à-vis state or governmental bodies (initially)</li> <li>• Advocacy work targeting state or governmental bodies (initially)</li> <li>• Long-term: Reduction of unnecessary government impediments to market competition</li> </ul> |
| Unleashing a Culture<br>of Competition      | <ul style="list-style-type: none"> <li>• Advocacy vis-à-vis the business community and society at large</li> </ul>  | <ul style="list-style-type: none"> <li>• Conduct of suitable advocacy work targeting economic actors and society at large (initially)</li> <li>• Long-term: Changes in social expectations and normative disposition toward market competition</li> </ul>  |
| Economic & Political<br>Freedom             | <ul style="list-style-type: none"> <li>• Attentiveness to political-legal institutional determinants of the political usability of economic power</li> <li>• Conditional on such usability: Structural analysis of market concentration and economic power (irrespective of “abuse” thereof)</li> </ul> | <ul style="list-style-type: none"> <li>• Sensitivity to conditional effect of market structure on political (in)equality (initially)</li> <li>• Long-term: Freedom from private economic power maintained/expanded</li> <li>• Long-term: Nominal political-legal equality remains de facto meaningful</li> </ul>                       |

\* All outcome measures are to be read as “... if attributable to competition law and policy,” which as a practical matter at a minimum implies: above and beyond increases/decreases that would be achieved in the absence of competition law and policy.

### III EXPLAINING VARIATIONS IN OUTCOMES (1): IMPEDIMENTS TO COMPETITION POLICY EFFECTIVENESS IN DEVELOPING COUNTRIES

The existing literature identifies many obstacles to the effective implementation of competition law and policy in developing countries. Such obstacles can be grouped into five categories. We specify how each of these common conditions of developing countries is said to interfere with the success of competition law and policy, especially in relation to the operational goals of competition policy discussed in part II.

#### A. Resource Constraints

The most commonly noted characteristic of developing countries' competition policies is a shortage of resources on three levels: financial resources for the competition agency; legal and economic expertise within the implementation/enforcement agency; and antitrust and economic expertise within the judiciary. These resource constraints affect a competition agency's ability to pursue or achieve all six of the goals identified in part II, though most severely the pursuit of efficiency due to its greater reliance on sophisticated economic analyses and law enforcement. It may be possible, however, to overcome these constraints in a number of respects.

##### 1. Financial Resources

Staff salaries usually constitute a competition agency's greatest expenditure (followed by the costs of administrative support and information technology equipment).<sup>48</sup> A shortage of financial resources thus translates to a shortage of staff and inability to hire additional, specialized outside experts. This affects the agency's ability to pursue any of the previously identified goals by undermining its ability to carry out the legal, economic, and political analyses that are required if the agency is pursuing an efficiency-maximizing competition policy, trying to target competition policy such that it is maximally supportive of the country's development needs, or seeking to identify public and private impediments to market competition. Lack of financial resources also constrains an agency's ability to engage in advocacy work to foster a culture of competition. While all possible goals are thus affected by financial resource constraints, enforcement-focused approaches should be particularly severely hampered because of the additional costs of on-site investigations and staff-intensive trial preparation and performance.<sup>49</sup>

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48. See Glob. Competition Rev., *Rating Enforcement 2016, Analysis: Part 2*, GLOB. COMPETITION REV. (2016), <http://globalcompetitionreview.com/surveys/article/41412/analysis-part-2> [<https://perma.cc/6FKA-79BH>] (showing that out of thirty-nine competition agencies surveyed, thirty allocate more than fifty percent of their budget to staff salaries, and fourteen allocate seventy-five percent or more of their budget on salaries).

49. See Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions*:

## 2. Expertise in the Agency

Shortage of expertise, particularly of well-trained competition lawyers and economists, impedes both an agency's ability to appropriately prioritize its activities and to enforce its laws and policies. As Gerber points out, this problem becomes even more acute when competition agencies choose a more economics-based approach to competition law, that is, when they pursue an efficiency-maximization goal. The sophisticated models needed for evaluating anti-competitive conduct and the stringent data requirements for the pursuit of efficiency require higher computational and staff resources.<sup>50</sup>

## 3. Expertise in the Judiciary

For enforcement-focused competition regimes in which the agency must bring and win its cases before a judge, the judiciary's lack of familiarity—not just with antitrust economics but also with the often recently adopted competition law—can be a very serious problem. In Mexico, for instance, the lack of expertise in the courts crippled early years of competition policy enforcement when district judges reversed agency decisions in several crucial cases.<sup>51</sup> In Chile, the Supreme Court used its broad powers of review to decrease fines imposed by the competition agency, in one case to less than \$100.<sup>52</sup> Furthermore, a lack of expertise in the judiciary can cause broader problems, such as an excessive backlog of cases that renders judicial review of competition agency decisions meaningless. Such delays enable anti-competitive actors to avoid judgments by utilizing the slow-moving appeals process. In Turkey, for example, delays of up to four years in the judicial review process often rendered the agency-imposed fines negligible due to high inflation rates.<sup>53</sup>

In sum, resource constraints are a real problem. Competition agencies in developing countries frequently have staffs so small that it is literally impossible for them to carry out all of their assigned tasks.<sup>54</sup> However, developing country agencies may be less unique in this regard than they seem. Few, if any, competition agencies have come to life fully formed and well-resourced. The EU

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*Learning from Experience*, in ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW 296, 311–314 (Michal S. Gal et al., eds., 2015) (discussing the implications of human and financial resource shortages for the enforcement of competition law in developing countries); Michal S. Gal, *When the Going Gets Tight: Institutional Solutions When Antitrust Enforcement Resources Are Scarce*, 41 LOY. U. CHI. L.J. 417, 423–425 (2010) (describing the implications of resource scarcity on the enforcement of competition law, and discussing possible solutions).

50. Gerber, *supra* note 16, at 253.

51. ORG. FOR ECON. COOPERATION & DEV., COMPETITION LAW AND POLICY IN MEXICO: AN OECD PEER REVIEW 45 (2004).

52. Javier Tapia & Santiago Montt, *Judicial Scrutiny and Competition Authorities*, in THE GLOBAL LIMITS OF COMPETITION LAW 141, 155 (D. Daniel Sokol & Ioannis Lianos eds., 2012).

53. ORG. FOR ECON. COOPERATION & DEV., TURKEY – PEER REVIEW OF COMPETITION LAW AND POLICY 41–42 (2005), <http://www.oecd.org/turkey/34645128.pdf> [<https://perma.cc/TY74-EHN6>].

54. See, e.g., Keabetswe Newel, *Competition Authority is Understaffed*, BUS. WKLY. & REV. (Nov. 3, 2015), <http://www.businessweekly.co.bw/competition-authority-is-understaffed/> [<https://perma.cc/7F7Y-DG2C>] (discussing the impact of staff shortages on Botswana's Competition Authority's enforcement efforts).



