CREATING EFFECTIVE COMPETITION INSTITUTIONS: IDEAS FOR TRANSITIONAL ECONOMIES

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I. INTRODUCTION

Increasingly, nations with transitional economies are drafting and adopting competition laws.[1] Often, they have been encouraged to adopt such laws by industrialized trading partners or international organizations. This encouragement is designed to facilitate international trade by eliminating monopolies that raise the cost of goods and raw materials sold by transitional economies and by opening domestic trade in the transitional economies to foreign-made goods. Transitional economies frequently expect that the implementation of such laws will promote economic growth or improve their competitiveness in international trade.

Efforts by individual nations to establish competition agencies have had mixed success. Numerous international meetings and programs have been devoted to the question of how best to establish such agencies in transitional economies.[2] Individual countries and

[1] The terms "competition law" and "competition agencies" as used in this article have the same meaning as "antitrust" and "antimonopoly laws and institutions," respectively. This use does not include the broader concepts of competition policy, which are generally thought to also include tariffs; intellectual property rights; business licenses; and other governmental and private actions that have competitive effects.

[2] The International Competition Network (ICN) had its first annual conference in Naples, Italy on September 28-29, 2002, and its second in Merida, Mexico on June 23-25, 2003. The latter focused principally on "capacity building

international organizations have organized seminars and training programs to help countries with transitional economies establish effective agencies.

This article concentrates on the structural issues of how to frame an effective and comprehensible competition law. Additionally, this article will examine procedures that are likely to be most effective in implementing a competition law. This focus on competition law is presented with the explicit recognition that a competition statute cannot, by itself, create a competitive economy or effectively serve as a comprehensive body of competition law. Competition laws and the agencies that enforce those laws are, at most, supplements in support of a free market economy. This article thus concludes that a nation must have a genuine and comprehensive commitment to developing a free market economy and that government policy must demonstrate that commitment. Unless a nation adopts such a comprehensive commitment, it is unlikely to successfully develop an effective competition law and will forfeit the rewards of a competitive economy.[3]

Circumstances that impede the formation of effective competition agencies fall into many categories. First, transitional

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and competition policy implementation." The Fourth Organisation for Economic Co-operation and Development (OECD) Global Forum on Competition was held in Paris, France on February 12-13, 2004. The OECD has also sponsored programs with Latin American countries, South Eastern Europe, and Africa, and regularly publishes the *OECD Journal of Competition Law & Policy*. The United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization, the World Bank, the Asian Development Bank, and other international organizations have ongoing programs concerning competition laws in developing economies. Individual countries, such as the United States, Germany, Japan, and many other developed nations also have ongoing assistance programs that provide technical assistance and guidance on competition law to transitional economies.

[3] This article should not be understood as advocating free market principles as the universal solution to all economic problems, nor as an unqualified endorsement of American competition laws or procedures. No country has relied exclusively on free market principles for its economic policy. All countries, at various times and for various reasons, have created tariff barriers, subsidized local businesses, licensed the right to enter businesses, and required adherence to safety, health and wage requirements in at least some industries. Some of these restrictions may be ill-advised, but others, in certain circumstances, have been important features of successful national economic policy.

economies,[4] almost by definition, have little experience with free markets. The lack of experience translates into the inability to harness the potential benefits of competition. Likewise, transitional economies cannot effectively identify and address the multitude of actions that are likely to harm competition. The absence of experience with a free market generally means that non-market actors make decisions about price, market entry, property rights, contract enforceability, and intellectual property rights. In some economies, the decisions are made by government decree, which may set prices or output quotas. In other economies, private individuals, with or without government authority, may monopolize the sale or purchase of particular goods. Sometimes these monopoly arrangements are based on local traditions, while others are enforced through government regulation or private violence.

Second, transitional economies often suffer from a dearth of competition law experts. This is complicated by the fact that competition law is difficult to express in a set of direct declarative prohibitions. For example, the United States, which has the longest history of competition law, has produced a wealth of intellectual resources devoted to explaining the few dozen words that contain the American prohibitions on anticompetitive behavior.[5] In contrast, transitional economies have frequently lacked both the skilled manpower and material resources necessary to interpret and apply competition law.

This article posits that a free market and a body of effective competition laws are appropriate default principles for a nation to adopt. In light of this position, the article assumes that absent compelling reasons to regulate a sector of its economy, a country is likely to be better off allowing free market principles to govern. References to American competition law are made throughout this article to provide examples and to illustrate discussions. As the country with the longest and probably widest experience with competition law, America's successes and failures provide lessons for any competition law. Likewise, equally important lessons may be

[4] The term "transitional economies" includes nations of the former Soviet bloc, South American economies dominated by oligarchies, rapidly growing economies of Southeast Asia, and other nations that are in the process of developing free market institutions.

[5] *See* discussion *infra* p. 120 and note 111.

derived from the experiences of other countries. Finally, observations regarding the possible problems in the Indonesian competition law are not to suggest that it is bad per se or in comparison with the competition laws of other nations. Rather, they are the product of personal experience gained through my work with the Indonesian competitive law commission, which is still in the process of establishing procedures under that nation's newly adopted competition law.[6]

II. BENEFITS OF A FREE MARKET

For any nation to have an effective competition law, the government, the public, and the business sector must recognize that competition benefits the country. Although some economists surmise that the beneficial nature of competition is self-evident, many people, especially in transitional economies, do not understand the potential benefits of competitive markets.[7] The notion of a transitional

[6] I had the good fortune to be assigned to the Indonesian Commission for the Supervision of Business Competition (commonly referred to by its Indonesian initials, KPPU) from August 2002 to July 2003. Working with the staff and commissioners of the Indonesian competition commission stimulated many of the thoughts that are reflected in this article. I am grateful for the opportunity I had to work with the Indonesian commission and for the lessons they taught me. I was assisted in my education by the Commissioners and the staff of the KPPU, by the Federal Trade Commission (FTC)'s Senior Counsel for International Affairs, James Hamill, and his staff, and by the Head of the US Agency for International Development (USAID) Economic Growth Office at the United States Embassy in Indonesia, Paul Deuster, and his staff. In addition, four individuals deserve special mention for assisting me on virtually all of the work I performed in Indonesia: John Davis, an American lawyer employed at the KPPU through a USAID contract, and his assistant Miranti; Markus Meier, my predecessor as the FTC advisor to the KPPU; and Ningrum Strait, JSD, an Indonesian law professor. I have also had the benefit of comments from other FTC employees who have served in similar capacities in other countries, including Eric Rohlck, Daniel Ducore, Timothy Hughes, Elizabeth Schnierov, and Paul Karlsson.

[7] The ongoing political debate in the United States concerning the desirability of the World Trade Organization (WTO) North American Free Trade Agreement (NAFTA), and the Free Trade Area of the Americas (FTAA) demonstrates that questions about the benefits of free markets and free trade are not limited to transitional economies. *See, e.g., Special Report: Trade Disputes - Dangerous Activities*, ECONOMIST, May 11, 2002, at 63; Robert Zoellick, *Unleashing the Trade Winds,* ECONOMIST, Dec. 7, 2002, at 27; *Trade In the Americas: All in the Familia*, ECONOMIST, Apr. 21, 2001, at 19. Also, *compare* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004) (qualified optimism),

economy is one in which the economy of a nation is moving toward a market system from some other system. Inevitably, while there are those who will gain economically from the move to a market system, others will be detrimentally affected. Accordingly, I was fully prepared before my experiences in Indonesia to find that not everyone would favor free markets. Even after years of dialogue with various foreign competition officials, however, I was unprepared for the degree of skepticism to free market ideas that I met with during my time in Indonesia.

A. *A Hesitancy to Embrace Competitive Principles*

In furtherance of my goals while in Indonesia, I conducted classes for the Indonesian commission staff on competition concepts. Early in these sessions, I asked the members of the class to raise their hands if they favored free markets and competition. Out of the thirty-five or so individuals who were attending that day, two to three hands were raised.

Initially, I thought perhaps that my question was misunderstood or that the members of the class were shy or unused to volunteering opinions. While both of these reasons proved to be true, further questioning revealed that most of the class did not believe that free markets would benefit Indonesian society or the Indonesian economy. It was their shared belief that free markets would result in higher prices and worse service for Indonesian consumers.

This view was neither unique nor confined to the new and inexperienced staff at this competition agency. In discussion with some of the participants and representatives of non-governmental consumer organizations at an economic conference in another Southeast Asian country, the representatives[8] of these organizations expressed their strong support and preference for competition laws. A member of one of these consumer groups provided an example of why he thought his country needed a competition agency. The government, he explained, had recently privatized a previously public agency. He was furious because the private water company had raised

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with WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS (2002) (qualified pessimism).

[8] The representatives of the consumer groups were all university graduates, and some were lawyers or economists.

rates and service for water problems had declined seriously. He wanted the "competition" agency to order the private water company to lower its rates and to provide better service.

Our discussion revealed that rather than a competition agency, what was needed in that instance was a regulatory agency. Competition agencies are not established to regulate prices or service offered by individual companies. Rather, they attempt to ensure that competitors do not collude to eliminate competition or create barriers that prevent other firms from entering the market. The benefits of competition come from the rivalry of firms trying to attract customers with lower prices, better products, or better service. The problem in the case of the water company was that it had no competitors and it was unlikely that anyone would create a second water system for the city. Thus, the solution to the problems with water service probably required a regulatory agency rather than a competition agency.

Returning to Indonesia, I felt some confidence about the clarification that arose as a result of the discussion about the water system, but was troubled by the general lack of insight by these educated and enthusiastic people of how the market mechanism is supposed to work.[9]

In an effort to increase understanding of competition laws and their purpose, I tried to explain the purpose of competition laws and their beneficial intent for consumers to my classes with the Indonesian staff, and in my public speeches. As an example, I pointed

[9] The experience at the conference reminded me of a meeting I had in Washington with the head of a South American competition agency. She told me a story about her first week following her appointment as head of the then new competition agency.

The poultry sellers in the capitol city of the country where her offices were located made an appointment to see her as a group. They arrived, exchanged pleasantries and congratulated her on her appointment. Furthermore, they assured her that they were thrilled with her selection and promised her their full cooperation in implementing her duties. In proof of their good faith, they promised to charge no more than the competitive price - if only she would tell them what that price was.

She told me this story in the obvious expectation that I would find it amusing, and we both laughed at the poultry sellers' anomalous interpretation of the competition law. She had a more serious point to her story, however, which was equally obvious to both of us. How could she enforce a law where the public so completely misunderstood its purpose? She said her staff was too small to enforce even a well-understood law. Consequently, she decided to devote her primary efforts to explaining the purpose of the law and how it was intended to benefit consumers, a sensible first step for a new agency.

to the benefits that competition provided in transportation in Jakarta. The wide variety of vehicles for hire in Jakarta range from trains and buses, to taxis, motorcycles, and *bajajs*.[10] The prices, comforts, and speeds of the vehicles differed greatly. Even among taxis, there exists a diversity of price and quality from the top of the line luxury cars offered by Silver Arrow taxis, to the clean reliable air conditioned Bluebird taxis, to the less comfortable and cheaper independent taxis.

Using this illustration allowed my class at the Indonesian agency to readily understand that there was a relation between price and quality. Rich people get better goods and services because they pay more. What was less clear to them, however, was that competition can create a dynamic that can improve services and lower prices. The taxis industry in Jakarta[11] provided a clear example. In their effort to retain customers, taxi companies built reputations upon established standards of quality.

Having established a standard of taxi quality, these preferred taxi companies almost automatically constrained the prices that other taxi companies could charge. None of them could raise their prices without losing customers to other quality taxis. Indeed, absent collusion, the existence of comparable taxis may exert some pressure on the taxi companies to lower prices to take business away from their competitors. That competitive dynamic could have dramatic effects on the entire transportation system. The prices for less attractive taxis would be constrained if the quality taxis lowered their prices. The less comfortable, less reliable taxis would have to charge less or lose business. If these taxis lowered their prices, then *bajajs* and motorcycles would feel pressure to lower their prices to maintain their market shares.

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[10] *Bajajs* are three-wheeled vehicles that are similar to motorcycles, but the addition of a second rear wheel allows for the inclusion of two passenger seats.

[11] The competition among the multitude of taxis in Jakarta created a dynamic that improved services and lowered process. Jakarta is a hot, humid, and heavily polluted city with a crowded and confusing road system. These environmental factors created a strong incentive for some taxi companies to build a reputation for clean, cool taxis driven by individuals who had a comprehensive knowledge of the road system. Several taxi companies developed such reputations and were rewarded by individuals flagging down particular taxis because of the reputation of their company. They were also rewarded by hotels and shopping malls that gave exclusive privileges to a single reliable taxi company to park a row of its taxis in front of their businesses. Any person leaving that mall or hotel would automatically be offered taxis solely from that company.

