

THE FUTURE OF INTERNATIONAL ANTITRUST AND IMPROVING ANTITRUST AGENCY CAPACITY[†]

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One of the key issues in international antitrust has been how to make antitrust more effective around the world. Most antitrust laws have been adopted or significantly modified since 1990.¹ A number of key jurisdictions are either fairly new to antitrust altogether or to an antitrust regime that effectively employs the latest in economic thinking and the legal tools necessary to promote competition.² Jurisdictions that have made antitrust a new and important cornerstone to economic policy include Brazil, Russia, India, and China. Because of the stakes involved in the ability of antitrust to foster economic development and to prevent misguided antitrust policy from operating as a regulatory tax, it is critical that the future of antitrust focus on improving agency capacity around the world.³ By capacity, I mean the ability of a given antitrust agency to undertake well-reasoned and effective decisionmaking in the implementation of antitrust policy. There are two concerns for countries in various stages of antitrust development: harmonization of domestic antitrust with international antitrust “best practices” and implementation of an effective antitrust regime.⁴ In an effort to solve these issues, policymakers in antitrust emphasize two dynamics to shape the development of increased capacity of younger antitrust regimes.

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¹ See Global Competition Forum Homepage, <http://www.globalcompetitionforum.org> (last visited Mar. 13, 2009).

² To provide some historic perspective on how significant a change this is, William Kovacic notes, “In 1979, nobody envisioned that competition policy would be a concern beyond a relatively small number of countries with well established market economies.” Interview by Stéphanie Yon with William Kovacic, Chairman, Fed. Trade Comm’n, *A new Chairman for the FTC*, CONCURRENCES, Mar. 2008, at 5, 6.

³ Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 SW. J.L. & TRADE AM. 211 (2007) (articulating a link between antitrust and economic development).

⁴ There is variation in how one defines antitrust “effectiveness.” See, e.g., INT’L COMPETITION NETWORK, AGENCY EFFECTIVENESS PROJECT (2008).

The first is international antitrust institutions, such as the International Competition Network, that develop antitrust norms.⁵ The other is technical assistance, either from these international antitrust institutions or directly from more developed antitrust agencies or other aid providers. By technical assistance, I mean the process through which agencies improve their capacity to undertake competition policy.

This Essay focuses on how both external—international institutions—and internal—agency capacity and technical assistance—dynamics shape the capacity of younger agencies to undertake antitrust in their jurisdictions. Both approaches play an important role in improving capacity. In the case of technical assistance, this Essay analyzes survey data from recipient agencies of antitrust technical assistance to determine the most effective means of improving antitrust agency capacity. Part I explains the type of capacity building that antitrust agencies undertake themselves. The rest of this Essay focuses upon international efforts that can assist agencies in capacity building. Part II describes the work that international antitrust institutions undertake to improve agency capacity. Part III provides an analysis of survey data that shows how technical assistance from outside providers can improve agency capacity. Part IV concludes and offers recommendations to improve developing world antitrust agency capacity building.

I. AGENCY LEVEL CAPACITY BUILDING

As young agencies face significant capacity constraints, they require assistance in how to use their scarce resources as effectively as possible to improve their ability to combat anticompetitive conduct. Though international antitrust institutions play a significant role in improving the capacity of newer antitrust agencies, capacity building ultimately is a local experience, and in-country dynamics play a critical role in shaping the contours of antitrust policy and enforcement. A number of factors impact the ability of an agency to be effective. These include the legal structure of antitrust law in its country, the human resources within the agency, and the agency's capacities within a larger country-wide regulatory system, such as the judiciary, sector regulators, and the legislature. Factors also include the level of independence of the agency from political interference, the level of investigatory authority provided under the law, and the funding to the agency.

Antitrust agencies may not have the skill set and internal capacity to take on certain types of work.⁶ There is a learning curve for young antitrust agencies. In some cases, new agencies only start their learning curve *after*

⁵ By institution, I limit myself to formal institutions devoted to antitrust, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD).

⁶ Michael W. Nicholson, D. Daniel Sokol & Kyle W. Stiegert, *Technical Assistance for Law & Economics: An Empirical Analysis in Antitrust/Competition Policy* (Univ. of Wis. Legal Studies Research Paper Series, Paper No. 1025, 2006), available at <http://ssrn.com/abstract=917909>.

they have been set up, as agency staff may not understand antitrust law and its application before then.⁷ There are two elements to the learning curve. The first is the environment of the institution (rules of the game). The second is institutional governance (play of the game).⁸ For an antitrust agency, the “rules” stage includes the conceptualization and creation of the antitrust agency and its institutional structure. It also includes drafting the antitrust law and ensuring that its provisions import the latest economic thinking with application to the specific political and economic dynamics of a country and rules of the game that allow an agency to combat anticompetitive conduct.

