

Application of Rule of Law in Competition Law and Policy: An Analysis of the Delayed Implementation of Competition Law in Kuwait

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Abstract:

Beginning with an analysis of why Kuwait adopted competition law in the first place, this paper will explore some possible reasons for the lack of application and enforcement of the law from 2009 to 2017, and whether or not this lack of enforcement represents a failure in the rule of law.

In addition, the paper will examine whether this delay in enforcement is, in fact, usual in developing countries with new competition law regimes. A gradual development over a period of at least twenty years may be the norm. An examination of factors weighted by experts yields the conclusion that the development of Kuwait's competition law is right on track.

As a country with one of the highest standards of living in the world, Kuwait's motivation for the development of competition law, encouraged by the World Trade Organization, appears to be grounded mainly in the desire to diversify its oil-revenue based economy through private market expansion. However, the enactment of law alone is not sufficient to change a government oriented social-economic structure often called rentier. Effecting a change requires that government limit its market involvement and educate the public on the benefits of a culture of competition. The competition authority needs a well-qualified professional staff to assist in this process.

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1. Introduction

In 2007, Kuwait adopted a comprehensive Competition Law, which called for the creation of the Authority for the Protection of Competition to enforce the law.⁽²⁾ The Authority consists of a board of directors and staff nominated and/or appointed by the Minister of Commerce and Industry.⁽³⁾ The Competition Law entered into effect on August 9, 2009. Executive Regulations were issued on February 16, 2009 by Council of Minister Resolution No. 106 and amended on August 2, 2015 by Council of Minister Resolution No. 994.

In April 2017, the Kuwait Competition Protection Authority made public announcements regarding several current investigations.⁽⁴⁾ This is the first time the public has been notified that the Competition Protection Authority is up and running and actively pursuing its mandate. Prior to this, the law remained unimplemented and unenforced.

The 2007 Competition Law repealed previously existing provisions primarily in the Commercial Code that proscribed certain anti-competitive behavior. Thus, save for Article 153 of the Kuwait Constitution prohibiting monopoly unless allowed for a limited time by the State, the current lack of implementation and enforcement of the 2007 Law left a complete void or practical absence of competition regulation in Kuwait from its effective date in August 2009 to April 2017.

(2) Kuwait Law No. 10 of 2007 Regarding the Protection of Competition, English Translation by Salah Al-Jassim Computer Systems; see Article 10.

(3) *Id.*, Article 11.

(4) KUNA, April 4, 2017, Minister of Commerce and Industry refers meat importers to prosecution regarding a collusive market shortage agreement pursuant to investigations by the Kuwait Competition Authority, accessed at <http://www.kuna.net.kw/ArticleDetails.aspx?id=2600420&language=en>. Kuwait Times, April 18, 2017 Chairman of the Union of Consumer Co-operative Societies received a letter from the Kuwait Competition Authority notifying the Union that it is under investigation for unifying prices of goods at various co-ops, accessed at <http://news.kuwaittimes.net/website/unifying-prices-co-ops-kills-competition-authority/>. In December 2015, the Kuwait Competition Protection Authority investigated the share sale of Kuwait Telecom (VIVA) stock to Saudi Telecom (STC), accessed at <https://english.mubasher.info/markets/BK/stocks/VIVA/news/2>. <https://english.mubasher.info/markets/BK/stocks/VIVA/news/2>.

Rule of Law is a term generally recognized to mean that when the government is granted powers “they use the powers we have granted them to protect us, in an appropriate, just and fair manner, and that we never need to be protected from [the government itself].”⁽⁵⁾The United States Agency for International Development (USAID) defines the term “rule of law” to include five elements⁽⁶⁾, the last of which is effective enforcement, “[t]his element pertains to enforcing and applying laws. Without consistent enforcement and application for all citizens and other inhabitants, there can be no rule of law.”

This leads to the conclusion that, for at least eight years, there was no rule of law in regard to competition in Kuwait. The effectiveness of the very recent enforcement of the law remains to be proven. “[U]nenforceable or erratically applied laws increases uncertainty and risk for private entrepreneurs . . . For the public, empty legal reforms feed cynicism about the rule of law and the value of economic and political decentralization.”⁽⁷⁾

Within the Gulf Cooperation Council (GCC), Kuwait is not alone in its practical lack of competition law. Raza Rizvi of Simmons & Simmons points out that competition law poses little risks for doing business in the GCC, “this is understandable - there is no significant known history of enforcement; despite the existence of specific laws, the executive infrastructure to police competition law is underdeveloped . . .”⁽⁸⁾The noted Middle East competition

(5) Marsden, P. (2009). Checks and balances: EU competition law and the rule of law, *Competition Law International*, 2/2009 at [https://www.biicl.org/files/4080_checks_and_balances_\(marsden\).pdf](https://www.biicl.org/files/4080_checks_and_balances_(marsden).pdf).

