



# DEPARTMENT OF JUSTICE

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## A CULTURE OF COMPETITION FOR NORTH AMERICA

Address by

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Buenos dias. Lo siento que yo no hablo su idioma, pero espero que mis hijos lo puedan.

Our relations with Mexico and Canada — our North American neighbors and partners — are integral to our well-being and security as a nation. These relationships are grounded, in increasing measure, in shared values and perspectives. We share a faith in democracy and the rule of law as twin pillars of sustainable governance. We also share a faith in competitive open markets as the proven route to sustainable economic growth and development for our peoples and nations.

When we created NAFTA in 1993, trade between the United States and Mexico totaled \$81 billion. Our two-way trade hit \$233 billion in 2001 -- nearly a 3-fold increase. Mexico is now our second largest trading partner. Today, we export more to Mexico than to Britain, France, Germany, and Italy combined.

The NAFTA legacy extends beyond a trade agreement, however. NAFTA represents a commitment by Mexico to modernize politically and economically and a commitment by the United States and Canada to support this great change. Since his election, President Fox has ushered in a new, more open economic environment in Mexico. The prevailing spirit is one of free enterprise and equal opportunity, in which entrepreneurship is rewarded and graft is punished.

In the year and a half since President Fox's inauguration, we have seen the Government of Mexico dedicate itself as never before to combating crime, with a serious campaign against drug trafficking and corrupt elements in government including judicial and law enforcement agencies. Mexico has taken these steps because it sees these scourges for what they are — threats to Mexico's own national interests. President Fox recognizes that as Mexico moves into the globalized world, it must offer its neighbors and investors a reasonable guarantee of security,

protection of their interests, and recourse in a judicial system which affords them the protection of the rule of law.

Mexico's actions are consistent with the message of the Finance for Development Summit in Monterrey in March: the globalized economy is a powerful engine for development, but each country must take on the responsibility to harness it by practicing good governance, adhering to the rule of law, investing in its people and encouraging political and economic freedom.

Today I would like to focus on one of the key ingredients in the recipe for building strong economies: the protection of the competitive process. Our goal should be to secure a robust culture of competition throughout North America.

Over the past decade or so, as more and more countries have embraced market principles, we have witnessed an explosive growth in the number of countries with antitrust laws and agencies. Nearly 100 countries have antitrust laws today. Rigorous enforcement of antitrust laws is essential in preserving and extending the gains that open markets have brought to national economies and the NAFTA partners. But it is equally critical that antitrust enforcement not become a bureaucratic obstacle to efficient business conduct and that antitrust enforcers not unnecessarily regulate — and thereby stifle — the competitive forces we mean to protect. Antitrust agencies must also work to nurture and strengthen a culture of competition within their economies and to advocate wherever necessary the importance of freeing consumers in competitive markets from overly burdensome regulation.

I would like to propose eight guiding principles that are critically important to the work of an antitrust agency as it protects and promotes a culture of competition, regardless of the

specific statutory structure under which it operates.

**First, Impose Strong Deterrent Measures Against Hard Core Cartels**

Detection and prosecution of hard-core cartels should be every competition authority's top enforcement priority. Cartels — whether in the form of price fixing, output restrictions, bid rigging, or market division — raise prices and restrict supply, enriching producers at consumers' expense and acting as a drag on the entire economy. In the U.S., we view cartels as crimes, pure and simple, and prosecute those who perpetrate them as criminals.

As commerce has become more global, so too have cartels. That is why the United States has been one of the leaders both in prosecuting international cartels and in encouraging other countries to do likewise. As a recent OECD study notes, “the amount of commerce affected by just 16 large cartel cases reported in the OECD survey exceeded \$55 billion worldwide. The survey showed that the cartel mark-up can vary significantly across cases, but in some it can be very large, as much as 50% or more. It seems clear that the magnitude of harm from cartels is in the billions of dollars annually.” Although hard data is often difficult to obtain when dealing with secret conspiracies, it is clear that much of harm from cartels falls on developing countries, who are often significant purchasers of cartelized products or services and must pay grossly inflated prices.<sup>2</sup>

Since 1996, the Division has prosecuted more than 50 companies for participating in international cartels affecting more than \$10 billion in U.S. commerce, and we have obtained fines of more than \$1.9 billion, and sentenced at least 20 senior executives to jail. While we are gratified at our success in prosecuting these cartels, we know our work has just begun. As the enforcement actions we have each brought against the lysine and citric acid cartels demonstrate,

cartels continue to be a way of life in many parts of the world, impeding economic performance, promoting inequality, impoverishing consumers, and thereby providing fuel for those who oppose globalization and free market ideals.

