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Commentary: Kenneth Davidson
Whither American Assistance to Competition Agencies:
An FTC-DOJ Workshop

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COMMENTARY

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WHITHER AMERICAN ASSISTANCE TO COMPETITION AGENCIES? AN FTC-DOJ WORKSHOP, a commentary on the conference sponsored by the two United States antitrust authorities on the future of their competition technical assistance program and the future of other international efforts to assist recently formed competition agencies.

Abstract

This Commentary presents the author's perspectives on a Workshop sponsored on February 6, 2008 by the US Federal Trade Commission and the Antitrust Division of the US Department of Justice entitled, "Charting the Future Course of International Technical Assistance at the Federal Trade Commission and Department of Justice. The Workshop had 33 participants who represented the two authorities, the European Union, the World Bank and other international agencies, recipients of technical assistance, academics and other staff of nonprofit and governmental institutions, and representatives of private business. This was the first such conference since the American technical assistance program was launched in the early 1990s.

*Whither American Assistance to Competition Agencies?
The FTC-DOJ Workshop*

On Wednesday February 6, 2008, the Federal Trade Commission and the Antitrust Division of the Department of Justice held a “workshop” on the future of their joint technical assistance program for recently formed competition agencies in transitional economies. This was the first such conference since the program was started in 1991 with funding from the US Agency for International Development. Despite pains in my lower back and low expectations about the conference, I went and I found it to be more valuable than I had expected.

Having long complained about certain aspects of international technical assistance programs, I felt obliged to go and to listen to the panelists throughout the day. My concerns have been expressed previously in two AAI Commentaries (“Assisting Foreign Competition Agencies,” 10/1/06, and “Promoting the Rule of Law Abroad,” 4/13/06) and elsewhere. Some of my concerns include the following: First, the US programs seem to overuse “NITA-like” deposition training for foreign agencies. This type of training forms the largest part of American assistance efforts. It is not clear that this use of resource is appropriate. Although depositions are the key to American antitrust enforcement, the national laws enforced in transitional economies frequently do not provide authority to demand testimony or responses to document requests. Second, American competition technical assistance, like virtually all other foreign technical assistance, suffers from a culture of secrecy that keeps confidential the methods and materials used by those providing assistance. As a result, there has been little basis on which to evaluate the effectiveness of particular programs. The lack of disclosure and evaluation means there is little institutional learning from experience or ways of building on past efforts even within technical assistance programs. The need for technical assistance is acute because since 1990 the number of countries that have enacted competition laws has grown from around 23 to well over a 100.

Herein are some of my personal impressions from the FTC-DOJ conference. Most of the participants and the audience have been my friends or acquaintances for many years; consequently I may have elided past conversations with the events of the day. (For those who do not remember my “With a Little Help from My Friends: A Fond Farewell [to the FTC],”

www.antitrustinstitute.org , (7/5/05), or who have not read it, I typically do not take notes while listening and Wednesday was no exception.)

The Daylong Workshop

The opening hour by Chairman Majoras and Assistant Attorney General Barnett was gracious and supportive of technical assistance, but their presentations realized my concern that the conference would celebrate the accomplishments of the program rather than search for more effective means to implement its goals. The Chairman and the AAG were didactic on the centrality of allocative price theory, antitrust law, and how perfect competition can solve all economic problems. They described the technical assistance programs as a great success in very broad conclusions.

Their introductory speeches referred to the categories of technical assistance and the countries that have received it. They noted the programs have been in existence for about twenty years, transitional economies like them, the US likes them, long term resident advisors appear to be more effective than short term training programs, the programs have established continuing personal relationships with foreign officials that are useful to them and us. They did not address what kinds of assistance had worked, what had not worked well, or why.

The first session, composed of foreign and US staff seemed to echo these celebratory themes. The representatives of foreign agencies declared they are grateful for every bit of technical assistance they received. The principles of price theory were declared to be universal laws applicable everywhere. To be sure, these presentations were not all bursting with cheer and confidence. Tim Hughes, of the FTC, repeated a more detailed history of the assistance program. Craig Conrath, of DOJ, described the usefulness of long term resident advisors. Such advisors are in place when the “teachable moment” occurs in an investigation or a case, over time they can build the trust that will allow their words to be accepted for that case, and they can reinforce the lesson of that moment the next time or use the prior success as evidence of credibility for the future. In a later session his DOJ colleague, Russ Pittman, noted that the successful relationship established by a resident advisor can develop into continuing phone or email relationships that continue long after the advisor returns to the United States. While there was more texture to these descriptions, the overall impression was so

positive that it was hard to discern any limiting principles from which to learn or improve.