Nevertheless, even if there are numerous participants in a market, the competition is limited by entry restrictions as a result of government licensing requirements or even price regulation, or by private anticompetitive agreements.[12] Where such agreements are common, competition may not have a meaningful role in the market. As a result, regulation may be seen as a more effective and possibly more responsive means to achieve consumer satisfaction.

The cascade of market effects as described in the Jakarta taxi illustration is not likely to occur if there are anticompetitive agreements that restrain competition in the citywide transportation industry. Accordingly, my class' skepticism about the benefits of competition in transportation and other industries may reflect more their knowledge of economic conditions rather than their misunderstanding of competition.

B. *Effects of Healthy Competition*

Competition in a free market economy provides three kinds of distinct benefits. The first of these benefits concerns maintaining price competition and eliminating output or entry restrictions. The second benefit concerns the improvement of standards of living through innovation. Finally, the third benefit centers on social mobility and social cohesion.

1. *Lower prices and higher quality*

Maintaining competition is the most familiar role of competition laws. Laws or doctrines that prohibit price fixing, market divisions, tying schemes, and predatory actions are generally presented in a manner that emphasizes consumer harm arising from such anticompetitive behavior. This harm is usually in the form of higher consumer prices, or lower producer output, or a combination of both. By eliminating price fixing or market division agreements, competition agencies can reduce costs for consumers leaving them with more money to spend on other goods.

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[12] An example of private anticompetitive agreements was reported in newspapers in Indonesia. The article reported that all of the major parking facilities had agreed to charge a new higher price for hourly parking rates. *Off-street Parking Fees Raised by 100 Percent,* JAKARTA POST, June 3, 2003, *available at* http://www.thejakartapost.com/Archives/ArchivesDet2.asp?FileID=20030603.G03 (last visited Mar. 30, 2005).

Lower prices and higher output may be the focus of technical discussions of competition law, but are not its most significant effect. As noted above, competition also promotes better service to consumers by providing them with more, and often better, choices. As elaborated below, the magic of competition is innovation. Competition forces producers to continually improve their products and to make them cheaper. If they do not innovate and their rivals do, then they will cease to be in business.

2. *Spurring innovation*

Innovation is the key result of a well functioning competitive market. In the middle of the twentieth century two American economists, Robert Solow and Edward Denison, surprised their colleagues by calculating how much innovation had improved the American standard of living compared to increases in capital investment.[13] Solow stunned his contemporaries by demonstrating that increased capital investment spurred less than 20 percent of economic growth, while eighty percent came from innovation.[14] Denison's later work made similar estimates that attributed 22 percent of economic growth to improved education and training of the work force, 48 percent came from scientific and technical innovation, and only 12 percent came from increased investment in capital equipment.[15]

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[13] Without denying the insights of Solow and Denison, William Easterly has shown the difficulties of translating the benefits of industrialization and innovation to transitional economies. *See* EASTERLY, *supra* note 7.

[14] Robert Solow, *Technical Change and the Aggregate Production Function*, 39 REV. OF ECON. & STATS. 312 (1957).

[15] EDWARD F. DENISON, ACCOUNTING FOR UNITED STATES ECONOMIC GROWTH 1929-1969 131-137 (1974).

If the beneficial effects of innovation seem improbable, consider the computer industry in the mid-twentieth century. In the 1950s, it looked as if General Electric Co. (GE) and the Radio Corporation of America (RCA) would dominate the industry because they manufactured the vacuum tubes on which the computers relied. They had more money and more experience with computers and larger research budgets than competitors and potential rivals. Nevertheless, within a decade both firms were out of the computer business because they had failed to understand the potential of transistors and other solid-state technology.

Another prime example is the development of the hand-held calculator. Before the 1950s, American consumers had a choice between big heavy mechanical calculators or even bigger vacuum tube computers to calculate numbers. Then,

In a competitive economy, innovation is not a choice. It is a product of what American economist Burton Klein has called the "hidden foot" of capitalism.[16] Since the time of Adam Smith, economists have talked about the "invisible hand" of capitalism to emphasize that economic growth in capitalism happens without any central planning.[17] Klein's hidden foot emphasizes, however, that capitalism kicks out those competitors who fail to innovate or keep up with the innovations of their competitors.[18] Innovation and the hidden

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Texas Instruments introduced consumers to its innovation with the amazing benefit of portability, the battery operated transistor calculator. *See*, Texas Instruments, *History of Innovation, at* http://www.ti.com/corp/docs/company/history/calc.shtml (last visited Mar. 13, 2005). This new calculator was revolutionary, as it was also relatively inexpensive and easy to use. The success of Texas Instruments created more competitors and innovations. Printed circuits replaced transistors, so calculators could be even thinner. *See,* Michael J. Cook et al, *Inside the New Pocket Calculators, at* http://www.hpmuseum.org/journals/woodb.htm (last visited Mar. 13, 2005). Photovoltaic plates were hooked up so the calculator would work on little light and never need replacement batteries. Liquid crystal displays were invented so that calculators became even thinner. *See, e.g. The International Calculator Collector: Liquid Crystal Display (LCD) Calculators, at* http://vintagecalculators.com/html/liquid_crystal_display_calcs.html (last visited Mar. 13, 2005). As the calculator improved through competition, it also became cheaper and cheaper. In fact, it became so inexpensive that practically anyone with a job could afford one. Ultimately, they have become so inexpensive that advertising promotions now commonly give away hand-held calculators about the size of a credit card.

Of course, these developments had devastating effects on jobs for employees of many companies. As this technology was being developed, it moved into the manufacturing of computers and the people making complicated delicate vacuum tubes and the steel and metal parts for mechanical calculators all lost their jobs. Many of these were highly paid skilled jobs became obsolete. But for every job that was lost, entire industries developed utilizing the technology that hand-held calculators had popularized. The liquid crystal display is now used for everything from digital watches and alarm clocks to laptop computers and flat screen TV sets. The silicon chips made possible the advent of the personal computer and are found in everything today from watches to automobiles, to refrigerators and greeting cards.

[16] *Compare* BURTON H. KLEIN, THE ROLE OF FEEDBACK IN A DYNAMICALLY STABLE ECONOMIC SYSTEM, (Cal. Institute of Tech., EconPapers, Working Paper No. 305, 1980-02), *with* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (1942) (describing essentially the same phenomenon as "creative destruction").

[17] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (1937).

[18] *See generally* BURTON H. KLEIN, DYNAMIC ECONOMICS (1977).

foot of capitalism are considerations that should be kept in mind when reflecting upon the shift to competitive markets. In the competitive economy, there may be no one with whom a government can make a deal to create or maintain existing businesses. There is no doubt that the free market, competition, and the invisible hand will all cause changes in the economic structure of nations as they move from economies that are the product of longstanding oligopolistic relationships or established by government licenses or centrally planned.

The choice to retain a controlled economy is not a viable solution for a nation that wants to engage in international trade, however. Even a nationally protected and subsidized industry is unlikely to succeed against a competitive world economy. As a general matter, international competitive success depends on exporting products that are better, or cheaper, or a combination of both. Insulating a domestic market from foreign competition through tariffs or other barriers is likely to diminish the incentives for a protected domestic industry to innovate unless it has vigorous domestic rivalry.[19]

Countries that try to break into the international market by subsidizing a "national" industry are unlikely to be successful. Unless the nation is extremely lucky, it is likely to invest in the wrong technology and commit resources to produce products for which there is no international market. Nations that try to outguess and outperform the market by internal subsidization are destined to fail because a single firm standing alone will lack the support of knowledgeable competitors that they can copy or raid for ideas and a trained workforce.

Michael Porter of the Harvard Business School has proposed viable alternatives to such planning innovation. His book, *The Competitive Advantage of Nations*, is the most direct and comprehensive discussion of what does and does not work in international competition.[20] Indeed, competition, which is his answer to the problem of planning innovation, is widely championed as a

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[19] *See* MICHAEL PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 118 tbl. 3-2 (1990). For example, during the 1960s and 1970s, the Japanese protected their automotive and electronics industries, but had domestically more manufacturers competing for market share than the rest of the world. *Id.*

[20] *See generally id.*

responsible domestic policy by competitive agencies themselves. The nations that are the leaders in international competition are the nations that face the most competition for sales of a particular product in their own domestic market.[21]

Competition, especially domestic competition, matters. It is the way businesses learn how to advance at their trade. Yet keeping this in mind, it is obvious that individual nations cannot excel in all products. Some will have natural advantages because they have more demanding local customers. Others will have advantages because of traditions or resources. Still others will have advantages because that country was the first to see the possibility of a new product or new kind of product. To keep an international advantage, however, innovation remains a necessary element of competition.

3. *Promoting social mobility*

The third, and in some ways, the most important aspect of a free market for transitional economies is the promotion of social mobility. The magic of the market may destroy jobs, but it also creates them.[22] The businesses of every nation must make choices about what they can successfully sell domestically and internationally. They will be aided in international competition if their nation adopts a

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[21] In his book, Porter discusses successful international companies in many industries. One example is the ceramic tile industry in Italy, which is a highly competitive industry within Italy. The industry's domestic competition and emphasis on innovation led to Italy's development into the international leader for title development. This provides a clear example of the role of competition without the distraction of high technology or huge capital investments. *Id.* at 210-225.

American examples of successful international companies that developed because of competition, not despite of competition, can be found in the Silicon Valley and the California computer industry. The Silicon Valley, however, is not an exceptional one. The American automobile industry in Detroit, the steel industry in Pittsburgh, and the movies in Hollywood, all developed because of competition. The American firms became world leaders only when pushed by the hidden foot of domestic competition.

[22] An example is the American consumer electronic industry. Despite initially leading the industry internationally, America now makes few of the many consumer electronic products that we buy. Consequently, there are almost no people in the United States who earn a living making consumer electronics, but there are many more people working in the United States producing other goods and services. Overall, American consumers have much better and cheaper electronic equipments than they had in the 1950s.

strong domestic competition policy, including a strong competition law and an effective competition agency. If national monopolies are privatized, they should either be broken up into competitive domestic companies that will be prepared for international competition, or if scale economies make more than one firm impractical that firm must be faced with foreign competition. A dominant domestic firm that cannot win in its home market surely cannot compete on an international level. As a general matter, if a firm does not have local competition, it will be at a significant disadvantage internationally.

For transitional economies, the concept of domestic competition has enormous social and legal implications. Governments cannot expect the free market to increase employment, to increase wealth, and to increase standards of living, without reducing domestic barriers to entry.[23] Opening domestic markets to foreign companies seeking low cost labor is insufficient. Governments must embrace the development of dynamic competition within its borders. They must facilitate the formation of new firms to challenge the dominance of old ones. In such circumstances, new entrepreneurs are likely to arise, and new kinds of jobs developed. In the United States, over ninety-nine percent of the five million employers are small businesses.[24] Each year new businesses account for about ten percent of this number, or 500,000, but another ten percent cease operating.[25] Some of the latter are rewarded by selling or merging their businesses, some simply close their doors, and a small minority close in bankruptcy. The American economy is characterized by this continuing cycle of small business creation, growth, sale and death. Small businesses were responsible for sixty to eighty percent of the net new jobs created during the1990s.[26] Employees of small businesses produce over ten times the patents that are registered by large firms.[27] And the

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[23] DICTIONARY FOR BUSINESS AND FINANCE 25 (1990) (defining "barriers to entry" as "an obstacle to the entry of new firms into an industry"). Such obstacles can be created by government action, by cooperative behavior of businesses, or by actions of a single business.

[24] UNITED STATES SMALL BUSINESS ADMINISTRATION, http://www.sba.gov/advo/stats/ (last visited Feb. 23, 2004).

[25] *Id.*

[26] *Id.*

[27] *Id.*

patents of small firms are almost twice as likely to be put to use.[28] Although, on average, small firms pay a little less than half the total private payroll, they employ about 39 percent of all engineers and account for almost thirty percent of American exports.[29]

As a result of this dynamism and creations of new entrepreneurs and types of jobs, more people invest in the development of economic institutions and social stability. Such changes create a constituency for competition laws. A dynamic free market is frustrated by barriers to entry and anticompetitive conduct. People operating in a free market see the role of government differently and expect different kinds of conduct in the marketplace.

The skepticism of my Indonesian class about the value of business competition might have been very different if their experience with economic transactions had been different. Had they seen the growth of new local industries and jobs created by persons of modest means who are now rich as a result of new ideas or new businesses, they might have had more hopes for market economics and competition. Likewise, if they had been exposed to lower prices, more jobs, or better services as a result of the growth of domestic industrial growth, they might have had a different frame of references with which to consider competition law. For the most part, however, the initial view of my class was that competition law is a foreign idea either imposed by foreign countries or by governments seeking to adopt foreign ideas.

