

The Antitrust Source, June 2017. © 2017 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Antitrust in the Americas: Enforcers' Roundtable Discussion*

Mexico City, Mexico • June 2, 2017

QUESTIONERS



William C. MacLeod
*Chair, ABA Section of
Antitrust Law, and
Partner, Kelley Drye,
Washington, DC*



**Eduardo Perez
Motta**
*Partner, Agon,
Mexico City*

PANELISTS



Esteban Greco
*President, Argentine
National Commission
for the Defense of
Competition*



Felipe Irazabal
*National Economic
Prosecutor, Chile*



Abbott ("Tad") Lipsky
*Acting Director, Bureau
of Competition, U.S.
Federal Trade
Commission*



Alexandre Macedo
*Commissioner,
Administrative Counsel
for Economic
Defense (CADE), Brazil*



Alejandra Palacios
*President, Mexican
Federal Economic
Competition
Commission
(COFECE)*



Brent Snyder
*Deputy Assistant
Attorney General,
Antitrust Division,
U.S. Department
of Justice*

Editor's Note: The 2017 Antitrust in the Americas program, held in Mexico City on June 2, 2017, concluded with an enforcers' roundtable of leaders of the antitrust agencies of Argentina, Brazil, Chile, Mexico, and the United States. The questioning was led by Section Chair William MacLeod and former ICN Steering Group Chair and Mexican agency head Eduardo Perez Motta.

—Russell Damtoft

WILLIAM MACLEOD: It's time to hear from the enforcers in the Americas. We will follow the pattern that we have used throughout our conference, and that is to find the best moderator and interrogator that we can.

In my case, that is Eduardo Perez Motta, who probably needs little introduction to those in the room. But if you do not know him, he is a Partner at Agon. In 2012, while serving as the President of the Mexican Federal Competition Commission, he was elected as the Chair of the Steering

* This Roundtable has been edited for publication. Panelists were speaking in their official capacities as of the date of the Roundtable (June 2, 2017). Tad Lipsky and Brent Snyder have since left their agencies.

Group of the International Competition Network. He had also been Mexico's Ambassador to the World Trade Organization and a negotiator of the free trade agreement between Mexico and the European Union. There is no better candidate to weave together the strains of competition and trade and the intricacies of enforcement than Eduardo.

Eduardo, can you introduce our panelists?

EDUARDO PEREZ MOTTA: Thank you very much.

I am going to start with Brent Snyder, who is representing the Department of Justice, the Deputy Assistant Attorney General of the Antitrust Division. Then we have the Commission President of the Mexican Antitrust Authority, Alejandra Palacios. On my left is Felipe Irrarrazabal, who is with the Fiscal Nacional de Economica from Chile.

[The] competition

Esteban Greco is the head of the Argentinian antitrust agency. Alexandre Macedo is Commissioner of Conselho Administrativo de Defesa Econômica (CADE). Last but not least, I would like to present Abbott Lipsky, who comes representing the Federal Trade Commission. He is the Acting Director of the Bureau of Competition.

reform of 2013 has

provided us, the

With that, I think we should go straight to the questions.

Mexican Competition

Our first question of the panelists—and we will proceed down our panel alphabetically by first name, in which case that means we will ask Alejandra first, is for a report on what are the hottest issues, or the hottest issue, at your agency.

Commission, or

ALEJANDRA PALACIOS: Thank you for having the Competition Commission in this panel and for choosing Mexico for this event.

COFECE, with an

unprecedented

As we have heard along this day and a half, our competition reform of 2013 has provided us, the Mexican Competition Commission, or COFECE, with an unprecedented opportunity to improve competition conditions in the Mexican markets. Since then we have undertaken the task of turning COFECE into a stronger, more efficient, and more transparent regulator.

opportunity to improve

competition conditions

As we have heard this day and a half, several cartel investigations with high expectations have been initiated in markets that are critical to the Mexican consumers, such as healthcare, food, banking, and transport. As Judge Tron Petit mentioned this morning, last February we announced the lodging of COFECE's first criminal complaint before the Office of the Attorney General against several individuals who participated in cartel activities in the healthcare sector. This is an important step in materializing the criminal sanctions for cartels, present in the Mexican Criminal Code since 2011 and then strengthened in 2014. As I always mention, my perception is that more often companies are investing resources in the implementation of antitrust compliance programs. I always say it's a new line of business for Mexican antitrust practitioners, and I find that very rewarding.

in the Mexican markets.

—ALEJANDRA PALACIOS

Regarding merger analysis, the Commission is working towards more effective merger review, as was just mentioned. At the Competition Commission, we believe that the new law makes it complicated for the Authority and the economic agents to have very open conversations, but we are working with these restraints as best as we can.

The 2016 highlight was the *Delta/Aeroméxico* merger. It was talked about yesterday, so I am not going to go into that.

In the upcoming days and months, the Commission will take important final decisions regarding two preliminary findings presented by our investigative authority regarding first, the procedures for essential facilities and barriers to competition in slot allocation in the Mexico City Airport; and second, on competition conditions prevailing in the Mexican railway market. If lack of com-

petition conditions is confirmed in one or both procedures, then sector regulators should act accordingly.

We will also launch our market study—and this will probably happen next week—on off-patent drugs and the role of generic entry on prices. Our findings show that the number of generic competitors and the rate of entrance is low and this is having an important impact on the prices that Mexicans pay for medicines.

Then also, we will launch a report with our analysis of some aspects of the Mexican trade policy. As Minister Guajardo said yesterday, we are organizing a seminar—this will be on the 13th of June, and you are all invited—to talk about Mexican trade issues. We are pushing for a trade policy that includes a competition perspective when deciding what is best for our country.

Important judicial precedents will be known in the near future. They have been mentioned in this forum: client/lawyer privilege, particularly complaints for the initiation of an investigation under Article 94, and immunity revocation in cartels. The system is in constant construction. We are waiting for these judicial precedents so we can use them and apply them to strengthen our activity.

Finally, we are about to arrive at our four-year mark. By the end of this year, we will assess how we did in implementing our four-year strategic plan. We will write on paper what we want to accomplish for our next four years.

MR. MACLEOD: Thank you very much. Can we go to Brazil?

ALEXANDRE MACEDO: For the past three years Brazil has been facing a lot of challenges. We have a big change involving a new law that has come, and a lot of things are new for us. We are improving every day and every day and every day. This law came with three big changes. Those changes were: the new CADE structure, the mandatory premerger notification, and the monetary penalty changing.

We have some data that can show what I am trying to say, and this is one thing that I want to just talk about a little bit. To have an idea about how big the changes are, in terms of the amount of money received based on the agreements, in 2007 we received 27 million reals (\$10 million) and in 2016 it was about 700 million reals (\$250 million). That is a huge increase because we changed the procedures, we changed a lot of things, we changed the way that CADE used to think. We gave back more power to CADE for people to work properly. The guys who changed the law and worked to build this new structure did a very good job, so we are seeing the results right now. But we still have a lot of changes to make and a lot of challenges to face, to go on.

MR. MACLEOD: Thank you very much.

Let's cross the equator and go to the Department of Justice in Washington, D.C. What will we be reading in the headlines, Brent, or what should we expect in the headlines?

