

BUILDING ANTITRUST AGENCY CAPACITY IN CONTEXT

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Since the early 1990s, the world has seen the establishment of comprehensive antitrust regimes in the Eastern European transitional economies,¹ Latin America,² China,³ and India.⁴ The growth of new and revitalized antitrust regimes around the world has focused attention on how to build effective and helpful competition law institutions. In many respects, this is a novel challenge because the need and impulse for antitrust had previously been associated with mature market economies.⁵ Technical assistance as currently supplied in the world predominantly takes the form of experts from senior antitrust institutions in developed countries making recommendations to new or newer antitrust regimes in emerging economies.⁶ Because of the incongruity of this fit, technical assistance may be aimed at the problems it seeks to find, rather than the most pressing problems.

This brief Essay provides some context to understand why the transfer of antitrust expertise from experienced regimes such as the United States to

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¹ See Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 245–48 (1999).

² See D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters In Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 233 (2008) (describing how in the 1990s, “[m]any [Latin American] countries included antitrust law within domestic reforms to encourage liberalization” of their economies).

³ See H. Stephen Harris, Jr. & Rodney J. Ganske, *The Monopolization and IP Abuse Provisions of China’s Anti-Monopoly Law*, 75 ANTITRUST L. J. 213, 213 (2007).

⁴ See Eleanor M. Fox, *India: The Long Road to a Full-Function Competition Law*, 21 ANTITRUST 72 (2007).

⁵ See John Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277, 283 (2004) (“[T]he perceived evils of monopoly power and restraints of competition have been viewed largely as the ills of advanced industrial states[, and] proponents of strong competition policies find it difficult to single out a case in which the effective implementation of competition legislation preceded economic development.”).

⁶ See Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. COLLOQUY 242, 243 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/46/LRColl2008n46Sokol.pdf> (hereinafter Sokol, *Improving Antitrust Agency Capacity*) (link).

emerging enforcement institutions elsewhere will likely not be a simple exercise. A technocratic model of antitrust law suits the context of the United States because of the wide consensus on the goals of antitrust policy in the U.S.⁷ But emerging antitrust regimes may not have the benefit of the same underlying consensus on methods and goals that American enforcers enjoy. As a result, technical assistance focusing on narrow questions of interpretation may elide difficult questions of first principles and institutional design in emerging antitrust regimes.

The descriptive statistics that Professor Sokol provides can help shed light on common problems with how technical assistance is provided to emerging antitrust regimes.⁸ However, as shown by the examples I will discuss, the focus on forms of technical assistance in isolation may lead to the inaccurate view that emerging antitrust regimes are part of a sterilized environment in which other issues of enforcement authority and state power in markets can be controlled. In fact, reforming or emerging antitrust regimes may confront difficult—and contested—issues involving both the methods and institutions of competition law (“rules” of the game in Sokol’s terms) and their application to achieve goals in specific cases (“play” of the game). Part I of this Essay sets forth an example of how competition law may involve different, intertwined goals, Part II provides an example of how competition law can hinge on the nature of enforcement authority, and Part III considers Professor Sokol’s findings in light of these issues.

I. COMPETITION LAW AND DIVERGENT GOALS

Divergent goals may complicate the spread of antitrust “best practices” through technical assistance. Ultimately, this will affect the “play” of the game by altering the choices that regulators make as they apply competition law to particular cases. As an example, American antitrust lawyers often confront foreign competition regimes that include provisions not only for the protection of consumer welfare—familiar in the U.S. as the touchstone of antitrust—but also for market integration. Competition regimes such as that of the European Union and the People’s Republic of China require that their antitrust enforcers consider implications for the reduction of internal barriers to free trade.⁹ Often, these barriers stem from protectionist restrictions imposed by lower levels of government.

