The Soviet Union dissolved on December 26, 1991. This accelerated a trend toward both the development of market economies and competition law to protect those economies. No one could have predicted that within twenty years most of the world’s trading economies would have adopted recognizable forms of competition law including the former nations of the Soviet Union, the centrally planned economies of Central and Eastern Europe, a host of transition economies in Africa, South America, and Asia, and such emerging economic giants as Brazil, China, and India.

Bill Kovacic has played a key role in helping us move from the world of 1991 to the world of the present where over one hundred twenty jurisdictions have some recognizable form of competition law. This has been the one of the principal, but by no means the only, topic of his work as an academic, then as general counsel, commissioner, and chairman of the FTC, and now back in academia. Kovacic has studied competition systems around the world, advised many of them, traveled relentlessly to dozens of these jurisdictions, and represented the FTC in interacting with them in countless public and private fora for these same two decades.

He came back from these travels with both great insights and great stories. My favorite Kovacic story goes like this:

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1 A full list of Kovacic’s publications can be found at [http://portal.law.gwu.edu/Bibliography/Bibliography.asp?uid=1731](http://portal.law.gwu.edu/Bibliography/Bibliography.asp?uid=1731). His work on the FTC embraced the full range of competition and consumer issues within the jurisdiction of the Commission. [http://www.ftc.org](http://www.ftc.org).
In early February 1993, I stood in a queue of fellows Americans gathered in the offices of Mongolia’s State Commission for Privatization, a major advocate of economic reform. As a member of a team from the University of Maryland’s Center for Institutional Reform and the Informal Sector (IRIS), I was there to help draft a new antitrust law for Mongolia. I watched as another group of American consultants gave a Privatization Commission official whom I knew a foot thick pile of paper containing laws and regulations for the securities industry in the United States. The American securities experts, who had been in Mongolia for all of a week, explained that the materials could serve as models for establishing a new Mongolian securities regulation system.

My Mongolian acquaintance laboriously leafed through the documents, examining almost every page. He then looked up at securities experts, smiled, and said: “These materials are clearly of high quality and will be very helpful to us. We will put them to good use.” Pleased with this favorable reaction, the Americans quickly added that they could supply more model statutes and regulations if desired. The Mongolian official replied that he would welcome more materials and asked that they be printed on one side only, like the paper he had just reviewed. The American said they easily would provide one-sided copies, shook hands, and headed for the airport, buoyed by what seemed to be a most productive week in Ulaanbaatar.

As I entered the privatization official’s office, I asked what he would do with the securities documents, which seemed hopelessly complex for a country whose newly created stock exchange was open one day per week and traded shares in only a few companies. “In Mongolia we have a shortage of paper,” he explained. “These advisors have given us high quality paper printed on one side. We will make copies on the other side. These materials are very useful. I hope they send more.” After a pause he added: “Do you know how many Mongolians have the background to comprehend these laws and regulations? Maybe a handful. New laws must be suited to our capabilities, experiences, and circumstances. If new laws are to succeed, Mongolians will have to carry out the new laws. Do not forget the human dimension of reform.”

This essay focuses on the insights that Kovacic brought back from his travels and embodied in his scholarship. I also focus how his work has both documented and affected transition economies enacting and enforcing competition law for the first time, their advisors from more experienced jurisdictions, and the more mature competition jurisdictions themselves. Finally, I offer a brief outline of a research agenda to help

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evaluate how well both old and new jurisdictions have applied these insights over the past twenty years and suggestions for the next twenty years.

I. Getting Started

Kovacic suggests a strategy of gradualism for most new jurisdictions. His writings suggest gradualism is three distinct senses. The first is that the statutory scheme need not necessarily embrace the full array of prohibitions that one finds in more developed jurisdictions, such as vertical restraints, price discrimination, and pre-merger notification. One strategy would be to start with the basics of horizontal restraints and add the additional powers as the competition agency gains confidence, competence, and credibility.3

