

**LUCKY TRIP? PERSPECTIVES FROM A FOREIGN ADVISOR ON
COMPETITION POLICY, DEVELOPMENT AND TECHNICAL
ASSISTANCE**

WILLIAM E. KOVACIC*

A. INTRODUCTION

My favorite travel document is a boarding pass issued by Air Georgia in the 1990s when I advised the Republic of Georgia on the implementation of its new competition law.¹ Flying to and from Tbilisi usually involved a ride on a fully depreciated Tupolev 154, the mainstay of Air Georgia's fleet. I trusted the Tupolev's rugged engineering but sometimes doubted the maintenance programme that kept it flying.

Air Georgia took various steps to allay these and other concerns of nervous Western travellers. One was the boarding pass. One side of blue and white slip of paper contained a drawing of a smiling aeroplane that soared above a greeting printed in Georgian and English. The English phrase probably translated the Georgian inexpertly, but it did not comfort the anxious. It said "Lucky trip!"

Since the early 1990s I have counselled 15 transition economies on market-oriented economic law reforms. As an academic and government official, I also have attended dozens of conferences, seminars and workshops to discuss competition policy and the role of individual governments and multinational bodies in the establishment of antitrust laws. On many occasions in these endeavours I have asked myself whether the whole business of providing technical assistance has been more than a lucky trip—an excursion in which the foreign advisors capture all the benefits (including exotic passport stamps, colourful stories and publishable paper topics) and the local advisees bear all the risks and only occasionally come out ahead.

* Commissioner, US Federal Trade Commission. On leave from the George Washington University Law School. This article is based upon a presentation on 6 July 2006 in Drapers' Hall at the 6th Annual Trans-Atlantic Antitrust Dialogue convened by the British Institute of International and Comparative Law. The views expressed here are the author's alone and do not necessarily reflect the views of the Federal Trade Commission or its individual members.

¹ This project is described in WE Kovacic and B Slay, "Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia" (1998) 43 *Antitrust Bulletin* 15.

My answer to this question usually depends on where I am in the manic–depressive cycle of a technical assistance project or conference when the question comes to mind. My mental record for each day of a trip has two columns. One is titled “how long can I stay” and the other says “how soon can I go”. After nearly 20 years of experience, the tallies are neck and neck.

This article considers how the global community of donor organisations and technical assistance providers is using the opportunity at hand to foster lasting acceptance of economic liberalisation in regimes that, not long ago, seemed firmly committed to variants of central economic planning. I am convinced that efforts to promote this economic transformation, and to encourage the political liberalisation that is necessary to sustain it, have immense value for developing and developed economies alike. At the same time, I am far less confident that developed economies with the means to facilitate economic and political reforms have either the will to stay at it for the long run or the wisdom to select strategies that are likely to succeed. On the worst days, I fear that inadequate commitments or clumsy implementation will forfeit the possibilities that emerged in the late twentieth century and will haunt us for decades to come.

Choices made in the coming few years will determine whether the pursuit of economic law reform has been a successful journey or an irretrievable disappointment. My theme is that good outcomes require more than mere luck. We expect Air Georgia and other airlines to prosper through effort and skill, not chance. We should do the same with technical assistance. Market-oriented law reforms demand a thoughtful long-term commitment from donors at the national and multinational level and from the institutions they enlist to provide technical assistance.

My comments focus on technical assistance and law reform in connection with competition law. I first discuss what I believe has gone badly with technical assistance and then offer reasons that cause me to hope for better results ahead. This account is personal and anecdotal.² I draw upon episodes from my own work to illustrate phenomena that I also have treated elsewhere in a more technical style. From many conversations with others who have worked on the same or similar projects, it is apparent that my experiences are not idiosyncratic. Although I discuss competition policy, many observations apply fully to other areas of economic law reform.

² I previously have recounted some of my experiences as an advisor on law reform projects, particularly in WE Kovacic, “The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries” (1996) 11 *American University Journal of International Law & Policy* 437 and WE Kovacic, “Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe” (1995) 44 *DePaul Law Review* 1197. Parts of this presentation are adapted from those papers.

