

Designing Technical Assistance For Different Stages of Institution Building

**Timothy T. Hughes
Counsel for International Technical Assistance
Office of the General Counsel
U.S. Federal Trade Commission**

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DESIGNING TECHNICAL ASSISTANCE FOR DIFFERENT STAGES OF INSTITUTION BUILDING

Thank you for the opportunity to share with you some thoughts. In the course of this conference you shall be thinking about and talking about how to organize competition agencies and establish procedures for conducting investigations. As you do so, I suggest that you also consider how developed countries can best assist developing countries with organizing their agencies, establishing procedures and other aspects of institution building.

Competition institution building takes place in fairly predictable stages that extend over many years. I will outline what those stages are, and what kind of assistance is useful or necessary during each stage. Knowing this will help you to plan and tailor the long-term assistance programs that you give or receive so that they are appropriate to the institution's stage of development and the different backgrounds and levels of sophistication that exist in different countries during each of those stages. I hope that my remarks provide some food for thought and discussion in our small groups.

Three Stages of Competition Institution Building

I have designed and delivered technical assistance programs for many developing countries, and I have spent a great deal of time listening to others who have done so. Based on my experience and the observations of others, I believe that it is useful and accurate to view competition policy and institutions as going through three major stages of growth and maturation: Stage one is when a policy commitment to market competition begins to take on institutional form. Stage two is when the main task is to acquire basic survival skills. Stage three is when enough basic experience and knowledge has been accumulated that it is possible to attack more complex issues and correct mistakes made in drafting the original laws. Each stage lasts about three to five years, totaling nine to fifteen years. Some countries, of course, suffer from what developmental psychologists might call "arrested development," and are stuck for a while longer at one stage or another. Development does not move along a straight line progression. Lapses backward occur and the stages overlap.

Because these stages are spread over many years, technical assistance plans should also be designed to extend over many years. There is a limit on how much technical assistance recipients can absorb in a limited amount of time and how much time they can take away from law enforcement for training. As with people, the most important engines of growth and maturation are time, experience and the learning that takes place from going about the business of daily work. Those who are older and more mature, however, can assist greatly in helping to acquire certain knowledge and skills and to nurture important relationships.

I have compiled a partial list of the major tasks with which outside assistance can help:

- (1) Building support to pass legislation and create institution(s);
- (2) Drafting good normative standards and institutional frameworks;
- (3) Gathering and organizing the human resources to keep alive the commitment to competitive markets;
- (4) Basic education of Commissioners, staff members, consumers, the business community and a core group of judges on the economic goals and purposes of competition;
- (5) Nurturing the growth of stakeholder groups;
- (6) Basic training of Commissioners, staff members and a core group of judges in the analytic skills needed to apply the general norms consistent with the goals and how to investigate cases in the two primary enforcement categories: agreements (horizontal and vertical and joint venture) and abuses of dominance;
- (7) Drafting of merger notification decrees, rules or regulations;
- (8) Advanced training of Commissioners, staff members and a core group of judges on selected economic and legal policy issues -- e.g., natural monopolies, intellectual property; mergers; competitor cooperation; vertical agreements regulated industries;
- (9) Amending original legislation.

In order to accomplish all of the tasks listed above, outside assistance is useful. For many of these tasks it is more than useful; it is necessary.

1. STAGE ONE: INSTITUTIONALIZATION OF THE IDEAL

The decision to let loose the forces of market competition is a fundamental option and largely a political decision. Once this decision has been made, the process of creating the institutions begins. When I use the term “institutions” I am using it in a broad sense. I am not just talking about a governmental agency. Max Weber, the great social scientist of the early 20th century, wrote extensively about the need to institutionalize any fundamental option to follow new ideals and insights. Without being institutionalized, the new ideal will either die or have no impact on society. Those who already possess economic power will be threatened by this new commitment to allowing market forces to dictate supply and demand. They will do what they can to reverse or obstruct society’s fundamental option. And, they will succeed unless mechanisms are put in place that will constantly nurture the option, keep it alive and healthy. Stage One begins after a nation has made that fundamental option and has begun creating the societal institutions that will ensure that the ideal survives after the individuals who initially promoted it have passed into history.

The first stage entails bringing the abstract ideal into physical being. This requires:

- (1) Written norms incorporating and guaranteeing the ideals;

- (2) Formal public ratification and adoption of the norms; and
- (3) People whose professional lives are dedicated to keeping that commitment alive.

