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## ANTITRUST AND THE EVOLUTION OF A MARKET ECONOMY IN MONGOLIA

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# Antitrust and the Evolution of a Market Economy in Mongolia

By William E. Kovacic and Robert S. Thorpe<sup>1</sup>

## Introduction

In 1990, after 70 years of communism, Mongolia began the transition from central planning to a market economy. One component of the transition process has consisted of the preparation and enactment of an antitrust statute. In taking this step, Mongolia has joined a large and growing number of developing countries for whom antimonopoly legislation is an ingredient of economic reform (Gray and Davis 1993).

Under the auspices of the University of Maryland's program on Institutional Reform and the Informal Section (IRIS) and the United States Agency for International Development (USAID), we have made two trips to Mongolia since November 1992 to assist the Government of Mongolia in drafting an antimonopoly law. In July 1993, the Mongolian Parliament adopted an antitrust measure, and attention has now shifted to implementing the new competition policy mandate.

There is an active debate among researchers about how regulatory reform should proceed in transition economies. One aspect of this debate is whether transition economies should adopt antitrust legislation and, if such legislation is appropriate, what

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<sup>1</sup>William E. Kovacic is a professor at the George Mason University School of Law in Arlington, Virginia. Robert S. Thorpe is a lawyer and Director of Field Programs for Institutional Reform and the Informal Sector (IRIS) at the University of Maryland at College Park. This paper is based in part on William E. Kovacic & Robert S. Thorpe, "Antitrust Law for a Transition Economy," *Legal Times*, August 2, 1993, at 41. The authors thank Peter Murrell for comments on an earlier draft, and Jim Anderson for his help in determining the content of the new Mongolian antitrust statute. The authors also thank IRIS and the U.S. Agency for International Development for their assistance in preparing this paper.

form such measures should take.<sup>2</sup> We believe that the process and the substantive results of the drafting effort in Mongolia yield useful conclusions about competition policy and legal reform for transition economies generally, whether they be former communist economies or economies recovering from longstanding, failed attempts by the state to orchestrate economic development.

Our paper uses the Mongolian antitrust law drafting experience as a vehicle for considering optimal approaches for accomplishing regulatory reform in transition economies, and in providing external technical assistance to that end. We also address the role that an antitrust system can play in facilitating the movement from planning to free markets in Mongolia and other countries with transition economies. We begin by briefly discussing the origin and current status of economic adjustment in Mongolia. The second section of the paper reviews the drafting process that resulted in the proposal to the Mongolian Parliament for a Mongolian antitrust statute. The third section describes the content of Mongolia's antitrust statute, as enacted by Parliament in July 1993. The fourth part examines the prospects for successful implementation and considers how the development of an antitrust system can encourage the emergence of market institutions and processes.

#### **Economic Adjustment in Mongolia: Background**

Mongolia evokes images of fierce horsemen, pastoral settings,

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<sup>2</sup>Compare Godek (1992) (criticizing programs to encourage development by transition economies of antitrust systems) with Boner and Langenfeld (1992) (favoring use of antitrust policy as one element of reform); Waller and Muenta (1989) (same); Willig (1991) (same).

and Genghis Khan. An independent country located between the People's Republic of China and Russia, Mongolia is now in the throes of transition from a central planning to a market economy. Its population of about 2.2 million people occupy a cold, dry land mass that is relatively large for the population. Its pastures support roughly 25 million livestock, the largest proportion being sheep and goats. Agriculture has accounted for approximately 20 percent of Mongolia's gross domestic product (GDP) and 30 percent of its workforce. Mongolia is remote and landlocked, and its transportation and communications networks are rudimentary.

Once "Outer Mongolia" in the Chinese state, Mongolia asserted its independence in 1911 with the demise of the ruling Chinese dynasty, and became independent in 1921 when the Russian Red Army allied with Mongolians defeated a White Russian force then occupying the Mongolian capital. For the next 70 years Mongolia was a client state of the Soviet Union. Ruled by the Mongolian People's Revolutionary Party (MPRP) -- the Mongolian version of a Communist Party -- Mongolia suffered the rigors of Stalinism and the rigidities of a socialist economy. During these 70 years the country developed several cities, including its capital Ulaanbataar, and was transformed from an essentially nomadic and pastoral livestock economy of herders to an economy that also had some light agricultural processing and extractive industries.<sup>3</sup>

In 1990 with the general collapse of the socialist economic

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<sup>3</sup>See Library of Congress (1991); World Bank (1991); Milne et al. (1991).

model, Mongolia began changing politically and economically (Shapiro 1992). Demonstrations in Ulaanbaatar led to the relaxation of monolithic Communist rule, adoption of a new Constitution, the development of political parties, elections, and major changes in government policy. Mongolia remained heavily dependent on the Soviet Union for direct aid and loans, essential imports, and export markets. The impetus for change came in no small measure from the effects on Mongolia of the evaporation of the Soviet economy. Before the upheaval of the late 1980s and early 1990s, Soviet aid accounted for 25 percent of Mongolia's GDP, and 90 percent of Mongolia's foreign trade took place with Eastern Bloc states.

