

**A DIAGNOSTIC TOOL FOR REFORM: IMPROVING THE EFFECTIVENESS OF COMPETITION LAW  
REFORM PROJECTS**

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At one time competition policy was seen as an irrelevance for the developing world. The economies of these countries were small, withdrawn, and lethargic. They were sheltered from the inexorable spread of globalization by impervious trade barriers and pervasive state controls. Post-liberalization these countries have caught the competition bug: they are hungry for the promised gains of open and competitive markets. To that end, and with some prodding and encouragement from the West, over one hundred jurisdictions have adopted some form of competition law.

Carefully designed competition laws, if properly enforced, can propel an economy forward by eliminating competitive restraints fostered by obstructive government interventions and restrictive business practices. This was the long-term goal of the many donor-sponsored reform projects in this field. What then explains the hollow commitment to implementation and the disappointing enforcement record? This is an important question because donors investing in new competition law reform projects, or evaluating past attempts, must isolate both the barriers to reform and enforcement and the drivers of change.

This paper develops a demand and supply model of competition law enforcement to analyze the political economy of competition law reform. This model aids in the characterization of three “reform scenarios”: starting with the pre-reform, *low-enforcement equilibrium*; moving into *excess supply*, as the enforcement capacity of the competition agency strengthens; and finally arriving at *excess demand*, as the “rent-preserving alliance” uses a mixture of legitimate and corrupt means to preserve their supra-competitive profits by suppressing the supply of competition law enforcement.<sup>1</sup>

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<sup>1</sup> The term “rent-preserving alliance” was coined by Stephen Weymouth, Assistant Professor at the Georgetown University, McDonough School of Business in Stephen Weymouth, Organized Business, Affiliated Labor, and Competition Policy Reform in Developing Democracies, October 18, 2010 *available at*

The success of competition law reform projects depends on correctly diagnosing the reform scenario at the outset. Applying the demand and supply model in this context, it becomes apparent that the “market” for enforcement can be at equilibrium at both a high and a low enforcement level. In so far as the stakeholders themselves represent limitations on the competition agency’s activities, resulting in an artificially low level of enforcement, the model can be used to map the nature and direction of those stakeholders’ opposing influences. All actors are assumed to have a (selfish) interest in the regulatory outcome, and the demand and supply model of competition law enforcement identifies the necessary measures to achieving alignment of those interests at a high-enforcement equilibrium. Donor-sponsored projects must adequately deal with the winners of reform as well the losers in order to achieve fair and sustainable outcomes.

Section 1 discusses the context in which competition laws were adopted in much of the developing world, setting the background for the competition law reform projects that are the subject of this paper. Section 2 describes the conventional demand and supply model, as applied to competition law enforcement services supplied by the competition agency. Section 3 looks at ways to increase the supply of enforcement services by building the capacity of the competition authority and expanding its jurisdiction. Section 4 highlights the importance of achieving public buy-in for the sustainability of competition law reform projects and discusses how to increase demand for enforcement services. Section 5 explains the mechanisms by which the rent-preserving alliance can influence the government and the competition agency, sometimes through corrupt means, to suppress supply of competition law enforcement.

The core areas for reform coming out of the discussion are:

- On the supply-side, reform projects must enhance the capacity of the competition agency to pursue enforcement actions, as well as develop the supporting institutions. This is both necessary and sufficient for increasing the supply of enforcement, in the short term.
- Such increases will be unsustainable without the complementary demand-side generation of awareness of the benefits of competitive markets amongst consumers and the business community, and the cultivation of a “competition culture.”

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[http://faculty.msb.edu/sw439/documents/interests\\_final.pdf](http://faculty.msb.edu/sw439/documents/interests_final.pdf). The term refers to the group of producers and workers that earn monopoly profits or “economic rents” under the anticompetitive regime and therefore resist competition law enforcement as encouraged by competition law reform projects.

- Cultivating a culture of competition also feeds into the necessary dismantlement of the ultimate barrier to robust enforcement: the pernicious influence of the rent-preserving alliance, especially as exercised through corrupt means. Competition law reform can therefore be added to the list of endeavors in the developing world that will fail if corruption is left unchallenged.

## 1. THE CONTEXT OF COMPETITION LAW REFORM

In the succeeding discussion, this paper will assume that the recipient countries of donor-sponsored competition law reform projects already possess *the* fundamental prerequisite for competition law enforcement: some form of competition law. The adoption of laws regulating the free market formed part of what are known as “second generation” reforms that have been pursued by various countries in the developing world. The “first generation,” as embodied by the “Washington Consensus,”<sup>2</sup> was characterized by a push towards economic liberalization, deregulation, privatization, and fiscal discipline, particularly in those countries that had otherwise shunned the open, free-market model. These reforms were seen as critical to economic development and growth, and it was hoped that they would help to lift developing countries out of poverty.

This expectation turned out to be somewhat naïve and, crucially, the “first generation” of reforms failed to appreciate the importance of institutions in promoting economic development. Unbridled free market enterprise can lead to unacceptable inequalities and persistent poverty among large sections of society. The lifting of trade barriers benefitted certain industries and left others vulnerable to the capriciousness of the market. Privatization turned some state-owned monopolies into privately-owned ones.<sup>3</sup> Free-market reforms did not always result in sustained and equally distributed poverty reduction.

In response to the perceived deficiencies of the “first generation” reforms many commentators called for a “second generation” of reforms to soften the harshness of the free market system. The World Bank’s 1997 *World Development Report* stated: “[w]ell-designed regulatory systems can help societies influence market outcomes for public ends. Regulation can

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<sup>2</sup> See JOHN WILLIAMSON, *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA* (1990).

