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Outline

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Acronyms and abbreviations

ANC: African National Congress
BEE: Black Economic Empowerment
CBB: Construction and Business Bank
CBE: Commercial Bank of Ethiopia
CIL: Comparative Institutional Analysis
COSATU: Congress of South African Trade Unions
CWIU: Chemical Workers Industrial Union
DTI: Department of Trade and Industry
EU: European Union
FDI: Foreign Direct Investment
FOSATU: Federation of South African Trade Unions
GDP: Gross Domestic Product
GoE: Government of Ethiopia
GTP: Growth and Transformation Plan
IMF: International Monetary Fund
JSE: Johannesburg Stock Exchange
LDC: Least Developed Countries
MAWU: Metal and allied Workers Union
MoFEC: Ministry of Finance and Economic Cooperation
MOI: Ministry of Industry
MOT: Ministry of Trade
NBE: National Bank of Ethiopia
NEDLAC: National Economic Development and Labor Council
PASDEP: Plan for Accelerated and Sustained Development to End Poverty
SAP: Structural Adjustment Program
SME: Small and Medium Enterprises
SoEs: State Owned Enterprises
TCCPP: Trade Competition and Consumer Protection Proclamation
TCE: Transaction Cost Econonomics
TPP: Trade Practices Proclamation
TPCPP: Trade Practice and Consumers' Protection Proclamation
TRIPS: Trade Related Intellectual Property Rights
UN: United Nations
UNCTAD: United Nations Conference on Trade and Development
USA: United States of America
WBG: World Bank Group
WIPO: World Intellectual Property Organization
WTO: World Trade Organization
NP: South African National Party
ANC: African National Congress
SACP: South African Communist Party
MAWU: Metal and Allied Workers Union (of South Africa)
CWIU: Chemical Workers Industrial Union (of South Africa)
TGWU: Transport and General Workers Union (of South Africa)
FOSATU: Federation of South African Trade Unions
ICN: International Competition Network

Abstract

Today a large number of developing countries have adopted competition laws even though enforcement record across these countries is uneven. Addressing the problem of deficient competition law and enforcement in these countries has proved to be a complicated task. Recent literature has attempted to look in to both economic and non-economic arguments. A sizable amount of these contributions has clarified the pertinent issues and has helped shape the discourse. Yet there is a tendency for analytical approaches to be prescriptive, with emphasis given to goals and value determination. Among others, significant portion of recent research in to competition law and policy in developing countries, whether discussed in terms of its economic underpinnings, strategic need, or the institutional and normative call for it, is done in 'public interest' terms. The market fouls-up; government corrects. Or need to! Behind many important conclusions lays an ill-defined sphere, 'political-will'. A phrase that has been used loosely.

This thesis employs *inter alia* tools in comparative institutional analysis to develop a positive examination of the institutional decision-making process to ascertain the underlying factors that bring about effective competition enforcement. This is supplemented by a normative analysis. Key to this investigation is to understand the behavior of competition law decision making process as an endogenous part of the exercise. Hence it is not simply 'capacity' or 'lack of will' to enforce that is absent in these regimes but rather due to the lack of institutional legitimacy, institutional participation as a factor of both pull and push factors, or in the existence of those, the rules and institutions that may have been, comparatively, inaccessible, or rigid to incentivize participation. It also argues that the current shape of competition law regime in most jurisdictions is underpinned by forced consensus.

In doing so, the analytical framework presented calls for understanding competition law enforcement in developing countries as a process of 'institutional choice'. From a positive analysis point of view, it examines competition law and policy decision-making process. It argues that the central part of analyzing market regulation and competition law and policy in developing countries is a process of selecting the least imperfect institution among a set of closely imperfect options. Hence, optimal allocation of institutional responsibility and division of functions is to fail unless its view is refocused to evaluate all institutional alternatives equally. A partial view will fail to look available institutions that may be already available, possibly better suited or that can be most easily reformed. From a normative analysis point of view, it provides the objectives and substantive standards of competition law and the resulting enforcement landscape should be seen as an outcome of institutional choice.

The choice of this analytical tool has multifaceted implications for the study of competition law and policy. First, by addressing institutions and the dynamics of institutional reform as an endogenous process, comparative institutional analysis provides a comprehensive analytical framework to understand them. It avoids the exclusive focus on goals, as well as excessive reliance on single institutions. Instead primary focus is given to a 'bottom up' approach that gives emphasis to understanding institutional participation and experimental learning process. Second, it means that the choice of goals of competition law is shaped by the intermediary institutional process. It is institutional choice that dictate the terms of the substantive legal rules, not the other way around. This reverses the perspective in recent competition law literature that approaches institutional choice only secondary to goals. This also implies that no single institutional choice and value (goals) determination could always hold constant across jurisdictions, issues, or time.

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CHAPTER ONE

Introduction

1. Background and Objectives

Today a large number of developing countries have adopted competition law and more are in the process of adopting one.[1] Several explanations have been put forward to explain this trend; post 1990 economic reforms, pressure from international financial institutions (IFIs), and of course growing awareness and recognition of the risk of anticompetitive practices in these markets. In large part competition law and policy gathered global prominence as majority of developing economies made economic reforms and free market principles held center stage in the economic growth and development orientation of these economies.

Meanwhile, enforcement of competition laws and the embodiment of competition policy in the national economic policy making and market governance experience of these countries has been weak.[2] Addressing this challenge has also proved to be a complex task. The various issues that come with it such as the objective or goal of the law, the content of various substantive standards, the nature of enforcement institutions etc., are not settled issues. Recent literature has attempted to look in to both economic and non-economic arguments and has contributed to elucidating pertinent issues and has helped shape the discourse.

However, often, analytical approaches put forward remain to be piecemeal and conclusions tend to be prescriptive. With too much emphasis given to goals and value determination, most of the analysis presented fails beforehand to positively rationalize the nature of the law as it applies in these countries. Institutional contributions also have the tendency to become illustrative. A menu of all necessary conditions that need to be setup prior to embarking on a first-class competition regime is given are prescribed without so much effort to analyze how these prescriptions are to be provided.

The thesis aims to come up with a workable theoretical framework that will contribute to our understanding of competition policy and enforcement in developing countries. In doing so it attempts to borrow lessons from Comparative Institutional Analysis (CIL) as an analytical framework to develop a positive analysis of the domestic decision-making dynamics to ascertain the underlying factors that bring about effective competition policy and enforcement, or lack thereof. This is coupled with a normative analysis.

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[1] Dina I. Waked, "Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges," *Journal of Law, Economics & Policy* 12 (2016): 193. Umut Aydin, "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits," *Law and Contemporary Problems* 79, no. 4 (2016): 1–36. Michal S. Gal and Eleanor M. Fox, "12. Drafting Competition Law for Developing Jurisdictions: Learning from Experience," in *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, 2015, 296.

[2] Eleanor M. Fox, "Outsider Antitrust 'Making Markets Work for People as a Post-Millennium Development Goal," *Competition Policy for the New Era: Insights from the BRICS Countries*, 2017, 22.

A particular emphasis will be given to the major contributions of Ronald Coase in the area of law and economics,[3] and most recently contributions by Neil Komesar.[4] Generally, new institutional economics and comparative institutional analysis employs transaction cost analysis to understand the dynamics of law and public policy decision making-process.[5] It emphasizes the role of institutions in mediating substantive goals and determining their outcome.[6] In doing so it heavily relies on Ronald Coase's contribution on market externalities, the problem of transaction costs and the institutional structures of the economy.[7]

Komesar's contribution to the field relies on basic premises of rational choice and argues against single institutional analysis. Institutional participation takes the core of his analysis and considers this basic intuition across market and nonmarket institutions. Accordingly, from a positive analysis point of view comparative institutional analysis studies decision-making institutions from legal, political, and economic perspective and analyses institutional behavior and choice. It argues that all institutions share a fundamental communality as they all involve choice among 'imperfect alternatives'.[8] Hence institutions are better understood when viewed as though institutional participants are engaged in choosing comparatively the best, or the least imperfect, among them. Comparative institutional analysis argues that each institution functions or reacts to the dynamics of institutional participation.[9] This means the gains and costs of participation determines the effectiveness of each institution. According to Komesar this understanding should serve as a building block to the analysis of law and policy. For the purpose of his analysis Komesar broadly classifies the pertinent decision-making institutions in to three; the market place, the political process and the judicial organ, although he also

[3] R. H. Coase, "The Nature of the Firm," *Economica* 4, no. 16 (1937): 386–405; R. H. Coase, "The Problem of Social Cost," *The Journal of Law & Economics* 3 (1960): 1–44; Ronald H. Coase, "The Regulated Industries: Discussion, 54 Am," *Econ. Rev* 195 (1964); Ronald Coase, "The New Institutional Economics," *The American Economic Review* 88, no. 2 (1998): 72–74; R. H. Coase, *The Firm, the Market, and the Law*, Paperback ed., [repr.]. (Chicago: Univ. of Chicago Press, 1988); Daron Acemoglu, "Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics," *Journal of Comparative Economics* 31, no. 4 (2003): 620–652; Daniel H. Cole, "Taking Coase Seriously: Neil Komesar on Law's Limits," *Law & Social Inquiry* 29, no. 1 (2004): 261–289.

[4] Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997); Neil K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights* (Cambridge University Press, 2001); Malcolm Rutherford, "Institutional Economics: Then and Now," *The Journal of Economic Perspectives* 15, no. 3 (2001): 173–94.

[5] Coase, "The New Institutional Economics"; Oliver E. Williamson, "The New Institutional Economics: Taking Stock, Looking Ahead," *Journal of Economic Literature* 38, no. 3 (September 2000): 595–613, https://doi.org/10.1257/jel.38.3.595.

[6] Shaffer, Gregory, Comparative Institutional Analysis and a New Legal Realism (December 21, 2012). Wisconsin Law Review, No.2, 2013, pp.607-628; Minnesota Legal Studies Research Paper No. 12-67. Available at SSRN: <http://ssrn.com/abstract=2192623>

[7] Coase, "The Problem of Social Cost."

[8] Neil Komesar, "In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative," *Michigan Law Review* 79, no. 7 (1981): 1350.

[9] Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1994), 4; Neil Komesar et al., *Understanding Global Governance: Institutional Choice and the Dynamics of Participation* (European University Institute, 2014).

underlined that the nature of such sub-division is irrelevant to the basic structure of the analysis and others may adopt a narrow or a much broader set of institutions.

From a normative analysis point of view, it contends that the choice of any value determination that may present itself in the form of normative principles or standards is an outcome of institutional choice. Therefore, institutional analysis is necessary and it must be comparative. Komesar proposes using participation centered approach to select among imperfect alternatives. His unique contribution also lies in his effort to take into consideration both minoritarian and majoritarian influence. Derived from this, the quality of participation serves as a proxy of conventional economic (e.g. efficiency) or distributional values.[10] The aim is to allocate decision making power to the institution that is least likely to lead in to either minoritarian or majoritarian bias.

Accordingly, this thesis will attempt to present an analytical framework of understanding competition law enforcement in developing countries as a process of institutional choice. It argues that the central part of analyzing economic regulation and competition law and policy in developing countries is a process of selecting the least imperfect institution among a set of closely imperfect options. Building on the contributions of comparative institutional analysis the model evaluates the relative outcomes of choosing among alternative ways of allocating antitrust decision-making powers.

The choice of this analytical approach has multifaceted implications. First, it means that the determination of the goals of competition law is significantly affected by the intermediary institutional process. As explained by Komesar, it is institutional choice "that define the terms of legal analysis not the way around."[11] This reverses the conventional perspective in recent competition law literature that approaches institutional analysis only secondary to goal selection. Second, institutional analysis of competition law and policy will have to give due care to undertake a 'truly' comparative examination compared to the conventional single institutional analysis.[12] As comparative institutional analysis considers all alternative institutional choice to have benefits and drawbacks, it considers such choice to be a selection among imperfect alternatives. Competition policy analysis thus would have to build its own empirical tools of analyzing and contrasting the process of institutional participation. This implies that no single institutional conclusion and value determination could always hold constant across jurisdictions, issues or across time as the relative cost benefit ratios of stakeholder position and institutional participation diverge across the same factors, (jurisdictions, issues, and time).

A participation centered analysis as developed by Komesar to elaborate the decision-making process in constitutional law, torts and property rights theory perfectly matches the kind of

[10] Ioannis Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," 2013, 56. Also published under Ioannis Lianos and Damien Geradin, *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing, 2013).; Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *The Modern Law Review* 37, no. 1 (1974): 1–27.
[11] Komesar, *Law's Limits*, 175.
[12] Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," 2013.,

issues that one is commonly exposed to in dealing with competition law and market regulation in developing countries. Unlike conventional neo-classical interest group analysis, participation centered analyses gives serious consideration to "over-representation of some majority interests (e.g. consumers) with may lead to unsatisfactory results from the point of view of welfare."[13] In doings so this approach is useful in providing a comprehensive analytical framework to positively analyze the state of competition law and policy in developing countries. The approach can also be illustrative of why the choice of market regulation instruments in various developing countries varies from one jurisdiction to the other or oscillates between approaches; which often take the form of heavy interventions in the market place, such as direct provision of goods and services, price control instruments, or conventional market regulation and, competition law. It also contributes its own analytical framework to show how some jurisdictions came about incorporating *sui generis* standards, such as 'non-efficiency' objectives. In addition, the focus on participation is keen to addressing the most important challenge of constructing a working antitrust regime in these countries; the problem of legitimacy. In this sense legitimacy shares the basic intuitions of participation based comparative institutional analysis.

This approach also shares a perspective with the more recent legal development literature that analyses the demand and supply of law/institutions as determining factor for effective institutional development.[14] The model will also help build a systematic map of the various institutional factors in play. For instance, various contributions in 'public choice' literature have attributed failures of a range of competition regimes due to 'interest group influence', but fail to provide a systematic analysis of the role of these groups across issues and institutions.

2. Research Questions

This thesis analyzes the nature competition law and its enforcement in developing countries. It broadly engages the discussion on how effective competition regimes can be built in developing countries. In doing so it aims to investigate the possibility of forging a single analytical framework that explains the nature of the regime. This analytical framework will be useful to answer questions such as what explains the skepticism and dereliction from effective enforcement of competition law in several developing countries? What defines their legitimacy? Most of all, what explains the great variance/divergence across countries?

With this aim, at the outset the thesis aims to address the following two broad questions;

First, it asks how institutional considerations influence the effectiveness of competition regimes in developing countries. This question encompasses considerations such as:

- What are the distributional implications of competition law enforcement in these countries, if any?

[13] Lianos., Neil Komesar, "The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness," *Wis. L. Rev.*, 2013, 265.
[14] Komesar, *Law's Limits*.

- What is the role of the domestic governance framework, and generally the relationship between government and various stakeholders during the formulation/reform stages of competition law?
- Who were the key stakeholders involved in the development of competition instruments, how? and which groups or objectives/interests did these actors represent?
- What are the primary actors that participate in the enforcement process?
- What institutional characteristics facilitate/hinder access/participation of these actors?
- What is the role of these agents in influencing the implementation and interpretation of the normative standards?
- What is the relationship between various regulatory instruments/ institutions and competition law?

Second, it asks what is the role of institutional considerations in affecting the various normative standards. The broader theoretical and practical utility of this enquiry is to illustrate, if evidence leads to this conclusion, how the pertinent normative standards evolve within this multifaceted decision-making process.

By engaging in a comparative evaluation of the role institutions and their impact on competition law design and enforcement in developing countries the thesis will attempt to develop a positive analysis of competition regimes in developing countries. The analysis will also be able to make further steps to ascertain how institutional considerations impact the nature of the normative standards.

3. Methodology

Competition law and policy is an interdisciplinary subject matter. The thesis relies on this aptitude to navigate the legal, political, and economic contours to address the above research questions. It employs a combination of theoretical, comparative, and qualitative analysis.

In particular, it employs comparative institutional analysis as a pragmatic tool to diagnose the overall market governance or regulation in these countries. In doing so the thesis develops an interdisciplinary model of analysis and attempts to understand the evolution of competition law and policy in developing countries by analyzing the participants in the institutional decision-making process. It considers the domestic institutional framework and the stakeholder dynamics for competition law design and enforcement as the most crucial element to the overall process.

It undertakes participation centered institutional analysis by examining stakeholder participation behavior and the cost-benefit determinants of institutional participation. It investigates factors that determine stakeholders' marginal cost of participation in alternative decision-making institutions; i.e. information costs, cost of organization, and cost of access to institutions etc., which are all tied to the benefits and per capita stakes of such participation.

For this purpose, two developing countries are selected as a case study; South Africa and Ethiopia. The two countries are not only in different state of economic development but also represent contrasting social and political characteristics. Most importantly, there is wide gap in the state of competition law and policy performance between the two countries. Application of participation centered comparative analysis in these selected jurisdictions will be supported by both qualitative evidence and doctrinal review.

The normative analyses will largely follow a doctrinal analysis of the legislative framework, case law and decisions of regulatory and competition agencies as well as courts. To undertake a normative analysis and examine the application of the model, a selection two substantive competition enforcement issues across the two different jurisdictions will be made. At the outset the research selects, non-efficiency objectives and excessive pricing and comparatively examines institutional choice.

4. Outline of the Thesis

The thesis is organized in six chapters. The next chapter provides an overview of the development of competition law in developing countries. It provides a general highlight on the economic and market reform experiences of these countries as well as adoption and evolution of competition law instruments. It provides a brief overview of the debate on relevance, 'appropriateness', of competition law to these countries. The chapter also sets the stage for the analytical core of the thesis. The chapter aims to understand the key challenges of effective competition law enforcement in developing countries. In doing so it dissects through conventional justifications provided for the weak enforcement landscape in these countries. The chapter lays the basis for the need to have a compressive analytical model. It gives emphasis to the legitimacy deficit the development competition law in many of the developing countries faces. It argues that the development of competition law and policy in developing countries often relied on technocratic legitimacy. Hence such development was by and large sympathetic to a push for stronger antitrust enforcement and therefore has grown separately from the broader institutional development discourse.

Chapter Three provides a review and analysis of the law and development literature and its relevance to the discussion of competition law in developing countries. It attempts to show how the law and development literature has rightly evolved in to understanding the demand and supply perspective to legal and institutional development. This perspective gives more emphasis to institutional analysis. The discussion reinforces the importance of building a bottom up institutional development process. It provides an important perspective to the discourse on competition law in developing countries that is in large part dominated by supply side prescriptions.

Chapter Four introduces comparative institutional analysis and its relevance to the study of competition law and institutions. It gives particular emphasis to the work of Neil Komesar. Komesar argues that single institutional analysis and emphasis in goal selection in law and public policy has ignored the important question of institutional analysis. His work is primarily focused on comparing three institutional alternatives the market, political organs, and

adjudicative bodies, i.e. courts. In developing his analysis, he draws a link between the major proportions of the poor performance of these three institutions and respective institutional 'transaction costs' involved. Komesar essentially sums up major institutional theories and develops a theory of optimal institutional selection process. Analysis of the development of competition law enforcement in developing countries could take important lessons from this theory. The chapter argues that the ultimate legitimacy and efficiency of competition law enforcement in developing countries will depend up on the institutional decision-making process.

Chapter Five provides a case study of competition law, institutions, development policy, and priorities in two developing countries, South Africa, and Ethiopia. The chapter aims to address two peculiar questions regarding competition law in developing countries. First, what the process of putting in place a credible competition law regime looks like in selected developing countries? Second, what is the role of institutional considerations in affecting enforcement effectiveness. In addressing these questions, the chapter highlights how the formation of competition institutions in Ethiopia and South Africa took different approaches. As South Africa came out of political and economic reform after the downfall of apartheid, the development of competition law institutions had prominent importance for the new government. On the other hand, while Ethiopia underwent a similar political economy reform process, the development of competition law had garnered little attention from the government or other agents. The Ethiopian experience is also illustrative of the enforcement experience of many of its peers. After establishing a formally independent enforcement agency there is still a wide gap before such agency establishes trust in the larger business and consumer community.

The case studies provide illustration of how during the formative stages the competition law landscape is affected by institutional participation, further determining the ultimate shape and efficiency of competition law. The chapter also highlights the role of institutional considerations in determining enforcement effectiveness of competition institutions. South Africa's experience in dealing with excessive prices in the pharmaceutical industry provides an interesting insight in to how institutional considerations determine the enforcement efficiency of competition agencies. The discussion will also show how Ethiopia's experience in dealing with potentially anticompetitive concerns though 'sui generis' standards and government intervention in the market under the disguise of consumer protection.

Providing the analytical core of the thesis the chapter utilizes the discussion made in the preceding chapters to show how even relatively mature regimes face institutional imperfections and choices. The chapter attempts to analyze, given institutional considerations, how the various agents make institutional choice decisions to further their economic and social goal. Material from the case studies will be used to analyze and showcase the ways and means by which domestic decision-making process interacts with both the positive and normative landscape of competition law. The case of South Africa is used to illustrate how a rather successful regime that has attracted significant enforcement interest even in areas that are traditionally devoted for 'regulatory' bodies. Ethiopia, on the other hand seats on the opposite

side of the spectrum. Weak competition law enforcement institutions reinforced by high costs of stakeholder participation, legitimacy challenges on the one hand and a relatively reactive political bodies have resulted in a situation where key competition law and policy issues are being presented and entertained by political bodies. The approach used is useful to explain why some competition law regimes show stronger or weaker enforcement practice and perhaps why the choice of market regulation instrument in various developing countries often oscillates between varying positions and instruments.

Chapter Six addresses pertinent normative questions surrounding competition law and policy in developing countries. The issue of broad objectives of competition law in developing countries is one of such debates. Today, several goals and visions underpin the development of competition law in these countries. Similarly, the role of competition law in addressing excessive pricing has been a contested subject. The chapter aims to contribute to this body of work. It does so by building on the discussion in the preceding chapters that have outlined the role and significance of comparative institutional analysis. It attempts to discuss non-efficiency objectives taking a particular look at public interest considerations in merger control cases in one of the countries selected for case review, South Africa. Similarly, by analyzing the proposed standards for dealing with excessive pricing issues, it attempts to provide normative insights derived from comparative institutional analysis. It discusses how both argument in favor and against of incorporating non-efficiency objectives in to competition law framework are driven by institutional considerations. In doing so the chapter highlights the relationship between goal choice and institutional choice.

Finally, a brief conclusion is provided.

CHAPTER TWO

Understanding the Challenges to Effective Competition Law Enforcement in Developing Countries

1. Introduction

The modern economic history of most developing economies started in the first half of the 20th century, especially for many in the wake of WWII and independence from colonial rule. Between 1950's and late 1980's the state played a pervasive role in controlling and intervening in the large parts of the national economy. The state machinery owned large parts of major economic operations and regulated intensively. Industrial policy and economic redistribution were major mottos of these newly independent nations.[15]

The economic downturn in mid 1970's and early 1980's led to severe financial strain on many of the developing country economies.[16] The International Monetary Fund (IMF) and the World Bank (WB) created various credit lines of majority of these countries.[17] As the United States, also the biggest contributor to these International Financial Institutions (IFIs), was in the middle of the Cold War, it promoted the principle of free market economy, in particular to developing and least developing countries, against fear of spread of socialism. It was within this context that international organizations such as the IMF and WB promoted various types of structural adjustment and economic recovery programs as a condition for their financial support.[18]

The reform was underpinned by two interrelated developments. The first has much to do with the pressing need for economic readjustment following an eminent economic crisis where chronic budget and balance of payments deficit had affected the already struggling economies. Hence, to get out of this conundrum, most developing economies sought the support of international financial institutions and other major industrialized countries. Together with an

[15] Michele Di Maio, "Industrial Policy and Development: The Political Economy of Capabilities Accumulation," in *Industrial Policies in Developing Countries: History and Perspectives* (Oxford University Press, 2009).
[16] "Reflection on Development Policy in the 1970s and 1980s," Development Policy & Analysis Division | Dept of Economic & Social Affairs | United Nations, August 25, 2017, https://www.un.org/development/desa/dpad/publication/policy-brief-53-reflection-on-development-policy-in-the-1970s-and-1980s/.
[17] Nicole Ball, Vijaya Ramachandran, and Nicolas Van de Walle, *Beyond Structural Adjustment: The Institutional Context of African Development* (Springer, 2003), 60.; Robert Lensink, *Structural Adjustment in Sub-Saharan Africa* (Addison-Wesley Longman Ltd, 1996).
[18] Lensink, *Structural Adjustment in Sub-Saharan Africa*; Clive S. Gray and Anthony A. Davis, "Competition Policy in Developing Countries Pursuing Structural Adjustment," *The Antitrust Bulletin* 38, no. 2 (June 1993): 425–67, https://doi.org/10.1177/0003603X9303800209.

extensive support program, these countries were greeted with extensive economic reform prescriptions.

'Washington Consensus' became the hallmark and a dominant force in the decades ahead.[19] The term was first coined by economist John Williamson in 1989 and is used to refer to a handful of policy prescriptions and standards promoted by the three most important institutions in Washington, the US Government, IMF and WBG.[20] Williamson identified at least 10 policy instruments proscribed by the Washington Consensus.[21] The policy prescriptions were meant to aid economic stability, growth and the promotion of free market and competition. While most of these policy prescriptions were initially designed by the three 'Washington Institutions' in their engagement with Latin American countries, it quickly become the development and reform model for the rest of developing countries including those in Asia and Africa.

The second, explanation has to do with the fact that many developing countries took lesson from the 'economic development miracle' of their Asian counterparts and hence started being skeptical about the promises of an inward oriented economic policy.[22] Hence some voluntarily liberalized their economies by allowing foreign competition including the promotion of foreign direct investment. Various domestic factors might have also led to such reforms. Nevertheless, one cannot confidently argue that these countries undertook their reform independently or free of the influence of the global discourse on economic liberalization driven by Washington Consensus.

This chapter introduces the development of competition law in developing countries in the context of these developments. As the spread of competition law in to developing countries received mixed reactions, the chapter brings in to spotlight the pertinent debates. The discussion on the debates identifies the importance of harmonizing competition law and policy with other development objectives. However, this argument is easier said than done. The chapter addresses these considerations as well as the key challenges to effective competition law enforcement.

2. Evolution of Competition Law

The first wave of introduction of competition law in developing countries dates from the end of the WWII to 1980's. There were only few examples in the pre-war period, such as in US

[19] John Williamson, "What Washington Means by Policy Reform," *Latin American Adjustment: How Much Has Happened* 1 (1990): 90–120.

[20] Williamson., John Williamson, "The Washington Consensus as Policy Prescription for Development," *Challenges in the 1990s*, 2004, 33; John Williamson, "A Short History of the Washington Consensus," *Law and Business Review of the Americas* 15 (2009): 7.

[21] These included, among others, strict fiscal and public expenditure discipline, tax policy reform, market based interest rates, free exchange rates, trade and investment policy liberalization, privatization, strong property rights and deregulation of the economy.

[22] Khalid Sekkat, *Market Dynamics and Productivity in Developing Countries Economic Reforms in the Middle East and North Africa* (New York: Springer, 2010), 1,

held Philippines,[23] and even though these developing countries that started adopting competition laws in the early post war period did not embrace competition law in its current form. Most of the countries that had adopted competition law, or something like it, had the objective of both extending broad market control, such as price regulation, as well as promoting market competition.[24]

India's attempt to regulate monopolies and market competition is a typical example of the characteristics of competition laws in this period. While India introduced its Monopolies and Restrictive Trade Practices Act (MRTPA) as early as 1969, its aim was to implement principles enshrined in the Constitution of India. Its Constitution provided that the state policies should be directed to ensure equitable distribution of resources and economic growth des not result in concentration of wealth.[25] In doing so the act was introduced under a broad political economy direction from the constitution. The Act was amended a number of times until it was replaced by the Competition Act of 2002.[26]

The same approach was followed by Pakistan in 1970,[27] and Korea in 1975.[28] The latter in particular designed an instrument that had nuances and properties of a price regulation apparatus than competition law per se. Korea's Price Stabilization Act was indeed, as its name implies, directed to oversee the structural reform of the Korean economy in the wake of the 1973 oil crisis that resulted in sharp increase in imported raw materials and inflation. The act was primarily meant to be used as a legitimate instrument to intervene in market prices of various essential goods between 1974-1979. According to Lee, "from 1975 to 1979, the government designated hundreds of monopolistic and oligopolistic products as targets for price control… [and] carried out extensive price regulation."[29]

Thailand's Price Fixing and Anti-Monopoly Act of 1979 was also a law that has more to do with the price controls than modern competition law principles.[30] In doing so, initially the Act was aimed at establishing a legal framework for price regulation and antimonopoly law. Following an extremely turbulent economic crisis of the late 1990's that also swept the entire

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[23] Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade" (Act No. 54 of 14,1947)

[24] Noboyuki Yasuda, "The Evolution of Competition Law in Southeast Asian Countries," *Globalization and Law in Asia: From the Asian Crisis to September* 11, no. 2001 (2003): 10–11.

[25] The Constitution of India 1949, Article 39

> 39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
> (a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (…)

[26] India, The Competition Act, 2002 (12 of 2003)

[27] Pakistan, Restrictive Trade Practices Ordinance of 1970 (often refered as "MRTPO")

[28] Korea, Act Concerning Stabilization of Price and Fair Trade of 1975

[29] Kyu Uck Lee, "Economic Development and Competition Policy in Korea," *Wash. U. Global Stud. L. Rev.* 1 (2002): 68.

[30] Thailand, Prices-Fixing and Anti-Monopoly Act, B.E. 2522 (1979)

South East Asia and newly formulated Constitution of 1987, a new dual regime of price control and competition act were introduced in the form of The Price of Goods and Services Act and the Competition Act.

By mid 1990's, the second wave, more than 70 countries have adopted some form of competition law.[31] Majority of these countries are developing countries.[32] Adoption of competition law by newly independent states and economic reform in much of the developing world as well as countries that emerged after the disintegration of the Soviet Union gave steam to the spread of competition law in to Eastern Europe and other Asian countries. However effective enforcement varied due to various institutional limitations. The third wave of competition law adoption started early 2000's. More than 30 developing countries adopted competition laws in this period and more are in the process of doing so.[33]

3. Developing Countries and Competition Law: The Debate

3.1. Arguments in Favor

3.1.1. Curtailing abusive practices

Various instances anticompetitive practices across developing countries has been provided as the primary reason supporting the competition law transplant project. Many developing countries indeed suffer from 'effective monopolization' of large parts of their economy in the hands of few enterprises, groups or individuals, families etc. at the expense of consumers which are characteristically 'less well off' than those residing in industrialized countries.[34] According to Stiglitz "strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies"[35]

There are various reasons that can explain the spread of anticompetitive practices in these economies. The first and most primary one has to do with their economic setting and historically inherited market characteristics. Historical experiences and economic policies that maintained state enterprises, legal cartels and various other regulatory measures evolved in to the modern economy.[36] As described above one of the quintessential political economy hallmarks of the late 20th century has been the sudden shift by many developing towards neoliberal orientation of economic governance that advocated a stern hands-off approach to

[31] Eleanor M. Fox and D. Daniel. Sokol, *Competition Law and Policy in Latin America* (Oxford; Portland, Ore.: Hart Publishing, 2009). 293.
[32] Waked, "Adoption of Antitrust Laws in Developing Countries," 193. Waked states, "the developing word has witnessed a massive spread of adoption of competition laws."
[33] Waked, "Adoption of Antitrust Laws in Developing Countries."
[34] Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge [U.K.]; New York, N.Y.: Cambridge University Press, 2010), 297.
[35] Joseph Stiglitz, "Competing over Competition Policy," *Project Syndicate*, 2001.
[36] William E. Kovacic, "Instututional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement," *Chicago-Kent Law Review* 77 (2002 2001): 265.Frank Emmert, "The Argument for Robust Competition Supervision in Developing and Transition Countries," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 7, 2016), https://papers.ssrn.com/abstract=2760478; William E. Kovacic, "Getting Started: Creating New Competition Policy Institutions in Transition Economies," *Brooklyn Journal of International Law* 23 (1998 1997): 403.

state involvement in the market. The last quarter of the century showed various episodes of structural transformation and adjustment in most developing countries from state led to market based economic development orientation. SAP's were directed against the significant level of state interference in these economies.[37] It advocated privatization and deregulation of various industries and policies. Many Eastern European, Latin America and Asian countries also remember the latter half of the century for the abrupt political change that occurred as the cold war ended and they transited from socialist to market led economic policies.[38]

This transition has important role to play on the development of competition law and policy in these countries. Markets that used to be state run were officially left in the hand of the private sector. A key ingredient of the change from state led to market-based economy in all those economies that started this venture was transfer of significant part of state-owned industries in to private hands – privatization.[39] This has been largely dictated by neoliberal economic thoughts that private ownership – combined with competition - is the single most important criterion to market efficiency and economic development. Considering most developed economies have also passed through the same historical period, became an agenda of IFI's.

The outcome of the transition process however had stark variance. Despite a large-scale transfer of ownership of key industries to private hands many markets in countries that have undertaken this venture fail far from being competitive. Rather the process often lead to the transfer of public monopolies in to private hands that took advantage of the situation. Few firms, individuals and privileged families profited at the expense of consumers.

The main reason was the underlying role played by various political economy actors in the economy. Privatization was influenced by political forces and thus become a political process.[40] Even though various countries pursued diverse objectives alongside privatization, such as maintaining domestic industrial competitiveness by keeping major industries in national hands, national security and other public interest considerations, ultimately these decisions were not made in a political vacuum. Therefore, introducing competition laws and

[37] Gray and Davis, "Competition Policy in Developing Countries Pursuing Structural Adjustment"; Lensink, *Structural Adjustment in Sub-Saharan Africa*.

[38] Ignacio De León, "Institutional Analysis of Competition Policy in Transition and Developing Countries: The Lessons From Latin America," *Wash. U. Global Stud. L. Rev.* 3 (2004): 405.Maria Vagliasindi, "Competition Policy Across Transition Economies," *Revue d'économie Financière* 6, no. 1 (2001): 215–50, https://doi.org/10.3406/ecofi.2001.4560.

[39] This trend has important implications for understanding the development of and currents challenges of competition law and policy in these countries. Primarily, it is conceivable that the practical utility of competition law and policy is almost exclusively reliant on the private market economy.

[40] Jeff Tan, *Privatization in Malaysia: Regulation, Rent-Seeking and Policy Failure* (Routledge, 2007). "Privatization is an inherently political process as 'what is privatized and how represents the state's continuing intervention within the economy, favouring certain capitals at the expense of others." Paul L. Joskow et al., "Competition Policy in Russia during and after Privatization," *Brookings Papers on Economic Activity. Microeconomics* 1994 (1994): 301–381.

building enforcement institutions was considered vital to control potential abusive practices by industrial incumbents that are now in private hands.[41]

3.2. Arguments Against

The sudden growth in the number of developing countries adopting competition law between 1990 - 2000s has been received with skepticism.[42] There are various reasons for the source of such doubt. First, several policy analysts consider that there is only a limited role for competition law to play in the large part of developing countries whose markets are more stifled by government erected barriers than private operators. In doing so they argue that instead of harming aggressive competitive strategies of incumbent firms governments should ease policy restrictions that limit market competition.[43] Hence exposure to international trade and competition is sought as the preferred means.

Others are more skeptical on the role that competition law and enforcement authorities can play considering a mixture of political influence and control that the state exerts on these enforcement organs. The same group also raises concern with politicians using competition enforcement powers to punish 'uncooperative' firms. To this extent many are ambivalent if it is worth considering building competition law instruments and organs if these institutions are in the end thwarted by politics.[44] Others in the same group emphasize the financial cost of erecting a working competition law and enforcement regime. This is especially the case with respect to least developed countries that may have to incur substantial costs to build institutional capacity and technical expertise in the face of varied economic challenges and other priorities.[45]

More technical arguments have to do with the economic rationale, size and nature of the market in developing countries. Critics argue that these countries are still at the bottom of the development chain and host very small markets that anticompetitive practices should be the least of their worries. Godek stated;

> Worrying about antitrust issues shows an unhealthy anxiety about the imagined ills of capitalism. Exporting antitrust […] is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he will not be able to eat what little there is available to him.[46]

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[41] Kovacic, "Instututional Foundations for Economic Legal Reform in Transition Economies."
[42] Maher M. Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge, U.K.; New York: Cambridge University Press, 2003), 304, http://public.eblib.com/choice/publicfullrecord.aspx?p=218086.
[43] Robert A. Levy, "The Case Against Antitrust," *Online] Dalam Cato Institute Http://Www. Cato. Org/Publications/Com Mentary/Case-against-Antitrust [Diakses 18 Februari 2016]*, 2004.
[44] Armando E. Rodriguez and Mark D. Williams, "The Effectiveness of Proposed Antitrust Programs for Developing Countries," *NCJ Int'l L. & Com. Reg.* 19 (1993): 209.Craig W. Conrath and Barry T. Freeman, "A Response to the Effectiveness of Proposed Antitrust Programs for Developing Countries," *North Carolina Journal of International Law and Commercial Regulation* 19 (1994 1993): 233–46. Indeed arguing that antitrust will have its own contribution vis-à-vis its advocacy role.
[45] Einer R. Elhauge, *Research Handbook on the Economics of Antitrust Law* (Edward Elgar Pub, 2013), 286.
[46] Paul Godek, "One US Export Eastern Europe Doesn't Need," *Regulation* 15, no. 1 (1992).

3.3. Reflection on the debate

There is no question that both sides of the debate raise compelling arguments. However, today, for various reasons a large number of developing countries have taken steps to introduce competition legislation and many have also built enforcement machinery.[47] It can be said that there is a growing consensus that these countries would derive benefit from adopting competition law than otherwise. According to Dabbah, the recent debate has shifted the onus from why developing countries need competition law? to why not?[48]

One of the interesting arguments here is a strand which argues that competition law is premature for these economies because a working market system must pre-exist before a competition law is established. Before assessing the technical quality this assumption, it seems relevant to check whether these assertions are even for the sake of argument coherent. First, the manner of grouping developing countries in one pool is highly general. Obviously "developing countries" is a large group and it would be incorrect to attempt to summarize economic performance of more than 150 countries in one paragraph. This list contains a long spectrum of stages and size of their economy and levels growth.[49] This diversity is also one important source of challenge for research in competition policy and economic development as it would be a complete disservice to expect recommendations and solutions that would work for countries like China or Brazil would also bear fruit in one of the least developed economies such as Haiti, Chad or Ethiopia. Most have quickly stepped up to the top ladder of economic development to a state that even some developed countries would envy, the case of Korea, Taiwan, Singapore etc. is a good example. International institutions such as the WTO, WBG and IMF grapple with this issue.[50] Even though it might seem a sensible thing to do to put all least developed countries or sub-Saharan African countries in one basket when comparing them against their European neighbors, or Northern America etc., the picture will be less clear and classification more daunting once one looks inside the vast range of variance in economic development inside each continent. Ethiopia might be in a similar or close group with Kenya or Sudan, but certainly has a different economic strength when compared with Nigeria or South Africa. If there is any sensible way of categorization, developing countries can only be put in a long array of stages of development. It is almost impossible to mark a line, between those who has a functioning market institution and those which does not. Second, there is also a temporal dynamic that may need to be revisited for making sense out of this argument. As

[47] Umut Aydin, "The International Diffusion of Competition Laws," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2010), https://papers.ssrn.com/abstract=1657456; Aydin, "Competition Law & Policy in Developing Countries."

[48] Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press, 2010), 305, https://doi.org/10.1017/CBO9780511777745.

[49] Djalita Fialho and Peter A. G. Van Bergeijk, "The Proliferation of Developing Country Classifications," *The Journal of Development Studies* 53, no. 1 (January 2, 2017): 99–115, https://doi.org/10.1080/00220388.2016.1178383.

[50] This is one of the major issues pertaining to recent discussion on WTO reform; see Ambassador Chiedu Osakwe, The Development Aspect of World Trade: Is It Necessary to Differentiate Among Countries, And How Should It Be Done? Conference on Wto Reform: "A Wto Fit for The 21st Century", Paris, Conference Center Pierre Mendès France (PMF) in Bercy (16 November 2018)

countries climb through economic growth figures and market and economic development, it is not clear where one should draw the line between a certain economy's graduation to a market system.

Indeed, with time and growing economic evidence, the basis of many of the challenges raised against adopting competition law in these countries have been eroded. As a start, in the last two decades, these countries have recorded an enormous transformation of their economy that out scales any change that has occurred in any given time of their economic history. In doing so, these emerging markets can become perfect nurturing grounds to anticompetitive practices. Arguments that take stock of underdevelopment of the market structure in these countries are no longer a convincing proposal why these countries should be hesitant to react to market failures. In one of the most comprehensive assessments undertaken so far, Evenett, Jenny and Meier built a database of press reports on anticompetitive practices Sub-Saharan Africa.[51] They recorded more than 500 different allegations and more than 600 anticompetitive practices.[52] Indeed even though their database merely collected allegations of anticompetitive conduct as such and neither confirm not substantiated the value of the allegations, the attempt however shades new light on the incidence and scale of opinion over anticompetitive practices in the continent.[53] The database identified collusion, anti-competitive mergers and abuse of dominance practices as the most cited anticompetitive practices. Between the time periods of its investigation (1995-2004), the study also showed an increasing incidence of anticompetitive behaviors in the region.[54]

Frédéric Jenny provided a clear picture of the scope of various anticompetitive practices in many developing countries based on evidences collected from press reports and competition authorities.[55] According to Jenny, there is evidence of a 'staggering' level of domestic anticompetitive activity in developing countries taking different forms; collusion, abuse of dominance and anticompetitive mergers, that is spread in to a number of sectors, including but not limited to, consumer and producers goods such as bread, chicken, beer, cement, aluminum, steel, telecommunications resulting in price surcharges as far as 30 percent.[56] In doing so Jenny identifies that the large part of anticompetitive practices are shouldered by poor farmers and consumers and thereby reducing the real income of the poorest segments of the society.[57]

In addition, various studies have identified that not all anticompetitive practices are home grown but could also be imported from abroad. For instance, studying the impact of

[51] Simon J. Evenett, Frédéric Jenny, and Michael Meier, "A Database of Allegations of Private Anti-Competitive Practices in Sub-Saharan Africa," in *Development Dimension of Competition Law and Policy: Economic Perspectives Workshop, Cape Town*, 2006.
[52] Evenett, Jenny, and Meier.
[53] Evenett, Jenny, and Meier.
[54] Evenett, Jenny, and Meier, "A Database of Allegations of Private Anti-Competitive Practices in Sub-Saharan Africa."
[55] Frederic Jenny, "Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence," *World Competition* 29 (2006): 109.
[56] Jenny, 113.
[57] Jenny, 114.

international cartel activity in developing countries, Levenstein and Suslow showed why developing countries should be alarmed by the extent of cartel-affected trade in their economy. Their study, although modest in its selection of cartel affected products, is significant as it highlights how in the absence of a properly functioning competition law institutions developing countries could face the brunt of international anticompetitive practices [58]

The above findings, whether founded on quantitative or qualitative empirical analysis carry one clear message; the way to approach the debate on the need for or otherwise of competition law in developing countries should be grounded on empirical conclusions. Jenny's conclusion is clear in this regard; the debate has for some time now relied extensively on theoretical underpinnings rather than being scientific and pragmatic which he regards as "often too abstract or too general."[59] One may also take the more recently growing antitrust activity in the part of developing countries as evidence of a shift of perspective in this regard. As articulated by Dabbah, "a 'presumption' has been created in favor of developing countries adopting some form of completion law."[60] Therefore the remaining question is what form of competition law?[61] Indeed this is the most difficult and topical question when it comes to analyzing competition law in developing countries today. Considering the pronounced diversity between developing countries in level of economic development, market size and various other policy priorities they may have, designing an antitrust regime well fitted to these characteristics is a painstaking challenge.

4. The Pursuit of Appropriate Competition Law Model

The gist of the above discussion has attempted to show the importance of harmonizing competition law and policy with other development objectives. However, this argument is easier said than done. It is one thing to argue that competition law and policy should endeavour to internalize other developmental challenges, yet the ultimate challenge actually has to do with how one actually brings this balance in to the ground.

Many developing countries have adopted some form of competition law framework that is largely extracted from the two major models; the US and EU competition regimes. Seemingly the latter is the preferred model due to various reasons.[62] Nevertheless, while there are clear identities of similarity, and harmonization of standards and institutions is visible, there is nevertheless subtle contrast and diversity as one goes deeper than the surface. This trend has

[58] Margaret Levenstein and Valerie Y. Suslow, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy," *Antitrust LJ* 71 (2003): 801.
[59] Marc Ivaldi, Frédéric Jenny, and Aleksandra Khimich, "Cartel Damages to the Economy: An Assessment for Developing Countries," in *Competition Law Enforcement in the BRICS and in Developing Countries*, International Law and Economics (Springer, Cham, 2016), 113, https://doi.org/10.1007/978-3-319-30948-4_3.
[60] Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge [U.K.]; New York, N.Y.: Cambridge University Press, 2010), 305
[61] Dabbah, *International and Comparative Competition Law*, 2010.
[62] Much has to do with its codified nature of the law whereas various aspects of the amenability of the regime and the broad objectives to the context of these countries has also been considered.

also been a ground source to the large debate on the appropriateness and relevance of the approach taken. This section sheds a brief highlight on the key corners of such debate.

4.1. Objectives and 'Means–end' Debate

As it is presented in the preceding sections the second half the 1990's saw more competition law and policy activity in the developing world than any other decade. Economic reforms were simultaneous across the globe. In particular, East Asian countries and Latin America saw the need for important economic overhaul that included among others prompt action to create nationally and globally competitive markets as the only viable alternative. Competition law and policy was one prescription, in addition to investment and trade reform, followed by most of these countries. In doing so competition law was adopted without meaningful discussion on the objectives/goals it aims to serve.

In this sense the development of competition law norms and principles in developing countries was characterized as a broad transplant project than being a home-grown institution. As explained by Gal and Fox, the challenge is to understand whether these countries should take competition law institutions 'off the shelf' of US or European experiences or should these institutions be home grown.[63] While this is discussed in the face of vivid communality and growing harmonization between competition law principles and institutions across the globe, there remains to be vital issues that raise stark differences and debates. The central question in this debate has to do with the issue of whether there is anything particular about these countries that would necessitate a design of special model competition regimes different from existing ones?[64]

Part of this debate has to do with the designated objective of competition law in developing countries. While most of these countries share basic objectives of promoting competition in the market, competition law has also been used to promote a variety of other 'non-efficiency', 'public policy' objectives. Among others, competition law has been mandated to promote democratic objectives, promoting small and medium sized enterprises, empowering social groups etc. The addition of these objectives raises issues with respect to the effect of multiplicity of objectives to the final efficiency of the system as it increases the chances of inconsistency with the primary objectives of competition law.[65]

4.2. Design of Substantive Norms and Standards

In addition to the overarching objectives, the development of competition law in developing countries raises its own debate on the optimal design of the various normative standards and principles.[66] Various authors have discussed how the economic and market characteristics of developing countries might necessitate a different take on the design of appropriate normative

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[63] Gal and Fox.
[64] Gal and Fox, "12. Drafting Competition Law for Developing Jurisdictions."
[65] Frank H. Easterbrook, "Limits of Antitrust," *Tex. L. Rev.* 63 (1984): 1.Frank Easterbrook, "The Limits of Antitrust," *Occasional Papers*, April 15, 1985, http://chicagounbound.uchicago.edu/occasional_papers/36.
[66] Mor Bakholm, "Dual Language in Modern Competition Law-Efficiency Approach versus Development Approach and Implications for Developing Countries, A," *World Competition* 34 (2011): 495.

standards that takes consideration of these special characteristics. For instance, Gal discusses how small economies that are characterized by highly concentrated internal markets due mainly to entry barriers that come inherent to their smallness should refrain from 'blindly' looking after to EC and US practices.[67] Gal draws her conclusion from a premise that there are important differences in market conditions between what she explains as small economies, a category that measures economies in terms of their population and geographic size than conventional measurements of GDP, GNP etc., and large economies. According to Gal, market competition should be seen a resultant output of the structure of the market and when the market is influenced by natural conditions, such as concentration that is the result of smallness, competition law ought to take account of such characteristics. In doing so she argues "the economic paradigms on which the competition policies of large economies are based do not necessarily apply to small economies."[68] Even though Gal's 'small economies' goes beyond what can be defined as 'developing economies', there certainly a large overlap between the two groups and her conclusions seem to have broad reach than the specific analysis made.

Another broad normative debate has to do with the issue of whether developing countries should design their competition law regime of clearer rules that are not subject to discretion of enforcement agencies. One example is the case of *per se* Vs *rule of reason* standard. Rule of reason analyses, which requires providing considerable discretionary power to competition authorities, could very likely result in rent-seeking activities in economies characterized by poor governance. On a similar line of debate, and an issue that has lost importance with time but still lives marks in many developing country competition framework, is the argument that whether developing countries should include merger review provisions in their competition legislations considering the apparent industrial underdevelopment, infancy of their market and the need to promote strategic concentration and building economics of scale. Many countries still choose to exudence merger control from the purview of competition laws.[69]

The reasons, implications and applications of this argument are diverse. One the one hand the argument has an industrial policy prescription; the need to tolerate anticompetitive market concentration for the sake of building industrial capacity and global competitiveness. It seems, for these reasons, several authors hold that in small economies, firms should be allowed to achieve economies of scale through less restrictive mergers rules. For instance, the South African Competition Tribunal has argued that, " [T]he operation of scale economies in small markets dictates a permissive approach to mergers in developing countries."[70] Similarly, some

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[67] Bakholm.

[68] Michael S. Gal, *Competition Policy for Small Market Economies* (Cambridge <Mass.>: Harvard University Press, 2003), vii. Michal S. Gal, "Size Does Matter: General Policy Prescriptions for Optimal Competition Rules in Small Economies," 2001, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070; Michal S. Gal, "Size Does Matter: The Effects of Market Size on Optimal Competition Policy," *S. Cal. L. Rev.* 74 (2000): 1437.

[69] Dabbah, *The Internationalisation of Antitrust Policy*, 328.

[70] OECD Global Forum on Competition, Contribution From David Lewis, Competition Tribunal (South Africa), CCNM/GF/COMP/WD(2002) 22. 3; Also see Franz Kronthaler, Johannes Stephan, and Frank Emmert, "Analysis of Statements Made in Favour of and against the Adoption of Competition Law in Developing and Transition Economies," *Halle Institute for Economic Research (IWH)*, 2005.

jurisdictions provide thresholds, set by the executive body of the government, for parties to notify mergers.[71] This can be used as an instrument of achieving various other goals than easing market dominant analysis by competition authorities. The experience of other East Asian countries is also full of diverse but exemplary experiences. In countries, such as Japan, South Korea and Taiwan, where export competitiveness and the need to foster innovation are key developmental objectives, merger control was not given priority.[72] In the Caribbean Community (CARICOM) region, competition policy does not also include merger regulation on the basis that small economies, such as those in the region, are largely made up of micro-firms that need to achieve critical mass to be competitive.[73]

Second, this also raises a pertinent issue of prioritization of competition concerns and enforcement measures in developing counties simply for the sake of enforcement capacity considerations. Many have argued that monopolistic abuses and anticompetitive agreements are inherently harmful and should be discouraged across the board, while merger regulation should be left aside until these economies establish mature markets and until the time their limited competition law enforcement capacity is developed. Indeed currently, a review of the large group of developing countries' competition enforcement organ experiences show that the bulk of the substantive work carried out by the competition authorities is devoted to addressing mergers.[74]

However, on the other side of this spectrum, it will not be wise to entirely disregard the role played by instruments of merger review as there is a whole range of potential setbacks in situations where large multinationals gain a foothold in smaller economies and the absence of merger control legislation will render these countries helpless in the face of any abusive business practices.[75] Therefore, the line of analysis most policy makers has to deal with is how one can safely balance the above two conflicting challenges.

4.3. Design of Enforcement Institutions

The design of appropriate competition regime that is fitted to the interests and character of developing countries goes beyond the optimal design of substantive norms.[76] Substantive norms have to be mediated through a framework of institutional setups that see the actual

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[71] Competition Act, Republic Of South Africa, Government Gazette, No. 89 of 1998, See Paul Cook, Raul V. Fabella, and Cassey. Lee, *Competitive Advantage and Competition Policy in Developing Countries* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2007), http://site.ebrary.com/id/10328554.

[72] Ratnakar Adhikari and Malathy Knight-John, "What Type of Competition Policy and Law Should a Developing Country Have? 1," *South Asia Economic Journal* 5, no. 1 (March 2004): 3.

[73] Ratnakar Adhikari, "Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal," *Competition, Competitiveness AND Development: Lessons FROM Developing Countries*, 2004, 71.

[74] Kim Kampel, "The Role of South African Competition Law in Supporting SMEs," in *Chapters* (Edward Elgar Publishing, 2007).

[75] Adhikari and Knight-John, "What Type of Competition Policy and Law Should a Developing Country Have?"

[76] William E. Kovacic, "Distinguished Essay: Good Agency Practice and the Implementation of Competition Law," in *European Yearbook of International Economic Law 2013* (Springer, 2013), 3–22.

implementation/ application of the rules. These organs enforce and interpret the substantive norms and give life to the dry letter of the law.

However, this debate is also an open one, albeit with growing consensus. [77] Clearly a one-size-fits-all approach cannot be applicable for competition law across the globe, as goals, application and enforcement are dependent on myriad social, economic and political considerations.[78] Therefore, there have been various and often contrasting analysis of the existing institutional alternatives in light of scope of competition law enforcement in developing countries and other economic considerations.

Drawing from the extensive literature on institutional design literature one can summarize the institutional design activity in to three broad streams.[79] The first deals with matters such as who shall initiate investigate and prosecute anticompetitive offenses. In this regard, there are two choices that may be seen as both alternative and complimentary. This is often explained by way of typical public/private distinction. It can be said that most developing countries have adopted a regime that is mostly reliant on public enforcement. This approach is mostly a lesson taken from EU model compared to US antitrust enforcement that largely relies on private judicial enforcement approach. In doing so the model seems to be pertinent to most developing countries that has only recently established competition law jurisprudence and judicial enforcement capacity. In the meantime, the above begs various other questions as to the quality, capacity and independence of public competition enforcement agencies in developing countries. In doing so the usual dilemma between maintaining independence on the one hand and accountability on the other comes in to picture. [80]

The second fundamental question has to do with who entertains the adjudicative/interpretive role and its relationship with the main enforcement agency. The choice is between having a bifurcated agency model or a single whole integrated agency.[81] The first grants an investigative mandate to an authority that is also responsible to bring cases before adjudicative bodies, mostly specialized or ordinary courts. In the second alternative, the integrated agency handless both investigative and adjudicative functions, while in most occasions appeal from the decisions of the agency is allowed to higher courts. Selection of either of these models involves trade-offs between efficiency and due process. While an integrated model is most likely to bring about efficient use of the limited capacity available, it however raises various due process and transparency concerns compared to the bifurcated model.[82] Generally, practice in many developing countries contains a combination or a variation of these two main

[77] Eleanor M. Fox, "Antitrust and Institutions: Design and Change Symposium Article," *Loyola University Chicago Law Journal* 41 (2010 2009): 473–88.

[78] Adhikari and Knight-John, "What Type of Competition Policy and Law Should a Developing Country Have?"

[79] William E. Kovacic and David A. Hyman, "Competition Agency Design: What's on the Menu?," *European Competition Journal* 8, no. 3 (2012): 527–538.

[80] Michael J. Trebilcock and Edward M. Iacobucci, "Designing Competition Law Institutions: Values, Structure, and Mandate," *Loy. U. Chi. LJ* 41 (2009): 457.

[81] Michael J. Trebilcock and Edward M. Iacobucci, "Designing Competition Law Institutions," *World Competition* 25 (2002): 361.

[82] UNCTAD, Model Law on Competition, Revised Chapter IX (TD/B/C.I/CLP/L.2, 2010) 3.

models. For instance, while an investigative body is granted also the power to decide on merger notifications, the same authority might have to file disputes to a semi or fully independent judicial organs when it comes to abuse of dominance and anticompetitive agreements.[83]

Third, there are a group of small yet often quite significant question that deal with the internal dynamic of the institutional machinery.[84] Most of these issues has to do with the authorities' exercise of internal decision-making power in terms of strategic planning, prioritization, administrative efficiency, due process and the issue of how to better handle competition advocacy.[85]

5. The Challenges to Effective Competition Law Enforcement

5.1. Insufficient Institutional Development

The institutional framework of competition law enforcement in developing countries has been subject of much discourse.[86] From a broad perspective, various authors see competition law and policy as only one part of a broad spectrum of development challenges facing these countries.[87] They argue that these countries should at first hand establish effective state institutions/governance machinery before adopting competition laws. Lack of democratic government institutions, and independent bureaucracy and judiciary are considered key priorities before the state takes any attempt to regulate the market. On institutional level, independence, and institutional and functional autonomy of competition enforcement agencies is given the most attention. OECD report states, "greater independence also was the step/measure most frequently identified as being likely to lead to better promotion/attainment of the embraced objectives."[88]

Others have concentrated their attention to the financial constraints, institutional capacity and technical expertise of enforcement agencies as a major explanation for why developing country competition agencies do not enforce the law as frequently as their developed country counter parts. On a narrower level, many have concentrated their attention to forging alternative internal institutional structures and priorities that are suitable for developing countries. This group advocates that the priority of competition enforcement in developing

[83] China and South Africa can be given as examples of two contrasting major jurisdictions that have adopted integrated and bifurcated models. According to China's Anti-Monopoly Law, the Anti-Monopoly Commission and tripartite Anti-Monopoly enforcement agencies are established that oversee both the investigative and adjudicatory functions under the law. On the other hand, the South African competition commission is a typical bifurcated or semi bifurcated agency model. The Competition Act establishes three interdependent but autonomous agencies each of which serve various functions.
[84] Trebilcock and Iacobucci, "Designing Competition Law Institutions," 2009, 456.; Eleanor M. Fox and Michael J. Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP Oxford, 2012).
[85] Trebilcock and Iacobucci, "Designing Competition Law Institutions," 2009.
[86] Richard Whish and Christopher Townley, *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Cheltenham, UK ; Northampton, MA, USA: Edward Elgar Pub, 2012).
[87] Godek, "One US Export Eastern Europe Doesn't Need."
[88] OECD, The Objectives of Competition Law and Policy, Note by the Secretariat, (CCNM/GF/COMP), (2003), 8

countries should be about promoting 'competition culture' in the market place before engaging in strict enforcement of competition law rules. This should be achieved by extensive promotion of the concepts of competition and its role in the healthy functioning of markets. Most importantly, advocacy of competition principles in the framework of government decision making is considered the highest propriety considering the large role the state plays in the economy of these countries.[89]

The above arguments rightly point to relevant development and institutional challenges. These characteristics indeed have relevant implications to competition law enforcement. In the meantime, the policy recommendations in this line suffer from a great level of obscurity and contradiction. For instance, one aspect of these argument goes by advocating the need for instruments of effective market regulation as these countries transit from state control to market led economies. Without such intervention they argued that state monopolies will be replaced by private monopolies and cartels leading to anticompetitive outcomes. Others emphasize the need for building effective institutional machinery first before attempting to introduce competition laws. Hence by following either of the two alternative policy recommendations developing countries would find themselves in default of the other.

In the meantime, the argument that these countries should build effective governance capacity before introducing competition laws might be too late for most developing countries. Most of these countries have already introduced competition legislations and not few have established enforcement institutions. To the extent possible, these countries should be encouraged to go forward for many reasons including the fact that these countries already started to experience the effect of anticompetitive practices. In addition to the above, given that the large portion of the pertinent literature has given less attention to examine how the necessary institutions may be developed simultaneously, there may be a need for experimental learning by these regimes.[90]

5.2. 'Political Will': Is it a bird is it a plane?

According to Owen, the literature analyzing competition law in developing countries is "chiefly descriptive or prescriptive."[91] The large part of theory and proposition of competition policy advocate the competitive economy as welfare enhancing and addresses obstacles to it

[89] Maurice E. Stucke, "Better Competition Advocacy," 2008., Simon J. Evenett, "Competition Advocacy: Time for a Rethink," *Nw. J. Int'l L. & Bus.* 26 (2005): 495.A. E. Rodriguez and Malcolm B. Coate, "Competition Policy in Transition Economies: The Role of Competition Advocacy," *Brooklyn Journal of International Law* 23 (1998 1997): 365; Stucke, "Better Competition Advocacy."

[90] The statement by Mosis Naim emphasizing this gap between prescriptions and ideas; "Once the economic reform establishment discovered "institutions," no speech or policy paper could be written about market reforms without including a fashionable reference to the need to strengthen institutions. In particular, it has now become obligatory to refer to the need to develop the institutions that are relevant for the establishment of the rule of law, for effective regulatory frameworks. Unfortunately, far fewer of these speeches and papers include useful ideas of how to implement these needed institutional reforms" Moises Naim, "Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?," *Third World Quarterly* 21, no. 3 (June 1, 2000): 517, https://doi.org/10.1080/01436590050057753.

[91] Bruce M. Owen, "Competition Policy in Emerging Economies," *Stanford Institute for Economic Policy Research Discussion Paper*, no. 04–10 (2005): 13.

through ‘capacity building’, ‘institutional development’, ‘legal innovation’, or broader legal, economic and social development. This approach however has divorced the more intrinsic issues to mere technical thought. This is done at the risk of making the entire discussion merely technical than it is in the real world were policy making is a function of a very broad political economy bargaining process. [92]

Having said the above, there is also a stream of research that deals with the role of ‘political considerations’ as underlying conditions for effective competition law enforcement. In this regard, despite variations in degree of emphasis given to the point, the success and failure of competition regimes has been attributed to the presence or lack of ‘political will’. A vast array of research on competition law and policy enforcement in developing countries attribute, in one form or another, the lack of ‘political will’ as one of the main and principal cause for dereliction from competition law enforcement. Generally, arguments in this line are made in the context that in the absence of ‘political will’ from the part of the government to enforce the law, all efforts to design the best competition framework will be futile. For instance, UNCTAD states the “lack of good governance, a lack of political will on the part of policymakers and a lack of a competition culture” as the cause for weak enforcement record in developing countries.[93] Various country case studies have also carried the same sentiment. A study on the development of competition law in Guatemala raises the State’s reluctance and the passivism of government officials to enforce the law. It provides “the state, allegedly due to a lack of political will to do so, have refrained from taking actions to enforce such laws.”[94]

Observer of competition law enforcement in developing countries is, more often than not, going to encounter a typical notion of ‘political will’ in the pertinent discussion of the subject without sufficient clarification. Accordingly, political will has mostly been treated as a hidden

[92] Notable exceptions include, among others; Pradeep S. Mehta, Manish Agarwal, and V. V. Singh, *Politics Trumps Economics* (CUTS International, CUTS Centre for Competition, Investment & Economic Regulation, 2007).; Stephen Weymouth, “Competition Politics Interest Groups, Democracy, and Antitrust Reform in Developing Countries,” *The Antitrust Bulletin* 61, no. 2 (June 1, 2016): 296–316, https://doi.org/10.1177/0003603X16644122; Jonathan B. Baker, “Competition Policy as a Political Bargain,” 2005, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103518.; Stephen J. Weymouth, “Organized Business, Affiliated Labor, and Competition Policy Reform in Developing Democracies,” 2010. Bakhoum, Mor et al,(2014 Abstract, forthcoming) Competition, Africa and the World: Development and Competition in Sub-Saharan Africa: Roots up, Top Down – Context, Community, and Intermediation in a Globalized World. Michal Gal, “The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 17, 2005), https://papers.ssrn.com/abstract=665181.; Michal S. Gal, “Reality Bites (or Bits): The Political Economy of Antitrust Enforcement,” 2006.

[93] UNCTAD, Effectiveness Of Capacity–Building And Technical Assistance Extended To Young Competition Agencies, Note by the UNCTAD secretariat (TD/B/C.I/CLP/11/Rev.1, 2011) 19; UNCTAD, Perspective on Competition Law and Policy 2013 (UNCTAD/DITC/CLP/MISC/2013/2, 07 Jul 2014)

[94] Louise du Plessis, Judd Lurie, and Amy van Buuren, “Competition Law in the Developing World: A Fish out of Water?,” n.d. Fifth Annual, Competition Law, Economics and Policy Conference, (4 & 5 October 2011)

'black box'.[95] The notion is also misleading as it carries the assumption that political explanations vary little across jurisdictions and time periods."[96]

Beside some very deep and conceptual fallacies in this approach, 'political will' is a nebulous term. According to Mehta and Evenett, as used in the competition law and policy literature, the notion by itself is 'empty' and call for endogenous analysis of the concept;

> Another consideration … is the emptiness of calls for greater 'political will' to support market-improving regulation. If the degree of political support for an economic law is contingent on the manner in which official decisions are taken, the potential for rivalry between official decision-makers and the willingness of others to 'pay' for favors, etc., then 'political will' is not an exogenous, independent factor that can be conjured up.[97]

Mehta and Evenett emphasize how such approach has taken a 'dim view' of the role of leadership and call for a meaningful examination of "the underlying determinants of political support for efficiency-enhancing regulatory reform."[98] Accordingly, it is important to uncover this 'black box' of 'political will' and to show clearly the basis on which legitimacy and efficiency of competition law and policy in developing countries is fundamentally dependent upon.

This proposal is based on the view that, even though other economic development or ideological factors can be real factors that should be taken in to consideration while speaking of competition policy making in developing countries, to a considerable extent, it is relevant to acknowledge that leaders indeed make political, economic, and institutional decisions rationally. While this is a general character of any political system, whether developed or developing, democratic or autocratic etc., the main goal is to investigate how this motivation is implemented and affect competition law and policy on the specific political economy characteristics of a particular country or a group of developing countries. What will be more revealing is to investigate, in the same context, the incentives or disincentives that competition law and policy creates in a national political economy that interest groups, corruption, race/ethnicity/language, religion, political ideology, underdevelopment and lack of democracy and good governance have strong hold.

One possibility is that effective implementation of competition law and policy might simply come in conflict with an elite centric system's means of creating and distribution of incentives. In an economy overwhelmed by informal sector and inefficient public sector, the capacity of a ruling group to have the resources to meet the demands of crucial vital interests using conventional methods is curtailed. Economic rents will thus fall pray of the ruling elite's tool

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[95] David Booth and Ole Therkildsen, "The Political Economy of Development in Africa: A Joint Statement from Five Research Programmes," in *Political Economy of Development in Africa Conference, Copenhagen*, vol. 30, 2012.

[96] Booth and Therkildsen.

[97] Pradeep S. Mehta and Simon J. Evenett, eds., *Politics Triumphs Economics?: Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* (New Delhi: Academic Foundation, 2009), 7.

[98] Mehta and Evenett, *Politics Triumphs Economics?*

of incentives. Hence decision makers in developing countries will be forced to steer from adopting and effectively enforcing competition law

Therefore, there is a need to reveal this hidden world of 'lack of political will' that is given as a major explanation for insufficient competition law enforcement in developing countries and explore how and the degree to which these factors play any role in shaping the nature of competition law and policy considering "political will is not created in vacuum."[99] This approach is slightly different from considerations that regard politics as an exogenous factor. Consideration of political capture theory as obstacles to the creation of effective competition law and policy enforcement in developing countries is different from the analytic approach that considers the same factors as building blocks its analysis.

The political economy perspective in to competition law reform in developing countries should aim to understand how the law is formed under competition from those that favor competition and vested interests that benefit from the status quo. Studies on the political economy of reform in developing countries argue that building effective competition policy reform "will depend on success in changing the nature of the incentives and the relative power and ability of different interest groups to influence the key decision-makers."[100]

5.3. The Legitimacy Deficit

Another key shortcoming of competition law and policy in many of the developing countries is its symbolic character. Often, competition law represents only a symbolic transition.[101] A law is symbolic when its legislators have no intention to seeing its enforcement.[102] It may also include situation where enforcement agencies have no effect in changing the behavior of others in the eyes of those that seek 'justice' in these institutions.[103]

Primarily, symbolic legislation allows those that govern the state the attribute of acting according to the law. Law makers aspire to seek legitimacy from it yet it has no demonstrable effect to limit the power the state. Secondly laws could remain merely symbolic as they portray a shift of ideological position or values but nonetheless remain superficial.[104] Symbolic law is in contrast and in tension with 'instrumental' law. Law is instrumental when it results in change of behaviors of its subjects, primarily agents of the state.

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[99] Mehta, Agarwal, and Singh, *Politics Trumps Economics*.