Commission's Directorate General for Competition (originally DG IV) illustrates this point well. When first set up—amidst considerable skepticism even among those member states who had supported the treaty provisions for a supranational competition policy—DG IV had a pitifully small staff. It had no meaningful resources beyond the intellectual firepower of the individuals who applied for the low-rank, low-prestige positions, mostly out of intrinsic commitment but with little prior experience, since none of the member states had meaningful competition law enforcement agencies at the national level prior to 1957. For the first several years, DG IV mostly just conducted market analyses to gain the analytical and practical experience needed for its later enforcement work. It also built a constituency by making impediments clearly known to market participants who could benefit from their removal. And it alerted these constituents to the availability of EU-level competition law and policy as a means of seeking redress.<sup>55</sup>

The EU experience suggests that capacity can (and maybe must) be built internally. It also highlights the issue of sequencing, a central component of Kovacic and Lopez-Galdos's argument that an assessment of the trajectory of a competition agency is only possible after twenty to twenty-five years. The capacity (and political support) for market analysis, advocacy, and law enforcement must first be built, preferably in that order, and then rendered independent of the charisma of a founding head of the agency, before the sustainability of an agency's success can adequately be evaluated.<sup>56</sup>

Matching tasks to available resources can make capacity-building more successful. Newly established agencies should, for instance, avoid requiring notification and review of all mergers, acquisitions, and joint ventures, no matter how small. Though sweeping notification requirements may be attractive because they usually generate fee income, they can also overwhelm the agency with the processing of paperwork alone, leaving no time for analysis and capacity-building. Even when the aspirations of an agency, as written into the authorizing law and implementing regulations, are not matched by budgetary allocations, the agency can still recover much ground by effectively setting its own priorities. Competition agency experts from developing countries as diverse as Jamaica, Egypt, Kenya, and Thailand, for instance, have emphasized the need to balance vigorous competition law enforcement with the allocation of scarce resources and skilled personnel to other pressing policy problems.<sup>57</sup>

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55. For details, see Tim Büthe & Gabriel T. Swank, *The Politics of Antitrust and Merger Review in the European Union: Institutional Change and Decisions from Messina to 2004* (Harv. Ctr. for Eur. Stud., Working Paper No. 142, Dec. 2006).

56. See Kovacic & Lopez-Galdos, *supra* note 5, at 94–97.

57. See Frank Emmert, Franz Kronthaler & Johannes Stephan, *Analysis of Statements Made in Favour of and Against the Adoption of Competition Law in Developing and Transition Economies*, HALLE INSTITUT FÜR WIRTSCHAFTSFORSCHUNG, SONDERHEFT 45, 56 (2005).

Moreover, attrition of skilled staff to the private sector is an even greater concern in developing countries than it is in advanced industrialized countries. Each year between 2005 and 2015, South Africa's Competition Commission lost more than 18% of its staff on average; the Mexican Federal Competition Commission 20%; and the Russian Federal Antimonopoly Service more than 24%.<sup>58</sup> Training and integrating new recruits can be a significant burden on an agency's financial and human resources—if the developing country's competition agency is able to replace the lost staff at all. Yet, though attrition can be a real problem in the short run, it may be better to view, and more palatable to defend, such lost training and manpower as positive spill-over from a public investment to the larger economy: if agency training in competition law and policy creates transferable skills, it may also earn political support for the agency's work.

Finally, even generous funding and staffing do not guarantee success. "Effectiveness gaps"—where an agency performs below the expected degree of effectiveness given their level of funding and expertise—are widespread.<sup>59</sup> Sometimes, other impediments may be so severe that even a well-funded and well-staffed agency cannot make a big difference. More often, however, it seems that an unwise use of resources (for political expediency or due to inattention to building capacity) explains those effectiveness gaps.

## B. Unsupportive Or Hostile Political–Legal Environment

A second set of obstacles to effective competition policy enforcement in many developing countries is political–legal in nature. We begin with impediments rooted in the legal and judicial system, then turn to impediments attributable to the broader political environment.

Many of the developing countries that have adopted competition laws in the last twenty-five to thirty years are characterized by weak rule of law and low judicial independence. These challenges are often exacerbated by restricted "access to justice"<sup>60</sup> for those who are not already socio-economically privileged; and small businesses as well as potential market entrants are often among the marginalized. Such conditions are a significant problem for the enforcement-focused competition policy in pursuit of economic efficiency (whereas they do not have a deductively clear effect on the pursuit of the other objectives of competition policy, discussed in part II above): The judiciary usually plays an important role as the final arbiter in the enforcement of competition law, even in systems where the initial steps in enforcement take place as an administrative process within the competition agency. Conditions limiting access to the judiciary

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58. Authors' calculations, based on *Rating Enforcement 2005–2015*, GLOB. COMPETITION REV. (2005–2015), <http://globalcompetitionreview.com/surveys/archive>. For comparison, the average for the same period was fourteen percent for the Australian Competition and Consumer Commission and five percent for Germany's Cartel Office (and a higher percentage of these departures were due to retirement compared to the developing countries).

59. Dalkir, *supra* note 6, at 238–244.

60. See WORLD JUSTICE PROJECT, RULE OF LAW INDEX (2015), <http://worldjusticeproject.org/rule-of-law-index> [<https://perma.cc/MRH9-M6TE>].

therefore inhibit the likelihood that competition law will be effective in achieving socially desirable outcomes. And often-pervasive corruption exacerbates the problem by creating uncertainty about the impartiality of competition law enforcement whenever suspicion of corruption extends to the judiciary or the competition agency.

Autocratic regimes, weak democracies, and generally high political inequality are also common among younger competition regimes. Autocratic regimes in particular are often sustained by a close alliance between entrenched economic elites in oligopolistic industries and a small group of political insiders. The former may be partly a creation of the latter, such as when members of the autocratic elite or the armed forces create monopolies and oligopolies in order to (re)distribute a larger share of the national income to themselves than they could obtain with competitive markets. In weak democracies, diffuse economic interests, such as the interests of consumers, also tend to be poorly represented or altogether marginalized.<sup>61</sup> These inequalities increase the risk of political interference in the implementation of the country's competition law and policy in the interest of firms with privileged access to political leaders. And firms with market power or exceptional economic resources due to their anti-competitive practices are among the most likely to have privileged access.

Having an unsupportive or even hostile political–legal environment is very likely to undermine enforcement-focused, efficiency-maximizing competition policies. But severe political inequality can also affect the ability to advance development objectives, foster rivalry in an underdeveloped private sector, or advance economic freedom through competition policy. These objectives require an ability to target competition law and policy to the detriment of insiders, making it very likely that those insiders will attempt interference. Advocating competition-compatible public policies is also less likely to be successful under conditions of high political inequality, because entrenched interests will likely pressure legislators or government bodies to prevent changes in laws and policies that generate rents for those entrenched interests.<sup>62</sup>

In sum, political–legal factors affect the ability of competition law and policy to achieve many of its possible goals, possibly severely. To be sure, one might argue that the possibility of political intervention is simply an additional reason to call for the adoption of a competition policy with a strong advocacy role (vis-à-vis both public actors and civil society), to be implemented by a competition agency with reinforced independence. However, anything more than a marginal contribution to democratizing the political system, increasing judicial independence, and ending corruption is too much to ask of even the most resourceful competition agency. Unlike in the case of resource constraints,

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61. Stephen Weymouth, *Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries*, 61 ANTITRUST BULL. 296 (2016).

62. Interference with policies that seek to foster a culture of competition should be unlikely, because such policies are much less immediately threatening to entrenched interests.

skillful implementation of competition law and policy by itself cannot overcome the problem.

### C. Lack Of Competition Culture

Distrust toward—or at least anxiety regarding—market mechanisms is common in many developing countries, and especially in countries that have only recently transitioned from either a socialist or a capitalist-yet-state-dominated economy to a market economy. Put differently, the normative commitment to market competition as the fundamental principle of economic relations is in many developing countries weak—among economic elites as well as in society at large.

