



Department of Justice

THE MEXICAN FEDERAL COMPETITION LAW:
SOME OBSERVATIONS FROM THE UNITED STATES' HISTORICAL EXPERIENCE

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BEFORE THE SEMINAR ON THE NEW MEXICAN
FEDERAL ECONOMIC COMPETITION ACT
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Good afternoon. I am delighted to be here in Mexico City; this is my first visit to your great city, and I hope to see at least a little bit of it while I'm here. I also look forward to building a strong cooperative relationship with SECOFI and the new Mexican Federal Competition Commission.

Sound competition laws and law enforcement, and effective cooperation among national competition agencies, are crucial to the efficient operation of today's complex economies. Mexico, Canada, and the United States have recognized that fact in the competition policy provisions of the North American Free Trade Agreement, Article 1501(2) of which provides that "each Party recognizes the importance of cooperation and coordination among their authorities to further competition law enforcement in the free trade area." It is very appropriate, therefore, that this seminar should focus on an event of exceptional importance for Mexico and Mexico's trading partners: the enactment of the Mexican Federal Competition Act.

In my remarks this afternoon, I would like to discuss some of the most important provisions of your new competition law in the light of our historical experience with antitrust in the United States. As I hope to show, the Mexican government seems to have profited by our mistakes in its work in drafting this comprehensive piece of legislation. In particular, I will

focus on Article 2 of the new law (which expresses the law's purpose), Articles 9 and 10 (which define "absolute" and "relative" monopolistic practices), Articles 14 and 15 (which cover conduct by state government authorities that impedes Mexican interstate and foreign commerce), and Chapter VI (which provides penalties for violations of the law). I have chosen these provisions because they are important, and because U.S. historical experience in antitrust may offer some interesting background for evaluating the new law's provisions.

Article 2

Article 2 of the new Federal Competition Act provides that "the purpose of this law is to protect the process of competition and free market participation, through the prevention of monopolies, monopolistic practices and other restraints on the efficient operation of goods and services markets." This formulation of purpose is an excellent one, which informs all that comes after it in the statute. If our Congress had endowed the Sherman Act with a similar explicit purpose in 1890, much difficulty -- and not a few bad government decisions -- would have been avoided.

The United States antitrust laws embody our nation's commitment to a free market economy. As Chairman Steiger explained this morning, United States antitrust law derives

from a handful of broadly worded statutes, the most important of which are: the Sherman Act, passed in 1890, which forbids both concerted conduct that unreasonably restrains trade and unlawful monopolization; the Clayton Act, passed in 1914, which, among other things, forbids anticompetitive mergers and acquisitions; and the Federal Trade Commission Act, also passed 1914, which gives the Federal Trade Commission authority to prevent firms and individuals from engaging in unfair methods of competition. These laws provide a set of basic rules for maintaining competition in our economy. They regulate the competitive process, but they do not determine whether firms will succeed, or which firms will excel, in providing consumers with attractive goods and services at an attractive price. The market must do that. Rather than picking winners and losers, our antitrust laws ensure that firms win and lose market share based on their own skill in competing in the market, on their ability to provide goods and services of good quality at a competitive price.

Consistent with the crucial role that antitrust law plays in the U.S. economy, the expansiveness of our statutory language has been characterized by our Supreme Court as having a "generality and adaptability comparable to that found to be

desirable in constitutional provisions."^{1/} At the same time, however, the very breadth and adaptability of our laws, their sparse or inconclusive legislative histories, and their application in thousands of court decisions in the century since the passage of the Sherman Act, have combined to inspire lengthy and vigorous debates over the appropriate objectives of antitrust law and policy in the United States -- debates that Article 2 of your new law should minimize here.

The Supreme Court of the United States nicely summarized U.S. antitrust policy, when it said 35 years ago that:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the Premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.^{2/}

This formulation concisely frames the possible scope of U.S. antitrust objectives, as it stresses the primacy of protecting the process of competition and yet alludes to broader political

^{1/} Appalachian Coals, Inc. v. United States, 2288 U.S. 344, 359-360 (1933).

