The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries

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The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries

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Dr. Michal Gal

Introduction

The number of developing countries that have adopted a competition law has grown exponentially over the past two decades. Often the passing of a competition law has been treated as one of the cornerstones of the liberalization and pro-market reforms that have swept many developing countries. Yet the mere adoption of a competition law is a necessary but not sufficient condition for it to be part of market reform. Just as ecological conditions determine the ability of a flower to bloom, so do some preconditions affect the ability to apply a competition law effectively. This study seeks to identify the ecology of antitrust in developing countries: the soil, sun, water and pesticides of competition law adoption and enforcement. In particular, it analyses the socio-economic ideology (soil), the institutional and organizational conditions (sun and water), and the political economy conditions (pesticides) that are necessary for competition law to bloom. It does so based on a theoretical framework as well as by analysing the experiences of several jurisdictions in adopting a competition law at different stages of development and with differing socio-economic ideologies. As will be shown, the ideology of policy makers must strongly support a pro-market reform for competition law to have a significant impact on markets. The section also highlights the two-way interaction between competition law enforcement and competition policy in developing countries. As will be argued, the competition authority has an important role to play in creating a competition culture. It can do so, inter alia, by advocating the creation of pro-competitive conditions to regulators and the general public and by enforcing the law to limit private barriers to trade, thereby exemplifying the benefits of antitrust.

The third section focuses on the political economy of antitrust. It delineates possible challenges to the adoption of a competition law in developing countries. As will be argued, competition law is susceptible to political influences given its non-sector-specific and long term nature. It is thus necessary to adopt pesticides, either internal or external, to overcome such obstacles. Such pesticides will also be analysed.

The fourth section focuses on the organizational and institutional preconditions for antitrust enforcement. As Richardson observed, firms will commit their investments and productive resources into production activities, as long as they have a reasonable expectation of obtaining a return for their investments (Richardson 1960). Such assurance depends not only on one’s competitive advantage but also on the existing institutional setting, which determines the actual enforcement of laws, including those limiting the creation of private barriers to trade (De Leon 2000, 14). To ensure credible and impartial enforcement, the institutional landscape should provide the enforcing bodies with efficient and effective tools for enforcing the law and for educating market players in its provisions and its benefits. It should also reduce the motivations of the enforcing bodies to make decisions that favour specific interest groups. The section will analyse the necessary institutional preconditions to achieving such goals, with a special focus on developing countries.

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1 I wish to thank Tal Sheratzky and Boris Sherman for their most helpful research assistance.
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3 Until 1990 only 16 developing countries had a formal competition policy. With encouragement and technical assistance from international institutions, 50 countries have completed legislation for competition laws in the 1990s, and another 27 are in the process of doing so (Singh, 2002, 6).
Clearly, the themes of this paper are interrelated. The political economy of antitrust affects the existing socio-economic ideology, and the institutional features of the enforcing agencies will affect their ability to educate the public in the benefits of competition law in order to create a competitive culture. Yet the somewhat sterile differentiation between the preconditions for antitrust enforcement serves an important function by enabling us to place a spotlight on each of the components of the ecology of antitrust.

It should be emphasized from the outset that this paper does not seek to answer the question whether competition policy is an optimal tool for promoting the economic and social objectives of developing countries. It is based on the assumption that the answer to this question is positive, at least to a considerable degree. Yet, it does seek to answer the question what preconditions must be present for a competition law to apply in practice.

I. Why focus on developing countries? Identifying the challenge

Developing countries pose unique and interesting issues for competitiveness and competition law enforcement. Their low level of economic development, which is often accompanied by institutional design problems and complex government regulation and bureaucracy, creates real-world challenges that have to be recognized before the successful implementation of an antitrust regime. The experience of many emerging competition authorities underlines the importance of identifying the specific challenges developing countries face in adopting and enforcing competition law as part of an overall public policy mix in pursuit of economic development.

The role of competition law has arisen in response to the privatisation and liberalization movements that have swept many developing economies in the past two decades, which have been spawned by technological, economic, political and ideological forces. To enjoy the benefits of liberalization, however, an appropriate regulatory framework must be put in place. Otherwise, private barriers may simply substitute governmental barriers to trade, an outcome which might prevent improvements in social welfare. Trade liberalization alone does not necessarily lead to more competitive markets. An important share of economic activity in developing countries relates to non-tradable goods and services (e.g., electricity, financial and legal services), which are only marginally exposed to international competition (Correa 1999, 368-9). Moreover, trade liberalization may sometimes exacerbate the need for competition law, as the liberalization process has entailed in many developing economies the displacement and closing down of many small and medium local enterprises, and has led to market dominance of a few firms through unilateral or coordinated conduct (Khemani 1996, 107). If such markets are not subject to constraints on private limitations to competition, companies might not be able to take advantage of competitive opportunities and social welfare might even be harmed (UNCTAD 2000, 12).

Moreover, the need for competition laws has increased due to the globalisation and the changes it has brought about at the international level, including the gigantic cross-border merger movement of the 1990s (Singh 2002; 9; UNCTAD 2002a, 17). Developing countries might be significantly affected by the monopoly power of large international firms, exercised either unilaterally or collusively, if such power is not properly regulated (UNCTAD 2002a, 11). Competition law is thus an important part of market reform, to ensure that social welfare is increased and that developing countries can enjoy at least some of the benefits of world markets.

A study on the effective implementation of competition laws estimated that competition authorities in advanced countries are 40 per cent more effective than their counterparts in developing countries (World Bank 2002). What, then, are the obstacles to the effective implementation of a competition law in developing countries and what can be done to overcome such obstacles and create a strategy that supports reduction of private barriers to trade? This will be the focus of the remainder of the paper.

II. Soil: Socio-economic Ideology and Competition Law

Competition law is a regulatory tool that limits the conduct of economic actors to ensure that the benefits of competition are not frustrated by the erection of private barriers to trade. It does so, inter alia, by limiting abuses of monopoly power by dominant firms, by prohibiting cartelistic activity and by preventing mergers and other types of cooperative conduct that would harm social welfare. Yet competition law is not a stand-alone regulatory tool. Rather, it is generally part-and-parcel of a wider set of public policies in pursuit of social welfare. As such, it is shaped and transformed by the existing socio-economic ideology and by the other policy tools that are implemented.
As the experience of many jurisdictions clearly indicates, socio-economic ideology, sometimes termed the competition culture, determines to a large extent the success or failure of a competition law. Several developing countries have had antitrust laws for several decades, but until recently none appears to have been regularly enforced to further the aims generally associated with competition law. This was because competition law clashed with the existing socio-economic ideology, which shaped public policy and thus it, did not enjoy full and consistent support by the enforcing government. This section analyses the experiences of developing jurisdictions in adopting a competition law in different public policy settings. It points to non-market ideology underlying public policy as a major obstacle for applying competition law, and proposes some methods to limit this obstacle.

The Israeli experience serves as a good example of the effects of socio-economic ideology on competition law enforcement (Gal 2004). Israel adopted a competition law in an early stage of its economic development, as a response to a public outcry against private cartels. The Israeli Competition Act dates back to 1959, only 11 years after the country was established, at a time when it was trying to create an economic infrastructure to serve a small, developing, immigrant country, while combating formidable monetary problems. To do so, the government adopted a highly interventionist and paternalistic industrial policy that regulated almost all aspects of economic activity. The market was likened to an infant, who cannot walk on his own and who has to be directed so that he would eventually learn to walk. Since the belief in the market’s invisible hand was very limited, the government held the reigns of the market, inter alia, by controlling import certificates, by providing monetary funding to economic activity that it deemed beneficial, by granting exclusivity rights to some producers and suppliers, and by directly controlling prices and trade conditions of many goods and services. As a result, competitive conditions in the Israeli market were very limited. Free competition, it was believed, would have prevented the establishment of efficient domestic firms and would have destabilized the market.

This raises the question of what role a competition law has to play in such an environment: How does a competition law apply when prices are controlled by direct price control rather than by market forces; where investment decisions are indirectly subject to approval by government officials; or where joint ventures between potential competitors are supported by the government in order to achieve scale economies and prevent market destabilization? The answer is that the application of the competition law reflected this socio-economic ideology. The Antitrust Tribunal, which was charged with determining the legality of business conduct, gave little weight to competitive considerations in its decisions. Rather, its decisions mirrored the controlling ideology by broadly interpreting the public interest exception that was included in the law.

