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HARMONIZATION OF THE UNITED STATES AND MEXICAN ANTITRUST LAWS UNDER NAFTA

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CHAIRMAN

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BEFORE

ABA SECTION OF ANTITRUST LAW

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I am pleased to be back in Mexico and to have the chance to discuss with you the important matters on today's agenda. Before proceeding, I should make my usual disclaimer that the views I express are my own, and do not necessarily reflect those of the Commission or any other Commissioner.

At the time of my last visit, NAFTA was a mere possibility and not the reality it has become. The "North American market" now has a real world significance that transcends its growing importance in the antitrust analysis of geographic markets. The economic ties that bind us have been evidenced recently by the proposed responses of Mexico's NAFTA partners to the economic dislocations of recent weeks. Competition law is the topic today, but we should not lose sight of the broader context. Whether the issue is antitrust or currency fluctuations, we are all on this continent together.

I would like to take this opportunity to congratulate Fernando Sanchez Ugarte on his appointment as President of the Mexican Federal Competition Commission. I look forward to working together and I am sure that our collaboration will be as productive as our previous relationship with Santiago Levy, who in his new position as Under Secretary of the Treasury will not work so directly on competition law enforcement issues but, I am sure, will continue to champion the cause of free trade.

I also want to congratulate everyone associated with the Federal Competition Commission. It has achieved a great deal, and its work has been particularly important and difficult as the

government transforms itself from the major player in the economy to the major guarantor of the competitive process. In the "new continental order" created by NAFTA, competition issues in Mexico will increasingly be our issues as well. I know the United States' FTC, is eager to work with Mexico's FCC in confronting our common challenges.

The FCC's first Annual Report is a useful reminder of how much our agencies have in common. For example, the report describes the goal of the Federal Law of Economic Competition as being to ensure that firms "produce more efficiently, offer lower prices and higher quality, or introduce new and improved goods and services."[1] That certainly sounds familiar. And at a more practical level, the report says that of all the areas in which the FCC worked, "the area of mergers was the most active."[2] That also sounds familiar; boy, does that ever sound familiar! We may already be "harmonized" enough for our annual report writers to be sharing computer discs.

The term "harmonization," which is part of the title supplied for my remarks, has different meanings in different circles. To some it has the narrow but far-reaching meaning of a world antitrust code enforced by an authority with global jurisdiction. Without in any way impugning the vision of the

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[1] Comision Federal de Competencia, Annual Rep't 93-4, at 9.

[2] Id. at 11.

Munich Group[3] or others with similar ideas, I have on other occasions expressed skepticism about the timeliness of such proposals.[4] But I am an ardent advocate of harmonization, which I view in broader, more practical terms.

As a process, harmonization is present reality. When the OECD issues Recommendations or conducts seminars for dynamic non-member economies; when Mexican antitrust law is the subject of conferences like this; when the U.S., Canada, Germany and others send staff to Central and Eastern Europe;[5] when lawyers and economists from around the globe spend internships in Washington; when countries sign antitrust agreements[6] and hold consultations

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[3] International Antitrust Code Working Group, "Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement," Munich, 1993.

[4] Janet D. Steiger, "Perspectives on U.S. International Antitrust Enforcement," Fordham Corporate Law Institute, October, 1993.

[5] The FTC and DOJ have sent missions to Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

[6] The 1986 Recommendation of the OECD Council Concerning Co-operation between Members and Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(86) 44 (1986), *reprinted in* IA Hawk, United States, Common Market and International Antitrust: A Comparative Guide (2nd ed. Supp. 1990), Appendix 35. The antitrust agreements to which the U.S. is a party are (1) Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, Sept. 23, 1991, Art. I.1., *reprinted in* 61 Antitrust & Trade Reg. Rpt. (BNA), 382-5 (Sept. 26, 1991), and 4 Trade Reg. Rpt. (CCH) ¶ 13,504; (2) Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,501; (3) Agreement between the Government of the United States (continued...)

-- in all these circumstances the process of harmonization is real and important.