<sup>3</sup> John Clark, *Competition Advocacy: Challenges for Developing Countries*, 6 *OECD J. COMP. L. & POL’Y* No. 4, 3 (2005).

help protect consumers, workers and the environment. It can foster competition and innovation while constraining the abuse of monopoly power.”<sup>4</sup>

This movement recognized that institutions can provide the missing link that can allow the exploitation of the benefits of free markets while regulating the less palatable side-effects. The terminology is that of the New Institutional Economics, which identifies “institutions” as the “formal and informal rules and their enforcement that shape the behavior of organizations and individuals in society.”<sup>5</sup> In this context, reforming institutions includes enacting legislation, and competition laws were adopted as part of the reform effort.

The current attempts to improve the effectiveness of competition law enforcement can be seen as part of late-stage second generation reforms that respond to the realization that institutions are not in themselves enough. There may be various barriers to effective enforcement even once the necessary legislation has been passed and the competition authority has been installed. To be successful, competition law reform projects must correctly identify and respond to those barriers. The remainder of this paper will address itself to this issue.

## **2. THE DEMAND AND SUPPLY MODEL OF COMPETITION LAW ENFORCEMENT**

How should a reform project go about increasing the level of enforcement? The literature on this topic hints towards several institutions and stakeholders that may play a role. Using the conventional demand and supply diagram as an organizing framework, it is possible to develop a model to chart how these stakeholders and institutions interact. This exercise will facilitate the identification of possible solutions to any barriers to reform identified along the way.

Fig. 1 shows the basic demand and supply diagram for the “market” for competition law enforcement. The competition agency can be thought of as supplying “enforcement services” to the public. Enforcement services take the form of: conducting market, firm and transactional investigations; levying fines; obtaining injunctions against anticompetitive conduct; and engaging in advocacy before other regulatory agencies. The supply schedule is vertical, i.e. supply of enforcement services is perfectly inelastic. The cost of supplying an enforcement

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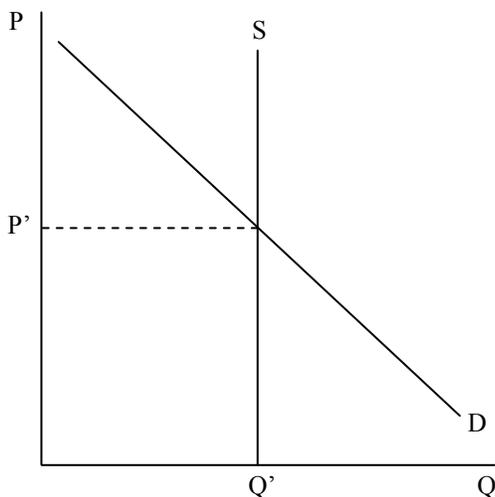
<sup>4</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 6 (1997).

<sup>5</sup> SHAHID JAVED BURKI & GUILLERMO E. PERRY, BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER 11 (World Bank, 1998).

action is the “supply price,” but the implicit assumption is that the competition agency supplies as much enforcement as it can – as much as its capacity will allow.<sup>6</sup> The level of supply is determined by the agency’s capacity to supply enforcement services with a given budget allocation.

The public, consisting of consumers, producers and workers – and their representatives – demands enforcement services. The level of demand depends on the cost to the tax-payer, per enforcement action. I assume the standard downward-sloping demand curve, on the basis that the higher the supply price of enforcement actions, the fewer such actions the public, in the broad sense, will demand.<sup>7</sup> At supply price  $P'$  the market for enforcement services will be at equilibrium if the enforcement agency can supply  $Q'$  enforcement actions.

**Fig. 1**



Even before progressing with the analysis, using the demand and supply diagram it is immediately evident that moving from this initial condition of low-enforcement to a high-enforcement equilibrium will involve shifting both the supply and demand curves. The remainder of this paper will explore the implications of this conclusion for competition law reform projects.

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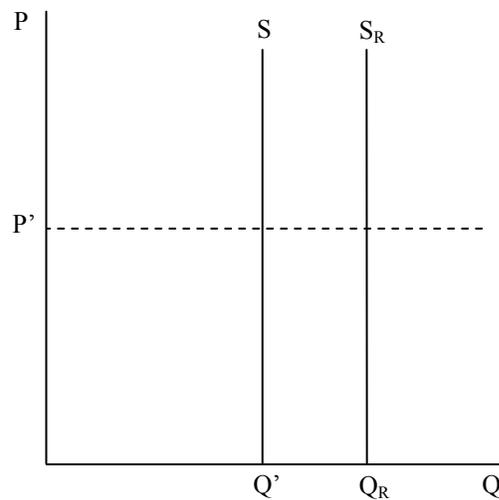
<sup>6</sup> For simplicity, it is assumed that the “supply price” is exogenously-determined.

<sup>7</sup> This may be because public resources are scarce and as the supply price of enforcement (the cost to the tax-payer) rises, the public would rather substitute away from competition law enforcement and towards other welfare-enhancing public services, such as healthcare or education.

### 3. INCREASING THE SUPPLY OF ENFORCEMENT SERVICES

The analysis starts from the position of the first reform scenario - the *low-enforcement equilibrium*, depicted in Fig. 1 above. Fig. 2 illustrates an increase in the level of enforcement from the *low-enforcement equilibrium* of  $Q'$  to post-reform level of  $Q_R$ , achieved by shifting the supply curve outwards from  $S'$  to  $S_R$ . Due to an increase in agency capacity the agency is able to supply more enforcement services for the same supply-price,  $P'$ .

**Fig. 2**



#### **Shifting the Supply Curve – Capacity-Building**

The most effective methods of shifting the supply curve involve alleviating the resource constraints limiting agency activities and broadening the agency's jurisdiction.<sup>8</sup>

##### *Alleviating resource constraints*

Competition agencies in the developing world operate under severe resource constraints.<sup>9</sup> The ability to supply enforcement services is capped by a lack of modern equipment and staff shortages. Typically an agency does not have the computers, printers, telephones, photocopiers,

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<sup>8</sup> It is worth noting that improving the capacity of supporting institutions, such as universities, the judiciary and the private bar, can also help to increase the supply of enforcement services. See Michelle Chowdhury, *The Demand and Supply of Competition Law Reform* (forthcoming 2011).

