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Commentary: Kenneth Davidson, Assisting Foreign Competition Agencies and the AMC recommendations

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ASSISTING FOREIGN COMPETITION AGENCIES AND THE AMC RECOMMENDATIONS

For reasons that I discuss below, I believe that the United States should give substantially more technical assistance to countries that have been recently encouraged to adopt antitrust or competition laws -- meaning more resources, more research and more funding. That assistance should be better coordinated between donor countries and international agencies to make best use of the limited resources that are likely to be available. And, most importantly, the antitrust assistance programs should be more integrated with other economic development and rule of law programs.

The US Antitrust Modernization Commission (AMC) purported to consider some of these issues as part of its mandate to review American antitrust law. Given the large number of subjects considered by the AMC, it is not surprising that their consideration of international assistance programs was cursory at best. The AMC conclusions are a departure point for my broader comments on international technical assistance because the AMC made a seemingly odd recommendation in the June 7, 2006, summary of its international recommendations.[1] It recommended that Congress appropriate funds for antitrust technical assistance directly to the Antitrust Division of the Department of Justice and to the US Federal Trade Commission; rather than continue the past practice of appropriating the funds for antitrust assistance to USAID, the United States Agency for International Development. The recommendation strikes me as odd for several possibly related reasons. First, representatives of the FTC and the Antitrust Division who spoke at the AMC hearings made no suggestion that the current procedure in any way detracts from the current program. Second, there was no discussion at the hearings of the effectiveness of the current assistance program; consequently no basis for any discussion of whether more or less funding or different types of programs would be desirable. And,

[1] The AMC staff is currently drafting a report based upon preliminary votes that were taken this summer. It is possible that the final report, to be issued no later than April, 2007, will differ from the preliminary votes. This essay's references to the AMC recommendations are based on the preliminary votes.

perhaps of greatest significance, there was no discussion whether there were any benefits of the current funding system that might be lost by the change in appropriation policy.

These issues seem important for reasons that were mentioned but not discussed in the AMC hearings. In the1950s only one nation had an aggressive antitrust law – the United States – and the major international controversy was the reach of US law in a world where developed countries believed that cartels or "crisis cartels" were beneficial to national economies or world trade. According to the testimony of Gerald Masoudi, Deputy Assistant Attorney for Antitrust, there were fewer than 10 nations in 1960 that had adopted competition laws. By 1990, a general consensus among developed economies had formed that cartels were bad, but still fewer than 30 countries had enacted antitrust laws. That consensus has more recently resulted in a concerted effort to promote the adoption of competition laws. The US, the EU, the OECD, the WTO and other organizations have advocated or even required in trade agreements the adoption of national competition (antitrust) laws. As a result over 100 countries now have enacted competition laws.

One issue we might consider, since the AMC did not, is whether the hundred fold growth in number of competition laws warrants more resources than are currently being devoted by national and international technical assistance programs to newly formed competition agencies. Randolph Trittell, Assistant Director for International Antitrust of the Federal Trade Commission, reported to the AMC that that in the year 2005, the United States sent 28 short term training missions to 18 countries and assigned one long term resident technical advisor to assist in the operation of competition laws. In a 2002 report to the OECD Global Competition Forum from the US Department of Justice and the US FTC, the agencies stated "The most effective form of assistance is to place long term advisors (i.e., those who spend over one month) in foreign postings to directly advise competition agency staffs over a period of time." While there are multilateral efforts, such as those of the International Competition Network (ICN), UNCTAD, OECD, the World Bank and other national technical assistance programs, the growth in number of competition agencies – more than triple the number in 1990 – suggests that the adequacy of resources ought to have been at least a topic of discussion at the AMC.

The admission of the FTC that it had only one resident advisor, without a request for more resources, when it is on record that resident advisors are the most effective assistance is an anomaly that makes one wonder whether any of the Commissioners or witnesses were paying attention to what was being said. I have worked as a long term advisor and a short term trainer in foreign competition programs. I think that both approaches can be useful when used together, but short term trainers without a long term advisor in place are of questionable value. It takes considerably longer than a month to understand the needs of a new competition agency and to gain the trust of those who operate the agency. Training in competition law is not a routine in which trainers arrive and show local officials how to put Tab A into Slot B. Fortunately, there is more than one resident advisor in the world, but how many there are is not known and what the appropriate number of US advisors—or total competition advisors worldwide-- would be has not been considered.

A more basic question is whether the assistance programs are effective. Again this is a question not even considered by the AMC. My experience is that sending in a group of well qualified, highly motivated antitrust lawyers and economists to train local officials using materials and techniques based on US antitrust laws and procedures can be incomprehensible to local officials who use civil law procedures that differ greatly from the adversarial common law procedures we use in the US. This is a particular problem for US trainers who teach how to conduct investigations by questioning witnesses in deposition-like hearings where witnesses required by law to answer. The use of witness testimony is a fundamental difference between even US and EU procedures. The EU procedures, based primarily on civil law traditions, permits testimony but only with the consent of the witness. Civil law and EU procedures are more common than US procedures in the transitional economies that have recently adopted competition laws.

The difficulty of understanding training by US competition investigators is compounded in countries where the trainees are unfamiliar with how a free market works or is supposed to work. Many of the countries and their officials have little understanding of how markets work either because they have had centrally planned economies or have been dominated by economic oligarchies in which monopolies are handed out to a favored few. For persons who are used to price controls on rice, bread, water and other necessities, it is not obvious why eliminating price controls would result in lower prices even if barriers to entry are abolished. Those persons suspect, indeed in countries I have visited, persons have told me that the only result of eliminating price controls has been price increases and no new entry. Why was there no entry? The reasons depend on the market and the country. Sometimes, it simply takes times for competitors to emerge. Sometimes they are kept out by scale economies, corruption or other reasons that tie buyers to particular sellers. Local differences such as these are one reason why it may be necessary to have a knowledgeable long term resident advisor who can interpret the state of the market, the honesty of the courts and the effectiveness of free market actions.