You will note that this process is, for the most part, procedural rather than substantive; it focuses on enforcement rather than legislation; it is practical rather than theoretical. In the month that has seen the birth of the WTO and its smaller cousin, Mercosur,[7] as well as the first birthday of another cousin, NAFTA, I am convinced that we must concentrate on the practical. The increases in trade that have followed NAFTA and that will follow the conclusion of the Uruguay Round will benefit the economies and consumers of North America and the world. But as trade barriers fall and trade volumes rise, the need for antitrust enforcement will rise as well. Cartels may be formed to fix prices or divide markets. Mergers will be proposed; many will benefit competition, others may threaten it. In all cases our vigilance will be required to ensure that consumers receive the benefits that NAFTA was designed to bestow.

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[6](...continued) of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,502; (4) Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, Mar. 9, 1984, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,503.

[7] Mercosur, also known as the Southern Common Market, is a customs union joining Brazil, Argentina, Paraguay, and Uruguay. It came into effect on January 12, 1995, when tariffs were ended on 95% of the goods traded among the countries. The Mercosur partners expect to sign agreements with Chile and Bolivia by June of this year, and with Peru, Ecuador, Columbia, and Venezuela by the end of this year.

As we explore harmonization in the evolutionary way I have described, we do encounter areas where further steps cannot be taken without new legislation. Confidentiality restraints in virtually all countries can make the sharing of information difficult if not impossible. You will hear shortly about one U.S. initiative, the International Antitrust Enforcement Assistance Act,[8] that may lead to future gains in this area. As the harmonic evolution proceeds, we will no doubt find other problems and will need to find other solutions.

I have in the past referred to two goals of harmonization that I believe are not only vital but achievable in the world of today and tomorrow.[9] When anticompetitive conduct produces transborder effects, antitrust regimes on both sides of the border must be effective and efficient -- effective in detecting and stopping the prohibited conduct and fashioning a workable remedy; efficient in deploying our resources and in interfering as little as possible with procompetitive transactions. These goals require constant cooperation and coordination between enforcement agencies.

While we can and do pursue these goals on a global scale, I want to concentrate today on the largest of the world's sub-markets, NAFTA. For the Three Amigos, as we now are, the treaty

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[8] PL 103-348, 108 Stat. 4597.

[9] Janet D. Steiger, "Making International Antitrust Enforcement More Effective and Efficient," IBA/ABA Symposium on Antitrust Law and Policy, Brussels, June 22, 1994.

expressly recognizes cooperation and coordination as a means to achieve effective and efficient enforcement.

To begin with, the first subsection of Article 1501 provides that the Parties shall "adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate actions with respect thereto." In the U.S. we are proud, and I believe justifiably so, of our long history of antitrust enforcement. We sometimes forget, however, that we were not the first on this continent to bring forth such laws -- we were, in fact, the last. Canada's first competition statute was passed in 1889, just one year before the Sherman Act, but the Mexican Constitution prohibited monopolies in 1857. Furthermore, their 1917 Constitution guaranteed a right to free market participation.

By the time NAFTA became effective, all three countries had "modern" antitrust statutes. The statutes have differences in language and emphasis, but what is important for the future of effective and efficient enforcement on this continent is that our statutes are harmonious if not totally harmonized.

All of our laws prohibit price-fixing and related cartels. For offenses that are not per se, the U.S. condemns "unreasonable" restraints, Canada "undue" restraints and Mexico "relative monopolistic practices." All three countries prohibit mergers that substantially lessen competition,[10] and we all

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[10] Canada: Competition Act [CA], R.S., 1985, c.C-34, as amended, § 92; Mexico: Federal Law of Economic Competition [FLEC] Articles 16-19; U.S.: Clayton Act § 7, 15 U.S.C. § 18; Federal Trade Commission Act § 5, 15 U.S.C. § 45.

require notification and premerger review of transactions that exceed a stated threshold.[11] Canada recognizes efficiencies and failing firm defenses;[12] in the U.S. we consider both of these issues, although under the Merger Guidelines, efficiencies are considered as a matter of prosecutorial discretion.[13] I understand it is likely that the Mexican authorities will also consider both these issues.

