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Denver Journal of International Law & Policy

Volume 43
Number 4 *Summer*

Article 4

April 2020

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Andy C.M. Chen, Justifications and Limitations for Adopting Divergent Competition Policy and Law in Emerging Economies, 43 Denv. J. Int'l L. & Pol'y 379 (2015).

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JUSTIFICATIONS AND LIMITATIONS FOR ADOPTING DIVERGENT COMPETITION POLICY AND LAW IN EMERGING ECONOMIES

ANDY C. M. CHEN*

I. INTRODUCTION

Regardless of the failure to become part of the World Trade Organization ("WTO") agenda,[1] competition law and policy and its relevance to economic development continue to interest researchers and have been documented in-depth by international organizations.[2] In addition, certain fundamental principles in competition law, such as eliminating entry barriers, promoting broader market access, or controlling market power that has been unfairly garnered, have been incorporated into several envisioned trade treaties, including the Transatlantic Trade and Investment Partnership ("TTIP") and the Transpacific Partnership ("TPP").[3] Those developments highlight the value of an active policy of competition law enforcement as a complement to the process of trade liberalization.

To enhance the living standards in poor countries, it is typically insufficient to simply make the people in those countries wealthier. If the business environments

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1. Distrust between emerging and developed economies regarding the form and manner in which competition law would be enforced was partly responsible for this failure. *See* David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 2007 CHI. -KENT C. L. FAC. SCHOLARSHIP 269, 272-73, http://scholarship.kentlaw.iit.edu/fac_schol/220.

2. For recent literature, *see* R. S. KHEMANI, COMPETITION POLICY AND PROMOTION OF INVESTMENT, ECONOMIC GROWTH AND POVERTY ALLEVIATION IN LEAST DEVELOPED COUNTRIES (2007), https://www.wbginvestmentclimate.org/uploads/FIAS+Competition+Policy+final.pdf; SUSAN JOEKES & PHIL EVANS, COMPETITION AND DEVELOPMENT: THE POWER OF COMPETITIVE MARKETS 24-31 (2008) (enumerating the successful stories of how a well-functioned competition policy could assist emerging economies to achieve economic growth).

3. For the objectives of TTIP, *See* EUROPEAN COMMISSION, THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP): TTIP EXPLAINED (2015), http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf; SHAYERSH ILIAS AKHTAR & VIVIAN C. JONES, CONG. RESEARCH SERV., R43387, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) NEGOTIATIONS (2014). For U.S. perspective on the objectives of TPP, *see* Trans-Pacific Partnership: Summary of U.S. Objectives, USTR.GOV, http://www.ustr.gov/tpp/Summary-of-US-objectives (last visited June 26, 2015).

in developing economies are characterized by highly asymmetrical information available for market transactions, or are inundated with unscrupulous business practices because of market power protected by cronyism, any increases in income may be substantially offset by unjustified price augmentation. For example, studies have shown that cartels have been associated with price increases of 10% to 45% in developing economies.[4] Potentially aggravating the problem, approximately 3.7% of total imports to developing countries in 1997 originated from cartelized industries.[5] Therefore, how to make markets an "asset" for the poor,[6] including the formulation of a sound competition policy and law that fits the needs of the emerging economies, is becoming increasingly critical for economic development.

Various approaches have been suggested in the literature to accommodate developmental variances into the design of competition policy in emerging economies. For example, emerging economies may need to prioritize their scrutiny of market misconducts in the industries crucial to their development, such as food supplies and health care, and continue to advocate for increased competition to stimulate popular interest in improving competition. This paper elaborates further on the likely responses to the challenges of incorporating developmental variances into competition policies and rules tailored to the needs of emerging economies.[7] The paper categorizes the features that might prompt emerging economies to adopt rules distinct from those of developed economies into economic (e.g., smaller market scale) and noneconomic (e.g., corruption or cronyism) features. The unique competitive problems caused by these features are discussed in the following section. In particular, the paper examines how developmental variances could influence the formulation of competition policies and substantive rules and standards in emerging economies. For example, it has been suggested that more prevalent corruption or cronyism in emerging economies may cause cartels in those states to be more stable and market-dominating power less likely to be challenged.[8] Therefore, emerging economies should rely less on

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4. Markus Kitzmuller & Martha Martinez Licetti, *Competition Policy: Encouraging Thriving Markets for Development*, VIEWPOINT, Sept. 2012, at 1, 6, https://www.wbginvestmentclimate.org/results/upload/Encouraging-Thriving-Markets-for-Development_Competition-Policy_Viewpoint.pdf.

5. *Id.* at 7 n.10.

6. *See* Matt Fellowes, *Making Markets an Asset for the Poor*, 1 HARV. L. & POL'Y REV. 433, 445-55 (2007) (proposing schemes that allow governments in emerging economies to curb price increases due to higher supply costs, unreasonable business conducts, and less transparent business environment).

7. For the definition of emerging economies or developing economies, *see Data: Country and Lending Groups*, WORLD BANK GROUP, http://data.worldbank.org/about/country-classifications (last visited Jan. 17, 2015).

8. *See* D. Daniel Sokol & Andreas Stephan, *Prioritizing Cartel Enforcement in Developing World Competition Agencies*, *in* COMPETITION LAW AND DEVELOPMENT 137, 144 (D. Daniel Sokol et al. eds., 2013) (arguing that in many developing countries, a competition agency may "lose funding or an agency head if the agency enforces the competition law against a politically well-connected family firm."); Philippe Brusick & Simon J. Evenett, *Should Developing Countries Worry About Abuse of Dominant Power?*, 2008 WIS. L. REV. 269, 279 (2008) ("[E]ven if the competition law provides for a

potential market entrants to address inefficiency from anticompetitive business arrangements.

This paper concludes by raising certain limitations for the preliminary findings. From a policy perspective, continual efforts of competition advocacy by governments to make free competition a more widespread and favored value is crucial for the resolutions of the competitive problems caused by the unique features of emerging economies. The key to success is professionalism in persuading skeptics and a transparent enforcement environment that allows public discussion and dissemination of information. Otherwise, competition policies in emerging economies could be misleadingly characterized by politicians as pro-business and laissez-faire to serve their unfounded populist agendas. With respect to the reviewing rules and standards for evaluating violations, the consideration of developmental variance in antitrust investigations could gradually lead to a regulatory landscape with increased focus on conduct-based reviews of the investigated cases in emerging economies. This development benefits resource-strapped competition agencies in emerging economies by reducing the need to undergo the onerous effect-based evaluation process frequently required by the rule of reason.[9] However, this could also misguide agencies to treat certain competitively neutral conducts in developed economies as illegal *per se*. Therefore, this paper proposes the following suggestions.

First, the connection between developmental variances and the unique competitive harms to emerging markets needs to be substantiated before divergent legal proposals are introduced. Otherwise, the emphasis on divergence could entail the risk of over-deterrence. The probability of over-deterrence increases as the enforcement landscape becomes more conduct-based.

Second, emerging economies have relied on their developmental variances and domestic policies resonating with those variances to justify conduct or arrangements that would be deemed serious violations in developed economies, such as cartels. For example, competition law in Tunisia broadly exempts from antitrust liability of cartels that (1) promote technical or economic progress and (2) allow consumers a fair share of the resulting benefits.[10] Similarly, the Kenya

certain degree of independence for the competition officials, there can be a de facto dependence on the wishes of politicians who might want to favor certain enterprises including state firms, firms owned by relatives, or foreign multinationals with strong links to the political elite.")