The second type of gradualism deals with institutional design. Given limited human capital and limited resources what does a new competition agency need and what should it do? Kovacic’s articles are replete with stories from the early 1990s of small staffs, inadequate training, large turnover, miniscule salaries, inability to pay the overworked civil servants on a regular basis, lack of basic telecommunications and computer equipment (and sometimes reliable heat and electricity), poorly educated judges, potentially corrupt judicial systems, hostile state enterprises and recently privatized firms, an uniformed general public, lack of compulsory process, and other hurdles that can

barely be conceived of in the United States and the European Union before its expansion eastward.\textsuperscript{4}

Against this background, important decisions have to be made as to how to best utilize the seriously outgunned competition enforcers. Should resources be split between competition and consumer protection or integrated into a single agency? Should the competition authority have the power to prohibit conduct subject to appeal or have to seek enforcement in the courts? Should enforcement or appeal be before specialized tribunals or courts of general jurisdiction? Should resources and people be concentrated in a central office or spread across multiple regional offices? Should criminal penalties be sought which normally require access to a judiciary which lacks experience, expertise, and sometimes interest in such case? How many of these issues are unique to the early 1990s and how many are still with us today? Perhaps most, importantly, how can these choices be made in a way that is consistent to the greatest degree possible with the existing political, legal, and social institutions of the country?\textsuperscript{5}

The competition agency also must make hard choices as to what kind of cases to pursue and whether to pursue cases at the expense of other non-litigation strategies to enhance the legitimacy and overall impact of competition enforcement. Kovacic suggests that it will often make sense in the early years to pursue educational campaigns, outreach to stakeholders, establishing effective internal organization procedures and training, research and publication, competition advocacy, and building relationships with foreign competition authorities and donors as major priorities before undertaking broad


\textsuperscript{5} Kovacic, \textit{Zimbabwe}, \textit{supra} note 3, at 261.
campaigns of case investigation and enforcement.\textsuperscript{6} Even then, the initial group of cases has to be carefully selected to ensure successful outcomes and minimize the chances of backlash from public and private actors who suffer from the growth of a more competitive private sector. What is striking about these eminently sensible suggestions is that they apply to a striking degree to competition agencies in jurisdictions large and small, both new and well-established.

II. Advising New Jurisdictions

Apart from presumably well-intentioned, but clueless, foreign advisors who leave behind “high quality” paper, the task of an adviser to a new or developing competition law jurisdiction is a complicated one. Distilling Kovacic’s many writings and experiences suggests a number of themes that should inform on-going future efforts.\textsuperscript{7} The good news is that we seemed to have moved past the early days of the 1990s when too often advice for the new competition jurisdictions in Central and Eastern Europe appeared to consist of photocopies of the applicable United States antitrust statutes and guidelines.\textsuperscript{8}

The first is simply humility. No one person, set of rules, history, institution, or system has all the answers for everyone else. The second is the need for careful study of the history, law, institutions, language, culture, and needs of the jurisdiction before offering any recommendations. The third is the need to avoid whenever possible short-term antitrust tourism in favor of longer term advisors. The fourth is the need for active, rather than passive, learning.

\textsuperscript{6} Kovacic, Getting Started, supra note 3, at 430--41; Kovacic, Institutional Foundations, supra note 3, at 282-84.

\textsuperscript{7} Kovacic, Competition Policy Entrepreneur, supra note 2; Kovacic, Getting Started, supra note 3; William E. Kovacic, Designing and Implementing Competition and Consumer Protection Reforms in Traditional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe, 44 DePaul L. Rev. 1197, 1215-20 (1995); Kovacic, Institutional Foundations, supra note 3, at 310-12.

Lectures, seminars, presentations, and position papers are fine, but pale in comparison to workshops, problem solving, and other team exercises that require active application of the key principles. Fifth, is the need for follow-up. Most studies of teaching and learning suggest that students understand and apply key concepts only after repeated exposure. Sixth is the need for a two way street. US and EU advisers should not just be working in the new jurisdictions, but key personnel from the newer jurisdictions can benefit even more from short term and long term assignments being seconded back to the adviser’s jurisdiction, whether in the enforcement agencies or the private sector for hands on training and experience which they can apply when they return home.