⁷ Daniel Crane uses the term “technocratic antitrust” to refer to the prevailing pattern in the U.S. currently, under which “antitrust decision making is increasingly insulated from popular political pressures and delegated to industrial-policy specialists and problem solvers.” See Daniel A. Crane, *Technology and Antitrust*, 86 TEX. L. REV. 1159, 1159, 1163 (2008) (referring to “consensus on antitrust goals, resolution of the most divisive ideological questions, and the absence of a need to balance the interests of identified groups” as preconditions in the U.S.).

⁸ See Sokol, *Improving Antitrust Agency Capacity*, *supra* note 6, at 249–57.

⁹ Salil K. Mehra & Yanbei Meng, *Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law*, 49 VA. J. INT’L L. (forthcoming 2009).

American antitrust lawyers often characterize these aims as being somewhat distinct from that of traditional antitrust policy. However, that view embraces a very narrow American—and lawyerly—sense of what competition law should include. In the U.S., the problem of local protection at the state level has been handled through litigation under the Commerce Clause for more than 150 years.¹⁰ And it has been handled largely independently from the consumer-welfare based, private-restraint focused antitrust laws. As a result, an American antitrust lawyer perceives attempts to reduce internal market barriers as foreign to antitrust because they are foreign to *her* conception of antitrust.

For example, for a nation such as China engaged in its third decade of economic liberalization (*gaige kaifang*, or “reform and opening up”), the use of competition law to take down internal barriers may reflect the attempt to take on a difficult political and economic problem by piggybacking on the momentum for liberalization.¹¹ The need to promote economic reform with the help of local governments, along with attempts to reduce the central government’s revenue assistance to them, led to the creation of what has been referred to as the “local developmental state.” This has in turn fostered “administrative monopolies” that are essentially lower-level government restraints on trade. Such results can be difficult to disentangle given their political and economic logic for those involved; the attempt to address them with antitrust law may reflect the hope of sweeping them up within a larger drive for liberalization.

The inclusion of goals such as internal market liberalization may seem to accentuate tension between goals of static and dynamic efficiency. On the one hand, traditional antitrust policy as effected in the United States aims to reduce private restraints and immediately eliminate deadweight loss. While policies aimed at reducing internal barriers to trade also reduce deadweight loss, their larger goal is more long-term. They seek economies of scale by enlarging producers’ available market. And by doing so, such policies hope to improve growth over time. But their goal is not merely economic. These policies also aim to alter the degree to which politics distorts markets. As such, the tensions they involve are difficult to measure using a conventional antitrust lens.

II. REGULATORY FIRST PRINCIPLES

Institutional design and fit within a political and economic system will also complicate the adoption of “best practices” through technical assistance—these “rules of the game” issues can influence how and whether these practices get adopted. An antitrust enforcement agency is at base a government actor. As such, its ability to conform behavior depends crucially on how those regulated perceive its actions.

¹⁰ *Id.*

¹¹ *Id.*

An example concerning the adoption of merger review guidelines by Japan's Fair Trade Commission in the early 1990s may illustrate this point. While Japan has been a developed nation for some time, it has not had a history of vigorous antitrust enforcement. Until recently, it had failed to adopt a set of merger guidelines similar to the concentration-based (HHI)¹² standards used in and spread by the U.S. since 1982.¹³ But this failure may be easier to understand by thinking about what such formal guidelines can mean in a system where the nature of regulators' authority may be different in degree or kind. Where regulators wield wide discretion, something like the merger guidelines restrains them. And where they derive authority from the perception that they are smart and efficient, giving up discretion by making credible commitments may not necessarily enhance the perception of their authority in the short run. Thus, Japanese officials may not have been as sanguine about adopting guidelines like the U.S. merger guidelines because of the inherent tension with their own authority.

