

# Designing Competition Law Institutions: Values, Structure, and Mandate

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## I. INTRODUCTION

Discussions of competition policy reform, both domestically and internationally, have typically focused on issues of substance, for example, appropriate rules for merger review, abuse of dominance, and horizontal arrangements amongst competitors. However, substantive policies must be mediated through the institutions that investigate, enforce, and adjudicate competition law issues and the decision-making processes that these institutions employ. As the legal realists long ago taught us, institutional and procedural differences are likely to generate widely different substantive outcomes, even with a similar legislative mandate.<sup>1</sup> Over the past decade, the number of competition agencies around the world has proliferated dramatically, now numbering in excess of one hundred, rendering these differences of increasing salience in a global economy.

In a recent paper prepared for the International Competition Network (ICN), Kovacic and Eversley note:

Discussions about the implementation of competition policy tend to focus more heavily upon the question of *what* competition authorities should do than on the question of *how* they should do it . . . . 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. The establishment of new competition systems and the refinement of older regimes have created a remarkable opportunity to consider the institutional prerequisites for the effective implementation of competition laws.<sup>2</sup>

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1. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 162–66 (1998) (arguing that regulatory outcomes are a function of administrative process rules).

2. WILLIAM E. KOVACIC & DECOURCEY EVERSLEY, INT'L COMPETITION NETWORK, AN

In another recent survey of agency effectiveness for the ICN, the authors state:

Since its creation, the International Competition Network has developed extensive analyses of competition policy practices around the world and also has provided member jurisdictions with useful recommendations and guidance on important competition issues . . . . [R]elatively little emphasis has been placed on the institutions and operational considerations through which competition law and policy are implemented. While institutional and operational questions are identified as important in ICN work products, there has not yet been a systematic examination of how agencies actually address institutional and operational needs and constraints.<sup>3</sup>

Most of the focus in these two studies is directed to the internal institutional machinery of a specialized competition agency. The studies emphasize the importance of periodic evaluation (internal or external or a combination of both) of the agency's legislative powers and activities; its internal organization and management; strategic planning and priority setting, including the relative emphasis on advocacy, education, and law enforcement; research capabilities; transparency mechanisms; investments in information technology; organizational structure; recruitment and retention of skilled professionals (including the role of senior economists); budget determination and allocation; and the effectiveness of past agency decisions.<sup>4</sup> While observations on these issues by the authors of these two reports are eminently sensible and are equally applicable to many other government agencies, it is curious that the choice of basic competition-agency models attracts two short, equivocal paragraphs in only one of these studies. Kovacic and Eversley acknowledge that "interviews with competition authorities concerning their experiences with these various models indicate that this is a promising area for

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ASSESSMENT OF INSTITUTIONAL MACHINERY: METHODS USED IN COMPETITION AGENCIES AND WHAT WORKED FOR THEM 1 (2007) [hereinafter ICN, ASSESSMENT], available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc368.pdf>.

3. INT'L COMPETITION NETWORK, COMPETITION POLICY IMPLEMENTATION WORKING GROUP, REPORT ON AGENCY EFFECTIVENESS 3 (2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc367.pdf>.

4. See also WILLIAM E. KOVACIC, OFFICE OF THE FTC CHAIRMAN, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR SECOND CENTURY—THE CONTINUING PURSUIT OF BETTER PRACTICES, at ii–xv (2009), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf> (presenting results of an FTC self-assessment and identifying institutional features for positive substantive outcomes); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 165–82 (2005) (providing a framework for defining success in government agencies and offering guiding principles for an effective competition agency).

additional research.”<sup>5</sup> This Article is devoted to these structural questions.

## II. KEY INSTITUTIONAL DESIGN QUESTIONS

Drawing on a previous paper,<sup>6</sup> we argue that any competition-policy institutional regime must address five fundamental questions. First, who investigates and initiates proceedings (including the relative roles of public and private enforcement)? Second, to the extent that investigation and other enforcement activities are undertaken by the government, which branch of the government is responsible? For example, the questions of who hires competition policy bureaucrats, to whom are they accountable, and whether the competition-enforcement body is part of a line ministry or is an independent agency with its own budget and personnel policies must be addressed. Third, what body adjudicates contested competition proceedings? Does a branch of the enforcement agency adjudicate, or is there a completely independent body? What process does the adjudicative body follow? Fourth, to what extent is there judicial review of competition decisions? Finally, what role, if any, is there for political review by elected officials of competition agency decisions?