The Tribunal’s decisions in the 60’s and 70’s are characterized by an emphasis on nationwide goals, such as the encouragement of export, the realization of scale economies, the and improvement of the country’s balance of payments while placing little emphasis on the establishment of competitive conditions. Accordingly, the Tribunal ordinarily approved agreements among competitors, which had the potential to increase productive efficiency by designating the production of different types of products to different firms. It also approved many agreements, which were geared towards an increase in exports, even if the effect was increased dominance in the Israeli market. This is exemplified by the Plywood decision, in which the Tribunal approved an agreement among plywood producers that fixed prices and designated quotas, although the agreement clearly increased prices in the Israeli market. It reasoned that the agreement was necessary to increase exports of plywood and to increase productive efficiency. This application of the law fit well with the prevailing ideology. The first Director of the Antitrust Authority, who adopted a more pro-competitive approach, was not well accepted by the government and most of his recommendations were not applied in practice.

It was only in the mid-eighties, when the socio-economic ideology of the Israeli government changed significantly towards a pro-market orientation, that the Competition Act began to have significant effect on the Israeli economy. The government’s pro-competitive approach resulted in the lowering of governmental barriers to the free operation of markets, the implementation of privatisation plans and the liberalization of trade to ensure that competition was the main driving force of most of the Israeli markets. Parallel, the Tribunal and the Antitrust Authority began to give more weight to competitive considerations and applied long-term, dynamic economic analysis. In the span of only a few years, a large corpus of decisions based on economic analysis was created and enforcement rates rose significantly. The Israeli Supreme Court to the Magna Carta of consumer

2 Antitrust file 202/240/5 Plywood producers vs. Director of Israeli Competition authority, 48 District Court decisions, 158.
rights and free competition likened the Competition Act.\textsuperscript{3}

This change can be exemplified by the decision in the case of Poligar.\textsuperscript{4} There, the Antitrust Authority was requested to approve a marketing joint venture between the only two Israeli producers of polietilen covers. In analysing the effects of the proposed venture, the Director stressed the disciplining effects of potential and existing imports on the market power of the domestic firms. He approved the venture since it would enable the domestic firms to reduce their costs and thus compete more effectively with foreign importers, without harming the Israeli consumer. This reasoning differs significantly from that on which past decisions to approve joint ventures were based. Whereas in the past emphasis was placed on the ability of the parties to the venture to reduce their costs without a real analysis of total welfare effects, the decision in Poligár approves the venture based on the need of the parties to act more efficiently in order to meet foreign competition. The analysis promises that the Israeli consumer, as well as the Israeli firms, will enjoy the benefits of the venture. This sort of analysis, which gives much weight to competitive considerations based on market conditions and evaluates the effects of the conduct on all market players, characterizes most of the decisions from the 90's on.

What are the lessons to be learned from the Israeli experience? Most importantly, that competition law does not stand-alone. The prevailing socio-economic ideology and public policy are determinant factors in the application of a competition policy. Without the elimination of governmental barriers to competition and a real change in public policy it is not possible to create a level playing field in which firms will invest and compete effectively. It is thus imperative that the government truly and consistently accept the principles of competition in all of its spheres: the judiciary, the government and the legislature, for competition law to be effectively implemented. Competition law, of the kind known and accepted in most developed economies, could only bloom in a society which is based on the belief in the benefits of the market's invisible hand over direct regulation, at least in most of its markets.

A similar conclusion can also be discerned from the experience of other jurisdictions, which have adopted a competition law without a real conviction and belief in a competitive system. Several Latin American countries have had competition laws for long periods. Yet, competition policy enforcement clashed against the industrial development policies prevailing in the region. Even when economic liberalization was under way, governmental barriers still existed in the form of capacity licensing, investment and procurement policies and price controls (Frischtak, Hadjimichael and Zachau 1989, 2). This conflict delayed the successful implementation of competition laws, as the setting within which Latin American competition law grew was not receptive towards the ideas and values ingrained in competition policy. Unsurprisingly, in this context competition could not emerge as a worthy social value. It was only when the paradigms of public policy in some Latin American countries changed profoundly to endorse market functioning, rather than government action, as the cornerstone of economic development, that competition law could begin to blossom (De Leon 2000).

Owen has also observed that comparative success in market reforms and the application of a competition law appears to be due in significant part to a policy consensus within the government. Competition law enforcement has been successful in some Latin American countries, such as Chile and Mexico, in which there is a substantial national commitment to market reforms. In countries where the political and social commitment to market reforms is more ambivalent, or where other priorities prevail, such as in Argentina, competition agencies appear to have been less successful (Owen 2003, ii).\textsuperscript{5} The following statement of the Brazilian Agency is indicative:

‘Although Brazil has had an antitrust system for more than 30 years, it was only after all the necessary structural reforms had been implemented that it did in fact become operational. The reforms included trade liberalization, privatization and the creation of sectoral regulatory agencies, which made it possible to enforce competition rules. These reflected the change in understanding over who should be responsible for the promotion of economic growth: before, there was the government leading the investment and indicating the relevant sectors for the private businesses, and then

\textsuperscript{3} Civil Appeal 2247/95 Director of Competition Authority vs. Tnuva Inc., 52 Supreme Court Decisions, 213.

\textsuperscript{4} Request for Exemption from Court Approval for Agreement to Establish Poligár, in Antitrust (Tel Aviv: Bar Association , 1994), vol. A, 108.

\textsuperscript{5} For a similar conclusion in the case of Venezuela see UNCTAD (2000, 24).
The importance of a strong and unambiguous pro-market policy as a key factor underpinning the enforcement of a competition law is also emphasized by the experiences of Korea, Jamaica, Zambia, Poland (ICN 2003, 28) Pakistan and India (CUTS 2003a).

One can legitimately ask why would a country adopt a competition law without a sound competition policy and a market-oriented ideology to support it. Several reasons may explain this puzzle. It may well be that the law was adopted in response to pressures from certain groups or institutions. These can be internal, such as in the case of Israel, or external, as in many Latin American and Eastern European countries which have adopted competition laws for the purpose of ensuring the successful negotiation of trade agreements, or in response to demands of international lending agencies who viewed the introduction of a competition law as a fundamental component of institutional reform. In other countries the adoption of the law was sometimes guided by rather superficial concerns, such as a potential antidote to spiralling price inflations, without the parallel creation of a competitive environment.

To sum, the experiences of many jurisdictions indicate that the socio-economic ideology of a country has an important role to play in shaping the antitrust landscape. Without a supporting belief in pro-market reforms, competition law alone has very limited effect on changing market conditions. Such support should be not only theoretical, but must also be manifested in other policy tools that serve to create a competitive environment, to induce and increase private players’ efforts to attain and maintain competitiveness. Thus, if competition law is to be an effective deterrent for private anti-competitive behaviour, a real change in the socio-economic ideology underlying public policy is required.

To be sure, this does not mandate the adoption of competitiveness or economic efficiency as a stand-alone goal. It does, however, require the government to limit competition only where such limitations are necessary in order to accomplish more important social objectives, after weighing the costs of reduced competitiveness against the benefits of such policies. This point is worth elaborating upon, given the resistance of many developing countries to the adoption and the implementation of a competition law, which is often based on the argument that it may harm the furtherance of goals, which are crucial to the country’s economic development or to its social values. In particular, it is argued that application of a competition law can harm the creation of a technological infrastructure that would enable firms in developing countries to achieve dynamic efficiency and compete in the future in global markets, and that it would strengthen distributive justice concerns.