This narrow view of national economic policy is not limited to people in transitional economies. People in the United States frequently judge economic policy on the basis of how it affects them.[30] Likewise, some American businesses seek higher profits by unlawful anticompetitive actions or agreements and try to gain advantage over international rivals by government action.[31]

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[28] *Id.*

[29] *Id*.

[30] If they lose their jobs, the policy seems bad, but if they keep their jobs, get a raise, or a better job, the policies seem good.

[31] An example is the steel and sugar lobbies have combined the strength of business and labor to gain advantages for American companies. The success of the steel lobby in getting protection by temporary import quotas, however, has been followed by a defeat in the WTO.

C. *Intuitional Prerequisites for a Market Economy*

A nation that seeks to obtain the benefits of a competitive market economy must have a legal structure and institutions that support market transactions. William Kovacic, a leading scholar on developing competition agencies in transitional economies, has identified five prerequisites to creating a market economy. These consist of:

1. Creating and defining private property rights and creating systems for recording and transferring such rights.
2. Establishing contract principles and enforcement mechanisms to facilitate exchange.
3. Recognizing the formation of business enterprises in the form of partnerships, corporations and sole proprietorships and specifying the means for governing such bodies.
4. Promoting capital formation through the sale of securities, issuance of debt, and pledging of assets.
5. Facilitating the exit of assets and their redeployment through bankruptcy procedures.[32]

There is a close relationship between each of the listed items and the benefits portrayed in the preceding section that the market economy can create. Transferable ownership rights that can be traded in an orderly manner are the cornerstones of the existence of a market economy. This trading constitutes the basis of price and quality competition. Trading requires an enforceable system of contract rights. The efficient production of goods and services requires the development of legally recognized enterprises with the capacity to act as a unitary entity capable of contracting with suppliers and customers in addition to raising capital to fund its operations.

Ownership rights of intellectual property can facilitate innovation and investment by granting at least limited rights to exclusivity in the sale of an innovative product or a product made with an innovative process. To induce investment in an enterprise,

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[32] William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case for Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 270 (2001).

investors must have rights to benefit from the success of the operations of the enterprise through periodic distributions of profits and/or sale of their ownership rights. The buying and selling of ownership interests as well as the sale of goods and services by new enterprises creates opportunities for significant economic and social mobility. Finally, if the enterprise fails, there should be some efficient mechanism, such as bankruptcy that allows an entity to redeploy its assets into the marketplace and reintegrate its owners and managers into the economy.

Virtually by definition, the enterprises just described are not fully present and operative in a transitional economy. What is lacking varies greatly from country to country and even within countries or economic sectors. Some countries, like the former Soviet Block countries, lack the legal tradition of property and contract rights. Other geographically isolated countries rely on traditional relationships rather than commercial transactions.[33] Still other nations have passed laws that purport to establish all five sets of institutions, but corruption or "crony" capitalism undermines the laws to such a degree as to make them meaningless.[34] Many nations have dysfunctional arrangements between ruling elites and ethnic minorities, in which the political or military elites grant the ethnic minority economic favors in return for a bribe or its equivalent.[35]

Transitioning to a market economy requires not only the passage of laws described in the Kovacic list, but also the elimination of corruption and the establishment of the rule of law through an honest and effective judiciary and legislature.[36] In the United States,

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[33] *See, e.g.,* JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED, at 279-293 (2004) (discussing the New Guinea and Tikopian populations).

[34] *See* EASTERLY, *supra* note 7; CHARLES WHEELAN, NAKED ECONOMICS: UNDRESSING THE DISMAL SCIENCE (2002).

[35] *See generally* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003). Professor Chua argues that the advantageous status accorded these minorities make them targets for attacks by indigenous majorities. The favoritism reduces competition in the countries and makes the minorities vulnerable to persecution by populist politicians, as the ethnic Indian community found in Uganda under Idi Amin and the ethnic Chinese found in Indonesia in the waning days of the Suharto regime.

[36] *See* EASTERLY, *supra* note 7; WHEELAN, *supra* note 34, at 54-56.

legislatures and courts by themselves are insufficient to maintain the necessary structure for the economy. Consequently, the American government has created a host of agencies to regulate banks and insure bank deposits, to monitor the issuance of corporate securities and the trading of ownership rights in stock markets, and to supervise the creation, limitation and termination of intellectual property rights. In addition, the United States has created numerous other institutions to promote public objectives, such as health, safety, the environment, education, and national defense that are not well regulated by market forces.

Few would maintain that any of these institutions work perfectly because they have the propensity to reflect problems in drafting and in implementation. Counterproductive ideas, inadequate resources, human error, favoritism, and bad luck all limit the effectiveness of governmental programs that are designed to support the U.S. market economy. Moreover, there are continuing disagreements as to which government actions support the market and which harm the productive forces of the market.

A free market, however, does not require unanimity on economic policy, nor does it require a total absence of corruption and favoritism. The United States has survived a history of economic scandals from the days of the nineteenth century "Robber Barons"[37] to recent scandals involving private companies such as Enron, Worldcom, Imclone,[38] accounting firms,[39] brokerage firms,[40] and

[37] *See generally* MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861-1901 (1934).

[38] *Special Report: Enron - One Year On, Corporate America's Woes, Continued*, ECONOMIST, Nov. 30, 2002, at 59; *A Trying Year*, ECONOMIST.COM, Jan. 13, 2004, at 1, *available at* http://proquest.umi.com/pqdweb?did=524464091&sid=1&Fmt=3&clientId=23440&RQT=309&VName=PQD (last visited Apr. 3, 2005).

[39] *WorldCom: Accounting for Change*, ECONOMIST, Jun. 29, 2002, at 13.

[40] *Special Report: Wall Street - The Value of Trust*, ECONOMIST, June 8, 2002, at 65.

government favoritism to large political donors.[41] Even so, the United States has generally had a vigorous growing economy.[42]

Turning again to Kovacic's list, notice that it does not include a competition law. Competition laws are supplements designed to maintain, but not create, a competitive economy. Competition authorities can police violations of a competitive economy, but they cannot force competition on a nation that lacks a commitment to a free market economy. Competition authorities lack the political power and the resources to transform a nation's economy. As the final section of this article argues, there must be a national consensus as to the value of competition and that consensus must permeate its economic, social and political communities in order for any competition law to be effective. Such an economy, however, does not require a perfect consensus. Rather an environment must exist that allows market forces to dominate and the public to support the rule of law.

III. DESIGNING UNDERSTANDABLE AND EFFECTIVE COMPETITION RULES: DRAFTING STATUTORY PROHIBITIONS OF COMPETITION LAWS

With such a consensus, it may be possible for a nation to design a competition program that will support a free market economy. By policing aberrant private behavior that restrains competition, and advocating for laws and institutions that promote efficient markets and against laws that inhibit market efficiency, competition authorities can help maintain the free market against forces that seek to supplant competition.

The design of effective competition institutions is the central focus of this article. This section illustrates difficulties of drafting an effective law in language that is understandable, precise and comprehensive. The problematic legislative and judicial history of competition laws within the United States serves as a vivid example. Next, this section addresses the difficulties created by the much more specific language of Indonesian competition law. Finally, this section outlines the benefits of drafting a competition law that is similar to the

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[41] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). In this case, the Supreme Court declared unconstitutional a Massachusetts law that prohibited businesses from making political expenditures.

[42] *See supra* notes 22-23.

approach taken by the European Union. Despite those advantages, however, the European model does not resolve the fundamental problem of clearly stating what business actions are lawful and unlawful. The succeeding sections consider some implications posed by that lack of clarity and provides some suggestions on how to cope with the inherent imprecision of the statutory language in competition laws.

The difficulty that transitional economies have in understanding competitive markets is rivaled by the difficulty they have in understanding what is prohibited and what is permitted by competition laws. The truth is that even after a hundred years of court decisions construing American laws, competitive or antitrust legislation still suffers from popular ambiguity. It should therefore not be surprising that lawyers, judges, and business people in transitional economies have difficulties understanding their own newly enacted competition laws. These difficulties are compounded by the fact that most transitional economies have a civil law tradition that is not conducive to understanding American common law court decisions.

A. *The American Experience*

1. *The Sherman Antitrust Act of 1890: precision and overinclusiveness*

The conceptual difficulty with competition law became apparent soon after the passage of the Sherman Act in 1890.[43] The Sherman Act was the first antitrust law passed in the United States,[44]

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[43] Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (2001) [hereinafter Sherman Act].

[44] The meaning and intent of the words chosen by Congress to write American competition laws have been the subject of constant debate since courts and historians first construed them. *See e.g.*, HANS BIRGER THORELLI, FEDERAL ANTITRUST POLICY (1954); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); RICHARD HOFSTADTER, THE AGE OF REFORM (1955) [hereinafter HOFSTADTER, THE AGE OF REFORM]; RICHARD HOFSTADTER, THE PARANOID STYLE OF AMERICAN POLITICS (1965); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003). This section on the American experience with competition law does not attempt to resolve the unending debates

and it had two provisions, which remain to this day the foundation of American antitrust or competition law. The Act's first provision makes unlawful any contract or other agreement that restrains trade.[45] The second provision makes it unlawful to monopolize or attempt to monopolize commerce.[46]

The Sherman Act was passed in response to harmful activities by American businesses. The most obvious amongst these harms were the formation of large monopolies that raised prices and prevented other producers from selling their products.[47] For example, when all of the sugar producers combined, they could set the price for sugar at a higher level. Then when all of the sugar producers demanded that railroads carry only their sugar, new producers were unable to sell sugar because they could not get the sugar to the markets. The harm to competitors and subsequently to consumers, in this situation is obvious, and clearly explains the consensus that developed between both political parties in Congress and with the President that an antitrust law was needed. Nevertheless, the Sherman Act did not work. For the first five years, the United States government lost almost every case that it brought to court.

The government's antitrust litigation losses stemmed from the fact that the very logic of the law did not make sense. Every contract

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about why American antitrust laws were passed and how they should be interpreted. Rather it focuses on the less controversial question of whether the wording of the laws makes it easier to apply the laws to facts of particular cases. In that sense, this article adopts the approach of Oliver Wendell Holmes, Jr. in his classic text, THE COMMON LAW. "The life of the law has not been logic, it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881). This is most true of competition law in the United States.

[45] Section 1 provides in part, "[e]very contract . . . or conspiracy, in restraint of trade. . . is hereby declared to be illegal." Sherman Act, *supra* note 43, §1.

[46] Before 1974, section 2 provided in part, "Every person who shall monopolize or attempt to monopolize . . . shall be guilty of a misdemeanor." The December 21, 1974 Amendment substituted "felony" for "misdemeanor." Sherman Antitrust Act, 15 U.S.C.S. § 2.

[47] *See, e.g.*, HOFSTADTER, THE AGE OF REFORM, *supra* note 44; Alfred Chandler, *The Coming of Oligopoly and its Meaning for Antitrust*, *in* NATIONAL COMPETITION POLICY: HISTORIANS' PERSPECTIVES ON ANTITRUST AND GOVERNMENT-BUSINESS RELATIONSHIPS IN THE UNITED STATES, FEDERAL TRADE COMMISSION (1981).

restrains trade. That is the purpose of a contract. A contract is a binding agreement to do something. If there is an agreement to sell a car to a specific party for $10,000, then the seller cannot sell the car to any other party. The seller is restrained by the contract. The courts will require the seller to deliver the car and require the purchaser to pay the agreed amount of $10,000. If every contract creates a restraint of trade and is therefore illegal, however, then there can be no contracts and no trade. Freedom to enter into binding contracts is the lifeblood of commerce and trade. Consequently, logic based only on the words of the Sherman Act is insufficient to apply this provision.

Judge William Howard Taft[48] made a critical distinction in the *Addyston Steel* case.[49] He held that a contractual restraint could only be lawful if it was ancillary to a lawful contract. Therefore, if the main purpose of a contract is to promote trade and the restriction is a condition that makes the sale possible, the restraining condition is lawful. Consider an old but very successful baker who wants to sell his business and retire. No one would buy his bakery unless the baker agreed that he would not open up another store the next day and sell baked goods to his old customers. So the old baker can more easily sell his bakery if the restraint – his promise not to compete – is lawful. He can retire on the money he receives for the value of the baking business that he has built - the reputation, goodwill, and customer loyalty - because a person would be willing to buy his bakery if he was sure that the baker would not go back into competition with the buyer. Judge Taft decided that this kind of restraint was lawful because it is ancillary to the sale. It promotes trade rather than restraining it.[50]

Trade is promoted by the agreement not to compete because more people are likely to enter a business if they can sell the business for its full value. If potential buyers cannot have the assurance that the seller will not compete, they are unlikely to buy the business, or pay

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[48] Later was the twenty-seventh President of the United States (1909 – 1913) and then Chief Justice of the United States Supreme Court (1921- 1930).

