The Emergence of Due Process following the Growth of International Antitrust Enforcement

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Abstract

The phenomenal spread of antitrust law to developing nations has spurred discussion of whether and how poor countries can benefit from it. Proponents tout antitrust law’s potential to foster free and competitive market economies. But one of the most significant contributions of competition law’s spread to developing legal systems, as well as in developed countries, is less direct: the international proliferation of antitrust law has been quietly strengthening legal institutions in developing countries and hasten the spread of due process.

Developing nations adopt antitrust law in the hope of stimulating growth. And because fair legal systems attract investment, developing nations are also motivated to ensure that their competition systems respect property and due process rights. Antitrust cases have already generated landmark due process opinions that reinforce fairness concepts in other areas of law involving government enforcement. As recent litigation in developed and in developing nations concerning fairness in competition proceedings indicates, antitrust law will serve a similar function for developing legal systems.

The spread of antitrust laws to developing nations may contribute to the advancement of due process in other areas of these nations’ legal systems and thereby strengthen the rule of law. Institutional-economics theory holds that this subtle benefit promises significant rewards for developing nations.

* The views expressed herein are strictly made for academic purposes, and do not necessarily reflect the views of White & Case LLP, its partners, or its clients. The authors thank Matthew P. Bernstein for his assistance.
Introduction

Although modern antitrust laws date back as far as 125 years, the last 30 years have witnessed a remarkable spread of competition laws throughout the globe. Many of these antitrust regimes were first enacted in a single decade, the 1990s, and a majority of antitrust newcomers are developing countries. Today, over 125 agencies in over 100 countries enforce competition laws. Developing nations have been attracted to antitrust law’s ability to stimulate and enable economic growth when it is informed by sound economic principles.

The phenomenal spread of antitrust law to developing nations has spurred discussion of whether and how poor countries can benefit from it. Proponents tout antitrust law’s ability to foster free and competitive markets, or even to reduce levels of perceived corruption.

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5 For example, the newly enacted Philippine Competition Act was intended to increase internal and foreign investment. See Mabini Dialogue Focuses on Philippine Competition Law, FOREIGN SER. INST. (Oct. 6, 2015, 12:47 A.M.), http://www.fsi.gov.ph/mabini-dialogue-focuses-on-philippine-competition-law/ (summarizing remarks of Geronimo L. Sy, Assistant Secretary of the Philippines Office for Competition, stating that the Act “significantly supports the Philippine government’s economic agenda of achieving inclusive growth”).

6 Some studies suggest that introduction of sound competition law principles results in notable positive economic effects in developing nations. For example, some studies show that competition law adoption may free up imports needed by developing nations lacking the means to produce certain goods on their own; it can increase the amount of internal investment by as much as four percentage points; and it has the potential to aid the free market in efficiently allocating resources. See Gutmann & Voigt, *supra* note 2, at 16 (“[I]ntroduction
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among developing populations. But this article suggests that one of the most significant contributions of competition law’s spread to developing legal systems is less direct: the international proliferation of antitrust law has the potential to strengthen institutions in developing countries and hasten the spread of due process. Viewed from the perspective of institutional economics—a theory associated with the scholarship of Douglass North and Frank Cross—this subtle benefit promises significant rewards for developing nations. Part I demonstrates that success in closing the gap between poor and rich nations does not depend upon geographic location, better distribution of natural resources, or trade flows. Rather, the presence of sound legal institutions is key.

The global spread of antitrust law has the potential to strengthen developing legal institutions for two reasons.

First, as shown in subpart II.A, there is an active movement to ensure that antitrust laws and procedures respect fundamental due process rights. A significant focus of this effort is on motivating developing nations to enact sufficient procedural safeguards. The arguments for these protections are based in sound economics. Firms are more likely to invest in economies that employ fair rules, that have legal constitutions that protect due process rights, and that respect private property. Several developing nations have acted upon these economic incentives and have introduced due process protections into their competition regimes.

And second, subpart II.B argues that antitrust litigation pioneering fairness concepts may spread to other legal institutions in the country. As markets globalize, developing nations

of competition legislation is followed by increases in overall investment between three and four percentage points.”); see also Chadwick Teo, Trade Ministry of Trade & Indus. (Sing.), Competition Policy and Economic Growth, Paper Presented at the ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area 4-5 (Mar. 4-8, 2003), https://www.jftc.go.jp/eacpf/04/singapore_p.pdf (explaining particular benefits of sound competition law for developing nations). Indeed, one study concluded that an “antitrust institution that exists for ten years increases the GDP per capita by 2.6 percent.” See Petersen, supra note 3, at 19. Of course, cross-country comparisons are difficult, and some research has come to contrary conclusions, as discussed below.

7 See Gutmann & Voigt, supra note 2, at 16.
9 See Part I, infra (discussing institutional-economics theory).
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will pursue antitrust enforcement actions against sophisticated parties with the resources and will to advocate for fair proceedings. Recent judicial opinions from the United States, European states, and Australia demonstrate that, when those countries’ judicial supervision has been effectively triggered, antitrust cases give rise to developments in fundamental rights such as privacy and due process that apply outside the antitrust context. When legal institutions are in place to protect property rights and due process, the spread of antitrust laws and the exercise of enforcement powers may spread due process protections to other areas of the country’s legal system and, thereby, strengthen the rule of law.

This article takes the long-term optimistic view of the effect that antitrust law’s spread to the developing world will have on the advancement of due process rights. But it also notes that several established competition regimes are rife with procedural shortcomings that render these systems inadequate to protect rights of the accused. And the trend of ever-rising fines and criminal sanctions demonstrates the growing need to address these shortcomings.10

In their pursuit of economic growth through sound competition law, most antitrust newcomers have adopted regimes that resemble those of the United States or European Union.11 However, adopting substantive antitrust enforcement regimes modeled after the American or European systems is not in and of itself a sufficient guarantee of procedural due process protections. Even these far more developed competition systems contain lamentable due process failures. Inadequate procedural protections undermine the strength of any antitrust institution and can threaten to counteract the economic benefits that nations hope to achieve through competition law. Part III shows that, although strong legal

10 See Christopher B. Hockett, Antitrust and Due Process, 28 ANTITRUST 1, 3 (2014) (“Penalties for competition infractions have also increased dramatically. . . . Jurisdictions outside the U.S. and EU are following the upward trend in penalties for competition violations, with India assessing a $1.1 billion fine in 2012 against a cement cartel (albeit a domestic one), and Brazil, Japan, Korea, South Africa, Taiwan, and Turkey each assessing fines in excess of $100 million on individual cartels in 2013, most of which set new records.”).

11 See Maher M. Dabbah, Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime, 33 WORLD COMPETITION 457, 461 (2010) (noting that “the vast majority” of new competition laws enacted by developing nations are modelled on “competition rules and standards” designed by UNCTAD or on the EU or US laws).
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Institutions contribute to economic growth, weak institutions hamper economic growth. Indeed, nations that fail to lay a strong institutional foundation for economic growth are often overtaken by those that do.

Whether antitrust law’s global spread will positively impact economic growth and development depends on a number of factors. Antitrust laws and enforcement policy must be based on sound economics; antitrust law has the potential to damage a nation’s economic growth and global competitiveness if it is written or interpreted improperly. The agencies that enforce competition law must be competent, well-funded, and free of parochialism, cronyism, and nationalism. And the antitrust adjudicator must be independent from the national competition authority, free from corruption, and must possess tools for effective judicial review and fact-finding. Accused should have notice of charges, access to the evidence, and the ability to summon witnesses and to cross-examine government witnesses.

This article will highlight some contemporary due process issues and how these deficiencies impede economic growth, bearing in mind that a sound competition regime may take years to form; after all, the United States’ antitrust laws have developed over a hundred of years of litigation and gray areas still remain. The article will then offer some suggestions for reform. The Appendix provides a list of key due process rights that must be protected in antitrust enforcement regimes.

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12 Cross, supra note 8, at 1739 (“It is now generally recognized that government institutions and the law are relevant to increasing economic growth.”).
13 See Hockett, supra note 10, at 4 (“[T]here may be some jurisdictions in which competition law is . . . invoked as a means to pursue other goals—such as protecting domestic industries, pursuing national industrial policies, or advancing perceived national security interests.”); Eleanor M. Fox & Michael J. Trebilcock, The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project 16 (N.Y.U. L. & Econ. Working Papers, Paper 304, 2012), http://lsr.nellco.org/nyu_lwp/304?utm_source=lsr.nellco.org%2Fnyu_lwp%2F304&utm_medium=PDF&utm_campaign=PDFCoverPages (“Shortfalls in [competition agency] expertise are especially likely in younger and resource-starved jurisdictions. . . . Some jurisdictions suffer from lack of reasoned decision-making, lack of publication of decisions, and lack of independence from political interference at some or all stages—investigative, enforcement, and adjudicative.”).
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I. Institutional Economics: Due Process and Respect for Property Rights

The problem of wealth disparities between poor and rich countries has long perplexed economists. Are human-capital issues like education and training the issue? Is wealth mostly a function of a country’s access to foreign markets? Or do endowments, such as a country’s natural resources, make the difference? And what role does law play? Two economic models, neoclassical economics and institutional economics, have attempted to provide answers.

The neoclassical economics model predicts that developing nations, which are often labor-rich, will grow faster than developed nations, which are capital-rich but face diminishing marginal returns. Neoclassical economics hypothesizes that capital will flow from rich to poor countries through a series of mutually beneficial transactions and that the natural force of the “invisible hand” will eventually force worldwide growth rates to equalize. From the neoclassical perspective, the wealth gap is only temporary and may be narrowed with more trade; laws are less important because the economy “will correct initially incorrect models, punish deviant behavior, and lead surviving players to the correct models.”