These concerns about the goals of antitrust are not necessarily valid. If correctly applied, a competition law should take account of dynamic efficiency considerations rather than be based on a static appraisal of business conduct. It may thus sometimes promote competition and in other cases allow for its limitation. Moreover, although the main goal of competition law is the enhancement of economic efficiency (OECD 2003), there is no inherent limitation in the law to the furtherance of broad industrial policy and socio-economic goals. In fact, developing countries may, and often do, give weight to other public policy concerns, such as distributive justice or employment concerns. South Africa is an often-cited example. There, the competition law is applied in a manner, which balances between competitive considerations and broader policy initiatives, such as the protection of low-income inhabitants from price rises. A mixed approach to antitrust, while creating costs in loss of efficiency, especially for small economies (Gal 2003), may be justified in those developing economies in which a purist approach might prevent societal acceptance and disintegrate the social fabric. This is particularly important where economic efficiency considerations alone would strengthen or maintain existing wealth disparities, especially where it parallels a racial divide. As Chua has argued, the overlapping of class and ethnicity characteristics, which characterize many developing economies, mandate that the distributional effects of a market economy be taken into account. Otherwise, this may create instability in democracy, which could convert into an engine of potentially catastrophic ethno-nationalism (Chua 1998; Chua 2000). Thus, the goals of competition law may, in some cases, need to be broadened to include distributional effects, which may be an important factor in the social welfare function. Such social policies may be especially important in the first years of transition to a more competitive economy (APEC 1999, 37) and may then be changed to be more efficiency-oriented. Thus in some settings,

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6 Brazilian response to ICN capacity working group (ICN 2003, 28).
competition law enforcement should not be blind to societal failures which might be even more important that market failures.

As argued above, a pro-competitive socio-economic ideology, whether or not intertwined with other social goals, is the soil of competition law. But the picture is more complicated than that, as the interaction between the competition law and socio-economic ideology is a two-way stream. While a competition law might be flexible enough to accommodate industrial policy or distributive objectives through the valve of a public benefit test, competition authorities, where they exist, have an important role to play in influencing public acceptance and awareness of competition law and policy. Competition advocacy, that is, those activities conducted by the competition authority that are related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms (ICN 2002), is, perhaps, the most significant task of competition authorities in developing countries.

Two advocacy roles can be identified: the first is the advocacy of the benefits of competition to governmental institutions (governmental advocacy). The second is the advocacy of competition to the general public, and especially to consumers and other market players (public advocacy). There exists a complex interaction between these two roles. Public advocacy can serve as an indirect form of government advocacy in two ways. First, it serves to increase the acceptance of pro-market policies, and thus the willingness of the government to adopt such policies in the first place. Second, public advocacy of the benefits from competition law enforcement can create public pressure on the government to change its policies. Therefore, strategies aimed at gaining public support for competition law enforcement are highly important. Public advocacy should be approached, however, carefully, as the competition agency is an integral part of the government and should not operate too strongly against the government’s stated policy objectives.

Let us first focus on governmental advocacy. For it to exist, some degree of support of pro-competitive market reforms within the government must be present, as the authority is part of the government, whose views and ideology it wishes to change. Yet the competition authority has a central role in assisting governmental and other regulatory agencies to realize and analyse the competitive effects of their decisions. The Venezuelan competition authority’s proactive efforts to air the arguments on market dynamics and the impact of different economic measures on market conditions, for example, assisted the process of opening up and liberalizing its economy. The awareness of public authorities of the long-run benefits of competition to the society, even when the adoption of competitive conditions may create difficulties and may clash with other social policies, is an important ingredient of building a competitive environment. By changing decision makers’ perceptions and understanding, it may change the range of options perceived by them to be rational and acceptable. Such awareness can be raised by a theoretical analysis of the social effects of market conditions. It might be best to build a convincing case for competition by focusing on examples and success stories derived from the experiences of developing countries. Taking examples from environments that are seen to resemble the local context more closely may help to make policy makers in developing countries aware both of the seriousness of the competition problems in their countries and of the benefits they could derive from adopting a competition law (ICN 2003, 25). The enforcement of a competition law can also serve as a governmental advocacy tool, if such implementation changes the decision parameters of decision-makers, either by convincing them of the benefits of increased competition or by creating societal pressure to adopt competitive measures. While it may be difficult to engage in governmental advocacy where the government is hostile to competition law issues, the Zambian and Zimbabwean experiences shows that if the government is merely indifferent to competition a strong willed competition authority can be effective (Holmes 2003, 7). The institutional conditions for governmental advocacy are elaborated in the fourth section.

Public advocacy is no less important. Without popular support, the regime will not afford the benefits that competition law may bring about. This is especially important in democratic regimes, in which a change in policy must have visible short-term or understandable long-term positive effects that consumers and other market players can appreciate. Accordingly, it is vital to create a competition culture among consumer organizations, the private sector, the media and other stakeholders that might otherwise be ignorant of the law and its virtues. Such awareness-raising activities also enhance the credibility and the convincing power of competition authorities. The institutional and organizational tools for public advocacy are elaborated in the fourth section.

To conclude, a pro-market socio-economic ideology dictates to a large extent the effectiveness of a competition law in reducing private barriers to trade. Simply adopting a competition law is not sufficient when such
adoption is not part of a broader pro-competitive microeconomic policy to which the government is strongly committed. The competition authority has an important role in advocating competition, should it exist at such stages.

III. Pesticides: Political Economy Obstacles to Antitrust

Assume that the adoption and enforcement of a competition law is socially desirable for a developing country and that such policy fits well with the country’s socio-economic ideology. Will it inevitably be adopted and implemented? The answer is not necessarily positive. As the field of political science has taught us, those who make the choices underlying public policies do not always have the motivations to adopt socially desired policies. Accordingly, this section seeks to identify the forces that may lead decision makers to deviate from optimal social policy in the context of competition law. As will be argued, there may exist strong political forces that affect the incentives of decision makers to adopt a competition law. It is thus vital to recognize such forces and to devise ways to effectively limit their effects. The latter are the pesticides of the ecology of antitrust.

Let us first identify the problem. The adoption of a competition law may encounter resistance from many groups in society. Generally, such adoption involves a significant change in the “rules of the game.” As noted above, it limits the ability of an incumbent monopolist to create artificial barriers to the entry or expansion of its rivals; it limits the ability of firms to raise their prices or profits collectively; and it limits the ability of firms to achieve market power by changing the market structure by way of merger or joint venture. As a result, it may change the legal status of deep-rooted types of business conduct. For example, in many developing countries trade associations have served an important function under the previous economic order by setting prices and quotas for all market participants (Stewart 2004). This form of conduct may well be prohibited under a competition law. Altering the legal status of entrenched conduct might encounter resistance from those who fear change, especially when they do not fully understand the benefits it brings about.

But more importantly, altering the rules of the game may change the existing economic equilibrium by impairing the economic status of some market participants that were secluded from competition by governmental-made or private barriers to entry. This change often involves high personal stakes of the existing dominant firms, entrepreneurial associations and employees of state-controlled enterprises who are likely to be adversely affected by the reduction in the intervention role of the government in the market. The prospect of reform may thus motivate such firms to engage in rent-seeking behaviour, aimed at limiting change in the existing regime. The higher the stakes of private groups in the policy at hand, the stronger their motivations to influence the policy makers. According to some scholars, such groups would invest in securing or maintaining a policy that favours them up to the total expected profits they stand to gain from it (Posner 1976, 8-18). They may do so directly, by appealing to decision makers to take into account their interests, or indirectly, by creating social resistance to the adoption of a policy, by building upon fears from change and misconceptions about the effects of competition law enforcement. Such conduct, even if it harms social welfare, is generally perfectly legal, and therefore cannot be limited by legal means.

Why should such interests affect decision makers, if they believe that the adoption of a competition law is socially desirable? The problem is simply that, in the absence of constraints, both legislatures and government officials may have motivations to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return to political support (Kaplow 2003). This problem is known as regulatory capture. Such capture arises when small groups with large per capita stakes in a policy organize and cause the government to regulate in ways that are against the public interest and usually against consumers, who are poorly organized and have small per capita stakes in the specific regulation. Regulatory capture is exacerbated in democratic societies, especially where the ultimate policy decision lies in the hands of one or a small group of politician (e.g. the relevant minister or a legislative committee) rather than the government as a whole, as specific, well-organized sectors can ensure the politicians’ re-election (Wiley 1986). Social logic may thus not always coincide with the logic of politics.

As noted elsewhere (Gal 2002), the problem of political influence might be aggravated with regard to competition law. This is because the benefits of competition law enforcement are inherently non-sector-specific and look at the long run horizon. The law applies similar rules to all industries, which are based on total welfare considerations, rather than on the welfare of specific market players. It also usually spells out a long-term vision for society, beyond the immediate pain of the adjustment or change in specific industries and beyond the profitability considerations of specific
firms. For example, a merger that would create significant market power would generally be prevented even if it results in financial loss for the firms wishing to merge. Yet these two traits of competition law- non-sector specific principles and its long-term horizon- create inherent political pressures to limit its adoption and its applicability.