9. In general, the rule of reason standard in competition law, particularly under U.S. antitrust law, refers to a judicial process of determining the "reasonableness" of the suspicious anticompetitive conduct. Under this reviewing standard, the court is required to consider and balance both the anticompetitive and procompetitive effects from the investigated business conduct or arrangement before declaring it illegal. When applying this standard, the court is typically required to assess the likely competitive harm from the conduct or arrangement, review its nature and duration, counteracted by the evaluation of the alleged business justifications. Compared with the per se rule, which establishes a violation simply by its implementation, the rule of reason requires more sophisticated analysis of the market impacts of the conduct and is considerably more time-consuming. *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 74-75 (2d ed. 2011).

10. Graceila Miralles Murciego, *Cartel Exemptions in Developing Countries: Recent Work from the World Bank Group*, COMPETITION POL'Y INT'L, 2013, at 1, 7

Competition Act allows prohibited cartels to be exempted if "exceptional and compelling reasons of public policy" could be shown.[11] In making exemption decisions, the Kenya Competition Authority considers whether a cartel would (1) maintain or promote export; (2) improve or prevent decline in the production or distribution of goods or the provision of services; (3) promote technical or economic progress or stability in any industry; and (4) provide benefits for the public that outweigh or would outweigh the decrease in competition that would result from the operations of the cartel.[12] This "positive" application of developmental variance could challenge the goal of pursuing a more coherent global application of competition law.

Finally, if complicated analytical techniques, such as market definition or the measurement of efficiency, can be flawlessly operated, it is irrelevant whether competition rules are based on an overly optimistic view of the self-correcting function that potential market entrants could provide. Economic and noneconomic features would be evaluated with substantial precision through the preference-revealing function inherent in the "substitutability" test for market delineation. Viewing this observation in context, equating the lack of capacity or resources to implement sophisticated techniques employed by the developed economies with the advantages of divergent competition policy and rules for emerging economies may be premature. Convergence in the form of regional technical assistance to improve the accessibility of analytical techniques and to enhance the ability of emerging economies to implement those techniques may still be preferable. This is particularly evident when the costs from business uncertainty occasioned by an increasingly fragmented international enforcement structure are accounted for.

II. UNIQUE FEATURES UNDERLYING EMERGING ECONOMIES

Certain scholars have asserted that emerging economies, because of their unique economic and institutional features, are more vulnerable to anticompetitive activities than developed countries.[13] Default antitrust standards or rules developed by advanced economies are frequently based on an overly optimistic view of the degree to which the market can self-correct the competitive problems caused by the economic interactions taking place inside it. Consequently, such unique features of emerging economies might render those standards and rules ineffective in emerging economies. This paper classifies those features into the

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https://www.competitionpolicyinternational.com/cartel-exemptions-in-developing-countries-recent-work-from-the-world-bank-group/.

11. *Id.* at 8.

12. *Id.*

13. *See* Robert D. Anderson and Anna Caroline Muller, *Competition Policy and Poverty Reduction: A Holistic Approach* 5 (WTO Econ. Res. & Stat. Div., Staff Working Paper ERSD-2013-02, 2013), http://www.wto.org/english/res_e/reser_e/ersd201302_e.pdf (summarizing the causes of high entry barriers because of poor business infrastructure; unnecessary regulatory and licensing requirements that prevent the entry and success of new entrants; inadequate investment and support for competition law policy and advocacy; asymmetries of information in both product and credit markets; and a greater proportion of nontradable markets).

following two groups: economic and noneconomic features.[14]

A. Economic Features[15]

First, in comparison with developed countries, emerging economies typically have higher minimum efficient scale ("MES") requirements.[16] Because individual firm sizes on average tend to be smaller than those in advanced economies, the sales required for efficient operations are also greater.[17] This further leads to higher market concentration ratios in emerging economies.[18] Second, industries in emerging economies are also characterized by higher entry barriers, which result from increased regulations and market-control measures implemented by the governments in those countries.[19] It is still popular for governments of emerging economies to establish tariffs that are three to four times as high as those adopted in developed economies.[20] In small emerging economies, constraints on the supplies of resources and skilled labor can increase the cost of market entry. Lower population and demands make the higher MES requirements more likely to become obstacles for potential entrants.[21] Additionally, a higher concentration ratio in one market could force competing entrants in a vertically related market to enter two markets simultaneously to engage in competition.[22] Capital markets in emerging economies typically being far less vibrant than in developed economies indicates the increased costs for entry into emerging markets.[23] Namely, entry barriers could be leveraged by existing firms to hinder competition in other markets. From a macroeconomic perspective, emerging economies tend to be low-income economies; therefore, the adverse effects on consumers and economic growth from price-fixing arrangements or unilateral misconduct in emerging economies are also larger.

B. Noneconomic Features

In addition to their unique economic features, emerging economies also vary with developed economies in social, political, and institutional designs that could

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14. This is a general classification. Fox and Gal further divided the noneconomic features into institutional, political, and cultural/social characteristics. *See* Eleanor M. Fox & Michal S. Gal, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience* 11-18 (N.Y.U. L. & Econ. Working Paper 374, 2014), http://lsr.nellco.org/nyu_lewp/374.

15. The analysis in this section is adapted from MICHAEL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 15-35 (2003).

16. *See id.* at 15-6.

17. *See id.* at 16-8.

18. *Id.* at 18.

19. *See* IMF Staff, *Global Trade Liberalization and the Developing Countries*, IMF (Nov. 2001), https://www.imf.org/external/np/exr/ib/2001/110801.htm#i.

20. *Id.* § III.

21. GAL, *supra* note 15, at 15, 32-33.

22. *Id.* at 22.

23. Eleanor M. Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries* 11 (N.Y.U. L. & Econ. Res. Paper Series, Paper No. 11-04, 2012), http://ssrn.com/abstract=1761619 [hereinafter Fox, *Competition*].

directly or indirectly affect the regulatory landscape of competition policy in those states. State-owned enterprises are generally more prevalent in emerging economies.[24] The number of regulated industries is also higher and franchise rights are frequently granted based on cronyism.[25] Therefore, connections and social networking may be at least as valuable as entrepreneurship in securing successful business operations. A byproduct of this phenomenon is that bribery and corruption are more prevalent in emerging economies.[26] A society where "a marginalized majority [is] shut out of participation in the economic life of the community" could thereby emerge in the long term.[27]

Institutionally, competition enforcement agencies in emerging economies often lack the resources and skills to effectively enforce competition law. Those agencies are typically understaffed, inexperienced, and ineffectively governed.[28] The lack of skilled personnel results in the inability to swiftly and correctly identify offenses or to manage complex antitrust problems.[29] For example, civil service systems in many countries rely on a relatively frequent rotation of staff rather than on more stable assignments, which in turn creates the risk of inconsistent enforcement.[30] Competition agencies in emerging economies are also more vulnerable to political intervention, risking loss of their independence.[31] Their role as the principal government institution responsible for safeguarding market competition may be constantly challenged and compromised by the demands from the state to protect other policy goals that are incompatible with the fundamental principles of competition law, but that are required to be implemented based on political considerations.[32] In addition, the effective enforcement of competition policy and law relies also on a judicial branch willing to protect legitimate competitive gains from being exploited by unfair competitive means.[33] Therefore, the protection of property rights by the courts, including intellectual

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24. *See* Fox & Gal, *supra* note 14, at 27.

25. *Id.* at 44.