“Play” issues present themselves once an agency has become established and resources shift to more active antitrust enforcement. These play issues require the institutionalization of antitrust by embedding it into a country’s legal structure and creating antitrust enforcement norms for the agency.⁹ Antitrust is evolutionary.¹⁰ This suggests that agencies will confront different variations of problems over time. The evolution happens at a number of levels—shifts in government policies, economic thinking, and judicial interpretation. These issues impact the ability of agencies to fight against anticompetitive conduct given changing political-economy dynamics within a country.

The cost of the allocation of scarce resources toward enforcement vis-à-vis the payoff is likely to differ across countries and regions. Detection and litigation costs are not the same in every jurisdiction. Cases are, to a certain extent, situation specific, and the ability to take on work in merger control, cartel enforcement, competition advocacy, or unilateral conduct changes in response to technical advances, political shifts, and economic growth. Agencies may be limited in what they can do based on the limits of their antitrust law or larger legal system.¹¹ Moreover, in countries with private rights of action, an agency may not need to spend as many resources against certain types of anticompetitive conduct because private litigants may substitute for the antitrust agency.

⁷ Michael Krakowski, *Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition—An International Cross-Country Comparison 4* (HWWA Discussion Paper, Paper No. 332, 2005), available at <http://ssrn.com/abstract=854908>.

⁸ Oliver E. Williamson, *Why Law, Economics, and Organization?*, 1 ANN. REV. L. SOC. SCI. 369, 385 (2005).

⁹ William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK J. INT’L L. 403 (1997).

¹⁰ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005).

¹¹ Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271 (2007) (providing the makeup of antitrust laws across legal systems).

II. INTERNATIONAL ANTITRUST INSTITUTIONS CAPACITY BUILDING

One international governance mechanism to improve the capacity of antitrust agencies comes in the form of “soft law” institutions, which are based on nonbinding norms.¹² International antitrust soft law institutions focus on cooperation to ensure international harmonization and the creation of antitrust norms.¹³ These soft law institutions identify best practices from around the world, create norms, and push the diffusion of such norms, such as greater transparency and predictability in mergers. Over time, through increased iterations of meetings and interactions, agencies develop a level of trust and relationship capital with one another.¹⁴ The network of agency level cooperation becomes strengthened through this trust.¹⁵ Trust in turn creates opportunities for increased cooperation among agencies.¹⁶ This process creates opportunities for younger antitrust agencies to adopt best practices in a setting that allows for integration of the norms into the local political and economic realities of a given country.

Three soft law international antitrust institutions provide support to encourage harmonization based on the creation and diffusion of antitrust best practices. The Organisation for Economic Co-operation and Development (OECD)¹⁷ addresses antitrust issues primarily through its Competition Law and Policy Committee. A second international antitrust institution is the United Nations Conference on Trade and Development (UNCTAD).¹⁸ UNCTAD serves as the UN-sponsored voice for the developing world. Like the OECD, it organizes conferences, peer reviews, technical assistance missions, and reports. However, UNCTAD is more limited in its impact as some of its viewpoints differ from those of the international antitrust institutions in which more developed countries shape the antitrust agenda. The

¹² Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000) (describing a far more nuanced set of factors that go into what constitutes soft law than word limits permit for this Essay); D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHL-KENT L. REV. 231, 242 (2008) (arguing hard law antitrust implicates the WTO and other trade agreements).

¹³ D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37 (2007).

¹⁴ Partha Dasgupta, *Trust as a Commodity*, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 49 (Diego Gambetta ed., 1988); Werner Guth, Peter Ockenfels & Markus Wendel, *Cooperation Based on Trust: An Experimental Investigation*, 18 J. ECON. PSYCH. 15 (1997); Larry E. Ribstein, *Law vs. Trust*, 81 B.U. L. REV. 553, 569–70 (2001).

¹⁵ Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 EURO L.J. 33 (1997).

¹⁶ Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159 (2000).

¹⁷ See Organisation for Economic Co-Operation and Development, Competition, <http://www.oecd.org/competition> (last visited Mar. 13, 2009).