The law’s non-sector specific nature increases the influence of politically influential groups, as its beneficiaries- consumers and small businesses - are generally dispersed. Moreover, its focus on long-term goals usually requires political fortitude that is typically in short supply among political figures. Most professional politicians that rely on regular and frequent popular elections are mainly concerned with their personal survival and advancement. This implies that they have an inherent tendency to discount heavily all events occurring beyond their personal time line. Instead, they tilt towards the achievement of short-term goals (Shepsle 1999).

In addition, the adoption of a competition law is usually an integral part of a change from a centrally controlled market to a decentralized market regime. It involves significant decentralization of decision-making, a shrinking of the size of the public sector, and a significant reduction in the interventionist role of the state in the economy. This often means the loss for politicians of some of the power, which they used to survive politically, and some of their political allies.\(^8\) The outcome often is that decision makers, even those convinced of the need for economic policy changes, could not escape considering the political wisdom of adopting and pursuing them.

The effects of political pressures on decision-makers can take many forms. In the most extreme case, such pressures may be sufficiently strong so as to virtually inhibit the willingness of decision-makers to adopt a competition law at all. But the effects may be subtler, by limiting the width or strength of the legal provisions adopted. Such effect might be articulated, inter alia, in limits placed upon the discretion granted to independent enforcement bodies, in the height of the sanctions for non-compliance with the legal prohibitions, in the weight given to the furtherance of economic welfare and freedom in the constitutional hierarchy, in the inclusion of wide social goals in the law, or in the adoption of sector-specific exemptions from the application of the law. In Israel, for example, the agricultural lobby has succeeded in including a specific exemption in the law for agreements for the marketing of agricultural produce (Gal 2004). Alternatively, the effects of political pressures may be less visible by affecting the institutional and organizational conditions for antitrust enforcement which are, as elaborated below, the sun and soil of the ecology of competition law. To give but few examples, decision makers may not properly fund and structure the competition agency in order to reduce its ability to enforce the law in practice, or they may not provide it with the political support necessary for a strong agency to survive. This, for example, was the case in Argentina (Owen 2003, ii). Of course, members of the competition law enforcement bodies are also susceptible to regulatory capture, an issue that will be dealt with separately in the next section.

These concerns are especially significant for developing countries. The reason is that economic power in developing economies tends to be more concentrated in the hands of a few rather than dispersed amongst many small competitors. Moreover, often the economic and governmental elites are intertwined. This reality increases the probability of lobbying, rent seeking behaviour, and political influences aimed at the pursuit of private objectives. The problem is also exacerbated by the fact that in developing economies many consumers- who are the main beneficiaries of competition law enforcement- cannot be easily educated with the benefits of competition law enforcement, and will rarely join forces to vie for it.

Given these political motivations, we should wisely recognize that the effect of politics on the adoption and the implementation of competition law cannot be simply ignored. Instead, it requires a modicum of responsiveness, away from Adam Smith’s absolute economic liberalism, by devising ways to reduce political pressures that might reduce government officials’ willingness to adopt and implement a socially desirable competition law. While such mechanisms may sometimes need to be tailored to the particular circumstances of each country, some general pesticides may well be applicable to most cases.

One possible method to reduce opposition to desirable reforms, which is sometimes suggested, is the adoption of a limited reform that does not fully apply the whole arsenal of competition law to incumbent firms but instead allows them to continue to engage in some types of business conduct that benefit them and would have otherwise been prohibited by the law. Such limited reform could definitely reduce political obstacles to the adoption of the rest of the legal provisions, especially if the law is a result of negotiation with pressure groups. At the same time, such limited reforms come with a large price tag attached.

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\(^8\) Unless, of course, the politicians’ political allies are the beneficiaries of such policies.
Politicians, however, limited applicability means limited competition and limited ability to achieve the benefits of a competitive system. In addition, as Kaplow rightly observes, such concessions may create higher costs to the implementation of socially desirable policies in the future. Special interest groups already have strong incentives to lobby for favourable treatment. If the norm is that if and when a change in the legal regime is implemented the special interests will be compensated or otherwise protected, then their initial incentive to lobby for such policies will be increased. It is thus not obvious that the net effect of buying off opposition, when one includes effects of future undesirable policies and wasteful rent-seeking expenditures, would be positive (Kaplow 2003).

Another method to reduce pressures of power groups on politicians is to balance these pressures out by creating opposite, pro-law pressures. This requires a political anchor or godfather for competition law, which can be a politically strong body, such as the Prime Minister’s office (CUTS 2003b,18), or a decision-maker that is less affected by pressure groups and narrow considerations, whether because he does not need the support of interest groups for his political survival, or because his motivation to adopt a competition law is stronger than his will to give in to pressure groups. Decision makers are often best placed to think strategically about managing opposition, taking advantage of opportune moments and putting together supportive coalitions for reform. Politicians often have detailed knowledge of power relationships that could help hinder efforts to reform, and can carefully craft the content, timing, and sequence of reform in order to mobilize support and manage opposition. For example, a crisis situation can be utilized to reduce political obstacles, as decision makers are likely to give more weight to societal concerns in such situations, and change is likely to be more dramatic and comprehensive (Grindle and Thomas 1991, 5).

An extremely powerful and important method for combating political influences on decision-makers is the creation of a strong and educated public opinion in favour of antitrust. Such public opinion may refocus the political interests of politicians on long-term and general goals and lead to the channelling of their private aspirations in more constructive and overall efficient ways. Even if politicians may not look beyond the next election, the interests of those who chose them may be long-term and non-sector specific. Education thus has the effects of lengthening the time horizon of politicians.

For public pressure to exist, however, two conditions must be met. First, the beneficiaries of the competition law, consumers and market participants who have so far been excluded from the market, as well as opinion formers, should be educated with the benefits of competition law enforcement. Second, the collective action function faced by many individuals with a mutual interest should be overcome. A competition authority, where it already exists and is non-political, may play an important role in this process by educating consumer groups, businessmen and academia alike on the merits of antitrust enforcement to ensure that the public is well aware of the consequences of the decision made and by solving the collective action problem.

There exists, however, a chicken-and-egg problem, as the same law that pressure groups would like to limit its adoption in the first place often creates the creation of a competition agency, which is the natural vehicle to solve the collective action problem by advocating consumer benefits in competition. Consumer groups, academics and concerned public figures can instead play an important role in taking the reigns of public support by forming consumer interest groups that would encourage lobbying aimed at establishing more efficient forms of regulation.

As internal forces to constrain problematic political motivations are likely to be limited, external sources, such as global institutions (e.g., the World Bank, UNCTAD or the WTO) or trading parties, may sometimes serve to overcome internal political economy issues. In this light, one can view the pressure of international bodies that developing countries adopt a competition law as a positive phenomenon, as it limits the discretion of policy makers and adds another factor to their political logic equation. In fact, many developing countries have adopted a competition law in response to external pressures, and external advisors that are generally devoid of internal political pressures have drafted their laws. One positive outcome of such laws is that they create a competition authority that, as elaborated above, if structured and funded properly (sun and water), may serve an important function in reducing internal political pressures to limit the law’s applicability. Such external pressure is only positive, however, when it echoes the desired socio-economic policy of the country to which it is applied.

IV. Sun and Water: Institutional and Organizational Preconditions

The actual enforcement of a competition law is no less important than its adoption. Enforcement is
The competence and credibility of competition law enforcement are necessary in order to limit anti-competitive conduct. The more effective the enforcement bodies are in detecting and sanctioning legal violations, the more instances of anti-competitive conduct will be prohibited ex post. But more importantly, the institutional conditions of the enforcing bodies affect the expectations of economic actors and their incentives to engage in such conduct in the first place. The higher the possibility of detection and sanctioning, the stronger the deterrence effects on market participants. In the face of uncertain enforcement, firms will reduce the possibility that they will be caught and charged with anti-competitive conduct and will have stronger motivations to engage in such conduct. If, on the other hand, enforcement levels are high, firms’ motivations to commit their resources into anti-competitive activities will be lower. Regulation by deterrence should be the main course of antitrust enforcement, as it is much more efficient than direct regulation of conduct in limiting anti-competitive conduct.