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15 See Matthew A. Cole & Eric Neumayer, The Pitfalls of Convergence Analysis: Is the Income Gap Really Widening? 2 (LSE RESEARCH Online Working Paper, 2003), http://eprints.lse.ac.uk/archive/00000603 (discussing the neoclassical model’s assumptions); Stephen Knack & Phillip Keefer, Why Don’t Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation, 35 ECON. INQUIRY 590, 590-91 (1997) (“Since 1952 scholars have advanced the hypothesis that poorer countries should grow faster than richer ones. Some have derived this hypothesis from the assumption of diminishing returns to physical capital, which should cause more advanced countries to grow more slowly than less advanced countries”).

16 Cross, supra note 8, at 1740 n.9 (citing Michael J. Trebilcock, What Makes Poor Countries Poor? The Role of Institutional Capital in Economic Development, in THE LAW AND ECONOMICS OF DEVELOPMENT 16 (Edgrado Buscaglia, William Ratliff & Robert Cooter eds., 1997)) (noting that the neoclassical theory predicts that “levels of economic development should steadily converge among nations, ultimately equalizing wealth, at least roughly”).

17 NORTH, supra note 8, at 16. See also Werner Lachmann, The Development Dimension of Competition Law and Policy 8 (UNCTAD Ser. on Issues in Competition L. & Pol’y, 1999), http://unctad.org/en/Docs/poitcdclpm9.en.pdf (“Most developing countries operate inside a production possibility curve which is backward in terms of technology. Since technical innovation in the developed nations is pushing the technological frontier outward at a rapid rate, the gap with developing countries is widening over time.”).
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Unfortunately, “[g]reat and persistent disparities in wealth remain, and countries have often shown a divergence . . . of economic welfare.”18 Another camp of economists devised the institutional-economics model in response. “The fundamental theory of institutional economics is straightforward. It begins with the assumption that individuals will invest for economic growth when they can capture the returns from their investments. . . . To achieve optimality requires the existence of ‘[p]erfectly specified and costlessly enforced property rights.’”19 Institutional economics accepts the neoclassical model’s premise that people will invest when doing so is in their interest,20 but recognizes that, “in the real world . . . carrying out a transaction is associated with costs” that get in the way of optimally efficient exchanges. 21 Transaction costs, generally understood as costs actually or potentially incurred in achieving the transaction,22 can arise from various sources including distrust, information deficits, the absence of the rule of law, and, especially, uncertainty.23

Because transaction costs are inherent, optimally efficient conditions often can only be achieved with the help of institutions—broadly defined “as a set of humanly devised behavioral rules that govern and shape the interactions of human beings . . . by helping them to form expectations of what other people will do.”24 It is the protection of property rights through institutions that has led to investment and economic growth. “The ‘establishment

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18 Cross, supra note 8, at 1741 (alteration in original). See also Knack & Keefer, supra note 15, at 590 (noting “the persistence, and even growth, of the gap between the world’s rich and poor nations”).
19 Cross, supra note 8, at 1741. See also id. at 1742 (“Another Nobel laureate, Mancur Olson, has identified ‘the conditions necessary for economic success’ as including ‘secure and well-defined rights for all to private property and impartial enforcement of contracts.’”)
20 Id. at 1741.
23 See Oliver E. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations, 22 J.L. & ECON. 233, 239, 252-54 (1979) (listing “uncertainty” as among the “critical dimensions for characterizing transactions,” and observing that uncertainty causes firms to seek a governance structure or to withdraw from the market through a process of vertical integration).
24 Dani Rodrik, Institutions for High-quality Growth: What They are and How to Acquire Them 2 (Nat’l Bureau of Econ. Research, Working Paper 7540, 2000); see also Cross, supra note 8, at 1741 (“Throughout human history, ‘growth has been more exceptional than stagnation or decline,’ which suggests that the circumstances enabling growth are not inevitable or natural but require thought and effort.” (footnote omitted) (quoting NORTH, supra note 8, at 7)).
of secure and stable property rights’ was a ‘key element in the rise of the West and the onset of modern economic growth.’”

Institutions take several forms, including an independent judiciary and formal legal rights such as the rights to property and to due process of law. Institutional economists theorize that, “institutional capital may be a more important determinant of economic development than financial capital, physical capital, human capital, or technological capital.” And nations that do not lay strong institutional groundworks ahead of time cannot take full advantage of opportunities for economic growth when they arise.

The World Bank has embarked upon a major research program on the importance of the rule of law, including a private sector survey of over 3800 enterprises in 73 countries. They produced a general government credibility indicator for variables such as political instability, the security of persons and property, the predictability of judicial enforcement, and corruption. When the credibility indicator was disaggregated into its components, the most robust predictor of growth was the predictability of judicial enforcement, which was significant in every regression. The rule of law appears to be particularly important to entrepreneurial enterprises.

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25 Cross, supra note 8, at 1742. See also id. (“North’s tour de force through history begins in the ancient world but keys on the Industrial Revolution . . . . England and the Netherlands surpassed France and Spain during the seventeenth century, in large part because of the effective recognition of property rights.”).

26 See Christopher Clague, Introduction to Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries 1 (Christopher Clague ed., 1997) (discussing the broad definition of “institution”); Rodrik, supra note 24, at 5 (listing “regulatory institutions” as important parts of an ideal institutional mix).


28 See Lachmann, supra note 17, at v (“Historical experience, including in countries which are now developed and in newly industrialized countries, has shown that the comparative advantages of today are mostly the results of the successful governmental intervention of yesterday, and that infant industry policies can increase efficiency and competitiveness.”); Cross, supra note 8, at 1742 (summarizing Douglass North’s historical analysis, which proved that the most successful economies implemented strong institutions prior to the onset of growth).

29 Cross, supra note 8, at 1768-69.
Data support the institutional-economics theory that high-quality legal institutions are the most important determinant of economic growth and demonstrate the theory’s particular relevance for developing nations. After examining three samples of 64, 79, and 137 nations, one study found that “the quality of institutions trump[ed]” other determinants of economic growth, including exposure to foreign trade and geographical location (which is correlated with natural resources and agricultural productivity). The study established that high-quality institutions are “the only positive and significant determinant of income levels.”

Other research found “that when good institutions are absent,” the wealth gap between rich and poor nations widens, and that “[i]n extreme cases, poor countries with institutions that are excessively deficient are found to grow more slowly than wealthy countries, even when other factors, including investments in human and physical capital, are taken into account.” That study concluded that the “poor getting poorer” phenomenon “appears to be a direct consequence of the institutional environment in those countries.”

The economic power of high-quality institutions is well-established; the challenge is in identifying which institutional qualities have positive effects on development. One such quality, which is statistically significant, is fairness. Fair and consistent rules and outcomes incentivize investment by permitting firms to act according to a set of normal expectations. Indeed, because “the perceived fairness of social rules and institutions can increase or decrease welfare in ways that cannot be replicated through the redistribution of

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32 Knack & Keefer, supra note 15, at 591.

33 Id.

34 Id. note 24, at 12 (“Healthy societies have a range of institutions that make . . . colossal coordination failures less likely. The rule of law and a high-quality judiciary . . . are examples of such institutions. What makes these arrangements function as institutions of conflict management is that they entail a double ‘commitment technology’: they warn the potential ‘winners’ of social conflict that their gains will be limited, and assure the ‘losers’ that they will not be expropriated. They tend to increase the incentives for social groups to cooperate by reducing the payoff to socially uncooperative strategies.”).

35 Id.
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money,” the most successful legal institutions feature protections for the rule of law, such as “independent judiciaries, . . . well-defined administrative procedures, [and] transparent decision making.” On the other hand, arbitrary decisions and expropriations are hallmarks of low-quality institutions that create insecurity and transaction costs.

Although the concept of “due process” has many manifestations, including the right to a hearing before a neutral adjudicator and the right to confrontation, its essential purpose is to guarantee fair and consistent treatment. Therefore, while due process protections are an end in and of themselves, they are also a common quality of strong institutions and are vitally important to achieving stable economic growth. The economic underpinnings of particular due process protections are discussed in further detail in Part III.

II. Strengthening Legal Institutions through Creation of Due Process Standards for Antitrust Enforcement

A movement led by organizations of national antitrust agencies to improve due process protections in antitrust law has followed in the wake of the global wave of antitrust enforcement. The movement argues that fair antitrust laws and procedures create more

36 Lee Anne Fennell & Richard H. McAdams, Fairness in Law and Economics: Introduction 3 (Coase-Sandor Inst. L. & Econ., Working Paper No. 704 (2d Series), 2014), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1935&context=public_law_and_legal_theory. See also Bickenbach et al., supra note 21, at 10 (“Antitrust and regulation may add confidence and the expectation of being treated fairly and may thus help contain transaction costs more effectively than private agreements on the basis of contract law and court enforcement alone.”).
37 See Rodrik, supra note 24, at 2 (“A clearly delineated system of property rights, a regulatory apparatus curbing the worst forms of fraud, anti-competitive behavior, and moral hazard, . . . the rule of law and clean government—these are social arrangements that economists usually take for granted, but which are conspicuous by their absence in poor countries.”) (emphasis added)).
38 Knack & Keefer, supra note 15, at 591.
39 See id. at 593-94 (listing, as a measure of institutional quality, the rule of law and constraints on executive power). See also id. at 594 (“Arbitrary administrative decisions undermine the legal bases upon which the security of property and contractual rights in a country rests.”).
40 Paul O’Brien, Krisztian Katona & Randolph Tritell, Procedural Fairness in Competition Investigations: U.S. FTC Practice and Recent Guidance from the International Competition Network, CPI ANTITRUST CHRON., July 2015, at 7 (“Procedural fairness is a necessary and beneficial ingredient of effective competition enforcement. . . . Regardless of the chosen enforcement framework, there are specific investigative practices that can promote transparency and better outcomes.”); U.N. CONF. ON TRADE & DEV [UNCTAD], MODEL LAW ON COMPETITION 69 (2010), available at http://unctad.org/en/Docs/trbpeconf7d8_en.pdf (“[I]t is indispensable . . . that in the process of investigation, the general principles and rules of due process of law . . . be duly observed.”).
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predictable outcomes and, therefore, make an economy more attractive to investment. These safeguards ensure that decisions are founded on law, rather than other considerations, and help to guarantee predictable outcomes. Foreign investment, therefore, is encouraged when a country’s antitrust enforcement regime provides procedural protections during investigations and effective judicial review. Several developing countries, persuaded by these arguments, have enacted safeguards for fair and transparent proceedings.

