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Working Group on the Interaction between Trade and Competition Policy

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The following communication, dated 19 April 2002, has been received from the Permanent Mission of the United States with the request that it be circulated to Members.

National Experience in Antitrust Law
Technical Assistance: a Ten Year Perspective

I. INTRODUCTION

The Doha Ministerial Declaration specifically recognized "the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building" in the area of the interaction between trade and competition.[1] Among the main areas of focus for further work and clarification in this Working Group, as confirmed by the Declaration, is "support for progressive reinforcement of competition institutions in developing countries through capacity building.[2] This submission describes in detail the US's extensive experience in providing technical assistance in the antitrust area, with the hope that it will encourage a productive exchange of views at the Working Group's April meeting, as well as assist the WTO in helping provide "strengthened and adequately resourced assistance" to developing and least-developed countries, consistent with the mandate of the Doha Ministerial.[3]

Issues of technical assistance and capacity-building have arisen in previous sessions of the Working Group. In particular, during its June 2000 and March 2001 meetings, the Working Group focused on approaches to promoting cooperation and communication among Members (including in the field of technical cooperation), and the United States submitted two papers related to this topic. The first US submission discussed issues involved in establishing an effective antitrust authority and ways in which Members could create a "culture of competition."[4] The second paper focused on administering antitrust laws and the mechanics of setting and pursuing policy goals with limited resources.[5] The Working Group's discussions in these areas should be supplemented by a comprehensive discussion about technical assistance, because many new agencies encounter difficulties in building a "culture of competition," setting policy goals, and prioritizing their antitrust enforcement efforts, and therefore can benefit immensely from properly focused technical assistance.

We now turn to a detailed exposition of our own experience with technical assistance and capacity building in the antitrust area. Our experience suggests, and much of the literature on the

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[1] Doha Ministerial Declaration, paragraph 24.
[2] Doha Ministerial Declaration, paragraph 25.
[3] Doha Ministerial Declaration, paragraph 24.
[4] WT/WGTCP/W/142 (August 3, 2000).
[5] WT/WGTCP/W/164 (June 26, 2001).

topic agrees, that technical assistance programs must take into account the country and culture, local concerns and conditions, and the body of domestic law.[6]

II. SPECIFIC CHARACTERISTICS OF THE US TECHNICAL ASSISTANCE PROGRAM

For nearly twelve years, the US Federal Trade Commission (FTC) and the US Department of Justice's Antitrust Division (DOJ) have provided international technical assistance, funded principally by the US Agency for International Development (USAID), for the benefit of antitrust agencies in developing countries and countries in transition. The program has reached scores of antitrust agencies in developing nations or nations in transition in Central and Eastern Europe, the former Soviet Union, South America and the Caribbean, and South Africa. It is important to note that our technical assistance work begins only after a country expresses an interest in developing an antitrust regime.

There have been four main features of the US program: resident advisors, short-term missions (one-two weeks), regional conferences, and internships in the United States for foreign personnel. Tailored to the specific requirements of the host economies, programs may assist in developing framework laws, creating enforcement agencies, educating supporting institutions (other government agencies, academia, business groups, consumer associations and the press), and training personnel in the substantive legal principles, analytical framework, and investigative techniques needed for the success of a competition law enforcement regime.

The FTC and DOJ use their scarce resources primarily for domestic law enforcement, and cannot make extensive use of their own appropriated funds for technical assistance programs.[7] The US program is managed and directed from outside the domestic law enforcement staff organizational structure. The agencies rely principally on USAID funds to organize programs and pay travel expenses and salary compensation for the time spent on foreign missions. Therefore, the US antitrust agency costs of international technical assistance in terms of personnel are chiefly opportunity costs.

The US program supports foreign policy goals, particularly expanding world trade and lowering barriers to investment. Because USAID is an agency of the US government, its priorities and funding have tracked the most significant developments in our foreign policy in recent years. Also, antitrust law is but one branch of a larger body of commercial law with which states characterized by central economic planning lack familiarity. In securing USAID funding for our activities, we have emphasized the need for an operating effective competition law system within a larger structure of reformed commercial law. In developing this theme, however, we have had to recognize that in many developing or transitional economies there exists no "culture of competition." Our general approach has been first to point out that competition is an engine of economic growth and development, spawning entrepreneurship. Antitrust law and competition policy need to facilitate sound business practices and not impede them.