Economic change in Mongolia meant that the socialist model was officially abandoned, private property and private enterprise were endorsed, and a privatization process for state-owned enterprises was begun.<sup>4</sup> A coalition reform government took power, with young economists in the forefront supporting radical reform. Mongolia thus joined the countries of Central and Eastern Europe escaping from Soviet bloc controls. As these countries did, Mongolia suffered major declines in its standard of living and faced the necessity of taking its economy apart and reassembling it.

Mongolia depended more heavily on the Soviet Union than most Soviet bloc countries.<sup>5</sup> With the socialist penchant for building

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<sup>4</sup>See Denizer and Gelb (1992); Murrell (1991); Murrell et al. (1992a); Whytock (1992).

<sup>5</sup>Mongolia borders Siberia and in many ways is similar to states of the former Soviet Union located in the same general area.

large plants that could serve broad geographic areas, privatization and the demise of central planning controls yielded industry structures far from competitive models and led to increasing worries about the effects of monopoly.

In 1992 the coalition reform government was replaced after a national parliamentary election victory by the Mongolian People's Revolutionary Party. Although no longer a communist party and having committed itself officially to reform, the MPRP ran on a platform criticizing the speed with which the previous government had pursued the transition. Among other tactics, the MPRP has sought to associate the languid condition of Mongolia's post-communist economy with efforts to institute economic reforms.<sup>6</sup>

#### **Drafting a New Antimonopoly Law**

IRIS<sup>7</sup> began working in Mongolia in early 1991 under the leadership of Peter Murrell, a University of Maryland Professor of Economics and a specialist in comparative economic systems and the evolution of economies. Before the antimonopoly project began, IRIS conducted a series of workshops for Mongolian policymakers on

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<sup>6</sup>See James McGregor, "In the Post-Soviet Era, A Nation of Nomads Wanders Into Oblivion," **Wall Street Journal**, March 16, 1993, at A1.

<sup>7</sup>IRIS is a USAID-funded affiliate of the Department of Economics at the University of Maryland at College Park. Its Principal Investigator is University of Maryland Distinguished Professor of Economics Mancur Olson. IRIS has a substantial research program and a number of field programs supporting institutional reform in Third World and East European countries. For IRIS, "institutions" are the rules of the game governing economic and political actors in a society, including laws, regulatory procedures, and patterns of behavior. In addition to Mongolia, IRIS has institutional reform programs in Poland, Russia, Chad, India, Madagascar, and Nepal.

the institutions of a market democracy, and undertook advisory activities as followup to issues considered in the workshops.<sup>8</sup> Georges Korsun, an IRIS economist, lived for more than a year in Ulaanbataar and worked with Mongolian policymakers on a variety of economic reform issues. Korsun was instrumental in shaping the thinking of Mongolian officials about the possible role for an antitrust system in the broader framework of economic reform.

The IRIS advisors and Mongolian officials involved in the law reform process envisioned an antitrust system as serving three basic aims in Mongolia. The first would be to create a mechanism for challenging efforts by the state, acting either through government ministries or state-controlled business enterprises, to hinder the development of competitive markets. Among the greatest impediments to the functioning of markets in Mongolia are state policies that restrict entry, curb imports, and favor established state-owned firms. An antitrust system could operate as an important counterweight to government efforts to sustain existing competition-suppressing measures or to adopt new exclusionary statutes, rules, or policies.

The second purpose would be to discourage private efforts to replicate the type of central coordination and single-firm control

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<sup>8</sup>A number of the members of the Mongolian Antitrust Law Drafting Group previously had attended IRIS Workshops on the institutions of a market economy, as had Mongolian Prime Minister Jasrai and Tsedendagva, a member of Parliament and Chair of the Parliamentary committee responsible for antimonopoly legislation. Our work on a Mongolian antimonopoly law was itself a followup to an IRIS workshop whose main topic was the role of prices in a market economy.

of markets that characterized economic organization under Communist rule. This role would assume particular significance in industries where the subjects of privatization will be single-firm monopolies or tight oligopolies accustomed to having industry-wide production decisions centrally orchestrated. For example, without some controls on horizontal collaboration among separate entities, firms simply might substitute private agreements for central ministerial control as the means for selecting products, choosing output levels, and establishing prices. By providing the public assurance that private entities will not be permitted to distort the market process through output-restricting arrangements, the implementation of an antitrust system also could assist in deflecting public demands for the maintenance or bolstering of a comprehensive system of price controls.