(6) USAID, Office of Democracy and Governance, Rule of Law Division, “Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework,” 2010, p. 1-2. See also ABA, Division of Public Education, Rule of Law at <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>.

(7) Kovacic, W. (1997). Getting Started: Creating New Competition Policy Institutions in Transition Economies, 23 *Brook. J. Int’l L.* 403, at 404.

(8) Simmons & Simmons, on Elexica.com, August 6, 2016 at <http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/25-update-on-competition-law-enforcement-in-saudi-arabia>, accessed on 9/4/2017.

law expert, Maher Dabbah, stated that “a country’s decision to adopt competition law is . . . political in nature and sits at the heart of an agenda drawn up by politicians to embrace the free market economy model, liberalize local markets and support the drive for economic development.”⁽⁹⁾ He further remarks that the key issue “is not a country’s decision to adopt a competition law [or whether it is on the books] . . . rather the important and crucial question that must be asked is how the law is applied and enforced. . . [T]he goals of competition law can only be gleaned from the way the law is applied which in turn depends . . . on the role ascribed to the law within an economy and the goals of the economy in general.”⁽¹⁰⁾

Beginning with an analysis of why Kuwait adopted competition law in the first place, this paper will explore some possible reasons for the lack of application and enforcement of the law for years. In addition, it will examine whether this delay in enforcement is, in fact, unusual in developing countries with new competition law regimes.

2. Why did Kuwait adopt a Competition Law in the first place?

Competition has come to be accepted as a critical process to promote economic growth and development and improve a country’s overall standard of living, as well as foster the efficient use of resources and consumer welfare by reaching a state of optimal quantity and quality of market products.⁽¹¹⁾ Adam Smith, widely regarded as the father of modern economics and the laissez-faire market, noted that it is through an invisible hand that pure competition guides the market into balance, “[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own

(9) Dabbah, M. (2007). *Competition Law and Policy in the Middle East*, Cambridge Univ. Press, p. 20-21.

(10) Id.

(11) Sumpf, D. (2015). *Economic Governance Series Competition and Regulation in the Arab Region*, Economic and Social Commission for Western Asia (ESCWA), p.11; and Godfrey, N. (2008). *Why is competition important for growth and poverty reduction?* Available from www.oecd.org/investment/globalforum/40315399.pdf.

interest.”⁽¹²⁾ A businessman “generally . . . intends neither to promote the public interest, nor knows how much he is promoting it . . . [H]e intends only his own gain, and is, in this, and in many other cases, led by an invisible hand to promote an end which was no part of his intention.”⁽¹³⁾

In Kuwait, citizens already experience one of the highest standards of living in the world, one of the best health care systems, one of the most inclusive educational systems yielding one of the highest literacy rates. So, given Kuwait’s already high standard of living, why is a competitive economy necessary and why enact competition law and policy at all?

One reason, is because Kuwait has designated economic diversification as its overarching goal, stating its vision to be, in part, “[To] transform Kuwait into a financial and trade center, attractive to investors, where the private sector leads the economy, creating competition and promoting production efficiency . . .”⁽¹⁴⁾ The attainment of this goal becomes even more urgent given the current decrease in crude oil price, which if maintained will mean a budgetary deficit increasing at a rate of at least 7% annually in step with the expected yearly increase in public expenditures, which are primarily public sector wages and subsidies. ⁽¹⁵⁾ Thus, by enacting the 2007 Competition Law, Kuwait may have hoped to encourage private sector development and economic diversification.

Article 2 of the 2007 Competition Law states as its purpose “[t]he freedom to practice . . . economic activity is guaranteed for all in a way that shall not lead to curb . . . free competition or to prevent it or to harm it.”⁽¹⁶⁾ This stated purpose appears to reflect what Maher Dabbah

(12) Smith, A. 1776. *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book IV, Chapter II, p. 456, para. 9. Available from Adam Smith Institute <https://www.adamsmith.org/adam-smith-quotes/>; generated 5/4/2017.

(13) *Id.* at p. 423.