26. *See e.g.* KLAUS SCHWAB, THE GLOBAL COMPETITIVENESS REPORT 2013-2014, at 412-13 (Klaus Schwab ed., full data ed. 2013), http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf (cross-country survey showing people in emerging economies are more likely to think that public funds are transferred to individuals or companies due to corruption and politicians have lower ethical standard); *see also Data on Corruption*, WORLD BANK GROUP: ENTERPRISE SURVEYS, http://www.enterprisesurveys.org/Data/ExploreTopics/corruption#—7 (last visited June 21, 2015).

27. Fox, *Competition*, *supra* note 23, at 11.

28. SUBGROUP 2, ICN COMPETITION POLICY IMPLEMENTATION WORKING GROUP, LESSONS TO BE LEARNT FROM THE EXPERIENCES OF YOUNG COMPETITION AGENCIES 27, 33-34 (2006), http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf.

29. *Id.* at 27.

30. Vivek Ghosal, *Resources Constraints and Competition Law Enforcement: Theoretical Considerations and Observations from Selected Cross-Country Data*, *in* COMPETITION LAW AND DEVELOPMENT, *supra* note 8, at 90, 101.

31. *See id.* at 101.

32. *See id.* at 98-101.

33. *See* Sokol & Stephan, *supra* note 8, at 152.

properties and financial assets, are weaker in emerging economies.[34]

III. HOW DEVELOPMENTAL VARIANCES AFFECT THE FORMULATION OF COMPETITION POLICY AND LAW IN EMERGING ECONOMIES

How developmental variances described in the previous section affect emerging economies to make competition policies or legislation that differ from those of developed economies can be understood from the following two perspetives: (a) the impacts on the formulation of competition policy, and (b) the implications for the developments of reviewing rules and standards.

A. *The Impacts on Formulating Competition Policy*

The aforementioned unique economic features affect the market structure and performance of competitors in emerging economies and would generate competitive concerns dissimilar to those of developed economies. For example, higher MES requirements could induce firms to assert more frequently the need to protect their status as a natural monopolist during antitrust reviews of mergers or abusive misconduct.[35] By contrast, higher concentration ratios and entry barriers could facilitate collusion among competitors and shield a monopolist from being challenged by potential market entrants.[36] Additionally, societies with lower incomes are typically more vulnerable to anticompetitive activities, which in turn would aggravate problems that stem from poverty in emerging economies.[37] Therefore, from a policy perspective, it would be advisable that competition agencies in emerging economies focus more on industries that would most harm the poor, such as anticompetitive arrangements in markets for necessities, infrastructure, or health care.[38]

Noneconomic features, such as more prevalent cronyism, bribery, and corruption increase the risk of distorting the application of law and unnecessary market intervention.[39] The constraints of enforcement skills and resources on

34. SCHWAB, *supra* note 26, at 410-11.

35. *Cf.* The Organisation for Economic Co-Operation and Development [OECD], Session 1 of the Global Forum on Competition, *Imagine: Pro-poor(er) Competition Law* 10, OECD Doc. DAF/COMP/GF (2013) 4 (Feb. 14, 2013) (by Eleanor M. Fox), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)4&docLanguage=En.

36. *Id.* at 9.

37. *Id.* at 13.

38. *Id.* at 4.

39. By taking bribes, government officials are "captured" by bribing parties. The officials would be pressed to return the favor by sub-optimally proposing new or adjusting existing regulations or policies to the bribing parties' benefits. In this context, corruption aggravates the problem of regulatory capture caused by information asymmetry between the regulatory agency and the regulated industries. As it is highly unlikely that the regulatory agency will acquire all the information required for making optimal regulations but held by the regulated industries, "the results of regulation, in terms of outputs and prices, remain 'second best' to those of a perfectly competitive market." Hossein Jalilian, Colin Kiripatrick & David Parker, *Creating the Conditions for International Business Expansion: the Impact of Regulation on Economic Growth in Developing Countries-A Cross Country Analysis*, *in* REGULATING DEVELOPMENT: EVIDENCE FROM AFRICA AND LATIN AMERICA 11, 14 (Edmund Armann

competition agencies could exacerbate problems of ineffective or inefficient enforcement. One of the frequently mentioned solutions to contain cronyism and corruption is for emerging economies to continue advocating for competition to activate popular interest in competition issues and to engage public discussion.[40] Nevertheless, the effectiveness of competition advocacy depends on the structural and operational problems in various countries. For example, it depends on the scope and design of a country's competition law and the degree of power entrusted to the competition agency that performs the advocacy.[41] Advocacy effectiveness also hinges on the structural design of competition oversight. For example, in countries where the power of competition oversight is shared between a competition agency and a ministerial department, the ministerial department may be in a more influential position and able to assist the agency in performing more effective competition advocacy.[42]

Additionally, to employ limited resources more effectively, competition agencies in emerging economies may need to set priorities for investigation. Prioritizing enforcement targets does not mean that emerging economies should forego certain types of anticompetitive arrangement to save enforcement costs. As Vivek Ghosal argued, emerging economies benefit from competition legislations that cover all types of antitrust violations because their competition agencies could thereby realize institutional scale and scope economies.[43] However, this requires the competition authorities to establish the sequence of the types of violations they intend to investigate. For example, D. Daniel Sokol and Andreas Stephan proposed a set of criteria for selecting the cartel cases that require more immediate investigation and dispositions.[44] Under their criteria it might be preferable for emerging economies to prioritize domestic over international cases because of the investigation costs assocated with prosecuting international cartels.[45] Alternatively, bid-rigging cases warrant a government's primary attention because such investigations typically evoke more public discourse and attract broader media coverage than other types of cartel cases.[46] Strategically, competition agencies in emerging economies could leverage this opportunity to engage in more active competition advocacy to entrench the culture of free competition.[47]

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ed. 2006).

40. *See* Susan Ross-Ackerman, *Redesigning the State to Fight Corruption: Transparency, competition, and privatization*, World Bank, VIEWPOINT, Apr. 1996, at note no. 75 ("In general, any reform that increases the competitiveness of the economy helps reduce corrupt incentives."); Frédéric Jenny, *Competition Authorities: Independence and Advocacy*, *in* THE GLOBAL LIMITS OF COMPETITION LAW 158, 167 (Ioannis Lianos & D. Daniel Sokol eds., 2012.) ("Competition authorities are seen as among the few public bodies (or sometimes the only one) that are not 'captured' and can counteract economic lobbies [and corruption].").

41. Jenny, *supra* note 40, at 168.

42. *Id.*

43. Ghosal, *supra* note 30, at 97.

44. *See* Sokol & Stephan, *supra* note 8.

45. *Id.* at 152.

46. *Id.* at 153.

47. *Id.* at 154.