In developing countries where such a competition culture is lacking, many scholars and practitioners consider it one of the most important impediments to effective competition law and policy,<sup>63</sup> even though it affects most of the operationalized goals identified in part II only indirectly. The lack of a competition culture can make it harder to find skilled economists and lawyers committed to working for an agency whose mission it is to safeguard and foster market competition. This in turn makes it more difficult to develop the capacity to identify impediments to competitive markets, which undermines the first, foundational step toward “unleashing rivalry,” as well as for an efficiency-oriented competition policy.

The lack of a competition culture also makes it less likely that competitors, customers, and maybe suppliers will turn to the competition agency when they encounter direct evidence—or apparent consequences—of suspected anti-competitive behavior. Such a lack of information from competitors and the consuming public is likely to significantly impede the identification of anti-competitive conduct: Even the U.S. and EU competition agencies, with their substantial staffs and sophisticated market-analytical capabilities, rely on formal complaints or quiet tip-offs from competitors, customers and consumers, or disgruntled former or current employees of firms engaged in anti-competitive conduct for some eighty percent of their enforcement actions.<sup>64</sup> A dearth of supporting information-provision from private actors due to the lack of a competition culture therefore can be expected to hamper—indirectly, yet seriously—the goal of unleashing rivalry, as well as the pursuit of efficiency. To a

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63. See, e.g., Allan Fels & Wendy Ng, *Rethinking Competition Advocacy in Developing Countries*, in *COMPETITION LAW AND DEVELOPMENT* 182, 183 (D. Daniel Sokol, Thomas K. Cheng & Ioannis Lianos eds., 2013) (identifying the need to build competition culture in developing countries, and advocating a national competition policy approach similar to the one taken in Australia); David Lewis, *Embedding a Competition Culture: Holy Grail or Attainable Objective?*, in *COMPETITION LAW AND DEVELOPMENT* 228, 230–235 (D. Daniel Sokol, Thomas K. Cheng & Ioannis Lianos eds., 2013) (arguing for the need to promote competition culture in countries with new competition regimes, not just among private actors but also within the government itself, based on experience of the South African Competition Commission, whose success in its first decade in mergers and cartels was overshadowed in its second decade by ministerial and judicial intervention into the Commission’s enforcement efforts).

64. Authors’ not for attribution interviews, Brussels and Washington, D.C.

lesser extent it may also affect the implementation of a development-oriented competition policy and of an advocacy-focused policy targeting the public sector and policymakers.

The lack of a competition culture, moreover, may be expected to impede law enforcement, possibly severely, because it makes it less likely that judges accept the premise of the competition law, which in turn will impede the enforcement-focused pursuit of efficiency. A strategy aimed at unleashing rivalry is also likely to suffer, because a lack of a competition culture reduces the probability that potential competitors will actually enter the market when incumbent firms are making supra-competitive profits.

The most severely detrimental consequence, however, is likely political: Without deep-seated support for market competition, the “natural” constituency for competition law—composed of groups such as consumers, and producers and entrepreneurs facing high entry barriers from existing firms—does not form and surely will not become vocal. The lack of a competition culture thus deprives the competition agency of advocates and allies in society, which play a helpful supporting role for the pursuit of any of the goals discussed in part II but will be particularly critical if a competition law and policy is to be used to safeguard political and economic freedom.

In sum, the lack of a competition culture is indirectly, but in important ways, detrimental to the achievement of almost all of the goals of competition law and policy. In addition, it directly affects competition culture as a goal, requiring advocates of competition law and policy to create and nurture such a culture rather than maintain and strengthen it.

The good news is that the lack of a competition culture also is a problem that competition agencies can themselves help alleviate. They can do so through a competition policy that puts advocacy (*vis-à-vis* society as much as *vis-à-vis* government agencies) front and center and thus builds a competition culture—and with it, a supportive political coalition, as Agüero shows in his analysis of the development of the Chilean competition regime.<sup>65</sup> Recognizing the importance of building a competition culture, the World Bank and the International Competition Network have recently started a joint program to highlight effective competition advocacy programs to help agencies elsewhere learn from successful advocacy efforts.<sup>66</sup>

#### D. Institutionally Underdeveloped Markets

Competition law and policy can only improve the performance of a market economy if there actually is a market—a market that, absent anti-competitive

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65. See generally Francisco Agüero, *Chilean Antitrust Policy: Some Lessons Behind Its Success*, 79 LAW & CONTEMP. PROBS., no. 4, 2016.

66. See WORLD BANK, THE 2015–2016 COMPETITION ADVOCACY CONTEST: HOW TO BUILD A CULTURE OF COMPETITION FOR PRIVATE SECTOR DEVELOPMENT AND ECONOMIC GROWTH (Oct. 2015–Jan. 2016), <http://www.worldbank.org/en/events/2015/10/30/the-2015-2016-competition-advocacy-contest-how-to-build-a-culture-of-competition-for-private-sector-development-and-economic-growth>.

structures and conduct, is functional. Two types of contextual factors render markets too dysfunctional to support an effective competition policy: institutional deficiencies, discussed here, and market imperfections created by geographical and other physical constraints, discussed in part III.E.

### 1. Weak or Poorly Enforced Property And Contract Rights

For goods and services to be traded in a market, it must be possible to meaningfully transfer property rights from one person or firm to another. Anything other than a spot transaction requires contractual commitments to be meaningful, and therefore usually enforceable.<sup>67</sup>

### 2. Government Directing Economic Activity

Many developing countries' economies do not work like true markets because the state retains significant ownership stakes in a number of industries. The government then uses this ownership to interfere politically in management decisions or to direct economic activity to achieve various non-economic objectives. Directly regulating competition among rivals through government-sanctioned monopolies can have a similar effect, as can price controls for industries that are not natural monopolies. For instance, the Mexican state effectively organized and protected a cartel when its telecommunications regulator ordered all Mexican carriers "to set their rates for calls entering Mexico at the rate set by the largest firm," Telmex.<sup>68</sup>

### 3. Exemptions From The Competition Law

An even more obvious institutional deficiency is created by categorical exemptions of state-owned enterprises or government-sponsored monopolies from the applicability of the country's competition law.<sup>69</sup> Other exemptions remove specific industries or entire sectors (such as agriculture) from the authority of the competition agency. In many Latin American countries, economic activity equaling more than sixty percent of GDP is exempt from antitrust enforcement through exemptions of nationalized strategic activities or industries.<sup>70</sup> In Mexico, for example, the constitution defines postal services, petroleum and other hydrocarbons, nuclear energy and electric power, and other sectors as "strategic" and therefore exempt from the application of the country's

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67. Contract enforcement can in principle be informal and communal. *See* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE (2006). But as Richman points out, communal enforcement is not compatible with fundamental principles of competition law, such as the prohibition on collusive refusal to buy or sell (boycotts). Barak D. Richman, *Contracts and Cartels: Reconciling Competition and Development Policy*, in COMPETITION LAW AND DEVELOPMENT 155, 164-166 (D. Daniel Sokol, Thomas K. Cheng & Ioannis Lianos eds., 2013).

68. Fox & Healey, *supra* note 33, at 772.

69. *See, e.g.,* Ley de Promoción de la Competencia y Defensa del Consumidor [Law for the Promotion of Competition and Consumer Protection], No. 7474, art. 9 (1994) (Costa Rica).

