

When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce

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I. INTRODUCTION

The adoption of antitrust law is a necessary but insufficient condition for it to affect social welfare. Laws remaining on the books will not change the conduct of market participants unless other indirect inducements for abiding by laws exist, such as moral incentives or legal sanctions. Such laws will not enable jurisdictions to reap the benefits of lowering private barriers to trade, which include reducing the ability of market participants to reap supracompetitive benefits based on anti-competitive acts and increasing the ability of others to participate in the market game.

What, then, determines whether and how antitrust law will be enforced? As elaborated elsewhere, antitrust is like a flower: in order to bloom it needs soil (a supportive socio-economic ideology), pesticides (tools to limit political economy influences), and water and sun (efficient institutions).¹ Indeed, antitrust is not a stand-alone regulatory tool; rather, it is part-and-parcel of a wider set of public policies in pursuit of social welfare. As such, it is shaped and transformed by existing socio-economic ideology and other policy tools that are implemented. The experience of many jurisdictions clearly indicates that it is only when the paradigms of public policy endorse market functioning, rather than government action, as the cornerstone of economic development, that antitrust begins to blossom.² Antitrust is

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1. Michal S. Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES 20, 21 (Phillip Brunsick et al. eds., 2004) [hereinafter Gal, *Ecology*].

2. See, e.g., Ignacio De León, *A Market Process Analysis of Latin American Competition Policy*, UNCTAD Regional Meeting on Competition Law and Policy, San Jose, Costa Rica 1, 14 (August 2000) (stating that markets are flexible, evolving institutions that develop incentives

also susceptible to regulatory capture which is strengthened by its non-sector-specific and long-term nature,³ rendering it necessary to adopt tools to overcome such obstacles. Of no less importance is the institutional framework, which determines the quality of the legal enforcement institutions.⁴ The institutional setting should provide the enforcement bodies with efficient and effective tools for enforcing the law and for educating market players in its provisions and benefits. These three conditions are, of course, intertwined. To illustrate, the strength and locus of political economy obstacles should shape institutional settings to reduce the ability and incentives of the enforcement bodies to make decisions that favor specific interest groups.

This paper focuses on the third condition: the institutional framework. In particular, it seeks to explore whether the institutional setting that is optimal for one jurisdiction would necessarily be efficient for another; or, in other words, whether jurisdictions can simply “cut and paste” the institutions of other efficient antitrust regimes into their own laws. Much of the literature has focused on the obstacles to legal transplant of substantive rules.⁵ But are such problems also

encouraging firms to engage in exchanges).

3. See, e.g., Michal S. Gal, *Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies*, in INTERNATIONAL ANTITRUST LAW AND POLICY 605, 606 (Barry Hawk ed., 2002) (describing the traits of antitrust to include non-sector specific principles and a long-term horizon).

4. For the importance of institutional frameworks, see, e.g., ASIA-PACIFIC ECONOMIC COOPERATION, STUDY ON COMPETITION LAWS FOR DEVELOPING ECONOMIES (1999) [hereinafter APEC]; CONSUMERS UNITY & TRUST SOCIETY, FRIENDS OF COMPETITION: HOW TO BUILD AN EFFECTIVE COMPETITION REGIME IN DEVELOPING AND TRANSITION COUNTRIES (2003); CONSUMERS UNITY & TRUST SOCIETY, PULLING UP OUR SOCKS: A STUDY OF COMPETITION REGIMES OF SEVEN DEVELOPING COUNTRIES OF AFRICA AND ASIA UNDER THE 7-UP PROJECT (2003) [hereinafter CUTS, PULLING UP OUR SOCKS]; WILLIAM E. KOVACIC & DECOURCEY EVERSLEY, INTERNATIONAL COMPETITION NETWORK, AN ASSESSMENT OF INSTITUTIONAL MACHINERY: METHODS USED IN COMPETITION AGENCIES AND WHAT WORKED FOR THEM (2007); WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS (2002); William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995); William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001).

5. The effect of cultural traits on the ability to transplant a law has generated a heated debate. See, e.g., C. MONTESQUIEU, THE SPIRIT OF LAWS (David Wallace Carrithers ed., The University of California Press 1977) (1748) (discussing environmental factors as a barrier to the transportation of laws); FREDERICK CHARLES SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (Abraham Hayward trans., The Lawbook Exchange, Ltd. 2002) (1831) (discussing how law has developed throughout history); Daniel Berkowitz, Katherina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (analyzing whether legal transplants work); Spencer Weber Waller, *Neo Realism and the*

encountered with regard to institutions?

Undoubtedly, jurisdictions have much to learn from the institutional experience of others. Indeed, different institutional settings serve as a laboratory for other jurisdictions. For example, the EU experience with the system of notification and ex ante approval of restrictive agreements by the Commission, which was prevalent until less than a decade ago, revealed the high costs involved in such regulation.⁶ Conversely, the two-tiered merger notification system, under which only merging parties that pass the first tier should provide extensive information on the merger, has proven to be quite efficient.⁷ Following the institutional solutions of another jurisdiction carries significant advantages. These include, *inter alia*, the ability to learn from experience and saving the costs of creating one's own design.⁸

Still, can all the institutional success stories of other jurisdictions be transplanted elsewhere? This paper argues that the answer is a definite no. Even if a certain institutional design is optimal for one jurisdiction, this does not guarantee that it will be beneficial for another. Most importantly, institutional transplants can be unsuccessful if they are not designed to deal effectively with the special characteristics of the jurisdiction. Such characteristics include cultural traits and economic or sociological conditions and objectives that affect the law.⁹

We make this point by focusing on one important institutional feature of antitrust enforcement bodies: their institutional endowment. In particular, this paper seeks to explore the effects of scarce enforcement resources (both financial and human) on optimal institutional design. Accordingly, the following question is raised: if a country has a small institutional endowment, should it transplant the institutional structure of another jurisdiction and simply shrink it to fit its budget—like the shrinking of the house in Alice in Wonderland—or should it apply a

International Harmonization of Laws: Lessons From Antitrust, 42 KAN. L. REV. 557, 568 (1993) (analyzing the transferability of law from one nation and culture to another); Alan Watson, *Legal Transplants and Law Reform*, 92 THE LAW QUARTERLY REVIEW 79, 80–81 (1976) (arguing that a nation could successfully borrow another's laws even when nothing was known about the political, social, or economic context of the foreign law).

6. See, e.g., Damien Geradin, *Competition Between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law*, 9 COLUM. J. EUR. L. 1 (2002) (providing an economic analysis of the European Commission's proposals to modernize the implementation of competition law).