The normative criteria or values for evaluating competition law institutions are likely to be inherently uncontroversial. However, each value implies an obverse value and indeed interactions with other values, thus rendering the weighting of, or trade-offs among, values a quintessential polycentric and highly contestable exercise. The key dyadic values are listed below.

### *A. Independence–Accountability*

On the one hand, competition law institutions obviously should be free of day-to-day political interference on grounds extrinsic to their mandate. On the other hand, at least in a representative democracy, it is difficult to defend institutional independence without some form of accountability, e.g., with respect to appointments, budgetary allocations, financial expenditures, periodic mandate, and performance review.

### *B. Expertise–Detachment*

Competition law matters typically require high levels of expertise in

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5. See ICN, ASSESSMENT, *supra* note 2, at 12.

6. Michael Trebilcock & Edward Iacobucci, *Designing Competition Law Institutions*, 25 WORLD COMPETITION 361, 372–80 (2002) (providing five questions for regimes to answer when developing balanced competition policy).

their resolution—expertise with respect to particular industries, expertise in marshalling and interpreting empirical data, and expertise in industrial organization theory. However, too close an involvement in the industry in question or excessively doctrinaire commitments to particular theoretical paradigms may compromise detachment in evaluating or adjudicating novel arrangements or evolving economic or theoretical environments.

### *C. Transparency—Confidentiality*

In order to enhance the performance and public credibility of competition laws' administration, high levels of transparency in performing investigative, enforcement, and adjudicative functions are desirable. Conversely, much of the information that a competition law agency is required to evaluate from the immediate parties involved and from competitors, suppliers, and customers is commercially highly sensitive; and public disclosure may be seriously damaging to legitimate business interests.

### *D. Administrative Efficiency—Due Process*

Competing concerns also exist between administrative efficiency and due process protections. Many matters with which a competition law agency may be seized are time-sensitive (e.g., merger review). However, timeliness in disposition is in tension with the value of due process in providing all affected or interested parties a right to be heard, to adduce evidence, and to contest the position of parties adverse in interest.

### *E. Predictability—Flexibility*

In a legal system based on the rule of law, significant value is placed on the predictability and consistency with which laws are applied. In such a legal system, affected parties can order their affairs with a fairly high level of confidence in the nature of the rules that govern those affairs. But the value of predictability is in tension with the obverse value of flexibility where the evolution of economic theory and the idiosyncrasies of particular industries, transactions, or practices may require reevaluation and refinement of preexisting rules, policy positions, or adjudicative decisions.<sup>7</sup> This leaves large domains of

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7. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49 (2007) (arguing that courts should avoid a generalized preference for standards and instead consider a multitude of factors in choosing the ex ante precision of liability determinants in antitrust lawsuits); David S. Evans, *Why Different Jurisdictions Do Not (and Should Not)*

uncertainty in the application of competition laws. In fact, this tension is reflected in long-standing debates in the antitrust literature on the relative roles of rules versus standards in this field.<sup>8</sup>

Obviously, in balancing these various (ten) values, a complex, subjective, and inevitably highly contentious optimizing calculus is involved. Moreover, the complexity of this calculus is, in fact, greater than the primary dyadic value tensions identified above in that many of the values interact with one another in polycentric, mutually reinforcing, or antithetical ways. For example, accountability may be antithetical to administrative efficiency by proliferating appeal or review processes, while expertise may enhance administrative efficiency. Confidentiality and flexibility may be antithetical to due process, but due process, such as that offered by non-specialized courts, may, in turn, be in tension with expertise.

### III. BASIC STRUCTURAL MODELS

In our earlier paper, we identified three basic models that seemed to map reasonably well on to comparative experience.<sup>9</sup> However, there is a wide range of variations or combinations of these prior models that are either observable or imaginable. Under the bifurcated judicial model, specialized investigative and enforcement agencies must bring formal complaints before and seek remedial relief from the courts, subject to normal rights of appeal to appellate courts. Under the bifurcated agency model, specialized investigative and enforcement agencies must bring formal complaints before separate, specialized adjudicative agencies. Under the integrated agency model, a single specialized agency undertakes investigative, enforcement, and adjudicative functions. With respect to the latter two models, an additional question arises as to what role, if any, there is for judicial appeals or judicial review of adjudicative decisions by specialized agencies.