<sup>9</sup> William Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT'L L. & POL'Y 437, 441.

fax machines, and internet facilities that are necessary to function efficiently. They may not even have adequate supplies of basic provisions, such as photocopier paper.<sup>10</sup> If a donor is willing to make funds available, in the first instance the money should be spent on more and more modern hardware and more and better-skilled staff. Both will increase the efficiency of the agency and therefore the capacity to supply enforcement services.

The agency needs lawyers, economists and administrators to function effectively. In addition to an understanding of competition law and the underlying economic principles, the lawyers should ideally have litigation experience and knowledge of administrative law and civil procedure.<sup>11</sup> To attract and retain suitably qualified professionals the agency will have to offer an appropriate salary. William Kovacic reports that a typical professional employee of the Ukraine Antimonopoly Committee (AMC) earns about \$20-40 per month.<sup>12</sup> The AMC Chairman receives roughly \$100 per month, and the use of an apartment and agency car.<sup>13</sup> In Russia, Kovacic reported an anecdotal story of the head of one of the regional antimonopoly offices paying staff salaries out of his own pocket for weeks at a time due to agency illiquidity.<sup>14</sup> These examples are from the 1990s, but other jurisdictions may be in the same position today. Donors do not typically fund salaries or other recurring costs because to do so would not support the recipient country's ability to function once the aid runs out. Focusing instead on improving agency efficiency will help free-up money to spend on hiring competent staff, while other projects work towards streamlining the internal management procedures, payroll and other administrative functions.

One of the key resources that donors can provide to an agency is expertise. Experienced practitioners from developed-country agencies visit recipient countries as part of legal technical assistance delegations to share their experiences of competition law enforcement. As resident advisers, they can hold training sessions, seminars or workshops, they can assist with the

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<sup>10</sup> William Kovacic, a Commissioner of the U.S. Federal Trade Commission, supplies a worrying anecdote from a competition law technical assistance mission in Mongolia. A Mongolian official gladly accepted a pile of project documents from another group of visiting experts, concerning the adoption of securities laws in Mongolia. The official encouraged the foreigners to bring more such documents, printed single-sided, like the first batch. When they left the official confessed that there was a shortage of quality copier paper in Mongolia therefore these single-sided documents would prove very useful indeed. *Id.* at 438.

<sup>11</sup> William Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 431 (1997-8).

<sup>12</sup> Kovacic, *supra* note 9, at 442.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

development of analytical methodologies or investigative techniques, and they can advise on enforcement priorities and internal management structures.<sup>15</sup> Attendance at training programs should be compulsory for all professional staff-members and it will not always be necessary for the expert to physically be in the recipient country to impart his or her expertise. Experts can assist through consultations via email or phone, and teleconferences or videoconferences.<sup>16</sup> Mentoring relationships can be developed by the expert with particular staff. Building the capacity of individual staff-members to take-on more difficult and challenging investigations in a logical, rigorous and effective way will increase the supply of enforcement services regardless of future resource levels.

One concern is that high staff turnover limits the contribution of training sessions to agency capacity because investments in individual staff members and the knowledge they develop are lost to the agency when they leave.<sup>17</sup> Knowledge-management mechanisms must be put in place to retain training materials and research outputs, and to record accumulated know-how, to preserve institutional memory and facilitate lasting capacity-building.

The technical assistance that is provided must be appropriately tailored to the capacity of the agency in question if it is to be effective. For example, studies indicate that, because the absorptive capacity of the agency develops as it gains more experience, relatively juvenile competition authorities benefit more from shorter-term technical assistance missions, whereas more mature agencies gain more from longer-term missions.<sup>18</sup> Kovacic suggests that “longer-term” may mean as long as 10 years, because the resident adviser must develop credibility, a knowledge of the local conditions, and personal connections with the agency staff.<sup>19</sup> Donors must be prepared to make this kind of commitment on a continuing basis if they are to see maximal results from their efforts.

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<sup>15</sup> *Id.* at 446.

<sup>16</sup> FEDERAL TRADE COMMISSION STAFF AND U.S. DEPARTMENT OF JUSTICE, CHARTING THE FUTURE OF INTERNATIONAL TECHNICAL ASSISTANCE AT THE FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE 6 (2009), available at <http://www.justice.gov/atr/public/reports/250908.pdf>.

<sup>17</sup> OECD, COMPETITION LAW AND POLICY IN SOUTH EAST EUROPE: A PROGRAMME OF ACTION 50 (2003), available at <http://www.oecd.org/dataoecd/12/62/2789007.pdf>.

<sup>18</sup> See Simon J. Evenett, *The Effectiveness of Technical Assistance, Socio-Economic Development, and the Absorptive Capacity of Competition Authorities*, Economic Commission for Latin America and the Caribbean, Estudios y Perspectivas Series (2006), available at <http://www.eclac.org/publicaciones/xml/8/27168/L755.pdf>.

<sup>19</sup> Federal Trade Commission Staff and U.S. Department of Justice, Report, *supra* note 16, at 7.

Donors should also consider other resources that they are uniquely able to provide. For example, many agencies lack access to translated competition law treatises and other source materials that could be used to learn from the experiences of more developed jurisdictions. A World Bank-funded project in Russia provided a translated copy of William Kovacic and Ernest Gellhorn's *Antitrust Law and Economics in a Nutshell*, translated into Russian.<sup>20</sup> The same project could be replicated in other jurisdictions – or even better, donors could fund the production of a handbook specifically designed for the needs of developing-world competition agencies.

