INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

HEARINGS

Washington, D.C.

November 2, 1998

This document constitutes accurate minutes of the hearings held November 2-4, 1998, by the International Competition Policy Advisory Committee. It has been edited for transcription errors.

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James F. Rill
Co-Chair

Paula Stern
Co-Chair

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Taken at the American Geophysical Union, 2000 Florida Avenue, N.W., Conference Center - First Floor, Washington, D.C., beginning at 9:00 A.M., before Sue Ciminelli, a court reporter and notary public in and for the District of Columbia.

APPEARANCES:

Advisory Committee Members:

James F. Rill, , Co-Chair and Senior Partner, Collier, Shannon, Rill & Scott, PLLC

Paula Stern, Co-Chair and President, The Stern Group, Inc.

Merit E. Janow, Executive Director and Professor in the Practice of International Trade, School of International and Public Affairs, Columbia University

John T. Dunlop, Lamont University Professor, Emeritus, Harvard University

Eleanor M. Fox, Walter Derenberg Professor of Trade Regulation, New York University School of Law

David B. Yoffie, Max and Doris Starr Professor of International Business Administration, Harvard Business School

Department of Justice Employees:

Joel I. Klein, Assistant Attorney General, Antitrust Division

A. Douglas Melamed, Principal Deputy Assistant General, Antitrust Division

Members of the Public Appearing before the Advisory Committee and Presenting Oral Statements:

Panelists: Opening Remarks:

Allan Fels, Chairman, Australian Competition & Consumer Commission, Australia

APPEARANCES(Continued):

Gesner José Oliveira Filho, President, Conselho Administrativo de Defesa Econômica, Brazil

Konrad von Finckenstein, Director of Investigation and Research, Competition Bureau, Canada

Karel Van Miert, Competition Commissioner, European Commission

Frédéric Jenny, Vice President, Conseil de la Concurrence, France

Dieter Wolf, President, Federal Cartel Office, Germany

Shogo Itoda, Commissioner, Japan Fair Trade Commission, Japan

Takaaki Kojima, Deputy Secretary General, Japan Fair Trade Commission, Japan

Fernando Sanchez Ugarte, President, Federal Competition Commission, Mexico

Luis de Guindos Jurado, Director General de Politica Económica y Defensa de la Competencia, Spain

Ignacio de León, Superintendent, ProCompetencia, Venezuela

Panelists: Discussion on Current U.S. Bilateral Agreements:

Allan Fels, Chairman, Australian Competition & Consumer Commission, Australia

Konrad von Finckenstein, Director of Investigation and Research, Competition Bureau, Canada

Karel Van Miert, Competition Commissioner, European Commission

Dieter Wolf, President, Federal Cartel Office, Germany

Panelists: Roundtable Discussion Among All Foreign Officials on Enforcement Cooperation, Multijurisdictional Mergers, And Trade And Competition Policy

APPEARANCES(Continued):

Interface:

Opening Remarks:

Jérôme Gallot, Director General, Direction Général de la Concurrence, Consommation et Répression des Fraudes, France

Additional Panelist:

Bernd Langeheine, Trade Counselor, Delegation of the European Commission

IN ATTENDANCE:

Advisory Committee Staff:

Cynthia R. Lewis, Counsel

Andrew J. Shapiro, Counsel

Stephanie G. Victor, Counsel

Eric J. Weiner, Paralegal

Estimated Number of Members of the Public in Attendance: 69

Reports or Other Documents Received, Issued, or Approved by the Advisory Committee:

Allan Fels, Statement

Allan Fels, Australian/US Bilateral Relations

Gesner Oliveira, Public Hearing Competition Policy Advisory Committee

Gesner José Oliveira Filho, CADE's New Resolution on Merger Review and the CADE's Ethics Rules

Konrad von Finckenstein, Q.C., Speaking Notes

Karel Van Miert, Speaking Note

Jérôme Gallot, Opening RemarksJérôme Gallot, Troisieme session

Frédéric Jenny, Trade and Competition in the Global Market: Challenges and Issues

Dieter Wolf, Statement to be given at the Hearing of the International Competition Policy Advisory Committee in Washington on 2 November 1998

Shogo Itoda, Summary of ICPAC Statement

Luis de Guindos Jurado, Competition Policy in a Global Economy: The Issue of Mega-Mergers

Ignacio De León, International Competition Policy From the Perspective of Developing Countries

Ignacio De León, An Alternative Approach to Policies for the Promotion of Competition in Economies in Transition

P R O C E E D I N G S

MR. RILL: Good morning. My name is Jim Rill. I know most of you. And I'm Co-Chair with Paula Stern of the International Competition Policy Advisory Committee. To Paula's right is Eleanor Fox, a member of the Committee. Eleanor is also known to most of you as one of the truly leading authorities in international antitrust law, a renowned expert, frequent author in the field.

To my left is Merit Janow. Merit is the Executive Director of the International Competition Policy Advisory Committee. Other members of the Committee will be joining us as we move along. I'd like to also introduce our staff, Andrew Shapiro, Cynthia Lewis and Stephanie Victor.

Following some opening remarks by me, which will be brief, don't laugh, and by Paula, we'll have welcoming remarks by Assistant Attorney General Joel Klein, who is known to all of you.

This is truly an historic event. Paula and I were deeply honored by Attorney General Reno and Assistant Attorney General Klein to be invited to co-chair the Advisory Committee -- I didn't mean to sound hopeful -- the Advisory Committee to the Department of Justice and other agencies of the U.S. Government on the direction that we as Committee members, a Committee of 12, feel that would be appropriate for U.S. and perhaps, indeed, even broader international antitrust policies.

We have focused on three areas: merger policy, trade and competition, and international antitrust enforcement, particularly against cartel

activity. Certain topics are not specifically on our agenda, particularly types of trade remedies, antidumping and countervailing duties.

Really it's a focus on global antitrust policy. We hope to be able to give sound advice to the U.S. Government and others on appropriate directions. I say this is a truly historic occasion. I can't recall any event that has been on parallel, at least in the United States, when so many distinguished leaders of government in the antitrust field have come together in a roundtable to give their advice on antitrust policy to an organization of another government at its invitation.

We are honored to have the participation of each of you in this meeting. We think that the comments and advice and thoughts that you will impart to us today will have a very significant influence on the outcome of the deliberations of this Committee and the development of its report to the Attorney General and the Assistant Attorney General of Antitrust. We want to hear from you what you consider to be the most important factors to take into account in our increasingly global trade and competition arena.

We don't need to expound at any length about the number of nations that have antitrust laws now and the extent to which merger activity, trade and competition activity, international cartel activity, has permeated the world economies.

As you recall, we respectfully suggested that certain questions be among those that you would focus on: What are the necessary and useful directions to enhance international cooperation and enforcement matters

among foreign competition authorities? Whether your jurisdiction is commonly involved in the review of mergers that are also being reviewed in other jurisdictions overseas and the source of conflict and cooperation you perceive from that coordinated review. And, what useful steps can there be to identify and alleviate barriers to market access resulting from private or hybrid restraints on trade and competition? Obviously we anxiously await your input on each of these issues and any others that you choose to advance.