Our program focuses on the development of sound competition policy principles and institutions, taking account of distinctive national conditions. We recognize that no single model is suitable for all circumstances, and we give considerable attention to establishing institutional capacities that support effective enforcement in established antitrust systems. Many countries use civil law systems, which may require greater specificity than is characteristic of most US antitrust

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[6] E.g., William E. Kovacic, Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement, 77 CHICAGO-KENT L. REV. 101 (2001); Assessing Aid: What Works, What Doesn't and Why, World Bank Policy Research Report; Cohn, Stuart R., Teaching in a Developing Country: Mistakes Made and Lesson Learned in Uganda, 48 J. LEGAL EDUC. 101, 107-108 (1998).

[7] Limited exceptions have occurred in cases where the competition agencies have a direct interest in the success of foreign competition agencies.

laws. For example, the FTC Act makes it unlawful to engage in "unfair methods of competition in or affecting commerce," leaving to the agency and the courts the delineation of such "methods." A civil law country requires more specificity, and we adjust our advice accordingly. Likewise, we encourage other nations to solicit the views of others, particularly the European nations that aspire to membership in the European Union.

Although our programs are adapted to the different legal environments in different countries, they focus on the three types of conduct that characterize most competition laws worldwide: anticompetitive agreements, especially cartels; single-firm conduct, referred to as "monopolization" in the US and "abuse of dominance" in many other countries; and anticompetitive mergers and acquisitions. We do not purport to be policy planners in terms of suggesting which industries or factual situations should be investigated. We do not profess specific knowledge of other nations' conditions, and we have no preconceived notions of what enforcement priorities should be set. Nonetheless, our experience informs us in ways that may have value to the recipients of our technical assistance.

- For example, we frequently suggest that countries consider cartels the most important component of the law. Cartels result in unambiguous harm, and do not require detailed economic analysis. An enforcement authority might benefit from choosing a factual situation involving a consumer product with a suspiciously high price that is uniform among competitors within defined geographic regions. An antitrust case by a new authority in a developing country that results in lower prices to everyday consumers can demonstrate the value of competition and competition law enforcement to the public and to the other institutions, inside and outside the government, that are interested parties in the results of the reform process.

- In the monopolization/abuse of dominance area, a focus on increased prices that are not cost-justified by an alleged monopolist or dominant firm may be of less competitive significance than whether barriers to entry into the market exist, and whether incumbent firm behavior helps maintain those barriers. We have often suggested that abuse of dominance theories could usefully be used to attack barriers to entry and have counseled against selection of enforcement targets based on dominance or pricing criteria alone.[8]

- Mergers and acquisitions are the most complex types of investigations and the least likely to be an enforcement priority in a developing country. Such investigations are quite resource-intensive when done properly and can divert the scarce resources of a new antitrust authority from more pressing matters. Nonetheless, most new competition agencies do review mergers, so in those cases we suggest sensitivity to whether competition concerns rather than political and social concerns inform the analysis. All too often, a proposed acquisition is seen as a threat to incumbent firms or employment, rather than something that might enhance efficiency, increase consumer welfare, and expand output in the long run. Concerns about employment or the closing of antiquated facilities may be a political reality, but sound competitive analysis is essential in all merger reviews.

Finally, we are mindful of the simple fact that government and laws often insulate markets from competition. Here we would look to the host authority to examine such realities, either as an enforcement matter or, more likely, as an advocate of procompetitive policies. The idea of promoting

[8] Particularly troublesome have been cases based on legislation that declares "excessive" prices to be an abuse of dominance. Some agencies have been tempted to use this as a vehicle to impose "back-door" price regulation in response to rising consumer prices.

competition advocacy also readily lends itself to larger issues, such as privatization policy and whether, and how, to reform policies towards regulated industry sectors of the economy.

Over a century we have accumulated many effective and creative investigative techniques. It is this experience that we seek to impart to the recipients of our technical assistance. We have seen there is a strong desire to identify practical, operational criteria by which general substantive directives (e.g., "don't fix prices") are translated into enforcement initiatives. We provide that know-how in great detail.

III. THE EVOLUTION OF AN ANTITRUST TECHNICAL ASSISTANCE PROGRAM

Our competition law and policy technical assistance program has had a clear evolutionary pattern. It began around 1989, when the state-controlled economic systems of Central and Eastern Europe began to give way to market-based systems. Nations in the region began to change their economic systems and commercial dealings. Antitrust law is only one building block of a functioning market economy, and as such can only be accomplished as part of a more complex reform process.[9] In the initial transition period, antitrust law took a back seat to more immediate reforms, such as macroeconomic reform, banking, and privatization. The need for antitrust law reform was predicated on a functioning free market economy, which was lacking at the outset in most cases. Host countries and the US agencies addressed competition issues some time after reform efforts began. Once this happened, we sometimes were asked to advise on drafting antitrust laws and related issues.