The competence and credibility of the enforcing bodies are, in turn, highly dependent on the institutional and organizational conditions in which the enforcing bodies operate. The level of deterrence depends on market players’ awareness of the objectives and scope of antitrust law. Thus, it is important to design and implement efficient mechanisms for disseminating information about competition law and its enforcement. Deterrence also depends on the existence of adequate human and financial resources for monitoring, detection, proof of violation and sanctioning, and on the enforcing body’s ability to make impartial decisions. It also depends on the stature of the authority within the public at large, as enforcement is influenced by the general perception that the decision-making process is predictable, impartial, and equitable.

Accordingly, this section seeks to shed light on the organizational and institutional conditions that are necessary to ensure the successful enforcement of competition laws in developing countries. It builds upon the vast literature of the past decade on the institutional economics of antitrust enforcement. William Kovacic (Kovacic 2001; Kovacic 1997; Kovacic 1995), among others, has emphasized the great importance of institutional competence, credibility and independence to the effectiveness of competition policy. Several international institutions have also generated detailed and interesting reports on the institutional conditions for antitrust enforcement (e.g., UNCTAD 2002; ICN 2003; APEC 1999; Cuts 2003a; Cuts 2003b).

It is regularly recognized that developing countries often face institutional difficulties in enforcing competition laws. These involve, inter alia, inadequate judicial systems, excessive bureaucracy, corruption and a lack of transparency, a lack of resources and professional expertise within the competition authority, extensive capture by regulatory groups and weak professional and consumer groups. These problems can and should be addressed by developing the ability and institutional strength of the competition enforcement bodies. No unique model exists for all developing economies. The mix of institutions and organizational features has to be tailored to the particular economy in which it is applied. Yet several general principles can be discerned for competition law to be workable.

Of course, competition law enforcement is only part of a broader legal enforcement environment. Thus it is vital that reforms be undertaken on several fronts to increase institutional competence and credibility (e.g., by creating a competent judiciary) and to build an environment that will support the efficient decisions of market participants (e.g., enforcement of contract law). Where there is no law and order, where corruption is rampant and where the informal sector is large, competition law enforcement might be extremely difficult. Yet some institutional measures that focus on the antitrust enforcement bodies can still improve the conditions for antitrust enforcement. This section focuses on such conditions.

The organizational and institutional conditions for competition law enforcement are for the most part cumulative: efficient enforcement depends on their parallel existence. For example, empowering the competition agency with investigative powers is not effective without sufficient human and financial resources to carry out investigations. Some conditions are mutually reinforcing. For example, educating consumers in the law and its benefits may significantly reduce enforcement costs and thus budgetary needs of a competition authority, by creating motivations of consumers to inform the...
authority of possible anti-competitive conduct. Interestingly, in some cases the organizational and institutional conditions necessary to perform certain functions conflict. This is the case, for example, with the double function of a competition authority: enforcement of competition law and creating support for competition policy, inter alia by advocating the reduction of non-governmental barriers to competition. The institutional conditions for achieving both goals are, however, different. If enforcement is the goal pursued then the institutional structure should favour independence, predictability and fairness of decision-making. On the other hand, if competition-oriented reforms are the most important policy objectives, then the institutional structure must allow for the greatest possible influence with the policymakers. Leaving antitrust decision-making to a judge, for example, favours independence while downplaying advocacy, especially when antitrust is completely left to private initiative (ICN 2003, 30). Each jurisdiction should thus find a balance between the achievements of these two goals that would fit its special setting.

It is useful to differentiate between two different types of institutional obstacles that must be tackled for enforcement to be effective: the practical ability to enforce the law and the motivations of the enforcing bodies to enforce it in practice. The two following sub-sections fit this divide.

A. Tools for Effective Enforcement of Competition Laws

Simply having a competition law on the books is not sufficient for its enforcement. The enforcing agencies must have a tool-kit that would enable them to apply the law effectively and efficiently. This requires financial and human resources, but it also requires legal mechanisms that would support such enforcement. This sub-section analyses such tools, based on a theoretical framework as well as on the experience of antitrust authorities, especially in developing countries.

1. Human resources the best of laws cannot be applied without adequate human resources, i.e. a staff of sufficient size with adequate technical competence. The last condition is especially important in the area of competition law, which often involves a high-level economic analysis that complements a legal one in order to detect and to analyse the effects of business conduct. Lack of such human resources may lead to under-enforcement of the laws. It may also undermine the standing and reputation of the competition authority, especially where it results in incompetent enforcement efforts such as the loss of many cases brought by the authority.

Competition authorities thus need to employ lawyers, economists and investigators familiar with competition law and policy. In addition, several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure should be hired. Particularly in its early years, the competition agency might be required to convince the courts that its cases are procedurally sound and substantively meritorious. It is vital that the agency be ready to prevail on such issues, as this will determine the breadth and scope of the legal basis for its future actions (Kovacic 1997, 431).

Yet the attraction of professional staff that can deal effectively with antitrust issues is a major obstacle to competition law enforcement in developing countries (Stewart, 184). Developing countries must therefore devise ways to overcome such obstacles. In the long run, low levels of professionalism can be countered by building links with universities and ensuring that they teach the appropriate relevant courses (APEC 1999, 9.3.14).

In the short run, staff training programs in procedural, methodological and substantive matters are key mechanism for overcoming human resource constraints. Such training can be provided internally, but often there is an important role for external training. Internships, or seconded staff from more mature authorities should be arranged to guide staff while gaining practical experience. Technical cooperation agreements and exchanges with other competition agencies are crucial in this respect, as long as they match the learning curve and annual operational targets of the authority (UNCTAD 2000, 38). It might also be advisable to retain outside counsel in important cases. To combat problems of high staff turnover rates that is plaguing competition authorities in developing countries, it was recommended that training of staff should be offered on the condition of being bonded for several years (Stewart 2004).

The inevitable disparities between private and public sector salaries also create problems of professional staff retention. The ability of the authority to overcome this problem will be determined, inter alia, by its standing and reputation within society. The independence, transparency and regard for due process all serve to create an attractive working environment for the high quality economists and lawyers. Poland's successful antitrust authority, for example, took early action and created a good reputation that set off a virtuous circle. Its advocacy role reinforced its success and it has continued to attract good staff and political support. Yet there is here a kind of a chicken and egg problem, because in order to achieve positive reputation, the authority will need
skilled staff. Just as a competent, reputable agency generates a virtuous circle which attracts appropriately skilled and competent staff, so too does a poorly performing agency create a vicious circle that might repel those who may be able to turn it around (ICN 2003). It is thus most important to invest in institutional conditions for antitrust enforcement from its start. Barbados has overcome this problem by setting up the agency and training its staff before its competition law was adopted. In that period, staff was recruited and trained in competition law and investigation procedures. By the time the law was passed, the Commission was ready to start operating (Stewart 2004). Yet the Barbados experience has its costs, as it requires hindsight regarding the passage of a law or the postponement of the adoption of a competition law. An alternative method to tackle the problem of financial compensation disparities is by emphasizing to possible skilled employees the impact of their work on increasing social welfare. The personality of the authority’s director will play an important part in such motivation-building efforts.

To reduce human resource problems it is also important that professional knowledge be accumulated in the agency, and not is totally dependent on specific people. Guidance manuals may provide new staff with access to the approach that would prevent similar cases. If sanctions were not sufficiently large, the probability of detection would be lower, and the harm prevented in the specific case or by the possible deterrence effects that would prevent similar cases. This is especially true for small economies, which naturally have lower enforcement budgets.

3. Legal Enforcement tools while this paper does not deal directly with the content of competition laws, there are several legal provisions and conditions that affect the institutional competence of the competition authorities. Three such conditions are elaborated below. The first condition is that the authority be granted broad investigative powers. Competition agencies need to be able to monitor markets and obtain information on the conduct of market participants if they are to be effective. To perform such tasks, the competition authority must be equipped with investigative tools that enable it to obtain the relevant information (CUTS 2003a, 67). For example, the authority should be empowered to enter business premises to collect information, to investigate managers and employees of firms and to demand information from business entities, where there is suspicion of a violation. There should also be a high penalty for failing to comply with investigative efforts. The importance of such tools can be illustrated by the Zambian experience. The Zambian Competition Authority had much trouble getting information from Coca Cola on possible anti-competitive violations. It was only when the government passed a law making it punishable by incarceration if a firm fails to cooperate with the authority, that the authority got immediate cooperation. While this is an extreme example, there are less draconian means by which firms could be persuaded to cooperate (Stewart 2004).