#### A. *Bifurcated Judicial Model*

The bifurcated judicial model existed in Canada until a major round

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*Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161 (2009) (suggesting that a singular approach to antitrust regulation is undesirable when considering theories of optimal design in antitrust rules); Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375 (2005) (proposing a general approach for antitrust regulators to make optimal decisions given the inherent uncertainty of antitrust outcomes).

8. See *supra* note 7.

9. See Trebilcock & Iacobucci, *supra* note 6, at 368–83.

of competition law reform in 1976 and continues to exist with the criminal prohibitions in the Competition Act. It also prevails in the United States with respect to the mandate of the U.S. Department of Justice, which performs investigative and enforcement functions but must initiate formal enforcement proceedings before federal courts to obtain either criminal sanctions or civil relief. The Canadian experience with this model has not been especially positive, particularly with the merger and monopolization provisions in the statute. The combination of a nebulous public interest standard of liability, the exacting criminal law burden of proof on the Crown, and all-purpose criminal courts meant that very few prosecutions were brought and almost all failed, so that by the 1970s these provisions were largely a dead letter and provided much of the impetus for the subsequent reform movement that began in the 1970s.

The U.S. experience with the bifurcated judicial model has been somewhat different. First, the Department of Justice, in initiating formal enforcement proceedings, may elect whether to proceed by way of criminal indictment or an application for civil relief. Second, formal enforcement proceedings, whether criminal or civil, are brought before federal courts, entailing the development of some degree of judicial familiarity with antitrust issues over time. Third, private actions before general civil courts, often involving jury trials, for antitrust violations are an extremely important feature of U.S. antitrust laws, and account for more than ninety percent of all enforcement actions; these private actions are further encouraged by a combination of treble damages, contingency fees, one-way cost rules, and liberal class-action procedures, which are much less prominent features of most other countries' competition law regimes (including Canada's). With two major federal antitrust agencies, state antitrust regimes, and a broad scope for private actions, the U.S. antitrust regime is far more decentralized than any other in the world, and it is unlikely that other countries should seek to emulate it.<sup>10</sup>

With respect to accountability, the bifurcated judicial model entails significant accountability through the process of judicial appeal. The model scores poorly with expertise in the performance of the adjudicative function, but conversely, does reasonably well with respect to detachment. Again, the bifurcated judicial model scores well with

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10. See generally William E. Kovacic, *Lessons of Competition Law Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361 (2000) (evaluating American antitrust institutions' adherence to the advice regularly given by Western observers to transition economies).

respect to transparency and probably strikes a reasonable balance with respect to confidentiality. The model does not score well with timeliness and process costs (administrative efficiency), although it does provide a high level of protection of due process values for the cases that are heard. However, to the extent that there are substitution effects away from costly formal adjudication to informal resolution of complaints within the investigative and enforcement agency, the model may not, in fact, vindicate due process values.

### *B. Bifurcated Agency Model*

The bifurcated agency model is the model that now exists in Canada with respect to non-criminal, reviewable practices (e.g., abuse of dominance, mergers, and restrictive practices). The Commissioner of Competition (the Competition Bureau) performs investigative and enforcement functions, and the Competition Tribunal, comprised of a mix of federal court trial division judges and lay experts, performs the adjudicative functions (subject to a right of appeal to the Federal Court of Appeal).

A similar model exists in South Africa, where investigative and enforcement functions are vested in the Competition Commission and most adjudicative functions are vested in the Competition Tribunal with rights of appeal to the Competition Appeal Court (a specialized division of the High Court). A somewhat similar model has existed in the United Kingdom for most of the post-war period, with the Director of the Office of Fair Trading undertaking investigative and enforcement functions, with adjudicative functions vested in either the Restrictive Practices Court (a mix of judges and lay experts) or the Monopolies and Mergers Commission (subject to the ultimate political decision-making authority of the Secretary of State). Israel has also adopted a bifurcated agency model where the Israeli Antitrust Agency investigates potential anticompetitive conduct and makes declarations subject to appeal in non-criminal cases to a specialized Competition Tribunal, comprised of a judge and an expert lay member.