(14) New Kuwait, Kuwait National Development Plan, accessed at <http://www.newkuwait.gov.kw/?lang=en>.

(15) Rung, G., Youssef, J., and Ghoul, I. (2016). *The benefits of Better Regulatory Infrastructure for Kuwait*, TICG – Tri International Consulting Group, accessed at <http://www.ticg.com.kw/media/TICG%20-Regulation%20in%20Kuwait.pdf>.

(16) English translation by Salah Al-Jasim Computer Systems.

calls a “fundamental principle and value in Islam” to encourage trade and business activity,” and the recognition of the Islamic “freedom to compete [as] a right that must be safeguarded and upheld so long as it is not abused, which connotes that normally there should be no intervention by the state in the market.”⁽¹⁷⁾ Dabbah maintains, “Islam recognizes that the market should be left to operate on its own and that it should be left to the market to address any problems;” government intervention is necessary only upon market failure.⁽¹⁸⁾

In addition to the motivations of economic diversification and development through market expansion, and the implementation of Islamic competitive principles in the marketplace, experts agree that for many developing countries, the adoption of competition laws appears to have been motivated by the urging of international organizations such as the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the World Bank.⁽¹⁹⁾

These organizations, as one theory portends, pressed for compatible or universal models of competition law to level the competitive playing field for multinational corporations of the developed world leading to the advancement of globalization. The OECD noted “strong links between competition policy and numerous basic pillars of economic development . . . rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards.”⁽²⁰⁾

(17) Dabbah, at p. 23.

(18) *Id.* at p. 24.

(19) Waked, D. (2016). Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges, *Journal of Law, Economics & Policy*, Vol. 12, Issue 2, pp. 193-230; Waked, D. (2015). Competition Law in the developing world: The why and how of adoption and its implications for international competition law. *Global Antitrust Review*, p. 70, accessed at <http://www.icc.qmul.ac.uk/docs/gar2008/144726.pdf>; and Dabbah, M. (2010), *International and Comparative Competition Law*, Cambridge University Press, hereafter Dabbah 2010, see Chapter 3 “The involvement of international bodies and organizations in the field of competition law and policy,”

(20) *Id.*

The following analysis begins with an examination of pressure from the WTO and desire for economic development as motivating factors for Kuwait's adoption of the 2007 Competition Law.

3. Pressure from International Organizations

More than 130 countries currently have competition laws in place; before 1990 only 10 countries had adopted competition laws.⁽²¹⁾ Experts attribute the expansion of competition law interest to the proliferation of trade agreements in the 1990's. Often, having a domestic competition law on the books was a prerequisite to the implementation of trade deals.⁽²²⁾ The WTO strongly encouraged its members and potential members to enact domestic competition law, and the European Union (EU) required such action before it would enter into bilateral trade agreements with developing states.⁽²³⁾

Kuwait, a member of the General Agreement on Tariffs and Trade (GATT) and an original WTO member, was not required to institute competition law prior to full WTO membership, but adoption of competition law was strongly encouraged after the WTO Working Group on the Interaction between Trade and Competition submitted its report on the subject.⁽²⁴⁾ The WTO has touted competition law and policy as promoting an efficient allocation of resources, enhancing the ability to attract foreign investment, and reinforcing the benefits of privatization.⁽²⁵⁾

(21) Waked, D. (2016). Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges, *Journal of Law, Economics & Policy*, Vol. 12, Issue 2, pp. 193-230; and Aydin, U. and Buthe T., (2016), *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, Law and Contemporary Problems Vol. 79:1.

(22) Waked, Id. at 197-201.

(23) Id. at 203; World Trade Organization, Working Group in the Interaction between Trade and Competition Policy, *Synthesis on the Relationship of Trade and Competition Policy to Development and Economic Growth*, WT/WGTCP/W/80 (18 Sept 1998), accessed at https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm,

(24) See WTO documents and member status at wto.org; Qatar and UAE were also GATT members and original WTO members, however, Oman and Saudi Arabia were not GATT members, Oman became a WTO member in 2000 and Saudi in 2005, both were given membership prerequisites; and note 20 above.

(25) Waked 2015 p. 73 citing WTO Working Group Paper above note 21.