Consider the Small but Significant and Nontransitory Increase in Price (SSNIP) test in merger review.¹⁴ Since the 1982 Horizontal Merger Guidelines, SSNIP has become well established in U.S. antitrust enforcement, and the U.S. advocates its adoption for emerging antitrust regimes. From an American viewpoint, this is all pretty uncontroversial. Indeed, as a method of gauging market power, SSNIP has also become well accepted in many emerging antitrust regimes.¹⁵

That said, as with any attempt to impose a rule or test in place of discretion, SSNIP creates the possibility of false negatives and false positives.¹⁶ That is, predictability has a trade-off with an idealized "perfect regulatory result." Of course, this objection can be answered with the point that whether one adopts SSNIP or not, one is trading off between two different ways of making a decision, both of which are likely to err at

¹² The Herfindahl-Hirschman Index (HHI) provides a measure of the concentration level within an industry. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.5 [hereinafter MERGER GUIDELINES] (rev. ed. 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm> (link).

¹³ See Salil Mehra, *Same Plant, Different Soil: Japan's New Merger Guidelines*, 26 NW. J. INT'L L. & BUS. 515 (2006).

¹⁴ See MERGER GUIDELINES, *supra* note 12 § 1.11.

¹⁵ See, e.g., Robert Lipschitz, Paul Anderson & Fatima Fiandeiro, *Self-supply and Indirect Constraints Within Competition Analysis*, G:ENESIS May 22, 2008, at 1 available at http://web.wits.ac.za/NR/rdonlyres/2372FFD6-0558-4478-82A1-6B3930BDC413/0/Fiandeiro_Selfsupply_indirect_constraints_22May2008.pdf ("In most competition cases, the basic methodological approach used to define markets and determine market power is relatively uncontroversial. Markets are defined based on the SSNIP (Small but Significant Nontransitory Increase in Price) test and market power is measured using a range of factors such as market share, barriers to entry and counter-vailing buying power.") (link).

¹⁶ This is based on discussions about SSNIP that the author has had with antitrust enforcers in Japan.

times.¹⁷ Additionally, there is Judge Easterbrook's insight that the harms from permissive errors are more likely than punishment errors to resolve themselves.¹⁸

While such arguments make good sense in our system, they may not apply well to regulators whose authority relies more on persuasive force than does the DOJ or the FTC.¹⁹ If a foreign competition authority's power relies on the perception that it is an elite body that does not make mistakes, they may perceive a test like SSNIP differently. Specifically, the gain in predictability may come at the cost of binding itself in ways that undercut its aura of authority. Thus, there is a meta-analysis above competition policy that involves the source of institutional power; tradeoffs at that level may complicate certain reforms.

III. REVIEWING ANTITRUST TECHNICAL ASSISTANCE

In light of these divergences between competition law considerations in the United States and elsewhere, we might expect to find a corresponding impact on how well technical assistance works, given the possible tensions with the recipient's domestic context. Professor Sokol's statistical findings support this conclusion. Indeed, what might appear at first to be a contradiction—that recipients prefer lawyers in some cases but economists in others—may instead in fact be quite rational, given the varying range of problems covered by different nations' competition laws.

Specifically, Professor Sokol focuses on comparisons between two different kinds of assistance, long-term technical assistance and short-term intervention, and two different kinds of technical assistance providers, economists and lawyers. His survey data shows that the personnel at emerging antitrust regimes prefer long-term assistance to short-term assistance. Further, they prefer that economists (rather than lawyers) provide long-term assistance, but that lawyers (rather than economists) provide short-term intervention. At first blush, one might wonder why the enforcement officials at emerging antitrust regimes do not always prefer one group over the other.

¹⁷ Cf. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (“[R]egulation’ and ‘antitrust’ typically aim at similar goals—*i.e.*, low and economically efficient prices, innovation, and efficient production methods—but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them *directly* by controlling prices through rules and regulations; antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about.”).

¹⁸ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3, 15 (1984) (arguing that the costs of false negatives, or failure to punish harmful conduct, are less than the costs of false positives, or punishment of non-harmful conduct, because market forces are more likely to correct the former than the latter).

¹⁹ See, e.g., John Haley, *Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law*, 59 WASH. L. REV. 471, 472–75 (1984) (discussing enforcement challenges in Japan and Germany).