7. Such a system is prevalent, for example, in Austria, the EU, and the UK.

8. See, e.g., Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 STUD. IN COMP. INT'L DEV. 3, 7–8 (2000).

9. See, e.g., MONTESQUIEU, *supra* note 5; SAVIGNY, *supra* note 5; Berkowitz et al., *supra* note 5; Waller, *supra* note 5; Watson, *supra* note 5.

different institutional structure?

Resource scarcity is common in three types of jurisdictions: small, developing, and transition economies. Indeed, such scarcity is one of their most important—if not the most important—defining institutional features. The prevalence of this characteristic makes it an interesting and important subject to study. Naturally, other factors such as political economy considerations affect institutional design as well. Yet, placing the spotlight on resource scarcity serves to clarify one set of institutional issues and solutions, which are central for the functioning of antitrust regimes in many jurisdictions. It also highlights some limits to transplanting solutions from jurisdictions with different resource endowments.

Accordingly, the first part of the paper analyzes the effects of a limited institutional endowment on antitrust law enforcement. In particular, it is argued that such scarcity significantly affects the ability to apply antitrust effectively. The second part analyzes the tools that have been employed or that can be employed to limit such negative effects. Such tools include long-term solutions, such as enlarging the pool of professional human resources, and short-term ones, such as prioritizing enforcement tasks. They include macro-solutions, such as joining forces with other jurisdictions to form regional antitrust agreements, and micro ones, such as motivating professional staff to remain within the agency. Some of these solutions are easy to apply and do not require significant investments and others are quite costly, and thus are only justified where other tools are not workable.

One of the more interesting possible solutions relates to the interplay between substantive rules and institutional structures. Indeed, it is often this interplay that leads to inefficient antitrust decisions. Most importantly, a combination of poorly equipped institutions with limited economic expertise and antitrust laws that require complex analysis of market conditions and their effect on welfare are apt to create erroneous decisions. Viewed from this perspective, designing an antitrust regime involves the creation of a delicate balance between institutional conditions and substantive rules. Accordingly, this interplay will be explored in depth. Given the novelty of the discussion in the context of extreme resource limitations, it will be conducted in a separate part. The analysis strengthens the claim that the institutional framework must fit the special characteristics of the jurisdiction in which it is applied.

II. THE EFFECTS OF RESOURCE SCARCITY

Scarcity of financial and human resources constitutes an important

obstacle to establishing an effective system of antitrust enforcement. This part will address this challenge.

A. *Empirical Evidence*

Imagine a world in which antitrust institutions enjoy unlimited enforcement resources—both human and financial. In such a world, enforcement would be optimal, within the boundaries set by substantive rules and political influences. Needless to say, no jurisdiction enjoys such conditions. Even jurisdictions that enjoy quite significant enforcement resources in absolute terms face an optimization problem. Resource limitations are, however, a matter of degree. While no jurisdiction can employ unlimited resources to all possible antitrust issues, some jurisdictions must operate with extremely limited institutional endowments, and these jurisdictions are our focus.

Three types of jurisdictions generally face significant resource constraints: small, developing, and transition economies. Nonetheless, the constraints they face differ in some respects. Small jurisdictions (which are not developing or in transition) generally suffer from limited financial resources but often have no significant human scarcity constraints, other than those resulting from a small financial endowment (quantity but not quality). Financial constraints result from the fact that, even if per capita investment in antitrust enforcement is relatively large, the small size of the population necessarily implies that the absolute size of the resource endowment is small. This financial constraint is further affected by the fact that the cost of conducting an antitrust investigation is often not affected by size, and that the highly concentrated nature of many of their industries raises a relatively large number of antitrust issues.¹⁰ Transition economies generally suffer from a human resource constraint: professional economists and legal scholars with skills necessary to apply antitrust effectively are oftentimes scarce.¹¹ This results from the fact that the educational background of the available cadre of professionals relates to a planned economy, not a market economy. Finally, developing jurisdictions generally suffer from both types of resource constraints—limited financial and human endowments which result from their low level of development.

10. See MICHAL S. GAL, *COMPETITION POLICY IN SMALL MARKET ECONOMIES* (The President and Fellows of Harvard College 2003) [hereinafter GAL, *SMALL ECONOMIES*] (exploring the implications of a small economy on the creation and implementation of competition laws).

11. William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 *BROOK. J. INT'L L.* 403, 419 (1997) [hereinafter Kovacic, *Getting Started*].

Indeed, empirical studies indicate that small and developing jurisdictions often suffer from significant financial resource constraints.¹² Human resource constraints are also often cited as a major obstacle to enforcement. A survey of twenty-seven antitrust agencies, conducted by the International Competition Network (ICN), indicated that many small, developing, and transition economies suffer from such constraints.¹³ For example, the Estonian agency had no people with knowledge and experience in antitrust at the time of its inception. Likewise, a major challenge for the Barbados Commission is the sufficiency of technical staffing to manage broad and varied technical agendas.¹⁴

These financial and human constraints are often intertwined. For example, in small economies, a small financial endowment might result in a small staff. One such situation is found in Barbados where financial constraints have led to the employment of commissioners on a part-time basis, which does not allow them to quickly develop the specialist knowledge required for the enforcement of antitrust.¹⁵ In addition, civil service salary structures often restrict agencies from recruiting and maintaining highly-skilled staff members.¹⁶ Jamaica, for example, faces serious problems in recruiting high level staff due to very low salaries in the civil service. The Kenyan Competition Commissioner stated that only by substantially increasing the Commission's budgetary allocations will it be possible to have the Commission "manned by high caliber and independent competition economists and lawyers so as to safeguard the quality of investigations, enforcement and compliance standards."¹⁷ Another common problem is the loss of professional staff to the private sector after those individuals have gained some experience within the agency, due to offers of high

12. See, e.g., APEC, *supra* note 4, § 2.9.4; CUTS, PULLING UP OUR SOCKS, *supra* note 4, at 55; KOVACIC & EVERSELEY, *supra* note 4, at 9 (noting that "establishing comparatively high thresholds [of activity] may be the only means that impoverished agencies can use to focus scarce resources on matters of the highest importance"); TAIMOON STEWART, UNIV. OF THE W. INDIES, AN EMPIRICAL EXAMINATION OF COMPETITION ISSUES IN SELECTED CARICOM COUNTRIES: TOWARDS POLICY FORMULATION 184 (Sir Arthur Lewis Institute of Social and Economic Research 2004).

13. INT'L COMPETITION NETWORK (ICN), COMPETITION POLICY IMPLEMENTATION SUBGROUP 2 - LESSONS TO BE LEARNT FROM THE EXPERIENCES OF YOUNG COMPETITION AGENCIES 27 (2006) [hereinafter ICN, LESSONS].