Some housekeeping matters. There are headsets for simultaneous interpretations for our officials from the government of Japan. Channel 5 for Japanese, channel 6 for English. Microphones for speakers that are using overheads: there is a wireless microphone available on the podium next to the projector. During roundtable discussion periods if you wish to make a comment, please put up your namecard, you know that process.

In the back of the room are materials that were put together for these hearings. They have been circulated to you all in advance. Review them, but please don't remove them from the room. We are delighted that this is a public audience. We have a good assemblage of observers here today. However, this is an opportunity for the Advisory Committee to discuss issues with the panelists in each of the panels over the next three days. We welcome your comments in writing, but please do not intervene from the floor. With those comments, I would like to introduce Paula Stern, who will be succeeded by Assistant Attorney General Joel Klein.

DR. STERN: Welcome. I'm delighted to see each and every

one of you here, both the distinguished panelists who will be featured this morning, as well as the public in the back. We are honored by your presence, and we appreciate how much effort it took for each and every one of you to be here today for what we hope will be a very constructive exercise that will benefit all of us.

This is a conversation we hope to start today. It is an opportunity for discussion. I personally have been interested in the government's role in impacting the structures of our individual economies and our globalized economy involved in microeconomic analysis and structural analysis of economies, as well as representing the business world, and how this affects the real world in the marketplace as a consequence of my activities on a number of corporations whose boards I sit on.

And I have had 16 years of government service, particularly in the trade field, and so the interface with trade and competition policy is an obvious one. But I don't think we have had necessarily in our rules, our laws, our regulations both at home and abroad a clearcut intersection between trade and competition policy, and trade policy and trade regulations, so it's an important opportunity to get into that area as well.

So I am delighted to be here to be informed by you. We will have three days of hearings in which we will hear, after you, an impressive array of lawyers, investment bankers, economists and other experts. Jim has talked to you about the three areas that we are focusing on, enforcement cooperation, multijurisdictional merger review, and finally, as I mentioned a moment ago, the

interface of trade and competition policy.

We have had several public hearings, public meetings, I should say, but this is our first set of hearings and it will be a very important part of our eventual recommendations. In effect, we are building a record. And we hope to present to the Attorney General and to Joel Klein, the Assistant Attorney General for Antitrust, a report by the fall of 1999.

We are in our information gathering stage, as I mentioned. The Committee itself has had meetings individually one-on-one with lawyers, with investment bankers, and with business associations, and we have tried to reach out, not only here at home to all the representative constituencies, but as you can see here, we are very much reaching out to the rest of the world, thanks to fax machines, Internet, and you personally coming today. We hope that in the end it will be a well-informed exercise, and it is our sincere hope that you will provoke us, stimulate us, and that we will come away intellectually enriched by your viewpoints.

And at this point, I would like now to turn to Joel Klein, our fearless leader and good, good friend, to give us some remarks.

MR. KLEIN: Thank you, Paula. Thank you, Jim. Ladies and gentlemen, first let me convey to you the personal gratitude and welcome of the Attorney General of the United States, Janet Reno, who spoke to me and asked me to say that she would have preferred to be here today, but she had to be out of town. Let me also add my welcome and my gratitude.

I have come to know all of you over the last several years in a

variety of contexts as we have worked together as friends and colleagues, and I cannot tell you how much I appreciate the personal commitment that you have made to come here today and the time and the energy that that takes to work with us on this area of shared responsibility. So I really want to emphasize how appreciative I am, and how much I know the Committee looks forward to your comments.

Let me say a little bit about what must seem somewhat strange and curious an American institution here. We have a thing in the United States called the Federal Advisory Committee Act, which is known as FACA, one of our dreadful acronyms. And what it allows is an executive agency to bring in outside independent consultants as part of a very formal open-to-the-public process, to chew on significant and difficult policy issues and to make non-binding recommendations.

And there are two things about the process that are critical, aside from it being subject to some light and open to the public. One is this is an independent committee, and they will make independent recommendations. And the only good news for us is it's non-binding, so that we can learn and benefit, but ultimately not feel constrained to implement.

But in my meetings with the Attorney General, when she asked me what I thought is the most important thing going on in antitrust in the United States today, I said, Madam Attorney General, the most important thing going on in antitrust is not in the United States. The most important thing going on in antitrust is how we adapt antitrust to a global economy. People always say,

well, the big challenge is high-tech or the big challenge is -- I think the big challenge is how we take enforcement policy and work together in a global network effectively and efficiently in a way that is good for enforcement but also does not undermine desirable business activity.

And the reason I think that's an enormous challenge is because essentially, as we sit here today, we are a collection of nation-states, accustomed to domestic jurisdiction and enforcement. Our powers tend to be defined in some respects by our territorial limits. Yet we have no choice but to intervene in a global economy. Business does not know the territorial boundaries that restrict our jurisdictional powers and reach in certain real-world respects.

And so, for example, in the eight years from when Jim Rill left the Antitrust Division to today, the amount of international business in the U.S. Antitrust Division has gone from 2 to 3 percent of our cases to right now close to 40 percent of our cases, and that's across the spectrum. Whether it is international cartel cases such as the Archer Daniels Midland case, which involved people in all aspects of this table, or the other 30 or 35 grand juries that we currently have pending that are looking at cartels that have had meetings in 50 or 60 cities on every continent in the world.

Or whether it is these multijurisdictional mergers that are as important whether it is a U.S. and a European company, such as Daimler Benz and Chrysler, or WorldCom/MCI, two U.S. companies that have an impact worldwide that will have as much influence in terms of the development of the Internet in Latin America as it will in Europe as in Asia and so forth, we are interconnected.

As we look at these issues, I said to the Attorney General, the challenge is to think through the mix of unilateral, bilateral and multilateral enforcement options. All of those are possibilities, and we need to think about what is the right mix of those options as we go forward. And this will become, I believe, increasingly important to all of us at this table, because I think there is no way to escape the fact that we need to figure out how to interact in a global economy and we do not have an available template simply to rely on.

We will have to create the mechanisms among ourselves to be effective. Unlike our colleagues in the trade arena, who have long dealt in these areas, who have many, many rounds under Uruguay and so forth. We are coming at this with some real background, to be sure, the OECD, UNCTAD, and so forth, but a lot of what we are doing is really first impression stuff.

And so what the Attorney General said is, you know, not all good ideas are contained at 10th and Constitution, which is where the Justice Department is. And she said let's bring together a distinguished group of thinkers and business people and labor representatives, and let's put them to work for two years to really think through the problems, to go out, analyze the literature, meet with the players to get a real feel for the various strands and to make some very serious tough recommendations to us on the mixture and the benefits of unilateral, bilateral and multilateral enforcement options.

And to then take that report, it's a two-year study -- we appointed this group in November of 1997, they have a sort of two-year window to come back with their report -- and we will take that report and analyze it and make

proposals, short-term, medium-term and even long-term, for U.S. government policy in this area. And so this is the work.

We are blessed by having a 12-person Committee that is as distinguished as any Advisory Committee could be in the United States. In addition to our Co-Chairs, one of whom is well-known to all of you because he headed the Antitrust Division of the Department of Justice under President Bush, and Paula Stern, who was the Chairwoman of the International Trade Commission under President Carter -- so right there at the top we have two people with a rich mix of both bipartisan as well as trade and competition backgrounds -- the other 10 members of the Committee are several CEOs from major corporations, a former secretary of labor, some distinguished academics, like Eleanor, as well as some leading members of the Bar and in the field of antitrust.