BRENT SNYDER: I think the big news in the Antitrust Division right now—in addition to, obviously, the fact that we are still in a Presidential transition and are still in the process of getting our political leadership, which I'll comment a little more on later—has been the number of cases that have gone to trial. Since just October, the Antitrust Division has tried nine cases to verdict, including one that is literally going to the jury right as we speak, so hopefully we may have a verdict later today or tomorrow.

Those nine cases involve a range of different things, from two very large healthcare mergers between four of the largest healthcare insurers in the United States, and in those cases we were able to block both of those mergers; to bid rigging on school bus routes in the Commonwealth of

Puerto Rico; bid-rigging trials involving real estate investors in California; and a trial involving a merger between two providers of low-level nuclear waste disposal. So we have quite a range of different cases.

Nine cases have gone to trial. In six of the cases we received verdicts. We won five of those cases. We did get an acquittal in one real estate case, but then we have a couple of cases where we are also waiting for verdicts. So it has been quite a run of litigation for us.

And it is not stopping now. On the criminal side of the Antitrust Division, we have another seven cases that are scheduled to go to trial, six of those probably in the next year or so. So we really stand with the prospect in the criminal program that over the course of a year and a half, we will have tried as many cases as we have tried in the last five years combined. So, for whatever reason, there has been a sharp uptick in our litigation, which means that we are investing enormous resources in those cases.

But the investment of resources, I think, is offset by the fact that we are developing very, very experienced attorneys. I say that you always learn better how to investigate cases once you have tried a case and see how your investigative decisions actually play out. We now are going to have probably more seasoned litigators than we have ever had in the Antitrust Division. In the cases that have gone to trial so far, I think well over a hundred of our Division lawyers have been involved in those cases. So that's a hundred lawyers, probably most of whom had never been in trial before—some now actually have multiple trials—and we will be adding more experienced litigators from the trials to come.

That's very important, I think, not only for our ability to litigate, but also our ability to investigate on both the civil side of our shop and the criminal side of our shop. Knowing that you can try the case makes you more confident as an investigator, it makes you more confident as a negotiator, and it gives you more credibility when you are dealing with defense counsel who know that the Division is willing to take cases to trial if they believe the merits require it. Whether it's on the civil side of the Antitrust Division or the criminal side of the Antitrust Division, this experience is giving us that credibility, and that will continue to pay dividends.

And on the merger side we continue to be very, very busy as well. We have some very large mergers that we are continuing to look at, including *Bayer/Monsanto*, *AT&T/Time Warner*, and some other large mergers.

On the cartel side, we have a very large cartel investigation regarding generic pharmaceuticals; ocean shipping, which I think we are going to be talking a little bit more about when we discuss the transportation sector later; and a wide variety of other criminal investigations as well.

—BRENT SNYDER

MR. MACLEOD: I remember Judge Diane Wood mentioning that about 1.5 percent of cases in the United States are tried before juries these days. It sounds like most of those are coming out of the Antitrust Division.

MR. SNYDER: We actually are attracting attorneys from U.S. Attorneys' Offices, where they normally get more trials. But some are coming to us because they view it as a better opportunity to get trial experience right now.

MR. MACLEOD: Esteban, can we hear a little from Argentina?

ESTEBAN GRECO: Thank you to the ABA for having me here. It is a good opportunity to talk about Argentina's competition policy.

[Y]ou always learn better how to investigate cases once you have tried a case and see how your investigative decisions actually play out. We now are going to have probably more seasoned litigators than we have ever had in the Antitrust Division.

Following the advice of my friend Felipe, I will point out only three points and leave the rest for the talk later.

The number-one hottest issue in Argentina is competition policy, and competition law enforcement is a top public policy priority for the government in Argentina. You can see this in different ways: in presidential decisions—for the first time our Commission has a formal structure with directions, and also because competition issues are taken into account in other policy decisions in different fields.

A second big issue is that this week began the debate and discussion of a new competition law that is under consideration by the Congress and the lower chamber. I had to make a statement for the Commission before the committees of the Congress last Tuesday talking about the new changes of the law. This is a big change to the Competition Act where we are introducing very important changes — an independent agency, premerger review, a leniency program, and more clear higher fines against cartels and for different anticompetitive conducts. So I think this is a hot issue.

Number three, I think you have to take competition law enforcement in Argentina seriously. I think this is good advice for all of you. We are enforcing this in a very serious way, taking into account best practices, but we are doing it now.

These are the three points.

MR. MACLEOD: This is yet another example of an amazing rise of antitrust in the Americas.

Let's continue that with Felipe. Felipe, is anything happening in Chile?

FELIPE IRARRAZABAL: I hope so. I think we have been very active in the last couple of years, not just in the prosecutor's office, but also the Tribunal as well.

But if I can follow my own advice to Esteban, and if I restrict myself to just one main hot issue, I would point to implementation of the law. When you are receiving more faculties and more responsibilities, it is always a challenge the way you will be implementing those rights, those faculties. And it's tough. In our case, our new law was approved in August of last year. I think we have a couple of challenges. We would like to do the job in a smooth and reasonable and sound way.

Probably the first big challenge is to move from a voluntary system to a mandatory merger system. That, obviously, poses and requires a lot of energy from the agency. Later I will show you how we are dealing with those challenges.

We increased our fines, which had a ceiling of (US)\$25 million to up to 30 percent of the sales. Also, the Tribunal will have the responsibility of imposing damages after we finish our fine or administrative procedure. Also, we have criminal sanctions in the case of hard cartels.

So the Congress has given us a lot of responsibilities and we must carefully apply those faculties.

Just to finish on the implementation of the law, we also have something that I would say is a little original, which is a cross-ownership provision in the law. Under this provision, when a company acquires more than 10 percent of its competitor, it has to inform the Fiscalía of that transaction after the transaction has been materialized.

MR. MACLEOD: Tad Lipsky, tell us about the Federal Trade Commission. What have we missed in the news while we've been down here in Mexico?

TAD LIPSKY: First, I want to echo the point about the blossoming of competition policy in Latin America.

*I think you have to
take competition law
enforcement in
Argentina seriously.
I think this is good
advice for all of you.
We are enforcing this
in a very serious way,
taking into account
best practices . . .*

—ESTEBAN GRECO

There is an old story, possibly even true, that back in the late 1970s, when Jimmy Carter was the U.S. President and John Shenefield was the head of the Antitrust Division, the Attorney General of Brazil paid a visit to the Attorney General of the United States. In the course of that visit, the U.S. Attorney General asked John Shenefield to explain the activities of the Antitrust Division to the Brazilian delegation, including the Attorney General. The story is that at the end of the presentation the Brazilian Attorney General turned to his colleagues and then turned back to the Americans and said, “You know, I’ve understood most of this presentation, but I really don’t understand what this antitrust law is all about. The story goes that Mr. Shenefield gave it another try, and finally the Attorney General for Brazil said, “Oh yes, trade practices, I understand. We have a trade practices law in Brazil too, but the only ones that use it are the Coke and Pepsi bottlers who sue each other.”