Attracting the right people to staff a new competition agency is not just a question of salary. Competition law is a complex field, blending legal and economic concepts in a way that must constantly respond to evolving business practices. Relatively few people in the world would consider themselves experts in this field, and many of those who do hold advanced degrees in the subject or have been practicing it as a profession for many years.<sup>21</sup> In some developing countries, the lack of expertise in competition law is compounded by a general depletion of the professional class. Some of the brightest and most motivated young professionals may have left their home country and sought careers in the developed world. One way to address this problem is to offer university scholarships tied to service at the agency, to propagate a new cohort of educated agency officials.<sup>22</sup> If it is not possible to attract experts to permanent jobs with the agency then, as an interim measure, it may be necessary to retain outside counsel or secondees from other government departments (for example, economists from the Ministry of Finance) for particularly demanding cases.<sup>23</sup>

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<sup>20</sup> The West Publishing Company granted a royalty-free license to prepare and distribute the Russian translation and waived the \$500 payment that is ordinarily payable for the right to offer a translation of one of its texts. Kovacic, *supra* note 9, at 442.

<sup>21</sup> Kovacic provides an illustrative quote from an agency official at the Antimonopoly Commission in Mongolia: “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, experience, 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.” The official was talking about new securities laws, but a parallel can be drawn with competition law. *Id.* at 438.

<sup>22</sup> TAIMOON STEWART ET AL., EMPIRICAL EXAMINATION OF COMPETITION ISSUES IN SELECTED CARICOM COUNTRIES: TOWARDS POLICY FORMULATION 202 (2004), available at [http://www.idrc.ca/uploads/user-S/11682895281CARICOM-Final\\_Report.pdf](http://www.idrc.ca/uploads/user-S/11682895281CARICOM-Final_Report.pdf).

<sup>23</sup> The Peruvian competition authority has done this in the past. Taimoon Stewart et al., *Competition Law in Action: Experiences from Developing Countries*, 30 (2007), available at [http://www.idrc.ca/uploads/user-S/11781215481Competition\\_Law.pdf](http://www.idrc.ca/uploads/user-S/11781215481Competition_Law.pdf).

The right investments can put an agency on a self-perpetuating trajectory, whereby borrowed expertise from foreign advisers is tested by agency staff in the domestic environment, adjusted according to own-country experiences, incorporated into the agency's best practice and then transmitted to the next generation. The virtuous cycle of learning by doing should allow the supply curve to shift continuously and inevitably outwards.

But the right investments – the sustainable investments with the greatest returns – are often, rather bizarrely, not the ones that are most attractive to donors. Injecting more funds is the knee-jerk reaction of some donor organizations, but throwing money at the problem will not necessarily provide a permanent solution. Donors typically view themselves as exogenous to the reform dynamic, but idiosyncrasies of donor internal management can affect the project outcome. Kovacic identifies the “chief pathology” of donor organizations as nearsightedness.<sup>24</sup> Donor organizations have a tendency to focus their efforts on projects that will produce measurable, and therefore marketable, results - and fast.<sup>25</sup> This is also true of the incentives facing individual staff-members. If an expert is posted on a two-year mission to a recipient country he or she will want to pursue projects that will yield objective, reportable results within that timeframe, to allow them to use that success to advance their own professional standing.<sup>26</sup> These problems are not peculiar to competition law reform, they are endemic in the organization of many donor agencies and they have been candidly discussed by prominent members of that community.<sup>27</sup>

### *Strengthening the agency's regulatory reach*

The agency's capacity to supply enforcement actions is also limited by the regulatory environment that may exempt certain industries or sectors or remove certain conduct from the agency's regulatory reach. But the regulatory structure is not static. The competition authority should engage in inter-agency advocacy to promote competition and raise competitive concerns at every opportunity. The agency must proactively claim new areas of jurisdiction and protect its

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<sup>24</sup> Kovacic, *supra* note 9, at 445.

<sup>25</sup> Kovacic provides the example of the Mongolian competition laws, which were drafted with expert assistance, funded by USAID, but no assistance whatsoever was given for implementation, resulting in a weak enforcement agency despite the reportable “success” for USAID. *Id.* at 446.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., William Easterly, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

existing scope of activities. This role is particularly critical as the economy first transitions towards a free market, when certain spheres of influence may still be “up for grabs” as the political and bureaucratic machinery realigns.<sup>28</sup>

In order to perform its advocacy function the agency must have the legal and institutional capacity to comment on changes in legislation and policy. A reform project could seek to put the competition authority on a firm legal footing by codifying its duties and obligations relating to competition advocacy.<sup>29</sup> The autonomy of the competition authority is also a key determinant of the agency’s capacity to engage in advocacy.<sup>30</sup> But there are institutional costs to independence. By removing itself from the inner circle of government, the agency may lose access to key decision-makers.<sup>31</sup> Agency officials may not even be informed of new developments that affect the regulatory climate. It may therefore be necessary to mandate that the agency be consulted in all legislative matters pertaining to the competitive environment.<sup>32</sup>

The competition authority must build its credibility if it is to be taken seriously by other government ministries. To a certain extent this will develop organically as the agency accumulates a successful enforcement record. But the advocacy team should also actively promote its achievements to bolster its legitimacy in relation to the other government departments while also increasing the reputational value of engaging in advocacy in the first place. By expanding the scope of economic activity that it may review, the agency’s advocacy function serves to increase the level of supply by shifting the supply curve outward.

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<sup>28</sup> Some commentators have suggested that this role is so vital that advocacy should be prioritized over enforcement activity when a country is first transitioning towards a market economy and the market structures and institutions are still in flux. See INTERNATIONAL COMPETITION NETWORK, *ADVOCACY AND COMPETITION POLICY* (2002).

<sup>29</sup> *Id.* at 88.

<sup>30</sup> *Id.*

<sup>31</sup> Clark, *supra* note 3, at 1.

<sup>32</sup> Even without mandated consultation, the competition agency can publically exert pressure on other government ministries. In Poland the agricultural ministry proposed a scheme of tariffs that would raise the price of imports dramatically. There was no provision in the legislation allowing the Antimonopoly Office to formally comment on this initiative, but the Executive Director gave interviews with leading Polish newspapers caricaturing the tariff measures in the following terms: (1) the Minister of Agriculture is governor-general of all agricultural markets; (2) he will exercise this authority in consultation with the farmers’ union; (3) consumers are free to decide whether to eat or not. This tactic of public ridicule was effective and the program was significantly reduced. Craig W. Conrath & Barry T. Freeman, *A Response to “The Effectiveness of Proposed Antitrust Programs for Developing Countries”*, 19 N. C. J. INT’L L. & COM. REG. 233, 245 (1993-4).