The third goal of an antitrust system in Mongolia would be to facilitate a basic adjustment in the nature of public intervention in the economy by moving away from an expansive conception of government as the central planner of economic activity and moving toward a narrower role of government as arbiter and rulemaker. As conceived in most countries, antitrust legislation embodies a preference for the primacy of market forces as the means for organizing economic activity. Antitrust enforcement contemplates that the government will continue to intervene in the affairs of business, but such intervention is viewed as exceptional (rather than routine) and must be justified by its capacity to correct market failures. Seen this way, an antitrust system can become an

institutional force for redefining perceptions about the government's proper role in the economy.

The effectiveness of external assistance to the Mongolians charged with drafting an antimonopoly law benefitted substantially from long-term IRIS activities in Mongolia, and from a sustained period of assistance designed to pave the way for law drafting.<sup>9</sup> Mongolia mirrors the IRIS experience in several other countries, notably Poland, where long-term and sustained assistance, research, and education have improved the chances that Poles will accomplish institutional reform as part of the country's progress toward free markets and democratic structures. There has been rightful criticism of technical assistance projects that consist chiefly of quick "parachute" visits by external consultants. Such endeavors may yield paper reforms, but the absence of sustained in-country activity before and after the participation by consultants often means that nominal reforms quickly are remitted to a back shelf with no implementation and a strong residue of cynicism about the rule of law and governmental processes.

#### **The Law Drafting Process: The First Trip**

In November 1992 an IRIS team including the authors spent two weeks in Mongolia making specific preparations for law drafting.<sup>10</sup> We gave lectures to the Mongolian Law Drafting Group on

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<sup>9</sup>IRIS continues to have a representative (Jim Anderson, an economist) resident in Ulaanbataar.

<sup>10</sup>The other IRIS team members were Karen Turner Dunn, an IRIS economist who has taught microeconomics at the university level and who had previously worked on the IRIS Mongolian Project, and Georges Korsun, the IRIS economist who was resident in Mongolia.

microeconomic theory as it applies to competition policy, on substantive antitrust law and procedure, and on the organization of antitrust enforcement. These lectures were videotaped and were followed by question and answer periods.

We also led Mongolian researchers in studies of competition in three major industry sectors -- telecommunications, livestock slaughter/meat production, and wool spinning. For these studies we asked Mongolian researchers and representatives of the industries to assemble data about sales, costs, and prices. The studies involved interviews of industry managers, plant tours, and discussions with government officials with oversight duties for the industry sectors. Through this process we identified business conduct and government interference that an antimonopoly law might address. Our written studies described the government's pervasive interference in the development of markets<sup>11</sup> -- a result that may be unremarkable in view of Mongolia's history and circumstances, but still provides a reminder of how difficult reforms are to achieve and how much Western advisors sometimes take for granted.

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<sup>11</sup>Price controls and governmental price setting were central features of socialist economies. One of the most difficult problems for transition economies is to let go of price controls and to trust the outcomes of markets. Price controls continue in one form or another in Mongolia in many sectors (for example, some Mongolian meat and flour products were subject to government rationing in February 1993). In addition meat is a dietary staple with important cultural significance in Mongolia, and the three largest meat production plants, although "privatized", were each majority owned by the Mongolian government. See Murrell et al. (1992a); Murrell et al. (1992b). Of course, price regulation to control monopoly power or to achieve other public purposes is hardly unknown in the United States, as the recently enacted cable television price control legislation and the proposals to regulate pharmaceutical drug and other medical prices show.

Finally we met with Mongolian researchers to discuss the methodology we used for the industry case studies and to review what we had learned. These meetings provided an opportunity to consider antitrust issues that might arise in specific industry settings, to analyze how antitrust principles might be applied to these industries, and to help guide the Mongolian researchers in undertaking studies of competitive conditions in other industries. We left behind treatises and papers on antitrust, and a schedule of activities for the Law Drafting Group to pursue in the next few months -- reviewing existing Mongolian laws for relevance to an antimonopoly draft, conducting additional competitive studies, and preparing a draft of the antimonopoly law. The plan was set for us to return in February 1993 to advise on the final drafting process.

In the succeeding three months, IRIS had regular contact with our Mongolian colleagues from the Law Drafting Group. Three important IRIS documents were prepared and sent to Mongolia. One was a short discussion of alternative organizational structures for an enforcement agency -- as an independent agency or as an agency located within an existing ministry. The second was a detailed review of antimonopoly laws adopted or being considered by other countries undergoing the transition from communism to market systems, with commentary comparing these measures to the American antitrust laws. The third document critiqued two earlier unsuccessful draft Mongolian antimonopoly laws.