1.1 Drafting Norms

Involvement of outside experts in the drafting process is more than just useful. It is necessary. Mid-level staff members of ministries who are involved in the day-to-day drafting process are aware of the need for this outside assistance. But, sometimes Ministers and legislators resist the involvement of outside experts.

Studying the legislation of other countries before drafting your own legislation is, of course, indispensable. In addition to studying foreign legislation, experts from those foreign jurisdictions should be consulted extensively. These consultations are essential. Our host, Vietnam, is drafting laws now and has studied the texts of the laws of many other countries, and, I know, has also consulted extensively with many experts from different countries during this drafting process.

Consultation with experts avoids misunderstandings from translations of subtle words with nuances in meaning. Experts can also point out where words have come to have very special meanings different from their dictionary meaning or where words, paragraphs, or entire sections of a law were incorporated into a law only because of political compromises. Just because some developed country had to make a political compromise many years ago, does not mean that you should imitate them.

Take, for example, the words of Section 7 of the U.S. Clayton Act, the principal substantive law that governs mergers and acquisitions. The law says that no merger or acquisition is permitted when “the effect . . . **MAY** be to **SUBSTANTIALLY** lessen competition, or to **TEND** to create a monopoly.”

- “May” has been interpreted by the courts to mean “likely.” “May” and “likely” are entirely different words. Which of these two concepts do you really want in your law. The Indonesia Law No. 5 uses the words: “yang dapat mengakibatkan terjadinya.” What did the Indonesian legislators really want to say when they used this language? Does the word “dapat” in this context mean “can”, “could”, “may”, “can possibly” or, were they trying to capture the word in the U.S. law, “may” which now really means “likely”.
- The words “substantially” and “tend” are so general that they require a major set of guidelines to give them meaning. Such guidance is provided in the FTC and DOJ jointly issued 1992/1997 Horizontal Merger Guidelines. (Guidelines on Horizontal Mergers have been issued in 1968, 1982, 1984 and 1992).

The form in which this kind of technical assistance can take place is very low cost. Much of it can be done by email supplemented with a few short visits where parties sit around a table and hammer out specific issues. Any country at this stage of development should include such email and in-person consultations in its technical assistance design. I also

personally think that even at this early Stage it is useful to take a key group of drafters through, step by step, an analysis of a few hypothetical cases. At this stage the purpose of such an exercise is not to teach investigative or interviewing techniques, but rather to expose the drafters to the actual analytical steps involved in applying the law so that they have a better sense of how the law will work when applied.

1.2 Building Support

Outside experts can certainly help with building public support to pass legislation, but they are not necessary. In fact, one must be very careful to avoid any appearance that the impetus for the legislation is foreign. Outside experts can, however, help gain support for the legislation especially if they can point to concrete examples of how, in their own countries, similar legislation has translated into real gains for consumers. Experts from highly developed economies are useful for this, as are representatives from economies that have recently made successful transitions, such as the Czech Republic, Slovenia, Hungary and Korea, to name only a few. The mere presence of outside experts can also drive home that supporting competition legislation is an important element in gaining the respect of the international community and being considered a real player in the global market. Do not underestimate the desire of legislatures, political leaders and powerful domestic economic actors to want international respectability and credibility.

The form in which this kind of assistance takes place is usually through conferences and public relations events. When, how and whether or not these public relations events should be included in a technical assistance design requires careful consideration. Will outside support, help or will it be viewed as meddling? Which outside sources of assistance will be controversial and which will help gain support? The recipient country must answer those questions.

1.3 Gathering and Organizing Human Resources

Only local people can gather together the human resources -- the Commissioners or Vice Ministers and their staff, the scholars, and members of NGOs. -- who will dedicate their professional lives to keeping the commitment alive. How to structure the framework for these groupings of professionals, however, is something with which outside experts can be of great assistance. The largest grouping will be the government bodies that have responsibility for formulating and enforcing competition policy. Other groupings are institutes or committees within academic institutions, consumer NGOs, and associations of lawyers and economists.

When it comes to how to structure the mechanisms and framework for the government enforcement authority, foreign experts are necessary. Too often the mistake is made of copying or rejecting another country's structures without really understanding them. And, too often countries feel that they can patch together pieces of different countries' institutions in a creative new way when, in fact, the pieces just do not fit together. Just

as reading and comparing laws from other countries, without talking with practitioners from those countries, risks misunderstanding their laws or adopting weaknesses that repeat the mistakes of the past, likewise with structuring the framework for these groups of interested people. By all means, do study and compare many different countries' institutions. But, also ask for assistance from experts who have worked in these institutions to point out their strengths and weaknesses and explain why they are structured the way that they are structured.

