

International Competition Technical Assistance: The Federal Trade Commission's Experience and Challenges for the Future

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Abstract

The FTC's technical assistance program contributes to economic growth in developing and emerging economies by helping to build institutions that enforce competition laws based on sound economic principles convergent with internationally recognized standards. While researchers have found it difficult to measure how much competition law enforcement contributes to growth, they have found demonstrable benefits

* The views expressed are the authors' own and not necessarily those of the Federal Trade Commission or its Commissioners.

from policy reforms that introduce competition into economies and sectors of economies previously insulated from competition. When based on sound economic principles, competition law enforcement helps to facilitate and accelerate the economic gains from these market-oriented reforms.

During a jurisdiction's transition to a more market-oriented economy, the FTC's technical assistance program addresses fundamental questions. FTC attorneys or economists that serve as long-term resident advisors in the agency or have worked with recipient jurisdictions for many years acquire the familiarity with local practice and issues needed to train new agency staff how to distinguish legitimate aggressive competitive behavior from anti-competitive conduct. When a jurisdiction becomes more experienced, the content of the FTC's technical assistance increases its focus on sophisticated analytic issues and economic tools for investigation. The objective throughout is to build institutions capable of maintaining an environment in which competition law, applied in a manner that is convergent with international best practices, can foster economic growth.

I. Introduction

Competition law enforcement in all jurisdictions aspires to contribute at least indirectly to economic growth. For a competition authority to contribute, it must be able to identify industry structures and firm behavior that enhance or harm competition, distinguish anticompetitive from pro-competitive or competitively neutral behavior, and deploy policy and enforcement resources to address harmful behavior effectively. Building institutions and staff with this capability is not an easy or quick task. For competition enforcement authorities and policymakers in developing and emerging economies this task is particularly urgent and challenging.

The US competition agencies help newer agencies develop the capacity to meet these challenges through their technical assistance programs, in which they offer the analytical framework and practical skills that they have learned over many years to be most helpful in promoting economic growth. As the International Competition Network ("ICN") has noted,

Successful enforcement of a competition law requires not only technical knowledge, but experience and judgment. In developed countries, this comes from on-the-job experience and institutional knowledge of the process of trial and error that led to past failures and successes. Technical assistance is the process by which a newer competition agency can take advantage of the experience of others as it develops that experience and judgment on its own.¹

Supported in many cases by funding from the US Agency for International Development ("USAID") and other institutions, the Federal Trade Commission ("FTC"), frequently in partnership with the Antitrust Division of the Department of Justice ("DOJ"), has been working to meet this need for over 25 years.² Through their technical assistance programs, the US competition agencies share and advance the long-term goals of US assistance including poverty reduction, economic growth, and development.

1 INT'L COMPETITION NETWORK [ICN], FINDINGS RELATED TO TECHNICAL ASSISTANCE FOR NEWER COMPETITION AGENCIES 1 (2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc366.pdf>.

2 FED. TRADE COMM'N & DEP'T OF JUSTICE, U.S. FEDERAL TRADE COMMISSION'S AND DEPARTMENT OF JUSTICE'S EXPERIENCE WITH TECHNICAL ASSISTANCE FOR THE EFFECTIVE APPLICATION OF COMPETITION LAWS 2 (2008), <https://www.ftc.gov/sites/default/files/attachments/international-assistance-program/ftcdojtechnicalassist.pdf>.

This article examines the role that economic development has played in the motivation, history, methods, and content of the FTC's technical assistance program. It also discusses the lessons learned from our experience and the challenges that we foresee in tailoring the program to the level of experience of the competition authority and the stage of economic development of the recipient jurisdiction.

II. Goals of the FTC's Technical Assistance Program

The FTC's technical assistance program has two principal goals: (1) building the capacity of competition authorities and policymakers to use competition to promote economic development; and (2) fostering convergence toward standards of competition law enforcement that enhance consumer welfare. The FTC pursues both goals at every stage of assistance.

1. Economic Development

During the early years of a jurisdiction's transition toward a market economy, policymakers and the public often question the ability of competition law enforcement to contribute to economic growth. This is also the period during which competition law enforcement—and therefore technical assistance—can be an important factor in implementing competition policies with a positive and measurable effect on economic development.

While studies in developed economies have tried to measure the extent to which implementation of competition law and policy contributes to economic growth,³ several studies in less developed economies have demonstrated the measurable benefits that the introduction of competition policies contribute to economic growth, development, and poverty reduction.⁴ The link between robust domestic competition as a means of promoting growth and development is increasingly well-established. As one scholar noted, “the growth rate of living standards essentially equals the growth rate of domestic productivity. Even though world trade is larger than ever before, national living standards are overwhelmingly determined by domestic factors rather than by competition for world markets.”⁵ The McKinsey Global Institute undertook a 12-year study, beginning in 1991, to determine why some nations remain wealthy while others remain stagnant or poor, even after years of international aid. In his book describing the lessons

3 See, e.g., Jonathan Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27 (2003); Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3 (2003); Hiau Looi Kee & Bernard Hoekman, *Imports, Entry and Competition Law as Market Disciplines* (World Bank Policy Research Working Paper 3031, 2003) (finding insignificant direct effect, but indirect effect on equilibrium mark-ups by promoting larger number of domestic firms); SIMON J. EVENETT, *LINKS BETWEEN DEVELOPMENT AND COMPETITION LAW IN DEVELOPING COUNTRIES* (2003) (finding no positive impact on foreign direct investment); Casey Lee & Bernadine Zhang Yuhua, *SMEs, Competition Law and Economic Growth* (APEC Policy Support Unit, Issues Paper No. 10, 2015).