[49] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[50] "[C]ovenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer . . . This very statement of the rule implies that the contract must be on in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary." *Id*. at 281-82.

as much for it. Such a restriction may discourage people from opening businesses if they know they can never sell the business for its full value.

On the other hand, there are many other restraints that would also make entry into a business more attractive that are nevertheless unlawful because they restrict rather than promote business. For example, an agreement between all rivals in an existing market to divide the market so that each would obtain an exclusive territory free from competition would be valuable to the competitors. Each, by virtue of the lack of competition in their exclusive territory, would be able to raise prices to monopoly levels as a result of the exclusive territorial agreement.[51]

In both examples, there is an agreement not to compete, yet one is considered lawful and the other unlawful. The distinction turns on the likely effects of the agreement on consumers – whether the consumers will have less choice or higher prices as a result of the agreement. Arguably, in the case of the bakery, the number of competitors is unchanged by the agreement to sell and not compete. One bakery existed before the sale; one bakery existed after the sale. The new owner is no more likely to be able to raise prices than the old. Moreover, the bakery is more likely to remain open or be sold because the owner is able to realize the full value of his efforts in building a reputation for quality.

The result should be different if the agreement inhibited trade rather than promoted it. Applying the bakery hypothetical, if all the area bakeries agreed that each would sell only one type of baked good (*e.g.*, one would sell only bread, another only pies, another cakes, another doughnuts, etc.), then each baker would have a monopoly on his product. Each baker, as the sole supplier, can limit production and charge higher prices, because there is no competition. In this agreement, the limitation on competition is not ancillary. Rather it is the central purpose of the agreement. Accordingly, it would not meet the exception declared by Judge Taft in *Addyston Steel*.

The distinction in these two examples appears to be clear, but that clarity may become elusive by the addition of even simple facts. Cases that look much the same may be judged differently on very particular circumstances, and different courts may be more or less swayed by the same particulars circumstances. One court might find a

[51] RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 159 (1976).

merger or joint venture between two firms unlawful unless the specific circumstances reflect the necessity of the merger. Still other courts might not be persuaded by the same argument and conclude that the that the motivation for the merger was based more on a desire to eliminate competition

To illustrate this fact, suppose that two competing business each decide to elect the same person as a member of its board of directors. Business competition and individual confidence issues are automatically triggered. Courts might decide it is reasonable for competing companies to have some of the same people on their boards of directors only where the two companies competed or where the individuals serving as directors on both boards did not constitute a majority or did not participate in matters that affected competition between the two companies.

This distinction between what contracts or business actions are both beneficial and lawful and those that are not has been central to U.S. competition laws for more than a century. In some circumstances, such as the monopolization case decided against the Standard Oil in 1911, the monopolist's abuses were so clearly unreasonable the Supreme Court was easily satisfied that the conduct was unlawful.[52]

2. *The Clayton Antitrust Act and the Federal Trade Commission Act of 1914: narrower prohibitions and expert decisions*

Congress, however, was concerned that the American competition law would not be effective or consistent if left up to judges to decide on a case by case basis whether restraints or actions were "reasonable."[53] To limit the discretion of courts to decide what a reasonable restraint is, Congress amended the Sherman Act in 1914.

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[52] "[I]t suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies, restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and the payment of rebates on oil, with like intent." Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 42-43 (1911).

[53] *See, e.g.*, LETWIN, *supra* note 44, at 269-270.

There were two divergent views on how the Act should be amended. One view argued that the competition law should more specifically define what constitutes "unreasonable," and therefore unlawful, business actions. The opposing view argued that the circumstances of business transactions and the nature of industries varied too much for Congress to set out specific rules. Instead this view advocated for the creation of a specialized body of experts that would decide which business actions should be considered lawful and unlawful.

Advocates of the latter view argued that an expert body would be less influenced by political considerations than the executive branch, more specifically, the President and the Attorney General. Furthermore, an expert body would understand better the reasons for and the effects of actions of businesses than judges, because they would have specific training and experience in this area of law. There was a further expectation that the expert body would be able to design specific rules of business conduct that would define all or most illegal anticompetitive behavior.

Curiously, both arguments met with success. In 1914, Congress increased the power of the Attorney General and restricted the powers of the courts when it amended the Sherman Antitrust Act by passing the Clayton Antitrust Act. The Clayton Act defined certain types of business actions as unlawful violations of the competition law. It also established the Federal Trade Commission and endowed it with the right to enforce both the Clayton Act and the Federal Trade Commission Act.

The Clayton Act foreshadowed in some ways the Indonesian competition law. It defines certain business actions as unlawful restrictive business practices more specifically than the Sherman Act. These actions include price discrimination,[54] tying and exclusive dealing contracts,[55] corporate mergers,[56] and interlocking boards of

[54] Selling the same product at different prices to similarly situated buyers. Clayton Act, 15 U.S.C. § 12 (2001) [hereinafter Clayton Act].

[55] Contracts that require a person to buy two related products together or contracts that require the buyer to buy all of its supplies from the one seller and none from his competitors. *Id*.

[56] One business buying out one of its competitors. *Id*.

directors.[57] However, having decided on a list of actions that could harm competition, Congress recognized that there might be circumstances in which these actions might not hurt competition or consumers. Thus, Congress required the antitrust agencies to also show that the effect of these actions "may be substantially to lessen competition" or "tend to create a monopoly."[58] Showing either of these economic effects can be a very complex matter because an antitrust agency must demonstrate the probable consequences of these actions by a particular company in a particular industry. Therefore, because of this complexity, the application of antitrust regulations has been judicially refined over a long period of time.

The Federal Trade Commission Act[59] created an independent and expert agency to enforce American competition laws. Its purview, however, is even less specific than the Sherman Act. The Federal Trade Commission Act declares "unfair methods of competition" as unlawful.[60] Congress recognized that these two laws - the Federal Trade Commission Act and the Clayton Act - appeared to be going in opposite directions in terms of specificity when gauged against the Sherman Act. Considering this, passing both acts at the same time appears to be illogical. History, however, has again proven more valuable than mere logic. While trends in American antitrust law have varied substantially over the course of a hundred years, the differences have had little to do with the language of the statutes.[61]

Modes of analysis, presumptions of legality and illegality, and economic theories of harms and benefits have all changed over time,

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[57] Having one person be a member of the board of directors of two firms that competed. *Id*.

[58] *See id*.

[59] Federal Trade Commission Act, 15 U.S.C. § 41-58 (2001) [hereinafter FTC Act].

[60] 15 U.S.C. § 45 (a)(1).

[61] *See, e.g.*, A.D. NEALE & D.G. GOYDER, THE ANTITRUST LAWS OF THE U.S.A.: A STUDY OF COMPETITION ENFORCED BY LAW (3rd Ed. 1980); INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey Goldschmid et al. eds., 1974); KENNETH M. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 103-128 (2003); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. J. 587 (1982).

but the central issue framed by Judge Taft remains – how to distinguish ancillary restraints that promote or at least do not harm competition from restraint that impair competition. In brief, there is little evidence that the language of the three American competition laws has helped significantly in communicating the essence of unlawful business actions. The following section illustrates that these laws have been clarified more by case law than by statutory language or agency rules.

3. *American judicial presumptions and per se rules*

The American inability to draft precise laws or regulations concerning competitive behavior has promoted the development of judicial or FTC doctrines for applying the statutory prohibitions. There are a number of well-accepted competition doctrines, often referred to as *per se* rules that describe unlawful anti-competitive behavior. Foremost is the doctrine that it is unlawful for sellers to agree on the prices that each will charge for competing products. Equally unlawful are agreements between businesses to eliminate mutual competition by dividing customers or territorial bases. In theory, these rules define certain conduct as illegal in all circumstances.

Although such doctrines are generally viewed as *per se* rules, they are neither automatically applied nor universally found to constitute violations. Even price fixing, arguably the most recognized and universally applicable *per se* violation, has limits on its application. As the Supreme Court noted in the *BMI* case,[62] it would be uneconomic and therefore unreasonable for every radio and television station that plays music to negotiate separate contracts with the owner of the copyright for each recording. The cost of contracting separately would often exceed the value of the contract. Accordingly, the Supreme Court found it reasonable to negotiate a blanket license to broadcast any recording at a fixed price, regardless of who owned the copyright. Other exceptions have permitted joint advertising by competitors who otherwise could not compete with larger companies.

Therefore, it is better to refer to these doctrines as presumptions of illegality that may be shown to be inapplicable in specific circumstances. Before condemning a business action as

[62] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

illegal, there must be at least an opportunity to demonstrate that the action enhances or at least does not harm competition in the marketplace.[63]

B. *The Indonesian Approach: Specificity*

Indonesia uses specificity to communicate the meaning of its competition law. This practice is consistent with the civil law tradition that the Indonesian government inherited from Dutch colonial law. Unlike the common law tradition, Indonesian lawyers would expect prohibitions to be explicit and not rely on the judiciary to develop and refine competition doctrines.

Law Number 5,[64] the Indonesian competition law, has twenty-four provisions that define separate unlawful actions. The goal behind such specificity was to provide the public with notice of what constitutes illegal behavior. Efforts to make the law more explicit than American law, however, have not proved successful. While the language of separate provisions seems to cover identical business actions, the requirements for demonstrating a violation differ and thus, in turn, promote inconsistency. Some provisions, for example, indicate that there must be a showing of competitive harm to establish a violation, whereas overlapping provisions make no such requirement.[65] Moreover, some provisions would be blatantly anti-

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[63] The FTC has largely followed decisions of the courts under the Sherman Act in defining competition violations under the FTC Act. It has sometimes claimed that the "unfair methods of competition" is a broader concept, but more often applied standards of competitive harm that are similar or identical to those announce by the courts. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980). The FTC has not produced rulings based on special knowledge of business behavior that Congress hoped for when it created an *expert* agency.

[64] Prohibition Against Monopolistic Practices and Unfair Business Competition, No. 5 (1999) (Indon.) [hereinafter Indonesia Competition Law].

[65] *Id.* Article 11, for example, is a fairly comprehensive prohibition of agreements that may cause competitive harm. Article 11 states, "[b]usiness actor[s] shall be prohibited to make agreements with their business competitors with the intention of influencing prices by arranging production and/or marketing of a good and/or service, which could result in the occurrence of monopolistic practices and/or unfair business competition." *Compare* Article 4, "[b]usiness actor shall be prohibited to make agreements with other business actors to jointly take control of the production and/or marketing of goods and /or services that could result in the occurrence of monopolistic practices and/or unfair business competition," *and*

competitive if applied literally. Article 6 of the Law, for example, prohibits all price discrimination. Literal application would mean that sellers could not compete on price. For example, once a seller sold one product, it would be bound to charge the same amount to any other buyer even if other sellers were offering the same product at a lower price.[66]

However, unlike the Sherman Act, the Indonesian law provides a means to reconcile the overbroad and seemingly inconsistent approaches to defining illegal business behavior. Ostensibly, the broad and overriding public goals set out in Articles 2 and 3 could promote general consistency. In addition, Article 35 imposes a duty on the Commission to make findings of competitive harm prior to finding a violation in every case.[67] Thus, it appears that the absence of references to competitive harm in certain Articles are not intended to contradict the statement of purpose in Article 3 (c) "to prevent monopolistic practices and/or unfair competition caused by business actors."[68] The Indonesian competition agency is still in the process developing guidelines about the application of this law. Consequently, it is too early to evaluate whether the law will be applied with a consistent rationale. Nevertheless, like the finding of violations of American law, Indonesia's law will rest on presumptively complex and unpredictable factual determinations.

C. *The European Union Treaty and Limits on Drafting*

Article 5, "[b]usiness actor[s] shall be prohibited to make agreements with their business competitors to fix prices of certain goods and/or services that have to be paid by consumers or customers in the same relevant market," *and* Article 9, "[b]usiness actor[s] shall be prohibited to make agreements with their business competitors with the purpose of dividing marketing territories or allocating the markets for goods and/or services, thus could result in the occurrence of monopolistic practices and/or unfair business competition."

[66] *Id.* Article 6 states, " [A] [b]usiness actor shall be prohibited to make agreements which result that one buyer has to pay a different price from the price which has to be paid by other buyers for the same goods or services." *Id.* art. 6.

[67] *Id.* Article 35(a),(b) and (c) declares that the "duties of the Commission [include] conducting evaluations of agreements that could result in the occurrence of monopolistic practices and/or unfair business competition as referred to in Article 4 to 16. . . . Article 17 to 24 . . . [and] Articles 25 to 28." *Id.* art. 35(a)-(c).

[68] *Id.* art. 3(c).