#### **The Law Drafting Process: The Second Trip**

Upon our arrival in February we found that a smaller core unit

had been formed within the Law Drafting Group. This unit was chaired by Amarsana, a former Minister of Justice, but its organization and day-to-day activities were supervised by Bailykhuu, a senior advisor to the Mongolian Privatization Commission.<sup>12</sup> The drafting group also included two economists and a lawyer. The core unit had prepared an eminently workable draft that became the basis for two weeks of intensive collaboration among ourselves and our Mongolian colleagues.

The core unit had absorbed all the background materials we had prepared, and more.<sup>13</sup> The IRIS memoranda discussing organizational structures and comparing antimonopoly laws in transition economies had been translated into Mongolian (no small achievement<sup>14</sup>) and had

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<sup>12</sup>In addition to privatizing state-owned enterprises, the Mongolian State Commission for Privatization has been a leading force for market reforms, and it had umbrella responsibility for drafting an antimonopoly law. Gerelchuluun, its Secretary, also attended an IRIS Workshop.

<sup>13</sup>Two incidents demonstrate the depth of the core unit's preparation. At one point, Badarch, an economist in the core unit, referred to a recent article by an official of the U.S. Federal Trade Commission's Bureau of Competition. This article had been translated into Russian and had been published in a Russian journal, which Badarch had read. The article prompted him to ask whether our advice was simply "main-line" or whether it reflected the "new trends" in antitrust analysis. At another point, Badarch asked us to compare and contrast the Japanese and Korean antitrust models as an aid for considering alternatives for Mongolia.

<sup>14</sup>We spoke no Mongolian, and most of our Mongolian colleagues spoke no English (but many spoke Russian). We relied on a superb translator/interpreter, Yanjemaa, who is well-known and respected in Mongolia. All oral presentations (and most conversations between Mongolians and Americans) were in consecutive translation. Yanjemaa has translated for IRIS workshops and knows the jargon of law and economics. As Mongolian is not a particularly commercial language, Yanjemaa often "invented" Mongolian phrases to convey Western ideas affecting commerce. Two other Mongolians, Batsetseg and Minjin, also provided valuable translation assistance.

been distributed with drafts of the law to government officials, members of Parliament, and private sector representatives. The draft law that emerged from our collaboration had a definite European flavor, showing a concern with dominant firms and, as compared with American antitrust law, a relatively lesser concern about agreements between horizontal competitors.

Four specific features of the draft legislation stand out. Among the paramount concerns of the Law Drafting Group was the definition of "dominance," which affected the operation of the draft law's controls on single-firm conduct and its restrictions on horizontal collaboration by rival entities. Large state-controlled or recently privatized concerns dominate the Mongolian economy. Mongolia has not experienced the dramatic development of a private sector, as has occurred, for example, in Poland. In these circumstances, our Mongolian colleagues did not want to hinder the private sector in any way, and saw little reason to regulate agreements among horizontal competitors as long as collectively they did not hold a dominant position, which the draft legislation defined as accounting for more than 50 percent of commercial activity in a relevant market. The application of a market share screen to horizontal arrangements is one area in which the draft Mongolian law could be viewed as on the "cutting edge" of antitrust analysis. The result reflects a concern all of us shared: that the law be attuned to Mongolian circumstances.

A second noteworthy "cutting edge" area involved merger enforcement. Again reflecting concern about interfering with

market activities as opposed to preventing harmful government actions, the Mongolians felt that restrictions on mergers should be narrowly cast. The draft legislation condemned horizontal transactions only if they yielded a dominant market position and banned vertical arrangements only if a vertical merger yielded a single entity with a dominant position in two or more vertically-related stages of a market. Moreover, the draft statute enabled the merging parties to raise efficiency defenses to sustain transactions that otherwise would be deemed unlawful through the application of the structural dominance criteria.

A third important area involved the choice of enforcement mechanism. The draft statute vested enforcement and adjudication responsibility in an independent Competition Commission, whose decisions were made appealable to the Supreme Court of Mongolia. The Law Drafting Group believed the enforcement authority should not reside within an existing government bureau, lest the new antimonopoly authority be hindered in performing the competition advocacy function described below. Because Mongolia's courts of original jurisdiction lack expertise in adjudicating commercial disputes, placing decisionmaking authority (subject to judicial review) in an independent agency dedicated to formulating and applying competition policy seemed more likely to create a body of antitrust expertise and to generate a coherent, sensible body of competition doctrines. Violations of the statute were to be remedied by decrees forbidding specific conduct, by the payment of actual damages to victims of illegal behavior, and by fines to be

imposed upon economic entities, government agencies, or individual managers of such organizations.