4 See, e.g., Mark A. Dutz, & Maria Vagliasindi, *Competition policy implementation in transition economies: An empirical assessment*, 44 EUR. ECON. REV. 762 (2000); Wendy Carlin, Mark Shaffer & Paul Seabright, *A minimum of rivalry: evidence from transition economies on the importance of competition for innovation and growth 2* (The Davidson Inst. Working Paper Series, No. 670, 2004) (finding that in Eastern Europe and countries of the Commonwealth of Independent States, “Firms facing between one and three competitors had sales growth of nearly 11% over the three years to 1999, while monopolists saw real sales decline by over 1% and firms facing more than three competitors had sales growth of under 2%.”); Michael W. Nicholson, *An Antitrust Law Index for Empirical Analysis of International Competition Policy*, 4 J. COMPETITION L. & ECON. 1009 (2008); Godius Kahyarara, *Competition Policy, Manufacturing Exports, Investment and Productivity: Firm Level Evidence from Tanzania Manufacturing Enterprises*, in *COMPETITION, COMPETITIVENESS & DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES* 264, 285 (2004) (finding in Tanzania, “firm-level productivity in the post-competition policy era is about 50 per cent higher than the productivity effect in the pre-competition policy period.”).

5 PAUL KRUGMAN, *POP INTERNATIONALISM* 9 (1997).

learned from that study, the Institute's founder, William Lewis, explained that, "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."⁶ In its 2005 World Development Report, the World Bank noted that, "Barriers to competition benefit some firms but deny opportunities and increase costs to other firms and to consumers. They also weaken incentives for protected firms to innovate and improve their productivity. Increasing competitive pressure can increase the probability of firm innovation by more than 50 percent."⁷ Furthermore, recent studies based on developments in Mexico, for example, have shown that the burden of restrictions to competition falls disproportionately on the poor,⁸ and that eliminating restrictions on competition in the supermarket industry can improve consumer welfare by 7% per household.⁹

Improved domestic competitive conditions can also enhance international competitiveness. Michael Porter, in his seminal work, *The Competitive Advantage of Nations*, wrote that, "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. . . . Firms that do not have to compete at home rarely succeed abroad."¹⁰ In addition, modernizing the whole range of commercial laws is needed to keep and attract the domestic and foreign investment needed to grow domestic markets.

Given that FTC technical assistance typically begins when the trust and competency of competition authorities are in the process of being established, and that studies have demonstrated that having competent and trusted competition authorities intensifies competition that leads to economic development, early assistance makes a particularly valuable contribution to economic growth.¹¹

2. Convergence

Convergence toward best practices in the design and implementation of competition laws is a key goal of the FTC's international antitrust program.¹² Now that over 130 countries have competition laws, the risk to global commerce posed by inconsistent standards of antitrust adjudication is significant. For example, as a former FTC Chairman noted, in a world of multiple arbiters, the one with the most restrictive rules can effectively set the standard for all.¹³ The FTC works bilaterally and through multilateral organizations, such as the ICN, the Organisation for Economic Co-operation and Development ("OECD"), and the United Nations Conference for Trade and Development ("UNCTAD"), to build consensus around

6 WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* 103 (2004).

7 WORLD BANK, *WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* WORLD DEVELOPMENT REPORT 15 (2005).

8 See Carlos M. Urzúa, *Distributive and Regional Effects of Monopoly Power*, 22(2) *ECONOMÍA MEXICANA NUEVA ÉPOCA* 279 (2013).

9 See David Atkin, Benjamin Faber & Marco Gonzalez-Navarro, *Retail Globalization and Household Welfare: Evidence from Mexico* 32 (NBER Working Paper 21176, 2015).

10 MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662 (1990).

11 See, e.g., R. Shyam Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries* (Foreign Investment Advisory Services, Occasional Paper No. 19, 2007) (finding a positive impact the more effective the law: (1) the less that dominant firms influence markets; (2) the higher the ranking on the Business Competitiveness Index; and (3) the greater the intensity of competition in local markets); Tay-Cheng Ma, *The Effect of Competition Law Enforcement on Economic Growth*, 7(2) *J. COMPETITION L. & ECON.* 301 (2011); Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, 9(3) *J. COMPETITION L. & ECON.* 593 (2013).

12 RANDOLPH TRITELL & ELIZABETH KRAUS, *THE FEDERAL TRADE COMMISSION'S INTERNATIONAL ANTITRUST PROGRAM* 2 (2015), https://www.ftc.gov/system/files/attachments/international-competition/the_ftcs_international_antitrust_program_may_2015.pdf.