Although it seems impossible to formulate concrete rules of general applicability, it may be possible to draft meaningful language for a competition law. Many countries have competition laws and more continue to adopt competition laws. There appears to be a growing consensus that actions such as price fixing, market allocations, and mergers resulting in monopolies generally harm competition, consumers, and a nation's economy to some degree.

Capitalizing on a hundred years of American experience, the European Union has adopted a statutory framework that may be a better model for transitional economies seeking to adopt competition statutes. The European Union's treaty divides its competition law into two sets of prohibitions. The first prohibits concerted actions that restrain trade. The second prohibits unilateral exercises of market power that restrain trade. To demonstrate the intended effect of the law, an illustrative set of actions is provided along with each prohibition.[69] The treaty subsequently sets out criteria for finding exceptions to the general prohibitions.[70] The competition provisions

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[69] This is not to say that the author recommends the specific language of Articles 81 and 82 or that the author agrees or disagrees with the manner in which the EU has implemented its competition laws.

[70] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C340) 3, arts. 81, 82 (1997) [hereinafter EC TREATY].

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

of the European treaty appear to more effectively communicate the scope of a competition law in comparison to both American and Indonesian laws. The American laws vary from the extreme abstraction of the Federal Trade Commission Act to the extreme specificity of the Sherman Act and the Clayton Acts, which have been made workable only by judicial and statutory limitations. Similarly,

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2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings:
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

the specificity of parts of the Indonesian law only provides the illusion of clarity. In contrast, the European approach sets out the general prohibition and then clarifies that by providing examples and exceptions.

Even though the European Union's treaty attempts to add further clarity to competition laws, basic ambiguities that encumber any legislative attempt to define those laws will remain. There will continue to be arguments about where permissible behavior crosses into anti-competitive actions, and what kinds of proof should establish elements of a violation. Additionally, issues such as what presumptions should exist about markets and market behavior, and who should bear the burdens of proof on issues of fact, what kind of investigative powers should be granted to those who enforce the competition law, what rights should be afforded to persons under investigation for actions that may violate the competition law, what kind of body should determine whether violations have occurred, and what remedies are appropriate for different violations are ever present.

These are not inconsequential details. They form the corpus of each nation's competition law and are likely to reflect the legal tradition of the nation, the resources the nation can dedicate to competition enforcement, and the needs of an effective competition law.[71]

Procedural differences, as well as those concerning the application of competition laws should not obscure the benefits of a free market that is regulated by such laws. Competition laws are necessary to ensure markets will operate freely in response to the demands of consumers and the initiative of producers. That consensus should form the basis on which competition laws are drafted and implemented, as well as the basis for international discussion about the effective application of competition laws.

IV. PROCEDURAL CHOICES TO IMPLEMENT COMPETITION LAWS

Due to the inherent difficulty in drafting clear and comprehensive definitions of business activities that violate competition laws, transparency in its enforcement is essential.

[71] Many of these issues continue to be the subject of controversy in the United States, despite the many years of experience enforcing American competition law.

Although it is not possible to define in advance the particulars of every violation, it is essential to provide the factual and legal basis of a violation. Good policy centers on demonstrating the fairness of competition law enforcement and how violations of such laws effectuate public harm.

This section considers three sets of issues that trace the progress of a competition enforcement action. The first part considers issues concerning the initiation of investigations and the prosecution of competition laws. The second focuses on adjudication processes and judicial review of competition decisions. Finally, the last part considers issues related to remedies that may be ordered for violations of competition laws.

A. *Initiation and Prosecution of Competition Law Violations*

1. *Private enforcement*

From the implementation of America's first competition laws in 1890 until the present, American law has promoted the enforcement of antitrust laws by individuals who were harmed by violations. The laws encourage private enforcement by granting private plaintiffs the right to recover treble economic damages suffered as a result of the anticompetitive actions of another.[72]

Many positive aspects exist in favor of allowing private rights of action for competition violations. Those who are harmed by anticompetitive actions have the strongest incentive to enforce the law. They are not subject to political or economic constraints that all government agencies face.

The American experience does not, however, suggest that private antitrust actions have had a profound effect on shaping American competition law. This may arise from the fact that in an action between private parties, the issue is merely money. Consequently, the parties may prefer to split the anticompetitive profits rather than to restore competition to the markets.

Transitional economies may encounter additional problems by allowing private actions under competition laws. Allowing private rights of action requires both a private bar that is trained in competition law and a legal forum that is competent to try the issues

[72] Sherman Act, *supra* note 43, § 7.

involved in proving a competition violation. At the inception of a nation's first competition law, there are likely to be few attorneys and judges with training in competition law. As a result, there is a likelihood that the institution of private actions may introduce confusion in the development of the substance of the law and such actions may be abused to disrupt lawful competitive actions.

The Indonesian Competition Law, Articles 38 and 39, provides for an interesting and perhaps appropriate middle position. It grants individuals and business entities the right to initiate investigations by the Indonesian Business Competition Supervisory Commission (KPPU) by filing reports with the agency indicating possible violations.[73] The KPPU is required to open an investigation if the report contains facts supporting the allegation of a violation.[74] However, the reporting party is not a participant in the investigation or prosecution of an alleged violation. Indeed, the KPPU is prohibited from revealing the identity of the reporting person.[75] This role gives some rights to those who have been harmed without introducing the complexities that are likely to be created by private actions in courts that are unfamiliar with competition law.[76]

2. *Specialized enforcement agencies*

As illustrated *supra*, factual evidence and interpretation of factual and economic evidence are critical to determining the existence of violations of competition laws. Many supported the creation of the Federal Trade Commission Act based on their view that specialized training would be necessary to develop and apply legal standards in a way that the Department of Justice and the courts had failed to do when applying the Sherman Act.[77] Through specially trained lawyers and economists, the FTC has developed a substantial

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[73] See Decision Number 5 of the KPPU that details the case handling procedures for reported violations, issued September 8, 2000.

[74] Indonesia Competition Law, *supra* note 64, at art. 39.

[75] *Id.* at art. 38.

[76] The FTC provides for a similar procedure in 16 C.F.R. §2.2 (2004).

[77] *See* M. Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 *passim* (2003).

degree of expertise and established the Bureau of Competition and the Bureau of Economics.[78]

The importance of specialized training for investigators and prosecutors is illustrated by the creation of the Antitrust Division within the Department of Justice, which abandoned assigning competition cases to general attorneys.[79]

The American experience suggests that specialized training in competition law is necessary for those enforcing the laws regardless of whether the attorneys representing the government are part of the existing prosecutorial agency or whether the attorneys are attached to an independent governmental agency.[80]

3. *Compulsory process authority*

The American compulsory process laws authorize government agencies to require persons with relevant information concerning a matter under investigation to turn over documents or testify under oath.[81] Due to the nature of competition law violations, evidence of the violations is usually obtainable only if the investigator has the enforceable authority to require the submission of documents and the

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[78] The Bureau of Competition has a corps of career antitrust lawyers and the Bureau of Economics is made up of career economists who focus on antitrust issues and work with the lawyers in investigating and prosecuting cases.

[79] *See* LETWIN, *supra* note 44, at ch. 4. Career lawyers and economists with specialized training staff the Antitrust Division. A majority of the training is obtained through apprenticeship-like environments within the Division. Such on-the-job training is supplemented by formal classes on antitrust concepts, investigative techniques, economics, writing skills, simulated depositions and trial arguments. Furthermore, the skills brought to bear in any particular case reflect the collective knowledge of the agency. The ongoing efforts maintain and improve those skills as well as use the breadth of the agency's experience to formulate the theory and proof of violation in each case.

[80] The implications of choosing to establish an independent agency to determine whether the competition law has been violated are discussed below.

[81] *See, e.g.,* FTC Act, *supra* note 59, §9. Compulsory process is also generally available to plaintiffs and defendants in litigation so that they may present the facts relevant to their cases. *See,* FTC Rules of Practice, 16 C.F.R. §§ 3.31-3.40 (2004) [hereinafter FTC Rules of Practice].

ability to compel testimony.[82]This authority, however, must be limited to curb abuses.[83] Consequently, there should be some independent or semi-independent individual or forum to which the parties under investigation can appeal in cases of abuse of the agency's authority to compel document production.[84] . However, given that actions and documents proving violations are almost always secret, the investigating authorities are presumed to be acting within their authority unless the person complaining can show that the demands for information have been made in bad faith or are unlikely to produce relevant evidence.

4. *Nonpublic investigations*

There is a strong public interest in not disclosing any information at the outset of an investigation. Even publication of the fact that an investigation is occurring can have a strong negative impact on the business being investigated because it can create an assumption of a violation. To avoid such unwarranted assumptions, procedures to ensure the confidentiality of investigations are necessary.[85]

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[82] Such authority needs to be enforceable by penalties for failure to supply true and complete documents and testimony.

[83] The concern that the authority to obtain documents may be abused is a real one as illustrated by American competition investigations that have required the submission of thousands of boxes of documents. Such submissions can be so costly that the subject of an investigation may decide not to contest its liability under the competition law simply to avoid the cost of supplying the documents.

[84] Under Section 2.7(d) of the FTC Rules of Practice a person being investigated can ask for relief from producing requested documentation if it can show that the documents or testimony sought is unreasonably burdensome or irrelevant to any theory of a competition law violation. FTC Rules of Practice, *supra* note 81, §2.7(d).

[85] In the United States, the FTC adopted procedures that forbid even confirmation that the agency is conducting an investigation unless the target of the investigation has chosen to make the fact of the investigation public. Policy statements of the FTC issued on April 11, 1997 and November 16, 1998. Notice of Revised Policy, Federal Trade Commission, Notice of Policy of Disclosing Investigations of Announced Mergers (Apr. 11, 1997), *available at* http://www.ftc.gov/os/1997/04/merger.htm (last visited Apr. 3, 2005); Policy Concerning Disclosures of Nonmerger Competition and Consumer Protection Investigations, 63 Fed. Reg. 30372 (Nov. 13, 1998), *available at* http://www.ftc.gov/os/1998/11/63fr63477.pdf (last visited Apr. 3, 2005).

B. *Adjudication Processes and Judicial Review*

1. *Specialized courts and specialized competition agencies*

Although the United States does not have courts that specialize in competition law, the American experience clearly illustrates the necessity of some such institution. In the United States, federal district courts of general jurisdiction have jurisdiction over cases concerning competition laws. This experience suggests that courts of general jurisdiction may be fully capable of determining violations if attorneys with specialized authority and training adequately present the evidence and law.

Yet, one of the problems with having courts of general jurisdiction resolve competition issues with a newly passed law is great amount of time required to develop a coherent set of competition rules.[86]

In contrast, a specialized court or agency will have greater knowledge of prior decisions and related policies. For example, the Federal Trade Commission in the United States illustrates the effectiveness of a specialized agency. The Federal Trade Commissioners (Commissioners) are required to spend full time on their responsibilities as a commissioner. Accordingly, they invest time and energy to learn about the implementation of the competition law. They can only consider evidence introduced in a proceeding before them, and are also required to write a full explanation of the reasons for their decisions. Therefore, the decisions are more likely to be consistent with the facts and to reflect a consistent theory of the competition law.

The five commissioners each serve a seven-year term.[87] The terms are staggered so that not more than one commissioner's term is completed in a single year. As a result, absent death or retirement, there are always four commissioners with experience on Commission.

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[86] The first twenty years of American experience with the Sherman Act indicates a widely disparate set of approaches to applying the newly enacted competition law. *See*, LETWIN, *supra* note 44, at ch. 5, 6. There is also a separate problem in many transitional economies that governments are frequently corrupt. *See generally* WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS (2002).

[87] FTC Act, *supra* note 59, § 41.

Unless barred by ethical rules, all commissioners participate in the decision making in all matters.

As illustrated by the American experience, it would be beneficial for transitional economies to adopt a system in which a specialized agency or court makes the determinations of violations, rather than a court of general jurisdiction. Furthermore, staggered terms is essential to preserve the procedural and substantive knowledge of the decision making body.

In contrast to the Federal Trade Commission, the KPPU has eleven commissioners, all of whom serve concurrent five-year terms.[88] The terms of all the commissioners will end in 2005. Also, a decision in a competition matter requires the participation of only three of the commissioners.[89] This format increases the risk of inconsistent decisions both during the term of the eleven commissioners and when their terms expire if few or none of the commissioners are reappointed. To assure continuity, Indonesia should reappoint a sufficient number of commissioners and circulate decisions by the three member panels for comment to the entire commission.

This risk of inconsistent or poorly articulated competition law doctrines in Indonesia is exacerbated by the fact that few Indonesians have training in competition law. American Federal Trade Commissioners[90] normally have three or four attorneys or economists as special assistants. Most of these assistants have past experiences as staff attorneys or economists at the Federal Trade Commission or other governmental or in private bodies specializing in antitrust law. Accordingly, they can assist new commissioners in framing the issues for decision in light of Federal Trade Commission precedent and procedure. Transitional economies are unlikely to have such a pool of professional experts to assist new commissioners. Consequently, preservation and continued growth on the prior work of the competition agency or court may be difficult.

