
Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe

William E. Kovacic

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DePaul L. Rev. 1197 (1995)

Available at: <https://via.library.depaul.edu/law-review/vol44/iss4/7>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

DESIGNING AND IMPLEMENTING COMPETITION AND CONSUMER PROTECTION REFORMS IN TRANSITIONAL ECONOMIES: PERSPECTIVES FROM MONGOLIA, NEPAL, UKRAINE, AND ZIMBABWE

*William E. Kovacic**

INTRODUCTION

In November 1992, I traveled to Mongolia to assist in a process which led to Mongolia's adoption of an antimonopoly law. During a seminar in Ulaanbataar for Mongolian government officials on merger enforcement, I described how some countries recognize a "safe harbor" in which firms with small market shares can merge without fear of challenge by public antitrust authorities. The translator quickly told me that the safe harbor metaphor lacked meaning in a landlocked nation. After searching for a phrase that would work in a country of no ports but many herders, we decided that "peaceful pasture" was a suitable way to capture the idea of creating zones of transactional immunity.¹

The discussion of peaceful pastures in merger enforcement provided one reminder of the many challenges posed by efforts to design and implement competition policy laws in countries undergoing the transition from central planning to a market economy. Estab-

* Professor, George Mason University School of Law. The author is grateful to the DePaul University College of Law and the DePaul Law Review for sponsoring the conference for which this paper was prepared. The author thanks the University of Maryland Center for Institutional Reform and the Informal Sector and the United States Agency for International Development for funding the technical assistance projects that provided the basis for this paper. The author also has benefitted from many discussions about the role of law reform in transitional economies with James Anderson, Kul Ratna Bhurtyal, Linda Boner, Roger Boner, Charles Cadwell, Cynthia Clement, Ramesh Dhungel, Praveen Dixit, George Gamota, Prakash Ghimire, Georges Korsun, Peter Murrell, Mancur Olson, and Robert Thorpe, who also provided comments on an earlier draft. The views expressed in the paper are those of the author alone.

1. When speaking through a translator to an audience having little familiarity with market economics, it is important to articulate one's thoughts clearly and deliberately. In another seminar in Mongolia, I hastily mentioned that "law and economics" had greatly influenced judicial thinking about antitrust policy in the United States. From my rushed presentation, the interpreter thought I had spoken of "lawn economics." At the seminar's end, one participant said that only a wealthy capitalist nation such as the United States could develop a subspecialty of economics devoted to the study of residential landscaping.

lishing a competition policy system in formerly socialist or communist nations entails far reaching changes. These include drafting and enacting new legislation; forming new government institutions; educating business managers, government administrators, judges, and the public about the role of competition in a market system; and, in some instances, even so basic a step as creating a new vocabulary to describe market phenomena and concepts central to competition policy analysis.

Since 1980, many formerly communist or socialist nations have enacted new antimonopoly and consumer protection laws or bolstered existing measures.² A number of other countries are considering new antitrust or consumer protection statutes to facilitate the transition from planning to markets.³ To draft and implement such measures, multinational donor groups and individual Western nations have sponsored a wide array of technical assistance programs. Experience with antimonopoly and consumer protection initiatives since the late 1980s provides a basis for evaluating how these and other law reform efforts can best be implemented in transitional economies. In the past three years, I have participated in antitrust or consumer protection law reform projects in Mongolia, Nepal, Ukraine, and Zimbabwe. Each consultation has been sponsored by the United States Agency for International Development (AID), and the programs in Mongolia, Nepal, and Ukraine have taken place under the aegis of the University of Maryland's Center for Institutional Reform and the Informal Sector (IRIS). This Article draws on these projects, discussing approaches for designing and im-

2. See, e.g., ANA JULIA JATAR, *COMPETITION POLICY IN LATIN-AMERICA: THE PROMOTION OF A SOCIAL CHANGE* 2-3 (1995) (describing adoption of competition laws in Latin American and European countries undergoing economic liberalization); Sergio Garcia-Rodriguez, *Mexico's New Institutional Framework for Antitrust Enforcement*, 44 DEPAUL L. REV. 1149 (1995) (discussing content of Mexico's new antitrust law); Clive S. Gray & Anthony A. Davis, *Competition Policy in Developing Countries Undergoing Structural Adjustment*, 38 ANTITRUST BULL. 425, 427-28 (1993) (describing adoption of antimonopoly legislation as element of structural adjustment in developing countries); William E. Kovacic & Robert S. Thorpe, *Antitrust and the Evolution of a Market Economy in Mongolia*, in *COMPETITION POLICY AND DEMONOPOLIZATION IN THE POST-COMMUNIST ECONOMIES* (Ben Slay, ed., forthcoming) (describing Mongolia's adoption of a new antimonopoly law); Robert G. Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275, 277-78 (1994) (examining origins and content of new consumer protection laws in South America).

3. See, e.g., William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253, 253-54 (1992) [hereinafter Kovacic, *Competition Policy*] (discussing Zimbabwe's consideration of a new antitrust system).

plementing law reforms.

Part I of this Article describes the possible contributions of anti-trust and consumer protection systems in promoting the development of free markets in transitional economies. This Article treats consumer protection laws along with antitrust legislation due to the overlap between the two in some transitional economies. Consumer protection laws in transitional economies sometimes contain provisions — such as a ban on cartelization or restrictions on advertising — with significant antimonopoly and competition policy implications.⁴ Antitrust laws in such countries occasionally contain consumer protection articles dealing with business torts and deceptive trade practices.⁵ Part II discusses features of the transitional economy environment relevant to the design and implementation of anti-trust and consumer protection reforms, and Part III considers the implications of these conditions in proposing methods for devising and carrying out antitrust and consumer protection reforms. Although the Article focuses on antitrust and consumer protection initiatives, its observations often apply to other economic law reform activities in transitional economies.

I. THE RATIONALE FOR ANTITRUST AND CONSUMER PROTECTION PROGRAMS

The case for establishing antitrust and consumer protection systems as part of transitional economy legal reform is not self-evident. Commentators have raised three basic criticisms about such measures. The first criticism views antitrust and consumer protection laws as excessively prone to misapplication in the form of corrupt, unduly aggressive, or arbitrary enforcement that can discourage investment and growth.⁶ With antitrust laws, a common fear is that

4. See *infra* note 10 (discussing antitrust and consumer protection laws in transitional economies).

5. See *infra* note 10 (discussing antitrust and consumer protection laws in transitional economies).

6. See Armando E. Rodriguez & Mark D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N.C. J. INT'L L. & COM. REG. 209, 222-27 (1994) (describing enforcement problems with antitrust laws, indicating that these laws may run counter to perceived national interests); Paul H. Rubin, *Growing a Legal System in Post-Communist Economies*, 27 CORNELL INT'L L.J. 1, 45-46 (1994) (describing the ineffectiveness and limitations of antitrust laws in developing countries); see also Vladimir E. Capelik, *Should Monopoly be Regulated in Russia?*, 6 COMMUNIST COUNTRIES & ECON. TRANSFORMATION 19, 22-24 (1994) (describing dangers of applying an excessively broad definition of "monopoly enterprise" or "dominant firm" in determining which companies are to be included on Russia's state register of mo-

enforcement authorities will use limitations on dominant firm behavior to punish all conduct that results in the disappearance of a rival, or to treat dominant firm price increases as evidence of improper exploitation and a basis for imposing variants of price controls. Major concerns with consumer protection laws are that the government will establish intrusive controls on the substance of bargains between sellers and buyers, and that expansive interpretations of bans against false or misleading advertising will discourage sellers from providing consumers with useful information.