14. *Id.* at 27-28.

15. *Id.* at 28.

16. See, e.g., APEC, *supra* note 4, § 2.9.11; CUTS, PULLING UP OUR SOCKS, *supra* note 4, at 58 (noting the importance of attracting and retaining high quality staff).

17. REPUBLIC OF KENYA, MONOPOLIES AND PRICES COMMISSION: ANNUAL REPORT 1998, at 17 (1999).

salaries for trained individuals, especially where such individuals are scarce.¹⁸

B. *Effects of Such Scarcity*

Resource scarcity has significant effects on antitrust enforcement. Indeed, sufficient resources are the bedrock of efficient antitrust enforcement because they largely determine whether antitrust is workable. The more effective the enforcement bodies are in detecting and sanctioning legal violations, the more instances of anticompetitive conduct will be prohibited *ex post*. More importantly, the institutional conditions of the enforcing bodies affect the expectations of economic actors and their incentives to engage in anticompetitive conduct in the first place. The higher the possibility of detection and sanctioning, the stronger the deterrence effects on market participants, and vice versa.

Let us first focus on the effects of human resource constraints, both qualitative and quantitative. To be effective, the staffs of enforcement institutions must possess the necessary skills to understand, analyze, and apply effectively the legal rules in specific cases. This requires, *inter alia*, adequate technical competence of the decision-maker in all stages of the enforcement process—from the investigative stage until the final reviewing body.¹⁹ Assume, for example, that a case investigator does not understand the sometimes subtle differences between oligopolistic coordination and cartelistic agreements. He might then be driven astray by the cartel parties. Or, even more important for many developing jurisdictions, perhaps the investigator cannot differentiate between welfare-enhancing and welfare-reducing activities of trade associations. Antitrust authorities thus need to employ lawyers, economists, and investigators who are qualified to understand and apply antitrust law. Alternatively, assume that the reviewing body—whether a court, a ministerial committee, or any other body—does not possess such skills but must nonetheless scrutinize the decision of the antitrust authority. Once again the risk of erroneous decisions may be quite high.

The welfare costs involved in erroneous decisions might be significant and may well extend beyond the direct effects on the conduct of the parties in a specific case. First, an erroneous decision might impact the incentives of other market players to engage in pro-

18. See, e.g., APEC, *supra* note 4, § 2.9.11 (noting the high staff turnover that has weakened new competition authorities).

19. Of course, other conditions are also relevant, including impartiality and procedural and evidentiary rules that allow the decision-maker to reach the necessary information. For the purposes of this analysis, however, we assume that all other conditions exist.

competitive or neutral conduct if it was not wrongly labeled as anticompetitive. Conversely, it might strengthen the incentives of market players to engage in anticompetitive conduct, if such conduct was erroneously found to be legal. Second, it might undermine the standing and reputation of the antitrust authority, especially where it results in incompetent enforcement efforts such as the loss of many cases brought by the authority. Particularly in its early years, the antitrust agency might be required to convince the courts, as well as the general public, that its cases are procedurally sound and substantively meritorious.²⁰ It is vital that the agency be ready to prevail on such issues, as this might determine the breadth and scope of the legal basis for its future actions as well as its public standing and the confidence of its staff in the organization.²¹ The costs of erroneous decisions might thus even be higher than if there was no regulation at all.

Human resource constraints might also lead to limited enforcement. The lack of skilled personnel implies a limited ability to readily identify offending practices, to respond to queries and complaints, to handle complex matters, and to engage in educative activities. Additionally, a study by the Asia-Pacific Economic Cooperation (APEC) reported reluctance in several developing jurisdictions in applying antitrust due to a lack of experience in competition cases and the difficulty in dealing with cases that require economic judgment. A vicious circle has been created in which the courts never gain experience and cases are never sent.²²

Finally, human resource constraints also affect the creation of a competition culture. Increasingly, it is recognized that antitrust authorities play an important role in the promotion of a competitive environment by proactively influencing regulatory activities to ensure the rejection of unnecessarily anticompetitive regulatory measures. This advocacy role may, in some cases, be more important in promoting competition than in the repression of anticompetitive behavior through antitrust enforcement. Yet, if the agency is not sufficiently staffed, this role will generally be one of the first to be harmed. The quality of personnel can also affect the competition culture in an additional way: the impact of the competition agency is often derived from the respect for its senior figures.²³

20. Gal, *Ecology*, *supra* note 1, at 37.

21. Kovacic, *Getting Started*, *supra* note 11, at 431.

22. APEC, *supra* note 4, § 2.9.16.

23. Peter M. Holmes, Some Lessons from the CUTS 7-Up Comparative Competitive Policy Project 9 (Nov. 2003) (unpublished manuscript).

Let us now turn to the effects of limited financial resources. Assume that all decision-makers are highly skilled professionals. Still, if financial resources are limited, enforcement will be sub-optimal. This is because the performance of many antitrust enforcement tasks requires a significant monetary investment. Some examples include investigating a cartel and bringing it to trial, analyzing the effects of allegedly monopolizing behavior, writing guidelines for enforcement, analyzing the effects of a proposed merger, and creating or strengthening the competition culture through interaction with lawmakers, regulators, and the media. Accordingly, a resource shortage poses severe constraints on competition enforcement, particularly in *ex officio* cases.²⁴ It might thus prevent the enforcement agencies from engaging in some activities which might have increased social welfare.

Indeed, the effect of financial resources on the ability of enforcement agencies to carry out their tasks is borne out in the empirical evidence. To give but a few examples, the Chilean agency was considered for many years a “second tier” agency, despite the fact that most of the prosecutors had been highly respected and influential individuals, due to insufficient resources.²⁵ Conversely, the Zambian authority was well-endowed, a fact that contributed to its ability to apply its laws.²⁶

In summary, the limited ability to employ needed financial and human resources creates significant challenges that have to be recognized and addressed for the successful implementation of an antitrust regime.

III. LIMITED INSTITUTIONAL ENDOWMENT: PARTIAL SOLUTIONS

Having identified the constraints imposed on antitrust enforcement by limited institutional endowments, we now turn to some possible solutions. The issue is largely one of resource allocation and efficient institutional design: making the best out of the existing endowment to promote the attainment of antitrust policy goals.

The solutions analyzed below are largely cumulative: a jurisdiction can apply all or some of them simultaneously as each serves to limit the problem partially but not completely. The efficient mix might differ among jurisdictions, depending on the severity of the constraint as well as other factors that affect antitrust enforcement which determine a jurisdiction’s motivation or ability to employ a certain solution.