B. WHAT HAS GONE BADLY?

When I talk of failure in providing technical assistance, I speak with authority. I have seen some of the worst (and, sometimes, the best) that technical assistance projects can offer. Two pathologies stand out: ignorance of local conditions and an emphasis on short-term projects.

1. Ignorance of Local Conditions

Foreign advisors too often set upon their local advisees with a frightfully weak understanding of what they are dealing with. To study local conditions carefully often means tossing aside the assumptions one accumulates through the course of living in a jurisdiction in which decades or centuries of effort have developed the institutions and social norms that we associate with the rule of law, not to mention a wide base of knowledge in competition policy.

The difficulty of initial conditions in many transition economies is unimaginable to most outsiders from developed market jurisdictions. In a number of instances, the very vocabulary of a system of competition law must be built from the ground up. One of my early experiences working on the design of Mongolia's first competition law taught me that competition law ideas and idioms do not always travel well.³ During a seminar in Ulaanbataar in November 1992, I discussed how merger policy in some countries created "safe harbours" that exempted relatively small transactions from review. As soon as I spoke this phrase, my Mongolian translator tugged on my arm. The metaphor of a safe harbour, she explained, lacks meaning in a landlocked country. Because Mongolia has no ports and many herders, we struck upon "peaceful pastures" as a suitable way to portray the zone of transactional immunity.

When the advisor and the technical assistance recipients have surmounted the problems of choosing the right nomenclature and drafting a statute, massive challenges of implementation lie ahead. One is the physical danger that can confront officials of the competition agency as they carry out routine investigative tasks. In October 1995, I participated in a conference in Kiev convened by Ukraine's Antimonopoly Committee (AMC) for officials from the agency's headquarters and regional offices. One speaker was William Baer, who then was the Director of the Bureau of Competition of the US Federal Trade Commission (FTC). Baer described the FTC's enforcement apparatus and took questions. One AMC attendee asked if, in enforcing the law, Baer ever faced threats to his physical safety. Baer said that even though business managers sometimes disagree vehemently with FTC decisions, the thought that a company

³ The Mongolian competition law project is described in WE Kovacic and RS Thorpe, "Antitrust and the Evolution of a Market Economy in Mongolia", in B Slay (ed), *Demonopolization and Competition Policy in Post-Communist Economies* (Boulder, CO, Westview Press, 1996), 89.

might assault an antitrust official never crossed his mind. For the Ukrainian participant and his colleagues, it was a genuine concern.

On another occasion in the mid-1990s, during a workshop with Russian antimonopoly officials in Novosibirsk, I helped direct a training exercise involving the analysis of a petrol distribution issue. The workshop participants examined range of antitrust issues, including market definition, the identification of improper behavior and the design of remedies. The dialogue was insightful and invigorating, and I was ready in my own mind to score the exercise as a success. At the session's end, one participant warned that we had ducked a big issue. The mafia, he explained, was a major petrol distributor. If the antimonopoly office tried to enforce a decree with real heft, there was a good chance that the head of the regional antimonopoly office might be shot. How, he asked, would I and the other foreign advisors propose to deal with that possibility? Faced with such a brutally hard query, one cannot readily fall back upon the traditional classroom evasions of saying "We'll get to that later" or "What do you think?"

Operating without adequate knowledge of local conditions, foreign advisors have a tendency to provide ill-fitting, off-the-rack solutions imported from cities such as Brussels, Canberra, London, Ottawa, Paris or Washington, DC. In the late-1990s, the World Bank held a conference in New Dehli to discuss the development of competition policy in East Africa and South Asia. At a session on merger policy, a renowned practitioner from North America told the attendees to study the recent court decision in *Federal Trade Commission v. Staples, Inc.*⁴ Oblivious to the circumstances faced by most of the attendees, he emphasised how sophisticated econometric models that used point-of-sale data obtained from electronic scanners had played crucial roles in the Commission's decision to prosecute. During the talk, I sat at the back of the room between attendees from Bangladesh and Tanzania. As he listened to the account of the *Staples* case, the Bangladeshi official leaned over and said with incredulity, "Scanner data? We don't have scanner data." The Tanzanian muttered what sounded to me like "motu noclu". I asked him what "motu noclu" meant. He answered: "Master of the Universe—no clue." No clue, indeed.