So these people will be digesting this material and bringing it to us. In this process, I believe there is no more important component than what is going on here today. It was my hope to bring together the leaders in this field, the people who have worked for years on these issues who have done thinking about this at every level, and to get this Committee the benefit of hearing from those people, not sifted through me or anybody else in the United States, but one-on-one in discussion, in colloquy.

And frankly, you have outstripped our expectations. I did not think they could bring this many heads of antitrust enforcement agencies together in a single room. Paula said to me when she walked in, she said, “Is that what you guys in the antitrust field call a cartel?” I think it is a cartel, but it is one of the

few I think that is ultimately going to prove to be procompetitive.

MR. RILL: I wonder how much coordinated interaction there will be.

MR. KLEIN: We will see. I know my friend Dieter Wolf has told me there is the odd cartel that we need to make sure is procompetitive, and I think there is one here. We are learning from the German experience, Dieter.

With that, I have a lot to say about the specific issues about the work we are doing on positive comity, about international cartel enforcement, about trade and competition where we have one formal request, a market access request that we have referred to Commissioner Van Miert and DG-IV with respect to the airline computer reservation service. All of that is well known and so I don't want to belabor it.

I would hope in the time that you have with us today, you give us your most candid, your most honest assessment of how to think from your perspective about the options that are available to us and the way to knit together a fabric of international antitrust enforcement for the global economy of the 21st century.

I think Commissioner Van Miert undertook a similar enterprise early in his tenure when he appointed his group of experts to report back to him, and I think we all benefited from that fine work that was received there. I expect to build on that work and to have this Committee set forward an agenda that will be analyzed in capitals all over the world.

As we go forward, one thing strikes me as I look around this

room and think of the hours we spent together in Paris and in Tokyo and in Brussels and in South and Latin America and, indeed, here in Washington. Karel and I were having breakfast in Brussels, I think it was Wednesday morning, and he said something to me that struck me then and strikes me now as very important: The level of professionalism and camaraderie in our field, the sense of shared mission, the fact that we view the world not simply as nation-states but people with a commitment to the enforcement of competition policy and effective antitrust laws throughout the world is really quite remarkable.

We spend less time bickering with each other and more time working collectively to try to solve our shared problems and build a better world for competition policy and antitrust enforcement. And I know that that attitude will infuse not simply this meeting but our deliberations in the years ahead, because what we are doing here is simply part of a much larger and much more important process, which is to get our field able to effectively intervene in the new economy, the 21st Century in a way that is good for consumers, good for business, and good for our respective nation-states.

I again want to end by thanking you personally for your attendance here and the sacrifices you have all made to come. And now, we will listen. Thank you.

MR. RILL: Joel, thanks very much for the inspiring remarks. I'm not going to undertake to presume to introduce each of you in the order of your presentation. We all know who you are. You know who each other is, and biographies are included in the materials provided. We have organized for the

morning to be spent with opening comments and remarks by each of you. We plan to take a break at 10:45, or thereabouts, and we have organized it basically in alphabetical order in the English language, though Germany will go as Germany and not Allemagne. And we will lead off with, in order, Allan Fels from Australia; Gesner Oliveira from Brazil; Konrad von Finckenstein from Canada; Karel Van Miert from the European Union; Frederic Jenny from France, and from the OECD CLP; as well as from the WTO antitrust working group --

DR. STERN: No acronyms.

MR. RILL: -- that is the World Trade Organization working group, and from academia. Jerome Gallot from the DGCCRF will be arriving this afternoon, and when he arrives will have an opportunity to speak also on behalf of France. Dieter Wolf from Germany. My old friend Shogo Itoda, and his colleague, Takaaki Kojima from the JFTC. Fernando Sanchez Ugarte from the Republic of Mexico. Luis De Guindos from Spain. And also my old friend, Ignacio de Leon from Venezuela. If we could just proceed in that order, take a break at about 10:45, and we look forward very anxiously to hearing your comments.

Professor Fels?

PROFESSOR FELS: Thank you very much, Jim. Ladies and gentlemen, thank you very much for inviting us to your important hearings. Australia welcomes this very important initiative by the United States. We think it's important not only for the United States but also for the rest of us. We are very interested in the outcome of your deliberations.

As the first speaker this morning, but one followed by many experts, I will range across areas where I feel I have more of a contribution to make and, about the particular topic of enforcement cooperation, I will be speaking about that this afternoon. That is to say, the Australian-U.S. agreement, which is an important one. So this morning, I want to talk about the general relationship between trade and competition policy, and I shall probably range a little more widely than some of your terms of reference, but I would still like to comment briefly on a couple of topics like regulation and intellectual property.

So let me begin by just making a few general comments about the relationship that I see between trade policy, competition policy, and government regulation, even though I think your concerns were essentially on some aspects of competition policy.

It seems to me there are three basic propositions about the relationship between trade and competition policy. First, free trade can be hindered by anticompetitive practices in the private sector. If trade barriers are lowered, and it's made easier for imports to enter a country, the effects of this liberalization can be defeated if there are, for example, anticompetitive agreements in domestic markets. This is particularly the case in distribution sectors if imports are prevented from reaching consumers. Hence, trade policy needs to be complemented by an effective domestic competition policy. While that proposition sounds simple, it gives rise to a major policy agenda.

For example, it's desirable that a country's trade partners adopt a competition policy and apply it properly. It is also necessary that

appropriate cooperation arrangements apply between the national competition laws and institutions around the globe, which becomes more important with ever-increasing economic interaction between countries.

The second proposition is the reverse, that because trade policy, for example, import restrictions, can hinder competition, it's also necessary that trade policy should conform with the general principles and culture that underlie competition policy. Many trade policies seriously restrict competition and it's important that these anticompetitive restrictions be removed by applying the general approach of competition policy to the area of trade policy.

A development between Australia and New Zealand in this regard has attracted some international interest. This is the replacement of the antidumping laws between the two countries with the application of the provisions of the competition laws of the two countries. The monopolization or abuse of dominance provisions of competition law in our two countries apply to dumping cases, an outcome likely to be more conducive to good consumer and business user outcomes than the pre-existing arrangements.

More generally, there is a discernible trend on the part of leading world economists and key policymakers to try to characterize trade policies as a form of competition policy, hence requiring the application of the same principles, and even processes, in the interest of world economic progress. Formulation and implementation of this ambitious approach is a substantial world policy challenge.

Now, this is not to say that progress in the two areas, trade

policy and competition policy, should be linked. I'm just suggesting that there should be common principles, the principles of competition policy. And I note that some of this is not on your agenda.

The third proposition about this relationship is less widely stated than what I have just said. It addresses the question of regulation that may restrict both trade and competition. Indeed, regulation may be a more serious impediment to trade than weaknesses in the enforcement of competition laws.

For example, the problems which some exporters face in having their products distributed in other countries may not necessarily arise from any failures by competition agencies to enforce the law, but rather from laws and regulations that restrict, for example, the number, size and opening hours of distribution outlets, and may even directly or indirectly prevent new foreign entrants from setting up their own distribution outlets. Many other forms of regulation, such as safety standards, may also deter trade and competition.