^{2/} Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

and social policy goals that are served by the maintenance of competitive markets.

The modern consensus is that the objective of U.S. antitrust policy is to promote economic efficiency through the optimal allocation of resources in a competitive market context. As the Department of Justice Antitrust Enforcement Guidelines for International Operations explain, our antitrust laws "establish broad principles of competition that are designed to preserve an unrestrained interaction of competitive forces that will yield the best allocation of resources, the lowest prices, and the highest quality products and services for consumers."^{3/}

Market competition enhances consumer welfare and promotes an efficient allocation of society's resources because those firms that best meet the needs of consumers with the lowest prices or best service will prosper. It is therefore a basic principle of U.S. antitrust law that antitrust laws should protect competition, not competitors. The mere fact that a particular competitor is injured by a practice does not mean that the practice is or should be prohibited. In fact, it is inherent in the process of competition that some firms prosper

^{3/} Department of Justice, Antitrust Enforcement Guidelines for International Operations, page 6 (1988).

and others do not. Accordingly, there is a solid and widespread consensus that it is the process of competition that U.S. antitrust law protects.

This consensus is, however, of relatively recent vintage. For much of U.S antitrust history, quite different goals have sometimes been espoused by the Executive Branch, Congress, and the courts. Only 15 years ago, Professor Sullivan, a leading antitrust scholar, wrote:

Among the non-economic goals of antitrust, all quite tenable as policy objective, are a preference for decentralization of economic power, reduction of the range within which private discretion may be exercised in matters materially affecting the welfare of others, enhancement of the opportunity for more people to exercise independently entrepreneurial impulses, and, most blatantly, a social preference for the small rather than the large--if you will, a nostalgia for that mythical past when social, governmental and economic organization was simpler, more comprehensible.^{4/}

For many years, the premise that antitrust protects the process of competition, but not competitors, coexisted uncomfortably alongside a significant tendency toward using the antitrust laws to protect small businesses, regardless of the consequences for the efficient functioning of competitive markets. In the famous Brown Shoe decision, for example, the Supreme Court observed that the Clayton Act, our chief merger statute, was concerned not only with addressing increased

^{4/} Lawrence A. Sullivan, Handbook of the Law of Antitrust 11 (1977).

economic concentration of the sort that threatens to create market power,—^{5/} but also with the promotion of competition through the "protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."—^{6/}

This broader, more comprehensive view of antitrust was not necessarily thought to be a bad thing; Congress and the courts sometimes endeavored to give simultaneous effect to a wide range of antitrust goals. Over time, however, the practical conflicts generated between pursuit of economic efficiency, on the one hand, and other, sometimes inconsistent goals of promotion of small business and decentralization, on the other hand, gave rise to the modern consensus, outlined above, that economic efficiency is in fact the appropriate basis for U.S. antitrust policy—^{7/}. Moreover, and most important, in the mid-1970's our Supreme Court began consistently to decide

^{5/} Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962).

^{6/} Id. at 344.

^{7/} See 1 P. Areeda & D. Turner, Antitrust Law ¶¶ 103-113 (1978).

antitrust cases in light of the laws' economic efficiency objective. 8/

Now, I want to add immediately that public policy in our country is not driven solely by a purpose of achieving economic efficiency -- far from it. State and federal laws that promote, in one way or another, small enterprises, fairness, and dispersion of economic power are too numerous to list. As I have said, however, there is increasing agreement that economic efficiency should be the touchstone of antitrust enforcement.

It seems to me that Mexico has reached the same conclusion -- much more efficiently, I might add -- as expressed in your Article 2. Your Federal Competition Commission can immediately go about the fundamental business of enforcing a sound competition law: that is, by protecting the process of competition. In other words, Mexican competition law and enforcement policy is off to a very good start.