A second basic criticism is that transitional economies can accomplish the most important competition policy objectives more effectively by directly facilitating the movement of goods across national and regional borders.⁷ Put another way, the best antitrust policy might consist of greater appropriations for airports, roads, and rail links; policies to encourage investment in communications infrastructure; the elimination of government restrictions on entry; and the dismantling of quota and tariff barriers to imports.⁸ Similarly, a consumer protection policy might best take the form of efforts to increase the reliability of contract enforcement, along with the recognition of doctrines that void agreements induced by fraud.

The third criticism is that efforts to create antitrust and consumer protection systems divert attention and scarce national resources away from more important law reform priorities.⁹ During a trip to Kiev in January 1995, I spoke on several occasions with a real estate investment entrepreneur who described how infirmities in rudimentary legal institutions impede investment and commercial activity in

nopoly enterprises).

7. See ROBERT D. COOTER, MARKET MODERNIZATION OF LAW 31 (1995) ("Developing nations can accomplish many goals of antitrust policy through free trade without the state creating an enforcement bureaucracy.").

8. See ANNETTE W. BROWN ET. AL., THE MYTH OF MONOPOLY: A NEW VIEW OF INDUSTRIAL STRUCTURE IN RUSSIA 38-39 (World Bank Policy Research Working Paper No. 1331: 1993) (describing how elimination of regional and local curbs on entry and movement of goods could improve Russia's system of distribution).

9. Paul Godek makes the point as follows:

East Europeans have limited resources and much more important things to worry about at this precarious stage of their development. Worrying about antitrust issues shows an unhealthy state of anxiety about the imagined ills of capitalism. Exporting antitrust to Eastern Europe is like giving a silk tie to a starving man. It is superfluous: a starving man has much more immediate needs. And if the tie is knotted too tightly, he will not be able to eat what little there is available to him.

Paul E. Godek, *One U.S. Export Eastern Europe Does Not Need*, in REGULATION 20, 21 (Winter 1992).

Ukraine. The entrepreneur wished to create a prototype subdivision outside of Kiev, equipped with prefabricated homes built in the United States and providing amenities such as a swimming pool and security guards. Because Ukraine has no law that clearly permits private ownership of interests in real estate, any effort to acquire land (either a fee simple interest or a long-term lease) and build permanent structures is beset with enormous uncertainty. In an environment of austere national resources, an argument could be made for subordinating the pursuit of antitrust or consumer protection legislation to the creation of legal institutions for defining and protecting property rights.

These concerns deserve serious attention. Yet there remains a potentially useful, positive role for well-conceived antitrust and consumer protection institutions in the transition to a market economy.¹⁰ Their potential value comes in three forms. The first deals with government activities that smother or distort market processes. It is important not to underestimate the hostility or skepticism among some elected officials, ministry leaders, and citizens' groups in many transitional economies to market-oriented reforms.¹¹ In many instances, official opposition to reform is not expressed openly (or is understated), so as not to draw opprobrium from donor entities, such as the International Monetary Fund and the World Bank, which have made market-oriented structural reforms preconditions for continued financial assistance.¹² Short of overt resistance, government authorities may seek to deflect market-based initiatives through half-hearted implementation of nominal reforms or the use of subtle administrative strategies for continuing state control of economic activity. In many transitional economies, market-oriented

10. For more sanguine assessments of the value of antitrust and consumer protection programs in transitional economies, see James Langenfeld & Marsha W. Blitzer, *Is Competition Policy the Last Thing that Central and Eastern Europe Need?*, 6 AM. U. J. INT'L L. & POL'Y 347, 367-76 (1991) (discussing the use of antitrust laws to create competition in Eastern and Central Europe); Spencer Weber Waller & Rafael Muenta, *Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru*, 21 CASE W. RES. J. INT'L L. 159, 159 (1989) (describing how a system of competition laws is vital to the development of an effective national economy); Robert D. Willig, *Anti-Monopoly Policies and Institutions*, in *THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE* 187, 195 (Christopher Clague & Gordon C. Rausser, eds. 1992) (applauding emerging market economies for recognizing that "anti-monopoly policy is integral to the process of transition").

11. See Jeffrey Sachs, *In Defense of Russia's Reformers*, WALL ST. J., Dec. 30, 1993, at A8 (describing "hand-to-hand combat" between economic reformers and the "communist old guard" in Russia).

12. See Kovacic, *Competition Policy*, *supra* note 3, at 256.

reforms have a tenuous foothold in public policy, and the success of efforts to remove the state from unnecessary and destructive intervention in the economy is far from assured.

Antitrust and consumer protection mechanisms can provide an institutional voice within the government for the promotion of markets and opposition to state efforts to suppress market processes. Antitrust and consumer protection institutions can attack government policies that impede the development of markets and help ensure that the state intervenes only to correct genuine market failures. Among other approaches, competition and consumer protection authorities might be given a formal role in reviewing or approving the decisions of other government ministries with respect to such matters as the issuance of licenses and the privatization of state-owned firms. An antimonopoly or consumer protection agency may be the only formal institutional counterweight to government efforts to deflect or obstruct market reforms.

A second useful function is to deal with private efforts to undermine market processes. There are (and will be) market failures that present serious obstacles to the emergence of markets and are amenable to correction. For example, business actors in the new market environment may experience a strong inclination to attempt to achieve by private agreement the type of industry-wide orchestration of activity that government ministries formerly performed. Carefully designed and focused antitrust and consumer protection institutions can challenge private conduct — such as cartelization and mergers to monopoly — that seriously threatens the successful operation of a market system.

The third function is to establish institutions that provide actual and symbolic assurance to the public and their elected officials that the move to a market system does not leave citizens at the mercy of market failures. In many environments, the realistic alternative to antimonopoly or consumer protection legislation may be far more intrusive forms of government intervention, including direct price controls, broad limits on entry, and continued widespread public ownership of business enterprises.

II. THE IMPLEMENTATION CONTEXT

Antitrust and consumer protection law reform efforts in transitional economies do not occur in a vacuum. These and other law reform initiatives take place in a distinctive national context, featur-

ing a mix of commercial, government, social, and political institutions and circumstances with important implications for the substance and process of law reform. Studying and understanding these conditions in the host country is crucial to designing and implementing constructive laws. Described below are some of the most important conditions that confront law reform programs in most transitional economy settings.

A. *The Commercial Context*

To achieve economic progress, market-oriented law reform should flow from a careful evaluation of the structure and patterns of commercial activity in the host country. In many transitional economies, the national commercial context features the following traits.

1. *Pervasive Role for the State*

In most transitional economies today, the state continues to exercise broad control over commercial activity.¹³ The state's influence is the residue of decades of central planning, in which individual sectoral ministries exercised enormous economic and political power through the oversight of state-owned business enterprises.¹⁴ Despite the adoption of economic liberalization measures, transitional economy governments shape commercial activity in many ways, including state ownership and management of business enterprises, severe regulation of entry, diversification, and exit, and controls over pricing.¹⁵ Even where transitional economies have embarked on seem-

13. See Irina Starodubrovskaya, *The Nature of Monopoly and Barriers to Entry in Russia*, 6 COMMUNIST ECON. & ECON. TRANSFORMATION 3, 13 (1994) (describing how local authorities in Russia continue to exercise control over commercial activity and obstruct competition).