The NAFTA partners recognize that effective cartel enforcement requires that all countries have effective anti-cartel laws and that they enforce those laws. We worked together to secure approval of the OECD 1998 Recommendation Concerning Effective Action Against Hard-Core Cartels, which encourages each member country to ensure that its competition laws effectively halt and deter hard-core cartels and to cooperate in investigating and prosecuting those cartels. We must, and will, continue to work together to prosecute cartels within our own borders.

### **Second, Protect Competition, Not Competitors**

As we move beyond cartels to other forms of conduct, including mergers, the single most important principle we must keep in mind is that the antitrust laws protect competition, not competitors. It is not our job to protect weaker competitors from stronger rivals. Indeed, competition benefits consumers through better products and lower prices in large part because it rewards success and punishes failure. Our job is to protect this process by encouraging vigorous competition and by outlawing only conduct that tends to destroy competition itself. This means, for example, that we should allow firms, even dominant firms, to compete aggressively, even at the risk of driving weaker, less efficient firms from the market. It is for this reason that we focus more attention on mergers and other concerted conduct than we do on single-firm conduct. It is also why we will generally challenge single-firm conduct as exclusionary or predatory only if it is both likely to exclude rivals from the market and serves no legitimate business purpose.

### **Third, Recognize The Central Role Of Efficiencies In Antitrust Analysis**

The next principle is a close corollary of the last one: namely, that efficiencies should play a central role in our analysis of mergers and other allegedly anticompetitive conduct. As the June 1994 OECD Interim Report on Convergence in Competition Policies states: “[T]he basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources — and thus efficient market outcomes — in free market economies.”<sup>3</sup>

In the United States, efficiencies have played a central role in antitrust analysis from the very beginning. One of the great insights of the rule of reason, as formulated by our Supreme Court nearly a century ago, was that determining the legality of conduct under the antitrust laws requires balancing its anticompetitive effects, in terms of market power, against its procompetitive effects, in terms of greater efficiency, in order to determine what the likely net effect will be on price, quality, output, innovation, and, ultimately, consumer welfare.

### **Fourth, Base Decisions on Sound Economics and Hard Evidence**

We must do everything we can to prevent antitrust from becoming politicized. As an economy grows, and the stakes become ever larger, firms are naturally driven to seek protection and help from their governments. They can be expected to try to use antitrust as a weapon to be wielded against their competitors. This is a problem faced by new antitrust agencies and old — newer agencies can expect to see their legitimacy challenged, and more mature agencies are increasingly confronted by lobbyists and public relations experts seeking to influence decisions, not through arguments on the competitive merits, but through the media and otherwise.

The best thing we can do to prevent antitrust from becoming politicized is to make sure our decisions are soundly grounded in economic theory and fully supported by the empirical and factual evidence. When complaints — particularly those of competitors — are brought to us, they must be tested against what Joseph Schumpeter called “the cold metal of economic theory.” We must also ensure that our decision-making is transparent and fair. Senior enforcement officials should give parties and complainants an opportunity to engage them substantively before reaching a decision, and should bring their own mature judgment to cases and not rely uncritically on the advice of their staffs. And, we must have in place effective mechanisms for judicial review.

**Fifth, Realize That Our Predictive Capabilities Are Limited**

Antitrust officials, like doctors, should take a sort of Hippocratic oath: before intervening, we should be confident that our actions will cause no harm. Antitrust authorities should be law enforcers, not industrial policy makers who try to move industries in a certain direction or dictate particular market results. Dictating industrial policy is not the proper role of an antitrust authority for a very good reason: the long-term (and, in some industries, even the short-term) predictive powers of antitrust enforcers are limited. Over the course of my twenty-five-year career as an antitrust lawyer, I continually have been amazed at how markets evolve — often in ways that even the most sophisticated of industry participants were unable to anticipate.

In the United States, we have relatively little confidence in our ability to make predictions far out into the future and have much more faith in the self-correcting nature of markets. These beliefs lead us to be skeptical of self-interested claims by rivals that particular conduct will lead to their ultimate demise and explain why we demand strong factual and

empirical proof before we accept such claims.