The first cases challenging antitrust enforcement actions are now beginning to make their way through the domestic courts of these developing countries. As new competition agencies increase their enforcement efforts, as penalties rise, as sophisticated parties enter emerging markets and confront enforcement proceedings, and as defense counsel challenge the status quo, some disputes will inevitably hinge on these due process protections.

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41 ASS’N OF SE. ASIAN NATIONS [ASEAN], ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY 1 (2010), www.asean.org/storage/images/2012/publications/ASEAN%20Regional%20Guidelines%20on%20Competition.pdf (establishing guidelines for competition policy “to help in the process of building stronger economic integration in the region” and stressing that “[b]usinesses engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality, transparency, consistency and non-discriminatory treatment under the law”); INT’L COMPETITION NETWORK [ICN], ICN GUIDANCE ON INVESTIGATIVE PROCESS 1 (2015), http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf (“Effective enforcement tools, procedural safeguards, and consistency of process and procedures within an agency contribute to efficient, effective, accurate and predictable enforcement by competition agencies. The credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency’s investigative process”); ICN, COMPETITION AGENCY TRANSPARENCY PRACTICES 10 (2013), http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf (“[R]espondents recognized a public interest and value in publishing specific agency decisions . . . as a central tool to provide transparency about the agency’s likely enforcement approach to similar facts and more generally”); ICN, INVESTIGATIVE PROCESS PROJECT ISSUES PAPER AND MANDATE 1 (2012), http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf (noting that effective antitrust enforcement relies on “the integrity of the process of conducting competition investigations and how this is perceived”) [hereinafter ICN, INVESTIGATIVE PROCESS PROJECT]; ORG. ECON. CO-OPERATION DEV. [OECD], PROCEDURAL FAIRNESS AND TRANSPARENCY KEY POINTS 23 (2012), http://www.oecd.org/competition/mergers/50235955.pdf (“[T]ransparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority”).


43 See Working Grp., supra note 42, ¶ 11.
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Although these disputes will arise in “antitrust” cases, their impact will not be so limited. Published legal opinions stemming from antitrust cases that advance fundamental rights—especially if those rulings rest on constitutional foundations—may be invoked in myriad other contexts. When the right of privacy against searches is protected in competition cases, that precedent can protect individuals in their own homes. In this way, the due process safeguards developing nations put in place in order to attract foreign investment will eventually help to strengthen other institutions. Even in some countries that have yet to enact sufficient due process protections into their antitrust regimes, parties have cited the movement toward due process to press for more adequate protections.\footnote{44 See infra notes 94–96 and accompanying text (discussing the Botswana Panel Beaters and Sugar Beans cases).} Because quality institutions are the most important determinant of long-term economic growth,\footnote{45 See supra notes 30-34 and accompanying text (reviewing the institutional-economics theory and its empirical support).} this broader benefit of antitrust law’s spread to the developing world should be recognized as one of the most important.

1. The Spread of Antitrust Enforcement Has the Potential to Advance Due Process in Developing Nations

Although significant reform is still needed to ensure that competition proceedings respect the fundamental principle of fairness, efforts to achieve progress on due process protections have met some success. Developing nations, responding to the economic incentives of fair and substantively sound antitrust law, have enacted procedural safeguards into their competition law systems.\footnote{46 Other explanations for the trend towards due process include the obvious efficiency of borrowing from some aspects of an already highly evolved system instead of developing competition policy from the ground up. Some authors also argue that the spread of competition law is due in large part to pressure applied by international organizations. See, e.g., Thomas K. Cheng, Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law, 12 CHI. J. INT’L LAW 433, 460 (2012).} Competition agencies have a natural, institutional self-interest in due process because due process protections provide legitimacy to the agency’s actions.\footnote{47 See Clifford Chance, Early experiences of the new COMESA Competition Regime, BRIEFING NOTE, July 2013, at 1, http://www.cliffordchance.com/briefings/2013/07/early_experiencesofthenewcomesacompetitio.html (Alastair Mordaunt, Director and Chief Executive Officer of the Common Market for Eastern and Southern Africa’s Competition Commission, suggested that, “there is a need for us as a new regional regulator to be accepted, and the only way you can be accepted is to be consistent, to be transparent and to have due process.”); Fox &}

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As former Chairman of the US Federal Trade Commission William Kovacic has written, “An additional dimension of process-oriented institution building is to establish agency policies that ensure that agency employees execute their responsibilities honorably and that the agency is perceived externally as a firm but fair champion of the nation’s competition laws.” Consequently, fairness is “a necessary and beneficial ingredient of effective competition enforcement” that “can promote transparency and better outcomes.”

The following section reviews the progress that countries have made through international and regional organizations to promote due process in antitrust proceedings. It then showcases some developing nations that have enacted fairness guarantees into their competition regimes in an attempt to stimulate investment and economic growth.

A. Efforts of International and Regional Organizations to Advance Due Process

In 2010, ASEAN published its Regional Guidelines on Competition Policy, which noted that a “[s]ound institutional framework and due process are fundamental in ensuring the effective application of competition law” and that “[b]usinesses engaged in the same or similar lines of activity should be subject to the same set of legal principles and standards to ensure fairness, equality, transparency, consistency and non-discriminatory treatment under the law.” It prodded member states to consider common competition related provisions “that effectively address anti-competitive behaviours, [sic] based on principles of transparency [and] due process.” Along these lines, it set forth a detailed eight-part framework for fair and transparent proceedings, and required ASEAN member states to enact a compliant competition law “by 2015.” The Regional Guidelines are addressed to the 10 ASEAN member states: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia,

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Myanmar, the Philippines, Singapore, Thailand, and Vietnam. In December 2015, the Asian Competition Forum held an annual conference devoted to further improving due process and transparency in Asian competition law systems.55

Other international organizations have also been steadily pressing for accountability and due process in competition proceedings. In 2010, the Organisation for Economic Co-operation and Development’s (“OECD”) Competition Committee held roundtable discussions with more than 30 participating members on procedural fairness and due process rights in competition proceedings. These discussions culminated in published OECD guidelines entitled *Procedural Fairness and Transparency: Key Points*.56 These OECD guidelines noted several essential features of fair competition proceedings, including: (1) transparency in the decision-making process; (2) accessible and timely notice of charges; (3) opportunities for parties to respond, to present evidence, and to confer with agency officials;57 (4) consideration of exculpatory evidence by the decision-maker; (5) a defined duration for investigations; and (6) publication of decisions.58

In 2012, the International Competition Network (“ICN”), which is composed of representatives from nearly every competition authority in existence,59 established a working group dedicated to investigative processes employed by competition regimes.60 This ICN working group noted that, “the credibility of competition agencies and of the

57 The opportunity to meet with agency staff is not enough; the meeting must serve as an opportunity for meaningful dialogue between the government and the party. Unfortunately, practitioners observe that meetings with government officials in antitrust investigations around the globe often are not satisfactory or meaningful. See Hockett, *supra* note 10 at 4 (summarizing a survey of nearly 100 attorneys “conducted on transparency and due process” safeguards: “55 percent stated that the meetings [with government officials] were either untimely or not meaningful, or both”; additionally, 41 percent responded that “they were not given a meaningful opportunity to challenge the evidence against them or to cross-examine witnesses during the agency process”).
58 Id. at 9-21.
60 ICN, *INVESTIGATIVE PROCESS PROJECT*, *supra* note 41, at 1.
general mission of competition enforcement is linked to the integrity of the process of conducting competition investigations and how this is perceived.” In 2013, the ICN released a guide entitled *Competition Agency Transparency Practices*. And in 2015, it issued the *Guidance on Investigative Processes* (“Guidance”). The Guidance noted that, “there is broad consensus among ICN members regarding the importance of transparency, engagement and protection of confidential information within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented.” In response to surveys on the subject, the Guidance identified principles of fair antitrust enforcement that were common among the member competition authorities, including: (1) defining the government’s investigatory powers in a legal framework with clear substantive and procedural requirements; (2) refraining from using investigatory tools to impose burdens on parties; (3) providing transparent legal standards and policies governing enforcement; (4) disclosing charges and their bases; (5) providing opportunities to present rebuttal evidence and arguments; (6) and respecting applicable legal privileges.

### B. Developing Nations Implementing Antitrust Due Process Protections

Developing nations eager to spur economic growth and to attract foreign investment are responding to the economic incentives of establishing fair procedures that mirror international norms, and several have imported due process measures into their antitrust regimes.