[100] P. Landell-Mills, G. Williams, and A. Duncan, *Tackling the Political Barriers to Development: The New Political Economy Perspective. Policy Practice Brief Brighton: The Policy Practice P. 1*, 2007. According to Louise du Plessis et al, "In developing countries, especially developing countries in Africa, the legacies of tyranny, war and colonialism have contributed to the prevailing status quo where the bulk of the wealth of a country is held by a disproportionate minority of its population." du Plessis, Lurie, and van Buuren, "Competition Law in the Developing World," 8.

[101] D. Daniel Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements," *Chicago-Kent Law Review* 83 (2008): 231.

[102] Ryken Grattet and Valerie Jenness, "Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice," *Social Forces* 87, no. 1 (September 1, 2008): 501–27, https://doi.org/10.1353/sof.0.0122.502

[103] Grattet and Jenness..

[104] Grattet and Jenness.

Despite the international pressure for quick fix in to the developing countries market reform challenge through, among others, competition policy, these countries still maintained sufficient economic independence and has garnered internal support from domestic interest groups to sustain the external pressure. In addition, where the extensive efforts of external pro-competition policy advocates poised developing countries in to harnessing competition laws, these countries did not respond to international pressure in identical ways. While in many countries external pressure did have a clear impact on the timing and manner of introduction of antitrust legislation, this does not explain why some countries went ahead to quickly utilizing these foundations as a base for further enforcement and why some countries lagged in implementation.

Two elements of internal consideration mattered the most how these countries responded to implementation of national competition laws; the technical knowledge on competition law within the state apparatus and the national institutional arrangement within the state. While only a few countries emerged out of their attempt to economic policy reform with some fair level of technical knowledge of antitrust enforcement, most started the process of building such capacity only after they embarked up on the implementation stage. Where antitrust experts were available in these countries, they were often part of the small group of pro-antitrust group working either in the state machinery, academia, or nongovernmental organizations. The large part of the effort to fill the national technical gap was addressed by international agencies and donors to the extent that some competition agencies heavily relied on direct provision of operational financing from these donors. Extensive technical support and training by these organs was also directed to these enforcement agencies. Although a natural practice in initial stages of institution building, it failed to broaden its reach to important policy makers outside the agency.

National institutional considerations also highly mattered. In most of these countries, antitrust decision making was often left in the hands of technocrats that are by and large sympathetic to the push for stronger antitrust enforcement. This group is separated from the broader national development policy discussion within the government. The consolidation of expertise on competition law matters inside its own enclave was important to those seating in the opposite, 'pro development', side of the table both in the government and outside. This was taken as a sign of formal independence.

Therefore, the development of market institutions, including competition law, were based on technocratic legitimacy, a term often used to explain whenever a claim is made on the argument that the designated policies are based on the best available expert knowledge.[105] In this way reforms and institutions lacked legitimacy and rather based themselves on a top-down approach. While such technical team of people/institution will serve as a key agent of competition law reform in these countries it does not necessarily support its legitimacy. Often

[105] Miguel Angel Centeno, "Between Rocky Democracies and Hard Markets: Dilemmas of the Double Transition," *Annual Review of Sociology* 20, no. 1 (1994): 125–147.; Grattet and Jenness, "Transforming Symbolic Law into Organizational Action."

technocracy and democracy go in different directions. According to Shapiro by the very specialization that emanates from the deeply technical nature of the work, such position renders them a title of special interest group.[106]

Hence, while developed jurisdictions have much to celebrate from 'technocratic antitrust',[107]in developing countries it may come in conflict with its germane development. The argument against technocratic legitimacy of antitrust is not made out of the preference to one or more type of non-technical/political decision-making process. It is rather based on the argument that the essential preconditions for a technocratic development of competition law and policy, such as those presented by Crane, i.e. "consensus on ends, resolution of foundational ideological questions, and the absence of explicit distributive considerations", are not settled issues when it comes to developing countries.[108]

In addition, several institutional considerations, which are relevant to developed jurisdictions, such as private antitrust enforcement in the US and the unique setup of the EU Competition Commission played a key role, the growing role of economic analysis in antitrust decision-making process, played a key role in the growth of technocratic antitrust. Similar to the above, most of the developing countries had a different institutional setup. Competition law developed in this way had no natural constituency.[109] The development of competition law and policy in these countries was largely a transplant exercise, a subject matter further discussed in the following chapter. Therefore, in the absence of relevant institutional readiness to absorb policy and institutional prescriptions the enforcement of competition law in many developing countries underwent a period of dormancy.[110]

6. Chapter Conclusion

The chapter introduced the context and the pertinent debates vis-à-vis the development of competition law in developing countries. The discussion on the pertinent debates identifies the importance of harmonizing competition law and policy with other development objectives. However, this argument is easier said than done. In doing so it remains to be an open and evolving discussion.

The chapter also addressed the key challenges to effective competition law enforcement in developing countries. It explored the various justifications put forward in this regard including,

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[106] Martin Shapiro, "Deliberative, Independent Technocracy v. Democratic Politics: Will the Globe Echo the E.U. The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005 2004): 343.
[107] Daniel A. Crane, "Technocracy and Antitrust," *Tex. L. Rev.* 86 (2007): 1159. Of course there are differing opinions in this regard for example see Harry First and Spencer Weber Waller, "Antitrust's Democracy Deficit Symposium: The Goals of Antitrust," *Fordham Law Review* 81 (2013 2012): 2543–74.
[108] Ariel Ezrachi, "Sponge," *Journal of Antitrust Enforcement* 5, no. 1 (April 1, 2017): 49–75, https://doi.org/10.1093/jaenfo/jnw011.
[109] Rodriguez and Menon argue; "notwithstanding the contrasting views as to the purity of its origins it is precisely the absence of these nurturing roots in emerging economies that render the current antitrust experiments merely a technocratic novelty that benefits from no natural constituency and draws on no popular wellspring to sustain itself." A. E. Rodriguez and Ashok Menon, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (Kluwer Law International, 2010); Rodriguez and Menon.
[110] Yane Svetiev and Lei Wang, "Competition Law Enforcement in China: Between Technocracy and Industrial Policy," *Law & Contemp. Probs.* 79 (2016): 188.

insufficient institutional development, lack of political will, and legitimacy deficit. In doing so the chapter argued that while these arguments rightly point to relevant development and institutional challenges, in the meantime, the policy prescriptions in this line suffer from a great level of obscurity. Giving particular attention to the 'political will' discourse, the chapter highlighted how much attention has been given to 'political considerations' as underlying condition for effective competition law enforcement. The argument provides, in absence of 'political will' on the part of the government to enforce the law, all efforts to design the best competition framework will be frustrated. Accordingly, laying the foundations to the remaining parts of the thesis, the chapter emphasized the importance of clarifying and analyzing such institutional considerations.

The chapter also emphasized the legitimacy deficit in the development competition law in these countries. It discussed how that the development of competition law and policy in developing countries often relied on technocratic legitimacy. It argued such development was by and large sympathetic to a push for stronger antitrust enforcement and therefore has grown separately from the broader institutional development discourse. In this way reforms and institutions lacked legitimacy and rather based themselves on a top-down approach.

CHAPTER THREE

Locating Competition Law and Policy within the New Institutionalism Movement:

Parallel beginning, divergent paths

1. Introduction

The spread of antitrust across the globe is one of the major episodes in contemporary legal transplant.[111] Legal transplant is the movement of a legal norms from one country to another.[112] The concept is also referred to by other names, legal borrowing, legal taking, legal transfer, diffusion of laws etc. This chapter approaches these terms flexibly but 'legal transplant' being used most often.

Even though the term 'legal transplant' is associated with A. Watson, the concept however goes as far back as the Roman Empire.[113] Montesquieu, for instance, has raised the challenges brought about by the reception of Roman Law throughout Europe in Medieval Period.[114] Legal transplant could take either the form of small borrowing of legal norms and concepts, which occur on a regular basis across the world, or might take the form of grand projects. The spread of Napoleon's French Civil Code across Europe in the 19th century, the transfer of the same codes into various non-European countries, such as Africa, e.g. Ethiopia in the 1950's and 60s, and Japan's adoption of a substantial set of the German legal system starting early 20th century are good examples of the latter.

More recently we have seen extensive transplant projects, among others in antitrust field.[115] While there are both positive and negative externalities from these projects, two challenges stand out. On the one hand the tendency to borrow competition law principles and institutions from advanced economies has been criticized for being inconsiderate of the actual economic and market characteristics of the receiving countries, mostly developing and economies in transition.[116] The large developing countries and antitrust community seem to have addressed

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[111] Waked, "Adoption of Antitrust Laws in Developing Countries," 217. Waked argues, "Developing countries adopted Western-inspired competition legislations. They did not take into account the evolution of these laws within their own origin countries. Instead, they looked to the most advanced ver-sions of these laws."
[112] Alan Watson, *Legal Transplants and European Private Law*, vol. 4 (Metro Maastricht, 2000).
[113] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).
[114] Charles de Secondat Montesquieu, Thomas Nugent, and Jean Le Rond d'Alembert, *The Spirit of Laws* (New York : The Colonial Press, c1899), bk. I, http://archive.org/details/spiritoflaws01montuoft. Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *The Modern Law Review* 37, no. 1 (1974): 1–27.
[115] Michal S. Gal, "The Cut and Paste of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant," *Eur. JL Reform* 9 (2007): 467; Wentong Zheng, "Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control," *U. Pa. J. Int'l L.* 32 (2010): 643.
[116] Godek, "One US Export Eastern Europe Doesn't Need."

this issue by applauding the call for more attention to be given to these special considerations.[117]

Second, the importance of other necessary or supplementary institutions to put the new competition law instruments in to actual use has been emphasized.[118] Having realized most competition law reform projects have only seen little of the enforcement light, many criticized the lack of institutions that are necessary for effective competition law enforcement, including but not limited to, stable government, effective judiciary, rule of law, effective antitrust enforcement agency, etc. While there is no question that the presence of these institutions will bring positive results not only for effective enforcement of competition law but also for the overall rule of law in the economy, it is however unclear how such institutions are to be developed. In general, the tendency to contextualize competition law reform together with institutional development is a salient character of the literature dealing with the development of competition law in developing countries.

No effort will made here to exhaustively cover these proposals. Rather the attempt is aimed at highlighting the apparent parallel history the discourse covering the development of competition law in developing countries has with the 'law and development' literature and see whether a comparative look in to the discussion will shade a new perspective to the discussion at hand.

The argument here is that, the development of competition law and policy in developing countries grew being ignorant of the broad social and political considerations in the ground and only started to catch up after a long pose and its ineffectiveness became well visible. Even then, while the law and development and institutionalist literature have given prime focus to domesticating institutions, the discourse of competition law in developing countries gave attention to customizing the goals of competition law rather than understanding the institutions that anchor these goals. The chapter lays the foundations to the following chapters that argue in favor of comparative institutional analysis of the development of competition law and policy.

2. Overview of Antitrust Transplant Across the Globe

The transatlantic transplantation of antitrust to Europe has been at the center of this development. As Europe prepares for one of the most successful regional economic integrations, inclusion of competition policy was certain. Together with laying the foundations for the European Coal and Steal Community (ECSC), the concern that agreements reached to lower barriers on trade might be frustrated by monopolistic practices was given equal

[117] Michal Gal et al., *The Economic Characteristics of Developing Jurisdictions* (Edward Elgar Publishing, 2015). Dina I. Waked, "Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices," *Seattle UL Rev.* 38 (2014): 945.

[118] *A Comparative Analysis of Antitrust Law Regimes : Designing Better Institutions for Deciding Antitrust Issues.* (Chicago, Ill. : Loyola University Chicago School of Law, c2009.).Fox and Trebilcock, *The Design of Competition Law Institutions*, 2012.

attention.[119] It is no surprise why competition policy received such prominence at the time. The pre-war cartels in France, Germany, Italy and the three Benelux countries effectively segregated markets almost in line with national territories and thus essentially restricted movement of essential goods, such as steel as the time, across Europe.[120] Indeed this was considered a threat to the stability of Europe.

Being one of the only few instruments available, and US's dominance in the region after the war, it was natural for these countries to refer to the US Sharman Act so as to draw lessons on the norms and principles the latter had developed for more than half a century According to Corwin Edwards, an American officer for the State Department working for ECSC Secretariat, ECSC's antitrust rules "were written in Washington and adopted as written."[121] From the position of ECSC advocates, such as Jean Monet the then architect of post war French economic reconstruction, the inclusion of antitrust rules under ECSC heralded a new era of effective competition policy in Europe. Among others the ECSC effectively used the new regime to impose its oversight on German coal and steel cartels and to disband most of them.[122]

From the perspective of US authorities, the transplant of US antitrust rules has a broader objective. Essentially US considered that even though its post war efforts to construct Western Europe has been successful in both economic and political arenas, it however considered that such achievements will only be short-lived if they were eventually countered by cartels.[123] According to Wells, the framework of Marshall Plan included conditions vis-à-vis cartel enforcement.[124] Thus for US the transfer of its antitrust law was central part of its engagement with Western Europe. By the time the European Community Agreement was signed in 1957, it inherited a fairly established cartel policy from its predecessor, ECSC. As the new European agreement further spread its umbrella to the rest of Western Europe, US lost its near monopoly on antirust across the globe.[125]

The transplant of antitrust to Japan is also one of the iconic examples of spread of antitrust across the globe.[126] Japan introduced its first antitrust regime in 1947 under the purview of allied occupation 1945-1952.[127] As a part of the movement to introduce democratization and economic reform in Japan, the US led allied occupation advocated measures that gave particular attention to "deconcentration of economic power."[128] Implicit in this project was the understanding that business conglomerates in Japan, the 'Zaibatsu', were inimical to

[119] See the Treaty Establishing the European Coal and Steel Community (ECSC), Treaty of Paris, (18 April 1951) Article 4
[120] Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002), 173.
[121] Wells, *Antitrust and the Formation of the Postwar World*., Corwin D. Edwards, *Control of Cartels and Monopolies: An International Comparison* (Oceana Publications, 1967), 246.
[122] Wells, *Antitrust and the Formation of the Postwar World*.
[123] Wells.
[124] Wells.
[125] Wells.
[126] Harry First, "Antitrust in Japan: The Original Intent," *Pacific Rim Law & Policy Journal* 9 (2000): 1–72.
[127] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of April 14, 1947
[128] Edwards, *Control of Cartels and Monopolies*, 246.

democracy but also were business anchors to Japan's aggressive government. Hence modeled by US antitrust law, Japan's Antimonopoly Law, prohibited cartels, interlocking of directors between different companies, and laid down rules for the breakup of enterprises beyond certain size and market share.[129] Japan's antimonopoly law underwent large scale reform in 1953.[130]

The most recent episode of large scale transplantation project took place by the turn of the 1990's under the rubric of global economic restructuring and legal reform. The principal factor driving legal transplantation projects in this decade was the disintegration of the Soviet Union and the birth of newly independent states across Eastern and Central Europe as well as economic reform in several African, Asian, and Latin American countries. The oil crisis, together with the two major global economic downturns, the Asian financial crisis and Mexico's "tequila crisis", led these states in to competition for capital and investment. One of the often-cited recommendations from policy advisors, including the WBG that provided conditional loans and grants to these countries, was reforming their legal regimes to be in line with market based economic principles and capable of attracting the much sought after foreign capital and investment.

Some Central and Eastern European countries transplanted EU's competition law in the name of necessary preparation to accede the Union. Not only the accession agreements called for the need to 'approximating' all legislations across the board to the EU, but also the Commission, provided the list of essential legislative instruments to be adopted by candidate countries so as to align these countries with the Union's *acquis communautaire*.[131] One of the top priorities was competition policy.[132] Hence, candidate countries were expected to harmonize their competition policy in line with EU's well established competition rules and institutions. The good news was that, unlike US antitrust law, the legislative format of these rules were easy for these countries to directly transplant in to the domestic legal framework.[133]

Similarly, other Mediterranean (Middle East and Northern Africa) countries followed similar suit through Euro Mediterranean cooperation agreements. While this instrument is to some extent different from the agreement with Central and Eastern European countries, it in general expects these countries to be bound by provisions equivalent to Articles 101, 102 etc. of TFEU. In the meantime, EU followed two different approaches while implementing this program. The different policy stance has to do with difference in the level of policy harmonization between Mediterranean countries that were also candidates to EU accession, such as Cyprus,

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[129] Patricia L. Maclachlan, *Consumer Politics in Postwar Japan: The Institutional Boundaries of Citizen Activism* (Columbia University Press, 2002), 144.
[130] Kenji Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network* (London; New York; Sweden: Routledge ; European Institute of Japanese Studies, 2002), 20.
[131] "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union - White Paper. COM (95) 163 Final, 3 May 1995," EU Commission - COM Document, 1995.
[132] "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union - White Paper. COM (95) 163 Final, 3 May 1995."
[133] Frank Emmert, "Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice," *Fordham International Law Journal* 27 (January 1, 2004): 646.

and other Northern African countries. The cooperation agreement with the latter mainly intended to complement the free trade agreement between the two partners and were less aggressive for instance with respect to regulation of state aid practices and merger policies.

3. The Function of Legal Transplant; is transplant good?

The legacy of legal transplant theory is a host of one of the most enduring debates of comparative legal analysis. On one hand, custom theories attributable to Montesquieu and latter Savigny's historical school of jurisprudence, take legal transplants as ineffective and unnecessary since there is always a unique set of social and historical interconnection between law and society all over the world. According to Savigny, the true source of law is customary law and the task of a jurist is to solicit, uncover and describe its social provenience. Hence his notions of legal evolution did not give much space for the role of legal transplants.[134]

The other side of the debate is represented that emphasize on the virtuous movement of law across legal regimes and traditions as a natural characteristics of the development of law.[135] According to Watson, history of law across the globe is a history of massive movement of law across legal systems and there is less connection between the development of the law and its endemic society.[136] To reach this conclusions Watson provides arguments with respect to how law is a conscious creation of the few in the State machinery than the entire society, and how such laws are often out of step of the evolution of the society and the ease with which laws can actually be copied and moved.[137] According to Watson, "law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or of the members of the particular society on the other hand."[138]

Contemporary legal transplant literature is less devoted to either of the two extreme sides. Watson himself in his most recent literature has admitted that law cannot absolutely be devoid of cultural connection with its society.[139] He stated; "social, economic and political conditions that affect other groups within society are important, of course, but their impact on the legal rules must not be exaggerated."[140] In doing so Watson himself opened the door for moderate approaches to legal transplant theory.

As the debate steered away from what is possible and impossible, the newly developed approach that took shape since early 1990's started to navigate the contours of what the objects

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[134] K. L. Bhatia, *Textbook on Legal Language and Legal Writing* (Universal Law Publishing, 2010), 270.
[135] Esin Örücü, "Law as Transposition," *International & Comparative Law Quarterly* 51, no. 2 (2002): 205–223. Alan Watson, *Legal Origins and Legal Change* (A&C Black, 1991); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 1974).
[136] Watson, *Legal Transplants*, 1974.
[137] Alan Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review* 131, no. 5 (1983): 1121–1157.
[138] Alan Watson, "Comparative Law and Legal Change," *Cambridge Law Journal* 37 (1978): 314.
[139] Watson, *Legal Origins and Legal Change*.
[140] Watson, 102.

of transplantation are, what is to be transplanted and how. etc.[141] Kahn-Freund distinguishes transplants between those that are merely mechanical and organic. He provides that, laws that are mechanical by their nature can be easily transplanted while those that are organic to their source necessitate interlocking institutions within adopting societies. Private law was considered to have mechanical character while rules that resonate personal and social nature have organic characteristics. Therefore, private law was largely considered to be easily transplantable than public law. While he considers various social and economic considerations are essential factors that determine the degree of transferability, he underscores the significance of political factors compared to the other factors.[142] Even more he mentions the role of organized groups within the state as determining factor to the receptibility of foreign law.[143]

Others such as Teubner, that emphasized on the organic character of laws, argue that transplanted norms can develop new meaning as they move across jurisdiction. Teubner defined this factor as 'legal irritants'. He argued; "when a foreign rule is imposed on a domestic culture, it is not transplanted into another organism rather it works as a fundamental irritation which triggers a whole series of new and unexpected events."[144]

Hence a sizable portion of the recent comparative law literature dealt with understanding the local institutional, social, economic, political, and institutional considerations that facilitate adaptation or repel legal transplants. However, there is no clear approach to the analysis and the approaches taken are as diverse as the factors considered. Many have argued that the transfer of legal regimes between identical or similar legal traditions is an important element of successful legal transplant.

4. Why Transplant Antitrust? To What Extent?

Many countries across the globe have used legal transplant as a major means to restructure their market governance. There can be various reasons for this. One the one hand, most of these countries had a very long history of their own established market system. Japan's cooperative business model trails for hundreds of years before it first introduced its Antimonopoly Law.[145] This is a history that is also shared by most Asian countries, e.g. Korea and China. Second, most of these countries were emerging economies in transition to market economy. Most had various degrees of socialist government and strict state ownership and

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[141] Tatiana Kyselova, "The Concept of Legal Transplant: Literature Review DRAFT 2008," accessed November 22, 2017, https://www.academia.edu/3371274/The_Concept_of_Legal_Transplant_Literature_Review_DRAFT_2008.
[142] Kahn-Freund, "On Uses and Misuses of Comparative Law."
[143] Kahn-Freund.
[144] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies," *The Modern Law Review* 61, no. 1 (1998): 11–32.; David W. Soskice and Peter A. Hall, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press Oxford, 2001).
[145] First, "Antitrust in Japan"; Masanao Nakagawa, *Antimonopoly Legislation of Japan* (Kosei Torihiki Kyokai, 1984); Michael L. Beeman, *Public Policy and Economic Competition in Japan Change and Continuity in Antimonopoly Policy, 1973-1995* (London; New York: Routledge, 2003), http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=93158.

control of market had left them with little experience in regulating private ownership let alone markets.

According to Gal and Padilla, there is an important benefit to be derived from transplanting antitrust since an established antitrust regime has a long history of application, interpretation and academic analysis.[146] They also argue that the benefits of learning from a host jurisdiction is not limited to borrowing the letters of the law but also its continued application of 'the living law' in terms of lessons to be derived from continuous improvements of the foreign law trough decisions, interpretations and applications in various factual settings.[147] They argue "the importance of this effect is apparent when one compares it to the alternative: the internal creation of such resources by domestic enforcement bodies and academia. Such a process might be lengthy and costly."[148] Gal and Padilla also identify that large emerging economies have less incentives to transplant antitrust rules compared to their smaller counterparts mainly due to either their ability to spend valuable economic resources in developing their own antitrust regime, or their lower dependence on trade with other jurisdictions.[149] According to Emmert, "transitional and developing countries should look to the European Union for the most advanced model of robust competition oversight and avoid costly and time consuming experiments with inferior alternatives."[150]

On the other hand, many others emphasize on the role of external forces and the limited choice that is available to adopting jurisdictions. For instance, Kovacic recalls how "western advisors sometimes have pressed transition governments to adopt close replicas of competition laws typically found in mature market economies."[151] Perhaps taking the middle ground Fox contends that the global transplant and spread of antitrust is the result of globalizations itself.[152] She argues, while some level of global harmonization of antitrust is inevitable, there is still an underlying question on how best to design these rules to be effectively in the recipient jurisdictions and "how should their special characteristics come into play."[153] From this point of view, Fox argued in favor of leaving a broad autonomy to receiving countries to determine the shape of their antitrust rules and institutions.[154] She states "law-making should come from

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[146] Michal S. Gal and A. Jorge Padilla, "Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy," *Antitrust Lj* 76 (2009): 899.
[147] Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies," 267.
[148] Gal and Padilla.
[149] Gal and Padilla.
[150] Emmert, Frank, How to and How Not to Introduce Competition Law and Policy in Transitional and Developing Economies (October 31, 2011). Available at SSRN: https://ssrn.com/abstract=1951609 or http://dx.doi.org/10.2139/ssrn.1951609 Frank Emmert, "How To and How Not To Introduce Competition Law and Policy in Transitional and Developing Economies," *Browser Download This Paper*, 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951609.
[151] Kovacic, "Institutional Foundations for Economic Legal Reform in Transition Economies."
[152] Eleanor M. Fox, "International Antitrust: Against Minimum Rules; for Cosmopolitan Principles," *Antitrust Bull.* 43 (1998): 5.
[153] Michal S. Gal and Eleanor M. Fox, "Drafting Competition Law for Developing Jurisdictions: Learning from Experience," 2014.
[154] Eleanor M. Fox and Lawrence A. Sullivan, "Antitrust and the Future: World Markets, Transnational Restraints," *Nw. J. Int'l L. & Bus.* 10 (1989): 140.

within, not without. Legislation should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should, too."[155]

The academic literatures addressing the antitrust transplant movement seem to have endorsed the above prescription. While some notable and important remarks have been heard from time to time on the relevance of adopting competition that run along the line of those implemented by the most advanced economies, the debate can be said to have subsided to understanding the fine line between taking the best of what the advanced jurisdictions can offer and understanding the domestic social, economic, and political institutions of the receiving jurisdictions.

One of the most prominent supporters of this argument is Gal. According to Gal, antitrust transplants would be surrounded with failures unless it effectively addresses the special characteristics of the adopting jurisdiction.[156] Among others, she illustrated her argument by using the effects of market size on competition laws.[157] She argues that the economic principle which competition law relies is in large part reliant on economic fundamentals that exist in large developed economies and this may have pitfalls if applied, as it is, to small market economies.[158] Her main argument relies on understanding how antitrust law in large developed economies identifies its false positives and some false negatives. [159]

5. Antitrust and the New Institutionalism Discourse

The global interest in antitrust transplant came parallel to a renewed interest in law and development movement and the objective of promoting rule of law and good governance.[160] Early competition law and developing countries literature concentrated its attention to broader market reform objectives (trade policy, privatization, sequencing) in these countries. All these were prescriptions that defined the Washington Consensus and post-Washington Consensus economic structural adjustment processes. A gradual shift to serious consideration of other factors, such as the legal and regulatory framework, as a bed rock for the market to function was given a fresh attention.

Perhaps because of lessons derived from the failures of previous economic reform programs, that advocated how markets would replace the state dominated economy if regulatory barriers

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[155] Eleanor M. Fox, "Economic Development, Poverty and Antitrust: The Other Path," *Southwestern Journal of Law and Trade in the Americas* 13 (2007 2006): 211.
[156] Gal and Padilla, "Follower Phenomenon," 97.
[157] Gal, *Competition Policy for Small Market Economies*.
[158] Gal.
[159] According to Gal; "[T]hese formulations are designed to achieve the goals of the law in each category of cases to which they apply, while recognizing that some false positives and some false negatives may occur at the margin. The marginal cases of large economies constitute, however, the mainstream cases for small economies. The effect of small size is similar to that of a magnifying glass: special market phenomena become more significant as extremes become the rule. This requires small economies to change the focus of their competition laws to regulate their markets efficiently." Gal.
[160] Randall Peerenboom, "Toward a Methodology for Successful Legal Transplants," *The Chinese Journal of Comparative Law* 1, no. 1 (2013): 4–20.

and structural policy challenges were removed, [161] a renewed attention was given to the role of institutions. Not surprisingly, the antitrust discussion was occupied by arguments that gave attention to both the substantive, procedural and institutional reforms. That "institutions matter"[162] Various studies called for the need to address corruption, the rule of law and much other broad governance problems to guarantee effective enforcement of competition rules that were mostly enacted in the early 1990's. Others looked much deeply and attempted to analyze how the design of the legal regime, rule of law and effective enforcement of the rules needs take account the basic political organization and effect of power relations in the economy. Generally, together with claims for more adjusted antitrust law, the recent literature on the development of competition law in developing countries also emphasized on the importance of institutions to build effective antitrust regime.[163]

According to De León, 'institutions' affecting the nature of competition law in developing countries can be classified in to three broad categories.[164] First, 'institutions' refer to the structure of the state administrative machinery.[165] It directly refer to state institutions that are related with market regulation and law enforcement. De León argues that this "creates external constraints on policymaking that influence the expediency of policy decisions."[166] Second De León identifies political institutions and ideological priorities of the state leadership including the "includes the personal beliefs of the policymakers,."[167] Typical examples in these regard areas state's legislative and administrative/enforcement institutions, including competition enforcement agencies and judicial organs. Thirdly, he considers various other social and cultural traits of the society within which competition law functions.[168]

Kovacic states, at least with respect to law reform, institutions encompasses important government institutions such as a working judicial system, and other administrative institutions that compel the government to act transparently and in accordance with the rule of law.[169] Ma argues that, success or failure of transplanting competition law is dependent on the adopting country's institutional receptive capacity.[170] He argues "a successful transplantation requires an institutional structure in the transplant country that could support and maintain transplanted law. If the country fails to meet this institutional requirement, then the enforcement of competition law will have a very limited effect on improving market competition and its transplantation will be neither harmful nor helpful in terms of legal

[161] Jeffrey Sachs, *Poland's Leap to the Market Economy* (Cambridge, MA: MIT Press, 1993).
[162] World Bank, *World Development Report 1997: The State in a Changing World* (Oxford University Press, 1997).
[163] Pistor.
[164] De León, "Institutional Analysis of Competition Policy in Transition and Developing Countries," 406.
[165] De León, "Institutional Analysis of Competition Policy in Transition and Developing Countries."
[166] De León.
[167] De León.
[168] De León.
[169] Kovacic, "Instututional Foundations for Economic Legal Reform in Transition Economies," 272.
[170] Tay-Cheng Ma, "Legal Transplant, Legal Origin, and Antitrust Effectiveness," *Journal of Competition Law and Economics* 9, no. 1 (March 1, 2013): 65–88, https://doi.org/10.1093/joclec/nhs032.

enforcement."[171] This is supported by Gal and Padilla, "laws that may promote efficiency under certain institutional conditions might instead generate high error costs under inferior institutional conditions."[172] Emmert argues "functioning institutions and procedures make the difference between laws that may well stay dead letter, and laws that will be effectively applied."[173]

This focus on the role of rule of law and institutions is an old and cross cutting theme and no effort will be made here to be comprehensive.[174] Most importantly early institutional theory drew lessons from Max Weber's notion of 'legal rationality' and development.[175] Writing on the sociological foundations to industrial development in Western Europe, in addition to his most debated essay on *The Protestant Ethic and the Spirit of Capitalism*[176]*,* Weber gave a focus to two identities, 'ideal types' that enabled bourgeoisie society to flourish in Western Europe unlike the rest of the world. The First, in Weber's tool box of identities, was the emergency of legal 'rationality', a notion that he described as whether the legal rules established objective and universal standards free of outside interference.[177] He argued the privity of industrial development and capitalist democracy in western economies was the "logically formal rationality."[178] Furthermore, he asserted, "the universal predominance of the market consociation requires on one hand, a legal system the functioning of which is calculable in accordance with rational rules."[179]

Second, Weber identified the need for some level of functioning state bureaucracy that can implement the rational rules objectively and 'professionally'. He argued, a system of hierarchy and order in state and government was necessary to maximize rationality, impersonal rule and efficiency. Weber however was also worry of the extent of maximization of bureaucratization itself; it is here were he also coined another popular term over the future challenges of bureaucratic organization; *an* 'iron cage', 'translated from the German *'stahlhartes Gehäuse',* of that may put individual freedom at the behest of 'technicalism'.[180]

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[171] Ma, 88.
[172] Gal and Padilla, "Follower Phenomenon," 907.
[173]Emmert, "How To and How Not To Introduce Competition Law and Policy in Transitional and Developing Economies."
[174] Jaime Ros, *Rethinking Economic Development, Growth, and Institutions* (Oxford University Press, 2013), 361. Ros cites Adam Smith, "Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government." Adam Smith, "An Inquiry into the Nature and Causes of the Wealth of Nations, London: W," *Strahan and T. Cadell*, 1776.
[175] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978).
[176] Max Weber, *The Protestant Ethic and the" Spirit" of Capitalism and Other Writings* (Penguin, 2002).
[177] David M. Trubek, "Max Weber on Law and the Rise of Capitalism," *Wis. L. Rev.*, 1972, 720.
[178] Weber, *Economy and Society*, 337.
[179] Weber, 337.
[180] Weber, *The Protestant Ethic and the" Spirit" of Capitalism and Other Writings*.

These two important notions by Weber greatly influenced the first wave of the law and development movement in the early 1960's.[181] Academics and development experts mostly advocated for a law and development movement in developing countries, particularly Latin America.[182] It largely advocated a broader role for the state in the economy.[183]

Contemporary institutionalism is largely ascribed to the work of Douglass North.[184] North drew much of Weber's essential analysis and argued that "institutions affect the performance of the economy by their effect on the costs of exchange and production."[185] He argued that institutions are necessary ingredient to establish certainty in human interaction, although not always efficient.[186] The key, according to North, is the ability of institutions to constrain human behavior to act predictably and avoid opportunism. Thus, North argues, institutions create and facilitate the basic incentive structure of an economy and assure long term growth.[187]

As one example, North gave the role of clearly established property rights on economic and technological development. "We have only to contrast the organization of production in a Third World economy with that in an advanced industrial economy to be impressed by the consequences of poorly defined and/or ineffective property rights."[188] He argued that the institutional framework adopted by poor countries not only causes high transition costs, but poor property right regimes will also result in using technologies that use little of the fixed capital available, thereby curtailing long term contracts. In doing so North argued that one distinctive characteristics of poor economies is their loose institutional foundation that does not encourage productive activity.[189] He suggested the need for incorporating institutional theory in to neo-classical theory.[190]

Others expanded this linage further by taking various empirical tests and examination on the role of institutions and economic development. For instance, one of the most discussed topics in comparative law literature in this regard is the common/civil law dichotomy in the context of legal origin and economic development discussion. Generally, the theory developed out of an attempt to understand the link between the type of legal origin and economic

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[181] Chantal Thomas, "Re-Reading Weber in Law and Development: A Critical Intellectual History of 'Good Governance' Reform," *Cornell Law Faculty Publications*, December 9, 2008.
[182] Mashood Baderin, "Law and Development in Africa: Towards a New Approach," *NIALS Journal of Law and Development* 1, no. 1 (2011): 1–48.
[183] Laura Nader, "Promise or Plunder? A Past and Future Look at Law and Development," *Global Jurist* 7, no. 2 (2007): 16.
[184] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge university press, 1990), 5.
[185] North, 5.
[186] North, 6.
[187] North, *Institutions, Institutional Change and Economic Performance*.
[188] North, 65.
[189]"Third World countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity." North, 110.
[190] North, *Institutions, Institutional Change and Economic Performance*.

development.[191] It however has a much narrower start than what its popularity among the law and development discussants represents. It was initially applied to contextualizing the development of financial markets, as one proxy for economic development to the common law legal system. This was particularly attributable to four prominent economists, La Porta, de-Silanes, Shleifer, and Vishny, who studied the relationship between legal origin and the development finance in close to 50 countries.[192] The conclusion reached was that the common law tradition, as compared to the French civil law and German and Scandinavian legal traditions, was better equipped to provide protection for corporate shareholders and creditors and thereby affecting their ability to attract financial investment.[193]

The renewed interest on institutionalism immersed itself in to a much broader discourse on the role of law in economic development. This opened a second period for the law and development movement. The new law and economic development literature identified that, as most of the impoverished countries lacked stable government and rule of law, uncertain property rights, regulatory transparency and predictability, effective and independent judicial organ etc., one of the most important first steps to be taken by these countries is to build these institutions. This argument was broadened as many formerly socialist economies in central and Eastern Europe and central Asia disintegrated from Soviet rule and started implementing market based economic policies. Many prominent policy thinkers presented arguments in favor of building 'Western like' institutions. They argued "institutional analysis is of paramount importance for guiding the transition to markets in formerly centrally managed economies."[194]

These arguments were in particular picked up and espoused by the so called Washington Consensus and Washington institutions.[195] The World Bank 1998 studies on Latin America came out with a heading 'Beyond the Washington Consensus: Institutions Matter'.[196] In 2002 the World Bank Report entitled 'Building Institutions for Markets' stated "we recognize the central importance of institutions in the development process through the Comprehensive Development Framework, which stresses the interdependence of institutions with the human, physical and macroeconomic sides of development."[197]

One of the turning points to this development was the East Asian Financial Crisis, which proved to be evidence of the risks against uncontrolled and rapid liberalization and deregulation and the need to establish institutions that oversee and support the newly

[191] Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law And Economic Development* (Washington, D.C: Brookings Institution Press, 2006), 32.
[192] Rafael La Porta et al., "Law and Finance," *Journal of Political Economy* 106, no. 6 (1998): 1113–1155.
[193] Porta et al.
[194] Lee J. Alston et al., *Empirical Studies in Institutional Change* (Cambridge University Press, 1996), 1.
[195] Estimates indicate that the World Bank has spent more than $3bn to support hundreds of 'rule of law' projects in more than 100 countries across the world between 1993-2003 alone., World Bank, Legal and Judicial Reform Observations, Experiences, and Approach of the Legal Vice Presidency, Legal Vice Presidency, The World Bank, p. 14, (2002)
[196] Shahid Javed Burki and Guillermo E. Perry, *Beyond the Washington Consensus: Institutions Matter* (The World Bank, 1998), http://elibrary.worldbank.org/doi/book/10.1596/0-8213-4282-7.
[197] World Bank, *World Development Report 2002: Building Institutions for Markets* (World Bank Group, 2001).

liberalized markets.[198] This underpinned the emergence of a new institutionalist movement. Iconic were calls for an independent central bank, independent courts etc. Others gave emphasis to the role of institutions in reducing the transactional cost of markets. World Trade Report 2004 indicated "the functioning of domestic markets and the robustness of institutions are key determinants of the ability of countries to benefit from engagement in the international economy…."[199] The most commonly identified are protection of property rights, cheap and speedy settlement of disputes, efficient supply of credit and overall financial services, unbiased provision of public services to foreign investors, competition law and policy, etc.[200] For instance many authors argue that, well-functioning institutions reduce uncertainties and transactions costs and has positive effect on the overall economic activity of an economy in general and international trade in particular.[201] Thus lack of efficient institutions can be obstacles to trade and development.[202]

In doing so this change of perspective was an attempt to incorporate both social and political aspects in to its analysis.[203] However it was not free of criticism. While the early law and development movement gave emphasis in laying down arguments in favor of normativity and formality in law and regulation, it turns out the focus in the 'neoliberal era' was to advocate how faulty rules or the regulatory state might actually be the problem with economic development.[204] This was, to a certain extent in contrast to the early period.

Following the above, focus on economic and efficiency-based institutionalism became the center of the movement. Even though a new emphasis is given to social concerns, they were mostly organized and assimilated as second tier priorities. Many legal and institutional reform projects gave precedence to substantive and institutional harmonization in line with standards used by advanced economies.[205] It is for this reason this evolution has been criticized for excluding the 'social' dimension.[206] Political factors were understood to be external and often conflicting with the development objectives. According to Thomas, this has led to "an

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[198] César Rodríguez-Garavito, "Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America," in *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011), 161. Duncan E. Williams, "Policy Perspectives on the Use of Capital Controls in Emerging Market Nations: Lessons from the Asian Financial Crisis and a Look at the International Legal Regime," *Fordham L. Rev.* 70 (2001): 561.

[199] WTO, World Trade Report 2004, Exploring the Linkage Between the Domestic Policy Environment and International Trade, WTO (2004) p 3

[200] Terry Roe, Markets, Trade and The Role Of Institutions In African Countries, Paper presented at Pre-IAAE Conference on African Agricultural Economics Bloemfontein, South Africa, (August 13-14, 2003) According to Terry Roe, "These reforms facilitate the entry of foreign firms, the industrial country outsourcing of component fabrication and assembly, and increase the growth in capital stock by attracting foreign savings."

[201] Marion Jansen, Institutions, Trade Policy And Trade Flows, World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2004-02, (April, 2004)

[202] Arne Bigsten et al., "Contract Flexibility and Dispute Resolution in African Manufacturing," *The Journal of Development Studies* 36, no. 4 (2000): 1–37.

[203] Kerry Rittich, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social," *Mich. J. Int'l L.* 26 (2004): 199.

[204] Rittich, 10.

[205] Rittich, "The Future of Law and Development."

[206] Rittich.

attraction to universalistic, 'one-size-fits all' reform objectives; an emphasis on 'values' as a determinant of economic growth and a target of reform"[207] Many critiqued the movement as having more to do with serving the interest of western economies in terms of market access, promotion, and protection foreign of investment than the perennial developmental challenges facing recipient developing countries.[208]

This is perhaps the key intersection point of antitrust law with the broad rule of law and new institutionalism movement. Generally, the spread of antitrust institutions occurred under 'idealized' market interactions and models that promoted efficiency at behest of other objectives.[209] This attempt to build antitrust's institutional heritage has been criticized at least on two fronts. First, authors such De Leon, argue that the normative and institutional role of antitrust is contrary to the role of conventional appeal for rule of law.[210] Even though he submits to the proposition that there is a clear role to be played by institutions in terms of facilitating markets by creating certainty and predictability, however he argues the pure pursuit of economic efficiency may not be compatible with the notion of rule of law. He stress that, understanding this premise is important to uncover the broad context behind the renewed interest in institutions.[211] While he concedes that the basic tenet of the 'rule of law' is to promote certainty and predictability, he argues that the concept is based on libertarian views of Leoni and Hayek and judicial 'common sense' and 'intuition'.[212] He argues it is this judicial intuition that enables judges to come up with objective rules.[213] In contrast he argues "economic common sense" is not established "objectively" as "they are intended to support the analyst's predictions about idealized models of the World."[214] Accordingly "antitrust analysis, concentrated on commanding "real life" business behavior along an idealized standard of social welfare, bears little connection with conventional judicial reasoning."[215] This view may have taken the most extreme position. As rightly indicated by De Leon, there is a tendency in the most recent antitrust literature to prescribe to objectives that emphasize on institutional reforms. However, De Leon may have overtly construed how he defined the 'rule of law' and its role in the market. In fact, his argument that judicial rule of law and economic theory are intended to serve different and contradictory purposes, may even be on much larger crash course with the broad field of economic analysis of law.

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[207] Rittich, "The Future of Law and Development," 4.
[208] James Thuo Gathii, "Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law," *Buff. Hum. Rts. L. Rev*. 5 (1999): 107.
[209] Ignacio De Leon, "Antitrust Policy versus the Rule of Law," n.d. 6
[210] De Leon, 6.
[211] De Leon, "Antitrust Policy versus the Rule of Law."
[212] De Leon.
[213] De Leon.
[214] De Leon.
[215] De Leon, 10. "[C]onventional economic analysis supporting antitrust policy undermines the rule of law because it is not aimed at developing a stable rule making through reference to previous rulings or hermeneutic logic. Instead, it is intended to predict market outcomes through the aid of contrived assumptions about market agents' rationality, linked together by tentative causal explanations (i.e., hypotheses) about their interaction."

Second, there are various authors who criticized the neo-institutionalists evolution from the preview of the role of the state in the market. The conventional paradigm on the objective of market regulation remained attached to ideologies that promoted constraint to the State's role in the market to correct market failures and promote efficiency. According to Rittich, "except to the extent that they have been reconsidered because of their clear contributions to productivity-enhancement, claims about the nature of efficient and pro-competitive interventions remain largely as they were in the first generation reforms."[216] Rittich reiterates, "conventional wisdom in the IFIs remains opposed to the use of regulation for purposes other than the correction of market failures."[217]

Again neo-institutionalists were criticized for ignoring the role of other important determinants in economic development, geography, culture, ideology etc.[218] Milhaupt and Pistor for instance argue that an incorrect assumption was taken in this regard as if law was the sole instrument of governance in the market while other social norms and self-regulatory mechanisms and best practices, even though not legally enforceable but having serious contribution in the market, were disregarded.[219] In addition various commentators called for the need to localize the design features of these institutions. "Institutional reform can only work if it is tailored to the local context,"[220] they argued, otherwise "so-called best-practice reforms typically fail: they create the illusion of progress, but not the reality."[221]

According to Peerenboom, the results of rule law and development movement and projects undertaken in its name were utterly disappointing.[222] Similarly after conducting an extensive stocktaking and empirical analysis of governance using cross-country perceptions data Kaufmann et al, conclude that there is merely littlie causal evidence that this movement have led to improvements in good governance. They state "we certainly do not have any evidence of any significant improvement in governance worldwide and, if anything, the evidence is suggestive of deterioration at the very least in key dimensions such as regulatory quality, rule of law, and control of corruption"[223]

Another important stocktaking study is one by Kevin Davis and Michael Trebilcock.[224] After analyzing a large body of law and development literature to understand the relationship between legal reform and economic development they found only a modest link between the

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[216] Rittich, "The Future of Law and Development."
[216] Rittich.
[217] Rittich, "The Future of Law and Development."
[218] Ros, *Rethinking Economic Development, Growth, and Institutions*, 370.
[219] Curtis J. Milhaupt and Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008), 21.
[220] Matt Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (Cambridge: Cambridge University Press, 2014).
[221] Andrews.
[222] Peerenboom, "Toward a Methodology for Successful Legal Transplants."
[223] Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Measuring Governance Using Cross-Country Perceptions Data* (Edward Elgar Publishing, 2006).
[224] Kevin Davis and Michael J. Trebilcock, *What Role Do Legal Institutions Play in Development?* (University of Toronto, 1999).

two.[225] Among others they study the evidences presented in favor of the role of formal contract enforcement institutions and their role for economic development and they specifically reject the idea that there is strong correlation between the two. Their conclusion; is to be cautious of the tendency to predetermine the role of formal institutions. They argue, "despite the contemporary focus in many development circles on enhancing legal system capacity in developing countries, a frank answer is that we know far too little."[226]

6. The Move to Demand and Process Based Transplant

Market and legal reforms with the preview of Washington consensus concentrated on the supply side, prescribing key rules and institutions that need to be established to bring economic transformation, and transition in those countries that had a state led economy. The reforms gave recognition to the importance of well-crafted legal rules and institutions that were self-enforcing by providing "all players with clearly delineated rights and responsibilities"[227] In doing so significant focus was given to the supply side of the matrix.

This approach is mostly in line with the 'political will' and technocratic legitimacy discourse identified in the preceding chapter. Various authors identified that the possible way to realize rule of law is by willful submission of power by politicians to nonpolitical organs, either in the form of delegation of authority or constitutional division or power.[228] At least two principal justifications were provided as to why such cause may take effect. First, those who hold political authority may want to avoid being taken responsible to unpopular decisions in the face of the general public and delegation to an independent authority may provide such a buffer.[229] In particular this argument was well entertained in the context of addressing rule of law and independence of the judiciary.[230] For instance Graber argues in favor of a deliberate attempt by the political legislative organ transferring decisional mandates to the judiciary to resolve controversies that itself is unable to address.[231] Similar explanations were provided by others such as Salzberger,[232] Holmes,[233] and Wittington.[234]

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[225] Davis and Trebilcock.
[226] Davis and Trebilcock.
[227] Cheryl Williamson Gray, Kathryn. Hendley, and World Bank. Transition Economics Division., *Developing Commercial Law in Transition Economies: Examples from Hungary and Russia*, Policy Research Working Paper ; 1528 ([Washington, D.C.]: World Bank, Policy Research Dept., Transition Economics Division, 1995), http://documents.worldbank.org/record?docid=000009265_3961019155010., Davis and Trebilcock.
[228] See Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 345–366.
[229] Yuhua Wang, *Tying the Autocrat's Hands, The Rise of The Rule of Law in China*, Cambridge University Press (2014) 5.
[230] Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7, no. 1 (1993): 35–73.
[231] {Citation}
[232] Eli M. Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?," *International Review of Law and Economics* 13, no. 4 (1993): 349–379.
[233] Stephen Holmes, "Lineages of the Rule of Law," *Democracy and the Rule of Law* 19 (2003): 35–37.
[234] Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, Or"; Holmes, "Lineages of the Rule of Law"; Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 2009).

Second, some argue that in a more democratic society that has a dynamic political climate, political agents may have an interest in supporting the call for rule of law, such as by building independent non-political organs, mainly out of the fear of being dominated or abused by future power holders.[235] Finkel for instance analyses judicial reform in major Latin American countries was a premium paid by politicians in exchange for political insurance.[236] Backed by these and other alternatives, the supply side argument for the rule of law drove much of the neo-institutionalist period.

Yet the underlying fact remained that most of these efforts had achieved only modest results. Mostly, supply-side theories were highly focused in explaining how the rule of law and non-political institutions are built in democratic societies. "[They] fall short in autocratic settings."[237] Introduction of legal norms, backed mainly by external influence, were not sufficient to bring about change.

The global spread of antirust instruments is a typical representative of such supply side institutional theory. Essentially, the antitrust transplant movement has the tendency to be prescriptive of certain 'best practice standards'. Attribute that is well illustrated by its endorsement of basic economic notions; such as efficiency. An attempt to catch breath and reorganize from the perspective of taking in to consideration other policy alternatives which are closer to the ground level socio-political circumstances of receiving economies was made only lately. Not to mention this tendency has garnered its own supporters and as well as critics.

Therefore, it was imperative to question why many of these projects failed to deliver on their promises. Many questioned "the assumption that legal harmonization will result in improvement of legal institutions."[238] According to Carothers, what is to blame is the "breathtakingly mechanistic approach to rule-of-law development"[239] He argues that this approach bread resistance to change in many developing countries.[240]

In search for solutions others looked at the process aspect of the reform and gave attention to its demand dimension. Generally, the demand dimension underscores the role of local interest groups as constituent building blocks of the rule of law.[241] The basic tenet is that those who hold political authority cannot afford to exclude powerful veto players that are holders of essential assets. Hence the rule of law emanates from a bargaining process where interest groups demand public policy in exchange for their political support.[242] Policies will also come at variant demand and cost conditions. Political rulers will be willing to supply clear policies whenever they have a high demand for assets. At the same time some policies come at high

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[235] Helmke and Rosenbluth, "Regimes and the Rule of Law," 350.
[236] Kurt Gerhard Weyland, *The Politics of Market Reform in Fragile Democracies: Argentina, Brazil, Peru, and Venezuela* (Princeton University Press, 2002).
[237] Yuhua Wang, *Tying the Autocrat's Hands* (Cambridge University Press, 2014), 22.
[238] Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Brookings Institution Press, 2010).
[239] Carothers, 21.
[240] Carothers, *Promoting the Rule of Law Abroad*.
[241] Wang, *Tying the Autocrat's Hands*, 5.
[242] Wang, *Tying the Autocrat's Hands*.

cost to them considering they may have to distribute advantages that hitherto belong to other agents.[243] According to Wang, prescribing to the rule of law is such an occasion. [244] On the other side of the table, the power of asset holders is determined by basic transaction cost limitations; ability to be informed, organize, and assert their interests.[245] More importantly their power depends up on the measure and mobility of their wealth.

Similarly, according to Gray and Hendley, there has to be an innate need for rule of law by the market participants.[246] Pistor argues that the pursuit of an optimal legal regime for developing an optimal set of legal rules disregards a key feature of development which relies on the dynamic growth of institutions.[247] According to Pistor, it is the process of legal development, its compatibility to preexisting conditions as well as the demand for it is more important than its supply side features.[248] In this sense the new institutionalism movement was criticized for transplanting 'best-practice' rules and institutions and being defiant on its calls for rule of law and effective enforcement of these rules while the single handedness and intrinsic deficiency of such rules and institutions might have a lot to do with lack of enforcement, the rule of law or good governance.

According to Rittich, the call for legal reform and rule of law as essential aspect of economic development is made on behalf of the importance of making sure security of property and predictability of regulation to enhance efficiency of markets. However, he argues, "to locate the role of law in social and distributive justice, […], as well as the democratization of development and market reform, legal rules and institutions need to be analyzed in a number of other modes as well."[249]

Rittich provides an example of at least three contexts for his argument. First, he provides ideological grounds and states that as much as rule of law and good governance claims may be grounded on legitimate social objectives, they may also be used "to alternatively normalize or de-legitimatize their legal or institutional expression or the frame in which they are pursued."[250] He argues both grounds may make it easier or hinder for gathering support for the reforms. Rittich's second context relies on the distributional consequences of a legal reform, application and utilization of the legal rules and institutions. Objects under consideration may be power or resources. He argues "because these constitute an important means of allocating power and resources to different social groups, the form and content of legal reforms can be crucially important to the question of who benefits and who loses in the

[243] Wang.
[244] "Some policies, such as building a fair and efficient legal system, are costly for the ruler, because the ruler has to treat everyone equally, which means taking privileges away from the politically connected." Wang.
[245] Wang.
[246] Cheryl W. Gray and Kathryn Hendley, Developing Commercial Law in Transition Economies: Examples from Hungary and Russia, Sachs and Pistor, *The Rule of Law and Economic Reform in Russia*, 139.
[247] Katharina Pistor, "The Standardization of Law and Its Effect on Developing Economies," *The American Journal of Comparative Law*, 2002, 97–130.
[248] Pistor.
[249] Rittich, "The Future of Law and Development," 211.
[250] Rittich, "The Future of Law and Development."

course of reforms."[251] According to Rittich, while discussing distributional consequences, it is irrelevant if the rules and institutions are aimed to achieving noble goals, such as addressing market failures or efficiency. Hence, the manner in which the rules will be applied will also be determined by others circumstances in the ground, such as pre-existing institutions, path dependence that ultimately determine if they are to face resistance or compliance.[252] Third, Rittich argues that the determinants to successfully implant rule of law reforms may also be constitutive. By that he intends to explain how the legal rules and institutions may change and reformulate the social attributes of the subjects they intend to regulate with social goals that come in tandem with the new institutions. For instance, he argues, the process may likely reinvigorate the political balance in the society.[253]

Supporting the above claim Milhaupt and Pistor reiterate that such assumptions emanate from an assumption that "that law is a politically neutral endowment."[254] They criticized how the law and development literature addressed the analytical landscape that treated law as the explanatory variable disregarding the actual process through which countries acquire and utilize the law.[255] They argued that these assumptions led to incorrect conclusions on the role of transplanting legal regimes with stark separation from the role of social and political factors on the adaptation and subsequent development of the legal systems.[256] Their conclusion is; "because the economics literature poorly conceptualizes where law comes from, its explanations for variations across countries in the use of law to govern economic activity are not very convincing."[257]

The response, albeit slow, was a shift within some of the rule-of-law community to new call for understanding concepts such as incentives and interests as discussed above.[258] In its 1996 World Development Report, the WB itself highlighted that "the rule of law cannot be created top-down, by decree. It also requires demand from below."[259] This was a strategic shift in response to addressing reform resistant institutions. According to Carothers, "after bouncing off a number of reform-resistant institutions, rule-of-law aid providers began saying that it was necessary to understand the underlying interests of institutional actors."[260]

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[251] Rittich.
[252] "Quite apart from their distributive effects, the effort to normalize a particular structure of private rights and to confine regulatory interventions by the State will likely affect the scope of sovereign power and the extent of democratic control at the national and local levels." Rittich.
[253] Rittich.
[254] Milhaupt and Pistor, *Law & Capitalism*, 2008, 22.
[255] Milhaupt and Pistor, *Law & Capitalism*, 2008.
[256] Milhaupt and Pistor.
[257] Milhaupt and Pistor.
[258] Carothers, *Promoting the Rule of Law Abroad*.
[259] World Bank, *World Development Report 1996 From Plan to Market*, World Development Report (Washington, D.C.: The World Bank, 1996), 6.
[260] Carothers, *Promoting the Rule of Law Abroad*. "This move was supported by empirical findings that studied reform process more in-depth than before. Carothers states, this "allowed some analytic insights, which while rather basic were at least better than completely technocratic approaches." Carothers.

Hence, a new emphasis on the demand side and incentive structure of transplanting legal rules came in to being. For instance Berkowitz, Pistor, and Richard, find that that legal transplantation has its own contribution to economic development yet indirectly "via its impact on legality."[261] Hence so as to make sure that there is at least a remote contribution from transplanting foreign law into a domestic legal system, the reform process should give due care while selecting rules, "whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers, and economic agents, who are the final consumers of these ruler."[262]

After analyzing data from 49 countries Berkowitz, Pistor, and Richard find that, the way how the law was initially transplanted and received is a more important determinant than the supply of law from a particular legal family.[263] They find that "countries that have developed formal legal orders internally, adapted the transplanted law to local conditions, and/or had a population that was already familiar with basic legal principles of the transplanted law should be able to further develop the formal legal codes and build effective legal systems."[264]

Milhaupt and Pistor provide that "treating a legal institution as a black box implies that the core of any legal system, in particular the strategic use of law by key players, is ignored."[265] They argue it is more important to understand the incentives structure that a given legal regime facilitates to further 'innovation and adaptation" to the system through time and the way this process is influenced by its key access points either at initial design or enforcement stages.[266]

Illustrating their argument Milhaupt and Pistor take the challenge of addressing the heatedly discussed common law-civil law caricature on the effect of each system to economic development. They argue that the most vital elements that are directly linked to the type of legal system and the market lies in the internal configuration of each system thereby negating the common characterization that common law systems are favorable to dynamic market development.[267] As evidence of this they identify various internal organizational variations among countries belonging to the same legal family.[268] For instance they argue, the US. internal legal system is more accessible to litigation than the one present in U.K., mainly due to the fact that the latter has no contingency fees for attorneys and class-action suits are limited than the US.[269] The result is UK misses a dedicated interest group that pars American bar that

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[261] Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "Economic Development, Legality, and the Transplant Effect," *European Economic Review* 47, no. 1 (February 1, 2003): 165–95.
[262] Berkowitz, Pistor, and Richard.
[263] Berkowitz, Pistor, and Richard.
[264] Berkowitz, Pistor, and Richard.
[265] Milhaupt and Pistor, *Law & Capitalism*, 2008.
[266] Milhaupt and Pistor.
[267] Milhaupt and Pistor. "In our view, more important than these formal characteristics are the incentives a given legal system generates to invest in innovation and adaptation of governance over time and the way this process is influenced by access to the legal system at the law-making and law enforcement stages"
[268] Milhaupt and Pistor.
[269] Curtis J. Milhaupt and Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008).

is the main contributor to mobilizing adversarial litigation in the US.[270] They also find similar traits in German legal traditions, for instance between German itself and Japan.[271]

Thus, according to Milhaupt and Pistor, the first step to understand the demand side of law is to unravel the assumption that sees law in a politically neutral endowment.[272] Second, they provide that it is important to understand the factors that determine divergence between the law in the books versus actual implementation of the law. One factor in this regard may be related to anomalies in the division of labor in receiving jurisdictions. Since different actors must participate and coordinate their activities to make appropriate use of the law, its receptivity may fall whenever actors in receiving states may not have compatible interests or in the presence of such factors may lack the necessary financial and technical capacity to coordinate.[273] Third, they argue in favor broadening the narrow subset of conventional perspective that sees law as nothing but having narrow and singular motives, such as protection of property rights. They consider this to be 'the endowment' narrative. Rather they argue consideration should be given to the fact that law might serve other functions such as "playing auxiliary roles such as signaling and credibility enhancement."[274]

Furthermore, they provide three complementary factors that determine the actual demand for the law. First, presence or absence of an effective but less costly non-legal alternative will determine the demand for law. Whenever there exists a cheaper alternative instrument that is equally capable of coordinating the interests of interest groups/'veto' player's demands, the demand for law is reduced. An example put forward in this regard is the role of normative rules in organizing the market structure in post WWII Japan. Despite the relative abundance in the supply of formal legal rules, their use as such was modest as the demand factor is absent amidst a more established relational structure coordinating the interaction among market players vis-à-vis the state. Second, supply of law itself can affect the demand side of the spectrum. They emphasize that, the relative role of various state and non-state agents may vary through time thereby directly affecting the demand for law. Third, they pronounce the dynamic nature of markets and argue in favor of a dire relationship between heterogeneity of markets and the demand for law. One explanation for this is that as markets become mature and complex, reliance on informal reordering based on trust and mutual respect might be less relied upon.

7. Chapter Conclusion

The Chapter highlighted the competition law discourse is not alien to area of research that attempts to give a 'demand' side diagnosis; a bottom up perspective. Although contributions vary in terms of scope and care/or seriousness given to come up with a truly 'demand' sided

[270] Curtis J. Milhaupt and Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008).
[271] Milhaupt and Pistor.
[272] Milhaupt and Pistor.
[273] Milhaupt and Pistor.
[274] Milhaupt and Pistor, 45.

perspective. Its major limitation indeed is the exclusive focus it gives to the spread of competition law in now industrial countries.

Early contribution in this regard analyzed the role of 'ordoliberal' political philosophy in influencing the shape competition law and policy in post war Germany. The theory traces its roots to the period between the two World Wars and its principals attributed to economists and legal theoreticians from Freiburg School such as Walter Eucken and Franz Böhm.[275] It generally espouses a liberal conception of social market economy prescribing important role of the state to create an enabling condition in the market to maintain a healthy and sufficient level of competitive conditions. Typical of its time, its main concern was the growing monopolistic and oligopolistic tendency in Nazi Germany that not only hampered the growth of a healthy economy but was also considered a threat to the Republic and democracy itself.

The influence of 'ordoliberal' thoughts in influencing the ultimate shape of Germany's new exposure with competition law during its occupation period was thus provided to contest 'supply' sided arguments. The latter favored the role of foreign imposition on rooting competition law not only within Germany but also its intrusion in to the European treaty and spread across Western Europe. According to Gerber, the ordoliberal thought had as its key stone 'competition law', as a central and indispensable part of its program and is responsible for drawing the intellectual framework of German competition law. [276] He strongly criticized a widely held belief that the birth of German's first competition institutions was the result of US's effort to impose its antitrust law. He argues ordoliberal versions of German competition rules were drawn long before the end of WWII with bare reference to the Sharman Act. US imposed cartel and decentralization laws had little germane impact to affect its initial evolution even though lawyers in the latter days analyzed it to resolve specific problems.[277] In particular Gerber mentions that the initial framework of German's competition law was a result of compromise between ordoliberals and social market economy advocates within the state bureaucracy, and the academic community on the one hand and the industry on the other that led to the enactment of the Law Against Restraints on Competition in 1956.[278] According to Gerber, the law had novel and ingenious innovations that took no inspiration from the US Sharman Act. From here the ordoliberal modeled competition law got its way in to the Treaty of Rome, which in the words of Gerber, were influenced by Germany; even though others may contradict him on this account.[279]

Another line of contribution addressed the transplant of antitrust institutions to Eastern Europe. For instance, Waller, argued that the development of new competition regimes in Eastern Europe and to a similar extent across developing countries has been influenced by

[275] Viktor J. Vanberg, "The Freiburg School: Walter Eucken and Ordoliberalism" (Freiburg discussion papers on constitutional economics, 2004), https://www.econstor.eu/handle/10419/4343.
[276] David J. Gerber, "Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe," *The American Journal of Comparative Law* 42, no. 1 (January 1, 1994): 25–84.
[277] Gerber, 64.
[278] Gerber, 65.
[279] Gerber, "Constitutionalizing the Economy."

functionalist approach of transplanting American-style antitrust law.[280] He regards this as 'selling' the Sherman Act to these new competition regimes and asks a general question; 'can the Sherman Act be exported?'[281] His answer is in the negative.[282]

Waller argues that there are contrasting narratives as to the role and objective of the Sharman Act. He argues that there is no settled dogma between conventional narratives that attempt to explain the origins of the Sherman Act and its goals.[283] Neither there exist a single and unified antitrust jurisprudence within US itself. The underlying jurisdictional separation between State and Federal Government and jurisdictional divide between the Federal Trade Commission (FTC) and Department of Justice (DJ) is an illustration. He considers the Sherman Act as an empty shell to be filled with flesh of American experience, which other jurisdictions may have no experience.[284] As an illustration he argues that Eastern European countries grapple with a different competition policy challenge than US and hence argues that transplanting US modeled Antitrust rules will serve little to regulate public market behavior since US antitrust jurisprudence has never grappled with these issues. Rather Weller provides a 'neo-realist' approach to analyze global harmonization of competition law. He defines 'neo-realism' as a method used to understand factors working behind the formal textual rules. An approach that recognizes the special social construct of both the model and adopting jurisdiction. Neo-realism is a concept in a close identity with legal realist movement of 1920's and 30's and the New Haven School that applied the concept to international relations theory. According to Waller neo-realist assessment gives due consideration to value sensitivity of legal development which should be a key consideration in transplanting legal rules across jurisdictions.[285]

Therefore, for Waller, the new competition jurisdictions should be the sole authority to identify the values that they would envisage to be adopted. He argues that almost all effective competition jurisdictions have demonstrated that value determination must come from 'within'. Transplanting legal rules or 'grafting' as he describes it, runs the risk of rejection, become only symbolically significant or the law is likely to be received with different understanding and purpose, unless indigenous consensus produces the intrinsic values.[286] Similarly, there is a growing scholarship that attempts to do a comprehensive analysis of the internal institutional setup in developing countries. Most do identify the importance of understanding the unique and special economic, social, and political characteristics of the

[280] Spencer Weber Waller, "Neo-Realism and the International Harmonization of Law: Lessons from Antitrust," *University of Kansas Law Review* 42 (1994 1993): 557.
[281] Waller, 574.
[282] Waller, "Neo-Realism and the International Harmonization of Law."
[283] While he underlines Chicago School's dominance of both the academia and judicial body, he argues "The Chicago school's influence will remain pervasive but its dominance, to the exclusion of other interpretations of the language chosen by Congress, will persist only if its normative values remain persuasive to policymakers, law enforcers and commentators." Waller.
[284] Waller, 580.
[285] Waller, 596.
[286] Waller, 603.

adopting jurisdiction even though there is a limited undertaking to do a comprehensive demand side analysis. [287]

Generally, as the law and development literature gradually developed in to giving prime significance to the demand side and institutional perspectives, on the other hand, the discussion on competition law and policy in developing countries has concentrated on value judgments and customization of the same in the form of adjusted policy objectives and goals. Focus given to institutional considerations tended to be prescriptive; often in the form of a call for 'good governance', 'the rule of law', 'stable government' or 'democracy'. In a sense, the call for rule of law and institutions did not explain how such valuable institutions are to be brought about. Institutions were considered as exogenous analysis. The resulting prescriptions contained a long list of legal and institutional reforms.

The chapter argued that absence of underlying social agreement that legitimizes competition law enforcement in these countries is a key concern in the development of competition law and policy. It argued that competition law and developing countries research need to be redrafted with serious attention given to organic development. Achieving these demands need to be seen more than a simple institutional, normative, and/or transplant analysis. Hence it is not simply capacity or 'lack of will' to enforce that is absent in these regimes but rather the lack of both pull and push factors, or in the existence of those the form of antitrust (standards and objective that were already set) that may have been too rigid or loose to incentivize participation.

[287] For instance, in reviewing the global convergence in merger policy, in particular with respect to small economies, Gal argues that there are both 'push' and 'pull' forces that drive merger policy. The 'push' factors constitute both internal and external factors that carry strong motivation to follow merger policies of others that do not necessarily match domestic conditions while the 'pull' factors are presented in terms of special economic characteristics of the following jurisdictions; "unique characteristics pull". She argues "the characteristics of a jurisdiction affect its ability to effectively enforce a transplanted law." Michal S. Gal, "Merger Policy for Small and Micro Jurisdictions," 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202718.

CHAPTER FOUR

Comparative Institutional Analysis and Its Relevance to the Discourse on Competition Law and Policy

1. Introduction

Analysis of competition law studied at both theoretical and practical levels is in one form or the other subject to predetermined analytical approaches adopted in legal reasoning. Generally, the models fall in one of the major approaches of legal analysis. For instance, Guido Calabresi defines these in to four groups; doctrinalism or autonomism, the 'law and...' viewpoint, the legal process school, and 'law and status' school of thoughts.[288]

The first approach, described as doctrinalism, autonomism or formalism is of the major and dominant approaches. Its distinctive attribute lies in the fact that it sees legal analysis as a self-serving technique, standing by itself independent from other values.[289] The primary job of a legal analyst is to find ways that it can interpret legal rules consistent to its predecessors and make sure that the analysis results in legal rules that are coherent to each other.[290] The legal scholar has only a limited role to play in introducing new values to the system. The latter is often left as the job of the more typical political actors, the legislature, or the 'people' in general.

"The law and …" approaches on the other hand stands in complete opposite to formalists and the legal analyst or the courts are conceived of being capable of proposing and introducing reform agendas.[291] This approach is often known as legal functionalism.[292] Hence legal analysis would escape the conservative and autonomous wall of doctrinarism and seek solutions in neighboring disciplines of social science such as; economics, sociology, politics etc. Analytical approaches with this rigor are not very hard to identify. One does not need to go beyond the revolutionary contributions of "the law and …" examples such as law and economics to understand how these schools of thought have had a large and transformative impact on legal analysis. This school of thought highly influences contemporary competition law literature.