A. ASSESSMENT OF THE ECONOMIC AND POLITICAL ENVIRONMENT

We offer technical assistance only after a nation has indicated that it wishes to adopt antitrust laws and policies. We first assess the political and economic environment. In some cases, this begins with a high-level visit to the host country. Indeed, the FTC Chairman and the Assistant Attorney General or one of their deputies participated in the early assessment missions. The importance of competition law and policy may be unfamiliar to governments where the challenges of competition among enterprises is a new experience. Visits by senior US officials helped focus high-level attention on the need for effective competition laws and policies, both in the host countries and in the US foreign assistance establishment.

During an initial assessment, we seek to learn more about the national political and economic historical experience, the principal bilateral and multilateral political and economic relationships, the political system and how it is held accountable, the extent to which private property is recognized and protected, the level of privatization, the degree to which the legal system supports civil society goals and the rule of law, and the main requirements for economic development and expanded trade. Recognizing the need for competition law to fit within a larger structure of commercial laws, we also assess the extent of compliance with internationally recognized standards of laws governing contract corporate governance, securities, bankruptcy, collateral rights, foreign investment, and trade.

Some components underpinning an antitrust regime are outside of our experience. We have little experience in dismantling centrally-controlled economies and reconstructing systems based on market principles. Developing standards of corporate governance and privatization are outside our direct experience. In such situations, we offer coordination with others with relevant experience. In some countries, useful liaisons have been established, for example, with the American Bar Association's Central and East European Law Initiative program.

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[9] USAID's Europe and Eurasia Bureau, as part of its Commercial Law and Associated Institutional Reform (C-LIR) project, has produced since 1999 a series of Diagnostic Assessment Reports for various formerly Communist countries. These reports show relative progress in seven areas of commercial law, including competition law, in terms of the development of framework laws, implementing institutions, supporting institutions, and the creation of functioning "markets" for each commercial law.

These initial assessment missions determine the host authority's needs and help target long-term assistance accordingly. For example, if an authority is well-staffed with economists but has few trained lawyers, we might offer the host authority a lawyer. In two cases, our assessment indicated the authority spent its resources primarily on consumer protection matters, so the long-term assistance teams included attorneys with consumer protection experience.

B. DRAFTING FRAMEWORK LAWS

In the past ten years, our agencies have examined and advised on the drafting or redrafting of around 50 laws. Domestic law enforcement experience, coupled with experience in observing what works and what does not work in transition economies, gives us a unique perspective in helping to draft antitrust laws. As a result of our experience, we are able to critically assess several discrete areas of legal drafting: forging definitions of the conduct being addressed, helping formulate the legal requirements for competitive injury, fashioning remedies, and helping design the enforcement infrastructure.

While countries planning to draft competition legislation often find no shortage of competent assistance in drafting the substantive provisions, we have found that legislation drafted without input from antitrust agencies often overlooks some important practical issues. Examples include:

- Failure to provide effective remedies for refusing to cooperate with legal requests for information. Antitrust laws typically provide that the antitrust authority may compel production of necessary documents by businesses. They do not always provide clear guidance as to what the authority may do when its request for documents is rebuffed. In addition, many laws provide only for fines of a determinate amount as a sanction in such cases. In the absence of more effective remedies, companies may choose simply to pay the fine as a cost of doing business.

- Failure of institutional design. In some jurisdictions, for example, the term of each member of the multi-member body responsible for the application or enforcement of the antitrust laws expires at the same time. This can lead to a loss of institutional continuity if all members are replaced simultaneously.

- Failure to take into consideration the relative strengths and weaknesses of antitrust authorities and the judiciary. In some systems, the judiciary is given a role in all cases but lacks adequate training and experience. Judges may have difficulty with the unusual role of deciding cases based on likely future market effects as opposed to the more familiar task of judging past conduct. In other systems, antitrust authorities are empowered to decide cases, but lack effective power to impose remedies and sanctions. It can be difficult to strike appropriate balances between bringing the authority's expertise to bear, imposing effective remedies, and ensuring fairness through independent review.

- Failure to provide for prosecutorial discretion. Some laws can be interpreted to mean that the authority is required to address every complaint, no matter how minor or ill-founded. This can lead agencies to waste time on cases that should never have been opened or, worse, to be used by weak competitors who wish to use the competition law against more efficient competitors.