8/ See, e.g., United States v. General Dynamics Corp., 415 U.S. 486 (1974); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Broadcast Music Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

Articles 9 and 10

Articles 9 and 10 of the new competition law establish a clear framework for analyzing anticompetitive business behavior. Article 9 prohibits "absolute" monopolistic practices, which are defined to include agreements among competitors to fix prices and quantities, market allocation agreements, and bid-rigging agreements. Article 10 prohibits "relative" monopolistic practices, which are defined to include several types of "vertical" practices, among manufacturers and distributors, such as resale price maintenance and tying arrangements as well as "[a]ny act in general, that unduly impairs or impedes the process of competition."

This straightforward dichotomy of prohibition is generally similar to the distinction that U.S. antitrust law makes between "per se" unlawful behavior and conduct evaluated under the "rule of reason." As Chairman Steiger explained this morning, per se unlawful agreements in U.S. law are those that, based on analysis and experience, always restrain competition and are unlikely to serve any productive, efficiency-enhancing purpose. Agreements that are not unlawful per se are judged under the "rule of reason," which embodies the notion that a practice that has some potential for fostering competition or efficiency must be examined in context, with a view to its purposes and effects, in order to decide whether it amounts to an unlawful restraint of trade.

One advantage of your new Articles 9 and 10 is that your law makes clear directly and at the outset, for government enforcers and business people alike, which types of business behavior will be treated in which way. United States antitrust history has been rather different in this regard. Section 1 of our Sherman Act broadly prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." It has taken our courts quite some time to decide what types of conduct are, and are not, encompassed within the prohibition.

Early on, in 1895, our Supreme Court read the law in a way that would largely have negated the Sherman Act's impact on the U.S. economy. In the "Sugar Trust" case,^{9/} the American Sugar Company acquired four rival sugar refineries (all located in Philadelphia) that gave it "nearly complete control of the manufacture of refined sugar within the United States."^{10/} 156 U.S. at 9. The Justice Department took the sensible view that these acquisitions violated sections 1 and 2 of the Sherman Act, and sought to have them rescinded. The Supreme Court, however, while acknowledging the anticompetitive nature of American Sugar's conduct, construed Congress' decision to regulate commerce through the Sherman Act to exclude the power to regulate the monopolization of the manufacture of -- as

^{9/} United States v. E.C. Knight Co., 156 U.S. 1 (1895).

^{10/} Id. at 9.

opposed to commerce in -- sugar. The Court further decided that the case involved only acquisitions of manufacturing facilities in a single State, and thus did not implicate actions in interstate commerce. Accordingly, the Court's majority concluded that the Sherman Act did not reach American Sugar's monopolistic behavior.

Fortunately, in 1898 the courts undid much of the harm caused by the Sugar Case, when the Department successfully prosecuted the Addyston Pipe case,^{11/} which charged manufacturers of iron pipe with price-fixing and market allocation. Judge (later President) William Howard Taft's opinion for the court of appeals -- later affirmed by the Supreme Court -- established the basis of a per se rule of illegality for "naked restraints" of trade.

By 1904, President Theodore Roosevelt's famed "big stick" had struck J. P. Morgan's Northern Securities Company. Despite Roosevelt's reputation as our nation's foremost trustbuster, the Supreme Court's decision in the Northern Securities case^{12/} set a rule that could severely have undermined the economic soundness of the Sherman Act. The Court ruled, in

^{11/} Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

^{12/} Northern Securities Co., v. United States, 193 U.S. 197 (1904).

effect, that any elimination of substantial competition between two competitors constituted a combination in restraint of trade without regard to its impact in the marketplace. Equally troubling was the dissent of Mr. Justice Holmes -- one of our most revered jurists -- who contended that the Sherman Act prohibited only "external" restraints and did not apply to "an arrangement by which competition is ended through community of interest." That rule, if sustained, would have validated price-fixing agreements and grossly anticompetitive mergers.