70. IGNACIO DE LEON, AN INSTITUTIONAL ASSESSMENT OF ANTITRUST POLICY: THE LATIN AMERICAN EXPERIENCE 50 (2009).

competition law.<sup>71</sup> In other countries such as Colombia and Venezuela, activities as diverse as agriculture, professional sports, labor organizations, and exports have been exempted from antitrust laws.<sup>72</sup> The larger the share of the country's economy affected by these exemptions, the less likely competition policy is to have a notable effect.

Having institutionally under-developed markets reduces the chances of competition policy attaining most of the objectives identified in part II, but it affects some more than others. Institutional deficiencies such as the absence of well-defined and readily enforceable property and contract rights should make an efficiency-oriented competition policy particularly unattainable,<sup>73</sup> whereas a development-oriented competition policy need not be much impeded by having the government direct *some* economic activity. By contrast, the chances of unleashing rivalry in the private sector will be potentially severely diminished, at least if institutional deficiencies create great uncertainty about the likelihood of commercial success when entering a market, whereas an advocacy-focused competition policy that seeks to establish a culture of competition may be impeded but can still hold much promise. Similarly, we would expect a negative effect on a competition agency's ability to "unleash rivalry vis-à-vis the state" through advocacy targeting elected officials and government agencies (as well as on its ability to pursue a competition policy aimed at safeguarding political and economic freedom) if market-based alternative solutions are less available or attractive, but such an effect need not be severe.

Much also will depend upon how sweeping the exemptions are: If a country's competition law can be readily rendered inapplicable by being able to portray the anti-competitive conduct in question as necessary due to any other law or due to the actions of any government policy ("state action"), it may be hard for a competition agency to make much headway. At the same time, this hardly suggests the futility of competition law in some general sense, but rather should alert us to the deficiencies in a given country's market-governing rules as interacting with the country's competition regime.

#### E. Geographically Or Physically Underdeveloped Markets

Last but not least, many developing countries have underdeveloped domestic markets due to size or geography, poor or limited physical infrastructure connecting producers and consumers or traders, or climatic conditions that prevent economic actors from using the existing infrastructure to create a single domestic market.<sup>74</sup>

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71. Constitución Política de los Estados Unidos Mexicanos, [CP] art. 28, Diario Oficial de la Federación [DOF] 03-02-1983, últimas reformas 20-12-2013.

72. DE LEON, *supra* note 70, at 56.

73. Working towards a culture of competition, if successful, should, collaterally, also increase support for the strengthening of contract and property rights and would thus alleviate one of the underlying problems over time.

74. Gal & Fox, *supra* note 49, at 307.

Size can affect the effectiveness of competition policy in two ways. First, domestic markets might have too few potential consumers for a given product or service to work like a truly competitive market, even in the absence of anti-competitive conduct. Size here is partly a matter of numbers, but also a matter of the level of economic activity. A country with a large but mostly poor population still has only a small market for products for which there is no demand among this population. This is why Gal advocates the small-country analogy as apt for many markets in developing countries.<sup>75</sup> Second, the size of the domestic market affects enforcement efforts against international cartels and mergers. Foreign firms can easily circumvent a small country's penalties or conditions by simply forgoing access to its market—a problem that motivates, in part, Ralf Michael's proposal in his article for this symposium.<sup>76</sup>

In sum, size matters. Even the most brilliantly executed competition policy cannot by itself bring about significant improvements in efficiency if the market is characterized by structural weaknesses. There also is not much room for unleashing rivalry through purely domestic strategies in an economically “small” country. The chances of competition policy achieving other goals seem much less affected by the size of the market.

Size, however, is by no means the only pertinent geographic characteristic. Neoclassical economics assumes away transportation costs (along with most other transaction costs). But for anything except light-weight, high-value goods, transportation costs still matter, both domestically and internationally.<sup>77</sup> Time and again in economic history, the transportation infrastructure has determined, and often radically changed, the boundaries of markets.<sup>78</sup> Today, innovations in information and communications technology, along with new technologies such as three-dimensional printing, promise to do the same again without the need to transport physical goods.<sup>79</sup> For the overwhelming share of most developing countries' economies, however, the extent to which consumers and producers are connected by both transportation and communication infrastructures currently remains critical to determining the extent of any market.

The feasibility of transport and communications is, at least in part, a function of geography. Mountain ranges, deserts, oceans, and major rivers are formidable

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75. See Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 *FORDHAM INT'L L. REV.* 1, 12ff, 31–37 (2009).

76. See generally Ralf Michaels, *Supplanting Foreign Antitrust*, 79 *LAW & CONTEMP. PROBS.*, no. 4, 2016.

77. David Hummels, *Transportation Costs and International Trade in the Second Era of Globalization*, 21 *J. ECON. PERSPECTIVES* 131, 151 (2007) (showing that distance and variations in transportation costs still explain a large share of countries' bilateral trade volumes, even with the significant decline in costs of air, land and ocean transport that are documented in the article).

78. See RICHARD FRANKLIN BENDEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900* (2000) (detailing the creation of a truly national economy in the United States).

79. For a prescient perspective on these developments, see *HOW REVOLUTIONARY WAS THE DIGITAL REVOLUTION? NATIONAL RESPONSES, MARKET TRANSITIONS, AND GLOBAL TECHNOLOGY* (John Zysman & Abraham L. Newman, eds. 2006).



barriers to building a transportation infrastructure, often depriving a country of a national market and dividing it instead into multiple, smaller jurisdictions. Within the Democratic Republic of Congo, for instance, the left and right banks of the Congo form practically unconnected economic spheres for hundreds of miles, even though there is commercial traffic along the river.<sup>80</sup> In Nepal, the majority of the population is estimated to have few, if any, opportunities for economic exchange beyond the local barter economy because the mountainous geography of rural Nepal turns every valley into a largely separate economic entity.<sup>81</sup> Climatic conditions in many developing countries can similarly prevent the maintenance of a national market: in countries as diverse as Bangladesh, The Gambia, Kenya, Nepal, Sudan, and Nicaragua, for instance, a substantial share of the country's roads become unusable for part of each year with the onset of rainy season.<sup>82</sup>

Do these characteristics of many developing countries' markets constitute insurmountable obstacles to an effective competition policy? Geography and climatic conditions surely are hard to change, though even these factors are usually less constraining for richer countries, which can afford an infrastructure that makes their national markets much less likely to be meaningfully subdivided by such conditions. And though the extent to which a country has an infrastructure connecting its producers and consumers to each other by creating a national-level domestic market is partly a function of resources, it also is a matter of political priorities. Similarly, economic size is at least in part a political choice rather than a given, as trade openness can greatly extend the size of the market,<sup>83</sup> especially when accompanied by domestic policies that help connect

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80. See, e.g., *Democratic Republic of Congo*, in AFRICAN ECONOMIC OUTLOOK 2005–2006 215, 223–225 (describing in some detail the “dilapidated or inexistent” transportation infrastructure of the Democratic Republic Congo). The beginnings of the “reconstruction of infrastructure” have started in recent years. See *Country Notes: Congo*, in AFRICAN ECONOMIC OUTLOOK 2014: GLOBAL VALUE CHAINS AND AFRICA’S INDUSTRIALIZATION 1f (2014); see also AFRICAN DEVELOPMENT BANK, OECD & UNDP, AFRICAN ECONOMIC OUTLOOK 2015: REGIONAL DEVELOPMENT AND SPATIAL INCLUSION 76 (2015).