13 Timothy Muris, *Merger Enforcement in a World of Multiple Arbiters*, Prepared Remarks for the Brookings Institution Roundtable of Trade and Investment Policy 10 (Dec. 21, 2001), https://www.ftc.gov/sites/default/files/documents/public_statements/merger-enforcement-world-multiple-arbiters/brookings.pdf.

sound, economically-grounded legal principles and transparent and fair procedures that support pro-competitive outcomes. This effort has been remarkably successful since the ICN was established in 2001.¹⁴

One of the goals of the FTC's technical assistance program is to promote the implementation of those consensus principles by developing competition agencies. Through its technical assistance program, the FTC promotes understanding and analysis of these principles and the skills needed to apply them. This begins with the program's first contacts with the legislators and competition authorities engaged in drafting new competition laws and regulations and continues through the period of institution building and implementation. The program takes on special importance during the early stages of implementing competition policy, when the effects of competition policy have not yet taken firm root and the public and political bodies may not yet appreciate its value. While the further development of skills is critical at this stage, it is equally important to help the agencies continue on the path of convergence even in the face of pressures to regulate prices or protect local incumbents. Finally, the FTC seeks to assist maturing competition agencies to apply increasingly sophisticated tools that enable them to more finely discern anticompetitive conduct from procompetitive commercial behavior.

In addition to its overall goal of increasing consumer welfare, the FTC's program promotes convergence as a way of fostering a business-enabling environment that is needed for economic growth. The business community has noted the potential for competition legislation both to improve the business climate and to misdirect enforcement and degrade the climate. Convergent and transparent competition laws and application support the commercial objectives of predictable and sound enforcement by reducing risks, facilitating planning, and avoiding undue burdens and delays for cross-border transactions and business activity. Application of rules based on sound economics also prevents discriminatory application. Appreciation of a culture of competition spurs greater domestic entrepreneurship and greater willingness to permit foreign companies access to business opportunities that can benefit the domestic economy. For these reasons, both the US Chamber of Commerce and the Antitrust Modernization Commission have supported antitrust technical assistance.¹⁵

14 See, e.g., Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274 (2011); Russell W. Damtoft & Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT'L LAW. 137 (2009); Alden F. Abbott, *Competition Policy and its Convergence as Key Drivers of Economic Development*, 28 MISS. C. L. REV. 37 (2008-2009).

15 US CHAMBER OF COMMERCE, BUILDING OPEN AND COMPETITIVE MARKETS 4 (2010), <https://www.uschamber.com/sites/default/files/legacy/grc/Senate%20Briefing%20-%20May%207th.pdf>; ANTITRUST MODERNIZATION COMM'N, ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS viii (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

III. Evolution of the FTC Technical Assistance Program

The FTC and DOJ technical assistance program has evolved from a program funded by USAID and targeted to a few jurisdictions needing assistance with basic skills to implement a competition law to a substantial program funded by several sources to provide assistance to dozens of jurisdictions with varying levels of experience and an array of issues and challenges.

1. Origins and Early Stage of the Program

The FTC and DOJ began conducting technical assistance in the 1990s in the transitioning economies of Central and Eastern Europe and in a few Latin American countries. At the time, competition law and policy were in their infancy in those countries. During the 1990s, at any given time, two or three Central or Eastern European countries or former Soviet republics and two or three Latin American countries were receiving USAID-funded technical assistance provided by the FTC and DOJ. Assistance consisted of helping to write laws and regulations and instructing staff in the basics of analyzing and investigating competition cases, typically by placing FTC and DOJ staff as long-term advisors in developing agencies.¹⁶

At that time and until about 10 years ago, the FTC and DOJ provided technical assistance to jurisdictions and competition authorities that were in the early stages of moving to a market economy. Passage of a competition law and creation of a competition authority often coincided with other policy reforms that included introducing competition into the economy as a whole or into sectors that had previously been subject to extensive government intervention, regulation, or planning. The assistance was provided when the agencies were just beginning to draft competition laws and regulations and to develop the analytical and investigational skills needed to enforce the law in accordance with international best practices that support these competition policies.

Competition agencies were among the institutions that provided policymakers the support and comfort to make market-oriented reforms. New competition laws and institutions also enabled governments to prevent unregulated private enterprises, many of which were recently privatized state-owned firms, from abusing their power, and to address other practices that harmed consumers and impeded growth. Competition law enforcement regimes completed the package needed to support competition policies and the transition to a market economy. They also helped prevent governments from intentionally or unintentionally retrenching on market reforms.

Technical assistance can enable young agencies to enforce competition laws based on sound economic principles in a way that helps achieve the benefits of liberalization. These benefits can have a particularly significant impact on the lives of the poor and near poor. The benefits to development and poverty reduction during the early years of introducing competition to an economy or major sectors can have dramatic results, as demonstrated in the US airline and telecommunications sectors.¹⁷ As sectors such as

¹⁶ See FED. TRADE COMM'N & DEP'T OF JUSTICE, *supra* note 3, at 2.

¹⁷ See generally ROBERT CRANDALL & JERRY ELLIG, *ECONOMIC DEREGULATION AND CUSTOMER CHOICE: LESSONS FOR THE ELECTRIC INDUSTRY (1997)*, available at http://mercatus.org/sites/default/files/publication/MC_RSP_RP-Deregulation_970101.pdf.

electricity, cable television, and pharmaceuticals open to competition and the benefits to economic growth from competition spread to them, competition law enforcement can play an important role by ensuring that the benefits of liberalization are passed on to consumers.