[T]he Federal Trade

So this is miles from where Brazil was, and, obviously, the trend has entirely penetrated Latin America as well.

Commission has

I have a slightly different perspective on antitrust litigation from the one Brent gave. He is obviously—and justly—overjoyed about the litigation success of the Antitrust Division. It needs to be said that 10 or 15 years ago there was significantly less joy about the litigation success of the U.S. antitrust agencies. There was really kind of a crisis and a great deal of introspection and some very intensive and well thought-through work at both agencies. Now it is fair to say that this has borne fruit because everything that Brent has said is absolutely true and should be credited seriously.

equally improved its

statistics, and it really

. . . is a 12-cylinder

Ferrari of a litigation

machine these days.

I would also like to say that the Federal Trade Commission has equally improved its statistics, and it really is a very finely tuned litigation machine. It really is a 12-cylinder Ferrari of a litigation machine these days. In all the areas that we cover—which, of course, excludes criminal—we share this enthusiasm for the vigor and the health of the agency.

Let me just make two other quick points.

—TAD LIPSKY

First, one thing notable in Washington is the lack of noise about antitrust law, even though there has been a rather significant change in the party in power and the philosophy of the administration. I think it’s a great credit to the fact that a consensus was established many years ago that the purpose of antitrust law is to maximize the economic wealth that can be produced with society’s scarce resources and that antitrust enforcement should ultimately be guided with the consumer interest in mind. Apart from some stray remarks made in the previous administration that might have brought that into question, the enforcement program is still oriented along those lines. So we have a question: you say, “Well, that’s great that you have all this wonderful successful litigation in the United States coming out of the antitrust agencies, but in the service of what?”

I think it’s good that the central focus on sound economic analysis, growing economic wealth, and serving the consumer remains the central focus of U.S. antitrust—Democrat or Republican, conservative, or liberal.

I’d like to conclude by describing a recent initiative of Acting Chairman Ohlhausen. Due to some favorable judicial decisions that were the product of a long and very painstaking and well thought-through process, the U.S. agencies have more flexibility in the way they can limit state government intervention in the economic process, and particularly circumstances in which states assign regulatory responsibilities to competitors in an industry without supervising the outcome.

We won a very significant victory in the famous *North Carolina Dental* case, and now we have our first case, in effect, applying the same doctrine that was established in *North Carolina Dental* to the Louisiana Real Estate Appraisers’ Board. That administrative complaint was just filed, and we look forward to success in that litigation.

MR. MACLEOD: Thank you, Tad.

While we might be challenging the statements about the influences of and forces affecting antitrust analysis, let's start exploring them and perhaps begin with the world of mergers.

Eduardo?

MR. PEREZ MOTTA: This is a very good topic, Bill, because what we have seen in the last five years in Latin America in mergers has been quite impressive. There has been a major movement from post-merger notification to premerger notification.

This started in Brazil with major reform in 2012. There was afterwards an important reform in Mexico in 2014 that made important changes, and Alejandra mentioned some of those elements, all the major procedures.

The case of Chile is quite interesting, quite important, and Felipe already mentioned this. Even yesterday, as far as I understand, the premerger notification mechanism started precisely yesterday.

The case of Argentina is also interesting because they are in the middle of this discussion in the Congress.

Let me start in a logical way so we will avoid any other classification, and let me start with Brazil. The move from post-merger to pre-merger notification was a major challenge. How did you face it, and what is your impression and your reflections on that process, Alexandre?

MR. MACEDO: In my opinion, this was the big change of the law. Premerger notification was the most important thing that it changed.

First of all, we had a lot of people who were against it at the beginning. They thought that CADE could not handle it because the time was too short. CADE used to take around two years to judge a merger and now the maximum time, according to the law, is 330 days. The average right now is about 27 days to judge a merger.

Just for an idea about the time—I have the data here—over time it has changed a lot. Saying again, it used to be two years and now it is 27 days. This is the average. But for a complex case the average is more than that; it's about 200 days. But 95 percent of our cases are simple cases and we judge them sometimes in 18, so this brings the average down and the whole thing is 27 days.

The other good experience about the premerger notification is that we don't have the parties going to the judiciary anymore. They used to do this. The old system used to allow the party to consummate the operation and after that notify CADE within 15 days. CADE used to take two years to decide the case. After that, if CADE blocks the operation, the party used to go to the court and get an injunction in order to keep operating together until the final judicial decision. We used to have a high number of injunction demands. The average time for judging a case in Brazil in the judiciary is about ten years.

We had a big case in Brazil, *Nestlé/Garoto*, that stayed for 14 years waiting for a decision. The market changed. Everything changed. It doesn't make any sense.

The old system was a good thing for the parties because they could consummate the operation and go to CADE and say, "Here is the merger." If CADE blocked it, they were together already, so it was very hard to separate the companies, also because they used to go to the judiciary and get an injunction to stay operating.

Right now it doesn't happen anymore because there is premerger notification. Before doing the merger, the parties have to go to CADE and ask for the authorization, and if CADE says, "no," the

CADE used to take

around two years to

judge a merger and

now the maximum

time, according to

the law, is 330 days.

The average right now

is about 27 days to

judge a merger.

—ALEXANDRE MACEDO

deal is done. We don't have one case in Brazil where they went to the judiciary and got an injunction in order to consummate the merger, against CADE's decision.

Why? Because it is hard for the judge to get into the merits about a merger case. How can they decide if CADE's decision is really bad in order to grant an injunction to allow the companies get together and start to operate together? This is really hard. I don't think that the judges have the courage to do this. It is a very hard decision.

So these two issues, in my opinion, were the big changes in Brazil that came from premerger notification. The first one was the time. The second one was no injunction anymore.

MR. PEREZ MOTTA: Thank you, Alexandre.

Alejandra, what do you think were the main challenges with the reform of 2014 in the case of mergers?

MS. PALACIOS: I think that the main challenge—and it comes out in every discussion—is that we cannot, as in other jurisdictions, discuss the merger issues from the premerger stage. In our case—and this is because how our merger procedure is structured in the new law and our bylaws—the staff can only begin discussing competition issues and possible remedies way into the procedure. That, I understand, generates discomfort within the practitioners' community.

We are trying to be more transparent and open in the preliminary stages, but, to tell the truth, it is difficult for the staff to communicate in the earlier stages exactly how the Board of Commissioners will vote. They can be very transparent on what they think, but that at the end of the day might not happen. We have restrictions by law. This does not mean, of course, that we are not constantly trying to be as clear and as transparent as possible. Believe me, we are working on this.

What we are also trying to do is to decide fairly quickly in the process if cases need a full merger review. If they do not need further merger analysis, then we are trying to accompany that with a fairly quick approval decision. Our time average is 20 days, and it happens in most of the cases.

In more complicated cases, we have by law 100 working days before a final decision could be made. The challenge here remains issuing a timely decision in mergers that are filed in multiple jurisdictions. As I have said in other forums, for this to happen I would also like to ask the community that they file their cases in Mexico at the same time as they do it in other jurisdictions, because parties tend to notify in other jurisdictions before they do in Mexico and then they want us to take our decision right when the other jurisdictions have taken theirs. It is a two-party game and both practitioners and ourselves need to work to get this right.