In addition to the elimination of trade barriers, effective free trade policies were considered to require regulation for the elimination of competition barriers as well (such as abuse of dominance, monopolization, collusive restraints on trade etc.)⁽²⁶⁾

Competition laws were prescribed as necessary to facilitate international trade, globalization, and foreign direct investment.⁽²⁷⁾ Trade policy established through the WTO and competition policy are considered to be complementary, competition law being necessary so that “private firms do not, through private (protectionist) arrangements, restrict the flow of trade and investment that countries worked hard” to achieve.⁽²⁸⁾

Even though most transitional economies, including Kuwait, ascribed to the rhetoric of the international organizations, academic experts have indicated that passing competition laws may have just been implemented as “window dressing,” to attract foreign investment with no plan to effectively implement those laws.⁽²⁹⁾

In addition, “some countries may view the advocacy of competition law as a cynical addition by Europe and America that has been added to trade agreements in order to open their markets to products sold by high income nations.”⁽³⁰⁾

4. Private Sector Development and Economic Diversification

In Kuwait, petroleum accounts for over half of GDP (gross domestic

(26) Waked, at 199.

(27) *Id.* at 197-198.

(28) Dabbah 2010 at p. 123-4.

(29) Emmert, F. (2011). How to and how not to introduce competition law and policy in transitional and developing economies, accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951609; and Gal, M. S. and Fox, E. M. (2014). Drafting competition law for developing jurisdictions: learning from experience, New York University Law and Economics Working Papers, Paper 374; accessed at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1378&context=nyu_lewp.

(30) Davidson, K. (2011). Economic Development, Competition and Competition Laws, the American Antitrust Institute Commentary, accessed at http://www.kennethdavidson.com/aa_i_davidson_economic_development.pdf.

product), 97% of export revenues, and 90% of government income.⁽³¹⁾ In addition, much of Kuwait's economy outside the oil sector depends on oil – refining, petrochemicals and fertilizer industries, and transport and logistics; even banking, finance, and real estate benefit from capital generated by oil rents. The State has been described as the “prime mover” of the economy.⁽³²⁾ According to current statistics, 18% of Kuwait's workforce is made up of Kuwaiti nationals, 80% of whom are employed in the government sector.⁽³³⁾

Kuwait's socio-economic system has been described as “rentier.” A “rentier” state is often defined as one receiving most of its revenue from the rent of its natural resources like oil.⁽³⁴⁾ Oil rents, the payments received by the state from the external sale of oil, produce an economy that survives mainly on the profits of oil and not on the productive activities of its own population.⁽³⁵⁾

Productive activity suffers because the population looks to the government's distribution of those rents in the form of government jobs, contracts, subsidies – food, water, electricity, gas, healthcare, education, private employment equalization payments, and welfare payments.⁽³⁶⁾ These factors slow growth and productive commercial development, and raise barriers to eventual economic diversification

(31) The World Bank's report on Kuwait's Economic Outlook for Fall 2016 noted that in fiscal year 2015/2016 the government experienced a deficit of 20% of GDP and expects a shortfall of 26% of GDP for 2016/2017; accessed at <http://www.worldbank.org/en/country/gcc/publication/kuwait-economic-outlook-fall-2016>.

(32) El-Katiri, L., Fattouh, B., and Segal, P. (2011). Anatomy of an oil-based welfare state: Rent distribution in Kuwait, Kuwait Programme on Development, Governance and Globalisation in the Gulf States, LSE Interdisciplinary Centre for the Study of Global Governance, accessed at <http://www.lse.ac.uk/middleEastCentre/kuwait/documents/Fattouh.pdf>.

(33) From Kuwait Central Statistical Bureau as reported by <http://www.arabtimesonline.com/news/total-workforce-kuwait-reaches-1-9-mn-june-2016-asians-top-number-foreign-workers/>, and <http://news.kuwaittimes.net/website/kuwaitis-make-74-percent-public-sector-employees/>.

(34) Al-Zumai, F., 2007. Rentier States and Economic Regulation Infrastructure: Kuwait as a Case Study. *Journal of Law*, 31 (3), <http://pubcouncil.kuniv.edu.kw/jol/home.aspx?id=8&Root=yes&authid=1365>.