The first stage of introducing competition policies and law enforcement is typically a long process, frequently lasting 10 or more years. Political developments can cause the process to stall or to fail and require restarting. During this stage, whether and how quickly to continue with privatization and deregulation is often an open question. There can also be considerable misunderstanding about the characteristics of a competitive market and what kind of structures and behaviors should follow from the policy decision to introduce competition to a whole economy (e.g., Eastern Europe) or major sectors of the economy (e.g., Vietnam).

The FTC's technical assistance work, especially during the first 10 years of the program, was in jurisdictions that were just establishing the foundational commercial laws governing contracts, banking, corporate law, bankruptcy, securities, and of course the institutions needed to enforce these laws. That work continues in some jurisdictions. Building an effective competition policy and law enforcement system is not necessarily the first priority among the countries implementing new commercial legal systems, but it is nevertheless a necessary building block. The aim of FTC technical assistance in such jurisdictions was, and in some jurisdictions remains, to build the basic capacity to enforce the competition laws effectively and to contribute that one piece to creating a market economy and reducing poverty. FTC attorneys and economists who serve as resident advisors and the attorneys specifically assigned to the FTC's technical assistance program become familiar with the major policy initiatives taking place in the economies in which they work and the difficulties that young competition authorities encounter in implementing a law effectively in that context. They also become familiar with local procedural rules and typical investigational methods. Their familiarity with these issues is vital to the FTC program's ability to promote both economic development and convergence.

2. Assistance Evolves as Recipients Mature

The FTC's technical assistance work focused largely on the basics until 2008 because the program was almost completely dependent on USAID for funding and, as a result, was motivated by USAID's commitment to poverty reduction and economic growth.¹⁸ USAID's funds and focus, however, were not sufficient to address the competition technical assistance needs arising around the world. By 2008, many jurisdictions in which USAID had made a significant investment and in which the FTC had invested its time and manpower in technical assistance had become fairly experienced. Nevertheless, they still lacked the ability to use more sophisticated economic tools or to address more intricate problems, such as measuring efficiencies, designing and applying divestiture remedies, analyzing the antitrust/intellectual property interface, or dealing with two-sided markets. Their economies had become more market oriented, and thus had "graduated" from USAID programs, but the competition agencies still needed assistance. As a senior official from one such agency told one of the authors, "We are good, but we are not as good as the world thinks we are." It became clear that the FTC technical assistance program needed greater freedom and flexibility to work where the foundations for competition law and policy had largely already been laid.

¹⁸ A small percentage of the funds during this period also came from the US Department of Commerce's Commercial Law & Development Program, typically for technical assistance in Egypt and the Middle East, from the US Trade Development Agency for technical assistance in Mexico and later in China, or in unusual cases from the FTC's own funds.

Responding to express encouragement from Congress in 2007¹⁹ and supported by additional funding, the FTC began to make much greater use of FTC appropriated funds for technical assistance. Beginning in 2008, the FTC began or continued work in several jurisdictions where USAID and other donor agencies had not worked or no longer worked on competition matters.²⁰

As a result, the types of economies and the competition environment in which the technical assistance program currently operates are quite different from those in the early 1990s. The number of jurisdictions with young competition authorities has vastly increased, and the degree to which they have well-functioning competitive marketplaces has become quite diverse. As a result, the types of assistance needed and requested have also expanded. In 2014, several dozen jurisdictions received FTC technical assistance, ranging from in-country seminars to participation in webinars.²¹ The economies in which the program operates now range from some of the least developed countries of sub-Saharan Africa to the robust economies of Mexico and India. While many jurisdictions still request technical assistance for basic capacity building, the requested assistance usually ranges from intermediate-stage issues to sophisticated issues, such as training economists on the use of economic modeling to assess competitive effects.

While USAID-funded assistance had been largely driven by USAID's development goals, FTC-funded assistance focuses more on the FTC's convergence goals. Most recently, the largest recipient of FTC-funded assistance has been the Competition Commission of India. In addition, the FTC, with DOJ, expanded its cooperation with the US Trade and Development Agency to provide technical assistance to China's new competition agencies,²² and the FTC expanded its cooperation with the US Department of Commerce's Commercial Law Development Program ("CLDP") in the Middle East.

Thus, the FTC's self-funded assistance often builds on earlier USAID-funded work. The goals of poverty reduction and economic development are compatible and are inherent in all competition authority work, only to a greater degree in less developed economies.

IV. Selection of Priority Jurisdictions

With the freedom to conduct technical assistance without regard to USAID funding priorities came the question of how the FTC should determine priorities. This is an important question because FTC funding and access to its expert attorneys and economists are limited. Several factors influence how priorities are set, including: relevance to FTC convergence goals and enforcement interests; relevance to larger US government objectives; size of the jurisdiction's economy; absorptive capacity of the recipient agency; focusing training on a specific area; maintaining a balance between reaching new agencies and maintaining relationships with historical partners; matching FTC expertise and the requested assistance; the availability of other sources of assistance; and resource considerations such as travel and related costs.

19 154 CONG. REC. H16054 (daily ed. Dec. 17, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H16054&dbname=2007_record.

20 The additional funding also allowed the FTC to begin technical assistance in support of its consumer protection mission, which had been only occasionally supported by USAID.