The Philippines enacted its first comprehensive antitrust regime, the Philippine Competition Act, in July 2015. It is reported that economic considerations motivated the Philippines to

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61 *Id.*
64 *Id.* at 1.
65 *Id.* at 2-7.
66 An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-competitive Mergers and Acquisitions, Establishing the Philippine Competition
incorporate due process safeguards into its competition law and, in fact, that these protections substantially facilitated negotiation of a fair trade agreement with the European Union. The Philippine Competition Act provides that the Philippine Competition Commission, after receiving a complaint or making a preliminary finding of anticompetitive activity, may issue a “show cause order” detailing the “business conduct complained of” and a summary of the evidence underlying the order. The party under scrutiny then has an opportunity to respond to the show cause order. The Act mandates “due notice and hearing” before the Philippine Competition Commission imposes any penalties, and requires that the Commission publish its final decisions and rulings online for public review.


68 The Philippine Competition Act conditions the issuance of a show cause order on the Commission’s discretionary determination that the order would not harm the “interest of the public.” See Philippine Competition Act § 37(b).

69 Id.

70 Id.

71 Id. §§ 12 (d), 29 (a), 31 (b).

72 Id. § 52.


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Competition Authority and Botswana Competition Commission, and established certain due process protections. The Botswana Competition Authority is the primary antitrust enforcer and possesses the power to police and prosecute allegedly anticompetitive activities. The Botswana Competition Commission is an administrative body that both adjudicates cases and provides the Botswana Competition Authority with policy direction and administrative supervision, including on hiring matters.

Before conducting a search, by statute, the Botswana Competition Authority’s inspectors must first secure a warrant from a separate magistrate court by proving they have “reasonable grounds” to believe an antitrust violation has occurred. 75 When an inspector first enters a premises to conduct a search, he or she must provide “the owner or person in control of the premises” with a copy of the warrant and proof of the inspector’s identity. 76 If no one is present during the search, then the inspector must “affix a copy of the warrant to the premises in a prominent and visible position.” 77 Once the Botswana Competition Authority refers a complaint to the Botswana Competition Commission for adjudication, parties are entitled to lodge their objections in a hearing before a four-member panel. 78 The Botswana Competition Commission is empowered to compel witnesses to provide oral or written testimony. 79 Following this hearing, the Botswana Competition Commission provides parties with written notice of its proposed decision, which sets forth the reasons supporting its preliminary judgment. 80 Parties are then afforded another opportunity to present their views to the Commission. 81 If a party appeals the Botswana Competition Commission’s final decision to the Botswana High Court, then it remains nonbinding until the appeal is adjudicated. 82

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Botswana’s competition law, “[u]niversal and transparent application of competition rules . . . [that leads] . . . to efficiency in the allocation of resources”).

75 Competition Act, 2009 § 36(3).
76 Id. § 36(5)(a).
77 Id. § 36(5)(b).
78 Id. § 39(1), 40(3).
79 Id. § 40(5).
80 Id. § 41(2).
81 Id. § 42.
82 Id. § 67.

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Bulgaria passed its 2008 Protection of Competition Act “to ensure that the parties’ due process rights were fully respected” and to mirror the processes employed by the European Commission.\(^{83}\) Bulgaria requires its competition authority to file a “Statement of Objection” describing the basis of charges and notifying parties of their right to access the case file.\(^{84}\) Parties are given an opportunity to respond to the Statement of Objection with their own evidence within 30 days.\(^{85}\) Poland,\(^{86}\) Mexico,\(^{87}\) and Chile\(^{88}\) have adopted similar reforms with the encouragement of their US and EU trading partners.

The international movement toward assuring procedural protections for due process rights in competition proceedings is active. Enthusiasm for attaining competition law’s perceived economic benefits and desire to attract foreign investment is motivating some developing countries to adopt protections for due process rights in antitrust proceedings. In this way, the global spread of antitrust law is helping to lay due process foundations in developing nations. The next section discusses how these due process protections may strengthen other legal institutions.

2. Antitrust Cases Advance Due Process Rights Applicable in Other Contexts

Although developing nations may adopt due process protections with the goal of attracting foreign investment, implementing these safeguards will help advance due process rights more generally and, therefore, strengthen developing legal institutions. Particularly with respect to cartel actions, antitrust matters present due process issues that transcend subject matter categories. As developing nations ramp up their competition enforcement efforts,\(^{89}\)

\(^{83}\) OECD, PROCEDURAL FAIRNESS, supra note 56, at 51.
\(^{84}\) Id. at 51-52.
\(^{85}\) Id. at 15.
\(^{86}\) Id. at 65 (enhancing transparency by adopting express guidelines on the leniency program and for the imposition of fines).
\(^{87}\) Id. at 17 (implementing an electronic filing system that allows full simultaneous access to all information included in a case file).
\(^{88}\) Id. at 66 (adopting the Transparency Act, which obliges the competition agency to publish all acts and resolutions that affect third parties, such as the closing of an investigation or the settlement of a case).
\(^{89}\) See Dina I. Waked, Do Developing Countries Enforce their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries, Paper Presented at the ZEW Conference on Economic Methods in Competition Law Enforcement 88 (June 24-25, 2011), http://ssrn.com/abstract=2044047 (demonstrating that developing countries are carrying out regular enforcement activities that are increasing
they will inevitably hear cases that prominently feature due process issues. For example, in
the years when the European Commission imposed relatively low fines, procedural due
process issues escaped judicial review. However, when fines rose dramatically in the 1990s,
so too did challenges to enforcement procedures.

Even today, as the United States and Europe and other developed nations come to grips with
the due process issues inherent in aspects of their enforcement efforts, developing countries
are just now confronting due process issues. Parties have already raised due process issues
in high-profile cases before developing competition authorities. Some have prevailed. In a
2013 ruling, India’s Competition Appellate Tribunal dismissed the Competition
Commission of India’s finding that the Board of Cricket Control abused its dominant
market position, holding that the Commission violated “principles of natural justice” when
it relied on information outside the record to define the relevant market without providing
the accused with an opportunity to contest that evidence. 90 And in a 2015 ruling, the
Competition Appellate Tribunal threw out a decision by the Competition Commission of
India to fine a hospital 38.1 million rupees over an alleged abuse of dominance, calling it
“wholly erroneous and unsustainable,” for overlooking key evidence, for holding
preconceived notions that the hospital violated Indian competition law, and for failing to
take testimony from a central figure in the matter. 91

Only two years after Botswana’s Competition Act entered into force, the respondents in
Panel Beaters, a bid-rigging case, lodged a due process challenge against the Botswana
Competition Commission’s dual role as both the adjudicator of competition cases and as the
Botswana Competition Authority’s governing body. 92 They argued, albeit unsuccessfully,

over time). But see Michal S. Gal, Antitrust in a Globalized Economy: The Unique Enforcement Challenge
Faced by Small and Developing Jurisdictions, 33 FORDHAM INT’L L.J. 1, 15-25 (2009) (arguing that
developing jurisdictions rarely tackle international antitrust issues).
90 See Bd. of Control for Cricket in India v. Competition Comm’n of India, Appeal No. 17 of 2013, ¶¶ 23, 27
(observing that “the appellant was not given a fair chance to defend itself”).
91 Tom Webb, Indian court overturns stem cell abuse of dominance decision, GLOBAL COMPETITION REV., Jan.
dominance-decision/.
92 See Thula Kaira, Botswana: Competition Authority, GLOBAL COMPETITION REV. (n.d.),
http://globalcompetitionreview.com/reviews/59/sections/204/chapters/2321/botswana-competition-authority/
(discussing the Panel Beaters case). This arrangement has also drawn fire from African legal scholars—
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that “[t]his institutional arrangement . . . [was] likely to lead to a perception of bias . . . in the adjudication process”\(^93\) and that the Competition Commission’s structure does not comply with international norms.\(^94\) The respondents appealed to the Botswana High Court but voluntarily withdrew their appeal to resolve the issue out of court.\(^95\) And in the *Sugar Beans* case, decided in July 2015, appellants successfully lodged a jurisdictional challenge against the Botswana Competition Authority’s allegations of collusive bid rigging. The Competition Commission dismissed the case for lack of jurisdiction because the Competition Authority failed to refer the case for adjudication within one year after opening its investigation.\(^96\)

Antitrust cases expounding upon due process rights may become an important resource for the accused in countries that do not provide representation or that generally have emerging justice systems. Cases from the United States, Europe, and Australia, presented below, demonstrate that antitrust rulings spawn published decisions that may be invoked to advance due process rights in other contexts.

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93 Kaira, *supra* note 92.


A. Australia: No Anonymous Witnesses in Government Antitrust Cases

In *Australian Competition and Consumer Commission v. Prysmian Cavi E Sistemi Energia S.R.L.*, 97 the Federal Court of Australia expanded the circumstances in which the government must disclose the identity of witnesses in cases it brings in court, in order to protect rights of the accused. In order to receive first-to-report immunity, a participant in an alleged bid-rigging and price-fixing cartel provided information to the Australian Competition and Consumer Commission (“ACCC”) on the alleged conduct. It was claimed that the ACCC had assured the witness that he would remain anonymous. Relying on information from this anonymous witness, which they named “Mr A,” the ACCC filed suit in open court without naming the anonymous witness, merely describing alleged cartel conduct by the defendants with “Mr A.” 98 In the *Prysmian* case, Nexans SA, one of the civil penalty defendants, asked the court to order disclosure of Mr. A’s identity and all communications he made with the ACCC. 99 Nexans invoked basic principles of fairness: the right to confront witnesses and the right to search for facts for its defense. It is a basic principle of human rights that knowing the identity of the accuser is the first essential step in confronting the evidence against the accused. 100 To prepare a defense to price-fixing, a firm needs to know the person or persons who have alleged that the firm had participated in a cartel. This information permits defense witnesses to be interviewed and documents to be searched. Nexans naturally argued that this information was essential to contesting the underlying basis of the ACCC’s asserted prima facie case.