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[288] Guido Calabresi, "An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts," *Stanford Law Review* 55, no. 6 (2003): 2113–51.
[289] Calabresi, 2115.
[290] Calabresi, "An Introduction to Legal Thought."
[291] Calabresi, 2119.
[292] Lawrence B. Solum, "Legal Theory Lexicon 040: Functionalist Explanation in Legal Theory," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 24, 2013), https://papers.ssrn.com/abstract=2359079; M. Mwalimu, "The Need for a Functionalist Jurisprudence for Developing Countries in Africa," *Third World Legal Studies* 1986 (1986): 39–52.

As its name, comparative institutional analysis is a systematic and comparative study of institutions. While the phrase comparative institutional analysis is commonly used in institutional literature, its analytical use here is different from its common usage. A detailed clarification of the various forms of which the phrase comparative institutional analysis is employed will be presented in the following sections. As it is used here, comparative institutional analysis employs transactions cost theory to understand the dynamics of law and public policy decision making. Particular emphasis will be given to the major contributions of Neil Komesar.[293]

Generally comparative institutional analysis carries a simple but powerful claim; "the pursuit of any substantive goal is necessarily mediated through different institutional processes that will affect outcomes."[294] Central to the framework is an analysis of transaction costs and in doing so it heavily relies on Ronald Coase's seminal contribution on market externalities, the problem of transaction costs and the institutional structures of the economy.[295] Komesar's contribution to the field relies on basic premises of rational choice and argues against single institutional analysis. Participation is the core of the analysis and considers this basic intuition across market and non-market institutions. According to Komesar, "the basic economic version of the market is a participation story…[and]…the same inherent emphasis on participation is also present for the economic analysis of nonmarket institutions."[296] Therefore institutional analysis must be participation centered.

Accordingly, from a positive analysis point of view, comparative institutional analysis studies decision-making institutions from legal, political, and economic perspective and analyses the institutional behavior and choice between them. It argues that all public policy decision making institutions share a fundamental communality as they all involve choice among 'imperfect alternatives'.[297] Hence decision makers are better understood when viewed as though they are engaged with choosing the best, or the least imperfect, between them to implement the given public policy goal. Comparative institutional analysis argues institutional behavior is a factor institutional participation which itself is an outcome of the cost and benefit of participation.[298] According to Komesar this should serve as a basis for analysis of law and public policy.[299] For the purpose of his analysis Komesar broadly classifies the pertinent decision making institutions in to three; the market place, the political process and the judicial organ, although he also underlined that the nature of such sub division is irrelevant to the basic structure of the analysis and others may adopt a narrow or a much broader landscape. From a

[293] Komesar, *Imperfect Alternatives*, 1997. Komesar, *Law's Limits*.
[294] Gregory Shaffer, "Comparative Institutional Analysis and a New Legal Realism," *Wis. L. Rev.*, 2013, 607; Victoria Nourse and Gregory Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 15, 2009), http://papers.ssrn.com/abstract=1405437.
[295] Coase, "The Nature of the Firm"; Coase, "The Problem of Social Cost."
[296] Komesar, "The Logic of the Law and the Essence of Economics."
[297] Komesar, "In Search of a General Approach to Legal Analysis," 1350.
[298] Komesar, *Imperfect Alternatives*, 1997. Also see Komesar et al., *Understanding Global Governance.*
[299] Komesar, "The Logic of the Law and the Essence of Economics."

normative analysis point of view, it contends that the choice of any value determination that may present itself in the form of normative standard is a result of mediated outcome through different institutional process that will affect its final landscape. Therefore, institutional analysis is necessary and it must be comparative.

Komesar proposes using participation centered approach to select among imperfect alternatives. His unique contribution lies in his effort to take into consideration both minoritarian and majoritarian influence. Derived from this, the quality of participation serves as a proxy of conventional economic or distributional values.[300] In doing so the objective of participation based comparative institutional analysis is to identify institutional alternatives that are least likely to be subject to either minoritarian or majoritarian bias.[301]

2. Comparative Institutional Analysis: The Analytical Landscape

2.1. Coase and Transaction Cost Theory

Comparative institutional analysis is a theory built on Coase's transaction cost theory. Coase argued that transaction costs lie at the heart of often difficult issues of market failures and externalities.[302] The latter referred to the imposition by a firm its cost of operation on others that are not at the same time beneficiaries from its rewards. Those external to the production process were considered victims of externalities. Economists preceding Coase overwhelmingly characterized the situation as harmful to social welfare and considered government intervention as a solution. Exemplified by Coase is Pigou's understanding of the externalities.[303] Coase summarizes; that according to Pigou; "it would be desirable to make the owner of the factory liable for the damage caused to those injured by the smoke, or alternatively, to place a tax on the factory owner … equivalent in money terms to the damage […or] to exclude the factory from residential districts."[304]

However, for Coase such characterization has masked the nature of the problem.[305] Rather the problem is essentially reciprocal;

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.[306]

Coase illustrates this same issue by giving various hypothetical and real examples. He raises a case of confectioner and adjacent neighboring doctor that is disturbed by noise emanating

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[300] Ioannis. Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," in *Handbook on European Competition Law*, 2013.
[301] Lianos.
[302] Coase, "The Nature of the Firm.", Ronald H. Coase, "The Problem of Social Cost'(1960) 3," *Journal of Law and Economics* 1 (n.d.).
[303] Arthur Cecil Pigou, *The Economics of Welfare* (Palgrave Macmillan, 2013).
[304] Coase, "The Problem of Social Cost," 1.
[305] Coase, "The Problem of Social Cost."
[306] Coase, "The Problem of Social Cost."

from confectioners' practice. He argues our attempt to alleviate the problem of the doctor will inflict harm on the confectioner. Another challenge put forward by Coase is the problem of a cattle rancher affecting a farming activity in adjacent land as his cattle destroy the crops or in the case of a factory contaminating a river and affecting the enjoyment of the water for downstream users; e.g. fishing. For Coase, the real question is a choice between restricting the practice of the confectioner or preference to the doctor's practice or similarly it is a choice between "meat or crops", or the fish vs. the produce of a polluting factory. He clears the air by stating the initial result of such choice is not clear unless the real value of the preferences gained and those lost is determined.

Therefore, according to Coase, often dubbed the 'Coase Theorem', where there are no market transaction costs, the initial endowment of allocation of property rights has no bearing on the ultimate allocation of the economic resources. The market assures that property rights are allocated in the most efficient use. Contrary to Pigou's observation, here private bargaining is presented as an alternative to state intervention.[307] That means, taking one of the above examples, if the price mechanism works smoothly, a neighboring farmer would pay the cattle rancher to ensure that his cattle will stop from crossing in to his field if the saving to the farmer from such choice is greater than the cost to be incurred in the form of payment to the rancher. In addition, the theory provides that in the absence of transaction costs, the size of damage to be paid is identical whether it is the farmer or the rancher that bears the burden.

Despite what it looks from in the surface, a typical classical advocate of the market system, Coase does not regard the price mechanism to be working in perfect state. This is perhaps one of the unfortunate interpretations of Coase's argument until the late in 1980's. Economic and legal theories influenced by it were dressed with a characterization that transactions costs should be minimized which led to an imaginary world of perfect competition and preference to free markets.[308] In fact, already in his earlier contribution; The "Nature of the Firm",[309] Coase has shown that there would be no reason for the firm to exist had transaction costs been zero. In doing so he regarded the firm as nothing but the "suppression of the price mechanism."[310] He provides that such cost can be expressed in terms of the cost of acquiring information on the prices in the first place and having identified the market price the cost of negotiation and contracting.[311]

Therefore, Coase argued that the existence of market transaction costs is a determinant factor to think about how to optimally design institutions/laws. He argues there is no first-hand rule in organizing social relations when choosing between the market, the firm and the state. All

[307] Klaus Mathis and Deborah Shannon, "Economic Analysis of Law," in *Efficiency Instead of Justice?*, Law and Philosophy Library (Springer, Dordrecht, 2009), 51–84, https://doi.org/10.1007/978-1-4020-9798-0_4.
[308] David M. Driesen and Shubha Ghosh, "Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction, The," *Arizona Law Review* 47 (2005): 63.
[309] Coase, "The Nature of the Firm."
[310] Coase. "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism."
[311] Coase, 391.

in one form or the other are not insulated from failures.[312] Hence there is no such thing as first best world.[313] In doing so Coase is perhaps a true comparatist. Found only in his last paragraph of the article, he reveals what should be the implication of his 'Theorem';

> [W]e have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.[314]

Therefore, the contribution of the 'Coase Theorem' to the large body of legal, social, and economic analysis has to do with the focus he gives to the ubiquitous presence of transaction costs in each respective sphere. He lays the initial seeds to the birth of the new institutional economics by advocating how careful understanding of transaction costs is a base to the next step, normative analysis.[315] Without knowledge of the institutional alternatives it is impossible to choose among them.[316] From here he guides us by his conclusion; "institutional and organizational structure is best that, under the circumstances, minimizes on transaction costs in order to maximize the social product (or social welfare)"[317] The discussion of comparative institutional analysis in this and the following chapters is essentially based on this analytical contribution of Coase.

2.2. Goal Choice Vs Institutional Choice

Traditionally the study of public policy is largely considered as study of and analysis of public policy goals. While there are number of ways how such analysis is undertaken, often the selection between alternatives goals is done among two important considerations; efficiency and equity.[318] Efficiency is an economic concept used to describe the why how society achieves the highest level of welfare within its limited economic resources frontier.[319] It is essentially a determination of benefits and costs of all economic decisions. Equity on the other hand is a less clear concept and encapsulates matters that might involve subjective determination such as equality, justice, and freedom.[320]

These considerations can be illustrated in two of the most iconic strands for the foundations of public policy in the modern world; Laissez-faire and Marxian political economy theories. Supporters of the free market consider markets to be complete by their own. i.e. markets do not need the assistance, support, intervention of the state. This is the extreme of the laissez-

[312] Coase, "The Regulated Industries."; Daniel H. Cole, "The Importance of Being Comparative-M. Dale Palmer Professorship Inaugural Lecture," *Ind. L. Rev.* 33 (1999): 928.
[313] Coase, "The Regulated Industries." "We inhabit a second-best world, in which our goal must be to structure social and economic interactions by those institutions and organizations which, in the circumstances, are least likely to fail, or are likely to fail the least."
[314] Coase, "The Problem of Social Cost," 44., Cole, "Taking Coase Seriously," 262.
[315] Cole, "Taking Coase Seriously."
[316] Coase, *The Firm, the Market, and the Law*, 30.
[317] Cole, "Taking Coase Seriously," 262.
[318] William K. Bellinger, *The Economic Analysis of Public Policy* (Routledge, 2015), 5.
[319] Bellinger, *The Economic Analysis of Public Policy*.
[320] Bellinger.

faire ideology.[321] The theory assumes markets will achieve optimal efficiency in the allocation of scarce resources and thus there would be no need for regulation. But it seems that time has proved this assumption wrong. Mainly, markets have proved to fail; there is not perfect information, there are huge externalities, there are monopolies and entry and exit from the market is not always perfectly aligned. To the contrary Marxian theories allege that markets are rigid with failures and it argues there is no need to look beyond the already stifled economic inequality to understand market failures. It considers the capitalist economy's arrangement of individual property rights as fundamentally incapable of ensuring equality and thus prefers a revolutionary rearrangement of the system. In doing so not only it enshrines different values/objectives of the process but also maintain different views on the role of these institutions. Marxian theories certainly favor the role of the state. Therefore, generally speaking, close examination of public policy analytic methodologies have, in one way or another, a tendency to a priori prefer one goal against the other.

According to Komesar contemporary theories and application of public policy give excessive attention on the desired goals and values or the implications of certain policy on important goals and values to be protected.[322] For instance economics is considered to be almost always veered in to the direction of attending to one and importantly single goal, efficiency. Komesar argues that although the choice between goals is an essential element of public decision and policy making process, goal selection standing by itself tells little about these outcomes. He argues, "efficiency is neither necessary nor sufficient to define the economic analysis of law and public policy."[323] The implication is that there is a missing link that connects such goals to result.[324] This missing bridge is the whole set of institutions and choice between them.[325]

Komesar gives an example of property rights as a legal norm that involves choice of both goals and institutions.[326] The goal of constitutional protection of private property implicitly involves a determination of institutional choice between the political and the adjudicative process in favor of the latter. Similarly, in the case of tort law, that purse the goal of protecting safety to the person and property, claims brought in favor of abolishing the system implicitly carry an institutional preference towards the market or government regulation rather than the adjudicative process.

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[321] Paul A. Samuelson, "Public Goods and Subscription TV: Correction of the Record," *Journal of Law & Economics* 7 (1964): 83. "'[S]ociety decides what degree of market autonomy or public decision-making shall be applied to it. Only a bigoted devotee of laissez faire will find the theory of public goods, properly understood, subversive"

[322] Komesar, *Imperfect Alternatives*, 1997, 4.

[323] Komesar, "The Logic of the Law and the Essence of Economics," 291.

[324] Komesar, *Imperfect Alternatives*, 1997, 5.

[325] Komesar, 5.He argues "Depending on the circumstances, resource allocation efficiency may be consistent with regulation or no regulation, with rights or no rights, with market decision making or with nonmarket decision making. Nor is resource allocation efficiency necessary for economic analysis to be useful. The essence of economics is institutional behavior and institutional choice, and these issues are central whatever the perceived social goal. Komesar, "The Logic of the Law and the Essence of Economics," 291.

[326] Komesar, *Imperfect Alternatives*, 1997, 5.

Hence, for comparative institutionalists, judges are one aspect of institutional choice. Judges, in their day to day function are engaged in formalistic determination and interpretation of the law, they chose between institutions.

> Judges must determine such issues as whether to apply a rule or an exception, or a bright-line rule or a fuzzy standard, or how to balance conflicting principles. In doing so, judges must ultimately make institutional choices and determine which institution is relatively more likely to accomplish a given purpose in a given context.[327]

If the judge interprets a standard as mandating some form of balancing between two contending interests or goals, he/she is implicitly deciding that the court is the preferred forum for the determination of the case. On the other hand, if the judge relies on a certain principle/exception to a standard in the law that may allocate decision making to another organ, this may be the market, the legislature, or an administrative organ, then choice is made to take the forum away from the courts.[328] Therefore, for comparative institutionalists, formalist reliance on interpretation of principles and doctrines obscures the role and importance of institutional choice and its implications.[329]

In this sense the determination of goals and institutional choice are inextricably related.[330] Institutional choice is not only of critical importance as it may impact the probability of enactment of a rule but it will equally determine its formal content and has an even more role to play in determining its efficacy.[331] In doing so, comparative institutional analysis carries a simple but powerful claim; "the pursuit of any substantive goal is necessarily mediated through different institutional processes that will affect outcomes, so that institutional analysis is required and such analysis must be comparative." [332]

2.3. Single Vs. Comparative Institutional Analysis

Following the above discussion, comparative institutional analysis looks at early and contemporary legal theories from a comparative perspective attempting to challenge the exclusive focus given to goal selection. In this sense comparative institutional analysis challenges both prominent and recent legal theoreticians for either, one, entirely ignoring the importance of institutional choice or two, for failing to compare institutions and choice between them very carefully.

First, Komesar criticizes prominent authors such as John Rawls for being completely in denial of the importance of institutional choice. He argues that Rawls important contribution to the theory of justice has actually fundamentally overlooked the big question of "who decides".[333]

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[327] Victoria Nourse and Gregory Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?," 2009, 107, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1405437.
[328] Nourse and Shaffer, "Varieties of New Legal Realism," 2009.
[329] Nourse and Shaffer, "Varieties of New Legal Realism," May 15, 2009.
[330] Komesar, *Imperfect Alternatives*, 1997.
[331] Joan MacLeod Heminway, "Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives," *Fordham J. Corp. & Fin. L.* 10 (2004): 226.
[332] Shaffer, "Comparative Institutional Analysis and a New Legal Realism."
[333] John Rawls, *A Theory of Justice, Harvard*, 1971.

According to Komesar, Rawls's effort is to merely articulate the principles of justice and equality with no significant attention being given to "the real world institutions and institutional choice".[334] Thus Rawls organization of principles will be of little help to organizing principles of justice without "the presence of institutions capable of translating high-sounding principles into substance."[335] Komesar points fingers to the nature of how such principles are organized in the first place. He argues that the fact that the principles are complicated and of loosely arranged nature it is paramount to take the nature and characteristics of the institutions that translate these standards in to real world meaning.[336]

Second, according to Komesar, despite Coase's worldwide acknowledgment by all economic, social and legal practitioners and the proliferation of sub disciplines, such as law and economics, little has been achieved to convincingly change the common assumption that economics is by nature a field that prefers markets instead of its alternatives.[337] Komesar underscores that economics is a discipline built on the foundations of analytical comparative techniques. One of its attractive attributes is its ability to care for and understand tradeoffs. When looking after benefits it is necessary to see the costs, and that alternatives are studied in terms of opportunity costs. Hence, there is an apparent preference to make an endogenous analysis of issues than exogenous one.[338] Komesar states that, traditionally, welfare economics analyzed market failures by advocating, criticizing or analyzing the appropriate response from the public side, in terms of government intervention etc.[339] For Komesar such approach violates the fundamental principles of economic analysis. [340]

Indeed, as briefly highlighted in the preceding chapter, the new institutionalism discourse has rightly emphasized the importance of understanding institutions. Broadly the works of several authors including Ronald Coase, Harold Demsetz, Douglas North, Oliver Williamson, A Dixit, Elinor Ostrom, etc.,[341] have explained the role and importance of understanding institutions as platforms for managing the transaction costs of dealing with economic and non-economic affairs. Perhaps in Komesar's opinion such approach as not gathered wide

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[334] Komesar, *Imperfect Alternatives*, 1997, 37.
[335] Komesar, 41.
[336] According to Komesar this is "an essential - perhaps *the* essential – component in the realization of the just society." Komesar, 42.
[337] Komesar, 290.
[338] Komesar, "The Logic of the Law and the Essence of Economics," 289.
[339] Komesar, 298.
[340] Komesar, "The Logic of the Law and the Essence of Economics."
[341] Harold Demsetz, "Information and Efficiency: Another Viewpoint," *The Journal of Law & Economics* 12, no. 1 (1969): 1–22. Douglass C. North, "A Transaction Cost Theory of Politics," *Journal of Theoretical Politics* 2, no. 4 (October 1, 1990): 355–67, https://doi.org/10.1177/0951692890002004001; Alston et al., *Empirical Studies in Institutional Change*; Oliver E. Williamson, "Transaction Cost Economics: How It Works; Where It Is Headed," *De Economist* 146, no. 1 (n.d.): 23–58, https://doi.org/10.1023/A:1003263908567; O. E. Williamson, "Public and Private Bureaucracies: A Transaction Cost Economics Perspectives," *The Journal of Law, Economics, and Organization* 15, no. 1 (March 1, 1999): 306–42, https://doi.org/10.1093/jleo/15.1.306., Acemoglu, "Why Not a Political Coase Theorem?" Avinash Dixit, "Some Lessons from Transaction-Cost Politics for Less-Developed Countries," *Economics & Politics* 15, no. 2 (2003): 107–133.Elinor Ostrom, "Beyond Markets and States: Polycentric Governance of Complex Economic Systems," *The American Economic Review* 100, no. 3 (2010): 641–72.

prominence in legal and economic discourse. According to Komesar, this may have to do with the difficulty that such work entails. Such difficulty emanates from the lack of readily available data that makes understanding vital traits of relevant decision making institutions and their abilities challenging.[342] This in turn leads to dependence on assumptions and intuitions.[343] In addition even those that give due regard to the importance of institutional analysis in analyzing public policy and the decision making process, they unfortunately fall short of being comparative and the tendency is to undertake 'single institutional analysis'.[344]

He argues that this single handedness has "served one-sided calls for political intervention …or against political intervention." [345] The former is the case of welfare economics and the latter in the case of public choice.[346] The correct approach, Komesar argues, is to ask whether, in any given setting one institution is better or worse than its available alternatives.[347] An abstract determination that favors either the market or the political process is irrelevant.[348] "[T]asks that strain the abilities of an institution may wisely be assigned to it anyway if the alternatives are even worse."[349] Komesar reiterates that single institutional analysis is also contrary to the commonly accepted rational choice theory. 'Rationality', despite its various versions; bounded rationality and the like, and 'choice', prescribe that individuals decided on their 'choices' by having seen alternatives and therefore does not make decisions by looking at only one alternative.[350] As indicated above, Komesar's serious comparatists approach is derived from a strict understanding of Coasian transaction cost theory.

3. Understanding 'The Market' of Law and Public Policy

Transaction cost analysis is useful to understanding the functioning of competition law and policy. The basic argument is that the basic principles of transaction cost analysis are also applicable to the socio political and legal setting as well. The style of reasoning applied by Coase is also useful to understand the functioning of the contemporary administrative state.[351] Just as there is multiple layers of organization in economics, the intra-firm organization and the market place, there are also choices between public policy making organizations; the legislature, the executive and administrative agencies and the adjudicatory bodies.[352]

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[342] Neil K. Komesar, "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society," *Michigan Law Review* 86, no. 4 (1988): 657–721. Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis," *The University of Chicago Law Review* 51, no. 2 (1984): 366–446.; Neil K. Komesar, "Back to the Future–An Institutional View of Making and Interpreting Constitutions," *Nw. UL Rev.* 81 (1986): 191.
[343] Ibid
[344] Komesar, imperfect alternatives, 6
[345] Ibid., 274
[346] Michele Goodwin, "Law's Limits: Regulating Statutory Rape Law," 2013.
[347] Komesar, imperfect alternatives, 6
[348] Ibid.
[349] Ibid.
[350] Komesar, "The Logic of the Law and the Essence of Economics," 299.
[351] David Epstein and Sharyn O'halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge University Press, 1999), 55.
[352] Epstein and O'halloran, 58.

Legislative bodies can delegate part of their authority and mandate to the executive. Executive bodies may leave it up to the courts to balance a certain public policy against equally competing stake. Just as transaction cost economics attempts to minimize the deadweight costs to economic transactions resulting from transaction costs, so does the socio, legal and political application of it.[353] The socio-political equivalents of transaction costs come in the form of serious of obstacles to socio political exchange. This analysis was fist comprehensively developed by the work of North forming the basis for a large literature on 'transaction cost politics'.[354]

Komesar's addition/alternative proposal is a 'participation-centered approach'. The analytical framework examines the relationship between institutional participation and performance.[355] The aim is to identify factors that best account for variation in institutional behavior and performance.[356] The approach gives focus to the actions of those that are set to contribute to normative and institutional change through their participation.[357]

3.1. Understanding Costs, Gains, and Institutional Choice

If institutional behavior is to be seen as a function of participation, buyers and sellers, in the case of the market; voters, lobbyists, and ordinary citizens in the case of the political process and litigants in the case of the courts;[358] then the next question is what determines institutional participation? According to Komesar, participation is a result of the cost and benefit for the key players.[359] He gives particular focus to "the characteristics of the distribution of benefits (the mean and variance of per capita benefits) and two forms of costs: the cost of organization and information."[360] Poised against this perspective, comparative institutional analysis postulates that variation in the actors' distribution of stakes, costs to organization and information will bring about differences in institutional behavior, performance and ultimately choice.

Indeed, institutional participation analysis is not a novel introduction of comparative institutional analysis. Rather it is a concept that various economic, political, and legal theories have advanced several lines of theories around it. Economic analysis of markets is inherently an analysis of participation. Participation determines one of the basic pillars of economic analysis, allocative efficiency. Market failures and externalities are hence result from failures of effective participation. Komesar himself states, "the basic economic version of the market

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[353] Epstein and O'halloran, *Delegating Powers*.
[354] North, "A Transaction Cost Theory of Politics"; North, *Institutions, Institutional Change and Economic Performance*.
[355] Komesar, *Imperfect Alternatives*, 1997, 7.
[356] Susan Freiwald, "Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation," *Harv. JL & Tech.* 14 (2000): 575.
[357] Freiwald, "Comparative Institutional Analysis in Cyberspace."
[358] Neil K. Komesar, "The Perils of Pandora: Further Reflections on Institutional Choice," *Law & Social Inquiry* 22, no. 4 (1997): 1002.
[359] Komesar, "The Perils of Pandora."
[360] Komesar.

is a participation story."[361] Similar is the case with participation analysis of the political process. Politics is essentially a study of mechanism of participation and influence. The political landscape malfunctions mainly due to failures of effective participation.[362]

Komesar's contribution rather lies in his distinctively useful improvements to preceding institutional analysis theories. Primarily, he argues that the problem that shades institutional participation in the form of high participation costs and low per capita stakes hunts all institutional alternatives.[363] That is, by privileging concentrated minorities institutional participation will disfavor 'dormant' majorities. According to Komesar, this trait encapsulates all institutional alternatives whether they are markets, political and administrative institutions, and the adjudicative process. Therefore, because participation costs and stakes move in parallel, the institutional alternatives associated with any goal are "close calls dependent on variations in the dynamics of participation."[364] Hence, seldom easy and fairly simple mechanics of goal vs. institutional association will be complicated by a more difficult but essential choice among institutions that are all imperfect alternatives.

3.2. The 'Two Force Model'

The second contribution of Komesar in his analysis of participation dynamics is his 'two force model'. Komesar brings to attention a two-force model of institutional participation dynamics that both criticizes and at the same time captures basic arguments of mainstream interest group analysis. According to Komesar, interest group theory gave excessive focus to the power of concentrated interests. On the other hand, Komesar's 'two force model' participation analysis favors to show a more 'balanced' approach that take careful cognizance of the occasions that 'majoritarian influence' can also occur.

Interest group theory of political analysis (IGTP) gave prime focus to highlight the power of minority influence in the political process. [365] One of the very active corollaries of IGTP is Public Choice Theory. The theory seeks to analyze the governance process by using methodological and analytic tools borrowed from economics. The main thesis, at least in the first generation of its development, rests on the *methodological individualism* approach of economics. A concept that depicts the market as an interaction between individual economic agents as rational maximizes of their own preferences and Adam Smith's invisible hand; that market interaction will inherently lead to perfect allocation of scarce resources. Here is where the economic method was thus for instance used by Buchanan and Tullock to analyze the political process of competition between individuals in a democracy.[366]

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[361] Komesar et al., *Understanding Global Governance*, 32.
[362] Komesar et al., *Understanding Global Governance*.
[363] Komesar et al.
[364] Komesar, "The Logic of the Law and the Essence of Economics," 293.
[365] Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (Princeton University Press, 1999), 10.
[366] James M. Buchanan, "The Pure Theory of Government Finance: A Suggested Approach," *Journal of Political Economy* 57, no. 6 (1949): 496–505.; James M. Buchanan and Gordon Tullock, *The Calculus of Consent*, vol. 3

In building their thesis, Buchanan and Gordon assimilate the constitutional process as noting but a contractual relationship between individuals containing a set of rules agreed upon in advance under the framework of which subsequent action will be conducted.[367] In this sense Public Choice theory developed as a contribution to understanding the behavior of individual citizens and politicians as mostly self-interested agents. It applies basic economic analysis, such as game theory and it is also adoptable to both positive 'what is?' and normative 'what should be?' approaches. [368]

In doing so the concept was groundbreaking in its contributions to the study of incentives behind governance and decision-making processes, such as the notion of state, democracy and dictatorship, political party competition, voting rules, federalism, bureaucracy, interest groups, size of government, and political business cycle behaviors etc. The theory was presented as reaction to and a criticism of various political economy theories of government that saw the state and the government as 'benevolent despot' that should function in nothing but the public interest. Following the above, by the early 1950's and after, the modern Public Choice theory as we know it was developed owing its main credit to the work of many, including Buchanan and Tullock, Arrow, Black, Olson, Stigler, Posner etc. Together all contributed to the development of the contemporary public choice understanding of political economy of governance.

Duncan Black and Kenneth Arrow, although working separately pursued similar thoughts and conclusions on economic analysis of electoral rule underpinnings.[369] They attempted to show how the concept of democracy is simply more than majority vote.[370] Others such as William Riker followed similar suit under the umbrella of 'Public Choice' scholarship. Riker contributed to the development of positive political theory and analysis of political coalitions.[371] Mancur Olson's contribution was the most popular of the many siblings to Public Choice theory. Olson's main argument lies in his argument that in a large group rational and self-interested individuals are likely to act against group interests unless an external agent

(University of Michigan Press Ann Arbor, 1962). James M. Buchanan, *The Logical Foundations of Constitutional Liberty*, vol. 1 (Liberty Fund Indianapolis, IN, 1999).

[367] Buchanan and Tullock, *The Calculus of Consent*, 3:vii.

[368] D. C. Mueller, "Public Choice III Cambridge University Press Cambridge Google Scholar," 2003, 1. "Public Choice can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science. The subject matter of public choice is the same as that of political science: the theory of the state, voting rules, voter behavior, party politics, the bureaucracy, and so on. The methodology of the public choice is that of economics, however. The basic postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximize."

[369] Duncan Black, *The Theory of Committees and Elections*, 1987 edition (Boston: Springer, 1986).

[370] Richard M. Ebeling, *Economic Theories and Controversies* (Hillsdale College Press, 2004). James M. Buchanan, "Public Choice: The Origins and Development of a Research Program," *Champions of Freedom* 31 (2003): 13–32.

[371] William H. Riker, "The Paradox of Voting and Congressional Rules for Voting on Amendments," *American Political Science Review* 52, no. 2 (1958): 349–366. William H. Riker, *The Theory of Political Coalitions* (Yale University Press, 1962); Dennis C. Mueller, "Public Choice: An Introduction," in *The Encyclopedia of Public Choice* (Springer, 2004), 32–48.

forces them to act in their group interest.[372] His thesis relies on the work of his predecessors which articulated individuals as rational maximizes of their own benefits in market and non-market decision making contexts. In doing so he argues this simple fact makes it difficult for a large group to collectively reach a mutually beneficial cooperative framework as they pursue short term individual benefits without some sort of coercive device. Olson's arguments were heavily applied to explain the dynamics of interest groups in public policy decision making.[373]

Olson's works also become precursor to the development of rent seeking theory. In 1974 Kruger, together with Tullock's early contribution in 1967, reckoned the concept.[374] The concept was influential to the development of the Public Choice theory as it described how individuals are inherent to seek rents as they function in the political arena. Progress in political economy research of governance was further extended by the works of Stigler who won the Nobel Prize in Economics in 1982 for his valuable and indispensable contribution to among others the Theory of Economic Regulation.[375]

In the time that precedes him, political science and economic wisdom on the cause and effect of public regulation was limited and construed to public interest theory of regulation. Stigler's 1971 article was a watershed in this regard as it tarnished the hitherto dominant understanding of the nature of economic regulation that believed the aim of public regulation to be maximizing the interest of the general public; 'public interest'. His work showed regulation is an outcome of the interaction between various self-interested participants interacting in what can be considered a market of policies and opinions. Key in this contribution was how he perceived and thus showed the way how legislation is 'an endogenous' result of the interaction of 'policy market' participants rather than 'exogenous' factor. In doing so he laid down the foundations to a new perspective of economic governance what latter become to be known as Public Choice theory.

Two authors parallel on the economics of regulation. Richard A. Posner starting his early contribution, Taxation by Regulation,[376] and many others that followed from this, empirically challenged the applicable scope of Stigler's capture theory as he showed various instances where public regulation could and have been found performing in the public interest unlike

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[372] Mancur. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press, 1977), 2.

[373] Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Economic Rigidities* (Yale University Press, New Haven and London, 1982).

[374] Anne O. Krueger, "The Political Economy of the Rent-Seeking Society," *The American Economic Review* 64, no. 3 (1974): 291–303.

[375] George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21, https://doi.org/10.2307/3003160. "Stigler's results do show that legislation can also be an outflow of market participants' optimizing behavior. To the extent that this is so, legislation is no longer an "exogenous" force which affects the economy from outside, but an "endogenous" part of the economic system itself." The Prize in Economics 1982 - Press Release". *Nobelprize.org.* Nobel Media AB 2014. Web. 28 Nov 2014. <http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1982/press.html>

[376] Richard A. Posner, "Taxation by Regulation," *The Bell Journal of Economics and Management Science*, 1971, 22–50.

Stigler's argument that this is normally not the case. By providing analysis of on the concept of cross subsidization, Posner illustrated how various groups of consumers rather than producers could benefit from public regulation. Posner's 1974 article on Theories of Economic Regulation was also equally critical of the empirical basis of Stigler's theory but however endorsed the valuable contribution of economic analysis to studying the political behavior of actors in public regulation. He stated "the general assumption of economics that human behavior can best be understood as the response of rational self-interested beings to their environment must have extensive application to the political process."[377] Posner was also followed by Pelzman as he further critiqued but also improved various segments of Stigler's theory.[378] Pelzman, concurs with underlying theory that there is essentially a political market place where those who are willing to pay the highest prices are guaranteed to win. But his most valuable contribution lies on the theory that showed how the answer to the fundamental question of why the policy market functions to benefit 'the producer' rather than the 'consumer' "lies essentially in the relationship of group size to the costs of using the political process."[379]

However, for Komesar despite the overwhelming acceptance of the basic intuitions of the interest group and public choice theory, there are at least two sources of doubt to its adequacy.[380] First, various economic commentators have already observed that 'too much legislation' seems to be 'broad-based, ideological, and even public interested to justify complete reliance of the IGTP."[381] Second, IGTP fails to take in to account the converse of another bias in the political process with equal if not more historical pedigree; "that is the overrepresentation of the many of the few (majoritarian bias)"[382] He argues;

> Especially for proponents of the IGTP who are concerned with constitutional economy, the failure to notice and integrate traditional concerns about the 'tyranny of the majority' leaves a significant gap. Our own constitution is as much, most likely more, a product of fear of the dominance of many over the few as it is a product of the opposite fear.[383]

According to Komesar this latter argument is not a question of motivation. For him IGTP should be criticized for its failure to balance its perspective between the two contending forces rather than the overwhelming critique it received for being over dependent in characterizing the political process as one motivated by a narrow and self-motivated interest opposed to public interest. For Komesar motivation has no relevance as an intrinsic theoretical framework for IGTP.[384] While conceding that such attention was brought about by the very way how important IGTP theoreticians have presented their arguments, that gave the impression that

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[377] Richard A. Posner, "Theories of Economic Regulation," *The Bell Journal of Economics and Management Science* 5, no. 2 (October 1, 1974): 335–58, https://doi.org/10.2307/3003113.
[378] Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19, no. 2 (August 1, 1976): 211–40.
[379] Peltzman.
[380] Komesar, *Imperfect Alternatives*, 1997, 56.
[381] Komesar, *Imperfect Alternatives*, 1997.
[382] Komesar.
[383] Komesar, 57.
[384] Komesar, 58.

motivation is central to their analysis, including a quote from James Buchanan, he underscores that such assumption is irrelevant to IGTP. He argues;

> Narrow self-interest neither a sufficient nor a necessary condition for outcomes associated with this theory. The same sorts of distortions and biases occur in the presence of public-regarding, public interested or ideological motives. Moreover, unbiased and undistorted results can coexist with narrow self-interest. The degree and direction of the biases or distortions in the political process are determined by character of that process, by institutional factors, not by the character of individual motives.[385]

Hence for Komesar, the most important and valid criticism that should be presented against IGTP is its failure to give equal emphasis to majoritarian influence. [386] Therefore, Komesar's secondary contribution is his effort to augment IGTP with a 'two-force model' that incorporates majoritarian influence without abandoning the basic and evidenced theory of interest group dynamics espoused by IGTP.[387]

Komesar's intellectual framework in this line is based on the argument that, similar to the way minoritarian influence is presented in the institutional sphere, majoritarian influence is also a crucial possibility as long as the majority is able to use its comparative advantage, its higher numbers, to influence the outcomes and direction of institutional performance.[388] Therefore the occasional cycle of variation in either minoritarian or majoritarian influence holds center stage to the two-force model. An interesting example put forward to elucidate the apparent recognition but the seldom sidelined issue of majority influence under IGTP is the case of state supported cartel that benefits from market monopoly but at the same time is incapable of influencing tax policy that imposes on it selective excise taxation.[389] He argues even when not explicitly recognized, majoritarian influences play a central if unseen role in the basic propositions or IGTP.[390]

Therefore, in understanding the role of majoritarian influence Komesar emphasis that, "in describing political behavior the most important factors are the per-capita stakes and their distribution across various interest groups",[391] hence it is natural that members of the majority seldom recognize that they even have an interest to protect. Indeed, this is not due to an inherent 'stupidity' of the majority but rather because they are 'innately passive'. This describes situations where the individual stakes are so little that the many hardly has the incentive to incur costs to acquaint itself with the information necessary to make informed decisions. According to Pelzman; "the voter must spend resources to inform himself about its implications for his wealth and which politician is likely to stand on which side of the issue.

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[385] Komesar, 60.
[386] Komesar, *Imperfect Alternatives*, 1997.
[387] Komesar.
[388] Komesar, 65.
[389] Komesar, 66.
[390] Thomas W. Merrill, "Institutional Choice and Political Faith," ed. Neil K. Komesar, *Law & Social Inquiry* 22, no. 4 (1997): 959–98.
[391] Komesar, *Imperfect Alternatives*, 1997.

That information cost will have to offset prospective gains, and a voter with a small per capita stake will not, therefore, incur it."[392]

Yet even when members of the majority had the occasion to enjoy accessing information on their stakes and the size of the benefit to be acquired is greater than the costs involved in participation, it is often observable that such group may end up with no collective action as each individuals may be motivated to seat back and wait, free ride, or refuse to contribute by subjugating others to bear the higher burden or participation. One may recon this situation as 'Property of the Commons'. In doing so the characteristics and nature of free riding will depend up on the ability of the group to take control of its affairs which itself will be dependent on group size.

In the mean time for Komesar, free riding also suggests a differentiated outcome among large groups if the per capita stakes are initially different.[393] Quoting Stigler he suggests that large groups with a high unevenness in the distribution of stakes are likened by small concentrations of individuals. "the large individuals in a group may therefore properly view themselves as members of a small number of industry if their aggregate share of the group resources is large."[394]

This insight suggests that whenever there are large heterogeneity of interests within the large group the likelihood of collective action will also similarly increase due to the presence of small group of high per capital stakeholders.[395] The 'skewness' of distributional outcome and 'pockets' of high stakeholder group determines the nature of political action.[396] This is of course without diminishing the role of the cost of participation and the mechanisms of avoiding free riding problem.[397] The costs acquiring information and organizational cohesion may also vary from one issue to another depending up on the complexity of the issue. According to Komesar, due to these factors the level of majoritarian influence varies based on the issues concerned as well as from one jurisdiction to the other.

> As the absolute per capita stakes for the majority increase… members of the majority will more likely spend the resources and effort necessary to understand an issue and recognize their interests. In turn, variation within the distribution of the per capita benefits of political action – the degree of heterogeneity – affects the probability of collective action on behalf of the majority by subgroups of higher stakes individuals. … in these instance those with higher stakes operate as a catalytic subgroup, activating the more dormant members.[398]

For Komesar the cost side of the axis also has implications for participation of the majority. These costs can vary based on the rules and institutional characteristics of participation

[392] Peltzman, "Toward a More General Theory of Regulation."
[393] Komesar, *Imperfect Alternatives*, 1997, 66.
[394] Komesar, 70. Citing George J. Stigler, "Free Riders and Collective Action: An Appendix to Theories of Economic Regulation," *The Bell Journal of Economics and Management Science*, 1974, 362.
[395] Komesar, *Imperfect Alternatives*, 1997, 70.
[396] Komesar, 71.
[397] Komesar, *Imperfect Alternatives*, 1997.
[398] Komesar.

including the size of the polity. Smaller sized jurisdictions lower the associated costs of the majority group and costs of controlling free riding. Thus, added with the above mentioned cost of acquiring information, which is affected by complexity issues, the overall stakes of the whole group and the relative stake size of the catalyst group, determines the ability of majority to influence the decision making process. Essentially the conclusion to be driven from this is that there are indeed occasions whereby majoritarian influence is a reality. According to Komesar often the simple reason why this may be the case is a "civics model' or politics "larger numbers of members translates to political power via voting."[399]

While Komesar takes cognizance of the failures of voter based majoritarianism, 'paradox of voting', he underscores that the reality seems to give less of a concern.[400] The paradox lies in the theory of incentives and rationalities of the voter. An empirical thought in political science has long established the theory of voter ignorance in democracy and governance theory. The theory owes a large debt to Joseph Schumpeter who by the mid 20th century succinctly exposed the flaws of classical understanding of democratic process which took bases on the collective rationality of voters.[401] According to Schumpeter, individuals are collectively ignorant of the collective good.[402] He provides;

> When we move still farther away from the private concerns of the family and the business office into those regions of national and international affairs that lack a direct and unmistakable link with those private concerns, individual volition, command of facts and method of inference soon cease to fulfill the requirements of the classical doctrine.[403]

The underlying evidence to Schumpeter's conclusion is the lack of incentive for an ordinary citizen to pursue political knowledge gathering endeavor under a range of personal welfare alternatives.[404] This argument was later supported by various empirical researches, particularly investigating election process in the United States bringing striking evidences of the extent of political ignorance of the American voter.[405] While the theory has faced both support and criticism, it has left its own vital contribution to contemporary political economic analysis of governance. Among others, voter ignorance explains how voters could be put in a dilemma between lack of knowledge on a political subject matter, the large size of the electorate that diminishes the significance of each vote and consequently reducing the chances of any cost incurred to acquire the political knowledge being compensated thereby further curtailing the individual motivation to cast votes.[406]

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[399] Komesar.
[400] Komesar.
[401] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (London; New York: Routledge, 1994).
[402] Schumpeter.
[403] Komesar, *Imperfect Alternatives*, 1997.
[404] Komesar.
[405] Michael X. Delli Carpini and Scott. Keeter, *What Americans Know about Politics and Why It Matters* (New Haven: Yale University Press, 2005).
[406] Jason Ross Arnold, "The Electoral Consequences of Voter Ignorance," *Electoral Studies* 31, no. 4 (December 2012): 796–815, https://doi.org/10.1016/j.electstud.2012.06.003; Christopher S. Elmendorf and David Schleicher, "Informing Consent: Voter Ignorance, Political Parties, and Election Law," *University of*

Another important concept in public choice and political economy of governance is the bundling of various political issues in political process. I.e. issues are often bundled within a political candidate's or Party's agenda and this list include all possible topics in the democratic process such as political issues, social economic and other agendas. Thus the standard voter is forced to vote for a political party or candidate rather than single policy issues. In doing so he is making choices between bundles of alternatives than individual policy matters.

Despite these propositions Komesar argues that "However haltingly and awkwardly, the power of the majority and their threat at the ballot box are felt. The fear of Majority influence has a long history, and its imprint can be found in present day politics in many ways"[407] He forwards a number of major historical and contemporary occasions that can be presented as instance of majoritarian influence. First the famous/infamous footnote four in *Carolene Products* dispute is presented as instance of majoritarian influenced political malfunction.[408] Second, tyranny of the majority is exemplified by the suffering of Jews in the hands of Germany's Nazi government.[409] Thirdly, an example of US's old and most recent black spots or slavery and Jim Crow laws are put forward.[410]

Recognition of the two-force model has various implications to the study of IGTP. Primarily it underscores effects that go beyond the one force model which may be the result of majoritarian biases.[411] The two-force model institutional analysis is the perhaps the first attempt to understand the latter within the purview of IGTP. It provides the analytical framework to understand the occasion why we observe both minoritarian and majoritarian bias.

4. Competition Law and Policy as Institutional Choice

As indicated above, CIL is presented as an alternative to the conventional paradigm that is often tied with single institutional analysis. Today there exists ample research that examines these factors. This thesis adopts a model that anticipates several other factors that cannot be comfortably addressed by 'single institutional analysis' explanations. Comparative institutional analysis can be an appropriate methodology to examine competition law and policy in developing countries as it provides the appropriate tools to see through the institutional and normative landscape beyond the conventional justifications provided.

In doing so comparative institutional analysis can be used as a pragmatic tool to diagnose the overall market governance in these countries. Essentially any legitimacy theory formulation process leads to the need for identification of the relevant players and stakeholders. In doing so the discussion aims to develop an interdisciplinary model of analysis and attempts to

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Illinois Law Review 2013 (2013): 363–432; Ilya Somin, "Democracy and Voter Ignorance Revisited: Rejoinder to Ciepley," *Critical Review* 14, no. 1 (January 1, 2000): 99–111, https://doi.org/10.1080/08913810008443552.

[407] Komesar, *Imperfect Alternatives*, 1997, 74.

[408] Komesar, 221–30.

[409] Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997), 225.

[410] Komesar, *Imperfect Alternatives*, 1997, 226.

[411] Komesar, 76.

understand the development of competition law and policy in developing countries by analyzing institutional choice and decision-making process. It considers the domestic institutional framework and the stakeholder dynamics for competition law design and enforcement as the most crucial element to the overall process.

The analysis mainly starts from the assumption that any economy is a host of both pro and anticompetitive agents that support or resist reforms that tend to benefit or are threatened by effective competition law enforcement. It may also include agents that are 'indifferent' to these reforms because they are unaware, are unable to process relevant information due to cost of accessing and analyzing the relevant information or simply lack the collective power. The key to understanding the legitimacy or lack thereof and ultimately the shape of competition regime will be to understand the decision-making process and the way how participation is maximized or reduced. It is therefore important to investigate the nature of the agents involved, if any, the critical access points for these agents to apply pressure, the nature of the 'bargaining process' and subsequent checks and balances.

In doing so the method draws lessons from two important contributions in comparative institutional analysis in general and a closely similar application of it in the field of antitrust. First it will draw lessons from the 'methodology of comparative institutional analysis' as developed by Neil Komesar.[412] Komesar argues that the strict emphasis given to 'goals' in public policy debates has ignored the important question of institutional choice to implement such goals: for instance, between the market, political or the adjudicative process. He draws a link between the major proportions of the poor performance of these three institutions to high transaction costs. In developing his theory Komesar essentially sums up the main tenants of public choice, legitimacy and transplant theories and develops a theory of optimal institutional selection process. Analysis of the development of competition law enforcement in developing countries can take important lessons from his theory as he develops a "participation-centered approach" to comparative institutional analysis.[413]

4.1. Understanding the Stakeholders: Transactions Costs and Influence in Competition Law and Policy

Despite vast economic reform and privatization measures undertaken by developing countries in the second half of the 20th century, it can be said that competition law and policy and policy was a late comer as it was introduced in most of these countries as they scaled further in to a market led economic policy. However, competition policy did not quickly see the light of the day as the same markets were engulfed by private monopolies and 'oligarchies' that quickly replaced the role of the state that hitherto dominated the economy. Various stakeholders distinctively inherited anticompetitive character from the economic policies that preceded market reform measures. There are also various circumstances where newly emerging private

[412] Komesar, *Imperfect Alternatives*, 1997.
[413] Komesar et al., *Understanding Global Governance*.

business also captured markets to their own advantage at the expense of the consumer leading to what Hellman, Jones, and Kaufmann call a 'capture economy'.[414]

In many developing countries clientelism also remained an important means to secure political and business leadership. Leaders attract political elites and important business groups as patrons by using their power to make important state policies. "[C]apital and other production factors are concentrated in the hands of the few – usually hands that were connected to political power in one way or another prior to market reforms."[415]

This relationship could evidence itself both in formal and informal mechanisms. In the first case it could take formal institutional mechanisms such as the legislature or various institutions under the executive arm of the government. Situations like this cannot be simply related to authoritarian governments. Rather despite well-established, or fairly working, institutional frameworks, decision making is captured by well-organized interest groups that directly or indirectly influence national policies in their favor. On the other hand, informal relationships may take the form of corruption and cronyism. Political leaders use their office to reward those that supported them to climb to office. Rent seeking and corruption range from simple family and friend relationship to ethnic and/or religious lines. Such 'strong reliance on clientelism' makes reforms difficult.[416]

In this sense politics and business will have intertwined interests at stake in the competitive operation of the market. Especially in developing countries where other means of redistribution of public rents are limited, access to the market is a key means of creating rents for political leaders. Accordingly, competition law and policy will come in conflict with these agents. Creating a level playing field will imply facing these groups. Effective competition law and policy enforcement will thus ultimately entail reconfiguring the built-in political and economic equilibrium.[417]

The key question of course is why this is so? Why should policy makers budge to the influence of certain business groups if they are committed to attaining competitive markets? IGTP does not address this question by way of making a reference to the inherent tendency by legislatures to favor large business against that of consumers. Rather IGTP would see the supply of public regulation, such as competition law, as an interaction of demanders and suppliers in a market for public goods; in this case competitive markets and by analogy competition law. Accordingly, the main reason lies on the fact that in the absence of a clear, legitimate and

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[414] Joel S. Hellman, Geraint Jones, and Daniel Kaufmann, "Seize the State, Seize the Day: State Capture and Influence in Transition Economies," *Journal of Comparative Economics* 31, no. 4 (2003): 751–773.Hellman, Jones, and Kaufmann; Joel Hellman, Geraint Jones, and Daniel Kaufmann, "Beyond the 'Grabbing Hand'of Government in Transition: Facing up to 'State Capture'by the Corporate Sector," *Transition* 11, no. 2 (2000): 8–11.

[415] Kronthaler, Stephan, and Emmert, "Analysis of Statements Made in Favour of and against the Adoption of Competition Law in Developing and Transition Economies."

[416] Simone Bunse and Verena Fritz, "Making Public Sector Reforms Work: Political and Economic Contexts, Incentives, and Strategies," 2012.

[417] Mwangi S. Kimenyi and John M. Mbaku, "Rent-Seeking and Institutional Stability in Developing Countries," *Public Choice* 77, no. 2 (1993): 385–405.

powerful constraint against doing so, political decision making process will chose to benefit specific groups of individuals and business, or largely producer interests in this case, against the interest of the large consumer mass in the economy since it is only the former group that will have the potential to cooperatively act upon its group interest and buy the favor of those with policy decision making powers. While there are various alterations to be made to this simple conclusion, this theory is largely considered a common denominator to the vast political economy literature analyzing regulatory decision making. Its prescriptions are more powerful with respect to competition law since the latter has a scope of horizontal application. As it is largely aimed at ensuring markets remain competitive, it has no specific closely tied group of the society as its single, immediate, and direct beneficiary.

4.2. Identifying the Players

Hoping that the preceding sections were able to lay some basic understanding of the essential political and perhaps theoretical dynamics of how vested interests can interact to determine the final shape of a given public policy, it is now time to further the investigation and particularly identify the constituents of those groups giving emphasis to competition law and policy. Understanding the form and nature of these interest groups that are political and economic stake holders to competition law and policy making process is an important step.

4.2.1. Business Interest Groups

Generally, the first and primary group that is identified by the literature influencing competition law enforcement performance in developing countries is business interest groups.[418] Often reckoned as; 'large businesses', 'large conglomerates', 'business moguls', 'business elite', 'oligarchies' etc. This is not surprising as this is the group that is the key player in the market. It is however a mistake to take this group as one single undiversified whole. Caution needs to be taken from generalizing business group's interests as identical and all disfavor competition law enforcement. Interest groups such as business groups that benefit from dominance in a certain economy and market place may influence when and how competition law legislation is introduced by the State. In particular, small economies and governments that have a natural tendency to have monopolies could fall pray of influence and manipulations of these business groups. [419]

As a counter argument to the above, business also cooperate to seek aggressive competition law enforcement. It is obvious that business function in the market as both suppliers and consumers of goods and services simultaneously. The market for these goods and services is also very broad and crosses industrial and sectoral boundaries. Therefore, even though cartelistic and monopolistic practices in one industry might benefit one group of business and industries, it will at the same time harm others situated either vertically, horizontally or across sectors. The latter group could thus benefit from competition law enforcement. If and whether

[418] See Vineeta Yadav, *Political Parties, Business Groups, and Corruption in Developing Countries* (OUP USA, 2011).Eugene. Ridings, *Business Interest Groups in Nineteenth-Century Brazil* (Cambridge [England]; New York, NY, USA: Cambridge University Press, 1994).
[419] Gal, "The Ecology of Antitrust."

the group will decide to champion competition law enforcement in the end is however determined by a total cost-benefit calculation of its gains and cost to collective action. In a way this represents an example of the political economy transaction cost.

Meanwhile an important challenge in empirically proving the influence of a single stake holder, for instance large business, is difficult since finding objective evidence beyond anecdotal conclusions is highly challenging. While there are general account of analyzing large business's role in public policy making, the most frequently used are those that are also more elaborate methods and approaches that give special care to topical nuances of various subject matters of public policy and types of business behavior and their interaction with public policy making process. Generally, the literature on political role of business can be classified between five streams of analyses; neo-pluralist, neo-corporatism and organized capitalism, network approaches, ideological dominance, structural power theory including informational - structural model.[420]

- *Pluralist group theory*

Pluralism is a theory that sees political decision-making process and the state simply as a phenomenon of constant and dynamic interaction were conflict of interests are settled.[421] At the outset the name given to it is less telling for the purpose intended of its use here. Pluralist group thinkers, just like the rest of theories that are identified below, think of national and international policy making as a place where policy agendas are set under competition from various interest groups. In doing so, interest groups compete to tilt the policy direction in their favor. What distinctly describes pluralist group theory is its emphasis on lobbying as the main technique and strategy used by groups to influence policy making.[422]

In its classical sense lobbying involved individual or agent that intends to influence a public representative or government official always waits in the lobby to pressure his/her parliamentarian or official. Drawing on this image is important to make a clear distinction between pluralist lobbying theory and other theories that one way or another explains mechanisms of imposing influence such as neo-corporate theories or organized capitalism. All investigate lobbying in general, what is however different of lobbying as such in pluralist theory is its emphasis on directly observable activity.

The directors of a company may finish their ordinary business and turn at the same meeting to discuss the part the corporation will take in the next political campaign. Their activity, which a moment before was industrial or economic, then becomes at once political – a part of the governing process of the country – and is to be studied specifically as such.[423] Therefore

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[420] Generally see Edward T. Walker and Christopher M. Rea, "The Political Mobilization of Firms and Industries," *Annual Review of Sociology* 40 (2014): 281–304.

[421] Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* (Yale University Press, 2005). John S. Dryzek and Simon Niemeyer, "Reconciling Pluralism and Consensus as Political Ideals," *American Journal of Political Science* 50, no. 3 (2006): 634–49; William A. Galston, "The Idea of Political Pluralism," *Nomos* 49 (2009): 95–124.

[422] Luigi Graziano, *Lobbying, Pluralism, and Democracy* (Palgrave, 2001).

[423] Patrick Bernhagen, *The Political Power of Business: Structure and Information in Public Policy-Making*

lobbying in this sense anticipates direct and observable contact, expression, and influence of interest holders with policy makers. It disregards non-overt relationships. It does not either give assumption to preeminence of one group (e.g. business) against the others. [424]

- *Corporatism and neo-corporatism*

Neo-corporatism is a more structured theory of interest group theory that sees the relationship between the state and its citizens as an interaction between the state and various other interest groups on a hierarchical organization where the state is located on top of every other interest.[425] It is a theory based on structural functionalism. Under this consideration organizations play a key role to intermediate the interest of their members by interacting with the state. Therefore, while pluralists tend to see interest group relationships as more loose and dispersed, neo-corporist thinkers pay large emphasizes on coordination of interest groups. Generally, these groups can be business group, labor groups, farmer unions etc. Corporatism in its modern sense is said to have emerged in the late 19th and early 20 century and is known to have been well cultivated in authoritarian regimes of the world including Adolf Hitler's Germany, Francisco Franco's Spain and fascist Italy between World Wars I and II.[426]

Neo-corporatism theory therefore argues that as nations differ in their form and economic priorities they also differ in the incentives they provide to various interest groups who often adjust their strategies based on these incentives.[427] In this sense modern corporatist theory is used to explain many of the contemporary coordinated development stories in Germany, Sweden, and South Korea.[428] In this sense neo-corporatist systems differ from liberal economics such as the US, in terms of the significant role played by 'para-public' institutions that serve interest intermediation functions. Due to these, non-state institutions heavily factor in the national political and economic organization of the state. It is argued that states with neo-corporatist systems have governments that are highly constrained due to the fact that many public policy decision making activity is shared with these non-state actors.

- *Elite Theory*

Elite theory describes the power relationship in the society to be based on competitive rivalry of interest holders just like described above under the pluralist schools but differs in the emphasis it gives to the role of networking between agents; elites.[429] While pluralist see

(Routledge, 2008), 25.
[424] Bernhagen, *The Political Power of Business*.
[425] Howard J. Wiarda, *Corporatism and Comparative Politics: The Other Great" Ism"* (Routledge, 2016); Philippe C. Schmitter, "Neo-Corporatism and the State," in *The Political Economy of Corporatism* (Springer, 1985), 32–62; Mancur Olson, "A Theory of the Incentives Facing Political Organizations: Neo-Corporatism and the Hegemonic State," *International Political Science Review* 7, no. 2 (1986): 165–189.
[426] "Interest Group - Factors Shaping Interest Group Systems," Encyclopedia Britannica, accessed August 12, 2018, https://www.britannica.com/topic/interest-group.
[427] Bernhagen, *The Political Power of Business*, 32.
[428] Olson, "A Theory of the Incentives Facing Political Organizations."
[429] "Elite (Elitist) Theory: A Glossary of Political Economy Terms - Dr. Paul M. Johnson," accessed August 12, 2018, http://www.auburn.edu/~johnspm/gloss/elite_theory; Jan Pakulski, "The Weberian Foundations of

difference/conflict of interests among varying business industries, banking vs agriculture for instance, elite theory however gives greater emphasis to situations and tendencies that make business enterprise collide together to form a single voice. In this sense elites in business or other backgrounds of the society will hold powerful voice and direct public policy to their favor since they enjoy grater economic and organizational power compared to the ordinary individual with high cost-to benefit ratio to public policy involvement.

Elite theorists make parallels between networking and interlocking relationship between powerful groups and other factors that facilitate coordination among the group such as family or 'old-school ties' including cultural, civic society and education.[430] This networking ability is what makes various individual stakeholders to form a group cohesion and influence against the natural tendency for groups to compete against each other as argued by Pluralists. Most importantly elite theory gives emphasis to the functionalist, as compared to class based, networking approaches. Elites groups can be organized among sectoral or interest lines and can capture regulatory policy across all branches of the government including the judiciary.

- *The Structural Power theory*

The preceding theories emphasize the organizational and networking ability of certain groups to dominate public policy decision making process. Groups or elites are considered to actively participate in both offensive and defensive positions to protect economic rents. On the other hand, this is also a theory that gives a higher weight to the structural economic power of groups, e.g. owners of capital. Often called 'Structural dependency' theory or 'theory of structural dependence of the state on capital', its underlying assumption resides with the fact that business as capital holders are the key instruments and most important avenue for the state to implement its public policy objectives.[431]

Structural dependency of the state also provides that even in situations where the capitalists group do not out of self-interest actively put pressure on the state machinery, public policy nonetheless would still be in line with their core interest since policy making will anticipate the investment decisions of these interest holders and will be self-restrained. Hence the essence of the theory is that influential business interest groups do not necessarily exert direct control on the state. Rather their investment or disinvestment decisions will effectively direct national

Modern Elite Theory and Democratic Elitism," *Historical Social Research / Historische Sozialforschung* 37, no. 1 (139) (2012): 38–56.

[430] "Elite (Elitist) Theory: A Glossary of Political Economy Terms - Dr. Paul M. Johnson."

[431] Stephen Bell, "The Power of Ideas: The Ideational Shaping of the Structural Power of Business," *International Studies Quarterly* 56, no. 4 (2012): 661–73; Mark A. Smith, "Public Opinion, Elections, and Representation within a Market Economy: Does the Structural Power of Business Undermine Popular Sovereignty?," *American Journal of Political Science* 43, no. 3 (1999): 842–63, https://doi.org/10.2307/2991837. Stephen R. Gill and David Law, "Global Hegemony and the Structural Power of Capital," *International Studies Quarterly* 33, no. 4 (1989): 475–499; Adam Przeworski and Michael Wallerstein, "Structural Dependence of the State on Capital," *American Political Science Review* 82, no. 1 (1988): 11–29.

politics as politicians will equate their interest perhaps due to the revenue or employment generation influence of business.[432]

4.2.2. Countervailing Forces

Even though the potential influence of large business groups in the design of antitrust law and policy is significant, this of course does not mean that large business always get what it wants. Public policy decision makers are always expected to respond to various non business appeals and demands from other stake holders. Accordingly, on the other side of the policy equilibrium lies 'countervailing forces' that influence the final shape of competition law and policy. At the outset theory in this regard is in variance to Stigler's argument that policy making is a process of acquisition of the political process by industry for its benefit.[433] Typical examples are the presence or absence of other factors such as labor and consumer groups, democratic institutions such as free and working media and press and civic institutions etc. that also play a key role.

Adoption and effective implementation of competition law as the preceding sections suggest hinges up on mobilization of key interest holders that are dispersed rather than concentrated groups. While it is relatively easier to see the how specific interest groups organize themselves in support or against a certain public policy measure, it is difficult to identify the effect of dispersed groups. But it does not mean that there are not occasions that these groups have tilted policy making in one or other directions.

- *Consumers as interest group*

As the main beneficiaries of competitive markets with resulting price and choice benefits, consumers hold the primary position of a countervailing force in favor of effective antitrust enforcement. Consumers in general however face higher obstacles to organize themselves and speak in one voice. The direct engagement of consumers with respect to competition policy is highly limited due to collective actions problem that naturally inhibit large groups.[434]

Despite these obstacles, often consumers have surpassed the collective action problem and have established consumer organizations or advocacy groups that aim to protect consumer and individual citizens against corporate and state regulatory abuse. It is also the case that often the state directly or indirectly intervenes to form consumer associations/institutions. The interests at stake could be as diverse as safety, public moral, human rights, false advertising, excessive prices etc. In this sense consumer organizations can be single-issue organizations that advocate for their specific interest or otherwise can also be a general consumer organization.

Consumer organizations also use different instruments and operate under various fora. Consumer groups are known for holding public protest and campaigning events, engage

[432] Clive S. Thomas, *Research Guide to U.S. and International Interest Groups* (Greenwood Publishing Group, 2004), 63.
[433] Stigler, "The Theory of Economic Regulation."
[434] Alice L. Edwards, "Consumer Interest Groups," *The Public Opinion Quarterly* 1, no. 3 (1937): 104–11.

directly in litigation representing group or individual interests against the state or corporate non-consumer bodies. They also indirectly influence the judicial and administrative bodies by submitting *amicus curia* briefs. In addition, consumer organizations and groups participate in lobbying key public decision-making organs expressing their opposition or support for certain public policy. Often consumer groups contribute to policy debates by providing key research and statistical findings that garner popular opinion and support in the direction of their objective.

Most importantly, seen as a collective organization of large number of private individuals that suffer collective action problems, the ultimate mechanism for the ordinary individual consumer to influence public policy is the ballot.[435] Which however also suffers from its own limitations identified bellow, e.g. voter ignorance, bundling of issues, etc.

- *Organized labor as an interest group*

Competition law and policy interacts with labor interests in two spheres. The first, a direct relationship that is well known in the competition law and policy world sees labor interests to be in a conflicting road to competition policy objectives, since the majority of labor laws in the world protect the right of labor to organize itself. Strictly speaking competition policy sees labor unions essentially as nothing but instruments of collusion in the labor market that restrict competition and distort market-based allocation of labor. Indeed, today, this debate seems to be settled. Competition law instruments across the globe provide explicit exemptions to labor in a format that seem to give courtesy to important social policy objectives underlying labor unions.

The second interface has to do with whether labor stands pro or against competition policy reforms in general, other than labor organization in the labor market itself. This is less familiar to popular competition policy debates. Less clear is also the important political economy dynamics of this interaction. The latter has to do with employment and labor market implications of competition law and policy reform. As it has been underlined in the preceding sections, directly or indirectly, competition policy reform and law enforcement will entail distribution of wealth/rent from one group to another. One among the many interests at stake is employment concerns. Labor therefore will have a key role to play in competition law and policy agenda setting.

Interestingly however, labor in general will not have a single and uniform position towards competition law and policy. It is essentially the case that when a segment of labor benefits from results of anticompetitive rents it will organize itself to protect this rent whether such threat comes from trade policy, competition policy or labor policy reforms. On the other hand, labor concentrated in the informal economy or newly developing industries will have opposite interests compared with labor in incumbent industry.[436]

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[435] Andrew Hopkins, Growth of A Consumer Orientation (in) Andrew Hopkins, *Crime Law & Business: The Sociological Sources of Australian Monopoly Law* (Canberra: Australian Institute of Criminology, 1978).
[436] Weymouth, "Competition Politics Interest Groups, Democracy, and Antitrust Reform in Developing Countries."

More importantly the political economy power of labor's influence is dependent on its ability to organize itself in to a viable interest group. Indeed, labor union or trade unions as they are known are typical examples of interest group coalition if not one of the first known.[437] Historical evidence of labor organizations describes handymen and craftsmen organization to provide mutual support, cash or otherwise, for sickness for widows and orphans of members.[438] In fact labor unions predate the Industrial Revolution. Trade unions were initially not a result of the industrial system, rather it was a makeup of artisans.[439]

Historically labor organizations were also likened to guilds. The latter are similar but not identical institutions to the labor/trade unions and were established to control the entry in to the trade of certain craftsmanship that ensured that the business was not over crowded by others. They were engaged in multipurpose functions controlling prices, quality of work, and "were generally about defending the customs and practices of the craft and maintaining control of entry into the craft."[440] Historical labor union organizations and guilds thus closely share the functional characteristics and roles of labor unions emphasized for the purpose of this study.

4.3. Competing Institutions in Competition Law and Policy

From a positive analytical point of view comparative institutional analysis studies decision-making institutions from legal, political, and economic perspective and analyses the institutional behavior and choice between them. It argues that all public policy decision making institutions share a fundamental similarity as they all involve choice among 'imperfect alternatives.'[441] Hence decision makers are better understood when viewed as though they are engaged with choosing the best, or the least imperfect, between them to implement the given public policy goal.

Comparative institutional analysis argues "institutional behavior depends on the dynamics of institutional participation… [and that in turn] …is dependent on the benefits and costs of participation."[442] According to Komesar "these must be the building blocks of any approach to law and public policy."[443] For the purpose of his analysis Komesar broadly classifies the pertinent decision making institutions in to three; the market place, the political process and the judicial organ.

Hence the hypothesis adopted here assumes competition law and policy as the equilibrium result of a non-cooperative game. The natures of the various competing institutions at hand dictate/prescribe the rules of that game. The approach thus primarily and simply takes the

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[437] Avery Leiserson, "Organized Labor as a Pressure Group," *The Annals of the American Academy of Political and Social Science* 274 (1951): 108–17.
[438] W. Hamish. Fraser, *A History of British Trade Unionism, 1700-1998*, British Studies Series (New York: St. Martin's Press, 1999), http://catdir.loc.gov/catdir/toc/hol052/98029187.html.
[439] Fraser.
[440] Fraser.
[441] Komesar, "In Search of a General Approach to Legal Analysis," 1350.
[442] Komesar, *Imperfect Alternatives*, 1997. Also see Komesar et al., *Understanding Global Governance*.
[443] Komesar, "The Logic of the Law and the Essence of Economics."

nature of this institutions as a given and rather attempts to understand their individual and collective implication to competition law and policy.[444] In doing so, one can identify at least four conventional institutions at play in the competition law and policy arena; the market place, the legislative bodies, administrative agencies and finally the courts/adjudicative bodies.

4.3.1. The Market as an Institution

The market place is the ultimate arbiter of demand and supply of economic goods. Key economic decisions are made within the market; such as what to produce, how to produce, how much to produce and the determination of which resources should be allocated to such production. The symmetry of these decisions with demand sets the market price. Therefore, the market in its bare form inherently represents a situation that is free of intervention from the state which could come either in the form of strict central planning of all the input and output decisions, such as the case of command economy, or various other less strict interventions in the form of regulation or as will be discussed latter bellow antitrust.

Laissez-faire economic theory, argues that the market is capable of making the above determination on its own and such free interaction leads to efficiency and maximization of welfare. Such perfectly competitive market brings about both allocative and productive efficiency, both considered to be static efficiencies. Allocative efficiency is a description of how the production process meets the qualities and quantities demanded by consumers while productive efficiency is met when those goods and services are produced at least cost and in a way that minimizes waste. The market is also capable of change, in technological progress and innovation, described as dynamic efficiency.