24. ICN, LESSONS, *supra* note 13, at 22.

25. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPETITION LAW AND POLICY IN CHILE: A PEER REVIEW 25 (2004).

26. Holmes, *supra* note 23, at 6.

Furthermore, the efficient solution within each jurisdiction might change over time.

Some of these solutions have also been adopted by jurisdictions with large resource endowments. Yet, as will be discussed at the end of this part, a small endowment affects the motivation to adopt such solutions as well as their application in practice.

A. *Creating and Attracting Qualified Staff*

As noted previously, attracting professional staff is a major obstacle to antitrust enforcement in developing and transition countries.²⁷ A long-term solution to the problem involves enlarging the pool of available, qualified people who can work in the enforcement bodies. Indeed, some jurisdictions have formed ties with local and foreign universities in order to ensure that the courses that are relevant to antitrust enforcement, such as antitrust law and industrial organization, are taught.²⁸ In the short run, staff training programs in procedural, methodological, and substantive matters are a key mechanism for overcoming human resource constraints.²⁹ Internships in more mature agencies can also assist staff in gaining practical experience. Technical cooperation agreements and exchanges with other competition agencies are helpful as well.³⁰ Some jurisdictions also have experimented with recruiting experts who are not attorneys or economists but are trained to perform analytical and investigational tasks that are integral to the handling of cases. Still others contract with outside counsel in important cases.³¹

To combat problems of high staff turnover rates, some agencies offer training of staff on the condition of being bonded for several years.³² A survey by the ICN has indicated that some jurisdictions offer lifestyle benefits—such as telecommuting, the availability of alternative work schedules, and access to a day care center inside the competition agency—that are not readily attainable in the private sector.³³

The ability of the authority to attract and retain staff is also

27. See also STEWART, *supra* note 12, at 184; ICN, LESSONS, *supra* note 13.

28. APEC, *supra* note 4, § 9.3.14.

29. ICN, LESSONS, *supra* note 13, at 14.

30. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, EXPERIENCES GAINED SO FAR ON INTERNATIONAL COOPERATION ON COMPETITION POLICY ISSUES AND THE MECHANISMS USED 38 (2003) [hereinafter UNCTAD], available at http://www.unctad.org/en/docs/c2clp21r2_en.pdf.

31. ICN, LESSONS, *supra* note 13, at 29–34; KOVACIC & EVERSELEY, *supra* note 4, at 11.

32. This was suggested, *inter alia*, in STEWART, *supra* note 12, at 9–10.

33. ICN, LESSONS, *supra* note 13, at 29–34; KOVACIC & EVERSELEY, *supra* note 4, at 11.

determined by its standing and reputation within society. The independence, transparency, and regard for due process all serve to create an attractive working environment for high quality professionals. Poland's successful antitrust authority, for example, took early action and created a good reputation that set off a virtuous circle. Its advocacy role reinforced its success, and it has continued to attract good staff and political support.³⁴ Yet a chicken and egg problem exists, because in order to achieve a positive reputation, the authority will need a skilled staff. Barbados tackled this problem by setting up the agency and training its staff before its law was adopted so that the Commission was ready to start operating by the time the law was passed.³⁵

B. Creating a Collective Memory

To reduce human resource problems it is also important that professional knowledge be accumulated in the agency and not totally dependent on specific people. Guidance manuals may provide new staff with access to the approach to be adopted. These should be supported by case histories so that the collective memory of the authority is easily and continually available.³⁶

C. Bypassing Incompetent Decision-Makers

As noted above, in order to reach correct decisions, all the links in the chain of decision-makers must be competent. If the antitrust agency's decision-makers are incompetent, the suggestions elaborated above might reduce the problem. Such solutions are more difficult to enforce on the judiciary, which often plays an important role in the institutional apparatus of antitrust enforcement.

A serious problem with the judiciary, encountered by many developing and transition countries, is the low level of expertise of judges in antitrust issues.³⁷ This stems from the judiciary's lack of experience in antitrust cases and from its possible difficulty in dealing with cases that require sophisticated economic analysis. The judiciary

34. INT'L COMPETITION NETWORK, WORKING GROUP ON CAPACITY BUILDING AND COMPETITION POLICY IMPLEMENTATION, CAPACITY BUILDING AND TECHNICAL ASSISTANCE: BUILDING CREDIBLE COMPETITION AUTHORITIES IN DEVELOPING AND TRANSITION ECONOMIES 31–33 (2003).

35. STEWART, *supra* note 12, at 206.

36. APEC, *supra* note 4, § 2.9.13.

37. Paul Cook, *Competition and its Regulation: Key Issues*, 73 ANNALS PUB. & COOP. ECON. 541 (2002); Kovacic, *Getting Started*, *supra* note 11, at 420–21; A. E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209 (1994).

may, then, issue decisions that are incompatible with the principles of antitrust or resort to purely technical reviews instead of determining the merits of the case. The problem of judicial competence is so significant that Jamaica identified it as its main constraint in the implementation of antitrust.³⁸ Similarly, Russia experienced enforcement problems due to its judges' lack of experience and understanding of necessary economic concepts.³⁹

Accordingly, some jurisdictions have devised ways to bypass incompetent courts. A common solution is the creation of a specialized antitrust tribunal, as in South Africa and Israel, which is exclusively empowered to hear certain competition cases.⁴⁰ This allows a small body of judges to develop experience in the application of antitrust. Moreover, especially where the jurisdiction does not have many experts in the field, a specialized tribunal might concentrate skilled individuals in one institution. Another partial but common solution is to increase the weight given to the decisions of the professional agency in the review process.

D. Matching Commitments to Capabilities

Making the most out of one's resources is always sound advice. However, when one's resources are scarce, this suggestion becomes even more important. Accordingly, institutional arrangements must be designed to match institutional capabilities.

First, the institutional structure should be designed to limit duplications and inefficiencies. While the U.S. can, for example, experiment with two different types of federal enforcement agencies simultaneously, this will generally not be advised for jurisdictions with much smaller enforcement endowments. In addition, inefficient regulatory tools, such as cumbersome merger approval procedures, should be eliminated where possible.

Second, enforcement priorities should be set. Even the least funded agency must develop a strategic plan that defines what it will seek to achieve.⁴¹ Indeed, there is considerable room for variation in

38. CAPACITY BUILDING AND TECHNICAL ASSISTANCE, *supra* note 34, at 35; *see also* APEC, *supra* note 4, § 2.9.16, 2.9.21 (noting the difficulties in establishing workable competition laws without a trained judiciary).

