Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices

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ABSTRACT

This Article outlines the different policy alternatives that could guide antitrust enforcement in developing countries. These include efficiency-based goals (allocative, productive, economic, and dynamic efficiency) and non-efficiency-based goals (protecting small businesses; achieving international competitiveness; eradicating poverty; and promoting fairness, equality, and justice). The actual antitrust goals selected by fifty developing countries are then presented. Finally, a proposal is made with regards to what developing countries should aim at achieving with their antitrust law enforcement. This normative take is geared towards realizing dynamic efficiencies or technological progress, coupled with redistribution through antitrust rules, as the accelerators of growth and development. Promoting growth through innovation, as an antitrust objective, corresponds to a desire to incorporate antitrust policy within a broader development agenda that is more suitable to developing countries than static efficiency-based goals.

I. INTRODUCTION

It is futile to argue whether developing countries should or should not adopt competition laws. The reality is that, despite adopting them due to Western and international pressure in many instances, most developing countries currently have competition laws and an enforcing authority in place.[1] Many scholars have focused their analyses on the *kind* of laws developing countries should adopt.[2] The argument repeatedly made is that developing countries need competition laws adapted to their eco-

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1. For a detailed analysis of why developing countries adopt antitrust laws, see Dina Waked, *Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law*, 1 GLOBAL ANTITRUST REV. 69 (2008).

2. *See id.*

nomic, social, and political backgrounds, and they should not cut and paste laws developed elsewhere.[3] However, many developing countries adopt competition laws identical to those established in more advanced countries.[4] This renders focusing on the need for specifically tailored laws for developing countries rather pointless. What is worth considering, and what has been addressed in recent literature, is what developing countries should pick as their policy orientation to guide their enforcement strategies.

Contrary to expectations, previous research has shown that developing countries do enforce their antitrust laws.[5] From this respect, an analysis of the policies that guide their enforcement process and those that *should* guide their enforcement is worthwhile. So far, we only know that most developing countries do enforce their antitrust laws and that their enforcement varies given their developmental, ideological, international, political, and institutional frameworks.[6] Yet, we do not know what they aim at achieving when they enforce these laws. This Article first discusses different goals of competition law enforcement. It also discusses what goals developing countries actually choose to guide their enforcement activity. The discussion ends with a normative assessment on what the guiding policy for developing countries' antitrust enforcement *should* be. This normative stance places antitrust as a tool in a broader developmental agenda for developing countries to pursue, with the purpose of enforcement being the realization of growth through dynamic efficiencies or technological progress, coupled with redistribution. Dynamic efficiency, as used by Alice Amsden and Ajit Singh, is used here to refer to the maximizing of the long-term rate of growth of industrial and overall productivity.[7]

Antitrust laws can be used as tools to achieve predetermined social and economic outcomes. Developing countries, therefore, have a choice to make as to the normative baseline that drives their competition policy and enforcement process. Their "objectives can shape enforcement policy and priorities. [These objectives] can alert policymakers to any gaps between actual and desired outcomes from current enforcement. They

3. *See, e.g.*, Michal S. Gal, *The "Cut and Paste" of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J. L. REFORM 467 (2007).

4. *See* Waked, *supra* note 1.

5. *See* Dina I. Waked, Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries (Dec. 22, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=2044047.

6. Dina Waked, Antitrust Laws in Developing Countries: An Empirical Analysis of the Reasons and Effects of Enforcement and Non-Enforcement (2012) (unpublished SJD Dissertation, Harvard Law School) (held by author, available upon request).

7. Alice H. Amsden & Ajit Singh, *The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea*, 38 EUR. ECON. REV. 941, 941 (1994).

can assist the courts in applying antitrust legal standards to assure that the result is aligned with the objectives."[8]

The frequently used quotation from Robert Bork's *Antitrust Paradox* captures the importance of finding the desirable objectives:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.[9]

This is particularly relevant for developing countries that are still shaping their antitrust legacy and do not have decades of antitrust jurisprudence to fall back on and try to make sense of.

To answer the question of "what the point of the law is," developing countries must assess their own needs and tailor their competition law enforcement in a way that particularly addresses what they consider important, be it development, growth, redistribution, or even poverty eradication.

The selected goal should guide the enforcement process to identifying the ideal market structure that allows realizing such a goal. This entails a two-step process. The first step results in identifying the overall goal of antitrust enforcement, which is often in conjunction with the overall policy orientation of a country. The second step is identifying the market structure that is responsible for accomplishing such a goal. For example, if the goal is lower prices as part of a distributive agenda to protect consumers, regardless of other outcomes, then antitrust policy should target a market structure based on increasing intensity of competition that leads to the realization of lower prices. This choice is straightforward, in the sense that economists agree that lower prices are achieved when the intensity of competition increases, which, in the hypothetical ideal of perfect competition, leads to firms pricing at marginal cost of production.[10]

On the other hand, it might be more difficult to predetermine the accompanying market structure to achieve other goals. For example, if the goal of antitrust is dynamic efficiency captured in higher rates of innovation, then two conflicting market structure alternatives are advocated in the empirical and theoretical literature. On the one hand, it is argued that more competition leads to higher rates of innovation.[11] Where-

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8. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 558 (2012).

9. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978).

10. EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 4–6 (2d ed. 2011).

11. *See, e.g.*, *infra* note 292 and accompanying text.

as, on the other hand, it is argued that more concentrated markets will allow firms to reinvest their monopoly profits in innovation.[12] When such conflicts exist, the task of choosing a guiding principle becomes more daunting, as one cannot have a straightforward answer as to which market structure to encourage.

However, before assessing the market structure that needs to accompany the chosen policy framework, developing countries first have to choose between a wide array of alternative, often conflicting, polices or goals that can guide their antitrust enforcement process. Picking a goal is "not merely a product of economic theorizing, but of political economy."[13] Evidently, it is also a political choice that countries need to make. Support for such choice being a political one can clearly be seen in the history of American antitrust policy, where the direction of the enforcement radically changes depending on the administration in office.[14] It is also "not a once-and-for-all-time decision, but rather reflects a temporary consensus that is likely to morph over time to accord with changing political and economic realities, advancing knowledge, and general fashions in political and economic thought."[15]

The intellectual debate in the West, as to the goals of antitrust, is neither novel nor settled. It spans from before the adoption of the Sherman Act in 1890 (given this Act is one of the oldest in the advanced West) to today.[16] This is not only a phenomenon in the U.S., but also a debated topic in Europe as well, where member states differ amongst each other in their policy orientations that guide their enforcement efforts.[17]

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12. *See, e.g.*, GENE M. GROSSMAN & ELHANAN HELPMAN, INNOVATION AND GROWTH IN THE GLOBAL ECONOMY (1991); Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297 (1977); Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71 (1990); Steven Salop, *The Noisy Monopolist: Imperfect Information, Price Dispersion, and Price Discrimination*, 44 REV. ECON. STUD. 393 (1977).

13. Albert A. Foer, *The Goals of Antitrust: Thoughts on Consumer Welfare in the US* 2 (Am. Antitrust Inst., Working Paper No. 05-09, Aug. 2005), *available at* http://ssrn.com/abstract=1103510.

14. *See generally* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW (revised ed. 1996); *see also* Foer, *supra* note 13, at 23 ("There is a danger in having economic policies, including antitrust, swing widely from administration to administration, with reversals taking a toll in the inability of businesses to plan for the future. While change of direction as a result of election politics is legitimate, it is arguably better for the antitrust system if change takes place more incrementally.").

15. Foer, *supra* note 13, at 2.

16. *See, e.g.*, Stucke, *supra* note 8.

17. Wernhard Möschel, *The Goals of Antitrust Revisited*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 7, 9–11 (1991) (arguing that a pluralist view predominates the debate on the goals of antitrust in Europe, and he explores this pluralism in Germany, France, and EC competition regulations); Laura Parret, *The Multiple Personalities of EU Competition Law: Time For a Comprehensive Debate on its Objectives*, *in* THE GOALS OF COMPETITION LAW 61, 61 (Daniel Zimmer ed.,

The fact that the Western world lacks a clearly defined goal forming its consensus on how to guide antitrust enforcement gives developing countries a rare chance to make a political choice with regard to what policy to choose. Had there been a Western consensus as to the desirable antitrust policy, it would have definitely been transposed together with the transplantation of the antitrust law itself to developing countries.

Nonetheless, choosing which policy to guide the enforcement process is, in and of itself, no easy task. The question about the normative baseline for antitrust theory lies at the root of much controversy in antitrust. The debate is not only with regard to what is the *one* goal to guide antitrust enforcement,[18] but also whether *multiple* goals are a better alternative to a monist reading of the purpose of antitrust.[19]

This Article's aim is to critically analyze these goals and to contribute to these debates by advocating that developing countries should enforce their antitrust laws with the realization of long-term growth and overall productivity in mind. This should also be coupled with redistribution to assure that their often-impoverished consumers are not paying the costly price of allowing firms and industries to grow. These intertwined objectives shall assure that developing countries' antitrust policies are used as part of a development plan with more to achieve than is possible with simple static goals.

The Article is organized as follows. Part II maps out alternative goals that have been used to guide antitrust enforcement, listing the varying policy orientations, their merits, and critiques. Part III discusses the goals actually chosen by developing countries. It highlights how most developing countries list a variety of goals in their antitrust laws, without consideration to the welfare tradeoffs that these goals entail. Part IV makes a normative claim to the goal that *should* guide antitrust enforcement in developing countries. It argues that dynamic efficiency, through its promotion of research and innovation, is the most likely goal to be in line with an overall developmental agenda important for developing countries to pursue. Part V concludes and lists further extensions to this research, particularly the debate surrounding how to achieve dynamic

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2012) (arguing that "[m]ultiple objectives still exist [in EC competition law] and they are not a thing of the past as is sometimes suggested").

18. Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191 (1977).

19. *See, e.g.*, Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1053 (1987); Michael E. Porter, *Competition and Antitrust: Towards a Productivity-based Approach to Evaluating Mergers and Joint Ventures*, 46 ANTITRUST BULL. 919, 933 (2001); Stucke, *supra* note 8, at 611. All of these authors propose a hierarchical or balancing approach to be followed when selecting amongst several goals of antitrust.

efficiency and the assessment of enforcement activities against the yardstick of dynamic efficiency and growth.

II. MAPPING OUT DIFFERENT POLICY FRAMEWORKS

Before introducing the different goals that have been widely used in antitrust enforcement, it is important to note that some of these goals are conflicting. There is even conflict as to how to achieve any one goal, especially dynamic efficiency, as briefly introduced above. But where the conflict is even more pronounced is when two goals, especially efficiency-based goals, are simultaneously considered as guides for enforcement. This is, in most cases, extremely problematic and is often referred to as *welfare* or *efficiency tradeoffs* in reference to the seminal article by Oliver Williamson.[20] Hence, a country is advised to pick one policy framework to guide its enforcement activities.[21] Nevertheless, the reality is that many countries swing between these listed goals, yet at any given investigation, there will be only one dominating orientation, otherwise the defendant could be found both guilty and innocent.[22]

Given the variety of goals used to guide antitrust enforcement and that many of them are incompatible, it is highly essential for an enforcing authority to frame its guiding policy in a clear and transparent manner. Such clarity and transparency will allow the enforcement process to be stable, predictable, and accountable. When these aspects are lacking, especially in developing countries, antitrust enforcement could be susceptible to cronyism, nepotism, and corruption.[23] It would also lead to general confusion for firms, disrupting the proper functioning of the market place. Bork and Bowman stress the need for such *ex ante* clarity:

> How could one know in a particular case whether the court would apply a rigorously pro-competitive rule or the social policy of preserving small business units from aggressive behavior? When the person whose conduct is to be judged is in doubt concerning which

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20. *See generally* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

21. *See infra* notes 238–239 and accompanying text.

22. *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012) (examining three kinds of conduct (all-or-none-offers, two-part pricing, and collusion in bidding) that "have purely distributional effects. On total welfare grounds, they are unobjectionable, but they are clearly objectionable on consumer welfare grounds").

23. Eleanor M. Fox, *Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT'L L. J. 579, 592 (2000) ("[T]he existence of wide swaths of ambiguity in the competition law could play into the hands of state officials, who could be inclined to discriminate in favor of their 'own' and may have the freedom to do so without accountability.").

> of two completely contradictory policies will be applied, the system hardly deserves the name of law.[24]

In an attempt to facilitate the mapping of the different policy orientations, the possible goals of competition policy enforcement are grouped in two loose categories: *efficiency-based* and *non-efficiency-based* goals.[25] The first group encompasses goals aiming at achieving allocative efficiency, productive efficiency, economic efficiency, and dynamic efficiency. The second group includes goals targeting the protection of small businesses; achieving international competitiveness; eradicating poverty; and promoting fairness, equality and justice.[26]

It is worth noting that two often mentioned goals are not discussed here: economic freedom and promotion of competition. The first goal—economic freedom—is considered an unhelpful guide as an objective policy choice, as *freedom* is a relative term and cannot be easily defined in general or in particular as it relates to antitrust enforcement.[27] The second goal, promotion of competition, is considered a description of a market structure, i.e., a means to achieve an end and not an end result itself.[28] Choosing it as a goal necessarily means that it is desirable for the belief that it is responsible for realizing *other* goals. For some, promoting a competitive market is desirable because of its effect on lower prices in terms of allocative efficiency; yet for others, it is desirable as it leads to more dynamic efficiency.[29] Pursuing competition as an antitrust objective necessarily contains a hidden presumptive goal that is not spelled out *ex ante* and thus fails at being a proper guiding objective policy.

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24. Robert H. Bork & Ward S. Bowman, Jr., *Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 370 (1965).

25. This categorization follows David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 797 (1989).

26. *Id*. (stating the more frequently used dichotomy is *economic* and *noneconomic* goals, but "those labels are less useful than the ones proposed because there is substantial economic content in the social and political goals [the latter refer to the non-efficiency goals]").

27. Stucke, *supra* note 8, at 592–93 ("[P]romoting economic freedom inherently involves trading in some people's freedom to promote others'. To make that trade-off, one invariably relies on other values and goals besides economic freedom. Accordingly economic freedom cannot be the primary goal.").

28. *Id*. at 596 ("[C]ompetition, however defined, is not the ultimate end. Competition instead represents the means to achieve broader government objectives for the economy or for a given industry.").

29. *See infra* text accompanying notes 283–294.

A. Efficiency-based Goals

1. Allocative Efficiency (Consumer Welfare)

A consumer welfare standard to guide antitrust policy defines the mainstream today.[30] It is the most widespread welfare criterion pronounced in developed countries' antitrust laws and case law,[31] and it is also the standard most widely replicated by developing countries.[32] It is important to note that this consumer welfare is not the consumer welfare standard that Judge Bork articulated as the guiding principle of antitrust. Bork used "consumer welfare as an Orwellian term of art that has little or nothing to do with the welfare of true consumers."[33] Bork's "consumer welfare" better lends itself to be discussed below when talking about total welfare or economic efficiency as the guiding objective of antitrust.[34]

In economic terms, consumer welfare is defined as consumer surplus,[35] which is the difference between what consumers were willing to

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30. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 242 (2008) ("In mainstream antitrust law, there is only one goal in addition to protecting buyers. When small suppliers are threatened by anticompetitive behavior, Congress wanted to protect them from exploitation as well, so long as this could be accomplished without causing purchasers to pay supracompetitive prices. In both sell-side and buy-side cases, in short, the ultimate goal is the same—competitive prices . . . for all.").

31. *Id.* at 211–12 (in reference to American case law, the authors argue: "In recent years, the case law has largely adopted the view that the ultimate goal of the antitrust laws is to protect consumers, not to increase efficiency." They list the case law supporting their claim on pages 213–27.).

32. INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 9 (2007) [hereinafter ICN REPORT 2007], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf (thirty of thirty-three countries identified consumer welfare as an antitrust objective).

33. Kirkwood & Lande, *supra* note 30, at 199 (internal quotation marks omitted); *see also id.* at 200 ("If he had been honest, Bork would have used 'total welfare' as the synonym for economic efficiency, the term employed by the economics profession for this purpose."); *see also id.* at 206 ("His deceptive use of the term 'consumer welfare,' instead of the more honest term 'total welfare,' was a brilliant way to market the efficiency objective."); *see also* Stucke, *supra* note 8, at note 85 (citing Chesapeake & Ohio Ry. Co. v. United States, 704 F.2d 373, 376 (7th Cir. 1983) (Posner, J., writing for the majority) ("The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field.").

34. BORK, *supra* note 9, at 90 ("Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation."); *see also id.* at 91 ("These two factors may conveniently be called *allocative efficiency* and *productive efficiency*. . . . These two types of efficiency make up the overall efficiency that determines the level of our society's wealth, or consumer welfare. The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." (emphasis in original)).