The second condition is that the authority be granted broad investigative powers. Competition agencies need to be able to monitor markets and obtain information on the conduct of market participants if they are to be effective. To perform such tasks, the competition authority must be equipped with investigative tools that enable it to obtain the relevant information (CUTS 2003a, 67). For example, the authority should be empowered to enter business premises to collect information, to investigate managers and employees of firms and to demand information from business entities, where there is suspicion of a violation. There should also be a high penalty for failing to comply with investigative efforts. The importance of such tools can be illustrated by the Zambian experience. The Zambian Competition Authority had much trouble getting information from Coca Cola on possible anti-competitive violations. It was only when the government passed a law making it punishable by incarceration if a firm fails to cooperate with the authority, that the authority got immediate cooperation. While this is an extreme example, there are less draconian means by which firms could be persuaded to cooperate (Stewart 2004).

The third legal institutional condition is that the enforcing bodies be able to impose high penalties for anti-competitive conduct. Economics has long taught us that the level of deterrence of a law is largely determined by the probability of detection of a violation and the height of sanction imposed upon the violator. If sanctions were not sufficiently...
high, then it would still be rational for market players to engage in anti-competitive conduct. Accordingly, the law should provide the enforcing bodies with sanctions that are high enough to act as a disincentive to engage in anti-competitive conduct, when taking into account enforcement levels. The Peruvian experience is a case in point. At first, the fine for engaging in anti-competitive conduct was set at US$40,000, but this was found to be too low to create disincentives for large multinational companies, and the fine was raised (Stewart 2004). Yet it might be better to base fines on the potential and actual profits from the anti-competitive conduct or on the yearly turnover rates of the firms instead of on predetermined sums. Sanctions should also depend on the law’s level of clarity. Where the legal principle is clear, the sanction can be higher than when there is some uncertainty in the legal provisions. This is because imposing high sanctions in instances in which laws do not clearly define legal conduct can prevent pro-competitive conduct. It is also suggested that where courts lack institutional competence, it might be better to leave sanctions in the hands of an independent competition agency and to avoid private remedies and treble damages.

4. Institutional Tools for building Credibility and Stature of enforcing bodies to increase social acceptance and compliance with competition law, the enforcing bodies should be regarded by consumers and producers as credible and should be respected. The authority’s stature, in turn, increases its ability to enforce its laws on both domestic and international firms. Accordingly, technical compatibility for enforcing the law must be accompanied by reputation-building procedures and tools. Here we shall focus on several tools. Others will be elaborated in the next sub-section, which analyses the tools for limiting political influences on the enforcement of antitrust laws.

An important tool for building credibility involves taking-on large incumbent players at the early stages of enforcement. Beyond educational and immediate social-welfare purposes, this will signal to market participants that the enforcing authority is determined to follow a resilient agenda of enforcement. It is also important to choose the first cases very carefully in order to build credibility. Jamaica’s experience exemplifies how important it is to exercise prosecutorial discretion. The Jamaican antitrust authority chose as one of its first cases to challenge the Bar Association, claiming that its Canons of Professional Ethics, including restrictions on advertising and fixing of fees, were inconsistent with its competition law. The Commission lost the case and its credibility, as the court decided that the Bar is exempted from the application of the competition law. It is thus important to choose cases that are easy to investigate and to win, in which the issues are easily understood by the public (Stewart 2004). Follow-up on compliance with the authority’s orders is also a valuable method for establishing credibility as a strong enforcement institution. Moreover, to enhance credibility, the law should apply to all sectors of the economy and exemptions should be limited. Otherwise, consumers might perceive enforcement to be discriminatory or marginal. The personality of the director of the competition authority is also important to build credibility and respect. The impact of the competition agency in South Africa, Peru and other developing economies was clearly derived from the respect for senior figures (Holmes 2003, 8).

Transparency is also an important mechanism for enhancing credibility. This includes transparency in administrative procedures and regulations, the right to appear before the enforcing bodies unless strong reasons mandate otherwise, the publication of fully reasoned decisions and, where feasible, the maintenance of a web site on which the authority publishes its decision as well as guidelines and speeches and other public statements. In Chile, for example, the Prosecutor’s Office has prepared a database containing summaries of many of the enforcing bodies’ rulings that is reachable through its website (Chile 2004).

A strong emphasis on consistency and due process are also central in developing the credibility of the authority. This could be achieved, in part, by adopting guidelines and notices setting out the manner by which the authority will apply substantive and procedural elements of the law, and by following such guidelines to the extent possible. It is also useful to set pre-determined time periods for the treatment of cases. Choosing and pursuing articulated priorities with a reasonable and well-explained rationale may also enhance credibility as a non-discriminatory agency (De Leon 2000). All these methods serve to demonstrate that the authority is acting impartially and efficiently within its legal mandate.

5. Judicial Competence The judiciary plays an important role in the institutional apparatus of antitrust enforcement. In most countries, decisions by the competition agency are subject to judicial review and in some cases the judiciary has also the initial decision-making power. It is thus crucial that the judiciary support sound and credible antitrust enforcement for limiting anti-competitive conduct and for creating deterrence effects.

A serious problem with the judiciary, encountered by many countries, is the low level of expertise of judges in antitrust issues (e.g., Rodriguez and
Williams 1994; Cook 2002). This stems from the judiciary’s possible lack of experience in competition cases and from their difficulty in dealing with cases that require economic analysis, as is often necessary in defining and proving anti-competitive conduct. The judiciary may, then, issue decisions that are incompatible with the principles of competition law or resort to purely technical reviews instead of determining the merits of the case. The problem of judicial competence is so significant, that Jamaica identified the main constraint it encountered in the implementation of competition law as the fact that the judiciary is not conversant with competition principles. Similarly, the Russian experienced competition law enforcement problems due to the lack of experience and understanding of the judges of necessary economic concepts (APEC 1999).

This is why the training of judges in competition matters is crucial to competition law enforcement. Another solution is to set up a specialized tribunal, as has been done in South Africa and in Israel, that is exclusively empowered to hear competition cases. This allows for a smaller body of judges to develop experience in the application of the competition law. Judges will, over time, learn the guiding principles of competition law and will be less inclined to uphold purely technical reviews in preference to determining the merits of the case. It may also be wise to structure the court of first instance as an administrative tribunal, which is headed by a judge, but composed also of competition experts, both lawyers and economists, to assist the courts in reaching their decisions. To ensure that the benefits of specialization are not lost, however, the appeals court should be limited in its review of the decisions of the tribunal to significant errors of law or fact.

It might also be useful to allow the competition agency to submit written comments to the courts in order to draw the court’s attention to issues that are important for the consistent and effective application of the law. Belgium and Finland, for example, empower the competition authority to submit its comments to the court. The issuance of the opinion of the authority to the courts, in the name of the public interest (as “amicus curiae”), is an important tool for creating consistent and credible antitrust enforcement. (ICN 2003).

Where problems of corruption or lack of expertise in the court system cannot be easily overcome, in might be wiser to place decision-making in the hands of an administrative body rather than a court. This circumvents the problem of generalist or corrupts judges taking decisions on competition matters. It also provides for swifter access to the decision-maker and it frees the adjudicative bodies from the extreme formalism that frequently characterizes judicial processes. Yet administrative enforcement lacks the diffused onus of responsibility, and increases the possibility of political considerations, as elaborated below. The institutional structure should thus be determined by the special characteristics of each country.

6. Role of Competition Authority in Regulatory Reform

Competition may not only be hindered by private anticompetitive conduct, but also by public regulatory intervention and rulemaking. Some examples include licensing, standards, import and export quotas, privatisation decisions, and policies for access of competitors to bottleneck segments (Tirole 1999, 3). Such government-made obstacles may be warranted where they are necessary to correct market failures or for the achievement of more important social goals. However, regulatory intervention may go beyond the strictly necessary. This might be due to the influence of interest groups, or to the insufficient weight given to competitive considerations (ICN 2002, ii-iii). The competition authority may provide important tools for minimizing both problems. While the next subsection will deal with the institutional tools to reduce political economy issues of antitrust enforcement, below we elaborate on the institutional mechanisms available to tackle the lack of competition culture problem.