Therefore, the debate about trade and competition should be broadened to focus on three variables -- trade, competition, and regulatory policy, and their interrelationship -- in order to recognize in particular that regulation may hinder both trade and competition, and that appropriate deregulation may be a crucial policy requirement.

I want to comment very briefly on intellectual property because it's an important element both in trade and competition law. Yet much policy discussion of intellectual property has fallen in the cracks between those two areas and hence been neglected. Generally, the laws regarding intellectual

property promote, rather than hinder, competition. But it's worth singling out one class of trade restriction for particular attention because to date it has been insufficiently considered: the restrictions on parallel imports imposed on intellectual property laws have widespread effects on international trade.

In the copyright area, for example, it is not possible for retailers in most countries to import for the purposes of resale books, CDS, computer software, farm chemicals, and many other products without the approval of the holder of the copyright in the importing country. Such approval is rarely given. This restriction is even applied to many goods where the packaging or labeling has been copyrighted. For example, toys, drinks, packaged foods, perfumes, clothing, footwear, and a very long list of others.

This law then creates import monopolies in each country that has these laws and enables the development of very substantial price discrimination between different countries. These rather draconian restrictions seem quite incompatible with the general liberalization of trade which has occurred worldwide, and are not consistent with the aims of copyright: protecting publishers, record companies and the like from the copying of their original works.

The next topic I want to discuss is the convergence of competition policy. It's desirable that all countries adopt competition policy. It's possible to specify some of the core principles and procedures that any competition policy should have. They include: coverage of hard core cartels and other horizontal anticompetitive agreements, anticompetitive mergers, abuse of

dominance, vertical restraints; comprehensiveness, that is, the law should apply to all product markets and sectors; independent enforcement by properly resourced agencies and courts; clear laws, sanctions, governments that don't enact anticompetitive laws themselves nor sanction anticompetitive conduct; no discrimination between foreign and domestic firms; transparency, due process; provision for international cooperation; and similar analytical approaches.

Even where there are substantial differences of emphasis on particular laws, for example, vertical restraints, there can still be a lot of progress by adopting similar analytical processes. The OECD is currently working on a specification along the lines I have just set up. If we were starting with a blank page, we would probably establish an international competition forum, or even an international competition agency. However, in present circumstances, it is better to make use of existing international organizations. Much of the intellectual work could be done by the OECD and in fact is being done by its new joint working group on trade and competition.

In my own personal view, the WTO also provides an excellent forum because it's membership is worldwide, it brings together both trade and competition officials, and has a long experience also in resolving international frictions, including by means of enforceable dispute resolution mechanisms. At present, the WTO, as well as the OECD, should be used as discussion forums. In the longer term, it's likely, in my view, that it will take on an enhanced role in the interface between trade and competition policies.

If it does this, it's important that the principles of

competition policy should govern the WTO's work. The real progress in the immediate future, however, will be made by convergence and by bilateral cooperative agreements between countries, and this is everyday becoming more important with increasing globalization.

Finally, let me just say one other thing about Australia. In any discussions about the international cooperation and enforcement in competition policy, it's important to take account of changing trends in competition policy domestically. Australia recently undertook a far-reaching review of its own competition policy, and it's worth noting a few points that emerged.

Our reforms include serious independent reviews of all the numerous laws at federal and state level that restrict competition, with a view to eliminating unnecessary or unjustified laws. So we think that's part of the agenda of competition policy and should not be ignored by your Committee. The laws themselves that the agencies can't touch are part of the agenda. In addition, there is now a great deal of regulation of public utilities, whether privately or publicly owned. In Australia it's been decided that such regulation is to be performed, and now is in part being done, by the competition regulator rather than by separate regulators.

In recognition of the numerous access questions that arise -- access to so-called essential facilities -- we have now doctored a comprehensive law regulating access to essential facilities, and we are currently applying it to communications, energy, and transport sectors. Only small attempts have been

made in Australia at this stage to integrate trade and competition policy, but it is worth considering initiatives to create greater harmonization of the concepts, procedures, processes and membership of competition and trade regulatory bodies. Thank you very much.

MR. RILL: Allan, thank you very much. I just should point out that it's becoming increasingly clear that the issue of governmental restraints is very much on the agenda for analysis and potential recommendation by this Committee, so your remarks in that area are particularly apt.

Next we will hear from Gesner Jose Oliveira.

MR. OLIVEIRA: I'll take the liberty to show a few transparencies to make my comments a little more objective.

DR. STERN: Excuse me. Will you make them available after your presentation? It clearly reflects a great deal, you can see we were taking very detailed notes.

PROFESSOR FELS: I gave you them already.

DR. STERN: Thank you. That will be useful just to make sure we have gotten the full flavor.

MR. OLIVEIRA: Good morning. Thank you very much for the invitation. I would like to congratulate the Committee members for this initiative and the U.S. Government, and also say that we are very thankful to have the opportunity to discuss with you part of the Brazilian experience and our perspective in competition policy issues and international cooperation.

I will point out three topics. First, the relationship between

economic reform and competition policy in developing countries. Second, a few aspects of the Brazilian experience. And third, what would be a perspective or what we think is a perspective on international cooperation on the part of developing countries.

It's important to understand this perspective, due to the fact that most of the dissemination of competition policies that we have seen in the recent past has occurred from what we can perceive in this chart on the developing countries. We have now more than 80 countries with legislation in competition and this is where the novelty is.

Competition policy is in a way the result of trade liberalization, privatization, and deregulation. It's the result of economic reform, and in a way is the factor that will assure that we'll guarantee that economic reform will continue. I do not believe that trade liberalization can continue in Latin America and in other places without strong competition laws and agencies. It's the presence of strong and independent competition agencies which will assure that trade liberalization, for instance, will not backslide.

What we can see in Latin America -- and to a certain extent, although the contrast is much greater, in Eastern Europe -- what we can see is two distinct periods. The first one is characterized by state intervention. And what we saw in the last 10 years is the rise of a more modern approach and what we would say is it is characterized by a competition policy approach to market legislation in the last 10 years in the developing world.

Let's take the example of Brazil. Brazil has had a law on

competition policy since the early '60s. Argentina has had one since the beginning of the century. And what we see is that it was only in the '90s that the competition agencies became more active. In the case of Brazil, the most important fact was the transformation of CADE in 1994 as a more independent competition agency. In Mercosur, the development has occurred since 1994 with the first harmonization effort in 1994, and then the Fortaleza protocol in 1996, and now we are regulating the terms of the protocol and we expect it to be implemented next year.

Let me give you some data on the number of cases that have been decided in Brazil that will give you an idea of the degree of implementation of the laws. As you can see, in the '60s and until the early '90s, the number of cases was very small, and it has increased sharply in the last three or four years. This gives you an idea of the composition of the cases. There is a vast majority of conduct cases and there is already an interesting experience on merger review since 1994.

If we see the composition of the conduct cases, we still see a large share of the cases which have to do with past cases that we view as state intervention. This is what is being called here abusive price cases, which are old cases, and already a large share of cartel cases in the conduct cases.

Let me call your attention to the merger review cases. Here we have three periods which correspond to the three councils that CADE has had since 1994. I would call your attention to two aspects. First, there has been a rise in the share of cases, this yellow part, that have been approved without any

kind of condition. And let me give you an additional number, which is the majority of those cases, four-fifths of those cases, involve foreign companies. And almost half of those cases, involve other jurisdictions, and have been analyzed by other jurisdictions.