There are many ways in which this assistance can be delivered. Outside assistance can be a catalyst for the formation of such groups by organizing meetings, conventions and providing some start up funding. Some of it can be done in written exchanges. Most of it requires long hours of personal interaction at seminars, workshops and roundtables. Again, the recipient country is best able to decide where the sensitive areas are, and what types of pedagogy are culturally most effective.

2. STAGE TWO: BASIC SURVIVAL SKILLS

After the ideals are reduced into laws and people are gathered together who are committed to the ideals, they have to begin to reflect on what those ideals really mean in concrete settings and how to go about working the ideals into the fabric of how producers and consumers operate. To do this requires:

- (1) Nurturing stakeholder groups;
- (2) Basic education of all levels of society of about the economic goals and purposes of competition and how it operates.
- (3) Basic training of Commissioners, staff members and a core group of judges in the analytic skills needed to apply these general norms and goals and to investigate cases in the two primary enforcement categories: agreements (horizontal and vertical and joint venture) and abuses of dominance.

2.1 Nurturing Stakeholder Groups

When society begins to take steps to implement a commitment to competition as the major engine of economic development, dislocations and disruptions in industries and labor will inevitably take place. To stay the course, those who with a vision of the future and understanding of the long run benefits of competition must be organized and able to resist political and social pressure to role back progress. Assistance from developed countries can offer models for these kinds of NGOs that have been successful in other countries and can provide some initial help in organizing and initially financing these groups.

2.2 Achieving Basic Understanding of Goals

All of society -- consumers, workers and businessmen -- must be involved in this process of learning to understand the basic goals and purposes of a market economy and how such markets operate. They must understand that governments' role is limited; and, that many enterprises in competitive markets can be expected to fail and that some labor dislocation and repositioning will take place, just to cite a few common causes of societal backlashes. Understanding these problems and being able to stand up to the pressure that comes during the early period of commitment to the ideal is not gained without effort, debate, discussion and misunderstandings. Some societies are lucky enough to start off having a small core group of its own citizens who understand how markets work and the role of government in relationship to those markets. Other societies start with virtually no domestic expertise. Whatever internal resources may be available, they are never sufficient. Experience has taught us that outside assistance is always necessary because the ways competitive markets benefit society in the long run, are not intuitively obvious, and staying the course requires much support.

Technical assistance programs can bring in speakers who will attract the attention of the public and the press, offer short one day conferences for large groups of the public in different parts of the country. These foreign experts can join forces with those in government, academia and business to achieve this basic understanding of goals, any technical assistance should be tailored to fit the knowledge, experience and cultural base from which a country is starting. It should match the country's experience and familiarity with competitive markets. In cultures that find competition quite foreign, learning and accepting what the basic goal of competition is may require years of discussion, debate, misunderstandings and slow progress. A country's starting point, will dictate what form the outside assistance should take.

2.3 Analytic and Investigational Skills For Professionals

A society committed to competitive markets, needs an army of economists and lawyers who are able to identify conduct that harms the competitive process and undermines society's goal of creating and maintaining markets driven by competition. The need to be able to distinguish between conduct that is aggressive even causes other individual competitors to fail and conduct that presents no serious threat to the competitive process in the market as a whole. This distinction is not obvious to those who are new to the task. To draw this distinction correctly, lawyers, judges, and economists must know how to delineate the boundaries of a market, assess difficulties with entry into that market, and in the end determining if firms have market power, and they must know how to gather the facts and evidence that are the basis for such judgments.

Very rarely does this knowledge base or these skills exist to a degree that is adequate in developing countries. Formal legal training at universities in developing countries almost never exposes lawyers and judges to any of these concepts. Many economics

departments in developing countries graduate many students who have not had some very basic training in micro-economics, much less industrial organization. Almost none have the practical skills needed for analyzing real life markets and the conduct of firms in those markets. Commissioners, judges and competition authority staff are usually totally without experience in conducting investigations that stay on focus, sort the relevant from the irrelevant information, and put the information together in a way that is useful to Commissioners or judges.

These three areas -- understanding the economic goals of competition, knowing how to analyze the facts of real life situations, and how to gather and sort the relevant information -- are the main thrust of many technical assistance programs. They have been historically the main focus of the U.S. technical assistance programs.