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[88] Indonesia Competition Law's Article 31 requires at least 7 members. Indonesia Competition Law, *supra* note 64, art. 31.

[89] Decision number 5 of the Commission for Business Competition Supervision, Chapter I, Article 1 (6).

[90] Some commissioners such as Chairman Janet Steiger, Commissioner Margot Machol, and Commissioner Orson Swindle, have been neither lawyers nor economists.

2. *Integrated independent competition agencies*

Although the United States does not have an integrated agency that investigates and adjudicates violations of competition law, the American experience provides strong reasons for a single integrated entity.

Although the Federal Trade Commission has an elaborately detailed process by which the Commissioners have a limited role in investigations and the authorization of a complaint, the Commissioners must approve every complaint that initiates a prosecution since the decision on the merits of a case and the decision to prosecute a business for a violation may both raise policy issues. A complaint can only be issued after the Commissioners' approval.[91] Furthermore, the Commission does not delegate the authority to require the submission of documents or testimony to the staff. Rather, the staff must obtain the need for compulsory process and the Commissioners vote on a resolution granting such authority.[92] Even after authority is granted, one commissioner must sign each subpoena that is issued pursuant to that authority.[93]

In contrast, the Indonesian commissioners actively participate in the direction of investigations in keeping with the civil law tradition. The commissioners also frequently have no knowledge of competition law, and may not even be lawyers or economists. In principle, they are selected for their maturity, wisdom, life experience and judgment rather than expertise. These commissioners are expected to use their life experience to determine whether the proof presented persuades them that the business actions complained of harm the competitive process and establish a violation of the law. The dual prosecutor/judge functions, however, have the appearance of a

[91] 16 C.F.R. 3.11 (2004).

[92] 16 C.F.R. 2.7(a) (2004).

[93] *Id.* Some agencies integrate the role of the commissioners even more deeply into the investigative and prosecutorial process. The Irish Competition Authority gives specific executive authority to each of its five members. Thus a member may sit in judgment on cases before the Authority and be the director of the section dealing with mergers, or abuse of dominance. To avoid any appearance that members might prejudge cases decided by the Authority, members must choose in each case coming before their section whether they will recuse themselves from the investigation and prosecution, or recuse themselves from the Authority's decision in the matter.

conflict of interest and would appear as inconsistent with the kind of detached judgment that is normally associated with courts.[94] The combined functions may be justified in the context of competition law, however, because of the inherent vagueness of competition law. Furthermore, this system would make the decision-makers more accountable to the political process than courts generally are.[95] In such circumstances, separating the decisional authority from the investigation and prosecutorial functions may be most appropriate.

3. *Rights of persons suspected of violations*

The nature of competition law makes it especially important that persons charged with violations be given a full opportunity to: (1) cross examine the witnesses presented by the prosecutors alleging a violation and to question the validity and meaning of documents submitted by the prosecutors in support of the allegations; and (2) an opportunity to present evidence and testimony supporting the defense. As noted *supra*, the existence of a violation often depends on intent or on specific factual circumstances. The person charged with a violation may be uniquely situated to the benefits or harmlessness of its actions. Where competition decisions must be made on the persuasiveness of the factual evidence it seems critical that evidence and argument of the person charged with a violation be fully considered. Such a presentation generally cannot be made unless the person has the assistance of a lawyer who has a full opportunity to present the

[94] Once a complaint is issued, however, no staff member may communicate with a commissioner concerning the matter except in official proceedings in which representatives of the respondent are also present and participating. *See* 16 C.F.R. §4.7 (2004).

The National Labor Relations Board (NLRB) is an example of an American agency that is structured to avoid some of the problems of appearing to be both investigator and judge. The National Labor Relations Act (NLRA) establishes the General Counsel as the chief executive officer of the agency who is nominated for a four-year term by the President and confirmed by the Senate. The General Counsel has final authority to determine whether a complaint should be filed for violations of the NLRA. The Members of the Board, who are also nominated by the President and confirmed by the Senate act solely as judges in determining the merits of the complaints filed under the authority of the General Counsel.

[95] The notion that independent agencies should be responsive to political processes in the American context means that Commissioners testify before Congress on policy issues concerning the agency. It does not mean that politicians tell them what to decide in any particular case.

defendant's view of the facts and the application of the competition law to those facts.

Representation of the person charged with a violation has further implications for the process to be used by the decision makers. It requires that the person and its representatives be present when the prosecution presents evidence to the decision makers so that it will have a fair opportunity to refute any and all evidence submitted by the prosecution.

There are, of course, costs to providing rights to all persons from whom evidence is requested and full notice of all charges and evidence to persons charged with violations. Lawyers for parties and witnesses may slow down proceedings and raise unwarranted questions about the evidence of violations. If the American experience is typical, some lawyers will simply delay proceedings or obscure the facts in an effort to help their clients. These costs seem warranted to ensure the fairness of the decisions about the existence of a violation.

4. *Transparent adjudicatory proceedings*

It is vital to the legitimacy of a competition proceeding that all evidence used to prove a violation is made public because the determination that a violation exists generally depends on the facts of each case. In order to understand the determination and to have confidence in the fairness of the decision, the public should have access to all non-confidential information indicating a violation. With the exception of trade secrets that should not be disclosed, all information that is used to prove a violation should be presented in a public adjudicatory process. Trade secrets that are entitled to remain confidential, but are also necessary to prove the elements of a case, should be submitted to the decision making body in private but referred to in public proceedings in a summarized manner that does not diminish the value of the trade secrets.[96]

[96] There are also classes of evidence that should never be made public. Irrelevant information, especially if it is personal or embarrassing and does not relate either to the violation or the credibility of a witness, should never be made public. Trade secrets, such as intellectual property or cost information, should normally not be made public even during public proceedings concerning the violation because release of such information may destroy the opportunity of the firm to continue its business and thereby lessen competition. The burden of demonstrating that a document or testimony ought to be kept confidential should rest on the business making the request since it has the facts that are at issue and is

The determination of the investigation and judicial proceedings should also be made public. If it is determined that there was a violation, the determination should identify what facts persuaded the decision-makers of the violation. Furthermore, the determination should be based solely on facts presented in the public adjudicatory process and should not rest on evidence developed in the investigation that was not presented in the public proceeding.

Transparency is vital in transitional economies due to the newness of competition laws. An open trial with full representation and airing of the issues would be both educational and demonstrate the standards of lawful business behavior and the fairness of the proceedings. Both functions are especially important in transitional economies where the laws are new and unfamiliar to the public and the business community.

5. *Settlements and consent judgments*

Settlement and consent judgments are an important part of effective application of competition laws since competition cases are costly and investigation and litigation is usually very slow. This is illustrated by the "settlement" system utilized by the Federal Trade Commission. In the United States, the vast majority competition cases, just like other litigation, are settled by agreement between the prosecutors and the person accused.[97]

If the party charged does not deny or admit to the violation allegations, and does not contest the imposition of an FTC order, the "consent" of the person has much the same legal effect as an admission of a violation.[98] The order is entered because the person

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normally best situated to demonstrate why it would be inappropriate to make such information public.

[97] In 1996, the FTC issued twenty-six consent orders and one complaint; in 1997 the FTC issued twenty consent orders and two complaints; in 1998 the FTC issued thirty-four consent orders; and three complaints; in 1999, the FTC issued twenty-two consent orders and zero complaints; and in 2000, the FTC issued twenty-six consent orders and one complaint.

[98] There are some technical differences under American law between litigated findings and consent orders. In particular, a litigated finding by a court or agency can be introduced by other parties as established fact; whereas, other parties cannot use the consent plea as an admission of fact by the defendant in other proceedings.

has waived its right to offer a defense. Once entered by the Federal Trade Commission, the order is final and enforceable like any litigated order.

Concerns about consent proceedings generally rest more on practical issues than legal ones. The absence of public evidence of violations and exculpatory evidence by the defense suggests that consent agreements are more subject to arbitrary or corrupt decision making than matters where all relevant evidence has been presented in a public trial. First, the agency may abuse its investigatory power to extract unwarranted settlements from persons being investigated. Second, either as a result of favoritism or even corruption, parties may be required to do less than the competitive harm requires. Requiring some degree of transparency in the consent process can lessen both concerns.[99]

6. *Deference and limited judicial review*

Some transitional economies, such as Indonesia, have legal systems in which administrative decisions may be appealed judicially. Contrary to the standard for judicial review in nations like the United States,[100] however, many of these transitional economies allow their

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[99] In the United States, both the Antitrust Division and the Federal Trade Commission are required to give notice to the public of the violations charged and of the remedy proposed, and give the public an opportunity to comment on the proposed remedy, before a final order can be issued. The factual details in the notice together with the allegations in the complaint should be sufficient to show that a violation has occurred and that the remedy is appropriate to eliminate the harm of the violation and deter others from similar actions. This public notice and comment procedure does not guarantee an absence of abuse of power or corruption, but they make them more difficult and therefore less likely. The public notice also serves the same educational function of an agency decision. It explains what competitive harms have occurred and how the remedy is intended to reestablish or maintain competition.

[100] The requirement that courts limit their review to the "substantial evidence" test was generalized to apply to all agency determinations in 1946 when it was incorporated into the Administrative Procedure Act. Administrative Procedure Act, 5 U.S.C. § 706(2)(e) (2001). The United States Supreme Court in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966), cited three factors – judicial efficiency, respect for agency expertise, and uniformity in the application of competition law – that are especially important in the development of a new law in transitional economies.

According to Kenneth Culp Davis and Richard J. Pierce, equally important is the American doctrine, which provides deference to statutory interpretations and

reviewing courts to make findings of fact and law in addition to, or independent of those made by the agency below. There are distinct benefits provided by judicial review of agency decisions, but equally strong reasons to limit the reviewing powers of courts regarding issues arising out of competition law. The benefit of having a centralized development of competition law is likely to be endangered if courts can routinely take new evidence and make new findings of fact and law.

In Indonesia, for example, the Civil Procedure Law, Articles 343-345 provide:

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other conclusions of law by certain administrative agencies. Where Congress has explicitly or implicitly delegated a policymaking function to a regulatory agency, a court may not substitute its own judgment unless the regulatory agency's judgment is "arbitrary, capricious or manifestly contrary to the statute." Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843-844 (1984).

The European Court of Justice has come to a similar conclusion about competition decisions by the European Commission and competition decisions of member nations in cases such as the *Schneider/Legrand* and *Tetra Laval/Sidel* cases. Case T-310/01, Schneider Electric SA v. Comm'n of the European Comty., 2002 E.C.R. II-04071; Case T-77/02, Schneider Electric SA v. Comm'n of the European Comty., 2002 E.C.R. II-04201; Case T-5/02, Tetra Laval BV v. Comm'n of the European Comty., 2002 E.C.R. II-04381. The Court has held that the Merger Regulation "confer[s] on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature . . . must take account of the discretionary margin implicit in the provisions of an economic nature." Case T-5/02, Tetra Laval BV v. Comm'n of the European Comty., 2002 E.C.R. II-04381, para.119. Moreover the Court in *Remia BV* case has indicated it will annul a decision only where it finds "manifest error." Case 42-84, Remia BV & others v. Comm'n of the European Comty., 1985 E.C.R. 02545.

Not only is the standard for review similar to the American common law and statutory doctrines of deference, but the European Court implemented its decisions through a remand procedure that is more typical of the common law than European civil law cases. For example, in *Schneider/Legrand*, the Court reversed the determination by the French competition agency that the merger was anticompetitive on procedural and other grounds, but held that if Schneider wanted to complete the merger, it would have to re-file with the French authorities. Those authorities would be required to apply the legal standard that is consistent with the opinion of the Court. Thus, as in the United States, where a European court finds that the competition agency has failed in its duties, it will not re-determine the issues that were before the agency. Rather it will vacate the judgment of the agency and remand the matter to the agency for further proceedings that are consistent with the ruling of the court.

> Parties would be allowed to submit explanations and documentations to the higher court which deemed it necessary, as long as the other party would be well informed through their lawyers or other authorized persons stipulated by the law about the submission of documents.[101]

Accordingly, all appeals in Indonesia may be subject to a trial *de novo* on issues of fact and law. The dangers of competition doctrine fragmentation are even greater if the competition issues faced by appellate judges are novel. In Indonesia, the chances of a judge or a panel of reviewing judges facing novel issues is very high. In 2002, there were 295 District Court Judges to whom a decision of the KPPU could be appealed. There is little likelihood that disparate District Court decisions would be reconciled by the Supreme Court of Indonesia. The Indonesian Supreme Court is comprised of 38 Justices who sit and decide cases in panels of three Justices. Moreover, the decisions of courts in Indonesia are unlikely to refine the meaning of the competition law because opinions written by the courts are considered to be the property of the parties and are not released to the public.[102]

The principle of judicial deference to competition agencies is well established and ought to be adopted by transitional economies.[103]

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[101] Translation courtesy of Dr. Ningrum Sirait, JSD.