Increasingly, it is recognized that competition authorities play an important role in the promotion of a competitive environment by pro-actively influencing regulatory activities to ensure the rejection of unnecessarily anticompetitive regulatory measures. This government advocacy role may, in some cases, be more important in promoting competition than the repression of anti-competitive behaviour through antitrust enforcement. A study undertaken by the OECD showed that the competitive process can be appropriately stimulated by the intervention of competition authorities when firms in a regulated sector abuse their privileges to the detriment of consumer interests. In fact, some of the greatest successes of competition authorities identified by developing countries are in the prevention or reduction of anticompetitive legislation and other interventions by government in the competitive process (ICN, 2003). For such a role to play out, a proper institutional framework must be put in place. Creating an institutional framework for competition advocacy is especially important for developing countries. In such countries many functions are still subject to direct regulation. This gives rise to an intensive rule making process in which competition advocacy has an important role to play (ICN 2003, iii). The competition authority
can assist in the adoption of socially desired policies.

The interaction between the competition authority and other regulatory frameworks takes place at two stages. First, the competition authority may seek to influence the rules that govern the sector, by ensuring that the concerns of competition are taken into account at the time the regulatory system is set up or reformed. Second, advocacy may take place at the implementation stage, by convincing other public authorities to abstain from adopting unnecessarily anticompetitive measures, and helping regulatory agencies to clearly delineate the boundaries of economic regulation (ICN 2003, iii). Both require some institutional preconditions for their existence.

An important prerequisite for effective government advocacy is that competition authorities be informed about regulatory initiatives in a timely manner, to ensure that the competition agency is consulted at a moment that there is still opportunity for considerable feedbacks. This task is best placed upon the legislative or regulatory body, by mandating it to inform the competition authorities of any act that may reduce competition. In the US, for example, some provisions ensure that the DOJ gets timely notice of proceedings.

A second institutional issue is whether the consultation of the competition authority is mandated by law or discretionary. The OECD’s Regulatory Reform Report recommended providing competition authorities the authority and the capacity to advocate reform throughout the government (OECD 1997). Some authorities can only conduct studies or make recommendations when requested by the Ministry they belong to and they cannot decide on their own to make the contents of their reports public or to pressure for their recommendations to be taken into account (ICN 2002). In other jurisdictions the authority may participate in meetings of the Government on an occasional basis, e.g. upon invitation to pronounce its view on a specific project. It is much preferable that competition authorities be granted the power to act on their own initiative. Some procedural safeguard or formalization of the consultation process is also desirable.

A third institutional issue involves the formal power of the competition agencies to influence governmental regulations: does the competition authority binding on the policy maker issue the opinions? There is a wide range of answers to this question. At one extreme, the competition authority has a decisive role in regulatory and reform processes. This can be achieved by a participatory role, as in Chile, where the competition authorities are included in the process of regulating infrastructure monopolies. Alternatively, the authority may have an influential supervisory role. In Uzbekistan, for example, the Anti-monopoly Committee may require state administrative bodies to terminate or modify legislative acts and orders which are found to contradict antimonopoly legislation. Similarly, in Hungary, if the Hungarian competition authority finds that any public administrative decision violates the freedom of economic competition, it may request the public administrative institution to amend or revoke the decision in question. If the public administrative institution fails to do so, the authority may seek a court review of the decision.

Yet in most jurisdictions the law places upon the agencies the smaller but important role of commenting from a competition policy perspective on issues that will be decided by other parts of the government. The UNCTAD Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices requires that regulatory authorities to competition incorporated in economic and administrative regulation should be assessed by competition authorities from an economic perspective (UNCTAD 2001, Art. 5; UNCTAD 2002b). This recognizes the authority’s expertise in determining market power and the conditions that must exist for effective competition, yet leaves the ultimate decision to the specific regulator, who may have expertise in the industry at hand.

In politics as in politics: Another way that may be used in practice to create government advocacy is to join forces with other governmental bodies with similar goals. This can be illustrated by the battle against the Israeli monopoly in public transportation. For years one firm dominated the Israeli public transportation market. The Ministry of Transportation was reluctant to open up the market to competition. The Antitrust Agency joined forces with the Ministry of Treasury to create public opinion for the introduction of competition into the market, which eventually led to the creation of more competitive conditions.

7. Public advocacy as an enforcement tool: the importance of educating market participants in the rules of competition law as a tool for reducing political economy obstacles and for creating a socio-economic ideology has already been emphasized. Here we focus on its importance as an enforcement tool, to increase compliance and deterrence effects, and on the institutional tools necessary for it to be effective.

It is possible to identify several ways in which public advocacy assists competition law
enforcement. Competition advocacy serves to change the mindset and raise the awareness of market participants to the legal framework. It can thus act as a preventive measure, as it adds to the economic calculation of market participants the perceived costs of anti-competitive conduct. In many developing countries, a significant problem with antitrust enforcement results from the fact firms are simply not aware of the antitrust implications of their conduct and there is no sense of wrong doing, especially where conduct has been legal for many years. To give but one example, the five largest poultry producers in Trinidad indulged in collusive increases of price, without being aware of the anti-competitive nature of their acts (Stewart, 184). Accordingly, there should be an intensive educative program that will focus on trade associations and dominant incumbents prior to and during the implementation stage of a competition law. A successful case against a particular form of behaviour can also have significant educative effects. A highly publicized UK test case in early 1959 brought to the voluntary abandonment of over 2000 cartels (APEC 1999, 9.3.10).

Also, education of the general public may increase enforcement levels. Competition authorities are always straddled for funding. They are also in constant search of proof of anti-competitive market always wracked for funding. They are also in enforcement levels. Also, education of the general public may increase publicized UK test case in early 1959 brought to have significant educative effects. A highly publicized UK test case in early 1959 brought to the voluntary abandonment of over 2000 cartels (APEC 1999, 9.3.10).

How is such public advocacy to be brought about? In the past few years there have been several extensive studies on competition advocacy that analyse the tools at a competition authority's disposal to strengthen the competitive culture (see, e.g., ICN 2002; ICN 2003). I would like to focus on some that are especially relevant to developing economies. In the specific context of developing countries, consideration must be given to potentially low income levels and high illiteracy rates, both of which may impact on the ability of consumers to understand the benefits of the law. Accordingly, the objectives, principles and tools of competition law should be explained in simple, "lay" rather than legal terms. The costs of monopoly, cartels and competition distorting regulations should be explained, while also reassuring the business community of legitimate forms of competition. Also, where other social goals may receive primacy over consumer welfare, the advocacy program should include emphasis on the goals of competition law and how it inter-relates with other policy tools. Such information should be disseminated through multiple channels, including giving public lectures to professional and trade associations, academic institutions, organizing conferences, writing articles for publication in specialized or general reading publications, holding press conferences and otherwise publicly explaining the importance and implications of competition and market principles. Another way of public advocacy is to select cases that resonate loudly with consumer concerns and relevant to the family budget. Some competition authorities have consciously selected cases that make a difference to the ordinary lives of low-income consumers. Peru, for example, took early action against cartels in the bakery and chicken industries, which resulted in a reduction of the price of such products. Even an uneducated consumer can easily grasp the effects of competition in his everyday context (ICN 2003). Indeed, the recipe for success might well be said to choose the initial cases with a view to strong impact on the general public and the publicity benefit that might be obtained. Thus, the
application of the law should initially be focused upon cases with little chance of loss and with a high and direct consumer benefit (APEC 1999, 2.9.8).

Another interesting idea to make the introduction of a competition law more acceptable in developing countries could be the adoption of a consumer protection law at the same time as a competition law, and to have both sets of laws administered by the same agency. Thereby, competition policy would become more visibly associated with consumer protection. It should, however, be ensured that the two policies work in a complementary way by focusing jointly on consumer welfare (ICN 2003) and that consumer protection does not take up too much resources.