III. Applying the Lessons Back Home

Looking abroad also can bring important insights into how to reform institutions at home. Kovacic noted early on that honestly answering questions about the peculiarities of the U.S. from officials in transition economies was a prerequisite to being able to effectively offer advice to others. This experience abroad, and his experience in government service at the FTC, has led to an equally interesting body of scholarship applying lessons from abroad to questions of institutional design and the structure of U.S. competition law enforcement.

The major institutional quirk in the United States competition law system is the dual and overlapping enforcement of the federal antitrust statutes by the Antitrust Division and the Federal Trade Commission. Other important issues are the relationship between the

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10 Kovacic, *Competition Policy Entrepreneur*, supra note 2, at 461-63.
federal competition agencies and the federal sectoral regulators, the relationship between federal and state antitrust law and enforcement, the effective immunity of anticompetitive governmental regulations at the state and local level under the state action doctrine, and the treble damage remedy and the predominance of private enforcement within the United States.\textsuperscript{11}

The conventional view is two-fold. First, our system is certainly odd but functions well enough most of the time that making fundamental changes is not worth exploring.\textsuperscript{12} The second is that if it were ever politically feasible to explore ending dual enforcement, that the FTC is the more obvious institution to be eliminated, or folded into the surviving federal enforcer.\textsuperscript{13}

Kovacic has challenged both of these assumptions. At one time, he appeared to see a more primary role for the Antitrust Division if the question of dual enforcement were ever resolved.\textsuperscript{14} In recent speeches and articles, those views have evolved and grown skeptical of the conventional wisdom. He is certainly correct that there is no natural, historical, or policy to favor the abolition of the FTC, if the two agencies were ever consolidated.\textsuperscript{15} In fact, there are strong arguments that any consolidation should run in the opposite direction of a single independent agency with both competition and consumer powers with a strong commitment to research, education, and ex post

\textsuperscript{12} ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 129-32 (2007).
\textsuperscript{13} Current Antitrust Enforcement and its Critics: Recent Proposals for Reform and Restructure in the Antitrust Division, the FTC and the Courts, 40 Antitrust L.J. 341, 360-87 (1971); Milton Handler, Reforming the Antitrust Laws, 82 Colum. L. Rev. 1287, 1318 (1982); Ernest Gellhorn et al., Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization, 35 Antitrust Bull. 694 (1990).
evaluation of enforcement initiatives governed by traditional administrative law procedures and protections.\textsuperscript{16}

Much of the case for such an outcome comes from the foreign experience of the past two decades. But given the realities of U.S. electoral and bureaucratic politics, Kovacic has also shrewdly focused on the more pragmatic issues of how to improve the existing federal joint venture and how to increase the effectiveness of federal competition advocacy and reform the gaping hole in U.S. competition policy by the state action doctrine.\textsuperscript{17}

IV. Making the Grade

Comparative competition law is, or at least should be, a form of empiricism.\textsuperscript{18} We now have approximately one hundred twenty jurisdictions with competition law systems, most with at least ten years or more of enforcement to study. Some have been studied intensively through the peer review processes of such entities as the Organization for Economic Cooperation and Development and the International Competition Network.\textsuperscript{19}

\textsuperscript{16}Criminal enforcement would, of necessity, remain in the Justice Department presumably in an Antitrust Group within the Criminal Division of the Justice Department much like the Organized Crime Strike Force following its reorganization in the 1990s. Spencer Weber Waller, Prosecution by Regulation: The Changing Nature of Antitrust Enforcement, 77 Or. L. Rev. 1383, 1439 n. 250 (1998).

\textsuperscript{17}James Cooper & William E. Kovacic, Antitrust and the Obama Administration: U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition, 90 BOSTON U. L. REV. 1555 (2010). See generally ABA ANTITRUST SECTION, STATE ACTION PRACTICE MANUAL (2d ed. 2010). Another interesting exercise would be address the current controversy of the Justice Department’s controversial plans to eliminate certain regional field offices from the perspective of the jurisdictions that included large number of regional offices and their contributions to effective competition enforcement.