Seen in context, however, these findings make sense. Consider our first example, representing the idea that emerging antitrust regimes often go beyond the U.S. approach by addressing problems such as regional and local government restraints with their antitrust laws. A short-term intervention is more likely to focus on a discrete problem in developing and prosecuting a case. But long-term assistance allows for consideration of a wider range of issues, and, while lawyers focus on individual matters, economists are trained in a method. Consequently, for an emerging antitrust regime whose bailiwick includes not only merger review and cartel enforcement, but also regulation of local government barriers to trade, an economist may be better suited to provide long-term help.

By contrast, with their narrower focus on process and cases, lawyers may be more appropriate to deal with discrete issues that do not reach wider questions of institutional design and the scope of competition law. Sokol's finding that emerging antitrust regimes prefer lawyers for technical assistance in the form of short-term intervention comports with this understanding of lawyers' roles. Indeed, his data suggest that almost half of short-term interventions in his data set involve abuse of dominance issues—an area that, while not characterized by universal agreement, nonetheless is a core area of coverage in most antitrust regimes. That combination of difficulty of application and consensus on its appropriateness for antitrust treatment seems a good fit for the strengths and weaknesses we might expect of lawyers relative to economists.

IV. TWO PROPOSALS FOR CONSIDERATION

Sokol's work, including a forthcoming piece with Professors Nicholson and Stiegert that presents a model of technical assistance,²⁰ represents a useful contribution in an area sadly lacking in empirical study. After all, significant sums of money are spent on technical assistance. Consequently, it is sobering to think how little evidence there is about what works and what does not.

That said, I suggest two proposals to consider when going forward with these studies, one focused on substance and the other on process. The substantive critique focuses on as substantive a topic as there is: money. All things being equal, short-term assistance ought to cost less than long-term assistance.²¹ The question that remains then is whether the marginal benefit of long-term assistance outweighs its cost disadvantage relative to

²⁰ See Michael W. Nicholson, D. Daniel Sokol & Kyle W. Stiegert, *Technical Assistance for Law & Economics: An Empirical Analysis in Antitrust/Competition Policy* 13–15 (Univ. of Wisconsin Legal Studies Research Paper Series, Paper No. 1025, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917909 (presenting model aimed at gauging effectiveness of antitrust technical assistance) (link).

²¹ Of course, things could well not be equal—short-term assistance might be aimed at more crisis-filled, high-stakes problems than long-term intervention.

short-term assistance. We often prefer expensive things to cheap things in an absolute sense, but buy the cheap thing based on our perception of the price/performance ratio. Thus, future studies should address the cost/benefit impact of short-term intervention and long-term assistance.

The procedural critique focuses on the concept of who “seeks” or “controls” the technical assistance project, the sender or the receiver. Sokol addresses this question, which is important to his conclusion about how to maximize the usefulness of technical assistance to its recipient. But in fact, this is a really difficult problem. After all, just as people might tell you what they think you want to hear, donors and recipients may both try to anticipate each other’s wishes. Decoding which side supplied the impetus for a technical assistance project may be quite difficult after the fact. How to best structure the process by which technical assistance projects are negotiated so that the range of options for assistance is widened—and so that each competition agency’s perceptions of the other are made more accurate and transparent—is a question that deserves serious consideration. For example, it may be worth thinking about how to make it more likely that recipients will contemplate types of assistance that do not just mirror the functions of developed nations’ antitrust agencies, but also reflect the context in which their competition regimes are emerging. By improving the process, it may be possible to reduce the likelihood of sending poorly-fitted assistance.

CONCLUSION

Competition law technical assistance has become widespread both as development assistance and as a means for confidence-building among the world’s competition law agencies. Technical assistance, however, will tend to face problems of divergence that at base lie with the design and coverage of different competition law regimes. These divergences may help explain some of Professor Sokol’s findings, and studies such as his are helpful in promoting a better transition to a world full of competition law regimes. Further work could focus on refinements concerning how technical assistance projects are designed and evaluated.