- Failure to provide appropriate and realistic deadlines for official action. If an antitrust authority is forced to reach a decision before it can conduct an adequate

investigation, the result may be ill-informed; conversely, overgenerous deadlines may result in unneeded delay to business.

- Failure to appreciate institutional demands created by legislative mandate. A merger notification program with unreasonably low reporting thresholds may result in a new antitrust authority being overwhelmed with notifications and having no time to analyze them, let alone address the potentially more serious cartels or abuses of dominance.

Problems such as these can be avoided if pragmatic assistance is provided during the drafting process. We do not recommend particular legislative outcomes. Instead, we advise the drafters on past experience and the implications of choosing one course of action over another. We provide options and identify the possible benefits and consequences of the choices under consideration.

C. CREATING IMPLEMENTING INSTITUTIONS

In a similar vein, we can assist officials responsible for setting up an antitrust authority. Typically this is done through short-term missions before the authority is created but after the country has decided to establish an authority. This work can also be done on an ongoing basis by long-term advisors, especially those who are present during the early days of an authority's life.

Internal operating procedures, authority structure, and internal guidelines can have a significant impact on the quality of an antitrust authority's work. Institutional issues include matters such as who holds the power to initiate investigations and to make decisions. Who within the authority will have the power to compel testimony and require documents? What form will staff recommendations take, and will they be subject to any sort of critical internal review before being presented to the decision-maker? What means will be used to assure the independence of decision-making? What will be the authority's advocacy and public education functions, and what measures will be in place to ensure that its voice is heard? What will be the organizational and procedural rules, and how transparent will they be? What is the appropriate staff skills mix, authority size, budget, and technical support systems? What should be staff educational requirements and how can appropriate training be implemented? Authorities are often reluctant to revisit these kinds of procedures once they are in place.

The United States has two successful models of government antitrust law enforcement, as well as a number of specialized regulatory agency models (such as the Federal Energy Regulatory Commission) where competition considerations are at least part of the regulatory policy analysis. While we do not suggest that the US dual agency system should be emulated, that model (an executive department and an independent agency) possesses a pedigree that traces to 1890 and 1914, respectively. In addition to the agency model, the US has developed a strong and independent judiciary, both at the trial and appellate level. Consequently, years of experience – of trial and error – inform our message.

D. EDUCATING SUPPORTING INSTITUTIONS

An antitrust authority cannot function in a vacuum. For it to do its job, there must be other institutions in place that understand the role of competition in a market economy.

- At the most fundamental level, this includes the legislative branch. The US agencies are accustomed to explaining their positions to Congress, and can offer advice as to how agencies can formulate their message to their legislators.

- Agencies that regulate natural monopolies, real or imagined, must understand the role of competition and not merely compare input costs with final prices.

- At some level, the work of antitrust agencies intersects with that of the courts, whether for adjudication of cases, for judicial review, or for enforcement of orders. Judges may not have any training in competition law, and without adequate training may be unwilling to uphold even the soundest decision of an antitrust authority.

- Linkages exist between competition and consumer protection, and if the antitrust authority does not itself handle this function (as the FTC does in the US), an antitrust authority should have a healthy relationship with the consumer protection authority and both should understand that consumer protection should complement, not replace, competition in a market economy.

Our working experience in building and maintaining these kinds of relationships with related institutions in the United States, as well as with our counterpart institutions at the state and local level, helps us to counsel the need for such relationships elsewhere and to convey the techniques for building them.

Support for competition policy also needs to come from non-governmental institutions. This can be done, for example, by encouraging appropriate economics and law course development. In the US, the antitrust agencies have found it useful to maintain healthy dialogues with bar and consumer associations and business groups. Finally, public education through the media also plays a critical role. We work to encourage competition agencies to develop these relationships and educate these institutions, and on occasion directly assist those efforts.

E. PUTTING THE PIECES TOGETHER: CREATING A WORKING MECHANISM FOR EFFECTIVE COMPETITION LAW ENFORCEMENT

These groundwork steps lead up to the final and most significant stage of competition law development: creating an effective functioning antitrust authority. Once a law is drafted and an enforcement entity created, the most difficult work is to help train new agencies to apply the law: to conduct investigations, to select appropriate enforcement targets, to shape prosecutions, and to craft remedies. Success in accomplishing this work is the basis for judging the success of an antitrust regime, and is one of the most difficult undertakings by our domestic agency staffs. Our inherent strength as antitrust agencies is in assisting staff to develop the skills necessary to identify cases where antitrust authority intervention might benefit the development of a market economy and to develop the skills necessary to investigate those cases, analyze the results, and develop appropriate remedies. This is a long process. At the FTC and DOJ, experienced antitrust lawyers and economists rarely begin with skills fully developed. They acquire skills, techniques, and judgment from more experienced attorneys and economists over many years. It should not be surprising that staff at new competition agencies need the same thing, and experienced antitrust enforcement staff from other agencies can help fill that gap.