On its face, this model seems designed to achieve a reasonable balance amongst the various values identified earlier in this Article. The model ensures a high level of independence in the performance of the adjudicative function, while ensuring some degree of accountability in the performance of this function through the judicial appeal process. It also appears designed to balance expertise and detachment in the composition of the Tribunal. The Tribunal's proceedings are transparent, although some reasonable degree of confidentiality of proprietary business information is ensured through *in camera*

introduction of such evidence. The model may also be designed to provide a reasonable balance between administrative efficiency and due process values in that the Canadian Competition Tribunal's constituting act provides that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit,"<sup>11</sup> while the presence of judicial members on the Tribunal is likely to ensure appropriate attention to due process considerations. One might also expect such a Tribunal—with mixed judicial and non-judicial membership—to strike a reasonable balance between predictability and flexibility.

In fact, the experience of the Competition Tribunal since its creation in 1986 has, in many respects, proven otherwise. Over the intervening twenty-three years, the Tribunal has heard and decided a case on the merits in only four contested merger cases and five contested abuse of dominance/exclusive dealing/tying cases despite the fact that, in many of the intervening years, the Bureau has examined several hundred mergers per year.<sup>12</sup> Over ninety-nine percent of all mergers notified to the Bureau are resolved within the Bureau through approval, modification, undertakings, or abandonment.<sup>13</sup> It is clear from these data that the Competition Tribunal has become a minor institutional player in the competition policy process relative to the Competition Bureau; this is contrary to the expectations of many participants in the reform process, where it was widely assumed that the Tribunal would become the central locus of authoritative expertise in the interpretation or application of the reviewable practices provisions of the Competition Act, at least in more difficult cases.

A large part of the explanation for this, as we argue in our earlier paper, is that the resulting costs, delays, and uncertainty involved in Tribunal proceedings have induced firms and the Commissioner to substitute the locus of decision-making, even in difficult cases, away from the Tribunal and towards the Bureau where process values, such as transparency, accountability, and reasoned public decision-making, are much diminished. This substitution effect has turned the Bureau into a *de facto* integrated competition agency, performing investigative, enforcement, and adjudicative functions. Moreover, the prominent role played by the federal court trial division judges on the Tribunal (with exclusive jurisdiction over questions of law) has encouraged federal appellate judges to regard the Tribunal as little more than a regular court

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11. Competition Tribunal Act, R.S.C., ch. 19, § 9(2) (1985) (Can.).

12. Trebilcock & Iacobucci, *supra* note 6, at 378.

13. *Id.*



of first instance. The appellate judges feel relatively unconstrained (non-deferential) in overruling its decisions and substituting their own (non-expert) judgments on the merits.

The contested merger cases are instructive in revealing the judicialization of the Competition Tribunal's proceedings. These cases typically involve many days of hearings, voluminous documentary evidence, many industry and expert witnesses, and a highly adversarial process. The average time frame from the notice of application to the Tribunal by the Commissioner to the Tribunal's decision (including that on remedies) is almost twenty months in fully-contested merger cases and about twenty-seven months from initial notification of the merger to the Bureau.<sup>14</sup>

### *C. Integrated Agency Model*

With respect to the integrated agency model, a specialized competition agency undertakes investigative, enforcement, and adjudicative functions. Probably the best-known examples of such an agency are the U.S. Federal Trade Commission (FTC) and the Competition Directorate of the European Commission (CDEC). Under the FTC model, many cases are taken to an Administrative Law Judge (ALJ) within the FTC from whom appeals lie to five commissioners sitting as a panel; however, the FTC will take some matters, such as applications for injunctive relief, to the general courts. In Europe, the CDEC investigates and initially adjudicates competition questions subject to approval of the Commission. EU Commissioners, however, have little day-to-day involvement with these questions. Parties have a right of appeal to the Court of First Instance and then to the European Court of Justice. Beyond the competition law context, such integrated agencies are common in a variety of other fields, including securities commissions in both Canada and the United States.

With respect to the advantages of this model, it may yield higher levels of expertise in that agency staff and commissioners are involved in all aspects of the administration of competition laws on a day-to-day basis. Due to this involvement, the model is likely to yield higher levels of expertise than the bifurcated agency model, where the formal adjudicative agency addresses episodically only a small fraction of all competition law matters which result in formal proceedings.<sup>15</sup> This expertise not only assists in adjudication but also in policy-making, perhaps through the promulgation of guidelines. In addition, because

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14. *Id.* at 375.

15. *Id.*

most integrated agencies are headed by multi-member commissions, this arguably yields both higher levels of accountability and more consistency and continuity of decision-making. Integrated agencies, in part because of higher levels of expertise, may also have advantages in terms of administrative efficiency (at least as reflected in the relatively expeditious decision-making process in merger review before the CDEC—typically five months from notification to decision).