14. See Paul J. Joskow et al., *Competition Policy in Russia During and After Privatization*, IN BROOKINGS PAPERS ON ECONOMIC ACTIVITY AND MICROECONOMICS 301, 306-24 (Martin N. Baily et al., eds. 1994) (describing state oversight of business enterprises in Russia during the era of central planning).

15. See e.g., JATAR, *supra* note 2, at 1-2 (describing how Latin American governments have followed economic regulation such as price controls, state monopolistic practices, and government ownership of industries and services and how many Latin American countries have not actively enforced their antitrust laws); see also PETER MURRELL ET AL., THE CULTURE OF POLICYMAKING IN THE TRANSITION FROM SOCIALISM: PRICE POLICY IN MONGOLIA 7 (IRIS Working Paper No. 32, 1992) [hereinafter MURRELL, CULTURE OF POLICYMAKING] (describing how despite economic liberalization, the Mongolian government continued to exercise control through official recognition of commissions and agencies to direct price policy and how the government continued to implement previous economic policies); PETER MURRELL ET AL., PRICE POLICY IN MONGOLIA: A CHRONOLOGY OF DEVELOPMENTS (IRIS Country Report No. 6, May, 1992) (discussing Mongolia's continued government control over commercial activity through the use of price control measures).

ingly ambitious privatization and deregulation programs, state ministries have sought to maintain control over privatized entities by way of regulation or by the exercise of ownership interests, or by limiting the scope of enterprises subject to privatization.¹⁶ Market-oriented reforms undertaken at the national level can be undermined by regional and local government authorities who continue to impose controls that the national government has disavowed.¹⁷ In approaching economic law reform, it is unwise to overlook the incentive and ability of government authorities at the national, regional, or local levels to undermine reform efforts that threaten to reduce their economic and political power.

Recent experience with Ukraine's efforts to draft a new law for the regulation of natural monopolies illustrates the point. Under Ukraine's privatization program, natural monopoly entities are exempt from privatization. This exemption places a premium on the ability of the natural monopoly law drafting group to devise (and gain acceptance for) a working definition of "natural monopoly" that properly limits the activities subject to natural monopoly oversight.¹⁸ This problem has two dimensions. The first is to identify industry sectors that today have natural monopoly traits and to provide a mechanism for adjustment that takes account of changes in technology and competitive circumstances. The second is to address the conglomerate, integrated structure of firms that engage in natural monopoly activities.

During the era of central planning in Ukraine and other countries, the absence of strong markets for intermediate inputs and the government's desire to use firms as engines of social policy caused state-owned enterprises to pursue self-sufficiency.¹⁹ Thus, the state pipeline company in Ukraine controls not only natural gas pipelines, compressor stations, and scheduling facilities, but also owns the housing in which its workers live, the retail stores in which they

16. See *supra* note 15 (describing different methods used in transitional economies to maintain control despite liberalization of economic measures).

17. See MURRELL, *CULTURE OF POLICYMAKING*, *supra* note 15, at 7 (describing how local government officials in Mongolia seek to control prices despite the elimination of price controls as a matter of national policy); Starodubrovskaya, *supra* note 13, at 13 (recounting how local governments impede competition).

18. Cf. Joskow, *supra* note 14, at 362-66 (describing competition policy issues associated with natural monopolies in Russia).

19. See Janusz A. Ordover et al., *Competition Policy for Natural Monopolies in a Developing Market Economy*, 2 *ECON. TRANSITION* 317 (1994) (describing how impetus to achieve self-sufficiency has determined structure of public utilities in transitional economics).

shop, the construction company that services the pipeline and other purchasers of building services, and the farms that produce the food consumed by the pipeline company's employees. Ministries responsible for specific economic sectors in Ukraine have a strong interest in seeing that the concept of "natural monopoly" is defined and interpreted broadly in order to increase the number of sectors exempt from privatization and to prevent the privatization of business entities that are affiliated with the natural monopoly firm, but perform no genuinely natural monopoly activities. A narrow definition of natural monopoly, and the deconglomeratization of firms holding natural monopoly assets, would reduce significantly the ministries' base of economic and political power.

2. Strong Residue of Commercial Behavior Shaped By the Planning Era

Many transitional economies have implemented law reforms that give commercial entities greater freedom to set prices, select output levels, offer products, and enter markets of their choice.²⁰ As the government relaxes controls on firm behavior, some business entities may show a propensity to attempt to recreate privately the types of planning mechanisms that the state formerly supplied. Consider the following examples.

During the November 1992 trip to Mongolia to assist the government in preparing to draft an antimonopoly law, a team of IRIS researchers conducted case studies in the meatpacking, telecommunications, and wool-spinning industries.²¹ In the era of planning, Mongolia had three large, state-owned slaughtering and meat processing facilities. At the time of our visit, the government had privatized the three processing plants while retaining majority ownership of the stock of each plant. Each plant functioned as a stand-alone firm. By late 1992, the government had ended price controls on the sale of animals, and herders had begun to shop their herds around to different meatpacking facilities in search of the best price. The manager of one meatpacking plant told us that the three

20. See Kovacic, *Competition Policy*, *supra* note 3, at 253 ("Many developing countries in Africa, Asia, and Latin America that once embraced socialism are pursuing market-oriented initiatives that present exciting possibilities for political and economic change."); see also *supra* note 2 and accompanying text.

21. The results of the case studies are reported in KAREN TURNER DUNN et al., *ANALYSIS OF COMPETITION IN MONGOLIA & THREE CASE STUDIES* (Iris County Report No. 14, Apr. 1994).

meatpacking facilities had begun to bid against each other to purchase the best animals for slaughtering. Dismayed by this phenomenon, the plant manager assured us that the competition for good animals would cease. When asked why this was so, the manager said he had just concluded a telephone conversation with his counterparts at the other two meatpacking plants, and the trio had agreed on the prices that they would pay to animal herders in the coming year.

A second example involves Zimbabwe. From the mid-1960s until the early 1990s, the Government of Zimbabwe (and the predecessor state of Rhodesia) centrally orchestrated pricing, output, and other business decisions in most industry sectors. Although private ownership of business was permitted, government regulation of pricing and production was comprehensive.²² To implement public controls, many private enterprises adopted competition-suppressing measures in trade association by-laws.²³ In recent years Zimbabwe has embarked on a broad program to remove price controls and otherwise deregulate private firms,²⁴ but privately-established limits on business freedom persist. As of early 1992, the rules of the Construction Industry Federation of Zimbabwe (CIFOZ) forbade its members from offering discounts off of standard rate schedules and from making a competing proposal for a project for which the buyer already had begun negotiations with another CIFOZ member.²⁵ The CIFOZ Management Committee also enjoyed power to restrict the categories of projects (organized by dollar value) for which each member company could submit bids.²⁶

3. Pre-Reform Customs and Institutions Relevant to the Growth of Private Markets

Even in an environment of comprehensive regulation or centralized planning, business managers and individual entrepreneurs de-

22. See Kovacic, *Competition Policy*, *supra* note 3, at 255-56 (discussing the government's intrusive regulation of Zimbabwe's economy, including price controls, labor controls, and capacity constraints and restricting foreign exchange).