I admit to having been discouraged by all this and skipped the consumer law discussion to visit with my former colleagues at the FTC. So it was with some reluctance that I left their company to return to Russ Pittman's session on World Experience in Delivering Technical Assistance. I am very glad that I did because throughout the day little nuggets of useful knowledge appeared without warning. Even the day's first session turned out to be more useful than I then appreciated. Assembled together, in the light of the total discussion, these nuggets may provide insights as to how technical assistance might be made more effective.

When I returned, Alberto Heimler of the Italian competition authority was talking about the European Union's assistance efforts in former soviet countries. These were very different from the American assistance programs that were operating in these same countries at the same time. The EU was seeking to establish competition agencies that were compatible with the EU competition framework because most of these countries were seeking admission to the EU. That gave the EU and the former soviet countries a clearer goal and stronger incentives to have effective programs. In contrast, the US antitrust assistance program tended to be oversold as a blueprint for creating a market economy in these countries. These amorphous claims have persisted notwithstanding the fact that American programs tend to be focused on how to do an investigation rather than be focused on broader issues of organizing the economy. In addition to clearer goals, the EU put more money (a million Euros) into each country project than the United States spent in any one year on its world wide programs.

Shyam Khemani, the World Bank's advisor for competition policy, confronted directly the premise of antitrust technical assistance that was presented during the morning sessions. He noted that, while competition and the development of market economies are high priorities at the World Bank, they do not have a competition enforcement training division. The Bank has continued to work on specific competition law issues, for example, beer mergers in Brazil or establishing the competition agency in Indonesia, but its primary efforts have been on establishing the legal and physical infrastructures needed to develop a market economy. For example, one World Bank project was dedicated to finding comparative data on how long it took for persons in different countries to establish a business entity and

how much it cost to do so. Typically, forming a business took far longer and was far more expensive in underdeveloped countries. As a result, the Bank has funded projects to reduce the time and cost of registering businesses. That focus on establishing new business entities has helped determine what regulatory barriers exist in transitional economies and provides an immediate standard in days and dollars for determining the success of programs to reduce barriers to formation of new businesses.

Edward Whitehorn, of the OECD, talked about its competition regional training centers for competition law and economic development, its global competition forum, and some new initiatives. Two initiatives seemed particularly interesting. First, the OECD has established a calendar to list all competition training program that are offered to transitional economies by all national and international programs. This could be a big step forward if all programs are listed. For the first time it would be possible to get a sense of what choices exist for new competition agencies in transitional economies. Second, OECD has initiated a program in Latin American that is focused on techniques to identify and remedy bid-rigging at all levels of government. Like the World Bank programs, this initiative has a clear focus for the trainers and an immediate application in the transitional economies.

The following session on Perspectives on Competition Technical Assistance revealed a number of discrete viewpoints. Former AAG Jim Rill (who was cited as one of the founders of the US technical assistance programs and is now partner at Howrey) and Stan Anderson of the US Chamber of Commerce argued forcefully that technical assistance should focus more on consistency of competition laws and transparency of results. They argued also for a shift from assistance to developing countries to assistance to large countries that have a substantial impact on international trade, like China, India, Brazil and Chile. I do not think that they need to worry: the antitrust agencies have established units to deal with foreign countries. The Foreign Commerce section at the Antitrust Division and the International Division of the Bureau of Competition at the FTC were formed long before the joint technical assistance program. The preexisting international units were responsible for coordinating US and foreign antitrust enforcement and for commenting on proposed competition laws, guidelines and regulations. At the FTC, Chairman Majoras has recently combined the technical assistance program with the international division into a new Office of International Affairs.

Jim Rill's support of direct funding of the US antitrust agencies international activities struck me as a substantial departure from the USAID roots of antitrust technical assistance. My suggestions have been closer to those of Shyam Khemani, that is, arguing for an integration of competition law and policy with other development efforts. I had not understood the agenda of the Antitrust Modernization Commission when it suggested Congress should fund the FTC and DOJ directly. This would allow antitrust technical assistance to escape the criteria used by USAID to fund the FTC and DOJ programs.