(35) Karl, T. (2007). Oil-Led Development: Social and Economic Consequences, No. 80, p. , Center on Democracy, Development, and The Rule of Law Working Papers, Stanford University, accessed at https://fsi.stanford.edu/sites/default/files/No_80_Terry_Karl_-_Effects_of_Oil_Development.pdf

(36) Id.

away from oil dependence.⁽³⁷⁾In addition, it becomes more difficult to moderate spending in response to oil price volatility thereby further distorting the economy.⁽³⁸⁾Consumers use the distributed external rent to import desired goods, thus the productive sectors of the economy are not benefited by consumer expenditures, so eventually disappear. As Dr. Hussein Mahdavy states, “The consuming sectors of oil producing countries may consequently develop more meaningful relations with the productive sectors of the countries they import from than with their own local productive sectors. Government expenditures made possible by oil revenues thus need not induce a commensurate expansion in the rest of the economy.”⁽³⁹⁾

Competition has been widely recognized as a means to expand market interaction and economic development. “Competition in markets and across business sectors is deemed crucial for economic growth and social development, as well as for consumer choice in the interest of better quality and efficiency.”⁽⁴⁰⁾Practitioner and competition researcher, Diane Hazel, described the direct and indirect benefits derived from competition law and policy as follows:⁽⁴¹⁾

“Several factors illustrate why competition—achieved through competition policies—contributes to economic growth and development. First, competition generally stimulates investment. Strong evidence shows that competition law and policy provide incentives for both foreign and domestic investment. Investors appreciate a stable regulatory environment in which they can be assured that their assets will be protected by law in the event of a dispute. Adopting a competition law may signal to investors that investing in a country is attractive and safe. Further, appropriate enforcement of a competition law adds transparency to a nation’s commercial landscape and contributes to

(37) *Id.*

(38) *Id.*, p. 20.

(39) Mahdavy, H. (1970). “Patterns and Problems of Economic Development in Rentier States: The Case of Iran,” in *Studies in Economic History of the Middle East*, ed. By M.A. Cook, Oxford Univ. Press.

(40) Sumpf, D., at p. 11.

(41) Hazel, D. (2015). *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, *Houston Journal of International Law*, 37:2, p. 286-287.

the predictability and stability of government policies and rule of law. Foreign direct investment not only contributes to growth through the stimulation of competition but also enhances the competitiveness of domestic enterprises through the potential transfer of managerial skills and technology.

Second, greater competition increases firms' incentives to cut costs and improve productivity. When new firms may freely enter a market, the new entrants increase the pressure on incumbent firms to become more efficient to maintain their market share. Thus, to remain in a competitive market, market players must constantly evaluate their product offerings and remain vigilant over their internal procedures, requiring constant streamlining of operations. As a result, the less efficient firms will exit the market as the number of firms increase. Without the pressure from entrants to reduce costs and increase efficiency, productivity may be slow and fall short of its full potential.

Finally, greater competition stimulates innovation in addition to process streamlining. To be competitive, firms must do more than just increase their productivity. They also must constantly evaluate their product and service offerings and think of new ways to serve consumers.”

As Ms. Hazel demonstrates, competition policy and law play key roles in the development of the private sector. Private sector expansion and diversification have been identified by Kuwait as essential to minimize the negative impact of oil price fluctuations and to create needed jobs outside of the public sector. However, as yet realization of this goal remains elusive.

5. Why has Kuwait's Competition Law remained unimplemented? – Lack of Government Support and Competition Culture

Professor Michal Gal said that although the enactment of a competition law has been considered to be a “cornerstone of liberalization and pro-market reforms,” the mere passing of the law is not enough, other conditions must exist.⁽⁴²⁾ He points out that “the ideology of policy

(42) Gal, M. (2004). The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries, New York University Law and Economics Working Papers, Paper 10, p. 1, accessed at [Http://lsr.nellco.org/nyu_lewp/10](http://lsr.nellco.org/nyu_lewp/10).

makers must strongly support a pro-market reform for competition law to have a significant impact on markets.”⁽⁴³⁾ Competition law cannot stand on its own to initiate economic growth and diversity, “it is shaped and transformed by the existing socio-economic ideology and by the other policy tools that are implemented.”⁽⁴⁴⁾

Gal notes that although several developing countries had competition law for decades, the law was not enforced because the socio-economic ideology embraced by the government of the time reflected a non-market policy.⁽⁴⁵⁾ Competition law does not apply when the government rather than market forces controls prices, when investment decisions are indirectly subject to government approval, and joint ventures are government supported to achieve market stabilization.⁽⁴⁶⁾

Competition law can be effective only when the government lowers its barriers to the free operation of markets and implements privatization and liberalization of trade planning.⁽⁴⁷⁾ “Without the elimination of government barriers to competition and a real change in public policy it is not possible to create a level playing field in which firms will invest and compete effectively.”⁽⁴⁸⁾ Market functioning rather than government action must become the “cornerstone” of economic development.⁽⁴⁹⁾ By itself, competition law has little effect on market reform.