39. *Id.* § 9.5.4.

40. *Id.* at Annex 2, § 7.1; *see also* A. Neil Campbell et al., *Rethinking the Role of the Competition Tribunal*, 76 CAN. B. REV. 297 (1997) (analyzing the role and effectiveness of the Competition Tribunal in Canada, as well as discussing the procedural aspects of competition tribunals and their relationship with the judiciary).

41. ICN, LESSONS, *supra* note 13, at 23–24; *see* KOVACIC & EVERSLEY, *supra* note 4, at 10–

determining which commands a jurisdiction should adopt. Take, for example, anti-cartel enforcement. Such enforcement should be given priority when it relates to significant domestic cartels. This is especially important in transition economies, in which anti-cartel enforcement prevents continued patterns of inter-firm relationships that flourished during the planning period.⁴² Yet, prosecuting international cartels that are prosecuted elsewhere should generally be given low priority. This is because these cartels will usually cease their activities worldwide as a result of such prosecution. Spending scarce resources on prosecuting such a cartel rather than on cartels that will otherwise not be brought to trial makes little sense. Indeed, empirical studies indicate that small and developing jurisdictions rarely bring international cartels to trial.⁴³

Third, resources should also determine the sequence of application of antitrust prohibitions. For example, it may be advisable to first spend resources on the most egregious and non-complex prohibitions, such as hardcore horizontal restraints, and gradually add more complex prohibitions.⁴⁴ It might also be advisable to give priority, at least in the first years, to advocacy and education.

E. Sharing Enforcement

Another way to optimize the use of a limited institutional endowment is to share some regulatory functions with other regulators. One option entails institutional integration between the antitrust authority and other regulators. Integration might create a functional capability that would not be possible otherwise given significant resource constraints. This benefit must, however, be balanced with possible costs which include, *inter alia*, negative spillovers from differences in regulatory frameworks and inefficient prioritization of regulatory tasks. Yet functional integration as a solution for resource constraints might be especially justified in micro-economies, such as Jersey and Guernsey, where

11 (discussing the organizational structure of competition agencies and the separation of distinct functions).

42. KOVACIC & EVERSLEY, *supra* note 4, at 7 (“An anti-collusion measure in a competition law could serve a useful purpose by making clear that the government will not tolerate private efforts to recreate collective planning techniques that the jurisdiction has abandoned.”).

43. CUTS, PULLING UP OUR SOCKS, *supra* note 4, at 71 (“Many [competition authorities] feel that they are unable to enforce their decisions in cross-border competition cases even if they take them up.”); Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions*, 33 *FORDHAM INT’L L.J.* 1, 26 (2009), available at http://works.bepress.com/michal_gal/3/.

44. KOVACIC & EVERSLEY, *supra* note 4, at 9 (noting how newer agencies and weaker systems may begin with a more “austere” competition policy and over time implement additional provisions to augment their law and enforcement capabilities).

resource constraints are extremely pronounced.⁴⁵ Some developing countries have adopted such solutions as well. Peru's organizational structure, which concentrates several mandates in addition to competition enforcement within the antitrust authority, has kept down its costs of small administrative units.⁴⁶ Such integration is less recommended, however, for transition economies, where one of the tasks of the authority is to create a countervailing force to traditional regulators who are more likely to rely on command-and-control regulatory tools.

Sharing can also be done on a wider basis. Indeed, cooperation agreements with other jurisdictions may provide an effective solution to some institutional endowment constraints.⁴⁷ Regional cooperation can create valuable means for developing new enforcement capabilities and reducing costs. Such alliances may allow members to reduce costs and human resource needs by consolidating certain functions in the regional authority, such as the investigation and prosecution of region-wide trade restraints, public education, or the strengthening of the competition culture.⁴⁸ Furthermore, the regional authority might reduce human resource constraints by concentrating the region's skilled professionals in one agency. On the other hand, cooperative agreements carry costs, such as some loss of sovereignty and the conclusion of certain cross-border issues in a way that, despite increasing regional welfare, may not entirely comport with the goals of a specific jurisdiction. Yet the potential of regional agreements to significantly reduce resource constraints has led to their proliferation among many developing and small economies worldwide. Some examples include the Western African Economic and Monetary Union (WAEMU), Southern and Eastern Africa Competition Forum (SEACF), and the Caribbean

45. Indeed, in Jersey the antitrust authority also performs some sector-specific regulatory functions. Jersey Competition Regulatory Authority, About JCRA, <http://www.jcra.je/cms3/v2/public/cmsPage.asp?pageID=1> (last visited Mar. 7, 2010). Guernsey is contemplating functional integration between the antitrust authority and the gas and electricity regulator. Interview with Guernsey officials (Nov. 2009).

46. ICN, LESSONS, *supra* note 13, at 24.

47. *See, e.g.*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Philippe Brusick et al. eds., 2005), available at <http://www.unctad.org/en/docs/ditclp20051%5Fen.pdf> (summarizing national, regional, and international initiatives intended to promote cooperative competition policy); UNCTAD, *supra* note 30, at 7 (addressing bilateral or tripartite competition law enforcement cooperation agreements, as well as trade, customs, and other market agreements and multilateral instruments).

48. KOVACIC & EVERSLEY, *supra* note 4, at 13 (advocating for multinational regional cooperation in building competition institutions as a means to expand capabilities, provide enforcement opportunities, and reduce costs).

Community regional agreement (CARICOM).

Broader international initiatives also provide opportunities for overcoming resource endowment limitations. Multinational bodies such as the ICN, OECD, and UNCTAD provide useful mechanisms for technical assistance by transferring information and know-how. In addition, relationships formed in the course of participating in these networks can facilitate formal and informal interaction between individual competition authorities that might, in turn, serve to further reduce enforcement costs by sharing knowledge and investigative techniques.⁴⁹

F. Stakeholder Sensitization and Participation

The antitrust authority performs a social function aimed at increasing social welfare that benefits both consumers and competitors. Empowering these beneficiaries to be involved in the enforcement process may reduce the enforcement costs of the agency by transferring some costs to such groups. Indeed, in a growing number of jurisdictions private enforcement plays a role in achieving the goals of antitrust.⁵⁰ Yet some institutional conditions must exist before private enforcement will be socially beneficial; most importantly, courts must be able to correctly apply the law.

Educational measures, aimed at stakeholder sensitization, may reduce enforcement costs in three main ways. First, they strengthen the motivation of consumer groups to assist the authority in detecting violations, which in turn serves to reduce investigation costs.⁵¹ Second, they may assist in disseminating information about legal prohibitions and possible sanctions. Third, they reduce the investment of the authority in countering political pressures by sector-specific groups by creating a stronger public opinion in favor of competition.