The fourth significant feature of the draft legislation is the role of the independent Competition Commission in opposing actions by other government agencies that reduce competition. The Law Drafting Group strongly supported an expansive competitive advocacy function for the new agency out of the belief that the most serious threat to the emergence of competitive markets would not come from privately-imposed restraints, but from competition-suppressing government intervention.<sup>15</sup> Specific focal points of advocacy activity would include government-imposed trade barriers and regulatory restrictions that inhibit entry, as well as efforts by state-owned or state-controlled enterprises to prey upon private rivals. In designing the advocacy role, the working group envisioned that the antimonopoly body would function as a "constitutional court" that could object to state intervention that suppressed competition and could issue decrees that support the operation of a market economy.<sup>16</sup>

Early in our two weeks it became clear that the issue of

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<sup>15</sup>See Rodriguez and Williams (1993: 30-31) (emphasizing the benefits for transition economies of competition advocacy programs that attack the establishment or maintenance of public restrictions on market rivalry); see also Kovacic (1992) (discussing usefulness of competition advocacy role in connection with Zimbabwe's consideration of new antimonopoly legislation).

<sup>16</sup>The Law Drafting Group attributed a "constitutional" character to the antimonopoly body's advocacy work because it believed that free market principles were fundamental to law reform and that government-imposed departures from such principles warranted close scrutiny.

regulating monopolies had risen on the Mongolian political agenda, and there was great interest in the work of the Law Drafting Group and the "American experts." We attended a roundtable discussion sponsored by the committee of the Mongolian Parliament which would consider the draft legislation. During the meeting, we responded to a raft of shrewd, intelligent questions about the draft law and its likely impact on the Mongolian economy. Similar sessions were held with representatives of the office of the President, the office of the Prime Minister, a council of managers of privatized businesses, and others.

We finished the drafting process with the realization that Mongolians had drafted the law with our help, which they had been free to accept or reject. It was their draft, not ours. The Mongolians saw it as their draft and their proposed law. We had engaged in an intellectually stimulating process, but it had not happened by accident nor without sustained preparation by both the external advisors and the internal drafting group.

#### **Content of the Mongolian Antitrust Statute**

We also had no illusions on the difficulties the draft might face when it made its way through the legislative process.<sup>17</sup> Much as we would have liked to have had an IRIS team present during those deliberations, for various reasons that proved not to be

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<sup>17</sup>Even though some members of the Law Drafting Group had strong ties to the Privatization Commission (the government body charged with drafting the antimonopoly law), the Law Drafting Group was not clearly an instrument of the highest levels of the Mongolian government. Moreover, in our experience, mechanisms by which policy choices are shepherded through the law enactment process are not well developed in Mongolia.

possible. As described below, our inability to consult regularly and first hand with the Law Drafting Group and other government officials may have been costly.

Following extended discussion, the Mongolian Parliament adopted the Law of Mongolia on Prohibiting Unfair Competition<sup>18</sup> in July 1993. The new statute has four principal operative elements: substantive antitrust prohibitions governing the conduct of business entities; restrictions on the ability of government bodies to adopt competition-suppressing regulations and policies; consumer protection mandates; and provisions addressing the mechanism for enforcement. Each of these elements is summarized below.

#### **Substantive Antitrust Provisions**

The statute's substantive antitrust prohibitions largely resemble the provisions of the Law Drafting Group's proposal. The statute's overriding focus is the conduct of firms that unilaterally or collectively hold a dominant market position. Article 3.1 ("Dominance, Monopoly, and Monopolistic Activities) defines dominance as a market share of over 50 percent in a relevant market.<sup>19</sup> All of the statute's antitrust provisions create a safety zone for unilateral or collective conduct where the market share of the economic entities in question fall below the 50 percent threshold. The statute's prohibitions apply equally to private and state-controlled firms.

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<sup>18</sup>The discussion in this part of the paper is based upon a draft, unofficial translation of the Mongolian statute.

<sup>19</sup>Article 3.2 defines "monopoly" as single-firm control over all production or sales in a market.

Article 4 spells out restrictions on unilateral conduct.

Among other provisions, dominant firms are forbidden to:

- \* Restrict production or sales for the purpose of creating an artificial shortage and raising prices;
- \* Impose contractual terms that discriminate among similarly situated suppliers or customers;
- \* Engage in sales below cost for the purpose of impeding entry or excluding existing rivals;
- \* Refuse to deal with other economic entities without a business justification and for the purpose of driving such entities from the market;
- \* Impose tying arrangements or resale price maintenance agreements; or
- \* Demand that input suppliers provide goods or services at price levels that might lead such suppliers to reduce production and sales of such goods or services.

Article 5 bars certain joint action by firms that collectively occupy a dominant market position. Article 5 bans the following types of conduct where such arrangements are designed to hinder competition:

- \* Agreements to fix prices, rig bids and tenders, or to otherwise restrict output;
- \* Agreements to allocate markets according to geographic territories, customers, products, or input suppliers;
- \* Agreements to impede competitors from joining organizations in which membership facilitates efficient business operations; and
- \* Agreements to refuse unreasonably to deal with other economic entities for the purpose of driving such entities from the market.