Perfect competition in the market place is a sum of various interlocking factors working towards the above goals. Among others it requires availability of multiple buyers and sellers with perfect information on the market, due to these each buyer and seller have only minimal influence on the quantity of goods and service supplied in the market, competition between suppliers thus leads to price being set at marginal cost and there is no limitation or barriers to the free entry or exist from the market.

However, the market place pictured above has a number of porous assumptions when compared to its real-world counterpart. To start with suppliers and consumers do not have perfect information on the market. Markets are also prone to various externality problems. Most importantly the market place can be disturbed by monopolistic practices. While production in perfectly competitive markets is essentially bound to be the function of price and the marginal cost of production, the monopolist can take advantage of the available demand elasticity in the market. The same is with respect to oligopolistic market as oligopolistic competition enables oligopolistic firms engage in a mutually beneficial

[444] Manfred Neumann and Jürgen. Weigand, *The International Handbook of Competition* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2004), http://www.books24x7.com/marc.asp?bookid=22390. "Competition policy in this new institutional economics perspective can be seen as a game between lawmakers, administrators, law courts and private actors. All actors in this game are boundedly rational and pursue their own interest."

cooperation to collude and set market prices. Such monopolistic decisions are detrimental to the social welfare function of the market and thus necessitate external intervention by the state.

It is thus under this premises that states intervene in the market place to mend its failures. It can use various array of alternative instruments to do the job ranging from direct participation in the market place to regulatory intervention, competition law and/or a combination of the two. Thus, the states will have to select the institution[s] that it considers best to handle such assignment. Learning from comparative institutional analysis none of them however are perfect at the outset.

4.3.2. The Political and Regulatory Process

Having seen markets are prone to failures this creates opportunities and justifications for the state to intervene in to the day to day functioning of markets. This is basically done by adding artificial incentives, both positive and negative, that changes the normal operations of the market. Such intervention could be derived from various objectives, such as social and market regulation, and could be implemented in various forms. Commonly known instruments can be sector specific regulatory instruments that attempt to manage market failures in natural monopolies by way of entry or price control mechanisms.[445] Social regulatory instruments may also attempt to manage the operation of the market system to serve various social objectives whenever the state considers the market is incapable of attending to these interests on its own. In this sense both economic and social regulation will serve as a substitute to the market for allocating society's scarce economic resources.[446] The regulation of public utilities is a typical case at hand.[447] Various service industries such as rail roads, and utility service providers such as telecommunications, electricity, water and sewerage etc. have been subject to public regulation. The result is to discipline (manage) the performance of these industries in exchange for the price mechanism.

However, regulation does not emanate out of the blue. Rather various agents cause and contribute to the creation regulatory instruments based on their preferences, capacity and most importantly power. These agents are not also single homogeneous groups of society. Preferences and power create conflict of interest between various agents. These agents for instance can be private individuals, business, or social organization and association of these, and the state itself primarily represented by its institutions and bureaucracy. These interests fight to set their preferences or disentangle a system that precedes them.

There are two essential approaches to understanding the political and ideological process working behind regulatory policy. These are public interest and interest group theories.[448] The

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[445] Richard A. Posner, "Natural Monopoly and Its Regulation," *J. Reprints Antitrust L. & Econ.* 9 (1978): 767.
[446] John W. Mayo, "The Evolution of Regulation: Twentieth Century Lessons and Twenty-First Century Opportunities," *Fed. Comm. LJ* 65 (2013): 119.
[447] Charles Franklin Phillips and Robert G. Brown, *The Regulation of Public Utilities: Theory and Practice* (Public utilities reports Arlington, 1993); Michael A. Crew and Paul R. Kleindorfer, *The Economics of Public Utility Regulation* (Springer, 1986).
[448] Stigler, "The Theory of Economic Regulation."Michael Hantke-Domas, "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?," *European Journal of Law and Economics* 15, no. 2 (2003):

latter generally rejects approaches to decision making process that define their agents as "the state" "the government" and bases its fundamental analysis on individual actors. In this sense regulatory policy is built up on by both formal and informal interaction among at least four building blocks of a democratic system. At the outset a legislature is tasked with passing the law that mandates the executive/agency/authority to implement it. In turn the authority establishes a set of enforcement tools that it applies within the scope of mandates it is given. Various other stakeholders and interest groups (business, social groups, labor unions, etc.) might also be given a formal role, such as advisors or stakeholders in decision making. In addition, an informal relationship between these organs is also key to effective enforcement and governance. For instance, while democratic process takes voting process as its key link between voters and their policy choices, political leaders being the link, formal mechanism however could be circumvented as the same process could allow political leaders interfere in the management of agency functions due to pressure from various interest groups. In this sense the formal and informal interaction determine the content, form and scope of a certain policy outcome.

Hence voters are the consumers of the political market place. Mainstream democratic process dictates that voters demand certain policy commitments and laws are to be supplied by the legislative organ of the government. The executive and bureaucratic arms implement the rules contained in the policy and legislative agendas. Voters are considered to be rational in the choices and policy preferences that they show while politicians are motivated by the desire to remain in power. Bureaucrats also show self-interest as they are less interested with downsizing staff and budget considerations and therefore often attempt to maximize their role in the governance hemisphere by introducing subjects that are appealing to politicians and voters.

Therefore, political equilibrium is reached as each actor attempts to maximize its own advantage. This interaction could lead to results that maximize overall welfare of the society, i.e. the public interest or otherwise. In terms of regulatory policy whenever the political dynamics results in outcomes that are economically and socially harmful it can be considered as regulatory failure. Defining such failure of course is not always an objective process. Borrowing from mainstream literature on the political economy theories of government we can identify a mix of at least four factors as causes for such failure – influence by vested interest, voter ignorance, short term motivations and decoupled cost and benefits, bundling of issues. The following paragraphs examine these factors in the context of competition law governance.

- *Vested interests and capture*

Despite the interchangeable nomenclature used; interest group, vested interest, special interest, capture theory, etc., today there is hardly any literature in political science and economic

165–94; Joost Berkhout, "Why Interest Organizations Do What They Do: Assessing the Explanatory Potential of 'Exchange' Approaches," *Interest Groups & Advocacy* 2, no. 2 (June 2013): 227–50, https://doi.org/10.1057/iga.2013.6.

regulation that does not mention the phrase vested interest. Examination of political institutions is not only made in the formal principal-agent relationship but rather takes in to consideration the profound impact of vested interest groups in government. Vested interests are present in every virtue of political process and policy making whether it is health, education, taxation, national security, social policy etc. Theory in this line is also not new. Modern and historical authors such as Bernstein,[449] Olson, Peltzman, Stigler, Lowi,[450] etc. have contributed since early 1950's to the development of the concept. Lowi's The End of Liberalism for instance boldly asserted the death of classic liberalism and has been metamorphosed by interest group liberalism. The later concept was used to indicate the growth in importance of interest group influence in the US democratic process.[451]

In general, the theory describes how political process and political institutions can be disproportionately influenced by a narrow group of political agents against the majority whenever the former can use its powers to capture rent. This includes influence on both legislative as well as institutional organs. Consequently, the theory showed how government action cannot always be assumed to be taken in public interest and perhaps attempted to rationalize why democratic governments might often make decisions that are not in public interest.

Political theory in this line is also long established. An example is Olson, whose contribution to understanding the uneasy relationship between collective policy making process and the private interest of groups and individuals dictates that a small group with concentrated cost or benefits will outperform the majority with diffuse benefits of high organization costs.[452] In competition law and policy context, the gains accruing to certain concentrated groups due to weak competition law enforcement is often larger than the cost incurred by the large consumer group in terms of higher price. Meanwhile the rent generated by the group might be shared with chronically related political leaders of the state, thus explaining why there may be little political opposition to the outcome.

Accordingly, the key to understanding the dynamics of agents and their interaction in affecting economic regulation is to understand the incentives and disincentive that it creates in the respective country's political economy sphere. This means the level of deviation by political decision makers from socially optimal result to create rents for the relevant business is dependent up on the presence or absence of any other alternative.[453] Whenever politicians find it that they are either not capable of or do not have to create economic rents from every sector of the economy at a given time, they might choose only to shelter those sectors that provide promising rents. Or it may be the case that some sectors have disproportionate costs to the political decision maker, compared to its benefits while others might carry niche rents that make them appealing. This is often done either formally, by providing some form of explicit

[449] Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton University Press, 2015).
[450] Mayo, "The Evolution of Regulation."
[451] Mayo.
[452] Olson, *The Logic of Collective Action*; Olson, "A Theory of the Incentives Facing Political Organizations."
[453] Mehta and Evenett, *Politics Triumphs Economics?*, 12.

exception, or exemption from the application of the law, and/or informally by failing to enforce the law.[454]

- *Voter ignorance*

Early contributions in political thought have long established the theory of voter ignorance in democracy and governance theory. The theory owes a large debt to Joseph Schumpeter who by the mid 20th century succinctly exposed the flaws of classical understanding of democratic process which is based on the collective rationality of voters. [455] According to Schumpeter, individuals are collectively ignorant of the collective good.[456] He states "when we move still farther away from the private concerns … into those regions of national and international affairs …, individual volition, command of facts and method of inference soon cease to fulfill the requirements of the classical doctrine."[457] This argument was later supported by various empirical researches, particularly investigating election process in the United States bringing striking evidences of the extent of political ignorance of the American voter.[458]

While the theory has faced its own support and criticism, it has left its own vital contribution to contemporary political economic analysis of governance. Among others voter ignorance explains how voters could be put in a dilemma between lack of knowledge on a political subject matter, the large size of the electorate that diminishes the significance of each vote consequently reducing the chances of any cost incurred to acquire the political knowledge being compensated. This further curtails the individual motivation to cast votes. The implication of this tendency is exhibited well when it is combined to the concept of vested interest theory identified above.

- *Short term motivations and decoupled cost and benefits*

Political leaders and decision makers are also shortsighted as they face short term office and election periods. The long term consequences of political decision making carries less weight in factoring cost and benefits by the decision maker. On the other hand political decision making could also involve a situation whereby the benefits of the policy outcome do not accrue to those who bear the costs of policy implementation. Normally targeted policy measures that benefit specific groups of the society are financed by the general taxpayer. This exhibits one inherent nature of competition law enforcement; the temporal and subjective decoupling of costs and benefits.

- *Bundling of issues*

Another important concept in public choice and political economy of governance is the bundling of various political issues in political process. I.e. issues are often bundled within a political candidate's or Party's agenda and this list include all possible topics in the democratic

[454] Mehta and Evenett, 12.
[455] Schumpeter, *Capitalism, Socialism, and Democracy*.
[456] Schumpeter.
[457] Schumpeter. 261.
[458] Delli Carpini and Keeter, *What Americans Know about Politics and Why It Matters*.

process such as political issues, social economic and other agendas. Thus the standard voter is forced to vote for a political party or candidate rather than single policy issues. In doing so he is making choices between bundles of alternatives than individual policy matters.

4.3.3. Competition Law and Institutions

The use of competition law as an instrument of economic regulation may come as a third facet next to regulation.[459] Meanwhile to a large extent competition law and market regulation share major similarities in the faults they tackle and the objectives and goals they seek to achieve. Both address the problems of monopolies. Similarly there are various occasions were both may deal with non-economic objectives. Therefore, competition law is nothing but another form of economic regulation; perhaps a more general one. [460] While competition authorities do not naturally have regulatory powers, there are however many regulatory authorities that carry competition functions. [461]

At the risk of overgeneralization, the broad understanding is that the market is capable of functioning under perfect competition but whenever it fails, such as in terms of monopolistic practices, competition law will intervene to correct the malaise.[462] In this sense the presence of antitrust institutions is a sign, although not always necessarily the case, of the pre-commitment by the state to the free functioning of the market system. At the same time competition law and policy is also a limit to how far the market is left to function on its own. It aims at ensuring that competition in the marketplace is not restricted by market agents in a way that is detrimental to society. Monopolistic practices and agreements have the potential to cripple competitiveness in the market. Even if entry is possible, dominant positions might persist, due to sunk costs, switching costs, network effects, etc. Within the framework of these objectives antitrust systems across the globe address anticompetitive practices, or the potential for it, under three commonly known rubrics; abuse of dominance, collusive agreements, and merger control.

As discussed above the primary target of antitrust laws is to address market failures that emanate from monopolistic practices. In the antitrust law parallel this is called abuse of dominance or an attempt to monopolize. Simply the rules are designed to tackle the tendency by market agents from using their dominant position from abusing their position. Second, almost all jurisdictions having some form of competition law and policy maintain provisions

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[459] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge: Cambridge University Press, 2015), 36.
[460] Michael A. Crew and Menahem. Spiegel, *Obtaining the Best from Regulation and Competition* (New York, NY: Kluwer Academic Publishers, 2005), http://public.eblib.com/choice/publicfullrecord.aspx?p=225238.
[461] Dunne, *Competition Law and Economic Regulation*, 36.
[462] Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing, 2012), http://www.elgaronline.com/view/9780857936608.xml; Waked, "Antitrust Goals in Developing Countries"; Jonathan B. Baker, "Economics and Politics: Perspectives on the Goals and Future of Antitrust," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 13, 2013), http://papers.ssrn.com/abstract=2200183; Kenneth G. Elzinga, "Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts," *U. Pa. L. Rev.* 125 (1976): 1191; Joshua D. Wright and Douglas H. Ginsburg, "The Goals of Antitrust: Welfare Trumps Choice," *Fordham L. Rev.* 81 (2012): 2405.

directed to addressing collusive practices. This are also known as cartels, anticompetitive agreements etc., and may be aimed at fixing prices, dividing/allocating markets, rigging bids etc. Effect of these agreements is to essentially set prices above marginal cost and close enough to monopoly price. Cartels are therefore a trust or associations between undertakings to control monopoly stake in the market..[463] Third most major competition regimes including most developing countries incorporate procedures for merger review. A review of developing countries' competition enforcement organ experiences show that the bulk of the substantive work carried out by the competition authorities is devoted to addressing mergers and anticompetitive practices prohibited in terms of the Competition Law.[464]

These categories constitute the basic elements to almost all major competition regimes. The US and EU antitrust rules stand out as major examples in this regard. The two jurisdictions have also established their own prototype of antitrust enforcement institutions that have also greatly influenced jurisdictions across the world. The US is distinctive in various counts. First, it established very early a dedicated federal agency that oversees the implementation of the Sherman and Clayton Act.[465] The Federal Trade Commission Act was enacted in 1914 and established the Commission in addition to the role played by the Department of Justice (DOJ).[466] Second, the Sherman Act contained criminal provisions that in addition to administrative and civil measures, empowered the government to penalize anticompetitive practices by way of criminal prosecution.[467] Third, the Clayton Act had long cleared the road for private antitrust suits by enabling damage claims by victims of anticompetitive conduct. Victims can sue for compensation as much as three times the damage including other litigation fees. The Clayton act has been amended and refined while it still maintained the basic facets of substantive and institutional framework.

The EU competition regime has taken significant lesson from its US counterpart. Formal rules dealing with competition issues were included in the Treaty of Rome as far back as 1957.[468] Today the TFEU deals with collusive practices and abuse of dominance under Article 101 and 102 while merger rules are provided by EU Merger Control Regulation.[469] However this does not mean that the EU does not have its own peculiarities. To start with one of the essential reasons why the EU developed its own competition regime was has different thesis from its US counterpart. Primarily, EU members were primarily interested in promoting trade and economic integration within the union. Hence the priority was to tackle discrimination on

[463] OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels adopted on (March 25, 1998)
[464] See Kim Kampel, The Role of South African Competition Law in Supporting SMEs, modified version of "Advancing Entrepreneurship and Small Business", 48th ICSB World Conference , Belfast, Northern Ireland, 2003, 10 Kim Kampel, "The Role of South African Competition Law in Supporting SMEs," *Chapters*, 2007.
[465] The Federal Trade Commission Act (38 Stat. 717)
[466] The Federal Trade Commission Act
[467] The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7)
[468] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957
[469] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24/1, 29.01.2004)

national grounds.[470] This explains why a European competition institution is set up over the competence of national jurisdictions. It may also lead to the conclusion that competition by itself is not an end when it comes to the objectives and goals of the Commission.

Initially the enforcement procedures of the commission were heavily reliant on notification procedures,[471] whereby undertakings can notify the commission of the intent to form their association while the commission may clear it if it is not found to be anticompetitive. I.e. the procedure provides for a procedure enabling business parties to an agreement to seek a declaration from the Commission that their activities do not come within the scope of the competition rules and are therefore 'safe'. This so called, 'negative clearances', can be given in individual cases, provided the parties have notified their agreement to the Commission. With the expansion of the Union such procedures however overstretched the resources of the Commission and it was overhauled with an ex-post procedures and delegation to national competition authorities with the introduction of the modernization Regulation 1/2003 that entered in to force in 2004. There is also no criminal punishment prescribed for violation of the competition rules at the EU level although member countries still maintain such option. The level of private enforcement of competition rules at the EU level is also remotely low compared to the US while this might change with the recent reforms.

Generally antitrust enforcement is a combination of both public and private enforcement. It incorporates public agencies, the courts, and private litigants as instruments of achieving its goals. The mixture of these institutions that have inherent differences of both structural and functional character is what makes institutional choice a center piece of understanding the system. Division of labor between the legislatures, agencies and courts is not always set out clearly and overlaps and conflicts are common events almost across all jurisdictions. While the classical assumption is that the legislative organ is the primary institution that sets the rules, principles and standards to be enforced by the relevant agencies followed by courts which will review and check the agencies performance in accordance with the law, such functional distribution of power however is not always clearly settled.

First, there is only a blurry line in terms of division of authority and function between courts and agencies, both with regulatory and antitrust functions. Secondly, there is also no clearly settled standards that mark the division labor between regulatory and competition agencies. Third, various antitrust jurisdictions maintain institutional landscapes that mix both agency and adjudicative functions within a single institution. In the meantime, each of these antitrust institutions possesses their own limitations. First, there are capacity limitations of the antitrust institutions themselves. These could emanate from both hard (legal) and soft constraints such

[470] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004), 13.
[471] Regulation 17 of 1962 (OJ 13/204, 21.2.1962) Motta, 13.

as institutional and financial capacity, expertise etc.[472] There is also a danger of path dependence to these institutions.[473]

In line with this, public choice theory has well illustrated how the enforcement or bureaucratic arm of the government could also fall pray of influence by special interest groups. Generally, it establishes that public institutions are prone to capture by vested interests. As described in the preceding sections, capture theory is well illustrated both in theory and application literature and it has been extensively used to explain regulatory failures. It described how some interests could be well represented and acquire more influence than others. While this tendency is most visible in regulatory bodies that are sector specific, the capture problem however is not absent even in generalist departments such as competition law enforcement agencies.[474] Posner's early contribution in this regard has well illustrated how US antitrust enforcement organs and the Congress that oversees their budget fall pray "at the behest of corporations, trade associations, and trade unions"[475] He argued; "by taking the part of well-organized economic pressure groups, representing established firms and their employees, rather than of new entrants, foreigners, or the unorganized and largely silent consumer, the FTC commissioners and staff have minimized the friction and work that a genuine dedication to consumer interests would have entailed"[476]

Capture theory gives serious attention to the lack of transparency of decision making by public organs. It emphasizes an underlying information asymmetry that exists between competition agencies and the general public that will create a space for regulatory capture.[477] In the absence of information asymmetry and public awareness of the cost benefits of running an effective competition regime, it will be unlikely for competition agencies to make decisions that are contrary to public welfare. In this sense capture could take various forms and features. If a competition authority does not explain the reasons for why and how it reached its conclusions towards, for instance with respect to some public policy or interest or efficiency justification and hides evidences and arguments brought to it in this regard, it cannot be said that it functioned purely free from capture.

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[472] D. Daniel Sokol, "Antitrust, Institutions, and Merger Control," *George Mason Law Review* 17 (2010 2009): 1071.

[473] Sokol, "Antitrust, Institutions, and Merger Control."

[474] Fred S. McChesney and William F. Shughart, *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (University of Chicago Press, 1995). "Antitrust authorities, no less than regulatory authorities, are vulnerable to capture by the collective interests of groups having the most salient stakes in antitrust law enforcement outcomes." "Antitrust, Regulation and the 'Chicago School,'" Oxford Law Faculty, February 26, 2017, https://www.law.ox.ac.uk/business-law-blog/blog/2017/02/antitrust-regulation-and-%E2%80%9Cchicago-school%E2%80%9D.>

[475] Richard A. Posner, "The Federal Trade Commission," *The University of Chicago Law Review* 37, no. 1 (1969): 47–89, https://doi.org/10.2307/1599016.

[476] Posner, 87.

[477] Roger van den Bergh and Peter D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia nv, 2001), 159.

In the meantime, courts are less vulnerable to capture, mainly because courts are not tied to regulating specific industries.[478] Nonetheless they may still be subject to malfunctions as they may be target of influence from litigation specific institutional pressures.[479] In addition, the same reason that saves courts from serious public choice concerns raises another challenge to their functionality and legitimacy. That is, because of the same reason that courts are not industry specific, they lack the necessary expertise or 'specialty' to handle complex industry specific factual information and analytical capacity. This threatens the quality of decisions that they render and consequently the legitimacy of their decisions.

5. Institutional Choice and Competition Law and Policy

5.1. Goal Choice vs. Institutional Choice

As described above, competition law enforcement can be seen as a problem of supplying a public good.[480] A public good at its roots has a collective action and free rider problem. Similarly, if one concedes to the public choice proposition that agents in political and economic decision making are rational maximizes acting in self-interest; it thus becomes very difficult to explain how collective goods will be supplied. Accordingly, to elevate the problem of supplying public goods some sort of collective supply, with controlling and monitoring mechanism, possibly an authority to control dissenters with some form of sanctioning power is ideal.

In this sense one can argue that anticompetitive practices and of competition law and policy, like most other public policy issues similarly reveal a collective action problem. Efficiency is hardly backed by any salient interest group in the strictest sense of use of the concept. To the extent that one considers market competition works to the good of the economy and consumers but is not supplied by the market itself, it can be assimilated to other variety of public goods. Since market participants acting individually pursue self-maximization and individual benefit anti-competitive practices are consequently to be seen as a free-riding problem. In this sense anticompetitive practices are nothing but one instance of market failure.

Hence competition law comes in to picture as a 'collective mechanism' to address anticompetitive practices. As explained above, today competition law has become a global phenomenon and developing countries are not in the sideline anymore. These countries have spent a great deal of their limited time and resources to prepare competition policy documents, enact competition law legislations and also establish enforcement agencies. The same however cannot be said about the goals of competition law and policy within these respective regimes, the level of enforcement or implementation of the said laws and policies. So what explains the lack of vigorous and effective enforcement? Or when some level of enforcement is seen, why

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[478] See differing opinions; J. Jonas Anderson, "Court Capture," *Boston College Law Review* 59, no. 5 (2018): 1543; "Courts and Regulatory Capture," ResearchGate, accessed December 8, 2018, http://dx.doi.org/10.1017/CBO9781139565875.020. Thomas W. Merrill, "Capture Theory and the Courts: 1967-1983," *Chi.-Kent L. Rev.* 72 (1996): 1967–83.

[479] Justin Hurwitz, "Administrative Antitrust," *Geo. Mason L. Rev.* 21 (2013): 1191.

[480] Jonathan B. Baker, "The Case for Antitrust Enforcement," *The Journal of Economic Perspectives* 17, no. 4 (2003): 27–50.

do we see a great deal of variance between countries? Is there something peculiar about this trend in developing countries?[481]

The above are important questions and there is perhaps no straightforward answer to all of them. In searching for a clue however it is important to see what other determinant variables exist in this context. It is also important to remember that collative action problems in developing countries are not limited to competition law enforcement. Competition law comes hardly to the top of the long lists of vital policy priorities of these states. However, competition law and policy also share similar challenges faced by its distant peers in the public policy portfolio such as taxation, good governance, security, and large group of public welfare issues such as transportation, education, health, etc.

A question and dichotomy that lies at the center of variation among various jurisdictions and a topic of open debate among competition law scholars is the issue of goals.[482] Several authors have emphasized the importance of determining such goals in the first place. According to Bork, "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…"[483]

Fox and Sullivan's historical review of the development of antitrust law and policy in the United states shows that, at the initial stages, antitrust law has hardly involved itself in to economic examination of the market place effects of cartels, agreements, collusions, mergers etc. Public and political perceptions dominated legislative rationales. Concepts such as market share, dominance, and abuse for instance where hardly synthesized. The US Supreme Court's view of a merger case involving *Philadelphia National Bank* and *Girard Bank & Trust Company* is one simple example where the court stated "should the merger proceed, local businesses that needed credit would have one less source of financing. The non-established firms would be at the mercy of the few." In this sense the core of antitrust had largely been distrust in bigness and socio-political rationale of protecting small business and consumer welfare.

With time, the open debate on the goals of competition law seems to have closed on narrower objectives of economic efficiency, at least the most developed jurisdictions.[484] Of particular

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[481] Aydin, "Competition Law & Policy in Developing Countries"; Umut Aydin and Tim Buthe, "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits Success and Limits of Competition Law and Policy in Developing Countries: Introduction," *Law and Contemporary Problems* 79 (2016): 1–36.

[482] Jonathan B. Baker, "Economics and Politics: Perspectives on the Goals and Future of Antitrust Symposium: The Goals of Antitrust," *Fordham Law Review* 81 (2013 2012): 2175–96; First and Waller, "Antitrust's Democracy Deficit Symposium"; Ofer Green, "Integration of Non-Efficiency Objectives in Competition Law" (2008); Azza A. Raslan, "Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?," *World Competition* 39, no. 4 (December 1, 2016): 625–51.

[483] Robert Bork, "The Antitrust Paradox: A Policy at War with Itself," 1993, 50. Daniel Crane, "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy," *Articles*, January 1, 2014, http://repository.law.umich.edu/articles/1550.

[484] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, Mass.: Harvard University Press, 2005).

relevance is the idea, dubbed Chicago School economics view on antitrust law, that antitrust policy should be a technocratic examination of the price system and should be saved from interference of other policy objectives.[485] The Chicagoans' view on antitrust law and policy is not different from their general view on markets and the role of the government. Like any another economic phenomenon they advocate for efficiency in market place and thus a short hand in the extent of government involvement in the market place with respect to competition law and policy identifying pure anticompetitive practices. To the contrary, development policy, industrial policy, and social welfare advocates emphasize the role to be played by state in the market with different tools of economic intervention than antitrust law. There are also those that hold the extreme critical position that is close to socialist ideology on the role of the state putting antitrust law as a tool within the larger context of power struggle between capitalists and laborers.

In all these cases the choice of goals of competition law and policy is directly related to the preference given to one or another institution. The preference is based on one's conjecture towards the ability of one or another institution to settle conflicting objectives. Those that support the inclusion 'non-efficiency' objectives in antitrust are motivated by the assumption that the market, as one of the alternative means of allocation of economic resources in the economy, is not capable of meetings those objectives effectively. Therefore, they prefer the intervention of the state through the political, executive, or judicial bodies to correct such failure.

On the other hand, those that contend the inclusion of 'non-efficiency' considerations within the antitrust framework are primarily concerned with the ability of antitrust institutions to effectively and efficiently settled the eminent conflict between the multiple objectives pursued. While many share the idea that the basic objectives of promoting competition in the market place is to promote efficient use of limited economic resources, it is also used to promote a variety of other 'non-efficacy', 'public policy' objectives. For instance, competition law has been identified as having a role of promoting democratic objectives, promoting small and medium sized enterprises, empowering social groups.[486] The addition of these objectives raises, according to some, concern with respect to the effect of multiplicity of objectives on the efficiency of the system and the capacity of competition agencies and the courts to settle the conflict as it increases the chances of inconsistency with the primary objectives of competition law. For instance, the argument favoring why Article 101 TFEU might incorporate non-welfare objectives is grounded up on two major justifications. The first has to do with the structure of the general EU treaty, the hierarchy of treaty objectives and the particular contextual position of Article 101 within this broad universe of EU body of laws.[487] It goes without saying that unlike its US counterpart the EU's competition rules are part of a

[485] "Antitrust, Regulation and the 'Chicago School.'"

[486] Niels Petersen, "Antitrust Law and the Promotion of Democracy and Economic Growth," *Journal of Competition Law and Economics* 9, no. 3 (2013): 593–636; Eleanor M. Fox, "We Protect Competition, You Protect Competitors," *World Competition* 26 (2003): 149.

[487] GlaxoSmithKline Services Unlimited v Commission of the European Communities, C-501/06 P,(2009)

wider multilateral economic framework.[488] This means interpretation of the various treaty provisions including Article 101 by the courts would generate potential conflict between various policy objectives that are essentially embedded within a single treaty instrument that aim to achieve various other goals including but not limited to market integration, social and security objectives, and competition law and policy. This embeddedness obviously is a balancing exercise which will generate conflicts between the various policy goals.

While the choice of goals of competition law seems to hold a center stage in contemporary debates surrounding competition law and policy, goal choice standing by its own delivers little to our understanding of the outcomes of competition law. Rather goal choice is fundamentally linked to institutional choice. In such occasion various institutions have varying capacity to handle the balancing exercise. Those institutions will have to choose and compromise and resolve conflicts.

As explained above, when courts present themselves as arbiter of the contending and apparent conflicts between various goals, they are implicitly considering themselves as the right institutions to settle the debate compared to other alternative institutions, such as the political organ i.e. the legislator or the competition authorities. Often, they declare the preferences to such institutional choice by way of accepting jurisdictional authority on the matter. On the other hand if the judge relies on a certain exception to a standard in the law that may allocate decision making to another organ, this may be the market, the legislature or an administrative organ, then choice is made to take the forum away from the courts.[489] This conception on comparative institutional analysis can be well illustrated by thoroughly examining the institutional makeup that lies under a more narrow efficiency/consumer welfare objectives of antitrust and vis-à-vis the inclusion of a much broader non-efficiency objective.

Generally, the legacy of Chicago School scholarship on the objectives of competition law is tied to the preference given to the market. According to its pronoun advocate, Bork, "antitrust was originally conceived as a limited intervention in free and private processes for the purpose of keeping these processes free".[490] Similarly, Easterbrook illustrated the choice between deadweight costs in antitrust decision-making process.[491] In the ideal world, antitrust institutions, attempt to get their decisions right. However, no institution is perfect and the possibility of overstepping the boundaries of permissible competitive situations or under inclusion of potential/actual anticompetitive practices is more than a mere possibility. These occasions are commonly expressed as false positives (erroneous findings of liability), referred here as Type I errors, and false negatives (erroneous exemption from liability) referred here

[488] Christopher Townley, "The Goals of Chapter I of the UK's Competition Act 1998," *Yearbook of European Law* 29, no. 1 (2010): 319. Also see Denis Waelbroeck, "Vertical Agreements: 4 Years of Liberalisation by Regulation 2790/99 after 40 Years of Legal (Block) Regulation," *The Evolution of Competition Law in the European Community*, 2006. 100;
[489] Nourse and Shaffer, "Varieties of New Legal Realism," 2009, 107.
[490] Bork, "The Antitrust Paradox," 418.
[491] Easterbrook, "Limits of Antitrust."

as Type II errors.[492] According to Easterbrook where a market is likely is to correct anticompetitive practices without the need to involve the intervention of courts, preference is to be given to the market, i.e. false negatives.[493] Today modern day antitrust is generally concerned in reducing the sum of errors plus transactions costs to minimize total social cost.[494]

In addition Chicago School's preference to the primacy of judicial decision making is essentially tied to its preference and choice of the judiciary as a better suited institution to function within limited discretion.[495] Quite to the contrary other regulatory instruments, e.g. price control, or sometimes the inclusion of non-efficiency considerations, for instance, broadens the matrix of possible objectives and outcomes of the decision making process thereby expanding the scope of discretion and selective intervention. Such approach is well illustrated by examining the role and influence of behavioral economics on regulatory practices across the globe.

Generally behavioral economics is an analysis of how human beings may deviate from economic rationality; the standard assumption in economic theory. While economic theory assumes that human beings, under the constraints of scarcity make rational decisions in ways and means that maximizes their welfare, this is what commonly explained as rational choice mode, behavioral economics studies how people may deviate from making decisions that benefit them and the implications of this to allocation of economic resources.[496] "Behavioral economics is the study of how *observed* human behavior affects the allocation of scarce resources."[497] To the extent that human beings are observed to behave in accordance with standard microeconomic assumptions of utility maximization there would be no need to deviate from the standard model. Obviously, this would be redundant. However human beings deviate from such assumptions and therefore led to a separate field of study.

Accordingly, behavioral economics studies the behavioral anomaly that cause people to act in variance from standard microeconomic analysis.[498] It among others considers the role of psychological, cognitive, and social factors on the economic decisions of human beings and therefore it borrows a great deal of experience from psychology, sociology, anthropology, history etc. The inclusion of tools and methodologies from these neighboring disciplines enhances the explanatory capacity of economics.[499]

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[492] Keith N. Hylton, *Antitrust Law and Economics* (Cheltenham, U.K.; Northampton, Mass.: Edward Elgar, 2010), 3.
[493] Easterbrook, "The Limits of Antitrust." Fred S. McChesney, "EASTERBROOK ON ERRORS," *Journal of Competition Law & Economics* 6, no. 1 (March 1, 2010): 11–31.
[494] Jonathan B. Baker, "Taking the Error Out of Error Cost Analysis: What's Wrong with Antitrust's Right'(2015)," *Antitrust Law Journal* 80 (n.d.): 1–7.
[495] Baker.
[496] David R. Just, *Introduction to Behavioral Economics* (Wiley Global Education, 2013), 1.
[497] Just, 1.
[498] Just, 1.
[499] Colin F. Camerer, *IBehavioral Economics: Past, Present, Futurejin CF Camerer, G. Loewenstein and M. Rabin (Eds.) Advances in Behavioral Economics* (Princeton: University Press, 2004). What Behavioral Economics Tries To Do, "Behavioral Economics: Past, Present, Future," *Advances in Behavioral Economics*, 2011, 1.

One of the major fertile areas for behavioral economics to play role is explaining the causes and rationales from where laws and regulations emanate.[500] In doing so it expanded the role of law and economics theory.[501] Understanding the behavioral anomaly of human beings has implications for law and public policy. Areas such as taxation, environmental law, constitutional and political laws, finance etc. learned a big deal from knowing that humans have limited information processing abilities and therefore are 'boundedly' rational.[502] To the extent that regulation is mean to 'regulate' human behavior, a theory that attempts to better ascertain the actual rather than predicted course of action makes better suited state intervention.[503]

One area of critical importance of behavioral economics for instance has been consumer protection. Standard economic theory does not typically justify consumer protection interventions from the state.[504] The reason being market competition would make sure that consumers are supplied with the necessary information and therefore will be capable of making decisions that maximize their utility. Behavioral economics however argues that consumers are actually poorly informed to be able to maximize their own utility and therefore the market needs the intervention of the state to function, notwithstanding the fairness based consumer protection element.[505] Accordingly governments design consumer protection laws which may among others ban certain forms of market transactions, provides guarantees for consumers and a whole plethora of consumer protection mechanisms that are based on bounded self-interest.[506]

In the meantime, general market intervention objectives by the state and behavioral economics should not be simply assimilated as public intervention to correct market failures, a subject matter which is conceivable even under standard regulatory theory. Rather behavioral economics argues take that even under normal market operations that is free of failures there is a need to do a real comparison of the choice of the individual market participant vis-à-vis a choice he/she would have made under the 'true' preferences that would only be revealed if he/she were free from cognitive biases.[507] Therefore behaviorialists actually and boldly circumvent rational choice not only by underscoring on market failures but also questioning

[500] Do, "Behavioral Economics."
[501] Do.
[502] Cass R. Sunstein eds, *Behavioral Law and Economics, Cambridge University Press*, (2000)
[503] Peter. Diamond and Hannu. Vartiainen, *Behavioral economics and its applications* (Princeton: Princeton University Press ;, 2007).
[504] Tom Baker and Peter Siegelman, "Behavioral Economics and Insurance Law: The Importance of Equilibrium Analysis," 2013. Also published in Eyal Zamir, Doron Teichman, (eds.) The Oxford Handbook of Behavioral Economics and the Law-Oxford University Press (2014) 497
[505] Baker and Siegelman.
[506] Martin Dufwenberg, Peter Diamond Hannu Vartiainen, Behavioral Economics and Its Applications (2007) 135
[507] Joshua D. Wright, "The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other," *Yale LJ* 121 (2011): 2223.

the very basis of the link between individual choice and welfare.[508] By doing so it rejects the notion that individual's way of making choices are actually useful for his/her own welfare.[509]

Behavioral economics therefore develops the tools to understand what the 'true' preferences of the individual are and in guiding the making of public policy and economic regulation it directs the latter in to the difficult road of identifying and correcting preferences. In doing so "an important feature of behavioral economics is that it broadens rather than reduces uncertainty about possible equilibrium outcomes from a given transaction, rule, or business practice."[510] This nature of behavioral economic (i.e. the lack of predictability) makes it particularly malleable and therefore attractive for justifying various public policy interventions.[511]

Therefore, the debate on whether antitrust law should include non-efficiency objectives is more than a debate on goals choice. The debate involves a well elaborated institutional question and institutional choice. Arguments that push for inclusion of consumer protection objective understand the notion of consumer choice as a light-weighted argument and question the relationship between revealed individual preferences and welfare.[512] Hence they advocate for regulatory intervention to dissect choices that are welfare enhancing from those that are 'biased' or 'welfare-reducing' ones.[513]

On the other hand, those that follow the teachings of Bork and narrower consumer welfare objective to antitrust proclaim neoclassical economic theories in line with rational choice economics and strong view of consumer choice. This preference to neoclassical price theory is well entertained by Chicago scholars such as Posner, Ginsburg, Moore etc. One of the main rationales for such preference is the economic complexity antitrust and the fact that the judicial organ is composed of generalist judges. Therefore, aimed at minimizing such complexity and easing the burden of the adjudicative bodies, price theory is put forward as it is minimalist by nature and capable of, relatively speaking, 'mechanical' application. According to Ginsburg and Moore, "[e]ven if economic analysis does not indicate a uniquely correct result in every case, it significantly constrains the decision-making of the courts by narrowing the range of plausible outcomes."[514] Indeed the common law nature of the evolution of antitrust in the US has made sure that it evolved in line with the advocacy of Chicago School, which is attractive for generalist judges than a possible 'behavioral antitrust'.[515]

In doing so the formalist emphasis on goals, perhaps overemphasis, given to the debate between efficiency and equity considerations hides the inherent institutional consideration present behind the debate. The institutional approach has important implications to the study

[508] Wright, 2223.
[509] Wright, 2223.
[510] Wright, 2325.
[511] Wright, 2325.
[512] Wright, 2326.
[513] Wright, 2330.
[514] Wright, 2356.
[515] Wright, 68.

of competition law and policy. First, it means that the choice of goals of competition law is equally determined by the intermediary institutional process. As explained by Komesar, it is institutional choice "that define the terms of legal analysis not the other way around."[516] This reverses the conventional perspective in recent competition law literature that approaches institutional choice only secondary to goal determination. The 2008 ICN, Agency Effectiveness Report stated, "relatively little emphasis has been placed on the institutions and operational considerations through which competition law and policy are implemented."[517] Similarly in commenting on of the pioneer works of Gal, Owen emphasized the need for careful comparative institutional analysis of competition institutions. [518]

5.2. Single vs. Comparative Institutional Analysis

Having addressed and clarified the importance of identifying the relationship between goal choice and institutional choice it is now time to investigate the identities of those institutions. In doing so it is at the outset recognizable that competition law and policy debates often boil down to a battle between adherents of the role of the government in addressing anticompetitive market failure and those that are committed to the opinion that governments are themselves a cause of great failures and thus would do more harm than good to the market if they intervene.

The market failure perspective to antitrust comes from a typical public interest welfare economics perspective. For instance, Leslie states "T[]he Sherman Act, America's foundational antitrust law, began life as a quintessential public interest statute."[519] It was initially aimed at addressing monopolistic and cartelistic tendencies by trusts that exploited that American peasant. Various other authors concede to the fact that significant role was played by farmers and small scaled producers are proved pivotal and was a great pushing force for the politicians to engineer the first antitrust legislation. Hence for those enthusiastic about correcting these market failures that task was to figure out how to define anticompetitive business practices, in the monopolies, collusive agreements, mergers etc. as presented in contemporary competition legislations. On the other side of the debate seat those that are characterized as "experts in pointing out government failures".[520]

The evolution of Chicago scholarship was also supported by public choice scholarship that underlined the fact that government failures are the consequence of interest group influence on the political system. Hence the theory was presented as reaction to and a criticism of public interest-based economy theories of government that saw the state and the government as 'benevolent despot' that should function in nothing but the public interest. Some of its advocates went to the extreme and called for the 'repeal of antitrust' on its entirety.[521]

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[516] Komesar, *Law's Limits*, 34, 175.
[517] International Competition Network (ICN), Agency Effectiveness Report, (April 2008.)
[518] Bruce M. Owen, "Imported Antitrust," *Yale Journal on Regulation* 21, no. 2 (2004): 441–459.
[519] Christopher R. Leslie, "Antitrust Law as Public Interest Law," *UC Irvine L. Rev.* 2 (2012): 887.
[520] Peter Swire, "Finding the Best of the Imperfect Alternatives for Privacy, Health IT, and Cybersecurity," *Wis. L. Rev.*, 2013, 649.
[521] Dominick T. Armentano and Dominick T. Armentano, *Antitrust: The Case for Repeal* (Auburn, Ala.: Mises, 1999).

This dichotomy of choice presented in this format is perhaps what guides the larger debates on the role of competition law and policy in developing countries. The assumption that markets fail and restrictions on participation are prevalent in the market is directly tied to various other social goals and objectives. Participation in the market is a major part of social and economic inclusion, especially in developing countries, and it is therefore relevant for fair and equitable distribution of income in the society.

A close look to both sides of the debate reveals that one of the single most important factor that serves as a dividing line between the two sides is their take on the functional and operational efficiency of their preferred institutions. While one side has a clearly optimist view of the market and its role in efficient allocation of resources, the other side rather seeks state intervention to correct essential market failures. Neil Komesar's perspective on comparative institutional analysis presents guiding principles on realistic and pragmatic assessments of these alternatives. First, his view is underpinned by a fundamental understanding that markets are subject to failure. At the same time he concedes to the fact that there are various occasions where the state's intervention in the market may reduce unnecessary externalities, failures, that the market otherwise is incapable of addressing on its own.

In doing so Komesar offers a balanced and realistic approach to examine how markets and state regulation may really work. He states it is important to look the inside outs of each institutions to understand their success as well limitations in a genuinely comparative approach that is free of predetermined conceptions. "Institutional choice is difficult as well as essential. The choice is always a choice among highly imperfect alternatives. The strengths and weakness of one institution versus another vary from one set of circumstances to another."[522]

Beyond this Coasian analysis of the relationship between markets and public policy intervention, Komesar's unique contribution to competition law and policy may come from his identification and emphasis of the fact that institutional failures of both alternatives, the market one the one hand and public policy regulation on the other, overlap to each other. Therefore, Komesar underlines to the assertion that institutional choice is a difficult choice. His main argument in this regard is that; "the same factors that change the ability of one institution across two situations very often change the ability of its alternative (or alternatives) in the same direction."[523] Hence he argues "institutions move together."[524] Therefore, the best possible path to be adopted perhaps may be one that is compounded with several flaws if the alternatives are worse.[525]

It is this element of being genuinely comparative that makes Komesar's work distinctly relevant for those that study the interaction between the market and the state regulatory bodies. In the contemporary antitrust scholarship concerning developing countries it is not hard to find predetermined institutional conceptions that on one occasion may strongly criticize broadly

[522] Komesar, *Imperfect Alternatives*, 1997, 5.
[523] Komesar, 23.
[524] Komesar, 23.
[525] Komesar, 23.

formulated antitrust legislations and roles of the state, while on another occasion vigorously labor to pin point the failures in untamed market situations that often led to monopolistic and cartelistic practices that harmed large swathes of the society. Komesar's Comparative institutional analysis however dictates on the importance of keeping both opposite ideas in to mind and forging a pragmatic analytical framework that betters encapsulates the realities of the world. This would dictate a careful analysis of market failures in developing countries as well as analyzing the challenges faced within the state itself and the deadweights of its intervention in the market through its political and or antitrust agencies.

In addition to the above, comparative institutional analysis, is well structured and open enough to expand one's analysis beyond the natural boundaries of markets and government intervention through regulation. In his analysis of various examples of market failure Komesar looks at the role of courts as equally important institutional alternatives. Competition law and policy in developing countries does not give prominent importance to courts. The reason is perhaps because competition law in these countries is not typically drafted as an instrument of individual redress than a regulatory alternative. Courts are considered to be "institutionally more expert at judging the facts of an incident than they are at intervening as managers over an extended period of time."[526]

The institutional evolution of antitrust in the United States is however different from the above. Primarily antitrust jurisprudence in the United States evolved as a common law principle. When Congress enacted the Sherman Act the idea was for the courts to give life to the broad and often incomplete provisions of the Act through case law. Chicago's pertinent activism on judicially applicable economic empirics is perhaps eminently tied to its jurisdictional relation with US antitrust regime.

However, as discussed above, courts themselves have comparative disadvantages when it comes to addressing issues that are of particularly technical nature. They are also best when addressing concerns that are limited within the facets of each case rather than being concerned with issues that have a longer term and large horizon implication. Most importantly courts are not active regulatory agents of the state. Functionally they are limited to serving justice only when cases are brought to them. Agents that hold interest in a dispute however may face various difficulties in utilizing the adjudicative bodies; information costs, litigation costs etc. Therefore, as Komesar rightly puts forward "like the transaction-costless market, the frictionless adjudicative process is a fiction."[527]

6. Application of CIL in Competition Law and Policy Literature

This thesis is not the first to employ comparative institutional analysis in discussing competition law enforcement issues. While a handful of authors have directly employed

[526] Swire, "Finding the Best of the Imperfect Alternatives for Privacy, Health IT, and Cybersecurity," 667.
[527] Peter Swire, "Finding the Best of the Imperfect Alternatives for Privacy, Health IT, and Cybersecurity," *Wis. L. Rev.*, 2013, 649.25.

comparative institutional analysis to study institutional considerations, several others have also addressed institutional participation issues.

Undoubtedly falling in the first basket of contributions, Komesar himself has argued that antitrust discourse will benefit from comparative instructional analysis.[528] According to Komesar, all institutional alternatives in competition law enforcement discussion are to be seen as imperfect institutional alternatives.[529] Sokol has similarly employed CIL in analyzing merger regulation in competition law. After examining the design and role of antitrust institution he argued that, several dynamically interacting institutions factor in the enforcement of competition law and in doing so such interactions influence the law's ability to address anticompetitive distortions. "Complexity affects institutional quality, and antitrust institutions respond to this complexity."[530] However, according to Sokol, "in spite of the complex interconnection of institutions, antitrust scholarship has suffered from a lack of more rigorous comparative institutional analysis-one that analyzes the relative strengths and weaknesses of all these institutions to better determine an optimal institutional design".[531]

Lianos has argued, in a paper that is also a key inspiration to this thesis, that the debate on the goals of EU competition law need to "move beyond the goals debate".[532] He argued that the hitherto single institutional analysis of the goals of EU competition law might commit "jurisprudential fallacy" as it "divorces" the discourse on goals from its institutional underpinnings.[533] According to Lianos, none of the competition law scholarship that dealt with the goal of competition law was able to systematically examine the institutional considerations.[534] In doing so he argues against the interpretational approaches and methods used by European Courts as being excessively focused, in abstract, on goals/objectives before giving due focus to institutional considerations.[535]

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[528] Neil Komesar, "Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts Symposium Article," *Loyola University Chicago Law Journal* 41 (2010 2009): 443–54. He argued "any analysis of institutional design in antitrust or anywhere in the analysis of law and public policy must be made in terms of a comparative institutional analysis that takes account of the dynamics of participation of the various interests"

[529] Ibid., 543, "It is the comparison of highly imperfect alternatives, not the listings of the imperfections of any one system, that makes a case for or against antitrust regulation in general, or antitrust regulation with a substantial judicial role, or antitrust regulation disciplined only by the political process in particular. One of these strategies may be the best, but none of them will be anywhere near perfect."

[530] Sokol, "Antitrust, Institutions, and Merger Control," 1055.

[531] Sokol, 1055., Also see D. Daniel Sokol, "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 7, 2007), http://papers.ssrn.com/abstract=988381.

[532] Ioannis Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," CLES Working Paper Series (3/2013), 51. Also published under Ioannis Lianos and Damien Geradin (eds.), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing, 2013)., Ioannis Lianos, *Toward a Bureaucracy-Centered Theory of the Interaction between Competition Law and State Activities* (Stanford University Press, 2014); Ioannis Lianos, "The Interaction between Competition Law and State Action: Looking Inside the Black Box (of the State)," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 1, 2013), https://papers.ssrn.com/abstract=2334208.

[533] Ioannis Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," CLES Working Paper Series (3/2013), 51.

[534] Lianos, 52.

[535] Lianos, 54.

Other authors have also employed interdisciplinary research that incorporates CIL in analyzing competition law and its enforcement landscape.[536] At the same time several authors have also addressed the essential institutional issues discussed even though not directly employing Komesar's CIL approach. Among others, Fox has argued that competition law's institutional design choices in developing countries should be reflective of the context and reality of each jurisdiction.[537] Fox has argued, in a number of occasion, the importance of understanding the role of interest groups and various other political economy considerations as a determining factor to effective competition law enforcement in developing countries.[538] Similarly Kovacic, has provided several perspectives in the same line.[539] Gal has also used the metaphor of 'ecology' to highlight the various 'institutional' considerations that underline effective competition law enforcement in developing countries.[540] Similarly Buthe and Aydin,[541] Weymouth,[542] and various other contributions analyze the role of interest groups and various political economy impediments attributable to legal, institutional political environment of each jurisdiction affecting effective enforcement of competition law in various developing and developed countries. These authors have significantly shaped the recent literature in terms of the need to understand the different institutional contexts and realities present in developing countries, albeit less comprehensively when seen in light of the broad and multidimensional CIL approach proposed by Komesar.

In addition, other authors have also contributed to the institutional discussion by providing theoretical frameworks that closely resemble CIL. In a recent contribution Rodriguez and Menon have provided insight in to how understanding of the transaction costs and institutional participation of key actors in developing countries may enable better understanding of institutional choice considerations involved with efficient utilization of competition law

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[536] Matthew Fagin, Frank Pasquale, and Kim Weatherall, "Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution," *BUJ Sci. & Tech. L.* 8 (2002): 451.Peter C. Carstensen and Paul Olszowka, "Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation," *Wis. L. Rev.*, 1995, 545; Brett Frischmann and Spencer Weber Waller, "Revitalizing Essential Facilities," *Antitrust Law Journal* 75, no. 1 (2008): 1–65.

[537] Fox, "Antitrust and Institutions.", Eleanor M. Fox, "Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries," 2012; Fox, "Economic Development, Poverty and Antitrust." Gal and Fox, "12. Drafting Competition Law for Developing Jurisdictions.", Eleanor M. Fox and M. J. Trebilcock, eds., *The Design of Competition Law Institutions: Global Norms,Local Choices*, First Edition, Law and Global Governance Series (Oxford, United Kingdom: Oxford University Press, 2013). 12/10/18 7:09:00 PM

[538] Fox, "Economic Development, Poverty and Antitrust"; Eleanor M. Fox, "Competition Policy: The Comparative Advantage of Developing Countries Success and Limits of Competition Law and Policy in Developing Countries," *Law and Contemporary Problems* 79 (2016): 69–84.

[539] William E. Kovacic, "Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement during the Reagan Administration Special Issue - Part II: A Retrospective Examination of the Reagan Years," *Antitrust Bulletin* 33 (1988): 467–504.; "Public Choice and the Origins of Antitrust Policy." (In), McChesney and Shughart, *The Causes and Consequences of Antitrust*.

[540] Gal, "The Ecology of Antitrust."

[541] Aydin and Buthe, "Competition Law & Policy in Developing Countries."

[542] Stephen Weymouth, "Essays on the Politics of Regulation," *EScholarship*, January 1, 2010, http://escholarship.org/uc/item/3bg497mt; Stephen J. Weymouth, "Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries," *Democracy, and Antitrust Reform in Developing Countries*, 2009, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434226; Weymouth, "Competition Politics Interest Groups, Democracy, and Antitrust Reform in Developing Countries."

and/or other alternative institutions in these countries.[543] According to the authors "the dual contribution imparted by interest groups and the ability and ease of substitution between private cartels and state-backed protective measures suggest the following hypothesis: the equilibrium level of antitrust enforcement in developing economies is likely to be much more modest than those in developed economies."[544]

Ezrachi similarly argued against the 'purist' analytical conception of competition law and its enforcement institutions on the basis of the argument that the law's inherent dynamic and 'sponge' like characteristics. He argues that such characteristics of the law make it susceptible to broad range of values and considerations. In doing so the domestic legal, social, and economic environment is an integral part of the law. According to Ezrachi, these factors are therefore the reason that explain "the margin for subjective, or at times, arbitrary, decision-making that may be shielded under the perceived structure of the law and the legitimacy of economic analysis"[545]

In general, the contribution of this body of literature is twofold. One, while several institutional analysis and contributions are provided, there is only limited contribution in the context of competition law in developing countries. In large part these contributions are made vis-à-vis antitrust enforcement in the United States and Competition Law enforcement in the European Union. Second, many of the same contributions, as described by Komesar, remain to be analytically incomplete. The role of institutional considerations is highlighted as a key insight in to the nature of competition law enforcement in developing countries, however, often only from a perspective of explaining the limitation of the enforcement landscape. The analysis often lacked a comprehensive assessment of key institutional alternatives.

7. **Chapter Conclusion**

Comparative institutional analysis advocates the idea that single institutionalists have only a partial view of the real world and optimal allocation of institutional responsibility and division of functions is to fail unless its view is refocused to view all institutional alternatives equally before making positive or normative conclusions. A partial view will fail to look institutions that may be already available, possibly better suited or that can be most easily reformed.[546]

Participation based comparative institutional analysis has various implications to the study of law and institutions. By addressing institutions and the internal dynamics within institutional change as an endogenous process, comparative institutional analysis provides a comprehensive analytical framework to understand them. It avoids the exclusive focus on goals, as well as excessive reliance on single institutions, such as courts in the form of rights

[543] A.E. Rodriguez and Ashok Menon, "The Causes of Competition Agency Ineffectiveness in Developing Countries Success and Limits of Competition Law and Policy in Developing Countries," *Law and Contemporary Problems* 79 (2016): 62.
[544] Rodriguez and Menon, 62.
[545] Ezrachi, "Sponge," 75.
[546] D. Daniel Sokol, "Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 7, 2007), http://papers.ssrn.com/abstract=988381.

and duties, which is prescribed by Komesar as 'single institutionalism'. Instead focus is given to what can be described as 'bottom up' approach that gives emphasis to the representation of interests and involvement and experimental learning process to forge institutional theory. [547] In this sense the state and its institutions are envisioned more than independent, rational, and autonomous but rather as a synergy of public and individual forces.[548]

This chapter argued that the above approach is useful to understanding the functioning of competition law and policy. It argues that the basic principles of transaction cost analysis are also applicable to the socio political and legal setting as well. The style of reasoning applied by Coase and others is useful to understand the functioning of the contemporary administrative state. By highlighting Komesar's 'two force model' the chapter also emphasized the importance of understanding majoritarian influence without abandoning the basic and evidenced theory of interest group dynamics espoused by IGTP.

The chapter also argued that comparative institutional analysis can be an appropriate tool to examine competition law and policy in developing countries as it provides the appropriate tools to see through the enforcement landscape beyond the conventional justifications provided. It argues that the formalist emphasis on goals, perhaps overemphasis, given to the debate between efficiency and equity considerations hides the inherent institutional consideration present behind the debate.

Generally, the institutional approach has important implications to the study of competition law and policy. Essentially any legitimacy theory formulation process leads to the need for identification of the relevant players and stakeholders. In doing so the discussion attempted to understand the evolution of competition law and policy in developing countries by analyzing institutional choice and decision-making process. It analyzed the domestic institutional framework and the stakeholder dynamics for competition law design and enforcement as the most crucial element to the overall process.

[547] Nourse and Shaffer, "Varieties of New Legal Realism," 2009, 75.
[548] Nourse and Shaffer, 75.

CHAPTER FIVE

Competition Law and Policy as Intuitional Choice: Evaluation of the Development and Enforcement Experience of Selected Developing Countries:

The Case of Ethiopia and South Africa

1. Introduction

This chapter aims to address two peculiar questions regarding competition law in developing countries. First, what the process of putting in place a credible competition law regime looks like in selected developing countries and second, what is the role of institutional considerations in affecting enforcement effectiveness.

As highlighted in the preceding chapters, this thesis starts from a premise that there must be a more robust positive analysis than simply 'lack of political will' to explain why competition institutions in many developing countries has not-been effective. The two country case studies presented in this chapter provide comparative perspective in a number of important issues under consideration in this thesis. First, as it will be seen bellow, the two countries have different development policy orientations. While both passed through turbulent political, social, and economic landscapes, in large part South Africa led a market based economic policy compared to that of Ethiopia that still has, what may be rightly called, a 'managed' economy.

Second, the two economies also have different variety of competition law, while both instruments have taken lessons of different competition regimes in the world, US, Canada and EU models in particular, both have features what may perhaps be considered unique to each jurisdiction. The case of public interest objectives in South Africa is a typical example. On the other hand, Ethiopia has a competition law instrument that incorporates conventional competition law objectives, consumer protection and unfair trade practices. Understanding how this variance came in to being will help in rationalizing its formative process and any role this may have in terms of its enforcement efficiency.

Third, the two countries are in contrast to each other in terms of the effectiveness of their competition regime. Clearly South Africa has one of the most recognized competition law regimes in the continent, if not among the world. On the other hand, Ethiopia seats in the opposite side of the array. The two jurisdictions perhaps are typical representatives of majority of the developing countries that have either been able to fledge a successful competition regime or those that are lagging behind.

In doing so the following discussion is aimed at providing an insight in to how institutional participation considerations determine the efficacy of competition law instruments in these countries. The aim is to highlight the relevance of comparative institutional analysis by examining the institutional traits of each jurisdiction. It attempts to identify the factors that determine stakeholder participation among alternative decision-making institutions. It examines, within the framework of key research questions raised in this thesis, the relationship between the effectiveness of competition institutions and the variants of the transaction costs and benefits that its main stakeholders face vis-à-vis other institutional alternatives, including political and regulatory institutions.

2. Development of Competition Law and Policy

2.1. South Africa

2.1.1. Institutions, Development Policy and Priorities

South Africa's political and economic history can be characterized as monopolistic capitalism.[549] This started in the early 1650's when the Dutch East India Company established its first presence in Cape Town.[550] British occupation of the Cape region came 1795, followed by a second occupation, where Britain accepted the independence of the colony as a self-governing territory – the South African Republic.[551] Between 1940's to1994 South Africa's history was darkened by the unpopular Apartheid regime.[552] The Apartheid government laid down policies that put racial divide to one of its highest priorities. White supremacist economic and power relations and excessive state intervention in the market were its main characteristics. The majority black society and other non-white minority groups were excluded from participating in the political environment. This led to massive imbalance of economic and social development among white and non-white communities, including in infrastructure building, education, and social development.

For the large part of the 20th century South Africa's economy was structured around its most profiting extractive industry sector.[553] Even when the country saw a boom in manufacturing sector in the second half of the century it was structured to serve the mining industry. The unpopular apartheid government did little to transform this economy. On the contrary it was dedicated to satisfy the quest for cheap labor, protection from competition, and unlimited

[549] Duncan Innes, "Aspects in Monopoly Capitalism in South Africa," Working Paper, September 1983, http://wiredspace.wits.ac.za/handle/10539/8784.
[550] "The Cape of Good Hope Under the Dutch East India Company 1652-1795 | History Today," accessed August 12, 2018, https://www.historytoday.com/cr-boxer/cape-good-hope-under-dutch-east-india-company-1652-1795.
[551] David Welsh, *The Rise and Fall of Apartheid* (University of Virginia Press Charlottesville, 2009).
[552] Daniel Patrick Hammett, "Rethinking the Rise and Fall of Apartheid," *Africa: The Journal of the International African Institute* 76, no. 2 (2006): 292–294; Welsh, *The Rise and Fall of Apartheid*; Adrian Guelke, *Rethinking the Rise and Fall of Apartheid: South Africa and World Politics* (Palgrave Macmillan, 2004).
[553] Ben Fine and Zavareh Rustomjee, *The Political Economy of South Africa: From Minerals-Energy Complex to Industrialisation* (C. Hurst & Co. Publishers, 1996); K. Coetzee, R. Daniel, and S. Woolfrey, "An Overview of the Political Economy of South Africa," in *Workshop Proceedings. Grenoble École de Management*, 2012, 5–6.

supply of land. The apartheid government supplied cheap labor by building a state-backed discrimination between white and blacks and other ethnic based divisions both at work place and on social life.[554] Excessive tariff protection created safe havens for the inefficient extractive industry by creating an artificial monopoly in South Africa and beyond in the region. White owned farms were supplied with free land, state subsidies and 'protection from African competition'.[555] The latter being the impoverished black farmers who might compete with white farmers.[556]

The apartheid government was also a heavy interventionist and a direct participant in the market.[557] It owned various industries in chemical and steel manufacturing, fertilizer, and energy and the more obvious, armaments. Between 1970 and 1985 the state operated more than 40 percent of the economy.[558] Hence between the dominance of the extractive industry, the grant of monopoly concessions and the excessive role played by the state in the market, at the wake of political transition in 1994, South Africa had one of the most concentrated economies not only in the continent but also in the world.

The apartheid government had significant presence in the market with the aim of advancing industrialization through either state-owned corporations or support to the private sector. Despite its resonance to industrial policy experimentation in East Asia, such as Korea, South Africa's state-business relationship was different in a way that it was not only an economic program but also systematically used to serve apartheid's exploitative social policy objectives. In this sense South Africa's economy in the second half the 20th century was characterized as state and "personal capitalism."[559]

The legacy of apartheid era left highly concentrated corporate ownership and structure in South African Economy. In the aftermath of South Africa's economic transition, six major conglomerate companies, including the most popular Anglo American Corp, controlled the majority of non-state economic activity in the country.[560] Initially, the mining sector was highly concentrated and gradually it laid its own shadow in the manufacturing sectors that are directly or indirectly attached to it, such as metallic industry and chemical processing and of course later it casted its shadow on the financial sector.[561] Not only the large part of South

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[554] Daryl. Glaser, *Politics and Society in South Africa: A Critical Introduction*, 1 online resource (xviii, 278 pages) : maps. vols., Sage Politics Texts (London ; Sage Publications, 2001).
[555] Daryl. Glaser, *Politics and Society in South Africa: A Critical Introduction*, 1 online resource (xviii, 278 pages) : maps. vols., Sage Politics Texts (London ; Sage Publications, 2001).
[556] Glaser.
[557] Christopher Lingle, "The Political Economy of Apartheid: A Public Choice Analysis," *Anuari de La Societat Catalana d'Economia*, 1991, 32–41.
[558] "South Africa - Role of the Government in the Economy," accessed August 12, 2018, http://countrystudies.us/south-africa/63.htm.
[559] Neo Chabane et al., "10 Year Review: Industrial Structure and Competition Policy," *Report Prepared for The*, 2003, http://www.sarpn.org/documents/d0000875/docs/10yerReviewIndustrialStructure&CompetitionPolicy.pdf.
"Personal capitalism" is used to describe how the prominence of few families in the political and economic hemisphere.
[560] Chabane et al.
[561] Chabane et al.

African economy was dominated and controlled by a small number of conglomerate corporations, but these were also owned by a handful of families.[562]

South Africa's political landscape made a sudden U-turn beginning September 1987 when President F.W. de Klerk was elected State President.[563] Immediately after taking office, De Klerk made serious reforms in South Africa's national political landscape, such as the affirmation of the right to demonstrate, and by February 1990 the unbanning of the African National Congress (ANC) and a number of other political organizations that played key role in the underground political movement during the apartheid years. [564]

To a certain extent the political reform in South Africa was not fully accidental as it influenced by a change in the international political dynamics of the time, mainly the end of Cold War and the disintegration of the Soviet Union. This had important implications for South Africa's internal political and economic landscape as the pro-black and democratic groups such as the ANC and South African Communist Party (SACP) were primarily leftist groups. With the advent of change in global politics it seemed that the Apartheid government was assured that the future state of South Africa's political and economic transformation will not be as radical as it would have been had communism maintained its global prominence.[565] At the same time the collapse of the Soviet Union and its retreat from interventionist stance significantly decreased the military significance of ANC and other political oppositions in South Africa. The sum of these two factors scaled the balance of forces in South Africa politics in comparable footing and consequently laid the ground for negotiation.

The core of the transition from apartheid government to a democratic South African State was the interim constitution negotiated both formally and informally between key the incumbent

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[562] A good and well-illustrated example in this regard is the beer monopoly. Just before the end of the apartheid regime, South African Breweries (SAB) had a complete monopoly, 98 percent share of the beer market in South Africa. In the comfort of its monopoly SAB not only invested in its beer market but also in hotels, bottling, winery, supermarket and distribution chains, and other untraditional sectors for a beer maker such as shoe and furniture factories. Indeed while SAB has been a subject of review under the Competition Board in 1982, and even though the Board criticized SAB's acquisition of its only other competitor, Inter-Continental Breweries (ICB), there was little it can do to dismantle the monopoly. See Beer Monopoly <http://www.beermonopoly.net/reports_jun09.htm > visited September 2015.

[563] Steven Friedman et al., *The Small Miracle: South Africa's Negotiated Settlement* (Ravan Pressof South Africa, 1992); Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (WW Norton & Company, 1997).

[564] Indeed the highlight of this change was the release of Nelson Mandela, who is to be the country's first black president in 1994. Guelke, *Rethinking the Rise and Fall of Apartheid*, 157.Saul Dubow, *The African National Congress* (Sutton Publishing, 2000); Johannes Rantete, *The African National Congress and the Negotiated Settlement in South Africa* (Van Schaik Publishers, 1998).

[565] Guelke, *Rethinking the Rise and Fall of Apartheid*, 157. The historical importance of these episodes has been reiterated by De Klerck himself; "The first few months of my presidency coincided with the disintegration of Communism in Eastern Europe which reached its historic climax with the fall of the Berlin Wall in November 1989. Within the scope of a few months, one of the our main strategic concerns for decades – the Soviet Union's role in southern Africa and its strong influence on the ANC and the SACP – had all but disappeared." Guelke, 157.

government and its National Party (NP) and ANC.[566] These negotiations lasted for a period of more than five years, mainly in between 1989 to 1994, amid popular movement and mass revolutions led by ANC. While the ANC had gathered significant political support during these years and thus has achieved higher bargaining leverage, it still had to concede to important policy demands from its NP counterparts. In particular, key constitutional liberties that will have serious implications to the shape of South Africa's incoming socio-economic policy, such as the protection of private property, were laid down in the interim constitution.[567]

The key economic and market policies of democratic South African State were put in place in this period. Months before his release from prison, Nelson Mandela made a clear and bold statement on the need to nationalization and public ownership of important natural resource and financial industry in South Africa. He even went out to say that it is inconceivable that ANC will modify its stance on this issue.[568] This had the impact of demoralizing those that hoped for a democratic free enterprise that protects individual rights to own and exploit their own private property.

Hence, in the aftermaths of political change in South Africa, there were two key objectives that the ANC government and its allies, e.g. labor unions, undeniably wanted to change. First, on pure efficiency considerations, South Africa had a highly distorted market. There were several anticompetitive market practices in the economy. Monopolies, most supported by the apartheid government, controlled not only the extractive industry but also other basic consumer goods industries. Second, the ANC government economic policy had bigger distributional objectives and the role of the South African market to perfect these objectives by its own was, at least on the eyes of ANC leadership, limited. For the most part of the 20th century South Africa's economy was monopolized by a handful of conglomerate companies that have the capability to exploit the Southern African markets that were distant from most industrialized neighbors and foreign competition was minimal.

Hence ANC had already in its 1955 Freedom Charter indicated its intention to substitute the market with state ownership.[569] Until the late 1980's ANC held on to the idea of the state

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[566] Constitution of the Republic of South Africa Act 200 of 1993. "Constitution of the Republic of South Africa Act 200 of 1993 | South African Government," accessed December 10, 2018, https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993.