35. Brodley, *supra* note 19, at 1033 ("Using the more precise language of economics, consumer welfare can be defined as consumer surplus, which is that part of the total surplus that accrues to consumers.").

pay for a good and what they actually paid. In Figure A.1 found in the appendix to this Article, the competitive price (Pc) and competitive quantity (Qc) are given by the equality of price and marginal cost (P=MC), which reigns under perfect competition. Here, the consumer surplus is equal to the triangle PcAB. Antitrust enforcement that cares about the maximization of consumer surplus will be intolerant towards activities that allow firms to raise prices, as this will automatically result in a reduction of consumer surplus. As can be seen from the same figure, if the seller acquires market power, allowing him to increase price to Pm, quantity will fall to Qm and consumer surplus will shrink to PmCB. A monopolist maximizes profits when setting price and output at a level that equalizes marginal cost (MC) and marginal revenue (MR). Such an increase in price and loss of consumer welfare also result in the emergence of an allocative inefficiency, labeled deadweight loss (DWL). This DWL is illustrated in Figure A.1 by the triangle EAC.

The literature presents two approaches treating consumer welfare as the goal of antitrust, each with a slightly different focus. The first approach seeks to protect consumer surplus or consumer property from being stolen by firms with market power.[36] According to scholars in this camp, antitrust enforcement should prohibit any conduct that would lead to a reduction of consumer surplus, as this would amount to exploitation "that unfairly transfers [the wealth of consumers] to firms with market power."[37] What is important to this line of argument is the prevention of wealth transfer, which is considered theft[38] and takes place when "consumers [are forced] to pay supracompetitive prices."[39] According to this approach, a consumer surplus standard better reflects society's judgments about the appropriate distribution of economic welfare.[40]

The second approach to promoting consumer welfare focuses on preventing the deadweight loss (DWL) triangle from emerging—i.e., a desire for the economy to produce without any inefficient allocation of

36. Kirkwood & Lande, *supra* note 30, at 201–06.

37. *Id.* at 192; *see also id.* at 196 ("The primary goal of antitrust is to protect consumers from paying higher prices to firms that have unfairly gained or maintained market power. The antitrust laws, in other words, can be explained as a congressional declaration that the property right we today call 'consumers' surplus' belongs to consumers, not to cartels.").

38. *Id.* at 202.

39. Robert H. Lande, *Chicago's False Foundation: Wealth Transfer (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 637 (1989).

40. Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, COMPETITION POL'Y INT'L., Autumn 2006, at 1, 8 ("Perhaps the leading philosophical claim made in favor of a consumer surplus standard is that it better reflects society's judgments about the appropriate distribution of economic welfare than does a total surplus standard.").

resources.[41] The advocates for allocative efficiency as the goal of antitrust argue that consumer welfare is maximized through the efficient allocation of resources.[42] This is achieved when "the existing stock of goods and productive output are allocated through the price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption."[43]

Allocative efficiency is commonly defined as Pareto optimality.[44] This takes place when no other distribution could make at least one person better off without making someone else worse off.[45] Pareto optimality is considered a static goal, as it is occupied with maximizing consumption value at a fixed point in time.[46] Static allocative efficiency is accomplished when prices are set at equilibrium—i.e., prices are set at the intersection of the supply and demand curves, implying price is equal to marginal cost. According to the first theorem of welfare economics, the market at competitive equilibrium will lead to Pareto-efficient allocation of resources.[47]

Both approaches caution against higher prices that will lead to either wealth transfer or allocative inefficiency, depending on the approach one follows to define consumer welfare.[48] Yet, those focusing on wealth

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41. Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 347 ("A person concerned about consumers' welfare (*a convenient shorthand for the allocative efficiency costs of monopoly*) must be exceedingly suspicious of claims that new products or low prices injure consumers by excluding rivals." (emphasis added)); F. M. Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. REV. 998, 998 (1987) ("From the standpoint of those who stress the desirability of allocative efficiency, [the deadweight loss] triangle is what antitrust is all about.").

42. Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 4 (1982) (quoting PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 103 (1978)).

43. Brodley, *supra* note 19, at 1025.

44. Hovenkamp, *supra* note 42, at 8 ("The most common definition of allocative efficiency is Pareto optimality."); Stucke, *supra* note 8, at 579 ("Another definition of allocative efficiency is Pareto efficiency.").

45. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–16 (1960).

46. Brodley, *supra* note 19, at 1027 ("[A]llocative or pricing efficiency in output markets is concerned with maximizing the consumption value of the existing stock of social wealth. Thus, allocative efficiency, which is achieved when goods are priced at marginal or incremental cost, maximizes social wealth at a fixed point in time.").

47. JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 20–21 (1988) ("Weak assumptions about preferences and technological possibilities yield general results on competitive equilibrium. The best-known of these may be the two fundamental welfare theorems. Roughly stated, the first says that a competitive equilibrium is Pareto optimal (that is, a benevolent and fully informed social planner could not replace the competitive allocation of goods with another feasible allocation that would increase all the consumers' welfare) and the second asserts that, under convexity assumptions (which rule out increasing returns to scale), any Pareto-optimal allocation can be decentralized (implemented by a market organization) by a choice of the right prices and an appropriate redistribution of income among consumers.").

48. Kirkwood & Lande, *supra* note 30, at 240–41 (stating that allocative inefficiency or wealth transfer lenses to screen antitrust violations will not cause much difference: "[M]ost situations of

transfer emphasize that focusing instead on allocative inefficiency does not yield the same outcome. "Do terms like 'stealing,' 'robbery,' 'extortion,' and 'stolen wealth' sound like allocative inefficiency?"[49] For Kirkwood and Lande, promoting consumer welfare is the goal of antitrust "not because it would enhance economic efficiency, but because it would prevent powerful firms from unfairly extracting wealth from their trading partners."[50] Therefore, this goal is clearly distinct for them from one that cares about allocative inefficiency.[51]

Also, caring about allocative efficiency does not always increase consumer welfare, particularly when the seller is practicing highly discriminatory pricing strategies.[52] In the case of perfect price discrimination, all consumers will buy the product at a price that will leave them without any consumer surplus. At the same time, no deadweight loss will emerge, and hence allocative efficiency is attained.

Some have argued that allocative efficiency and consumer welfare are incompatible when competitors lower production costs but still manage to raise prices.[53] Yet, this is not true; any price increase, even with cost efficiencies, is bound to create a deadweight loss, and hence allocative inefficiency. Figure A.2 shows that regardless of the magnitude of the cost efficiencies, if market power leads to any (even insignificant) price increase, then a DWL triangle will emerge. This is because any price increase above marginal cost is bound to reduce output, which in turn will lead to a welfare loss to society (DWL) by misallocating society's resources.[54] The lost output leads to lower profits earned by the monopolist and reduced customer value by forcing buyers to buy less than they would have at the equilibrium price. This misallocation of society's

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antitrust concern (such as routine horizontal price fixing) give rise to both allocative inefficiency and a transfer of wealth from purchasers to the cartel. Cartels, for example, would be condemned under either approach, and it does not matter very much why we condemn them.").

49. *Id.* at 202.

50. *Id.* at 242; Lande, *supra* note 39, at 631 ("The main purpose of the antitrust laws is to prevent firms from acquiring and using market power to force consumers to pay more for their goods and services. Congress was primarily concerned that corporations would use market power 'unfairly' to extract wealth from consumers.").

51. Lande, *supra* note 39, at 637 ("Our goal is to prevent this transfer as an end in itself, not because it causes inefficiency.").

52. Brodley, *supra* note 19, at 1033.

53. *Id.*

54. Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* 2 (The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 693, May 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873432 ("[T]he term deadweight loss refers to the sacrifice in total surplus due to price being elevated above marginal cost (which welfare loss is the excess of consumers' valuations over marginal cost for units not purchased due to price elevation).").

resources leads to a poorer society given that its resources could have been used more productively.[55]

No DWL triangle will emerge only when the cost efficiencies are so significant that they will lead to prices at least equal to marginal cost.[56] Thus, from this perspective, allocative efficiency and consumer welfare compatibly aim towards pricing efficiency, or marginal cost pricing.[57] This is because when prices are set at marginal cost, no deadweight loss will emerge, consumer surplus will be maximized, and no welfare tradeoffs will have to be considered.

Another way to look at realizing the goal of consumer welfare is through limiting market power—the variable that gives firms the ability to raise prices and sustain high margins.[58] It is also sometimes regarded as a form of distributive justice, which maximizes consumer welfare at the expense of firms.[59]

Despite consumer welfare being one of the dominating terms in antitrust discourse, there is no clear consensus as to what it actually means.[60] It is considered to some extent "the most abused term in modern antitrust analysis."[61] This is particularly true due to the confusion created by Robert Bork when he used the term to describe economic efficiency, or total welfare.[62] An illustration of the lack of consensus in reference to

55. EARNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 72 (5th ed. 2004).

56. *See* Figure A.2 *infra*.

57. Brodley, *supra* note 19, at 1025; Stucke, *supra* note 8, at 580 ("Some view allocative efficiency as 'leading firms to produce output up to the point where the marginal cost of each unit just equals the value of that unit to consumers.'").

58. Lande, *supra* note 39, at 631 ("The main purpose of the antitrust laws is to prevent firms from acquiring and using market power to force consumers to pay more for their goods and services. Congress was primarily concerned that corporations would use market power 'unfairly' to extract wealth from consumers."); Porter, *supra* note 19, at 933 ("Drawing on Welfare theory, the primary focus in U.S. antitrust for the last twenty years has been on limiting price/cost margins or firm profitability (*allocative inefficiency*) as the most important outcome for consumers. Market power is seen as giving firms the ability to elevate prices and sustain high margins. Hence, limiting market power is the major focus of attention.").

59. Blair & Sokol, *supra* note 22, at 13.

60. Brodley, *supra* note 19, at 1020.

61. *Id.* at 1032.

62. BORK, *supra* note 9, at 107–15. For a reference to this confusion, see Blair & Sokol, *supra* note 22, at 7 ("[T]he ambiguity arose as a result of Robert Bork's use of the term consumer welfare to mean total welfare."); Brodley, *supra* note 19, at 1032; Foer, *supra* note 13, at 6 ("[B]ut what does [Bork] mean by consumer welfare? His answer constitutes one of the great acts of academic legerdemain . . ."); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 918 (1987) ("Chicagoans assert an ahistorical view of antitrust. They rationalize the history of antitrust to fit their economic model. They declare that the only significant goal of the Congress that passed the Sherman Act was to enhance consumer welfare (a term that they then misdefine)."); Stucke, *supra* note 8, at 572; *see* Fox, *supra*, at 918 n.7 ("Chicagoans define 'consumer welfare' as the sum of

the term is found in an International Competition Network (ICN) survey of fifty-seven authorities, which found that only seven authorities agreed with the provided definition of consumer welfare; namely, consumer welfare as it relates only to consumer surplus and excludes noneconomic considerations.[63]

Another problem with consumer welfare as the goal of antitrust is how to define the consumer. Is the consumer only the individual who uses the good, or does it refer to all direct and indirect users who are affected by the anticompetitive agreement, behavior, or merger in question?[64] The way the consumer is defined may lead to different interpretations of the standard.[65] When the market is not a final-goods market, then a consumer surplus standard favors buying firms over selling firms.[66] In addition, consumers do not all have the same welfare preferences, and they even might have conflicting preferences at times.[67]

A further critique focuses on the distributive objectives advanced by adopting a consumer welfare standard. According to Louis Kaplow, such distributive objectives lead to

> [the adoption of] less efficient rules (ones that fail to maximize total welfare) because of their more favorable distributive consequences—[which] is an inefficient means to redistribution. Accomplishing the same degree of redistribution through the tax and transfer system allows the redistribution to be achieved at lower cost, which means that both producers and consumers can be made better off. Thus, if the purpose is to help consumers as a whole, using a means to help them less hardly makes sense.[68]

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producers' and consumers' welfare, on the theory that consumers will be better off if producers make more money because producers will invest that money in things consumer want.").

63. Stucke, *supra* note 8, at 571.

64. *Id.* at 573.

65. *Id.* ("If the consumer is anyone who uses the economic goods, or 'refers to all direct and indirect users who are affected by the anticompetitive agreements, behavior or merger in question,' then everyone—from the poorest individual to the wealthiest corporate monopoly—is a consumer. The consumer welfare standard then becomes a total welfare standard, which raises separate concerns over the distribution of wealth. If the consumer, however, is said to include poor individuals but exclude wealthy monopolies (and other corporate purchasers of goods and services), then the definition becomes more political and subjective. Therefore, the way in which the consumer is defined leads to different interpretations of the consumer welfare standard.").

66. Farrell & Katz, *supra* note 40, at 11–12.

67. Hovenkamp, *supra* note 42, at 6.

68. Kaplow, *supra* note 54, at 3; *id.* at 19 ("[I]t is more efficient to confine competition law to the maximization of total welfare and achieve redistribution solely through the tax and transfer system. The same redistribution can be achieved at less cost, or more redistribution at the same cost; in general, all income groups can be made better off."). For a similar argument, see generally LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 403–63 (2002) (arguing that giving weight to nonwelfarist considerations entails endorsement of the view that it is sometimes best to make everyone in society worse off).

Similarly, Farrell and Katz have argued:

> Consumer surplus can provide a very poor approximation to a welfare measure that weights impacts using ordinary notions of distributional preferences. One reason is that rich and poor consumers may be differentially affected by an antitrust decision; distributional concerns would suggest weighing the impact on the poor more heavily, but a consumer surplus standard insists that they count equally.[69]

Michal Gal has also argued that "making broad policy decisions that might carry social, political or cultural consequences is not within the mandate of the antitrust authority and may even impair democratic values. Public policy should rather be determined by the government."[70]

Moreover, some have critiqued the occupation of antitrust only with consumers and have considered this to be a choice to serve the interest of a particular class of society.[71] This is true given that a consumer welfare standard, regardless of its definition, is bound to create a zero-sum game between consumers and firms.[72] It also rests on "the unsubstantiated, relatively esoteric, and counter-intuitive premise that low prices and high quality sum-up the consumer's welfare preferences."[73]

A further critique of the consumer welfare standard is that it fails to take account of product value by its focus on prices.[74] In some instances, prices might rise to improve value.[75] Such a narrow focus on price without due consideration to value ignores "the long-term trajectory of value,

69. Farrell & Katz, *supra* note 40, at 11.

70. Michal S. Gal, *Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies* 11 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 06-22, 2006), *available at* http://ssrn.com/abstract=901756. For a similar argument, see Michael E. Porter, *Michael Porter on Competition*, 44 ANTITRUST BULL. 841, 874 (1999) ("[I]nequality is more a failure of government policy and institutions than a failure of capitalism. The focus should be on addressing the root causes of inequality, not stopping or distorting the competitive process in the vain hope of achieving equal outcomes.").

71. Foer, *supra* note 13, at 17.

72. Porter, *supra* note 19, at 935.

73. Hovenkamp, *supra* note 42, at 20.

74. Porter, *supra* note 19, at 935.

75. *Id.* at 934 ("Roughly speaking, productivity is price times quantity divided by the quantity of labor or capital involved. It can be divided into two distinct components: the prices that products command in the marketplace (which reflect value) and the efficiency with which a unit of product can be produced. Thus, productivity is enhanced not just by efficiency improvements, but also by improvements in product quality, features, and services [that better meet customer needs and justify a higher price]. . . . With a focus on price/cost margins, however, high prices are often seen as inherently undesirable for consumers. Higher prices should be a danger sign in antitrust analysis only if they are not justified by rising customer value.").

prices, and costs [that we care much more about] than we do about consumer welfare in the short-run."[76]

Furthermore, defining consumer welfare or allocative efficiency as Pareto optimality leads to its own set of critiques. Primarily, the fact that "Pareto optimality is an abstract perfect state that no society will ever reach. The voluntary market actually contains many imperfections, the exchangeable commodities change daily, and the vast majority of interactions between members of society are not voluntary transactions at all, but unexpected, unavoidable, or coerced ones."[77] This makes the standard unattainable and hence ineffective as a guiding enforcement tool.

A final critique to the consumer welfare standard is made with reference to other goals that are arguably more important. Porter argues that "[b]y relying too heavily on narrowly conceived consumer welfare theory, antitrust policy may be overlooking some of the most important benefits of competition for society."[78] Loss of consumer welfare is temporary, but the realization of production or innovation efficiencies has multiplier effects on the growth and wealth of societies.[79]

2. Productive Efficiency (Producer Welfare)

Productive efficiency is achieved when goods are produced using the most cost-effective combination of productive resources and existing technologies, or in other words, when a firm produces at minimal cost. Bork has referred to productive efficiency as "competitive effectiveness."[80] Productive inefficiency results when firms are unable to exploit economies of scale, or as a result of X-inefficiencies—for example, when managers pursue goals other than profit maximization.[81]

In economic terms, productive efficiency is defined as producer surplus or welfare, which is measured as the difference between what producers are willing to sell a good for and the actual price they receive for the sold good. In Figure A.3, producer surplus is illustrated by triangle ECPc (whereas consumer surplus is shown by triangle BCPc). Given a steady supply curve slope, a higher sales price will yield greater producer surplus. One can also think of producer surplus as profits, as it is

76. *Id.* at 935.