21 See FED. TRADE COMM'N, FTC OFFICE OF INTERNATIONAL AFFAIRS: FY2014 TECHNICAL ASSISTANCE REPORT (2014), <https://www.ftc.gov/system/files/documents/reports/ftc-office-international-affairs-technical-assistance-report-fy2014/fy2014oiatarpt.pdf>.

22 See FED. TRADE COMM'N, FTC OFFICE OF INTERNATIONAL AFFAIRS: FY 2013 TECHNICAL ASSISTANCE REPORT 4 (2013), <https://www.ftc.gov/system/files/documents/reports/ftc-office-international-affairs-technical-assistance-report-fy2013/fy2013oiatarpt.pdf>. USAID is prohibited from providing government-to-government assistance in China due to restrictions imposed in the wake of the 1989 Tiananmen Square events. See DIANNE E. RENNAK, CHINA: ECONOMIC SANCTIONS 2 (2006), <https://www.fas.org/sgp/crs/row/RL31910.pdf>.

Requests from jurisdictions like Mexico, India, or China that frequently review antitrust transactions in common with the FTC, or regions with significant commercial ties to the United States are more likely to be considered for technical assistance than those whose antitrust or commercial ties are remote. Some agencies are also more prepared to absorb technical assistance than others because they have started investigating cases and already have staff who are ready to absorb assistance—i.e., they are at a “teachable moment.” A potential recipient that can articulate a clear purpose for a particular assistance mission, such as market definition or ramifications of a recent statutory amendment, is also more likely to receive assistance.

The size of the economy is also relevant. Some jurisdictions like India and Indonesia are a priority because they have large economies in whose economic performance the United States has a substantial interest and where poverty reduction is a major objective. Countries that are just now establishing competition agencies and need basic capacity building, however, often have very small economies. Yet some of these small economies, such as those in the Caribbean or Central America, are neighbors with close economic and other ties with the United States and are therefore higher priority recipients than their size might suggest.

Agencies in some jurisdictions have had a particularly strong historical technical assistance relationship with the FTC, such as those in Central and Southeastern Europe. While our assistance in the latter region predates the accession of these States to the European Union (“EU”), it now makes sense for the EU to play the lead role in providing assistance to the region given the availability of EU resources and the mandate that those countries adapt their laws to the EU framework. Nevertheless, limited US involvement may be appropriate.

Sometimes agencies other than the FTC are better suited to provide technical assistance in certain areas. For example, the FTC has received requests from agencies interested in assistance in topics, such as anti-cartel enforcement, telecommunications, and state aids, that the FTC is not well placed to provide.

Finally, airfares and travel time to some countries are high relative to the other criteria that they may satisfy and may tip the balance unless the assistance can be part of a regional program (e.g., Cambodia, Laos, and some African countries).

There is no mechanical formula for weighing these various criteria, and their relative importance varies from year to year.

V. Methods of Delivery and Content

A competition technical assistance program’s ability to contribute to a jurisdiction’s economic growth is only as great as its ability to affect the recipient enforcement entities and policymakers. This, in turn, hinges on both the means of delivery and the content delivered. The FTC developed successful methods of delivery through experience in the early years of its program. These methods have been reinforced by an ICN survey and imitated by many other donors. While these methods have remained stable over the years, the substantive content of the program has evolved. The program now covers a much broader array of issues and in much greater depth in jurisdictions with which the program has worked for several years. As explained above, in the early stages of establishing a competition regime, economies are generally in the process of making broad policy changes and assistance is directed to fundamental issues such as distinguishing between pro-growth aggressive competitive behavior and anti-growth exclusionary behavior.

At later stages, the competition authority typically requests assistance with specific refinements to laws, regulations, procedures, or other more technical issues.²³

1. Methods of Delivering Technical Assistance

One of the greatest challenges in delivering technical assistance is determining how to convey practical and analytical knowledge in a usable and sustainable way. Two days of PowerPoint presentations by experienced academics, practitioners, and agency officials in a conference room of a luxury hotel do not do the job. The ICN conducted an empirical study of the kinds of programs that have worked well and those that have not.²⁴ It found that: project design requires active collaboration between recipient, funder, and provider; a needs assessment is critical; assistance activities should be related closely to the goals; knowledgeable providers, especially those with competition agency experience, are essential; the absorptive capacity of agency staff must be considered; and different circumstances dictate whether long-term and/or short-term interventions are best employed.²⁵ These findings largely mirror the FTC's experience. The challenge is how to convey analytical frameworks and practical tools in an effective and sustained manner, and to design effective institutions that will take root and be sustainable.