With respect to the disadvantages of the integrated agency model, the principal disadvantage is the reality—or at least perception—of bias by decision-makers within such an agency in undertaking its formal adjudicative functions. This is in large part because of the actual potential of involvement in prior investigative and enforcement decisions. This has been a concern with respect to the FTC, where Commissioners must vote on the initiation of formal enforcement proceedings and then subsequently adjudicate with respect to the same proceedings (although ALJs are perceived to be more independent of complaint counsel than the hearing examiners whom they replaced). This has also been a widespread criticism of the CDEC model, although the recent separation of the roles of case-handler and hearing examiner and a more proactive role by the Court of First Instance in judicial appeals in recent cases may have mitigated this concern.

The Jamaican Court of Appeal has recently held that the Jamaican integrated agency model violates principles of natural justice.<sup>16</sup> In order to allay this concern, if only partially, the Ontario Securities Commission ensures that Commissioners involved in authorizing initial proceedings are not involved in their adjudication. Another potential disadvantage of the integrated model is that administrative efficiency may come at some cost in terms of due process values, at least in the relatively informal administrative or inquisitorial model of decision-making employed by the CDEC.<sup>17</sup> To the extent that these concerns are addressed within a single agency by moving to a more adversarial model, as the FTC has done, the advantages of administrative efficiency of the integrated model relative to the bifurcated agency model are sharply diminished.

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16. INT'L COMPETITION NETWORK, COMPETITION POLICY IMPLEMENTATION WORKING GROUP, LESSONS TO BE LEARNT FROM THE EXPERIENCE OF YOUNG COMPETITION AGENCIES 11 [hereinafter ICN, LESSONS], presented at the Fifth Annual Conference, Cape Town, S. Afr. (May 3–5, 2006).

17. David Gerber, *Two Models of Competition Law*, in *COMPARATIVE COMPETITION LAW: APPROACHING AN INTERNATIONAL SYSTEM OF ANTITRUST LAW* 113–15 (Hanns Ullrich ed., 1998).

#### IV. THE SCOPE OF A COMPETITION AGENCY'S MANDATE

A number of important and difficult institutional design issues arise in defining a competition agency's mandate. First, it could be vested with functions beyond the area of competition policy, such as consumer protection (e.g., the Canadian Competition Bureau and the U.S. FTC); with price regulation functions with respect to some industries (e.g., the Australian Competition and Consumer Commission); with administration of intellectual property laws; with review of and enforcement of restrictions on foreign investment in some sectors; with protection or promotion of local employment or indigenous small and medium-sized businesses (e.g., the Black Economic Empowerment provisions in South African competition law); or with a more amorphous public interest mandate that ranges well beyond consumer welfare and efficiency considerations. Many of these functions are likely to be antithetical to promoting competitive markets. They are also likely to carry serious risks of deflecting the agency from an unambiguous commitment to this policy goal and to complicate and potentially compromise accountability for its performance against a clear set of policy goals.

Second, if these risks of mandate diffusion or ambiguity are sought to be mitigated by vesting these various functions in other agencies, a new set of problems arises in managing institutional interdependencies and cooperation effectively. This has proven to be a particularly acute problem in Canada with respect to regulated industries, especially federally regulated industries such as telecommunications, broadcasting, banks, airlines, and railways, where sector-specific regulators have extensive jurisdiction (often subject to Ministerial oversight or override).<sup>18</sup> While the Competition Bureau's jurisdiction may be concurrent in some respects (e.g., merger review), in other respects this turns on the extent to which the specialized sector-specific regulator has chosen to forbear from regulating activities in the sector in question on the grounds that it considers competitive forces to be a sufficient discipline. Especially in large national network infrastructure industries where sector-specific regulation, including merger review, is often subject to Ministerial or Cabinet appeal or override in many jurisdictions (including Canada), there will also be issues of whether the competition agency's decisions in these sectors should be subject to similar political appeal or oversight.

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18. See Trebilcock & Iacobucci, *supra* note 6, at 380 (“[W]here the Commissioner of Competition is mandated to provide a competitive assessment of proposed mergers . . . the Competition Tribunal has been excluded from any role in merger review . . .”).