In 1911, however, in Standard Oil and American Tobacco^{13/} the Supreme Court corrected its own overly literalistic reading of the Sherman Act in Northern Securities, and firmly set the course for application of a rule of reason analysis to most forms of potentially anticompetitive business conduct. But the formal adoption of a rule of reason analysis in these cases resulted in a widespread public furor: the popular press of the day accused the Court of being soft on trusts; business complained bitterly about antitrust uncertainty (sometimes it still does); and Congress passed the Clayton Act and FTC Act to remedy perceived deficiencies in the Sherman Act.

^{13/} Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

In the 80 years since Standard Oil established a clear distinction between the per se and rule of reason concepts, antitrust enforcers, business people, academics, Congress, and the courts all have continued to argue about which practices should be given which analytical treatment. For example, resale price maintenance has been per se unlawful since 1911, but there are still disputes about whether rule of reason treatment would be more appropriate. Similarly, while as late as 1967 our Supreme Court concluded that certain types of territorial distribution restrictions were per se unlawful,^{14/} only 10 years later the Court reevaluated the procompetitive utility of such arrangements and determined that they should receive rule of reason treatment instead.^{15/} Over the years, in fact, the general tendency of U.S. courts and enforcement agencies has been to narrow the category of per se offenses and to broaden the category of conduct judged under the rule of reason. This trend reflects the increasing and widespread recognition that some practices formerly condemned under the per se rule may in fact foster competition and create efficiencies.

^{14/} United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

^{15/} Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

In the common law system that governs so much of U.S. antitrust law, these judge-made changes in the law over a long period of time are not surprising, and sometimes are even useful. As our economy changes and economic theory becomes more sophisticated, business practices that once might reasonably have been deemed unacceptably anticompetitive may come to be recognized as having procompetitive effects that ought not to be ignored. And, as I have explained, U.S. antitrust law has maintained a remarkable coherence over the years, after a rather bumpy start. That said, U.S. antitrust history suggests that the precise analytical approach taken in Articles 9 and 10 of the new Mexican law has real theoretical and practical advantages for your antitrust enforcers and the business community alike.

Articles 14 and 15

Article 14 of the Mexican competition law provides that acts by Mexican state governments whose objective "is to prohibit the entry into or exit from its territory of goods or services of domestic or foreign origin, shall have no legal force." Article 15, in turn, provides that the Federal Competition Commission may, after investigation, formally "declare [the] existence" of such trade-restraining acts by state governments. Because subnational governments around the world sometimes attempt to impose unreasonable trade restrictions, these are extremely interesting, and potentially

very significant, provisions. There is nothing like them in the U.S. antitrust laws.

There is no need for such provisions in our antitrust laws, however, because of the efficacy of our Constitution's Commerce Clause, which empowers Congress to regulate commerce, inter alia, "among the several states". A striking aspect of the historical role of antitrust in the United States is that the Commerce Clause created a "common market" a full century before the passage of the Sherman Act in 1890. Accordingly, U.S. antitrust enforcers have had to work to maintain the competitive integrity of the U.S. free trade community, but have not had to create a common market. Long before there was a Sherman Act, the Commerce Clause was invoked to strike down anticompetitive state legislation. Indeed, the famous case of Gibbons v. Ogden, an 1824 decision in which the Supreme Court asserted the primacy of Congress' commerce powers over inconsistent state legislation, struck down a state-created monopoly.^{16/} In that case, the New York state legislature had, by statute, given Robert Fulton -- the inventor of the steamboat -- a monopoly over navigation by steamboat in New York waters. This legislation had the effect of requiring residents of New Jersey to pay Mr. Fulton's monopoly price if they wished to ride a steamboat across the river to New York

^{16/} 22 U.S. (9 Wheat.) 1 (1824).

City. New Jersey retaliated with legislation that created a right to damages against Mr. Fulton on behalf of anyone who sought to compete with the monopoly but was restrained from doing so by New York. The Supreme Court's decision to invalidate the New York legislation thus not only upheld the federal commerce power and defused a dispute between neighboring states, but it implicitly demonstrated that some anticompetitive actions by States could violate the Constitution.