Since the adoption and implementation of competition law requires such a significant change in the ideology of government and structural changes from a centrally controlled market to a decentralized one, it may not be a popular change for those who have previously prospered or were protected from competitive forces by the government.⁽⁵⁰⁾ These factions may politically influence those in government not to implement or enforce an enacted

(43) Id.

(44) Id., p. 2.

(45) Id., p. 3.

(46) Id.

(47) Id.

(48) Id., p. 4.

(49) Id., p. 5.

(50) Id., p. 6.

competition law.⁽⁵¹⁾ Professor William Kovacic noted that in transitional economies, powerful political forces might wish to support the centralized economic power of the state and impede the development of a market system through resistance to market-oriented economic reforms.⁽⁵²⁾

In addition, even though consumers are the primary beneficiaries of the law, for the most part, they do not possess sufficient knowledge of the benefits of competition to engage them in advocating for the law.⁽⁵³⁾ “[T]he creation of a strong and educated public opinion” in favor of competition law, is a powerful method of combatting political influences on government decision-makers.⁽⁵⁴⁾

Two types of competition advocacy are necessary in developing countries. The first is advocating the benefits of competition to government institutions directly, and the second is advocating the importance of competition to the general public. The competition authority has the role of aiding government and ministries “to realize and analyze the competitive effects of their decisions.”⁽⁵⁵⁾

Many experts have recognized that a lack of a competitive culture in society is detrimental to the success of newly adopted competition law and policy.⁽⁵⁶⁾ A “culture of competition” may be defined as “a broad based consensus [by the public at large] that competition is both generally beneficial and normatively desirable.”⁽⁵⁷⁾ Professor Gal points out that educating the public on competition benefits transforms the public into a powerful influence on government to provide the political atmosphere needed for positive competition-oriented decision-making.⁽⁵⁸⁾ In a rentier environment, such as that of Kuwait, where citizens rely on the government

(51) Id.

(52) Kovacic 1997 at note 6.

(53) Id.

(54) Id., p. 7.

(55) Gal 2004.

(56) Gal, M. and Fox, E. (2014). Drafting competition law for developing jurisdictions: leaning from experience. NYU Law and Economics Working Papers, NYU School of Law, p. 17; Dabbah, 2010, p. 320; Sumpf, p. 65.

(57) Aydin and Buthe, at note 20 p. 12.

(58) Gal, 2004.

for the distribution of payments, subsidies, and the allocation of jobs, much education is needed to foster an appreciation of the benefits of a market economy in an atmosphere of fair competition. Experts consider a lack of competition culture to be one of the most substantial obstacles to effectively implementing a competition law and policy regime in a transitional economy.⁽⁵⁹⁾ The competition authority has no allies in society - consumers, new entrepreneurs, and producers - to support and push forward its goals to the political establishment.⁽⁶⁰⁾ As the judiciary is regarded as an institution upholding societal values, if an appreciation for the benefits of competition is not part of those values, judicial decisions will reflect that lack.

Clearly, the government's reticence or unwillingness to take steps toward a market economy and the public's educational deficit in regard to competition benefits are two of the primary reasons for the delay in implementation of Kuwait's Competition Law.

But has it really been delayed or is Kuwait's experience a reflection of the usual course or maturation of competition law and policy in society? Kovacic and Lopez-Galdos assert, "[T]he establishment of a well-functioning [competition law] system in most jurisdictions is likely to be a relatively slow process."⁽⁶¹⁾

In fact, they estimate that a period of twenty to twenty-five years is needed, beginning with the adoption of a competition law, to adequately assess whether or not the new regime is on "the path to successful implementation over the longer term. In more difficult circumstances, the path can be longer."⁽⁶²⁾

They further state that "[t]his calls for realism in setting expectations about what a competition system can do, and how quickly it can do it."⁽⁶³⁾ With that in mind, a look at the current state of competition regulation in Kuwait is necessary.

(59) Aydin and Buthe, at note 20, p. 20.

(60) *Id.* at p. 21.

(61) Kovacic, W. and Lopez-Galdos, M. (2016). *Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes*, Law and Contemporary Problems, Vol. 79:85, p. 88. (Hereinafter Kovacic and Lopez-Galdos).

(62) *Id.*

(63) *Id.*, p. 89.

6. Current Status of Competition Enforcement in Kuwait

A recent interview with a Kuwait Competition Authority official⁽⁶⁴⁾ revealed that the Authority's first Board of Directors was appointed in 2012; its current Chairman, Nayaf Al-Lafi, was appointed in 2015, and its Executive Director, Hussein Safar, was appointed in 2014. The Authority currently employs 15 staff members.