¹⁸ See United Nations Conference on Trade and Development, Competition Law and Policy, <http://www.unctad.org/competition> (last visited Mar. 13, 2009).

third international antitrust institution is the International Competition Network (ICN).¹⁹ The ICN's purpose is to identify, create, and spread antitrust norms and results-driven outputs to reduce the costs that make enforcement against anticompetitive conduct more difficult. One effect of ICN-promulgated nonbinding recommended practices has been their adoption by many antitrust agencies.²⁰

One mechanism to diffuse norms through international antitrust institutions is the process of peer review. A peer review is a diagnostic (pioneered by the OECD) that measures the strengths and weaknesses of a country's antitrust system.²¹ Peer reviews cover a number of issues. After describing the background of a country's antitrust system, the peer review engages in a critical analysis of substantive issues such as merger control, cartels, and monopolization. A second element of the review is to analyze the institutional setting of antitrust in a given country. This includes the enforcement structure, resources, and practices of the agency, the role of the judiciary, and the impact of international issues. After an analysis of substantive and institutional issues, the peer review provides conclusions and policy options. In a formal meeting along with other countries' antitrust agency representatives present, the reviewed agency responds to the peer review. Then other agencies comment upon the peer review.²² This process allows agencies to offer constructive criticism of policies to one another. Bad policies may be subject to shaming of an agency by its peers. Through this mechanism, peer reviews can help to create compliance with best practices.²³

Another mechanism that increases antitrust agency capacity is the use of reports that survey members about their practices. Reports allow agencies to take stock of their practices relative to other agencies. Agencies learn from the experiences and approaches of other agencies in the summary of jurisdictional practices or a series of case studies. Some recent examples of such reports discuss how agencies address issues of predatory pricing²⁴ or how agencies confront dominant firms.²⁵

¹⁹ See International Competition Network Home Page, <http://www.internationalcompetitionnetwork.org> (last visited Mar. 13, 2009).

²⁰ J. William Rowley & A. Neil Campbell, *Implementation of the ICN's Recommended Merger Practices: A Work-in-(Early)-Progress*, ANTITRUST SOURCE, July 2005, at 1–2. The size of the ICN, with roughly one hundred member antitrust agencies and additional participation from nongovernmental participants seems small enough that reputation-based enforcement mechanisms work.

²¹ FABRIZIO PAGANI, ORG. FOR ECON. CO-OPERATION & DEV., PEER REVIEW: A TOOL FOR CO-OPERATION AND CHANGE: AN ANALYSIS OF AN OECD WORKING METHOD 4 (2002) (peer review is the assessment of a state by other states designed to improve policymaking).

²² *Id.* (peer review is characterized by dialogue and interactivity, and contains a consultation phase).

²³ The OECD recommended a change to Brazilian merger control in 2005 based on international practices. A current bill before Brazil's Congress seeks to implement such changes.

²⁴ See generally INT'L COMPETITION NETWORK, REPORT ON PREDATORY PRICING (2007).

²⁵ ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION ON THE MERITS (2005) (describing the different theories to prevent abuse of dominance).

Aiding in the creation of improved capacity, the ICN tailors a number of its work products to younger antitrust agencies. These include the creation of enforcement manuals, reports on how jurisdictions address various types of conduct, workshops to improve investigation techniques and analytical approaches, and meetings of enforcers and nongovernmental advisors to discuss report findings and agency priorities.²⁶ These outputs provide an opportunity to share ideas and enforcement experiences. For young agencies, the ICN also organizes regular meetings in which agency members from around the world meet via conference call on a regular basis to discuss how best to utilize analytical tools for cases and policy work. The ICN also spends considerable time and resources on conceptualizing agency priorities, which the OECD and UNCTAD do as well.

How effective are these international institutions? It is difficult to determine measures of success generally based on whether this was the best way to spend time and resources. Anecdotally, such international efforts seem to be improving the capacity of younger agencies.²⁷ Soft law is most effective at reducing costs when the costs stem from information and coordination costs.²⁸ For example, antitrust soft law institutions have become increasingly effective in reducing the costs associated with merger review and cartel enforcement.²⁹ The reason for this is simple: international merger control and international cartel enforcement require coordination, such as how much time to approve a merger or to ensure that the law provides adequate investigative powers against cartels. There is no serious disagreement as to the pernicious effects of cartels or the fact that multiple and overlapping merger control systems create increased compliance costs around the world. Nor is there disagreement that the merger regimes of younger agencies should not create unduly burdensome restrictions when there are not competitive concerns or merger regimes that lack transparency and expediency.

In substantive areas of law, antitrust soft law institutions may have difficulty implementing best practices where there is disagreement over analytical approaches, particularly between the United States and the EU. For example, compare the U.S. and EU responses to Microsoft litigations on single-firm conduct.³⁰ These tensions over differing analytical frameworks

²⁶ Sokol, *supra* note 13, at 109–15 (describing the ICN’s attempts to promote cooperation and harmonization among antitrust jurisdictions via benchmarking and working group issue study).

²⁷ *Cf.* INT’L COMPETITION NETWORK, *supra* note 4 (evaluating the efficacy of twenty national and international regulatory and advisory bodies).