Nick Klissas, of USAID, confirmed that China could not get such funds from USAID in the course of an interesting discussion of commercial law reform programs for transitional economies. His presentation on law reform paralleled much of Shyam Khemani's World Bank presentation.

Eleanor Fox, NYU law professor and longtime leader of international and transitional competition law, noted there is a gap between the needs of developing countries and what US agencies deliver on antitrust substance and the scale of needs in countries with new competition law. Some American technical assistance focuses on cartels rather than monopoly because Americans have more experience with cartel law even though monopoly, state owned businesses and crony capitalism tend to be more common problems in transitional economies.

Professor Fox made a provocative suggestion that was not picked up directly in that session. She suggested that some transitional countries might not be currently suitable for receiving technical assistance because they lack rule of law, have endemic corruption, or are dominated by state owned enterprises or ruling elites. Implicitly she argued that the very limited US funding of these assistance programs ought to be targeted toward countries that demonstrate they have an economy that is in a position to implement a competition law. In a sense, this is the flip side of what Nick Klissas and Shyam Khemani said about the importance of giving priority to establishing a viable legal infrastructure.

Finally, Angel Lopez Horer, of the Mexican competition agency, echoed an earlier comment by a Hungarian official, Virag Balogh, that transitional nations with more experienced competition agencies can sometimes play a unique role in helping agencies that are just starting up in their regions. As regional and, possibly, developmental neighbors, they sometimes have more

credibility than rich nations, whose motives are sometimes suspect. Angel also suggested that there is some sense of “deregulation fatigue” because consumers in many transitional economies have not seen the benefits of lower prices from deregulation, privatization and competition law.

Angel also noted that one problem with training the staffs of transitional economies is that frequently, after being trained by international trainers, the staffs of these new agencies leave for work in the more remunerative private sector. This provoked a flurry of comments about how the agencies in transitional economies thereby lost institutional knowledge and the international assistance had to start all over. Even so, it was argued that the spread of knowledge about competition rules to the private sector was a positive development for the society if not the development of the new competition agency.

The final session run by FTC Commissioner Bill Kovacic, (former FTC General Counsel, former law professor, frequent consult to governments of transitional economies and prolific scholar on assistance to competition agencies in transitional economies) was his usual insightful, humorous and impassioned self. He made many points but none so emphatically as his condemnation of the tradition of secrecy by those engaged in technical assistance. He described the “debacle in Jakarta” where ten assistance programs purported to be helping Indonesia establish its competition law and agency. The World Bank sought to facilitate these separate efforts by identifying what each assistance agency was trying to do. However, none of the officials representing the separate assistance programs would “confess.” They limited their responses to admissions that they were providing “technical assistance” on “competition law and policy.” How can one find one’s way forward in such darkness?

His session on Moving Forward included some very bright young academics. Danny Sokol presented findings he, Michael Nicholson and others, have teased out of an ICN survey on competition assistance programs. They found support in the ICN data for the long held view that longer term resident advisors are more effective than short term programs. Michal Gal, an Israeli law professor, described as the best of the new generation of international and transitional competition law specialists, presented a careful refinement of the points made earlier by Eleanor Fox and Angel Lopez Horer that there are maturation stages that determine the capacity of new competition agencies. She suggested that new competition

agencies should first develop their skills and public support by focusing on relatively easy high profile cases that have immediate consumer benefits, like prosecution of a bread or a rice cartel.

Both points were refined in later discussion. Several people noted that competition agencies cannot necessarily wait and gain experience before they address Microsoft issues or the high price of HIV drugs. The difficult issues of intellectual property law may be front and center political issues that need to be resolved publicly and immediately. Where such public urgency was recognized, the World Bank seems to have departed from its assistance to competitive infrastructures and attempted to provide competition technical assistance that is directed more specifically to new competition agencies in transitional economies. Although not discussed at the workshop, the United States has also provided short term assistance where transitional economies have demonstrated an emergent need, for example, an American specialist to help in the drafting of a new competition law.