In both the U.S. and Canada antitrust agencies have traditionally viewed competition advocacy as an important aspect of their missions. The situation is similar in Mexico, where Article 24 of the statute authorizes the FCC to conduct studies and issue opinions concerning laws and policies proposed by other organs of government. A significant exercise of that power was the FCC's examination of the telecommunications industry and its recommendations for the future of long-distance telephone service. The FCC was apparently an effective advocate; the Ministry of Communications and Transportation adopted most of the FCC's positions.

Private rights of action are available in all countries,[14] though the U.S. is unique in the degree to which we rely on

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[11] Canada: CA, §§ 108-124; Mexico: FLEC, Articles 20-22; U.S.: Clayton act, § 7A, 15 U.S.C. § 18a.

[12] CA §§ 96,93.

[13] 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, reported in 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-11 (May 5, 1992).

[14] Canada: CA § 36; Mexico: FLEC, Article 38; U.S.: Clayton Act §§ 4,16, 15 U.S.C. §§ 15,26.

private enforcement. In the years to come we may well see more private actions in both Canada and Mexico, but the U.S. treble damage remedy has not been a hot export item.

Looking at the three countries' laws on a "macro" basis, the ABA's NAFTA Task Force suggested that the Mexican law tilts toward economic efficiency and producer welfare, the U.S. favors consumer welfare and Canada falls somewhere in between.[15] However correct this assessment may be, I think that the range of difference is not nearly as great or as important as the range of similarities. And even though competition laws may evidence variations in national policy priorities, the existence of NAFTA demands that we work together to achieve the goals proclaimed in the treaty.[16]

The heart of the matter is contained in article 1501(2) of the treaty. It is short, so I will read it:

> Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and

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[15] Report of the Task Force of the Antitrust Section of the ABA on the Competition Dimension of the North American Free Trade Agreement, March 25, 1994, at 17. [Special Report: NAFTA]

[16] For a thorough analysis of the Mexican statute, see Newberg, "Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust," 31 Colum. J. of Transnational Law 587 (1994); y en Espanol, Newberg, "La nueva Ley de Competencia Economica de Mexico: hacia el desarrollo de una nueva ley Mexicana antimonopolios," en ESTUDIOS EN TORNO A LA LEY FEDERAL DE COMPETENCIA ECONOMICA 79 (Instituto de Investigaciones Juridicas, Universidad Nacional Autonoma de Mexico, 1994).

exchange of information relating to the enforcement of competition laws and policies in the free trade area.

Our job as enforcement agencies is to implement this mandate. As you know, last year's report of the Special ABA Task Force on NAFTA[17] contained a lengthy list of recommendations. Neither I nor the Commission has taken a position on the Report, but some of my comments may sound familiar.

Because Canadian and U.S. enforcement agencies have longer histories than the Mexican FCC, we have already had the need and the opportunity to establish in large measure the relationship envisioned by Article 1501. The U.S.-Canada Memorandum of Understanding took effect in 1984 and was originally designed to ease tensions that had arisen from earlier U.S. antitrust prosecutions. It has done more than that. Over the years, the MOU, and the regular consultations it engendered, have not only diminished the occasions of conflict, but also contributed to a level of productive cooperation that we now hope to reflect in a "modernized" agreement.

We need to establish our relationship with Mexico on the same footing. I look forward to the early scheduling of formal consultations with the subject of an MOU high on the agenda. We can then build on the already positive level of interactions and create a culture of cooperation that can only benefit all our countries as the overall NAFTA market matures.

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[17] Special Report: NAFTA, supra n. 21.

Beyond the formal structure of an MOU and bilateral consultations, there are a number of issues that I believe deserve serious consideration on a trilateral basis. For example, in our current agreement with the EU, and I would expect in any new agreements with Canada and Mexico, we have provisions on comity, negative and positive. The former is designed to avoid conflict, the latter, to foster cooperation. Should there be a special definition of comity within NAFTA? Does the nature of the relationship suggest some special efforts to sort out the overlaps in enforcement initiatives that we can all predict will become more common?