#### 4. INCREASING THE DEMAND FOR ENFORCEMENT SERVICES

The discussion so far has focused on increasing the capacity of the enforcement agency in order to increase the level of enforcement. The agency's capacity is developed through the injection of funds to pay for more and better equipment and people, technical assistance missions led by foreign experts sharing experience and best practice, and engaging in inter-agency advocacy.

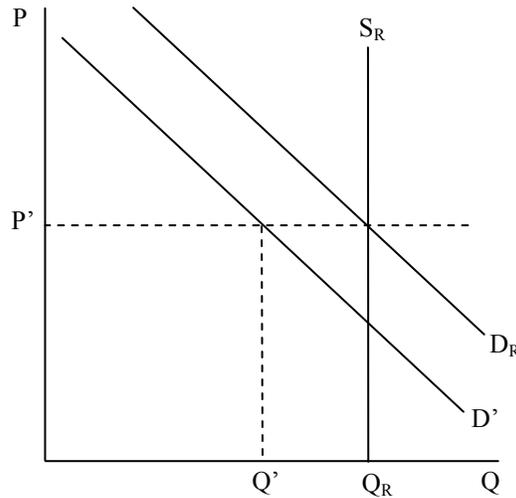
But increasing the agency's capacity to enforce will only increase the level of enforcement in the short term. The public will not tolerate the use of scarce resources in pursuit of a goal they do not value or understand. Businesses will not report competition law infringements if they too are involved in anticompetitive conduct. One can imagine the situation playing out in front of the relevant appropriations committee. If competition law enforcement is not a valued government activity then, once the agency increases its capacity to supply competition law enforcement, at the very least the budget allocation for the competition agency will be reduced by an offsetting amount, to account for the efficiencies achieved through developing agency capacity. Since the agency has increased its capacity, it may be said, the agency can make do with fewer resources. The identities of the interested parties pushing for limited enforcement, and their motivations for doing so, will be described in further detail shortly, but the end result will be a reduction in the level of enforcement back towards the *low-enforcement equilibrium*.

Fig. 3 depicts the enforcement outcome after the capacity-building reforms that were described in the previous section have been implemented, but now introducing the demand schedule into the analysis. The supply curve has shifted outward to  $S_R$ , therefore the agency is able to supply  $Q_R$  enforcement services. But at supply price  $P'$  the public demands only  $Q'$  enforcement. This disequilibrium characterizes the second reform scenario: *excess supply*. To move the outcome to a high-enforcement equilibrium, and to avoid reversion back to the low-enforcement level, it is necessary to shift the demand curve from  $D'$  to  $D_R$ .<sup>33</sup>

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<sup>33</sup> Some commentators have recognized that addressing the demand side is crucial to success for law reform projects. Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT'L L. 415, 415 (2009).

**Fig. 3**



Competition law has the potential to protect the most vulnerable consumers from anticompetitive harm, and they stand to gain the most from efficiency-enhancing competition law enforcement. Consumers benefit in the form of lower prices, greater quality and more innovative products, as firms compete more fiercely for their custom. If the cost of flour or beans or rice goes down, people will have more money to spend on medicines or school fees, easing by a fraction the painful daily choices that the world's poorest people have to make between equally essential necessities. Why would these consumers not demand as much enforcement as possible? And why would competitive companies that are excluded from the market or otherwise harmed by anticompetitive conduct not insist on strong enforcement?

### **Cultivating a “Competition Culture”**

As a threshold matter, the public (consumers and the business community) may not know what competition law is or what its objectives are. In this respect citizens of the developing world may be no different from their wealthier counterparts in the developed world. The public may see no nexus between its welfare and competition law enforcement. “Consumer welfare” and “efficiency” are amorphous concepts, and particular instances of enforcement action may not have an observable impact on either.

Spreading awareness of the benefits of competition law falls under the broader umbrella of cultivating a “competition culture,” a popular concept in the literature.<sup>34</sup> It is frequently stated as a necessary condition for successful implementation of competition law reform, without further explanation. The demand and supply analysis above demonstrates why having a competition culture is necessary - without it consumers will resist investment in competition law enforcement, perceiving such expenditures to be a waste of scarce revenue, and the business community will not support enforcement either. Firms may fail to report anticompetitive conduct or refuse to cooperate in agency investigations. The result is a shift back towards low enforcement. Without public backing the agency will face resistance to any action perceived to be part of an aggressive enforcement agenda.

Cultivating a competition culture takes time, commitment and resources. Reformers can use surveys to gauge consumer awareness and support for competition law. Surveys can be conducted asking respondents whether they know what competition law is, whether they are aware of the competition authority’s activities, and whether they feel that competition enforcement promotes their welfare.<sup>35</sup> But reformers should interpret the survey results with caution. One survey by the International Competition Network indicated strong support for competition amongst consumers.<sup>36</sup> But answering in the affirmative to a survey is not the same as committing to the allocation of resources for competition law enforcement.

If a competition culture has not taken hold of its own accord, how can a donor-sponsored project begin to encourage a change in attitude? As well as increasing the agency’s capacity to pursue enforcement, donors can help the agency to use its advocacy function to promote its activities. A campaign of public education is one important way to build a competition culture. But distributing leaflets enumerating the benefits of competition enforcement will not be enough to change the mindset of consumers more familiar with protectionism. The basic message – that society as a whole benefits from competition – must pervade all government and agency action. It can feature in vocational training to support small businesses. It can be incorporated into the

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<sup>34</sup> See, e.g., OECD Competition Division, *supra* note 17, at 8; Clark, *supra* note 3, at 8.

<sup>35</sup> Simon J. Evenett, *Competition Advocacy: Time for a Rethink?*, 26 NW. J. INT’L L. & BUS. 495, 509 (2005-6).