²⁸ Causation may go the other way. Where agencies cannot reach agreement on binding rules, we are more likely to see soft law as a result.

²⁹ Sokol, *supra* note 13, at 112–15.

³⁰ *See, e.g.*, WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE 2* (2007) (providing a detailed analysis of the U.S. response); Daniel Spulber, *Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission*, 25 *YALE J. ON REG.* 247 (2008) (describing the European approach in *Microsoft v. Commission*).

have significant potential repercussions. Without the active support of the major powers in antitrust—the EU and United States—the efforts of the international antitrust institutions will be severely limited in their ability to create and promote increased capacity building around the world. Should the EU and United States not put their resources and efforts into soft law institutions, the lack of their participation would compromise the effectiveness of any antitrust soft law institution.

III. TECHNICAL ASSISTANCE CAPACITY BUILDING

Apart from agency level building and international institutions, another form of capacity building is more formalized and occurs through technical assistance to newer antitrust agencies. Unlike general norm diffusion, technical assistance directly targets specific antitrust agencies and the overall competition system of a given jurisdiction. Technical assistance is the process through which donors provide assistance to recipients for direct diffusion of knowledge and skills. In the antitrust context, technical assistance allows for agencies to build their skills in identifying potential anticompetitive conduct; combating it through cases, filings, and legislative means; and reaching out to government and nongovernment stakeholders in the larger antitrust system. Technical assistance also entails providing advice on how to prioritize agency goals, how to manage an effective antitrust agency, and how to make competition policy relevant outside of the agency.

For the most part, the antitrust policy and academic communities remain in the dark about what makes for effective antitrust technical assistance. The Antitrust Modernization Commission's 2007 Report recommended that Congress directly fund antitrust technical assistance through the Department of Justice (DOJ) and the Federal Trade Commission (FTC), rather than indirectly through USAID.³¹ This recommendation was made without any guidance from empirical work on the effectiveness of DOJ/FTC technical assistance or the effectiveness more generally of antitrust technical assistance. In 2008, panelists at a joint DOJ/FTC workshop on antitrust technical assistance focused as much on identifying ineffective strategies as identifying effective ones.³² Similarly, capacity building has been the topic of meetings at international antitrust institutions.³³

³¹ ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 219 (2007) ("The commission believes that providing funding . . . directly to the antitrust agencies will help to ensure that the objectives and priorities of antitrust technical assistance are properly weighed.").

³² U.S. Dep't of Justice, 2008 International Technical Assistance Workshop: Charting the Future Course of International Technical Assistance at the U.S. Department of Justice and the Federal Trade Commission (Feb. 6, 2008), available at <http://www.usdoj.gov/atr/public/workshops/techassist2008/236894.pdf>.

³³ See, e.g., INT'L COMPETITION NETWORK, ASSESSING TECHNICAL ASSISTANCE: PRELIMINARY RESULTS 1 (2005) ("Capacity building is the major challenge facing developing competition authorities today."); ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION ASSESSMENT TOOLKIT (2007) (describing ways to increase competition).

Previous empirical work on antitrust technical assistance has identified that short term interventions (STIs) and long term advisors (LTAs) play a role in more effective technical assistance.³⁴ LTAs are long term in the sense that they spend an extended amount of time (such as a year) working in the recipient county's antitrust agency—for example, an FTC economist who spends a year residing in Mexico's antitrust agency. In contrast, an STI is an intervention that addresses a discrete issue or task, such as how to bring a successful merger challenge in the banking sector or how to gather evidence against cartels, which a DOJ antitrust attorney might do in a one-week session for Indonesia's antitrust agency.

In a survey undertaken in 2004 for technical assistance from 1996 to 2003, the ICN gave member agencies who had received technical assistance a 1,000-plus-question questionnaire about their experiences.³⁵ Below, I provide a descriptive analysis of the survey data, which is distinct from the formal modeling that Professor Stiegert and I undertook in another paper.³⁶ There are a number of theoretical observations and new evidence from the ICN data that provide further guidance on the most effective way to utilize LTAs and STIs.

Any critique of antitrust technical assistance must address the fundamental issue that scholars and policy makers often ignore: do technical assistance interventions choose the appropriate expert for the technical assistance?³⁷ It may be that experts lack sufficient competence to provide technical assistance. The wrong people may be chosen for the STI and LTA missions. A shortcoming of advisors with limited specific antitrust knowledge (or relatively weak knowledge of antitrust based on only a few years of practice in this area) is that such advisors may not themselves have the appropriate level of knowledge to provide assistance to young antitrust agencies.