2. Impatient, Short-term Orientation

I participated in my first technical assistance project in Zimbabwe early in 1992. Soon before my departure to Harare, I met with an academic who was a veteran of a dozen or so projects in developing countries. As we parted, he offered a final piece of advice: "Always buy your souvenirs on the first trip." In Zimbabwe and in many other countries, I came to learn what he meant. There might not be a second trip, as many technical assistance initiatives evaporated almost as quickly

⁴ 970 F Supp 1066 (DDC 1997).

as they were formed. For many donors, to speak of something being “long-term” meant a project that would run for a year or two.

The penchant for quick hits inspired numerous impractical undertakings. Many a foreign advisor approached these engagements with laughable expectations. In Ulaanbataar in February 1993, I watched a group of American securities lawyers in the offices of Mongolia’s Ministry of Privatisation give a Mongolian official whom I knew a foot-tall stack of paper containing laws and regulations for the securities industry in the United States. The Americans were making their first and only visit to Mongolia and had spent one week in the country. They explained that the materials could serve as models for establishing a new Mongolian securities regulation system.

The ministry official examined almost every page. After several minutes, he told the securities lawyers, “These materials are clearly of high quality and will be very helpful to us. We will put them to good use.” Visibly pleased, the Americans promised to supply more model statutes and regulations if desired. The ministry official accepted the offer and asked that any additional materials be printed on one side only, like the papers just reviewed. The Americans said they would send one-sided copies, shook hands and headed for the airport. Their ebullience indicated that they regarded their week in Mongolia to be a major success.

As they disappeared down a long corridor, I asked my acquaintance what he would do with the securities documents. In my brief exposure to Mongolia, I sensed that the US regulatory regime was hopelessly complex for a country whose newly created stock exchange was open one day per week and traded shares in few companies. “In Mongolia we have a shortage of paper,” he explained. “These advisors have given us high quality paper printed on one side. We will make copies on the other side. These materials are very useful. I hope they send more.” I fear that our competition-law drafting project did not fare much better. It lasted barely one year. No sooner had we completed the drafting exercise, and the Mongolian parliament enacted the statute, the donor pulled the plug. Not a penny was applied to implementation.

Another telling manifestation of the short-term orientation is the donor habit of sponsoring one-off seminars, workshops or conferences. One of my bookcases contains shelves of course material binders whose covers tell the story of one lovely conference site after another: Capetown, Bangkok, Hong Kong, Lima, Paris, Singapore, and the like. From the choice of venues, one might conclude that the donors believed the best place to discuss competition law and poverty reduction was a plush hotel that was the antithesis of poverty. By the end of the 1990s, signs that this exercise had become jaded and unproductive abounded, whether it was the appearance of a transition economy political appointee to attend his fourth basic introduction to competition law, a presenter whose tiresomely repetitive slides still displayed the name of the city of the previous

conference, or a participant who berated a conference organiser for refusing to pay for a ticket in the first two sections of the aeroplane. To these patterns one can add the excessive willingness of donors to approve recipient country requests for study tours that gave short-term political appointees journeys to the finest cities of Europe and North America. In the right dosage, these and related activities serve useful ends, but they count for nothing without a substantial, sustained investment in the hard work that gradually builds the capability of the transition economy competition system.