23. See *id.* at 260 (noting that competition-suppressing provisions are common features of trade association by-laws, especially in service industries such as construction).

24. See *id.* at 258-59 (noting that Zimbabwe's plan includes trade liberalization, currency reform, dismantling entry and exit restrictions, price decontrol, reductions in the civil service workforce, and the establishment of a mechanism for addressing restrictive business practices in the absence of comprehensive regulation).

25. *Id.* at 260 n.24.

26. *Id.*

velop customs and institutions that promote efficient resource allocation and can provide valuable foundations for carrying out economic activity in the post-reform era.²⁷ These market-relevant customs emerge in several ways. In one setting, customs and institutions take root in the “informal” sector of a heavily regulated economy.²⁸ In the “informal” sector, economic actors operate at the fringe of legality or in defiance of existing legal commands.²⁹ Participants in the informal sector often devise market-oriented customs and institutions that can illuminate paths for transforming the heavily regulated “formal sector.”³⁰

A second variant has emerged in countries such as Zimbabwe, where the state did not assert public ownership over business enterprises in the pre-reform period, but instead superimposed expansive regulatory commands on private enterprises. In such situations, private ownership of business units was officially sanctioned by the state and constituted an element of the “formal,” legal sector of the economy.³¹ Despite intrusive government regulation, the rudiments of market institutions developed and survived by virtue of the efforts of private entrepreneurs.³²

A third source of market-relevant customs and institutions in the pre-reform era is the product of official or unofficial deviations by socialist or communist governments from a regime of strict centralization of economic decisionmaking. To increase production and compensate for the shortcomings of planning, communist or socialist regimes sometimes tolerate the operation of markets and the development of private customs that serve to improve resource allocation

27. See generally HERNANDO DE SOTO, *THE OTHER PATH* 17-127 (1989) (documenting the substantial role of the “informal” sector in Peru’s economy).

28. See *id.* at xxii (defining “informality” as “the refuge of individuals who find that costs of abiding by existing laws in the pursuit of legitimate economic objectives exceed the benefits” and noting that “informals” have developed specific interests and organized rules to replace those not provided by the state).

29. See *id.* at 17 (explaining that Lima’s tremendous urban growth since the 1950s is the result of people acquiring, developing, and building up their neighborhoods outside of or in defiance of state laws, through informal settlements).

30. See generally, *id.* at xxii, 17-127 (giving a thorough description of “informals” and their development of rules and customs to supplant state guidelines and suggesting that state acceptance of these “informal” practices could be beneficial).

31. See, e.g., *id.* at 216 (describing development in England, where formation of new laws authorized rural and suburban industry that had been established to avoid state control and Sweden, by which “informals” were incorporated into the “formal” legal system).

32. See *id.* at xxii (noting that “informal” sectors of the economy were developed by private individuals to replace those the state failed to provide).

and use.³³ Such customs sometimes represent efficiency-based solutions that can be adopted as part of the reform process.³⁴

Pre-reform commercial customs and institutions can have important implications for the design of legal reforms. First, commercial actors — especially private entrepreneurs in the formal and informal sectors — can provide a base of political support for economic liberalization, including measures to promote competition. Second, individuals who have gained some experience with market processes can be a source of new entry and expansion in the post-reform economy. Third, private enterprise participants in the formal and informal sectors rarely enjoyed effective recourse to a well-established, judicially-enforced system of rules governing commercial behavior. Such firms often devised private customs or institutions to define property rights and govern their transactions. With economic liberalization, these informal customs can supply a useful basis for establishing formal principles of law.³⁵

A final reason for examining the operation of the pre-reform economy is to identify respects in which nascent market processes promise to protect consumer welfare without the need for additional government intervention. In particular, the development of robust competition may obviate the need for expansive consumer protection measures. In Nepal, many commodities are sold by weight. Retail merchants typically measure and weigh products at the point of sale. Consumers frequently express the concern that merchants engage in shortweighting. In interviews conducted with Nepali business owners in February 1994, I saw evidence that competition is motivating merchants to take greater efforts to establish a reputation for honesty and accuracy in weighing products.

Himal Iron & Steel ("Himal") is one of Nepal's leading fabricators of iron and steel products. Like many other goods in Nepal, iron and steel products are priced by the kilogram, and buyers often complain that retailers use rigged scales to measure the weight

33. See, e.g., Douglas Farah, *Farmers' Markets Help Ease Cuba's Pain*, WASH. POST, Jan. 23, 1995, at A1 (describing how Cuban President Fidel Castro has begun to permit farmers to sell produce directly to Cuban consumers at prices set by the supply and demand for food).

34. See ROBERT D. COOTER, *AVOIDING TRAGEDY IN THE WORLD'S LARGEST COMMONS* 3-6 (1994) (describing how nomadic herders in Mongolia developed customary land use rights to ensure efficient use of scarce winter pasture land).

35. One would need to be wary of customs that serve mainly to cartelize individual industry segments. See *supra* notes 23-26 and accompanying text (describing formation of competition—suppressing by-laws by trade associations in Zimbabwe).

of products, such as steel reinforcement rods, before sale. Retailer shortweighting poses a problem for Himal, because retailer misconduct casts Himal in a bad light. Retailers realize that they will not bear the full brunt of purchaser displeasure, as buyers will attribute at least some of the blame for shortweighting to Himal. To cope with this agency problem, Himal began weighing its products at the factory, wrapping the products in plastic at the factory, affixing a seal that states the weight as measured at the factory, and warning users that Himal cannot vouch for the weight if the seal has been broken.

Himal's practice of weighing iron and steel products at the factory is costly (in the time required to weigh products and in the cost of hiring laborers to do the weighing), but it has increased purchaser confidence in Himal. The approach has succeeded to the point that buyers often dispense with any weighing of Himal's products at the point of sale and instead trust the seal's representation of the products' weight. Himal also features this measurement and certification technique in its advertisements. I asked Himal's chief executive if the firm had considered other techniques (such as purchasing and operating retail outlets) to deal with the agency problem. He said that Himal owns no retail stores, but that the company is beginning to identify approved Himal dealers who are permitted to place a Himal label in their shop windows.

B. The Public Institution Context

The success of market-oriented legal reforms depends heavily on the ability of the host country to develop public institutions necessary for the functioning of a new legal regime. Most efforts to establish antitrust and consumer protection legal systems in transitional economies pose extraordinary institutional challenges for the host country. Several constraints significantly affect the magnitude and rate of change.

1. Government Agencies

Several features of government agencies in transitional economies are important for the design and implementation of antitrust and consumer protection laws. One major constraint is a severely limited supply of expertise relevant to the implementation of an antitrust or

consumer protection program.³⁶ In the law drafting exercises in which I have participated, I have been very favorably impressed by the sophistication of host country experts assigned to the drafting group.³⁷ However, in transitional economies, attorneys or economists familiar with competition law principles or industrial organization economics are generally rare.³⁸ For example, in Mongolia, the government has delegated the drafting of procedures for implementing the country's antitrust law to engineers whose previous assignments had been to monitor the technical performance of Mongolian infrastructure industries such as energy and telecommunications. In a meeting with the engineers to discuss the implementation procedures in June 1994, it was clear to me that the procedures working group was very capable and had absorbed a great deal of antitrust learning in a short time, despite little relief from their regular duties. It was also apparent that the procedures group would benefit from continuing participation by Western and Mongolian attorneys and economists.