So given the fact that the majority of the cases are approved without condition, and given the fact that many of them have already been analyzed by other jurisdictions, it's very important to focus on the simplicity of the analysis in international cooperation in terms of reducing transaction costs for companies which are investing in Brazil, in Latin America, and in other regions of the world.

DR. STERN: Excuse me. In this last display here, do you find that the cases that you have approved for that image are different in terms of foreign investment than in the previous periods? In other words, you have given us an idea about the regulations, but could it possibly reflect a difference in the type of investment or the intensity of the investment or sectors that they are investing in?

MR. OLIVEIRA: Yes. There has been some change in the pattern of investment, and I think that this is true for all Latin America. There is a great increase in the investment in infrastructure of sectors, in telecommunications, in other service sectors which we don't find in the '80s and in the '70s.

DR. STERN: And it reflected perhaps more state-owned companies that were being privatized?

MR. OLIVEIRA: Yes. That certainly has to do with the process. What I want to emphasize is that we do have to have some cooperation to analyze cases which already have been analyzed here in the U.S., in Europe, and in other countries, and I will give some examples in the following.

Let me show you the share of the cases which have been considered to be the relevant market, the geographic relevant market has been considered national. It's striking that even with trade liberalization and with globalization, we still have a large share of markets being considered national. I suspect that if we had more information on international markets, part of those markets could be considered international. This would be a result of more cooperation amongst agencies.

Let me give you some examples of transactions that, as we mentioned before, were analyzed in Brazil in the dates indicated and also in other jurisdictions. Most of you probably know and had the opportunity to analyze those transactions and can even protest our decisions.

Let's take the Mahle acquisition: a German company that acquired a Brazilian company that had important business in the U.S. market, so that was a particularly interesting case. Let's see what the decision was. In the U.S., there was a fine for non-notification and non-approval, and an order of divestiture in one of the relevant markets. In Brazil there was a fine for late notification and approval in the relevant markets of pistons and separated pieces and a non-approval for one of the relevant markets. As you can see, we made different decisions, as one would expect, because we have different relevant

markets, but I think that we got consistent decisions. And we'll get more and more cases like this one.

The acquisition of Kolynos by Colgate was an interesting case. The decision in itself was interesting. It would be worth discussing, but the important point here is that it involved two U.S. companies, a transaction between two U.S. companies outside of Brazil, and had an important impact upon the Brazilian market. It involved also a third U.S. company which also operates in the Brazilian market, so it's one case that would be worth analyzing to see what kind of international cooperation could help us in getting a consistent and good decision.

As a result of the decision, the suspension for a four-year period of the Kolynos trademark in the Brazilian market, we have observed some benefits for the market with new entry and with a fall in the price of toothpaste of 11 percent since the decision.

Another case was the joint venture between the Brazilian leading brewery and Miller, a U.S. company. And the transparency gives you some information about CADE's decision.

Another point that should give us some elements for discussion is our relationship with the courts. We have in Brazil now more than 70 cases in the Brazilian courts. As you can see, the share of the cases which go to state courts is relatively high due to the autonomy of the states of the federation. And what would be interesting would be to emphasize and to focus more on the dissemination of competition culture among courts in different regions

of the world. It's hard to overemphasize the importance of this if one analyzes the legal tradition of courts in some regions, especially in Latin America.

In order to set priorities for international cooperation, it would be useful to have a gradualist approach to competition policy and to competition policy implementation in each national jurisdiction. We have a gradual approach. We think that we are going from the second stage of implementation to a third stage. We already have merger control and repression of horizontal agreements, but we are now starting to implement international cooperation in a relation with the regulatory agencies in the infrastructure of sectors. So what does that imply in terms of international cooperation?

In the early stages, it's very important indeed to have technical assistance, one point I would like to emphasize. It's not technical assistance in terms of writing laws, but it's technical assistance in terms of institution building. I think if we want to have strong implementation of competition policy in the world, we ought to have independent transparent institutions in the different national jurisdictions. And if we do not have external technical assistance, there will be underinvestment in terms of the institutions. There is political market failure in terms of what we get as a budget for national competition bodies. So there has to be support for independent and transparent competition agencies.

After a certain degree of development, then we can think about early attempts in terms of international cooperation. We have an interesting experience and a very positive experience with Argentina. And we hope in the

near future to sign an agreement with the U.S. But for most parts of the world, what I would call the second generation international agreements, we still have to get some preconditions for having more advanced agreements with developing countries.

Just to end these remarks, let me give you some idea of some internal reforms of CADE in order to prepare CADE for this type of international cooperation. We have been changing our internal rules in order to get more transparency with respect to due process of law. Let me give you some information about a recent change in the merger review in order to make it easier for international cooperation.

First, we try to maximize the intersection of the information set that we get from the merger parties with the OECD notification form, we had a proposal and now we have this approved OECD notification form. We also started a two-stage decision process and we simplified dramatically our information set, reducing the number of items of information and documentation.

With that, we hope to reduce the time length of analysis. We have reduced it from 20 months to 7 months and we hope to reduce it at 2.4 months more for next year. So this is one of the preconditions for having, let's say, an international agreement with other jurisdictions that would allow for joint analysis of a particular transaction. And also, for the area of conduct, it would be necessary to have a more rigorous treatment of confidential information in order to have more exchange of information.

The three goals that we have for the next two years are the

consolidation of CADE's work in terms of the consolidation of stages one and two indicated in the earlier transparency, institutional cooperation both nationally and internationally and with a priority of legal certainty.

I would say that if we do that, we will be proving the three roles a competition agency has to have. The repressive role, which was the focus of the early period of the history of antitrust, the preventive role, which has been developed with merger review and with analysis along the century. But most important of all is the educational role, so we do give a lot of emphasis on the educational role that competition bodies can have and have to have.

I think that internationally, one could say that we do have to have coordinated repression of hard core cartels. We should reduce transaction costs by having more joint analysis of mergers, but most important of all, we should emphasize institutional building, and we should emphasize the promotion of independent and transparent agencies around the world. This is certainly a precondition for good competition policy in the world, and I think it's characteristic of modern competition policy as opposed to the antitrust tradition of the late 19th century.

Thank you.

MR. RILL: Thank you very much. I think much of what you have said is going to be part of and perhaps even stimulate to a great degree the panel discussion on multinational mergers that we'll be undertaking in the last part of today and again tomorrow. So thanks for those very thoughtful comments.

Konrad.

MR. VON FINCKENSTEIN: Thank you, Mr. Chairman. Thank you for inviting me to participate in this forum. I think it must be a unique forum where you make policy by inviting your international colleagues to give input. I hope it sets a precedent and I'm certainly delighted and flattered to be here.

We in Canada are a very strong supporter of international cooperation. Part of it of course is easily explainable in terms of geography. We are right next door to the United States, the biggest market in the world. We are the biggest trading partner with the U.S. and, since the advent of the FTA and NAFTA, we have in effect a North American market. Business treats North America as one market.

There are tremendous opportunities in terms of efficiencies of scale and concentration, but also risks in terms of collusion. And we have seen, since the advent of the FTA, a considerable increase in both multinational conspiracies and in mergers involving both your jurisdiction and ours. So, as a corollary, a high degree of cooperation among antitrust agencies is essential for the effective administration and enforcement of our systems.