81. World Bank, *Feature Story: Connecting Nepal’s Rural Poor to Markets* (2009), <https://www.worldbank.org/en/news/feature/2009/12/17/connecting-nepals-rural-poor-to-markets> [<https://perma.cc/KK42-E8R7>] (describing how “Nepal’s rugged terrain prevent[s] people from moving with ease” with “some 60% of [its] road network and most rural roads not operable during the rainy season”). For an overview of the disparity of economic condition within the country, see NEPAL HUMAN DEVELOPMENT REPORT 2014 11–24 (2014), [http://hdr.undp.org/sites/default/files/nepal\\_nhdr\\_2014-final.pdf](http://hdr.undp.org/sites/default/files/nepal_nhdr_2014-final.pdf) [<https://perma.cc/DKQ2-PYS7>].

82. See, e.g., José A. Barbero, *Logistics Challenges in Central America*, in GETTING THE MOST OUT OF TRADE AGREEMENTS IN CENTRAL AMERICA 181, 199 (J. Humberto López & Rashmi Shankar eds., 2011).

83. See generally SETH K. JOLLY, *THE EUROPEAN UNION AND THE RISE OF REGIONALIST PARTIES* (2015) (showing how the highly institutionalized supra-national economic integration of the EU has increased the viability of political movements for autonomy and “national” independence within several of the member states of the EU); Alberto Alesina, Enrico Spolaore & Romain Wacziarg, *Economic Integration and Political Disintegration*, 90 AM. ECON. REV. 1276, 1277 (2000) (developing a formal model that endogenizes the number and size of countries as a function of openness to trade); David A. Lake & Angela O’Mahony, *The Incredible Shrinking State: Explaining Change in the Territorial Size of Countries*, 48 J. CONFLICT RESOL. 699, 719–20, (2004) (documenting and explaining the increase

domestic producers and consumers to international markets—though it should not be assumed that international integration of product or financial markets alleviates, rather than exacerbates, problems that need to be addressed by competition policy.<sup>84</sup> In contrast to some of the other obstacles faced by competition regimes, this cannot be alleviated by skillful competition regulators: Competition law and policy themselves seem unlikely to affect the broader policy priorities that are at issue here. That said, the impact of these obstacles on the likely effectiveness of a development-oriented competition policy with its primarily local focus, as well as on advocacy-based policies or on the benefits of being attuned to concerns about political and economic freedom should be modest. And where public policy shows a clear commitment to minimizing the effects of these seemingly immutable constraints, competition policy may yet hold much promise.

**Table 1.2**  
**Variation in Expected Detrimental Effect of the Impediments,**  
**by Competition Law and Policy Goal/Objective**

|  | Efficiency       | Development      | Unleashing Private | Unleashing Public | Culture of Competition           | Freedom                  |
|--|------------------|------------------|--------------------|-------------------|----------------------------------|--------------------------|
| Resource Constraints                                       | major            | minor            | minor              | minor             | minor                            | major (but surmountable) |
| Weak rule of law; low judicial independence                | major            |                  |                    |                   |                                  |                          |
| Political inequality (formal or de facto)                  | major            | major            | major              | minor             |                                  | major                    |
| Lack of a competition culture                              | major (indirect) | minor (indirect) | major (indirect)   | minor (indirect)  | major (direct, but surmountable) | minor (indirect)         |
| Institutionally under - developed markets                  | major            |                  | major              | minor             | minor                            | minor                    |
| Geographic/ physical deficiencies of the country's markets | major            | minor            | major              | minor             | minor                            | minor                    |

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in the average size of states in the 19th and decrease in the 20th century).

84. For an overview, see Tim Büthe, *The Politics of Market Competition: Trade and Antitrust in a Global Economy*, in OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL TRADE 213 (Lisa L. Martin ed., 2014).

IV  
 EXPLAINING VARIATIONS IN OUTCOMES (2):  
 POLITICAL SUPPORT AS A CONDUCIVE CONDITION FOR EFFECTIVE  
 COMPETITION POLICY

Variation in outcomes is not only explained by variation in the impediments to competition policy effectiveness discussed in part III. It is also a function of variation in conducive conditions, among which we believe the following three to be particularly important, building on previous theoretical literature as well as case studies. They are three distinct elements of the political context, in which competition law and competition agencies operate.

A. Domestic Political Allies

The presence of domestic allies who are supportive of the competition agency appears to have been an important factor in several successful cases. The availability of such allies is in part a function of the country's regime type. For instance, democratization gives a voice to previously excluded groups such as consumers and small businesses, who are natural allies for competition agencies' efforts to curb the power of dominant economic actors that prevent newer firms from entering into markets.<sup>85</sup> In addition, a vibrant civil society can help a competition agency succeed in safeguarding economic and political freedom, establishing a culture of competition, and spurring rivalry in the private sector. Non-governmental organizations—such as the India-based Consumer Unity and Trust Society, and the Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional in Brazil—for instance educate the public and contribute to national debates on competition policy.<sup>86</sup> A competition agency may also find allies among other regulatory agencies and different parts of the government and the bureaucracy when their interests coincide in pursuit of regulating the country's competitive process. Consumer protection agencies, such as those in Mexico and Chile (where these agencies are separate from the countries' competition agencies), have aided competition law enforcement by providing information to competition agencies or by bringing class action suits to claim damages on behalf of consumers against dominant firms or cartel members, thus augmenting the deterrent effect of fines imposed by the competition agencies.<sup>87</sup> Cooperative relations between different government agencies may

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85. Weymouth, *supra* note 61, at 5.

86. Albert A. Foer, *The Role of Non-Governmental Organizations in the Development of Competition Law*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW 279, 287 (Josef Drexler et al. eds., 2009).

87. In México, PROFECO (Federal Attorney's Office of Consumer) helped initiate an investigation into a national poultry cartel by providing information it gathered through monitoring price levels in the markets. See COMISIÓN FEDERAL DE COMPETENCIA, ANNUAL REPORT 2012 60 (2012), [http://189.206.114.203/images/stories/Publicaciones/Informes anuales/Annual\\_Report2012.pdf](http://189.206.114.203/images/stories/Publicaciones/Informes anuales/Annual_Report2012.pdf). The Chilean SERNAC (National Consumers' Service) has sued the cartel members in both the pharmacies and the poultry cartel cases. See *Colusión de Medicamentos*, SERNAC (Feb. 1, 2013), <http://www.sernac.cl/colusion-de-medicamentos-ernac-demanda-a-salcobrand-cruz-verde-y->

also help avoid jurisdictional overlaps, conflicting mandates, and potential turf wars, and allow agencies to draw on one another's expertise.

## B. International And Transnational Political Support

Political support from international and regional organizations may also help boost a competition agency's effectiveness in various ways. International organizations such as the United Nations Conference on Trade and Development, the Organization for Economic Cooperation and Development, and the International Competition Network, provide competition agencies with much needed resources and know-how on enforcement issues. The first two have working groups focused on various aspects of competition law and its enforcement. The third, a virtual network of competition agencies founded in 2001, aims to promote convergence among national competition laws and enforcement practices.<sup>88</sup> These three organizations hold regular fora for competition agencies from all over the globe to share experiences and exchange recommendations. They offer technical assistance to younger competition agencies and provide opportunities for voluntary peer reviews of competition law and its enforcement.<sup>89</sup> These fora create peer groups that foster learning and capacity building in younger agencies, and create pressure on them to build and maintain a reputation as an independent, effective agency.<sup>90</sup>

Regional organizations can also positively influence the effectiveness of competition policies within member states, prospective member states, and associated countries, as illustrated by the European Union (EU). The EU typically includes competition law provisions in its trade and association agreements, and candidate countries have to adopt competition laws or modify their existing laws to conform to EU legislation in this area.<sup>91</sup> The adoption and subsequent development of competition laws and policies in Central and Eastern Europe was influenced significantly and, for the most part, positively by EU membership negotiations.<sup>92</sup> The conditionality of the competition provisions in

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farmacias-ahumada-y-pide-compensa/ [https://perma.cc/F9YF-J4DG].