[567] COURTNEY JUNG and IAN SHAPIRO, "South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order," *Politics & Society* 23, no. 3 (September 1, 1995): 269–308, https://doi.org/10.1177/0032329295023003002., A. J. Van Der Walt, "Dancing with Codes - Protecting, Developing and Deconstructing Property Rights in a Constitutional State," *South African Law Journal* 118 (2001): 258; Lawrence Hamilton, "Human Needs, Land Reform and the South African Constitution," *Politikon* 33, no. 2 (August 1, 2006): 133–45, https://doi.org/10.1080/02589340600884568.

[568] Patrick Bond, "Elite Transition: From Apartheid to Neoliberalism in South Africa," 2014, 15.

[569] Relevant parts of the Charter states "the mineral wealth...the banks and monopoly industry shall be transferred to the ownership of the people as a whole", Robert Davies, *Nationalisation, Socialisation and the Freedom Charter* (University of York, Centre for Southern African Studies, 1986); Ben Fine, "The Freedom Charter: A Critical Appreciation'," *South African Labour Bulletin* 11, no. 3 (1986); Peter A. Hudson, "The Freedom Charter and Socialist Strategy in South Africa," *Politikon: South African Journal of Political Studies* 13, no. 1 (1986): 75–90; Z. Pallo Jordan, "Socialist Transformation and the Freedom Charter," *African Journal of Political Economy/Revue Africaine d'Economie Politique* 1, no. 1 (1986): 142–161.

having a good grip on the economy and the market while starting 1990's ANC position showed a sudden turn to transforming the South African economy using the market as its primary tool. In doing so, the ANC initiated a movement towards privatizing important state assets that belonged to the apartheid regime. The results of the privatization measures were albeit mixed. First just like its East-European, former Soviet Union, or Latin American counterparts, ANC's privatization steered off-track to grant advantages to key interest groups, mostly ANC technocrats.[570]

It also engaged in various trade agreements, including the task of taking over the role of representing South Africa in the GATT/WTO Uruguay round negotiations with the aim of liberalizing the South African economy. While the aim of the liberalization movement has been to break apart the dominance and concentration of economic power and wealth in the hands of few, the effect of liberalization was limited. According to some major critics of the reform process, liberalization of the economy tended to reinforce the specialization and concentration in key economic sectors. At least in the short run, the liberalization of South Africa's market did not result in declines in the share of these major holdings. Rather trade liberalization heightened concentration in these industries.[571]

Thus, the vast and rapid trade liberalization movement that occurred between 1990 and 1997 has come to a halt as it failed to bring rapid structural changes in South Africa's economy.[572] In fact selective tariffs aimed at protecting strategic industries soon became tools of industrial policy.[573] Indeed the organization of the market showed some changes after 1994 as major players in South Africa's mining and financial industry unbundled their stakes. However, unbundling on its own does not show real change in the concentration of the market. The latter was importantly manifested with the level of concentration and vertical integration. The newly elected ANC government was concerned with the implication of this type of ownership structure on small and medium enterprises that already function on the market or that are potential entrants.[574]

In trying to mitigate these historical distortions, the ANC government had various options in its policy portfolio. Indeed, while its original and early policy agendas involved purely 'socialist attitudes' towards the organization of the market including various redistribution policies, it however changed this stance immediately before coming in to power and the period shortly after that. As the result the importance of competition policy and economic regulation were underpinned.[575]

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[570] Taeko Hoshino, "Big Business and Economic Development: Conglomerates and Economic Groups in Developing Countries and Transition Economies under Globalisation-Edited by Alex E. Fernández Jilberto and Barbara Hogenboom," *The Developing Economies* 46, no. 4 (2008): 460–463.
[571] Chabane et al., "10 Year Review."
[572] Coetzee, Daniel, and Woolfrey, "An Overview of the Political Economy of South Africa," 13.
[573] Coetzee, Daniel, and Woolfrey, 13.
[574] South Africa, Draft Competition Bill (1998) 27
[575] Janine Aron, Brian Kahn, and Geeta Kingdon, *South African Economic Policy under Democracy* (Oxford University Press, 2009), 216.

During the preparatory stages of the new Competition Act the ANC government underlined that its overriding objectives in proposed competition legislation are the promotion competition to promote economic efficiency as well as market access to SMEs.[576] Related with above objectives is the commitment from the state that there is diversification of ownership in the market that gives fair share to member of the black majority. ANC also emphasized on the need to make sure that markets function so much as to increase new employment opportunities.[577] This however does not mean that various other socio-political instruments were disregarded. Indeed, there were very strong political movements that advocated for stronger intervention by the State in the market to correct the malfunctions and distributional imbalances created by the apartheid government.

Meanwhile, when ANC's Reconstruction and Development Program (RDP) was publicized in January 1994 the socio-economic picture that it unveiled was to a certain extent different from one that would implement a hardline redistributive economic and social policies that ANC had been outspoken about since 1950's.[578] Nelson Mandela stated in 1994 that, "in our economic policies, there is not a single reference to things like nationalization, and this is not accidental. There is not a single slogan that will connect us with any Marxist ideology."[579] Yet the RDP still contained left leaning policies. However, the RDP being a result of political compromise, became a document that had different meaning to different sides of the political angle; left, right wing and centrists, and its content was latter interpreted differently by these organs to satisfy the desires of their political constituency.[580]

Subsequently ANC's economic policy revealed a much more 'neoliberal paradigm' when it came up with its government's Growth, Employment and Redistribution Strategy (GEAR) in 1996.[581] It sought an outward looking economic policy with commitment to trade liberalization; including participation in the Uruguay Round trade negotiations of the General Agreement on Tariffs and Trade GATT) which latter become the World Trade Organization (WTO).

There are various accounts to this sudden makeover of ANC economic policy. Some describe it as a personal retreat of key ANC leadership from the party's stance and elite compromise made between ANC leadership and the apartheid government leaders. Others consider this

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[576] South Africa, Draft Competition Bill (1998) 27

[577] South Africa, Draft Competition Bill

[578] Clarence Tshitereke, *The Experience of Economic Redistribution: The Growth, Employment and Redistribution Strategy in South Africa* (Routledge, 2006). "Freedom Charter adopted in Kliptown, June 26, 1955, which reads: The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole; all other industry and trade shall be controlled to assist the well-being of the people."

[579] Tshitereke.

[580] Bond, "Elite Transition," 92–95.

[581] Asghar Adelzadeh, "From the RDP to GEAR: The Gradual Embracing of Neo-Liberalism in Economic Policy," *Transformation*, no. 31 (1996); Jonathan Michie and Vishnu Padayachee, "Three Years after Apartheid: Growth, Employment and Redistribution?," *Cambridge Journal of Economics* 22, no. 5 (September 1, 1998): 623–36, https://doi.org/10.1093/cje/22.5.623.Sagie Narsiah, "Neoliberalism and Privatisation in South Africa," *GeoJournal* 57, no. 1/2 (2002): 29–38.

only the tip of the iceberg and provide a political economy feature that is compounded within structural power dynamics of the time between the dominantly white capitalist group and ANC. There is truth in both explanations. Indeed, until the time ANC came up with the RDP document, the dated 1955 Freedom Character was its only economic policy program. This is not surprising considering the fact that for more than a quarter of a century ANC was a banned organization and run a disorganized guerilla movement inside and outside South Africa. When its key leaders were released and the party was unbanned in 1990 it hardly had an eloquent economic program that not only it can consider as its future development blueprint but also a program that has attuned to a change in the global political and economic dynamics; mainly the end of cold war and the almost global failure of socialism.[582] Hence ANC needed to urgently formulate an economic policy that takes in to consideration both the local and global context.

In doing so it was imperative that the design of a new economic policy was attuned to the interests of both capitalists, i.e. business, and the large disenfranchised black society. For instance, in the interest of satisfying the demands of domestic and foreign capital ANC agreed as a part of the new constitutional settlement to give full independence to South African Reserve Bank (SARB) and constitutional protection of private property.[583] More importantly, in balancing economic demands of these two groups ANC largely followed a bargaining and negotiation approach, via various forums, and most of its key economic pillars adopted after 1996 took in to consideration the socio-economic demands gathered in these forums.[584]

2.1.2. Formation of Competition Law

Even before the advent of the new South African state and the coming in to force of ANC leadership, South Africa has one of the oldest competition regimes in the continent. Already in 1955 it had established its own competition rules, so called Regulation of Monopolistic Conditions Act, which lasted 25 years until it was replaced by apartheid government's Maintenance and Promotion of Competition Act of 1979.[585] From the start this law was made ineffective largely due to the nature of apartheid and the political economic interconnectedness between the state and business conglomerates. Such selective nationalism project advanced by the apartheid government allowed white special interests to have exclusive access and influence on economic and competition policy in the country.[586]

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[582] Tshitereke, *The Experience of Economic Redistribution*, 100.
[583] "Mandate - South African Reserve Bank," accessed December 10, 2018, https://www.resbank.co.za/AboutUs/Mandate/Pages/Mandate-Home.aspx.
[584] Interest groups; Country Studies; South Africa: http://countrystudies.us/south-africa/79.htm "During the 1980s, business owners and management organizations, such as the Afrikaner Trade Institute (Afrikaanse Handelsinstituut--AHI), which had represented Afrikaner commercial interests since the 1940s, were forced to negotiate with black labor leaders for the first time. To adapt to the new labor environment, they established the South African Employers' Consultative Committee on Labour Affairs (SACCOLA) to represent the owners in lobbying and collective bargaining sessions."
[585] The Regulation of Monopolistic Conditions Act, 1955; Maintenance and Promotion of Competition Act 96 of 1979, https://wipolex.wipo.int/en/text/130462
[586] *Eleonora Poli*, *Antitrust Institutions and Policies in the Globalizing Economy* - 145

In addition, Competition Act of 1979 had various substantive and institutional defects. Even though it established a Competition Board, key executive decision-making powers were in the hands of a political organ, the Minister of Trade and Industry. Because of its inherent identity as a representation of key State officials the Board was not expected to make decisions against the large State-owned enterprises during its more than 15 years of existence. According to Torok, the ineffective outcome of South Africa's competition regime was due to at least three major factors. First, the law did not provide clear rules that define prohibited ant-competitive practices. For instance, the lack of *per se* prohibitions made it difficult for the competition board to proceed against what would be basic violation of the law in some other jurisdictions. Second, according to Torok the competition enforcement organs were fully inserted in to the government system and therefore did not enjoy political independence as competition policy was often directed at protecting the economic interests of the small white minority group in the economy.[587]

Hence when ANC first revealed its economic plans for a new democratic government it was hoping to build in South Africa, its plans contained few roles for competition law and policy. By the time it revealed its 1992 Policy Guidelines for a Democratic South Africa, the document made explicit reference to the importance of market led economic reconstruction and development and the importance of a working competition law and policy.[588] Antitrust held a full paragraph of its own on the section of *Democracy and Policy*. [589]

Even though the 1992 Policy Guidelines still contained some wording of the ANC's extreme leftist economic policies such as nationalization of key industries so as to create a 'mixed economy,' it left open the decision on this very important policy position to 'balancing of evidence' that will guide its decision.[590] When ANC came up with its program Reconstruction and Development in 1994,[591] it has outlined ANC's commitment to establish a 'strict antitrust legislation' that will address the apparent excessive concentration and interlocking of corporate management in key mining, industrial and financial sectors in the country.[592]

Thus, after taking office in 1994 the ANC government assigned the Department of Trade and Industry (DTI) to review the country's competition regime in light of its policy priorities.

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[587] Ádám Török, "Competition Policy Reform in South Africa-Towards the Mainstream CP Model for 'Transition'Economies in the Third World" (mimeo, 2005), 10, http://dev3.cepr.org/meets/wkcn/6/6641/papers/Torok.pdf.

[588] Ready to Govern: ANC policy guidelines for a democratic South Africa, <http://www.anc.org.za/show.php?id=227>

[589] See Pradeep S. Mehta, *Evolution of Competition Laws and Their Enforcement: A Political Economy Perspective* (Routledge, 2012), 162. "The concentration of economic power in the hands of a few conglomerates has been detrimental to balanced economic development in South Africa. The ANC is not opposed to large firms as such. However, the ANC will introduce anti-monopoly, anti-trust and mergers policies in accordance with international norms and practices, to curb monopolies, continued domination of the economy by a minority within the white minority and promote greater efficiency in the private sector."

[590] See <http://www.anc.org.za/show.php?id=227> Accessed Sept 2015

[591] White Paper on Reconstruction and Development in 1994 (Notice 1954 Gazette 16085 of 23 November 1994)

[592] The Reconstruction and Development Programme (RDP) <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm>

DTI's first steps were to prepare a Proposed Guidelines for Competition Policy which was published in 1997.[593] The DTI proposals were then submitted to the National Economic Development and Labor Council (NEDLAC) for deliberation and negotiation process between three key stakeholders; the government, labor, and organized business. The NEDLAC forum reached an agreement on its proposed competition act on May 1998 and the draft was opened for public consultation after which it was passed on October 1998 in Parliament.[594]

The process of developing South Africa's new competition legislation reveals the role of interest group participation at its best. Primarily, key ANC leadership has made a fundamental change on its program for South Africa's future economic development agenda from state lead approach to a market-based development. In shaping ANC's economic policy however, each interest group has played its own role.

The most important role in this regard came from organized business. As explained in the preceding chapters, the business interest here is a factor of both costs of applying pressure on the system and the resultant benefits. The primary costs of business interest have to do with information, organization, and costs of applying pressure on the system. In terms of information South African organized business had at least three predetermined advantages. First, during apartheid government's rule, organized business had direct participation in the formation and administration economic policy in South Africa. Not only key business leaders were members of apartheid government governance structure, but they also directly influenced state policy. Therefore, by the time apartheid government was replaced by the new ANC led government, business in South Africa was well aware of the implications of ANC's policies to its interest.

Second, as indicated above, South Africa had one of the most concentrated market participation and ownership structure not only in the continent but also in the world. By mid 1990s, a handful of conglomerates controlled more than 85 of the registered stakes in JSE.[595] This concentration was vital for the largest businesses to organize themselves in to a strong political force. Furthermore, the large business enterprises in South Africa were almost exclusively owned or directed by a handful prominent of white families. The apparent economic divide between large white business and the unorganized black business community that operated small business enterprises was strengthened by the clear ethnical divide between the two. In doing so organized business in South Africa was exclusively ethnic white. Therefore, the ethnic cohesion and concentration of business organization highly minimized the cost of organization for the business lobby. Hence by 1998 there were more than five business association in South Africa, all of them having active role in lobbying activities.

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[593] Evolution of Competition Policy: http://www.compcom.co.za/evolution-of-competition-policy/ . In 1997 DTI released its negotiating document "A Framework for Competition, Competitiveness and Development"

[594] "Evolution of Competition Policy | The Competition Commission of South Africa," accessed August 12, 2018, http://www.compcom.co.za/evolution-of-competition-policy/.

[595] Rafael X. Zahralddin-Aravena, "Development in South Africa and Venture Capital: The Challenges and Opportunities for the Enterprise Fund for Southern Africa," *Berkeley J. Int'l L.* 15 (1997): 78.

To understand what this means in terms of costs to the business side it is important to understand the status-quo during and before 1998. Organized business participated directly in the formation of national economic policy. Beyond the ethnic, family, and congenial affiliation of the apartheid state and business, apartheid government's industrial policy facilitated direct influence of organized business in policy making. Businesses were organized in terms of boards to fix production and distribution volumes and prices. As international movement against apartheid rule in South Africa intensified and boycott movements and sanctions achieved momentum, white and Afrikaner business directly worked with the apartheid government to shelter themselves from the effect of international pressure or whenever possible attempted to circumvent them. Hence their costs of accessing key public policy information and organization was relatively low.

The other major interest group that has put its own mark in shaping South Africa's pre and post-apartheid politics were labor unions**.** To understand the significance of labor in South Africa one needs to understand both its strength in collective action and second its political significance in terms of its ability to mobilize its members to change the political and economy dynamics. Labor's political significance emanates from its ability to disrupt the economic system. Throughout the 20th century South Africa has been dependent in its extractive sector to generate state revenue and foreign earning. Employment in the labor-intensive extractive industry was one of the most important means of job creation for the apartheid government. Hence a paralysis of this sector through various labor resistance movements, such as strikes, labor demonstrations, etc. will be a significant blow to such labor dependent industries. Reactions from the state or employers against labor movement are also a challenging task. Tougher actions against skilled workers, such as in the form of prosecution, police action, expulsion from the work force is a double aged sward, as its blow the sector that it aims to protect is equally significant as skilled workers are hard to replace quickly.[596]

Even though labor unions have a long historical presence in South Africa, before 1980s they operated merely as underground organization as they were not only denied legal recognition, some were explicitly banned by the state.[597] For instance the black labor union organizations were explicitly banned by the apartheid government between 1956 to 1973.[598] A renewed unionism activity grew in the following years with the coming in to being of a number of industrial unions including the launch of Metal and Allied Workers Union (MAWU), Chemical Workers Industrial Union (CWIU) and the Transport and General Workers Union (TGWU) and a Federation of South African Trade Unions (FOSATU).[599]

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[596] Glenn Adler, "Engaging the State and Capital: Labour and the Deepening of Democracy in South Africa," *Law, Democracy & Development* 2, no. 1 (1998): 1–26.

[597] The Industrial Commercial Union (ICU), formed by Cements Kadalie in 1919, was the first real flowering of trade union activity among Black workers in the country -See more at: tinashe, "Congress of South African Trade Unions (COSATU)," Text, South African History Online, December 8, 2011, http://www.sahistory.org.za/topic/congress-south-african-trade-unions-cosatu.

[598] Industrial Conciliation Amendment Act in 1956 to prohibit Africans from joining registered unions. - See more tinashe.

[599] tinashe.

These groups thus started to play prominent economic and political role during the 1970-80's. By 1981 there were more than 29 unions in the country having different objectives, membership and operating in different regions/zones.[600] Federations such as FOSATU, and South African Congress of Trade (SACTU) were also established that helped organize major labor movement. Unionization reached its pick when Congress of South African Trade Unions (COSATU) was established in 1986. COSTAU facilitated the merger of various fragmented unions under the motto "one industry, one union", helped carry out successful worker strikes and held large congresses across South Africa between 1987-1990.

In the post-apartheid era labor unions went through various transformations to deal with socio-economic challenges facing their membership. No longer the 'enemy of the government', COSTAU officiated its relationship with ANC and South African Communist Party, SACP forming a 'Tripartite Alliance'. Therefore, due to its pre-organization advantages and the close alliance established between labor unions and the government, COSTAU held major stakes in ANC leadership, therefore labor was well informed of the economic transition questions of the time including competition policy and was ready to put pressure where and when necessary.[601]

Similarly, both organized business and labor had different cost-benefit ratios in advocating for or challenging competition law in South Africa. First, organized business has much to lose from not participating in the new competition policy making process. The predecessor competition framework laid down under the 1955 Regulation of Monopolistic Conditions Act made it possible for business to exert their influence. Not only the law had limited scope of application, such as the fact that it did not encompass merger regulation, it also did not contain any form of direct prohibition of anticompetitive conduct. The 1979 Act although containing various provisions addressing prohibited anticompetitive conducts, it established a tootles competition body with mere advisory function while the DTI maintained the power on substantive determination.

Even though organized business was not a new comer to competition policy in South Africa, and had already predisposed itself to occasional interaction with the Competition Board, with the advent of new democratic South Africa it has to change its policy preference and tactics. Hence in the aftermath of the political change, organized business had to change its tactic from being protectionist and its attachment to the state machinery to become advocate of market-based economy. Its views on the role of competition law and policy thus suddenly transformed with the change in the government. In doing so it chose the front that is predictably accessible and cheaper to serve its interests.

In terms of benefits, labor's stake of being involved in the competition law and policy drafting process is not as direct as organized business. Labor, unlike organized business, has in principle no specific preference or objections to competition law. While at the outset it has

[600] tinashe.
[601] See COSTAU's submission to the draft Competition Bill. "Submission on the Competition Bill," accessed June 10, 2016, http://www.cosatu.org.za/show.php?ID=778.

had political objections to ANC's diversion of opinion to market led economy, it brought only few agendas to the table.

The other major stakeholders in this regard are - of course - consumers. As the main and direct beneficiaries of competitive markets with resultant price and choice benefits, consumers hold the primary position of a countervailing force in favor of effective antitrust enforcement. Consumers in general however face higher obstacles to organize themselves and speak in one voice. The direct engagement of consumers with respect to competition policy is highly limited due to collective actions problem that face large groups.

At the end of the day it appeared that both political agents, organized business, and labor, had strong incentives to lobby the ANC government to shape the desired competition regime in their favor but had no objections to competition law legislation in principle. Therefore, the preference by each of these agents and their ability to shape policy making determined the final outcome of competition policy. This means the preference to be given to the 'market' to address and fill the gap of policy space between these challenges is dependent up on its strength and weakness. Ideally selection of the market alternative is a selection of social decision making through transactions. These transactions determine several decision points, such as what should be supplied? how much? by whom? and at what price? The market lets individuals to make decisions based on rational preference none of whom are concerned with broad questions of efficient allocation of scarce economic resources, or distribution of wealth in the society. It is this atomistic identity of the market participants that makes a difference between political institutions whose actors, voters, lobbyist, politicians etc., carry a more specific objectives that are quintessential to their character or a determination to achieve a specific aggregate outcome.

The market place is to be understood as a focal point of individual participants coming together. Neoclassical economic theory considers the market as the preferred institution to allocate economic resources and is capable of achieving the most efficient outcome. Meanwhile not all market transactions result in efficient outcome as not all participants function with atomistic behavior simply abiding by the market rules. For instance, while the market is essentially expected to set the amount of goods and services supplied and set prices, individual participants in the market may have the capability due to their size or otherwise to directly affect the market outcomes.[602]

Therefore, when the new ANC government took office it was clear that not all market participants inherited from the apartheid government were created equal. Hence even though the market is theoretically capable of attaining optimal efficiency it has however failed in this case to achieve its goals. This is a good illustration of market failure. It illustrates that market failures are caused by limitations, both private and public, on participation of actors. The market failure construct could have both narrow and broader connotations. First market failure concept can be used on narrow sense when its construct is directly tied to its 'economic'

[602] Komesar, *Imperfect Alternatives*, 1997, 94.

objective of efficient resource allocation.[603] On the other hand the market failure could also carry a much broader objective. Often the market process is relevant and is intimately tied to broad public policy objectives of fairness, distribution of income (among groups of participants in the market or among different market territories etc.), and the creation of opportunities.[604] The ability of the market to achieve these objectives is thus always tested in comparison to other institutional alternatives.

Meanwhile as individuals engage rationally in the market the level of their participation is determined by the cost and benefit of participation. Interestingly, beyond the usual suspects, the cost of participation my also include other factors such as, the refusal by market parties to transact with others due to racial, ethnic or gender differences.[605] These costs could also relate to other dynamic factors such as education and prior exposure to the field, and most importantly prior advantage over individual or family wealth. Accordingly the cost benefit determination of market participation is a result of the sum of all factors that are essential to the market itself as well as individual characteristics, such as education and experience, wealth, ethnicity, sex etc.

This understanding is key to interpret the South African economy and market at the end of the 20th century and the institutional choice of prioritizing the market over and above other 'alternatives' such as strong and prominent role for the state to participate in the market and play both allocative and distributive functions. Even though South Africa had one of the largest economies in the continent, with one of the few well managed and mature financial markets, all these were not sufficient to make sure that markets in South Africa insured equal opportunity to participation by all due to various historical anomalies.[606]

2.1.3. Drafting the Competition Act, the Participation Landscape

A critical part of the 1998 competition act drafting process started when the government, specifically the Department of Trade and Industry, prepared a policy document, Proposed Guidelines for Competition Policy,[607] that is to lay the foundations for a tripartite negotiation involving the government, business and labor. According to David Lewis who at the time was one of the authors of the document, the document contained broad objectives in to the promises of free markets and the role of competition law, as well as, various bits and pieces and sometimes grand aims such as industrial policy, public interest, and black economic empowerment objectives.

The policy document was then submitted to negotiation under the NEDLAC forum. NEDLAC represented a quadripartite policy negotiation body where organized business, labor, the

[603] Komesar, 94.
[604] Komesar, 104.
[605] Komesar, 104.
[606] Indeed, these views have been reflected not only by the black majority, represented by ANC but also the white minority business society.
[607] Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development

government, and some other 'community' interest holders were represented. Even though it has its roots to negotiation forums where organized labor and business discussed labor and work place issues in South Africa during the apartheid government, NEDLAC was officiated as an Act of parliament only in 1994.[608]

Hence, during the negotiation process, organized business came to the negotiation table more as a defender of its interests rather than a demander. However, cornered against various potentially stringent political proposals that would restrict its operational autonomy, it appeared to find it latter that a neutral antitrust regime is in its best interest compared to other political or interventionist alternatives. Thus, in principle business interest groups did not want to have competition legislation at all.[609] Their hands were however tied from officially challenging the government's proposal in its entirety to the extent that antitrust law promotes market competition and punishes anticompetitive conduct.[610] Therefore business representatives in the NEDLAC process focused their attention to advocate for conservative or 'normal', antitrust rules. According to David Lewis, organized business has beforehand foreseen the possibility of it becoming a target of the upcoming competition legislation and was committed to spend resources to make sure it's essential interests are protected in the legislation.[611] Organized business cannot be blamed for bad intentions here. Many in ANC and the popular discussions imagined antitrust as a different animal capable of intervening in the much-debated issue of balancing income and wealth between the white minority group and the larger black majority. Labor's interest in the negotiation was different from its business counterpart in that competition law was not a typical labor instrument and the effects on labor's interests were limited. Within the NEDLAC negotiations its focus was to ensure specific interests of labor within the larger competition framework are protected. In general, labor's primary goal was to make sure that it received as much privileges as possible, either in the form of exemptions or exceptions, on all areas that might have to affect labor interests directly or indirectly. Labor was adamant in making sure that various anticompetitive practices and merger activities did not threaten job security of its members and it wanted special oversight and indication to this effect in the competition legislation.[612] Indeed despite repeated calls made by labor to industrial development, diversification of ownership and promotion of employment, it was also clear to its representatives that competition law can only play a secondary role in this regard.

In the meantime, consumers were not directly represented within NEDLAC. According to David Lewis, "academics, regulators, trade unions and business associations all made submissions at these hearings but I cannot recall a single submission made on behalf of

[608] National Economic, Development and Labour Council Act 35 of 1994
[609] David Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act: A Personal Account* (Auckland Park, South Africa: Jacana Media, 2012), 34.
[610] Lewis, 34.
[611] Lewis, 34.
[612] Lewis, 34.

consumers." [613] Accordingly, consumer interests as such were only fended by labor unions as secondary to their labor interests. This is also only conceivable only because of the historical political economy context of South Africa that the large impoverished black consumer population was also part of the family of disenfranchised labor that worked for South Africa's conglomerate mining and other business ventures.

Various commentators mention the innate affinity from South African labor to seek for any sort of government intervention that will 'discipline' corporate business in South Africa.[614] According to David Lewis, during the NEDLAC negotiations representatives of the labor union were 'intent' to ensure that the competition legislation was toned in manner that is 'sufficiently robust', 'prescriptive' and 'regulatory'. Labor proposed inclusion provisions that will make sure business conglomerates erected during the apartheid era are broken apart when this is in line with the public interest.

To shape the final policy guidelines in their favor both parties played different tactics and provided various justifications for their proposals. Each carried its own arsenal and advantages against the other. Without any doubt there was much more than economic arguments made by labor to make sure its interests in the competition legislation were protected. Labor already had a direct stake in South Africa's political setup. It was not only part of the struggle against apartheid but it also held key posts in the new South African government that was formed with a key coalition between COSTAU and ANC.

Business's strongholds were its exclusive access to business and economic information. It was ready to utilize this advantage to emphasize on the cost of any non-efficiency consideration to be inserted in to the competition legislation that may affect its interests. Furthermore, it argued during the negotiation how the various structural limitations of South African economy do not allow a full-fledged competition regime.[615]

Even more so, organized business had the economic power to persuade the ANC government on the economic consequences of politically motivated intervention in the market including antitrust. ANC was already facing the brunt of sharp decline in investment and its foreign exchange reserves were getting depleted due to uncertainty in the future shape of South Africa's economic policy. What is worse is that in more than few occasions major business organizations have started to leave the South African market and relocate their headquarters elsewhere.[616] This outflow of investment seriously threatened the ANC framework as it sought to keep as much of the country's business operating as before, perhaps even more so as to put the massive and unemployed black youth to work.

To the benefit of organized business, the characteristics of how NEDLAC was organized and run also played its own role. First, because of the nature of the negotiations process, business

[613] David Lewis, Role of Civil Society in Cooperating with National Competition Authorities, INSCOC Workshop Geneva (January 2004)
[614] Lewis, *Thieves at the Dinner Table*, 32.
[615] Lewis, *Thieves at the Dinner Table*.
[616] Lewis.

voice was heard. It gave organized business an opportunity to present 'technical' business and economic information to make its case. Second, compared to its alternatives the NEDLAC process was apolitical. David Lewis quotes one of the representatives of organized business, Stephan Malherbe, describing the forum as 'pleasant' and 'non-political'.[617] Third, even though there were major decisions within the NEDLAC that might originally upset organized business as they went out of the context of what it considered a 'normal' antitrust regime, e.g. the inclusion of public interest exceptions, business representatives were happy that they were 'depoliticized.'[618] Among others, the latter meant that the final shape of competition law enforcement in South Africa and the interpretation of non-efficiency objectives was not given as a prerogative of the political body that organized business may fear it will act opportunistically.

That is, even though organized business is not expected to at first hand advocate for a strong competition law and its enforcement due to its long history of clandestine relationship with the apartheid government, business' interest in effective competition policy gradually shifted to support the latter as it saw the alternative market intervention instruments in the hands of ANC government could become even more draconian. Hence, ironically, it gradually became 'ideologically committed to competition law and the rules necessary to defend it and promote it.'[619]

The last argument brings to attention an important lesson on the interaction between the substantive content or objective of competition law, and the institutional choice. That organized business was at the start opposed to having competition legislation with broad mandates including public policy exceptions that it feared may be exploited by the political organ to its disadvantage.[620] The resulting institution was independent and self-enforcing that can be explained by various attributes. First, one of the key deviations of the new competition regime from its predecessor is the institutional arrangements it aspired to set up to run the business of enforcing the substantive rules of the Act. It seems the ANC led government position on the proposed regime has become liberal from the very beginning as the DTI policy document proposed an independent agency with its own internal functional divisions. The policy guideline clearly indicated ANC's commitment to setup a 'competent' and 'professional' agency that can swiftly respond to anticompetitive market problems. The guidelines stated that the government is committed to take competition enforcement away from criminal investigation and criminal courts that had resulted in a lengthy and protracted dispute under the apartheid regime.

The guideline also envisioned an investigative organ and a competition tribunal whose decision will be subject to only judicial review and free of political interference. One way of achieving the latter was for the guideline to clearly state that the possibility of political interference is curtailed by removing the so called 'ministerial discretion' that existed under

[617] Lewis, 37.
[618] Lewis, 37.
[619] Lewis, 37.
[620] Lewis, 37.

the antimonopoly act of 1979. Thus, during the NEDLAC negotiations, although there was for a short period debates on what the intention of the proposed guideline where on the extent of the independence of the competition organs, the case was settled in a way that the political organs will play no central role on competition law enforcement.

There was more than a single reason why the issue of the role of the minister on the decision of the competition agencies was easily illuminated. First, while organized business understood that it is inevitable that a certain form of competition law is going to be introduced, it was particularly concerned of the role of any political organ in its enforcement and therefore was committed to making sure that the proposed competition regime does not become a political instrument. When coming to NEDLAC negotiations this was one of the top priorities of organized business and its intentions was clear to all sides of the negotiation.[621]

Second, there was a commitment from the side of DTI leadership, in particular Minister Alec Erwin that did not see the wisdom of overseeing each and every competition decision made by competition agencies. The first reason may perhaps be personal. DTI Minister Alec Erwin himself was worried that the competition regime will be politicized.[622] According to David Lewis, the Minster "never hesitated in relinquishing the considerable powers that his predecessors retained over competition decisions."[623] David Lewis argued that this made Alec Erwin stand out compared to its other compatriots in other Ministries. Second, there is an obvious institutional limitation consideration to be worried about for DTI and Minister Alec Erwin. There is a clear understanding of the limitation of how much can DTI take in to be able to efficiently arbiter competition cases, and its social and economic challenges and dilemmas. The later reason stands out more than the opinion of Minister Alec as the DTI and other political organs of ANC were expected to handle public policy exceptions that are to be installed within the new competition law framework. While initial policy proposal from DTI mainly aspired for an independent enforcement organ, it deviated on this position when it comes to the role of the political organs, in particular the DTI, on certain public policy exceptions in merger regulation. [624]

Organized labor gave a strong support for political organs to play higher role. It argued in favor of a mechanism whereby the DTI would be given a discretionary power to review the

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[621] Lewis, 37.
[622] Lewis, 37.
[623] Lewis, 37.
[624] The draft provided; 18. Review power of the Minister:
(1) Within 30 days after notice of a decision by the Competition Tribunal in terms of section 15 or 16, an interested party, by application in the prescribed form, may request the Minister to review that decision, on any of the following public interest grounds -
(a) The effect that the merger will have on -
(i) a particular industrial sector or region;
(ii) employment; or
(iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive.
(b) The ability of national industries to compete in international markets.

rulings of the competition tribunal on all public policy issues related with merger review.[625] It supported its argument by giving examples of various developed country competition regimes that gave a similar form or power to ministerial organs derogating the power of competition enforcement agencies.[626] Labor was also keen to make sure that review and veto powers the Ministry includes employment conditions and at the same time a formal mechanism is created that makes sure labor representatives are informed and be allowed to submit their opinion at a time in which the Ministry is exercising its powers.

Needless to say organized business's view on the matter was to the contrary. However, during the negotiation, labor's influence held strongly against its business counterparts and it resulted in a number of achievements to its delight. First as highly regarded as one of the key priorities of the new government and the competition regime, the proposed Act contained provisions on public interest criteria, including but not limited to black economic empowerment, alongside its merger review provisions.

Second, despite organized business strong resistance to the inclusion of Ministerial review of competition agency's decisions, the first draft and proposal of the Act submitted to the new cabinet indeed contained a provision that would give the DTI rather than the tribunal and the competition appeal court a final say on the interpretation and application of the public interest provisions in the competition act.[627] This provision was only subsequently altered in the cabinet and neither the NEDLAC nor DTI experts representing DTI in the NEDLAC negotiations were aware of why and how such a sudden change of heart from the country's top executive body was made to grant full autonomy to interpret the public interest exceptions in the Act to the competition agencies.[628] David Lewis said; 'neither I nor anyone else to whom I have spoken … is able to recall why it was decided to shift the public interest decision from the minister.'[629]

There are only few outspoken comments on how the decision to grant full autonomy to the competition agencies was made. The clearest articulation is by David Lewis himself who states that this is clearly a decision that involved Alec Erwin's consent and it "possibly followed business lobbying."[630] He states; "I do know that the government team sent a memo to the minister, indicating, probably incorrectly, that there might be constitutional problems involved in the exercise of a ministerial veto over a decision of a quasi-judicial tribunal or when taken by the Competition Appeal Court (because it is a division of the High Court)."[631]

2.2. Ethiopia

[625] Lewis, *Thieves at the Dinner Table*, 34.
[626] Ethiopia "Overview," Text/HTML, World Bank, accessed August 12, 2018, http://www.worldbank.org/en/country/ethiopia/overview Ethiopia.
[627] Lewis, 34.
[628] Lewis, 34.
[629] Lewis, 34.
[630] Lewis, 34.
[631] Lewis, 34.

2.2.1. Institutions, Development Policy and Priorities

Ethiopia is one of the oldest and ancient empires in the World, as old as 3000 years, dating back to the Axumite Empire in the South Red Sea, and has a long history of independent agrarian society in the continent even after the advent of the global colonial movement. Ethiopia's recent past has experienced an abrupt political and economic transition, similar to most of its African peers. Just within the last fifty years or so it transited from 'feudalistic' kingdom, to socialist economy led by a military junta and more recently to revolutionary democracy. Except its brief Italian occupation between 1936-40 it has never been colonized, making its economy somehow different from the rest of the continent that in some way used to exhibit colonial industrial organization until very recently. Other than that, is economy, markets, politics, and governance has almost all the quintessential characters of a typical least developed economy. Its population size figure more than 100 million making it the second largest in Africa with a per capita income of not more than 783 USD.[632] It also has a predominantly informal economy, as much as 60% of its GDP. The formal sector is heavily state dominated.

After the fall of the Derg, socialist regime, Ethiopia undertook economic liberalization in early 1990's that lowered its average tariff levels to 17% and aggressive privatization of state owned enterprises under IMF and World Bank pressure. According to the Human Development Report 2015, Ethiopia ranks 174 out of 188 countries constituting the bottom countries with low human development. Ethiopia has the second largest population within the UN category of least developed countries, appx., only next to Bangladesh. As most LDCs in the continent it has a predominantly agricultural economy. Ethiopia's economy has seen a rapid expansion in the last decade, averaging 11% real GDP growth per year. However, despite positive growth in the last decade, the contribution of industrial manufacturing remains small. Ethiopia's economy is one good example of a so called 'dual economy'; dominated by large subsistence agriculture with minor contribution of the industrial and commercial sectors.

Since the early 2000's Ethiopia adopted various economic development strategies. Recent reform efforts included programs set-out by the Ethiopian government under the Plan for Accelerated and Sustained Development to End Poverty (PASDEP), which was the country's framework for development policies and programs for the period 2005/06 to 2009/10, the Ethiopian Industrial Development Strategy, as well as other sectoral Government strategies. The role of the Government in creating a conducive environment for private sector participation in investment was manifested in the following areas: (i) creation of a public-private partnership forum; (ii) assurance of a stable macro-economic environment; (iii) introduction of a modern and development-supporting financial sector; (iv) provision of a reliable infrastructure; and, (v) provision of institutional support. Its successor, the GTP for

[632] World Bank, "Ethiopia: Overview," Text/HTML, World Bank, n.d., accessed August 12, 2018.

the period 2010/11 to 2014/15 contained the objectives and strategies for sustaining rapid and broad-based economic growth and was based on seven strategic pillars.[633]

Market regulation in Ethiopia has historical roots to the advent of formal legal development in the medieval Ethiopia. The market place in the medieval Ethiopia was subject to oversight and rules both from the state and the strong Ethiopian Orthodox Church that has equal if not more important role in influencing the function of the society including commercial activity.[634] The Church prohibited markets on weekends and Ethiopian holidays.[635] The Fetha Negest, also known as The Law of the Kings, is the oldest compendium of rules and procedures that combined both spiritual and secular rules. The Fetha Negest governed from civil, criminal to church matters and the affairs of the state. Its role in regulating markets and Ethiopian society between the 16th and 19th century was immensely significant. It regulated prices not as the outcome of the market but by divine principles. It provided, that transactions should be made under 'fair' and 'just' prices and prohibited 'fraud' and 'usury'. It directly regulated how market interactions should occur in a passage that outlaws free market competitive bargaining. The code disfavored profit maximization and any attempt of 'over charging' as it considered such practice 'usury' which is punished with segregation.

Ethiopia's economy between the 16th to the mid-20th century passed through an array of barter and primitive market economy. According to Pankrust, "in the view of the subsistence character of the traditional Ethiopian economy, the absence of money and the prohibition of 'unjust' commercial practices, trade tended to be of marginal, or secondary importance."[636] Pankrust reiterates Karl Polanyi's thesis that markets in traditional non-western societies were not primarily run in accordance with market considerations contrary to the 19th century western capitalism. [637]

Ethiopia, more or less, led such a medieval feudal political economy until mid-1930s. A period which also saw the second Ethio-Italian War. Subsistence agriculture was the predominant way of life and the contribution of the formal sector to the economy was very small. In the first half of the 20th century the state did play a large role in modernizing the society. The time of Emperor Hile-Selase is perhaps considered one of the most important breakthroughs of the modern Ethiopian state. In addition to the states massive role in provision of basic education,

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[633] These are (i) sustaining rapid and equitable economic growth, (ii) maintaining agriculture as major source of economic growth; (iii) creating conditions for the industry to play key role in the economy; (iv) enhancing expansion and quality of infrastructure development; (v) enhancing expansion and quality of social development; (vi) building capacity and deepen good governance; and, (vii) promoting gender and youth empowerment and equity.

[634] Richard Pankhurst, "Ethiopia and the Great Transformation," *Aethiopica: International Journal of Ethiopian Studies* 7 (2004): 98.

[635] Fetha Negest "It is forbidden to say to someone who bought [from another] on condition of trial: Cancel the contract you have made [with A], and I will sell it to you at a cheaper price or at the same price he offered to you, and my goods are better than his. It is also forbidden to say to a man who is going out to sell something he owns for profit: Do not sell it, for I will sell it little by little at a higher price. If a buyer, finding a new roll of woolen cloth, is bargaining with the seller about its price, it is improper for him to bring another buyer who offers to buy it at a price lower than what is normally charged at the place of sale, or to buy it [at that price]."

[636] Pankhurst, "Ethiopia and the Great Transformation," 99.

[637] Pankhurst, 111.

health and infrastructure, this period is also known for successful growth of the role of the private sector in the economy. The state also gave serious consideration to facilitate such role by, among others, enacting the country's first Civil and Commercial Codes that serve to this date.[638] This led to a brief flourishing period for business organizations, especially financial markets, which were regulated in line with free market principles.[639]

After the 1974 revolution this budding private sector disappeared as the socialist ideology of the military government envisioned only a limited role and space for the private sector. It transferred land under the slogan 'land for the tiller' from nobles and land lords to the petty farmers that worked on the land owned by their lords; perhaps one of the few popular measures it took in its 17 years rule. Its 1975 Economic Policy of Socialist Ethiopia nationalized all financial institutions, large and medium commercial and industrial firms. It merged almost all financial service providers under the state owned Commercial Bank of Ethiopia, the only remaining ones being two small Development Banks specializing in housing and agriculture sector, and Ethiopian Insurance Corporation. Ethiopia's economy suffered heavily under the strain of bitter civil war in the North and poor political and economic administration.

Ethiopia's economy entered a new advent during the first half of the 1990s after the fall of the socialist government. After a transitional government between 1991 and 1994, the new government took office in 1995 after a new constitution which also saw Ethiopian People's Democratic Front (EPRDF) came out as the leading party formed out of coalition of four major ethnic based political and military alliances. The Constitution also formed an Ethnic based federal state of nine regions.

The new government entered the phase of cautious economic reform program. It abolished quota-based administration and liberalized prices of the agricultural and manufacturing economy and encouraged market based economic development and sought participation of private capital. With the help of foreign aid it laid down massive expenditures to implement and expand health, education, and agricultural extension programs.

In the meantime, international financial institutions (IFIs), i.e. the IMF and WB, urged various types of structural adjustment programs as a condition for their financial and technical support. These programs implemented measures aimed at achieving liberalization of the economy. As a result, tariffs and other trade barriers were reduced.[640] Tariffs that had cliffs as high as 230 percent and strict quantitative restrictions were replaced with tariff levels that averaged around 22 percent. By 2002 the maximum tariff level was set at 35 percent. Most export subsidies have also been lifted, and subsidies on agricultural inputs such as fertilizer were abolished.

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[638] Ethiopia. Commercial Code of the Empire of Ethiopia of 1960. Addis Ababa; Ethiopia., *Civil Code of the Empire of Ethiopia.*, Negarit Gazeta. Gazette Extraordinary ; 19th Year No. 2 ([Addis Ababa]: [publisher not identified], 1960); Rene David, "Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries," *Tul. L. Rev.* 37 (1962): 187.

[639] S. Abay Yimer, "Financial Market Development, Policy and Regulation: The International Experience and Ethiopia's Need for Further Reform," 2011, 1.

[640] As part of the economic reform since 1993, tariffs have been streamlined and substantially reduced (maximum from 230% to 35% and average from 41.6% to 17.5%

Under the guidance of IFIs the country also steered away from import substitution policies and started a vast program of privatization of large number of public enterprises.[641] It reestablished the National Bank of Ethiopia as the sole monetary and regulatory authority (central bank role). It started strict control of monetary policies and started implementing a semi-flexible exchange rate regime. In 1992 the Birr was devalued by more than 142 percent.[642]

2.2.2. Development of Competition Law

Ethiopia first introduced its competition legislation, the Trade Practices Proclamation (TPP) in 2003,[643] which was replaced by two other consecutive revisions in 2010 and 2013. The TPP contained 31 articles within four general parts. Part one contains the general provisions, including the definitions, objectives, and scope of the Proclamation. Part two of the Proclamation contained basic prohibitions on anticompetitive conduct, followed by part three that establishes the Trade Practices Investigation Commission as its sole administrative body. The later came in to force in September 2004.[644] Part four contained miscellaneous provisions mostly related to consumer protection concerns, such as indications of prices on goods, labeling, issuing receipts and administrative measures that constitute part of the sanctions imposed for violation of the rules provided under the Proclamation. This part also contained important provisions that provide powers for the government to regulate prices of basic goods and services and intervention in the distribution of basic goods.

However, the TPP, had various shortcomings. First, the title of the Proclamation 'The Trade Practices' is different from what would be the conventional nomenclature for competition legislations. Indeed, the generic title of the Proclamation is self-explanatory once it is observed that the Proclamation is a composite of broad objectives with multiple roles in the market from typical antitrust provisions to consumer protection and price regulation instruments.

Its objectives, as contained under Article 3, are broadly provided; "to secure fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices," and "to safeguard the interests of consumers through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services."[645] In addition the preambular objective indicates the objectives of the government to regulate prices and guarantee "equitable distribution of certain basic goods and services", where it is necessary to safeguard the public. This bundle of objectives not only created confusion on the objectives of the law but also caused implementation and enforcement challenges.

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[641] Proclamation No. 87/1994, Ethiopian Privatization Agency (EPA), Privatization Proclamation No. 146/1998. Since 1994 more than 300 enterprises were privatized

[642] Stefan Dercon, "Economic Reform, Growth and the Poor: Evidence from Rural Ethiopia," *Journal of Development Economics* 81, no. 1 (2006): 3.

[643] Trade Practices Proclamation or the Proclamation, No 329/2003, Federal Negarit Gazetta, 2003-04-17, Year 9, No. 49, pp. 2152-2159

[644] H. Haroye, "Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law," *Mizan Law Review* 2, no. 1 (January 1, 2008): 47, https://doi.org/10.4314/mlr.v2i1.55619.

[645] See Article 3, Objectives

The high profile of its members and apparently time taking powers and function of the Commission established under the Proclamation led to serious enforcement challenges. According to Article 15(1(a)) the Commission is responsible to investigating alleged anticompetitive practices submitted to it by complaining party. Having made its investigation, at the same time, the Commission is expected to make its own determination on whether or not any of the provision of the Proclamation was violated. This clearly raises many due process questions.

Second due to the extensive content of the Proclamation from conventional competition law provisions under part two, anticompetitive practices, and various other consumer protection and unfair competition provisions, the limited time of the Commission and its members was mostly exploited by typical unfair competition cases. In the not more than 6 years of its operation the Commission entertained mostly cases related to trademark infringement and unfair competition disputes. The Commission investigated 38 cases out of which 24 are unfair competition cases and just five are cases dealing with competition law. The rest are cases of improper jurisdiction, which the Commission rejected right at the beginning.[646]

Meanwhile the decisions of the Commission were not final. According to Article 15 (2) any decision by the commission are subject to approval by the Minister of Trade and Industry who has the power to approve, amend or return the decision back to the Commission for further review. The Minister is the responsible organ that has the power to execute any sanctions based on the recommendation of the Commission.

In addition, the Proclamation did not contain any rules regulating mergers and acquisitions. One can only speculate why such was the case, and it seems the drafters assumed that the economic circumstances of the country at the time did not warrant regulating mergers. This may have to do with industrial development reasons derived from an assumption that the size of firms and the market in the country is too small to consider anticompetitive mergers as a key problem.[647] In addition, it may also has to do with recognition given to the importance of developing institutional capacity that is capable of enforcing the rules. Unlike the rules dealing with abuse of dominance and anticompetitive agreements, rules regulating mergers tend to be readily put to use by many developing countries without necessarily developing the relevant institutional capacity.

The TPP was replaced in 2010 with Trade Practice and Consumers' Protection Proclamation (TPCPP).[648] The TPCPP made a number of significant changes to its predecessor. First, while it has kept the preamble of the predecessor Proclamation, it has replaced the reference to price regulation and distribution of basic goods and services. It excluded from its scope of application price regulation of 'basic goods and services' that are 'subject to decision of the

[646] Asress Adimi Gikay, *Competition Law in Ethiopia* (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2016).
[647] Haroye, "Competition Policies and Laws."
[648] Trade Practice and Consumers' Protection Proclamation (TPCPP), Came in to effect in August 2010.

Council of Ministers.[649] Second, it establishes Trade Practices and Consumers Protection Authority with both investigative and adjudicative powers.[650] Thirdly, for the first time it introduced merger regulation in to the competition regime. Chapter Three of the Proclamation contained provision that mandates the 'Authority' to prohibit merges that are found to "causes or is likely to cause a significant restriction against competition or eliminates competition." [651]

The TPCPP was also a significant lip forward compared to its predecessor in terms of setting essential principles that clarified the appointment procedure of officials of the Authority. One way of ensuring independence and professionalism that is seemingly embraced by the TPCPP is to establish an adjudicative body with judicial powers to receive complaints from both the Commission and private individuals with the powers to impose both administrative and civil sanctions. The Tribunal officially began its work only after three years after the Proclamation became effective in October 2013. A panel of three judges was appointed to oversee all disputes pertaining to anticompetitive practices, unfair trade practices and consumer protection complaints.

Despite its improved substantive and institutional content, the TPCPP still suffered from various limitations. First, confusion between the role of the Authority, Ministry of Trade (and or regional trade bureaus) and ordinary courts stalled the immediate and effective use of the institutional provisions. The Proclamation gave the Ministry or regional trade bureaus the power to conduct investigations and submit their cases to the adjudicative organ established under the Authority. While it seems this is aimed at establishing independence between the investigative and adjudicative organs of the Authority it resulted in an apparent passivity from the Ministry that was ill prepared or motivated to pursue any major investigation. In addition, there appeared to be confusion between the role of the Competition Tribunal and the ordinary judicial bodies, including the Federal Supreme Court. It was unclear whether the tribunal has now an exclusive jurisdiction on matters that are included under the TPCPP since the latter contained rules that dealt with common unfair competition and consumer protection issues that were also part of the Commercial Code.

To clear the confusion on the above matters, the TPCPP was again replaced by the Trade Competition and Consumer Protection Proclamation, (TCCPP).[652] The latter was largely a result of much thoughtful project of the government in partnership with other development partners.[653] In doing so it has many advantages compared to its predecessors.

TCCPP also maintains the Trade Competition and Consumers Protection Authority, herein after Competition Authority, with notable improvements in institutional setup and mandates. However, the TCCPP has still left a number of gaps that were also consistently present in the

[649] Article 4. Scope Of Application (2(c))
[650] Article 31
[651] Chapter Three, Regulation of Merger and Unfair Competition, Article 15. Principle (1)
[652] Trade Competition and Consumer Protection Proclamation, Proclamation No 813/2013
[653] UNCTAD, A Review Of Competition Policy In Ethiopia (New York and Geneva, 2018)

legislations preceding it. First while the TCCPP is a much streamlined instrument compared to its predecessors, it still has maintained broadly worded objectives that remain to this date detached from the conventional focus of antitrust law. Article 3 states the objectives of the Proclamation is, 'to protect the business community from anti-competitive and unfair market practices, and also consumers from misleading market conducts, and to establish a system that is conducive for the promotion of competitive free market.' Article 3(2) and 3(3) provide that the Proclamation is aimed at ensuring consumer safety and accelerating economic development. In doing so there still appears to be reluctance to clearly outline the role of competition law enforcement as such, as well as its relationship with unfair competition and consumer protection principles.

TCCPP has also maintained the general scope of application of its predecessor. Any commercial activity in the territory of Ethiopia or having such effect falls subject to the scope of the Proclamation. The Proclamation leaves no space to exempt any industry or activity run by state owned enterprises. It however leaves space for the Council of Ministers to exempt by regulation activities that it considers are 'vital in facilitating economic development'.[654] No such regulation has been introduced until now. It will be interesting to see how the Council will interpret the mandate it is given under this provision and in particular whether the caveat is of any use to restrain over exploitation of the exemption.

Article 4(3) of the Proclamation provides the most critical element of Part One of the Proclamation. The sub-provision provides that application of the Proclamation "may not affect the applicability of regulatory functions and administrative measures to be undertaken in accordance with other laws."[655] There are variety of ways how this particular provision may be interpreted. First it appears from the outset that the provision is intended to give priority if not supremacy to regulatory instruments over and above that of the competition and consumer protection rules. This is the case if one gives strict connotation to the word 'affect' in a way that would give the meaning that the application of the Proclamation may not interfere with the applicability of other regulatory and administrative measures. Such take on the provision would have serious implications in leaving regulatory loopholes. According to Kibre Moges, 'Ethiopia under the new law has taken a clear position in affirming the precedence of sector-specific policy objectives over the general law of competition.'[656]

On the other hand, the implication of the provision may also be interpreted lightly in the sense that the provision does not actually give any primacy or superiority to regulatory instruments to the extent that the two are not in conflict to each other. Hence as long as they functioned within their own spheres of application there is no need to raise claims of supremacy of one against the other. Thirdly there is also an interesting twist to the apparent confusion on the meaning of the provision. There is apparently some slight variation between the English and

[654] Article 3(2)
[655] Article 3(3)
[656] Kibre Moges Belete, "The State of Competition and the Competition Regime of Ethiopia: Potential Gaps and Enforcement Challenges," *Organization for Social Science Research in Eastern and Southern Africa (OSSREA)*, 2015, 186–87.

Amharic version of the provision and the latter does not have the strong tone that the English version has. Instead of 'regulatory functions' indicated in the English version, a direct translation of the Amharic version provides the meaning 'control'. This seems to be the take of one of the Judges at the Competition Tribunal.[657] According to him these control measure may be the provision of the criminal code and other laws that provide similar or additional controls on anticompetitive practices. In this sense the only rational behind the provision will be to provide a clarification that application of the provisions of the Proclamation are not exclusive to application of other 'control measures'.

There are multiple reasons why the relationship between the competition law provisions prescribed in this Proclamation and other regulatory instruments should not be exclusive to each other. Parallel application of both competition law and regulatory instruments is not only possible but perhaps also necessary. One particular reason has to do with the fact that competition or antitrust law operates often in ex post. Essentially there are only few restrictions on business prescribing on how they should operate in the market. Businesses face the risk of punishment only if their conduct runs foul to the prescribed prohibitions, generally prohibitions pertaining to anticompetitive conduct.

The substantive content of TCCPP is also largely identical to its predecessor. Part Two contains provisions that prohibit anticompetitive trade practices as well as provisions pertaining to the regulation of mergers. Article 5 contains the rules regarding abuse of market dominance. Sub article (1) provides the principal prohibition followed by sub article (2) that provides the type of measures considered to be abusive.[658] The list is not exhaustive and the Council of Ministers is empowered to include anticompetitive practices similar to the above.[659] In doing so TCCPP departs from its predecessor that granted such authority to the competition agency.

An enterprise is said to be dominant if it is capable of controlling 'prices or other conditions of commercial negotiations or eliminate or utterly restrain competition'[660] According to Article 6(2) dominance is to be established after taking in to consideration the enterprise's market share or its 'capacity to set barriers against the entry of others in the market or other factors 'Article 6(2) and (3) define what should be the product and service market and the geographic area of such markets. The Proclamation also leaves a room for the Council of Ministers to determine dominance through a regulation having a specific numerical expression.

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[657] Interview, September 2015

[658] The list includes a.Limiting production, hoarding or diverting, preventing or withholding goods from being sold in the regular channels of trade; b.Predatory pricing and 'causing the escalation of the costs of a competitor or preempting inputs or distribution channels'; c. Directly or indirectly imposing unfair selling price or unfair purchase price'; d.Refusal to deal; e. Refusal to provide access to essential facility; f. discrimination on price and other conditions of supply or service; g. tying imposing such restrictions as to where or to whom or in what conditions of quantities or at what prices the goods or services shall be resold or exported';

[659] Article 5(2)(i)

[660] Article 6 (1)(5)

Similarly, the TCCPP has largely maintained the exceptions and efficiency defenses that were indicated in its predecessor. It provides an open ended list of justifiable excuses including; but not limited to 'maintenance of quality and safety of goods and services; 'leveling with prices or benefits offered by a competitor', 'achieving efficiency and competitiveness'. What is peculiar of TCCPP is however the limitation of efficiency defenses to particular set of abusive practices compared to the predecessor legislation that made the exception available for all sorts of activities they may be considered abuse of dominance. According to Article 5(3) the use of the exception is limited to activities as indicated above that fall under the category listed from (e) to (h) above. Article 5(3d) still leaves a room for the Council of Ministers to issue regulations that may be added to the list of exceptions illustrated above.

TCCPP's rules on anticompetitive practices are covered under Article 7. Article 7(1) and (2) prohibits agreements between enterprises in horizontal and vertical relationship if 'it has the effect of preventing or significantly lessening competition'. In both occasions the provisions contain defense of 'technological, efficiency, or other precompetitive gain.' However no such defense is available when such concerted practices involves price fixing, collusive tendering, market divisions and allocations of customers, or in case of vertical agreements it 'involves the setting of minimum resale price'[661]

Section Two of Part One contains the rules regulating mergers. Article 9 provides, "no business person may enter into an agreement or arrangement of merger that causes or is likely to abuse a significant adverse effect on trade competition.'[662] It provides that no such agreement may come in to effect prior to approval by the Authority. The merging parties are required to notify their proposed merger to the authority up on which it will either approve, prohibit or approve the merger subject to conditions.[663] Unlike TPCP that has only left the investigative role of the authority implicit, TCCPP's article 10(2) imposes an explicit duty on the Authority to investigate the merger. Article 10 also empowers the authority with the power to, whenever necessary, require the parties to submit additional information or invite the attendance of any interested third party. There is no prescribed time limit in the Proclamation for the Authority to come up with its determination on the merger.[664] TCCPP reorganized the enforcement organ that was established under its predecessor by adding important improvements that may perhaps arguably be its best contributions. It established the Trade Competition and Consumers Protection Authority. According to Article 27(1) the Authority is established as autonomous organ of the Federal Government, even though sub article (2) of the same provision makes the Authority accountable to the Ministry of Trade. This was also the case in the preceding Proclamations and it seems the Ministry has only overseeing powers, especially when it comes to administrative aspects of the Authority, and may not interfere with

[661] See Article 7(1(b)) and Article 7(2(b))
[662] Article 9(1)
[663] Article 10, Article 11
[664] The draft of TCPP had included a provision for effecting the merger if the Authority did not give response in due time. See Fikremarkos Merso, *Review of the Legal and Institutional Framework for Market Competition in Ethiopia*, 7 (Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectoral Associations, 2009), 70.

the decisions of the Authority. This seems to be the intention of the legislature as it reiterated the independence of the authority under Article 33. The latter stated the authority is to be free from any interference or direction on cases it adjudicates.

TCCPP also adopts a bifurcated agency model. The model empowers the competition enforcement agency to investigate and bring enforcement actions to a specialized competition tribunal.[665] This spread enforcement functions within the investigative and adjudicatory bodies of the Authority including the Appellate Tribunal. The approach is useful to isolate a part of the institution from undue influence and pressure from various interest groups including the political pressure by government agencies. Moreover, the model has also garnered global recognition and therefore there are compelling reasons on the part of the drafters to follow the growing trend.

TCCPP also established two adjudicative bodies. Articles 32, 28 (2) cum 30(9) establish an administrative tribunal, referred to as 'adjudicative benches' of the Authority, with the power of taking administrative measures and penalties on enterprises found to have violated the provisions of the Proclamation. In addition, TCCPP establishes the Trade Competition and Consumers Protection Appellate Tribunal.[666] The tribunal is empowered to hear appeals from the decisions of the authority, such as decisions on merger, and the decisions of the adjudicative benches of the authority.[667] Both the adjudicative benches and the appellate tribunal have three judges one of which will serve as the presiding judge. The authority is mandated to organize the adjudicative benches under the Proclamation and provide secretarial services to the Appellate Tribunal. [668]

In addition to the above the authority also has various functions attached to its consumer protection mandate. Among others it is expected to regularly inform consumers goods banned from consumption enhance consumer awareness on consumer rights, oversee advertisement practices of producers vis-à-vis their compliance with consumer health and safety, protect consumers from unfair trade practices.

2.2.3. The Enforcement Landscape

Without doubt, since 1992, Ethiopia has entered in a new realm of economic liberalization and market reform. However, the result of Ethiopia's economic reform program has been mixed.

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[665] Trebilcock and Iacobucci, "Designing Competition Law Institutions," 2009, 461. Fox and Trebilcock, *The Design of Competition Law Institutions*, 2012.

[666] Article 33

[667] Article 33 (2)

[668] The Authority is designed to have a director general and deputy director general that are appointed by the Prime Minister with recommendation of the Minister of Trade. It will also host investigating officers and prosecutors. Currently the authority has its head office in Addis Ababa, while as indicated by the Proclamation it may also establish branches outside the capital as may be necessary. It is empowered to take appropriate measures to market transparency and raise awareness on the principles contained in the Proclamation. It is empowered to receive merger notifications and decide on their consistency with the relevant provisions contained in the Proclamation. It is also expected to undertake policy research and initiate policy proposals. See Article 29

While the country saw a relative level of openness and various policies that promoted market competition were laid down, these policies did not enjoy the full force of their objectives.

This has to do with, first, the results of the liberalization process were incomplete. Major sectors in the economy were still closed to foreign competition. For instance, the government chose to maintain closed doors and in some cases state ownership against private foreign investment in key economic sectors such as, telecommunication, finance, transportation and logistics, energy, business and legal services, etc. The government also controlled the importing and manufacturing of fire arms and other defence equipment, import of fertilizer and several consumer goods including fuel oil, cigarettes etc.

One of these is the monopoly of the Ethiopian Shipping Lines. The enterprise has the monopoly to provide freight services for goods that are imported from ports where its ships call and others. With only 11 ships it served the remining ports by contracting with other shippers. This give a huge competitive advantage to the shipping enterprise. In doing so, Ethiopia has a very restrictive logistics regime with a complete dominance of the state monopoly in maritime transport and logistics services with almost no private competition.[669] This has added to the more natural set of international trade barriers such as geography and location. [670]

While various explanations were provided as to why such unsatisfactory level of privatization process occurred the most direct one seemed to be the ideological standing of the ruling government. The EPRDF government that is in power for the past 28 years ensured that privatization of SoE's and economic liberalization process as gradual as possible. The late Prime Minister, Meles Zenawi stated, "for the first ten years after we took over, …we were bewildered by the changes. The New World Order was very visible and especially so in this part of the world. The prospect of an independent line appeared very bleak. So, we fought a rearguard action not to privatize too much."[671]

Despite seemingly 'good intentions' of the Ethiopian government, gradualism only meant an incomplete liberalization for the most part of the past 28 years and what was promised as a gradual liberalization did not materialize. Those sectors and industries that were opened for private investment also faced several limitations. Among others, just like the unfortunate incidence of the privatization in Russia and some eastern European countries, the privatization project ended up transferring state monopolies to private ones, often the select few, and did not lead in enhancing efficiency and competition in the market.

In addition, the state's role in the market took a different dynamics with the introduction of party owned business enterprises, 'partystatals'. According to Matfess, '"one means by which

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[669] See Addis Fortune "Freight Forwarders cry foul as ESLE monopoly grows" Capital, Monday, 20 February 2012 <http://www.capitalethiopia.com/index.php?option=com_content&view=article&id=575:freight-forwarders-cry-foul-as-esle-monopoly-grows-&catid=35:capital&Itemid=27>

[670] Jean-Fran ois Arvis, Ga l Raballand, and Jean-Fran ois Marteau, *The Cost of Being Landlocked: Logistics Costs and Supply Chain Reliability* (World Bank Publications, 2010).

[671] Alex De Waal, *The Theory and Practice of Meles Zenawi* (Oxford University Press, 2012), 152.

the state has pursued economic reforms under revolutionary democracy has been through *endowment-funded* companies."[672] Generally, government ownership of commercial assets and enterprises is a very well-defined concept. Government owned enterprises, or 'parastatals' are common and conventionally used terminology to describe business enterprises that are owned or controlled by the government. Although not exceptional to developing countries, these enterprises have been a common trend in Asia, Latin America, and Africa, especially in formerly socialist countries. Vast literature also exists on the anticompetitive concerns brought by the interaction between these enterprises and the state bureaucracy.[673] However, the case of partystatals brings a new addition to the dictionary of interest groups in developing counties.

Partystatals, party-owned enterprises, or sometimes called 'parbus' are establishments that are mostly owned by a ruling political party that run fully profit based commercial business. While they are commonly present in a political regime that is dominated by one single party, this is not however always the case. In most ideal situations their proceeds are used to finance their party. Despite neglect from most economic and political literature, these unique enterprises have significance presence in some developing countries and sway key political and economic decision-making powers. Among others Taiwan, Ethiopia, Rwanda, and South Africa host this type of enterprises despite some variance in their form, seize and nature of the enterprises or the business operations they carry.

For instance, Taiwan's KMT political party, has a legacy of owning one of the largest commercial conglomerate corporations in Asia that also controlled significant parts of Taiwan's economy. The party owned enterprises functioned under a complete profit-making objective contributing in some estimates as much as 600$ Billion to Taiwan's economy and making it the world's wealthiest political party.[674] Similar figures estimate that by the turn of the century KMT enterprise assets constituted at least 50% of all company assets in Taiwan and 30% of its GNP.[675]

Just like Taiwan's KMT, after economic liberalization, what is left of the Ethiopia's formal economy was quickly filled by an Ethiopian version of party owned business enterprises, *'endowments'* as they are called, which are run by the party ruling the country since defeating the socialist military rule in 1991 - Ethiopian People's Revolutionary Democratic Front (EPRDF). EPRDF is a political coalition of four ethnic based political parties that also today represent the major four regional states. The endowment enterprises of the party are run by the major four parties in the coalition; EFFORT of the leading Tigray ethnic based party,

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[672] Hilary Matfess, "Rwanda and Ethiopia: Developmental Authoritarianism and the New Politics of African Strong Men," *African Studies Review* 58, no. 2 (2015): 191.[emphasis added]

[673] David Sappington and Gregory Sidak, "Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities," *Competing with the Government: Anticompetitive Behavior and Public Enterprises, Rick Geddes (Ed.), Hoover Institution*, 2004; David E.M. Sappington and J. Gregory Sidak, "Competition Law for State-Owned Enterprises," *Antitrust Law Journal* 71 (2004 2003): 479–524.

[674] Mitsutoyo Matsumoto, "POLITICAL DEMOCRATIZATION AND KMT PARTY-OWNED ENTERPRISES IN TAIWAN," *The Developing Economies* 40, no. 3 (2002): 360.

[675] Karl J. Fields, 'KMT, Inc. Party Capitalism in a Developmental State' JPRI Working Paper No. 47: (June 1998) < http://www.jpri.org/publications/workingpapers/wp47.html>

'Tiret' of Amhara ethnic based party, Dinsho/Tumsa of ethnic Oromo based party and Wondo Group controlled by the party leading the Southern Peoples and Nationalities. Various sources contributed to the initial investment of the endowment enterprises, spoils from its war with the socialist rule, contributions, diverted aid money, remittances, and donations from its members. The endowment enterprises are registered as business enterprises and are run by the party's top political leadership. The enterprises participate in agriculture, industry and service sectors and earn large profits in an economy that is, as indicated above, dominantly informal and touted with various establishment and operational difficulties.

While these enterprises have been positively supported as growth-enhancing as well as severally criticized from various fronts such as corruption, anti-democratic pressure on the political sphere, etc. the interest here is to observe their particular role on the market and their potential anticompetitive effects. According to Berhanu Abegaz, this situation "paints a grim picture of highly concentrated markets, dominated by government or party-owned enterprises with virtual monopoly by the latter in such markets as fertilizers, sugar, and microfinance."[676] World Bank report also corroborates this situation; "in some instances, direct competition between endowment and private firms has resulted in the closure and exit of the private firm."[677] A study by Sarah Vaughan and Mesfin Gebremichael mentions how an entire value chain for fertilizers happed to have fallen under the dominance of EFFORT, one of EPRDFs endowments companies. [678]

Accordingly the interaction between the private sector, state owned enterprises and partystatals create an interesting twist to markets. Basic features of partystatals blur the line between the State and political affairs and has the tendency to steer government preference and become obstacles to competitive market reforms and competition law. In many occasions partystatals maintain the ethnic and/ or regional basis of the political party and thus have a potential to divide markets as well as function as price cartels, since they can control the flow of the goods and services supplied out of the region to where prices are attractive. Various agricultural supplies and commodities or services, such as fertilizers and access to credit, have fallen pray for such practices.