\textsuperscript{19}Country reviews of competition policy frameworks, available at http://www.oecd.org/document/43/0,3746,en_2649_37463_2489707_1_1_1_37463,00.html; Peer review on competition law and policy, available at http://www.unctad.org/templates/Page.asp?intItemID=3845&lang=1. While there are important reasons that such exercises are carefully couched exercises in diplomacy, rather than hard hitting critiques, they nonetheless constitute an important and growing body of information for comparative competition law analysis.
Others have been the subject of both descriptive and evaluative academic scholarship and study in the private sector. A number of jurisdictions have made important changes to the substance and enforcement of their laws making before and after comparisons possible for the first time.

Virtually all jurisdictions now have websites with a wealth of publicly available information that was unimaginable a generation ago at the dawn of the contemporary competition law era (and the internet).\(^{20}\) We are on the verge of an era where a combination of quantitative and qualitative empirical research techniques can begin to draw tentative conclusions of the key criteria that Kovacic has offered for the formation and operation of competition law in transition economies.\(^{21}\) Space limitations barely allow for the articulation of what some of those studies would be let alone conduct them. But the challenge remains to study and analyze some of the issues set forth that Kovacic has so eloquently championed.

One challenge is that data may be difficult to gather to measure the effect of initial design choices and to disentangle a host of competing factors and explanations for progress or lack thereof. In other areas data on budgets and human capital may be available, but may not offer more than very tentative conclusions about how such resources translate into effectiveness. While traditional multi-factor regression analysis will be difficult, it appears that more rudimentary data sets are available that would at

\(^{20}\) Many of these web sites can be accessed at Antitrust Sites Worldwide, available at http://www.justice.gov/atr/contact/otheratr.html.

least allow for the comparison of comparable groups of jurisdictions, the formulation of basic theses, and the eventual drawing of tentative conclusions.

A. Gradualism versus the Big Bang

One set of studies should focus on the key thesis that jurisdictions will be more effective if they take a gradual approach to their tasks rather than attempt to create and enforce a full-blown western style competition law all at once. Another set of studies could look at whether jurisdictions have been more effective if they choose to forego the blandishments of competition policy entrepreneurs selling a version of their own systems and embarked on the more arduous, but more meaningful, task of drafting an indigenous set of laws and institutions better suited to the new jurisdiction’s history, institutions, and capabilities. Again, I suggest the study of roughly comparable competition authorities where the jurisdictions took different paths at their creation, rather than a rigorous econometric or control group study.

B. Institutional Design

Perhaps most interesting is the question of institutional design. Serious study is needed to determine how well jurisdictions have fared with the choice between:

1) competition only missions compared to combined competition and consumer jurisdiction;
2) civil enforcement power versus criminal/civil enforcement;
3) administrative versus judicial control;
4) specialized versus general courts;
5) central offices only versus networks of regional offices plus headquarters;
6) the creation of dual or multiple competition enforcers versus unitary enforcement;
7) the allocation of jurisdiction between national and state and local authorities in federal systems; and
8) the allocation of jurisdiction between the competition enforcer(s) and sectoral regulators.

While some jurisdictions conduct retrospective studies of individual initiatives, it is not apparent that many have done a serious study of their own institutional design and the success or failure of the choices made. Political considerations and resource issues may make it impossible for insiders or the agencies themselves to undertake this fascinating, but painstaking, research agenda. Twenty years of experience may now have given us enough natural experiments to compare the before and after within jurisdictions which have changed their institutional design and between comparable jurisdictions in the same region which have made different design decisions and enacted substantial amendments.

C. Resource Constraints

Kovacic has detailed so eloquently the extreme resource disadvantages that many new competition agencies have had to overcome. These range from tiny budgets, abysmally low salaries (when they are paid), rapid staff turnover, and the lack of heat, basic phone systems, computer resources, and even office supplies. One example is Ukraine whose total budget in its early years was a grand total of $263,000 for its headquarters and twenty four regional offices.22 Another example is the Republic of

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22 Kovacic, *Ukraine*, supra note 4, at 16 n. 27.
Georgia where in the early days sixty five staff rotated in and out of a single unheated central office.\textsuperscript{23} Up to date comprehensive budget and staffing data is hard to come by, but is available for certain jurisdictions through commercial and governmental sources.\textsuperscript{24} For example, as of 2009 the Antimonopoly Committee of Ukraine had an astonishing 924 employees, with 260 in the central body and 664 in the regional offices.\textsuperscript{25} The current budget of the Ukrainian Antimonopoly Committee appears to be in the neighborhood of 65 million Ukrainian Hryvnia (approximately $8 million) spread over the many employees and offices.\textsuperscript{26} It is hard to imagine how these resources are sufficient but it is equally hard to imagine how they are not an improvement over the early years. Every jurisdiction wants, and need more, to do their job effectively, but we finally can begin to study these questions with the benefit of time and data.