88. See Maria Coppola, *ICN Best Practices: Soft Law, Concrete Results*, CPI ANTITRUST CHRON. 2 (July 2011); Marie-Laure Djelic & Thibaut Kleiner, *The International Competition Network: Moving Towards Transnational Governance*, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 287, 287 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006).

89. The World Bank and the Inter-American Development Bank also financially support various national and regional projects in the area of competition policy, and foster research in this field.

90. For an insightful analysis of many aspects of the ICN's operations, conceptualizing the ICN as a "network of networks," see Yane Svetiev, *Partial Formalization of the Regulatory Network* (Mar. 2010), <http://ssrn.com/abstract=1564890> [https://perma.cc/HP3B-HLWV].

91. See Umut Aydin, *Promoting Competition: European Union and the Global Competition Order*, 34 J. EUR. INTEGRATION 663, 673–674 (2012) (documenting how the EU has promoted the adoption of competition laws in its neighborhood through accession and association agreements); Thomas J. Doleys, *Promoting Competition Policy Abroad: European Union Efforts in the Developing World*, 57 ANTITRUST BULL. 337, 340 (2012) (describing the EU's efforts to export its competition law to developing countries, and arguing that the scope of political-legal integration, and market dependence account for the variation in outcomes).

92. Eleanor M. Fox, *The Central European Countries and the European Union's Waiting Room*:

the Customs Union Agreement of 1996 played a key role in the adoption of the Turkish competition law, and membership negotiations have contributed to the maturation of the Turkish competition authority.<sup>93</sup> However, regional organizations elsewhere have only recently gone beyond declamatory politics.<sup>94</sup> And in the case of the West African Economic and Monetary Union, the aspiration to establish the primacy of a supranational competition regulator actually appears to have weakened existing competition agencies at the national level, for example, in Senegal.<sup>95</sup>

Foreign support can be a double-edged sword, however. On the one hand, such support may help alleviate impediments to agency effectiveness by addressing issues such as lack of resources and expertise. International and regional organizations may also serve as important external anchors for competition policy reforms, which may otherwise be blocked by entrenched interests, private or public. On the other hand, such foreign support may reinforce the perception of competition law as a foreign import, and undermine local receptiveness to such laws. Foreign support may also leave less room for developing countries to devise competition laws that are more attuned to local conditions—which, as Eleanor Fox argues in her contribution to this symposium, is critical for ensuring that the competition law and policy serve the interests of the country enacting it.<sup>96</sup> Such laws also have a better chance of being enforced.<sup>97</sup> Thus, while support from international and regional organizations has been key to the effectiveness of competition law and policy in some developing countries, there are also significant pitfalls to international involvement.

### C. Embedded Autonomy Rather Than Formalistic Agency Independence

The independence of regulatory bodies has become a major issue in analyses of governance and the evolution of the regulatory state.<sup>98</sup> According to the conventional wisdom, regulators as “agents” should be independent from elected politicians as their nominal political “principals” in order to be able to pursue

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*Why Must They Adopt the EU's Competition Law?*, in COMPETITION AND ECONOMIC INTEGRATION IN EUROPE 31 (Saul Estrin & Peter Holmes eds., 1998).

93. See Umut Aydin & Kemal Kirisci, *With or Without the EU: Europeanization of Asylum and Competition Policies in Turkey*, 18 S. EUR. SOC'Y & POL. 375, 386 (2013).

94. See generally, COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Josef Drexel, et al. eds., 2011). A few regional bodies, such as COMESA, have since 2011 established competition agencies or at least moved from long unenforced competition rules toward the beginnings of a real competition policy.

95. Mor Bakhom & Julia Molestina, *Institutional Coherence and Effectiveness of a Regional Competition Policy: The Case of the West African Economic and Monetary Union*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES, *supra* note 94, at 96.

96. Eleanor M. Fox, *Competition Policy: The Comparative Advantage of Developing Countries*, 79 LAW & CONTEMP. PROBS., no. 4, 2016.

97. See Gal & Fox, *supra* note 49, at 303.

98. See, e.g., MARTINO MAGGETTI, REGULATION IN PRACTICE: THE DE FACTO INDEPENDENCE OF REGULATORY AGENCIES (2012); Arndt Wonka & Berthold Rittberger, *Credibility, Complexity and Uncertainty: Explaining the Institutional Independence of 29 EU Agencies*, 33 W. EUR. POL. 730 (2010).

their assigned goals without distraction from conflicting agendas, and in particular, to ensure that the principals cannot pressure them to abuse their regulatory powers for short-term political gains of the elected politicians.<sup>99</sup> In addition, regulatory bodies need to be autonomous from those whom they regulate to prevent capture by special interests.<sup>100</sup> These arguments have been particularly clearly articulated with regard to central bank independence. Even though there are notable differences between central banks and regulatory agencies,<sup>101</sup> the core arguments in favor of central bank independence and autonomy have been said to apply similarly to competition authorities.<sup>102</sup> On the empirical side, in addition to case studies supportive of the importance of agency independence,<sup>103</sup> there is statistical evidence that de facto independence of competition agencies increases the perceived effectiveness of a country's anti-monopoly law or policy.<sup>104</sup> Other analyses suggest that both de jure and de facto independence of competition agencies leads to significantly higher total factor productivity, as well as lower levels of corruption, in both developed and developing countries.<sup>105</sup>

Does this imply that the optimal institutional arrangement is one that maximizes agency independence? Notwithstanding the above arguments and findings, the benefits of independence should depend on the strength of the rule of law in the country (which is a hallmark of liberal democracy but should be considered a distinctive institutional characteristic) and the strength of political support for competition policy. Competition agencies thus might not need pure independence or autonomy but rather something akin to what Evans, when

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99. See, e.g., Daniel Y. Kono, *Optimal Obfuscation: Democracy and Trade Policy Transparency*, 100 AM. POL. SCI. REV. 369 (2006) (discussing the incentives of elected political leaders to use regulations, among other means, to provide rents to favored groups in a way that obfuscates political responsibility for doing so at the expense of the general public).

100. For recent reviews of the theoretical literature and assessments of the empirical evidence of the causes and consequences of regulatory capture, see PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel P. Carpenter & David A. Moss eds., 2014); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203 (2006).

101. Fabrizio Gilardi, *The Same, But Different: Central Banks, Regulatory Agencies, and the Politics of Delegation to Independent Authorities*, 15 COMP. EUR. POL. 303, 306 (2007) (arguing that while delegation to central banks and regulatory agencies is similarly driven by concerns with credibility, delegation follows a different pattern in each case, varying with the number of veto players as well as the extent of political uncertainty).

102. John Vickers, *Central Banks and Competition Authorities: Institutional Comparisons and New Concerns* 14–16 (Bank for Int'l Settlements, Working Paper No. 331, Nov. 2010).