The FTC delivers technical assistance in five ways: resident advisors; short-term missions; consultations and written comments from FTC staff in Washington, DC; regional conferences and internships in the United States for foreign personnel; and informal email and telephone consultations. The blend and frequency with which it uses these methods depends on the state of development of competition law and institutions in the recipient jurisdiction.

a. Long-Term Advisors

For developing competition authorities that have just begun operation, the most effective capacity-building tool is the use of resident advisors who work directly in the office of the new authority for several months. Investigation and analysis are best learned in the context of actual cases in the local context. Advisors are thus in place when a case presents the proverbial "teachable moment" that cannot be replicated in a scheduled seminar. Advisors build relationships of trust and rapport as colleagues, which results in their advice being more readily sought, accepted, and applied. Their regular presence permits insights about case selection, internal procedures, the fairness of processes as actually applied in investigations, and priority setting that are generally not apparent to short-term advisors.

b. Skills Workshops

The next most useful assistance tools are interactive investigative skills workshops, and thus a significant focus of the technical assistance program involves conducting training for competition authority staff on specific methods of competition analysis, investigative techniques, and prosecutorial or enforcement skills and procedures. In these workshops, the FTC and DOJ use hypothetical but realistic cases that present

23 See Timothy T. Hughes, *Designing Technical Assistance for Different Stages of Institution Building*, Remarks before the 4th APEC Training Program On Competition Policy 11-12 (Aug. 3-6, 2004), <http://www.jftc.go.jp/eacptf/05/APECTrainingProgramAugust2004/usa.hughes.pdf>.

24 ICN, ASSESSING TECHNICAL ASSISTANCE: PRELIMINARY RESULTS (2005), <http://www.internationalcompetitionnetwork.org/uploads/library/doc365.pdf>.

25 *Id.* at iii-iv.

issues typically found in monopolization, cartel, or merger cases.²⁶ FTC professionals, frequently in conjunction with DOJ staff, guide participants through interactive role-playing designed to help them learn to identify issues, develop an investigational plan, interview witnesses, gather and analyze documents, evaluate results, and devise an appropriate remedy. This allows participants to watch a real investigation unfold, but with the facts tailored to those that they might encounter in their work.

c. Internships

In 2006, the FTC received Congressional authority to allow foreign agency staffs to have access to nonpublic information, which enabled them to work alongside FTC staff to learn how the FTC conducts investigations and analyze cases.²⁷ In response, the FTC established an International Fellows Program²⁸ through which foreign agency case handlers come to the FTC for periods of approximately three months. Fellows are assigned to a division in one of the FTC Bureaus and participate in all aspects of an investigation. While the confidential information they may see remains protected, they bring the skills and analytical techniques they learned home with them. Their experience also facilitates cooperation between the FTC and the Fellow's home agency.

d. Informal Consultations and Webinars

One of the by-products of using career enforcers to conduct technical assistance is that personal relationships that FTC staff develop with their international counterparts through working on projects together often lead to ongoing relationships through which recipients engage in follow-up consultations and maintain regular contact with the US agencies via telephone or e-mail.

In addition, technology sometimes allows the FTC to use new tools to provide technical assistance. For example, the FTC participates in and helps coordinate a monthly Spanish-language webinar among Latin American competition agencies, and has from time to time, when language and time differences permit, conducts webinars with newer agencies. The webinars tend to be most valuable when they supplement in-person assistance, as assistance is more likely to be internalized when delivered by a person with whom a relationship of trust has been established.²⁹

e. Building Relationships

To be effective, assistance must take into account the needs, resources, and experience of the recipient. Special challenges exist in developing countries that sometimes require adjusting ways of thinking about "best practices." Understanding the local economy and having a feel for the context in which recipient agencies operate is also important. This requires an ongoing relationship built over time. Consultants that "parachute in" for a week lack this local knowledge. On the other hand, resident advisors or FTC

26 For examples of such hypothetical cases, *see* TRAINING MATERIALS, <https://www.ftc.gov/policy/international/international-assistance-program/training-materials> (last visited Jan. 12, 2016).

27 Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers Beyond Borders Act of 2006, (Public Law 109-455, Dec. 22, 2006, 120 Stat. 3372 (codified in scattered sections of 15 U.S.C. Chapter 2). This statute applies only to the FTC.

28 *See* INTERNATIONAL FELLOWS PROGRAM, <https://www.ftc.gov/internationalfellows> (last visited Jan. 12, 2016).

29 The FTC leads the ICN's Training on Demand Project, in which competition agency staff and non-government advisors create online training modules directed at newer competition agencies. The topics of the modules produced to date include, among others, market power, market definition, competitive effects, fundamentals of mergers, leniency, planning investigations, interviewing techniques, and competition advocacy. *See* ICN TRAINING ON DEMAND, <http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx> (last visited Jan. 12, 2016).

attorneys who work with a jurisdiction over years, commenting on drafts of laws and regulations and conducting training workshops, can make the adjustments needed to be most useful for an agency. These relationships often last years after the end of formal technical assistance programs.

f. Building Judicial Capacity

Depending on the specific features of the competition law system, judges may hear and decide competition cases, enforce the agency's orders, and adjudicate appeals of agency decisions. To fulfill these roles, judges must understand the purpose and methods of antitrust analysis. In many countries, however, there is seldom training available to judges and, as a result, judges sometimes forego substantive review of orders in favor of parsing competition agency rulings on narrow procedural grounds. To help judges reach sound interpretations of competition law and ensure the effectiveness of competition agency orders, programs to assist judges have proven quite helpful. Because judges often prefer dialogue with fellow judges to instruction from government functionaries, the FTC taps into the willingness of several current and former federal judges to help conduct judicial workshops.

g. Leveraging Resources

Co-teaching with recent recipients of technical assistance can also aid in delivering technical assistance. For example, the FTC has partnered with the Mexican antitrust agency to deliver technical assistance in Central America and with agencies from the Baltic States to deliver assistance to an agency in the Caucasus region. While FTC staff may have a relative advantage on antitrust law and economics, the partner agencies have a greater understanding of the economic and political context in countries that in some ways resemble their own. Both the FTC and recipient authorities have found these partnerships to be quite valuable.