Article 7 prohibits certain mergers. This provision prohibits dominant economic entities from buying the capital stock or shares

of its rivals. Article 7 does not appear to apply to transactions by which two non-dominant firms merge to create a single dominant firm, nor does it contain any limitations on vertical mergers. Article 7 also provides that the merging parties can overcome a finding of illegality by showing that the merger's benefits in increasing production "in sectors of the national economy of prime concern to the population," or in increasing the competitiveness of Mongolian firms in achieving sales in export markets, exceed any harm to competition.

#### **Controls on Government Efforts to Suppress Competition**

The Mongolian Unfair Competition statute retains the draft legislation's suspicion of government intervention that stifles the competitive process. The prominence of concerns about government-imposed controls is evident in Article 1, which recites the law's aims:

The purpose of the Law is to regulate relations connected with prohibiting and restricting state control over the competition of economic entities in the market, monopoly and other activities impeding fair competition (emphasis added).

Article 9 takes two approaches to curbing government intervention that reduces rivalry. The first is to forbid national or local government bodies acting unilaterally from adopting a variety of competition-suppressing measures unless such measures are explicitly authorized by an act of the Mongolian Parliament. Government agencies are forbidden to bar or restrict market entry by new or existing firms, to set production levels, or to treat any economic entity in a preferential or discriminatory manner.

The second approach is to prohibit government entities from acting in concert with other government agencies or with affected firms to restrict competition, unless such action is explicitly authorized by an act of the Mongolian Parliament. Forbidden actions include decisions to set price levels, divide markets, restrict market entry by an economic entity, or to compel exit by an economic entity.

#### **Consumer Protection Features**

Although most of its substantive features involve antitrust commands, the Mongolian Unfair Competition Law contains consumer protection safeguards.<sup>20</sup> Unlike the antitrust strictures, the consumer protection measures apply to dominant and non-dominant economic entities, alike. Among other features, Article 8 condemns:

- \* Dissemination of false or misleading advertising that causes losses to competitors or diminishes their reputations;
- \* Engaging in the unconsented copying of the trademarks, brand names, packaging, or labels of other firms;
- \* Misappropriating the intellectual property (e.g., production and customer information) of other firms; or
- \* Concealing product quality defects or dangerous characteristics of products.

#### **Enforcement Mechanism**

The most ambiguous and worrisome aspect of the new law is the mechanism established for its enforcement. The vagueness with

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<sup>20</sup>The Law Drafting Group's proposed antimonopoly law also had included consumer protection provisions.

which enforcement power is delineated may reflect a parliamentary decision to defer consideration of enforcement questions and, effectively, postpone implementation indefinitely. Although the statute was passed in July 1993, implementation has yet to begin.

The Unfair Competition Law distributes enforcement-related power across four institutions: Parliament, the heads of central government ministries, the Department of National Development (DND), and the Mongolian courts. Article 10 of the statute gives Parliament (the Great Hural) responsibility for enforcing prohibitions against anticompetitive behavior by instrumentalities of the national government. Under Article 11.1, agencies of the central government also must consult with Parliament when they adopt decisions concerning price regulation of industries considered to be natural monopolies or concerning restrictions on import or export activities.

For all other matters arising under the Unfair Competition Law, Article 11 delegates enforcement authority jointly to the heads of Mongolian national government ministries and to the DND Chairman.<sup>21</sup> Article 11 directs these bodies to:

- \* Present proposals to the national government about supervising enforcement of the Unfair Competition statute and about procedures for enforcing it;
- \* Submit proposals to the Prime Minister about

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<sup>21</sup>The statute creates no private right of action, but permits (in Article 13) individual firms, citizens, or organizations representing consumer or producer interests to register complaints with the Hural (concerning law violations by national government agencies) and with the government ministries and the DND (concerning law violations by local government bodies and by business enterprises).

overruling decisions by local government authorities that violate the Unfair Competition statute;

- \* Require businesses and government bodies to supply information concerning whether individual firms are monopolies, natural monopolies, or dominant firms;
- \* Demand that monopolies or dominant firms engaged in illegal conduct be dissolved; and
- \* Publish their decisions concerning efforts to redress prohibited conduct.

These provisions lend themselves to at least two conflicting interpretations about the responsibilities of the ministers and the DND. One view is that each government ministry and the DND has authority to enforce the statute's substantive provisions. A second possibility is that Article 11 merely directs these entities to supervise the creation of a new instrumentality (either as a bureau of an existing government agency or as a new government body) that will be responsible for enforcement. The statute does not indicate which approach was intended, and efforts by IRIS's present in-country representative to clarify this important point have been unavailing.