The quality mismatch may be a function of supply-side issues. Some technical assistance may be in countries or regions that high-quality advisors are not willing to travel to or reside in for any number of reasons. If the donor chooses an advisor who is not a member of a current antitrust agency, this may open up technical assistance to full-time consultants. Some may have limited experience specific to antitrust, even though they

³⁴ Nicholson, Sokol & Stiegert, *supra* note 6.

³⁵ The survey instruments can be reviewed at Int'l Competition Network, Document Library for the Competition Policy Implementation Working Group, <http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group/16> (last visited Mar. 13, 2009). Among forty-nine agencies surveyed, seventeen agencies had an LTA while twenty-nine agencies had an STI.

³⁶ See D. Daniel Sokol & Kyle W. Stiegert, *An Empirical Evaluation of Long Term Advisors and Short Term Interventions in Technical Assistance and Capacity Building* (Univ. of Mo. Sch. Of Law Legal Studies Research Paper Series, Paper No. 2008-03, 2008), available at <http://ssrn.com/abstract=1095884>.

³⁷ Nicholson, Sokol & Stiegert, *supra* note 6 (finding that technical assistance is more effective when both donor and recipient are actively involved in its planning).

may be experienced in regulated industries more generally or in public administration. These consultants may tend to be relatively weak in their understanding of antitrust and may yield poor results in the quality of their technical assistance intervention.

A. Who Provides Technical Assistance?

I examined the make-up of technical assistance advisors to get a sense of whether or not they are the most effective for the type of work at hand. Figures 1 and 2 identify the educational backgrounds of LTA and STI advisors respectively. LTAs and STIs have similar educational backgrounds. The highest percentage of LTAs and STIs have law backgrounds (53.85 percent and 44.44 percent for LTAs and STIs respectively) followed by economics (23.08 percent and 33.33 percent for LTAs and STIs respectively). Next are advisors with joint law and economics degrees (15.38 percent and 9.26 percent for LTAs and STIs respectively). The educational backgrounds of the remainder of advisors were unknown.

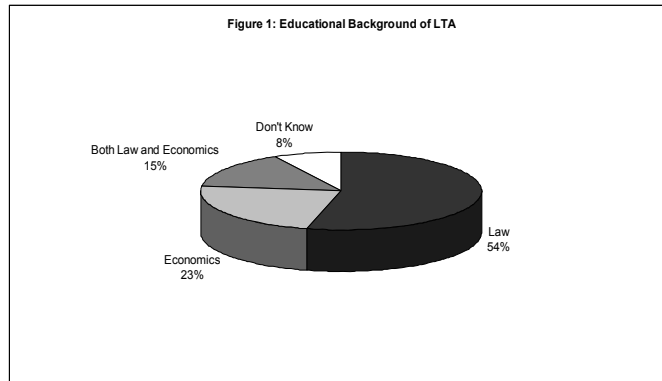


Figure 1: Educational Background of LTA Advisors

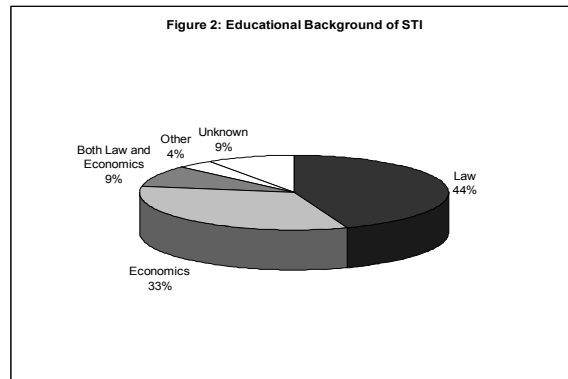


Figure 2: Educational Background of STI Advisors

From these findings, what remains unclear is what percentage of lawyers and economists had a background in competition law or competition economics. I get the answer to this indirectly by examining the origins of the LTA and STI advisors. Of LTAs, 71 percent came to the recipient agency from competition agencies. Of the remainder, 14 percent came from law school faculties, 7 percent came from economics departments or business school faculties, and 7 percent came from private firms. The breakdown looked a bit different in terms of STIs, which may account for why STIs seem to be less effective. A smaller percentage of STI advisors came from competition agencies (62 percent). The next highest number of STIs originated in law school faculties (14 percent), followed by economics departments or business school faculties (9 percent), multination lender or multinational organizations (6 percent), private firms (6 percent), and not available (3 percent).³⁸

B. Evaluation of Technical Assistance

In general, agencies were more satisfied with LTAs than STIs. However, when the advisor had a law background, agencies were more satisfied with STIs than LTAs. Conversely, when the advisor had an economic background, agencies were more satisfied with LTAs than STIs. Recipient agencies were more satisfied with LTA than STI providers who had a background in economics. Why might this be the case? Many discrete legal issues where attorneys are selected for which advice can be given are hands on and lend themselves to short interventions, such as how to bring a case, how to gather evidence, or how to depose a witness. Economics might be more difficult to absorb in a short period of time. A one-week course on the use of econometric techniques may not be easy to absorb for an agency in which perhaps only one economist has an advanced degree in economics and all other agency economists have no training beyond a bachelor's degree.