A second significant feature is that government agencies enjoy sweeping discretion and abide by few, if any, due process-oriented controls.³⁹ Government ministries usually operate under open-ended grants of authority with no requirement that they give affected parties the right to oppose or appeal government decisions, or offer a public explanation for their acts. Regulatory decrees are subject to frequent, unannounced adjustment and often are not published.

A third condition is that, in the absence of antitrust or consumer protection institutions, there may be no government entity with a clear mandate or strong incentive to promote competition and the development of markets. Other government bodies, such as a privatization commission, sometimes can be counted on to support market-oriented reforms. The creation of an antitrust agency can supply

36. See, e.g., Kovacic, *Competition Policy*, *supra* note 3, at 265 (noting lack of competition policy expertise in Zimbabwe).

37. The Mongolian attorneys, economists, and other experts with whom IRIS worked in drafting an antimonopoly law for that country were strikingly well-versed in policy considerations relevant to the design of antitrust prohibitions. See William E. Kovacic & Robert S. Thorpe, *Antitrust Law for a Transition Economy*, LEGAL TIMES, Aug. 2, 1993, at 41.

38. See, e.g., Jim Leitzel, *Russian Economic Reform: Is Economics Helpful?*, 19 EASTERN ECON. J. 365, 366 (1993) (discussing the lack of experience among Russian economists with the analysis of markets).

39. See Mancur Olson, *The Hidden Path to a Successful Economy*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE 55, 67-68 (Christopher Clague & Gordon C. Rausser, eds. 1992).

a major institutional counterweight to the many organizations of government whose interests often lie in opposing or retarding the emergence of private ownership and business rivalry.

2. *The Courts*

Market-oriented law reforms, including antitrust and consumer protection legislation, often entail some judicial participation either in resolving disputes at the trial level or reviewing the decisions of an administrative commission. Two basic conditions affect the skill of the judiciary's participation in the enforcement of antitrust or consumer protection commands.

The first constraint is that, like many government ministries, the judiciary often has little familiarity with economic or legal concepts relevant to business law, including antitrust or consumer protection. The courts in most transitional economies will be building essentially from scratch in developing analytical principles for interpreting antitrust or consumer protection statutes.

Important exceptions to this general condition will appear in a careful study of each country's laws and jurisprudence. For example, Zimbabwe's legal system has several features that would facilitate the implementation of an antitrust law. Derived from Roman-Dutch common law, Zimbabwean contract doctrine bars certain agreements deemed to be in "restraint of trade."⁴⁰ In Zimbabwean jurisprudence, agreements in restraint of trade generally consist of unreasonable noncompetition covenants contained in employment agreements or in contracts for the sale of a business.⁴¹ Such restrictions are invalid if they are unreasonable in geographic scope or duration.⁴² In dealing with noncompetition covenants, Zimbabwe's courts have become familiar with analytical principles that would be important in applying an antitrust statute that prohibited the formation of cartels and other output-restricting schemes by direct competitors. In distinguishing between "naked" and "ancillary" restrictions in noncompetition agreements, Zimbabwe's courts have devised a methodology for assessing the procompetitive and anticompetitive features of such agreements.⁴³ This experience will fa-

40. Kovacic, *Competition Policy*, *supra* note 3, at 57.

41. See Pearson Nherere, *No Requiem for the Restraint Doctrine—Yet*, 6 ZIMB. L. REV. 1, 1-3 (1988).

42. Kovacic, *Competition Policy*, *supra* note 3, at 57.

43. For a general discussion on the importance in antitrust analysis of agreements among com-

cilitate the operation of a ban on certain restrictive business practices.

Relevant commercial adjudicatory expertise and a source of post-reform rules might be found in ministries that formerly controlled industry activity. Even planned economies engaged in a form of contracting to govern relationships among input suppliers, fabricators, and distributors. For example, during the planning era in Mongolia, a government ministry established schedules by which herders would deliver their animals to state-owned meatpacking facilities. The ministry's central orchestration of this process, which involved coordinating the movement of herds over vast distances to ensure a steady supply of animals to the processing plants, did not eliminate the possibility for disputes between the herders and the meatpackers.

Suppose a herder demanded a higher payment and a relaxation of the delivery schedule, claiming that unusually harsh weather conditions had increased the herder's costs and slowed the progress of the herd.⁴⁴ If the meatpacker and the herder could not agree to an adjustment of the original price and schedule, the government ministry would be called upon to settle the dispute. Through the rough equivalent of an arbitration process, ministry arbiters would focus on some of the same criteria that common law courts in capitalist economies use to decide cases involving the attempted renegotiation of contract terms, such as the foreseeability of the contingency that prompted the demand for renegotiation, and the relative capability of each party to cope with the contingency at the lowest cost.⁴⁵ The government officials who gained experience in resolving disagreements, and the rules they devised to decide such disputes, could be useful in developing post-reform commercial dispute resolution forums.⁴⁶

petitors and the distinction between naked and ancillary restraints, see ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 179-96 (4th ed. 1994).

44. I used the problem described in the text during discussions with managers of Mongolia's meatpacking plants in 1992 and with judges of Mongolia's courts in 1994.

45. The ministry decisionmakers also would be guided by any provision of the annual economic planning document that may have addressed the contingency in question.

46. In Russia and the Ukraine, the post-reform commercial law courts are antecedents of the "arbitrage" offices that, among other functions, resolved supplier-fabricator disputes between state economic enterprises during the era of central planning. On the operation of the "State Arbitrazh" system in the former Soviet Union, see Christophher Osakwe, *The Modern Soviet Legal System in Comparative Perspective*, in 8 *MODERN LEGAL SYSTEMS CYCLOPEDIA* 8.150.1, 8.150.84-89 (Kenneth R. Redden, ed., 1991).

A second formative condition is that courts in transitional economies usually operate with an austere administrative infrastructure that severely limits the dissemination of information about the result or logic of judicial decisions. At the local and regional levels in Nepal and Mongolia, courts seldom publish opinions. Judges in these tribunals rely mainly on an oral tradition to decide cases. The highest court in the country may have the use of research tools such as personal computers or communications equipment such as a fax, but most courts do not. Even where judicial opinions and the statutes they interpret are published, it is unlikely that distribution of these materials throughout the nation's legal community will be widespread, current, or complete.⁴⁷

3. Multiplicity of Law Reform Measures

The agenda of law reforms needed to build a market economy is especially long in transitional countries. Antitrust and consumer protection are only two elements of the effort to establish a market system. To create the legal infrastructure for a market economy, a formerly communist or socialist country may need to adopt a wide array of new laws, including measures governing administrative practice and procedure, banking, bankruptcy, business associations, contracts, customs, environmental protection, insurance, intellectual property, judicial reform, labor, privatization, product liability, property, securities, taxation, and trade. The energies of the national legislature, key ministries, and indigenous experts knowledgeable about market processes will be stretched very thin.