Andreas Reindl, the new co-director of the Fordham law international program, dissented from the notion that long term advisors and programs are necessarily better. He noted that there can be important and unique roles for short term programs. For example, Fordham put on a two or three day program for eight heads of small competition agencies. In contrast to meetings of the ICN, the OECD Global Competition Conference, or the ABA annual, this Fordham program for officials from transition economies was not held in Paris, Washington, Cancun, Naples or another tourist destination, and did not have its focus on matters of high profile cases or cutting edge economic theory. Rather the program brought the heads of agencies together to discuss their organizational problems and solutions in hopes that sharing parallel experiences would enable each of them to function better in the future. The session was private, intense and seemingly successful.

Other comments were made that touched on the theme of the maturation stages of competition agencies. For example, long term advisors did not make much sense for brand new agencies, both because there was not enough training to do, and because the constant presence might be embarrassing or overwhelming to the new staff and agency. Short term assistance in drafting or revising competition statutes can be helpful if the foreign advisors do not become the Jakarta Tower of Babel.

This more nuanced portrait of the useful assistance advisor emphasized the importance of being both adaptable to the needs of the new agency and also to try to operate more as coach than substitute player (much less star player). But as Graciela Ortiz of Peru said in the first session, sometimes it is definitively helpful to have the outsider, the official of a rich successful country, validate the need for a particular competition policy.

In combination, these comments do not suggest blanket support of long term or short term advisors, or of other programs. Rather they confirm the intuitive notion that there is no one size fits all solution, that different advisors, different programs and different formats are effective in different settings. In one instance it might be most important to have the participation of heads of the DOJ or FTC to validate the importance of competition and a new competition law, in others it may be more important to have specialists who have conducted investigations or persons who are knowledgeable about how to organize or publicize an agency.

Some of these refinements came from Bill Kovacic's organizing principles for his session, where he assembled a very diverse panel of academics, lawyers, economists, consultants, business representatives and nonprofit representatives and then focused their discussion on three primary questions: identify one or more examples of a successful assistance project, identify one or more examples of a failed assistance project, and suggest concrete steps to improve assistance.

Surprisingly to me, Scott Cooper, of the American National Standard Institute (ANSI), provided the clearest examples of success and failure. His success story concerned Romanian export industries. Those industries found they had a hard time entering the international market because their reliability was unknown. In order to establish an acceptable international profile, they worked with the American association of Better Business Bureaus to obtain a certification of their reliability. With the changes in Romanian procedures needed to get the BBB endorsement, they found international commerce more possible. This story echoed the earlier remarks of Shyam Khemani and Nick Klissas on the importance of building infrastructures that make market economies possible.

The BBB story also illustrated that there many more ways of delivering technical assistance, and sometimes more effective ways, than relying on

government providers. This complemented the remarks of Danny Sokol and Andreas Reindl that American universities have a largely untapped potential to train foreign officials, staff and students, and that they can do so in a nonprofit framework like ANSI that may be able to react more quickly and flexibly than governmental institutions.

Scott Cooper's failure example highlighted some limits to private and nonprofit initiatives. He described a three year project of 80 large multinational corporations to establish rules for alternative dispute resolution systems for consumers in trans-border transactions. It was a global effort that involved the CEOs of corporations and consumer organizations from around the world. The idea was to establish an international procedure to resolve disputes between consumers in one country and producers from another. The idea was that a neutral forum could be quicker, cheaper, and more satisfactory than the legal systems of the producing or consuming country. At the end of three years, a protocol had been agreed upon by the representatives of the corporations and consumers, but it was never implemented. As a result of the dot.com crash in the late 1990s, many of the CEOs were replaced and those who remained could not find sufficient political will in the developed or developing world to implement the protocol.

Mark Whitener, of GE, reaffirmed the responsibility and interest of multinational corporations, like his, in furthering effective international rules of commerce. He said GE will continue to fund such efforts and these have a potential to greatly increase the resources available for technical assistance. He, too, noted the need for government involvement to implement many solutions.

On one matter there seemed to be an explicit consensus. There needs to be longer term planning of competition technical assistance. Much of the perceived weakness of existing programs derives from the fact that government donors of technical assistance have not demonstrated a consistent political will that permits long term planning, thus programs tend to be ad hoc.

Bill Kovacic's buddy and longtime collaborator in assistance, Georges Korsun, of Deloitte, stressed the need for a world wide and country by country "needs assessment" of technical assistance. Priorities should be determined and acted upon in a consistent long term framework. This was

perhaps an echo of Eleanor Fox's earlier remarks about an intelligent use of limited assistance funds.