For this reason, in much of the training that I have participated in, I have emphasized that certain legal institutions and concepts must be in place for a freer market to benefit the citizens of a country. Building on work by FTC Commissioner Bill Kovacic, I have argued that a country must have a concept of property rights, including the right to sell property, the right to contract, the right to enter into enforceable contracts, the right to form and do business as legally separate entities from the owners, the right to raise capital through ownership interests and debt, and the right to go bankrupt so that assets and persons can reenter the market. I have also added the need for trust, honest adjudication and a widely held belief that markets can encourage lower prices, higher quality, innovation, and the formation new businesses and economic growth. Of course, no society is made of totally honest people, no society has functioned as a totally free market with no regulation. The point I make is that a society must approximate the concepts I outline for there to be a role for a competition law.

I think a small digression based on another recommendation of the AMC makes more clear the relevance of understanding how markets and competition work. The AMC

concluded that understanding and functioning of the US antitrust laws would not be improved by additional legislation. That is not because American antitrust laws are clear or well framed. They are not. They are the most opaque laws in the US Code. Neither the text, nor the legislative history of the FTC Act gives any assistance in understanding what an "anticompetitive practice" is. The Sherman Act's prohibition on contracts "in restraint of trade" if interpreted literally would make even ordinary sales contracts unlawful. Nevertheless, I do not quarrel with the conclusion of the AMC that further legislation would not be helpful. That is because we have a common law system and a hundred years of court decisions that have outlined at least the broad parameters of what constitutes an antitrust violation. And to their credit, American antitrust advisors have generally not advocated that other countries mimic the language of our laws. Rather they talk about how competitive principles and competitive analysis can demonstrate consumer harms of higher prices, lower quality and less innovation. Given that the American trainers assume that facts creating anticompetitive effects will be determined in oral testimony, the procedural training may not be possible for local officials to implement, even if they understand what the trainers tell them.

It is not clear how trainees use this competition training. Civil law assumes that the enforcement of law is simply the application of the law to actions which are declared unlawful in the legal code. U.S. antitrust law is more directed to the prohibition of anticompetitive effects rather than the prohibition of actions. The competition laws of the EU and its members attempt to bridge this gap by declaring prohibited actions with exceptions based on effects. While this appears to work in Western Europe using documentary discovery techniques, it stands as a conundrum for many other less sophisticated civil law countries where decision makers continue to try to find violations on the basis of the wording of prohibitions in their statutes. In Western European countries decision makers have a sense of how competition functions and therefore they can use that knowledge to frame decisions to prohibit anticompetitive practices. For countries that lack that experience with competition, it is unclear what they would use for guidance.

These difficulties lead me to question the wisdom of directing the funding of antitrust training to the US antitrust agencies. The ability to find and prove anticompetitive effects requires both an understanding of and aspirations for a market system. That requirement – having and believing in a market system – is often not fully in place, or is partially developed, or is openly resisted by traditional trading relationships, by economic oligarchies or by explicit government policy of transitional economies. USAID promotes a host of economic development and rule of law programs that ought to give it some perspective on the readiness and the will of developing nations to benefit from competition laws. USAID currently evaluates the American antitrust technical assistance programs and makes some determination as to its usefulness and appropriateness to particular countries. It should do more. It should coordinate competition training with other US and international efforts to develop transitional economies. To the extent that cutting USAID out of the funding process for antitrust training reduces the integration of that training with other economic and social assistance, it is a mistake. It is a step in the

wrong direction. Competition laws are not independent entities. Competition laws are only effective in helping to police market economies. They cannot by themselves create free markets.

More funding and better coordination with other USAID programs are surely needed, but they are not enough. We live in an increasingly interdependent and dangerous world. Rule of law, economic growth, income disparities, pollution control and climate change, and disease control are no longer separate problems, although we need to be very careful that particular assistance programs are suitable to local conditions. As William Easterly points out in "The White Man's Burden," the industrialized nations have spent in excess of $2.3 trillion in the past five decades in providing foreign aid, almost none of which has contributed to the lessening of world poverty.

There is a general recognition that we need new and better ideas even for teaching the seemingly remote and arcane legal specialty that is competition law and the more important concepts of competition policy that are relevant to the legal, economic and social structure of nations. CUTS, an Indian institute is sponsoring a forum on what kind of competition training is effective. The International Competition Network is conducting a survey to determine what training is effective. We should support and encourage such research.

The AAI proposal for an international antitrust academy has some promise for providing an introduction to competition concepts for persons appointed as commissioners to the newly formed agencies and for some enforcement staff. It might provide the kind of introduction that the Federal Judicial Center gives to newly appointed judges. More technical training for investigators and prosecutors probably needs to be done on a country by country basis to reflect the difference in traditions of law, economic and other circumstances. The ICN initiative to harmonize competition laws is an attractive approach for resolving some problems, but we should heed Professor Eleanor Fox's warning to the AMC that maintaining multiple approaches to competition law also has benefits. As the American antitrust experience has shown, varied federal, state and private litigation has enriched the development of our law throughout the past 100 years.

Most important, competition law should not be seen as separate and apart from legal and economic development. It must be integrated into social and economic development programs of transitional economies. Without that integration those who administer a new competition law will not have a framework for decision making and those who are the subject of their decisions will not understand the reasons that their actions are competitively harmful and unlawful.