4. History of Nonenforcement of Nominal Legal Commands

Citizens in many formerly communist or socialist countries are accustomed to nonenforcement, or highly selective application, of laws and regulations. The lack of commitment and institutions to enforce nominal requirements engenders cynicism about the rule of law and the usefulness of enacting new legal commands. If imple-

47. In Zimbabwe, I interviewed one of the country's leading corporate law specialists. At one point in our conversation, the attorney pulled from the shelf in his office a well-thumbed copy of a volume containing Zimbabwean statutes dealing with business associations. The volume contained numerous handwritten annotations, and on many pages the attorney had affixed typed or printed inserts to the printed text. As new statutes were passed and existing statutes were amended, the government did not published complete, revised texts of the law. Thus, it fell to practitioners to annotate the official published texts of the original laws.

mentation is not forthcoming, the efforts of transitional economies to adopt new laws to satisfy conditions of loan agreements or structural adjustment programs may exacerbate public doubts about the efficacy of the legal system. Many countries have passed market-oriented laws,⁴⁸ but have failed to establish mechanisms for implementing them. Creating new legal commands without effective institutions for implementation may be worse than passing no new laws, given the tendency of hollow rules to undermine confidence in the law.

C. The Political Context: Enduring Suspicion of Capitalism and Market Processes and Impulses to Reimpose Controls

In a number of transitional economies, the political consensus favoring economic and political liberalization is fragile. To many citizens and public officials, the shift to a market economy has imposed unacceptable economic, social, and political costs. Former communists who are candidates for elective office have skillfully exploited popular discontent with the costs of the transition process to regain control of the national legislature and positions of responsibility in key government ministries. Pressure from external donors provides the principal impetus for transitional economies to sustain at least the outward commitment to reform.

Amid broad political and social resistance to economic liberalization, the development of competition and consumer protection policy can supply an important bridge to a market system. The availability of antitrust scrutiny of dominant firm conduct, mergers to monopoly, and cartels can help deflect pressures for the maintenance or reimposition of price controls. Notwithstanding legitimate fears about excessively aggressive antitrust oversight, an antimonopoly system may well be a superior alternative to government efforts to regulate prices and other business decisions. Indeed, the realistic political alternative to creating an antitrust system may not be doing nothing at all, but instead more intrusive forms of government control of the economy. The establishment of basic commands against deception and fraud also can provide some degree of assurance to the public that they will not be victimized by market failures.

48. See *supra* notes 2-3 and accompanying text (describing the adoption of antimonopoly and consumer protection legislation); see also Matthew S. R. Palmer, *Privatization in Ukraine: Economics, Law, & Politics*, 16 *YALE J. INT'L L.* 453 (1991) (discussing prospects for privatization in Ukraine with comparisons to experience in Chile and Poland).

III. IMPLICATIONS FOR THE DESIGN AND EXECUTION OF LAW REFORMS

The implementation context has a number of implications for how one designs competition and consumer protection laws and the institutions to execute them.

A. Studying Existing Economic and Institutional Conditions

The design of market-oriented law reforms should flow from careful advance study of the host country's economy and existing institutions relevant to the operation of a market system.⁴⁹ Such study should include case studies of specific industries and interviews with academics, consumers, government officials, legal practitioners, and business managers. The case studies serve to identify problems on which antitrust and consumer protection reforms should focus, to assess the institutional capabilities of the host country, and evaluate needed adjustments in institutions.

Pre-reform study should involve a collaboration between indigenous specialists and external technical advisors. A cooperative effort to perform case studies and interviews gives indigenous experts the benefit of experience and theoretical insights from external advisors, and ensures that external advisors are alert to distinctive circumstances of the host country. Such collaboration is an excellent opportunity for foreign advisors to help indigenous experts to develop analytical techniques for understanding market processes.⁵⁰ As described below in this section, the participation by external advisors in pre-reform analysis, law drafting, and implementation will be most constructive when technical advisory bodies have a continuing, long-term presence in country.

B. Tailoring the Law to Reflect National Conditions

The pre-reform analysis should generate useful insights about the appropriate design of a competition or consumer protection system.

49. For example, the drafting of an antimonopoly law in Mongolia in 1992 and 1993 built extensively upon research by IRIS in-country representatives, project members, and consultants. See, e.g., PETER MURRELL, *REFORM ISSUES IN MONGOLIA* (IRIS Country Report No. 1, 1991) (identifying priorities for economic and legal reform in Mongolia); PETER MURRELL, ET. AL., *PRICE POLICY IN MONGOLIA: A CHRONOLOGY OF DEVELOPMENTS* (IRIS Country Report No. 6, 1992) (describing modern evolution of price controls in Mongolia).

50. Cf. ROBERT KLITGAARD, *TROPICAL GANGSTERS* 102 (1990) ("The only justification for foreign experts . . . was as teachers, as builders of analytical capacity.").

As with the pre-reform analysis, the law drafting process should involve a collaboration between indigenous experts and external technical advisors.⁵¹ The draft law that has the strongest prospects for adoption and implementation is one that emerges, in its principal elements, from the recommendations of the indigenous experts and commands their enthusiastic support. In this model, foreign technical advisors do not dictate terms.⁵² Instead, they identify alternatives, discuss the strengths and weaknesses of different approaches to solving problems, illuminate the experience of other countries with different systems, and ensure that important issues of substance and implementation are addressed.⁵³

In terms of the law's substance, the objects of the law drafting process should be to correct serious market failures identified in case studies and interviews and to design an implementation mechanism that ensures that the law's nominal substantive commands are executed. Perhaps the most important contribution of external technical advisors in the drafting process is to focus the drafting group's attention on implementation issues. Here the goal is to ensure that the law's substantive requirements do not outrun the nation's ability to execute them, either through existing institutions or through the formation of new institutions whose timely establishment reasonably can be anticipated.

To the greatest extent possible, the law's substantive commands and implementation mechanism should build upon existing legal commands and institutions. To minimize transitional difficulties that accompany the absorption of new legal concepts, the law drafters should seek to engraft the new law onto existing institutions and practices. As the following examples indicate, the ideal design of the

51. For a description of the collaborative process through which Mongolia's antitrust law was drafted, see Kovacic & Thorpe, *supra* note 2.

52. This may not always be the case. In some instances the government of the host country may refuse to take an active hand in devising politically unpalatable reforms. In such cases it may be necessary for donor organizations to "cram down" specific reforms to establish needed elements of a market-based legal infrastructure and to enable leadership of the host country to deflect political opposition by characterizing the adoption of a reform as an inescapable concession to external financiers. KLITGAARD, *supra* note 50, at 100-03.

53. Robert Klitgaard makes the case for technical assistance that encourages full-fledged "participation" by host country officials:

It had been my experience that decisions are improved by collegial efforts to lay out issues, clarify choices, and separate the value judgments and the factual questions. Foreigners like me can help in this, and if one is lucky, in the process the locals learn how to do it themselves.

KLITGAARD, *supra* note 50, at 79.

law may vary considerably from country to country, depending on existing institutions and legal practice. One issue in law design is whether the law should provide for enforcement by private plaintiffs (either before a court or a regulatory commission), or should limit standing to public officials who investigate complaints of private parties and initiate their own inquiries. In some transitional countries, such as Mongolia, the idea of private enforcement is largely alien and would require greater effort to establish as part of an antimonopoly system. By contrast, Zimbabwe permits private enforcement of a number of legal commands, including criminal statutes. Thus, a private right of action to attack certain antitrust violations might be much easier to implement in Zimbabwe than in Mongolia.⁵⁴

A second example concerns the capability of the country's judicial system. Where the courts have minimal experience with commercial law issues, it may be best to commit enforcement authority to an administrative commission with power to adjudicate complaints internally, with its decisions subject to review by the country's appellate courts. To enhance the legitimacy of commission enforcement and administrative adjudication, the reform law should incorporate procedural safeguards to ensure fairness to affected parties and to promote transparent decisionmaking.