There are many ways to convey this knowledge and these skills. The U.S. competition authorities, the Federal Trade Commission and the Department of Justice, Antitrust Division, are on record as believing that having experts reside and work at the newly forming competition authorities is the best and most effective form of delivering this technical assistance. For a good analysis of the effectiveness of the different forms of technical assistance I refer you to the U.S. Department of Justice and Federal Trade Commission's paper entitled "The U.S. Experience In Competition Law Technical Assistance: A Ten Year Perspective," which is posted on the OECD's webpage.

Short internships abroad are of little use. On the other hand, long-term programs of degree oriented university studies such as MBA's, LL.M.s, and Masters in Economics are very good. I think that every new competition authority would benefit significantly from having a few staff or, even better, Commissioners or Directors, who have completed such foreign degree programs. They are costly. They take valuable individuals out of the country for one or two years, and the tuition is high. But, they are worth it.

2.3 Drafting Merger Notification and Other Rules

You should note that I put drafting merger notification and other rules into Stage Two, not Stage One. If it is possible to do so consistent with a country's legal system, it is better to postpone drafting many Rules, Regulations and Guidelines until after the major institutions that support competition policy are a few years old. It is better for two reasons. First, it is better to draft rules knowing from experience what they mean. Too often, they are drafted and adopted without fully appreciation their ramifications. It is especially useful to postpone creating merger notification procedures for a few years. I say this because there is a danger that a country can feel that it is doing a lot to further competition in the market by devoting large amounts of time and manpower to processing merger notifications. In fact, much of that effort is devoted to processing paper for mergers that raise no competitive concerns and distract a country from attacking cartels and the kind of exclusionary conduct that enhances or maintains a dominant firm's position.

Earlier in this paper, I have talked about why outside experts are necessary and how they can deliver assistance with drafting laws and other broad norms. Those comments apply equally to the process of drafting rules and regulations.

3. STAGE THREE: CONSOLIDATION & REDRAFTING NORMS.

Several things have often occurred by the time that a country's competition policy has reached this stage of development. A generation of young people raised on the new policies is able to start taking control. The government competition authority has also often experience much turnover both at the level of Commissioners and Directors and at the staff level. Many lawyers and economists have moved to the private sector where they can make more money. That is good. They take with them a specialized understanding and will be able to challenge intelligently the government authorities, making the government authorities do higher quality analysis. Many also begin to look back on the actions taken during the early process of institutionalizing competition policy and see mistakes. They are ready to revisit more critically and with more sophistication practices such as distributional agreements, exclusive access to facilities, deregulation of certain sectors and joint ventures.

3.1 Advanced Competition Issues

I have observed that by this stage many government policy makers have understood how to define markets and compute market shares and even how to identify individual enterprises or groups with market power. They are, however, often still unable to sort conduct that it harmful to competition from conduct that is not harmful.

Further technical assistance is needed at this stage to insure that the competitive effects of private business conduct and government regulation, where regulation is appropriate, is examined. We donors make a mistake to stop our training short, sometimes because funding runs out, before we have succeeded in training a core group that can see the difference between reasonable and unreasonable restraints on trade, between exclusivity agreements that maintain or enhance monopolies and those that produce great efficiency. A good understanding of how to analyze the competitive effects of conduct is also important for those who are providing guidance to government policy makers who are deciding how to liberalize certain economic sectors and to government regulators of sectors such as the health industry and certain professionals.

Advanced training of Commissioners, staff members and a core group of judges on selected economic and legal policy issues -- e.g., natural monopolies, intellectual property, mergers, competitor cooperation, vertical agreements, and regulated industries is needed. This training can easily be done in the form of short one-week long seminars. But, the recipient country must decide which of these more advanced topics are needed.

3.2 Amendments to Original Legislation

Usually after six or seven years, a need for significant reorganization of the government competition authority arises. Reducing the number of Commissioners and giving them staggered terms is very often considered. Use of the laws over several years also often points out the need for streamlining and eliminating repetitions and apparent contradictions and refining the language of the law so that it most accurately reflects a more mature understanding of the goals of competition policy and enforcement. As already indicated, when engaged in drafting laws or regulations, it is important to involve experts who have extensive experience already applying similar laws and regulations and have seen their practical ramifications.

CONCLUSION

As you see, there are many tasks, and it will take many years to complete these tasks. Everything cannot be accomplished at once. The tasks usually fit into one or another stage of development. Each of the tasks also should be tailored and molded to the needs, culture and history of recipient countries. Funds and available personnel from donor countries are not unlimited. Therefore, recipient and donor countries must set priorities and do so knowing in advance what the characteristics are of the stages through which a developing country can be expected to pass.