Many skills need to be imparted. How do staff members identify promising potential cases, and perhaps as important, how do they identify those that should be quickly closed? What elements must be proved to establish a case? What information is needed to satisfy those elements, and what might suggest that the case should be closed? Where can that information be found, and how can it be obtained? What are the evidentiary standards required by the decision maker, and how may it be ensured that the information gathered will satisfy those standards? What remedies are appropriate, and what will be their impact on the marketplace? How should the results of the investigation and recommendations be presented to the decision maker? How can investigations be effectively supervised and reviewed to ensure that the right issues are identified, investigated, and discussed and

time not wasted on superfluous issues? The list goes on. Given the high turnover in personnel, our biggest challenge is as much the teaching of skills to individual staff members as the creation of a knowledge base that will survive turnover.

We have learned that different legal and political environments produce unique challenges. The need to explain the rationale for government action may not be obvious in countries that used to rely on state coercion to implement government policies. Finally, the idea that the bottom line matters can be as difficult to inculcate abroad as it sometimes is at home. It is easy to believe that success can be measured by the number of cases brought or the amount of fines levied. Perhaps the most critical skill we try to impart is the skill of judging success by the degree that competition improves the condition of a country's consumers.

Our advantage in skilled professional human resources is thus brought to bear in a program that stresses long-term resident mission advisors and targeted short-term work including regional conferences. We turn next to a discussion of those two basic components of our program as well as of other techniques we have tried and assessed.

IV. LONG-TERM ADVISORS

In our experience, placing advisors in antitrust agencies on a long-term basis is the most effective way to effectuate the goals of technical assistance.[10] No amount of lecturing, simulation exercises or retrospective case analysis can better train staff while promoting development of a competition culture than having advisors present to work with the staff on their own investigations utilizing the actual mechanisms and procedures of their own laws and agencies. Only by being there over a sustained period is it possible to learn what the authority's true needs are. Antitrust authority officials may be unwilling, or indeed unable, to identify their needs and shortcomings to those they do not know well and trust. There is no substitute for engaging staff at that point in an investigation when their energies and attention are intensely focused on a given issue and they are most motivated to learn — what some have called "the teachable moment." Having an advisor on the scene at those times is ideal, from the point of view of pedagogy and learning. Advisors who have become familiar with a country's antitrust law and institutions and market developments can also give much more focused counselling. Moreover, a long-term presence helps develop personal relationships, respect and rapport, which are essential to the development of trust.[11] Over the course of time, resident advisors earn the respect, trust, and confidence of foreign agency staff, who are then more likely to solicit, listen to, and implement their advice. Only when a relationship of mutual trust develops will advice, no matter how well informed, be absorbed and applied. These relationships often continue long after the advisor leaves a country, are especially strong among fellow law enforcers, and lead to informal consulting among peers.

Our experience has been that technical assistance programs operated by experienced antitrust authorities are particularly effective because they are able to draw on their own long-term expertise in the investigation, prosecution, and, in some cases, adjudication of competition matters. The career legal and economic experts the US agencies send on long-term technical assistance missions are expert in the practical and analytic skills that are most likely to be lacking in newly formed competition agencies. In our view, the strength of the current US program is its ability to provide human resources to strengthen the ability of new competition agencies to investigate and resolve competition cases in a way that supports the development of functioning market economies.

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[10] *See also*, William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A Preliminary Assessment, in* ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 537 (Barry Hawk ed., 2000, Ch. 23) ("The best assistance programs are anchored by the presence of long-term advisors who reside in-country and work directly with the host country's policy officials").

[11] *See also* DevTech Systems, Inc., Final Evaluation of the Federal Trade Commission and Department of Justice Component of the Project on Competition Policy, Laws and Regulations 7-9 (Jan. 24, 1996).