The Unfair Competition Law appears to vest all authority to adjudicate violations with the Mongolian courts. Article 12 gives the courts power to decide the market status of individual economic entities (i.e., monopoly, natural monopoly, dominant firm, or nondominant firm), to demand that economic entities cease engaging in law violations, and, more generally, "to settle disputes arising from violating" the statute's prohibitions. Article 12 suggests that the national ministries and the DND have no independent

adjudicatory authority and must prosecute all complaints involving violations by economic entities before the courts of Mongolia. Thus, unlike the Law Drafting Group proposal, which contemplated a combination of independent agency adjudication and appellate review, the Unfair Competition statute places all adjudicatory authority with the Mongolian courts.

Article 14 presents the main remedial tools of the enforcement process. Article 14.1 entitles injured parties to actual damages for injuries suffered as a result of law violations. However, this provision does not specify whether damages may be assessed against economic entities, government bodies, or both; nor does it indicate which instrumentality (i.e., a government ministry, the DND, or the court) is responsible for calculating and awarding damages. Article 14.2 permits the court to impose fines upon business owners and firm managers for law violations, for failure to comply with court decrees, or for refusing to supply required information. Unlike the Law Drafting Group proposal, the statute imposes no fines on government entities which engage in law violations. Indeed, the statute does not indicate how government agency violators are to be punished.

#### **Prospects for Implementation**

Throughout our work with the Mongolian Antitrust Law Drafting Group, implementation issues arose repeatedly. It is impossible to overemphasize the importance of sustained effort and preparation in assisting other countries to achieve legal reform. Implementation is the Achilles Heel of law reform in transition economies, and

experience in many countries has shown that quick fixes and shortcuts are utterly unavailing. Close attention to implementation is a central element of a successful reform process.

Experience with the passage of Mongolia's Unfair Competition Law indicates why many law reform efforts are prone to founder without sustained concern with implementation as legislation is being drafted, debated, and approved. As enacted, the Unfair Competition Law ignores a number of important enforcement issues and leaves other ingredients of the enforcement apparatus ill-defined. Perhaps the most significant deficiency is the new statute's failure to specify whether each ministry and the DND is to proceed to enforce the statute, or whether these entities have been directed to collaborate in devising a new enforcement mechanism for consideration by Parliament. Whatever form the enforcement mechanism is intended to take, the law is also silent about what resources will be made available for its operation.

As adopted, the Unfair Competition Law contains a number of potentially useful substantive commands (particularly dealing with the role of the state in the economy) but at this point it is not clear that there will be effective means for putting them into effect. As the statute is now written, there is a danger that the antimonopoly experiment may join the roster of nominally impressive reform measures whose practical impact is slight. Moreover, because adopting laws without serious efforts to apply them can corrode public confidence in the rule of law, the failure to pursue implementation seriously could be counterproductive.

Such gaps in the new legislation might have been avoided, or their implications realized more fully, if an IRIS team could have been present in-country while Parliament debated the statute, and if there had been a plan for outside experts to be present for the beginning of the implementation process.<sup>22</sup> External advisors cannot dictate the terms of legislation to the lawmakers of the transition economy, but they may exert a valuable influence in ensuring that crucial issues are recognized and confronted. They can best play this role by combining attentiveness to distinctive national conditions with close familiarity with how other countries have adopted and implemented similar statutes. Their ideas and suggestions ultimately may be rejected, but the advisors can serve as a valuable sounding board for identifying the implications of different policy choices.<sup>23</sup> A practical lesson from the Mongolian experience is the importance of having expert external advisors on-hand in the critical stages of the law enactment process.<sup>24</sup>

Given the lack of a clear implementation scheme, the issue in Mongolia is whether the new antitrust statute can serve as a

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<sup>22</sup>See discussion following note 17 supra.

<sup>23</sup>For example, during the parliamentary deliberations on the Unfair Competition Law in Mongolia, an IRIS team might have had some success in ensuring that Parliament's attention remained focused on implementation concerns.

<sup>24</sup>At the same time, there is the issue of when a country should be left "on its own" in pursuing policy reform. In this context, we note that the United States has provided technical assistance on antimonopoly law implementation to transition economies in Eastern Europe, including Poland, the Czech Republic, Slovakia, and Bulgaria -- which are themselves already better equipped (in terms of an institutional infrastructure and resources) than Mongolia to deal with such issues. See McDermott (1991).

platform for developing a useful national competition policy. Efforts to devise an implementation approach must take account of at least two fundamental institutional constraints. First, the Mongolian government is likely to be able to commit few resources to enforcement. Not only does the country face enormous pressure to cope with other national needs and financial obligations, but only a relative handful of Mongolians have familiarity with the legal concepts or industrial organization economics that underpin the operation of an antitrust system. A second and related point is that many institutions essential to effective enforcement will need to be built virtually from the ground up. A new enforcement bureau will have to be created (either within an existing ministry or as a stand-alone body), a professional staff must be assembled and trained, and judges of the courts that will hear antitrust disputes must be given at least a rudimentary education in legal and economic principles that are certain to be alien.<sup>25</sup>