### **Sixth, Impose No Unnecessary Bureaucratic Roadblocks**

As antitrust enforcers, we must work hard to ensure that the antitrust laws do not themselves become bureaucratic roadblocks to efficient transactions. A vigorous, competitive, free-market economy produces millions, if not billions, of agreements and transactions every day. The vast majority are pro-competitive or, at worst, competitively neutral.

We enforcement authorities should therefore continually take stock of our procedures to be sure that only conduct that raises legitimate competitive concerns is investigated and that we block only conduct that is truly anticompetitive. In recent years, for example, the United States has been able to clear roughly 97 percent of all mergers in the first thirty days and we aspire to do even better.

### **Seventh, Be Flexible and Forward Looking**

Finally, antitrust agencies should be as flexible and dynamic as the industries with which they deal. We must make sure that antitrust adapts to changes in technology and in the economy. In particular, we should recognize that in our new, knowledge-based economy, competition in some markets is driven more by innovation than price. New-economy industries frequently require very large and risky upfront investments that will not be made without the promise of a substantial return. They also are often characterized by large network effects and low marginal product costs. All of this means that the most efficient outcome in some markets may be for a single firm to serve the entire market for at least a period of time.

In the new economy, the costs of regulatory missteps are therefore very high. Too much government interference will frustrate innovation and discourage efficient practices to the



detriment of consumers worldwide. On the other hand, a totally hands-off approach could lead to high prices and frustrate the emergence of potentially superior technologies — also to the detriment of consumers. The fact that many of the new economy industries are global in nature, coupled with the reality that numerous enforcement agencies may now be looking at the same transactions, make it that much more important — and that much more difficult — to get it right.

### **Eighth, Protect Consumer Welfare Through Competition Advocacy**

Dr. Fernando Sanchez Ugarte, chairman of Mexico's Federal Competition Commission, is one of the foremost experts on the role of competition and competition policy in economic development. He was the lead speaker on this subject at the OECD's Global Forum on Competition last February in Paris. He has also taken a leadership role in the International Competition Network, where he chairs the Working Group on Competition Advocacy. As Dr. Sanchez Ugarte has demonstrated, in many cases a competition agency can have a great impact in advancing consumer welfare in a particular sector by engaging in forceful competition advocacy. This can occur at any level of government, from broad federal legislation or sectoral regulation to arcane local municipal rules. The authority's job is to further four main goals:

- to eliminate unnecessary and costly existing regulation;
- to inhibit the growth of unnecessary new regulation;
- to minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the valid regulatory objectives; and
- to ensure that regulation is properly designed to accomplish legitimate regulatory objectives.

An effective competition advocacy program by a committed and independent competition authority will encourage the greatest scope for allowing markets to allocate resources, thereby improving productivity and economic growth to the benefit of consumers.

### **International Initiatives**

This is an exciting era full of new and unique challenges for antitrust. By adhering to the principles I have enunciated here, I think we can successfully meet those challenges. Speaking from the United States perspective, it is important that we continue to be engaged with our enforcement counterparts around the world. As the economy becomes increasingly global, and as more and more jurisdictions begin betting on competition and antitrust enforcement, it is all the more critical that we continue our technical assistance efforts, continue to cooperate on investigations, and continue to achieve greater convergence. We have a solid record of cooperation with our colleagues in the Federal Competition Commission and a framework for cooperation in the bilateral agreement between the U.S. and Mexican agencies signed here in July 2000. Mexico, Canada, and the United States are moving in the right direction, toward a North American culture of competition. The newly formed International Competition Network provides us a vehicle to work with other competition authorities around the world to assure that this culture of competition, like our economy, one day becomes truly global.

1. Deputy Assistant Attorney General for International Enforcement, Antitrust Division, U.S. Department of Justice. These remarks reflect my personal views and not necessarily those of the Department. I want to thank Caldwell Harrop who contributed importantly to this paper and, of course, my assistant, Gloria Jenkins. Any mistakes are, of course, my own.
2. See remarks of Simon Evenett at OECD Global Forum on Competition, February 14, 2002 - 16 international cartels for which data was available affected \$81 billion of LDC commerce; prices often fell by 20-40% after break-up of the cartels involved.
3. Organization for Economic Co-operation and Development. Interim Report on Convergence of Competition Policies. OECD/GD (94) 64, Paris, June 1994 (on file with OECD).