MR. PEREZ MOTTA: That is particularly important for Mexico because we still have a free trade agreement with the United States. In many cases the relevant market is what the DOJ or the FTC might be analyzing in those cases as well.

Let me ask you, Felipe, in the case of Chile—you are now facing a major challenge in moving from post to pre merger notifications and analysis. How do you expect to deal with that, and what would be the optimal result that you would expect from the Fiscalía?

MR. IRARRAZABAL: Again, you would like to be reasonable, sound, and obviously in a very short period of time. Everybody wants that. But, as Alejandra said, that is not easy. Especially with international transactions, somehow you have to be in tune, and especially if there are some remedies that are coming from abroad.

The good thing is that, at least now, I cannot talk about our experience on premerger because the system, as you pointed out, was just started yesterday. But what I would like to do is just to

mention three or four main aspects of the Chilean system which might be interesting, especially for attorneys who practice in international transactions.

The first thing is that we planned this in advance. I know that planning is not that sexy. But we planned this in advance, which means that we approached the OECD, I would say, in 2012 and we asked them for a report to evaluate the system.

This is different from Brazil. We were not that negative on the former system, and the Tribunal was doing their job in a very diligent way, and we were just taking the very, very big transactions. So the voluntary system obviously has a lot of positive things, especially for a small agency.

We asked the OECD and we said, "You have to come to Chile. You have to knock on the doors of our counterparts and in the Chilean legal community and ask them about their experience with the system. And not just that, but also you have to interview the minister from the antitrust court; and also you have to go to the Supreme Court and interview them, just to have a fine-tuning on what is going on. They did, I would say, a wonderful job. It helped us a lot, because somehow we have the brand of the OECD saying that the system must be changed and also giving some basic guidelines on the way we can change the system.

The law at the end was approved unanimously by all the political parties.

So, as you can imagine, the idea is not to be so creative if you are establishing a system because you would like to be in tune with the most well-known international practices.

As you know, we have a Phase one of 30 days and then we have a phase two of 90 days. Then, we have an administrative silence system, so if we don't say anything the transaction should be considered approved. Then, remedies can only be offered by the parties and not by us, so they have to draft the remedies. Then, if we don't like the remedies, we should prohibit the transaction. So the law pushed us in the sense that if you don't like the remedies you have to prohibit the transaction, then we go to the antitrust court. The antitrust court, as a check-and-balance, will be looking at the cases where the Fiscalía decides to prohibit the merger on the grounds that the mitigations offered by the parties do not outweigh the competitive harm.

In terms of the threshold, which is a tricky part of our mandatory system, at the beginning of the bill it was said that the threshold would be determined by the Minister of Economics. I don't know why in the Senate they decided to give to us that faculty. Now I am very happy with that.

What we did is that we asked an independent economist to explain the methodology and then to calculate the current numbers for our Chilean system. Then, with that report, which we made public—it's a 15-page report, and obviously that economist took a look at all the jurisdictions and all the thresholds all over the world—we requested opinions from five very well-respected economists in Chile, with one requirement: just one page. Have you tried that, to push an economist—just on one page? It was like a legal opinion but coming from an economist. The good thing is we were lucky enough to hire the most well-known Chilean economists. In one page they said, "We think that the methodology is reasonable and we think that the numbers are also reasonable based on that methodology."

The result of that was around (US)\$72 million and also (US)\$12 million for the joint and individual thresholds, respectively. Also what is interesting is that we didn't fix that amount in Chilean pesos because of inflation. Although inflation is not that high in Chile, it is very much under control, but we decided to use UF (*Unidades de Fomento* or adjustable units), which is a unit which incorporates inflation so the adjustment would be automatic.

We think probably we will be looking at and reviewing the thresholds, and if we think they are not appropriate, we can change them. Obviously, we will be trying to use the same procedure as I already described.

Then, the President of Chile signed a Supreme Decree which pointed out in a very detailed way which are the documents that must be filed to begin merger analysis. That was published yesterday.

Then we started working on guidelines. We have been working for months on the guidelines, and believe me it is not easy. Basically, yesterday we launched five guidelines:

- One on jurisdiction, where we specify which are the transactions that must go into the system for review.
- Then a guideline on how to calculate the thresholds. We already calculated the thresholds, but the companies must obviously do their math, so they can be using that guideline in order to find the number.
- Then two guidelines on the documents that must be provided. We have the law, we have the Supreme Decree, but we wanted to give more details, a very strict precision on which are the documents that must be provided. So we launched two guidelines: one on the short list of documents for simpler merger notifications, and the other on the long list of documents for complex notifications.
- Then we finish with the guidelines on remedy.

The good thing is that we were able to receive comments because we launched the draft first. So we were able to receive the comments not only from the local attorneys, but also from the American Bar Association, the International Bar Association, and from the Federal Trade Commission. That's interesting.

Because most mergers are global in nature, we need to fulfill our legal standards by focusing our analysis in their effects in Chile, but always considering not to introduce unnecessary distortions to the global context.

We have all those documents on our Web page. All of those documents will be translated into English to facilitate the whole process. We hope that the system will run smoothly. Most of the people ask us, "How many transactions?" We have been calculating that, but you never know.

We hope that with this threshold we will be able to catch really the most important transactions and have time to really review those, and those are not really imposing any risk to free competition, just to resolve in a very quick way.

MR. PEREZ MOTTA: Thank you, Felipe. I think we all agree that we would like to wish you the best in this endeavor. If you do well, I am sure that many other agencies will be able to convince their congresses to move to premerger analysis and notification in the case of mergers.

Esteban, let me ask you two questions. Let me ask you, first, how is your discussion in the Congress going at this moment? I understand that you just arrived yesterday morning because you were meeting with some commissions in your Congress. What is your expectation on that reform that includes premerger notification in the case of Argentina?

Second, how do you plan to deal with the big backlog that you received when you took your office of so many cases which are in the process of being analyzed and approved in Argentina?

MR. GRECO: About the discussion of the law, I think we took the first step. This is the discussion, and the debate in the Congress has begun. We had a good reception. I think there are no structural or ideological objections to the draft proposal. But this is an electoral year. We have a midterm election coming, so it is difficult to predict the time of Congress. That is a difficult task.

I have good expectations. I think the law will pass. But the thing is, when? It could be up to the end of this year or maybe early next year. But I think we have a good expectation about that.

Premerger review is one of the big issues to take into account in the changes that will come when the law will be passed. The law has a provision for premerger notification and also higher thresholds for notification. The first threshold in the draft proposal goes to (US)\$150 million. Now, with this problem that Felipe mentioned, that in the actual law our local currency threshold takes it to 1999, so we have now a threshold of about \$13 million. That is a problem because we have a lot of unimportant deals that have to be notified.

The law also proposes a fast-track procedure for these deals that will not have competition effects.

Also, the draft proposal provides for a one-year transition period between when the new law is passed and when the premerger system takes effect.

But at the same time we need to prepare for these changes. So we are making changes in our procedures and analysis within our current legal framework.