I'd like to address four points with you. Basically I'm concentrating, given that I'm in Washington, on Canada-U.S. relations, but essentially my comments apply to our relations with other countries as well. I'd like to talk to you about the Canadian priorities for international antitrust cooperation in terms of deepening our relationships with the United States, expanding our positive comity in the region, and in terms of availing ourselves of

the International Antitrust Enforcement Agreement Act (IAEAA). And I'd like to finish off by making a few comments about the Competition Bureau's view of antitrust policy in the context of the WTO. Let me go through these one by one.

Deepening our relations. We have with the United States the international antitrust cooperation agreement of 1995. We also have an agreement with the FTC on misleading advertising. Further, we have the Mutual Legal Assistance Treaty on criminal matters. These three agreements are really the core of our relationship and have worked very well so far.

We have had several major cases that we have handled together, but we have to deepen this relationship given the increasing number of issues involving both of our jurisdictions. By deepening, I mean such things as making more coordinated or parallel investigations. We have to coordinate our searches when appropriate. We have to share information within the limits of our respective laws, especially in those areas where we are not restricted, such as market definition, theory of cases, views of industry, et cetera. That kind of information can be extremely valuable.

We have to make sure we time our activities properly so we don't interfere with each other. And we have to assist each other in order to obtain the necessary evidence through cooperation. All of this is an ongoing process. We are learning day by day, but it is a challenging process because your ways are sometimes different than ours. We learn about each other's preoccupations, practices, ways of looking at things, and the many unwritten rules that exist on both sides of the border, which are very important and have to be respected. But I

expect we will continue to improve and we will become a model of bilateral cooperation.

Secondly, I believe we should expand on the use of positive comity between the United States and Canada. Positive comity: we all know the concept. If anticompetitive activity takes place in another country, and hurts both that country and one's own country, it may be most effective to defer one's own enforcement activity and ask the other country to investigate and deal with it. That's the basic notion. Currently, our cooperation agreement has a reference to positive comity, but it is a relatively basic reference because it suggests that when you receive a request for positive comity, you will look into it carefully and then advise the other party whether you intend to proceed or not. That's essentially all.

I have looked at the U.S.- EU agreement on positive comity, which I think is much more complete and sets a very valuable and interesting precedent. It sets out the grounds for invoking positive comity, the conditions for deferment, and the timetable under which one should deal with requests. It has the implied necessity of accepting the resolution that the requested party will implement. It also has a reservation allowing a requesting party to recommence its own investigation after sufficient notice.

This latter point, I think, is based on the realization that there may be instances when it is imperative for a country to step in and enforce its own laws. A safety valve that reserves the right for the requesting party to start its own investigation is very necessary. Generally I think the approach taken by the U.S. and EU is very practical. It is do-able and we should do it on a Canada-U.S.

basis, and I understand my office is discussing potential negotiations with the DOJ and the FTC in order to work out such an agreement.

Lastly, there is the issue of exchanges in what we call civil matters. We exchange a lot of information on criminal matters by virtue of the agreement that we have and by virtue of the Mutual Legal Assistance Treaty on criminal matters. There is no counterpart on the civil side, which means the United States cannot cooperate with us because we don't have reciprocal legislation as required under the IAEAA.

On the Canadian side, we have confidentiality restrictions that prevent us from letting the U.S. have certain civil matter information and that also do not allow us to accept waivers. Even with a waiver, we can't give you certain non-public information. Consequently, on the civil side, we only exchange information that's in the public arena. That's not very helpful and it means that in major civil cases, on major issues of abuse of dominance, for instance, which may occur on both sides of the border, we have to go our separate ways -- we can't talk to each other. This should be addressed.

We wanted to address this in our last round of amendments to the Canadian Competition Act. Unfortunately, there was an intervening case that suggested that prior to making a request for information located in a foreign jurisdiction you needed judicial authorization. Ironically this was a decision made by one of my predecessors -- but it has since been reversed by the Supreme Court of Canada. So the way is now clear for Canada to amend its Act and enter into an agreement with the U.S. under the IAEAA.

This is a priority for our office and I hope that we will be able to do this. However, entering into such an agreement is going to be very difficult and there is one simple reason, and that's treble damages. The idea of being exposed to treble damages by reason of information that emanates in Canada being exchanged with U.S. authorities, absolutely galvanizes Canadian industry and the Canadian Bar to oppose any such exchange. Therefore, when we negotiate an IAEAA agreement, we will have to address the issue of treble damages and see how we can deal with it, because we do not have treble damages in Canada.

I have never been quite convinced about the necessity and utility of treble damages, but of course that's your law and for you to decide. However, to the extent that Canadian firms become or perceive themselves to be exposed to treble damages, it poses a major problem in terms of working out a consensus in Canada and dealing with this issue. We will have many interesting discussions trying to square the circle.

Lastly, let me say a few words, speaking from the Competition Bureau perspective, on how I see antitrust enforcement fits into the WTO. So far in the WTO, we have addressed some issues of competition. There are some agreements, for instance, the latest one on basic telecom that have all sorts of provisions, which are clearly competition provisions. The basic Telecom Agreement essentially prescribes a competitive regulatory regime and the rights of the parties under it. We have smidgens of competition in the intellectual property agreement, and you can find it in the various other WTO agreements. But it is haphazard. It is not a common approach. We now have a working group in the

WTO, under Frederic Jenny, which is doing a lot of exploratory work and in terms of familiarization of competition laws and policies, and consciousness-raising, especially for developing nations.

However, I think the time has come to contemplate an agreement on competition in the next round of the WTO. And I believe the key building blocks already exist and just need to be brought together. In the OECD, for instance, there is the Recommendation on Hard-Core Cartels; there is the framework for merger prenotification just adopted this month; there is work in process on the rights of parties, which basically sets out the procedural rights of parties. There is also work in progress on the principle of comity and how that should be played out in a multilateral context.

There has been work done by the OECD, which has not yet resulted in formal documents, be they frameworks or recommendations, but which are works in process that will come to fruition very soon. There is developing OECD consensus on an approach to the abuse of dominance; the core principles my friend from Australia referred to; and also on the elements of a minimum competition law institutional infrastructure required, such as an independent investigative agency and some sort of appeal or judicial review of the decisions of that agency.

It strikes me that all of the elements are semi-ready. Some further refinement at the negotiating stage is required, but they could very easily be wrapped up in an agreement using by analogy the WTO, a competition agreement on basic principles would leave to each nation to determine it in

accordance with its tradition and history, its own objectives and its way of doing business. What you would have is a dispute settlement mechanism purely to determine whether these principles have been translated and incorporated into those domestic laws or not.

Some thought should probably be given to whether it should be a plurilateral agreement initially, with only those nations that already have competition systems or are about to accept them, acceding. Over time it would become a multilateral agreement, but I think if the next round would produce a plurilateral agreement, it would be a very useful first step. It would serve three purposes.

First of all, it would be a model for nations without competition systems, setting out what should be included in one and how to structure it.

Secondly, for members that already have a competition regime, it would give them an opportunity to review their system, deal with some anomalies, and to straighten out certain provisions that have always been there but, for lack of political consensus, have never been addressed.