G. Discussion: The Effects of a Limited Institutional Endowment on Solutions

The solutions elaborated above all serve to reduce the negative

49. *Id.* (noting the importance of informational exchange, the formation of regional relationships, and institutional interaction).

50. AM. ANTITRUST INST., *THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW* (forthcoming 2010).

51. RIJIT SENGUPTA & CORNELIUS DUBE, *OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT, COMPETITION POLICY ENFORCEMENT EXPERIENCES FROM DEVELOPING COUNTRIES AND IMPLICATIONS FOR INVESTMENT* 13 (2008), available at <http://www.oecd.org/dataoecd/42/55/40303419.pdf>.

welfare impact of a limited institutional endowment.⁵² Some solutions have been tried and tested in jurisdictions with antitrust regimes that do not suffer from significant resource constraints. The EU regional antitrust enforcement agreement, the U.S. private action doctrines, and the Canadian Competition Tribunal all serve as such examples. Their success or failure can guide jurisdictions with more limited institutional endowments as well. Of course, their success also depends on factors that go beyond institutional endowments, such as political pressures, the prevailing socio-ideology, and cultural constraints.

A low level of resource endowment has, however, three main effects on such solutions. First, it often strengthens the need for their adoption. While other jurisdictions can achieve reasonable enforcement, for example, without limiting institutional duplication, this might not be true in highly constrained jurisdictions. Second, their adoption in jurisdictions with no significant resource constraints might be primarily motivated by other considerations. The EU regional agreement, for example, was largely motivated by the wish to create a common market to overcome historic rivalries rather than by the need to use scarce resources efficiently. This effect of resource scarcity is especially important where the solution carries costs, such as the loss of sovereignty, which must be balanced against reduced enforcement costs. Accordingly, while a certain solution might not be optimal for most jurisdictions in which resources are abundant, it might be so when resources are scarce. This leads to the third effect, which is that resource scarcity may also impact the application of the solution in practice. To illustrate, prioritizing enforcement is a good tool for all jurisdictions as they all face some resource constraint. Yet the degree of the constraint will affect the content of the set priorities. Moreover, resource scarcity will affect the optimal mix of solutions to be applied in a certain jurisdiction.

Not all solutions can be copied from jurisdictions with large resource endowments, however. Given that jurisdictions face a different set of institutional issues, the proper mix of solutions must be developed locally or mirror the practices of jurisdictions which face similar issues.⁵³ To give but one example, combining antitrust and sector-specific enforcement is rarely found in such jurisdictions, and if it is found, it is largely motivated by considerations other than resource

52. This paper does not attempt to enumerate all such solutions, but only the most important ones.

53. Rodrik, *supra* note 8, at 7, 10–15 (discussing regulatory institutions and how they are acquired among varied jurisdictions).

scarcity.⁵⁴

IV. DESIGNING APPROPRIATE SUBSTANTIVE RULES

All the solutions elaborated above have one common trait: they are based on the assumption that substantive legal rules are given. This Part relaxes this assumption and treats substantive legal rules and institutional features as integrated parts of one system which has to be designed effectively. Viewed from this perspective, the interplay between these two factors might sometimes lead to changes in substantive law due to institutional limitations, rather than to institutional design solutions. This analysis thus broadens the set of options to deal with institutional endowment shortcomings to additionally include the content of substantive rules.

The effect of institutional limitations on antitrust rules is, of course, not relevant only to jurisdictions with scarce enforcement resources. Indeed, decision theory, which provides a theoretical framework for designing efficient rules under assumptions pertaining to the ability of the decision-maker to reach correct decisions,⁵⁵ has been applied to U.S. and EU antitrust.⁵⁶ Yet there is no in-depth exploration in the literature of the application of this framework in extreme conditions of limited institutional endowments. Accordingly, this Part is dedicated to such an analysis. First, it develops the argument that a possibly effective solution to some institutional endowment issues involves changing the content of substantive rules. Second, it explores the possible costs of such a solution, especially in an international setting, in order to provide

54. Australia has combined such functions, but for reasons other than resource scarcity.

55. For the pioneering work on this subject see Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (examining the legal process and regulatory efficiency from an economics standpoint).

56. See, e.g., C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999) (joint ventures and other horizontal restraints); Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per se Rules vs. Rule of Reason,"* 2 J. COMPETITION L. & ECON. 215 (2006) (concluding that economics should be employed to develop appropriate competition rules, rather than relying on a case-by-case examination); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005) (unilateral practices); David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. COMPETITION L. & ECON. 97 (2005) (excessive prices under EU competition framework); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001) (tying doctrine); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006) [hereinafter Popofsky, *Exclusionary Conduct*] (exclusionary rule under Section 2); Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265 (2008) [hereinafter Popofsky, *Safe Harbors*] (Section 2 safe harbors).

a balanced framework to determine in which situations its use is advisable.

A. Changing Substantive Rules as a Solution to a Limited Endowment

Optimal deterrence entails prohibiting anticompetitive conduct and allowing neutral or pro-competitive conduct. In practice, however, this goal is difficult to attain given informational and institutional limitations which might lead to erroneous or costly decisions. Erroneous decisions fit into two main categories: (1) those that apply the regulatory net too narrowly and thus do not capture conduct that is socially harmful (false negatives); and (2) those that apply the regulatory net too widely and prohibit conduct that is socially desirable (false positives). Erroneous decisions can cause significant deviations from optimal deterrence because they will not only bind the litigating parties but also guide other market participants.⁵⁷ Such errors can result from partial information or from the inability of the decision-maker to use the information correctly. A rational social planner must therefore consider the relative merits and the error and enforcement costs associated with alternative legal tests, recognizing the real-world circumstances—including institutional limitations—in which those tests are applied or enforced.⁵⁸

Decision theory provides a theoretical framework for such analysis by balancing the relative costs and benefits involved in the application of different rules under given institutional limitations. Relevant considerations in selecting the appropriate test include not only the likely consumer harms and benefits from the conduct but also the risks of false positives, false negatives, and legal process costs resulting from systemic limitations.⁵⁹ To illustrate, assume that the application of a certain law requires a complex and costly market analysis. Such a situation will lead to high informational costs or, alternatively, to high error costs. This is because if the costly information is not obtained, then the decision-maker is prone to reach mistaken decisions that are based on only partial information. The social planner will thus have to balance the two types of costs in order to reach an efficient rule. Although decision theory often focuses on information costs, its framework is sufficiently wide to include other limitations which lead to erroneous decisions, such as a limited ability to correctly apply antitrust

57. Beckner & Salop, *supra* note 56, at 51 (describing how decisions from a court serve a precedent “by which future conduct will be judged” and thus over- or under-deterrence can have a negative impact by influencing other market participants).