This added to the already existing and complex relationship between the state and enforcing competition law and policy in multiethnic society where markets have closer relationship with ethnic, religious, or racial dividing lines. In such context competition law enforcement organs

[676] Berhanu Abegaz, "Political Parties in Business," 2011.;
[677] World Bank, Ethiopia; Accelerating Equitable Growth Country Economic Memorandum, Part II: Thematic Chapters, Poverty Reduction and Economic Management Unit Africa Region (June 2007): (2007) 81.
[678] Sarah Vaughan and Mesfin Gebremichael, "Rethinking Business and Politics in Ethiopia: The Role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray," *Africa Power and Politics Programme, Research Report* 2 (2011). Their report states; "It seems clear that the links between organizations with strong connections to EPRDF and the government in the supply and distribution of fertilizer in the 1990s went well beyond a normal pattern of commercial synergies. Fertilizer in Tigray, for instance, was for some time imported and distributed by Guna, transported by Trans-Ethiopia, on roads constructed by Sur, under an extension program organized by REST, on credit provided by the Dedebit Savings and Credit Institution (DESCI), through Farmers' Associations and Co-operatives, with a payment guarantee from REST and/or the regional government." [all of these being endowment enterprises]

are likely to be fearful that their actions will not stir further tensions between certain ethnic, religious, or other groups. This will have a chilling effect on the motivation of the enforcement organs. Even in circumstances where formal independence is guaranteed, it will be difficult to state that it will function independently if it perceives that it is involved in a matter that is politically charged. In the one hand it will be cautious not to blow air in to the public discontent through its decisions that may be taken as evidentiary support for an already rooted public perception. On the other hand, a competition law enforcement organ would also like to the public's support and avoid the chances of it being perceived as ignorant of the social and economic imbalance created by some market agents. Hence competition law enforcement authorities could be stuck in the middle of this paradox.

One can find several trails of historical and contemporary evidence in many developing countries that reinforce this analysis. A good example is the case of dominance of a certain market or segments of a market by a group organized along ethnic lines. Group formation in this sense is a method whereby a distinct attribute of a group is used as a means for self-organization to fight for political, social, and economic power.[679] This can be considered as one way of competition policy 'interest group' formation - something which can at least be described as a loosely organized and 'informal interest group'. Indeed, Hansen and Wigger describe the constituency of competition policy making process as an output of the process of class formation. They describe the process of fractionalization of capital as a nurturing ground to class organization and further collective action.[680]

In this sense market dominant minority is a concept utilized to define a category of either ethnically, or socially related groups that have a greater dominant control on markets compared to other groups in a society. This market dominating tendency of the group could be found in the control of key sectors, larger share of the economy in terms of output and a temporal element of the duration which such tendency is present consistently. These characteristics have attracted the serious attention of those investigating the relationship between market dominant minorities and the shape of democratic decision making process.

According to Chua, "market-dominant minorities are the Achilles' heel of free market democracy. In societies with a market-dominant ethnic minority, markets and democracy

[679] The reasons why groups organize themselves along ethnic lines is a complex question. Ethnic identity can solve some of the basic challenges of effective collective action problem in large groups as it creates strong cohesion between group members. They can use their moral and cultural obligations to bring group cohesion and obedience. The exploitation of ethnicity as an informal way of interest group organization has been seen all over the world in various policy circles, attention here is given only to understand how this factor interacts with competition law and policy.

[680] Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Routledge, 2011), 19.They state "Classes … only become driving forces of history when a circle of their 'members' unite – that is, when a group of agents occupying similar class positions, constituting what Marx called a 'class-in-itself', develop a common class consciousness, articulate common preferences and work for their realization, thereby becoming a 'class-for-itself'. Economic concentration across national borders, be it in the form of mergers and acquisitions, or commercial intercompany agreements, constitute one of the most important mechanisms through which the material basis for the formation of class agency at the transnational level comes into being"

favor not just different people, or different classes, but different ethnic groups." [681] Similarly, in an early ethnographic and anthropologic study of West Africa, Cohen provides an overview of the interaction between ethnicity, politics and the market in the region. In particular he provides firsthand experience of market dominance for long-distance trade in cattle by the so-called Hausa ethnic groups in Nigeria. According to Cohen, there is a very close connection between economic and political institutions of the group. Cohen observes that; "at nearly every stage in the chain of the trade, economic institutions are closely inter-connected with political institutions."[682] Ogunnika argues, "ethnic monopolies exist in certain industries and business in Nigerian Urban areas, and almost all the members of the society agree that they should not be broken. It is believed that an attempt to break such monopolies would certainly lead to ethnic confrontations and violence."[683] He states that these kind of 'ethnic monopolies' have long history and presence in Nigerian market to the extent that some market sectors have become synonymous with a certain groups name. [684]

Among others, this is explained as a result of absence of functioning public and private institutions. Lack of effective property rights or use of formal dispute settlement mechanisms could be very low. Under these conditions market problems could be thus avoided if people of the same race, religion or other group character dominate or control the entire market for a commodity. As Cohen argues in the process the monopolizing group will be quickly forced to further organize itself for political action to compete with external actors. Historical, cultural, geographical, economic, and political grounds could lead one group to dominate a certain market.

This reinforces the discussion how in some developing countries certain segments of the market may be so significant but so also obscure at the same time could develop a potentially monopolistic tendency. Perhaps the connection between informal markets, ethnicity and market dominance is the real but hitherto overseen hurdle many developing countries, importantly Africa. In an argument that furthers this conclusion, Teodros Kiros observes "Africa has yet discovered its ethnic antitrust laws." [685]

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[681] Amy. Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability*, 1st Anchor books ed. (New York: Anchor Books, 2004), http://catdir.loc.gov/catdir/samples/random051/2004268661.html.

[682] Abner Cohen, *Custom and Politics in Urban Africa: A Study of Hausa Migrants in Yoruba Towns*, 2 edition (London ; New York: Routledge, 2003), 8; Abner Cohen, "Politics of the Kola Trade: Some Processes of Tribal Community Formation among Migrants in West African Towns," *Africa* 36, no. 01 (January 1966): 18–36, https://doi.org/10.2307/1158126. According to Cohen the political institutions were a result of the group's effort to stream line its dominance in the market by keeping outsiders out of its monopoly and also result the creation of arbitral and enforcement organs in the group which initially are meant to facilitate the economic aspects.

[683] Zacchaeus O. Ogunnika, *Non-Formal Approach to Ethnicity* (Trafford Publishing, 2013), 145.

[684] Ogunnika, 145.

[685] Teodros Kiros, *Explorations in African Political Thought: Identity, Community, Ethics* (Routledge, 2013). He argues, "A notorious inhibition of the free market in Africa is the simple fact that the whole market can be cornered or monopolized by an ethnic group. Africa has yet discovered ethnic antitrust laws to prevent or break up 'ethnic monopolies' in certain key industries. Nigeria underwent the trauma of a civil war partly because the Igbo had been perceived in the north as monopolizing certain economic areas of activity – and the nation had no 'antitrust legislation' for dealing with ethnic specialization and monopoly."

2.2.4. The Participation Landscape

Ethiopia has formal democratic institutions but very weak civil society and democratic participation. Many describe Ethiopia as 'developmental authoritarianism,' a phrase that explains a situation where the state undertakes massive developmental and civil works but at the same time exerts excessive control in the daily aspects of social and political life of the society.[686]

According to Matfess, there are at least five social, political, and economic characteristics that are common to these regimes. First, the transition to developmental authoritarianism often comes immediately after a bitter socio-political instability, and often war. Leaders emerge that promise stability and unity of the state. Second, as the name explains developmental authoritarianism, imposes strict control on democratic rights, such as freedoms speech, association, assembly, and freedom of the pres. They are often accused of manipulating prolonged conflict to justify accusations on political dissent and opposition. Thirdly they are identified by high level of government intervention in the economy which are often contradictory to free market principles. Forth, there is strategic use of the military and political party leadership to mobilize movement in favor of grand development efforts. Finally, as the result of the above, developmental authoritarians tend to cooperate and at the same time enter in to uneasy relationship with development partners, states, or non-state actors. While the pursuit of attracting foreign capital and developmental aid brings them closer to these partners they at the same time clash whenever records of good governance and respect for human rights are brought to the table.[687]

In doing so the Ethiopian developmental state political economy does not squarely fit in to the conventional literature that describes a totalitarian state as one typically led by ideology, single party monopoly led by one person, strong-man state, with strong police force often used to squash dissent and any form of civic movement, centrally directed economy. These traits do fit well with the Ethiopian context but however fall short of explaining the regime's commitments to state led economic development agenda as well as the presence of, despite being largely nominal, democratic institutions that are different from states considered totalitarian.[688]

Similarly, the Ethiopian context cannot also be explained by those that see a gradual evolution of democratic institutions in line with economic development. Contrary to the argument provided by the likes of Przeworski or Lipset that envisioned growth in democratic institutions is 'more likely to emerge as a consequence of economic development,'[689] the situations in the

[686] Matfess, "Rwanda and Ethiopia," 182.Matfess, "Rwanda and Ethiopia," 182.
[687] Matfess, 182.
[688] Matfess, 184.
[689] Adam Przeworski, "Democracy and Economic Development," *Mansfield & R. Sisson (Eds.), The Evolution of Political Knowledge. Democracy, Autonomy, and Conflict in Comparative and International Politics*, 2004, 300–324.;

ground seem to show evidence to the contrary. Though the country has made serious progress in economic development, this did not strengthen democratic institutions in the country.[690]

Rather the Ethiopian case needs to be seen in line with the political economy literature that studied the evolution of developmental state in East Asian countries. With some of shortcomings of its own, the latter is a good example of the embeddedness of a developmental state in the social, political, and economic governance of the nation including but not limited to the economic policy, the bureaucracy, and a symbiotic relationship between the state and the private sector.[691] There is underlying recognition to private property and the power of the market but dictated under strict oversight of the state. Democratic and economic governance constrained within a select elite bureaucracy that closely works with the private sector. It generates consensus on policy objectives, solicits information that is vital for policy making.[692] The limitations on socio-political freedoms in these Asian developmental states are also well elaborate. As explained by Linda Low, it is incorrect to assume a smooth relationship between developmental states and democratic institutions as "some social engineering and authoritarianism is implicit,"[693]

This explanation of the ideological underpinnings of the Ethiopian developmental state model is well demonstrated by the late Prime Minister Meles Zenawi. One important source of evidence is his draft manuscript, "African Development: Dead Ends and New Beginnings".[694] In advocating for a paradigm shift in African developmental state he provides that neo-liberalism has failed 'to bring about African renaissance' as it advocates a passive night watchman state under the assumption that markets are pareto efficient and leaders exercise public power solely on self-interest and wasteful rent-seeking.[695] His argument to the role of controlling rents to direct the performance of the private sector towards growth enhancing outcomes is explained by his critique of the neo-liberal assumption of the 'predatory state' in post-colonial Africa.[696] He argued that the assumption take by Bretton Woods Institutions to replace the post-colonial government of Africa with the 'Market' is incorrect.

Zenawi considers the Ethiopian and perhaps the whole neo-colonial African economy, to be behind the globe in leading innovation and industrial growth to propel a dynamic economy

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690 Matfess, "Rwanda and Ethiopia," 184.
691 Huck-ju. Kwon, *The Developmental Welfare State and Policy Reform in East Asia.*, 1 online resource (309 pages) vols. (Basingstoke: Palgrave Macmillan, 2004), http://public.eblib.com/choice/publicfullrecord.aspx?p=270642; Linda Low, "The Singapore Developmental State in the New Economy and Polity," *The Pacific Review* 14, no. 3 (2001): 411–441; Gordon. White and Jack. Gray, *Developmental states in East Asia*, 1. publ. (New York: St. Martin's Pr., 1988).
692 Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy: 1925-1975* (Stanford University Press, 1982).
693 Low, "The Singapore Developmental State in the New Economy and Polity."
694 Meles Zenawi, "African Development. Dead Ends and New Beginnings. 2007," in *Unpublished Note, Http://Cgt. Columbia. Edu/Files/Conferences/Zenawi_Dead_Ends _and_New_Beginnings. Pdf*, n.d.; Meles Zenawi, "African Development: Dead Ends and New Beginnings," *Internal Document. Addis Ababa: EPRDF*, 2006.
695 Zenawi, "African Development. Dead Ends and New Beginnings. 2007"; Zenawi, "African Development."
696 De Waal, *The Theory and Practice of Meles Zenawi*, 152.

that is transformative and at the same time sustainable. Due to productivity comparative disadvantages investment in these economies is doomed to look for profits in rent seeking and not value addition. In the absence of the strong developmental state to guide it though the dark corners of long term investment that supports the economy, private capital will find way 'to make money through rent: natural resource rent, aid rent, policy rent. So the private sector will be rent-seeking not value creating, it will go for the easy way and make money through rent.'[697]

He argued that ''you cannot change a rent-seeking political economy just by reducing the size and role of the state. The neo-liberal paradigm does not allow for technological capacity accumulation, which lies at the heart of development. For that, an activist state is needed, that will allocate state rents in a productive manner.'[698] According to Zenawi the 'neoliberal assumption on rent seeking behavior' treats such behavior 'as an exogenous to the firm'. However, he argues, 'firms that perform in a certain manner would be given access to the rent, and those that perform differently would have no such access.'[699]

In explaining the ideological basis of a 'developmental state' he argues that, 'acceleration of development is a mission and at the same time a source of legitimacy of the government.'[700] He provides that the structural basis of such state should be founded on autonomy of the state that enables it to pursue its developmental sate objectives without interference from 'myopic interests'. The role of autonomy indeed held crucial importance in the minds of Ethiopian developmental state thinkers. According to Zenawi, in addressing the question what characteristics distinguish the nature of state autonomy in developmental state from others that are primarily based on market economy, he explains that the answer to such questions is to be found in the distinction between truly autonomous states and subordinate states, a notion that is also introduced by Dani Rodrik.[701] According to Zenawi, the distinction between the two lies on the way how policy decisions are implemented. First Zenawi advocated for decision making autonomy and independence from external influence. He provides 'there has to be more political space for experimentation in development policy than has been the case so far in Africa.'[702]

Second, according to Zenawi, autonomous states have an essential characteristics where decisions are made autonomously based on its development agenda; private sector lacks the means to reshape them or avoid compliance as they are implemented'[703] One the other hand, subordination comes to picture when 'decisions and their outcomes are the result of the

[697] De Waal, 152.
[698] De Waal, 152.
[699] Meles Zenawi, "States and Markets: Neoliberal Limitations and the Case for a Developmental State," *Good Growth and Governance in Africa: Rethinking Development Strategies*, 2012, 140–174.
[700] Zenawi.
[701] Dani Rodrik, "Political Economy and Development Policy," *European Economic Review* 36, no. 2–3 (1992): 329–336.
[702] De Waal, *The Theory and Practice of Meles Zenawi*.
[703] Zenawi, "States and Markets."

interplay between private-sector pressure and government motives and are rarely final.'[704] In this sense Zenawi advocated a domestic political landscape where developmental policies are implemented 'regardless of the views of the private sector on the issue.' This is something which a subordinate state is unable to achieve as it implements policies by passing through a bipolar process of 'juggling interests' of the private sector. In doing so, subordination occurs as the state is significantly influenced by the whims of the private sector. To the contrary the developmental state influences the private economy to guide it through a canal that makes sure 'it makes decisions in a manner that accelerates growth by using a sect of incentives and disincentives.'[705]

The key objective is therefore creating a system that has a long-term investment on rents and value addition. Zenawi believed that, 'If the state guides the private sector, there is a possibility of shifting to value creation – it needs state action to lead the private sector from its preference (rent seeking) to its long-term interest (value creation). Hence, the state needs autonomy.[706]

The third element in the anatomy of Ethiopian developmental state is the role of the internalization of the developmental order in the minds of the bureaucracy as well as the state. Zenawi described this as the process of 'building a consensus on the rules of the political game'.[707] The 'hegemony of the developmental discourse' is therefore vital.[708] In doing so a key test to success of 'the developmental state' is political one. It may also determine the level of democratic participation and the nature of the state in these countries. Zenawi argues that there will be little or no space for democratic governance in these countries unless the society is freed from the trap of 'pervasive rent seeking.'[709]

Such political economy understanding of the developmental state in Ethiopia has very vital implication for the state and private sector relationship as well as the ways and instruments the state intervened in the market, including competition law and policy. First, the architects of Ethiopian developmental state are reluctant to what is a conventional participatory democratic process at the initial stages of development. A system that individual citizens organize themselves in to social organization and political parties to lead or influence the functioning of the state is considered a farfetched 'utopia'. Zenawi describes this as a formula of 'trickle-up democracy'. They considered in the face of a rent seeking society most if not all social and political organizations would become easy converts to patronage interests. The resulting outcome would be 'no-choice democracy' or a zero-sum politics where the end result is a situation where groups fight to the office and hence enrich themselves out of its rents.

Therefore, in the developmental state, interest group participation in not a life blood line of political legitimacy. The need for autonomy of the state dictated the presence of a strong state

[704] Zenawi.
[705] Zenawi.
[706] De Waal, *The Theory and Practice of Meles Zenawi*. 168.
[707] Zenawi, "African Development. Dead Ends and New Beginnings. 2007"; Zenawi, "African Development."
[708] Zenawi, "African Development. Dead Ends and New Beginnings. 2007"; Zenawi, "African Development."
[709] De Waal, *The Theory and Practice of Meles Zenawi*.

with broad executive powers.[710] This guaranteed 'elitist centralism' rather than full-fledged participatory political process. EPRDF's political document on the developmental state provides that "the political stage is occupied by a few politicians … who substitute for the public at large."[711]

Second, the Ethiopian developmental state doctrine did not provide or leave and critical role to be played by 'a powerful, competent, and insulated bureaucracy',[712] concept that has been well illustrated as a feature of east Asian emerging states which the Ethiopian or African model of developmental state has its basis. Zenawi did not mention this imperative anywhere in his manuscript. The only place the bureaucracy has been mentioned is critical importance to internalize the shared developmental state paradigm.

Many have criticized the evasion of the role of the bureaucracy in the developmental state discourse in the country as intentional. Lefort argues that such 'blind-spot' is left unaddressed, even though it a key part of the developmental state political strategy, because it would have contradicted it.[713] They considered it a dilemma of building a strong developmental state leadership while at the same time the state aspired 'the constant involvement of all in the decision making process.'[714]

The revolutionary democrats responded with clear and determined opinion on the importance of democratic legitimacy of the developmental state. They reiterated that while developmental sate could be both authoritarian and democratic, in a multiethnic and diverse society that Ethiopia or perhaps the rest of Africa, holds such undemocratic states have only short life span. Therefore, they argued 'democratic legitimacy' was a prerequisite to the survival of the state.[715] However, as it revealed in the political manifestos as well as the 1995 constitution, such legitimization process was limited to meeting group social and political rights than focusing on individual rights and freedoms.[716] Most importantly, the developmental state doctrine gave little room to describe what the democratic legitimacy of the economic and market governance sphere would look like.

3. Institutional Choice Among Imperfect Alternatives

Hoping that the preceding chapters have set the theoretical basis for understanding the role of CIL and its contribution to the study of the interaction between the different facets of the market place, economic regulation as well as competition law, this section deepens the discussion by putting forward paratactical illustrations. With this objective the following

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[710] René Lefort, "The Theory and Practice of Meles Zenawi: A Response to Alex de Waal," *African Affairs* 112, no. 448 (2013): 461.
[711] René Lefort, "Powers–Mengist–and Peasants in Rural Ethiopia: The Post-2005 Interlude," *The Journal of Modern African Studies* 48, no. 3 (2010): 442.
[712] Ian Taylor, "Botswana as a 'Development-Oriented Gate-Keeping State': A Response," *African Affairs* 111, no. 444 (2012): 466–476.
[713] Lefort, "The Theory and Practice of Meles Zenawi."
[714] Lefort.
[715] Lefort.
[716] Jon Abbink, "Ethnic-Based Federalism and Ethnicity in Ethiopia: Reassessing the Experiment after 20 Years," *Journal of Eastern African Studies* 5, no. 4 (2011): 596–618.

sections discuss the interaction between compulsory licensing and competition law, in South Africa, and non-competition law enforcement in Ethiopia, to argue in favor of rethinking the competition law and policy landscape beyond preconceived institutional assumptions.

The discussion provides an insight in to how institutional participation considerations determine the efficiency of competition law instruments in these countries. It attempts to identify the factors that determine stakeholders' participation among alternative decision-making institutions, which are mainly related to information costs, cost of organization, and cost of access to institutions etc., which are in turn all tied to the benefits and per capita stakes of such participation.

It provides that within the framework of the key research questions raised in this thesis, effective competition enforcement is a variant of the transaction costs and benefits that its main stakeholders face vis-à-vis other institutional alternatives, including political and regulatory institutions. Having said that, it is also implicit in the above argument that the conditions under which competition law will be effective is dependent up on its ability to garner institutional participation.

3.1. South Africa - The Case of Compulsory Licensing vs. Competition Law

3.1.1. Use of Public Health Flexibilities: Compulsory Licensing

As any major IP regime, South Africa's Patent Act provides options for the government to derogate from the rights of patent holders under the act. First, section 56 of the Act provides for options for the State to provide compulsory licenses in circumstances where the patent holders may abuse its rights under the Act. Second, the Act provides, under section 55, the case for 'dependent patent', in that it provides flexibilities in situations where the dependent patent cannot be used without infringing the earlier patent. In this case state may grant compulsory licenses. Third and most importantly section 4 of the Act provides a policy space for the State to grant compulsory licenses for public purpose, such as public health concerns.[717]

South Africa hardly used these flexibilities, in particular those provided under section 4. South African courts handled only a handful of cases under Section 56 and none of them had to do with pharmaceuticals. However, with the advent of the HIV-AIDS crisis their use become imminent. The South African government itself acknowledged the role of patents in increasing the price of essential ARV drugs.[718] The government also publicly criticized multinational pharmaceutical corporations. This opened the door for pharmaceutical companies (through their association, PMA) to challenge the government's stance in every front. In fact in June 1997 PMA made a formal appeal to the office of the Ombudsman that certain government departments, including Ministry of Health, are engaging in subversive practices of bad naming

[717] 4. State bound by patent. A patent shall in all respects have the like effect against the State as it has against a person: Provided that a Minister of State may use an invention for public purposes on such conditions as may be agreed upon with the patentee, or in default of agreement on such conditions as are determined by the commissioner on application by or on behalf of such Minister and after hearing the patentee.

[718] Amir Attaran and Lee Gillespie-White, "Do Patents for Antiretroviral Drugs Constrain Access to AIDS Treatment in Africa?," *JAMA* 286, no. 15 (2001): 1886–1892.

its members and spreading wrong information including that its members are charging South African consumers higher prices while the case was otherwise.[719] According to PMA the rates charged by its members are comparatively lower than what is being charged by international aid organizations and any shortages in the drugs was a result of institutional deficiency in South Africa's health infrastructure including theft and security.

PMA's objective in making the above claim was to challenge the introduction of a new legislation that was proposed by South Africa's Ministry of Health that would amend South Africa's Medicines and Related Substances Control Act (MRSCA) and allow parallel importation of medicine from abroad. The amendment proposed to insert Section 15C , which contained a language that was contained within WIPO's draft patent treaty. Among others the amendment gave unreserved authority to Minister of Health "to prescribe conditions for the supply of more affordable medicines . . . so as to protect the health of the public . . . notwithstanding anything to the contrary in the Patents Act."[720] The proposed amendment quickly passed through parliament and became law in December 1997.

However, the Act was subsequently challenged by multiple stakeholders including the US government for failure to meet the requirements of the TRIPS Agreement.[721] South Africa responded by way of making it public that it is being pressured by the US government on the matter. Indeed, the amendment was mostly in line with the TRIPS agreement when it comes to the parallel imports doctrine, while its compulsory licensing provisions largely deviated

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[719] Cyrill P. Rigamonti, "The South Africa AIDS Controversy: A Case Study in Patent Law and Policy," 2005. "[A] perception in the minds of the general public that medicines in South Africa are unreasonably expensive and moreover that the blame for such expensive medicines lies with the manufacturing and primary importing companies."

[720] The provisions outlines;

15C. The Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public and in particular may—

(a) notwithstanding anything to the contrary contained in the Patents Act. 1978 (Act No. 57 of 1978). determine that the rights with regard to any medicine under a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine. or with his or her consent;

(b) prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic but which is imported by a person other than the person who is the holder of the registration certificate of the medicine already registered and which originates from any site of manufacture of the original manufacturer as approved by the council in the prescribed manner, may be imported;

[721] Duane Nash, "South Africa's Medicines and Related Substances Control Amendment Act of 1997," *Berkeley Technology Law Journal*, 2000, 485–502. See "The Act's ambiguous wording can be read to permit activity which is in violation of TRIPS, however. For example, the Minister of Health could enforce a compulsory licensing provision in the absence of any prior attempt to obtain the license on reasonable commercial terms, without a licensing fee, or without the possibility of judicial review. Although such a compulsory license is arguably valid under the Act, it is in clear violation of TRIPS." Pieter Fourie, *The Political Management of HIV and AIDS in South Africa: One Burden Too Many?* (Springer, 2006)."During the second half of the Mandela administration the US government placed immense pressure on the South Africans to honour the patent rights of the American companies that developed the drugs, going so far as to put South Africa on the US 'Super 301' watch list."

from TRIPS. The Acts was challenged for not having the clarity needed to make it in line with TRIPS flexibilities.[722]

Confident in its legal stand as well as the backing of various internal and external bodies including key governments such as US, PMA challenged the amendment to the High Court of South Africa.[723] The claim largely concentrated on vague and excessive powers that were given to the Minister. Latter PMA suspended its challenge claiming that it has settled with the South African government in that it is providing its good gesture and alliance with the South African public while the latter will work towards clarifying the content of the amendment and making it in line with the TRIPS Agreement.[724]

3.1.2. Competition Law

3.1.2.1. The Hazel Tau & others v. GlaxoSmithKline ("GSK") & Boehringer Ingelheim ("BI")

Hazel Tau and Others v GlaxoSmithKline and Boehringer Ingelheim,[725] involved a claim submitted by a group of individuals living with HIV-AIDS, other health care professionals, unions, and NGO's.[726] The complaint brought by public health activist group led by Hazel Tau and others claimed that the excessive price charged for essential HIV treatment medicine by the two respondents was the cause for thousands of deaths in South Africa and hinge in resolving the country's public health crisis.

Accordingly, the Commission agreed with the claims and decided to refer the matter to the competition Tribunal. The Commission also expanded the claim based on section 8(b) and (c) of the Act arguing that GSK and BI have refused access to essential facilities to competitors even though it is economically appropriate to do so. In addition, the Commission argued that the parties have been engaged in exclusionary conduct. [727]

However, before the Tribunal makes any decision, the parties settled the claim alongside the Competition Commission. The agreement made sure that generic version of the said drugs will be available for South African consumers including, licenses to be given to other generic manufactures, allow experts by licensed manufacturers, based on the necessary regulatory approval that confirms there is lack of domestic capability to manufacture the drugs, to allow

[722] It is to be noted that South Africa was required to comply with the TRIPS agreement by the end of the Year 2000.
[723] High Court of South Africa, Case number: 4183/98, the Pharmaceutical Manufacturers' Association of South Africa, et all, v. the President of the Republic of South Africa, the Honourable Mr. N.R. Mandela N.O., et all.
[724] Duane Nash, South Africa's Medicines and Related Substances Control Amendment Act of 1997, 15 Berkeley Tech. L.J. 485 (2000).
[725] Competition Commission Case Number: 2002: Sep 2; 26
[726] South Africa's experience in the Pharmaceuticals Industry Prepared for the 2015 UNCTAD Round Table on "The role of competition in the Pharmaceutical sector and its benefits for consumers" (8 July 2015)
[727] "GSK and BI had abused their dominant positions in their respective ART markets. They had charged excessive prices, refused to give competitors access to essential facilities and engaged in exclusionary behavior in which the anticompetitive effect outweighed technological, efficiency or other pro-competitive gains."

importation of the drugs in to South Africa, and most importantly not to require royalties in excess of 5% of the net sales of the relevant ARV's.

The outcome of the case was significant. Just before the case was brought to the attention of the commission, pre 2002 period, the price of common antiretroviral treatment was R2000 per person per month. This was a price that most South African's can't afford to pay. However immediately after the time the settlement agreements were reached in mid 2003 the price of a typical ARV drug dropped appx. R100 per person per month.[728]

3.1.2.2. Treatment Action Campaign (TAC) v. MSD & Merck

In late 2007 a complaint was submitted to the Competition Commission claiming that multinational pharmaceutical companies has exploited the country's patent laws and gained unfair advantage in the market for essential medicines necessary for HIV-AIDS treatment. The complaint was submitted by an advocacy group called AIDS Law Project (ALP) on behalf of Treatment Action Campaign ("the TAC"), another group that gained popularity starting 2000s in its innovative advocacy and campaigning strategies related to the welfare of people living with HIV-AIDS. Among others, it was the main agenda of the group to campaign for equitable access to HIV-AIDS medicines through various approaches including advocacy, lobbying and litigation.[729]

The compliant primarily made its subjects MSD (PTY) Ltd. ("MSD"), a South African company with exclusive license from Aspen Parmacare and Adcock Ingram to market a particular antiretroviral medicine (ARV) 'efavirenz' in South Africa as a representative for Merck&Co. Inc.[730] The complaint also identified Merck one of its respondent claiming Merck was the relevant patentee of 'efavirenz' in South Africa.

According to the complaint, MSD and Merck intentionally failed to license a key ARV drug 'efavirenz' to any other South African establishment at reasonable price to either import, or manufacture the drug including any co-formulations and/or co-packaged generics containing efavirenz.[731] The complaint argues that this action by MSD and Merck led to excessive prices that only a small part of the South African population can afford to buy and therefore violated section 8(c) of the Competition Act 89.

In making a case for the claim, the complaint provided that MSD and Merck have more than 46 percent share of the South African market for ARV, thereby meeting the necessary threshold of market share in accordance with South African Competition Act.[732] The

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[728] The Treatment Action Campaign's Oral Submission to the Competition Commission's Inquiry into the Private Healthcare Sector: http://www.compcom.co.za/wp-content/uploads/2016/06/TAC-Submission-to-Private-Healthcare-Inquiry.pdf

[729] The Treatment Action Campaign (TAC), http://www.tac.org.za/about_us, Mark Heywood, "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health," *Journal of Human Rights Practice* 1, no. 1 (2009): 14–36.

[730] Competition Commission of South Africa, In The Complaint Submitted By: Treatment Action Campaign Concerning The Conduct Of: Msd (Pty) Ltd Merck & Co., Inc. And Related Companies, Statement of Complaint

[731] Complaint Submitted By: Treatment Action Campaign

[732] See Article 7

complaint also alleged that the MSD and Merck acted in bad faith to exploit their dominance in the market thereby violating the provision of the Competition Act as contemplated under section 8(c). In doing so, the complaint also made it clear that it is not claiming that the due exploitation of patent rights in and of itself is tantamount to prohibited conduct. It rather argued, the patent rights should not, on its own, be used as a justification for refusal to license such right at reasonable price.

In line with this, the claim presented various arguments to explain how one major objective of Article 8 of the Act is directly related to the objective of ensuring fair competition in the market as a "means of securing the broader public interest".[733] It argued public interest should be interpreted in broad terms, in particular the rights to life, dignity and access to medicines, provided various justifications for this with reference to the South African consultation and other international human right instruments that South Africa has become party to.

Accordingly, the claim argued that there is a "sufficient reason" and legal authority to compel the respondents to license their patent rights to third parties at reasonable and acceptable price as well as "declaring the conduct to be a prohibited practice to facilitate damages claims".[734]

By the time the case was in public spotlight the parties settled the case before any decision by the South African Competition Commission. However, the claim itself and the significant public attention it gathered led to no less than seven voluntary licenses granted to generic manufacturers; with significant cost savings to the government as well as the public.[735]

3.2. Ethiopia: Navigating the Political vs. Competition Institutions Landscape

3.2.1. Steel market monopoly saga

The case brings in to light an abuse of dominance issue between large steel mill and other SME nail manufacturers. The issue was brought to public attention in April 2014 when the then Ministry of Finance and Economic Development, now Ministry of Finance and Economic Cooperation, introduced a circular that increased the tariff imposed on imported steel. The measure was taken in the interest of local steel manufactures, in particular with the repeated 'request' /'lobbying' of a large steel manufacturing enterprise, Steely RMI, established in 2010 by Ethiopian investors.

The circular largely changed the way imported steel has been categorized under the country's tariff schedule. Before the change was introduced, a wire road that is a key steel input used in the manufacturing of nail and other similar products fall under the part of the schedule that imposed only five percent tariff. This is an advantage given to various manufacturers in the downstream market classifying wire road as a basic raw material used for domestic value addition – nail production in this case. The change however introduced a thirty percent increase in tariff.

[733] Complaint Submitted By: Treatment Action Campaign
[734] Complaint Submitted By: Treatment Action Campaign,24
[735] Heywood, "South Africa's Treatment Action Campaign," 25.

The change gave the only large local steel manufacturer, Steely RMI, a competitive advantage compared to imported steel, in particular wire road. Steely started producing wire road on March 2014 and since then it became the only local source and supplier of wire road. Steely RMI effectively held a monopoly in local wire road production in the country. Meanwhile, Steely RMI, has a local subsidiary firm that, among others, manufacturing of nails; Asmen Nail Factory Plc. This gave Steely RMI an advantage both in the upper and downstream market.

The measure put local nail manufacturers at a disadvantage. They argued that the measure has effectively created monopoly in the local supply of wire road. With this discontent, the nail producers submitted three different complaint letters at three different dates to the to the Prime Minister's office (PM's Office). The first one in early 2014. Their appeal was given little attention at the time until they submitted a second appeal, alongside to six other Ministries and government agencies, in January 2016. With the repeated appeal of nail produces including some media attention, the Prime Minister's office stated that it has opened investigation in to the issue.[736] A major newspaper reported the issue as, "Industry monopoly claim rocks PM's Office, again-the PM's office is assessing the issue of a monopoly in the nail market".[737]

A key part of the second appeal contained issues regarding Steely's lack of capacity to satisfy the local market. Steely RMI responded by arguing that it has a capacity to produce 120,000tn of wire road that will satisfy the local markets demand and save foreign currency. However according to Nail producers this figure is incorrect and the measure has created serious shortage of the raw material in the market. The probable cause given by the latter is the fact that Steely is not producing at full capacity.

In addition, nail manufacturers argued that Steely has intentionally suppressed its supply of wire road to the local market to benefit its subsidiary nail producing company, Asmen. They argued that the situation gave Asmen the upper hand in receiving much sought after raw materials compared to other producers and for Steely and Asmen directly control the price of nails in the market to its and Asmen's benefit. According to the appeal submitted to the Prime Miniser's Office, after the above measure, Asmen has monopolized the local nail market with a share exceeding 65 percent.

Local nail manufacturers also argued that the measure has affected the nature of competition between locally produced nail and imported one. According to the appeal, the measure has equalized the price between the two. Interestingly the measure has also raised jurisdictional issues. Nail manufactures argued that the issue of whether to impose the tariff or not cannot be determined by a small department of the Ministry of Finance and Economic Cooperation (MoFEC). They argued this is a subject matter that deserves the council of Ministers or Parliament's approval.

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[736] Capital, <http://capitalethiopia.com/2016/09/26/steel-confusion/#.V_ihyPl97IU>

[737] Addis Fortune; Industry Monopoly Claim Rocks PM's Office, Again; http://ajebnew.com/business/story-in-english/Industry-Monopoly-Claim-Rocks-PM%E2%80%99s-Office-Again-129796

The PM's Office first reaction perhaps was to assign a committee organized by the Ministry of Industry and an institute established under the Ministry; Ethiopian Metal Industries Development Institute (EMIDI). The committee among others recommended that the tariff imposed on wire road be lifted. The Ministry of Industry was expected to take the lead on this and submit the proposal to the Ministry of Finance and Economic Cooperation (MoFEC).

After considering the issues, the committee's response was not as strong as expected. First, according to the committee, the economic rational of the adjustment needs to be well studied under closer scrutiny. It needs to be examined whether the measure was intended to provide support to the sector or merely an attempt to benefit a particular industry. Hence, before implementing the measure, its impact on other manufacturers in the downstream market, and the value chains and employment effects should have been well studied. According to the committee's report, no such study worth of consideration was done by MoFEC. However, the committee also said that it did not find any foul play either by Steely or Asmen. Members of the committee stated "there is no monopoly in the market."[738]

Irrespective of recommendations of the committee, the Ministry of Industry sent a letter to MoFEC arguing that the latter has overlooked the seriousness of the measure in terms of creating monopoly in the steel market. The letter also stated that MoFEC did not implement any measures that will be able to overcome the monopoly effect of the measure on the nail market, therefore making the issue much more complex. Indeed, nail manufacturers have alleged that out of the 48 manufacturers, 20 are in the brink of closing and perhaps have started lying off employees.[739]

Again, on September 2016 some nail manufacturers submitted another letter to the PM Office. This time it was for a completely opposite reason. In submitting the third letter nail producers and others interested in the matter faced a serious organizational challenge. Initially only seven individuals showed up to the meeting, four of which are owners of a small-scale nail manufacturing plant, two individuals in import export business and one lawyer of the two manufactures. In addition, perhaps due to the various interests each had on the issue no consensus was reached among them. Two of the manufactures attending the meeting were interested in keeping the increased tariffs as they are. They argued that if the new tariffs are lifted it would harm producers of wire rod from which they source their raw material to manufacture nails. Others clearly held a different position and wanted the tariffs be lifted.

In the end the parties failed to reach a consensus and only the two individuals with an interest in keeping the tariffs as they are decided to draft and sign the letters. In doing so the two parties have to write the letter clearly stating that only seven individuals participated in the meeting and nor were there any consensus reached.[740]

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[738] Addis Fortune; Industry Monopoly Claim Rocks PM's Office
[739] Addis Fortune
[740] Interview with Mr Merkebu Zeleke, Former Director of Trade Competition and Consumer Protection Authority. Addis Ababa (Feb 2017)

In late 2016 the Council of Ministers formed a committee to investigate the claim; a committee that is composed of experts from MoFEC, Ministry of Industry and The PM Office. An expert from the Trade Competition and Consumer Protection Authority was latter added to the team. After months of deliberations and 'investigation' the committee failed to come up with any recommendations/reports or any finding of market failure. Later the Competition Authority opened an investigation based on the claims that were brought to the attention of the PM office. However, the investigations were interrupted without any reason.[741]

3.2.2. Merger: Commercial Bank of Ethiopia & Construction and Business Bank

Ethiopia saw one of its most important domestic merger activities in December 2015 when the two state owned banks, Commercial Bank of Ethiopia (CBE) and Construction and Business Bank (CBB) merged. Before that the Competition Authority received only a handful of merger applications most of which involved foreign firms.

Before the merger, there were 18 banks operating in the country, three of which are state owned, the third being the Development Bank of Ethiopia. The latter served as a 'policy bank' providing long term investment loans to large and medium scale agricultural and manufacturing enterprises. CBE and CBB were established to carry out conventional commercial banking activity.[742] The merger raised eyebrows as CBE is the single largest commercial bank in the country and there were already criticisms of market dominance by the rest of the 15 private banks that currently operate in the country. CBE is put in such dominant position as it holds more than 65% of the national deposit and more than 40% of all bank loans in the country. This has, according to industry experts, distorted the market competition especially because Ethiopia does not allow foreign ownership of banks nor any type of participation by foreigners in the financial market.

Beyond the market effects of the merger it is the institutional context of how the merger was handled that grabbed the attention of industry experts, lawyers, and academics. The merger was not notified to the Competition Authority and no examination was made by the latter.[743] The Authority heard about the matter only after the merger was reported by public media. Accordingly, those that were interested in the issue raised the question of why this merger by two state owned enterprises (SOEs) overlooked the presence of the Competition Authority. They asked;

> Is the merger in connection with public financial institutions an exception to the principle laid down under Proclamation Number 813/2013 and hence the Council of

[741] Interview with Mr Nebeyu Belete (July 2017)
[742] Council of Ministers Regulations 202/2002 and 203/2002, respectively.
[743] The Authority has Adopted a Merger Directive in 2016. According to the Directive, pre-merger notification is only if the combined assets or turnover (which ever combination is higher) of both the acquiring and the target company is more than ETB 30m, or in case of acquisition: if the target company assets or turnover (whichever is higher) is more than ETB 30m. The authority also classifies large maergers to be those above ETB 120m. Currently the authority only analyzes larger mergers.

> Ministers may not need the approval from the Authority? Does the highest organ of the executive branch need the consent of TCCPA? Much seems to be unclear.[744]

For others it seemed there is confusion as to whether the Authority's power over SOEs is replaced by sector regulatory organs, in this case the National Bank of Ethiopia (NBE). The latter is mandated to license and supervise banks in the country.

> But what is the appropriate organ to entertain competition issues raised among SOEs in the relevant market? Is it the task of national competition authorities or sector regulatory organs?[745]

These questions are warranted since the Proclamation issued to provide the rules and regulations concerning commercial banks, Banking Regulation Proclamation, provide a rule that no bank shall merge with or takeover the other without the prior approval of NBE. However, the TCCPP also contains rules that no merger shall be effected by any enterprise carrying commercial activity before an application to such effect and approval of the Competition Authority.

It seems there was more than confusion or grey area effect created on the overlap between the two institutions. Officials of the Competition Authority were concerned about the precedent that this case will entail and therefore approached NBE to discuss why the merger was not duly notified to the Authority. There was no agreement reached on what should be the legal nature of similar mergers in the future, however the Authority's officials returned from NBE simply agreeing to the fact that the government has a power to effect the merger in accordance with a regulation that it will issue to such effect.

Many argued that there was clear power play between the two institutions. The National Bank being the power center for making key monitory and financial decisions in the country, also hosting the most politically powerful members of the ruling party, EPRDF, it seemed for many unlikely that the politically middle layer appointees of the Competition Authority will be able to change a decision made by the government.

4. Lessons Learned: Positive Analysis of Competition Law and Policy in Developing Countries

4.1. Development of Competition Institutions and Institutional Persistence

Traditional literature with 'political will' approach to understanding competition law enforcement considers the evolution and growth of effective competition institutions as an outcome of willful submission of authority by political leaders to independent bodies. Most developing countries followed their developed counterparts in designing their institutions. The reforms gave recognition to the importance of well-crafted legal rules and institutions with the

[744] Addis Fortune, http://addisfortune.net/columns/the-curious-case-of-construction-business-bank/

[745] Tesfaye Neway, Laws' Grey Areas Confuse Regulation, A Presiding Judge At The Adjudicative Tribunal Of The Ethiopian Trade Competition & Consumer Protection Authority. https://addisfortune.net/columns/laws-grey-areas-confuse-regulation/

expectation that they will become self-enforcing.[746] As discussed above, focus is given to the supply side of the matrix. [747]

This approach is in line with delegation theory of government regulation. Delegation theory highlights one of the causes of delegation by political organs to nonpolitical agencies is to address the capacity limitations of the latter on technical issues that address market failures or other social policies. While critics of the government regulation have highlighted the limitation of the political organ to, among others, anticipate the market function due to information limitations.[748] The theory also postulated that political organs have limited time and space to deal with individual issues while independent specialized agencies can be designed to the necessary scale and duplication. Similarly, delegation theory argues that those who hold political authority may want to avoid being taken responsible to unpopular decisions in the face of the public and delegation to an independent authority may provide such a buffer.[749] In particular, this argument was well entertained in the context of addressing rule of law and independence of the judiciary.

In addition, there is also a well elaborate theory of time lag between the time policy initiatives are taken, implemented and results are achieved. In this sense discretion is one of the challenges of public policy making. Hence many have argued in favor of 'fixed rules' rather than discretionary policies as anchor to policy making so as to maximize policy certainty and institutional credibility. The pervasiveness of policy is guaranteed by minimizing discretion to save future opportunistic actions that favors the then political organ. However regulatory discretion is inevitable in areas such as market regulation as they involve the application of rigged rules to dynamic market circumstances. Therefore, the alternative is to give power to a delegated agency that has both structural and functional independence from the political organs.

The above strand of theory of delegation of course had its own limitations. According to Majone, the traditional analysis put forward to understand delegation to specialized agencies had its own limitations because of its narrow focus in postulating only the cognitive limitations of the political organ.[750] While these arguments have their own merit, he argued, they are limited to the extent that they fail to underscore the main explanatory factor in delegation theory has to do with achieving policy credibility.[751] Majone argues, without independent and effective democratic institutions politicians will find it hard to make long-term policy

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[746] Cheryl W. Gray and Kathryn Hendley, Developing Commercial Law in Transition Economies: Examples from Hungary and Russia, Sachs and Pistor, *The Rule of Law and Economic Reform in Russia*, 139.
[747] Helmke and Rosenbluth, "Regimes and the Rule of Law."
[748] Giandomenico Majone, "Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions," 1996, http://cadmus.eui.eu/bitstream/handle/1814/1472/RSCAS_1996_57.pdf.
[749] Yuhua Wang, *Tying the Autocrat's Hands, The Rise of The Rule of Law in China*, Cambridge University Press (2014) 5.
[750] Majone, "Temporal Consistency and Policy Credibility."
[751] "Temporal Consistency and Policy Credibility," accessed October 3, 2016, http://www.eui.eu/Documents/RSCAS/Publications/WorkingPapers/9657.pdf.

commitments.[752] In evolving democratic society that has a dynamic political climate, political agents may support the call for rule of law, such as by building independent non-political agencies, mainly out of the fear of domination or abused by future power holders.[753] Backed by these and similar other arguments the supply side prescription significantly influenced the neo-institutionalist thought.

The willingness of the majoritarian political institution to establish an autonomous agency depends on both structural and political factors.[754] According to Gheventer, in Latin American context, the interest in designing autonomous antirust agencies emanated from sudden change in economic freedom. The transition from state controlled markets to liberal ones weakened the role of the state in the market and revival of such control was considered risky as it will bring uncertainty and instability in the market affecting investment decisions.[755] Credible regulatory intervention allows the reduction of investment risk spreads and hence reduces the risk costs of capital owners consequently raising investment in the regulated sector.[756] Gheventer rightly argues that regulator credibility is not a function of the scale of intervention by the state, rather it is tied to the stability of the regulatory arena, the confidence that regulatory outcomes are not influenced by short-term opportunistic behavior of politicians.

The above discussion highlighted that the development of competition law in some developing countries carries significant importance as a strategic commitment instrument. South Africa's experience provides perspective to this argument. The most important anchor to the argument that South Africa's competition regime was a result of 'negotiated' power balance was its drafting process that paved various access ways to both business and labor interest groups to voice their concerns. Hence unlike the other institutional alternatives presented above, the competition policy drafting process ensured both interest groups access to important information and direct participation in the discussion that followed. Even though these groups did not directly discuss the draft legislative instrument, important 'give and take' type of deliberation between the government, business and labor gave an opportunity to these groups to put their mark on the proposed policy guidelines.

Ethiopia's political economy entered the 21st century with a mixture of policies that are shaped in line with the neoliberal ideologies and EPRDFs motto of 'revolutionary democracy'. The latter is often described as a sum of 'ambiguous' political and economic principles that diluted neoliberal principles with Marxist/Leninist political philosophy.[757] This had implications both in the political as well as economic landscape. First, revolutionary democracy dictated only

[752] Majone, "Temporal Consistency and Policy Credibility."
[753] Helmke and Rosenbluth, "Regimes and the Rule of Law."
[754] Alexandre Gheventer, "Antitrust Policies and Regulatory Credibility in Latin America," *Dados* 1, no. SE (2005): 0–0.
[755] Gheventer.
[756] Gheventer.
[757] Jean-Nicolas Bach, "Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia," *Journal of Eastern African Studies* 5, no. 4 (2011): 641–663.

minimal form of multi-party democracy.[758] It argued that contemporary Ethiopian politics in not mature enough to handle full-fledged democratic process without a temporary incubation period for a genuine electorate to emerge.

In the economic governance and development field the revolutionary democrats did initially move in the direction of liberal economic principles under the advice of international financial institutions. However, they quickly moved to openly criticize structural adjustment programs advocated by IFIs and resorted to their own 'self-determined policies'.[759] These policies made sure that the government held monopoly in controlling the provision of key economic services, such as telecommunications, finance, energy as well as other critical parts of the predominantly agricultural dependent economy such as access to land, credit and fertilizer.

It seemed more than one conundrum faced the revolutionary democrats in transforming the countries in to a sustainable capitalist state. First, they have to face the dilemma of political and economic liberalization; such as the advent of federalism and the recognition of the rights of nations and nationalities across Ethiopia and key initial economic liberalization projects, vis-à-vis the aim to directly control and orient large aspects of the economy in accordance with their revolution and developmental ideologies. Second, the revolutionary democrats did wonder if their revolutionary democracy and developmental state objectives would contradict their power craving members and interest to stay in office. In doing so they critically prevented the emergence of any mature and capable political opponent and the growth of economic competitors. According to Davide Chinigò and Emanuele Fantini, this dilemma is visible when one sees a rescaling of economic globalization and reform projects that started early in the areas of land reform, commercialization of agriculture.[760] This had serious implications on the process and substance of the development of competition law in the country. In large part there was almost zero public participation in the drafting process of the instruments with only formalistic parliamentary discussion and approval. There was no objective from the side of the ruling government to use competition law as a reform instrument. Neither was the case of any interest groups, including consumers.

In doing so, the analysis of the development of competition law in developing countries did not always follow a rational-functional/instrumental approach. Several factors beyond a rational institutional design effort dictated the choice and approach taken in designing competition enforcement agencies. Institutional design had to follow globally recognized norms and institutional design options to claim legitimacy.[761] Due to the mature experience of

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[758] Davide Chinigò and Emanuele Fantini, "Thermidor in Ethiopia? Agrarian Transformations between Economic Liberalization and the Developmental State," *EchoGéo*, no. 31 (2015), http://echogeo.revues.org/14141.
[759] Joseph E. Stiglitz, *Globalization and Its Discontents*, vol. 500 (New York Norton, 2002), 30.
[760] Davide Chinigò and Emanuele Fantini, "Thermidor in Ethiopia? Agrarian Transformations between Economic Liberalization and the Developmental State," *EchoGéo*, no. 31 (2015). para 15
[761] Kovacic and Hyman, "Competition Agency Design"; Antonio Estache and David Martimort, "Politics, Transaction Costs, and the Design of Regulatory Institutions," Policy Research Working Paper Series (The World Bank, 1999), https://ideas.repec.org/p/wbk/wbrwps/2073.html.Also see, Elizabeth George et al., "Cognitive Underpinnings of Institutional Persistence and Change: A Framing Perspective," *Academy of Management Review* 31, no. 2 (2006): 347.

competition regimes in the US and Europe, the role of development assistance ensured the flow of ideas was only a one-way stream, in doing so there was little room for innovation. These compelling circumstances largely influenced the design of competition institutions in developing countries.

The experience of Ethiopia shows how this directly affected the market governance and regulatory setup of the state and private sector relationship in the country. Primarily 'professional autonomy of the technocracy' was very much limited.[762] Elitist centralism replaced participatory policy making process,[763] with the consequence that 'technical input is at best deficient or simply absent.'[764] While the developmental state advocates that it intends to govern/rule by incentives, in a carrot and stick fashion, it has been criticized of often carrying more of a stick than a carrot.[765] This created an 'anemic' relationship.[766] The rational-functional/instrumental approach that relied on technocratic legitimacy therefore did not serve its intended purpose. Agents/stakeholders had little or no technical readiness or appeal to use conventional competition framework.

South African's experience was to the contrary. The key policy and institutional pillars of South Africa's Competition Act were a result of negotiations among the government, business groups and labor. Hence, it was imperative that the rules provide a fair playing filed for all actors. Thus, competition institutions developed as technical bodies. While technocratic legitimacy served marginal role in Ethiopia, in South Africa competition intuitions evolved in a manner that served the need for technocratic legitimacy.

Accordingly, in the absence the right preexisting conditions, the development of competition law rules and institutions in developing countries, the likes of Ethiopia, was largely influenced by US and EU competition law regimes. In such broad transplant exercise normative and institutional persistence was the norm rather than the exception. Whether the transplant process was voluntary or otherwise most countries did not have a blank slate. Institutional influences took both hard and soft approaches as they both constrained and guided the competition law development process.[767]

4.2. Experiments in Building Competition Enforcement Institutions

As described in the preceding chapters, a key challenge of many of the nascent competition regimes is the strong role that the state plays in the market. This is also a typical example of, out of many, policy induced barriers to competition in developing countries. Similarly, a feature of policy induced barriers to competition regimes in developing countries that is illustrated by Ethiopia is the weak autonomy and power of competition agencies.

[762] Lefort, "The Theory and Practice of Meles Zenawi," 465.
[763] Lefort, 465.
[764] Lefort, 465.
[765] Lefort, 465.
[766] Ibid, Ken Ohashi, 'Is Ethiopia in a low productivity trap?', Addis Fortune, 4 December 2009.
[767] Rodriguez and Menon, *The Limits of Competition Policy*, Introduction.

Independence of the competition agencies is one of the key shortcomings of effective competition law enforcement in many developing countries.

Even though TCCPP establishes the Competition Authority as an autonomous organ with powers to investigate and institute action for alleged violations it has yet to initiate any major enforcement action. The Authority is organized under the Ministry of Trade as an autonomous organ and largely maintains a structural autonomy. It maintains investigative powers as well as administrative (fist instance) and appeal tribunals that also function largely outside the purview of the executive branch of the government. The Ministry does not have formal powers to interfere in the day today activities of the Authority.[768]

However, the operational autonomy of the Authority is questionable. Despite TCCPP's explicit provision or rules on the operational autonomy of the Authority, the authority have failed to operate independently of the influence of the executive/political organs of the state.[769] Various authors have put forth institutional solutions; such as parliamentary selection of the director general, allocation of budget directly by parliament (instead of the Ministry of Finance) and representation of the private sector in the management of the Authority, etc.[770] As highlighted in the preceding chapters competition law's institutional discussion in developing countries is largely framed by highlighting the role of, or rather the need for, an independent and professional institutional environment, for an effective competition regime to thrive. i.e. the technocratic argument. It is expected that the regime will derive its legitimacy out of its independence from political interference and its objective and technical (substantive, and procedural) capacity.

However, these assumptions only address the tip of the iceberg. First, countries like Ethiopia have only a recent experience in establishing independent regulatory bodies. In doing so, the newly established agencies under the three consecutive competition legislations were newly converters from typical civil service institutions, and sometimes SoE entities. This is a characteristic that is also shared by several newly established competition regimes.[771] Hence despite the apparent independent structure of these agencies, they had many pitfalls related to wide resource gap that these countries faced in terms of skills, financial constraints, and the like. According to UNCTAD such constraints not only hampered the growth of competition institutions but also the larger business regulation and legal system; the business sector, the judiciary, and the legislator.[772] In doing so these limitations made it impossible for these agencies to break ground by employing relevant enforcement and advocacy programs.

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[768] Interview with Ato Merkebu Feleke, former Director General of Ethiopian Trade Competition and Consumer Protection Authority, Feb 2017. (The interview was made when he was still a Director General of the Authority.)

[769] Article 27, 32 and 33

[770] Kahsay G. Medhn, "Ethiopian Competition Law: Appraisal of Institutional Autonomy," *International Journal of Innovative Research and Development* 5, no. 3 (February 24, 2016): 84, http://www.ijird.com/index.php/ijird/article/view/88407.

[771] UNCTAD: Independence and accountability of competition authorities, Note by the UNCTAD secretariat, TD/B/COM.2/CLP/67), 12.

[772] UNCTAD: Independence and accountability of competition authorities

For instance, it took the Ethiopia's Competition Authority no less than a decade to do a makeshift market assessment and evaluation for potential anticompetitive practices.[773] Then after it failed to bring any enforcement measures despite the fact that the studies indicated the presence of anticompetitive market distortions. Indeed, such a brake though has also been challenging even for countries such as South Africa. According to David Lewis, the South Africa competition authorities were at first handicapped by resource constraints. However, it used the Competition Act's merger regulation mandate to show the seriousness of the new regime.[774]

Second, institutional autonomy of the authority should be seen in the context of the place of competition law enforcement in the general political economy environment. As stated by one author, "the problem lies with the economic structure of the country… the question should be who owns the economy? "…there is no playing field for private sector in our country. Large and medium scale economy is controlled by either public sector or political party (EPDRF) affiliated enterprises."[775] In the absence of trust from the larger public, no level of formal institutional independence will bring about the level of legitimacy needed for these institutions to garner institutional participation; either in the form of bringing complaints, claims, private enforcement etc. Lack of confidence on the role of these institutions will diminish the involvement of the business community, other interest groups, and consumers. Ethiopia is a good show case for many of its peers that having established a formally independent competition authority, there is still a wide gap before the authority establishes trust in the larger business and consumer community of being an independent and effective arbiter of the competition rules.

Ethiopia's steel market distortions highlight this situation. With no confidence on the competition institutions often aggrieved parties appeal to the political organs of the state. There are more than one explanation why such avenues are preferred; it may as well be lack of information on the existence of the competition agencies. However, in the cases presented above it can be said that this largely has to do with the fact that such groups understood the very 'political' nature of the measure by the government. Hence in the absence of the need for technocratic legitimacy, competition authorities had to compete with the political organs in terms of providing the best forum to deal with competition issues.

Ethiopia's steel industry saga is not unique in presenting an example of how the government approached similar issues of appeal to the political bodies. A number of non-competition law issues, e.g. bankruptcy issues in real estate industry, manufacturing sector and service sectors etc., are appealed directly to the highest government organs, often the office of the Prime Minister for which the latter responded by establishing committees of government officials, sometimes including the private sector, to provide 'recommendations' to the government. This

[773] The Authority studied: Cement and transport industries as well as a study on 'Misleading market practices'; Interview with Mr. Fantahun A., Expert at Market Research Directorate, Competition Authority, Sep 2017.
[774] Lewis, *Thieves at the Dinner Table*.
[775] Tessema Elias Shale, A Critical Analysis of the Enforcement Framework of Consumer Protection in Ethiopia: Challenges and Prospects, Tesis, Addis Ababa University (2011)

is despite the fact that the country has, a comprehensive and one of the oldest codified bankruptcy rules in the continent.[776] In general, this trend is evidence of the deep lack of trust in the technocratic organs of the state.[777] The market distortions of the form presented above and the way how interest groups appeal to the top political body of the state is therefore no exception. There is little trust on independent agencies with their ability to make key policy and regulatory decisions.

It is therefore not surprising why Ethiopia's first competition law instrument established a Commission which is composed of a committee of senior government officials under the name 'Trade Practices Investigation Commission' to oversee competition cases rather than what may be a conventional independent agency type organ. Other than the criticisms forwarded against the Commission, such as joining both investigative and adjudicative functions within one organ, its technical capacity, human resource constraints etc., the main criticism has been against the very 'political' nature of its establishment. It's politically appointed members serve only on part-time basis.[778]

In hindsight there is clearly no attempt by the government to establish a full-fledged and independent competition agency. Despite the 'free-market' rhetoric the government was still worried of giving unhinged powers to any independent agency. Even though the economic objectives of efficiency-based competition law application might be noble, it cannot be denied that a state/government that is still at stage of experimenting with its policies will feel uncomfortable with a group of technocrats pocking issues with its market policies. Hence the way how the government structured the Commission is as a carefully designed tool that not only gauges policy unfriendly intervention in the name of competition law enforcement but also an instrument of brining on board different alliances within the government establishment under one roof of policy measurement even if the latter might not always be relevant within the context of competition law.

Two interesting examples reinforce the argument. First, while the Proclamation maintained a general scope of application, 'all persons involved in any commercial activity',[779] it granted the Commission a power to determine the applicability of the Proclamation to 'commercial activities that are according to the Investment Proclamation exclusively reserved for the Government', 'enterprises having significant impact on development and designed by the Government to fasten growth and facilitate development', 'basic goods or services that are subject to price regulations.'[780] The Proclamation did not contain any guidelines as to how to interpret which sectors should be considered essential to fasten economic development. Hence, in practice this may include both measures by the government and private sector that may be shielded from the application of the Proclamation for genuine developmental and industrial policy reasons or otherwise. Second, while the Proclamation anticipates that the

[776] Commercial Code, Book 5 – Bankruptcy.
[777] Interview with Dr Mulugeta Mengist, Director, Prime Minister's Office, Addis Ababa, May 2016.
[778] Haroye, "Competition Policies and Laws," 48.
[779] Article 4
[780] Article 5. Exceptions

composition of the commissioners is to include unspecified number of members solicited from the government and the private sector,[781] in its short life time the Commission did not include any members from the private sector and its assigned five commissioners were very high level government officials and policy makers including Minister of Justice, head of the Federal Cooperatives Commission, economic advisor of the Prime Minister, and Governor of the Central Bank (National Bank of Ethiopia) and head of the Quality and Standards Authority.

In doing so, it seemed the Commission was intended to serve as a gate keeper to the government's interests in the economy/market.[782] However, this is also not an entirely bad idea for an emerging competition regime; it comes with both positive gains and shortcomings. Its positive aspect has to do with the way such an organ may serve as instrument of credible commitment by the government to oversee claims that may even be considered politically sensitive. Hence private and government induced anticompetitive market practices can be confidently entertained by the commission. This is contrary to a character of conventional competition agency in low enforcement jurisdictions that is concerned about politically sensitive cases. In addition, such bodies can also garner support from various sides of the government to the extent that the different interests might align with different government ministries and representatives. In the end it might serve as a good platform for these groups to carefully examine the real cost benefits of each case at hand.

An interesting case that is also illustrative of the above argument has been handled by the Commission in its early period. In a matter that involved a claim brought by the then Ministry of Trade and Industry, now Ministry of Trade, the Ministry argued that two wholesale and retail enterprises have contravened the provisions of the competition Proclamation by 'hoarding' large stocks of consumer products.[783] According to the Ministry, this has affected the respective product market by constraining distribution of the goods to the consumers. Members of the Commission disagreed with the claim's relevance within the Proclamation as the Ministry failed to provide any evidence of market dominance position and resulting abuse. After the case was rejected by the Commission, the Minister of Trade had to personally intervene to discuss the outcome, leading to brief 'skirmish' with the Chairman of the Commission. The economic advisor to the Prime Minister and prominent member of the Board had to intervene to explain how such claims cannot fit the purpose of the Proclamation and difficulty of proving abuse of dominance position.[784]

The risks that similar intervention by politically powerful organs of a state might bring to the autonomy of any conventionally independent competition agency is clear. A vivid example of the seriousness of this concern is seen, as it will be further discussed below, by how the Ministry of Trade ensured that the revised Trade Practice and Competition Proclamation included provisions prohibiting the act of 'hoarding' under the section dealing with 'consumer

[781] See Article 13(2),
[782] Interview; Harka Haroye; Former Minister of Justice and Chairman of the Commission Hawassa, Ethiopia. (July 2017).
[783] Interview; Harka Haroye;
[784] Interview; Harka Haroye;

protection'. Therefore, in hindsight such an organ might have served the nation well from policy induced barriers to competition. The steel monopoly problem discussed above is therefore an example of retreat by the government to such 'committee' approach.

On the other hand, such approach also has its own shortcomings. First, even though the Commission was given investigative powers because the Commission was organized on a board like structure with almost no permanent staff, resources, and procedural rules, it made almost no effort to proactively engage in market surveillance and investigation exercise.[785] The Commission was paralyzed by the fact that all of its members were senior officials of the government which were busy with more urgent tasks. Second, it cannot be said that all potential anticompetitive practices are policy induced. In this sense it is obvious that majority of anticompetitive issues that are not politically motivated and that largely reside in the private sphere of the market may not be properly addressed due to an inefficient institutional setup of the enforcement organ. Hence in this regard autonomous competition agency with competent staff and procedural rules might do better. However, the latter will still have to suffer from its own credibility and efficiency challenges.

Therefore, it seems to be the case that during early stages of their development, newly established competition regimes such as that of Ethiopia often have to choose between equally challenging and difficult institutional choices. A politically powerful organ might not have the credibility of the larger consumer and business stakeholders. Such organ is likely to fall pray of interest group or, as the case may be, majoritarian influence. However, it may serve as a transition instrument from the government's point of view. Through deliberation of its members there is a better chance that such a body and approach will enable the government to see both the costs and benefits of its decision. Even if all decisions may not be efficiency friendly, it can be said that such decisions have the chance to be well informed of both the efficiency gains and losses accruing from the decision.

Therefore, this analysis challenges conventional approaches that attempt to 'perfect' competition enforcement institutions from the gate go. It indicates that institutional actors including the government are likely to attempt to build 'efficient' institutions as the number and complexity of cases grows. The experience of Ethiopia is a vivid example of how irrespective of a formally established 'conventional' enforcement organ the role of competing institutions was significant enough to outweigh the competition agencies. In doing so TCCPP's predecessors attempt to form a committee modeled Competition Commission might have been appropriate to its time.

4.3. Competition Law Vs. Regulation - Institutional choice at its best?

South Africa's experience in dealing with abuse of dominance issues in the pharmaceutical industry presents an interesting insight in to how institutional considerations determine the enforcement efficiency of competition agencies. A very straightforward question that would arise in this regard is the relationship between competition law and compulsory licensing

[785] Haroye, "Competition Policies and Laws," 49.

regimes. I.e. could the government not have acted against MSD and Merck within the framework of flexibilities provided under the Patent or Medicines Act? And/or for interest groups, such as TAC pressure the government or directly submit claim for such action?

Compulsory licensing may perhaps theoretically provide the most straightforward means to address public health crisis in South Africa. However, to date almost no compulsory license has been issued for pharmaceuticals.[786] Despite the success of the South African government in introducing changes to its intellectual property policy and laws, including compulsory licensing, this option was not fully exploited by the government.[787]

The primary cause has to do with the respective political/diplomatic and economic powers of the interest groups that are pro-stronger patent protection. This much has to do with the fact that the larger consumer group and individuals living with HIV-AIDS, the interest groups that are formed in the form of advocacy groups, had a much weaker institutional organization than their adversaries. In addition, the prospect for compulsory licenses generated serious political reaction from politically and economically powerful countries which are also the sources countries to the patented technologies.[788] In this regard the role of the US government has been significant. Other than that, the large consumer group was disorganized while other interest groups were comparatively weak to fight big-pharma.

The other aspects are deeply institutional. First, the process of how compulsory license are issued lacked clarity. The lack of clarity drove legal challenges that are expensive and time taking even though according to the TRIPS Agreement, South Africa could have established a much simpler and practical procedures for application of compulsory licenses.[789] Second, compulsory license request procedures were technically complex. According to the established procedure every request for compulsory license needs to be submitted to the Commissioner of Patents which is a single judge of the High Court of South Africa. This system was technically challenging even for well-organized advocacy and litigation teams such as TAC, the NGO that has lodged the antitrust complaint to the South African Competition Commission, has at the time. According to TAC, the process of requesting a compulsory license "is a complex process requiring the use of specialist lawyers, and subject to the vagaries of the system, namely, filling of papers, hearing of arguments, adjournments

[786] Balthasar Strunz, "Interface of Industrial Policy and Competition Law in South Africa," in *The Interface of Competition Law, Industrial Policy and Development Concerns*, Munich Studies on Innovation and Competition (Springer, Berlin, Heidelberg, 2018), 433, https://doi.org/10.1007/978-3-662-57627-4_6.
[787] Tenu Avafia, Jonathan Berger, and Trudi Hartzenberg, "The Ability of Select Sub-Saharan African Countries to Utilize TRIPS Flexibilities and Competition Law to Ensure a Sustainable Supply of Essential Medicines: A Study of Producing and Importing Countries," *Documento de Trabajo*, no. 12 (2006), http://apps.who.int/medicinedocs/documents/s18249en/s18249en.pdf.
[788] Frederick M. Abbott et al., "UNDP, Using Competition Law to Promote Access to Health Technologies: A Guidebook for Low-and Middle-Income Countries," *United Nations Development Program (Ed. FM Abbott)(2014)*, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439416; Brook K. Baker, "International Collaboration on IP/Access to Medicines: Birth of South Africa's Fix the Patent Law Campaign," *NYL Sch. L. Rev.* 60 (2015): 297.
[789] Baker, "International Collaboration on IP/Access to Medicines."

and often undue delays in the finalization of the application."[790] Thirdly, compulsory license request procedures carried prohibitive costs to most applicants. According to TAC "the costs to the applicants are prohibitive and they will invariably encounter opposition from patent holders who are usually multinational corporations with deep pockets."[791]

These challenges of the process made it less practical for applications to be made in public interest; especially in situations of public health emergencies.[792] According to TAC this is not in line with Article 1 of the TRIPS agreement that gave flexibilities to WTO members to set their own method and acceptable procedures to implement. It argued South Africa should have implemented simplified procedures "that does not act as a barrier to issuing compulsory license"[793] For TAC an administrative procedure that is designed to be simple and expeditious is preferred than a judicial adjudicatory body.[794]

TAC also argued that the confusion and lack of clarity as to royalty rates and negotiation periods as set out under section 4 and section 56 of the Patent Act should have been provided more clearly.[795] Therefore due to this and similar other factors TAC was forced to use alternative routes to address what at the time seemed unlikely outcome of pressuring multinational pharmaceutical companies. It is in this regard that the option of using South Africa's newly reinvigorated competition law institutions came to picture.