98 Id. ¶ 34. Before granting leave to serve a foreign defendant, Australian law requires the court to determine that the plaintiff “has a prima facie case for all or any of the relief claimed . . . in the proceeding.” Id. ¶ 57 (quoting *Federal Court Rules* (Cth) O 8 r 3(2)(c)).
99 Id. ¶ 72. As recently as 2012, commentators have noted the “relative paucity of competition litigation in Australia . . . and thus limited guidance from the case law on a range of important procedural and substantive questions.” See Fox & Trebilcock, *supra* note 13, at 60.
100 In US jurisprudence, the right to confront witnesses is governed by the Confrontation Clause of the Bill of Rights. *See* U.S. Const. Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”). International human rights law also recognizes confrontation as a minimum guarantee of fair proceedings. *See* International Covenant on Civil and Political Rights (ICCPR) art. 14(3)(e), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (providing a party the right “[t]o examine, or have examined, the witnesses against him” as a “minimum guarantee”).
The court ordered the ACCC to reveal Mr A’s identity. Although the propriety of disclosure is nominally determined on a case-by-case basis,\textsuperscript{101} prior Australian precedent had required disclosure where the informant provided material information and where revealing the informant’s identity tended to prove the defendant’s innocence or was necessary to fight the government’s case.\textsuperscript{102} But the Prysmian Court rested its decision, in part, on a different ground. The outcome depended on whether keeping the informant’s identity secret would generally interfere with the defendant’s ability to make strategic decisions based on the strength of the government’s claims, including the decision to not combat the government’s case.\textsuperscript{103} Mr. A was the only natural person with whom the defendants had allegedly conspired. Consequently, the Court required the ACCC to disclose Mr. A’s identity and the surrounding materials, including the ACCC’s interview materials for Mr. A.

Permitting the defense to cross-examine witnesses at trial is necessary to weed out false testimony. And the right to confront witnesses—starting with revealing their identity to the defense—will deter the use of weak witnesses in the first place.\textsuperscript{104}

\textbf{B. Europe: Protections from Search and Seizure in European Dawn Raids—Nexans and the Right of Privacy}

In Nexans SA v. European Commission, the European Union’s General Court held, for the first time, that a warrantless “dawn raid” violated the fundamental right to privacy because the government did not have “reasonable grounds” to conduct it.\textsuperscript{105}

\textsuperscript{101} Prysmian, [2011] FCA 938, ¶ 185.
\textsuperscript{102} See, e.g., Haydon v. Magistrates’ Court of South Australia (2001) 87 SASR 448 ¶ 13, 70, 71 (requiring disclosure of an informant’s identity where doing so would aid the defense at trial); Jarvie v. Magistrates’ Court of Victoria (1995) 1 VR 84 (“[T]he overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution.”).
\textsuperscript{103} See Prysmian, [2011] FCA at ¶ 208 (“The fact is, without the documents and knowledge of Mr A’s identity, . . . Nexans would find it difficult to assess the strength of the ACCC’s claim.”) (emphasis added).
\textsuperscript{104} See, e.g., Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2537 (2009) (concluding that “of course, the prospect of confrontation will deter fraudulent analysis in the first place,” and forcing prosecutors to bring to court lab technicians who produce lab reports to face cross-examination, under the Confrontation Clause of the US Sixth Amendment, rather than permit prosecutors to stand at trial on a hearsay lab report).
Some time prior to 2009, the European Commission’s Directorate-General for Competition (“DG Comp”) received information pertaining to anticompetitive activity involving the sale of high-voltage underwater cables. The DG Comp then conducted a dawn raid at Nexans’ offices. When it initiated the dawn raid, the DG Comp claimed—as was its routine practice—that it was entitled to conduct an exceedingly broad search—in that case, a search embracing any material associated with “the supply of electric cables.”106 After the DG Comp executed the search, Nexans brought suit before the European Union’s General Court against the DG Comp in 2009, arguing the search was defective in that it was overbroad and violated its right to privacy.

The General Court held in 2012 that the DG Comp had indeed violated Nexans’ privacy rights. Although European procedures do not currently provide for the General Court to conduct pre-dawn raid review of the DG Comp’s requested search, the General Court made clear for the first time under EU law that the European Convention of Human Rights empowers it to conduct post-search judicial review of the underlying “reasonable grounds” for the DG Comp’s searches and to annul those searches if they exceed the permissible scope.

The General Court compared the allegations made in the pre-search leniency statements with the DG Comp’s scope of search. The Court concluded that, although the DG Comp possessed a reasonable basis to inspect Nexans’ premises for materials relating to the sale of high-voltage underwater electric cables, it had no grounds to search for any materials relating to the sale of electric cables in general, such as low-voltage cables. Therefore, the

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105 Case T-135/09, Nexans v. Comm’n, 2012 E.C.R. I-000, ¶¶ 39-46, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=129701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=224723 (“[T]he Commission . . . must . . . identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its cooperation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking’s sphere of private activity, and to make it possible for the Court . . . to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes.” (emphasis added)).

106 Id. ¶ 3.
DG Comp’s search exceeded its alleged basis for conducting the investigation. Because the DG Comp searched for documents to detect possible competition infringements in all of Nexans’ activities, and did not limit its search to information related to the “reasonable grounds” justifying the search—i.e., anticompetitive activity in high-voltage cables—the DG Comp search amounted to a “fishing expedition” and its actions were “incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society.” Therefore, the General Court ordered the DG Comp, for the first time, to provide the Court with the leniency statements that were the purported basis for the search.

*Nexans* not only impacted the investigation in question, which was limited to only considering the specific products for which the DG Comp had “reasonable grounds” to search, it also paved the way for others to challenge the DG Comp’s investigatory practices. The case has changed the entire climate of EU investigations and has given others the fortitude to make similar challenges.

In a 2015 case, the German Regional Court of Bonn restricted the Federal Cartel Office’s use of an “imminent danger” exception to the ordinary court-order requirement for evidentiary seizures. Under German law, antitrust investigators must ordinarily secure a court order before seizing material uncovered during a lawful search. A statutory exception

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107 *Id.* ¶ 67, 91.
108 *Id.* ¶ 35, 66. The General Court’s decision in *Nexans* has prompted comment on whether the European Convention for the Protection of Human Rights requires EU and national courts facing objections to government searches to hear these issues during the preliminary investigation stage, or whether aggrieved parties must first await a final decision by the DG Comp. The General Court concluded that it did not possess jurisdiction over Nexans’ claims that the DG Comp improperly copied its corporate records for later examination at the DG Comp’s Brussels office. *See Nexans*, 2012 ECR I-0000, ¶ 131. This ruling seems to be at odds with other EU decisions. *See* Ingeborg Simonsson, *Digital Evidence Gathering in Dawn-Raids, Judicial Review: Up-Front or Retrospective?*, Presented at the 20th St. Gallen Int’l Competition L. Forum ICF 1–4, 7–11 (Apr. 4-5, 2013), http://ssrn.com/abstract=2327122 (urging that the court should have gone farther; noting that, on the question of the timing of relief, the *Nexans* Court relied on inapplicable cases and “that there would have been support for the opposite outcome[] in *Nexans*,” and identifying advantages to reviewing such claims at the preliminary investigation stage).
110 Landgericht Bonn [LG Bonn] [Bonn Regional Court], Sept. 21, 2015, No. 29 Qs 7/15.
to this rule is available for evidence that would be in “imminent danger” of being lost if the government was forced to wait for a decision; this “imminent danger” exception embraces circumstances where the evidence obtained is so voluminous that the reviewing judge could not make a seizure determination remotely. The applicant complained that the government was routinely claiming that the quantity of evidence it seized was so vast as to make judicial review impractical but that the government was not supporting these assertions. Although the Court did not pass judgment on whether the government was invoking the “imminent danger” exception mechanically, it required the government “in future proceedings” to specifically state the efforts it made to analyze the evidence and why the exception therefore applied.

C. United States: Stolt-Nielsen and the Enforcement of Government Amnesty Promises

In 1993, the Antitrust Division of the US Department of Justice (“DOJ”) announced its corporate amnesty and leniency programs for antitrust violations. Similar programs have since been adopted in more than 50 other nations. By the early 2000s, more than 100 firms had signed written amnesty agreements with the DOJ.

In 2003, the DOJ decided for the first time to revoke a signed amnesty agreement in the *Stolt-Nielsen* cases. In exchange for a promise by the DOJ “not to bring any criminal prosecution . . . for any act or offense it may have committed prior,” Stolt-Nielsen disclosed evidence of its participation in a cartel. At the time, the DOJ knew that Stolt-Nielsen had not independently investigated the anticompetitive conduct by its employees, had not reported past antitrust violations, and at least one of its employees “had been accused publicly of ongoing antitrust violations.” The DOJ materially relied on the information

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112 *Stolt-Nielsen I*, 352 F. Supp. 2d at 558.

113 *Stolt-Nielsen II*, 524 F. Supp. 2d at 621.
Stolt-Nielsen provided in its successful prosecution of other cartel co-conspirators. Based on a co-conspirator’s allegations, the DOJ concluded that Stolt-Nielsen failed to take “prompt and effective action” to terminate participation in the cartel activity it reported and thus the DOJ decided to revoke the amnesty agreement. When the DOJ arrested a senior Stolt-Nielsen executive, Stolt-Nielsen and the executive promptly sought an injunction against further criminal prosecution in order to enforce their rights under the amnesty agreement.