<sup>36</sup> Survey referred to in R. S. Khemani, *Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries*, 3 (Foreign Investment Advisory Service, Occasional Paper No. 19).

school curriculum. Young entrepreneurs should be given recognition and rewarded through national competitions.

The best advertisement for the benefits of competition law enforcement will be successful prosecutions by the competition agency in sectors that visibly impact the day-to-day lives of consumers, especially if they receive extensive media coverage.<sup>37</sup> The competition authority has a limited window of opportunity in which to prove its worth, immediately following establishment. The agency should prioritize high profile cases that capture the public's interest. The cases must have an impact on the average consumer and must be winnable.<sup>38</sup> As its first case, the Jamaican Commission investigated allegedly anticompetitive conduct by the Jamaican Bar Association. The case was complicated by the overlapping issues of competition and professional ethics, and ultimately the Commission's challenge was not successful.<sup>39</sup> Such failures have an inevitable impact on public opinion of the competition agency. If competition policy is to be used to promote economic development then the agency must pursue cases that matter to the country's welfare and affect a broad base of the public.<sup>40</sup>

The Peruvian competition agency provides two examples of the kinds of cases that can generate public support. The first two cases the agency brought were against cartels in the public transport and wheat industries.<sup>41</sup> By focussing on such critical products and services the cases raised the profile of the competition agency. Donor experts can provide guidance as to good candidates for the first few cases, based on their own experiences of cases that attracted significant public attention in their jurisdictions.

Reform projects may also focus on enabling the competition agency to use the media to broadcast its message. Educating the media as to the benefits of competition is as important as using it to communicate to the public.<sup>42</sup> The agency must make it as easy as possible for news outlets to report on competition cases, particularly enforcement successes, perhaps by funding

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<sup>37</sup> Bratton et al. discuss the role of "performance evaluations" on the public's acceptance of market reforms, positing that far from being driven by ideology and identity the public will support market reforms when they see that politicians are effectively delivering the promised economic and political goods. MICHAEL BRATTON ET AL., PUBLIC OPINION, DEMOCRACY, AND MARKET REFORM IN AFRICA 42 (Margaret Levi ed., 2005).

<sup>38</sup> Clark, *supra* note 3, at 9.

<sup>39</sup> Stewart et al., *supra* note 22, at 180-183.

<sup>40</sup> Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 Sw. J. L. & Trade Am. 211, 219 (2006-7).

<sup>41</sup> Stewart et al., *supra* note 23, at 29.

<sup>42</sup> *Id.* at 39.

training for journalists in competition law or by promptly providing press-packs online in relation to each completed case. The media can also support the agency's enforcement functions by drawing public attention to anticompetitive conduct. The agency can establish email listserves to disseminate information. All reasoned decisions should be published as quickly as possible after a case closes, to allow other stakeholders to access the information and ensure transparency. These initiatives will drive an expansion of demand for enforcement services.

Even if some consumers are convinced of the benefits of competitive markets, not all members of the public are likely to be persuaded. Those that stand to lose out from the introduction of competition have an incentive to resist competition law reform. These producers and workers will be inimical to the enforcement of competition law in their industries and they will form a rent-preserving alliance to secure protection. Groups of actors face organizational barriers to collective action. In particular, it may not in any particular actor's interest to take action if they can free ride off the efforts of others. But an extensive literature supports the proposition that smaller groups are better able to coordinate and overcome these hurdles.<sup>43</sup> Producers therefore have an advantage over consumers in collectively pursuing their common interests and obtaining their preferred policy outcomes. The following section analyses the mechanisms through which the rent-preserving alliance secures this preferential treatment and the possible solutions that reform projects can implement.

## **5. SUPPRESSION OF SUPPLY BY THE RENT-PRESERVING ALLIANCE**

The preceding section highlighted the incentive of the rent-preserving alliance to organize itself to lobby government to achieve their preferred policy outcomes – outcomes that preserve the benefits that accrued to them without competition. The “losers” in this bargain are the consumers who, due to the dispersed nature of their losses, do not individually have the incentive to overcome the informational and organizational costs, and risks of free-riding, to counter the influence of the rent-preserving alliance. In so far as the rent-preserving alliance is able to exert political pressure on politicians or agency officials, the public interest will only be served if it is in the interests of the politicians or officials for it to do so. Otherwise the rent-

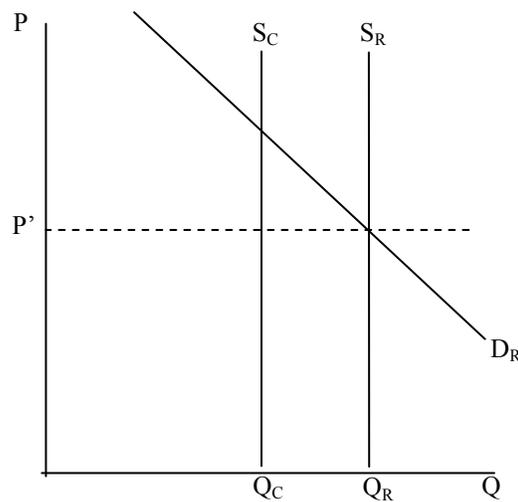
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<sup>43</sup> See, e.g., George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3 (1971).

preserving alliance will be able to “capture” the agency and manipulate it to pursue a low-enforcement outcome.

Fig. 4 shows the cumulative effect of the rent-preserving alliance’s political pressure, causing a shift in the supply curve from  $S_R$  to  $S_C$ . At supply price  $P'$  the public demands  $Q_R$  in enforcement services, but only  $Q_C$  is provided. This constitutes the third reform scenario: *excess demand*.