TAC's position statement on launching its Treatment Action Campaign states;

> Unfortunately, neither Minister has seen fit to use this crucial public power, despite being urged to do so. In the result, an organization such as TAC has had to assume the responsibility itself. To its credit, government has provided TAC with the legal space within which to operate, primarily by enacting the Competition Act and establishing and resourcing the Competition Commission.

Indeed, the competition enforcement landscape had a much favorable dynamics than its compulsory licensing counterpart. Complaints are submitted to the South African Competition Commission; a government agency of administrative and investigatory role. In accordance with the mandate given to it under the Competition Act the Commission will receive the complaint and investigate the case on its own thus saving the much-needed resource of advocacy/ public interest groups such as TAC.

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790 "Campaigning for Pro-Public Health Reform of South Africa's Patents Act – TAC – Treatment Action Campaign," accessed August 14, 2018, https://tac.org.za/news/campaigning-for-pro-public-health-reform-of-south-africas-patents-act/; Heinz Klug, "Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDS and TRIPS," *Law and Globalization from Below*, 2005, 118.

791 "Campaigning for Pro-Public Health Reform of South Africa's Patents Act – TAC – Treatment Action Campaign."

792 " Treatment Action Campaign."

793 " Treatment Action Campaign."

794 "Campaigning for Pro-Public Health Reform of South Africa's Patents Act – TAC – Treatment Action Campaign." "The Patents Act should set up a simple, expeditious administrative (rather than judicial) procedure for hearing applications for compulsory licenses, with opportunity for the patent holder to be heard."

795 TAC also argued "patent holders should not be entitled to stay the operation of a compulsory license should the right holder seek review of the issuance of a compulsory license." "Campaigning for Pro-Public Health Reform of South Africa's Patents Act – TAC – Treatment Action Campaign."

The Commission also works within a prescribed schedule and frame of reference. It has a maximum of one year period to investigate cases and make its determination as to whether it will reject the complaint or submit it to the Competition Tribunal. If the Commission refuses to submit the case any complainant can refer the matter to the Tribunal itself. There is also a chance that during the investigations the Commission may give opportunity for the complaining party, such as TAC in this case, to review the response given by the respondent.

In addition, as most other competition institutions, the Commission is empowered to make search and seizures of premises and documents or subpoena relevant individuals and seek testimonies. This gives the complaining party a greater advantage compared to, as discussed above, the more adjudicatory process compulsory licensing procedures entail. Most importantly, the formal independence of the competition enforcement agencies provided a better institutional environment that protected interest groups from domestic and international political pressure.[796]

4.4. Institutional Choice and the Use of Alternative Instruments

As indicated above, Ethiopia's TCCPP is a collection of three legal regimes; competition law, unfair competition, and consumer protection. Article 8 of the TCCPP contains the main provision providing for rules relating to unfair competition. "No business person may, in the course of trade, carry out any act which is dishonest, misleading or deceptive and harms or is likely to harm the business interest of a competitor."[797]

The provisions of the proclamation are to be applied parallel to unfair competition rules that are also contained under the Civil Code, such as Article 2057, and the Commercial Code, articles 130-134.[798] Both the Civil Code and the Commercial Code provide civil remedies to the victim in the form of damages and other orders, such as injection or corrective relief.[799] In addition article 719 of the Criminal Code also contains criminal penalties. TCCPP's unfair competition rules are therefore neither complete nor compressive on their own. Despite this overlap, however, the Proclamation does not contain any rule that may bring clarity on its relationship vis-a-vis these other rules. TCCPP's consumer protection rules are contained in part three and constitute one third of the Proclamation. The provisions guarantee the right of consumers to access full information on goods and services, the right of choice and protection from deceptive practices including the right to be compensated for damages. In addition,

[796] Abbott et al., "UNDP, Using Competition Law to Promote Access to Health Technologies." S. Flynn, "Using Competition Law to Promote Access to Medicines," *Washington, DC: American University, Washington College of Law: Program on Information Justice and Intellectual Property*, 2008.
[797] Article 8(1), The list of unfair trade practices include; act that is likely to cause confusion with respect to the business interest of other enterprises, interference with the trade secrets of another business person, including through the use of its current and former employees, 'false or unjustifiable allegations', false advertisement
[798] The Civil Code 1960, Commercial Code 1960. Article 133 of the Commercial Code provides the following activities as unfair competition; (1) Any act of competition contrary to honest commercial practice shall constitute a fault. (2) The following shall be deemed to be acts of unfair competition: (a) any acts likely to mislead customers regarding the undertaking, products or commercial activities of a competitor; (b) any false statements made in the course of business with a view to discrediting the undertaking, products or commercial activities of a competitor.
[799] See Art. 2122 of the Civil Code.

TCCPP contains provisions that allow the government, in particular the Council of Ministers, with the proposal Ministry of Trade, to impose price control measures on what are defined to be 'basic consumer goods'. [800]

There are various implications to the inclusion of unfair competition and consumer protection provisions under the Proclamation. First there are certain overlaps in terms of the substantive rules contained in the Proclamation that are certain to raise confusion. The preamble and objectives of the Proclamation is a case in point. Second, it raises institutional design and enforcement questions. Enforcement experience of the Trade Practice investigation commission under Trade Practices Proclamation 2003 as well the Competition Tribunals established in the latest two legislations reveals that cases handled by these agencies were predominantly unfair competition cases.[801]

Most importantly, the experience of Ethiopia shows a tendency to resort to non-competition instruments to resolve alleged competition problems. There have been several controversial enforcement measures based on these standards. During January 2011, the government-imposed price controls on selected basic consumer goods including sugar, edible oil, soft drinks, and beer. The measure has been taken in the context of rising prices that were, according to the government caused by 'price gauging' and 'hoarding' by 'dominant' business in the market.[802] However, it was argued by many that the real cause of the price hike was the critical shortages of supplies in the market, inflationary pressures caused by high government spending, devaluation of the currency, drought in various parts of the country and problems in logistics corridor that connects Ethiopia to the rest of the world.[803]

Similarly, after the central bank (NBE), announced a 15 percent devaluation of the Birr on October 11, 2017, inflationary pressures where visible in the economy.[804] As a result the price of food as well as non-food items spiked in the weeks following the devaluation.[805] Particularly, the price of steel and other construction materials soared up to 100 percent.[806] To

[800] Article 2(1) of the TCCPP defines basic goods and services to mean goods or services related to the daily need of consumers, the shortage of which in the market may lead to unfair trade practice.
[801] H. Haroye, "Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law," *Mizan Law Review* 2, no. 1 (January 1, 2008): 49,.
[802] S. Hassan, "Futility and Damaging Effects of Ethiopian Price Caps (ANALYSIS)," *New Business Ethiopia*, 2011.
[803] "Ethiopia Imposes Price Caps to Fight Inflation," *Reuters*, January 7, 2011, https://www.reuters.com/article/ozabs-ethiopia-economy-prices-20110107-idAFJOE70606F20110107. For example, Ethiopia devalued the Birr by appx 10% during October 2009 and by more than 20% during September 2010. See Seid Hassan, "Devaluation of the Birr - A Layman's Guide," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 23, 2010), https://papers.ssrn.com/abstract=1688561. Yonas Abiye, "Ethiopia: Price Control - Brewing Investment or Gambling?," *The Reporter (Addis Ababa)*, August 11, 2014, http://allafrica.com/stories/201408111539.html.
[804] See IMF Article IV report.
[805] "Rising Inflation 'Not Related to Politics' | The Reporter Ethiopia English," accessed August 3, 2018, https://www.thereporterethiopia.com/article/rising-inflation-not-related-politics.
[806] "Cement Price Hikes | The Reporter Ethiopia English," accessed August 3, 2018, https://www.thereporterethiopia.com/article/cement-price-hikes.

tame such galloping prices the government established investigative committees,[807] while the Competition Authority undertook massive enforcement campaign and charged and several steel manufacturers and importers with price fixing.[808] It also shut down the business of more than 21 local steel retailers for alleged 'hoarding'. Similar charges were brought against pharmaceutical and medical devices manufacturers and importers, as well as importers of milk products.[809] The common nature of the Authority's preference to employ such easy to use enforcement tools was depicted by a local paper as, "It took a day for the price of re-bar to show a spike by more than a third of its value following the devaluation of the Birr… allegations of hoarding by retailers were next to follow."[810] Many argued that the government is hitting the wrong targets to fix inflation.[811]

In doing so Ethiopia presents a different enforcement dynamic to that of South Africa. Rather than investigating potential anticompetitive practices under the standard of 'unfair prices', often the government and the competition authority intervened directly and perhaps 'excessively' to regulate prices in a loosely defined basket of 'basic consumer goods'. The use of 'hoarding' as a competition enforcement tool also exceeds the use of any other standard under the TCCPP. As prosecuting anticompetitive agreements is difficult the authority often exploits the standard to address high prices caused by other macroeconomic causes. The result has been noting but more distortions in the market with proliferation of underground markets for regulated goods and stifling of future investment.

These episodes illustrate how the use of competition law to address 'anticompetitive' practices might be less preferred considering the availability of less technical, even though inappropriate, instruments that can address raising public concerns. In line with the analytical approach outlined above, in the absence of institutional readiness to bring claims through competition institutions, it is possible to envisage consumer groups, the larger public, is likely to pressure government to use 'alternative' instruments to address such concerns. In this sense, while the dearth of competition enforcement record may appear to be a systematic preference by the government to downplay the role of effective competition agencies, institutional choice considerations may as well be the determining factors.

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[807] Addis Fortune, "Committee to Arrest Food Inflation Emerges," accessed August 3, 2018, https://addisfortune.net/articles/committee-to-arrest-food-inflation-emerges/.

[808] "Ethiopian Government Charges Steel Bar Producers for Price Fixing," accessed August 3, 2018, https://www.ezega.com/News/NewsDetails/6250/Ethiopian-Government-Charges-Steel-Bar-Producers-for-Price-Fixing. Addis Fortune, "Uncertainty Prevails Over Rebar Market," accessed August 3, 2018, https://addisfortune.net/columns/uncertainty-prevails-over-rebar-market/., Addis Fortune, "Rebar Manufactures Face Charges of Price Jack Up," accessed August 3, 2018, https://addisfortune.net/articles/rebar-manufactures-face-charges-of-price-jack-up/.

[809] Haimanot Ashenafi, "Ethiopia: Authority Charges 11 More Medicine Importers," *Addis Fortune (Addis Ababa)*, January 2, 2018, 11, https://allafrica.com/stories/201801020228.html., Addis Fortune, "Authority Accuses Drug Suppliers of Price-Gouging," accessed August 3, 2018, https://addisfortune.net/articles/authority-accuses-drug-suppliers-of-price-gouging/.

[810] Fortune, "Uncertainty Prevails Over Rebar Market."

[811] Addis Fortune, "Gov`t Aims at Wrong Targets in What Ails the Economy," accessed August 3, 2018, https://addisfortune.net/columns/govt-aims-at-wrong-targets-in-what-ails-the-economy/. The government took similar measures in 2010 to address inflationary pressures,

4.5. Enhancing Institutional Participation

The preceding sub-sections highlight that to the extent that institutions serve as the best possible avenues to channel all possible debates, they may be selected even though they are not in line with 'conventionally' accepted models. In the meantime, the success of both institutional alternatives hinges up on the participation of stakeholders. Both can suffer from failing to garner the participation of key stakeholders that provide essential information for enforcement action, either by submitting claims, evidences or taking direct enforcement action etc.

Therefore, at early stages of development, it is important that competition enforcement organs take initiatives to enhance participation by implementing different techniques. In this regard the role of civil society, business associations, consumer groups, legal community etc. is very critical. South Africa's experience in dealing with pharmaceutical prices through its competition regime is evidence of the strong role played by civil society and NGO's. On the other hand, in Ethiopia, weak knowledge of the competition law and its institutions, contributes greatly as to why even less politically sensitive matters are brought to the attention of the highest government organs.

In generally this has to do with the weak and structural limitation of the legal system, institutional capacity of key stakeholders (e.g. consumer associations, professional associations, business and sectoral associations, universities, civil society etc.), and knowledge of the rules. Compared to its South Africa, civil society in Ethiopia is underdeveloped. During initial stages of the introduction of competition law and consumer protection, consumer associations played some role in the drafting process. A formal organization 'Ethiopian Consumers' Protection Association' was established in 2001 with the aim to "promote and protect consumers' rights in Ethiopia through research-based awareness raising, consumer education, training and compliant handling."[812] The Association was to some extent involved in the drafting process of the first competition and consumer protection instrument, The Trade Practice Proclamation. The Proclamation also recognized Consumers' and other associations to be part of the Commission which was entrusted with the enforcement of that law.[813] But as indicated above, these stakeholders did not eventually participate and still are not part of the institutional framework of the current regime. Rather, the association has been weekend and only exists as a 'one man' organization with no formal working relationship with the Competition Authority.[814]

Indeed, much of this has to do with the preexisting social, economic, and political background of the state. However, recently the topic of civil society development is attached to various political concerns. Often, civil societies are seen by the government as political opponents and due to this it is excessively regulated. On the wake of the regime change and downfall of the Derg in early 1990's, Ethiopia's civil society, in particular humanitarian NGO's, proliferated,

[812] Belete, "The State of Competition and the Competition Regime of Ethiopia."
[813] Article 11 of the Trade Practice Proclamation No.329/2003
[814] Interview with Mr. Fantahun A., Expert at Market Research Directorate, Competition Authority, Sep 2017.

as did the larger political space.[815] However, after the disputed 2005 election and bloody civil protest, the government introduced a new regulatory regime governing the registration and regulation of charities and civil societies.[816] The law limited the participation of 'international' NGO's in socio-political affairs and limited the foreign financial sources of 'Ethiopian' NGO's engaged in advocacy affairs.[817] The law has been criticized as "violating international standards relating to the freedom of association".[818] The stringent regulatory features of the law essentially closed the effective participation of civil society in advocacy areas.

A second major challenge is the gap in the knowledge and experience of the legal community vis a vis competition laws and institutions. None of the law faculties in the country offer courses in competition law until recently where two law schools started offering elective courses on a post-graduate level. Similarly, none of the economics departments offered courses in industrial organization.[819] The collective effect of this shortcomings is that key technical knowledge and institutional intermediaries were absent in Ethiopia.[820] Hence the dispersed consumer societies and other concerned bodies often preferred to approach the political and high level government agencies for solutions.

On the other hand, the experience of South Africa shows that not only it is in a more advanced state of building supporting institutions but also the laws and regulations were framed in a way that will enhance the growth and participation of the relevant stakeholders. More specifically, the Competition Act gives serious consideration for the role of various groups. Section 13A includes mandatory pre-merger notification to unions. Other rules insure open intervention/ participation for interested individuals. The role of civil society is also acknowledged within the Consumer Protection Act; Section 77. According to the International Center for Not-for-Profit Law "South Africa's legislation is generally enabling and supportive of CSO activity"[821] South Africa's pharmaceutical industry intervention is a good example of the role civil society in promoting increased competition in the sector.[822] The active engagement of the Commission

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[815] Yntiso Gebre, "Reality Checks: The State of Civil Society Organizations in Ethiopia," *African Sociological Review/Revue Africaine de Sociologie* 20, no. 2 (2016): 2–25.

[816] Lovise Aalen and Kjetil Tronvoll, "The End of Democracy? Curtailing Political and Civil Rights in Ethiopia," *Review of African Political Economy* 36, no. 120 (2009): 193–207.

[817] Charities and Societies Proclamation (Proc. No.621/2009)

[818] Civic Freedom Monitor: Ethiopia, http://www.icnl.org/research/monitor/ethiopia.html

[819] A postgraduate program on Competition Policy and Regulatory Economics used to be offered within Addis Ababa University, Faculty of Business and Economics. However, the program was interrupted after graduating not more than 3 classes due to financial and administration reasons.

[820] According to Hadfield, "developing an effective antitrust law, for example, depends on the extent to which lawyers, judges, and legal scholars develop expertise about the competitive environments in specific industries, the likely responses of firms to bright-line rules as opposed to standards, and the impact of injunctive remedies on consumers." Gillian K. Hadfield, "Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies," *DePaul L. Rev.* 56 (2006): 401.

[821] ICNL, Civic Freedom Monitor: South Africa, http://www.icnl.org/research/monitor/southafrica.html, ICNL states regarding Ethiopia's current civil cociety law "The law violates international standards relating to the freedom of association." ICNL, Civil Freedom Monitor: Ethiopia http://www.icnl.org/research/monitor/ethiopia.html

[822] POKU ADUSEI, *Patenting of Pharmaceuticals and Development in Sub-Saharan Africa: Laws, Institutions, Practices, and Politics* (Springer Science & Business Media, 2012), 188.

in raising awareness has also been recognized. It had established a strategy and stakeholder relations team as well as Advocacy and Public Affairs division to raise awareness and engage stakeholders in policy formulation and elaboration.[823]

5. Chapter Conclusion

The chapter set out to address three pertinent questions regarding competition law in developing countries First, what the process of putting in place a credible competition law regime looks like in selected developing countries? Second, what is the role of institutional considerations in affecting enforcement effectiveness.

In addressing these questions, the chapter highlighted that the development of competition institutions in Ethiopia and South Africa took different approaches. As South Africa came out of political and economic reform after the downfall of apartheid, the development of competition law institutions had prominent importance for the new government. Among others, the ANC government supported the reform of South Africa's competition regime with the aim of correcting market distortions by addressing anticompetitive practices as well as keen interest to use competition law intuitions as one of the pertinent instruments to correct the legacy of apartheid in the market. ANC's distributional objective in framing the new competition regime was however challenged by the business community. As did South African trade unions, organized business held critical stakes to influence the development of competition rules. In doing so the development of the new competition regime followed bargaining and negotiation approach. The resulting institution was independent and self-enforcing that cater for the interest of these agents.

On the other hand, while Ethiopia underwent a similar political economy reform process in the early 1990s, the development of competition law had garnered little attention from the government or other agents. This was in line with Ethiopia's limited success in achieving economic liberalization and market reform. As a result, the process of development of competition law in Ethiopia is simply a transplant of legal regime with well-crafted rules and institutions with the expectation that they will eventually develop in to a self-enforcing institution. The chapter highlighted that, due to several political economy limitations, the development of competition institutions did not carry any significance as an instrument of 'strategic commitment'. In large part there was almost zero public participation in the drafting process of the instruments with only formalistic parliamentary discussion and approval. There was no objective from the side of the ruling government to use competition law as a reform instrument. Neither was the case of any interest groups, including consumers. In doing so the chapter highlighted that development of competition law of competition law in developing countries did not always follow a rational-functional/instrumental approach. Therefore, the rational-functionalism approach that relied on technocratic legitimacy therefore did not serve its intended purpose. Agents/stakeholders had little or no technical readiness or appeal to use

[823] Dennis Davis and Lara Granville, South Africa: The Competition Law System and the Country's Norms in. Fox and Trebilcock, *The Design of Competition Law Institutions*, 320.

conventional competition framework. A bottom-up and demand driven development of competition law might have a better result.

The Ethiopian experience is also illustrative of the enforcement experience of many of its peers. After establishing a formally independent enforcement agency there is still a wide gap before such agency establishes trust in the larger business and consumer community. Ethiopia's steel market distortions highlight how in the absence of functional independence and technocratic legitimacy, competition authorities compete with political organs in terms of providing avenues to deal with competition issues. This in hindsight showed the relevance of Ethiopia's experiment in trying to establish a semi-autonomous Commission. The latter enabled the government to assess the utility of policy induced barriers to competition in the name of competition law enforcement but also served as an instrument of brining on board different alliances within the government establishment under one roof. Even if all decisions may not be efficiency friendly, it can be said that such decisions have the chance to be well informed of both the gains and losses accruing from the decision.

In the meantime, such institutional experiment will eventually come face to face with its institutional limitations. As number and complexity of cases grow the need for 'technocratic' institution will become apparent. Therefore, the analysis presented challenges conventional approaches that attempt to 'perfect' competition enforcement institutions from the gate go. It indicates that institutional actors including the government are likely to attempt to build 'efficient' institutions as the number and complexity of cases grow.

The chapter also highlighted the role of institutional considerations in determining enforcement effectiveness of competition institutions. South Africa's experience in dealing with excessive pharmaceutical prices presents an interesting insight in to how institutional considerations determine the enforcement efficiency of competition agencies. The case illustrated relationship between competition law and compulsory licensing, 'regulatory', regimes. The case shows how under the circumstances the relevant agents (consumers and interest groups), found it more effective to purse their claim under competition institutions against compulsory licensing procedures. In the face of higher 'costs' of participation under the latter avenue, these agents submitted their claims under the Competition Act, among others, due to the fact the independence of the competition enforcement agencies provided a better institutional environment that protected interest groups from domestic and international political pressure. In doing so the case illustrated not only how competition regimes may be effective but also showed how they may be preferred/selected 'choices' mainly from institutional points of view.

The review also showed Ethiopia's experience in dealing with potentially anticompetitive concerns though 'sui generis' standards, such as 'hoarding'. The review of Ethiopia's competition legislation revealed that the law is a collection of three legal regimes; competition law, unfair competition, and consumer protection. This opened the room for government intervention in the market under the disguise of consumer protection. Most importantly, the government resorted to using non-competition instruments to resolve alleged anticompetitive

practices, such unfair prices, which were largely a result of inflationary pressures caused by broader macroeconomic problems. As prosecuting anticompetitive agreements or abuse of dominance is difficult, the authority often exploited consumer protection rules, such as hoarding, to challenge high prices. The result has been noting but more distortions in the market with proliferation of underground markets for regulated goods and stifling of future investment. In this sense, while the dearth of enforcement record may appear to be a systematic preference by the government to downplay the role of effective competition agencies, institutional choice considerations may as well be the determining factors.

The chapter also highlighted that to the extent that institutions serve as the best possible avenues to channel key issues, they may be selected even though they are not in line with 'conventionally' accepted models. In the meantime, the success of all institutional alternatives hinges up on participation. Institutions can suffer from failing to garner the participation of key stakeholders that provide essential information for enforcement action, either by submitting claims, evidences or taking direct enforcement action etc. Therefore, at early stages of development, it is important that competition enforcement organs take initiatives to enhance participation by implementing different techniques.

Analyzed under this rubric, comparative institutional analysis shows that even mature regimes face institutional imperfections and choices. The case of South Africa presents a rather successful regime that has attracted significant enforcement interest even in areas that are traditionally devoted for regulatory bodies. Ethiopia, on the other hand seats on the opposite side of the spectrum. Weak competition law enforcement institutions reinforced by high costs of stakeholder participation, legitimacy challenges on the one hand and relatively reactive political bodies have resulted in a situation where key competition law and policy issues are being presented and entertained by political bodies.

Therefore, the approach used is useful to explain why some competition law regimes show stronger or weaker enforcement practice and perhaps why the choice of market regulation instruments in various developing countries often oscillates between varying positions; such as the choice between interventions in the market place in the form of direct provision of goods and services, price control instruments, market regulation versus competition law.

CHAPTER SIX

Understanding Competition Law's Normative Landscape Through CIL

1. Introduction

The objectives and normative scope of competition law in developing countries is an open debate. No doubt several goals and visions underpin competition law and policy in developing countries. For example, whether non-efficiency objectives should be part of developing countries' competition law framework is one of the most pertinent and contested issues. In this regard while a vast array of contributions have argued that there is a place for non-efficiency considerations, there is almost no consensus on which of these considerations should be taken in to account or what principles should guide this exercise.[824] Similarly, the issue of whether competition law should directly address excessive pricing has been one of the most discussed topics.[825] While approaches differ, a number of standards and tests have been put forward having in mind one key goal, minimizing both under and over enforcement concerns.

This chapter aims to contribute to this body of work. It does so by building on the discussion in the preceding chapters that have outlined the role and significance of comparative institutional analysis. It attempts to discusses non-efficiency objectives taking a particular look at public interest considerations in merger control cases in one of the countries selected for case review, South Africa. Similarly, by analyzing the proposed standards for dealing with excessive pricing, it attempts to provide normative insights derived from comparative institutional analysis. It discusses how both argument in favor and against of incorporating non-efficiency objectives in to competition law framework are driven by institutional considerations. In doing so the chapter highlights the relationship between goal choice and institutional choice.

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[824] Ofer Green, "Integration of Non-Efficiency Objectives in Competition Law" (2008); *Economic Efficiency The Sole Concern of Modern Antitrust Policy Non-Efficiency Considerations within Article 101 TFEU, Van Rompuy (2012)*, n.d. Ziyanda Buthelezi and Yongama Njisane, "The Incorporation of the Public Interest in the Assessment of Prohibited Conduct: A Juggling Act?," in *Competition Law Enforcement in the BRICS and in Developing Countries*, International Law and Economics (Springer, Cham, 2016), 289–307, https://doi.org/10.1007/978-3-319-30948-4_12; Nicholas Meyer, "Competition Law's Inclusion of Public Interest Considerations in Mergers and beyond: A Potential Paradox?" (University of Cape Town, 2017).

[825] David Gilo and Yossi Spiegel, "The Antitrust Prohibition of Excessive Pricing," 2017; Thomas Ackermann, "Excessive Pricing and the Goals of Competition Law," *The Goals of Competition Law, Cheltenham, Northampton*, 2012, 349; Talya Solomon and Iris Achmon, "Excessive Pricing in Israel—How to Deal with A 'Hot Potato'?," *Journal of European Competition Law & Practice*, 2017, 1–8; Claudio Calcagno and Mike Walker, "Excessive Pricing: Towards Clarity and Economic Coherence," *Journal of Competition Law & Economics* 6 (2010): 891–910; Massimo Motta and Alexandre de Streel, "Excessive Pricing in Competition Law: Never Say Never?," *The Pros and Cons of High Prices* 14 (2007).Simon Roberts, "Assessing Excessive Pricing: The Case of Flat Steel in South Africa," *Journal of Competition Law and Economics* 4, no. 3 (2008): 871–891.

2. Non-efficiency Objectives - A Comparative Institutional Analysis Perspective

2.1. Non-efficiency Objectives in US and EU

US Antitrust regime today does not contain any major non-efficiency considerations.[826] However, Fox and Sullivan's historical review of the development of antitrust law and policy in the US shows that, at the initial stages, public and political perceptions dominated legislative rationales.[827] Concepts such as market share, dominance, and abusive practices for instance where hardly synthesized. As described in the preceding chapters the US Supreme Court's view in *Philadelphia National Bank and Girard Bank & Trust Company*, is one example of the importance of non-efficiency.[828] In this sense the core of antitrust had largely been distrust in bigness and socio-political rationale of protecting small business and consumer welfare. The historical exposition by the authors has in fact shown how the history of US antitrust law has changed through time and has been affected by various political economy factors.[829]

The issue brings in to attention the popular debate between Chicago School's economic view on antitrust law, industrial policy advocates and the views of critical legal studies. The Chicagoans' view on antitrust law and policy is derived from their general view on markets and the role of the government. They advocate for a short hand in the extent of government involvement in the market place and hence competition law and policy should only deal with tackling anticompetitive practices.[830] Industrial policy advocates emphasize the role of the state in the market thought with different tools of economic intervention than competition law and policy. Extreme critical legal study advances a left-wing academic thought on the role of the state putting competition law as a tool within the larger context of power struggle between capitalists and laborers.[831]

The above question is however less settled within the EU competition law framework. The proper role of Article 101 of TFEU within the general EU Treaty, economic, legal and political universe is still an open inquiry. Among others, the proper understanding and delimitation of the role of competition law affects the proper assessment to be given to the rules which essentially can determine its status within the general framework of EU law or within the context of more specific and technical interpretational issues.[832] As various authors put it, these reasons are significant enough to put the issues under discussion, while it is also conceivable that the issue is topical considering various academic and institutional debates

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[826] Green, "Integration of Non-Efficiency Objectives in Competition Law."; OECD, Public Interest Considerations in Merger Control – Note by the United States, OECD DAF/COMP/WP3/WD (2016)10 (Working Party No. 3 on Co-operation and Enforcement, June 2016)

[827] "United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)," Justia Law, accessed August 4, 2018, https://supreme.justia.com/cases/federal/us/374/321/. Fox and Sullivan, "Antitrust and the Future."; Eleanor M. Fox, "Against Goals," *Fordham L. Rev.* 81 (2012): 2157.

[828] The court stated "should the merger proceed, local businesses that needed credit would have one less source of financing. The yet to be established firms would be at the mercy of the few."

[829] Fox and Sullivan, "Antitrust and the Future."

[830] Bork, "The Antitrust Paradox."

[831] Alan Hunt, "The Theory of Critical Legal Studies," *Oxford Journal of Legal Studies* 6, no. 1 (1986): 1–45.

[832] Christopher Townley, "Article 81 EC and Public Policy, (2009) Hart Publishing, Oxford (Book)," 2009, 315.

have come to the forefront following recent guidelines from the Commission on the role of Article 101.[833]

Generally two groups of thought debate the proper role to be given to EU competition law framework.[834] One largely outspoken, if not mainstream view, has been a conventional emphasis on pure consumer welfare reasoning.[835] This position holds firm ground on neo-classical understanding of market competition and argues that consumer welfare is and should be the sole goal of Article 101.[836] Recently this also seems to be one of the publicly expressed opinion of the Commission.[837] The Commission has specifically stated that the role of Article 101, "is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[838]

On the other hand, the view from the other side has added other public policy objectives/goals. Advocates of this view argue that the pure consumer welfare analysis is erroneous and that other Member States and European Union public policy goals, such as public health and the environment, should also be considered. Of course, often the differences on emphasis between the above roles might be difficult to underline and thus these two streams of thought might have to be seen us a movement under spectrum, from pure consumer welfare emphasis towards a robust inclusion (or perhaps overtaking) of other public policy objectives.

Accordingly, the centre battle of the above views can fairly be summarised under two largely defined themes. First, whether or not the sole goal of Article 101 TFEU has always been consumer welfare, and perhaps independent of the first issues, a question of whether this is how it should be. The argument supporting Article 101's broad role to incorporate non-efficiency objectives is based up on two major justifications. The first has to deal with the structure of the general EU treaty, the hierarchy of treaty objectives and the particular contextual position of Article 101 within this broad universe of EU body of laws.[839] It goes without saying, unlike the US antitrust instruments EU competition rules are not stand-alone institutions aimed at isolated goals. Instead, they are part of a web of interrelated Treaty articles.[840] This means interpretation of the various treaty provisions including Article 101 by

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[833] C. Townley, "Which Goals Count in Article 101 TFEU? Public Policy and Its Discontents: The OFT's Roundtable Discussion on Article 101 (3) of the Treaty on the Functioning of the European Union'(2011)," *European Competition Law Review* 32 (n.d.): 441.441, Also see by the same author;, Christopher Townley, "Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer," *Cambridge Yearbook of European Legal Studies* 10 (2008): 346.346

[834] Claus-Dieter Ehlermann and Laraine L. Laudati, *European Competition Law Annual 1997: The Objectives of Competition Policy*, vol. 2 (Hart Publishing, 1998), sec. 1.

[835] See, for example, the Commission's Article 101(3) Guidelines, the CFI's recent Glaxo Case

[836] Barry Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (Routledge, 2008), 7. Motta, *Competition Policy*, 17. Also see counter arguments Oliver Black, *Conceptual Foundations of Antitrust* (Cambridge ; New York: Cambridge University Press, 2005), 34 ff.

[837] Commission Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C101/97,

[838] Commission Notice, Para 13

[839] GlaxoSmithKline Services Unlimited v Commission of the European Communities, C-501/06 P,(2009)

[840] Denis Waelbroeck, "Vertical Agreements: 4 Years of Liberalisation by Regulation N. 2790/99 After 40 Years of Legal (Block) Regulation," in *The Evolution of European Competition Law: Whose Regulation, Which Competition?* (Edward Elgar, 2006), 100.

the courts would generate potential conflict between various policy objectives that are essentially embedded within a single treaty instrument that aim to achieve various other goals including but not limited to market integration, social and security objectives, and competition law and policy. This embeddedness obviously is a balancing exercise which will generate conflicts between the various policy goals.[841]

This argument can be further explained by reading the intricacies between the 'objectives' of the TFEU on the one hand and Article 101 & 102 on the other hand which puts the latter in to spotlight as an implementing provision with an aim to achieve its broad objectives.[842] This means the various objectives which generally underlie the treaty structure might contradict, overlap, or support each other.[843] Accordingly consideration of any part of the treaty as an autonomous and independent sibling (for instance Article 101) rather than part of one whole instrument would contradict the structural foundations of the Treaty.

The second argument explaining why non-efficiency objectives might have to be considered under Article 101 of TFEU has to do with the various 'policy-linking' clauses that are similarly embedded within the treaty instrument. These objectives relate to public health, environmental protection, employment, culture, consumer protection, economic and social cohesion, and development policy. While examples of past and current practical experience in this regard are very broad to sufficiently cover in this section, it suffices to say here that "there is widespread agreement …that the policy- linking clauses are there to ensure that other Treaty rules, for example, … those relating to competition incorporate such objectives." Generally, the above two rationales show why consumer welfare limits may not always be appropriate at least under the context of Article 101. Both the fundamental hierarchical structure of the Treaty and the embedded presence of policy-linkages between the various treaty norms create overlapping outcomes that in the end have to be balanced.[844]

In the meantime, and despite its traditional position, a recent guideline from the Commission has created confusion by explicitly stating that the proper goal of Article 101 is the protection of consumer welfare. Under this understanding, "employment, cultural and industrial policy considerations become irrelevant because they cannot be subsumed" under Article 101.[845] Despite this position from the Commission, it will also have to follow the relevant Courts' position in its decisions.[846]

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[841] Townley, "The Goals of Chapter I of the UK's Competition Act 1998," 319.

[842] Pablo Ibáñez Colomo, "ARTICLE 101 TFEU AND MARKET INTEGRATION," *Journal of Competition Law & Economics* 12, no. 4 (December 1, 2016): 749–79, https://doi.org/10.1093/joclec/nhw027. Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?: Non-Efficiency Considerations Under Article 101 TFEU* (Kluwer Law International, 2012).

[843] Marlies De Deygere, "The Interface between Competition Law, other EU Public Policies and their Objectives,",Thesis, Katholieke Universiteit Leuven (2010-2011) 3, Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press, 2011).

[844] Laura Parret, "Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy," *European Competition Journal* 6, no. 2 (August 1, 2010): 339–76, https://doi.org/10.5235/174410510792283808.

[845] Giorgio. Monti, *EC Competition Law* (Cambridge; New York: Cambridge University Press, 2007), 120.

[846] Townley, "The Goals of Chapter I of the UK's Competition Act 1998."

Parret, puts the above discussion in to context by examining the underlying objectives of competition law in the EU.[847] She underscores the importance of giving due regard to the objective of EU Competition law since, among others, the proper understanding and delimitation of the role of competition law affects the proper assessment to be given to the rules which essentially can determine its status within the general framework of EU law or within the context of more specific and technical interpretational issues. In so doing she describes that there are generally two groups of thought debating the proper role to be given to EUs competition law regime. The first view being been a conventional emphasis on pure consumer welfare reasoning thereby holds firm ground on pure neo-classical understanding of market competition and argues that consumer welfare is and should be the sole goal. Along the same lines she identifies three groups of other objectives as espoused by other authors: market integration goals, economic freedom, economic efficiency and industrial policy, protection of small and medium enterprises, justice, and fairness and non-discrimination goals.[848] She argues that the interpretation of the various treaty provisions of the EU treaty would generate potential conflict between various policy objectives that are essentially embedded within a single treaty instrument that aim to achieve various other goals including but not limited to market integration, social and security, and competition law and policy. This factor she argues will lead in to an obvious balancing exercise which will generate conflicts between the various policy goals.[849]

2.2. Non-efficiency Objectives in Developing Countries

Non-efficiency considerations take prominent position in the discussion of competition law and policy in developing countries. These types of objectives come with different names 'public interest', 'non-efficiency', etc., while various jurisdictions use different modalities to accommodate these objectives in their domestic competition law regimes.[850] In general these considerations share one major communality – they broaden the objectives and principles to competition law. These objectives also have institutional implications. In doing so, jurisdictions designate competition agencies, political, administrative, or judicial organs of the state, as arbiters of the clauses.[851]

Meanwhile, as indicated above, there is no consensus on whether competition law in these countries should deal with non-efficiency considerations. The academic discourse in this

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[847] Laura Parret, "Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy," *European Competition Journal* 6, no. 2 (August 1, 2010): 339–76, https://doi.org/10.5235/174410510792283808.

[848] Laura Parret, "Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy," *European Competition Journal* 6, no. 2 (August 1, 2010): 339–76, https://doi.org/10.5235/174410510792283808.

[849] Laura Parret, "Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy," *European Competition Journal* 6, no. 2 (August 1, 2010): 339–76, https://doi.org/10.5235/174410510792283808.

[850] Antonio Capobianco and Aranka Nagy, "Public Interest Clauses in Developing Countries," *Journal of European Competition Law & Practice* 7, no. 1 (January 1, 2016): 46–51, https://doi.org/10.1093/jeclap/lpv076.

[851] David Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights," 2016.

regard is as diverse as the regimes themselves. Those that defend the approach base their argument on the 'uniqueness' of the social, economic and political environment in these counties.[852] Many argue developing countries possess a unique developmental and social-political landscape that warrant a different approach to competition law. The argument goes, competition law cannot exist in 'vacuum' and its role may not necessarily be limited to economic efficiency goals.[853] Hence, inclusion of public interest considerations in competition law regimes of developing counties may be a 'necessary evil'.[854] According to D. Lewis, these features should not be taken as a weakness of the regimes, rather their strength, as consideration of public interest grounds in competition enforcement by these regimes will likely underpin their credibility.[855]

On the other hand, partisans of a narrower and efficiency-based role of competition law base their argument on highlighting the limited tools that competition law has to address broader development and socio-political objectives, e.g. such as economic redistribution. For this group competition law should rather focus on limited economic objectives and in doing so should deal with its traditional focus – dealing with cartels. Others rely on the institutional and technical competence of the enforcement organs to interpret public interest objectives alongside efficiency objectives. According to W. Reekie, referring to Section 2 of South Africa's Competition Act, these broader objectives are going to be 'questionable' if all of them were to be addressed under the framework of the competition act. [856] "The promotion of employment is a matter for macroeconomic, not competition policy."[857] Accordingly, public interest issues should be addressed by more specific – special - laws and regulations.[858] Consideration of broader public policy objectives in competition law is also criticized for creating unpredictable environment in the enforcement of competition law.[859] There is a fear that incorporating multiple objectives in a single instrument will lead to conflict of objectives and consequently inconsistent outcomes. Among others this concern is of key importance in merger analysis.[860]

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[852] Fox, "Economic Development, Poverty and Antitrust."
[853] Frédéric Jenny, "Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation," *Competition Policy in Global Trading System*, 2002.
[854] Vane, H. 'Public Interest Clauses May Be a Necessary Evil, Says OECD Head', Global Competition Review (2015),: http://globalcompetitionreview.com/news/article/38187/publicinterestclauses may-necessary-evil-says-oecd-head (Last accessed June 2016)
[855] David Lewis, 'The role of public interest in merger evaluation, International competition netwoek, merger working group, (Naples 28-29 Sept 2002,) 3-4
[856] W. Duncan Reekie, "The Competition Act, 1998: An Economic Perspective," *South African Journal of Economics* 67, no. 2 (June 1, 1999): 115, https://doi.org/10.1111/j.1813-6982.1999.tb01142.x.
[857] Reekie, 115.
[858] Abigail Machine, Public Interest Test and Merger Control in South Africa: The Walmart Case Revisited (2014, African Antitrust & Competition Law), http://africanantitrust.com/2014/12/03/publicinterest- merger-control-the-walmart-case-revisited/. accessed 7 August, 2017.
[859] https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-in-antitrust-merger-control/
[860] ICN, Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis, in Dave Poddar and Gemma Stooke, 'Consideration of Public Interest Factors in Antitrust Merger Control' (2014) 1–5 Competition Policy International 2.

Others fear public interest objectives in competition law will be used by interest groups as tactical instruments rather than serving legitimate public interest objectives. For example public interest objectives in merger control is often criticized for opening the doors for unwanted litigation and delay. Hence, various groups may use public interest objectives to delay and obstruct mergers that have no anticompetitive implications. Others also fear having competition agencies pursue public interest objectives risks the independence and neutrality of these institutions due to political interventions that may come under the pretext of public interest objectives.[861] This claim has for example attracted significant attention when it comes to cross - border merger control.[862]

2.2.1. Non-efficiency Objectives in South African Competition Act

South Africa's experience with incorporating public interest considerations within its Competition Act is one of the most discussed aspects of the country's competition law regime. The Competition Act attempts to achieve mixed policy objectives of promoting competition as well as achieving a number of non-efficiency goals. Section 2 of the Act states;

> The purpose of this Act is to promote and maintain competition in the Republic in order –
>
> a) to promote the efficiency, adaptability, and development of the economy;
> b) to provide consumers with competitive prices and product choices;
> c) to promote employment and advance the social and economic welfare of South Africans;
> d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
> e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
> f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

In addition, public interest considerations also feature in the specific sections of the Act, including merger control. Section 3 of South Africa's Competition Act regulates mergers. It requires all mergers and acquisitions in South Africa (or having effect on the South African market) be notified to the competition authorities for approval. The Act shares the review powers between The Competition Commission and the Competition Tribunal by categorizing mergers in to three groups; small, intermediate, and large based on the overall monetary threshold involved in the merger.[863]

Only large and intermediary mergers are subject to notification and approval. Small mergers are not subject to mandatory notification and approval procedures unless such notifications are made voluntarily or otherwise the Competition Commission deems it necessary to do so in which case formal notification is to be mode in accordance with subsection (3) of Section 13. Intermediate and large mergers are to be notified to the Commission.

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[861] Capobianco and Nagy, "Public Interest Clauses in Developing Countries," 47.
[862] Capobianco and Nagy, 48.
[863] The Competition Commission has also published guidelines. GN 216 of 2009. ,

In reviewing a merger, the competition authorities are expected to undergo a three-legged substantive review process. First, evaluation of whether the merger is likely to cause a substantial lessening of competition. Second, in the event that the first assessment led in to positive finding of lessening of competition, evaluation of whether other technological and efficiency gains resulting from the merger counterbalance the effect on competition. Thirdly, the results of the above have to be evaluated against a set of public interest grounds specifically enumerated in the Act, e.g. Section 12A.[864]

2.3. Non-efficiency Objectives and Institutional Choice

The argument in favor of incorporating non-efficiency objectives in competition law is driven by the assumption that the market, as one of the alternative means of allocation of economic resources, is not capable of meetings those objectives. Hence, the need for intervention by the state. On the other hand, those that argue against incorporation of these objectives within the antitrust framework are primarily concerned with the ability of antitrust institutions to effectively settle the eminent conflict between the multiple objectives pursued.

Hence, decision making on public interest objectives should be allocated to institutions best suited to decide those questions.[865] In doing so public interest issues are considered to be difficult if not impossible to be handled by competition law enforcement organs. For instance, when courts present themselves as arbiter of the contending and apparent conflicts between various objectives, they are implicitly considering themselves as the right institutions to settle the debate compared to other alternative institutions, such as the political organ. They assert institutional choice by way of accepting jurisdictional authority on the matter. On the other hand if the judge relies on a certain standard that may allocate decision making to another organ, then choice is made to take the forum away from the courts.[866] This understanding of comparative institutional analysis can be well illustrated by thoroughly examining the

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[864] 12A: Consideration of Mergers
(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –
(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine-
(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain ...; and
(ii) whether the merger can or cannot be justified on substantial public interest grounds …; or
(b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds …
(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –
(a) a particular industrial sector or region;
(b) employment;
(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) the ability of national industries to compete in international markets.

[865] Timothy A. Cook, "Pharmaceutical Patent Litigation Settlements: Balancing Patent & Antitrust Policy Through Institutional Choice," *Mich. Telecomm. & Tech. L. Rev.* 17 (2010): 417.

[866] Nourse and Shaffer, "Varieties of New Legal Realism," 2009, 107.

institutional makeup that lies under a more narrow consumer welfare objectives vis-à-vis much broader non-efficiency objectives.

As discussed above, the emphasis on efficiency and consumer welfare and application of economic analysis to antitrust is aimed at reducing errors by granting sufficient space in terms of economic analysis to contextual nuances of the case.[867] The evolution of the Chicago School's prescription to antitrust illustrates the school's deep rooted preference to applying a set of economic tools that are capable of narrowing the possible set of outcomes, reducing uncertainty and improving the quality of decisions.[868] In doing so Chicago's preference to the primacy of judicial decision making, which is inherently related to US's well developed private damage suits and litigation experience, is essentially tied to its preference and choice of the judiciary as a better suited institution to function within limited discretion.

On the other hand, non-efficiency considerations broaden the matrix of objectives and possible outcomes by expanding the scope of 'selective' intervention and discretion. The first argument has to do with the simple constructionist view to competition law taken by many. In doing so they argue that public interest issues are "multi-dimensional, complex and are better addressed through other more suitable policy instruments"[869]

The second argument has to do with the fear that such objectives will be exploited to serve special interests. It will open the floodgate for both substantive and frivolous claims by interest groups that serve their own interest - rather than the 'public'. Many argue that the subjective element in interpreting public interest objectives cause the 'politicization' of competition law. According to Mariniello et al., "the multiplicity of goals and objectives, and in particular the adoption of non-competition goals, opens the door to discretionary decisions, political intervention and more generally the capture of enforcement decisions."[870] Reksulak argues, "the 'public interest theory' of antitrust policy is on a retreating path - and that is squarely in the public's interest."[871] He argues "caution with respect to possible remedies, which can be subject to political interference, susceptible to the sway of well-organized interest groups."[872]

It is also presented that policy prescriptions can be "ambiguous" and therefore lead to political capture.[873] "The de jure public interest objectives may de facto serve private interests"[874] This is considered to be serious constraint on the autonomy and independence of competition

[867] Christopher Decker, *Economics and the Enforcement of European Competition Law* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2009), 190.
[868] Wright, "The Antitrust/Consumer Protection Paradox," 2225.
[869] Philip Sutherland and Katharine Kemp, *Competition Law of South Africa* (Butterworths, Durban, 2000); Robert Kaniu Gitonga, "Social and Political Goals of Mergers in Competition Law: Comparative Analysis of the Efficiency and Public Interest Provisions in Kenya and South Africa" (University of Cape Town, 2015).
[870] Mario Mariniello, Damien Neven, and Atilano Jorge Padilla, "Antitrust, Regulatory Capture and Economic Integration" (Bruegel Policy Contribution, 2015).
[871] Buthelezi and Njisane, "The Incorporation of the Public Interest in the Assessment of Prohibited Conduct."
[872] Buthelezi and Njisane.
[873] OECD Global Forum of Competition, The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency: Ireland (2003). 3
[874] OECD Global Forum of Competition, The Objectives of Competition Law

agencies.[875] As discussed above, because many concede to the argument that public interest considerations are inevitable in developing countries the solution proposed in terms of handling these concerns is often to propose that other 'political' and 'administrative' branches of the government should deal with it; i.e. referral. Comparative institutional analysis however may show different perspectives.

At the outset the referral argument provides only half answers to institutional competence of competition authorities to handle public interest considerations. From institutional standpoint, the assumption, although implicit, is that competition law enforcement agencies fair badly from institutional choice point of view compared to other branches of the government. The preference for other branches of government has to do with the 'ability' of other government agencies to handle non-efficiency objectives better than competition authorities.

However, this is only a partial analysis of the institutional qualities present both at the competition agencies and other government branches. It cannot be simply assumed that 'influence' of interest groups within the competition law regime will disappear as it goes across the road to other branches of the government. Rather comparative institutional analysis will analyze both choices. For instance, it needs to be seen if the same 'interest groups' have the power to influence other branches of the government and in doing so compare which forum provides, comparatively speaking, the least likelihood of capture. The South African experience presents a good evidence of this reality. The weakness of the political organs to entertain non-efficiency objectives embedded within the Competition Act is articulated by David Lewis; "for one authority to decide on competition grounds and another to take on the public interest decision would initiate massive lobbying and would lack the openness and transparency of the unified process"[876]

Others fear the risk of competition objectives being entirely disregarded.[877] Tepco, a case involving merger between Shell and Tepco**,** provides a good example in this regard. Tepco, a Black Economic Empowerment, (BEE), enterprise worked on a deal to transfer its subsidiary company Tepco to Shell South Africa, reportedly due to financial issues the latter has faced. After determining the merger raised no threat to competition, the Tribunal analyzed if there are any public interest implications raised by the merger. The Competition Commission argued against approving the merger on the basis that the merger warranted a set of conditions that are designed to ensures that control, full or partial, of Tepco remains in control of

[875] Green, "Integration of Non-Efficiency Objectives in Competition Law."
[876] "Public Interest & Merger Control: The Walmart Case Revisited," *African Antitrust & Competition Law* (blog), December 3, 2014, https://africanantitrust.com/2014/12/03/public-interest-merger-control-the-walmart-case-revisited/.
[877] Martin Rifuwo Mgiba, "The Role of Section 12 A (3) of the Competition Act to Bring into Effect the Objectives of the Act of Addressing Social and Economic Problems and Past Inequalities through the Public Interest Assessment in Merger Proceedings" (Thesis, University of Cape Town, 2015), https://open.uct.ac.za/handle/11427/15176. "Given the power that these organizations have for example the department of trade and industry, compared to the competition authorities, this is more likely to result in competition issues being sacrificed."

historically disadvantaged people, as well as Tepco's separate entity/brand, to promote the latter's competitive position in the market.[878]

According to the Tribunal, it found it difficult to order the recommended restructures over the deal as Tepco is under a financial stress and the empowerment objectives will not be serviced by imposing the said conditions on a company that is under 'life support'.[879] Stating its clear objection to the Commission's recommendations, the Tribunal stated that, care should be given when "competition authorities use public interest as a basis for their intervention, particularly when disadvantaged investors are directly affected expressly reject the commission's interventions."[880] David Lewis, who is also author of the Tribunal's findings, states the Commission's recommendations effectively discriminated against Tepco, as any other white owned firms will not face such limitation on how they can dispose of their business.[881] According to the Tribunal, the role of the Commission is only secondary to other statutory bodies and regulatory instruments. Hence, "the competition authorities … are …advised not to pursue their public interest mandate in an over-zealous manner least they damage precisely those interests that they ostensibly seek to protect."[882]

Most importantly, the Walmart merger case highlights, how, if given the opportunity, other institutions might interpret the rules in favor of a certain group falling victims of 'minoritarian bias'. In September 2010 world's largest retail giant Walmart declared its intention to acquire a majority share on South African Massmart.[883] The acquisition quickly becomes a popular discourse not only within South Africa but also across the continent. Even though the bulk of Massmart's operations remain largely within South Africa, Massmart also has presence in more than a dozen countries in sub-Saharan Africa. It was Walmart's declared intention to use Massmart's infrastructures to enter the larger African continent. Walmart invested more than $ 2.3 billion for the acquisition, a deal that entitled it to 51% share on Massmart. The merging parties notified their intention to the Competition Commission which gave its positive recommendation without conditions to the Tribunal, as it is the latter that have the jurisdiction to oversee large mergers. The Tribunal held oral hearings to investigate the merger.

There was no major competition concern brought by the merger as Walmart has no prior presence in the South African economy. It only maintained a small interest in a local firm that is engaged in export business of fresh fruits and vegetables in South Africa. Second, the South African retail market competition is largely competitive. Massmart itself was not a leading

[878] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)," n.d.
[879] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty)
[880] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) para. 58.
[881] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty)
[882] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)," para. 58.
[883] "Walmart Announces Intent to Acquire
South Africa-Based Massmart," accessed August 13, 2018, https://corporate.walmart.com/_news_/news-archive/investors/walmart-announces-intent-to-acquire-brsouth-africa-based-massmart-1474802.

firm in terms of market share. It held not more than a quarter of the relevant South African market, a size which puts it only third after its rivals Pick-n-Pay and Checkers.

However, Walmart is also known for its poor record on employment practices, especially its policies against labor unions. The result is an already anticipated confrontation between Walmart and the very strong South African labor unions.[884] The unions took the opportunity of the merger evaluation to oppose the merger on employment grounds. They argued the merger will distort existing labor relationship within Massmart due to Walmart's global reputation against labor organizations.[885] They also raised Walmart's experience in other countries and the likelihood it will engage in business practices that are against South African labor laws and regulations.

The merging parties defended these objections by showing evidence that the merger raises no employment cost. Rather the available evidence showed there might even be employment gains.[886] This is in addition to a holding consumer interest towards Walmart's entry in to South African economy that held strong promise in the form of improved competition.[887]

For our purpose the most relevant part of the Walmart dispute has to do with the way how three government departments; Agriculture, Forestry & Fisheries, Economic Development and Trade and Industry, intervened in the merger proceedings.[888] The concern of the departments has to do with the effect of the merger on local employment due to increased imports as a consequence of Walmart's business model.[889] According to the Minister of Economic Development Mr. Ebrahim Patel, '"tens of thousands of jobs could be lost in local factories that supply Massmart and other retailers."[890]

According to Minister of Trade and Industry Dr. Robe Davis, the tribunal failed to take in to consideration the cost of changing sourcing and contractual practices carried a serious economic impact that outweighs any likely job created by the merger. The Minister especially underlined the effect of the merger on small and medium sized South African firms that had prior business relationships and ties to various supermarket chains including Massmart and the threat of losing such opportunities to Walmart's foreign suppliers. The risk on employment

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[884] Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 42 (29 June 2011) (n.d.), accessed August 13, 2018.
[885] Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 42 (29 June 2011).
[886] David Lewis, "Embedding a Competition Culture: Holy Grail or Attainable Objective?," *Competition Law and Development*, 2013, 240.
[887] John Oxenham, "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty," *US-China L. Rev.* 9 (2012): 211.
[888] Economic Development Department and Others v Wal-Mart Stores, Inc and Another (73/LM/Dec10) [2011] ZACT 58 (15 August 2011)
[889] MEDIA BRIEFING: WALMART CASE, 3rd October 2011, http://www.economic.gov.za/downloads/walmart-massmart-merger
[890] DTI, "Joint Media Statement by the Ministers of Agriculture, Forestry and Fisheries, Economic Development, and Trade and Industry on the Heads of Argument for the Legal Review and Appeal Against the Decision of the Competition Tribunal in the Walmart/Massmart Merger Case," October 4, 2011, https://www.thedti.gov.za/editmedia.jsp?id=2276.

especially to small and medium size companies that are also largely operated by black South African majority, that is considered to be disadvantaged by South Africa's long history of apartheid government, became the main concern. A study commissioned by the department predicted a loss of appx 4000 – 40,000 jobs due to the merger.

The merging parties defended their position by providing how Walmart's prior experience of entering other developing countries that have similar economic and market structure to that of South Africa did not result in any significant diversion of sourcing practices away from domestic enterprises.[891] They provided the experience of Walmart's entry to Chile. However dilute, due to the perceived anxiety the merger posed, the merging parties agreed to a set of voluntary undertakings. In May 31st 2011 the tribunal found the merger did not raise any significant competition concerns and approved the merger. However, while it raised its concerns on some public interest issues, such as the effect of the merger on employment relationships, it also found that voluntary conditions submitted by the parties can address those concerns. The voluntary conditions addressed issues that may be of concern for Massmart's large employment base, more than 27,000 employees. They undertook various voluntary concessions, including refraining from any retrenchments for 2 year, honoring labor agreements, preference to be given to 503 employees that were retrenched beforehand whenever vacancies are available etc.

The merging parties also agreed to establish a development program of R100 Million for local South African suppliers, in particular SME enterprises. The tribunal provided that the fund should be utilized in the following three years from the date of its decision and should be administered by the merged entity with the advice of a joint committee that includes representatives from trade unions, other business including SME's, and the government. The tribunal also ordered that the merged entity should submit an annual report to the commission on the progress achieved. The merging entity was also ordered to establish a training program for local suppliers that is aimed at acquainting them with business practices models of the merged entity and Walmart.[892]

After the decisions of the tribunal were made public the three government departments submitted an appeal to the South African Competition Appeal Court requesting a review of the decision of the tribunal which most are basically founded up on procedural arguments. Among others the departments argued flaws in the Tribunal's discovery orders as it limited the government's request for information, limitations on the number of and available time allowed for oral submissions by witnesses.[893] They also appealed that the Tribunal maintained

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[891] "Wal-Mart's Africa Foothold Shaky as Job Worries Mount - WSJ," accessed August 13, 2018, https://www.wsj.com/articles/SB10001424052748703864204576312723397850988.

[892] Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 42 (29 June 2011).

[893] Media Statement, 21 July 2011, Government Seeks A Review of The Walmart / Massmart Merger Approval, DTI, "Joint Media Statement by the Ministers of Agriculture, Forestry and Fisheries, Economic Development, and Trade and Industry on the Heads of Argument for the Legal Review and Appeal Against the Decision of the Competition Tribunal in the Walmart/Massmart Merger Case," October 4, 2011, https://www.thedti.gov.za/editmedia.jsp?id=2276; "Wal-Mart and Massmart Merger (110/CAC/Jun11 and 111/CAC/Jun11) | Appeal Appeal Court Judgements | Competition Tribunal (SACCAWU, the Minister of

a rigid scheduling decision that made it impossible for a 'fair' and 'proper' analysis of the public interest concerns raised by the merger.[894]

In addition, the Department of Economic Development proposed a baseline proportion commitment form the merging parties that will guarantee a minimum level of procurement quota for domestic suppliers. SACCAWU on the other hand submitted a proposal that would guarantee that the merger does not result in procurement practice that is below the current value for some predetermined period. It also submitted an argument to increase the contribution to the supply development fund.[895] The Appeal Court in large part maintained the decision of the Tribunal with small adjustments.[896] Among others, it ordered the merging entity to reinstate the 503 employees that were laid off in 2009 and 2010. It also ordered the merging parties to commission a study group of at least three experts that will propose a mechanism by which South African suppliers would be able to manage the effects of the merger to their business.[897]

What is highlighted in these cases is not that the agencies involved are inherently in favor 'public interest' objectives. Rather the argument is to the contrary. One needs to see beyond the 'outside appearance' of the institutions to engage in institutional choice discourse. In doing so 'participation analysis' can serve as a useful analytical tool. Evaluating the participation story of the Walmart- Massmart merger, for instance by identifying the real interests that influence the intervention of the relevant government agencies can be illustrative of the importance of understanding institutional choice broadly.

Behind the above agencies' aggressive engagement on the merger, five labor organizations lobbied the government; these were SACCAWU, FAWU, NUMSA, SACTWU etc. SACCAWU clearly stated its position as "it is not in the best interest of South Africa for Walmart to be allowed into our country, but that if they are, it must be under conditions that protect workers, suppliers, and the wider South African community."[898] It is also important to notice an important change in the institutional setup of South African competition institutions. Prior to 2010 South African Competition Commission and the Competition Tribunal where under the umbrella of South Africa's Department of Trade and Industry. However, in April 2010, a determination was made to house the two institutions under the

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Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc & Massmart Holdings Limited)," accessed September 10, 2017, https://www.comptrib.co.za/cases/appeal/retrieve_case/1386; "Saccawu Wants Walmart to Boost Supply Fund | Business | M&G," accessed August 13, 2018, https://mg.co.za/article/2011-10-10-saccawu-wants-walmart-to-boost-supply-fund.

894 Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 42 (29 June 2011) (n.d.), accessed August 13, 2018.

895 "Saccawu Wants Walmart to Boost Supply Fund | Business | M&G," accessed August 13, 2018, https://mg.co.za/article/2011-10-10-saccawu-wants-walmart-to-boost-supply-fund.

896 Wal-Mart and Massmart merger (110/CAC/Jun11 and 111/CAC/Jun11) | Appeal Appeal Court Judgements | Competition Tribunal (n.d.), accessed August 13, 2018.

897 "COSATU Urges Competition Tribunal to Reject Walmart/Massmart Deal," accessed August 13, 2018, http://www.cosatu.org.za/show.php?ID=4878.

898 "COSATU Urges Competition Tribunal to Reject Walmart/Massmart Deal."

Department of Economic Development.[899] According to various commentators, this opened the way for a highly aggressive ministry, Ministry of Economic Development headed by Minister Ebrahim Patel, a former trade-union official, to pressure the competition institutions on critical public interest issues. An indication of such influence was the manner of departure of its former Commissioner, Shan Ramburuth. Various commentators have described it as "evidence of pure uninterrupted interventionism by the department of economic development'[900]

On the other hand, according to the industry spokesman, the outcry about the merger from the state departments is not aimed at promoting competition and development in the economy, rather it is merely targeted at protecting the huge profit margins of local retailers. He said, the competition appeal court was not tough enough on the government.[901] It is also important to take in to account which interests are exerting influence on the respective government agencies. For instance, it is important to question what role is played by labor unions. It can be said, as unions were critical the merger due to fear of loss of jobs. In doing so they were acting in favor of incumbent labor.[902] Hence the unorganized consumer group, as well as the passive labor that ultimately may become beneficiary from competitive market remain unrepresented.

In principle such risk is apparent in both directions. In dealing with institutional choice, it should also be seen if other branches of government will 'sponsor' non-efficiency objectives, by their own initiative or of others. However, "such a practice was tried and tested before the new act was implemented and it was found out that it was not working."[903] Hence, the option of refereeing public interest issues to non-competition bodies has been tried and failed. Inherent in this discussion, although implicit, is the key role participation of stakeholders plays in the institutional choice evaluation. In doing so each alternative institution presents its own strengths and weakness. A simple fact about government administrative agencies such – such as ministries in the case of South Africa as well as Ethiopia, is that they function as a semi-political, administrative, and regulatory agency with no formal institutional setup or procedures to deal with competition analysis and engage all interested parties in an open and transparent forum. In doing so these types of institutions, first, feature as fertile grounds to minoritarian ('interest group') influence.

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[899] It is important to note that the Competition Commission and the Competition Tribunal were recently (this was officially completed April 2010, although the announcement was made in 2009) housed within the DED, headed by Minister Patel. The Competition Commission and the Competition Tribunal were previously housed within the Department of Trade and Industry. Oxenham, "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty."

[900] oxenhamjmj, "Quo Vadis? Political Interventionism in South African Competition Law," *African Antitrust & Competition Law* (blog), November 25, 2013, https://africanantitrust.com/2013/11/25/quo-vadis-interventionism-in-competition-law-in-south-africa/.

[901] "'Government Should Have Stayed out of Walmart Merger' | Business | M&G," accessed August 13, 2018, http://mg.co.za/article/2012-03-10-government-should-have-stayed-out-of-walmart-merger.

[902] Stephen J. Weymouth, "Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries," *Democracy, and Antitrust Reform in Developing Countries*, 2009.

[903] "Public Interest & Merger Control."

On the other hand, as discussed in the preceding chapters, the over representation of concentrated interests come in the form of a large consumer group that bears only a small per-capita efficiency cost of possible prohibition of the merger, e.g. Walmart vs a relatively concentrated labor group, that not only bears a significant cost/benefit advantage over the merger decision but also is relatively better situated in terms of the cost of acquiring and processing information and taking a collective action. In the South African context this is illustrated by a large disorganized consumer group that had little resources to lobby the Minister of Economy and others. This form of participation requires that consumer groups recognize the benefits of the engagement in the political process (i.e. information) and avenues of its influence (both of organizational challenge and access). It is to be noted that neither of the ministries had any clearly defined channels of discussion with the consumer group and avenues of submitting public opinions etc. As evidence of this fact it intervened only in select few cases, and especially before the Competition Act of 1998 there was hardly any intervention by the Ministry. This shows that in effect the rules by themselves will have little significance unless they are acted up on - and the latter is largely a result of participation.

On the other hand, competition authorities provide a completely different avenue. This is in particular true for adjudicative bodies or other institutions that feature adjudicative type institutional organizations. First, they function with largely formal framework of participation. To initiate or be informed of the issues, both related to efficiency and non-efficiency considerations, it is important that individual stakeholders participate in the investigative/adjudicative process. "[I]n order to be informed about all these considerations (economic and noneconomic ones), relevant stakeholders have to be able to participate to illuminate the competition authorities: way in reaching a decision"[904] South Africa's experience in this regard has been exemplary. In undertaking merger evaluation that has significant employment considerations the competition authorities have actively sought the participation of all concerned parties. The Competition Act itself provides for rules the ensure that various stakeholders, in particular trade unions, are informed of any proposed merger subject to review by the competition authorities.[905] The adjudicatory process largely functions with strict procedural and evidentiary rules. Third, the public interest considerations in South African Competition Act are not only exhaustive but they are also merger 'specific'. The Act only enumerates a specific list of public interest grounds, (employment, protection of SME's owned by historically disadvantaged persons, international competitiveness and impact on particular industrial sector or region. "Other public 'values' related to an 'industrialization' policy are often rather arbitrarily added."[906]

Forth, despite the concern raised vis-à-vis the ability of adjudicatory bodies to handle public

[904] Azza A. Raslan, "Public Policy Considerations in Competition Enforcement: Merger Control in South Africa: (UCL - Centre for Law, Economics and Society Research Paper Series: 3/2016," 2016.
[905] Competition Act of 1996, Section 13A
[906] Willem Boshoff, et al. The Economics of Public Interest Provisions In South African Competition Policy, <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>; Paul K. Gorecki, "Private v. Public Interest: The Strategic Use of Competition Law in Ireland by Private Interests," *World Competition* 31 (2008): 401.

interest cases in the first place, a serious economic analysis show that a significant group of these objectives does not merely seek equity objectives.[907] Willem Boshoff et al., show that economic efficiency and equity considerations can co-exist in analyzing these objectives.[908] They sate, "public interest provisions are not necessarily concerned with equity." In doing so four out of the six objectives provided under Article 12(3) of South African Competition Act, in particular those having a bearing on competitiveness and employment; "can be interpreted as dealing with the efficiency".[909] According to Willem Boshoff et al. "the provisions are not strictly concerned with the earnings of employees or particular businesses within industrial sectors or regions." "The view of public interest objectives as essentially concerned with efficiency suggests that the analysis will proceed in much the same way as in conventional competition analysis – the analysis will be concerned with surplus within a particular market (albeit a different market from the conventional competition market)."[910] Hence most of the public interest considerations are capable of 'examination' 'deliberation' and decision making by the adjudicative bodies.