And lastly, I think that an agreement, specifically if it included a clearly spelled out positive comity arrangement, would give members of the agreement the mechanisms to deal with constraint issues caused by private arrangements, rather than by governmental-sponsored arrangements, something that the WTO is now incapable of addressing. Essentially, the WTO focuses on government sanctioned measures and this would be the first time that we would

have a way of dealing with private arrangements that can create barriers to access.

That's basically all I wanted to tell you by way of introductory comments. I'm looking forward to the day and would be glad to answer any questions. Thank you.

MR. RILL: Thank you, Konrad. You provoke so many interesting potential responses to what you have said. Just for a moment on the private treble damage remedy. That is an issue that's come up in discussions with my colleagues in the Bar as well as with some of you.

The question then would be not whether the U.S. could say in international matters, should there be an exchange of information leading to a civil action against a foreign firm, treble damage remedy would not be available. I think that would raise serious questions of reverse national treatment -- the domestic firm is liable for treble damages, the foreign firm is liable for only single damages. I think it would be very difficult perhaps legally and, certainly, politically in the U.S.

On the other hand, it's not beyond question that the whole treble damage remedy in the U.S. could be evaluated as it has been from time to time and modified to some extent, for example, under the National Cooperative Production and Research Act, for notification would eliminate the treble damage remedy.

Thanks very much. Karel?

DR. STERN: Before you go ahead, I would like to recognize that we have been blessed now with the Boston shuttle's arrival. Professor John

Dunlop has joined us, as has Professor David Yoffie. I would like to recognize that in the audience we are getting an increasing number of very high visibility public officials as well. I see Carol Crawford from the International Trade Commission back there, the Commissioner, and many others, and I want to make sure that you can hear back there.

Is the public having a problem hearing? Yes. I thought so. You all have been very polite about saying so. But the substance is so interesting and we need to make sure that everyone can hear, and let me assure the public in general that this is being recorded, that there shall be a transcript and it will be put on our Web Page. But if we can at this table remind ourselves that we are having a discussion not only amongst ourselves, but that it is being monitored by some very important people, that would be very helpful. Excuse me, Karel. I thought we should pull everyone together and get on the same page so that we can all hear what you have to say.

MR. VAN MIERT: Thank you very much. Good morning, ladies and gentlemen. First of all, I would like to congratulate Janet Reno and Joel Klein for this initiative, having set up this Advisory Committee. Because I believe it's absolutely timely. As Joel pointed out, globalization is happening. Interaction is happening all the time. I think what has already been brought about over the last decade is truly impressive. A lot of bilateral agreements are functioning well. A lot of work is being shared, is being done.

But indeed, we need to think about the options which are available or should be available for what comes next and not only what comes for

the next decade but beyond that, beyond the next decade. And that means not only discussing options but also to see how to bring about solutions, so how to proceed in which framework. I think this is now the most important thing we need to discuss.

And it's in this light that I would like to follow the three questions which have been put to us. And as Joel reminded you already, we started some years ago to do some work ourselves, although it was much more limited. We asked knowledgeable people to give their opinion and to discuss that with our own officials. This eventually did lead to the initiative, which the European Union has taken inside the World Trade Organization, to create a working party, which again I think is doing extremely valuable work.

So today you are thinking about it, and again, thank you very much for having invited all of us. We have been doing some work. In the meantime, things are being discussed, so I would say before the end of this century, we should be able to come up with some very valuable ideas on what comes next. Anyway, it's in that light and in that spirit that I wanted to be part of this discussion today.

Now, ladies and gentlemen, I'm not going to come back on some of the very interesting things which have been raised, for instance, trade and competition, and also regulatory issues. But since it was not put specifically to me, I will leave it there. But I do recognize that this is extremely important, and probably it's one of the more valuable things also which could be put in your report, and not just stick to the relation between trade and competition and

copyright and all those things. So there is a lot to be discussed, and since this work is meant to be, should I say, a guiding paper for what comes next, it shouldn't be forgotten.

Now, ladies and gentlemen, the first question: What should be the useful direction or directions to enhance international cooperation and enforcement matters? Obviously we will continue as all of us, I think, to try to extend bilateral agreements, deepen them, make them function even better than is the case today, second generation bilateral agreements, but this is something we have been doing and will continue to do.

Very soon now we'll have a bilateral agreement with Canada, we will try to have others. I understood that also Japan seems to be interested in developing bilateral agreements. I welcome that explicitly, but this is already known. We can make things more perfect. Function better as they do today, and in this respect, ladies and gentlemen, I certainly would underline the necessity that in the bilateral agreement we do have with the U.S. that the next stage might be the exchange of confidential information.

But it is highly sensitive in the business community. It's highly sensitive with several of our Member States so it's not going to be easy to bring it about, but it is on our agenda. Somehow for the time being it's more a process of trying to convince people that it might be useful for them as well, not just a threat. And it's striking, by the way, that in several merger cases -- I will come back on that a little bit later -- the companies were prepared to give us a waiver to allow U.S. and European Union authorities to exchange confidential

information, because one day they discovered that it might be in their interest. So I'm hopeful that it might be brought about, but I must indicate that on the side of the European Union it's not going to be easy. It's a rather complex discussion with industry, but in our view it is the next step to be undertaken.

As far as bilateral agreements is concerned, I will leave it there for the moment, ladies and gentlemen, and concentrate on the second leg. And the reason why we have been doing that over the last year is indeed the firm belief that in the light of globalization, interconnection, in spite of some difficulties which are around that, it's going to be continued. It's going to be there to stay and to be developed further.

So therefore I think we must indeed discuss the future-oriented solutions in the light of globalization and try to develop some global approaches, including global procedures. And again, as I indicated, it's not just to what comes next in, say, 2005 or 2006. No. It should go beyond that. And there is a very strong logic in it now also to start thinking about global approaches and global procedures.

So this is the general spirit in which we were ourselves already doing some work about it, and we came up with four suggestions, but I want to underline the word <u>suggestions</u>. Four suggestions to try to carry things further.

First of all: make sure that -- and the trend is there -- more and more countries do have or do introduce competition rules, do create competition authorities. Okay, let's help them to do so in a genuine way. We have

some very valuable experience, not only the European Union but several Member States. Several of our Member States have been extremely, extremely cooperative in trying to help some Central and Eastern European countries to introduce rules of the game, to share experience of them, even having given practical help, technical assistance on both levels.

And this eventually, ladies and gentlemen, did indeed lead to the fact that now several of the countries concerned already have competition rules and competition authorities and have and are gaining a lot of practical experience before they eventually will join the European Union and then be subject to the global rules of the European Union. So there is a lot of experience already out there, which can be used elsewhere as well. And I know what's happening in South America which also, I think, points in the same direction. So therefore, let's try to make it a kind of multilateral thing, bring this about everywhere. And be helpful.

The second thing I wanted to mention, as Joel mentioned earlier, there are still a lot of things which are extremely difficult to be tackled when they are outside your own reach. Now, obviously, extraterritorial actions have been taken but perhaps that's not the right way forward. At least we feel strongly that the right way forward is to do it on the basis of bilateral or multilateral cooperation.