2. Substantive Content of Technical Assistance Programs

The substantive content of a particular program is driven largely by the recipient agency's level of experience and sophistication in implementing its competition law.

a. Early Stage Content

The FTC's technical assistance is likely to have its greatest impact during the early years of a jurisdiction's transition to a market economy. As discussed above, many of the issues that typically confront an agency during its early years involve the difficulties that arise from the major government policy decision to move toward a competition driven market and the inevitable "creative destruction" that accompanies that move. For example, to what extent should the displacement of workers that privatization or modernization of production or distribution facilities cause be a concern of the competition authority? To what extent should the power of large buyers and sellers to reduce profit margins of small, local suppliers and competitors be a concern? Frequently, a genuine competition law enforcement concern is present and addressing the concern in a market oriented way is possible.

Competition authorities should be concerned with privatizations that merely transfer monopoly power from a publicly controlled monopoly that may be somewhat responsive to the poor to a private party that may be concerned solely with profit. A competition authority should be involved to help structure the

privatization in a way that will avoid the abuse of power. In mergers or joint ventures that seem likely to result in the displacement of labor, competition authorities have a role in determining if the displacement arising from modernization is the result of genuine efficiencies or simply from a reduction in output resulting from increased market power. When the entry of large buyers and sellers tempt small businesses to form cartels, competition authority experts can offer alternatives such as encouraging efficiency enhancing cooperatives and joint ventures. In other words, competition agency staff are taught how to distinguish harm to competitors from harm to competition.

On a more practical level, staff are taught skills such as what line of questioning and which witnesses will likely be most fruitful in assessing competitive effects, and what kind of remedies are best for deterrence and restoring competition to the market. The goals of technical assistance at this stage are to help ensure that enforcement is consistent with international norms of good practice such as the ICN Recommended Practices and that the institution and staff are capable of investigating conduct and applying the law.

These issues are not unique to developing and emerging economies, but they are more common and often have much greater political and social ramifications than in developed economies. It may not be enough to say that the social displacement resulting from competition is a creative, destructive force that will in the long term lead to increased consumer welfare. Nor is it realistic to suggest that a competition agency ignore powerful political pressures and pass on to other ministries the problems of the displaced. The FTC's technical assistance program and the experts involved are sensitive to these issues and work with their counterparts to find market-oriented, competition-compatible ways of addressing these problems. Economies generally do not move quickly from planned, regulated, or crony capitalist systems to open and competitive ones. During the transition, an effective competition authority, assisted by experienced experts sensitive to the issues of a developing economy, can help the transition to move forward as smoothly as possible.

b. Later Stage Content

After 10 years of receiving capacity building technical assistance—assuming that an agency has been bringing cases and has not experienced massive staff turnover—most agencies are reasonably capable of investigating cases and designing remedies. As with any developing skill set, there may be weaknesses in analysis, and the process may not always be what is optimal under the circumstances. Weak analysis and process, measured against international best practice standards, may be attributable to insufficient experience applying them in actual practice, but may also result from a conscious decision by the agency or other political officials to deviate from these norms. These cases call for something other than training and capacity building.

Understanding international best practices and how to implement them are the stuff of capacity building; persuading enforcement agencies to follow them is a very different undertaking.

For competition authorities that have been operating for several years, therefore, more attention is given to helping with fine tuning statutes and regulations, analyzing complex issues, and applying sophisticated economic and other analytical tools.³⁰ The substantive content of the assistance program also covers a much broader array of issues and in much greater depth. For example, the FTC frequently sends attorneys and economists with relevant sectoral expertise to work with agencies in emerging economies that are

30 See Hughes, *supra* note 25.

dealing with newly liberalized sectors. It is also common for the assistance to shift to comments on, and assistance with, amending laws or regulations. Training that demonstrates through hands-on workshops how these amendments yield better results also strengthens the hand of those advocating the reforms.

The FTC's capacity building efforts over a period of approximately 10 years in several jurisdictions in Southeastern Europe and Southeast Asia are good examples of how content evolves to more technical economic and legal questions. The FTC's work has helped with the successful efforts by several ASEAN jurisdictions to create a small but capable core of enforcement officials with the tools to analyze and enforce their competition laws. Some staff in these agencies are capable of mentoring new hires and conducting their own assistance in jurisdictions in their region that are just beginning to implement competition laws and create competition institutions.

Several jurisdictions have recently realized the need for some major amendments to, or a substantial rewriting of, some parts of their competition laws and implementing regulations in order to bring them closer to international best practices. Many of them have successfully worked with the government to make these changes. The next steps in capacity building in these countries are easy enough to discern. The FTC's many years of experience in providing assistance in other countries has drawn a blueprint for the type of programs that will be needed.