77. Hovenkamp, *supra* note 42, at 9.

78. Porter, *supra* note 19, at 920.

79. Brodley, *supra* note 19, at 1039.

80. BORK, *supra* note 9, at 106.

81. Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, *in* ECONOMIC THEORY AND COMPETITION LAW 4 (Josef Drexl, Laurence Idot & Joel Moneger eds., 2008), *available at* http://ssrn.com/abstract=1075265.

the value of what producers have produced minus the cost of production.[82]

From an antitrust policy perspective, any policy that aims at increasing the reward to producers will tend to ignore consumers. The aim of such policies becomes encouraging producers to maximize their profits, which is often achieved when they are allowed to grow up to the point when they can exploit economies of scale. Once producers reach this point, they will also be able to produce at the minimum efficient scale of production. Consumers might benefit in the long run from producers operating at economies of scales, as the supply curve might be shifted outwards due to decreases in the cost function. This could result in lower prices over the long run.

Those who have advocated for a productive efficiency standard to guide antitrust have claimed that productive efficiency has a multiplier effect on the growth of social wealth.[83] As compared to allocative efficiency, production and innovation efficiencies make a more powerful contribution to social wealth because they comprise the growth factors by which social wealth increases over time.[84] They are also responsible for increasing social wealth over the whole range of output because the gains from lower production costs are recurring and cumulative.[85]

Nonetheless, productive efficiency, albeit beneficial to society in some cases, has many drawbacks. Primarily, it aims at strengthening a group of society that is in no need of further strengthening. Producers, as a class, are far more homogeneous, organized, and powerful than consumers.[86] They also possess information asymmetries, better possibilities of lobbying, and rent-seeking.[87] Some are also already protected through trade barriers and antidumping duties.[88]

For producers to achieve economies of scale they might need to acquire higher levels of concentrations, which might increase their ability to achieve market power and thus charge much higher prices above

82. Foer, *supra* note 13, at 19.

83. Brodley, *supra* note 19, at 1039.

84. *Id.* at 1027.

85. *Id.*

86. OLIVER BUDZINSKI, THE GOVERNANCE OF GLOBAL COMPETITION: COMPETENCE ALLOCATION IN INTERNATIONAL COMPETITION POLICY 61 (2008) ("Generally, groups of producers can exert more lobby pressure on politicians than consumers (due to their poor degrees of both homogeneity and organization).").

87. Kerber, *supra* note 81, at 12.

88. José Tavares de Araujo Jr., *Legal and Economic Interfaces Between Antidumping and Competition Policy*, 25 WORLD COMPETITION 159, 172 (2002) ("Like other conventional trade barriers such as tariffs and quotas, antidumping belongs to a generation of policy instruments that were designed to protect domestic producers from international competition.").

costs.[89] In doing so, producers would redistribute part of the consumer surplus to increase their own producer welfare.

As such, although productive efficiency may at first glance appear to further goals that have a multiplier effect, such as those achieved when producers operate at economies of scale, a closer look shows that much of the gain accrues to producers to the detriment of consumers. Thus, an antitrust policy that seeks to achieve productive efficiencies will likely introduce further inefficiencies and unwanted redistribution from consumers to producers.

3. Economic Efficiency (Total Welfare)

Economic efficiency, or total welfare, as the normative baseline of antitrust enforcement and policy has gained widespread acceptance, owing to the writing of Chicago School economists and jurists, particularly Robert Bork, who has repeatedly stated that the sole goal of antitrust laws is to increase overall economic efficiency.[90] Economic efficiency was declared by the Chicagoans to correspond to an enhancement of consumer welfare, which they define as the sum of producers' and consumers' welfare, on the theory that consumers will be better off if producers make more money because producers will invest that money in things consumers want.[91] By defining consumer welfare in this manner, Chicago School antitrust argues for a total welfare criterion to guide antitrust policy—disguising it as a consumer welfare one.

According to Robert Lande, the efficiency-only story came to rule as the primary purpose of antitrust due to the term "consumer welfare" chosen by Robert Bork.[92] Lande explains that

> Bork's brilliant but deceptive choice of the term "consumer welfare" as his talisman, instead of a more honest term like "total welfare," "total utility," or plain "total economic efficiency" [was the reason for the triumph of the efficiency-only goal of antitrust.] After all, who can be against "consumer welfare"?[93]

Consumer welfare, as defined by Chicago School scholars, has little or nothing to do with the welfare of consumers.[94] According to Bork's definition of the term, it refers to the "maximization of . . . consumer

89. MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 52 (2003).
90. BORK, *supra* note 9, at 10, 15–16, 90–91.
91. Fox, *supra* note 62, at 918.
92. Lande, *supra* note 39, at 638.
93. *Id.*
94. *Id.*

want satisfaction."[95] Whether due to this play on words, or for other reasons, Chicagoans and many non-Chicago antitrust scholars claim that economic efficiency as the goal of antitrust has reached uniform consensus.[96] This sentiment is paramount in Posner's following quote:

> Almost everyone professionally involved in antitrust today—whether as a litigator, prosecutor, judge, academic, or informed observer—not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal.[97]

A total welfare standard implies the maximization of producer and consumer surplus (total surplus) to the extent that it outweighs any inefficient allocation of resources (deadweight loss, DWL). It calls for efficient allocation of resources as the sole goal of antitrust.[98] This standard corresponds to the Kaldor–Hicks welfare criterion, also known as the potential Pareto standard.[99] Using a Kaldor–Hicks efficiency standard, an outcome is more efficient if those that are made better off could *in theory* compensate those that are made worse off while still being in a better position.[100] In other words, applying a Kaldor–Hicks efficiency standard, an outcome is considered effficient if the rewards to winners outweigh

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95. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & ECON. 7, 7 (1966).

96. *See* MASSIMO MOTTA, COMPETITION POLICY, THEORY AND PRACTICE (2004); Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242 (1967); Dennis W. Carlton, *Does Antitrust Need to Be Modernized?*, 21 J. ECON. PERSP. 155 (2007); Elzinga, *supra* note 18; Farrell & Katz, *supra* note 40; Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010); Möschel, *supra* note 17, at 8 ("Advocates of monism see only one worthwhile purpose of antitrust law—the fostering of economic efficiency . . . ."); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979); Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1208–09 (1969).

97. RICHARD A. POSNER, ANTITRUST LAW ix (2d ed. 2001). For a similar sentiment, see Hovenkamp, *supra* note 42, at 4 ("Only . . . [the] wealth maximization . . . definition of efficiency [Kaldor–Hicks efficiency] can even arguably serve as a statement of efficiency goal for the antitrust laws.").

98. Lawrence A. Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1218 (1977) ("Indeed Chicago analysts tend to identify the efficient allocation of resources, a value derived from neoclassical economics as the sole goal of antitrust.").

99. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 549–50 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 9 ECON. J. 696 (1939); *see also* Herbert J. Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 1037 (1990) ("In the late 1930s Nicholas Kaldor and John R. Hicks attempted to increase the usefulness of ordinalist welfare economics for policy analysis through the development of the 'potential' Pareto criterion sometimes known as 'Kaldor–Hicks efficiency.'").

100. *See* Kaldor, *supra* note 99; Hicks, *supra* note 99.

the losses suffered by the losers. However, no actual compensation needs to be made for an outcome to be considered to meet the Kaldor–Hicks efficiency criterion. If, somehow, compensation is indeed made, then the outcome will also meet the stricter Pareto criterion as well. According to the latter, an outcome is Pareto-efficient if no one can be made better off without making someone else worse off.[101]

According to an economic efficiency model, a merger, joint venture, or cartel that is charging higher prices in the short-run may still be considered "efficient" and will not be prohibited or blocked if it manages to realize cost efficiencies that increase producer surplus more than the higher prices reduce consumer surplus. In this case, a balancing of the improved efficiency against the cost of allocative inefficiency needs to take place. This balancing follows a typical Williamson efficiency trade-off analysis.[102]

Figure A.4, *infra*, illustrates such an efficiency tradeoff. Here, you see a merger or joint venture that manages to reduce cost from MC—under perfect competition—to MC1. Nonetheless, this cost efficiency is realized alongside an increase in market power, which increases price from Pc under perfect competition to Pm. The quantity is also reduced from Qc to Qm. Because of this market power, an allocative inefficiency takes place in the form of a deadweight loss given by triangle ECB. Producer surplus increases by the rectangle PcEBPm because of the market power, and because of the cost savings it also increases by the rectangle GFEPc. On the other hand, consumer surplus has shrunk from triangle PcCA to PmBA, or in other words, by the deadweight loss and the increase of producer welfare due to market power. To approve a merger or joint venture under a total welfare standard, the gain made by producers needs to be sufficient to compensate the consumers and still make producers better off. If this is the case, then the merger or joint venture is considered to be Kaldor–Hicks efficient.

To verify whether the merger or joint venture meets the wealth-maximization criteria, the cost savings, represented by rectangle GFEPc, needs to be greater than the allocative inefficiency, given by the triangle ECB. If this is so, then the merger or joint venture is approved. This is the same as assessing whether the gain in producer surplus, shown by rectangle GFBPm (this includes the producer surplus resulting from the market power *and* from the cost savings) is greater than the loss in consumer surplus, given by rectangle PcEBPm (which is considered to be

101. *See, e.g.*, VILFREDO PARETO, COURS D'ECONOMIE POLITIQUE (1896).
102. Williamson, *supra* note 20.

redistributed from consumers to the producers because of the market power) and the deadweight loss triangle (ECB).

According to some, a repeated application of the Kaldor–Hicks welfare criterion would result in a Pareto-superior situation, as all persons will be both winners and losers in different situations.[103] Similarly, those who call for a total welfare standard in merger policy argue that many consumers might also be shareholders of firms, and hence a balancing of the winner–loser role will lead to a Pareto-efficient situation for all.[104]

Another argument for why a total welfare criterion should guide antitrust enforcement is that the cost savings that result in producer surplus also have positive consequences on consumers; namely, they free resources that can then be used to produce goods and services in other markets at lower prices.[105] Such "consumer benefits flowing from these cost savings may be diffused throughout the economy, but they exist nonetheless."[106]

Michal Gal also argues that economic efficiency should be the guiding enforcement goal of antitrust in small economies: "Small economies should strive to achieve economic efficiency as their main goal because they cannot afford a competition policy that is prepared to sacrifice economic efficiency for broader policy objectives."[107] Gal states that small size should tip the balance in favor of the total welfare standard for two reasons. First, requiring a high standard of proof of no negative effect on consumer welfare may lead to market stagnation of oligopolistic structures because most markets in small economies are so concentrated.[108] As a result, the oligopolistic structures will not only charge supracompetitive prices, but they also will not achieve productive efficiency.[109] Thus, the total welfare approach will reduce productive and even dynamic inefficiencies. Second, the consumer welfare approach may

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103. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

104. Kai Hüschelrath & Jürgen Weigand, *A Framework to Enforce Anti-Predation Rules* 5 (ZEW Discussion Paper No. 09-085, 2009), *available at* ftp://ftp.zew.de/pub/zew-docs/dp/dp09085.pdf ("[A] total welfare standard might be preferred simply because the producer surplus could be interpreted as just another form of consumer surplus. This is basically because consumers are shareholders of the companies who realise the profit and therefore in the longer run pocket the producer surplus as well."); s*ee also* MOTTA, *supra* note 96, at 39–64.

105. Blair & Sokol, *supra* note 22, at 37.

106. *Id.* at 485.

107. GAL, *supra* note 89, at 48.

108. *Id.* at 203.

109. *Id.*

conflict with the goal of enhancing the international competitiveness of domestic firms.[110]

Many do not appreciate the merits of a total welfare approach.[111] A frequent critique is that the Kaldor–Hicks efficiency criterion is strongly influenced by value judgment and amounts to a political decision.[112] For example, current stockholders are allowed to reap the benefits of a merger at the expense of the class of consumers who are forced to pay for a higher-priced good from the merged entity.[113] In doing so, this efficiency criterion allows individual rights to be infringed to increase the general wealth of society. It ignores the distributive impact of the so-called efficient policies and outcomes, thereby leading to a complete disregard to equity considerations.

The efficiency view of antitrust is another form of "trickle-down economics." According to Kirkwood and Lande, it embodies

> the hope that if we allow businesses to take from consumers in the short run, then eventually, somehow, in some indirect, uncertain and difficult to explain long-run manner, the money will find its way back to society as a whole, including consumers . . . . But no one knows what will actually happen in the long run, such as whether the public at large eventually will benefit, because the long run is much more uncertain. . . . In the long run economists remind us that we are all dead . . . .[114]

A further critique worth mentioning regarding the Kaldor–Hicks efficiency criterion is about fairness. Applying a total welfare standard balances injured consumers against overall economic efficiency, yet it does not consider that the injured consumers might not be the same ones who will presumably benefit at a later date from the trickle-down benefits to the whole society.[115]

Finally, under this efficiency criterion, the initial endowments, factors, and entitlements of the different actors (consumers and producers in

110. *Id.*

111. *See* Dina I. Waked, *Development Studies Through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the South*, 5 TRANSNAT'L LEGAL THEORY 649, 652–56 (2014) (enumerating critiques levied against the economic efficiency approach).

112. *See, e.g.*, Duncan Kennedy, *Cost–Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

113. Foer, *supra* note 13, at 26.

114. Kirkwood & Lande, *supra* note 30, at 239 (referring to JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) ("[*L*]*ong run* is a misleading guide to current affairs. *In the long run* we are all dead." (emphasis in original)).

115. Foer, *supra* note 13, at 26.

our case) are ignored.[116] This further distorts the distribution of income and creates a bias towards the status quo, as the assignment of initial entitlements will affect the outcome of a Kaldor–Hicks application.[117]

4. Dynamic Efficiency (Promoting Innovation/Growth)

Dynamic efficiency, also referred to as technological progress or innovation efficiency,[118] is achieved "through the invention, development, and diffusion of new products and production processes that increase social wealth."[119] A product innovation can shift the demand curve to the right, while a process innovation can lower the marginal cost curve, resulting in an outward shift of the supply curve.

This innovation efficiency criterion, if chosen as the goal of antitrust law, shifts the focus from both consumers and producers to innovation. The aim becomes making the pie larger through emphasizing the centrality of innovation, which is considered "the single most important factor in the growth of real output in the United States and the rest of the industrialized world."[120] Innovation efficiency is also responsible for providing the greatest enhancement of social wealth.[121] According to Kerber,

> Since it is an undisputed empirical fact that technological progress is the most important determinant for long-term economic growth, there is also a wide-spread consensus that innovation and diffusion of new products and technologies is one of the important results ef-

116. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 208 (1980) ("If economic analysis makes someone's initial right to his own labor depend upon whether he would purchase the right if assigned to another, that right cannot be 'derived' from economic analysis unless we already know who initially has the right. This appears to be a serious circle. We cannot specify an initial assignment of rights unless we answer questions that cannot be answered unless an initial assignment of rights is specified.").

117. Kennedy, *supra* note 112, at 426 ("For example, it may be that if polluters are entitled to pollute, the neighboring landowners could not possibly buy them out, whereas if they are entitled to clean air, they would demand far more than the factory could pay for a release. Since the wealth effect generated by the initial setting of the entitlement in question tends to make that setting appear to be the efficient one at the conclusion of the analysis, it is sometimes described as introducing a bias in favor of the status quo.").

118. Brodley, *supra* note 19, at 1025.

119. *Id.*

120. *Id.* at 1026 (quoting Ziv Griliches, *R&D and Productivity: Measurement Issues and Econometric Results*, 237 SCI. 31, 34–35 (1987)); *see also* Porter, *supra* note 19, at 922 ("The fundamental benefit of competition is to drive productivity growth through innovation, where innovation is defined broadly to include not only products, but also processes and methods of management. Productivity growth is central because it is the single most important determinant of long-term consumer welfare and a nation's standard of living."); Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); Lester C. Thurow, *A Weakness in Process Technology*, 238 SCI. 1659, 1660–62 (1987).

121. Brodley, *supra* note 19, at 1026.

fective competition should bring about. This innovation dimension of competition is often linked to the term "dynamic efficiency."[122]

In 1942, Joseph Schumpeter challenged the traditional static models of analysis, arguing that what really mattered for economic well-being in the long run was how well entrepreneurs seized opportunities for reducing cost through innovation rather than how efficiently resources were allocated and utilized.[123]

Because innovation impacts a nation's standard of living, growth, and social wealth, Joseph Brodley and Michael Porter have argued that "antitrust enforcement should give priority to advancing innovation,"[124] and thus, "the *new standard for antitrust should be productivity growth,* rather than price/cost margins or profitability."[125] Because innovation is the accelerator of growth, it becomes the intermediary focus of antitrust enforcement.[126] Brodley has also argued that consumer welfare should be subordinated to long-run efficiencies, as long as consumers will eventually share in the economic welfare promised by innovation.[127] Phillip Areeda argues that "[t]he benefits of competitive pricing are not nearly so great as the benefits of inventions, new products, new processes, and other innovations."[128]

Innovation efficiency and consumer welfare could, in some instances, compliment each other. Yet in some other situations, they could be found to be incompatible in the sense that consumers might suffer short-term harm in the pursuit of innovation and growth. Although this might seem like an undesirable antitrust goal, a closer look illustrates

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122. Kerber, *supra* note 81, at 5.

123. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3d ed. 1984) ("Economists are at long last emerging from the stage in which price competition was all they saw. . . . [I]t is not that kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization (the largest-scale unit of control for instance)—competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives. This kind of competition is as much more effective than the other as a bombardment is in comparison with forcing a door.").

124. Brodley, *supra* note 19, at 1032 ("[A]s an enforcement ideal, antitrust should strive to achieve all three types of efficiencies. But in a less than ideal world, where not all goals can be achieved simultaneously, antitrust enforcement should give priority to advancing innovation and production efficiencies in view of their cardinal importance in creating social wealth. Most certainly, antitrust should not pursue allocative efficiency alone.").

125. Porter, *supra* note 19, at 932.

126. *Id.* at 934 ("Because of its direct effect on productivity growth, the most important goal for society is a healthy process of dynamic improvement, which requires innovations in products, processes, or ways of managing. If the rate of dynamic improvement is healthy, over time this dominates static technical and allocative efficiency concerns.").

127. Eleanor M. Fox, *"Antitrust Welfare"—The Brodley Synthesis*, 90 B.U. L. REV. 1375, 1378 (2010).

128. Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 531 (1983).

how consumers are ultimately set to gain, especially when redistribution is factored into such a policy.[129]

In pursuit of innovation efficiency, rules should allow firms to innovate. But scholars disagree about the market structure that encourages firms to innovate. Some argue that competitive markets encourage more innovation,[130] while others, following Schumpeter, argue that only firms with high market concentrations will be able to invest in innovation.[131] But if monopoly power is a necessary condition for innovation, pursuing innovation as a goal for antitrust enforcement could be quite worrisome.[132]

Promoting innovation as the goal of antitrust elicits a couple critiques. First, that innovation does not need further encouragement under antitrust laws, given that it is already protected through the patent system.[133] The patent system automatically generates positions of monopolies that are, in theory, "the enemy" of the antitrust system. Therefore, arguing for an antitrust policy that pursues the protection and encouragement of innovative efficiency might seem, at first glance, to promote an unsound policy framework.

Further, because it is quite difficult to measure innovation efficiency, it might be problematic to use it as a guide for antitrust enforcement.[134] It is also problematic to distinguish between socially beneficial and harmful innovation that is still under development.[135] These technical complexities may stand in the way of its utility as a successful efficiency criterion.

Because "economic theory has not successfully integrated the innovation dimension into general equilibrium theory, the problem of technological process and, therefore, dynamic efficiency remains, to a large extent, outside the mainstream neoclassical equilibrium theory."[136] Thus, this standard presents a complicated goal for antitrust enforcement.

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129. *See infra* Part IV.

130. *See, e.g.*, *infra* note 292 and accompanying text.

131. *See, e.g.*, *supra* note 12 and accompanying text.

132. Foer, *supra* note 13, at 30.

133. *Id.* ("The conundrum of intellectual property is that there may be such a thing as too much protection.").

134. Stucke, *supra* note 8, at 583.

135. *Id.*

136. Kerber, *supra* note 81, at 6.

B. Non-efficiency-Based Goals

1. Protecting Small Businesses

Alternatively, antitrust enforcement goals can aim to protect small businesses to assure that the free market does not cause them harm. Historically, the U.S. Supreme Court has interpreted the antitrust statutes to protect small businesses.[137] A quote from Judge Learned Hand attests to this intention: "[O]ne of [the] purposes of [the antitrust statutes] was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[138]

The Warren Court identified small business as a protected class under the antirust laws.[139] Warren-era decisions were more inclined to favor small business and condemn practices that reduced cost or generated more desirable products.[140] These practices were condemned because they harmed rivals who were unable to match them, despite benefiting consumers at large.[141] In many cases, the Court ended up condemning mergers because of, rather than in spite of, efficiencies.[142]

The *Brown Shoe* decision exemplifies application of this goal.[143] In this opinion, the Court declared that despite the fact that the antitrust laws protect competition and not competitors, "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing consideration in favor of decentralization."[144]

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137. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 30 (1989) ("Senator Sherman was not speaking for consumers of refined petroleum products, but rather for the small producers and refiners whom Standard Oil had driven to ruin."); *see id.* at 29 ("The principal victims of the trust movement of the 1880s—certainly of the trusts that appeared most frequently on Congress' hit list—were inefficient small firms, rather than consumers. Competitors were the principal protected class of the Sherman Act.").

138. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

139. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1 (2005).

140. *Id.* at 315 ("E.g. . . . *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), which condemned a horizontal merger in a highly competitive market with easy entry, in part because the resulting firm would be able to undersell its rivals; and *FTC v. Procter & Gamble*, 386 U.S. 586 (1967), which condemned a conglomerate merger for creating efficiencies that rivals were unable to match.").

141. *Id.*

142. *See supra* note 140 (for the cases cited).

143. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

144. *Id.* at 344.

Protecting small businesses, as an antitrust goal, is not unique to outdated American jurisprudence; modern American statutes[145] and several European countries still endorse it as a goal of antitrust enforcement. French competition law allows for exceptions to the application of the law based on a wide range of public interest considerations.[146] It allows for group exceptions for individual types of agreements by way of regulations "if they are aimed at an improvement of the management of small or medium-sized undertaking."[147] The same holds true in German law, where Section 5b GWB allows cooperation between small and medium-sized corporations by excluding them from some restrictions that apply to large corporations.[148] Also, modern Canadian antitrust policy explicitly seeks not only to promote economic efficiency, but also to protect small and medium-sized businesses.[149]

Some argue that protecting competitors under antitrust laws is a matter of justice, stating that "[t]he dogma that 'antitrust laws protect competition not competitors' overstates the case and ignores considerations of justice."[150] Others promote the desirability of this goal as a means to allow

> economic power not [to] be concentrated in the hands of a few large firms, but rather distributed over many smaller ones, even though the resulting inefficiencies in production and distribution will yield higher prices. That preference is particularly likely if people believe that a high degree of economic concentration poses a political threat, such as a loss of some democratic freedoms.[151]

Yet others argue that this goal is noble in its aim to maintain a "more convivial" marketplace, whereby the little neighborhood grocery is protected from the conglomerate supermarket chain. Despite the little

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145. U.S. statutes that are argued to support small businesses include the Celler Kefauver Act, Clayton Act, and Robinson-Patman Act.

146. Möschel, *supra* note 17, at 10.

147. *Id.* (quoting Article 10.2 of the French Competition Law).

148. *Id.* at 9.

149. Canadian Competition Act of 1985, R.S.C. 1985, c. C-34, s. 1.1 (Can.) ("The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order *to ensure that small and medium-sized enterprises have an equitable opportunity to participate* in the Canadian economy and in order to provide consumers with competitive prices and product choices." (emphasis added)).

150. Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1078 (1979); *id.* at 1076 ("I would not yield as freely as he does to the dogma that the antitrust laws protect 'competition not competitors,' because the goals of justice and the antitrust laws sometimes demand protection of competitors.").

151. Hovenkamp, *supra* note 42, at 21.

neighborhood grocery's higher prices, protecting small business assures the continuity of familiar and warm human interactions.[152]

However, this protection goal is heavily critiqued. Robert Bork considered antitrust policy aimed at protecting small businesses a means to create "shelters for the inefficient"[153] and "an ugly demand for class privilege."[154] Other critics argue that small businesses do not need special laws or protection from fierce competition, especially given that such protection often results in higher prices and inferior quality for consumers. In a way, protecting small businesses amounts to levying a tax on consumers to guarantee that the smaller businesses remain in the market. Bork sarcastically summarizes:

> Too few people understand that it is the essential mechanism of competition and its prime virtue that more efficient firms take business away from the less efficient. Some businesses will shrink and some will disappear. Competition is an evolutionary process. Evolution requires the extinction of some species as well as the survival of others. The business equivalents of the dodoes, the dinosaurs, and the great ground sloths are in for a bad time—and they should be. It is fortunate for all of us that there was no Federal Biological Commission around when the first small furry mammals appeared and began eating dinosaur eggs. The commission would undoubtedly have perceived a "competitive advantage," labeled it an "unfair method of evolution," and stopped the whole process right there.[155]

Despite the critiques, many countries support protecting small businesses as an antitrust goal to encourage domestic competition and the establishment of small and medium-sized enterprises.

2. International Competitiveness / National Champions

Many countries, particularly developing ones, consider protecting their national industry from foreign competition an important antitrust policy that allows them to establish a level playing field for their domestic firms in international markets.[156] Encouraging national champions entails laxer domestic competition law enforcement—at least with respect to those national champions. Proponents of such a policy reason: if

152. *Id.* ("Some people unquestionably prefer the smile of their neighborhood grocer to the relative impersonality of the supermarket, even though the neighborhood grocer charges higher prices.").

153. Bork & Browman, *supra* note 24, at 369.

154. *Id.* at 370.

155. Bork & Bowman, *supra* note 24, at 375.

156. *See* Table A.1, *infra* (Kenya, Namibia, and South Africa).

the local producers are to compete in international markets, they should be given some slack in the local enforcement of competition laws.

Laws supporting this goal should allow for either export cartels, mergers to concentration in key industries, or discriminatory enforcement against companies considered national champions. Such policies would allow local firms to compete effectively with their Western counterparts, as larger enterprises are required to promote the technical change necessary for international competitiveness.[157] Arguably, larger firms will be able to achieve minimum efficient scale of production and produce greater economies of scale than their smaller counterparts.

Similarly, some scholars argue the importance of protecting infant industries from fierce competition at the early stages of their development so that they can compete domestically and internationally. Antitrust laws can thus be used to protect both nascent firms and those that are to be fostered for the international markets.[158] The protection of the latter can be evaluated, for example, against the firm's performance on international markets and the realization of preset export targets.[159] This protection can take the form of selective antitrust enforcement, allowance of higher concentration levels (through, for example, laxer merger enforcement), higher prices, and certain types of unilateral conduct and agreements necessary to achieve this end; for example, the allowance of export cartels.

In many instances, this policy goal is part of an industrial policy tailored towards encouraging local firms to compete internationally. The Japanese and South Korean policies offer a clear example of intertwined competition and industrial policies.[160] Alice Amsden and Ajit Singh argue that the approach taken by the Japanese government

> [is] more pragmatic . . . to antitrust enforcement, one that makes allowances for national goals such as industrial catch-up. It takes into account other collective values and extenuating circumstances in weighing enforcement decisions against the letter and spirit of antitrust laws. Included here are such considerations as economies of scale, enhanced efficiency, optimal use of scarce resources, interna-

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157. Amsden & Singh, *supra* note 7, at 944 (characterizing these prevailing practices as the "anti-competitive bias of many of MITI's policies and actions").

158. Porter, *supra* note 70, at 862 ("Nurturing 'infant industries' to allow them to achieve critical mass is also important."); Claudio R. Frischtak, Bita Hadjimichael & Ulrich Zachau, *Competition Policies For Industrializing Countries*, 7 WORLD BANK POL'Y & RESEARCH SERIES 2 (1989) ("Developing countries should use competition as a powerful tool of industrial policy. It is an instrument that might have been unavailable in the early stages of industrial development, but it is more effective than government controls and incentive systems in the presence of functioning markets and a dynamic entrepreneurial class.").

159. *Id.* at 4.

160. *See* Amsden & Singh, *supra* note 7.

> tional competitiveness, heightened productivity, business cycle stabilization, industrial orderliness, price stabilization and economic security.[161]

However, the experiences of East Asian economies differ from those in centrally planned Eastern European, former Soviet Union, and socialist countries in Africa and Latin America. In those areas, the government tolerated neither competition nor openness under the guise of protecting the local production and their national champions.[162] Domestic firms that have been granted complete protection from competition have in many instances underperformed rivals, local or foreign, that operated in more competitive environments.[163] The failure of such extreme protectioninst policies testifies to the inadequacy of *complete* protection of national industries.[164]

Contrastingly, in East Asian economies, the government did not shield local firms to the same extent. For example, during Japan's years of rapid growth (1950–1973), the Ministry of International Trade and Industry (MITI) encouraged cartels in a wide range of industries,[165] mergers between leading firms in key industries,[166] *and* vigorous domestic rivalry and international competitiveness.[167]

Importantly, no Japanese industry was totally shielded from competition. MITI provided a "crucial coordinating role and orchestrated the dynamic of collusion and competition which characterizes Japanese industrial policy."[168] Young industries in the development phase remained protected from competition only until they matured technologically.[169] At that point, the government allowed competition until the industries in question would face a competitive decline; then, the government again would discourage competition.[170] MITI facilitated this "life-cycle" process by organizing an investment race, setting exports and international market shares as significant performance targets.[171]

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161. *Id.* at 944 (quoting D. I. OKIMOTO, BETWEEN THE MITI AND THE MARKET 12–13 (1989)).

162. *Id.* at 943.

163. *See generally infra* note 303 and accompanying text.

164. Amsden & Singh, *supra* note 7, at 943 ("The economic failings of the highly monopolized and closed centrally planned economies of Eastern Europe and the former Soviet Union do not suggest that the other extreme of almost zero competition and almost zero openness has much to recommend it either.").

165. *Id.* at 944. These cartels included "export and import cartels, cartels to combat depression or excessive competition, rationalization cartels, etc." *Id.*

166. *Id*.

167. *Id.* at 945.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

Crucially, MITI made sure to install strict performance standards for protected industries to assure that the import ban would not result in technological backwardness and inferior performance.[172] To illustrate this approach taken by Japan, Amsden and Singh write: "The emphasis on exports and maintaining oligopolistic rivalry—instead of concentrating resources and subsidies on a single 'national champion,' which many governments in their industrial policies are prone to do—are the key factors which distinguished Japanese policies from those of other dirigiste countries."[173]

The paradox of the Japanese economy is that, despite the weakening of the antimonopoly laws and the anticompetitive bias of many MITI policies, competition actually grew in Japan during the years studied;[174] that is, concentration ratios declined.[175] The reason market concentration declined was not because of the effectiveness of competition policy, but because of the rapid growth of the economy.[176] This economic growth was manifested by both increasing investments and, more importantly, new entry or expansion of smaller firms.[177]

Despite the success of East Asian economies, many scholars caution against prioritizing industrial policy over competition policy. The problem is that such industrial policy was often used to continue protecting mature industries against local and foreign competition in a way that hampered economic development beyond early industrialization.[178] Michael Porter critically summarizes many such concerns:

> When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their suppliers, and firms in related industries will become less productive. This demonstrates in particular the danger in arguments about the creation of "national champions" in an industry in the home country in

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172. *Id.* ("To illustrate, Japan's machine tool industry was given selective tariff protection specifically for those machine tools with potentially high income elasticities of demand and high productivity growth rates. But machine tool builders benefiting from protection were required to produce at least 50% of their output in the form of computer numerically controlled machine tools by a certain date.").

173. *Id.* at 946.

174. *Id.* (explaining that competition was measured by conventional industry concentration ratios).

175. *Id.* ("The average (unweighted) 3-firm concentration ratio was 57.6 in 1937, 53.5 in 1950, and 44.1 in 1962. Between 1950 and 1962, concentration increased in only three of 20 industries, stayed roughly the same in two, and fell in all the rest.").

176. *Id.*

177. *Id.*

178. Frischtak et al., *supra* note 158, at 5 ("In many cases policies designed initially to provide temporary incubation for infant industries hardened into policies protecting mature industries from both domestic and international competition. As a result competitive markets did not develop.").

> order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will usually quickly lose its competitiveness abroad.[179]

Some measures of protective antitrust policies might be necessary so that developing countries overcome the industrial and development gap between them and more advanced nations. Selectively enforcing antitrust laws, together with industrial policy, to grant certain protective measures might help developing countries counterbalance some of the adopted neoliberal policies. These neoliberal policies have forced many of the developing countries to give up other protectionist measures necessary for industrial catch-up and international competitiveness. It is, however, important to advocate for the more successful protectionist approach, such as the one followed by Japan and South Korea, where protection is conditional, temporary, and does not shield the protected industry or firm from all forms of competition.

3. Reducing Poverty

Another goal of antitrust policy is reducing poverty. This goal resonates with a pressing need of many developing countries. It also embraces distributional concerns that are often ignored and are considered important policy questions to be addressed under the rubric of antitrust enforcement. Eleanor Fox, in advocating for this goal, called for widening the scope of antitrust as a tool for mobility and poverty eradication as part of a broader context of developing economics.[180] She argued that antitrust laws could drive prices down and eliminate barriers, especially for basic necessities, which can help the poorest members of society.[181] As a result, businesses could afford better inputs, enabling domestic businesses to compete in the global economy.[182] Fox writes:

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179. Porter, *supra* note 19, at 931–32; *see also* Fox, *supra* note 127, at 1379 (quoting Joseph F. Brodley, *Antitrust and Competitive Advantage in World Markets*, 5 ANTITRUST 40 (1990) (reviewing MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 170 (1990) ("Loss of domestic rivalry is a dry rot that slowly undermines competitive advance by slowing the pace of innovation and dynamism.")).

180. Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path,* 13 SW. J. L. & TRADE IN THE AMERICAS 211, 212 (2007).

181. *Id.* at 219, 222 ("Not only do the poor suffer from prices that are too high, but they suffer from suppressed growth.").

182. *Id.* at 223–24 ("The marketplace should give firms, including smaller and younger firms, a fair chance to compete on the merits of their product, free from artificial and unnecessary foreclosing restraints by powerful firms. Empowerment to engage in markets free of unnecessary business restraints is the counterpart to de Soto's vision of empowerment to engage in markets free from unnecessary government restraints. Undue market restraints, whether public or private, retard efficient development.").

> Market tools are a very important part of the panoply of tools needed to address world poverty and should be used liberally. These market tools include market-freeing measures that reduce prices. They also include antitrust priority-setting that targets conspiracies that raise the price of staples, such as milk, bread, transportation and utilities, helping the poor as well as those who are better off.[183]

In a sense, this approach is about pricing efficiency, but only as it refers to necessities directly affecting the well-being of the population at large. However, what is different about this approach is that it incorporates the ladder of mobility idea that is created once barriers to entry are torn down. This ladder of mobility "opens the door to inclusion, from the poorest up[,] and it proposes to do so for pragmatic reasons of building a better society"[184] to "enable mobility, incentivize entrepreneurship, and stimulate invention."[185] It assures that smaller and younger firms have a fair chance to compete free from artificial and unnecessary foreclosing restraints by powerful firms.[186]

Eradicating poverty as a guide for antitrust enforcement is especially relevant for developing countries where a high percentage of the population lives below the poverty line, and monopolies and cartels abuse the impoverished population further.[187] Antitrust law can be used to deter these abusive practices, and encourage small firms and new entrants to participate in the economy.[188]

Basically, this proposition expands the reach of competition laws to be part of a broader developmental agenda focused on economic development. By doing that, competition laws may be used to facilitate development, and not just to protect producers or local champions. Furthermore, competition legislation focused on narrow efficiency standards tends to entrench a political economy that favors the ruling elite and discriminates against the masses. A neoliberal framework of competition laws will do little to help countries develop.[189] Instead, such a framework

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183. *Id.* at 219.

184. *Id.* at 222.

185. *Id.* at 220.

186. *Id.* at 223; Porter, *supra* note 70, at 874 (positing inequality is a result of "limits to competition—collusion, monopoly, and artificial restrictions on entry—that gives business owners too much power to appropriate returns.").

187. Fox, *supra* note 180, at 226 ("Anticompetitive practices are rife in areas of physical and business necessity, such as milk, soft drinks, beer, chicken, sugar, cotton, paper, aluminum, steel, chemicals (for fertilizers), telecommunications including mobile services, cement and other construction materials, transportation including trucking, shipping, and port access, industrial gases, banking, insurance, coal and electricity.").

188. *Id.* at 227.

189. *Id.* at 215. ("This does not imply that antitrust for developing countries would or should look dramatically different from a developed country's antitrust. There are reasons why it might look

will mirror the effects of laws based on liberalization, privatization, and globalization—a widening disparity of wealth.[190]

Nevertheless, scholars often argue that competition law should not concern itself with developmental or redistributional goals,[191] which should be left to government action specifically tailored to address such issues.[192] However, developing countries often have benevolent governments that fail to introduce or implement such policies. Taxes are evaded and subsidies are slowly being lifted under the rubric of privatization and liberalization, leaving the masses at a loss. Laws are transplanted from the West with the promise of prosperity—competition law being no exception—and lead to nothing more than entrenchment of local structures of cronyism, statism, corruption, and income inequality. Thus, broadening the scope of antitrust in developing countries to include issues such as poverty eradication seems appealing as a policy framework.

4. Fairness, Equality, and Justice

A number of jurisdictions recognize promotion of fairness and equality as one of their antitrust laws' objectives. A few scholars argue that such fairness goals are desirable competition policy frameworks, particularly Eleanor Fox: "[S]ome goals are more important than efficiency. Achieving a more equitable distribution of opportunity may be such a goal."[193]

One of the often cited examples is South Africa, which states that its competition law considers a "broader range of considerations including the promotion of a more equitable spread of ownership as well as the

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much the same, . . . but there are also reasons why the perspective might differ form the neo-liberal one that currently informs many antitrust laws of developed countries—a perspective that has 'relatively little resonance for the great majority of the population that is poor.'" (quoting Francis Fukuyama, *Keeping Up with the Chavezes*, WALL ST. J., Feb. 1, 2007, at 7)).

190. *Id.* at 217.

191. This has been the trend since the Chicago School influence on competition law. *See* BORK, *supra* note 9, at 427 ("[T]he goal [of antitrust law] is maximum economic efficiency to make us as wealthy as possible. The distribution of that wealth or the accomplishment of noneconomic goals are the proper subjects of other laws and not within the competence of judges deciding antitrust cases."). However, this does not negate the fact that prior U.S. Supreme Court decisions have attempted to address the issue of redistribution in competition cases. An example critiqued by Bork for doing that is *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), where the Court admitted the value of small-business welfare into the adjudicative process.

192. Elzinga, *supra* note 18, at 1194–95 ("Antitrust policy . . . need not concern itself directly with increasing the purchasing power of the poor because it accomplishes this indirectly when it prohibits cartels and monopolies in the single-minded pursuit of efficiency.").

193. Fox, *supra* note 23, at 593; Kaplow, *supra* note 54, at 2 ("[D]istributive objectives are better achieved through the tax and transfer system, with competition law advancing total welfare and hence giving equal weight to consumer and producer surplus. A traditional argument for relying on taxes and transfers that applies in many contexts is that they are better targeted than indirect means, such as the use of competition law. This point is certainly true.").

'interests' of workers."[194] According to its competition law, "the purpose of this Act is to promote and maintain competition in the Republic in order to [among other goals] promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."[195] According to the Act, one may be deemed a historically disadvantaged person "if that person . . . is one of a category of individuals who, before the Constitution of the Republic of South Africa . . . came into operation [in 1993], were disadvantaged by unfair discrimination on the basis of race . . . ."[196] This definition also applies to associations where the majority members are considered historically disadvantaged as well as to firms controlled by such individuals.[197] This is an important goal to a country like South Africa where its majority has been discriminated against through most of its history.

In another attempt to promote equality, the South African Competition Act states that the Competition Commission may exempt an agreement or practice from the application of its competition rules if it contributed to the "promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive."[198]

Finally, the South African law furthers equality, fairness, and antidiscrimination by allowing a merger to be justified on public interest grounds.[199] This provision explains that the Competition Commission or the Competition Tribunal must consider, among other things, the effect that the merger will have on "the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive."[200] The same provision applies when considering whether to exempt an agreement otherwise prohibited.[201] The availability of such exemptions for certain agreements and mergers can be construed to mean that South Africans are sometimes willing to pay a higher price for goods and services as a cost of including the historically excluded segments of its population into the marketplace.[202]

Similar equity claims have been included in the Indonesian competition law, which is "infused with principles of equality of opportunity,

194. ICN REPORT 2007, *supra* note 32, at 18.

195. South African Competition Act, Act No.89 of 1998, ch. 1, para. 2(f) (S. Afr.).

196. *Id*. at ch. 1, para. 3, § (2)(a).

197. *Id.* at ch. 1, para. 3, § (2)(b)–(d).

198. *Id.* at ch. 2, pt. C, para. 10, § (3)(iii).

199. *Id.* at ch. 3, para. 16, § (3)(b)(ii).

200. *Id.*

201. *Id.* at ch. 2, pt. C, para. 10, §3.

202. Fox, *supra* note 23, at 587 ("The South African competition law applies a limited measure of affirmative action.").

fairness, equal treatment, and a leveling of advantage."[203] The inclusion of such equity claims is done against the backdrop of a society that has suffered from cronyism, nepotism, and corruption since its independence in 1945.[204] Business was centralized in the hands of the friends of the government and the successful ethnic Chinese minority.[205] When the competition law was adopted, it aimed at closing the social gap that had caused the economy to be uncompetitive, rearranging business activities so that they could grow in a fair manner and avoid the concentration of power around a certain person or group contradictory to the ideals of social justice.[206]

Other equality considerations included in certain jurisdictions' competition laws often address labor policies. For example, the German Competition law allows certain mergers, with prior approval by the Federal Minister for Economics, to be justified by an overriding public interest, such as labor and industrial policy considerations.[207] Also, the European Community (EC) competition law allows crisis cartels for social reasons.[208]

The problems of using competition laws for equity ends include, among others, the difficulty of interpreting vague terms that are not supported by clear definitions. This leads to wide discretion for the enforcing agency, creates ambiguity for businesses, opens the door for abuse by enforcers, and might result in lack of transparency for the public.

Having presented the different policy alternatives that can guide antitrust enforcement, the next Part of the Article illustrates the choices actually declared by developing countries in their respective competition laws.

III. POLICIES GUIDING DEVELOPING COUNTRIES' ANTITRUST ENFORCEMENT

Most developing countries adopt competition laws with more than one enforcement objective.[209] Contrastingly, more advanced countries focus their antitrust enforcement on the realization of only one goal, of-

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203. *Id.* at 592.

204. *Id.* at 589.

205. *Id.* at 589.

206. People's Legislative Assembly of the Republic of Indonesia, Elucidation of the Law of the Republic of Indonesia, No.5, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, paras. 5–6 (1999) (quoted in Fox, *supra* note 23, at 590–91).

207. Möschel, *supra* note 17, at 9.

208. *Id.* at 10.

209. Table A.1, *infra*, summarizes the stated objectives guiding antitrust enforcement in fifty studied developing countries.

ten consumer welfare or economic efficiency.[210] Looking at the goals listed in the antitrust laws of fifty developing countries,[211] I found twelve principle objectives being pursued: protecting consumer interests; public interest; competition; economic efficiency; eliminating restrictive business practices (RBPs); economic freedom; protecting small businesses; progress and development; fairness and equity; consumer choice; competitive prices; and competition in international markets. Some developing countries pursue less frequently mentioned antitrust objectives: freedom of trade;[212] promoting innovation;[213] regional integration;[214] employment;[215] expanding the base of entrepreneurs;[216] and spread of ownership.[217]

Table A.1 illustrates that the overwhelming goal chosen by developing countries is the protection of competition. This appears as the sole goal for ten countries out of the forty-three that pursue it alongside other goals.[218] For those ten countries, one can assume that they consider competition an end in itself; for the other countries that choose competition alongside other goals, competition is rather a means to achieve other ends.

Some of the goals chosen by developing countries are in conflict. An obvious conflict emerges for countries that aim at protecting their consumers, yet at the same time aim at protecting small businesses and promoting their domestic firms to compete internationally.[219] As discussed above, protecting small businesses and encouraging international competition often means supporting higher prices to achieve these goals. This is clearly in conflict with a standard that aims at protecting consumer welfare, which is automatically reduced once prices rise.

Another conflict emerges for countries that promote both consumer interest and economic efficiency, when consumer interest is understood to imply a consumer welfare standard and economic efficiency to imply

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210. Stucke, *supra* note 8, at 567 ("[W]hile the United States sought a single economic antitrust goal, other countries enacted competition laws with more antitrust objectives.").

211. *See* Waked, *supra* note 5 (explaining how these fifty developing countries were chosen as part of larger research based on the following criteria: (1) they are considered developing according to a World Bank classification of low income, lower middle income and high middle income economies in 2005; and (2) have adopted a competition law and set up an enforcing agency by 2007).

212. *See* Table A.1. These are: India, Philippines, and Zambia.

213. *See* Table A.1. These are: Kenya.

214. *See* Table A.1. These are: Kenya and Russia.

215. *See* Table A.1. These are: Namibia and South Africa.

216. *See* Table A.1. These are: Zambia.

217. *See* Table A.1. These are: Namibia and South Africa.

218. *See* Table A.1. These are: Albania, Bosnia & Herzegovina, Bulgaria, Chile, Croatia, Estonia Lithuania, Mongolia, Montenegro, and Turkey.

219. *See* Table A.1. These are: Colombia and Kenya.

a total welfare standard.[220] The previous discussion has demonstrated how these welfare standards are incompatible and would, in most instances, lead to opposite outcomes if applied to the same case. For example, a merger might be approved under a total welfare standard, even when consumers are harmed, when the gain to the merging firms outweighs the harm suffered by consumers. However, applying a consumer welfare standard would block such a merger. If economic efficiency is understood to refer to allocative efficiency instead, then no such conflict emerges.

Ten countries follow only a consumer welfare standard,[221] and six countries follow only a total welfare standard. Many of the countries that pursue a consumer welfare standard are Eastern European, such as Latvia, Poland, Romania, and Slovakia. This is in conformity with the more prominent EU objective of protecting consumer interests rather than achieving overall economic efficiency.[222] The countries that aim at total welfare are Indonesia, Mexico, Namibia, Russia, South Africa, and Venezuela.

Barbados, Colombia, Indonesia, Namibia, and South Africa aim their competition laws, among other things, to protect small businesses by giving them a level playing field to compete with larger businesses. Kenya, Namibia, and South Africa state international competitiveness as one of the goals they hope to realize with their competition policy. One would assume more countries to state both of these preceding goals as guiding enforcement objectives. We would expect that smaller, less-advanced countries tend to use their competition policy to advance the competitiveness of small businesses locally and of their domestic firms internationally.[223]

That only so few developing countries cite these goals is surprising. It might, however, be that they do not declare these goals as a policy ob-

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220. *See* Table A.1. Thirteen countries' competitions laws aim at protecting consumers *and* promoting economic efficiency: Colombia, Costa Rica, El Salvador, Honduras, Hungary, Kenya, Macedonia, Morocco, Pakistan, Panama, Papua New Guinea, Serbia, and Zambia.

221. *See* Table A.1. These are: Armenia, Brazil, India, Latvia, Peru, Philippines, Poland, Romania, Slovakia, and Sri Lanka.

222. *See Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings* 2004 O.J. (C 31) Sec. VII. EFFICIENCIES, para. 77 ("The Commission considers any substantiated efficiency claim in the overall assessment of the merger. It may decide that, as a consequence of the efficiencies that the merger brings about, there are no grounds for declaring the merger incompatible with the common market pursuant to Article 2(3) of the Merger Regulation. This will be the case when the Commission is in a position to conclude on the basis of sufficient evidence that the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have.").

223. *See supra* Part II.B.1 and Part II.B.2 and accompanying notes.

jective, while still pursuing them in practice. One could also imagine that by not stating these goals, but instead citing some type of efficiency standard, some developing countries are signaling to the rest of the world that their antitrust laws are not used to promote controversial protectionist objectives. Instead, they attract foreign firms and investments by assuring them that they follow mainstream efficiency goals. This would also appear to be in line with the recommendation by international organizations, such as the OECD, to shift away from the use of antitrust law to promote public interest objectives.[224]

It is interesting to note that ten out of the fifty studied developing countries clearly spell out that their antitrust enforcement should aim at promoting progress and development.[225] This is particularly intriguing given that pursuing progress and development is a rather unorthodox competition goal that has no counterpart in more advanced countries. It is quite important for developing countries to place their competition policy within a wider development framework as discussed before. The fact that so many actually state development as a competition goal attests to their aim at broadening the scope of antitrust to include pressing development needs. To formulate a competition policy that has development implications is rather complex. Yet, once such a policy has been untangled, its repercussions on growth and development would be extremely rewarding.[226]

Three countries—Hungary, Indonesia, and South Africa—state that their antitrust laws pursue fairness and equity.[227] In the case of both Indonesia and South Africa, these provisions mainly apply to granting historically disadvantaged persons access to the marketplace, as discussed above.[228] It is a clear testament that competition policy can be used to achieve a more equitable distribution of the means of production. It also shows the extensive reach that competition policy can be used to achieve.

Public interest guides antitrust enforcement in eleven developing countries.[229] This goal is more general than consumer or producer interests, as it can be interpreted to encompass a variety of outcomes that arguably serve the public at large. This allows, on the one hand, great flex-

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224. OECD GLOBAL FORUM ON COMPETITION, THE OBJECTIVES OF COMPETITION LAW AND POLICY 1, 3 (2003), *available at* http://www.oecd.org/daf/competition/2486329.pdf.

225. *See* Table A.1. These are: Armenia, Hungary, India, Indonesia, Namibia, Serbia, Slovakia, South Africa, Ukraine and Venezuela.

226. *See* Part IV. Discussing a proposition as to how to formulate a competition policy that leads to growth and development.

227. *See* Table A.1.

228. *See supra* notes 193–206 and accompanying text.

229. *See* Table A.1. These are: Hungary, Indonesia, Kenya, Latvia, Namibia, Papua New Guinea, Peru, Poland, Serbia, South Africa, and Zambia.

ibility; yet, on the other hand, this goal leads to a lack of predictability and certainty. A public interest goal may open the door for disguised corruption and nepotism in the name of the public interest, and such broadness is often discouraged.