However, there are also number of reasons to distrust the adjudicative process. First, competition authorities face limitations in terms of balancing among the Act's consumer welfare/efficiency standards vis-à-vis public interest objectives.[911] In dealing with this exercise the authorities undertake a two-stage analysis. First, they are required to decide on the merits of the public interest claims in accordance with the principles set in the Act. Second the authorities are required to weigh the same against the welfare effects of the merger under consideration.[912]

However, this does not mean that competition institutions evaluation of non-efficiency objectives does not have its own limitations. First, because competition cases are generally complexity they attract little involvement of the large consumer group. Rather the majority of cases brought to the attention of the competition authorities were through claims by actual business competitors of the respondent. This in itself raises concerns on the role of competition institutions and the effect it may have in terms of 'protecting competitors rather than competition'.[913]

Second, this process opens opportunities for competitors to bring 'strategic' and/or 'frivolous' claims in the name of protecting public's interest.[914] According to D. Sokol, "The global pressure points in industrial policy include competitors misusing antitrust and taking advantage of the lack of due process across antitrust authorities."[915] South Africa is not an exception in this regard. Meanwhile it is also relevant to recognize the commendable effort of

[907] Willem Boshoff, et al.
[908] Willem Boshoff, et al.
[909] Willem Boshoff, et al.
[910] Willem Boshoff, et al.
[911] Willem Boshoff, et al.
[912] Willem Boshoff, et al. 22.
[913] Eleanor M. Fox, "We Protect Competition, You Protect Competitors," *World Competition* 26 (2003): 149.
[914] Gorecki, "Private v. Public Interest."
[915] D. Daniel Sokol, "Tensions Between Antitrust and Industrial Policy," *Geo. Mason L. Rev.* 22 (2014): 1259.

both competition organs, including the courts, of their attempt to identify genuine claims with those of tactical ones. The Competition Appeal Court held;

> Competition law must be prosecuted in this country with fairness but also with expedition. The legal community, which appears both in this court and the Tribunal, owe their clients a paramount duty, but they also owe, as officers of the Court a duty to the integrity of the legal system. There needs to be a debate in the legal profession of South Africa as to the role of lawyers in relation to balancing the interests of clients and duty as officers of the court enjoined to uphold the integrity of the system without which there can be no rule of law.[916]

On the other hand, administrative enforcement of competition law and non-efficiency considerations, also bring forward both advantages and limitations.[917] The main advantage has to do with the opportunity that a dedicated competition enforcement agency brings with it in terms of expertise and investigative powers. The major comparative institutional deficit is visible in the form of the challenge addressed in previous chapter – under the circumstances developing countries might tend to use other instruments to challenge competition law concerns rather than enforcement though competition bodies. In addition, competition authorities might waste valuable time and resources in sponsoring what it to be purely private commercial claims. Ethiopia perhaps provides the best example in this regard as between 2013 and 2016 the Competition Authority was largely busy investigating 'unfair trade practice' claims brought by business.[918] These were cases that should be dealt with by ordinary courts.

In doing so we can see all institutional choices are not perfect; hence the choice is selecting the least imperfect among the options available. As highlighted in the preceding chapters, there is much to learn from Komesar's contribution of comparative institutional analysis. The argument made here is simply a call to take participation as a central piece of the objective and institutional consideration in competition law analysis.

This does not mean however that institutional choice is a novel issue to competition law scholarship, policy makers, and competition bodies. Rather the argument is to the contrary. Competition authorities are often engaged in institutional choice determinations, although inadvertently or in a partially evaluated process.[919] As presented bellow there are experiences, in more than few occasions where competition law enforcement bodies have engaged in a comparative institutional exercise, although not explicitly.

South African competition bodies provide interesting set of examples and experiences. For

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[916] Clover Industries (Pty) Ltd and Others v Competion Commission and Others; Clover Industries (Pty) Ltd and Another v Lewis NO (79/CAC/JUL08;103/CR/DEC2008) [2008] ZAWCHC 297 (17 November 2008) (n.d.), accessed August 13, 2018. Clover and the Competition Commission (78/CAC/Jul08) | Appeal Appeal Court Judgements | Competition Tribunal (n.d.), accessed August 13, 2018.

[917] Paul Nihoul and Tadeusz Skoczny, *Procedural Fairness in Competition Proceedings* (Edward Elgar Publishing, 2015), http://www.elgaronline.com/view/9781785360053.xml.

[918] H. Haroye, "Competition Policies and Laws: Major Concepts and an Overview of Ethiopian Trade Practice Law," *Mizan Law Review* 2, no. 1 (January 1, 2008): 33–51, https://doi.org/10.4314/mlr.v2i1.55619.

[919] Neil Komesar, "Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts Symposium Article," *Loyola University Chicago Law Journal* 41 (2010 2009): 443–54.

instance, in dealing with employment concerns raised vis-à-vis section 12(3,b) of the Act, the Tribunal's focus in large part has been towards understanding whether effect on employment is warranted and directly tied to the efficiency gains of the merger as well as to protection of unskilled workers. In *Metropolitan Holdings Ltd and Momentum Group Ltd*, the tribunal provisionally approved Metropolitan's acquisition of the latter without any finding of negative effect of the merger on the competition.[920] However, in undertaking evaluation of the public interest effect of the merger the tribunal found that the projected job losses for about 1000 employees did not establish a rational connection between the efficiency gains resulting from the merger vis-à-vis the actual job loss. Accordingly, in approving the merger based on a set of conditions, the Tribunal prescribed various conditions that prohibited the merging parties from pursuing any retrenchments for two years.

Meanwhile, in taking in to consideration the 'employment' implication of the merger, it can be said that the competition authorities have generally taken a backseat to other legislative instruments and the role of other regulatory agencies.[921] In Tepco,[922] Distillers Corporation vs Stellenbosch Farmers Winery, [923] Unilever Plc /Robertson's Foods Pty Ltd,[924] and others,[925] the tribunal observed that its role in employment matters is only "secondary", "as these other statutes and the institutions that they create are better placed and resourced to deal directly and effectively with these issues."[926]

The Tribunal has reflected in Tepco that, in dealing with BEE issues, the role of the Commission is only secondary to other statutory bodies and regulatory instruments.[927] It specifically cited the Employment Equity Act, the Skills Development Act and the Petroleum Charter as more relevant issues to directly deal with the concern at hand. Hence, 'the competition authorities…are …advised not to pursue their public interest mandate in an over-zealous manner least they damage precisely those interests that they ostensibly seek to protect."[928] In doing so the Tribunal is directly engaged in institutional choice exercise, even if it is a partial one.

2.4. Contribution of CIL to Understanding Non-efficiency Objectives in

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[920] "Metropolitan Holdings Ltd v Momentum Group Ltd (41/LM/Jul10) [2010] ZACT 87 (9 December 2010)," accessed December 10, 2018, http://www.saflii.org/za/cases/ZACT/2010/87.html.

[921] Azza A. Raslan, "Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?," *World Competition* 39, no. 4 (December 1, 2016): 625–51.

[922] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)."

[923] Distillers Corporation (Sa) Limited and Stellenbosch Farmers Winery Limited (08/Lm/Feb/02) [2003] Zact 36 (18 June 2003) (n.d.).

[924] Unilever Plc (55/LM/Sep01) | Large Merger Large Mergers | Competition Tribunal (n.d.).

[925] "Grindrod Holdings South Africa (Pty) Limited v Sturrock Grindrod Maritime Holdings (Pty) Ltd, In Re: Grindrod Shipping South Africa v Unicorn Calulo Shipping Services (Pty) Ltd (019125) [2014] ZACT 92 (5 August 2014)," accessed December 10, 2018, http://www.saflii.org/za/cases/ZACT/2014/92.html.

[926] Unilever Plc (55/LM/Sep01) | Large Merger Large Mergers | Competition Tribunal (n.d.).

[927] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)," n.d.

[928] "Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd (66/LM/Oct01) [2002] ZACT 13 (22 February 2002)," para. 58.

Competition Law

Having said competition law institutional choice discussions are often partial, the following paragraphs discuss what a comparative institutional analysis may imply for the understanding of non-efficiency objectives. At the outset, understanding the institutional participation realities present in each institutional alternative can serve as a key and perhaps an objective litmus test. From a normative point of view comparative institutional analysis provides key lessons by analyzing the limitation of each institution. Primarily, allocating decision making powers on non-efficiency objectives in the hand of competition organs, against those of administrative or regulatory enforcement agencies, means that success of these considerations is limited by the number of enforcement actions/cases brought to the attention of the competition enforcement agencies/courts.[929] For instance, where the said public interest, considerations are provided as exceptions to the rule, or simply secondary considerations, such as the case of public interest exceptions in South African Competition Act, the role of these instruments in terms of having actual impact in the market is largely limited by the number of cases brought to the attention of the competition bodies. This means competition law enforcement cannot be taken as the primary instrument to protect or advance these objectives.

In addition, even functioning under these limitations, the participation of key stakeholders in the system will determine its effectiveness. As it has been evidently seen in South Africa, it takes strong interest groups to represent these claims, and a capable administrative and/or adjudicatory body to provide the forum for such intervention. Hence, a legislature that understands the significance of institutional participation will make sure these objectives are not made redundant due to lack of enforcement avenues by, among others, understanding the participation landscape and making an informed choice in terms of which institutions guarantee the optimal level of participation and hence enforcement. For instance, a choice of adjudicative bodies in South Africa has ensured that public interest considerations are adjudged publicly, with strict evidentiary standards. This not only ensures transparency of decision-making process but also clarifies the cost-benefit rationalization that may be undertaken behind closed doors if the mandate was given to executive/political bodies. However, at the same time, these objectives are pursued to the extent that the cases are brought to the attention of the enforcement agencies in the first place. Indeed, the law may also boost participation by fixing institutional shortcomings. A good example in this regard is how the South African Competition Act incorporated various provisions that ensured the transparency of the decision-making process. This minimizes information costs. The effective representation of the labor unions during the drafting process of the Act played its own role in this regard.[930]

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[929] Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1997); Neil Komesar, "The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness," *Wis. L. Rev.*, 2013, 265.

[930] See International Competition Network (ICN) Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis, "Recommended Practices For Merger Analysis," *ICN* (blog), accessed December 10, 2018, https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-merger-analysis/.

Similarly, from enforcement point of view, comparative institutional analysis provides key lessons vis-à-vis the role of enforcement organs, both administrative or adjudicative. Competition enforcement bodies function within the limitations of the rules prescribed by the legislature. In this regard they are differently positioned in terms of the scope of choice available to them. For instance, South Africa's Competition Act does not provide an open-ended public interest test. The legislator limits the enforcement agencies' scope of choice by recognizing only a specific set of public interest consideration, e.g. in merger analysis, contrary to the broad objectives provided in the preamble.[931] However, these agencies often engage in institutional choice, in many broad areas where they have discretion. These agencies may compare themselves with other government agencies or the market, often related to the resource limitations they have. In this context the literature argues in favor of prioritizing resources and differ, whenever possible, to other regulatory body or the market. In doing so, participation analysis may come handy among the analytical tools used by enforcement agencies.

Taking the South African experience in to account, one option of integrating the participation element with the rest of 'public interest' normative analysis is to use the 'substantiality' standard. I.e. one of the major considerations taken in to account in interpreting public interest provisions is to see if these are worth or are 'substantial' enough to displace any other consumer benefit.[932] According to the South African Appeal Court, the standard demands that a considerable weight is given to these objectives. While there are several highly valuable uses of the standard it is proposed here that the competition enforcement organs also use it to engage in a robust comparative institutional analysis. As described above, when faced with an option of refereeing the matter to other institutions, competition bodies are often willing to submit to the jurisdiction of other agencies by simply looking at their formal availability. However, it is equally important to scrutinize if these institutional alternatives are effectively available to entertain the public interest claims. In doing so, the body making such examination, whether the legislature during the drafting process or the enforcement bodies, may take in to account 'effective participation' as a litmus test.

Hence, from normative point of view, claims that all public interest considerations are better placed in other political or regulatory forums should be rejected. For instance, in one of the few occasions that the South African Competition Tribunal made a determination on the public interest grounds, *Unilever Plc /Robertson's Foods Pty Ltd*, the tribunal acknowledged that the most effective institutional alternative for labor unions to address employment related issues

[931] Latest amendement to the South African competition act broadnes the scope but maintains the principle. "South Africa's Competition Amendment Bill 2018 | LEX Africa," accessed December 10, 2018, https://www.lexafrica.com/south-africas-competition-amendment-bill-2018/.

[932] This is derived from Section 12 A(1) of the ACT, and the latest Gudilines for the Assessment of Public Interest Provisions in Mergers; "Guidelines for the Assessment of Public Interest Provisions in Mergers | The Competition Commission of South Africa," accessed December 10, 2018, http://www.compcom.co.za/guidelines-for-the-assessment-of-public-interest-provisions-in-mergers/.

is through employment legislation or collective bargaining agreements.[933] Meanwhile the tribunal also showed its preference to deal with 'residual' aspects of the employment consideration, which is "not susceptible to or better able to be dealt with under another law."[934] While this finding is illustrative of institutional choice, the Tribunal may also have given a better look at the institutional participation milieu of its determination that have a bearing both in selecting itself as a preferred choice of forum as well as differing it to other 'more relevant' platforms. Absent this consideration it cannot objectively consider itself or other organs as capable of making an informed decision.

3. Excessive Prices: A Comparative Institutional Analysis Perspective

The role of competition law in dealing with 'excessive prices' has been another major contentious issue.[935] At the outset there are two major reasons that drive the controversy. Primarily there is a wide range of disagreement on whether the notion is in the first place within (or should be) the traditional reach of competition law. Those in favor rely on the argument that taming excessive prices should be a natural reflection of competition law's ultimate mandate of protecting consumers from exploitative practices; since "in the consumers' eyes', excessive pricing is one of the most noticeable and blatant forms of abuse."[936] Lleras argues that developing countries in particular may find it important to use the standard as it may 'compliment' other non-efficiency objectives .[937] Roberts argue the prominent role the standard has in small developing economies where "conditions for excessive pricing are much more prevalent than in large industrialized economies."[938]

Arguments against emphasize the risk of harming pricing freedom of business and their incentive to invest, especially to those that may have reached the dominance threshold.[939] Higher prices are considered to be a key signal to new entrants in to the market, which challenge the power of the dominant firm and consequently stabilize prices.[940] Simply

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[933] Unilever Plc (55/LM/Sep01) | Large Merger Large Mergers | Competition Tribunal (n.d.)., John Oxenham, "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty," *US-China L. Rev.* 9 (2012): 211.

[934] Distillers Corporation (Sa) Limited and Stellenbosch Farmers Winery Limited (08/Lm/Feb/02) [2003] Zact 36 (18 June 2003) paragraph 237.237

[935] Reena das Nair and Pamela Mondliwa, Excessive pricing under the spotlight: What is a competitive price? (in) Thula Kaira et al., *Competition Law and Economic Regulation : Addressing Market Power in Southern Africa* (Wits University Press, 2017), 97, http://oapen.org/search?identifier=634572., Ackermann, "Excessive Pricing and the Goals of Competition Law"; Calcagno and Walker, "Excessive Pricing."

[936] David Gilo and Yossi Spiegel, Excessive price regulation, Extended abstract submitted to 1st Conference of the Research Network on Innovation and Competition Policy: Modern Approaches in Competition Policy; Willams, M.. Excessive pricing in The Pros and Cons of High Prices Stockholm: Konkurrensverket - Swedish Competition Authority. Chapter 6, (2007) 126-153.

[937] Andrés Palacios-Lleras, "The Uneasy Case for Enforcing Competition Law Provisions Related with Excessive and Unfair Prices in Developing Countries," no. 6 (January 2010): 457.

[938] Simon Roberts, "Assessing Excessive Pricing: The Case of Flat Steel in South Africa," *Journal of Competition Law and Economics* 4, no. 3 (2008): 871.

[939] OECD, Excessive prices, DAF/COMP(2011)18 (2012) 26

[940] Max Huffman, "Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 1, 2010), https://papers.ssrn.com/abstract=1546106. Robert O'Donoghue and Atilano Jorge Padilla, *The Law and*

challenging higher prices will only interfere with this healthy process to the benefit of consumers in the short run.[941] In addition, many argue that it is often difficult to put this notion in practice due to difficulty of developing a standard threshold above which normal pricing practices will be considered exploitative.

Summary of the general justifications given by the literature both in favor and against the notion by OECD provides comprehensive insight. According to the OECD, the arguments put forward for non-intervention include; the self-correction power of markets, the role of regulatory failure in aggravating market failure, higher cost of intervention, difficulty of devising price regulation/remedies, lack of clarity of the concept, how intervention will tantamount to prohibiting monopoly itself, and its negative effect on investment decisions.[942] Generally, these arguments highlight the potential or risk of error in both counts of intervention (type I error) and non-intervention (type II error). The argument also presents that type I error outweighs the latter due to its effect in "undermining dynamic efficiency, possibly even foreclosing the market to entry."[943] On the other hand, it is worth mentioning here that several counter arguments have also been presented. One argument deals with the uncertainty in the ability of markets to 'self-correct' in certain situations. Particularly 'small economies' faced with 'natural' barriers to entry may find it difficult to promote market competition using conventional tools.[944]

Unsurprisingly, this different understanding of the concept has also resulted in a mixture of country experiences. There is no uniform approach used between those that have somehow adopted the notion. For instance, US antitrust jurisprudence does not contain any notion of excessive pricing activity.[945] Monopolistic prices are embraced because of the natural play of the market and competition process.[946] As judge Learner Hand put it, "the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus*

Economics of Article 82 EC (Hart Publishing, 2006).By Bloomsbury Professional, "The Law and Economics of Article 82 EC," Bloomsbury Publishing, accessed October 25, 2017, https://www.bloomsburyprofessional.com/uk/the-law-and-economics-of-article-82-ec-9781841135021/. Calcagno and Walker, "Excessive Pricing."

[941] Motta and de Streel, "Excessive Pricing in Competition Law," 18.

[942] OECD, Excessive prices, DAF/COMP(2011)18 (2012) 27

[943] OECD, Excessive prices

[944] Ariel Ezrachi and David Gilo, "Excessive Pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation," *Antitrust Law Journal* 76 (2010 2009): 873. Michal S. Gal, "Size Does Matter: General Policy Prescriptions for Optimal Competition Rules in Small Economies," 2001, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070; Michal S. Gal, "The Effects of Smallness and Remoteness on Competition Law-The Case of New Zealand," 2006; Michal S. Gal, "Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief about Monopoly?," *The Antitrust Bulletin* 49, no. 1–2 (2004): 343–384; Michal S. Gal, "Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions," 2009.

[945] OECD, Working Party. "on Competition and Regulation." Committee on Competition Law and Regulation, DAF/COMP/WP2/WD(2011)65 (2011), 2. Indeed US regulates 'price gouging' in cases of emergency situations; Huffman, Max, Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection (February 1, 2010). European Competition Journal, Vol. 6, No. 1, (2010)

[946] Michal S. Gal, "Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief about Monopoly?," *The Antitrust Bulletin* 49, no. 1–2 (2004): 343–384.

coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."[947]

On the other hand, EU competition jurisprudence incorporates 'limited intervention" mechanisms against excessive prices.[948] Similarly several member states adopted a spectrum of intervention approaches against excessive prices.[949] Article 102 of TFEU stipulates "directly or indirectly imposing unfair purchase or selling prices" as one example of exploitative practices by a dominant enterprise. The Court of Justice of the European Union (CJEU) has addressed 'unfair' selling practices under the rubric of the provision several times.[950] In the most cited ruling, *United Brands*, the CJEU provided a two-part analytical test, a standard that has garnered global reception. According to the court, the analysis involves a determination of "whether the difference between the costs actually incurred and the price actually charged is excessive", and if so, "whether a price has been imposed which is either unfair in itself or when compared to competing products."[951] This approach has been followed by the court in other cases, as well as, by other jurisdictions.[952]

Several developed and developing jurisdictions have adopted various types of the excessive price standard. According to OECD "many of the (relatively recent) competition law regimes of developing countries provide for a prohibition of exploitative abuses in the shape of "excessive" prices."[953] South Africa's Competition Act incorporates the concept under Section 8(a) which prohibits a dominant firm from "charg[ing] an excessive price to the detriment of consumers"[954] In addition, unlike most jurisdictions that incorporate the concept, Section 1(vii) defines excessive pricing as a "price for a good or service which – (a) bears no reasonable relation to the economic value of that good or service; and (b) is higher than the value referred to in subparagraph (a)".[955] This definition is largely in line with the approach put in place by ECJ in *United Brands*.[956] The provisions envisage no efficiency defenses, making it one of the only two such clauses in the Act; the other being exclusionary abuse in the form of refusal to grant access to an essential facility.

Until today South African competition jurisprudence has seen about six excessive pricing

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[947] "United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)," Justia Law, para. 1, accessed November 2, 2017, https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/.
[948] Reena das Nair and Pamela Mondliwa, Excessive pricing under the spotlight: What is a competitive price? (in) Kaira et al., *Competition Law and Economic Regulation*, 97.
[949] Gilo and Spiegel, "The Antitrust Prohibition of Excessive Pricing."
[950] Case 26/75 General Motors Continental NV v. Commission EU:C: 1975:150, Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission EU:C:1978:22; Case C-385/07 P Der Grüne Punkt – Duales System Deutschland GmbH v. Commission EU: C:2009:456.
[951] Case 27/76 United Brands Company and United Brands Continental; 252
[952] P Isabella Scippacercola and Ioannis Terezakis v. Commission EU:C: (2009). Case C-159/08
[953] OECD, Excessive price, 383
[954] South Africa, Competition Act, 1998.
[955] South Africa, Competition Act
[956] Case 27/76 United Brands Company and United Brands Continental

cases, the first being Mittal.[957] As it is a case that has been extensively discussed in the literature it will only be briefly mentioned here.[958] The case involved ArcelorMittal, a dominant steel manufacturer where its prior state ownership before 1989 and South Africa's unique market characteristics gave it significant market power. Harmony Gold and Durban Roodepport Deep, consumers of flat steel complained that such an entrenched position of Mittal gave it exclusive powers to set excessive prices including by engaging in import parity pricing.

The Competition Tribunal employed a two-step analysis to determine whether Mittal engaged in excessive price practices. In its evaluation of the South African market situation and the practice by Mittal, it found evidence of the latter's successful strategy of limiting its supply of steel to the local market by engaging in an exclusive supply deal to divert excess supply of steel abroad which had the effect of driving domestic prices high.[959] Following an appeal by Mittal, the South African Competition Appeal Court overruled and remitted the Tribunal's findings due to failure on the latter's part to apply the correct test as provided under Section 8 of the South African Competition Act. In particular it criticized the tribunals approach by stating "the Tribunal's idea that a market must be 'uncontested' and 'incontestable' and the firm 'super-dominant' otherwise the price charged cannot be excessive finds no support in the Act."[960] According to the Competition Appeal Court; Section 8(a) of the Competition Act requires a five-stage analysis;

1. The determination of the actual price of the good or service;
2. The determination of the 'economic value' …expressed in monetary terms;
3. The determination of whether there is a reasonable relation between the actual price and the economic value; and finally
4. The determination of harm to consumers.[961]

In doing so it required a clear-cut price and economic value comparison approach rather than, a simple comparison of the domestic prices and the spotlight given to how Mittal implemented strategies that limited parallel imports. Even though the parties settled the case before the Tribunal had the chance to reexamine the case, the case was influential in South Africa's Competition Act excessive price jurisprudence as it dictated a 'complex' price analysis

[957] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) (n.d.).
[958] David Lewis, *EXPLOITATIVE ABUSES–a Note on the Harmony Gold v Mittal Steel Excessive Pricing Case* (Retrieved from Competition Tribunal: http://www. comptrib. co. za/assets/Uploads/Speeches/lewis12. pdf, 2008); Ezrachi and Gilo, "Excessive Pricing, Entry, Assessment, and Investment"; Roberts, "Assessing Excessive Pricing," 2008. Campaigning for pro-public health reform of South Africa's Patents Act; Campaigning for pro-public health reform of South Africa's Patents Act;
[959] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009).
[960] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) paragraph 32.
[961] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009) paragraph 32.

exercise which may impose serious burden on the competition agencies.[962]

South Africa's second excessive price case is Sasol;[963] a case brought against a large chemical firm Sasol Chemical Industries (Sasol) which manufactured propylene and polypropylene. The two products are byproducts of Sasol's fuel production industrial line and are inputs used to manufacture plastic products. Similar to Mittal, Sasol had a history of state support. The claim brought against it alleged, among others, that it practiced an import parity pricing scheme despite the fact that it is one of the most price competitive producer of propylene in the world.[964] The Tribunal adopted the basic recommendations of the CAC employed in reviewing Mittal; determination of the price under consideration, an objective examination of the economic value of the product in the market and the reasonableness of the relationship between such price and the economy value.[965] In doing so the Tribunal found, in addition to implementing an import parity pricing strategy, it exercised price markups on the two products mentioned above, and equally significant markup compared to other producers e.g. Western Europe.[966] Accordingly, it found Sasol in violation of Section 8(a) of South Africa's Competition Act and imposed an administrative penalty of 534 million South African Rand.[967]

Sasol appealed the case to the Competition Appeal Court claiming the Tribunal incorrectly assessed its cost of production. According to Sasol such cost consideration should include its primary line of fuel production as the two products are merely a result of that process. In addition it claimed that the Tribunals failure to determine reasonable relation to the economic value of the product supplied implied serious error. [968] Hence "where the firm's prices are no higher than economic value, no contravention of s 8(a) can arise."[969] The Court upheld the appeal and set aside the decision of the Tribunal.[970] It is also to be noted that the Constitutional Court of South Africa rejected an application to appeal brought by the Commission against CAC's ruling.[971]

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[962] Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009).; Du Plessis, L. & Blignaut, L. Staying safe – dominant firms' pricing decisions in industries where high prices do not attract entry. Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa (2009)

[963] Sasol Chemical Industries Limited v Competition Commission (131/CAC/Jun14) [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015); Competition Tribunal Case No: 48/CR/Aug10.

[964] Sasol Chemical Industries Limited, Competition Tribunal Case No: 48/CR/Aug10.

[965] Sasol Chemical Industries Limited

[966] Sasol Chemical Industries Limited

[967] Sasol Chemical Industries Limited; 36 - 37

[968] Sasol Chemical Industries Limited;11, 38.

[969] Sasol Chemical Industries Limited; 40. "In the light of this analysis, the ultimate determination of whether appellant has contravened s 8(a) must be predicated on a feedstock price which represents the price which Synfuels sold feedstock to appellant. That price can be justified as the actual cost pursuant to an agreement that is subject to independent regulatory scrutiny. There is no basis to adopt a hypothetical price, divorced from the reality conceded by appellant, which application would gut any possibility of prosecuting on excessive pricing case." Sasol Chemical Industries Limited; 115.

[970] Sasol Chemical Industries Limited

[971] Sasol Chemical Industries Limited

Ethiopia's TCCPP also provides rules for 'unfair prices'. Article 5(2,c) prohibits a dominant firm from "directly or indirectly imposing unfair selling price or unfair purchase price".[972] TCCPP provides no guidance on how 'unfair prices' are to be defined.[973] There is also limited enforcement practice by the Competition Authority on the bases of this provision.

3.1. Proposed Standards & Tests

Despite a broad-based legislative recognition, excessive price standards are not vigorously enforced. Some has considered this as 'paradoxical.'[974] In large part, this reluctance may have to do with the fact that proving excessive prices is a difficult task. In doing so irrespective of one's position towards the role of competition law in regulating excessive prices, it is important to recognize the apparent difficulties of lodging successful intervention limits its practical role. Second, as the remedy for excessive prices is nothing but another form of price regulation this is considered to be inappropriate for competition agencies to deal with as they lack sufficient sector-specific knowledge and also because regulatory remedies require regular monitoring and enforcement of compliance.[975] Third, it is almost impossible to formulate a universally applicable standards of assessment to dissect the notion of 'excessiveness'.[976] Whish and Bailey rightly state that "even if it is accepted, despite these arguments, that exploitative pricing should be controlled, there is the difficulty of translating this policy into a sufficiently realistic legal test."[977] According to Gal;

> The hands-off approach was based, at its inception, on the belief in the self-correcting tendency of the market and the limited role of government in regulating markets. The modern paradigm is based on a dynamic analysis of the market and the economic effects of monopoly pricing regulation. The basic premise still remains that most markets are competitive and monopoly tends to be self-correcting. But even when markets are not competitive, it is believed that the costs of regulation are likely to outweigh its benefits."[978]

The challenges of delimiting the proper role of competition law in dealing with excessive pricing issues has invited broad contributions on where the 'optimal' level of intervention should be demarcated. In large part the consensus seems to be that, "an optimal competition policy should provide for strict conditions to determine candidate markets for intervention as

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[972] Trade Competition and Consumers Protection Proclamation, Proclamation No. 813/2013.

[973] Article 25: Regulating Prices of Basic Goods and Services 1) The Ministry, when deemed necessary, shall submit to the Council of Ministers its study on basic goods and services that shall be subject to price regulation and upon approval announce their list and prices by a public notice. 2) It shall be prohibited to sell or attempt to sell basic goods and services beyond the price fixed by the government and announced by a public notice.

[974] OECD, Excessive prices, DAF/COMP(2011)18 (2012) 35

[975] Massimo Motta and Alexandre de Streel, "Excessive Pricing in Competition Law: Never Say Never?," *The Pros and Cons of High Prices* 14 (2007): 28.

[976] Asress Adimi Gikay, "Competition Law in Ethiopia (Introduction)," 2016, 79, http://sci-hub.cc/https://papers.ssrn.com/abstract=3044745.

[977] Richard Whish and David Bailey, *Competition Law*, 7 edition (Oxford: Oxford University Press, 2012), 719.

[978] Gal, "Monopoly Pricing as an Antitrust Offense in the US and the EC."

well as a high standard of proof."[979] In doing so several tests have been put forward as a set of predetermined conditions for competition agencies to take in to account when dealing with excessive pricing cases. Among others Evans and Padilla developed, a three-step test that need to be simultaneously fulfilled before the competition authority can intervene in the matter.[980] First, they provide that "the firm enjoys a (near) monopoly position in the market" due to other reasons than pure efficiency considerations. This perhaps may be due to "insurmountable legal barriers" to entry the firm enjoys in the market against potential competitors.[981] Second, a 'modified per se illegality' standard is to be used where a price would only be presumed illegal if it exceeds its average total costs. Third, "there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets."[982] According to Evans and Padilla, the first two conditions ensure that the chances of type I errors occurring is relatively small "while the expected cost of false acquittal is large." As this may not be enough to warrant type I errors the third test ensures that "the cost of false acquittal in orders of magnitude is much larger than the cost of false conviction"[983]

O'Donoghue and Padilla offer a modified test of the above by simply replacing the third test with a condition; "where investment and innovation play a relatively minor role."[984] They admit that "there is much less consensus, however, on how to distinguish excessively high prices from competitive prices, since all possible benchmarks are subject to criticism."[985] Similarly, others such as Fletcher and Jardine propose a three legged approached where first, there is a finding that there is no possibility of entry in to the market. They argue that it should be proven that high prices are not able to invite new competitors in the market in reasonable period. Second, they argue the importance of understanding more than one element of the market competition by considering various other factors such as the possible competition the dominant firm faces in the market. Third, they emphasize the importance of dealing with the structural challenges of the market rather than merely punishing firms for high prices. Fourth, they argue against any intervention in innovative product within its patent period. Fifth, they argue the importance for competition agencies to analyze the effect of intervention on investment decisions of others in the market, and finally, there are no substitute structural remedies.[986] Gilo and Spiegel add interesting benchmark to the portfolio of the proposed

[979] Motta and de Streel, "Excessive Pricing in Competition Law," 20. "The Pros and Cons | Swedish Competition Authority," accessed October 25, 2017, http://www.konkurrensverket.se/research/seminars/the-pros-and-cons/.
[980] David S. Evans and A. Jorge Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules," *Journal of Competition Law & Economics* 1, no. 1 (January 1, 2005): 97–122, https://doi.org/10.1093/joclec/nhi002.
[981] Evans and Padilla.
[982] Evans and Padilla, 117.
[983] Evans and Padilla, 117.
[984] O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, 638.
[985] O'Donoghue and Padilla, 638.
[986] Amelia Fletcher & Alina Jardine, Towards an Appropriate Policy for Excessive Pricing, in, Claus-Dieter Ehlermarm & Mel Marquis (eds.) European Competition Annual 2007: A Reformed Approach to Article 82 EC, Hart Publ'g 2008) 544. Also see Nazzini, "Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU," 464–72.

approaches; that the incumbent dominant firm takes a significant price cut after entry of competitor.[987] "A benchmark that can be used to prove excessive pricing by a dominant firm, namely, a significant price cut by an incumbent firm following entry into its market."[988]

A largely cited contribution is that of Motta and Streel, who also propose a three condition test.[989] Similar to the above proposals they argue that first there needs to be proof of "high and non-transitory entry barriers" that led to or caused "a super dominant position".[990] The assumption taken in this regard by them has to do with not only the sector is not subject to direct regulation but also such choice is made because it is expected that the market's competitive force are preferred than direct regulation. In additional the test envisages beyond a mere finding of dominant position as it anticipates the presence of a monopoly or quasi-monopoly position.[991] The second test provides that such monopolistic position is a result of current or past special privileges enjoyed by the firm. This also takes in to consideration failure to regulate previous anticompetitive practices in the market, such as exclusionary practices.[992] Simply speaking this test attempts to avoid from the preview of excessive price regulation any price that is the result of any investment and efficiency enhancing measures by the dominant firm. Thirdly, according to Motta and de Steel, competition agencies should intervene in the market there only when there is no specific sector regulatory bodies that have a mandate to regulate the case at hand.

Motta and de Steel admit that, in particular with the third test, there may be conflicts between competition agency and the sector regulator in cases where either of the two institutions is satisfied with the price at hand being appropriate while the other might consider same prices to be 'high'.[993] They argue in these cases it will be difficult to determine who is right. Rather, such conflicts are common across different jurisdictions and each jurisdictions have different approaches to dealing with these conflicts.[994] In doing so Motta and Steel submit that in this cases the competition authority should differ the matter to the sectoral regulatory in cases were the latter has such jurisdiction to act.[995] They add, "at the minimum, we think that if the antitrust authority intervenes, it should prove, in addition to the excessive price, that the decision of the sectoral regulator was manifestly wrong."[996]

Developing on the contribution of Motta and Steel, Roller provides a five stage scenario for competition agencies to intervene in excessive price cases; 1) there needs to be significant barriers to entry 2) no likelihood of the market to self-correct on its own, 3) there are no structural remedies available 4) there is no regulator with jurisdiction to act or that there is no

[987] Gilo and Spiegel, "The Antitrust Prohibition of Excessive Pricing."
[988] Gilo and Spiegel. 4
[989] Motta and de Streel, "Excessive Pricing in Competition Law," 21.
[990] Motta and de Streel, 21.
[991] Motta and de Streel, 23.
[992] Motta and de Streel, 24.
[993] Motta and de Streel, 24.
[994] Motta and de Streel, 24.
[995] Motta and de Streel, 28.
[996] Motta and de Streel, 28.

evidence of failure on the part of any such organ and finally 5) that there may have been any 'gap' or 'mistake' cases where dominance of the firm in the market is a result of past exclusionary practices.[997] All these tests are proposed as a cumulative.[998] Further enhancing the contributions of Evans and Padilla, Lewis argues that intervention is also warranted were barriers to entry were due to 'historically circumstances' stating this are as good as legal barriers.[999]

3.2. Institutional Considerations

Efforts to come up with a workable standard deal with, even though implicitly, with institutional considerations. As rightly put by Ackermann, "price interventions are based on the premise that authorities or courts are better than markets at detecting and bringing down monopoly rents."[1000] Terhechte also highlights the importance of institutional considerations from an enforcement perspective.[1001]

At the outset, price regulation is understood here as a direct intervention by a public agency on the pricing practices of the market players, often on ex-ante basis while competition enforcement is generally characterized as an ex-post regulation of market behavior.[1002] A broad definition proposed by Seznick generally does the job of defining the concept; "sustained and focused control exercised by a public agency"[1003] In this process competition law is often taken as the least preferred remedy compared to sectoral regulation. Various reasons are put forward in this regard. First, competition agencies have limited technical and resource capacity. According to Terhechte, the task requires a certain level of technical quality that competition authorities normally does not enjoy.[1004] Second, the role of regulatory capture is also a matter that has been given distinct attention. Motta and de Steel identify the risk of regulatory capture.[1005] In this regard judicial review of excessive price enforcement actions has also been considered. Strict judicial review is one reason why some competition agencies and judicial organs are reluctant to engage in excessive price determination.[1006]

Third, it may also be an issue of availability of alternative avenues and instruments. The reason

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[997] Lars-Hendrik Röller, "Exploitative Abuses," (in) *European Competition Law Annual 2007: A Reformed Approach to Article 82*, (eds.) Claus-Dieter Ehlermann and Mel Marquis (Oxford, UK: Hart Publishing, 2008), 530.
[998] Lars-Hendrik Röller, "Exploitative Abuses,"
[999] Lewis, *EXPLOITATIVE ABUSES–a Note on the Harmony Gold v Mittal Steel Excessive Pricing Case*.
[1000] Thomas Ackermann, Excessive pricing and he goals of competition law, in, Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing, 2012), 361, http://www.elgaronline.com/view/9780857936608.xml.
[1001] Jörg Philipp Terhechte, *Excessive Pricing and the Goals of Competition Law: An Enforcement Perspective – Comment on Ackermann* (Edward Elgar Publishing, 2012), 378, https://www.elgaronline.com/view/9780857936608.00026.xml.
[1002] Jörg Philipp Terhechte, 380.
[1003] Selznick, Philip 'Focusing Organizational Research on Regulation'. In: Noll, Roger G. (ed.) Regulatory Policy and the Social Sciences. (Berkley, CA: University of California Press, 1985). 365
[1004] Terhechte, *Excessive Pricing and the Goals of Competition Law*.
[1005] Motta and de Streel, "Excessive Pricing in Competition Law."
[1006] Terhechte, *Excessive Pricing and the Goals of Competition Law*.

why US antitrust law abstained from regulating excessive prices has to do with more than its ideological standing. Rather, it is because the US chose to deal with the situation through the sphere of regulation.[1007] According to Ackermann the choice between competition law and regulatory instruments is not always free due to 'constitutional constraints' that vary across jurisdictions.[1008] In doing so he emphasizes how the EU lacks an alternative regulatory instrument within the TFEU while the US Congress on the other hand has the power to come up with various regulatory tools.[1009]

Evans and Padilla provide a clear preference to regulation as they state;

> We have found a possible exception to our general recommendation of no intervention. Under some 'exceptional circumstances' it may be appropriate public policy to interfere with the pricing policies of entrenched monopolies enjoying the protection of legal barriers to entry whose actions may impede the launching of new products or the emergence of new, adjacent markets. But even in those cases, it remains unclear why it may not be better simply to rely on ex-ante regulation, setting up sector-specific regulatory bodies with more information about the fundamentals of the markets in question and better able to monitor compliance.[1010]

Meanwhile, these approaches take availability of institutional choices on face value without undertaking a realistic assessment of whether the choices are better choices. It is not sufficient that other regulatory instruments are available or as such regulatory bodies have jurisdiction to and make formalistic institutional choice determinations. Rather all comparative institutional considerations need to be taken in to account.

Contrary to the tests mentioned above, the mere fact that other remedies are available does not make them better placed.[1011] Roller comes close to understanding the concern by providing that it may be appropriate for competition agencies to play their own role in dealing with excessive pricing issues where "the regulator does not operate effectively."[1012] He emphasizes the role for competition law because regulatory agencies are prone to the risk of regulatory capture than an competition agencies.[1013]

The asymmetry of this institutional considerations can be seen in the case of regulating the pharmaceutical industry. As described in the preceding chapters, other than competition law enforcement, there are a few other alternative instruments available for the government to intervene and manage excessive pharmaceutical prices. Among others, direct price controls, the use of compulsory licensing of patent rights, the use of their direct state procurement instruments, use of emergency or public security rules etc. are available to them. Lewis states,

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[1007] Ackermann,Excessive pricing and the goals of competition law. 370.
[1008] Ackermann,Excessive pricing and the goals of competition law. 370.
[1009] Ackermann,Excessive pricing and the goals of competition law. 370.
[1010] Evans and Padilla, "Excessive Prices," 122.
[1011] Lars-Hendrik Röller, "Exploitative Abuses," (in) *European Competition Law Annual 2007: A Reformed Approach to Article 82*, (eds.) Claus-Dieter Ehlermann and Mel Marquis (Oxford, UK: Hart Publishing, 2008), 531.
[1012] Lars-Hendrik Röller, "Exploitative Abuses,"
[1013] Lars-Hendrik Röller, "Exploitative Abuses,"

in the context of the controversial Mittal case, "if government was not satisfied with the outcome of the remedy initially proposed, it could have taken steps to regulate the steel price or dismember the monopoly. These would no doubt have been controversial, but nonetheless credible, remedies and they remain so." He emphasizes the complexity, time consuming and indeterminate nature of competition law for addressing excessive prices. [1014]

However there needs to be a realistic assessment of the availability of these instruments. Often the transaction cost of enforcement through these avenues is prohibitively high that institutional choice is only theoretical. Abbott provides an example of 'political economy' challenges.[1015] According to Abbott, the key challenge in this regard is that while the conventional approach of dealing with excessive prices is to 'fix the market' on structural point of view, this approach may however be inappropriate when it comes to State mandated exclusive markets, such as those protected by patents.[1016] Therefore, in this situations institutional alternatives are not simply available due to the fact that "political institutions, such as legislatures, that might step in are constrained by political economy (e.g., lobbying), and do not respond as they should."[1017]

Indeed, as described above, a conservative view of the role of competition agencies would see the issue irrelevant if not inconsistent to the primary goal of competition law. For those that have greater trust in the role of the market, interventions such as this is nothing but an obstacle to market efficiency. On the other hand, from a broad understanding of the goal of competition law, rules that protect consumers from any type of exploitative practices is the major goal of competition law. For stern advocates of each side of the argument the conundrum is nothing but a clash of objectives. Several proposals and standards have been put forward in an attempt to balance these objectives. Many also acknowledge the political necessity of regulating excessive prices.

Meanwhile, institutional considerations are not well entertained. From a comparative institutional analysis point of view each jurisdiction faces an intrinsic institutional choice dilemma. Excessive prices present interpretational questions and while the challenge is often presented as determination of which of the errors is to be preferred over the other, the more important question is institutional choice; 'who decides what'? The task entails the job of identifying which of the alternative institutions between the market place, the political/regulatory organs and/or competition agencies should decide on those policy goals. The concern here is to understand the occasions where such substitutability will occur or should occur.

Primarily, the concern on the role of the market, as primary institution, is its tendency to malfunction in a way that will lead to outcomes that exploit consumers. Hence whenever such

[1014] Lewis, *Thieves at the Dinner Table*, 176.
[1015] Frederick M. Abbott, "Excessive Pharmaceutical Prices and Competition Law: Doctrinal Development to Protect Public Health," *UC Irvine L. Rev.* 6 (2016): 283.
[1016] Frederick M. Abbott, "Excessive Pharmaceutical Prices and Competition Law: Doctrinal Development to Protect Public Health," *UC Irvine L. Rev.* 6 (2016): 284.
[1017] Abbott, "Excessive Pharmaceutical Prices and Competition Law," 284.

failure is identified, the regulatory or competition agencies are called up on to review the pricing decisions of the dominant firm and decide whether they should be acceptable or rejected. Depending on their decisions these institutions either supplement or replace the private ordering to their own. In this sense, the policy and substantive debate with regard to excessive pricing is nothing but argument of institutional choice. [1018] As presented above, there is predetermined preference in this discourse to one institution against the other. In the competition law and policy arena it is not so uncommon to easily allocate the job of dealing with excessive prices to the market itself or regulatory institutions mainly out of the concern of the ability of competitions agencies without similarly evaluating the institutional trait of the regulatory organs. Comparative institutional analysis however tells us otherwise. Just because one institution fails it does not mean that its alternatives will always perform better. According to Komesar, all institutions tend to move in same direction as numbers and complexity increases.[1019] Therefore, it is important to understand that each institution suffers from its own institutional limitation. Markets failure is a well elaborated concept in the economic literature, while political malfunctions are also well illustrated by IGTP theory. This may come in the form of either overrepresentation of special interest or sometimes the 'tyranny of the majority.' Competition agencies also whenever presented as an alternative, have their own limitations.[1020]

In addition to the above, the role of comparative institutional analysis, as outlined by Komesar, is to show how by using institutional participation as a standard litmus test across these institutions we can measure the 'participatory efficiency' and 'institutional reality' of each alternative.[1021] Evaluation of the excessive pricing standard in this line would result in a different constellation of allocation of institutional responsibility than what would be a simple task of deference by competition bodies of such cases towards regulatory bodies.

Broadly speaking, if competition agencies decline to correct the market imperfections in the form of excessive prices, then they will deny consumers access to remedy. At the same time if they keep an open-door policy to such cases or adopt lax interpretation to the legal standard, they risk reviewing a sizable number of pricing practices in the market.[1022] This may so happen to be the case considering the fact that markets rarely function at a degree which might be considered 'perfect competition.' But this will not only be impractical but will also overstretch the reason why such intervention is necessary in the first place.[1023] It would be impossible for competition agencies to substitute themselves to review even the smallest fraction of the pricing practices of the market, even when it relates to consumers and dominant entities.

However, it also seems that, once the leeway is established, competition agencies may be

[1018] Komesar, "The Logic of the Law and the Essence of Economics," 2013, 283.
[1019] Komesar, 283.
[1020] Komesar, 283.
[1021] Despoina Mantzari, "Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK," *Oxford Journal of Legal Studies*, December 9, 2015, gqv035, https://doi.org/10.1093/ojls/gqv035.
[1022] Lewis, *Thieves at the Dinner Table*.
[1023] Despoina Mantzari, Economic Evidence in Regulatory Disputes:

overwhelmed by multiple demands for intervention. Yet this does not seem to be the experience of some of the jurisdictions reviewed; this did not happen to be the case at least until now. Therefore, there must be some sort of systemic disincentive that functions as filter to regulate the overwhelmingly large demand for review. In large part this may perhaps be because multiple standards have been put in place to achieve such balance. This standards and interpretational approaches applied by competition agencies put a limit to the volume of claims based on such standard. Most importantly the nature of the enforcement environment itself may be prohibitive. Where consumers suffer from excessive price and related exploitative practices they may still fail to bring claims to the competition agencies due to the small per capita loss they suffer on individual level. This may be reinforced by the fact that competition agencies suffer both institutional and technical capacity limitations to observe the market and take corrective action.

On the other hand, there are various disadvantages to substituting competition agencies to markets. However, this does not mean that competition agencies will always see themselves as inappropriately positioned. At least in rare occasions such intervention will bring better results than what may be the market outcome. They attempt to seek out if the case submitted to their review is that rare instance.[1024] It is a different story whether they are always successful, nevertheless, by doing so they are engaged in institutional choice.

Comparative institutional analysis teaches us that many of the same reasons that make one institution function less than optimally will also affect the performance of the other institutions. We cannot simply assume that when the market malfunctions the regulatory or competition bodies will run smoothly and vice versa. Hence in 'the real world' all institutions move together.[1025] While each institution possesses its own qualities, in no occasion they will be free of imperfections. As discussed in the preceding chapters, IGTP theory has nothing but illustrated how regulatory bodies are more likely to function contrary to the interests of the dispersed majority than simply 'in public interest.' In addition, IGTP also has its own blind spots in analyzing the relationship between majoritarian and minoritarian biases. In doing so both excessive majoritarian policies as well as policies simply designed to serve minority interests are unwelcome.

The case of excessive prices serves as a good illustration of how the interaction between majoritarian and minoritarian biases on competition policy. In most developing countries, it is safe to assume that consumers are disorganized groups. And Olson's theory of 'collective action problem' tells us that the cost of information, organization and discipline makes it hard for these groups to have an impact on public policy decisions compared to interest groups of smaller size whose organizational cost is relatively lower. However, it is also not always true that dispersed groups remain unorganized and disenfranchised. For instance, one has to be able to reconcile the commitment of political leaders to leverage extensive political mass and intervene in favor of consumer interests that were contrary to big-business's interest. 'Political

[1024] Komesar, "The Logic of the Law and the Essence of Economics," 2013, 287.
[1025] Komesar, 276.

will' justifications are often presented in the form of the distorted nature of the political environment, that public policy decisions are characteristically considered to be in favor of concentrated interests. The clue to resolving this 'paradox' is to understand that the transaction costs each group face varies based on the issue and various other underlying circumstances. For instance, despite the organizational disadvantages faced by dispersed groups they may still have opportunities to become active whenever the issues are simpler, thereby reducing information costs, as well as when the economic stakes involved are high. As presented in the preceding sections the experience of South Africa in dealing with high pharmaceutical prices tells us that, from time to time, these often disorganized consumer groups have been able to take their cause to the streets and demand important policy changes by the government.

In doing so it can be seen that comparative institutional analysis provides two significant additions to the discussion dealing with the role of competition law vis-à-vis excessive prices. First, from the point of view of the discussion on what the role of competition law in developing countries should be, abstract discussion on objective of competition law will only provide partial guidance. Even if it is considered that competition law should deal with excessive price issues, the limitation of this institution should be well understood and entertained. On the other hand, simply stating that other institutional alternatives are better placed to deal with excessive price concerns without giving equal opportunity to understand the limitations present in these organs is also an incomplete assessment. Competition agencies, for instance may successfully embrace the role of being arbiter of this difficult exercise not because it is simply in their benefit to get the favor of consumers and the larger citizenry by dealing with appealing excessive price cases, but because as the case may be, they are comparatively placed in a better position to enhance participation of all sides of the debate.

Second, derived from the above conclusion, an addition or amendment to some of the most prominent standards proposed above can be made. For instance, the third test of the three-legged test proposed by Motta and Steel, provides an incomplete evaluation of the role of alternative institution as it provides a condition that "no sector-specific regulator has jurisdiction to solve the matter". The argument here is determination is not sufficient if a realistic access to these regulatory alternatives is not available. Consumers may be unware of the issues as access to the information is costly, regulators may have capacity limitations or most importantly they may fall victim of capture. In this regard it can always be considered that there is a non-competition enforcement alternative to market regulation even in the absence of a formal regulatory body. Political organs of the state can intervene, including in the form of specific price regulation. However, these alternatives may be far-fetched and time taking or at the same time be victim of the same regulatory failures that inhibit regulatory bodies from functioning properly.

Accordingly, it is proposed here that an additional test is necessary to ensure competition agencies assess their relative institutional positions before simply deferring mandates to their regulatory peers. Among others competition agencies should assess, whether the alternative forums provide, simply speaking, better opportunities to hear 'all sides of the debate'. I.e. by engaging in a comparative institutional analysis of the role of each institution, competition

agencies can come up with a more informed decision by choosing the 'least imperfect' institution to deal with the matter at hand. Accordingly, the standard tests should include an assessment of not only the presence of alternative institutions but also whether the same institutions provide a realistic, broad participation, and well-informed assessment of the matter.

4. Chapter Conclusion

The issue of broad objectives of competition law in developing countries is one of the hotly debated issues. Today, several goals and visions underpin the development of competition law in these countries. However, many consider such broad goals as irrelevant if not inconsistent with the primary objective[s] of competition law. Non-efficiency objectives are said to be the domain of other political and regulatory agencies. Similarly, the role of competition law in addressing excessive pricing has been a contested subject. For those that have greater trust in the role of the market, such intervention is nothing but an obstacle to market efficiency. On the other hand, from a broader point of view of the goal of competition law, prescribing rules protecting consumers from any type of exploitative practices is considered important. In doing so the standard brings forward a broad disagreement on the objective/goal of competition law as such.

From a comparative institutional analysis perspective these considerations bring in to front an institutional choice dilemma. The chapter highlighted the importance of looking beyond the 'outside appearance' of the institutions to engage in a proper institutional analysis. By evaluating the participation story of two popular merger cases under South African Competition Act, the Shell and Tepco and Walmart- Massmart merger, the chapter highlighted the importance of identifying the real interests that influence the intervention of the relevant government agencies as illustrative of the importance of understanding institutional choice broadly. In doing so the chapter argued that 'participation analysis' can serve as a useful analytical tool. One approach in integrating the participation element with the rest of 'public interest' normative analysis is to use the 'substantiality' standard. The concern here is to understand the occasions where such substitutability will occur and/or should occur. In doing so the competition bodies may employ the 'substantiality' analysis to deal with comprehensive institutional analysis. One way of doing so perhaps may be that the competition bodies will chose to retain interpretation (of finding of substantiality) of a certain aspect of the public interest considerations/claims being dealt with in the case at hand if it was found that the competition bodies provide the best possible avenue of participation of the relevant stakeholders. This is also a determination of which body is to be best positioned to receive all the information necessary for effective determination of the matter.

The chapter also highlighted that excessive pricing issue presents similar institutional choice questions; 'who decides what'? The task entails the job of identifying which of the alternative institutions between the market place, the political/regulatory organs and/or competition agencies should be selected to make a determination on those policy goals. Price regulation is a direct intervention by a public agency on the pricing practices of the market players, often

on ex-ante basis while competition enforcement is generally characterized as an ex-post regulation of market behavior. However, this chapter argued that it is not sufficient that other regulatory instruments are available or as such regulatory bodies have jurisdiction. Rather all comparative institutional considerations need to be taken in to account. Hence, the thesis argued contrary to the tests provided by various authors to make determination on excessive pricing, the mere fact that other remedies are available does not make them better placed. It argued often the transaction cost of enforcement through these avenues is prohibitively high that institutional choice is only theoretical. Therefore, the thesis argued that by using institutional participation as a standard litmus test across these institutions one can measure the 'participatory efficiency' and 'institutional reality' of each alternative.[1026]

In general, to those that argue in favor of a bigger public policy role to be played by competition law and policy in the hands of competition agencies, comparative institutional analysis reminds them of the institutional limitation of these agencies beyond a simple efficiency/welfare dichotomy. At the same time to those that are determined with the argument that such objectives are better dealt with other institutions, such as political organs; the analysis in this chapter and broadly in this thesis also reminds them of the way how institutional malfunctions move across the institutional divide. Hence, the key argument is that the normative debate on competition law in developing countries will benefit from incorporating participation based comparative analysis beyond its current focus on 'institutional efficiency' considering institutions are the gates to realizing those objectives.

[1026] Despoina Mantzari, "Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK," *Oxford Journal of Legal Studies*, December 9, 2015, gqv035, https://doi.org/10.1093/ojls/gqv035.

CONCLUSION

In the last half a century alone several developing countries have implemented a range of economic reform measures including free-market driven economic policy, openness towards foreign trade and investment, regulatory reforms and the introduction of competition law and policy. It is the latter instrument which is the subject of this thesis. Today a large number of developing countries have adopted competition laws and most have also established enforcement institutions, even though these are not equally effective across the board.

Several explanations have been put forward as causes for this divergence. However, a quintessential characteristics of competition law and policy in developing countries is its lack of legitimacy. It is often considered a façade institution. Competition law and policy rarely comes to public debate. Lack of government commitment - 'political will', coherent policies, enforcement capacity deficit as well as several other development challenges have been put forward as constraints to effective competition law and policy landscape in these counties.

Among these, two major analytical perspectives stand out which were selected for deeper discussion in this thesis. First, contributions focus on exogenous causes to explain why certain competition regimes have not been as successful as their peers. Lack of 'political will' has been put forward as a major cause. Second, the doctrinal scholarship has given prime focus to discussing normative objectives and goals of competition law in these countries. Emphasis is given to examine how the special developmental and other peculiarities of developing countries may warrant different normative standards. Without denying these challenges are complex, and hence there is no one simple solution, this thesis attempted to contribute to the discussion by putting forward analytical tools that may be used to better explain these regimes, positive analysis, as well as normative contribution derived from this analysis.

The thesis engaged these arguments by emphasizing the role of comparative institutional analysis. From a positive analytical point of view comparative institutional analysis studies decision-making institutions from legal, political, and economic perspective and analyzes the institutional behavior and choice between them. It argues that all public policy decision making institutions share a fundamental communality as they all involve choice among 'imperfect alternatives'. In line with this analytical framework the thesis challenged the excessive focus given to goal choice. It argued goal choice standing on its own provides limited perspective to our understanding of the outcomes of competition law. Rather the choice of the goals must be fundamentally linked to institutional choice.

To illustrate this argument, this thesis undertook a participation-centered institutional analysis of selected competition regimes; namely South Africa and Ethiopia. The following broad analytical contributions are derived from this exercise.

- **A bottom-up perspective to competition law and policy in developing countries**

The thesis attempted to highlight how the global spread of competition law is a story of legal transplant, and being so, has much to learn from the new institutionalism movement.[1027] It argued that the development of competition law and policy grew being ignorant of the broad social and political considerations in the ground and only started to catch up lately. As a result, transplanting competition law has the tendency to be prescriptive of certain 'best practice' standards. While the new institutionalism literature has given prime focus to domesticating institutions, the discourse of competition law in developing countries gave attention to customizing the goals of competition law rather than understanding the institutions that anchor these goals.

Accordingly, the thesis highlighted how the current shape of competition law in developing countries is underpinned by forced consensus that much has to do with the historical antecedents of market reform in these countries. Competition law's institutional discussion in developing countries is largely framed by underlining the role of, or rather the need for, an independent and professional institutional environment, for an effective competition regime to thrive. i.e. technocratic argument. Such regime is expected to derive its legitimacy out of its independence from political interference and technical (substantive, and procedural) capacity. Rather this thesis argued that competition law's institutional development process in these countries should be seen as a systemic governance challenge of formalization of market regulation through competition law, and hence the lack of formalization as an essential failure.

It identifies absence of underlying 'social agreement' that legitimizes the competition law and policy framework as the main culprit. It argues that the competition law and institution development in developing countries and inquiry in that regard needs to be redrafted with an indigenous process of formalization, depoliticization and 'technocratization' and achieving these objectives with more than a simple institutional design analysis. Hence it is not simply enforcement capacity or 'lack of political will' that is absent in these regimes, rather the lack of both pull and push factors, or in the existence of those the construct of the competition regime, e.g. objectives, standards, institutions that were already set, and perhaps have been inaccessible or rigid to incentivize participation. In this sense the thesis argues that an effective competition law regime should be seen as an outcome of interaction between demanders and suppliers of public goods, i.e. competitive markets and by analogy competition law.

- **Positive analysis of competition law and policy in developing countries**

Analyzing the existing competition law and policy landscape in developing countries is a key step in the direction of finding solutions to the pertinent problems. A sizable portion of the pertinent research, whether discussed in terms of its economic underpinnings, markets and strategic need for it, the institutional and normative call for it, etc. is discussed in 'public interest' terms.[1028] The market fouls-up; government corrects. Often failure to do so has been

[1027] Heba Shahein, "Designing Competition Laws in New Jurisdictions: Three Models to Follow," *New Competition Jurisdictions; Shaping Policies and Building Institutions, Edward Elgar Publishing Limited, Gran Bretaña y Estados Unidos*, 2011.

[1028] Of course, there are several notable exceptions. This non exhaustive list includes; Mehta and Evenett, *Politics Triumphs Economics?*; Weymouth, "Competition Politics," 2009; Weymouth, "Organized Business, Affiliated

predominantly explained as the lack of political will. The phrase that has been used loosely to express everything that an economic, legal, or institutional explanation could not. From ideological and policy grounds, capacity, governance, etc., the term has been used as scapegoat and exogenous variable. The thesis argued that this is a highly unproductive way of addressing the challenges of effective competition law enforcement in developing countries. It clings conclusions to a concept that is least understood.[1029]

This thesis employed comparative institutional analysis to ascertain the underlying factors that bring about effective competition enforcement in developing countries. Key to this investigation is to understand the behavior of competition law decision making process as an endogenous part of the exercise. In doing so, the thesis highlights the significance of understanding competition law and policy as one among the various market regulation arsenals that are present in any given time. Therefore, effective competition law enforcement in these countries need to be envisioned as more than a correlation of good laws, independent agencies, and rational decision-making process. Rather it is imperative to understand competition law and policy as an instrument in competition with other institutional alternatives. Participation based comparative institutional analysis indicates that the success or failure of these institutions will depend up on their ability to garner institutional participation.

A case study of selected enforcement practices in South Africa and Ethiopia discussed illustrates the practical significance of this analytical approach. South Africa's experience in dealing with abuse of dominance issues in the pharmaceutical industry presents a useful insight in to how institutional considerations determine the efficiency of competition institutions. The South African experience is presented as a rather successful regime that has attracted significant interest even in areas that are traditionally devoted for 'regulatory' bodies. Ethiopia, on the other hand seats on the opposite side of the spectrum. Weak competition law enforcement institutions reinforced by legitimacy challenges and high costs of stakeholder participation, on the one hand and relatively reactive political bodies have led to a situation where key competition law and policy issues are directed towards political bodies.

The Ethiopian experience is illustrative of the enforcement experience of many of its peers. After establishing a formally independent enforcement agency there is still a wide gap before such agency establishes public trust. Ethiopia's steel market distortions highlight how in the absence 'technocratic legitimacy', competition authorities compete with political organs in

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Labor, and Competition Policy Reform in Developing Democracies"; Gal, "The Ecology of Antitrust."; Bakhoum, Mor et al, Competition, Africa and the World: Development and Competition in Sub-Saharan Africa: Roots up, Top Down – Context, Community, and Intermediation in a Globalized World; Josef Drexl et al (2012) *Competition Policy and Regional Integration in Developing Countries*, Edward Elgar, Zhang (2014) "Bureaucratic Politics and China's Anti-Monopoly Law", Cornell International Law Journal, Vol. 48, Issue 1; Michal S. Gal (2002) "Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies" in *International Antitrust Law and Policy*, Barry Hawk, ed., Juris. Publishing, Armando E. Rodriguez, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies*, vol. 43 (Kluwer Law International, 2010); Rodriguez and Menon, "The Causes of Competition Agency Ineffectiveness in Developing Countries Success and Limits of Competition Law and Policy in Developing Countries." Rodriguez, *The Limits of Competition Policy*. Evenett, "Competition Advocacy."

[1029] Pradeep S Mehta & Simon J. Evenet (2009)

terms of providing avenues to deal with competition issues. In the meantime, the thesis argued that as number and complexity of cases grow the need for 'technocratic' institution will become apparent. Therefore, the analysis challenges conventional approaches that attempt to 'perfect' competition enforcement institutions from the gate go. It indicates that institutional actors including the government are likely to attempt to build 'efficient' institutions as the number and complexity of cases grow.

The thesis also highlighted the role of institutional considerations in determining enforcement effectiveness of competition institutions. South Africa's experience in dealing with excessive pharmaceutical prices presents an interesting insight in to how institutional considerations determine the enforcement efficiency of competition agencies. The case illustrated the relationship between competition law and compulsory licensing, 'regulatory' regime, and how under the circumstances the relevant agents found it more effective to purse their claim under competition institutions contrary to established compulsory licensing procedures. In the face of higher costs of participation, these agents submitted their claims under the Competition Act, among others, because the independence of the competition enforcement agencies provided a better institutional environment that protected consumer interest groups from domestic and international political pressure. The case illustrated not only how competition regimes may be effective but also showed how they may be preferred 'choices' mainly from institutional points of view.

On the other hand, Ethiopia's experience in dealing with potentially anticompetitive concerns through 'sui generis' standards, such as 'hoarding' shows the transaction cost implications of dealing with competition law issues. This opened the room for government intervention in the market under the disguise of consumer protection. Most importantly the government resorted to using non-competition instruments to resolve alleged anticompetitive practices, such unfair prices, which were largely a result of inflationary pressures in the market caused by broader macroeconomic problems that country faced. As prosecuting anticompetitive agreements or abuse of dominance is difficult, the competition enforcement authorities often exploited consumer protection rules, such as hoarding, to challenge high prices. The result has been noting but more distortions in the market with proliferation of underground markets for regulated goods and stifling of future investment. In this sense, while the dearth of enforcement record may appear to be a systematic preference by the government to downplay the role competition law and policy, institutional choice considerations may as well be the determining factors.

Therefore, the thesis highlighted that to the extent that institutions serve as the best possible avenues to channel greater participation, they may be selected even though they are not in line with 'conventionally' accepted models. In the meantime, the success of all institutional alternatives hinges up on participation. Institutions can suffer from failing to garner participation of key stakeholders that provide essential information for enforcement action, either by submitting claims, evidences or taking direct enforcement action etc. Therefore, at early stages of development, it is important that competition enforcement organs take initiatives to enhance participation by implementing different techniques. Analyzed under this

rubric, comparative institutional analysis shows that even mature regimes face institutional imperfections and choices.

Therefore, the approach used is useful to explain why some competition law regimes show stronger or weaker enforcement practice and perhaps why the choice of market regulation instruments in various developing countries often oscillates between varying positions; such as the choice between 'excessive' interventions in the market place in the form of direct provision of goods and services, price control instruments, or acceptable level/type of market regulation and/or competition law. In doing so participation based comparative institutional analysis has various implications to the study of competition law and policy in developing countries. By addressing institutions and the internal dynamics within institutional change as an endogenous process, comparative institutional analysis provides a comprehensive analytical framework to understand them.

- **Normative contribution**

The thesis highlighted that the development of competition law in developing countries raised broad debates vis-à-vis its objectives and the optimal design of the various normative values. Various authors have discussed how the special economic and market characteristics of developing countries might require a different take on the design of appropriate normative standards that takes cognizance of these special characteristics.[1030] This has in large part dominated the pertinent scholarship in the field.

The thesis selected two pertinent subjects of this debate, non-efficiency objectives and excessive pricing, to illustrate the importance of comparative institutional analysis in this normative debate. Non-efficiency considerations take prominent position in the discussion of competition law and policy in developing countries. However, there is almost no consensus on whether these considerations should be taken in to account or what principles should guide this exercise.[1031] Similarly, the issue of whether competition law should directly address excessive prices has been one of the most discussed yet open issues.

The thesis highlighed that determination of normative goals and institutional choice are inextricably related. It discussed how the argument in favor of incorporating non-efficiency objectives in to competition law framework is driven by the assumption that the market, as one of the alternative means of allocation of economic resources, is not capable of meetings those objectives. On the other hand, arguments against incorporating these objectives are primarily concerned with the ability of competition institutions to effectively settle the eminent conflict between the multiple objectives pursued. Similarly, on the issue of whether competition law should directly deal with excessive pricing, while approaches differ, several

[1030] This group seeks to develop a "unique formula of competition and non-competition considerations." Dabbah, *International and Comparative Competition Law*, 2010, 321.

[1031] Dabbah, 362. "'[A] continued existence of the bundled competition law and non-competition law provisions within the competition rules of developing countries is bound to hinder the future development of competition law and policy in these countries."

standards and approaches have been put forward and applied having in to mind one key goal, minimizing both under and over enforcement concerns.

However, from comparative institutional analysis point of view this is only an incomplete analysis of the institutional attributes present within competition and other institutional alternatives. The thesis argued that often institutional limitations move across institutional alternatives. Through a case study of non-efficiency objectives and excessive pricing jurisprudence in selected developing countries the thesis attempted to illustrate the importance of recognizing the institutional choice exercise implicit in any normative analysis. In doing so it emphasized the importance of understanding institutional participation as a basis to normative analysis.[1032]

By evaluating the participation story of two popular merger cases under South African Competition Act, the chapter highlighted the importance of identifying the real interests that influence the intervention of the relevant government agencies as illustrative of the importance of understanding institutional choice broadly. In doing so the thesis argued that 'participation analysis' can serve as a useful analytical tool. One approach in integrating the participation element with the rest of 'public interest' normative analysis is to use the 'substantiality' standard. As the concern here is to understand the occasions where such substitutability will occur and/or should occur, 'substantiality' examination may be employed to deal with comprehensive institutional analysis. One way of doing so perhaps may be that the competition bodies will chose to retain interpretation (i.e. finding of substantiality) of a certain aspect of the public interest considerations/claims being dealt with in the case at hand if it was found that the competition bodies provide the best possible avenue of participation for the relevant stakeholders. This is also a determination of which body is to be best positioned to receive all the information necessary for effective determination of the matter.

In addition, the analysis highlighted that excessive pricing issues presents similar institutional choice questions; 'who decides what?' The task entails the job of identifying which of the alternative institutions between the market place, the political/regulatory organs and/or competition agencies should be selected to make a determination on those policy goals. The thesis argued that it is not sufficient that other regulatory instruments are available or as such regulatory bodies have jurisdiction for competition law to defer jurisdiction to these bodies. Rather all comparative institutional considerations need to be taken in to account. Hence, the mere fact that other remedies are available does not make them better placed. Often the transaction cost of enforcement through these avenues is prohibitively high that the choice is only theoretical. Therefore, the thesis argued that by using institutional participation as a standard litmus test, one can measure the 'participatory efficiency' and 'institutional reality'

[1032] Cole, "Taking Coase Seriously," 262.
Daniel H. Cole, Taking Coase Seriously: Neil Komesar on Law's Limits, 29 Law & Soc. Inquiry 261 (2004) 262

of each alternative.[1033]

Similarlly, as participation may define many goals, at minimum level, the normative focus on participation is useful to addressing the key challenge of building effective competition law regime in developing countries; the problem of legitimacy. In this sense legitimacy shares the basic intuitions of participation based comparative analysis.

[1033] Despoina Mantzari, "Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK," *Oxford Journal of Legal Studies*, December 9, 2015, gqv035, https://doi.org/10.1093/ojls/gqv035.

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