A. GENERAL DESCRIPTION OF LONG-TERM PROGRAMS

The US began sending its personnel on long-term missions in 1991, soon after the former Warsaw Pact countries set out to form free-market economies. With the exception of Argentina and South Africa, most of our long-term missions have been to former socialist countries. The missions have run from three months to three and a half years. Our first advisors were to Poland (3.5 years) and Czechoslovakia -- later the Czech and Slovak Republics (2.5 years), followed by Hungary (4 months) and Bulgaria (10 months). Subsequent long-term missions were sent to the Baltic nations of Lithuania, Latvia, and Estonia (14 months), Russia (7 months), Ukraine (1 year), Romania (3.5 years), Argentina (3 months), and South Africa (so far 2.5 years). Typically, an individual advisor's residency overseas lasts between six months and a year. Rotating teams of advisors account for the length of some missions.

We staff these missions with one or two experienced staff members. When the US agencies can fund a team of two, we strive to have a lawyer and an economist, one from each agency. They live in-country and work on a daily basis within the offices of the institution responsible for implementing competition policy, supported by a capable interpreter.[12] We have on occasion extended our resources by having advisors travel on a regular basis from a home base in one country to a nearby country. Long-term advisors in Lithuania, for example, commuted to Latvia and Estonia; more recently, an advisor in Romania commuted regularly to Bulgaria.

Advisors review and comment on both the substance of matters under investigation and the investigative tools that are being used. In some agencies, they have also counselled the decision-making body or authority head. In so doing, they help develop decision makers' capacity to identify the outcome determinative facts and issues. While US agency personnel perform an active advisory role, they do not actually conduct investigations or argue the merits of cases, nor do they counsel particular outcomes. Instead, they help identify options and the strength, weaknesses, and likely consequences of the various choices under consideration.

B. ASSISTANCE TO INVESTIGATING STAFF

Some of long-term advisors' most important work is imparting experience to the investigating staff. These staff can be very short on experience both in practical skills such as investigational skills and, in many cases, the relevant substantive areas of law and economics. When the long-term advisor programs began in the early 1990's, few of the staff at the agencies we worked with had any training in competition law or industrial economics.

Long-term advice on the practical application of these new concepts helps build on and coalesce some of the fragmented knowledge that the staff picks up from other sources. The guidance of seasoned lawyers and economists is needed to understand what these concepts mean in the real world and to apply them correctly. For example, it is one thing to know that there is such an idea as a small but significant non-transitory price increase resulting from a lessening of competition, but it is quite another to learn how to ascertain whether it might result from a particular transaction.

Often a long-term advisor extends his or her own reach by calling on the US-based resources of the FTC or DOJ when confronted with a specialized problem outside of his or her own experience. Specialists at FTC and DOJ are easily consulted by telephone or e-mail, and can send written

[12] The importance of the interpreter's role cannot be overstated. In most countries we hire an interpreter who usually remains with the program throughout, and who becomes a full-fledged member of the team, not just translating, but helping us understand the basis and context of a concern or question. The interpreter, as a fellow national, often becomes a conduit for news and identifies issues needing our help about which we might not have been approached directly.

materials as needed. In addition, as discussed below, long-term advisors can identify and coordinate short-term missions by industry experts from Washington.

C. ASSISTANCE TO DECISION MAKERS

When cases reach the decision-making level, long-term advisors often review staff's memoranda and recommendations. They meet with the authority head or council members to discuss the matter and make suggestions. In some countries, advisors prepared confidential written analyses for decision makers. In some countries staff attended council meetings and were even asked to contribute to the discussion of the case.

Participation in an authority's proceedings at this decision-making stage helps to ensure that decisions have a solid basis in the findings of fact, that the orders and remedies, if any, are effective, and written decisions are well-reasoned, useful, and enlightening. Because he or she comes from an enforcement authority with a long experience, a long-term advisor can give the new antitrust authority the confidence to make the difficult but necessary decision. For example, senior antitrust authority officials may be reluctant to reject a staff recommendation and close an investigation after a lengthy investigation has proved nothing. Advisors can confirm for them that taking no action can itself be a successful outcome. Through experience garnered over time, advisors can see problems with imposing remedies that are effective in the short-run, but anti-competitive in the long-run. They can point out problems with remedies that limit price increases or prevent labour-cutting and other cost-cutting measures, remedies that ultimately can restrict, rather than promote, competition. The advisor can, for example, provide useful assistance to decision makers who face political pressure to keep prices down or to prevent multi-national corporations from absorbing hallmark national industries. The role of an antitrust authority in these social issues should be limited to an analysis of the competitive consequences. The long-term advisor is strictly neutral with respect to issues that fall outside the scope of the law or economics of competition. The very fact that the advisor has nothing to gain or lose by the decision makes his or her own advice all the more valuable.