Because low-income emerging economies would be affected by anticompetitive practices more severely than developed economies would be, Eleanor Fox suggested that competition authorities should set their priority for investigation to cases that can promote social mobility and facilitate reductions in poverty, such as those involving food, transportation, or utilities industries.[48] Moreover, because a substantial portion of the anticompetitive practices in emerging economies are facilitated or patronized by the governments, Fox and Deborah Healey further proposed that competition authorities should extend the coverage of competition law and limit the scope of immunity to state actions.[49] The avoidance of market harms by unjustified state restraints should be a priority for emerging economies.[50]

B. The Implications for Constructing Reviewing Rules and Standards

Higher entry barriers and concentration ratios render the force from potential competition that could constrain the formation of cartels and abuses of monopoly power much weaker or even nonexistent.[51] Similarly, in societies where state-owned enterprises are widespread, legislation aiming to justify or exempt anticompetitive activities is more likely.[52] Prevalent corruption and cronyism would also induce firms to engage more frequently in inefficient rent-seeking activities, and thereby enlarge the welfare losses from market monopolization. Once "networking" and "connections" with competitors and governments become crucial to successful business operations, firms will be incentivized to seek a less competitive environment. In other words, deviating from the agreed collusive arrangements is not profitable for cartel members and is not expected to occur as frequently as in developed economies. In this context, some of the successful mechanisms for detecting cartels, most notably the leniency program,[53] may not be effectively implemented in emerging economies. Finally, a resource-constrained enforcement agency lacking the capability and skills to investigate and prosecute anticompetitive practices could exacerbate the aforementioned problems. In sum, these unique economic and noneconomic features may challenge the application of reviewing rules and standards established by developed economies on emerging economies.

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48. *See* Eleanor M. Fox, *Economic Development, Poverty and Antitrust: the Other Path*, 13 SW. J.L. & TRADE AM. 211, 219-20 (2007) [hereinafter Fox, *Economic*].

49. Eleanor M. Fox & Deborah Healey, *When the State Harms Competition-the Role for Competition Law*, 79 ANTITRUST L.J. 769, 812 (2014).

50. *Id.* at 814.

51. *Compare* Fox, *Economic*, *supra* note 48, at 213 n.6, *with* Fox & Healey, *supra* note 49, at 769.

52. A number of countries, including Hungary, China, Lithuania, Malaysia, have laws aiming to replace partly or entirely the application of competition law. Fox & Healey, *supra* note 53, at 779 n.44. For a cross-country comparison of the extent to which state-owned enterprise and government activities are exempted from competition law. *See id.* at 784.

53. *See, e.g.*, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), http://www.justice.gov/atr/public/guidelines/0091.pdf; Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (EC), 2006 O.J. (C 298) 11.

This section highlights how the unique economic and noneconomic features affect the reviewing rules and standards for specific competition problems in emerging economies. In particular, this section focuses on the following four most commonly discussed anticompetitive practices: vertical restraints, merger review, abuse of market power, and cartels.

1. Vertical Restraints

The predominant standards in developed economies for reviewing vertical restraints, such as arrangements on resale price maintenance, allocation of distribution markets, or tying arrangements, are substantially influenced by considerations of efficiency.[54] The economic theory behind the efficiency approach stresses the contribution that vertical restraints might make to address the incentive-disparity problems inherent in a vertical relationship. In such a contractual relationship, downstream distributors have the incentive to increase their own profits by using strategies that could decrease the benefits of the upstream suppliers.[55] For example, the distributors may try to evade their duties to provide presale services to save promotional costs. However, this evading behavior deprives suppliers of the opportunities to assist customers to be more informed of their products or services, and thereby enhance the market demands for suppliers' products or services.[56] As the efficiency approach has argued, the failure to control the incentive-disparity problem may lead to diminishing promotional efforts by distributors, which limits the availability of useful presale product information for buyers.[57] This harms consumers, whose welfare is the predominant interest that competition law aims to protect, including within the United States.[58] Therefore, vertical restraints are illegal only when their market-foreclosing effects outweigh the benefits of assisting the upstream suppliers to

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54. It is fair to argue that the efficiency hypothesis of vertical restraints is attributable to a series of theoretical and empirical studies by scholars from the camp of the so-called "Chicago School." For a summary and analysis of those studies, *see* Andy C. M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 HASTINGS L. J. 573, 575-76 (1999).

55. *Id.* at 578.

56. *Id.* at 575-76, 601-02.

57. For the economic theory on using vertical restraints to avoid this downstream "free-riding" behavior, *see* Lester G. Telser, *Why Should Manufacturers Want Fair Trade*? 3 J. L. & ECON. 86, 91 (1960).

58. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (accepting the view that the legislative intent of the Sherman Act was to design the Sherman Act as a "consumer welfare prescription."); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."). Despite the support from the Supreme Court, the genuine goal of U.S. antitrust law is still an unsettling issue in academia. *See, e.g.*, Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 874 (1999) (arguing that "'unfair' transfers of wealth from consumers to firms with market power" should be the primary congressional concerns when the Sherman Act was enacted."); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 624 (2012) (the legislative intent of the Sherman Act was to "secure political, economic, and individual freedoms...").

control the incentives of the downstream distributors to evade product quality or to free ride on the promotional efforts provided by other competing distributors.[59] Even if vertical arrangements imposed by a specific brand supplier lead to anticompetitive actions, the efficiency approach further suggests that the competitive harms could be neutralized if upstream competition is maintained or strengthened. In this context, vertical restraints are contractual profit-sharing arrangements between a supplier and a distributor to encourage "interbrand" competition through the restriction of "intrabrand" competition.[60]

The incentive-disparity and the "interbrand vs. intrabrand competition" hypotheses have been questioned by researchers for neglecting the market structure in which commodities are distributed in emerging economies.[61] Unlike developed economies where the retailing markets are typically dispersed with competing outlets, the retailing markets in emerging economies are more likely to be controlled by several powerful distributors that are frequently large multinational firms.[62] For example, Bruno Dorin demonstrated how local traders of cocoa in Ivory Coast were replaced by large multinational firms who entered the local market by merging local exporting and processing companies.[63] As a result, local cocoa growers had to face new transacting counterparts with increased buying power.[64] Dorin's study exposed the likely shortcomings of the efficiency approach when applied to emerging economies. The efficiency approach evaluates the competitive effects of vertical restraints primarily through the supplier-customer relationship, but neglects the harms associated with an overly concentrated intermediate market. Implicitly, the existence of interbrand competition counteracts any anticompetitive harm from implementing intrabrand restrictions may be too optimistic a view for emerging economies.

2. Merger Review

The economic and noneconomic features of emerging economies have several implications for merger review.

First, a comprehensive effect-based analysis of mergers as are practiced by developed economies may not be in the interest of the emerging economies.

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59. Telser, *supra* note 57, at 99-105.

60. Put simply, by imposing vertical restraints, such as exclusive sale areas on distributors belonging to the same distribution chain (intrabrand competitors), the supplier shares part of its wholesale profits with the distributors to motivate them to compete with other chains (interbrand competitors). The justification for employing vertical restraints to promote interbrand competition gained judicial recognition in the widely discussed case of Sylvania decided by the US Supreme Court in 1977. Cont'l Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52 (1977).

61. ELEANOR M. FOX & DANIEL A. CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 298-300 (2010).

62. *Id.* at 298.

63. *See* Bruno Dorin, *From Ivorian Cocoa Bean to French Dark Chocolate Tablet: Price Transmission, Value Sharing and North/South Competition Policy, in* UNCTAD, THE EFFECTS OF ANTI-COMPETITIVE BUSINESS PRACTICES ON DEVELOPING COUNTRIES AND THEIR DEVELOPMENT PROSPECTS 237, 319-20 (Hassan Qaqaya & George Lipimile, eds., 2008).

64. *Id.*

Rather, as was suggested by Fox and Michal Gal, several presumptions based on clear and objective criteria may be needed to simplify the reviewing process for mergers in emerging economies.[65] How the presumptions should be determined require policy makers to achieve a balance between the benefits of legal certainty attained by these presumptions and the error costs from making inappropriate presumptions. It may still be necessary for emerging economies to use economic analysis to formulate these presumptions, and the enforcement experience of developed economies may be helpful in implementing this analysis.[66] However, emerging economies are cautioned against presuming mergers to be procompetitive, as has been advocated by developed economies.[67] The rationale of presuming mergers to be legal is based on the hypothesis that any harm from mistakenly approving an anticompetitive merger can be corrected by the force of potential competition.[68] As the unique economic feature of higher entry barriers would imply, it is less realistic to expect this self-correcting market function to occur in emerging economies.

