O. Abstract

In this preliminary thought paper, I develop the idea of substitution antitrust. By this I mean that a developed country's antitrust agencies are substituted for those of an underdeveloped country. Essentially, the developed country would take over regulation of the underdeveloped country's market. I am not aware that this idea has been seriously discussed, but I have not done the research and would not be surprised if I am missing something. Thus, I welcome especially suggestions as to where to look, either in theoretical or in empirical literature and examples. In addition, of course, I am interested in any comments regarding the viability of the idea, and of course the concrete factors and suggestions I make. All of this is very preliminary at this stage.

I. Should Underdeveloped Countries Have Antitrust Laws and Agencies?

The Two Questions Involved

Should small and underdeveloped countries have antitrust laws and agencies to enforce them? This question combines two questions that are logically distinct, and their disentangling may potentially open up new ways of thinking about this question.

The first of these questions is whether underdeveloped countries would benefit from the existence of antitrust regulation. The answer to this question is almost certainly yes. It may be that different countries would benefit from different antitrust laws, and it may well be that many types of conduct should not be regulated in underdeveloped countries even if they are regulated in developed countries, but it is hard to think (at least presuming that antitrust law is not generally bad) that some countries would not benefit from antitrust regulation. A strong counterargument, namely that antitrust enforcement might be too costly to be worthwhile, appears to have been refuted in the literature—although costs do play a role and do also in my argument later.

The second of these questions is who should be charged with the development and enforcement of antitrust law. We normally think that the answer is obvious: the underdeveloped country itself. That we think of this answer as obvious has, I think, a number of reasons. The first of these is sovereignty, including economic sovereignty. Politically, we think that sovereignty entails mastery of one’s own markets. It would be
hegemonialist, even colonialist, for a developed country to take over regulation of an underdeveloped country. Legally, the competence to regulate markets rests with a country itself, and especially in antitrust law, this competence is currently turning more and more into an exclusive one. A second reason, this one more psychological, is that we tend to think of markets and economies as national, and therefore think of antitrust issues also as national. If this is so, it may appear that only the affected state itself is really interested in regulation, and only that state seems justified in making decisions. And a third reason may simply be that the answer has never been put into question (though I would be very interested in learning whether I am wrong on this).

II. Existing Cases of Substitution

1) Lawmaking

If we look more closely, we realize that the actual answer to the second question is already not always so clear. As to the drafting of antitrust laws, the underdeveloped country’s own preferences are often not the most important factor, or even a factor at all. This is so for at least four reasons: First, underdeveloped countries often do not even develop such preferences, for lack of democratic representation or for lack of economic expertise. Second, legal and economic advisers often bring with them their own preferences, even if they aspire to do otherwise. Third, countries have incentives to match their antitrust laws to a global consensus in order to assure investors. And fourth, lending institutions like IMF and World Bank often make loans conditional on the adoption of not just any antitrust laws but actually fairly specific variants of such antitrust law. In fact, even if an antitrust law is formally a sovereign legislative act of an underdeveloped country, substantively it often reflects global and foreign preferences more than domestic preferences.

2) Enforcement

a) Aid

And as to the enforcement question, while it is true that formal enforcement is in most cases done by the underdeveloped country’s own agencies, this sometimes so only in form and sometimes not so at all. It is so only in form where development aid comes into play. Development aid can consist of expertise and it can consist of money. Expertise aid may tend to substitute the donor’s policy preferences for those of the underdeveloped country. This is not necessarily a bad thing—a sovereign is of course justified to follow the advice of others—but it limits the full autonomy of that decision. Money aid may not come with the same constraints, but money will rarely be given without some expectations, and so—as in other areas—the donor of money will come to own, to some extent, the policy decisions that are made.

b) Regulation by a Nonmarket Country

i) Positive Comity

And sometimes enforcement is done by another country altogether. This is so in the case of positive comity, in which countries agree which amongst them takes the lead in investigating and regulating an antitrust violation that concerns both countries. Once a
relative rarity, such positive comity agreement have recently mushroomed, as has—we should think (I have not yet looked for empirics)—their use in practice.

ii) Extraterritorial Regulation

And it is so where a country other than that of the affected market regulates an antitrust violation. There are, under current law, at least two situations in which this may be the case. One is regulation at the place of conduct as opposed to the place of effects (where both places differ). The state of conduct undoubtedly has jurisdiction to regulate. For a long time, many countries viewed this as the only legitimate basis, whereas the effects doctrine was very contentious.

The other situation in which this may happen is where one affected country regulates an antitrust violation with effect not just for its own market but also for other markets. This may seem eccentric and also potentially unjustified, but it happens with some regularity. Merger control quite often has such effects: when the EU bans a certain merger, it is usually impossible for the merger to go through for other markets, even though those other markets did not engage in enforcement, or would even have preferred the merger to go through. Moreover, even in the law of cartels such effects are possible. In its Empagran decision in 2004, the U.S. Supreme Court rejected an interest of the United States (that would have triggered applicability of its laws) to regulate a global cartel insofar as it affected markets outside the United States, but the decision left many questions open.