58. Popofsky, *Safe Harbors*, *supra* note 56, at 1296.

59. Popofsky, *Exclusionary Conduct*, *supra* note 56, at 449–50 (describing the costs and effects of legal tests in reference to the decision theory framework).

rules even when all the relevant information is available.

Enforcement resource scarcity affects the costs involved in applying substantive rules in two main ways. First, given low financial endowments, the decision-maker will have a limited ability to gather the relevant information where gathering such information is costly. This, in turn, might lead to higher degrees of erroneous decisions, since the decision will be based on partial information. Alternatively, it might lead to a lower number of decisions if resources are spent on gathering information in a select number of cases. Second, and often more importantly, human resource limitations might lead to the misapplication of rules. Misapplication is often the result of the decision-maker's lack of ability to perform a complex economic or legal analysis even when all the relevant information is available.⁶⁰ This is a serious concern. As our understanding of economics develops, generally the economic models become more complicated and require more nuanced, in-depth, and fact-specific analysis of each specific case in order to minimize false positives. The cost of such rules is increased demands on levels of competence and increased financial costs of application. In large, developed jurisdictions, application of complex rules often makes perfect sense—given the generally high level of expertise of the enforcement institutions, error costs are often low. But once we transfer such complex laws to jurisdictions with a much more limited ability to perform such analysis, error costs will be significantly increased.

Accordingly, laws which may be efficient under certain institutional conditions might instead generate high error or application costs under inferior institutional conditions and might even reduce domestic welfare.⁶¹ Consider, for example, a rule that bases the proof of market power on an in-depth economic analysis of the conditions in the market, including the height of entry barriers. The application of such a rule would require significant economic expertise and would likely involve a costly exercise in the study of the market. Compare it to a rule which creates presumptions of market power based on market shares. The application of the latter might be much less demanding where markets

60. See, e.g., William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001) (analyzing economic law reform in transition economies through the development of competition systems).

61. In a study of eighteen Eastern European countries that are newcomers to antitrust, Dutz and Vagliasindi found that the "Institutional Effectiveness" variable showed the strongest impact on domestic competition. Mark A. Dutz & Maria Vagliasindi, *Competition Policy Implementation in Transition Economies: An Empirical Assessment*, 44 EUR. ECON. REV. 762, 770–71 (2000).

are relatively easily defined. To determine the desirability of such legal presumptions the social planner would need to balance the reduced administrative costs and the effects of the increase in enforcement that might result from the savings of such costs on the incentives of market players to engage in anti-competitive conduct, against the increase in error costs that will result from a less nuanced analysis of market power. A rule based on a legal presumption might therefore be justified in jurisdictions with limited institutional endowments.⁶²

Similarly, institutional endowments should play a role in determining the scope of the application of rules. Merger regulation serves as a good example. A regulatory model based on ex ante notification and authorization is quite resource-consuming, given that the authority must review all mergers that meet the threshold. This fact will have spill-over effects on other areas of enforcement, given that the authority generally has one pool of enforcement resources for all its activities. Thus, some modifications might be necessary in order to create a more efficient enforcement system within the existing endowment. In particular, the scope of merger review might be limited. One option is to increase the threshold for notification. Another is to abolish mandatory notifications. In New Zealand, for example, there are no mandatory merger notification thresholds. The commission has the power to disintegrate a merger if it harms competition significantly, and the merging parties can control this risk by applying for clearance.⁶³ In other jurisdictions creating a “corridor” for merger review might provide an efficient solution.

Let me elaborate on the “corridor” notification system, which is currently considered in Guernsey and might serve micro-economies particularly well.⁶⁴ Under this system, notification should be required only from mergers that fall within a “corridor” between a minimum and a maximum threshold. The minimum threshold should be set to ensure that mergers that have limited economic effects would not need to be scrutinized. The innovation of this suggestion is the addition of a maximal notification threshold: notification would not be required from

62. In small economies such presumptions are further justified by relatively low elasticity of supply. See GAL, SMALL ECONOMIES, *supra* note 10, ch. 4 (introducing the tools that are available to competition authorities to regulate natural monopolies in order to achieve competition policy goals).

63. NEW ZEALAND COMMERCE COMMISSION, MERGERS AND ACQUISITIONS GUIDELINES 6 (2004), available at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.pdf>.

64. The author served as an advisor to the government of Guernsey on the shaping of its Mergers and Acquisition Legislation, which is still in its legislative stages.

mergers that are above a certain threshold. The threshold should capture mergers between international firms with very high world-wide turnovers which are not headquartered in the reviewing jurisdiction. This is not because such mergers may not have significant effects on the micro-jurisdictions' markets, although in many cases this will be true. Rather, the reason is more practical: such mergers would rarely, if ever, be dropped if they were not cleared by the micro-economy's authority.⁶⁵ The resources spent in the merger review process of such mergers are thus often wasted. Such a notification system can be coupled with a rule enabling the authority to impose, within a given time frame, behavioral or structural remedies on the merged entity that apply only to its activities within the jurisdiction, much like the system in New Zealand. This system would significantly reduce enforcement costs while not necessarily increasing the practical costs from false negatives.

In sum, institutional endowments should be taken into account when designing substantive rules. Relevant factors include: (1) enforcement costs, where the more complex the rule, the more resources must be spent in applying it in practice and the more limited the ability of the decision-maker to make additional decisions; (2) error costs, resulting, *inter alia*, from the level of economic or legal expertise of the decision-maker; (3) the level of harm created by the relevant conduct; and (4) the ability to enforce the rule in practice.

B. Considerations for Changing the Content of Rules

So far we have focused on the benefits involved in reducing the level of complexity or the scope of an antitrust rule in order to reduce costs resulting from limited institutional endowments. The creation of idiosyncratic rules in accordance with specific institutional endowments might, however, come with a high price tag.

Idiosyncratic changes necessarily create a discrepancy between one's laws and those of other jurisdictions with different institutional endowments, most importantly the laws of large, established jurisdictions. This discrepancy will limit the benefits involved in following the latter, which are enumerated hereafter.⁶⁶ First, the adoption of "ready made" and pre-tested rules saves the costs of determining what content ought to be given to the law. Second, an

65. See, e.g., GAL, SMALL ECONOMIES, *supra* note 10, ch. 6; Gal, *supra* note 43, at 31-32 (discussing the disincentives on micro-jurisdictions to bring antitrust actions against large international mergers).