Several years ago when Sir Leon Brittan first proposed an EC-U.S. antitrust agreement, he envisioned an arrangement that would determine which agency would take action against conduct with effects on both sides of the Atlantic.[18] Our 1991 agreement did not adopt this proposal, but the members of the ABA NAFTA Task Force have suggested that the NAFTA Parties consider such an arrangement.[19]

Let's consider a real world example. FTC staff recently noticed a press report stating that two companies, one in the U.S. and one in Mexico, were selling the same product and "had agreed not to invade each other's markets." Whatever the facts of that case turn out to be, it raises interesting questions.

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[18] Sir Leon Brittan, "Jurisdictional Issues in E.E.C. Competition Law," Hersch Lauterpacht Memorial Lectures, Cambridge, February, 1990.

[19] Special Report: NAFTA at 42-44.

Which agency should pursue the matter? If both the FTC and FCC decided to take action, would it make sense to coordinate investigations? Should one defer to the other in bringing a case? What about remedies? Would either agency have the power to fashion an effective remedy that would adequately take account of the actions, or inactions, on both sides of the border?

For some years now we have had a project with the EU to study the requirements of our respective premerger notification programs. Analysis of the premerger regimes within NAFTA is also in order. It may be that we can do something to ease the burdens on business[20] and to make our investigations more efficient.

Throughout this process, we should not lose sight of the fact that education is a mutual process of enlightenment. For example, I understand that former FCC Commissioner Alba has devised a variation on the Herfindahl that factors the relative size of the merging parties into the analysis. I know that our competition and economic staffs will be most interested in studying this concept.

Recent years have seen an increase in the degree to which the FTC's other area of responsibility, consumer protection, has developed a significant international component. One example is the phenomenon of telemarketing fraud, which has rapidly become a

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[20] ABA Section of Antitrust Law, Report of the Special Committee on International Antitrust, October 1991 at 17-24.

problem of billion dollar proportions.[21] Last September in Ottawa we conducted a seminar that brought together Canadian antitrust and marketing practices officials, local police and even the Royal Canadian Mounted Police. We focused on how we can cooperate in the future and eliminate the border as a barrier behind which the perpetrators can hide and victimize those on the other side. I am not aware that telemarketing fraud has yet become a serious problem across our southern border, but we should be starting now to think about how to protect consumers from scam artists who will be quick to take advantage of any new opportunity.

Another feature of consumer protection that I believe deserves trilateral attention is freeze orders. As you know, in appropriate cases the FTC can ask a judge to freeze the bank accounts of respondents so that assets will be maintained to make payments to victims. In a recent case, after the judge's order, we discovered that the respondents also had at least one bank account in Canada. As the laws now stand, there is no mechanism to enforce the U.S. order in Canada or convert it into a Canadian order in time to prevent the respondent from dissipating or removing those assets to some other jurisdiction. I understand that we would face similar difficulties in Mexico, as would Canadian and Mexican authorities if they tried to enforce their orders in our courts. This issue clearly would take time, care,

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[21] Report, "The Scourge of Telemarketing Fraud: What Can Be Done About It?" House Comm. on Government Operations, H.Rep. No. 102-421, December 18, 1991.

and legislation to resolve, but it is not too early to consider it.

This is an ambitious agenda, and it may be more difficult than it appeared only a few months ago, because in troubled economic times there are often forces who argue that antitrust enforcement is irrelevant or will inhibit recovery. They were wrong in the past and must be resisted now, as the world of trade and competition is developing and evolving at a pace that would have been unimaginable a few years ago. The Three Amigos will soon become four when Chile enters the fold. And at the Miami summit last month plans were made for the creation of a hemispheric free trade zone with a $13 trillion market and 850 million people. The ambition of that vision must be matched by an equally farsighted response on our part.

Thank you very much.