As you said, we received a very big backlog of cases. We could review these during the first year, 2016, about 70 percent of the backlog of cases. But we received, to give you an idea, almost 300 files with an average age of 3.2 years. So it was a great challenge to deal with that, and also with a lot of new merger notifications because of these lower thresholds.

So I think there are three issues.

One is that we needed to approach this by restructuring the agency with capacity building and with cooperation. I think international cooperation and interchange of information and experiences with our colleagues is very useful for us. We could take this with a practical perspective because we really think that these are useful tools. Our training programs with the FTC and DOJ and the World Bank and our talks with our colleagues from Brazil, Chile, and Mexico were really useful for us.

This has practical consequences. One is, because we can rethink our procedures. In the last year, we took an approach to prioritize cases and to improve productivity. But we realized that it was not enough, that we needed to change procedures. In May we made a change. We created a triage unit for mergers. All new cases came through this unit and we have guidelines to deal with which cases can be dealt with by fast-track criteria because they have no effect and which cases need a more in-depth analysis.

Yesterday, we had the first case where the Commission issued an opinion in a merger case that was notified on May 12, which was 13 working days. This is good news for our prospective new system.

We needed to change the approach and to improve the quality of analysis. We issued a document that is on our website with our new investigative tools and analysis. We are using different tools for assessing dominance by defining relevant markets, using critical elasticity criteria, and also we are approaching upward pricing pressure analysis as Darrell Williams told us in the last panel and we are applying this to cases.

Also, we are preparing new merger guidelines. I have the draft to read on my plane flight tonight. At the end of this month we are going to issue a consultation document about the new merger guidelines. These are important steps that we are taking to improve our practices.

But one more thing. We needed to change the approach to cases after 15 years of not applying best practices. We needed to change our staff. We made a restructuring of the staff. We will keep some staff who are valuable.

We need to focus on important issues. I can give you an example of a merger case where one firm acquired a farm. They had to notify their buying of a farm because of these low thresholds. I don't know the theory of harm, but the Commission was asking about how many cows do they have at this farm. We cannot spend our resources on this kind of analysis.

MR. PEREZ MOTTA: Thank you very much, Esteban. We also wish you the best on this project, which is a major, major project. We have a lot of expectations from Argentina, obviously.

Bill, if you allow me, I think another area that is quite important in terms of convergence in Latin America is cartels. I think the main feature is a convergence towards criminalization of cartel activities, which I think is very good news.

Brazil has been the leader in Latin America in the application of fines and criminal sanctions on cartels. If I remember correctly, your law started at the beginning of the 1990s. The case of Mexico was the next one in 2011, when criminalization was introduced in the Mexican law.

In the case of Chile, it is very recent. In the law of 2016, last year, it was approved the possibility to “invite respectfully”—as one of the Mexican presidential candidates used to say, “respectfully invite your people to go to jail” in the case of cartel activities—ten years in your case, two-to-five years in the case of Brazil, and five-to-ten years in the case of Mexico.

I think the main feature

is a convergence

towards criminalization

of cartel activities,

which I think is very

good news.

Now, the main challenge that I perceive here relates to our legal systems in most Latin American countries. We are here in a boat where you have two players: the competition agencies on one side, and on the other side the federal prosecutors, because they are the ones who have the possibility to invite very respectfully these people to go to jail and to convince judges.

My question here—and I would like to start with Brazil—is: How has this coordination been between competition agencies (in this case CADE) and the prosecutors? I think your system has been working for a much longer time than the other systems here at this table—except for the case of the United States obviously.

But I understand that in 2007 there was a program, the federal police’s cartel intelligence program. I think in 2009 the Ministry of Justice announced a national anti-cartel strategy, and you signed in 2013 a cooperation mechanism with the Ministry of Justice and the police. So what can you tell us about this? Do you think that is working correctly, that it is something that should be done in the future, Alexandre?

—EDUARDO PEREZ
MOTTA

MR. MACEDO: Yes, for sure.

Our relation with the federal prosecutor and the police in the cartel cases is pretty good. The example of that is the “Car Wash” case. This is the big example.

Just to have an idea of what is going on in Brazil right now, the leniency program in our law doesn’t obligate CADE to sign the leniency agreement with the federal prosecutor in order to file them in the criminal area. So if the parties sign the leniency just with the CADE, according to the law, they are not going to be prosecuted in the criminal area as well.

But since the first agreement that we signed, we asked for the federal prosecutor to sit at the table with us and sign the agreement together. So we have not signed any leniency agreement without the federal prosecutor. We bring them to work together, as well as the federal police.

Right now we are working together in a lot of corruption cases that involve bid rigging and cartels. This is a very big challenge in Brazil because the anticorruption law brings a lot of people to work together. This is very hard. There is a kind of Administrative Tribunal whose role is to supervise the public account and the biddings and they want to participate in the whole process as well.

All of those institutions have a constitutional role in those cases. That is why sometimes it is very hard to sign a leniency program in anticorruption law, because a lot of people have to get together, but the political dispute does not allow them to reach a consensus.

In our law, in competition law, it is just two parties, it is just the CADE and the federal prosecutor. Our relationship is pretty good and we can see the results happening right now in Brazil.

MR. PEREZ MOTTA: Thank you. That is quite interesting.

Alejandra, you mentioned at the very beginning that you had your first case that was brought to the federal prosecutor. Obviously, moving to the world of the penal system is a major challenge. What did you expect there? As you have in the case of the administrative courts — do you think there should be specialized federal prosecutors dealing with these kinds of cases? What kind of coordination do you think is needed there?

MS. PALACIOS: Yes, as I said, we launched our first criminal complaint for bid-rigging activities in the healthcare sector in Mexico this last February. How has the coordination been or how should it be in the future? I think we can't answer that question now, we are learning with this first experience. As I said, this is a system in construction. I hope this case moves smoothly so I can answer this question next year or maybe at the end of this year.

When the criminal complaint was first presented, the reactions were interesting. On the one hand, some people within the competition community said this was serious cartel prosecution in Mexico. Others criticized it because they said that criminal cases have higher evidentiary requirements, which is true, and that all this was new, so the probability of this case being successful would be low. To that I answer that we need to start. There is always a first time for everything.

I personally do not handle the investigations, but I am sure that if our prosecutor files a specific case, it is because he understands that the requirements and the merits for a criminal complaint are part of the evidence he has gathered and turned over to the national prosecutor. It is also important to notice that the national prosecutor has different and harsher powers to request that information that is deemed necessary in order to follow that path.

Our intention, of course, is to provide as much information as possible and to present all those cases that have the requirements and the merits for a criminal complaint. But we also would expect the national prosecutor to use its power to request further information, if necessary.

As I said, this is a learning-by-doing process. This is the first time. There is always a first time for everything. Maybe in some months we will have some answers.

MR. PEREZ MOTTA: Thank you, Alejandra.

Felipe, this is going to be a new job for your office. Do you have to bring this case to the federal prosecutors directly or do you have to go first to the Competition Tribunal? How does that work and how do you plan to face this challenge?

MR. IRARRAZABAL: Well, let me put it this way. So far it is not a marriage, not close to that. But we will see in the future.