After a two-day evidentiary hearing, the district court enforced the agreement, directing the DOJ to make good on its promises to the company and its executives. The court granted the injunction against the DOJ’s criminal prosecution—the first injunction of its kind granted against the DOJ. The DOJ, however, appealed and the Third Circuit reversed.

The DOJ proceeded to indict two Stolt-Nielsen executives and the company so they moved to dismiss the indictment. In respect to the indictments, the district court explained:

Non-prosecution agreements are binding contracts. \textit{United States v. Castaneda}, 162 F.3d 832, 835 (5th Cir. 1998).

While general principles of contract law guide interpretation of non-prosecution agreements, ‘such agreements are unique and are to be construed

\begin{itemize}
\item \textsuperscript{114} See id. at 614 (“Without Stolt-Nielsen’s cooperation, the Division did not have sufficient evidence to sustain a conviction of any company in the parcel taker industry.”).
\item \textsuperscript{115} Id. at 614-15.
\item \textsuperscript{116} \textit{Stolt-Nielsen I}, 352 F. Supp. 2d at 559.
\item \textsuperscript{117} Id. at 555 (“[Stolt-Nielsen] performed its obligation under the agreement when it supplied DOJ with self-incriminating evidence that led to the successful prosecution of [the company’s] co-conspirators. Because DOJ got the benefit of its bargain, it cannot avoid fulfilling its promise based on an understanding it contends the parties intended during negotiations but is not clearly defined in the integrated agreement”). See also id. at 560 (“Because due process is implicated, the government cannot unilaterally declare an immunity agreement void. Instead, due process demands that the government first obtain a judicial determination that the defendant breached the agreement.”) (citations omitted).
\item \textsuperscript{118} Id. at 562-63.
\item \textsuperscript{119} \textit{Stolt-Nielsen II}, 524 F. Supp. 2d at 615 (two-judge panel).
\end{itemize}
The court heard each of the DOJ’s witnesses and concluded that there was “no credible evidence” that Stolt-Nielsen broke the agreement. Examining the DOJ’s evidence witness-by-witness, the court found that the DOJ’s witnesses provided statements that were riddled with “inconsistencies” and “misstatements of fact.” Ruling again for Stolt-Nielsen, the court enforced the amnesty agreement and dismissed the indictment. The court held that, “as a matter of fundamental fairness,” the DOJ “may not . . . revoke the agreement on the basis of facts known to it at the time it entered into the agreement.” The court further explained:

It ill behooves government agents and prosecutors to enter into agreements of transactional immunity with mid-level co-conspirators, milk them of substantial leads and information that literally make the government’s case . . . then, at the last moment, rely on some technical or relatively minor deficiency in performance to pull the rug out from under the cooperating informant by claiming a breach and proceed to prosecute him in a slam-dunk case based largely on his own revelations. Yet, this is precisely what we perceive to have happened here, and due process cannot abide such behavior.

The Stolt-Nielsen decision is the first court decision to enforce an amnesty promise against the government and reaffirms that independent judiciaries perform an important check on the power of antitrust enforcement agencies.

120 Id. at 606 (omitting paragraph numbers).
121 Id. at 628.
122 Id. at 625.
123 Id. at 621. The DOJ chose not to appeal the district court’s comprehensive findings of fact and conclusions of law. See Scott Hammond on Stolt-Nielsen, GLOBAL COMPETITION REV. (May 1, 2008), http://globalcompetitionreview.com/features/article/800/scott-hammond-stolt-nielsen/ (“In January, the US Department of Justice announced that it would not appeal against a court’s reinstatement of Stolt-Nielsen’s leniency arrangement.”).
124 Stolt-Nielsen II, 524 F. Supp. 2d at 628 n.25 (enforcing the amnesty agreement).
Developing countries have attempted to adopt antitrust policy in the hope of stimulating economic growth through free markets. But protections for free markets, and the economic benefits that they entail, will not be the only potential value of antitrust law’s spread to the developing world. Several developing nations have responded to economic incentives and have implemented procedural fairness measures as part of a comprehensive antitrust law. Litigation involving these safeguards may produce legal developments that can have a positive effect on other fields of law, including traditional criminal prosecutions. As due process values emerge, legal institutions will strengthen. Because high-quality institutions are the key to closing the gap between rich and poor nations, antitrust law’s role in furthering due process values is perhaps the most important economic benefit that antitrust law can offer to the developing world.

III. Three Examples of Urgent Due Process Issues in Antitrust Regimes

The methods that developing nations employ to enforce their antitrust laws carry economic consequences even if they rest on sound policies. Therefore, it is not sufficient for an antitrust regime to be built on sound economic principles; fair enforcement is a necessary condition for attaining the economic growth that countries expect from sound antitrust regulation. Fairness is “a necessary and beneficial ingredient of effective competition enforcement” that “can promote transparency and better outcomes.”125

Legal institutions that are unfair, and therefore unpredictable, discourage investment by imposing transaction costs that are not present in other jurisdictions.126 Therefore, just as the conditions for economic growth require thought, effort, and support through sound

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125 O’Brien, Katona & Tritell, supra note 40, at 7.
126 See Rodrik, supra note 24, at 12 (observing that lack of respect for the rule of law results in coordination failures); Lachmann, supra note 17, at 22 (noting that “weak rule of law” has often functioned as [an] obstacle[] to growth”); Knack & Keefer, supra note 15, at 594 (tying arbitrary decision-making to measures of low institutional quality); World Trade Org., supra note 42, ¶ 11 (noting that stable and predictable competition policy attracts investment).
governmental institutions, deficient legal institutions “may in fact produce perverse policies, [and become] the source of man-made economic decline.”¹²⁷ Even as experience in the United States has crossed the 100 year mark, there is still room for improvement in the US antitrust laws. For a cogent example, one need only look to Shughart and Tollison’s 1991 study on the US economy after 125 years since passage of the Sherman Act, which demonstrates just how sensitive markets can be to methods of antitrust enforcement. The study found that mere “unanticipated rises” in antitrust enforcement from 1932 to 1981 were responsible for a net loss of jobs over that period.¹²⁸

Due process guarantees are designed to ensure that firms are protected from the arbitrary decisions, abuses of power, and political influence in adjudications that are a common feature of weak legal institutions.¹²⁹ With respect to competition enforcement in particular, the need for adequate due process protections is even more pressing in light of the notable rise in criminal sentences and civil fines imposed for antitrust violations.¹³⁰ Compounding

¹²⁷ Cross, supra note 8, at 1742.
¹²⁹ See Rodrik, supra note 24, at 12 (observing that lack of respect for the rule of law results in coordination failures); Lachmann, supra note 17, at 22 (noting that “weak rule of law” has often functioned as [an] obstacle[] to growth”); Knack & Keefer, supra note 15, at 594 (tying arbitrary decision-making to measures of institutional quality).
matters, inadequate protections in one jurisdiction may leave parties at significant risk of liability in several other jurisdictions as antitrust authorities increasingly conduct coordinated cross-border and transnational investigations.\(^\text{131}\)

Industrialized and developing nations alike should, therefore, be especially sensitive to whether their competition enforcement procedures are offering sufficient protection. This section discusses three due process issues of particular importance, explaining how they protect firms’ expectations and highlighting some deficiencies in current competition systems. Readers will observe that many of the most serious procedural shortcomings in competition regimes are found in the developed world.\(^\text{132}\) Nevertheless, developing nations can benefit from the lessons learned slowly in the litigation of due process rights in the US


Practically, according to Article 22 [of Regulation 1/2003], ECN members can request each other to carry out inspections and any other fact-finding measures on each other’s behalf and for each other’s benefit. Any information collected pursuant to Article 22, or otherwise in the context of national proceedings, including confidential information, may then be communicated by the ‘transmitting authority’, ie the ECN members that gathered the information to the ‘receiving authority’, ie the ECN members that requested the information, in accordance with Article 12. The information may then be used as evidence by the receiving ECN member ‘for the purpose of applying Article 101 or 102 of the Treaty[ on the Functioning of the European Union] and in respect of the subject matter for which it was collected by the transmitting authority’. Limitations apply in relation to the prosecution of individuals: information can be ‘used in evidence’ by the receiving authority only if the law of the transmitting authority ‘foresees sanctions of a similar kind’ for individuals or applies the ‘same level of protection in the rights of defence’ of individuals than under the law of the receiving authority.

\(^{132}\) See Bill Baer, Assistant Attorney Gen., Antitrust Div., US Dep’t of Justice, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), http://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out. The publicly carved-out executives almost invariably lost their jobs and ability to earn a living in their industry—despite the complete absence of any finding of guilt or due process. In the *Air Cargo* cases, more than 80 airline executives were “carved out” of corporate plea agreement protections—less than a quarter were ever indicted. The reform was long overdue.
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and Europe. The Appendix provides a detailed list of suggested features for fair competition proceedings.

1. Prosecutors and Agencies Limiting Access to the Evidence at Trial

Requiring the government to disclose the basis for its enforcement actions, and any exculpatory evidence it possesses, discourages government actors from using public power for personal gain or other nefarious purposes. As such, mandatory and automatic disclosure of the government’s evidence helps to ensure that antitrust laws are applied according to the nature of the alleged acts, which allows firms to use less time (and money) wringing their hands over how to avoid unfair treatment and to instead focus on more economically beneficial tasks, like making deals. Yet several countries still impose restrictions on disclosure that threaten to weaken institutions and expose firms to unnecessary transaction costs.