I evaluated the accomplishments of technical assistance via responses to questions concerning how satisfied agencies were with their technical assistance experience. To simplify, I concentrated my analysis on three overall evaluations on both the LTA and STI survey: (a) the overall quality of the LTA/STI component, (b) the overall quality of the advisors themselves, and (c) the overall impact of the LTA/STI component on the effectiveness of the agency at fulfilling its mission or objectives. Agencies answered the questions by using a scale of 1 (very dissatisfied) to 7 (very satisfied). I calculated the averages of each response and classified all evaluations by the educational background of the LTA/STI advisor.

³⁸ The smaller numbers for this and other charts are not statistically significant.

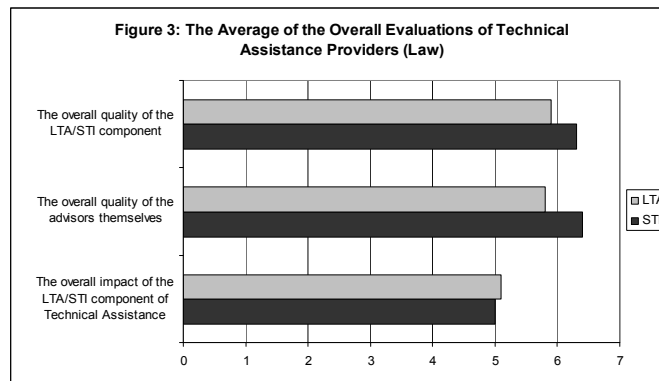


Figure 3: The Average of the Overall Evaluations of Technical Assistance Providers (Law)

Figure 3 shows that for LTA and STI providers whose educational background is law, agencies are more satisfied with STI than LTA interventions in the overall quality of the component and advisors. In contrast, the overall impact concerning the effectiveness of the agency at fulfilling its mission or objectives shows a higher LTA evaluation than STI.

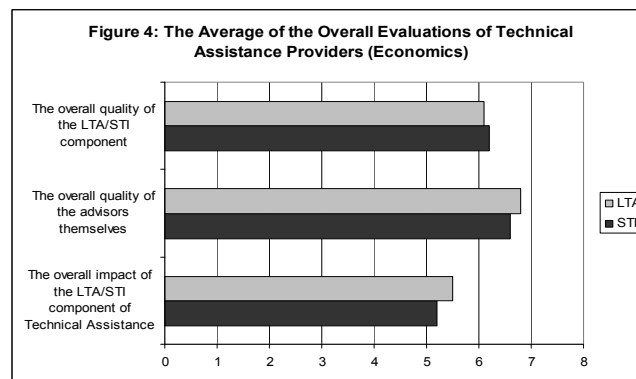


Figure 4: The Average of the Overall Evaluations of Technical Assistance Providers (Economics)

Figure 4 illustrates that recipient agencies are more satisfied with LTA than STI providers who have a background in economics. Scores overall were higher for economists than for lawyers, but much of this difference

was based upon stronger scores among economist LTAs relative to lawyer LTAs.³⁹

C. *What Kind of Technical Assistance?*

Figure 5 shows the types of anticompetitive practices that technical assistance sought to overcome: cartel agreements, non-cartel horizontal agreements, vertical agreements, and abuse of dominance/monopolization. Excluding unavailable responses, abuse of dominance has the highest percentage of technical assistance intervention at 31 percent. The next highest was vertical agreements at 25 percent, with cartel agreements and non-cartel horizontal agreements at 22 percent each.

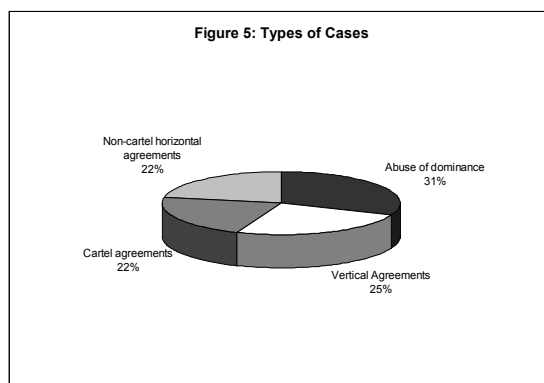


Figure 5: Types of Cases

Though not shown graphically, types of cases can be broken down into both LTA and STI components. In the case of LTA interventions, the breakdown for types of cases was abuse of dominance at 40 percent followed by the remaining three types of cases evenly split at 20 percent each. In the case of STI interventions, abuse of dominance made up 44 percent of the cases, vertical and non-cartel vertical agreements each made up 22 percent of the cases, and cartel agreements made up the remaining 11 percent of cases undertaken. These breakdowns suggest that technical assistance reaches broadly in many different substantive areas of antitrust and that regardless of what agency enforcement priorities should be, young agencies confront many types of conduct challenges immediately.