3. Challenges for Future Technical Assistance

In the course of its work, the FTC has seen new competition authorities face major challenges. Three stand out. First, the public and business communities have little faith that competition law will be applied in accordance with the rule of law, free of corruption. Second, it is important to address actual and perceived deficiencies in investigation procedures, such as transparency and engagement with parties and protection of confidential information.³¹ Third, competition authority staff and the judiciary have little, if any, cross-training in economics and law; this deficit must be addressed both at the university level and with on-the-job seminars.

The FTC and other technical assistance providers also face some challenging questions. Building an enforcement agency and staff with depth of experience is a lengthy undertaking. The FTC and many others institutions have been providing technical assistance for well over 10 years in many jurisdictions. What happens after a decade or more has passed, for example, in Indonesia, South Africa, Colombia, and Vietnam? Does the assistance just stop, or is there an "exit" or "graduation" strategy? Does capacity building and technical assistance eventually transition to a continuing-education program and become a way of promoting convergence and facilitating enforcement cooperation on cross-border transactions? Or does the relationship evolve toward cooperation between the US and foreign agencies in cases under common review, as has occurred with, for example, Mexico and Brazil?

31 See generally ICN, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

VI. What is the Measure of Success?

A successful technical assistance program is a long-term endeavor. At the conference for which this article was prepared, Professor William Kovacic said that the appropriate time frame for grading an agency is 25 years. Success is often measured as the ratio between a recipient agency's steps forward and steps backwards. Many agencies that the FTC helped when they started one or two decades ago have evolved into capable and respected agencies with substantial achievements. For example, the FTC and DOJ provided assistance to Brazil's competition agencies when their modern competition law was coming on-stream. More recently, the FTC hosted several International Fellows from Brazil and has continued to provide assistance as needed to address particular topics. Brazil has developed a more efficient merger review system and has taken on high-profile cartel cases. The trajectory, however, was not one of smooth and continuous progress. In the early 2000s, Brazil was widely criticized for its inefficient merger review system. As the Brazilian competition agency matured, its capacity to influence Brazilian legislation to conform to international best practice and its ability to implement its authority soundly grew. Many other jurisdictions, such as Mexico, Colombia, South Africa, and countries across Central and Eastern Europe, show similar achievements.³²

Such progress, however, can be fragile. For example, despite many years of technical assistance in the Ukraine in the 1990s, the FTC is restarting a technical assistance program there with an agency that is emerging from major setbacks. Commentators have also pointed to the difficult position in which the Hungarian competition authority, the GVH, finds itself: "The GVH has become an island in an increasingly incompatible environment in terms of . . . the concept of the liberal market economy as opposed to protectionism, paternalism, over-regulation and rent seeking."³³

What ultimately matters is whether competition is contributing to an economic environment conducive to consumer welfare. A number of factors bear on this of which competition law enforcement is but one. Assessing the effect of competition law enforcement on economic growth is difficult in itself. The role that technical assistance has played—for example, how much has it helped the proponents of competition policies and competition law enforcement that, in turn, brought about measureable economic progress—may defy objective measurement.

The FTC's assistance is just one of the many factors that helped new agencies to improve performance. Other mature agencies and donors also provide assistance. The educational systems of these countries have begun to produce well-trained competition lawyers and economists. In many cases, political shifts resulted in greater political support for needed changes and resources. In addition, over time the new agencies learned from their own experiences, just as the FTC did over the past century. It is probably impossible to isolate the effect of technical assistance from other factors to allow for meaningful quantitative conclusions to be drawn.

32 To be sure, there have also been some failures, for example, because the agency failed to invest in staff, resulting in such rapid turnover that the impact of technical assistance evaporated, agency leadership and/or the government was insufficiently invested in the success of effective competition law enforcement, or mid- or top-level agency leaders restricted their staff's access to the advisors because they were uncomfortable with the advice being provided.

33 Csaba Kovacs & Andreas Reindl, *The Evolution of the Hungarian Competition Regime: Two Decades of Dynamic Change and Continuity*, in *BUILDING NEW COMPETITION LAW REGIMES: SELECTED ESSAYS* 26, 73 (David Lewis ed., 2013).

Given the difficulty of quantitative assessment, the best measure of the success of technical assistance may be to look at the qualitative indicators of a successful agency³⁴ and to examine whether the assistance program has been able to reinforce them effectively. Questions to be asked in such an evaluation might include:

- » Does the agency's work function within the context of an overall national strategy to promote competition and free markets?
- » Are agency decisions to prosecute and adjudicate well-grounded in fact, law, and economics?
- » Are agency procedures transparent and fair?
- » Are sanctions and remedies well-tailored to address the harm at issue?
- » Are agency resources effectively targeted towards the most important competition issues?

In the end, the best measure may be to ask the agency's stakeholders—practitioners, businesses, academics, government officials, and others who follow the evolution of competition policy—whether the agency's work is improving the well-being of consumers. The Federal Trade Commission will continue to ask these questions, and to strive to ensure that its technical assistance program, while fulfilling the convergence and other goals of the FTC, serves the needs of the recipient agencies and their consumers.

34 See, e.g., WILLIAM E. KOVACIC, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY* (2009), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-100-our-second-century/ftc100rpt.pdf>; WILLIAM E. KOVACIC, *From Activity to Accomplishment: Competition Law and Performance Measurement*, 27 *ANTITRUST* 75 (2012); WILLIAM E. KOVACIC, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 *GEO. MASON L. REV.* 903 (2009).