Eliminating restrictive businesses practices appears as an antitrust objective in the competition laws of thirteen developing countries.[230] However, explicitly including this goal as an objective of the law is rather unnecessary, as the aim of any law is to eliminate restrictive practices that are not in conformity with the law. Nonetheless, some countries do find it important to spell it out as a guiding enforcement objective.

Three remaining goals are mentioned in some developing countries' antitrust legislations: assuring economic freedom (three countries),[231] providing consumer choice (two countries),[232] and securing competitive prices (four countries).[233] These goals are often subsumed under other objectives, such as economic efficiency and consumer interests.

The International Competition Network (ICN) reported very similar results regarding the goals of antitrust, discussing thirty-three competition authorities' responses to a questionnaire on the objectives of unilateral conduct laws.[234] Member countries considered ten different goals/objectives for their competition laws. These objectives, listed in order of the number of times cited by respondents, are: ensuring an effective competitive process; promoting consumer welfare; maximizing efficiency; ensuring economic freedom; ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets.[235] The first three listed goals are the most important goals for most jurisdictions, with the rest only mentioned by some jurisdictions and not others.[236] Moreover, two subsequent ICN surveys identifying the objectives of antitrust have found very similar results. The main goals continue to be the promotion of competition (both as a means to achieve other goals and as an end in itself), economic efficiency, and increasing consumer welfare.[237]

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230. *See* Table A.1. These are: Barbados, Costa Rica, Egypt, Mexico, Peru, Philippines, Slovakia, Syria, Tunisia, Ukraine, Uzbekistan, Venezuela, and Zambia.

231. *See* Table A.1. These are: Argentina, Russia, and Tunisia.

232. *See* Table A.1. These are: Namibia and South Africa.

233. *See* Table A.1. These are: Morocco, Namibia, Papua New Guinea, and South Africa.

234. ICN REPORT 2007, *supra* note 32. Table A.2 reports the published ICN results on antitrust objectives.

235. *Id.* at 2 and Annex A.

236. *Id.*

237. TURKISH COMPETITION AUTH., REPORT ON INTERFACE BETWEEN COMPETITION POLICY AND OTHER PUBLIC POLICIES 44 (2010), *available at* http://www.icn-

Despite countries failing to unify antitrust enforcement around a singular objective, it is still considered better to pursue one goal rather than many.[238] Having multiple goals guiding antitrust enforcement in developing countries is bound to create problems. According to Foer,

> There is indeed a yearning to find one goal, the single goal, because then one could design a system of antitrust that would appear to be scientific, objective, safe from the prejudices introduced by such human factors as politics. When multiple goals are acknowledged, logic is likely to suffer. Tradeoffs will have to be made. Discretion and hence politics will enter into the process. Compromise is messy. Outcomes [will] not necessarily [be] predictable . . . .[239]

As a result, I will attempt to promote a one-goal oriented antitrust policy for developing countries in the next section.

IV. RECOMMENDED ENFORCEMENT POLICY FRAMEWORK

Developing countries face unique circumstances that make antitrust policy frameworks—which were initially suited for developed countries—inapt to address their needs.[240] Policymakers in developing countries have, as discussed before, the flexibility to use their antitrust laws in ways that are not necessarily in line with the Western mainstream. They should ask themselves: Which antitrust policy is suitable to address the country's "systemic poverty, aggravated by corruption, cronyism, selective statism, weak institutions, and often unstable democracy[?]"[241] More importantly, they need to ask which antitrust policy promotes development in a way to address these chronic problems.[242]

Recently, Eleanor Fox recommended that "developing-country antitrust should aspire to fit the Spence Consensus, not the Washington Consensus."[243] The Washington Consensus model of competition law is "[focused on removing] government barriers and distortions—licensing,

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istanbul.org/Upload/Materials/SpecialProject/SP_BackgroundReport.pdf; INT'L COMPETITION NETWORK, COMPETITION ENFORCEMENT AND CONSUMER WELFARE—SETTING THE AGENDA 14 (2011), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf.

238. Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust, in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECTS OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 11, 13 (Robert Pitofsky ed., 2008) ("Having only a single objective at least *permits* the consistency and predictability needed to make a deterrence-based policy effective.").

239. Foer, *supra* note 13, at 31.

240. *See* Waked, *supra* note 1.

241. Fox, *supra* note 180, at 213.

242. Eleanor M. Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries* 3 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 11-04, Feb. 14, 2011), *available at* http://ssrn.com/abstract=1761619 ("Developing countries need sustained and inclusive growth and development.").

243. *Id.* at 11.

trade barriers, subsidies—and just let markets work."[244] It is "focused on increasing aggregate efficiency (aggregate wealth for the world). It assumed that markets 'let alone' (business freedom) would increase aggregate efficiency. It opposed policies that took account of distributional concerns and individual vulnerabilities, assuming that regard for these values undermines efficiency."[245] By advocating for the Spence Consensus, Fox is referring to the Spence (World Bank) Growth Report, which was developed by the Spence Growth Commission, chaired by Nobel Laureate Michael Spence and comprised of experts principally from developing countries.[246] The report concludes that "not only does growth critically matter, but *inclusive* growth critically matters. Distribution counts. And distribution of wealth and, more important for our purposes, of opportunity and chance for mobility was [and is] deeply skewed."[247] According to Fox, competition policy in developing countries should aim at growth, distribution, and empowerment.[248]

Similar to the aim of Fox, the idea is to outline a new direction for antitrust that better suits developing countries' unique conditions.[249] This new direction selects development and growth as the priority objectives of antitrust. Alice Amsden and Ajit Singh have already argued that the goal of antitrust in semi-industrial and transition economies should be to promote industrialization and economic growth.[250] Michael Porter has also rejected "the Chicago School's commitment to efficiency in favor of growth and innovation."[251] He argues that the "new thinking [about the goals of antitrust] sets forth productivity growth as the basic goal of antitrust policy."[252] Porter argues that productivity growth should be the new standard for antitrust for all countries, not just developing ones.[253] I

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244. *Id.* at 5.

245. *Id.* at 5–6.

246. *See* COMM'N ON GROWTH AND DEV., THE GROWTH REPORT: STRATEGIES FOR SUSTAINED GROWTH AND INCLUSIVE DEVELOPMENT (2008), *available at* http://cgd.s3.amazonaws.com/GrowthReportComplete.pdf.

247. Fox, *supra* note 242, at 7.

248. *Id.* at 3–4.

249. *See* Waked, *supra* note 1 (for an analysis of these unique conditions).

250. Amsden & Singh, *supra* note 7, at 941.

251. Foer, *supra* note 13, at 13.

252. Porter, *supra* note 19, at 920.

253. *Innovation, Rivalry, and Competitive Advantage: Interview with Professor Michael E. Porter*, 5 ANTITRUST 5, 5 (1991) [hereinafter *Porter Interview*] ("It is well established in economics that progressiveness or innovativeness is by far the most important source of economic growth and welfare, greatly outweighing price/cost margins (allocative efficiency), or even static efficiency. The central focus of antitrust policy in my view, ought to be on fostering progressiveness, defined broadly to include not only technological innovation but new ways of competing in product, marketing, service, and so on.").

argue that it is fundamentally more important for developing countries to target productivity growth with their antitrust laws.

Two questions are important for developing countries to address in conjunction with realizing growth as an antitrust objective: (1) how growth is generated, and (2) how to formulate an antitrust policy that promotes the chosen growth accelerator.

The first question does not have a straightforward answer. Economic growth theory has spanned various economic schools of thought, each providing a distinct answer to the question of how growth is generated. Four leading growth paradigms are generally addressed in this context.[254] The first is the neoclassical growth model—also referred to as the Solow model[255]—which utilizes a production equation that expresses the current flow of output goods as a function of the current stocks of capital and labor.[256] The neoclassical model assumes technological change or innovation as exogenous to the economic process.

The other three growth models (the AK model, the Product–Variety model, and the Schumpeterian model) are all based on endogenous growth theories.[257] The AK model, which is the first version of endogenous growth theory, does not, however, distinguish between capital accumulation and technological progress.[258] Yet, the other two models are clearly innovation-based endogenous growth models. The Product–Variety model does not, however, incorporate a role for exit and turnover, which means it does not take account of the idea of creative destruction.[259] Regardless of which of these new neoclassical models one chooses to follow, "identifying endogenous technological change as the

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254. PHILIPPE AGHION & PETER HOWITT, THE ECONOMICS OF GROWTH 12 (2008).

255. Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q. J. ECON. 65 (1956).

256. *Id.*

257. AGHION & HOWITT, *supra* note 254, at 12–16; *see also id.* at 47 (Endogenous growth theories incorporate technological change into their models. It no longer treats the rate of technological change as being determined exogenously by noneconomic forces. Instead, in endogenous growth models technological change depends on economic decisions as it comes from industrial innovations made by profit seeking firms. Technology is therefore an endogenous variable, determined within the economic system. Growth theories that take this endogeneity into account acknowledge that the rate of technological progress is what determines the long-run growth rate.).

258. *Id.* at 13.

259. *Id.* at 15. Creative destruction, as developed by Schumpeter, refers to the process by which new innovations that drive growth by creating new technologies, destroy the results of previous innovations by making them obsolete. *See infra* note 261 and accompanying text. *See generally* SCHUMPETER, *supra* note 123.

main driving force for economic growth obviously adds to the level of realism of growth theory."[260]

The Schumpeterian growth model, which is the one arguably more suitable for analyzing growth in developing countries,[261] was initially developed by Segerstrom, Anant, and Dinopoulous,[262] and further elaborated by Aghion and Howitt.[263] This paradigm grew out of modern industrial organization theory and is called *Schumpeterian*—referring to Schumpeter's creative destruction idea, where quantity-improving innovations are considered to render old products obsolete.[264] According to this model, "faster growth generally implies a higher rate of firm turnover, because this process of creative destruction generates entry of new innovators and exit of former innovators."[265]

According to the Schumpeterian growth model, a country farther from the technological frontier will grow faster when innovating.[266] This is particularly important for developing countries that are generally situated farther away from the global technological frontier. The closer countries move to the technological frontier, the more they need to shift from implementation-enhancing institutions to innovation-enhancing institutions to grow.[267] This will allow them to catch up with the frontier level of GDP per capita.[268]

The recent growth models have mainly shown the centrality of technological change and innovation to growth.[269] This has also been backed up by empirical studies, which have found that innovation is the

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260. Bart Verspagen, *Endogenous Innovation in Neo-Classical Growth Models: A Survey*, 14 J. MACROECON. 631, 659 (1992).

261. AGHION & HOWITT, *supra* note 254, at 17 ("Schumpeterian theory provides a framework in which the growth effects of various policies are highly context-dependent. In particular, the Schumpeterian apparatus is well suited to analyze *how a country's growth performance will vary with its proximity to the technological frontier . . . , to what extent the country will tend to converge to that frontier, and what kinds of policy changes are needed to sustain convergence as the country approaches the frontier*." (emphasis in original)).

262. Paul S. Segerstrom, T. C. A. Anant & Elias Dinopoulos, *A Schumpeterian Model of the Product Life Cycle*, 80 AM. ECON. REV. 1077 (1990).

263. Philippe Aghion & Peter Howitt, *A Model of Growth Through Creative Destruction*, 60 ECONOMETRICA 323 (1992); *see also* PHILIPPE AGHION & PETER HOWITT, ENDOGENOUS GROWTH THEORY (1998).

264. AGHION & HOWITT, *supra* note 254, at 15.

265. *Id.* at 16.

266. *Id.* at 18.

267. *Id.* For more on catching up with global technological frontier, see generally ALEXANDER GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE (1962); Daron Acemoglu, Philippe Aghion & Fabrizio Zilibotti, *Distance to Frontier, Selection, and Economic Growth*, 4 J. EU. ECON. ASS'N. 37 (2006); Rachel Griffith, Stephen Redding & John Van Reenen, *Mapping the Two Faces of R&D: Productivity Growth in a Panel of OECD Industries*, 86 REV. ECON & STAT. 883 (2004).

268. AGHION & HOWITT, *supra* note 254, at 18.

269. *See supra* notes 257–267.

most important factor for real output.[270] Once innovation enters as an endogenous economic phenomenon in growth theories, the first fundamental welfare theorem holding that perfect competition generates optimal allocation of resources could be questioned.[271] This is because of the possibility that monopolistic structures could be found to be necessary for innovation to occur.[272] These are drastic policy shifts that challenge the conventional wisdom about the absolute benefit of perfect competition. This is related to the second question that developing countries need to address: how to draft a competition policy that furthers technological change and innovation, now that the latter has been found to be the accelerator of growth.

Innovation is not only credited for its crucial role in generating economic growth, but is also responsible for expanding the domestic economy by introducing new products that consumers desire and lowering the costs of existing products.[273] This reduction in cost has a direct benefit, freeing resources that can be used elsewhere in the economy and thereby increasing economic welfare if it results in lower prices and greater output.[274]

Developing countries need to formulate a competition policy that strives at realizing these dynamic efficiencies instead of static ones. Scholars have already been calling for developing countries to pursue dynamic efficiency given its developmental impact.[275] The competition policies adopted by developed countries are not often suitable for the developing world due to the fact that "[t]he attention to allocative efficiency and lower prices that underlies competition policy in developed

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270. *See supra* note 120 and accompanying text; *see also* Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957).

271. Verspagen, *supra* note 260, at 635 ("Both the presence of increasing returns and monopoly power are important novelties in neo-classical growth theory. These features of the model shed a wholly different light upon the concept of perfect competition as a means to achieve a socially optimal growth path."); *id.* at 657 ("The . . . assumption . . . of monopoly power [which] is needed to generate innovation sheds new light upon the conclusion reached by general equilibrium models and welfare analysis that perfect competition in all markets generates an optimal result (in the sense of allocation of goods). New neo-classical growth models explicitly assume that a monopolistic market structure is necessary for innovation and therefore for economic growth. The role of competitive market as a means of generating efficient prices is thus no longer obvious. Anti-trust policy as a form of government intervention is no longer obviously related to a better (compared to the monopolistic market) allocation of goods. This is not to say that anti-trust policy may not be necessary. The point is merely that it is no longer obvious to make the point for perfect competition irrespective of what happens in the technological field.").

272. SCHUMPETER, *supra* note 123 and accompanying text.

273. Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569, 573 (1995).

274. *Id.*

275. J. S. Metcalfe, R. Ramlogan & E. Uyarra, *Economic Development and the Competitive Process* 24 (Ctr. on Regulation and Competition Working Paper Series, Paper No. 36, Dec. 2002).

countries may be too narrow and static from a development perspective."[276] Further, "it is usually understood that dynamic efficiency can have a far more dramatic effect on the economy than static efficiency, and this can be visualized by comparing the overall impact of improving the manufacturing process of a buggy whip with inventing the reciprocating engine."[277]

Joseph Brodley has argued that "[a]ntitrust law has always permitted some degree of social conduct that is not in the immediate interest of consumers in order to sustain innovation and production efficiencies."[278] For example, patent law temporarily grants the right of lawful monopolies to exist.[279] Bordley further argues that, "whatever future benefits accrue to consumers generally through innovation and production efficiencies, the need to maintain producer incentives may require the consumers of a particular product to pay higher prices in the short run."[280] Consumer interest may be temporarily subordinated to the general welfare if (1) the activity may increase total social wealth by realizing significant production or innovation efficiencies; (2) the activity must be necessary to achieve such efficiencies; (3) the activity must not permanently suppress interfirm rivalry.[281] Michael Porter has also argued that

> antitrust must move away from a narrow conception of welfare—that is, whether a consumer has to pay more for a particular product at a particular point in time—to a broader conception of national welfare that encompasses the productivity of industry, including the wages paid to employees.[282]

The challenge is figuring out how to pursue such dynamic efficiency as the goal of antitrust. What developing countries need to address is "what the optimal degree of competition is for promoting dynamic efficiency (in the sense of maximizing the long term rate of growth of industrial and overall productivity)."[283] There has been a long-standing debate about whether higher degrees of concentration or more competitive environments are the appropriate basis for encouraging innovation.[284]

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276. *Id.*
277. Foer, *supra* note 13, at 21.
278. Brodley, *supra* note 19, at 1036.
279. *Id.* at 1037.
280. *Id.*
281. *Id.* at 1037–38.
282. *Porter Interview*, *supra* note 253, at 5.
283. Amsden & Singh, *supra* note 7, at 941.
284. It is also known as the Schumpeterian vs. Darwinian debate. See Waked, *supra* note 1 for a summary of this debate.

Those in the Schumpeterian camp have their ideological underpinnings in the writings of Joseph Schumpeter.[285] They consider monopoly power a necessity to generate innovation.[286] According to Schumpeter, monopoly profits are necessary for firms to pursue R&D and innovation.[287] Schumpeter's claims are: (1) only large businesses are able to achieve scale economies and bear the risks of investing in innovation;[288] (2) monopoly rents are an ideal source of funds to support industrial research and innovation;[289] and (3) a monopoly position is a security that makes investments in innovation seem worthwhile.[290] Thus, a competition policy aligned with Schumpeter would be more accepting of higher levels of concentration through, for example, mergers that result in dominance.