Second, the limit to properly conducting economic analysis due to the lack of enforcement skill and resources may also imply that emerging economies should use business turnover rather than market share as the threshold for filing premerger notifications. The market-share approach requires competition authorities to accept the complicated task of delineating relevant markets for merger.[69] The approach is time-consuming and increases the uncertainty of merger reviews, as well as causes substantial delays for completing the reviewing procedure.[70] Similarly, lacking the enforcement skill necessary to conduct sophisticated economic analysis may justify the tendency of emerging economies to rely more often on "behavioral" rather than "structural" remedies as conditions for clearing a merger.[71] Structural remedies, such as divesture of the corporate assets of merging

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65. Fox & Gal, *supra* note 14, at 49-50.

66. *Id.* at 50.

67. *See id.* at 19.

68. Intellectually, this view reflects a policy suggestion originating from the error-cost analysis of antitrust enforcement. Given the vulnerability to error of antitrust enforcement, this policy suggestion argues that "false negatives" caused by under-enforcing competition law should be preferred to "false positives" from over-enforcing it. Central to this observation is the belief that pro-competitive business arrangements mistakenly condemned represent a permanent and irreversible loss to the market. Alternatively, anticompetitive behavior erroneously allowed will be self-corrected by the market if the competitive force, including force from potential competition, in subsequent market interaction is maintained. This proposition has substantially changed the views of the United States judiciary toward several types of competitive activities initially considered illegal in the past several decades. *See* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 79, 83-85 (2010).

69. ICN MERGER WORKING GROUP NOTIFICATION & PROCEDURES SUBGROUP, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW 4-5 (2008), http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf.

70. *Id.*

71. MASSIMO MOTTA, MICHELE POLO & HELDER VASCONCELOS, MERGER REMEDIES IN THE EUROPEAN UNION: AN OVERVIEW 11 (2002), ftp://ftp.igier.unibocconi.it/homepages/polo/RemediesMPV10.pdf.

parties, impose a heavy burden on competition authorities.[72] The agency is required to evaluate the scope of the assets that need to be divested and whether the divesture could restore the market competition that is likely to be reduced after the merger.[73] Structural remedies are typically irreversible, and thus entail substantial sunk costs if wrongly implemented, which causes the implementation of this mechanism to be even more challenging for emerging economies.[74]

Third, buyer power as a countervailing factor for assessing the competitive effects of a merger is less critical for emerging economies than it is for developed economies.[75] The existence of market power at the buyer's market may force suppliers to lower their prices to more competitive levels, which benefits buyers and final consumers.[76] In particular, when only several suppliers dominate the upstream market, the exercising of this buyer power against monopolistic or oligopolistic suppliers may benefit efficiency and consumer welfare.[77] Nevertheless, buyer power being a countervailing force against the potential increase of seller's post-merger market power is less credible if the entry barrier at the seller's market is high. In an upstream market where potential suppliers face insurmountable entry barriers, concentration-increasing mergers would also increase the costs of a powerful downstream buyer if they refused to interact with the merging firms because fewer alternatives would be available to the buyers to leverage the countervailing force on the merging firms.[78]

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72. The burden from implementing structural remedies such as corporate divesture originated mainly from the problem of informational asymmetries and incentives of the parties not in line with the objective of restoring competition. MOTTA, POLO & VASCONCELOS, *supra* note 71, at 6.

73. *Id.* at 3, 7.

74. The complexity of implementing divesture remedies could be evidenced by the promulgation of remedy guidelines issued by both the U.S. Department of Justice and E.U. Commission. *See, e.g.*, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011), http://www.justice.gov/atr/public/guidelines/272350.pdf; Commission Notice on Remedies Acceptable Under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004 (EC), 2008 O.J. (C 267) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN.

75. For buyer power being used as a countervailing factor in merger review, *see* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 8 (2010), http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings (EC), arts. 64-67 2004 O.J. (C 31) 5, 12, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN.

76. John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1494 (2012); *see also* Peter Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination among Suppliers*, 53 ANTITRUST BULL. 271, 330-31 (2008).

77. Kirkwood, *supra* note 76, at 1500-01.

78. *See* CATALIN STEFAN RUSU, EUROPEAN MERGER CONTROL: THE CHALLENGES RAISED BY TWENTY YEARS OF ENFORCEMENT EXPERIENCE 180 (2010) ("[T]he Commission will regard buyer power as being sufficiently strong and providing adequate countervailing force if purchasers have the ability to develop alternative suppliers.... The key factor in this assertion is the sufficiency of the countervailing power as embodied in the relative degree of dependence of one party on the business of the other.") In addition, the effectiveness of using buyer power as a countervailing force depends also on whether the brand of the merging firm is strong. If the merging firm holds a brand that is highly

3. Abuse of Market Power

The first and immediate implication is how the economic and noneconomic variances may affect the view toward the reviewing standards for abusive cases in emerging economies. In most jurisdictions, unilateral abusive conducts by a monopolist are not illegal per se. Antitrust reviewers would need to conduct a tradeoff between the pro- and anticompetitive effects arising from this conduct to evaluate the overall market impacts, and to reach final legal conclusions. In antitrust literature, a debate exists regarding the standards for conducting this tradeoff. The *total welfare* test investigates the aggregated welfare changes caused by abusive conduct on the premise that the law treats all members in a society equally.[79] Therefore, a price being increased because of a monopolist exercising its market power may not immediately justify the prohibition of this conduct insofar as the efficiency gains from the conduct, such as cost reduction to the monopolist, outweigh the associated deadweight loss to the society.[80] The harm incurred by consumers from higher prices is treated as a wealth transfer to the monopolist, and would not be factored into the analytical process by using the total welfare test.[81] By contrast, the *consumer welfare* test asks whether efficiency gains could be realized without diminishing the benefits or "surplus" initially held by consumers.[82] The standard assumes the interest of the consumer to be the ultimate goal pursued by competition legislations.[83] It further suggests that exclusionary conduct violates antitrust laws "if it reduces competition without creating a sufficient improvement in performance to fully offset these potential adverse effect[s] on prices and thereby prevent consumer harm."[84] Namely, if consumers are worse off because of the implementation of an alleged practice, the practice should thus be prohibited, even though it would generate net welfare-enhancing outcomes.

Although each of the reviewing standards is theoretically persuasive, none of

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recognized and favored by consumers, it would be more difficult for a powerful buyer to threaten to switch to other suppliers. *See* VAN BAEL & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 809-10 (2005).

79. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 110-12 (1978). Although Bork used the term "consumer welfare" to describe his idea regarding the legislative goal of the Sherman Act, the major American antitrust legislation, he was not referring to the "protection of consumers" or the maintenance of a "consumer surplus." Rather, it was the overall net effect from the alleged practices that he deemed crucial. *Id.*

80. This is the famous "Williamson Tradeoff" in antitrust economics, initially proposed by Williamson to evaluate the welfare effect of mergers. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 22 (1968).

81. *Id.* at 22, 28.