66. For a more elaborate analysis see Michal S. Gal, *The 'Cut and Paste' of Article 82 of the EU Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J.L. REFORM 467 (2007).

established antitrust law has a long history of implementation, interpretation, and academic discourse in its saddlebag. Foreign courts, enforcement agencies, and market players can thus tap such resources to understand the transplant's concepts and how it should be applied in practice. Furthermore, the continued application of the living law in a generally well-functioning jurisdiction generates ongoing positive network externalities: as more decisions and guidelines that apply the law to various factual settings accumulate, legal certainty is typically increased. Third, the transplant can also help push through new concepts and ease their acceptance. The adoption of a foreign law that is perceived to be successful can help convince local constituencies of its importance and can assist the government in combating group-specific political pressures.

Additional benefits arise when we add trade to the analysis.⁶⁷ Some large jurisdictions require that their trading partners prohibit anticompetitive conduct to prevent the creation of artificial barriers to trade. Following their laws ensures at least some degree of compliance with this requirement. Another benefit is a reduction in the learning and compliance costs of firms wishing to trade beyond their jurisdiction. Transplant jurisdictions reduce the costs for domestic exporters of learning which antitrust issues they might face in the followed jurisdiction. In addition, transplanting an antitrust regime may strengthen pro-competitive pressures in the domestic market by increasing the incentives of foreign firms to import into it. Moreover, unification of legal rules might better enable antitrust authorities to work together towards joint solutions and to engage in cooperative educational efforts. Such benefits are dependent, of course, on the transplanted law not being unduly burdensome and not significantly diverging from one's optimum law.

The above analysis indicates that the content of domestic laws is affected by other jurisdictions. To paraphrase John Donne, "no [country] is an island, entire of itself."⁶⁸ Indeed, tailoring institutional structures to special needs might be much easier, in some respects, than tailoring substantive rules. While there is often external pressure on jurisdictions to harmonize substantive laws, there is less pressure on harmonizing institutions, so long as the outcome meets some common standards.

67. *Id.* at 478–80, 482–83. *But see id.* at 481–82 (discussing some "unintended results" of Israel's whole-cloth adoption of Article 82 from the European Commission).

68. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, AND SEVERAL STEPS IN MY SICKNESS 415 (1624).

This does not imply, however, that no change to substantive rules will be warranted to solve institutional endowment issues. Rather, in situations in which error or enforcement costs are significantly high, reducing the complexity and informational requirements involved in applying a certain antitrust rule, or even abolishing the prohibition, might well be justified. Alternatively, at least some of the benefits elaborated above can be retained if jurisdictions with relatively similar institutional endowments adopt similar solutions.

It is interesting to note that institutional endowment issues have already created obstacles to harmonization. The failure of the attempt to include a prohibition against hardcore cartels within the WTO framework can be partly attributed to institutional endowment issues. All countries were, in principle, in favor of prohibitions against hardcore cartels. Developing jurisdictions, however, voiced two main concerns against the use of the WTO institutions to ensure the application of such prohibitions. First, they were concerned that joint ventures which serve to further industrial policy would be deemed illegal. Second, and more important for our analysis, they were concerned that due to their limited institutional endowments they would not be able to meet enforcement requirements and would then be sanctioned in accordance with WTO rules.⁶⁹ Institutional limitations must therefore not be disregarded when harmonization of substantive rules or the creation of international mechanisms for increasing enforcement are considered.

V. CONCLUSION

For many years the design of substantive rules has overshadowed institutional design issues. Today there is growing consensus that institutional issues are no less fundamental to the successful implementation of antitrust.⁷⁰ As Popper and Kegan suggest, law is like a fortress—it should be properly built and manned in order to protect its citizens.⁷¹

Yet properly manning the fortress is too often quite a challenging task. One of the main institutional problems that antitrust authorities face is resource scarcity—both financial and human. Institutional

69. EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS* 1108 (2007).

70. *See* KOVACIC & EVERSLEY, *supra* note 4, at 1 (“Both older and newer competition systems have come to realize that a body of competition laws is only as good as the institutions entrusted with their implementation.”).

71. KARL R. POPPER, *THE POVERTY OF HISTORICISM* 66 (1957).

endowment constraints can severely limit the ability of antitrust enforcement bodies to perform their tasks effectively. This problem is most pronounced in developing, small, and transition economies. Finding adequate solutions to such constraints is thus necessary for antitrust to take effect. Otherwise, the law might not achieve its goals and instead create a negative reaction to its enforcement in the general public and in other governmental arms.

Accordingly, this paper has identified some institutional design and substantive law solutions that may assist jurisdictions in meeting their antitrust goals. These solutions attempt to enable jurisdictions to make the best out of their existing endowments within the framework of more general constraints.

Some solutions have been tried and tested in jurisdictions with established antitrust regimes that do not suffer from significant resource constraints. Not all solutions can be copied from such economies, however. Given that different jurisdictions face different sets of institutional issues, some solutions or the proper mix of solutions must be developed locally or follow the successes of jurisdictions which face similar issues.⁷² Indeed, there is no reason to suppose that large, developed jurisdictions have adopted the useful institutional mix that could underpin antitrust enforcement under conditions of severe resource constraints. To give but one example, combining antitrust and sector-specific enforcement is rarely found in such jurisdictions, and if so, it is largely motivated by considerations other than resource scarcity.⁷³ However, such a solution might be a useful way to overcome institutional endowment limitations for micro-economies.

Indeed, the analysis indicated that resource scarcity affects both the motivation to adopt certain institutional tools as well as their application in practice. Furthermore, the application of a decision-theoretic framework taking into account institutional limitations indicated that the adequacy of legal provisions is also based on, *inter alia*, the jurisdiction's institutional capabilities. Substantive rules that are optimal for one jurisdiction thus might not be optimal for another and should be changed in accordance with institutional endowments.

Accordingly, the institutional repertoire available in large, developed countries may be inappropriate to meet the needs of jurisdictions which operate under conditions of severe resource scarcity. While in some cases the analogy to Alice in Wonderland is appropriate—the institution

72. Rodrik, *supra* note 8, at 11–15 (discussing and analyzing the *blueprint* and *local-knowledge* perspectives for institutional development).

73. Australia has combined such functions, but for reasons other than resource scarcity.

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should be shrunk to the size of the institutional endowment—in other cases resource scarcity will require a new blueprint of solutions. Institutional transplants thus also raise issues of compatibility, just like the substantive law issues which have been explored in depth in the literature.⁷⁴

74. *See supra* note 5 and accompanying text.