## V. SPECIAL CHALLENGES FACING NEW COMPETITION AGENCIES IN TRANSITION OR DEVELOPING ECONOMIES

About sixty countries have competition agencies that are fifteen years or younger in age—mainly in transition or developing economies.<sup>19</sup> The World Bank reports that a 2000 survey found that, on average, competition authorities in industrial countries are forty percent more effective than competition authorities in developing countries.<sup>20</sup> In recent surveys or evaluations of the experience of such agencies by the Competition Policy Implementation Working Group of the International Competition Network<sup>21</sup> and the International Development Research Centre (Ottawa),<sup>22</sup> a number of challenges were identified. These challenges are addressed in turn below.

First, many countries have borrowed heavily from developed countries in designing their respective laws, and the legislative framework does not effectively address the realities of the jurisdiction that these agencies are called upon to regulate. Some statutes fail to address important anticompetitive forms of conduct because of carve-outs or exceptions for industrial policy, political economy, or other reasons. Others are expansive in their scope but fail to establish any set of priorities for the agency consistent with its resources and capabilities. Others do not provide for compulsory ex ante notification of mergers, yet others set notification thresholds so low that agencies are overwhelmed with merger notifications that they are not able effectively to review. In other instances, agencies are not invested with adequate investigative powers to unearth and eliminate anticompetitive conduct or are unable to effectively enforce compulsory disclosure laws and lack powers to grant immunities to facilitate cartel investigations. Finally, in some countries, fines and other penalties are too low to induce effective deterrence or cannot be effectively enforced.

Second, young agencies commonly report a lack of cooperation and

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19. A recent survey and analysis of the competition laws of 102 countries finds mild preliminary support for the claim that competition law has a positive, albeit quite limited, effect on the intensity of competition within a nation. 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, 275 (2007). Much of the impact appears to be due to the strength of enforcement in particular areas rather than the scope of the substantive law, largely through reducing collusive practices. *Id.* The study finds that merger or abuse of dominance law does not seem to enhance competition intensity. *Id.*

20. WORLD BANK, WORLD BANK DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 141 (2002).

21. ICN, LESSONS, *supra* note 16, at 8–38.

22. TAIMOON STEWART ET AL., INT'L DEV. RESEARCH CTR., COMPETITION LAW IN ACTION: EXPERIENCES FROM DEVELOPING COUNTRIES 19–20, 26–31 (2007).

coordination of policy and effort with particular government ministries and other regulatory bodies in their attempt to enforce and promote competition policy. This is partly a result of the recent introduction of competition laws without provisions that address prior conflicting legislation or sectoral regulatory regimes. In some cases, these problems have been mitigated by memoranda of understanding with other agencies as to respective roles and responsibilities.

Third, many agencies in developing countries face major obstacles in dealing with cross-border anticompetitive conduct, especially international cartels, and often lack formal and informal cooperative mechanisms with other countries' authorities with more effective jurisdiction over potential wrongdoers.

Fourth, many agencies responding to the ICN survey indicated challenges relating to the interface between the competition authority and the judiciary. The agencies reported that cases have often taken years to process, partly as a result of a lack of specialized competence of public prosecutors, attorneys, and the local judiciary. An earlier ICN survey<sup>23</sup> of competition agencies in developing and transition economies reported:

The all-but unanimous view expressed is that the judiciary is a major stumbling block in the path of effective competition enforcement—the judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side-streets out of which the substantive matters at issue rarely emerge.

Fifth, many new agencies suffer from extreme financial and human resource constraints that pose major challenges in priority setting. Additionally, such agencies are often plagued by political cronyism that compromises the quality of key appointments. Developing specialized human capital within agencies and complementary educational and professional institutions is a pressing challenge.<sup>24</sup>

Finally, the studies note the lack of a competition culture in many of the jurisdictions in which these new agencies operate. This is reflected in a lack of awareness by the business community, government agencies, non-government agencies, the media, the judiciary, and the general public of the rules of competition law and their overall

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23. INT'L COMPETITION NETWORK, CAPACITY BUILDING AND TECHNICAL ASSISTANCE: BUILDING CREDIBLE COMPETITION AUTHORITIES IN DEVELOPING AND TRANSITION ECONOMIES 35 (2003) [hereinafter ICN, CAPACITY], available at [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org).