82. Although the term "consumer welfare" has been widely used by antitrust commentators, what constitutes a "consumer" using this test has never been precisely defined. *See* Gregory J. Werden, *Consumer Welfare and Competition Policy*, *in* COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS 11, 13-15 (Josef Drexl, Wolfgang Kerber, & Rupprecht Podszun eds., 2011).

83. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329 (2006).

84. *Id.* at 330.

them are analytically perfect for all types of abusive or exclusionary conduct. A more pragmatic and realistic view might be to treat the selection of reviewing standards as a dynamic process that varies with the conduct and market structures involved in individual cases.[85] Under this dynamic view, it is the error costs from the application of the selected reviewing standard that are decisive for the determination of selection.[86] For example, the consumer welfare standard may neglect the efficiency gains realizable by a monopolist who is incentivized to innovate more aggressively by the additional market shares it will gain from innovation. Accordingly, the consumer welfare standard has the potential to over-deter welfare-enhancing conduct.[87] Nevertheless, this concern of over-deterrence is minimized when market power is predominantly gained through cronyism and rent-seeking activities, and is less likely to be challenged by potential competitors because of the protection of state-granted franchises. Therefore, it may be justifiable for emerging economies to adopt the consumer welfare standard.[88]

Additionally, the prevalence of anticompetitive harms associated with the problems of limited enforcement resources and skills may also imply that emerging economies should adopt revised and, preferably, simpler antitrust rules. A comprehensive rule-of-reason analysis involving the delineation of relevant markets and assessment of exclusionary effects is not only unnecessary, but also often beyond the enforcement capacity of emerging economies. For example, the current U.S. rule on predatory pricing requires the plaintiff to prove that the defendant is capable of *recouping* the predatory losses in the post-predation period.[89] This requirement imposes an onerous burden of proof on the plaintiff and has in reality made it extremely difficult for the plaintiff to prevail in price-predation cases. The theory underpinning the recoupment test is based on an over-optimistic view towards the degree to which potential entrants in the post-predation period could eventually make the recovery of the losses incurred during the predation period unlikely.[90] Therefore, predatory pricing is an unprofitable and irrational strategy. Nevertheless, it may not be necessary to undergo this complicated reviewing process if the entry barrier in emerging economies is high and post-predation recoupments are more likely to succeed. Similarly, U.S. courts tend to be more reserved in intervening in refusal-to-deal cases, particularly in cases involving regulated monopolists.[91] The rationale for this enforcement

85. *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 441 (2006) ("[C]ourts do not implement Section 2 through a single legal test. Rather, Section 2 courts often apply different liability tests to different conduct.").

86. *Id.* at 448-49.

87. *Id.* at 465.

88. Keith N. Hylton, *The Law and Economics of Monopolization Standards*, *in* ANTITRUST LAW AND ECONOMICS 82, 105-06 (Hylton ed., 2010).

89. *See* Fox, *Competition*, *supra* note 23, at 9; Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 210 (1993); Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 U.S. 312, 312 (2007).

90. Fox, *Competition*, *supra* note 23,at 9.

91. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409-10

tendency is the concern that overactive intervention by competition tribunals to impose the duty to deal may reduce firms' investment incentives in the future.[92] Again, such a rationale might become less relevant if market power is gained mainly through cronyism and inefficient rent-seeking activities in emerging economies.

4. Cartels

Studies have shown that the competitive harms caused by cartels to emerging economies may be more damaging than those to developed economies, and that the enforcement of competition law could effectively reduce anticompetitive effects.[93] However, because of the restraints on enforcement skills and resources, the enforcement rules for cartels should be as clear and straightforward as possible. One likely approach is to adopt a "white-and-black" list enumerating the type of conduct that would be considered illegal, and make this known to businesses.[94] This approach is particularly necessary for emerging economies to successfully resolve the problem of establishing the existence of a collusive agreement among competitors. The methods developed by developed economies may be too complex to be implemented by emerging economies. This is particularly true when collusive agreements can be inferred only from economic circumstantial evidence.[95] The degree of complexity of the economic analysis involved in this determination is frequently beyond the professional capacity of the competition authorities in emerging economies.

IV. LIMITATIONS FOR FORMULATING DIVERGENT COMPETITION POLICY AND LAW IN EMERGING ECONOMIES

The previous analysis demonstrated how developmental variances interact to foster unique market conditions and structures in emerging economies. The implications for the formulation of divergent competition policies and laws in those countries should be duly acknowledged. In particular, they caution against an uncritical acceptance of the enforcement philosophy and rules for market

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(2004).

92. Fox, *supra* note 23, at 10.

93. *See* Fox & Gal, *supra* note 14, at 39.

94. *Id.*

95. In practice, direct evidence, such as documents that identify an agreement and the parties involved in it, or oral or written statements of cartel participants describing the operations of the cartel are typically unavailable. As a result, circumstantial evidence, such as communications among cartel participants or economic evidence concerning the market structure in which concerted actions are taking place, as well as the conduct undertaken by participating members suggesting collusion, may play a crucial role in proving the existence of collusive agreements. However, economic circumstantial evidence can be difficult to interpret and can be ambiguous, consistent with either concerted or independent action. It requires careful and detailed economic analysis to reduce the probability of making incorrect inference by competition authorities. For a succinct summary of the approaches used to determine collusive agreements from circumstantial evidence, *see* Organization for Co-operation and Development [OECD], *Policy Brief: Prosecuting Cartels without Direct Evidence of Agreement* (June 2007), http://www.oecd.org/competition/cartels/38704302.pdf.

competition established by developed economies. However, implementing those suggested divergent policies and reviewing rules and standards requires paying attention to certain limitations inherent in the suggested proposals.

A. *Transparent Enforcement Environment, Political Support, and Competition Policy*

From a policy perspective, continual efforts in competition advocacy by governments to transform voluntary market transaction to a more widely accepted culture is crucial to resolving the competitive problems caused by the unique economic features of emerging economies. The key to its success is not only professionalism to persuade skeptics, but also a transparent enforcement environment that allows public discussion and dissemination of information. Otherwise, competition policies in emerging economies could be misleadingly characterized by politicians as pro-business and laissez-faire to serve their unfounded populist agendas.

Successful advocacy also requires support from the top of the political hierarchy to "ensure that the [competition] agency can undertake investigations into some of the most economically powerful actors in the country or large international investors."[96] This is critical when policy implications from unique economic features can be symmetrically drawn to maintain policy or legislations with anticompetitive potential. Regulatory agencies in emerging economies may be more likely to advocate that unique economic features, such as the need to realize scale economies, justify the implementation of some regulatory measures that entail anticompetitive potentials. Those regulatory policy proposals are frequently implemented through the "immunity" or "exemption" clauses in competition law. For example, the Antimonopoly Law of the United States Virgin Islands exempts "formal agreements between small entrepreneurs engaged in the retail sale of the same or similar commodities for the purpose of bulk purchase of those commodities in order to meet in good faith, competition of businesses with substantially larger sales volumes."[97] To ease the likely tension between competition and regulatory agencies in emerging economies, it is the responsibility of the person who is politically authorized to conduct interagency coordination to make the final decisions on interagency policy conflicts.

B. *Simpler Reviewing Rules and Standards and the Costs of Over-Deterrence and Uncertainty in Compliance*

Justifying the adoption of distinct, simpler, or stricter competition rules for emerging economies, based on the consideration of their unique economic or noneconomic features, requires in-depth investigation of the following preconditions.