D. Human Capital

At the dawn of the competition law era, there was a woeful shortage of agency heads, managers and staff with relevant legal and/or economic experience. Many came from state run enterprises with experience in the very different processes of state planning. Many came from engineering or science backgrounds. Others came from other government ministries with very different mandates, often price control responsibilities.

\textsuperscript{23} Kovacic, \textit{Getting Started, supra} note 3, at 419.
\textsuperscript{24} See generally Global Competition Review, \textit{THE HANDBOOK OF COMPETITION ENFORCEMENT AGENCIES} (2011), \textit{available at http://www.globalcompetitionreview.com/handbooks/35/the-handbook-competition-enforcement-agencies-2011/}. 2009 budgets in dollars range from $1.4 million for Argentina ([94 staff], $200,000 for Jordan; $1.5 million for Mauritius (21 staff); $46,700 for Senegal (9 staff); and $22 million for the 2010 budget for Turkey (327 staff). Id. at 15, 170, 193, 254, and 295.
\textsuperscript{25} Id. at 302. In contrast, the combined 2013 budget for the FTC was $300 million and the Antitrust Division was $165 million. The DOJ antitrust budget was up 3.2 percent from 2012, while the FTC’s 2013 budget represents a drop from last year’s allotment of approximately $310 million. \textit{See http://www.law360.com/articles/309169/2013-budget-trims-ftc-boosts-doj-s-antitrust-division.}
\textsuperscript{26} See \textit{http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=199017&cat_id=199016}. 12
Some came in good faith, some came to develop skills to take to the private sector, and still others came with grave reservations of, or even opposition to, the protection of competition in the transition to a functioning market economy. Many jurisdictions were fortunate to have a first generation of competition agency heads that were phenomenally talented and dedicated to the tasks at hand despite many daunting obstacles.\footnote{Kovacic identifies Ana Julia Jatar, Gesner Oliveira, Beatriz Boza, Anna Fornalyczk, the top leadership in Ukraine, and others as just some of this remarkable group of initial agency heads. Kovacic, \textit{Lessons of Competition Policy Reform}, supra note 9, at 368.}

As in the budget area, we have some data available that can shed some light on what the second generation of competition enforcers looks like. Sources like the Global Handbook of Competition Enforcement Agencies and publicly available data from agency website and peer review studies can reveal much about the education and professional backgrounds of key agency personnel, how long they remain with the agency, and where their careers take them after government service. Here too, we now have a full generation of data to draw preliminary conclusions about the “human dimension” that lies behind successful competition enforcement.

\textbf{E. The Growth of Private Sector Support Institutions}

In several of his articles and speeches analyzing the past work, Kovacic has highlighted the need for a vibrant non-governmental and private sector to support the growth of a competition culture and the work of the government competition enforcers.\footnote{Kovacic, \textit{Institutional Foundations}, supra note 4, at 270-73.} He has identified universities and relevant curriculum, knowledgeable academic communities, a private competition bar, non-governmental organizations with a focus on competition and consumer issues as key participants in this process. In addition, of to
there is the need for officials and staff to interact with each other in intergovernmental settings, regional and bilateral cooperation, academic conferences, and more informal gatherings to support each other, even when such support is lacking internally within their own jurisdiction. Other commentators have furthered identified the need for a vigorous press covering the work of the agencies, competition advocacy, and private litigation to further build a more vibrant culture of competition.  