In the years since Gibbons v. Ogden, the Commerce Clause often has been invoked to safeguard our common market at the expense of anticompetitive state laws. Just six years ago, for example, the Supreme Court invalidated, on Commerce Clause grounds, a New York statute that required every liquor distiller selling to New York wholesalers to affirm that the prices charged for its liquor were no higher than the lowest price at which the same product was sold in any other State during the same month. This "price-posting" statute had the effect of preventing distillers that wished to offer price promotions from doing so both inside and outside New York at the same time. The Court held that this competition-detering statute was invalid under the Commerce Clause.^{17/}

^{17/} Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986).

In my view, Articles 14 and 15 of your new competition law offer the Federal Competition Commission an opportunity to break down anticompetitive barriers that may be erected by state governments, rather than by private business. As the history of our Commerce Clause has shown, such barriers tend to protect local interests at the expense of consumers and the national welfare. I wish you success in applying these two important provisions to enhance competition in Mexican markets.

Chapter VI

Chapter VI of the Federal Competition Act sets out the penalties for violations of the law's substantive provisions. These penalties include fines (in U.S. dollar equivalents) of up to \$1.7 million for "absolute" monopolistic practices, up to \$1 million for most "relative" monopolistic practices, up to \$1 million for unlawful mergers, and up to double all these amounts for repeat violators -- an especially nice touch. Moreover, where the Commission finds absolute monopolistic practices and certain other offenses to be "particularly serious," it may impose a fine of up to 10 percent of annual sales or total assets, whichever is higher. These are significant sanctions, particularly in the context of your brand new competition law regime. Our experience in the United States has been that such tough antitrust penalties are a crucial aspect of a sound competition law enforcement program.

U.S. law provides that price-fixing, bid-rigging, and market allocation -- the equivalent of your "absolute" monopolistic practices -- are crimes punishable, if committed by an individual, with jail terms of up to three years and fines of up to \$350,000, and, if committed by a company, with fines up to \$10 million. In recent years, the Justice Department has brought 80 to 90 criminal antitrust cases annually. Last year alone, we obtained sentences for convicted individual defendants totalling nearly 21 years in prison and other confinement; we also obtained criminal fines, payable by individual and corporate defendants, totalling nearly \$27 million and a special corporate penalty totalling another \$28 million in one case alone -- an all-time high for a monetary penalty in a government antitrust case. We believe that these tough penalties constitute appropriate sanctions on seriously anticompetitive behavior, and we hope and expect that they will deter others who may be contemplating such behavior.

To be frank, however, historically the penalties for antitrust violations in the U.S. were not always so significant, and our enforcement effort has not always been so sustained and focussed as it is today. Indeed, U.S. antitrust history demonstrates the dangers of failing to provide appropriately tough penalties for anticompetitive behavior, and of failing to ensure that such penalties are consistently imposed on guilty parties.

From 1890, when the Sherman Act was passed, until 1955, the maximum fine for violating our basic antitrust law was a mere \$5,000 (for individuals or corporations), and the maximum jail term was only one year. It was only in 1974 that antitrust crimes, such as price-fixing, were made felonies, that maximum criminal fines were increased to \$1 million for corporations and \$100,000 for individuals, and jail terms increased to up to three years. Moreover, it has only been within the last several years, with additional Sherman Act amendments and the new Sentencing Guidelines, that criminal antitrust penalties have reached what we believe to be a satisfactory deterrence-inducing level, and that jail terms for price-fixers have become the norm, rather than the exception.

The first criminal action brought by the Justice Department to enforce the new Sherman Act was brought in 1892 against a group of lumber dealers who were charged with fixing prices; we lost that case. We continued to bring, and to lose, a few price-fixing cases throughout the first 15 years of the law's existence; between 1890 and 1904, the Department brought an average of less than two Sherman Act cases each year. Indeed, the first successful criminal prosecution under the Sherman Act, in 1894, was of a labor union for engaging in strike-related activity. Not a very good start.