First, the causal connection between developmental variances and the unique competitive harms to emerging markets must be empirically substantiated before

96. Sokol & Stephan, *supra* note 8, at 152.
97. JOEKES & EVANS, *supra* note 2, at 35.

divergence proposals are introduced. Otherwise, divergent applications of competition law could be counterproductive and over-deterring. Simpler competition rules to respond to unique market features and competitive problems frequently lead to a regulatory landscape in favor of conduct-based reviewing standards and the rule of per se illegal in emerging economies.[98] Although simpler rules could enhance the preditability of law, they could also aggravate the risks of over-deterrence. Striking an appropriate balance between these two competing effects may not be simple. This potential problem is illustrated in a study by Richman on how the diamond industry has relied on informal arbitration to ensure contracts of diamond sales are honored by association members.[99] At the core of this self-enforcing mechanism is the penalty of group boycott, which diminishes the reputation of the defaulting parties, as well as forecloses their future business opportunities.[100] In emerging economies where the public institutions may not be competent or willing to properly resolve contractual disputes, the self-enforcing function provided by the cartel-like mechansim could be particularly valuable for the economic developments in those countries.

A more controversial problem regarding the need to apply distinct competition rules to counteract corruption and cronyism is the beneficial effects to market competition that corruption may unexpectedly create. Similar to the welfare effect of rent-seeking activities, government action influenced by corruption and cronyism may not be viewed entirely as a deadweight loss to society. On certain occasions, governmental measures based on the consideration of cronyism may, in effect, facilitate the entry of more efficient firms into those markets inefficiently protected by domestic law.[101] For example, a government may grant a franchise right to enter a rigidly controlled local market to a highly competitive international firm in exchange for its political financial support. Such

98. *See* Fox & Gal, *supra* note 14, at 32 (using Mongolia law as an example); Pamela Sittenfeld, *Advantages and Limitations of Costa Rica's Experience in Competition Policy: A Benchmark for the Rest of the Countries of the Central American Region, in* COMPETITION POLICIES IN EMERGING ECONOMIES: LESSONS AND CHALLENGES FROM CENTRAL AMERICA AND MEXICO 145, 159 (Claudia Schatan & Eugenia Rivera Urrutia ed., 2008).

99. Barak D. Richman, *Contracts and Cartels: Reconciling Competition and Development Policy, in* COMPETITION LAW AND DEVELOPMENT, *supra* note 8, at 158-59.

100. *Id.* at 163-64.

101. The idea that corruption may sometimes be efficient is an anathema in most policy discussions; however, the "grease the wheels" hypothesis of corruption, in which bribery can act as a means to address bureaucratic inefficiency, has been proposed by Leff & Bayley. *See* Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption* 8 AM. BEHAV. SCIENTIST 8 (1964); David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719 (1966). For a more recent empirical study supporting the "grease the wheels" hypothesis, *see* Pierre-Guillaume Méon and Laurent Weill, *Is Corruption an Efficient Grease*? (BOFIT Discussion Papers 20/2008), http://www.suomenpankki.fi/pdf/160134.pdf. Economists who held more reserved views towards the hypothesis had also recognized the potential contribution by corruption to economic efficiency. For example, a theoretical study by Daron Acemoglu and Thierry Verdier had discovered the "unavoidability of corruption" and proposed that corruption "should be observed as part of an optimal allocation" when certain regulatory conditions were met. Daron Acemoglu & Thierry Verdier, *The Choice Between Market Failures and Corruption*, 90 AM. ECON. REV. 194, 196 (2000).

competitive benefits are particularly evident in emerging economies with sluggish legislative procedures to make the required legal changes occasioned by new market events. By presenting this observation, we are not endorsing a type of "bribery competition" in emerging economies; however, as the reviewing rules and standards become increasingly conduct-based and in favor of the *per se* rule, the potential to neglect incidents with such unintended competition-friendly consequences also increases.

Second, it is worth mentioning that the assessment of the competitive effects from the unique economic and noneconomic features in emerging economies may not under all circumstances be a separate and static process. Both unique features may have conflicting policy implications that render the choice of reviewing rules in emerging economics less straightforward. Alternatively, they may sometimes interact in complementary ways to aggravate competitive problems. Consider first the problem of conflicting policy implications. For example, lowering the market-power threshold may be viewed as necessary in emerging economies to increase the possibility that exclusionary conduct protected by cronyism would be reviewed. However, smaller markets and the persistent need for the realization of scale economies could make raising the market-power threshold for initiating merger review or for allowing more exemptible exclusionary conducts in monopolization and cartel cases reasonable in antitrust rule making. In addition, to address the problem associated with high entry barriers, it may be advisable for emerging economies to prefer "behavioral" to "structural" remedies because the latter may deter new entrants, particularly foreign investors.[102] However, behavioral remedies also require the competition authority to engage in post-merger supervision on whether the merging parties have complied with the remedies.[103] This type of supervision frequently involves a substantial degree of discretion by the competition authority, and would increase the occurrence of corruption.[104] Fox and Gal suggested that emerging economies should minimize exemption from competition law, particularly for industries that are treated with priority, such as food or utility.[105] Using banking as an example, they further argued that encouraging more banks into the market to provide loaning services can improve competitive problems, such as a lack of vibrant capital markets in emerging economies.[106] However, the reasons why governments need to control the bank entry into capital markets is likely based on information asymmetry between banks and investors being a more prevalent and urgent market failure in the banking sector. Because of the general lack of sufficient investment knowledge of depositors or investors, introducing increased levels of competition may confuse

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102. SHANKER SINGHAM, A GENERAL THEORY OF TRADE AND COMPETITION: TRADE LIBERALISATION AND COMPETITIVE MARKETS 114 (2007); *see also* MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES: A CASE STUDY ON BRAZIL AND ARGENTINA 344 (2011).

103. *See, e.g.*, OECD *Policy Roundtables*: *Merger Remedies* 1, 192, DAF/COMP(2004)21 (2003), http://www.oecd.org/competition/mergers/34305995.pdf.

104. *Id.* at 17.

105. Fox & Gal, *supra* note 14, at 20.

106. *Id.*

rather than enlighten them when making investment decisions.

With respect to the problem of joint aggravation of competitive harms, several noneconomic features, such as cronyism and corruption, are frequently practiced by states in a subtle manner, resorting to the unique economic features as the justifications for their actions. A corrupt government may justify its favors unlawfully granted to an enterprise by manipulating economic theories or studies to support the "uniqueness" of its market and the necessity for permitting such a favor. Taking corruption as a fact and then designing mitigating mechanisms to implement around it may not be an effective method of counteracting corruption. Rather, we may still need skill and professional knowledge on how to conduct solid economic analysis to expose the distorted uses of economic theories to prevent the competitive harms of corruption. In this regard, experiences of developed economies may still be helpful.

Finally, although the prevailing rules and standards applied by developed economies fail to appropriately address the anticompetitive problems facing emerging economies, it may still be advisable to consider whether those problems may be more effectively addressed by alternate regulatory means. For example, the enforcement costs from proving market effects of cronyism, or the potential risk of over-deterrence caused by removing or reducing the threshold for proving these effects, may make anticorruption legislation rather than a reshaped competition law the more preferable policy choice to tackle the competitive harms generated by corruption.[107] Similarly, the legal compliance costs for businesses increase as the enforcement structures of global competition law become more fragmented.[108] Therefore, it is necessary to investigate in detail whether the current reviewing rules and standards are genuinely inadequate for solving the competition problems unique to emerging economies. In this context, George L. Priest argued that years of experience of enforcing antitrust law in developed economies has established a well-defined set of competition law principles that, if appropriately implemented, could be universally applied to enhance economic growth across societies.[109] If a uniform enforcement structure could reduce the cost of legal compliance for business, then the competition law should not be harmonized by "compromise allegedly among separately valid approaches to

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107. JOSH GOODMAN, *The Anti-Corruption and Antitrust Connection*, THE ANTITRUST SOURCE 1, 2 (Apr.2013),http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr13_goodman.authcheckdam.pdf.