V. SHORT-TERM MISSIONS

While we have found that the use of long-term advisors is the best way to provide technical assistance to new competition agencies, there are occasions when the use of short-term advisors is an effective tool. We have found that short-term advisors are effective in the legislative drafting and institutional design stages, discussed above, in targeted support of long-term missions, and for conducting interactive investigational skills workshops. On the other hand, our experience has shown that they are rarely as effective as the type of assistance we can provide through long-term advisors.

A. TARGETED MISSIONS IN SUPPORT OF LONG-TERM MISSIONS

Short-term missions have a role in support of long-term missions. They can supplement and extend the skills of the long-term advisors once they are in place, and can provide follow-up assistance after a long-term mission ends.

Although the long-term advisor will doubtless have his or her own areas of specialized expertise, the long-term advisor is necessarily an antitrust generalist and cannot be expert in all of the disciplines of antitrust. When an important issue requiring specialized expertise arises, we have found that sending someone from FTC or DOJ with the appropriate expertise can make a big difference. For example, one antitrust authority we assisted was confronted with a highly controversial privatization that was subject to merger review. Highly vocal opponents of the merger claimed it would result in the loss of tens of thousands of jobs; proponents argued that blocking it would result in loss of investor confidence. There was significant pressure on the new authority to "get it right." The long-term advisor had never handled a case involving that industry, so we sent an economist with experience in the industry to assist the authority in conducting a rigorous market analysis. After our

long-term advisor leaves, there are often significant unfinished projects. Follow-up short-term missions by the long-term advisor can help complete the work.

B. INTERACTIVE REGIONAL TRAINING PROGRAMS

We have also used short-term missions successfully to conduct interactive investigational skills training workshops based on hypothetical cases. We have developed hypothetical cases that would present a panoply of issues one might expect to encounter. One involves a hypothetical merger; one involves a possible abuse of dominance (or monopolization); one involves a suspected cartel agreement; and one involves deceptive advertising.[13] In these exercises, participants are initially presented with some background information and the kind of document that might trigger an investigation in the real world: a competitor or consumer complaint or a pre-merger notification. Participants are then guided through the identification of appropriate issues for investigation and the formulation of an investigational plan.[14] Under our guidance, they formulate a document request. This, in turn, results in purportedly responsive documents (prepared in advance) being produced. Simulated interviews are conducted. Interspersed with the practical exercise are lectures on investigational skills based on our staffs' own experience. Participants from numerous agencies have told us that these seminars are of great value because they convey real-world investigational experience in the context of an actual case. These interactive exercises were designed by experienced former long-term advisors with extensive domestic experience and expertise with the type of investigation at issue. They are designed to approximate, as closely as possible, actual investigations that antitrust enforcement staff anywhere might encounter. We have modified each "case" to fit the facts of the countries in which they are employed.

Our most successful training exercises have been conducted on a regional basis. Given the high turnover in personnel, it is difficult to ensure that technical assistance is learned and retained over time, but we believe that regional approaches to assistance are a measure of assurance that countries continue to learn from each others' experiences. Regional conferences have permitted the sharing of experiences and a broader approach to conveying the most important message, which is how to conduct an actual competition investigation. In particular, regional programs create other synergies that ultimately lead to more effective law enforcement. They promote regional networking. Staffs often receive little opportunity to meet with their counterparts in other countries, and in some cases, contacts formed at regional conferences have led to cooperation on investigations. We have also structured conferences so that more advanced agencies in the region can develop mentoring relationships with less experienced agencies, such as by co-hosting events with the US, and offer approaches that are indigenous to conditions within a region. This has recently been undertaken, for example, in Hungary with respect to Southeast Europe. At the end of the conference, participants leave with a full set of materials so that they can present the hypothetical case in their own offices.

Larger international conferences, while generally successful substantively and ideal for creating networking opportunities, have proven more cumbersome and less cost-effective than regional conferences. Between 1992 and 1995, FTC and DOJ co-hosted four large international antitrust conferences in Vienna, and the FTC conducted an additional program devoted to consumer protection. These events were attended by delegations from as many as eleven nations. Materials were translated into each language, with oral presentations simultaneously interpreted in each language as well. As many as ten US representatives formed the faculty, and the teaching materials were of a fairly high order of sophistication, including brief hypothetical cases illustrating what to look for in investigations of specific suspect conduct. While we were pleased with the results of the

[13] The FTC has broad jurisdiction over the U.S. consumer protection laws, including those directed at marketing fraud and deceptive or false advertising and can offer technical assistance in those areas as well.