On the other hand, those in the Darwinian camp argue that innovation is stimulated in competitive markets.[291] This is because each firm

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285. SCHUMPETER, *supra* note 123.

286. *See, e.g.*, F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 469–70 (2d ed. 1980); Philippe Aghion & Mark Schankerman, *Competition, Entry and the Social Returns to Infrastructure in Transition Economies*, 7 ECON. TRANSITION 79, 95–96 (1999); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 1 (1973); Dixit & Stiglitz, *supra* note 12, at 297; Salop, *supra* note 12, at 393; Scherer, *supra* note 41, at 1012; F. M. Scherer, *Corporate Inventive Output, Profits, and Growth*, 73 J. POL. ECON. 290 (1965); F.M. Scherer, *Firm Size, Market Structure, Opportunity, and the Output of Patented Inventions*, 55 AM. ECON. REV. 1097 (1965).

287. SCHUMPETER, *supra* note 123, at 106 ("What we have got to accept is that [the large-scale establishment or unit of control] has come to be the most powerful engine of [economic] progress and in particular of the long-run expansion of total output not only in spite of, but to a considerable extent through, this strategy which looks so restrictive when viewed in the individual case and from the individual point in time. In this respect, perfect competition is not only impossible but inferior, and has no title to being set up as model of ideal efficiency.").

288. *Id.* at 89 ("[L]arge-scale plans could in many cases not materialize at all if it were not known from the outset that competition will be discouraged by heavy capital requirements or lack of experience, or that means are available to discourage or checkmate it so as to gain the time and space for further developments.").

289. *Id.* at 89–90 ("[E]nterprise would in most cases be impossible if it were not known from the outset that exceptionally favorable situations are likely to arise which if exploited by price, quality and quantity manipulation will produce profits adequate to tide over exceptionally unfavorable situations provided these are similarly managed.").

290. *Id.* at 88 ("Practically any investment entails, as a necessary complement of entrepreneurial action, certain safeguarding activities such as insuring or hedging. . . . Hence it becomes necessary to resort to such protecting devices as patents or temporary secrecy of process or, in some cases, long-period contracts secured in advance. . . . [I]f a patent cannot be secured or would not, if secured, effectively protect, other means may have to be used in order to justify the investment."); *id.* at 102 ("Thus it is true that there is or may be an element of genuine monopoly gain in those entrepreneurial profits which are the prizes offered by capitalist society to the successful innovator.").

291. *See, e.g.*, Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources to Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY 609–25 (Nat'l Bureau of Econ. Research ed., 1962); Jennifer F. Reinganum, *The Timing of Innovation: Research, Development and Diffusion*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION 849 (Richard L. Schmalensee & Robert D. Willig eds., 1989); Partha Dasgupta & Joseph E. Stiglitz, *Uncertainty, Industrial Structure, and the*

fears its products will be rendered obsolete by another firm's innovation. Therefore, the more firms that compete, the higher the pressure to innovate. Many empirical studies on whether competition or concentration provides better tools for growth conclude that competition has the greater effect.[292] One of the most cited empirical studies is one of 640 U.K. companies that concluded that increasing levels of competition leads to increasing levels of total factor productivity growth, because competition exerts downward pressure on costs, encourages efficient production, and innovation.[293] Others have argued that it is a combination of both market structures—in the form of an inverted U-shaped graph—that describes the relationship between competition and innovation.[294] At low levels of competition, innovation will increase as more firms enter the market up to a point when a further increase in the number of firms will negatively impact innovation.[295]

Given the variety of conclusions about how to promote innovation, the debate is far from being settled. Further research needs to study which market structure is more inclined to advance innovation in developing countries. Despite the difficulty of "the economics of innovation . . . and our [limited] empirical knowledge[,] . . . innovation is too important for antitrust to use the limits of our knowledge as an excuse for failing to take action in appropriate cases."[296] Empirical studies have thus

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Speed of R&D, 11 BELL J. ECON. 1 (1980); Gilbert & Sunshine, *supra* note 273, at 569; Tom Lee & Louis L. Wilde, *Market Structure and Innovation: A Reformulation*, 94 Q. J. ECON. 429 (1980); Glenn C. Loury, *Market Structure and Innovation*, 93 Q. J. ECON. 395 (1979).

292. Some of these studies include: Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002); Mark A. Dutz & Maria Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment* (Eur. Bank for Reconstruction and Dev., Working Paper No. 47, 2002); Aydin Hayri & Mark Dutz, *Does More Intense Competition Lead to Higher Growth?*, (World Bank Policy Research, Working Paper No. 2320, Nov. 30, 1999); Bruce M. Owen, *Competition Policy in Emerging Economies*, (Stanford Inst. for Econ. Policy, Research SIEPR Discussion Paper No. 04-10, Apr. 2005); John Preston, *Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences* (DIFID Case Study for WDR, Nov. 2003); Yuichiro Uchida & Paul Cook, *The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination*, (Ctr. on Regulation and Competition Working Paper Series, Paper No. 72, June 2004); Maria Vagliasindi, *Competition Across Transition Economies: An Enterprise-level Analysis of the Main Policy and Structural Determinants* (Eur. Bank, Working Paper No. 68, Dec. 2001).

293. *See* Stephen J. Nickell, *Competition and Corporate Performance*, 104 J. POL. ECON 724 (1996) (the author proves with empirical evidence that competition, measured either by increased number of competitors or by lower levels of rents, is associated with higher rates of total factor productivity growth).

294. *See* Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005).

295. *Id.* at 707.

296. Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECTS OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 51, 58 (Robert Pitofsky ed., 2008).

far mainly focused on the developed world, with the exception of a few studies on one or two developing countries.[297] Once conclusive cross-nation empirical evidence is available, one of the two theories about market structures that generate innovation will prevail.[298] Developing countries can then select this prevailing market structure to stimulate innovation while achieving growth and development. This lacking empirical evidence is crucial to give an ultimate answer to the second question: how to achieve dynamic efficiency and encourage innovation. Figure A.5 illustrates the known and unknown parameters of the current *new thinking* of antitrust for developing countries.

Regardless of the innovation-generating policy that developing countries choose, especially if it is one that accommodates market power, they should continue to assure that prices for necessities are not elevated. Developing countries face rampant poverty and should not force consumers—through their antitrust policy—to pay higher prices for their necessary subsistence goods and services. They should also be open to incorporating redistribution, which is usually left to be tackled outside the realms of antitrust (through tax and transfer systems), *into* their antitrust policy. Einer Elhauge developed one such idea and it involves a consumer trust concept, which is funded by fixed cost efficiencies realized to firms that acquire market power under a Coasian deal in merger review analyses to be redistributed back to the consumers.[299] The idea is to translate fixed cost efficiencies into marginal cost reductions that directly benefit the consumers. Thus, a merger that improves fixed cost efficiencies, but increases prices, is still approved under a consumer welfare standard.[300]

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297. *See, e.g.*, Philippe Aghion, Matias Braun & Johannes Federate, *Competition and Productivity Growth in South Africa*, 16 ECON. TRANSITION 741 (2008); Riadh ben Jelili, *Markup Pricing and Import Competition: Has Import Disciplined Tunisian Manufacturing Firms?* (Working Paper No. 0426, 2001), *available at* http://www.erf.org.eg/CMS/uploads/pdf/0426_final.pdf.

298. This is the subject matter of a current study I am working on.

299. ELHAUGE & GERADIN, *supra* note 10, at 1004–05 ("[I]f the dollar gains to the merging parties exceed the dollar losses to consumers, one would think the merging parties could devise some mechanism to transfer enough of their gain to consumers to offset any losses to those consumers. . . . Another possibility would be to allow firms to create some sort of consumer trust. For example, if the objection to a merger efficiency is that it lowers fixed costs but not marginal costs, then merging firms could create a trust, funded out of their reduction in fixed costs, that pays merged firm a dollar sum for every unit they sell. In this way, the trust could convert a reduction in the firms' fixed costs into a reduction in their marginal costs. If the concern is that the merging firms will not pass on a sufficient share of the reduction in their marginal costs to make consumers better off, the trust could pay consumers a sum for every unit they purchase . . . . Whatever the details, one would think merging firms with large net efficiency gains in the offing could put together some sort of Coasian deal that makes them better off without harming consumers, unless the transaction costs of doing so are so large they exceed the net efficiency gain.").

300. *See* Robert Rubinovitz, *The Role of Fixed Cost Savings in Merger Analysis*, 5 J. COMPETITION L. & ECON. 233 (2009) (detailing how fixed cost reductions are not considered effi-

This concept is particularly interesting for developing countries if the cost efficiencies are generated through innovative improvements and, at the same time, cause consumers to suffer. In the cases when consumers would not be drastically harmed through elevated prices, for example with more elastic goods, such a mechanism would be less of a concern. This model applies a Kaldor–Hicks efficiency standard, but finally incorporates actual redistribution. Here, all parties benefit. Firms and producers can go ahead with their innovation-generating mergers or collaborations because their novel market powers and higher prices are used to fund a consumer trust that is then redistributed back to the consumers once their cost functions are indeed reduced.[301]

Promoting innovation and growth as an antitrust goal, therefore, needs to be aligned with a mechanism of redistribution through the antitrust rules. This guarantees that the benefits accrued through innovation and growth at the firm, industry, and national levels are felt by the consumers who would have suffered had redistribution been ignored or left to be tackled through the tax and transfer system. This is particularly important given that awaited expectations from trickle-down economics in many developing countries have failed to be realized.[302]

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ciencies in U.S. merger analysis and a call for such fixed cost reductions to be considered efficiencies under a consumer welfare standard).

301. See Waked, *supra* note 1, at 93–94, for an elaboration of this idea: "The merger [to dominance that will generate fixed efficiencies through innovation] will be allowed to go through. This will nevertheless allow the merged entity to increase prices. This will not be prohibited. However, the competition authority will decide what the competitive price should have been. This may be the price pre-merger or the price of other firms selling similar products in a competitive market. Then, the authority will allow the merged entity to raise the prices only if every purchaser of the product sold will be given a coupon with the difference between the current price and the but-for price . . . . The consumers can only cash in their coupons after a certain time. The competition authority, upon consulting with the merging firms, will set this time. The idea is that the merged firm may be allowed to harm consumers in the short-run, only to achieve their promised efficiencies in terms of lowering their cost-curves in a pre-set time frame, and then be required to give back to the consumers the realised efficiencies to offset their harms. So, this means that each product sold would come with a coupon to be cashed at a later time. Once this grace period elapses consumers will cash their coupons. At this moment their harm will be offset. . . . This mechanism can be understood to function as follows. Through the consumer trust, consumers become de facto shareholders who are owed dividends at a certain time. Or, they become creditors who are owed their loans back at a certain time. The mechanism can also be devised to allow for interest payable on every coupon received. If the firm fails to pay back its so-to-speak debts to the consumers, then the competition authority may liquidate the firm and use the sold assets to repay the consumers. This will be a driving force for the merged entity to achieve the promised efficiencies. The benefits of such are threefold. First, the firms will be able to undertake their merger and realise their efficiencies. This will allow the firms to achieve dynamic efficiencies when they invest in R&D and innovate. Second, the merger will allow the firms to compete in international markets, which is often a major concern in developing countries. Third, consumers will benefit in the long-term. Also, they will benefit as workers who may have more work options at the merged firm."

302. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).

Arguably, international competitiveness and small business protection should guide enforcement in developing countries. Nonetheless, they are considered outdated goals, as they only lead to higher prices for consumers and evidence has shown that lack of domestic competition is bound to create sluggishness and lack of productivity.[303] This is particularly true for many developing countries that have pursued years of protection and are today very far away from the global technology frontier. Evidence from Korea and Japan has shown that curbing local competition might only be successful when international targets are set for the domestic firms; otherwise protection is not merited.[304] Unless a government exercises such a similarly tight grip on its domestic firms, the Japanese and Korean experiment cannot be repeated.

The world today is different. Developing countries can no longer exercise the same protection Japan and Korea afforded in the 1950s and 1960s. Yet, this does not mean that developing countries need to accept mainstream neoliberal economic theory either. They do have a choice to make. They can choose to grow using workable growth models, namely those that put innovation at the center of their equilibrium theories. They can pursue growth in heterodox manners, through promoting concentration, if evidence shows monopolistic structures to be more innovation-encouraging. What is crucial, however, is that developing countries pursue growth as the objective of their antitrust policy. By pursuing growth, they can tackle one of their most important concerns: technological advancement. Also, promoting innovation will, in the long run, "keep prices low for consumers, . . . generate rising wages[,] and create many other national benefits such as technological spillovers."[305]

Redistribution should be a part of developing countries' competition policy. This means that consumers should not suffer more under elevated price levels. On the contrary, once innovation becomes the central driving force of antitrust policy, prices are bound to decrease over the long run when cost functions are reduced. Figure A.2 shows that when the monopolist invests his monopoly rents in lowering the marginal cost curve to MC_2, the price is reduced to P_{m2} (which is lower than under perfect competition at P_c) and the quantity is increased to Q_{m2} (which is higher than under perfect competition at Q_c). However, it is important to note that had the monopolist only reduced the cost to MC_1 and not to

303. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 143 ("Rivalry has a direct role in stimulating improvement and innovation."); *id.* at 144 ("A group of domestic rivals draws attention to the industry, encourages investments by individuals, suppliers, and institutions that improve the national environment, and creates diversity and incentives to speed the rate of innovation, among other benefits."); *see also supra* note 179 and accompanying text.

304. *See* Amsden & Singh, *supra* note 7.

305. *Porter Interview*, *supra* note 253, at 6.

MC_2, price would have still been higher and quantity lower than under perfect competition ($P_{m1} > P_c$; $Q_{m1} < Q_c$). This graph shows that a firm enjoying a monopolist position may be able to transform its cost reduction to lower prices and higher output, which is to the benefit of consumers. This position is, according to the graph, only reachable when the cost functions are lowered *sufficiently*, which is often only possible when monopoly rents are invested in R&D and innovation.

It is important to note that until the monopolist or dominant firm that is encouraged to innovate manages to lower its cost functions that result in lower prices, consumers should still not suffer in the interim. They can be awarded interest-stakes in these firms equivalent to their purchases or direct cash-backs or coupons awarded when they buy the respective products.[306] This immediate redistribution aims at guaranteeing that the overall policy orientation of promoting innovation and growth does not harm consumers in the short and long run.

V. Conclusion

Antitrust laws are considered tools to achieve not only economic, but also social, ends. The flexibility of these laws has awarded them a special status, where they have been used to achieve a variety of goals for more than a century. The lack of a consensus as to what goal they are intended to achieve has allowed them to morph over time to account for changing surrounding circumstances.

Developing countries' recent encounter with antitrust laws gives them a fresh choice regarding what to aim at achieving with the implementation of these laws. They can look to the arsenal of choices made by advanced countries that preceded them for inspiration. In this paper, I indicate that developing countries select a range of antitrust goals that are often in conflict to guide their enforcement. Developing countries also pursue goals that are considered outdated to more advanced countries, such as promoting international competitiveness, increasing employment, encouraging entrepreneurship, and diffusing ownership.

One goal—selected by a fifth of the fifty studied developing countries—is promoting growth and development. This goal aligns with calls by Alice Amsden, Ajit Singh, Michael Porter, and Joseph Brodley to use antitrust as a tool for growth. Promoting growth through a dynamic efficiency objective for antitrust enforcement, especially one coupled with redistribution through antitrust rules, is a radical policy shift from the current static goals that most developed countries' and many developing countries' antitrust laws promote. As Gilbert and Sunshine point out,

306. Waked, *supra* note 1, at 93–94.

> One of the more fundamental criticisms leveled at antitrust enforcement is its traditionally static orientation. Focusing most of its energy towards ensuring productive and allocative efficiency, it has often neglected dynamic efficiency. In a world of rapid technological advance, it is important that antitrust law pay greater attention to innovation issues.[307]

New growth theory has made a significant contribution to the neoclassical growth models, namely treating innovation and technological change as an endogenous economic phenomenon. These endogenous growth theories have come to conclude that innovation is a central accelerator of growth. Given this knowledge, antitrust laws that aim at promoting growth and development should encourage innovation and technological change.

Deciding which market structure is responsible for encouraging innovation, and thus growth, is a complex task. Research, both empirical and theoretical, has presented conflicting results.[308] Some argue that competition is the environment most encouraging of innovation and growth, while others have argued that market power and monopolies are considered responsible for more R&D investments, innovation, and thus growth.

This lack of agreement as to how to achieve growth through innovation makes promoting this goal as a competition policy rather tricky. Would a country that is persuaded to adopt this goal as an antitrust objective adopt a policy that is tailored towards the ideal of perfect competition? Or, would it adopt a policy that is more favorable towards higher degrees of concentration? Or a mix of both?