108. Multijurisdictional merger review provides a good example of how significant and inefficient compliance costs would need to be incurred by merging parties when a merger is required to be reviewed by various competition agencies with different procedural and substantive reviewing requirements. *See* ICN MERGER WORKING GROUP NOTIFICATION & PROCEDURES SUBGROUP, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW 4-18 (November 2004) http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf.

109. Those principles include (a) prohibiting price fixing and market division among competitors; (b) prohibiting mergers with monopolists; (c) prohibiting exclusionary practices through contracts or governmental regulation; (d) adopting policies of free entry to all industries. George L. Priest, *Competition Law in Developing Nations*, *in* COMPETITION LAW AND DEVELOPMENT, *supra* note 8, at, 85-86.

competition law, but harmonized substantively because there is a single best-defined competition law to improve societal welfare."[110]

Based on this premise, Priest further argued that a uniform competition law serves as a template against which explanations or proposals of competition law could be more seriously evaluated.[111] In addition, legal transplants by emerging economies from the competition rules of the developed jurisdiction offer benefits of increasing legal certainty, reducing compliance costs for businesses, and facilitating the resolutions of cross-border trade problems among competition authorities from countries with various degrees of development.[112] This observation further implicates the need for re-examining the extent to which the unique features of emerging economies could be factored into the current analytical framework established by developed economies. It is undeniable that high concentration ratio, infrequent market entry, high entry barriers, or rampant corruption and cronyism deprive consumers in emerging economies of the alternate choices that are available in developed markets. However, fewer alternatives means that consumers in emerging economies are less likely to switch to substitutes in response to a price increase by firms with market power either protected by high entry barriers or unduly gained through cronyism. In other words, unique economic or noneconomic features in emerging markets could in theory be integrated into the market definition process, in particular the SSNIP approach,[113] to make the relevant market narrower and the market power held by the actors more dominant. Accordingly, identical anticompetitive practices by dominant firms in emerging economies are no less likely to be investigated and punished than in developed economies.[114] In this context, even if a reviewing standard is based on an unrealistic confidence in the market's self-correcting abilities it may not affect the overall reviewing results. Neither will the debates regarding the reviewing standards for unilateral misconducts decisive for effective enforcement of competition law. Exclusionary conduct by a monopolist holding formidable market power gained through favoritism in a narrowly defined market typically indicates less innovative or cost-saving activities in the market. This further implies that consumers' interest will be at the center of the reviewing process regardless of what reviewing standard is applied. Namely, the "total welfare" standard will converge with the "consumer welfare" standard.

Various challenges can be raised against the aforementioned suggestions. For example, the current approach for defining a relevant market and market power is

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110. *Id.* at 81.

111. *Id.* at 80.

112. *See* Michal S. Gal & A. Jorge Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, 76 ANTITRUST L. J. 899, 904-07 (2010).

113. SSNIP ("Small but Significant and Non-transitory Increase of Price") refers to a methodology in competition law that seeks to find the product and geographic boundaries subject to competition by testing the substitutability among products and competing regions in response to a price change within a specific time period. *See* U.S. DEP'T OF JUSTICE AND FED. TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES §1.1 (1992).

114. *Id.*

criticized as being flawed and is not an appropriate benchmark for assessing market power and competitive harms.[115] However, this is a problem common to both emerging and developed economies. It may also be premature to equate the lack of enforcement resources and skills to conduct the sophisticated techniques employed by developed economies with the advantages of applying divergent rules in emerging economies. Convergence in the form of regional technical assistance to improve the accessibility and workability of those techniques for emerging economies may still be preferable.[116] Other venues, such as the International Competition Network ("ICN"), through its recommendation of best practices for competition law, also offer a platform for designing a uniform analytical framework more adaptable to the needs of countries with divergent levels of economic development.[117] Similarly, the regular annual meetings and the "peer review" procedure of the Organization of Economic Cooperation and Development ("OECD") Competition Committee offer member states the opportunity to discuss and debate the effects of divergent economic and noneconomic features on the formulation of competition policy and law.[118] Consensus regarding the most appropriate form of market regulation may thereby be formed.

V. CONCLUSION

This paper discussed and analyzed how developmental variance might limit the application of prevailing competition rules established by developed economies. First, the paper described how the unique economic and noneconomic features in emerging economies have shaped the market structures and performance differently from those of developed economies. Recently, those differences have been recognized and studied by antitrust researchers. Various proposals for formulating competition policy and law in emerging economies have

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115. *See* Louis Kaplow, *Why (Ever) Define Markets?* 124 HARV. L. REV. 437 (2010).

116. The objectives of technical assistance programs include assisting emerging economies in resolving problems concerning institutional designs, dealing with international business and legal practices, and providing educational and consulting programs that enable staff and officials to more efficiently and consistently implement competition policy and law. Michael Nicholson, D. Daniel Sokol & Kyle W. Stiegert, *Technical Assistance for Law and Economics: An Empirical Analysis in Antitrust /Competition Policy*, (Food Sys. Res. Grp. Working Paper Series FSWP2006-07, 2006), http://www.aae.wisc.edu/fsrg/publications/WP2006-07.pdf. The effectiveness of technical assistance depends on several factors that are closely related to the unique economic and noneconomic features of emerging economies. Fox & Gal, *supra* note 14, at 63-64. The effectiveness also varies with the political power that has been assigned to the competition agencies in emerging economies. For example, one of the critical findings of an empirical study conducted by Sokol and Stiegert is that agencies with a leader that ranks as minister or higher and that enjoy prosecutorial discretion most effectively accept assistance. D. Daniel Sokol & Kyle W. Stiegert, *Exporting Knowledge Through Technical Assistance and Capacity Building*, 6 J. COMP. L. & ECON. 233, 250 (2010).

117. For a comparison of the similarities and differences of the ICN and the OECD Competition Committee, *see* Frederic Jenny, *The International Competition Network and the OECD Competition Committee: Differences, Similarities, and Complementarities*, *in* THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS, AND ASPIRATIONS 93, 102-04 (Paul Lugard ed., 2011).

118. OECD, *Peer Review*, http://www.oecd.org/site/peerreview/ (last visited June 21, 2015).

been made to address the competitive problems attributable to these unique features. Those proposals suggest that the competition policies and laws in emerging economies be simplified to reflect the prevalence of competitive harm and constraints on the enforcement capabilities in those countries. We noted at the end of this paper that the suggested proposals could render the regulatory landscape for competition law in emerging economies more conduct-based and move it toward per se rule. While divergence between emerging and developed economies should be duly acknowledged, policy makers should also be alert to the possibility that simpler and stricter rules increase the risks of over-deterrence. Therefore, this paper pointed out the limitations and conditions that must be assessed before implementing these proposals, and emphasized that the value of a uniform competition rule should not be discounted simply because of the existence of certain economic or noneconomic features in emerging economies. Arguments for formulating distinct competition rules or standards based on those considerations should be tested against the feasibility of factoring those unique features into the existing framework. Otherwise, costs from business uncertainty could offset the benefits realized through the divergent application of competition law.