[14] *See also*, William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A Preliminary Assessment*, *supra* n. 11 (advantage of short-term missions focused on hypothetical cases and role playing).

conferences, we no longer are able to justify these activities. If done properly, they are extremely expensive, costing several hundred thousand dollars each. In today's environment, the amount of money needed to stage a large international conference is almost as much as the cost of a resident advisor and supporting short-term missions for a year. Our own experience has been that the resident advisor program is a better value, given scarce resources. It is also difficult to measure the lasting effect of what may be taught at a week-long conference. There are more effective delivery systems, such as interactive case analysis, for short-term missions.

C. OTHER SHORT-TERM MISSIONS

In some countries, budgetary limitations or the desires of the host countries have prevented us from using long-term advisors, and we have attempted to rely exclusively on a program of short-term missions instead. While these have proven of some use in limited circumstances, they have generally not proven an effective substitute for long-term advisors.

Short-term missions of this sort tend to focus on lectures and, in some cases, the presentation and discussion of ongoing cases. Lectures, however, tend to focus on theoretical or general themes which cannot be readily transformed into real-world applications. Moreover, visiting lecturers are not always as familiar with certain key aspects of a developing country's legal system and can therefore have a difficult time adapting and interpreting concepts in ways that make sense. Short-term experts without technical assistance experience cannot be expected to absorb these nuances immediately, and we have found that experts who demonstrate ignorance of them quickly lose credibility.

There are two types of short-term missions that we believe are worthwhile: case analysis seminars (such as those sponsored by OECD) and national-level conferences during the pre-legislative stage. We have participated in case-analysis seminars in Vienna, Ukraine, Russia, and Brazil, and have found that by bringing together antitrust agency working staffs from various countries to present and analyze cases of their own, with participation by more officials from more experienced countries, real educational synergies occur. Antitrust authority staffs from developing countries can be each others' toughest critics.

Antitrust conferences that are held at the national level during the pre-legislative stage are also quite useful. During these conferences, local and foreign experts are able to discuss the pros and cons of enacting antitrust legislation in a constructive format. Examples include the UNCTAD-hosted conferences in Egypt during the late 1990s and the OECD conferences in Mexico during 1994.

Another situation in which stand-alone short-term missions have proven valuable is when a relatively advanced antitrust authority correctly identifies an area in which its expertise is deficient and asks for focused help to remedy the deficiency. In those cases, we can dispatch a lawyer or economist with experience in the area that has been identified and can provide useful help. Recently, for example, we received a request from a moderately advanced authority that we help it learn how to analyze bank mergers. It was confronted with several such mergers and realized that its understanding of the analysis was incomplete. The assistance of a DOJ banking expert was well-received and useful.

VI. INTERNSHIPS AND STUDY VISITS BY FOREIGN PERSONNEL IN WASHINGTON, D.C.

The original US program included funding for internships in Washington for teams of employees of foreign competition agencies. The theory of such internships is that by working beside US counterparts, foreign representatives could learn first hand how the US agencies do their work in actually conducting investigations. In practice, this proved not to be feasible because of the US confidentiality laws that protect many documents, testimony, and interviews obtained in investigations from disclosure to persons not on the US agency's staff. The US hosts were left with

arranging a series of lectures and discussions that may have had some worth because of the relatively large human resource base that existed in the Washington area.

Internships are very expensive because of travel and per diem costs, and require a good understanding of English to work best. The actual US experience in the mid-1990s was that some of the most able interns did not remain long at their sponsoring agencies upon their return. In programs where funds are limited, there may be more cost-effective forms of assistance.

Our current approach is to host visiting delegations who have been funded outside the USAID programs administered by the US agencies, and to divide the visitors' time between our agencies for usually no more than a week each. Each authority offers a series of presentations by a diverse group of experienced people, who describe their work and their role in the larger enforcement picture. We leave plenty of time for questions, which is one way to direct our advice to real world problems of concern to the visitors.

VII. CONCLUSION

As the United States has explained in prior meetings of this Working Group, a WTO Member's decision to enact an antitrust law is only the beginning of a long and complex process of resolving the policy and practical issues in legal drafting, institution building, and making the new law meaningful through the authority's action. New antitrust agencies are likely to encounter difficulties as they face these challenges, and can benefit from technical assistance provided by more experienced antitrust authorities. The US hopes that this paper's presentation of the details of our program, as well as our experience with various methods of technical assistance, will assist the Group in its discussions of technical assistance and capacity-building and help the WTO in its mandate to help provide for strengthened assistance to developing and least-developed countries in this area.