In the United States, criminal prosecutors are only required to disclose evidence that they deem material and favorable to the defense, also known as Brady material. The current Brady doctrine, which delegates the decision of whether evidence is “relevant” and subject to disclosure to the prosecutors, places prosecutors in inherent conflicts of interest. Not surprisingly, “[t]here is an epidemic of Brady violations abroad in the land,” and much (if not most) Brady evidence is never disclosed. To avoid these conflicts, some individual US Attorney’s Offices have adopted an “open-file” policy that permits the accused access to

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133 See William J. Brennan, Jr., The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L.Q. 279, 280 (1963) (“We have forgotten that these safeguards, while they do indeed make harder the conviction of an accused, were not provided for that purpose . . . . These safeguards are checks upon government—to guarantee that government shall remain the servant and not the master of us all.”).


136 Olson v. United States, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinsky, J., dissenting from denial of petition for rehearing en banc).

137 See Bennett L. Gershman, Litigating Brady v. Maryland: Games Prosecutors Play, 57 Case W. Res. L. Rev. 532, 536 (2007) (“[I]t is commonly believed that most Brady evidence never gets disclosed; rather, it remains buried in drawers, boxes, and file cabinets in the offices of the prosecutor, the police, and other law enforcement and government agencies connected to the case.”).
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all evidence in the prosecutor’s possession. However, many Offices have decided against an open-file policy and, at this writing, the DOJ Antitrust Division has no such written policy. This situation is a human rights disgrace as antitrust evidence is often subtle and the legitimacy of actions may require the surrounding context. The Stolt-Nielsen trial demonstrated that isolated snippets of evidence can be misread to suggest a violation, when the full context demonstrates completely legitimate joint venture activity. Currently, rights of the accused may depend on the government’s choice of forum or the choices made by prosecution teams. The adversary system is completely undermined when access to the evidence is denied.

To make matters worse, in many high-profile antitrust prosecutions, much of the evidence is overseas and the leniency applicants may be tempted to, or even are encouraged to, cherry-pick only the “bad” documents from overseas files. As a result, the full files are not brought into the United States. This is one of the moral hazards of a program that permits one competitor to turn in its rivals for crippling punishments (forcing jail sentences on opposing executives and steep fines). Cherry picking of overseas files leaves defendants with little overseas discovery recourse to confront witnesses sufficiently.

Some recent precedent has extended Brady protections, but true reform awaits the DOJ’s adoption by rule of open files, or a judicial response. The Sixth Circuit applied the Brady rule in a civil extradition case in part because “[t]he consequences of denaturalization and extradition equal or exceed those of most criminal convictions.” The Fourth Circuit recently cited this case as illustrating the “rare instance” in which Brady obligations may apply to a civil case brought by the government.

139 For background, see Anthony Barkow & Beth George, Prosecuting Political Defendants, 44 GA. L. REV. 953, n.286 (2010) (noting the DOJ declined to implement an open-file policy).
141 See Fox ex rel. Fox, 739 F.3d 131, 138-39 (4th Cir. 2014). Ginsburg and Owings note that the European Court of Human Rights, the European Court of Justice, and the Supreme Court of Canada have held that large civil fines may amount to criminal penalties, thus implicating greater procedural safeguards. See Ginsburg & Owings, supra note 135, at 41 (noting, for example, the Supreme Court of Canada’s Wigglesworth decision, in which the court held that Section 11 of the Canadian Charter of Rights and Freedoms applies to a person

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Japan’s Anti-Monopoly Act and its attendant regulations have also drawn increasing scrutiny. The Japan Fair Trade Commission (“JFTC”) is neither obligated to disclose the evidence obtained during an investigation nor the underlying basis for its administrative findings of anticompetitive activity until the first court hearing; at that point, the JFTC has already issued an “enforceable court order.” The JFTC also conducts custodial interrogations without allowing access to counsel and compels written witness statements in custodial interrogations—as discussed below. The JFTC even retains the power to refuse inspection targets the right to copy their own documents that the JFTC obtained, for example, during a dawn raid, and has refused these requests in the past.

2. **Lack of a Neutral Decision-Maker; Failure to Separate the Investigatory and Adjudicatory Roles**

The decision-maker in a competition agency must be legally independent from the investigator. Without a layer of separation maintaining distance between the adjudicatory and investigatory roles, the investigator is asked to determine whether its efforts have borne fruit—indeed, whether its existence is justified. Such “integrated agencies . . . raise systemic concerns that the integration of investigation, enforcement, and adjudicative functions create bias or lack of objectivity (‘confirmation bias’), or the appearance of it, in the discharge of the adjudicatory functions vested in the agencies may render the agencies ‘judges in their own cause.’” This increases the risk that antitrust authorities will emphasize ends over means, especially where the ends are measured in the aggregate total facing a civil fine because Section 11 “is intended to provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense”).

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143 Id.
144 Ginsburg & Owings, *supra* note 135, at 45 (“Competition cases brought by an enforcement agency in which the same official(s) direct or authorise the staff to undertake the investigation, direct or authorise the staff to prosecute a case based upon the evidence turned up in that investigation, and then decide whether the evidence is sufficient to show an infringement, might reasonably be thought to have an interest in the outcome; for them to say the evidence is insufficient is to say the entire undertaking was a waste of resources for which they are responsible. The potential for unfairness is self-evident.”).
of yearly fines accruing to the government. Therefore, the risk of unfair proceedings is enhanced, and economic growth is impeded, unless investigations and adjudications are carried out by two independent bodies.

In the European Union, the officials who investigate a case also determine if a violation has occurred. After charges are brought, parties are not provided a hearing in front of the adjudicator before a verdict is rendered. As Ian Forrester has observed: “the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the [European Convention on Human Rights].” The adjudicatory panel is staffed with political appointees who do not attend hearings and do not participate in drafting the order. Similar issues exist under Japanese law. The same body that conducts the investigation, the JFTC, also decides whether a violation occurred.

3. Preventing an Effective Defense: Limited Access to Counsel and Insufficient Time to Prepare

Fair legal proceedings place the defendant on equal footing with his or her accuser. Both the International Covenant on Civil and Political Rights and the European Convention for

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147 See Kebonang, supra note 92, at 178-79 (making this argument against the relationship between the Botswana Competition Authority and Competition Commission).
149 Id. at 823 (“The hearing gives the accused company the chance to restate its case to the case team which is accusing it, but not to argue before a neutral judge, hearing officer or other person who will decide on guilt or innocence.”).
150 Id.
151 Forrester, supra note 148, at 822 (“[T]he decision . . . is taken by a college of 27 political appointees who take such a decision collectively by a majority vote. No competition agency on earth takes decisions this way, nor does any criminal instance in any democratic country. There is the institutional possibility that political considerations will influence—pollute is perhaps too strong—the decision making.”); Martin Möllmann, Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough, CPI ANTITRUST CHRON., June 2014, at 2.
152 Assuring Due Process, supra note 142, at 5.
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Human Rights hold this principle to be a fundamental guarantee of a fair trial. The right to counsel at stages affecting legal interests and the right to adequate time and facilities for preparing a defense are particularly crucial to ensuring a fair dispute between the government and the accused. Involvement of counsel is needed to ameliorate the often-coercive interrogation environment. And defendants cannot have a meaningful opportunity to be heard unless provided with sufficient time to formulate a reasoned response to charges (on the other hand, depending on the relevant statute of limitations, the government often has several years to compile its case). These rights, by guaranteeing that the defense has the same opportunity to present its evidence, impose a check on executive power—they force the government to rely on the strength of its case rather than any weaknesses it can exploit from the defense. This enables enforcement according to the written or common laws that inform firms’ expectations and, therefore, yields economic benefits. Yet some competition authorities block parties under investigation from seeking the assistance of attorneys during key investigatory phases. Others permit little time to prepare a response. Further, some competition authorities do not allow themselves

153 See ICCPR, art. 3 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality”). Although this provision of the ICCPR is expressly limited to criminal trials, exceedingly high civil antitrust fines may amount to penalties that implicate rights applying to criminal cases. See Ginsburg & Owings, supra note 135, at 41 (citing A Menarini Diagnostics SRL v. Italy, Judgment of 27 September 2011, 43509/08, paras. 58-67).

154 See ICCPR, art. 3(b), (d) (listing, among other minimum guarantees of fair trial, the right “[t]o have adequate time and facilities for the preparation of [a] defence,” and the right “[t]o have legal assistance assigned to him, in any case where the interests of justice so require”).

155 1 U.S. INST. OF PEACE, MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE: MODEL CRIMINAL CODE art. 71 cmt. (2007) (“The presence of counsel during interview not only facilitates the right of the suspect or the accused to defend himself or herself . . . but also helps to protect the accused’s right to freedom from coercion, duress, threat, torture or cruel, inhuman, or degrading treatment.”).


157 See Thomas W. Wälde, “Equality of Arms” in Investment Arbitration: Procedural Challenges, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 161 (Katia Yannaca-Small ed., 2010) (observing that the “self-restraint” required to implement the principle of equality “is difficult for some governments,” especially if the investment dispute is politically charged, or if the government is accustomed to influencing investigations and adjudications, and no separation of powers is in place); cf. Knack & Keefer, supra note 15, at 591 n.2 (“Even if the entrepreneur’s expectation is that, on average, the policies of today will prevail tomorrow, the possibility of large deviations from today’s policies—which is higher when institutions are deficient—is sufficient to induce slower investment and less efficient production.”).

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any time to really consider the arguments of the defense but rather proceed immediately to
the adoption of their final decision, literally minutes or hours after the defendant gave
evidence and made specific arguments in writing or at an oral hearing. In these jurisdictions,
the ability to meaningfully mount a defense is significantly undermined and the risk of
unfair enforcement is heightened.