In 2013, the Authority began working in coordination with the World Bank to investigate markets targeted by the World Bank in the GCC. Thus far, the Authority has participated in several studies instigated by the World Bank involving the GCC Telecoms market and the local fish auctions markets due to the current increase in fish prices. Recently, the Authority began an investigation into the import of mutton into Kuwait and an alleged price-fixing, controlled-supply agreement in that market. Pursuant to this investigation, the Minister of Commerce and Industry referred several livestock importers to the Public Prosecutor. In addition, the Authority is investigating the Union of Consumer Co-operative Societies in regard to alleged price unification.

The Competition Authority has begun receiving and reviewing applications for mergers and acquisitions. It reviewed an application from Saudi Telecom Co. (STC) for the acquisition of shares in Kuwait Telecommunications Company (VIVA). In all the Authority has reviewed approximately 30 cases, but found most not to be within its jurisdiction.

The Authority's next project is to analyze market regulations for specific sectors pursuant to guidance from the OECD, to determine if industry-specific regulations have an effect on market competition or are contrary to the competition law. Also, in coordination with the World Bank, an analysis of retail banking and financing availability for small and medium enterprises will be initiated in regard to barriers to market entry.

The Official interviewed indicated the Authority had completed Phase

(64) Interview on April 26, 2017 with Tareq Al-Duaij who is a consultant to the Kuwait Competition Authority.

I of its implementation and was beginning Phase II. In Phase II, the Authority plans to continue its market studies and begin advocacy and education programs, including the education of businesses on the maintenance of information necessary in case of investigation or in support of merger or acquisition.

The Authority is an active member of the International Competition Network, attends its annual conferences and takes advantage of the networking, support, and training opportunities available through that organization. The Authority also participates in training provided by the World Bank. One serious hurdle to adequate authority implementation is an identified difficulty in attracting qualified, experienced, and professional staff under the government authorized salary structure. Employing professional staff with bi-lingual proficiency is also a challenge.

7. Rule of Law – gradual progression of Competition Law and Policy implementation and enforcement

If western experience is an indication, the implementation of a new competition regime is normally gradual and often difficult.⁽⁶⁵⁾The antitrust regime in the United States began with the adoption of the Sherman Act in 1890, enforced by the Department of Justice (DOJ). Not until 1897 was the DOJ successful in defending its application of the Act before the Supreme Court.⁽⁶⁶⁾History shows that the Federal Trade Commission (FTC), formed in 1914, had an even more difficult beginning. The FTC did not receive Supreme Court rulings upholding its broad grant of regulatory authority until the 1960s.

Kovacic and Lopez-Galdos postulate that there are recognizable lifecycles of competition regimes and variances in their implementation.⁽⁶⁷⁾ They suggest that assessment of the activity or enforcement levels of new competition law regimes is not an accurate measurement of the successful development of these regimes in their first decades.⁽⁶⁸⁾ Rather, they say the first decades of regimes should be devoted primarily to “the enhancement of institutional foundations and agency capability, and

(65) Kovacic 1997, at note 6, p. 416.

(66) US v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341-42 (1897).

(67) Kovacic and Lopez-Galdos, at note 58 p. 89.

(68) Id. at p. 95.

secondarily to the exercise of law enforcement or rulemaking powers.”⁽⁶⁹⁾ Improvements in institutional foundations include defining goals and strategies for obtaining those goals, regular training to improve the staff knowledge base, and disclosure of enforcement and analytical methods.⁽⁷⁰⁾ Improvements in capability realized by increases in human capital – knowledge, expertise in evidence gathering and analytical techniques - would over time increase the authority’s contribution to improved social welfare.⁽⁷¹⁾ When evaluating early regime success, Kovacic and Lopez-Galdos suggest using the following criteria: success in hiring skilled professionals and staff; building public awareness of the competition law regime; issuing guidelines for enforcement; and establishing routine procedural tasks such as merger application review.⁽⁷²⁾ Again, these experts assert that, for most jurisdictions, it takes twenty to twenty-five years to actually get a competition system running.⁽⁷³⁾

Professors Aydin and Buthe describe several obstacles to the effective implementation of competition law regimes as follows: (1) resource constraints, including financial, expertise, and judicial familiarity; (2) unsupportive or hostile political or legal environment; (3) a lack of competition culture; and (4) underdeveloped markets.⁽⁷⁴⁾ Professors Kovacic, Lopez-Galdos, Aydin, and Buthe agree that the implementation of a successful competition law regime in a transitional or developing country includes the following factors:

- Financially well-funded authorities.
- The ability to attract and retain professional staff and external consultants.
- An authority that successfully matches its projects and programs to its financial resources and professional capability, gradually increasing its enforcement agenda as its experience grows; in addition the authority develops methods of assessing and refining its performance.