103. E.g., Fred O. Boadu & Tolulope Olofinbiyi, *Regulating the Market: Competition Law and Policy in Kenya and Zambia*, 26 WORLD COMPETITION 75, 82, 89 (2003) (suggesting that the stronger record of the Zambian agency in controlling monopolies and economic power is due to the greater autonomy of that agency).

104. Tay-Cheng Ma, *Competition Authority Independence, Antitrust Effectiveness, and Institutions*, 30 INT'L REV. L. & ECON. 226, 231 (2010).

105. See Stefan Voigt, *The Effects of Competition Policy on Development: Cross-Country Evidence Using Four New Indicators*, 45 J. DEV. STUD. 1225, 1239–45 (2009). But see Mattia Guidi, *The Impact of Independence on Regulatory Outcomes: the Case of EU Competition Policy*, 53 J. COMMON MARK. STUD. 1195, 1206 (2015) (finding no effect of agency independence on the levels of foreign direct investment or consumer prices in European countries).

discussing characteristics of the state that are conducive to adjustment and economic growth, called “embedded autonomy.”<sup>106</sup>

We have reasoned that competition regulators often need to challenge not only the anti-competitive practices of private-sector elites, but also the anti-competitive practices of state-owned enterprises and unnecessarily competition-restricting laws and regulations. This reasoning arguably applies particularly strongly in developing countries. It implies the need to take on entrenched interests of private-sector elites, as well as entrenched interests within the government and the state. Any agency to take on such an agenda on its own would need to be extraordinarily powerful to stand a chance.<sup>107</sup>

Some form of autonomy from the political elite surely is a necessary element of the competition agency’s power. However, an agency with such an ambitious agenda cannot function effectively without political support.<sup>108</sup> Agency budgets are customarily subject to legislative approval; competition laws often require adjustments, especially during the early years, to make them work in the local context; legislative action is needed to keep fines meaningful in high-inflation countries; and legislators and regulators in other parts of the executive branch need to be responsive to the agency’s advocacy efforts. This dependence on other political actors provides ample opportunity for pushback, which creates a need for competition agencies to be embedded in the political system—to have concrete ties that provide institutionalized channels for negotiation of goals and policies<sup>109</sup> and enactment of reforms.

Likewise, a competition agency’s total isolation from society is not desirable either. Autonomy from concentrated and powerful economic interests is necessary if the competition agency is to effectively enforce the law against such interests. At the same time, the agency needs to make a sustained effort to

106. Peter Evans, *The State as Problem and Solution: Predation, Embedded Autonomy, and Structural Change*, in *THE POLITICS OF ECONOMIC ADJUSTMENT* 139 (Stephan Haggard & Robert Kaufman eds., 1992) (building on John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *INTERNATIONAL REGIMES* 195 (Stephen D. Krasner ed., 1983)).

107. Indeed, the power of a regulatory agency able to take on such a broad swath of entrenched interests would have to be so great as to be arguably incompatible with democratic governance. See Brian Barry, *Does Democracy Cause Inflation? Political Ideas of Some Economists*, in *THE POLITICS OF INFLATION AND ECONOMIC STAGNATION* 280 (Leon N. Lindberg & Charles S. Maier eds., 1985).

108. For a discussion of the challenge if not necessarily complete futility of trying to foster a competition culture without political support, see, e.g., TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930–2004* (2006) (outlining the development of Japanese competition law and policy); ELEANOR M. HADLEY & PATRICIA HAGAN KUWAYAMA, *MEMOIR OF A TRUSTBUSTER: A LIFELONG ADVENTURE WITH JAPAN* (2003) (providing a more personal account of this historical development); Marco Botta, *Does the EU Competition Law Model Satisfy the Needs of the Emerging Economies? Lessons from the Countries Without a ‘Carrot’ in* *FRAMEWORK FOR ECONOMIC DEVELOPMENT IN EU EXTERNAL RELATIONS* 51 (Karolina Podstawa & Laura Puccio eds., 2012) (providing a comparative analysis of the Argentinian and Brazilian competition regimes); see also Frédéric Jenny, *Competition Authorities: Independence and Advocacy*, in *THE GLOBAL LIMITS OF COMPETITION LAW* 158, 162 (Ioannis Lianos & D. Daniel Sokol eds., 2012) (distinguishing between structural and operational independence).

109. Evans, *supra* note 106, at 12.

communicate with the public to gain and maintain a good understanding of societal preferences and perceptions—and to explain to civil society in a clear and persuasive manner the benefits of competition law and policy. The Mexican Competition Commission, for instance, sees its sustained efforts to make the public aware of the need for competition in the Mexican economy as essential to preparing the ground for legislative changes that strengthened the country's competition law.<sup>110</sup> An agency's embeddedness in society is important for gaining domestic political allies that generally help it succeed. It also might strengthen enforcement efforts by improving the flow of information between the public and the agency, and it might possibly even lead to better compliance with the law. As both firms and the public at large learn more about cartels and their costs to the society, for instance, public naming and shaming starts to become a stronger deterrent against cartels.

#### IV

##### THE SYMPOSIUM: A PREVIEW

The symposium begins with a paper by Armando Rodriguez and Ashok Menon on *The Causes of Competition Agency Ineffectiveness in Developing Countries*.<sup>111</sup> The article builds on their important book-length examination of why the reality of competition law implementation and competition policy in developing countries often falls far short of the ex ante promises and expectations of policymakers and legal advisors.<sup>112</sup> This disappointing performance arguably is especially puzzling since the laws adopted by the new competition jurisdictions often incorporate an impressive array of “best practices,” as defined by the pioneers of competition law and policy among advanced industrialized countries. Rodriguez and Menon's article in this symposium, however, goes well beyond the discussion of practical shortcomings of competition agencies' enforcement practices, which might explain the divergence between the theoretical strengths of competition laws on the books and the reality of competition policy practice. Specifically, Rodriguez and Menon argue that competition law and policy are in the end more likely to do harm than good in the developing world. Markets in developing countries, they caution, are very far from the optimal mechanisms for the efficient allocation of values through arm's-length transactions in neoclassical economics. The deficiencies of market-supporting institutions—such as dearth of trust, weak property rights, and lack of timely and independent administrative or judicial contract enforceability—force market participants to rely on a variety of non-market mechanisms to make economic exchange possible and not overly risky. And what to Western or Northern antitrust analysts readily *appear* to be anti-competitive structures (such as overly close relationships between private sector firms and the state) or anti-competitive behaviors (such as price

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110. Angel López Hoher, *Competition Advocacy in Mexico: Lessons from the Past Decade*, 2 CPI ANTITRUST CHRON. 2–3 (2012).

111. Rodriguez & Menon, *supra* note 40.

112. See RODRIGUEZ & MENON, *supra* note 4.



discrimination to the detriment of economic actors with whom the seller has no established relationship) are in fact, Rodriguez and Menon argue, solutions to deficiencies in market-supporting institutions, which are efficient in a Coasean sense. Therefore, Rodriguez and Menon argue, competition agency interventions against anything other than pure “hard-core” or “naked” private-sector cartels will jeopardize or even choke off mutually beneficial economic exchanges rather than yield gains in efficiency or any other legitimate objective of competition law and policy.