³⁹ Some of these scores might be influenced by factors outside the actual quality of the technical assistance. Unfortunately, there was no way for us to measure this because there is no central database of technical assistance missions but this outside bias could affect all of the results.

D. Is Some Technical Assistance Better than Others?

My hypothesis is that LTAs would be viewed as more effective than STIs. As a theoretical matter, where there is a staff that does not have high levels of knowledge and experience in certain tasks, an LTA can overcome the knowledge gap and jump start the types of work that an agency might otherwise not be able to undertake.⁴⁰ Because an LTA is embedded within an agency, an LTA may respond rapidly to local changes because it has more flexibility.⁴¹ An STI, in contrast, may require months of planning so that by the time it arrives, there is another issue that has developed that is of a higher priority that needs immediate attention, which the STI cannot provide.

Because an LTA has the ability to contextualize an agency's needs and priorities rather than being confined to a discrete task, the LTA may call in the right STIs for specific needs of an agency. For example, a recent FTC LTA called in a short term advisor to provide training on the economics of price squeezes in regulated industries. A second advantage of LTAs is that they have the flexibility to wrap themselves around problems as they arise. In contrast, short-term missions may not provide an adequate amount of time to make significant progress on an issue. Moreover, should an issue take an unexpected twist, an LTA need not constantly seek approval to focus on different tasks and when to request additional assistance in the form of STIs. Finally, because of longer tenure at an antitrust agency, an LTA advisor will gain a greater opportunity to develop trust and credibility with the agency than an STI advisor would.⁴²

On the other hand, STIs might be more successful for several reasons. Some interventions need not be long term. There may be discrete tasks that can be undertaken in just a few days for which a short term intervention is more appropriate. STIs may be effective in situations in which the donor and recipient are in agreement as to the appropriate assessment of the agency—its strengths and weaknesses. An STI can serve a diagnostic purpose to gauge the skills and temperament of the agency staff and leadership.

⁴⁰ William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A Preliminary Assessment*, in 1999 ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 513, 537 (Barry Hawk ed., 2000) (“The best assistance programs are anchored by the presence of long-term advisors who reside in-country and work directly with the host country’s policy officials.”).

⁴¹ Of course, the degree to which an LTA is embedded varies greatly based on the receptiveness of the recipient agency.

⁴² There are some caveats. LTAs may focus on donor goals rather than recipient agency goals, if the two are not the same. This could create a disconnect between the LTA and the recipient agency. For example, goals may diverge when the recipient of antitrust technical assistance begins to investigate a firm from the donor’s country. Does the technical assistance relationship lead to effective monitoring by the donor of the LTA or STI? What incentives does accountability (or lack thereof) create? In an effort to reduce the agency problem, donors may focus on efforts with more project-related tangible gains (for example, more cases rather than fewer but better cases). I did not have an effective way of measuring these concerns.

Alternatively, an STI may highlight the need and create legitimacy for a better push for an LTA. STIs tend to be effective when there is a well-defined problem that requires specialized skills. For example, a competition agency analyzing its first merger in the banking industry might benefit from an STI that includes a merger specialist in the banking sector. The most effective STIs will be those that build technical skills and capacity in an agency on discrete issues, and thus have less need to understand the general political and economic context surrounding the agency. STIs that might be particularly effective may be those that address issues of investigative techniques rather than ones of strategic issues, such as which priorities to pursue.

The relative weakness may be that STIs may provide general policy prescriptions that are not localized to deal with the specifics of the agency and its political economy.⁴³ This includes assumptions about the scope of antitrust legislation, the role of the judiciary, and the context for obtaining nonagency approval to undertake enforcement. In countries where there is significant corruption within the government, the need to request approval from other parts of government to undertake enforcement serves as a way of rent-seeking for corrupt officials, so classroom truths would be of limited use.

An additional problem for STIs that may lead to lower scores is the potential lack of an opportunity to provide follow-up assistance. This may have led to general confusion on the part of the recipient agency as to whether and how to implement the advice of the STI. Similarly, slow reaction time may be an issue. By the time donors launch an STI intervention—weeks or months later—the issue may no longer be relevant.