24. See Daniel Sokol, *The Development of Human Capital in Latin American Competition Policy*, in COMPETITION LAW AND POLICY IN LATIN AMERICA 13 (Eleanor Fox & Daniel Sokol eds., 2009).

responsibility to ensure that such rules are observed in the interest of competition and overall economic development. Many of these new agencies are operating in economies in transition from command to market economies, with major state-owned enterprises (SOEs) or only recently privatized SOEs—often operating in highly concentrated sectors. Furthermore, many developing countries struggle with long histories of state-led development policies, including import substitution policies that severely restrict import competition and foreign investment, extensive SOEs and highly concentrated economic sectors often subject to extensive price, entry, and exit regulation. This implies that both within and outside government there are substantial vested interests in policies that are antithetical to effective competition.<sup>25</sup> An earlier ICN report concluded:

In the end, we have been persuaded that the over-arching challenge confronting competition authorities in developing and transition countries relates to their stature and standing within the ranks of key stakeholders or interest groups, as well as the public at large. In other words, all struggle to make themselves heard and it is this that constitutes the gravest challenge confronting competition authorities in these countries.<sup>26</sup>

Many of the challenges associated with a lack of a competition culture have been insightfully analyzed by William Kovacic in several papers<sup>27</sup> and by Michal Gal.<sup>28</sup> Kovacic, based on extensive experience

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25. See Ignacio de León, *A Market Process Analysis of Latin American Competition Policy 5* (Apr. 22, 2001), available at <http://ssrn.com/abstract=258959> (“The pervasive involvement of Latin governments in running economic affairs soon enticed them to erect all sorts of barriers to competition and trade.”).

26. ICN, *CAPACITY*, *supra* note 23, at 74.

27. See generally William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT’L L. & POL’Y 437 (1996) (discussing difficulties of public officials in implementing competition policy systems); William E. Kovacic, *Developing and Implementing Competitions and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197 (1995) (discussing the effect of antitrust and consumer protection systems in promoting the development of free markets in transition economies); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT’L L. 403 (1997) (analyzing strong political opposition, limited legal and economic expertise, and resource austerity as barriers to effective competition programs); William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy in Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265 (2001) [hereinafter Kovacic, *Institutional Foundations*] (examining economic law reform in transition economies in light of the development of competition systems).

28. 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* 20–38 (Phillip Brunsick et al. eds., 2004) (analyzing the effects of socio-economic

in advising new competition agencies, focuses particularly on priority-setting given three forms of scarcity—financial, human, and political capital—and argues convincingly that in the initial stages of a new agency’s mandate, it should focus on education, publicity, and advocacy programs, as well as building internal capacity and enhancing the capacity of collateral institutions, such as university research programs, professional associations, sectoral regulators, and the media in their engagement with competition policy issues. In a second phase, Kovacic recommends that a new agency focus on a short list of enforcement priorities, such as the following: eliminating hardcore cartels; monitoring barriers to new business entry; studying strategic bottlenecks to competition in terms of access to key infrastructure; preserving the benefits of recent privatization initiatives; eliminating collusive schemes directed at public procurement; barring the continuation of inter-firm relationships that may have flourished during earlier periods of central planning; addressing complex and arbitrary taxation systems, policing anti-competitive forms of price controls, and restrictive labor laws.

One striking feature of Kovacic’s list of enforcement priorities is that many challenges facing new competition agencies in transition or developing economies are the legacy of the role of the state in planned economies. The World Bank also notes that in developing countries the main institutional barriers to competition are government regulations on entry and exit of firms.<sup>29</sup> As Gal points out,<sup>30</sup> this raises severe political economy problems for new competition agencies with limited capacity and a shallow and fragile political base with diffuse beneficiaries—in contrast to the typically more concentrated beneficiaries of the status quo—in confronting anti-competitive policies that find their ultimate genesis in the state that created these agencies. Unlike competition agencies in developed countries, new competition agencies in transition and developing economies often find themselves in actual or potential conflict with other agencies of government, and the vested private sector interests that these agencies have created—in effect, government at war with itself—whereas in developed economies competition agencies are primarily concerned with purely private sector conduct. Thus, as a recent review of competition law in developing countries by

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ideology, institutional and organizational conditions, and political economy conditions on competition law in developing countries).

29. WORLD BANK, *supra* note 20, at 135.

30. See Gal, *supra* note 28, at 30 (“[T]hose who make the choices underlying public policies do not always have the motivations to adopt socially desirable policies.”).

the International Development Research Centre (Canada) points out,<sup>31</sup> new agencies face the daunting and politically-fraught challenge of establishing both an intellectual and political constituency for their activities in an often hostile or at least skeptical environment, facing ever-present risks from vested interests of regulatory capture in the framing of their legislation (carve-outs or exceptions for economically and politically influential sectors) or in the efficacy of their enforcement efforts.