These are extremely important questions to set a priori before dynamic efficiency can indeed guide antitrust enforcement in developing countries. An extension of this research is to study which of these two market structures, or a mix of both, is responsible for higher growth levels. Once conclusive evidence is available, particularly as it pertains to developing countries, the resulting market structure can be considered a guiding ideal.

For decades, perfect competition has been considered the ideal market structure in neoliberal policies communicated to the developing world thorough global institutions such as the World Bank, the OECD, the development banks, and the IMF. Many have argued that attempts at

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307. Gilbert & Sunshine, *supra* note 273, at 601.

308. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 385 (Harvard Univ. Press, 2003) ("[A]fter many years of study, it remains completely uncertain in both theoretical and empirical analysis whether concentration promotes, reduces, or does not affect innovation.").

questioning the optimality of maximum competition for investment and technical progress by economists such as Schumpeter and Richardson have been relatively ignored.[309]

Assessing the market structure responsible for more innovation and higher growth levels will aid in formulating a complete antitrust policy that realizes dynamic efficiencies, which many consider a more suitable guiding goal for antitrust enforcement. However, no countries have formulated a comprehensive policy with dynamic efficiency or technological progress at the center.

It is, therefore, imperative to assess the market structure responsible for innovation in developing countries to focus antitrust enforcement toward the goal of promoting dynamic efficiency, growth, and redistribution. These are the goals that this paper advocates are more suitable for the development needs of the Global South.

309. Amsden & Singh, *supra* note 7, at 942 ("As Telser (1987) notes: 'It is hard for many economists to accept the proposition that competition may be excessive because the received theory regards competition as always good, the more there is the better'. Although earlier contributions by Schumpeter (1942) and Richardson (1965) among others had seriously called into question the optimality of maximum competition for investment and technical progress and hence dynamic efficiency, these contributions were effectively ignored by the profession.").

APPENDIX

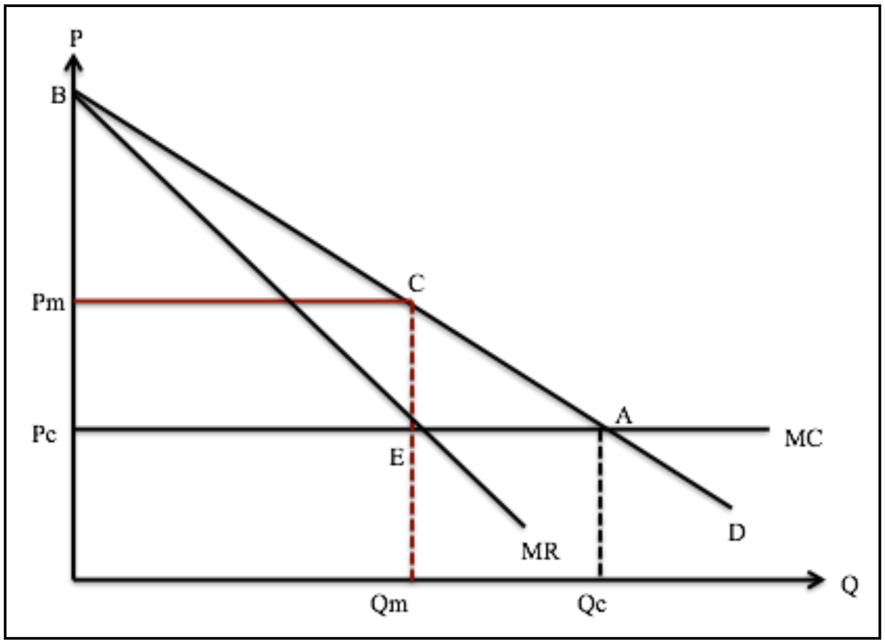

FIGURE A.1. PERFECT COMPETITION VS. MONOPOLY (MARKET POWER)

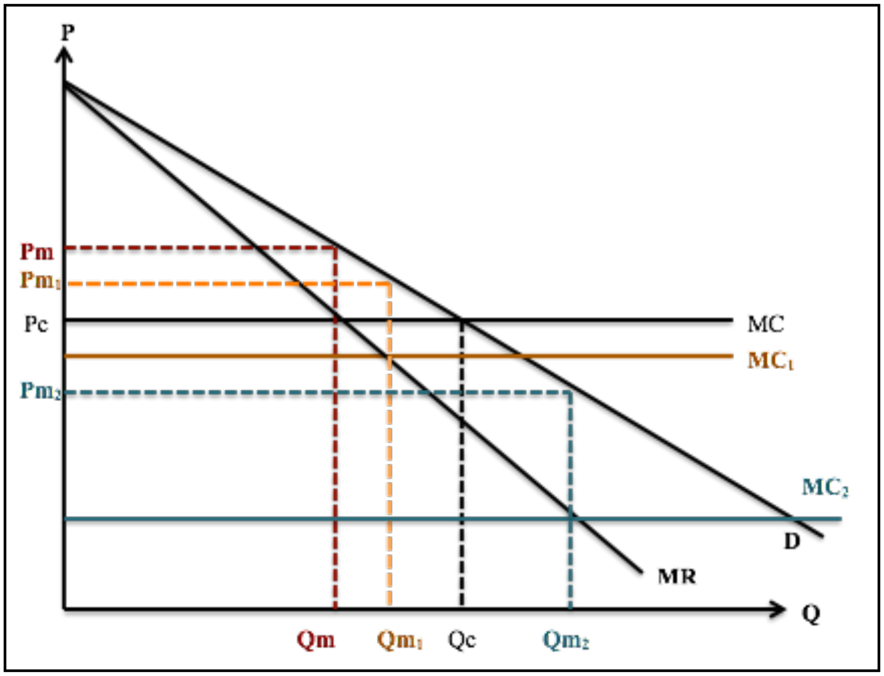

FIGURE A.2. MONOPOLIST'S COST EFFICIENCIES

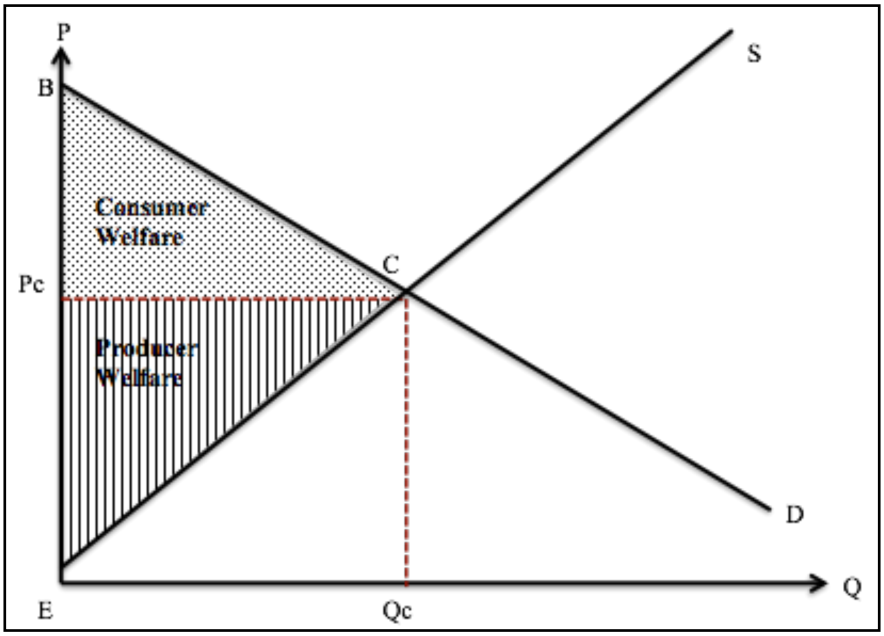

FIGURE A.3. CONSUMER AND PRODUCER SURPLUS

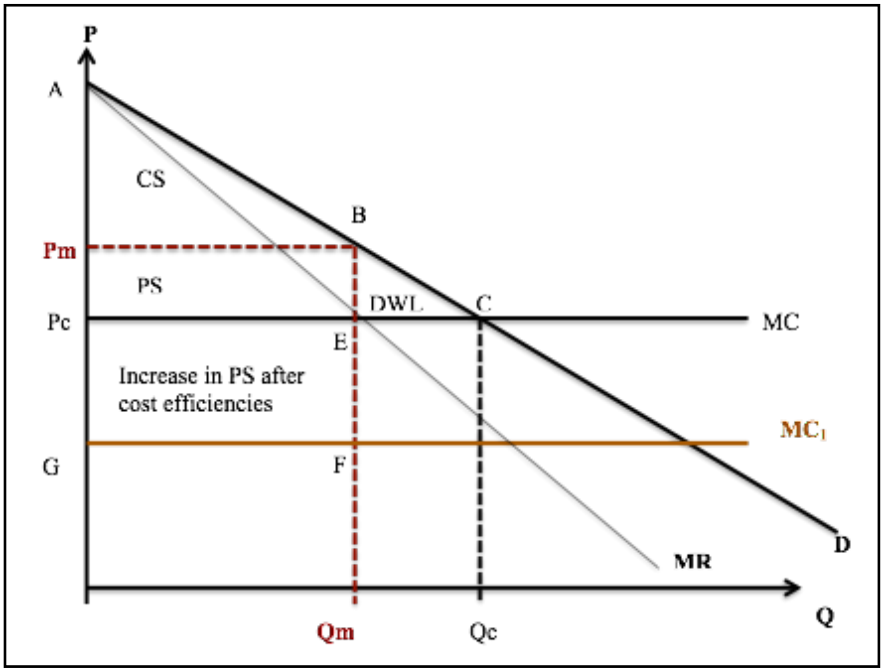

FIGURE A.4. WILLIAMSON TRADEOFF MODEL

TABLE A.1. OBJECTIVES OF ANTITRUST LAWS IN DEVELOPING COUNTRIES

Country	Year CL Adopted	Consumer Welfare	Public Interest	Competition	Eliminate RBPs	Economic Efficiency	Economic Freedom	Protect Small Businesses	Progress & Development	Fairness & Equity	Consumer Choice	Competitive Prices	Competition In Int'l Markets	**Other**
Albania	1995			x										
Argentina	1980			x			x							
Armenia	2000	x		x					x					
Barbados	2002			x	x			x						
Bosnia & Herzegovina	2001			x										
Brazil	1994	x		x										
Bulgaria	1998			x										
Chile	1973			x										
Colombia	1992	x		x		x		x						
Costa Rica	1994	x		x	x	x								
Croatia	1995			x										
Czech Republic	1991													
Egypt	2005			x	x									
El Salvador	2006	x		x		x								
Estonia	1993			x										
Honduras	2005	x		x		x								
Hungary	1996	x	x	x		x			x	x				
India	2003	x		x					x					freedom of trade
Indonesia	1999		x	x		x		x	x	x				
Jamaica	1993													
Jordan	2004													
Kenya	1988	x	x	x		x							x	innovation, encourage investment, regional integration
Latvia	1998		x	x										
Lithuania	1999			x										harmonization with EU
Macedonia	2006	x		x		x								
Mauritius	2003													
Mexico	1992			x	x	x								
Mongolia	1993			x										

Country	Year CL Adopted	Consumer Welfare	Public Interest	Competition	Eliminate RBPs	Economic Efficiency	Economic Freedom	Protect Small Businesses	Progress & Development	Fairness & Equity	Consumer Choice	Competitive Prices	Competition In Int'l Markets	**Other**
Albania	1995			x										
Argentina	1980			x			x							
Armenia	2000	x		x					x					
Barbados	2002			x	x			x						
Montenegro	2005			x										
Morocco	2001	x		x		x						x		freedom of prices, transparency & honesty in business relations
Namibia	2003		x	x		x		x	x		x	x	x	employment, spread of ownership for historically disadvantaged persons
Pakistan	1970	x		x		x								
Panama	1996	x		x		x								
Papua New Guinea	2002	x	x	x		x						x		
Peru	1991	x	x	x	x									
Philippines	1992	x			x									international cooperation and trade
Poland	1990	x	x	x										
Romania	1996	x		x										
Russia	1991			x		x	x							free movement of goods, common economic area
Serbia	2005	x	x	x		x			x					
Slovakia	1994	x		x	x				x					
South Africa	1979		x			x		x	x	x	x	x	x	promote emplyment, spread of ownership and increase
Sri Lanka	1987	x		x										
Syrian Arab Republic	2007			x	x									
Tunisia	1991			x	x		x							price transparency

Country	Year CL Adopted	Consumer Welfare	Public Interest	Competition	Eliminate RBPs	Economic Efficiency	Economic Freedom	Protect Small Businesses	Progress & Development	Fairness & Equity	Consumer Choice	Competitive Prices	Competition In Int'l Markets	**Other**
Albania	1995			x										
Argentina	1980			x			x							
Armenia	2000	x		x					x					
Barbados	2002			x	x			x						
Turkey	1994			x										
Ukraine	1993			x	x				x					
Uzbekistan	1996				x									effective functioning of competitive relationships
Venezuela	1992		x	x	x	x			x					solidarity; don't limit benefits to producers
Zambia	1994	x		x	x	x								free trade, expand base of entrepreneurs
Total		**22**	**11**	**43**	**13**	**19**	**3**	**5**	**10**	**3**	**2**	**4**	**3**	

TABLE A.2. OBJECTIVES OF UNILATERAL CONDUCT LAWS IDENTIFIED IN AGENCY RESPONSES (ICN 2007 SURVEY)[310]

Countries	**Ensuring an effective competitive process as a goal and/or a means**	**Promote consumer welfare**	**Maximize efficiency**	**Ensure economic freedom**	**Ensure a level playing field for SMEs**	**Promote fairness and equality**	**Promote Consumer Choice**	**Achieve market integration**	**Facilitate privatization and market liberalization**	**Promote competitiveness in international markets**
Australia	x[c]	x	x		x			x		
Brazil	x[a]	x	x	x						
Bulgaria	x[a]	x		x		x				
Canada	x[b]	x	x		x		x			x
Chile	x[a]									
Czech Republic	x[a]			x						
European Union	x[b]	x	x					x		
France	x[a]	x	x	x		x				
Germany	x[a]	x	x	x	x					
Hungary	x[b]	x	x							
Ireland	x[b]	x					x			
Israel	x[a]	x		x						
Italy	x[b]	x		x						
Jamaica	x[c]	x	x			x	x			
Japan	x[a]	x				x				
Jersey	x[b]	x	x	x						
Korea	x[b]	x		x	x	x				
Latvia	x[b]	x					x			
Mexico	x[a]	x	x	x						
Netherlands	x[b]	x								
New Zealand	x[b]	x	x					x	x	
Pakistan		x	x	x						
Romania	x[b]	x								
Russia	x[a]	x	x	x				x	x	
Singapore	x[c]		x							
Slovak Republic	x[b]	x								
South Africa	x[b]	x	x		x	x	x			x
Sweden	x[b]	x								
Switzerland	x[a]	x	x	x	x					
Turkey	x[a]	x	x		x					

310. ICN Report 2007, *supra* note 32 (33 agencies answered this part of the ICN Survey).

Ukraine	x[a]	x	x							
United Kingdom	x[c]	x	x							
United States	x[b]	x	x							
Total	**32**	**30**	**20**	**13**	**7**	**6**	**5**	**4**	**2**	**2**

a. 13 agencies cite ensuring an effective competitive process as a goal.

b. 15 agencies cite ensuring effective competitive process as both a goal and a means.

c. 4 agencies cite ensuring an effective competitive process exclusively as a means to achieve other goals.

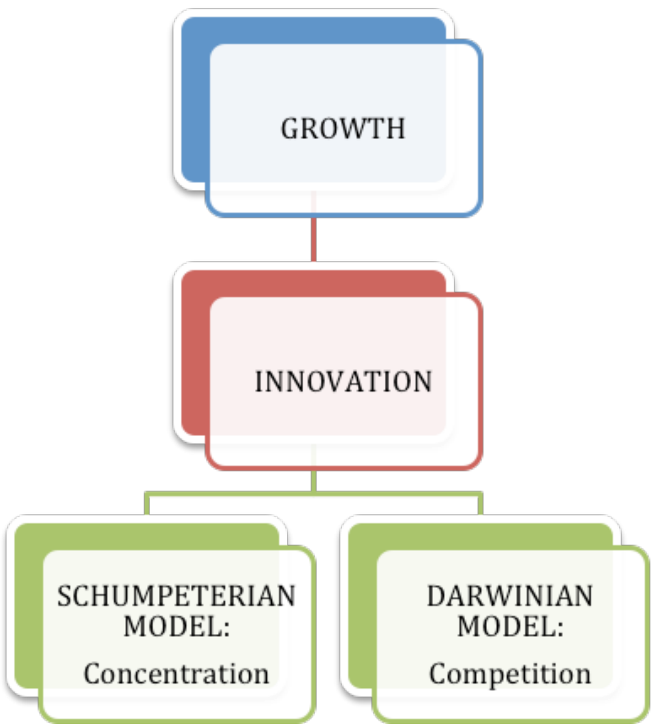

FIGURE A.5. ANTITRUST POLICY FOR DEVELOPING COUNTRIES