Based on these assumptions, one hypothesis is that LTAs could allow the recipient agencies to take on more kinds of work than STIs due to greater integration with the recipient and a better understanding of its needs. On the general effectiveness of LTAs and STIs, I examined the answers to following question: Has the agency undertaken enforcement cases after the beginning of this project that it could not have undertaken without the technical assistance received during the project?

In the case of LTAs, Figure 6 illustrates that 47 percent of respondents answered “yes,” that the presence of the LTA had assisted recipient agencies to undertake work that they could not have undertaken previously. An additional 47 percent answered “no,” while 6 percent did not respond to the question.

⁴³ Jonathan Zeitlin, *Introduction* to GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS (Jonathan Zeitlin & David Trubek eds., 2003).

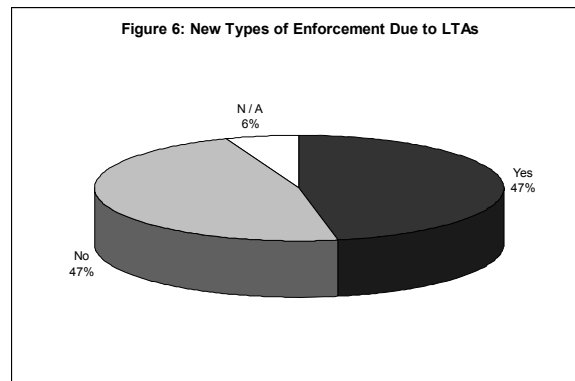


Figure 6: New Types of Enforcement Due to LTAs

In the case of STIs, Figure 7 illustrates that only 14 percent of technical assistance recipients found that the STI allowed them to take on new cases that they could not have undertaken previously. In contrast, 83 percent answered that STI intervention was ineffective in that it did not allow agencies to take on new kinds of cases. These findings support the hypothesis that LTAs may be more effective in creating increased new capacity for young antitrust agencies.

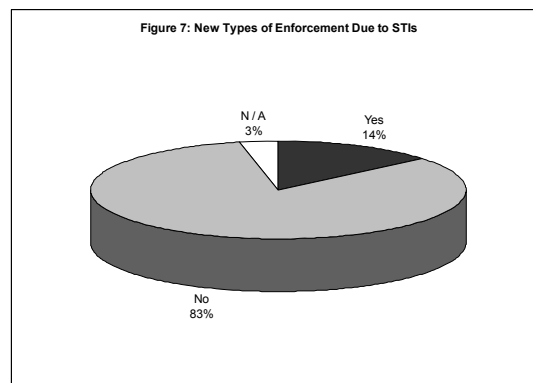


Figure 7: New Types of Enforcement Due to STIs

STIs may not be as effective because an agency may not express its needs for STIs very well. Consequently, the wrong experts may be sent over or an intervention may spend too much or too little time on certain issues. For example, an agency may identify what it believes to be an exclusive dealing issue, whereas after the first day of a three-day mission, an advisor may discover that the underlying problem for the agency is actually a predatory pricing issue. This leads to an ineffective use of presentation

time, whereas LTAs have more time to perform a diagnostic to determine the actual needs of an agency.

IV. CONCLUSION AND RECOMMENDATIONS FOR FUTURE TECHNICAL ASSISTANCE

With respect to international institutions and soft law norms spreading, this Essay demonstrates that international antitrust institutions play an important role in improving agency capacity. With respect to technical assistance, descriptive analysis of the survey was in line with my hypothesis that LTAs would be more effective than STIs in undertaking new work. The reasons for this are that LTAs had longer to understand the true economic situation in the country, the larger political context, and a sense of the strengths and weaknesses of the agency and supporting institutions of the country's antitrust system. Another finding is that economists and lawyers seemed to be more effective in some settings than others. Not only does this analysis have relevance for future international antitrust efforts, my analysis may prove relevant to policies of how to make assistance more effective across other regulatory fields. It shows the need for understanding the political and economic contexts of agencies and their countries, as well as creating efforts that have the flexibility to respond to problems as they arise and the need to choose experts appropriate for the problem, in creating effective aid. Because these results are based on a small number of responses, we should be cautious in drawing conclusions from them. Nevertheless, this initial analysis leads to a number of recommendations:

- More LTAs. More resources should be put into LTAs provided by developed-world antitrust agency staff.
- Increased coordination between donors and recipients of technical assistance. Technical assistance will be more effective when the requirements for such assistance are better understood by both donor and recipient.
- Increased norm creation on coordination issues. Improved coordination across agencies has proven to be incredibly effective as a way to transmit antitrust norms and improve capacity. Working on the nuts and bolts of everyday coordination and cooperation across different antitrust issues can improve the effectiveness of younger agencies.