[102] The organization of the Indonesian courts can be found at www.mari.go.id (last visited Mar. 11, 2004). Translations again are courtesy of Dr. Ningrum Sirait.

[103] In 1914, the United States Congress passed the Federal Trade Commission Act and provided that courts reviewing the decisions of the Federal Trade Commission must accept findings of fact by the Commission if they are supported by substantial evidence. This provision directed the appellate court to examine the record of the evidence introduced before the Commission rather than conduct a *de novo* hearing on the facts of the case. It required the court to accept findings made by the Commission if a reasonable person could reach the same conclusion. A court might disagree with the conclusion of the Commission, but it is powerless to base its review on that disagreement. The findings of the Commission are given deference, and the courts have little room to find that the commission erred in its findings of fact. Thus, if the court finds that the Commission has failed in its duties, the court will not re-determine the issues that were before the Commission. Rather it will vacate the judgment of the Commission and remand the matter back to the Commission for further proceedings that are consistent with the ruling of the court.

Indeed the scarcity of knowledgeable people almost demands that courts of transitional economies defer to the specialized agencies on the development of competition law. That conclusion does not remove the courts from any role in reviewing the decisions of competition agencies or courts. The availability of judicial review is an important check on the functioning of the specialized agency in accordance with the procedural and substantive requirements of the competition law. That would mean that the decision reviewed would have to be supported by substantial evidence in the record taken as a whole. The facts cited in the decision must be based on evidence in the public record and that evidence must be credible. Conclusions of law must be reasonable interpretations of the competition law and not arbitrary rulings unsupported by the facts, common experience, or the terms of the law.

C. *Remedies for Violations of Competition Laws*

Remedies for competition law violations should serve several purposes. First and foremost, the remedy ought to restore or maintain competition. In addition, a remedy should deter the violator and others from committing the same kind of violation. Finally, it may be appropriate to require disgorgement of unlawful profits earned by anti-competitive actions and in appropriate cases distribute the profits to those harmed by the violation.

1. *Restoring competition*

When a competition law has been violated, restoration of competition is essential. In cases of mergers that violate competition laws, an order forbidding the merger can be issued. In other cases, if the merger has been consummated and personnel of the acquired company fired, and the machinery sold off for scrap, an effective remedy may require the creation of a new company by the violator. The new company would then be sold to restore competition, or the division of the existing corporation into two competing entities may be required.[104] In other cases, a merger may be permitted on the

[104] *See, e.g., In re* Ekco Prod. Co., 65 F.T.C. 1163 (1964), *aff'd* 347 F.2d 745 (7th Cir. 1965) (the FTC ordered the buyer of a competitor, that had then dismantled the competitor's operations, to recreate the company and divest it to a new buyer).

condition that a product or a business unit be divested.[105] In other cases, no competitive remedy may be appropriate because, for example, by the time the case has been resolved, innovation may have changed the industry and its participants so radically that it would impossible or irrelevant for the violator to reconstitute a competing company.[106]

Due to the greatly varying circumstances of each violation, no listing of remedies is likely to be complete. Accordingly, the delegation of remedial authority should be phrased in broad enough terms to require what is necessary to restore or maintain competition. The courts should limit the orders only in circumstances where the agency has failed to demonstrate that the remedy is related to restoring competition or the harm from competition, or is an unreasonable way to restore competition.

Furthermore, the imposition of remedies should be subject to the same kind of transparency safeguards as the determination of violations. The decision makers should be required to state publicly the basis for imposing the remedy they have chosen and allow public comment on the appropriateness of that remedy.

2. *Monetary remedies and criminal penalties*

Although some competition agencies may be reluctant to bring formal charges against violators due to the novelty of their statute and the stigma associated with a criminal accusation,[107] in cases of

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[105] Such divestitures may involve complex transfers of intellectual property, physical facilities or technical personnel. *See, e.g., In re* Roche Holdings Ltd., Docket No. 3809, May 22, 1998 (Roche Holdings was permitted to acquire the pharmaceutical business of Corange Limited on the condition that Roche divest two of the many products of Corange to maintain competition in these two markets).

[106] *See, e.g., In re* Arkla, FTC Docket No. C-3265, (Order Modifying Order, Apr. 5, 1995). The Commission modified its order requiring a divestiture on the grounds that changes in the relevant market made the divestiture no longer necessary. New firms had entered the market, which made a divestiture unnecessary and made it more difficult to find a buyer of the assets to be divested in this less concentrated market.

[107] Some years ago I attended a panel discussion in which the representative of the competition agency from a transitional economy stated that his agency had been reluctant to bring any actions against violators because the sole remedies in the statute were criminal.

intentional and knowing violations of competition laws, criminal penalties and monetary fines appear to be appropriate. Competition is the primary force of a free market economy. Violations of competition law can jeopardize the viability of a competitive economy; consequently there are occasions when monetary or even criminal penalties are warranted. Foremost are price fixing agreements, which strike at the heart of the competitive system and are the blatant product of intentional and illegal actions. Although criminal penalties are rarely invoked for competition violations in the United States, such actions are the type of violation in which the government is most likely to seek imprisonment for violators. The international conspiracy to fix lysine prices was widely seen as suitable for prison terms because, contrary to most competition cases, the prosecution had videotapes of the participants agreeing to the price fixing and laughing at the inability of the United States government to stop them.[108] Knowing violations, other than price fixing, however, are more likely in the United States to result in the imposition of monetary penalties than imprisonment.[109] Repeated

[108] *See In re* High Fructose Corn Syrup Antitrust Litig. 295 F. 3d 651 (7th Cir 2002).

[109] The 2003 Federal Sentencing Guidelines contains only one provision that relates to Antitrust violations, Chapter 2 Part R – Antitrust Offenses section 2R1.1. Bid rigging, Price fixing or Market-Allocation Agreements Among Competitors. The commentary of the Sentencing Commission on this section states in part:

> Background: These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market- allocation, can cause serious economic harm. There is no consensus, however, about the harmful ness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.
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> The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect. The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences

violations or violation of remedial orders are routinely be subject to at least monetary penalties.

D. *Procedural Objectives*

Adopting the kinds of transparent procedures discussed in these sections can help establish the credibility of a competition agency and the law that it enforces. However, the fairness of competition rules is not always obvious even when explained. The presumptions of fact and law used by the decision makers are not always obvious and sometimes may not be persuasive even when explained. Moreover, it takes time and experience for the decision makers to develop policies and even more time for the public to gain reasonable expectations and confidence in competition agencies.

V. TRAINING PERSONNEL TO IMPLEMENT COMPETITION LAWS

Training in competition concepts has been a major obstacle to establishing effective competition agencies in transitional economies. There have been programs by governments, international organizations and Non Governmental Organizations ("NGOs") to provide training to governments that have or seek to adopt competition laws. Unfortunately, the overall effect has not been equal to the needs of countries seeking such assistance and the wide range of problems that these countries face. Assuming a country with a transitional economy adopted the best-designed competition law and implemented the most transparent and fair procedures to apply that law, it would still face formidable problems in creating an effective competition agency. Two problems would still stand out. The first is the need for a larger corps of well-trained public and private economists who understand the laws, procedures and intent of competition law. The second is the need for the government and the public to support a market economy and subscribe to the five elements listed by Professor Kovacic, as discussed *supra*.

The United States system of training its large corps of well-trained experts provides a model for transitional economies to follow. The American system for training antitrust lawyers, economists, and

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> coupled with large fines. The controlling consideration underlying this guideline is general deterrence.

U.S. Sentencing Guidelines Manual § 2R1.1(1998).

commissioners relies on a large number of sources. Beginning with the academic education, there are standard microeconomic courses in colleges, graduate schools and even law schools that introduce students to basic free market concepts. In addition, law professors and economists write commentaries on competition issues that are published in widely available academic and commercial journals. A specialized commercial publication sector has developed a report on developments in American and foreign competition laws.[110] There are treatises, books, "hornbooks," "Nutshells," law school casebooks.[111] The American Bar Association Section on Antitrust Law[112] also produces an annual series of books entitled 'Antitrust Law Developments.'[113] The Section also publishes the Antitrust Law Review three times a year. Furthermore, government competition agencies issue written guidelines on competition issues and deliver speeches to private lawyers and industry groups.[114] Even private groups sponsor specialized training in antitrust and trial techniques.[115]

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[110] CCH TRADE REGULATION REPORTER; BNA ANTITRUST & TRADE REGULATION REPORTER.

[111] Even a partial listing would be overwhelming, Amazon.com lists 6179 separate entries under the topic Antitrust Law, including the 18 volume set by PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1995); RICHARD A. POSNER, ANTITRUST LAW (2001); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1980); ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL (1994); F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (2d ed. 1980); F.M. SCHERER, COMPETITION POLICY, DOMESTIC AND INTERNATIONAL (2001); LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK (2000); THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY (John Kwoka & Lawrence White eds., 2003); DANIEL J. GIFFORD & LEO J. RASKIND, FEDERAL ANTITRUST LAW: CASES AND MATERIALS (2002).

[112] The section has annual conferences with continuing education programs to educate new competition lawyers and update practicing attorneys. The annual conferences also include presentations by members of the bar and the government officials on currents competition issues.

[113] It is now in its fifth edition and adds an annual supplement each year.

[114] The Federal Trade Commission web site, lists the following antitrust guidelines that are available:

In an ideal world, the resources of this American system would be made available to each nation that is using a competition law as part of a larger effort to transform its economy toward a free market system. In this information age, it is not difficult to transport large portions of the mountains of written competition materials that exist and are being generated. But the essence of the American system is the apprentice-like training given to lawyers, economists, and commissioners who work in a market economy and are trained in the midst of a competition community. The constant interchange in one-on-one discussions for new attorneys and economists combined with speeches, expert testimony, trials, arguments and legal decisions create a never-ending education process. This huge and costly educational process is probably necessary and may be even efficient given the indeterminate or evolving nature of competition law.

Unfortunately, no effective method has been developed to transfer this educational process to transitional economies. Competition officials of transitional economies attend American and other competition programs, and small numbers of foreign lawyers or competition staff members come to the United States and receive competition training at American universities and other competition programs. The effectiveness of even these programs is limited,

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Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the United States Department of Justice

- Antitrust Enforcement Guidelines for International Operations
- Antitrust Guidelines for the Licensing of Intellectual Property
- Revised Federal Trade Commission, Justice Department Policy Statements on Health Care Antitrust Enforcement (08/26/96)
- Guides to Advertising and Promotional Allowances ("Fred Meyer Guides ")
- 1992 Horizontal Merger Guidelines

Bureau of Competition Guidelines, at http://www.ftc.gov/bc/guidelin.htm (last visited March 20, 2005).

[115] For example The Sedona Conference, *Antitrust Law and Litigation,* November 14-15, 2002, and the Practicing Law Institute's 43rd Annual Advanced Antitrust Seminar, *Distribution and Marketing*, January 26-27, 2004.

however, because of language difficulties, the shortness of most programs, and the small number of individuals who participate.

The American competition agencies have frequent meetings with foreign competition officials in one or two-day sessions, but they lack the resources to undertake the process of taking in the thousands of competition officials in transitional economies and train them.

In an effort to assist new competition agencies in transitional economies, the United States has undertaken at least five strategies. It has offered a small number of scholarships to study in American universities.[116] The International Division of the FTC and the Antitrust Division provides comments on draft regulations and other questions posed by foreign agencies. It has put on training programs in competition investigation techniques in foreign countries. The International Technical Assistance units of the FTC and the Antitrust Division have sent attorneys and economist for two or three-day programs to train foreign competition personnel or to assist in draft laws and regulations. Finally, they have sent long-term resident advisors[117] to provide ongoing assistance to foreign agencies.

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[116] Under a contract with the Economic, Law, Institutional, & Professional Strengthening Project (ELIPS II), USAID provided funding for sending 30 Indonesians to attend graduate programs in the United States.

[117] American agencies have concluded that sending a long-term resident advisor to a foreign agency is the most effective way to communicate competition concepts. The author's personal experience found these resident advisors programs to be the most effective, especially when they are supplemented by short term training programs in investigative techniques. Despite the relative effectiveness, the program is inadequate to the challenge faced by the large number of transitional economies. Foremost is the fact that the agencies, which rely on USAID funding, do not have the resources or the personnel to place resident advisors in more than two nations at any one time. Second, the advisors generally have language barriers and lack an understanding of the law of the country where they are resident. Third, it generally takes a substantial period of time to build the kind of trust that is needed to contribute meaningfully to an agency. Fourth, foreign agencies are frequently reluctant to allow resident advisors to participate fully in the decision-making and operations of the competition agency. Note the Irish Competition Authority has taken more direct action to incorporate the learning of experienced competition law practitioners by appointing two American antitrust lawyers to the Authority as members. There is often resistance or simply unawareness in other parts of the government or society that make implementation of a competition law ineffective. Even with the participation of other countries such as Germany and Japan, the resources do not begin to match the training needs of the competition law programs in transitional economies.