**Fig. 4**



How can we diagnose an excess of demand? Riots and protests sometimes accompany unfulfilled demands for certain types of laws. This is unlikely to be the case for competition law as typically the general public is largely unaware of its operation. However, citizens are liable to protest about high prices of staple goods and essential services or persistent wealth inequality in society, both of which could be symptoms of an uncompetitive environment.<sup>44</sup>

If the *excess demand* persists then there will be a tendency for the market for enforcement services to return back towards the *low-enforcement equilibrium* because the presence of an ineffectual regulatory body and empty legal reforms breeds cynicism for the rule of law and the

<sup>44</sup> For example, travellers in Belize rioted when the main cross-country bus route, previously serviced by several companies, was monopolized by one company through predatory pricing schemes and mergers. Taimoon Stewart et al., *supra* note 22, at 146. On the other hand, riots and protests could be equally consistent with a desire to introduce a comprehensive system of price controls, rather than competition law enforcement.

value of market reforms, reducing demand.<sup>45</sup> If consumers perceive that the government agency is beholden to the monopolist then they will be unlikely to complain. If consumers anticipate that there will be long delays in handling the matter (during which time they may have no access to the vital input) their complaint becomes less likely still.

It will not be possible to remedy the situation by injecting funds or using the other mechanisms proposed in the low-enforcement equilibrium reform scenario. This will not shift the supply curve outwards, it will merely drive up the “price” of the bribe. A rational producer would pursue activities to prevent dissipation of its rents up to the value of the rents themselves. Shifting the supply curve in response to excess demand requires addressing the root causes of corruption and countering the political influence of the rent-preserving alliance. Reform projects that fail to recognize the constricting influence of the rent-preserving alliance will invest in capacity-building of competition agencies but continue to be disappointed with the results because supply of enforcement services will remain artificially suppressed. This will be true even if politicians and officials are not solely motivated by private interest. If the rent-preserving alliance is armed with significant levers of influence then government action may reflect their will more than the interests of the public.

### **Tackling Corruption**

There is a fine line between legitimate lobbying activities and corruption, and enough is at stake for the rent-preserving alliance that they may be willing to cross that line. Many countries protect the right of individuals and corporations to petition their government, but the waters become murky when lobbying is accompanied by remuneration, particularly when funds are directed towards specific individuals with policy influence.

Corruption and anticompetitive behaviour frequently occur in tandem.<sup>46</sup> Corrupt officials can be bribed to ignore anticompetitive conduct or mergers, resulting in higher economic rents, which can then be shared with corrupt officials. Tackling corruption is a formidable task because the offending practices may be embedded into the norms of doing business, and the

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<sup>45</sup> Kovacic, *supra* note 11, at 404.

<sup>46</sup> Kovacic provides an anecdotal report from Russia of officials taking bribes to leave firms off the Register of Monopoly Enterprises, a list of firms with market shares thirty-five percent or more, subject to enhanced oversight. Kovacic, *supra* note 9, at 443. *See also* OECD, COLLUSION AND CORRUPTION IN PUBLIC PROCUREMENT 9 (2010) available at <http://www.oecd.org/dataoecd/35/16/46235399.pdf>.

*dramatis personae* may be drawn from a tight-knit community of the political elite. It is a pervasive problem, and one that governments and international organizations have been prioritizing over the last decade, although some donors appear unwilling to face the problem head-on.<sup>47</sup>

One World Bank project identified extensive corruption in relation to road construction in Bangladesh.<sup>48</sup> The Operational Risk Assessment concluded that putting more controls in place would merely shift the rents from one group to another. As long as the rent-preserving alliance can make it worth their while, agency officials and politicians can always find a way around any checks or protocols. Instead the recommendation was to combine support of the relevant government departments with strengthening public participation in decision-making, partially through a public information campaign to spread awareness of the proposed reforms, and raising the visibility and building the capacity of the key oversight bodies.

Reform efforts must tackle the incentive structure itself.<sup>49</sup> Committing acts of corruption must be made more difficult, there must be a credible threat of severe punishment, and the likelihood of detection must be high. Transparent hiring processes may ensure that new agency staff-members are not solely recruited from within the political elite. Personnel evaluations must be based on a broad range of criteria, including enforcement record, with professional integrity being of paramount importance.

### **Amplifying the Influence of Consumers**

To counter the interference of the rent-preserving alliance, reform projects must help consumers overcome the organizational barriers to collective action. By amplifying their influence, self-interested politicians and agency officials will find their interests aligning with those of the public in an increasing number of instances, allowing a movement towards the high-enforcement equilibrium.

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<sup>47</sup> For example the OECD Competition Division report only hints at corruption by referring to “undue interference from interest groups or other questionable influence.” OECD, *supra* note 17, at 8.

<sup>48</sup> Verena Fritz, Kai Kaiser & Brian Levy, Problem-Driven Governance and Political Economy Analysis: Good Practice Framework, 66 (World Bank, 2009), *available at* <http://siteresources.worldbank.org/EXTPUBLICSECTORANDGOVERNANCE/Resources/PGPEbook121509.pdf?resourceurlname=PGPEbook121509.pdf>.

<sup>49</sup> George Stigler, *supra* note 43, at 17-18.

One way to empower consumers is to routinely consult them as part of the decision-making process. In India, the Electricity Act 2003 requires the electricity regulator to consult with consumers on important regulatory and policy matters. The agency has issued over 200 decisions on important proposals, in each case offering the proposal for public comment. The consumer response was underwhelming. In many instances there was no response at all. The regulator engaged the electricity companies to help publicize the opportunity for comment but even when the public notice of consultation on tariff rates for 2006-07 was circulated to consumers with their electricity bill only two consumers responded.<sup>50</sup>

To make comments on a particular proposal a consumer must inform him or herself of the relevant issue and make the effort to draft a formal submission to the relevant agency. If there is a public hearing it will usually be held in the capital city, so a complainant would have to bear the expense and time commitment of travelling to the city. As the benefits of successfully persuading the government to pursue an enforcement action are shared by a large class of consumers, individual consumers do not have the incentive to pursue complaints. This may be compounded if the individual perceives that the agency will be unresponsive to their comments, either because they are in the pay of big businesses or because the submission is likely to get lost in a labyrinthine bureaucracy.