I have attended many events in which representatives from well-developed market economies lament the inability of a transition economy to achieve substantial results in the first 5–10 years of a new competition law. To acquire the proper perspective, donors and technical assistance providers would do well to reflect on the difficulties that their own systems, with far superior institutional foundations, encountered in achieving successful implementation of their own laws. Consider how one might have rated experience under the Sherman Act after its first decade. The stocktaking in 1900 would have been relatively grim. The Supreme Court had seemed to conclude that a merger to monopoly of manufacturing assets fell beyond the reach of the statute. This ruling, coupled with literalist judicial interpretations that appeared to condemn “all” agreements among competitors, helped set in motion a merger wave of unprecedented size and long-term economic effects. The federal government had not accomplished a single restructuring of the dominant firms whose formation in the late nineteenth century had inspired passage of the Sherman Act. Congress had yet to make a special appropriation of funds to enforce the law, and no special competition agency had been created for enforcement.

To jump ahead in the story, a good case can be made that it was not until the late 1930s and the 1940s, roughly a half-century after passage of the Sherman Act, that the United States made antitrust law a central element of economic policy. A new competition system can learn from the experiences of other jurisdictions, and it need not take five decades to become well established. It is also unreasonable to expect grand results after 5 or 10 years. For donors and technical assistance providers, it should be apparent that the requisite institution building is more like a marathon than a sprint.

C. REASONS FOR HOPE

Despite the disappointments recited above, there are experiences that show how to build effective technical assistance programmes for competition policy and other economic law reforms. I see the possibilities for a continuing shift in emphasis concerning the duration of technical assistance initiatives—from one-off, short-term encounters to longer-term engagements—and the type of

assistance to be provided—a backing away from reliance on individual conferences toward simulations and other skills training that build needed capacity for the long run.

One of the most encouraging trends in technical assistance in recent years is the conscious commitment of effort to take stock of past experience. There is a growing willingness on the part of donors, assistance providers and recipients to engage in constructive assessment of what has worked and where improvements might be achieved. Assessments undertaken by individual jurisdictions and multinational entities—involving donors, providers and recipients—have served to build a consensus about what constitutes effective technical assistance. Most generally, there is a fuller understanding of the importance of implementation issues as crucial features in the design of a competition law and in the establishment, post-enactment of an effective enforcement system. The drafting and adoption of a statute today are widely seen as only the first steps of a much larger undertaking that involves not only the construction of a competition agency but also the engagement of collateral institutions—courts, consumer groups, legal societies, trade associations and universities—that make major contributions to the operation of effective competition systems. Discussions about competition policy today focus increasingly on the crucial role that institutional design plays in determining substantive outcomes, and that the requisite institution building is a slow growth that demands continuing, periodic enhancements for new and old systems alike. This is a major step forward from the period in the 1990s when the index of progress principally was the enactment of the competition law itself.

The improved understanding of competition policy as the function of the operation of a system of interrelated institutional elements and the increased awareness of the importance of implementation concerns stem significantly from the study of newer transition economy systems that have enjoyed success. A particularly informative case is Hungary, whose competition authority is among the most highly respected. Hungary is an illustration of technical assistance at its best. Throughout the 1990s and into the beginning of this decade, the European Union and the United States devoted substantial resources to building the capacity of Hungary's competition agency. For example, the US Department of Justice and FTC programme provided assistance to the Hungarian agency for roughly 12 years. The assistance took various forms, including the use of long-term resident advisors, seminars, conferences, workshops and long-distance consultations.

The vital element of this relationship was its continuity and durability. The repeated interaction built trust between the US advisors and their Hungarian counterparts, and improved the understanding of the US agencies and their chief funding source (the US Agency for International Development) of the needs of the Hungarian agency. Moreover, conferences and related events often

invited participation by other nations in Central and Southern Europe. These gatherings, which featured extensive participation by frontline personnel rather than simply short-term political leadership, provided the foundation for regional cooperation in which Hungary plays a leading role as an advisor to the newest competition agencies and a convenor of events within the region.

The conscious effort to reflect upon and learn from modern experience is showing promising results in other areas. Donor agencies are backing away from one-off events in glamorous venues and instead are placing a greater share of their technical assistance resources into capacity-building exercises that emphasise skills training within a single jurisdiction or within a region. Donors also are spending more money on developing an indigenous research base by funding local universities and think tanks. This trend recognises that the competition system depends critically on the quality of the jurisdiction's intellectual infrastructure and the nexus of universities and other research institutions that train the attorneys, economists and public administrations who will be part of the competition law community.