As I have already indicated in my discussion of per se and rule of reason analysis, for some years we continued to have a hard time explaining the Sherman Act to the courts. Our first successful criminal prosecution did not occur until 1903, when a manufacturer of salt pleaded guilty to price fixing and was fined the magnificent sum of \$1,000. The first convictions for individual price fixers that resulted in jail terms did not occur until 1921, when 24 companies and 40 individuals were convicted of fixing the price of wall tile; three of the individuals actually went to jail, and the companies paid fines totalling \$122,000 (which I suppose was a significant sum in those days). Even after this unusual success, the Department averaged fewer than ten criminal prosecutions per year until the 1940s, when sustained rigorous antitrust enforcement really began in the U.S.

One of the reasons why our early enforcement record was so modest is that our government devoted only modest resources to antitrust enforcement. In the early days, resources were scarce at the Department, even by today's standards. Until 1904, Congress provided no specific appropriation for antitrust enforcement, and there was no Antitrust Division within the Department; in fact, there were no lawyers assigned full-time to antitrust matters. This situation improved very slowly. In 1904, Congress authorized a veritable army -- or, as the Department called it, an Antitrust Division -- of five lawyers to enforce the antitrust laws. Nearly forty years later, there

were still fewer than 60 employees in the Division, and no economists. Only in the early 1940's did the Division's staff increase to over 100 employees, including a few lonely economists. Today, in contrast, the Antitrust Division has nearly 600 employees, including 300 attorneys and nearly 60 economists; the Federal Trade Commission devotes roughly comparable resources to antitrust enforcement.

I have developed this historical sketch at some length in order to emphasize an important point. It is not enough to enact a sound competition law; there also must be effective enforcement of the law. Effective enforcement, in turn, requires that government commit adequate resources to ensure that persons subject to the law take the law seriously and do not flaunt the important values embodied in it.

I, of course, have no view as to the appropriate level of resources that Mexico should devote to antitrust enforcement in order to achieve meaningful results. You must decide that for yourselves. But I would strongly urge you to avoid the mistakes we made long ago in failing to commit sufficient resources to antitrust enforcement. Our experience in the United States has been that only through vigorous and successful prosecution of antitrust offenses, can we hope to deter anticompetitive conduct at the outset and, if such conduct occurs, to punish it in the end. I believe that the

penalties set out in Chapter VI of your new law offer a solid basis for such an enforcement program in Mexico.

I would offer briefly one other thought on the subject of prosecution of per se offenses. It is useful, and indeed necessary, that there exist a broad base of support or good will on behalf of antitrust enforcement among our citizens. They must be aware that antitrust exists and convinced that it is good for them, as indeed enlightened antitrust enforcement is.

I believe that such support can be most readily obtained by vigorous prosecution of conduct that is unambiguously anticompetitive and harmful, which consists, of course, of naked horizontal restraints such as price fixing, bid rigging and market allocation. It is the case today in the United States, and has been so for decades, that nearly one-half of the resources of the Antitrust Division are devoted to investigating and prosecuting such conduct. The benefits, as I have said, are two: the most economically harmful conduct will have been interdicted, and public awareness and support will have been most efficiently generated.

Conclusion

I beg your indulgence for filling my remarks today with dry accounts of long-forgotten antitrust problems. History often

can be an excellent teacher, however, and we in the United States have learned some important lessons over the years about the appropriate focus of competition law and policy, and about the appropriate means of maintaining efficient markets through sound antitrust enforcement. Your Federal Competition Act provides an excellent foundation for safeguarding the interests of Mexican consumers by -- as Article 2 of your law provides -- protecting the process of competition in Mexican markets. I wish you the best of luck. I assure you that we stand ready to cooperate with the Federal Competition Commission in its difficult, but crucial, new tasks. Thank you.