I will answer your specific question. But first I would like to point out that a criminal prosecutor is very different because of many aspects compared with an antitrust prosecutor, in terms of the size of each institution, the media exposure, even on the specific regulation on secrecy. Obviously, they have criminal judges and we have the antitrust court. In the case of Chile, the Criminal Prosecutor is no more than 15 years old and the Antitrust Prosecutor is somehow old; we are in our '50s as an institution.

If I see a movie, I can bring four different scenes which would show you that although we are trying to build a relationship, we are still far away from having "a marriage."

The first scene of this movie is when we faced the pharmacy case, which was basically a cartel case. We did it very well. It wasn't easy; as a hard-core cartel it is never easy. But it ended up with the maximum fine imposed by the antitrust court, and also confirmed by the Supreme Court. But the case was so attractive that the criminal prosecutor was, in my personal opinion—let me

try to be diplomatic—anxious to have some participation in this process. They started a criminal procedure and an investigation against individuals in this cartel, but without a precise and clear criminal provision. They had a criminal provision—and I'm sure you have this in Mexico—but it was a provision regarding alteration of natural prices, which was part of the criminal code which was approved in 1874. I always said that if that provision is fully applied for cartel cases, then we have to defend that we are the country that invented antitrust in the whole world, which is not the case, much before Canada and the United States.

What we foresee on this, without being criminal attorneys, is that they will fail. And it happened, it failed, because a criminal judge said, “No way. Where is the provision? Where is the infraction?” They were trying to use that old provision, and they said basically “No way.” So that is one picture of the movie.

Then we have another case, which is the tissue case, where we received two leniency applications. Obviously, the case attracted a lot of media exposure and attention. One of the criminal prosecutors became interested in the case probably, and he requested all the confidential information that the applicant had provided to the Fiscalia. We basically said, “No way.” They made the same request even to the antitrust court. So not just against us, which is an administrative body, but against an antitrust court.

The antitrust court—this was not our idea—decided to bring a case regarding that petition before the Constitutional Court on the jurisdiction issue between an agency or a tribunal and another agency which was the criminal prosecutor.

We were obviously under stress. We basically understood that if they had won, then that would mean a real challenge to the leniency program, because the confidential files given to us with the leniency application would become public under the criminal provisions.

I remember Brent helped us a lot on the confidentiality issue, as well as the Federal Trade Commission. Also we requested some advice from the United Kingdom, from Spain, and also from Brussels. And Judge Javier Tapia was on the hearing before the Constitutional Court as well as me. As you can imagine, we were not friends in that part of the movie.

What was the result? Well, we won. We won 9-to-0. Not one vote to the criminal prosecutor. And the confidential documents were kept that way.

And then we got the new law. What happened was that the criminal prosecutor wanted to be involved from the beginning in the investigation, as if it were a criminal investigation. As Eduardo said, we included a criminal offense which is from three-to-ten years, only for hard core cartels.

But I think Congress was wise enough to not allow parallel procedures. So the criminal system must wait until we have finished our case vis-à-vis the antitrust court and the Supreme Court. Only once we finish that, which is basically the procedure where we request the fines, then we can go to a criminal system, and only if the head of the antitrust prosecutor's office decides so, in grave cases.

They were not happy when we were dealing with this in the Congress because the Criminal Prosecutor wanted to participate from the beginning. That is the third scene.

In the future, and despite the scenes that I have already described, I see myself working together with the criminal prosecutor. And also, we will be facing a challenge trying to specify in a legal way what does “grave cases” mean, the cases that will trigger a claim against individuals for criminal offenses.

We also—and I will finish with this—have launched guidelines on leniency three months ago, which we received very helpful comments on from the American Bar Association and the International Bar Association.

MR. PEREZ MOTTA: Thank you, Felipe.

Brent, this is going to be a very good new opportunity for the DOJ to get better coordination with some Latin American agencies in the case of international cartels. What can you tell us about this?

MR. SNYDER: Well, first, my job at the Antitrust Division is to be responsible for our criminal prosecutions. I am personally very enthusiastic and I have been watching with great interest the developments of the last several years in the various countries that have been adding criminal sanctions.

One of the key things about this trend toward increased criminalization is that I think it reflects a shifting in public attitude, where people are now recognizing the harm that is caused by cartels and are willing to try to deter and ultimately punish that harm with much more severe sanctions than has been the case in the past. I think that shifting of public perception is good for all of us because I think it shows greater support for our mission to protect competition.

In terms of whether there are going to be opportunities or challenges presented by this increased criminalization, I view it as really nothing but opportunities. For instance, the United States has mutual legal assistance treaties with a sizable number of countries in the Americas. These allow us to share evidence and to share information with other countries. We can request information from them, and they can request it from us. It allows us to share information within the context of criminal investigations that we would not be able to share, or even request, if the other country did not also have criminal sanctions. So really this is creating an opportunity for us to coordinate our cartel investigations more closely and to share more information.

Likewise, we have extradition treaties. But extradition from one country to another normally requires dual criminality, meaning that the conduct for which, for instance, the United States is trying to extradite somebody from a foreign country also has to be criminal in that country. For a long time, really it was only the United States and Canada that had criminal cartel sanctions. But the more countries that add criminal cartel sanctions, the more likely it is that we will be able to extradite people from one country to another for cartel violations. That is also a very important deterrent to cartel conduct.

A great example of just how this works relates to an investigation we recently, about a year or so ago, wrapped up in a bid-rigging investigation involving a hazardous waste cleanup site in the United States. One of the key defendants in that particular investigation was a Canadian national and he lived in Canada. During the course of our investigation we were able to send a Mutual Legal Assistance Treaty, or MLAT, request to Canada in order to get information related to this individual's company, and the cooperator was key to building our case. Then, ultimately, when we determined that we had enough evidence to actually bring a case and indict that individual on conspiracy and major fraud against the U.S. charges, we then were able to apply for extradition to Canada. Because both Canada and the United States have criminal sanctions for the crimes with which we charged the defendant, we were able to extradite that individual to the United States. We tried him about a year ago and he was convicted and he is now in prison in the United States. That's not a one-way street. We periodically receive MLAT requests from Canada where we are providing them with information that they are using in their investigations as well.

I think this is only going to create more of those types of opportunities between the Department of Justice and the other enforcers in the Americas that have criminal sanctions.

MR. MACLEOD: Thank you.

I would like to put the agencies on the spot. Let's go back to where we began our discussions yesterday, and that was with the Minister calling on the competition community to stand for the principles of competition law and economics. We heard Tad give a brief history of that when he gave his opening comments today, but this is now going to be a fundamental debate over the next several months. As a matter of fact, there is a request for comments right now by the United States Trade Representative, with comments due on the 12th of June, on issues to consider during the NAFTA renegotiations, one of which is "relevant competition-related matters that should be addressed in the negotiations."

So my question to anybody who would like to pick this up is: (1) what role should competition agencies have in international trade relations; and (2) should the tools of competition analysis be modified so that a competition case can speak to the public and say, "We have heard you and we have taken into account this particular national interest?"

Does anybody have any thoughts on this?