III. The Idea of Substitution

In my paper, I want to formulate hypotheses towards answering this second question. Concretely, I want to ask: is it conceivably justified, under certain circumstances, for the antitrust agencies of a developed country to substitute for those of an underdeveloped country? And if so, what are the circumstances under which this would be justifiable? At this stage, this research is hypothetical and very much a priori. Although I hope to draw on existing experience, especially with positive comity and with extraterritorial enforcement, I expect many of my findings to be speculative. This is so because the idea of substitution is different from both positive comity and extraterritorial enforcement. Extraterritorial enforcement rests on—indeed, requires—a regulatory interest of the enforcing state. Without such interest, jurisdiction does not exist. Positive comity does not require such an interest of the regulating state, but it does, as far as I am aware, regularly rest on the idea of mutuality and shared labor: countries help each other out. The idea of substitution, by contrast is much more altruistic (at least in the short run) and in this sense much more akin to that of development aid. The idea is that a developed country would take over the enforcement of antitrust law for the benefit and in the interest of an underdeveloped country.

IV. Factors

a) Internationality

In order to determine criteria towards this question I expect a number of factors to matter. The first of these is the degree of internationality of an event. On the one end of this continuum we find purely local antitrust violations. On the other end we find truly global
events—mergers between global competitors, allocations of a global market, global pricefixing. In between these we find international events—those especially in which the place of conduct and the origin of the perpetrators differs from that of the affected market. In essence, I expect to find that the regulation of truly global markets might often justifiably lie with just one country’s agencies, possibly with coordination amongst leading antitrust agencies, but not necessarily requiring a worldwide consensus. The US Supreme Court rejected this idea in Empagran, but based on the counterfactual assumption that the global market of vitamin products could be compartmentalized into several national markets. As for purely domestic markets, there will often be a presumption for local regulation (or non-regulation). This is so even where such regulation could take place more effectively if done by foreign, more experienced, agencies, because agencies of developed countries must be allowed to collect both experience and legitimacy by pursuing their own cases. For cases in between, in particular international cartels, I see good reason for stronger regulation by the state of the place of conduct or the home state of the perpetrators. This is so for a variety of reasons: ease of access and control, responsibility for effects on other states, avoidance of harboring lawbreakers, but also genuine state interests in the regulation of world markets.

b) Size and Complexity

A second criterion is the size and complexity of the event and of the regulated actors. In relatively small and simple cases, domestic agencies of underdeveloped countries can certainly be active. In more complex cases and cases involving strong corporate actors, such agencies may lack the required expertise and means. Here, substitution might become attractive, at least where less intrusive measures, like aid, are not effective.

c) Congruence of Law and Policies

A third criterion is the congruence of laws and policies. Simply speaking, substitution seems much more legitimate where no conflict exists between the enforcing state’s laws and policies and those of the underdeveloped country. Where such conflicts exist (and pertain to the case), substitution is almost necessarily ruled out. The difficult case is the one in which the developing country has not actually developed its own independent laws and policies. In this case, it appears substitution can be justified only insofar as the enforcing state is willing and able to develop policies that are, hypothetically at least, optimally catered to the needs of the underdeveloped country.

V. Normative Considerations

There are some broader normative questions involved. Although I do not yet have a clear picture of what they are, let alone how to answer them, I can list a number.

1) Neocolonialism/Hegemonialism

The first and perhaps most pressing question is that of sovereignty and independence. Substitution may smack like a negation of independence. A developed country making and enforcing economic policies for an underdeveloped country sounds
like neocolonialism. And the idea that a developed country’s agencies expand their reach has a hegemonialist ring to it.

I think these concerns must be taken seriously, but they can be answered. As to the latter, it needs to be said that Western hegemonialism today consist not only, or not even primarily, on the expansion of Western laws—it consists of the expansion of Western economic power. This is clearest where it is Western countries that are engaged in anticompetitive conduct. In this case, an expansion of Western law merely follows the expansion of such economic powers. In offering our law to those injured by the conduct of our corporations, we are not hegemonialist—we merely reestablish the balance between economic freedom for corporations and protection of consumers that we take for granted in our own countries.

This could still be viewed as neocolonialist, but at least ex hypothesi an important difference exists between neocolonialism and substitution. Neocolonialism, like colonialism, depicts a situation in which a developed country exploits an underdeveloped country for its own benefits. Substitution, by contrast, depicts a situation in which a developed country helps an underdeveloped country to succeed. Of course, this is easier in theory than in practice, and much will depend here on the factors described earlier.

2) Lack of Interest

If that first problem was one in which the developed country inserts too much of its own interests into the substitution, the opposite problem is that the developed country may have no such interest at all. Lack of interest can be a problem of resources. Antitrust agencies in developed countries have limited resources and may not want to spend those on activities that do not benefit their markets. Moreover, it can become a legal problem—without interest, a country may not be legitimizied to regulate extraterritorially.

I believe both problems can be overcome. As to the resource problem, this may not be so grave: if we give development aid, we may also be willing to provide substitution. In fact, underlying both development aid and substitution is a common idea that helping global markets is in fact a genuine interest also of developed countries. As to the legal problem, an argument can be made that jurisdiction should be confined only where an actual conflict of interests exists. Where the underdeveloped country has no diverging policy, perhaps no policy at all, such a conflict is absent. (This is speculative on a legal basis.

3) Lack of Expertise/Altruism

Arguably the biggest problem is, ironically, lack of expertise, paired with lack of altruism. Agencies in developed economies have insufficient expertise on the needs of underdeveloped countries. And they may have insufficient incentive to have those countries’ own interests in mind. I see this as a real problem, and one that cannot be answered in a purely speculative way; it would require actual empirical research. However, I do not think this problem is insurmountable, either. Such lack of expertise and altruism might still, in a given case, be outweighed by the benefits of substitution. Moreover, expertise can be gained, and agencies can be aided by experts from the underdeveloped country.