It is therefore important that, if consumers are encouraged to comment on particular proposals, their comments are acknowledged and where possible incorporated into the proposal. Information should be disseminated in an easy to understand format and the costs of making a submission should be minimized (for example, by providing a pro-forma for complaints and by allowing different modes of submission – email, post, telephone, in person). It may not be economical to hold meetings in all affected regions, in which case minutes of the meeting held in the capital should be published and a further opportunity for comment should be allowed after the meeting. Using the internet and cell phones as collaborative tools can help to dramatically reduce the costs of disseminating and gathering information.

Another way reform projects can increase the capacity of consumers to influence the enforcement outcome is by encouraging civil society organizations to lobby for, research and

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<sup>50</sup> Rajesh Kumar, *Consumer Participation in Electricity Regulation: Rajasthan Experience*, 2 (CUTS International, No. 2, 2009), available at <http://www.cuts-ccier.org/RESA/pdf/Consumer-Participation-Electricity-Regulation.pdf>.

promote consumer interests.<sup>51</sup> These groups can harness the power of the media to spread their pro-enforcement message and they may be in a better position than individual consumers to comment on particular proposals. They must not only have the internal capacity to represent consumers – i.e. the knowledge, resources and credibility – but they must also have the freedom of public engagement without fear of suppression.

The agency has every interest in promoting the capacity for consumers to take action because consumers and CSO's can be the eyes and ears of the agency, monitoring markets and identifying anticompetitive behaviour. In Mali, the consumer organization ASCOMA undertook a price survey of the meat industry in response to an unexpected price increase in 1994. The evidence they gathered was useful to the government for pushing the competition agenda.<sup>52</sup> In Zambia, the civil society organization ZACA set up Consumer Water Watch groups to monitor the water and sanitation services being provided post-privatization. ZACA is therefore able to represent consumers and offer information to the regulatory authority on issues relating to this industry.<sup>53</sup>

It is not only consumers that can be rallied to the competition cause. Not all producers will align themselves with the rent-preserving alliance. The competition agency can find support amongst those businesses that are currently excluded from the market, or are paying monopoly prices for inputs, or would stand to gain from more competitive conditions due to their low cost base or innovative products. The competition authority can use its successful interventions to empower this group of pro-competition producers. The agency may be able to draw on their public support for future enforcement actions.

## 6. CONCLUSIONS

The majority of competition law reform projects have focussed on building agency capacity, either because this is seen as higher in the hierarchy of conditions for effective enforcement or because this is the area to which external assistance is most well suited. Assuming that the agency will pursue as much enforcement action as it has the capacity to

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<sup>51</sup> Albert A. Foer, *International Consumer Advocacy for Competition Policy: Learning from the AAI Model*, 25 BOLETIN LATINOAMERICANO DE COMPETENCIA 62 (2009).

<sup>52</sup> Kamala Dawar, *Establishing Consumers as Equivalent Players in Competition Policy* 14, available at <http://www.competition-regulation.org.uk/conferences/southafrica04/Dawar.pdf>.

<sup>53</sup> *Id.*

pursue, increasing the supply of enforcement services necessitates enhancing the agency's capacity to enforce. The presence of severe resource constraints is identified by many experts as the most critical barrier to enabling the agency to carry out the responsibilities within its mandate. In this regard it is necessary to hire adequate staff, train them, and build institutional memory by creating knowledge management mechanisms. Donors can provide expertise in substantive and technical matters, as well as guidance on agency administration. This requires a long-term commitment to developing a supportive relationship with the agency.

The agency may have the internal capacity to pursue anticompetitive infringements but be limited by the regulatory environment, which may remove certain conduct from the agency's jurisdiction or grant exemptions to certain sectors or industries. The agency's sphere of influence can be expanded through persuasive advocacy, in particular as directed at other government agencies. This function should be supported by a legal and institutional framework that requires consultation with the competition agency on matters relevant to its mandate.

The above-described measures are certainly priorities in any project to improve competition law enforcement. However, any insufficiency in these areas does not adequately account for the disappointing lack of enforcement in those jurisdictions that have enacted competition laws. This is because these measures address only the supply side and do little to build demand for competition law enforcement.

Using conventional demand and supply diagrams this paper has identified three distinct reform scenarios for competition law reform projects. Supply-side measures will increase the agency's capacity to supply enforcement services, moving the state of enforcement from the *low-enforcement equilibrium* to *excess supply*. There will be an excess of supply because, for a given resource allocation, the public (broadly defined to include consumers, workers and producers) will not support the higher level of enforcement that the agency now has the capacity to provide. In order to move towards the *high-enforcement equilibrium* it will be necessary to build demand.

Consumers must be convinced of the benefits of competitive markets if they are to be expected to continue to allow the utilization of scarce resources in the pursuit of this goal. In addition, the business community must be encouraged to adopt a culture of competition, otherwise firms will not report anticompetitive behavior to the agency and the agency's resources will not be able to reach all infringing conduct. Cultivating a competition culture takes time, commitment and resources. Again there is a role for donor-sponsored projects to train

agency staff on effective advocacy, not only towards other government agencies but also directed at consumers and industry. The best advertisement for the benefits of competition law enforcement will be successful prosecutions, particularly when brought in sectors that are critical to the economy and which have an impact on the day-to-day lives of consumers. These successes should be widely publicized, using the media as a tool to spread understanding of competition issues.

It may be expected that not all sections of the public will support vigorous competition law enforcement. Those companies and workers that stand to lose monopoly rents if competition is introduced may form a “rent-preserving alliance” that seeks to influence government policy and enforcement to its advantage. If they are successful then the agency may not supply enforcement services to the level of its capacity or to the level that is demanded by the rest of the public. This situation of *excess demand*, when the supply of enforcement is suppressed by the rent-preserving alliance, sometimes through corrupt means, must be remedied by empowering consumer groups to amplify their influence on policy. This suppression of supply must be distinguished from the lack of agency capacity at the low enforcement equilibrium. The demand and supply model indicates that ultimately the success of competition law reform projects in developing countries is inextricably linked with broader reforms tackling the root causes of corruption.