Well, that is the way I remember the conference. But you need not take my word for this Mid-Winter's Daylong Dream, the FTC transcribed the proceedings and will no doubt make the full remarks available to those who are interested, in due course. The FTC and DOJ have also asked for suggestions from the public and promised a report on the future of technical assistance.

Some Observations

My view is that the conference was a useful beginning, but it failed to address two questions that I consider crucial. The first question concerns the nonpublic nature of training materials and programs. Although the culture of assistance secrecy was dramatized, the proceedings did little to undermine the opaqueness of training efforts. No training materials or programs were disclosed or examined in a way that could let observers analyze what worked, what did not work, or why. Perhaps this is too soon, or not the right people, or not enough time for such "real" work.

The second question concerns the failure to consider how, when, or if competition technical assistance should be integrated into the more general commercial law reform and infrastructure development frameworks. I have a sense of shared unreality when working on competition law in transitional economies. I and the people I have worked with or have taught frequently sense that competition law is a supplement to a larger economic framework that is assumed, but not addressed, in technical assistance training or materials. So, when I am consulting or teaching in transitional economies, I hand out some of my writings that attempt to bridge that divide. On Wednesday, my only contribution was a suggestion to Craig Conrath and Russ Pittman that they make Craig's "Practical Handbook on Antimonopoly [Competition] Law Enforcement" even more widely available. It is the best set of competition law training/teaching materials I know of, but is, unfortunately, not well enough known and was unmentioned at the conference.

Some important issues were addressed during the day. There were a surprisingly large number of very different people who seemed to say, from very different points of view, that American technical assistance, and

competition technical assistance worldwide, ought to be refocused to make the efforts more successful and more efficient. Jim Rill and Stan Anderson want the focus of efforts to be on resolving issues between large trading partners regardless of their developmental stage as market economies. Eleanor Fox indicated support for the more traditional new-competition-agency focus, but suggested paring back to use the limited assistance funds in situations where countries have economies that are capable of implementing a competition law. Georges Korsun wants a survey of needs for competition training. And, virtually everyone, who discussed the issue, said that the training and assistance offered should reflect the capacities and circumstance of those receiving assistance.

None of these are entirely new ideas. When I went to Indonesia as a long term resident advisor from the FTC, Markus Meier, my predecessor, spent weeks preparing me for my task. He gave me materials on the history and development of Indonesia, and its competition law. He gave me the set of materials, borrowed from Craig Conrath's "Practical Handbook," that he had adapted to the Indonesian competition law. This was not a unique experience. In a short term training mission to Armenia, I benefited from help by Michael Nicholson, then a long term resident advisor in Armenia. He and I were then employed by IRIS, a private contractor to USAID. In response to my requests, he provided me with copies of the Armenian law, decisions of the Armenian agency and Armenian courts. As a consequence, when I arrived in Armenia, I was prepared to integrate my presentations and discussions with the circumstances as they existed in Armenia.

I am certainly not the only one who has experienced this kind of sustained effort to prepare and support a new advisor/trainer. The problem is that these kinds of detailed preparations for assistance programs are unusual because they reflect commitments by individuals rather than an institutional process. They should be implemented routinely.

The suggestion of Georges Korsun and others for comprehensive assessment and planning is much harder to do. The ICN survey shows that it very difficult to obtain finely grained enough data to provide good information on technical assistance. To be sure, long term resident advisors may be better generally than short term programs. But the consensus at the workshop was that long term advisors are not always suitable and no one discussed that there are very few long term advisors because they are very expensive for the agencies and USAID. To get really good information about the needs

and capacities of new competition agencies requires that those doing the assessment live and work with the staff and leaders of the new agencies and to gain the confidence of the new agencies. The OECD world training calendar might be a starting place for comprehensive technical assistance planning, but even the American agencies have a hard time disclosing their future assistance plans because final approval of their training programs by foreign countries and American embassies frequently arrives only shortly before the programs are given.

The participants in this workshop demonstrated that there are many channels for delivering competition technical assistance and many effective methods for its delivery. The private sector, the academic community, the nonprofit community, foreign competition agencies and global organizations all have the potential to greatly magnify the programs of the American competition agencies. I hope that this workshop conference and its follow-on report lead to a recognition that more focused and integrated competition technical assistance programs are both needed and possible.