Relating these challenges back to institutional structure, a 2003 ICN report notes some tension in the structural implications of the advocacy and enforcement roles of the agencies:

If enforcement is the most important goal that the authorities are pursuing, then the institutional structure should favour predictability and fairness of decision-making, or, as it is commonly referred to, independence. On the other hand, if competition-oriented reforms are the most important policy objectives, then the institutional structure must allow for the greatest possible influence with the policymakers, thus providing expertise for the political debate.<sup>32</sup>

As discussed in Part II, there will always be these kinds of tradeoffs in choosing an institutional model. In the context of developing countries, the weights assigned to competing considerations are likely different from those in the developed antitrust world. In particular, in our view, the dangers associated with a lack of expertise are acute for new antitrust regimes. For this reason, we tend to favor the integrated model, where investigators and adjudicators are drawn from the same talent pool. We recognize the concerns about independence that follow from this model, but view it as the preferable alternative. In the early years of an antitrust regime, human capital in the sector will be thin. Adopting an integrated model allows enforcers and adjudicators to move more quickly up the learning curve than the other models, in which adjudicators will have only sporadic contact with antitrust policy. It is better to have potentially biased experts than to have independent, but uninformed, adjudicators.

Experience in Canada is instructive. When antitrust law was modernized in 1986, a bifurcated agency model was adopted. As noted above, practice appears to have reached an equilibrium in which the adjudicators are relegated to a secondary role at best. This is self-reinforcing: if the adjudicative agency, the Competition Tribunal, does not hear cases, and its members are otherwise not engaged with current

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31. STEWART ET AL., *supra* note 22, at 33–34.

32. ICN, CAPACITY, *supra* note 23, at 30.



antitrust policy, then there is no opportunity for it to develop expertise, and the parties will seek to avoid hearings before it, all else equal. An integrated agency, on the other hand, would facilitate the development of human capital by adjudicators who also serve in enforcement roles. The possible sacrifice of some independence associated with the integrated model may be warranted in new antitrust regimes in order to encourage the development of expertise.

## VI. CONCLUSION

We are only beginning to come to terms with how key institutional design issues—values, structure, and mandate—in the competition policy area are likely to impact substantive policy outcomes. But it is obviously the case that no single institutional model of a competition agency will be optimal for all countries, developed and developing, given particularities of history, initial conditions, institutional traditions, and political economy considerations.<sup>33</sup> Efforts at international harmonization or convergence of substantive competition law face a host of obstacles, both practical and principled.<sup>34</sup> The importance of locally optimal institutions reinforces the importance of locally optimal substantive law, rendering an extensive international harmonization project even more impractical and undesirable.

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33. See *supra* note 7 and accompanying text (noting the need for institutional flexibility as governments evolve). See also Kovacic, *Institutional Foundations*, *supra* note 27, at 405 (discussing obstacles to implementation of effective competition programs). See generally Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341 (2009) (discussing path dependence theory in the context of institutional reform).

34. For various perspectives on the international harmonization of competition laws, see *COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY* (Richard A. Epstein & Michael S. Greve eds., 2004). For arguments in support of a relatively conservative approach to international harmonization initiatives, see Michael Trebilcock & Edward Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, in *COMPETITION LAWS IN CONFLICT*, *supra*, at 152 (arguing that the extraterritorial application of domestic antitrust law can be desirable but requires certain organizing principles). See generally Michael Trebilcock, *Trade Liberalization, Regulatory Diversity, and Political Sovereignty*, in *SUSTAINABILITY, CIVIL SOCIETY, AND INTERNATIONAL GOVERNANCE* (John Kirton & Peter Hajnal eds., 2006) (discussing factors traditionally thought to be outside trade policy and their effect on non-tariff barriers to trade); Michael Trebilcock & Robert Howse, *A Cautious View of International Harmonization: Implications from Breton's Theory of Competitive Governments*, in *COMPETITION AND STRUCTURE: THE POLITICAL ECONOMY OF COLLECTIVE DECISIONS* (Gianluigi Galeotti, Pierre Salmon & Ronald Wintrobe eds., 2000) (critiquing international harmonization for eliminating the benefits of competition within and between governments).