MR. GRECO: I think this is a big, big issue. I think from the point of view of antitrust in the Americas, international trade is one of the most powerful procompetitive tools. Mainly, when you have different markets and sectors with scale economies, if you have a closed market or you do not have international trade, maybe you will have a local monopoly or a few firms. So in this sense I think that competition issues are relevant to take into account when governments have to deal with decisions about international trade.

I think the competition agencies have an important role of advocacy in the sense of explaining the benefits of this tool to have more competitive markets and protect consumers, innovation, and productivity in the long term.

But, at the same time, these issues have to deal with other public policy issues. I think in this sense competition issues, at least in the short term, have to deal with tradeoffs between public policies, because you can have short-term effects on employment and industries and firms that you need to take into account as a government. I am not talking about competition specifically, but competition is one of the issues. In this sense, there are other effects that a government may take into account.

For this I don't think that it is desirable to fail in a very good long-term policy that strengthens international trade because we do not take into account the short-term effect and who are the winners and losers. So I think the competition agencies have a role in these advocacy issues.

In our case, in Argentina we are making some sector and market investigations, for example in some markets where economies of scale are high, such as steel and aluminum and this kind of input, where we think that international trade is an important issue to take into account. We have made this in a case recently in the petrochemical sector, advising to eliminate some trade barriers because this is procompetitive. So this is, I think, a good role for competition agencies.

MR. MACEDO: Actually I agree with Esteban, especially about the advocacy. But one thing I really want to add is in our law we say that the collectivity is the owner of the rights that are defended by this law. What does the term "collectivity" mean? Sometimes you have a lot of interests that are not just the competition issue. Should our agencies consider another kind of national interest in our decisions, like protecting the internal market, international trade, industrial policy? Should we consider these in our decisions? This is an issue that comes up every time. There are some cases where the argument of saving jobs came up. Should we consider that?

I think that the principal role, the main role, of the antitrust agencies is the consumers and the competition. That's the point. On the other hand, it doesn't mean that I don't have to consider the

other things, but the main issue is the consumer and the competition. After doing the analysis of the consumer and the competition, I can look for the other things and analyze the balance and the cost/benefits to take some decision in order to give some deference to another issue. . .

MR. IRARRAZABAL: No!

MR. MACEDO: . . . but the main point for me is competition and consumers.

MS. PALACIOS: Are you talking about merger analysis?

MR. MACEDO: Yes, I'm talking about the merger analysis and everything in a general way, the role of antitrust.

MS. PALACIOS: I would say I am not with him in this decision. As competition agencies, I think that our mandate is very clear: to protect competition in the markets. Specifically in merger analysis, we are not responsible for other industrial policies such as employment or investment. What I believe—and this is analyzed in one of our advocacy reports that is coming out soon—is that trade policies should take a competition perspective within their framework analysis.

As we all know, imports serve as a source of supply of inputs that maintain competitiveness in several markets, in the Mexican case in very important industries, for example natural gas, and imports also increase the local supply of products, pressuring local prices down through competition. So whenever you as a government decide to apply a tariff, that tariff will have a competition impact in the local market. So in that sense we believe that they should take into account a competition perspective when they do that analysis because, as Esteban said, this will have a medium- and long-term impact, not just a short-term impact.

MR. MACLEOD: I once represented the State of Alaska, or rather the legislature of the State of Alaska, which was concerned about the effects on employment of the BP/Amoco deal on the Alaska Pipeline.

So let me put a hypothetical to you, Tad. I now represent the International Association of Accountants and Lawyers. Two Fortune 50 firms are merging and half the accountants and lawyers are going to lose their jobs. Can I come into your office and advocate these job losses as a reason for you to challenge this merger?

MR. LIPSKY: Not in the United States you can't, because we have a law that is very clear. You have to find substantial lessening of competition or the likelihood of the creation of a monopoly, and that's all our law says.

MR. IRARRAZABAL: I also agree. I think the whole antitrust law is like a truck which is already loaded with many concepts and responsibilities. If you want to put more load, more weight, on that truck, I don't think it is a wise decision, and in the long term it would not work. It is rather difficult to measure the impact of our enforcement and advocacy in terms of the national employment

So I would prefer to stay with the standard concepts on antitrust. And we already have a lot of work to do, just focused on mainstream antitrust ideas and effects on the economy. That that's the reasonable approach, I believe. In the medium term it might not be a good business for the prestige of the antitrust institutions.

I think the whole

antitrust law is like a

truck which is already

loaded with many

concepts and

responsibilities. If you

want to put more load,

more weight, on that

truck, I don't think it is

a wise decision, and in

the long term it would

not work.

—FELIPE IRARRAZABAL

MR. MACLEOD: Let me broaden the question then and put it this way: How is the competition community, and especially the competition enforcement community, lending its credibility and prestige to the debates over who benefits from competition policy? Should we be doing anything different? Can we do anything different? What kind of successes are we having?

Let's have a quick round as to whether we think the competition message is getting across. Debbie Majoras yesterday said it is easier to get the populist message across than the competition message across. How do we as competition enforcers and competition advocates most effectively explain to the public what we do? Does anyone want to take a bite at that?

MS. PALACIOS: As I was saying yesterday, at least in the Mexican case, which is the one I can talk about, when I listen to people say that markets don't work and that's why we need to pull back, I always answer that I think that analysis is not correct because in Mexico in many sectors we don't have efficient markets. What we have are tons of privileges and tons of regulations and government activities that protect certain groups.

So, I would fight for more profound and efficient markets in Mexico. We need to go there before turning back.

MR. IRARRAZABAL: I would add that I think the magic word is cases. You have to bring cases. It is not that easy to explain the cases, especially if we are in the middle of their litigation, but that is the magic word. You need cases, and through the cases you maintain your prestige as a needed institution or a needed agency.

MR. MACEDO: I would say the same thing: a lot of regulation, inefficient markets, protecting specific people. We look for efficiencies as well. So I agree with you.

MR. GRECO: I agree with Felipe that cases are the best way. Competition, how markets work and how competition has effects on markets, may be a very abstract idea if you cannot translate this into cases and into direct benefits to consumers and to the economy. I think selecting the cases and constructing a good narrative about how this works is essential for that.

Also, the way things could affect the issue: We had an example in Argentina recently because there was a closed market for computers, so the prices of laptops and computers were really high. There was also, as there always is, an interest group, very small in comparison with the potential beneficiaries of opening the market. There were some firms that did not build but they imported parts of the computers and put them together and sold at a high price in the local market.

But there was, I think, a good explanation of how this could benefit. And also, the government took into account how they could deal with the losers of the liberalization, giving support and building capacity for workers and reallocation of workers. But mainly the high benefits were for the consumers and for the economy because of the high productivity that you can achieve with more use of computers.

In terms of employment, in the end the net effect on employment would be positive because new employments are coming in the distribution sectors, in repairs, and a lot of complementary activities that when you have a closed market people cannot see these potential benefits.

So I think it is challenging, but we need to consider this kind of narrative.

MR. MACLEOD: There is an interesting effort on this right now in the United States with a message that I think could resonate very well. It's called economic liberty.

Tad, could you give us just a quick sense of what this means? You described it before in more legal terms. What is economic liberty and how does that play into this initiative?