D. CONCLUSION

In many transition economies, the success of new competition policy systems and other economic law reforms is highly uncertain. Through the intensity and skill of their commitment of technical assistance resources, jurisdictions with well-developed market systems will play a central part in determining the success of these efforts. Having encouraged the adoption of antimonopoly laws as part of economic liberalisation, the developed countries now face major decisions about how to support implementation and by how much.

My hope is that the older market economies approach these decisions with two perspectives. The first is with a sense of faith in, and even optimism for, the capacity of patience, goodwill and the thoughtful, reflective investment of effort to turn events for the better over the long term. Those interested in global affairs readily can point to developments that cast doubt upon this vision, yet we also can see signs—look no further than the improbable realisation of the hopes of Monnet and Schumann—that suggest it is not a delusion.

For all of its frustrations and disappointments, the experience with technical assistance has sustained my faith in the good that can happen in the long run. Since the mid-1990s, on a number of occasions I have had to work, as an academic and a government official, in Vietnam on projects related to competition law. On one visit, my Vietnamese academic counterpart took me to the Red Army Museum in Hanoi. Among the museum's exhibits on the war with the United States was a collection of flight uniforms and helmets of American pilots. The name on one helmet staggered me. Years before, I had

taught a student whose father had died in Vietnam when his fighter aircraft was shot down over Hanoi. The helmet in the display bore the last name of her family.

Perhaps there were other US Navy aviators with the same name. Yet I could not forget the day at graduation when, at the reception after the ceremonies, I heard my student's mother tell her, "Your father would have been very proud of you." My Vietnamese colleague, who had fought and been wounded in the war, could see I was upset and asked why. I explained the possible connection with the former student. He remarked that, for all the sadness, it was also encouraging to think of how two academics born in the early 1950s, one from Hanoi and one from the United States, someday would work together on a project to develop a competition law for Vietnam.

Upon returning home, I wrote to my former student, reminded her of her mother's comment at the commencement ceremony and told her what I had seen. She wrote back that her law practice regularly took her to Asia and that, prompted by my letter, she had visited the exhibit I had seen in the Red Army Museum. "I cannot be certain that it is my father's helmet," she wrote, "but from what I have been able to determine, it probably is." She went on to say "I do lots of work in Vietnam, and I have many good friends in Hanoi. I think my father would be very proud of me."

The second perspective I would hope the major donor jurisdictions would bring to bear upon funding decisions for technical assistance to assist the implementation of competition law is a recognition of obligation. Many transition economies have set out on the path of competition law with the encouragement or at the insistence of countries with well-established market economies. Enduring duties ought to accompany these forms of guidance.

On a project in Nepal 1994, one of my local colleagues joined me to tour a market in Kathmandu. Throughout the day we discussed local commerce, the frustrations of technical assistance programmes and the chances for the consumer protection law we had worked on together. Our final stop of the day was a carpet factory, where my colleague described the origin and meaning of their designs.

The next day, as I left the hotel to return home, the clerk gave me a note my Nepali colleague had left in the morning. Atop the note he wrote: "May the Parliament approve a law as splendid as the carpets." At the bottom was a transcription of the Yeats poem, *He Wishes for the Cloths of Heaven*. The poem reads:

Had I the heaven's embroidered cloths,
Enwrought with golden and silver light,
The blue and the dim and the dark cloths
of night and light and the half-light,
I would spread the cloths under your feet:

But I, being poor, have only my dreams;
I have spread my dreams under your feet;
Tread softly, because you tread on my dreams.⁵

Those who accepted our urging to adopt and implement competition laws and other market-oriented reforms have spread their dreams at our feet. Tread softly.

⁵ WB Yeats, "He Wishes for the Cloths of Heaven", in ML Rosenthal (ed), *Selected Poems and Two Plays of William Butler Yeats* (New York, Collier Books, 1966), 27.