In Japan, the presence of an attorney is not guaranteed at dawn raids and the JFTC will not
wait for even a reasonable amount of time for the company’s attorney to arrive before
starting an unannounced inspection.158 In cases where the company’s attorney is present
during the inspection, the JFTC may revoke the right to counsel if it deems that the
attorney’s presence “affect[s] the smoother implementation of the on-the-spot
inspection.”159 The right to legal representation during witness interviews is even further
restricted. At these closed-door custodial interviews, attorneys are not permitted to
accompany interviewees, note-taking and audio or video recording is outlawed, and court
reporters are prohibited.160 In civil investigations, witnesses must answer all questions
under penalty of perjury—Japanese law does not recognize a privilege from self-
incrimination in administrative proceedings.161 Once the interview is complete, the JFTC
prepares a statement, which the witness is expected to sign out of the presence of counsel,162

158 See Japan Fair Trade Comm’n, Report Issued by the Advisory Panel on Administrative
Investigation Procedures Under the Anti-Monopoly Act (Summary) ¶ 1(a) (2014),
http://www8.cao.go.jp/chosei/dokkin/finalreport/brief-english.pdf (“[C]ompanies may not refuse an on-the-
spot inspection on the grounds that the attorney has not arrived.”) [hereinafter JFTC REPORT].
159 Id. ¶ 1(b).
160 Id. ¶ 3(b).
161 See Mel Marquis & Shingo Seryo, Japan’s Consolidated Anti-Monopoly Act: Recent Developments and
“Article 38(1) of Japan’s Constitution provides for a right against self-incrimination where the party testifying
may be held criminally liable,” that privilege does not extend to “the context of . . . normal administrative
investigations”).
162 The Anti-Monopoly Act does not contain an express right for witnesses to refuse to sign the statement. See
Shiteki-dokusen no Kinshi oyobi Kōseitorihiki no Kakugo ni Kansuru Hōritsu [Dokusen Kinshihō] [Anti-
Monopoly Act], Act No. 54 of 1947, art. 111, available at
_12.html.
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but the JFTC does not provide the witness with a copy.\textsuperscript{163} Compounding matters, “confessions . . . form the basis of nine-tenths of [all] criminal prosecutions” in Japan.\textsuperscript{164}

In 2014, under mounting criticism for its disregard of the right to counsel in antitrust investigations, the JFTC created an advisory panel to review its investigation procedures. Unfortunately, the advisory panel recommended no significant changes.\textsuperscript{165} Allowing another opportunity for reform, the JFTC issued draft guidelines on administrative investigation procedures and called for public comment.\textsuperscript{166} Several organizations, including the Japan Federation of Bar Associations, the National Federation of Small Business Associations, and the Japan Business Federation, noted that the draft guidelines still failed to remedy due-process and right-to-counsel issues.\textsuperscript{167} As of the date of publication of this paper, the JFTC has not released a final version of the guidelines.

India’s antitrust laws provide a prime example of a system that does not afford parties sufficient time to prepare their cases. After filing its recent findings relating to Google’s alleged anticompetitive modification of search results, the Competition Commission of India gave the global internet behemoth 10 days to respond with evidence and arguments tailored to Indian law.\textsuperscript{168} Google asked for an extension on September 8th, 2015.\textsuperscript{169} Previously, in March 2014, the Commission had fined Google 10 million rupees after determining Google failed to show cause for failing to provide requested information

\textsuperscript{163} Assuring Due Process, supra note 142, at 6.
\textsuperscript{167} Yuri Nagano, Japanese industry lobbies may object to new administrative investigation guidelines, PARR (Sept. 17, 2015), http://app.parr-global.com/intelligence/view/1303780 (on file with author).

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despite being granted several extensions.\textsuperscript{170} Google protested that it was not given sufficient time to comply.\textsuperscript{171}

Lastly, Russia’s Federal Antimonopoly Service recently adopted an infringement decision for an alleged concerted practice against major international container shipping companies without allowing them the opportunity and time to present economic evidence in a meaningful way.\textsuperscript{172} There were reportedly two short hearings on December 7 and 14, 2015, and the infringement decision was announced right at the end of the second hearing, notwithstanding the fact that during the hearings the defendants presented additional evidence.\textsuperscript{173} Surely, the arguments of the defendants were arguably made in vain if the authority had already been inclined to issue the infringement decision in this case. Apparently, this unacceptable procedural sequence is not something unique to Russia. For example, Lithuania had followed a similar approach, although now the law has been changed to give the authority sufficient time to consider the parties’ arguments.\textsuperscript{174} There is no doubt that such amendments are not only a matter of due process but also of ensuring quality of enforcement.


\textsuperscript{171} Id.

\textsuperscript{172} The decision is now under appeal. \textit{See} Janet Porter, \textit{Maersk to appeal Russian antitrust decision on GRIs}, LLOYD’S LOADING LIST (Jan. 15, 2016), http://www.lloydsloadinglist.com/freight-directory/news/Maersk-to-appeal-Russian-antitrust-decision-on-GRIs/65359.htm#.VrfQZ7IrJpg.

\textsuperscript{173} Compare Ginsburg & Owings, supra note 135, at 43 (describing potential shortcomings of administrative decision-making including the tendency that officers may serve only as a “rubber stamp” of staff recommendations and observing, as “the US Supreme Court put it: ‘the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.’ ”) (quoting Mathews \textit{v. Eldridge}, 424 U.S. 319, 333 (1976)).

\textsuperscript{174} Sarunas Pajarskas, Head of Administration, Competition Council of the Republic of Lithuania, \textit{New Developments in Competition Policy in Lithuania After the Accession to the European Union}, http://kt.gov.lt/en/index.php?show=cases_other&other_doc=other_20040602 (last visited Feb. 2, 2016) (“[T]he time period for the Competition Council to take a final decision has also been liberalized - it has been prolonged for one month (in addition to the previous four months period) if the companies so request the Council.”)

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IV. Concluding Remarks and Suggestions

The international proliferation of antitrust law—when based on sound economics—offers developing economies something more than an opportunity for economic growth through free markets. Because firms are more likely to invest in nations that have fair and clear procedures and sound legal institutions, the lure of foreign investment is pushing developing nations to incorporate into their antitrust regimes higher levels of due process guarantees in accordance with international standards. Continued progress will also be expected to be made in developed countries, where due process rights are not fully observed or practiced today. Across the globe, the independent judicial branch has been key to this growth of due process (along with, at times, enlightened antitrust enforcers making procedural changes to their own rules and procedures), and there is an emerging consensus among jurists that many current competition agency enforcement practices do not comport with fundamental due process rights. The growth of global competition studies, comparative studies of competition systems, and even the rankings of global competition agencies also play a role in driving countries to reform, improve, and refine the due process accorded to the accused. Due process is an important determinant not only of firms’ confidence for investment, but also of the legitimacy of government institutions. When due process is assured, competition agency outcomes will improve. Due process reforms will in turn inspire other competition agencies to follow suit and will provide parties with an opportunity to advance due process rights outside the antitrust context. The result will be stronger legal institutions, which are proven to be the most important determinant of economic growth.

Sound competition policy takes years to form. In comparison, enhancing due process protections and affording fair procedures in competition cases is a relatively simple and straightforward—but powerful—fix. All competition authorities, whether they are old or new, should place emphasis on the adequacy of due process protections in competition proceedings.
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Appendix

The following is a partial listing of fundamental rights that every competition regime should afford targets of their investigations in order to respect due process rights and the rule of law:¹

1. Ascertaining, written, transparent rules for competition
2. Effective access to legal counsel at all stages of the proceedings
   2a. Right to counsel during interrogations
3. Conduct of investigations
   3a. Right to remain silent
   3b. Right to have privileged communications with counsel remain privileged
   3c. Search and seizure—probable cause standard, pre-search judicial review, privacy rights respected
   3d. Written and public agency rules for the conduct of investigations
   3e. Protections for maintaining confidential business data and trade secrets²
4. A meaningful right and opportunity to assert defenses³
   4a. Notice of the specifics of charges (no anonymous witnesses) and sufficient time to respond
5. Independence of judiciary from prosecutorial function: separation of powers
6. Impartial and meaningful judicial review of agency actions at the trial court level

¹ See also Christopher B. Hockett, Antitrust and Due Process, 28 Antitrust 1, 4 (2014) (listing 7 norms for antitrust due process).
² See New York v. Actavis, plc, Civ. No. 14-7473, 2014 WL 5353774, at *3 (S.D.N.Y. Oct. 21, 2014) (compelling New York Attorney General to seal portions of complaint to protect confidential business information; “courts grant confidential treatment under circumstances where trade secrets and material that would place a party at a competitive disadvantage are being used in public filings.”); William E. Kovacic, Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 Brook. J. Int’l L. 403, 435 (1997) (“For example, before the agency begins collecting business records, it must institute safeguards to ensure that such records can be retrieved readily and that confidential information will not be disclosed. A lapse in such safeguards early in the agency’s existence could raise fatal doubts about its competence.”).
³ The authors are aware of many agencies around the world—including in Europe—that spend many months if not years developing a list of alleged violations of law (e.g., 300, 500, or 800 paragraphs of detailed factual assertions) and then provide the defense a meaningless short period of time to respond—15, 30, or 60 days. Such a short response period precludes any meaningful opportunity to investigate the charges, marshal the evidence, and present a factual and legal response. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”).
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6a. Trial rights—the opportunity to subpoena witnesses and documents
6b. The right to present evidence and legal arguments
6c. Freedom from reliance on anonymous or absent witnesses
6d. Defendants have a fundamental right to question government witnesses that the government presents “live” at trial4
6e. Access to the evidence possessed by or within the power of the government agency (e.g., open file access, access to a leniency applicant’s files, etc.)

7. The sanctity of amnesty promises is upheld
8. The right and ability to obtain overseas evidence
9. The right to appellate review5

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