Although competition agencies in transitional economies might improve the effectiveness of resident advisors by giving them some direct authority and responsibility, the language, legal and cultural barriers are likely to limit the effectiveness of the small number of resident advisors that are available. More fundamentally, even a trained competition agency will not succeed unless it supplements an existing competitive economy.

Equally important to formation of an effective agency is that the understanding of the staff of the importance of competition in an economy. Investigation and presentation of competition cases require both technical skills and an understanding of the harms that anti-competitive actions cause to the economy and consumers. Absent such an understanding, the application of the terms of a competition law is likely to be a sterile exercise in construing words. The constraints on training resources as outlined above are a significant barrier to creating effective competition agencies, but such constraints are ultimately less significant than the absence of a full commitment by transitional economies to transform their economies into free competitive markets.

VI. COMPETITION POLICY: A MORE COMPREHENSIVE APPROACH FOR TRANSITIONAL ECONOMIES

In order to have an effective competition agency, most business actions must be determined by the rules of the market. In the absence of a market-oriented economy, a competition law program is likely to set up an adversarial relationship between the competition agency and the business community and other government agencies. If the competition agency seeks to alter the way businesses have traditionally related to each other and to the government, the agency will lose. Expecting a new agency to alter traditional ways businesses operate with each other, much less change the way that the businesses relate to government officials, is too optimistic. Politically, it is unlikely that a newly created competition agency will be able to enlist the necessary judicial, executive and legislative support. The agency is also unlikely to find the necessary support in the business, labor or consumer sectors to compel compliance with changes in the ways business is done in the absence of a broad consensus regarding the necessity and desirability of a competitive economy.

This suggests that a more comprehensive different approach may be necessary to transform transitional economies toward market economies with effective competition laws. Competition programs by

the United States, other developed economies, and international organizations have focused on providing technical assistance to competition agencies in transitional economies in the form of assistance in drafting competition laws and training staff in investigative techniques. This type of assistance is appropriate, but insufficient. The development of indigenous institutions that can and will pursue the goals of building understanding and support for free markets and competition is required to create an effective competition system.

Some governments that lack an understanding or an adequate commitment to competition policy impose enormous costs on businesses and make it virtually impossible to conduct business in their country.[118] Free markets require reasonable, effective and efficient regulations as well as a host of other compatible institutions.

These institutions need to be comprehensive in scope, involving the government, business, consumers, labor, educational institutions and the legal community. Donor institutions already support economic and legal reform programs. The donor institutions, however, tend to be isolated, and like the competition law assistance, do not coordinate with other programs. Encouraging privatization should be coordinated with competition concepts. Both transitional economies and donor institutions should incorporate competition concepts into the design of all of their economic assistance programs.[119]

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[118] "A group of economists studied the [effects of regulation] by examining the procedures, costs, and expected delays associated with starting up a new business in seventy-five different countries. The range was extraordinary. Registering and licensing a business in Canada requires a mere two procedures compared to twenty in Bolivia. The time required to open a new business legally ranges from two days, again in Canada, to six months in Mozambique. The cost of jumping through these assorted government hoops ranges from 0.4 percent of per capita GDP in New Zealand to 260 percent of per capita GDP in Bolivia. The study found that in poor countries like Vietnam, Mozambique, Egypt, and Bolivia an entrepreneur has to give up an amount equal to one to two times his annual salary (not counting bribes and the opportunity cost of his time) just to get a new business licensed." WHEELAN, *supra* note 34, at 73.

[119] Consider, for example, a government that decides to privatize a publicly owned utility. If the utility is a natural monopoly, it needs to be subject to rate and quality regulation, because there will be no competition to protect the public. If the government-operated business is not a natural monopoly, it needs to be privatized in a manner that protects the public by providing for domestic or foreign competition or both. Selling off government business facilities that have the capacity to compete with each other can encourage competition. Eliminating or reducing tariffs or

When transitional economies and donor organizations support such programs, they should design interventions by the government that will support the development of a market economy and not suppose that their intervention will substitute for the market. A market economy rests on the principle that most decisions affecting the market will be made by businesses and private individuals. Further, those who support market economies assume that the decisions that are made by individuals and businesses will make the market better for consumers. Consumers will benefit, not because businesses set out to help or benefit consumers. To the contrary, businesses will generally seek to increase their profits, but competition will normally force businesses to offer better goods and services at lower prices to stay in business. It is in this setting that government actions that affect the economy should be judged.[120]

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import quotas may encourage foreign competition. Also consider lending programs. Microlending has been view primarily as an important means of assistance to the poor, but such programs can also become an important part of the competitive dynamic both by creating jobs and competition. As noted above, lending to start-up and small businesses is the leading source of growth in the American economy. It can play the same role in transitional economies. Small businesses can facilitate social economic mobility and change the way in which a population sees its relation to the economy. In transitional economies access to capital can enlarge the portion of the population that has a vested interest in a stable and honest government.

[120] The following are some examples that help illustrate the types of perceptions of public and private economic activities that need to be considered to provide the basis for an effective competitive market:

(1) A government official is bribed by one company to gain exclusive oil drilling rights and rights to sell oil. One way of looking at that incident is to view bribery as a crime, much like theft, and those involved should go to jail for an immoral criminal act. The bribe grants an exclusive right, but also harms the economy by creating a monopoly. Prices for oil products are likely to increase since the lack of competition will diminish the pressure to find new cheaper ways to look for oil. If oil products are more expensive, then consumers will have to pay higher prices and those who manufacture using oil products will be less competitive manufacturers in countries that have lower, more competitive oil prices. In other words, the bribery, or cronyism, is not simply a bad action that should be punished. It is an action that undermines competition and the economic health of the country in at least three different ways.

Another way to think about this issue is, assume that the legislature passes legislation that provides for the sale of the exclusive right to sell oil products in the country. That sale of monopoly rights is likely to have the same negative effect as the bribery considered in the first example. The harm to competition flows from the creation of the monopoly, not whether its creation was lawful.

(2) A local government decides that the taxi service in its city is not sufficiently attractive for international tourist and business passengers. After

It should be noted, however, that regulations should not be overbroad. The problem with an overbroad rule is that it creates the illusion that the enforcement of competition laws can be effective without regard to evidence of economic harm. That illusion is especially harmful in transitional economies, because it shifts the focus from economic harm to formulistic application of legal provisions. It creates incentives for competition agencies to create the illusion that they are being active and effective by finding harmless

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considerable discussion with owners of fleets of taxis, the local government is persuaded that the reason that taxis are shabby is that there are too many taxis and none can make a sufficient profit to provide better service. Accordingly, the local government passes a law requiring all taxis to be licensed and grants licenses at a very low fee, but to only half the number of taxis that previously provided service to the city. The licensing system has the desired effect of increasing the profits of the taxi owners, but they do not significantly improve the quality of the taxi service.

In fact over time, the quality of the taxi service began to decline. With diminished competition, the taxi companies found little competitive pressure to maintain, much less improve, service and raised prices. As a result, consumers found that they were paying more to get the few taxis available. Moreover, the owners of the taxis found that they could sell their licenses for a high price because the business was so profitable. However, the margin of profit decreased as the cost of entering the taxi business increased. As a consequence, the owners of taxis now complained they were not making enough profit to improve service and suggested that the government further limit number of taxi licenses.

The problem with the licensing system is that it creates economic opportunities to raise prices but does not create incentives for better service or lower prices. Having more taxis, not less, is more likely to create an incentive for taxis to differentiate their products with some high price, better service taxis and other taxis with fewer amenities and lower prices.

(3) Two cousins own small food stores on a street that has three other food stores. The cousins have been friends since childhood and one day they decide that it is silly for them to compete on the prices of the goods that they sell. Instead they decide to divide the responsibility for figuring out a fair price on each of the products and both sell at the same price.

There is little doubt that this agreement constitutes a price fixing agreement. For those competition agencies that use "*per se*" rules that would be enough to make the agreement illegal. But what is the harm if these two small shops agree to charge the same price. If they have adequate competition on their block or in the neighborhood, the two cousins will not be able to affect prices of the products that they sell. If they try to raise their prices higher than their competitors they are likely to lose business.

Competition agencies generally take the position that price fixing should be an automatic violation of law on the grounds that price fixing has no benefits and proving market power is time consuming and resource intensive and thus a waste of time and public money and it adds unnecessary complexity to competition cases. While those arguments have some merit, consider that there is no competition reason for the rule. The agreement does not harm the economy.

technical violations of law. It diverts resources from deterring or repairing economic harm to the economy to creating numbers that purport to demonstrate that the agency is useful.

All bureaucracies have a temptation to increase their "numbers" of successes to justify their existence, but the temptation is greater in many transitional economies. Many such countries have adopted competition law under pressure from international trade or monetary bodies, from bilateral trade agreements, or as an imitation of "modern" "trendy" legislation that exists in more successful economies. Such laws may be adopted with little or no understanding of how free markets work or what function the competition law should or can play in an economy.

Government action frequently affects competition and that transitional economies should be careful that government action enhances rather than inhibits the market economy. Even enforcement of a competition law may damage a competitive market by shifting the focus from protecting market forces. The enforcement of competition laws like the design and application of other laws should always take into account not only their direct affect on the market but also the perception that the public and businesses have of those actions.

Transformation into a free market economy must be accomplished through political and educational reform concerning the purpose and operation of a market economy. Much has been made of the corruption that stands as a barrier to reform,[121] but it is not bribery or corruption itself that undermines the market. Rather it is when corruption targets the free market that the competitive process is harmed. Limiting entry into an industry either to achieve anticompetitive ends or as an endless series of bureaucratic bribes has the same effect on competition. Until there is a full recognition of the competitive effects of public as well as private restrictions, there will not be the possibility of effective competition laws.

When the public understands the role of the market, when the market functions to broaden opportunity, spur innovation and lower prices, then individuals and government officials are unlikely to harbor the skepticism about competition with which my Indonesian students began our class. Learning or implementing market principles is not simple or automatic, but moving to a market economy is the way to establish an effective competition law, not the other way

[121] *See,* EASTERLING, *supra* note 7, at 241-252.

around. A competition agency may be able to contribute in the transitional phases of forming a market economy by advocating the market and perhaps bringing cases where competitive harm is indisputable. Where a single nation finds that it lacks the resources to develop materials to train leaders in how markets work, the pooling of regional resources should provide an adequate base to form institutions that can help educate the leaders of nations looking to move to a market economy.

Foreign advisors can be of assistance in training competition agencies and competition effects of other laws, but countries that look can probably find that they have many untapped resources. A look at the American system shows that it is possible to use the private bar to do much of the formal training investigative and trial techniques. Countries that have little experience with competition law should solicit the involvement of the domestic business, academic and legal communities, including the foreign lawyers who have experience with competition laws. Those groups need to be involved in the formulation of policies that affect the economy. If they can be induced to support economic policies that open business opportunities, then the free market will have a more realistic chance to form and the public will have a context in which to understand the more limited role of competition law enforcement.

VII. CONCLUSION

In a market economy, the reasons for basic principles of competition law such as prohibitions on price fixing, and market divisions are clear.[122] An effective competition agency can be built on this foundation. Presumptively, general disagreement is likely to arise as to whether certain actions restrain the market. Time and experience are needed to resolve such disputes, but the basic rules of competition should be clear enough for the competition agency to perform its functions as a supplement to the market. It is a mistake to think that competition laws are responsible for the creation of competition in developed free market economies. At best, enforcement activities of competition authorities maintain or restore competition that already exists.

[122] As noted above, competition laws in the United States rely primarily on the understanding and voluntary compliance of businesses.

Competition programs in transitional economies have the potential for greater impact by refocusing a substantial part of their efforts towards planning for the transition to an effective market economy. Newly formed competition agencies in transitional economies and donor organizations that provide technical assistance to such agencies could provide a more essential function if they broaden their efforts to include advice about laws and policies that promote the transition to a competitive market economy. Competition advocacy on the part of donor organizations and competition agencies should assume a greater role in planning the development of market institutions. If such agencies are to contribute to market development in a meaningful way, they must be involved as the policies are being formed. This kind of involvement requires a broad understanding of the potential of market economies, which few agencies hold. However, having a competition agency assist in the formation of economic policy should help focus attention on the importance of competition in a market economy and help the competition agency develop an understanding of how market economies work.