C. Simplicity

Few transitional economies have a large reservoir of human capital or a well-established institutional infrastructure for implementing new market-oriented legal commands, including antitrust and consumer protection laws. This dictates that law drafters place a premium on achieving simplicity in the new legal regime. Achieving simplicity requires rigorous efforts to focus new substantive commands on the most serious market failures, and to ensure that legal commands do not overpower the ability of existing or contemplated institutions to execute them. The aim is to avoid a serious mismatch between the law's requirements and the capabilities of the institutions to satisfy them.

Even seemingly simple legal commands may involve complexities that may not be apparent at first glance. Many legal concepts that

54. See Kovacic, *Competition Policy*, *supra* note 3, at 264 (describing Zimbabwean practice of allowing citizens to sue on the government's behalf when the Attorney General does not sue).

strike external observers as relatively straightforward are not easily transplanted to transitional economy settings. One of the clearest and simplest rules in antitrust jurisprudence is the *per se* prohibition against agreements by direct competitors to fix prices.⁵⁵ Key operative elements of the *per se* ban on horizontal price fixing are the definition and proof of agreement.⁵⁶ In some countries, evidentiary standards may require the introduction of a writing to establish the fact of an agreement, placing spoken understandings outside the reach of a ban upon collusion. Thus, efforts to condemn cartels orchestrated through a spoken exchange of assurances may require a major change in the host country's evidentiary standards.

An additional reason for simplicity is that it facilitates self-execution. Donor entities sometimes have funded technical assistance programs to help transitional economy governments to implement new laws,⁵⁷ but the host country cannot count on donors for extensive commitment or follow through once the new legislation is enacted. Thus, it is best to design law reform measures on the assumption that no great amount of follow-on assistance will be forthcoming.

D. Durable Commitment By Advisors Before, During, and After the Adoption of New Laws

External technical assistance is a major ingredient of law reform programs in transitional economies. The effectiveness of technical assistance depends heavily on the establishment by external technical advisors of a long-term in-country presence. Having one or more persons resident in-country is essential to analyzing indigenous economic and political conditions, identifying reform priorities, participating in the drafting and enactment of legislation, and assisting in implementation. Maintaining a long-term in-country presence helps to develop constructive relationships between foreign advisors and indigenous officials and to overcome the host country's justifiable suspicion toward expert outsiders who dispense wisdom for a few days, collect souvenirs and colorful stories, and journey homeward

55. See GELLHORN & KOVACIC, *supra* note 43, at 165-69, 179-87 (describing the content of and the rationale for the *per se* rule against horizontal price-fixing).

56. See William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 7 (1993) (describing the importance of determining whether behavior in question stemmed from an agreement).

57. See Kathleen E. McDermott, *U.S. Agencies Provide Competition Counseling to Eastern Europe*, 6 ANTITRUST 4, 4 (1991) (describing placement of antitrust specialists from the Department of Justice and the Federal Trade Commission in antimonopoly bodies in Eastern Europe).

in the knowledge that they will not have to live with the results of their advice. The in-country advisor can draw upon foreign specialists for short-term visits, but a program consisting mainly of "parachute" visits by external advisors is prone to misapprehend national needs, to design laws that are ill-suited to national conditions, and to slight critical implementation issues.⁵⁸

The last issue — implementation — deserves special emphasis. Few technical assistance programs give implementation the attention it deserves.⁵⁹ The presence of external advisors in the period following enactment of a new law can be critical for two principal reasons. First, in countries such as Mongolia and Nepal, statutes tend to cast important provisions in general terms and delegate the preparation of operational rules or procedural guidelines to a government agency. The impact and efficacy of a statute can hinge crucially on how these rules and guidelines are drafted, and foreign advisors can provide a useful perspective on what such documents might say. Second, the first years of the life of the new enforcement apparatus may have an enormous effect on its prospects for long term success. The new agency faces difficult choices about organizing its operating units, designing an enforcement strategy, educating affected parties about the new legal regime, publicizing its activities, and educating its professional staff. Foreign advisors can be a valuable resource to agency managers as these matters are addressed.⁶⁰

58. Cf. Glenn R. Lawrence, *Are We Exporting Our Legal System?*, 41 FED. BAR NEWS & J. 672, 679 (1994) (questioning the value of short-term exchange visits to support rule of law projects in formerly communist and socialist countries).

59. As one commentator noted:

In the usual brand [of technical assistance] an expert comes and carries out a task, the classic case being writing a report and then leaving. Much rarer was an expert who worried about implementation, how the report would be used in practice. And rarer still, at least in Equatorial Guinea, was the expert who worked with the Guineans and trained them.

KLITGAARD, *supra* note 50, at 185.

60. An informative test of this assertion is unfolding in Ukraine, where IRIS holds an AID contract to supply technical assistance to Ukraine's Antimonopoly Committee (AMC). IRIS has placed a team of three American professionals in the AMC headquarters in Kiev. Two are economists (Linda Boner and Roger Boner) who combine extensive experience in the Federal Energy Regulatory Commission and the Federal Trade Commission. Both have made numerous presentations to foreign antitrust officials. Roger Boner has performed a number of in-country competition policy consultancies and has written widely on the subject of competition policy in transitional economies. See Roger A. Boner, *Competition Policy and Institutions in Transitional Economies*, in REGULATORY POLICIES AND REFORM IN INDUSTRIALIZING COUNTRIES (Claudio Frischtak ed., forthcoming) (discussing importance of adapting new competition policy system to existing national institutions in transitional economies); Roger A. Boner & James Langenfeld, *Liberal Trade and Antitrust in Developing Nations*, in REGULATION 5, 6 (1992) (discussing the roles of trade

The creation of a long-term, in-country presence depends heavily on the preferences and choices of donor institutions such as the World Bank, the United Nations Development Program, and individual national assistance entities such as the Agency for International Development. Technical advisors will not take a long-term view, and cannot invest in a sustained in-country presence, unless the funding agencies adopt a long-term perspective and commit resources over a period of years to accomplish pre-reform analytical tasks, law drafting, and implementation. Government managers have weak incentives to look beyond the relatively short-term — the two-year term of a posting in a transitional economy, the one-year assignment as head of a bureau, or the preoccupation of the donor country's legislature in the immediate year's budget cycle. A project that arouses great enthusiasm today may lose funding in next year's budget as the donor organization shifts its attention to the crisis or policy demand of the moment.

The short-term focus of decisionmaking places a premium on investing in activities that show swift, measurable returns. The donor might emphasize assistance in adopting a new statute (a measurable event), but commit few resources to pre-reform economic and legal analysis or post-reform implementation (activities whose impact is not readily calculated). In the fields of antitrust and consumer protection, sustained technical assistance that helps the host country establish effective enforcement institutions may yield few immediate, tangible returns, but such assistance is valuable in raising the probability that new legal commands will be applied sensibly. Reform efforts must cope with not only the fragile commitment of the host country to a market system, but also with the short attention span of donor institutions in seeing any single reform initiative through to the end. As noted above, the possibility that donor organization support for a specific reform program may be short-lived suggests the importance of devising relatively simple legal commands and implementing institutions whose success does not depend heavily on long-term external technical assistance.

liberalization and antitrust in promoting competition). The third professional (George Gamota) is an attorney who speaks Ukrainian. This team is especially well-suited to assist the AMC in training its professional staff, in developing programs to educate various Ukrainian constituencies on Ukraine's antimonopoly law, in developing a competition advocacy program before other government bodies, and in formulating an enforcement strategy.