Here the data is available, but its significance remains elusive. Enforcers in the newer jurisdictions can interact with each other in a broad range of public and private settings to develop best practices and promote the culture of competition within their jurisdiction and between jurisdictions. At the multilateral level there are the annual and other meetings of the OECD, UNCTAD, and the ICN and the related private meetings and conferences held in conjunction with those more official and formal intergovernmental meeting. These multilateral meetings are supplemented with meetings of the various regional competition bodies. Diverse private academic and policy bodies ranging from Fordham University, Loyola University Chicago, the American Antitrust Institute, George Washington University, Chatham House, the Max Planck Institute, ASCOLA, CUTS, and other groups throughout the developed and developing world now offer regular programs focusing on the needs of newer competition jurisdictions. Even if

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30 For example in 2012, the Academic Society for Competition Law (ASCOLA), is holding its annual meeting prior to the ICN annual meeting in Brazil. In addition, the International Development Research Centre (IRDC) holds a research conference aimed at developing country enforcement officials the day before the ICN annual meeting the past several years.
private rights of actions are in their infancy outside of a small handful of jurisdictions, a far larger number of jurisdictions have a meaningful competition bar, often with sophisticated counsel who advise both the victims of competition violations as well as defend the accused. With sufficient diligence, one can identify the Universities and colleges which are now teaching meaningful competition related courses in their law, economic, and business faculties. Some programs and initiatives are available on-line, particularly the ICN curriculum project which Kovacic was instrumental in establishing.\footnote{International Competition Network Curriculum Project, available at http://www.internationalcompetitionnetwork.org/about/steering-group/outreach/icncurriculum.aspx; COMPETITION POLICY IN THE GLOBAL ECONOMY: AN ON-LINE CASEBOOK, available at http://www.luc.edu/law/academics/special/center/antitrust/online_case_book/index.html.}

And yet, it would be difficult to argue that competition law is a vibrant part of the fabric of civil society in that many jurisdictions (either old or new). This area of the law usually lacks political salience or a high degree of public awareness for its potential to empower consumers and promote economic justice. For far too much of the globe, competition policy is still a luxury and not a necessity, and perhaps properly so given other pressing social and political priorities.

V. A Global Training Opportunity

Let me close with a suggestion that can make a modest contribution to training what will be the third generation of competition enforcers and advocates in many of these jurisdictions. It is time to explore the creation of a comprehensive on-line program for competition lawyers, and, equally importantly, non-legal staff and professionals whether economic, business, or governmental administrators originally from other areas.
For lawyers that could encompass an LLM or related degree. For non-lawyers, it could involve a shorter Masters of Jurisprudence program for those who seek substantial training in competition law and economics but who are not interested or able to pursue comprehensive legal training. The potential audience is the world-wide competition community whether in government service, private practice, or academia.

Faculty could be drawn from many jurisdictions. Courses could be in a combination of limited real time and mostly asynchronous offerings to deal with the realities of students and faculty in up to twenty four different time zones. While start-up costs would be significant, running costs would not. Fees could be scaled based on the modules taken and with students from wealthier jurisdictions paying more than students from developing jurisdiction. Much of the content could be free and/or licensed through open source licensing terms so that users could customize the materials to their own needs. Resources permitting, capstone workshops, workshops, and thesis presentations could be held on-site in a network of cooperating universities, NGOs, and/or enforcement agencies geographically close to a critical mass of the students involved. If done right, imagine the benefits of harmonization with the creation of a low cost common platform of knowledge and training within a given agency, between the public sector and private sector within a given jurisdiction, and between jurisdictions.

32 Loyola University Chicago runs similar web based programs in the health law and family law areas. See http://onlinemj.luc.edu/aboutMJ.html. Other law schools have various on-line LLM programs in different fields. To my knowledge there is nothing available anywhere in the world in the competition law area or that encompasses the global training mission outlined above.

33 See Waller, Competition Policy in the Global Economy, supra note 30.
VI. Conclusion

It is important to think boldly in moving forward on the international competition front. It is relatively easy to demonstrate that the last twenty years have produced much more competition law and more sophisticated public and private sector actors who participate in the enforcement of competition law. It is much harder to demonstrate that there is much greater competition or consumer benefit. Documenting outputs is simply harder than documenting the growth of inputs in terms of people, resources, and knowhow which are a legitimate source of optimism. However the past twenty years has taught us much about how to go about that process and it is now our task to do so.