B. Institutional Solutions to Political Obstacles to Competition Law Enforcement

The previous section focused on strategies available to developing economies to counter political pressures on legislatures to refrain from adopting a competition law or to limit its breadth or scope. This sub-section deals with the institutional tools available to reduce political pressures on the enforcing bodies to limit competition law enforcement in favour of specific interest groups. As noted above, the enforcement of a competition law involves high personal stakes, both to incumbent market players and to politicians. Such high stakes are often translated into lobbying, rent-seeking behaviour, aimed at limiting enforcement efforts in specific sectors or cases. As the competition authority is an integral part of the government, no such authority is completely independent from political pressures (Pittman 1992).

Yet careful institutional design and social planning can significantly improve upon the influence of political motivations on competition law. The key is the creation of an autonomous and non-partial agency. This sub-section will analyse the tools available for limiting political pressure, based on a theoretical framework as well as on the experience of antitrust authorities, especially in developing countries. It is based, in large part, on the author’s previous work (Gal 2002). The tools suggested are often intertwined. To give but one example, in a cyclical manner, the less political the authority’s decisions are perceived to be, the stronger public support, and the more powerful the public opinion to reduce political pressures in the first place (Gal 2002).

1. Autonomous agency probably the most important condition for combating political pressures on enforcement is ensuring that the antitrust authority is independent, to the extent possible, from political figures. This requires that the authority be a separate body and not an integral part of a ministry and that its decisions could not be overturned by a political figure. The possible consequences from lack of independence are exemplified by a Pakistani case, in which the decision of the competition authority was overturned due to the intervention of a minister who was on the board of the company in question (Holmes 2003, 4).

In some circumstances, however, the politicization of the antitrust authority need not be rejected. Russia provides a fascinating example (Yuzhanov 2002). Russia has adopted an Antimonopoly Law as an integral part of wide-scale economic reforms to move from a centralized, communist government to a market-oriented economy. A minister, who is an active member of government, heads the Russian Antimonopoly Ministry. This proved to be beneficial: the antitrust principles were so different from the embedded ones, that to be effective, the head of the antitrust authority had to be a strong political figure that took part in the ministerial discussions on the adoption of economic policy. Although some decisions were based on political considerations, others could not have been reached or implemented without strong political power. Once the new economic order matures, however, it might be wise to change the institutional organization and create a more autonomous agency.

2. Non-political nomination of the Director In reality, the head of the agency largely determines the authority’s priorities and the outcomes of its decisions. Even if he is not legally empowered to authorize certain types of conduct, he may nonetheless decide whether or not to conduct an inquiry of certain markets. It is thus crucial that he not be politically oriented towards any specific group of interests. Although political pressures on the nomination process cannot be totally eliminated, it is important to minimize such pressures. In Chile independence is sought by nomination by the President of Chile. In Hungary the leading officials of the competition authority are appointed by the President of the Republic on nomination of the Prime Minister, and their appointment is for six years, two years longer than the mandate of the government. In Israel the Director of the Antitrust Authority is chosen by a special committee headed by a judge, which selects amongst the contenders to a public tender in accordance to their personal qualifications. The Minister appoints only one of the three-committee members. The chosen director must meet the criteria necessary for a justice of peace. Another often-used method involves prohibiting the Director
from working in the private sector on antitrust-related issues for a predetermined period after his term is over, as is done in Israel. This reduces, at least to some extent, his inclination to weigh the considerations of possible future employees or clients. Such institutional tools may reduce political pressures on an important decision.

3. Independent budget yet even the most impartial person will have limited ability to disregard political considerations if he does not have the fiscal resources to carry out his actions. It is thus extremely important that determining the agency's budget be free of political considerations. Although this cannot be accomplished in full, the agency being part of the government, there are several methods to reduce political pressures through budget setting. One method is to base at least part of the budget upon some income that is generated by the agency, such as on fees charged by them for merger decisions and on fines imposed for anti-competitive conduct. Another important method is to separate the agency's budget from that of other governmental functions and make it transparent to the public. The stronger the public scrutiny, the more difficult it will be for the political system to cut back the agency's budget. Here the competition agency has an advocate role, which it can carry out by publishing its expected enforcement costs relative to the proposed budget, the relative budgets of successful competition agencies in relatively similar countries, the estimations of international bodies of the expected costs of competition law enforcement, and the expected savings to society that will result from such enforcement. A third method is to establish a minimum budget in the law, to ensure that the agency has funding to carry out at least some of its tasks.

4. Juridical scrutiny Juridical scrutiny of the antitrust authority’s decisions, where there exists a strong, independent and objective judiciary, may also be used to reduce political pressures. For such scrutiny to be meaningful, the scrutinizing court should be an expert one that is empowered to hear cases de novo, rather than determine whether the decision was reasonable. In South Africa the court was even granted special inquisitorial powers. Yet, for several reasons, juridical scrutiny is a limited tool. First, it is very difficult to question cases in which the authority has decided not to take any operational step. Second, there may exist informational asymmetry problems between the agency and the court. Third, for such scrutiny to be operational, there need be a plaintiff who is willing to invest resources in questioning the authority’s decision. Fourth, juridical scrutiny is often not timely. Yet juridical scrutiny may still reduce political pressures if politicians know that the agency’s decision might be subject to investigation and might be overruled by an objective body.

5. Transparency of decisions an important method for minimizing political influences is by ensuring the transparency of antitrust decisions to public scrutiny. This requires the adoption of several complementary methods. Most importantly, the decision-maker, whether the Director of the authority, the court or any other body, should be mandated to issue reasoned decisions. Technical tools to disseminate decisions in a timely manner, such as via an Internet site or via a newsletter should complement this. In addition, hearings before a competition court should be public, except to the extent necessary to protect confidential information.

6. Empowerment of Consumer groups another method to reduce political pressures is to grant consumer groups standing in the decision process. In South Africa, for example, some third parties with a material interest (such as the parties entitled to notice about mergers) may participate in hearings before the Competition Tribunal, with the right to put questions and examine evidence presented.

7. Criminalization of Antitrust Proceedings The criminalization of antitrust proceeding may serve to limit political pressures on the antitrust authority. Where interference with an on-going criminal investigation is an offence, politicians might be more cautious before intervening in an antitrust investigation, unless they enjoy legal immunity for the consequences of such interference.

Therefore, institutions play an important role in providing the tools necessary for a workable competition law. The law is similar to a fort, which must be correctly built and protected in order to protect its inhabitants (Popper and Kegan, 66). Accordingly, the success of competition law enforcement depends on the adoption of institutional and organizational tools to ensure social acceptance of the law, to enable the enforcing bodies to enforce the law in practice and to limit political pressures.

VI. Conclusion

A competition law is an important tool for creating competitive conditions, Yet the creation of a
workable competition law is not an easy endeavour. As this article has shown, the adoption of a competition law is only one precondition for the enforcement of the law. For the law to take root and bloom, other conditions must also exist, which are the soil, sun, water and pesticides of competition law.

As has been argued, the socio-economic ideology of the government is an important determinant of the adoption and the enforcement of a competition law. A competition law is generally wide enough to incorporate divergent ideologies- from total rejection of power and large size, to the acceptance of monopolistic positions as necessary for creating incentives for firms to compete in markets. Its enforcement, thus, depends to a large degree on the view of the enforcer regarding the role of market forces and the role of the government in its regulation. Accordingly, its efficiency as a pro-market tool depends on the government’s competition culture and its public policies based on it. Changing the socio-economic ideology of a country is one of the most important and difficult challenges for a developing country, in which a market ideology is not deeply ingrained and protective policies are often used to solve economic problems.

In addition, it is vital to recognize the obstacles created by political pressures to limit the adoption and implementation of a competition law. Such influences should be combated by both internal and external counter-tools that are crafted to meet the specific concerns of each jurisdiction. Otherwise, political logic might triumph over social logic.

The legal tools must also be accompanied by institutional and organizational conditions that are conducive to the enforcement of competition rules. As such, they should provide the regulatory bodies with the necessary resources - human, financial, and legal - that are needed in order to apply the law effectively.

The implementation of a pro-market regulatory framework thus requires more than simply liberalizing trade or supporting privatization processes or adopting a competition law. It also requires strategic thinking about the ecological conditions for effective competition law enforcement, of the kind suggested in this Chapter.

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