E. Emphasis On Education and Publicity

Major ingredients of the program for implementing antitrust and consumer protection reforms should be publicizing the existence of the new legal regime and educating consumers, business managers, and government officials about its contents and rationale. Carried out through booklets, public service announcements, speeches, and workshops, the education and publicity program can help educate the nation about the functioning of a market economy and the specific protections of the new legislation.⁶¹ Enforcement authorities also can help educational institutions develop market-based courses, such as basic microeconomics for undergraduates and courses in antitrust and consumer protection for law schools.

Another dimension of the education process is building the analytical capability of the antitrust and consumer protection agencies. Foreign technical advisors can play a valuable role in this effort, particularly in conducting workshops in which advisors engage the host country participants in problem solving exercises.⁶² Workshops enable participants to analyze competition and consumer protection problems and to evaluate alternative solutions. The foreign advisor can design problems based on experience in other countries and contribute observations about analytical techniques and enforcement methods that have succeeded in other settings. A longer term goal of the education process is to build a self-sustaining indigenous training capability through which the host country can maintain the quality of its professional staff in the face of substantial turnover, as capable employees leave to take new positions outside the government.

The education and publicity program also can serve to reinforce positive indigenous trends in the pre-reform era. The enforcement institutions can teach consumers about their ability to shape producer behavior through changes in purchasing behavior. By teaching consumers how competition can protect their interests, the enforcement authority can encourage efforts by producers to attract con-

61. See James Langenfeld & Dennis A. Yao, *Competition Policy and Privatization: An Organizational Perspective*, in *GOVERNMENTS AND MARKETS ESTABLISHING A DEMOCRATIC CONSTITUTIONAL ORDER AND A MARKET ECONOMY IN FORMER SOCIALIST COUNTRIES* 195, 214 (H.J. Blommestein & R. Stuenkel, eds. 1994) (describing value of educational outreach activities by competition authorities in transitional economies).

62. See KLITGAARD, *supra* note 50, at 137, 149 (describing value of workshops as instructional tools).

sumers on the basis of superior price and quality attributes. Efforts to demonstrate the value of advertising can reinforce efforts by producers, such as Himal Iron & Steel, to devise methods for signaling high quality and truthfulness in dealer with consumers.

F. Emphasis On Advocacy of Market Institutions

Among the most important contributions of an antitrust or consumer protection system is to discourage attempts by other government institutions to stifle competition and otherwise restrict consumer sovereignty.⁶³ In many transitional economies, the state remains a potent threat to the market process.⁶⁴ Government agencies at the national, regional, and local levels retain formidable power to frustrate economic liberalization by imposing new restrictions or interpreting existing legal commands. Sustained efforts by antitrust and consumer protection authorities to remove state impediments to market rivalry deserve at least as much attention as the scrutiny of conduct by private economic actors.

G. Development of a Law Enforcement Program

The investigation and prosecution of private misconduct should follow an initial period of education and publicity. The raw material for individual cases should emerge from several sources, including industrial organization studies performed in the pre-reform period, investigations conducted by the new enforcement agency, and complaints from consumers or business managers generated by the edu-

63. See Craig W. Conrath & Barry T. Freeman, *A Response to the Effectiveness of Proposed Antitrust Programs for Developing Countries* 19 N.C. J. INT'L & COM. REG. 233, 243-45 (1994) (presenting competition policy advocacy as a valuable element of antimonopoly program in transitional economies); Imrich Flassik, *Priorities of the Czechoslovak Anti-Trust Office*, in *THE ROLE OF COMPETITION IN ECONOMIC TRANSITION* 73, 74-75 (Christopher T. Saunders, ed. 1993) (discussing efforts of Czechoslovak Federal Competition Office to reduce customs tariffs for imported automobiles) Joskow, *supra*, note 14, at 359-60 (recommending that regional antimonopoly authorities in Russia advocate procompetition policies in sectors such as energy, telecommunications, and transportation). The value of competition advocacy by competition authorities has been demonstrated in Western economies as well. Since the early 1970s, the federal antitrust agencies in the United States have made numerous appearances before federal, state, and local government authorities to oppose various regulatory impediments to competition. See *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 93-96 (1989) (discussing Federal Trade Commission competition advocacy activities). In many instances, the United States antitrust agencies promoted a transition from regulatory strategies — including limits on entry and pricing — that motivated much economic policymaking in the 1930s. *Id.*

64. Conrath & Freeman, *supra* note 63, at 243-44.

cation and publicity effort. To establish the credibility of the new enforcement institutions, emphasis should be placed on the prosecution of a small number of especially egregious offenses, such as a bid-rigging cartel or fraudulent advertising of over-the-counter drugs. Enforcement actions should be widely publicized to establish business and public awareness of the new antitrust and consumer protection regime.

H. Ex Post Evaluation

Successful implementation requires continuing efforts to evaluate the impact of completed enforcement initiatives. Ex post assessments can inform the judgment of enforcement officials about the future choice of initiatives and can illuminate, for the host country and external donor organizations, the strengths and weaknesses of specific law reform measures. Academics and other commentators have begun to perform informative assessments of the results of competition policy initiatives and other market-oriented law reforms in transitional economies.⁶⁵ To be effective, such assessments require the cooperation of government agencies in providing access to data and internal decisionmaking processes. Donor organizations are in a strong position to elicit such evaluative efforts by making additional assistance contingent upon the host country's willingness to examine past activities, both through internal agency self-assessments and by facilitating analysis by external observers. Of course, a commitment to encourage ex post evaluations assumes a long-term perspective that donor organizations have not always exhibited in the past.

CONCLUSION

In principle, antitrust and consumer protection laws can play a positive role in facilitating the transition from planning to markets. Whether such measures do so in practice depends vitally on the process by which the laws are drafted and implemented. Successful

65. See generally Carolyn Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary*, 15 MICH. J. INT'L L. 1129 (1994) (assessing experience with antitrust laws in Central and Eastern Europe); GEORGES KORSUN & PETER MURRELL, *THE EFFECTS OF HISTORY, OWNERSHIP AND PRE-PRIVATIZATION RESTRUCTURING ON POST-PRIVATIZATION GOVERNANCE* 12-15 (IRIS Working Paper No. 147, 1995) (studying determinants of post-privatization corporate governance structures in Mongolia); BEN SLAY, *INDUSTRIAL DEMONOPOLIZATION AND COMPETITION POLICY IN POLAND AND HUNGARY* 30-32 (Middlebury College Working Paper No. 94-9: 1994) (evaluating impact of structural competition policies on economic transition in Hungary and Poland).

drafting demands careful evaluation of existing economic and legal customs, practices, and institutions to identify serious problems and devise solutions that are likely to take root in the host country. Effective implementation requires matching the law's commands to the institutional capabilities of the host country, and sustained efforts following enactment to assist antitrust and consumer protection authorities in executing their responsibilities. The tasks of law design and implementation cannot be accomplished skillfully from a distance, nor through short-term interventions by outsiders. To do either effectively requires a sustained in-country presence by technical advisors, close collaboration with indigenous experts, and a willingness to provide assistance through the critical period in which the host country's institutions are applying the new law.