Eleanor Fox’s consciously provocative article, *The Comparative Advantage of Developing Countries*, contrasts with Rodriguez and Menon, offering a glass-half-full rather than a glass-half-empty perspective.<sup>113</sup> Similar to Rodriguez and Menon, she argues that OECD countries’ (and especially U.S.) “best practices,” designed for well-functioning markets, are often ill-suited for new competition jurisdictions in the developing world, which are trying to create market competition in an environment of weak institutions and privileged, entrenched market players that are often emanations of the state. But she challenges the idea that developing countries are limited to a second-rate implementation of first-world legal blueprints. Rather, she submits, new competition regimes in the developing world actually have two advantages compared to the more established regimes (even though they find themselves in the sea of handicaps). First, not having the baggage of many years of antitrust, developing countries have better incentives to design competition law and policy regimes that are well-adapted to their own needs today. In the older regimes, existing laws and enforcement agencies (and the interests that have grown up around them) make institutional change path-dependent and efficient institutional adaptation difficult. New competition regimes in developing countries, by contrast, can (*ceteris paribus*) design competition regimes suitable for their arguably distinctive goals, including inclusive development and the need to foster rivalry vis-à-vis the state. Second, because some of their most palpable harms arise from hybrid state and private restraints at the border, they have better incentives to design and embrace a supra-national framework that can help make markets work for them.

Whereas Rodriguez and Menon’s discussion is mostly categorical, Fox’s argument suggests a conditional answer to the two key questions motivating this symposium: She hypothesizes that success—especially with regard to the broader objectives of developing countries’ competition laws—should be more likely the more a country’s competition law (and its agency’s practices) represent a home-

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113. Fox, *supra* note 96.

grown adaptation rather than an adoption of a foreign template of Western best practices.

William Kovacic and Marianela Lopez-Galdos, the authors of the third article after this introduction, address the symposium's central questions head-on, developing a series of conditional answers, and exploring the factors that contribute to the successful implementation of competition law principles across a large number of competition regimes.<sup>114</sup> In *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, Kovacic and Lopez-Galdos develop an argument about likely trajectories of competition regimes over their first twenty to twenty-five years in existence, with a typology based on three ideal-types. Based on meticulous primary research that included extensive interviews with competition agency officials and other policymakers, as well as years of participant observation by one of the authors, they identify the factors that improve the prospects for effective implementation. They highlight—and examine in much greater detail—several of the factors briefly discussed in this introduction (such as funding, expertise, and political support, as well as generally supportive collateral institutions) but they also go further. Based on a wealth of original research across a large number of new competition regimes, Kovacic and Lopez-Galdos find, for instance: Agencies that develop a general capacity and specific tools for learning from their own and others' experiences tend to get on (or are able to switch to) a path toward effectiveness. Successful agencies tend to assess their capacities periodically, and return to their national legislatures for upgrades.

The article by Kovacic and Lopez-Galdos is followed by three separate single-country analyses, tracing the development of the competition regimes of Chile, Mexico, and China, respectively. In *Chilean Antitrust Policy: Some Lessons Behind Its Success*, Francisco Agüero explores how the Chilean competition regime has evolved from a mostly ineffective system when it was established in 1959 to one of the success stories in Latin America.<sup>115</sup> Agüero's explanation for the success of the Chilean competition regime emphasizes its embeddedness in the political system, as well as a flourishing competition culture in the country. Support from political parties across the ideological spectrum has enabled legislative changes in 2003, 2009, and 2016, which have strengthened the Chilean competition law and enforcement institutions—an illustration of the “upgrades” discussed by Kovacic and Lopez-Galdos. The solid enforcement record of the agency and the tribunal, as well as the publicity afforded by the recent discovery of a number of cartel cases in key markets, have contributed to a flourishing competition culture among economic actors and the society at large.

Like its Chilean counterpart, the Mexican competition regime is one of the success stories in Latin America. It is the focus of Umut Aydin's contribution to

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114. Kovacic & Lopez-Galdos, *supra* note 5.

115. Agüero, *supra* note 65.

this symposium.<sup>116</sup> In *Competition Law and Policy in Mexico: Successes and Challenges*, Aydin examines what allowed Mexico's Federal Competition Commission, after the mixed record of its first fifteen years, to become a generally highly effective enforcement agency more recently. She argues that both institutional learning and a series of legislative reforms were critical. And those reforms were made possible by a domestic constituency supportive of strengthening Mexico's competition law, which included civil society actors, competition lawyers, and firms trying to break into traditionally dominated markets—a coalition consciously fostered by the Competition Commission itself. International and transnational actors such as the Organization for Economic Cooperation and Development and the International Competition Network also aided the reform process with their expert assessments and recommendations, as well as their political support to help convince the legislators of the need for reforms.

In *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, Yane Svetiev and Lei Wang explore the reasons behind the success of the Chinese competition regime.<sup>117</sup> Svetiev and Wang argue that Chinese policymakers and enforcers have not blindly followed mature competition regimes, but rather have incorporated domestic specificities and policy concerns in drafting the law, designing the institutional structure for enforcement, and making individual decisions—much like what Fox advocates for developing countries' competition regimes in general. In the face of uncertainty about the role and possible effects of a competition instrument, Chinese enforcers also sought and received considerable input from market and civil society actors regarding their implementation of the Anti-Monopoly Law, which has allowed them to incorporate multiple policy objectives besides efficiency and consumer welfare. As a result, Chinese competition enforcement is openly sensitive to a broader set of policy goals compared to the legal and technocratic antitrust templates of mature jurisdictions. Such societal contestation, according to Svetiev and Wang, both enlivens competition law in the Chinese context and has the potential to deliver positive results along various public policy dimensions, including developmental and distributional ones.

Though Chile, Mexico, and China, might all be considered successful cases, it is unlikely that all countries will be able to establish effective competition regimes at the domestic level. The final article in the symposium, Ralf Michaels' *Supplanting Foreign Antitrust*, explores the contours of a competition law regime that offers a substantial improvement if the status quo is having no “functioning antitrust regime.”<sup>118</sup> Specifically, Michaels examines under what conditions it is desirable for the regulatory agency and courts of a country with a well-

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116. Umut Aydin, *Competition Law and Policy in Mexico: Successes and Challenges*, 79 LAW & CONTEMP. PROBS., no. 4., 2016.

117. Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, 79 LAW & CONTEMP. PROBS., no. 4, 2016.

118. Michaels, *supra* note 76.

functioning anti-cartel regime to exercise jurisdiction over cartels that have some or even all of their effects in a country without such a regime—in the absence of a treaty that might explicitly delegate jurisdiction and possibly even in the absence of a request from the latter country’s government.<sup>119</sup> After developing a proposal that specifies the conditions that would need to be met for such “supplanting” to be legitimate, Michaels works through three different scenarios or constellations: A multinational cartel case, where an international cartel has anti-competitive effects in at least one jurisdiction with a well-functioning competition regime and at least one without such a regime; a transnational cartel, where firms from one or more countries with a functioning competition regime collude to the exclusive detriment of economic actors in a third country without such a regime; and strictly “domestic” cartel cases, where the members of the cartel, their anti-competitive actions, and those who are thereby harmed all reside in a country without an effective competition regime. Only for the “domestic” case do a number of possible objections hold, Michaels argues.<sup>120</sup> In sum, supplanting antitrust allows countries without an effective domestic competition regime to deter anti-competitive behavior that is detrimental to its citizens.

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119. His analysis focuses exclusively on anti-cartel law and policy; parts may be applicable to other competition issues, too, but Michaels explicitly brackets such an extension of his proposal.

120. Even here supplanting antitrust would be desirable if it took place with the consent of the country where the harm occurred, though as a practical matter, Michaels suggests that supplanting is virtually inconceivable under such conditions.