Operating within these constraints, we suggest an Unfair Competition Law implementation program built upon a hierarchy of four priorities. The first priority would be to build an austere enforcement apparatus around a small cadre of Mongolian experts, such as the core members of the Antitrust Law Drafting Group. The Mongolian officials would benefit from assistance provided by an external competition policy advisors resident in-country and by

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<sup>25</sup>Our interviews with members of Mongolia's legal community indicated that Mongolia's courts historically have served chiefly as forums for deciding criminal cases and have gained little experience in hearing commercial disputes.

competition policy workshops conducted by external advisors either in Mongolia or in other countries. Such workshops also could be offered to judges who will adjudicate disputes under the statute.

The second priority would be for the newly-created competition bureau to devote its efforts in its first year of operation to performing an education and publicity function within and outside the government about the new competition policy system. Through media interviews, pamphlets, and seminars, the competition policy bureau could inform business leaders, government officials, and Mongolian citizens about the new statute. In dealing with internal and outside constituencies, the new office would declare that its main goal for the first year of the statute will be education rather than the prosecution of cases. Such an approach could raise public awareness of the statute, provide visible evidence of the government's commitment to implementation, create the sense among affected actors that the legal regime is fair because it will be applied only after notice of its requirements has been given, promote the virtues of market-oriented public policy, and give the new office time to devise an enforcement strategy.

The third priority would be to begin to perform the competition advocacy function contemplated by provisions of the statute that seek to discourage government intervention that impedes market rivalry. Among other specific targets, a competition advocacy program could attack regulatory controls and policies that restrict entry and favor incumbent firms. More generally, the antitrust bureau could use the competition advocacy

program to create an institutional force to foster the adoption within the government of market-oriented reforms.

The fourth priority would be to begin initiating cases to challenge violations of the statute commands. A possible target of such enforcement might be efforts by large, formerly state-owned enterprises to use cartels to restore the regime of planned production and marketing that prevailed in the era of central controls. Here too, the new antimonopoly bureau could benefit substantially from the assistance of external advisors in choosing possible cases and prosecuting violators.

#### **Conclusion: Lessons for Regulatory Reform in Transitional Economies**

Our experience suggests six general conclusions about the process of legal reform in transition economies. First, effective legal reform requires sustained effort over a substantial period of time. There will be failures and false starts. Successful participation by external advisors is unlikely to flow from visits by consultants who "parachute" into the country, make a few quick lectures, and head for home. Particularly for programs involving legislative reform, consultants are likely to have the greatest impact where they participate extensively in preliminary fact-gathering as a prelude to law drafting, assist in drafting, remain available to monitor and advise in the legislative process, and help with implementation.

The second lesson relates closely to the first. Legal reform is most likely to take root within an overall context of ongoing relationships with a country and as part of a larger process of

teaching and interaction. It is an enormous advantage if the legal reform team can rely on colleagues who are resident in the country.

Third, reform experts coming to a country cannot spend all their time "whispering in ministers' ears." The reform process needs to involve encompassing interests. There is much a reforming country can learn from an open and transparent legal reform process, where the consumers and users of the law are involved in the legal reform process.

Fourth, reform ultimately has to be generated by citizens of the reforming country. Foreign experts can serve as catalysts, teachers, and expert advisors, but reform efforts will fail if groups and leaders in the country do not take major roles in achieving reform.

Fifth, laws and regulatory processes must be adapted to the host country's environment. It is insufficient for reformers to adopt an American law, or even the "best" law on the subject. Indeed, it sometimes may be necessary for outside advisors to accept provisions that are "bad" in their eyes, because such provisions might be the only ones that have a chance of being passed and implemented and might improve the existing situation. A crucial ingredient of the catalytic and teaching process is to help the drafters choose from among alternatives adapted to the country's distinctive circumstances.

Sixth, implementation must be a priority from the beginning. There are plenty of fine sounding laws in the world, and even constitutions, that sit on shelves and never are implemented. The

drafting process for the Mongolian Unfair Competition Law could serve as a model for other law drafting exercises. Nonetheless, important questions remain as to whether the new statute's attractive substantive features will be applied effectively.

Finally, antimonopoly legislation can play a valuable role in facilitating the adjustment from controls to markets. We acknowledge that the usefulness of an antimonopoly law to transition economies remains controversial. There is reason to fear any regulatory bureaucracy in a transition economy. However, one of the most important lessons to be learned is the proper role of the state in a market economy. The process of adopting and implementing an antimonopoly law can be a centerpiece in the transition from government as central planner and manager of the economy, to government as arbiter and rulemaker for private competitors.

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