(69) Id.

(70) Id.

(71) Id. p. 95-96.

(72) Id. p.96.

(73) Id. p. 97.

(74) Aydin and Buthe, at note 20, p. 15-26.

- An authority that “learns” as it gains experience from its own projects, from networking with international entities such as the International Competition Network, the OECD, and the UNCTD, and from international cooperation with other state authorities.
- Strong political support for the goals of the competition regime.
- Support from institutions, including the judiciary, with adequate business and administrative knowledge and efficiency in case processing, and academic institutions providing a “sound intellectual infrastructure” to teach courses and perform and collaborate on research projects in competition law.⁽⁷⁵⁾

Kovacic identifies two phases in the implementation of a competition system.⁽⁷⁶⁾ He describes Phase I as involving institution building, which includes recruiting and training staff, developing internal policies and procedures, and publishing guidelines and protocols to inform businesses of the authority’s operational methods and procedures. In addition, foundation building includes educating and publicizing the benefits of a market economy targeting consumers, businesses, and government officials, and engaging the media. Phase I also involves the performance of case studies to advance staff knowledge of domestic markets and how they operate. Advocating to government the importance of competition considerations in new legislative programs or policies is a part of institution building. Initially, it may be advantageous for the authority to assist business in voluntarily complying with the law rather than penalizing business with early compulsory enforcement.

Phase II involves the development of a positive enforcement agenda.⁽⁷⁷⁾ Kovacic describes this as the promotion of new business entry into the marketplace through the removal of barriers to entry, particularly government-imposed barriers, such as the granting of exclusive licenses or arbitrary license denials. Kovacic asserts that “government intervention is the greatest source of trade restraints in transition environments, and challenges to public entry barriers promise to yield the greatest benefits in increasing competition and improving

(75) *Id.*; Kovacic at note 6, p. 429-441; Kovacic and Lopez-Galdos at note 58, p. 117-121.

(76) Kovacic 1997 at note 6, p. 431-441.

(77) *Id.*, p. 441-446.

consumer well-being.”⁽⁷⁸⁾ In addition, the competition authority can assist in implementing privatization programs to assure that process includes competing businesses in the targeted sector. The authority may also investigate bottleneck impediments to competition such as financial services or transportation.

8. Conclusion

In conclusion, according to the experts, it does not appear that the development of Kuwait’s competition regime is delayed in any respect. On the contrary, the Kuwait Competition Authority appears to be clearly on tract with the expert recommended gradual implementation of a new competition regime in a country in transition.

Kuwait’s Phase I implementation includes partnership with a mentoring international organization, the World Bank, which provides training and cooperative market study project opportunities. In addition, the Authority is a member of the International Competition Network and gains knowledge from the experience of other state members. It is also initiating small investigations and looking at developing protocol and databases of business reporting.

One area in which the Authority’s Phase I development is lacking is in its ability to attract experienced professional staff because it is limited by the government salary structure. As the experts indicate, this can be a severe impediment to the effective application and enforcement of the law and cause significant delay in implementation. In addition, the Authority should consider cooperating with the academic community for research and educational program development in competition law. Kuwait International Law School includes introductory competition law instruction in its curriculum, but more advanced legal analysis could be added. This could prove to provide a source of competent staff for the future.

Finally, a substantial push to educate the public at large on the

(78) Id. P. 441

operation and advantages of a competitive market economy in order to cultivate a culture of competition as recommended by the experts has not been accomplished by the Authority in Phase I. This step is essential in the climate of a state with a rentier socio-economic system. The lack of competition culture could result in the ultimate failure of Kuwait's new competition regime. The recent historic rentier nature of Kuwait has substantially modified and, according to Dabbah, supplanted the foundational Islamic concept of fair and equitable competitive markets, which work to enhance consumer welfare. The public might benefit from a re-introduction of this concept.

As the experts indicated, if consumers and businesses expect fair and equitable market competition, this expectation influences the judiciary, the government and the political climate in a positive way further supporting the advancement of the competition law regime.

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