MR. LIPSKY: Well, economic liberty, I suppose, is the freedom for people to engage in trade and commerce, just basically stated.

Maureen Ohlhausen, when she became Acting Chair, established an Economic Liberty Task Force that has been very active, advocating primarily to state and local governments that requirements to engage in occupations be held to a reasonable minimum that is necessary to address objective concerns about health and safety. Of course there are a number of professions regulated at the local level where licenses and training are required—law, medicine, accounting, engineering. But there is a host of professions—cosmetologists, people who work in hair salons and nail salons—and there is a tendency for local regulation to extend much further than would really be required in an objective sense to protect public health and safety. I don't know if there are many injuries that occur in hair braiding—maybe there are.

But in any event, the purpose of the Economic Liberty Task Force is to advocate on a consistent nationwide basis, and it has had a tremendous amount of success. It has been received very well in many states and localities. It is headed by our Office of Policy and Planning. They are constantly working on advocacy pieces that have usually been invited by the local authority.

But, if I may, Bill, this is part of a trend that has appeared at different times and with varying strengths in the U.S. antitrust community throughout history. You know that our transportation industries in the United States—and I don't want to jump the gun on your transportation question—railroads, trucking, even barges in inland waterways, and of course air transportation, used to be regulated according to a very strict public utility model where entry and exit were very tightly controlled, prices were rigid and tightly controlled, you couldn't change a price without filing a tariff and giving others an opportunity to object and so on and so forth. Actually, most of the agencies that regulated transportation in the United States have been abolished precisely because it became possible to identify very clearly and in ways that were easily understood by the general public that this form of regulation, because it restricted competition, was very bad for the consumer and for the economy.

The classic example being at the height of the most-restrictive regulation of commercial air transportation, the price of flying from Boston to Washington was, I think, about three or four times the price of flying the very same distance from San Francisco to Los Angeles because the Boston-to-Washington route was subject to this terribly restrictive federal economic regulation by the Civil Aeronautics Board, whereas the intrastate routes between San Francisco and Los Angeles did not suffer from that public utility regulation, and therefore the price was set by competition. It's one of the great parables in the arsenal of stories that we true believers in competition have to demonstrate why economic liberty is very much in the interests of the economy and the consumer.

MR. MACLEOD: I think economic liberty is something that is very apparent in the COFECE activities. Brent, I'm hoping that we will never have to come up with a message that explains why we go after cartels. If the cartels start getting the upper hand on that messaging we're in trouble.

But Tad mentioned transportation. Why don't we finish with a note on transportation because it is now much more in the competition realm than it has been before. Transportation and antitrust have been intertwined for decades in the United States, but the action is relatively new in a number of Latin American states.

Eduardo, why don't you give us the last question on that and then we will wrap up?

MR. PEREZ MOTTA: I would like to put this question to Alejandra. In Mexico there was a major set of reforms at the beginning of this administration, and it was a result of a political negotiation among different parties. From that discussion, which was called a political pact, there came reform in telecoms, competition, energy, education, and in some other areas.

But something that was just mentioned at the beginning, in the first document of the pact, but it was not operationalized, was a reform in transport, which is a very important sector, especially today when the telecoms revolution has generated a very important decrease in the price of information. Information is accessible to most people today, but in order to make that a reality in the marketplace you need a very efficient transport system.

I have to say, very frankly—I say this privately and I can say it publicly—I think that the only agency in Mexico that is actively promoting efficiency in the transport sector, which is something the players of the political pact didn't do, is the Competition Commission. You mentioned this at the beginning, Alejandra, that the Competition Commission is working in air transport, in railroads, in auto transport. What do you think will come out from this effort that the Commission is doing?

MS. PALACIOS: Thank you, Eduardo, and thank you for the opportunity because I am going to mix the issue of economic liberty with transportation.

Yes, of course all the reforms, what they wanted to do—and the Minister said that yesterday—is to lower transaction costs for medium and small companies, and also the costs of basic services, and they did that in the energy reform and in the financial reform and in the telecom reform, and they did not specifically touch transportation. In the Commission, when we came in three and a half years ago, we elaborated a strategic plan, and we decided that transportation was an important sector. I would say that at least 30 percent of our resources are being used in the transportation sector. As I was saying, we are going to take a final decision regarding two preliminary findings in this sector soon: slot allocation and competition conditions prevailing in the railway sector.

We have an ongoing cartel investigation on the commercial airline industry, and the market is defined as landing and departing flights in Mexico.

We have two investigations in Mexican ports. One is an abuse of dominance investigation, and the other one is a barrier to competition—the new procedure under our law. Ports are very important, especially for a country that wants to become an export and import platform, we need ports to take our things out and bring products in.

We will announce in the next week our final decision, which we took two weeks ago, regarding an international cartel investigation in shipping lines.

One case that I love has to do with freight transporting in the Mexican State of Sinaloa. This case is for me emblematic because it is an Article 94 investigation. It has to do with barriers to competition, and these barriers come about because of regulation. What you have is a law and bylaws that basically foreclose a market. The state is divided by zones, so for freight transportation you can only take the product out of your zone, but if I go to the other zone, then I cannot bring my truck back full with a load. In reality, as a consumer you are charged for the service to go and come back, even though you can only hire a one-way service.

Then there is a committee that decides upon new concessions, but it is the old transportation associations that are sitting on that committee. So if they would ask one of them if they want competition, what is the incentive, and it is quite normal, to say “No.” So there are concessions waiting for an answer for 10, 20 years and nobody will answer them positively. Then the individual responsible for the transportation department within the government is the owner of a big concession. So when we talk about conflict of interest, that may be one.

And then prices are regulated and the prices are defined by this committee. So it is a legalized cartel. You cannot fight against a cartel when it is a legalized cartel.

The consequence of all this is that in certain municipalities you have one concessionaire that owns all the concessions for that zone. That happens in the construction sector and that also happens when they want to transport grain. This state is the most important state in Mexico in terms of agricultural production.

The construction people say that they pay at least 40 percent more for their transportation because they cannot do it by themselves, they need to hire these associations. And then what is really absurd is that many grain producers prefer to send their products 700 kilometers away to a port in another state because it is cheaper than to go to the port which is in their state 40 kilometers away from their production area, which is Topolobampo, because of the cost of the service.

This is all absurd regulation. So talking about economic liberty and transportation issues, this is the case. And what we find in the State of Sinaloa is replicated in many other regulations at the state level in Mexico. So if we want to lower transportation costs, I think there is a big battle to fight against in this sector.

MR. PEREZ MOTTA: That is the way in the States?

MR. MACLEOD: Yes, absolutely.

It reminds me of a comment that a senator, who was known for fighting for the little guy, made back in the 1970s. The senator was asked, "Why are you supporting airline deregulation, because only rich people fly?" His answer was, "That's why I'm doing it, because I want everybody to." That's economic liberty.

I am just delighted to hear our panel converge on the issues that economics and law should influence and inform competition policy, and that advocacy for the marginal consumer, for the liberty of those who cannot break into businesses and sectors that are protected by barriers, is what we will continue to do in cases as well as in industry investigations. We in the private bar are here to help the agencies do it as well as we can.

Thank you, everybody. ●