And in this respect, we fully share in the concerns that for instance export cartels, bid rigging, market sharing agreements, outward-fixing agreements, and all these kinds of thing that we cannot tackle as we should like to

do, even as European Union. For instance, we cannot tackle export cartels, which is fairly regrettable. So why not try on a more global level to say: All these types of practices, we should be able to tackle them because we have some kind of universal rules which would be part and parcel of all competition policy wherever in the world. So that this becomes a kind of global base on which these kinds of practices can be tackled in the future.

The third point I wanted to mention, ladies and gentlemen, is indeed based on cooperation between individual, bilateral agreements, positive comity and comity. We are having some experience in the meantime ourselves so things can be improved, by the way, because we are learning and tackling individual questions and we would like to improve this as well. But very important is a spirit in which this is taking place.

I could give you examples of cases, for instance the Nielson case, that has not been done on the basis of a formal demand. But the way it has been done is absolutely in accordance with the spirit of comity and positive comity because, since the problem was mainly happening in the European Union, our friends on this side of the ocean asked us to look into it. That's exactly what we did. We obviously kept them informed. Once we were negotiating a remedy with the company that had been attacked, obviously we were checking whether that was good enough with our American friends, so at the end of the day the thing could be sorted out.

Apart from these formal procedures the spirit in which this is being conducted is automatically, so to speak, leading to an in-depth, very close

and confident relationship and cooperation. So therefore we feel, even if perhaps it's not the first thing to do on a broader scale, that it should be part and parcel nevertheless of a global approach.

And then finally, the fourth suggestion I would like to make deals with dispute settlement. This is probably the most controversial one because indeed it has to do with some kind of a multilateral global mechanism. I should immediately add that in order to avoid misunderstanding that it's not about an appeal mechanism. I think that would be unrealistic, certainly for the time being and as far as I can see. Certainly I don't think we would like that individual decisions which are being taken by the authorities might be appealed somewhere, again for the time being.

But what could be considered is that if states, if members of the World Trade Organization, because we in principle would like things to go ahead in such a framework. But here again immediately I should say one should not mix up trade issues with competition issues so it must be specific, must be a specific approach, something along the lines as follows: That if some of the Member States of the World Trade Organization, being committed to introducing genuine competition rules and having a genuine competition authority, if they will for instance discriminate between companies according to the origin that obviously would be a case to be discussed on a more global level.

So not individual appeal procedures but a more global surveillance operation or mechanism in order to make sure that the way competition issues are being conducted is genuine, and if that's not the case that at

least it could be discussed on a more global or multilateral scale.

So these are a few suggestions again and we would like first of all that the work being done by the Working Party would be continued, could be continued. And secondly, that during this work, we perhaps could start discussing how then things could be tackled further after that. Because it would be too bad if after the valuable work being done by this Working Party that it would stop there and it would be left there, so we are very much in for some kind of follow-up.

Now having said this, ladies and gentlemen, obviously we want to discuss it with all of you and with others as well to be assured that what would be considered is going to be in a truly multilateral spirit. One thing I should add, because I know on this side of the ocean there is a lot of concern, that such discussions should not lead to something else: discussions about antidumping. We do understand that and we share that view.

On the other hand, I think we must be open-minded enough to listen to concerns of others as well. But as far as the substance is concerned, it should be a competition policy thing and not something different. That should be well understood. But for the rest, again, be open-minded enough again to listen to what others have to say. I was listening very carefully to what you said has taken place between New Zealand and Australia. You mentioned an agreement between the European Union and the United States. That would be something truly revolutionary, I think.

DR. STERN: Or between the U.S. and Canada, which has been suggested a number of times.

MR. VAN MIERT: We have similar discussions with Central and Eastern European countries for the time being because they would say: Look, you want us to have competition policy, now shed antidumping procedures. One day they will be a member of the European Union, ipso facto, that will be the case. We know about these discussions. But having said this, as far as I can see, we should mainly concentrate on competition issues.

Let me very briefly turn to a few other issues you were mentioning. Well, the mergers. I was looking into the statistics from last year because this year is not yet finished. Last year we notified 31 merger cases to the U.S. authorities. And they in turn notified 20 merger cases to us. Last year we had in the European Union 172 merger cases to scrutinize. This is considerably increased over previous years. Four or five years ago we only had between 40 or 60 cases, and may I point out that we only tackled the most important ones because the others would be tackled by the national competition authorities. It has to be more than 5 billion ECUs as far as the global turnover is concerned.

Now, the figures show -- by the way, this year we will have probably about 200 big merger cases, so I guess this year there have even been more notifications than last year. But the figures and the data show indeed that this becomes increasingly a very intense activity across the ocean. Indeed, there are a lot of fairly well-known cases where this has been indeed confirmed. There has been one case, as everyone knows, the Boeing case where we could not agree, although even there the cooperation was valuable.

I think we could on some points limit the difference of

opinions so even there it could be wrong to pretend that it was not valuable, and cooperation did not add some positive things to the complicated case in question. But all other cases, and I underline all other cases, could be sorted out in good spirit, ending up eventually with identical remedies.

In the WorldCom/MCI case this has been shown, and it was a complicated case from the very beginning. And we only could sort it out in such a good spirit and in such a way because from the very beginning there was this very, very close cooperation including finding out about relevant markets, how to analyze, how to call in expertise. So it was an extremely valuable exercise ending indeed with the fact that we had identical remedies to which both sides could agree. And by the way, because there was such an intense cooperation we could also avoid that the companies concerned would play one jurisdiction against the other, because eventually they will try to do so, but unsuccessfully, I must say.

Let me now turn to a few problems which are still out there because in spite of the fact that it functions very well, including eventually where one authority is negotiating a remedy, like in the Halliburton/Dresser case, since the remedy being negotiated on the U.S. side was good enough also for us we could just stop there and say, look, you have been negotiating with the companies concerned on the U.S. side, a good remedy, we just take it in and finish the case. So it's even leading to some extent to a kind of division of work in spirit and in fact.

Now, which are the outstanding problems? From time to time indeed the fact that we can't share confidential information. Although as I

mentioned earlier, usually the companies concerned, if they find out that it might be in their interest, are prepared to do so.

One thing which from time to time leads to complications is the fact that we have different deadlines because inside the European Union we absolutely have to finish a case within five months. So this is an obligation. We can't do otherwise. Now, in the U.S. it might take sometimes longer than that and therefore to adjust remedies and make sure that they are compatible from time to time really creates practical problems. And perhaps it's good to think about it, how to improve things. But apart from that, I think that the cooperation is very good.

It is true that in the Boeing case since the rules on which the case was based on the U.S. side and the European Union side were a little bit different, were also leading to different conclusions, so there might be from time to time problems as far as the substance of the rules is concerned. We should not fight that. But again globally speaking, I think we can just safely say that cooperation, particularly as far as mergers and acquisitions are concerned, is outstanding but can be improved.

Now, the last thing I want to say a few words about is the third question: How to resolve market access problems due to private conduct? It's obviously a delicate matter, but basically speaking there are still a lot of outstanding questions. By the way, I obviously share the view which has been given by our Brazilian friends, that a lot has to be done within the given territory. And that's our experience in the European Union. By liberalizing, for instance,

telecoms and other areas, ipso facto you are opening up the markets.

Opening up the markets has to do with a lot of other things. First of all, you are trying to get things right in your own territory in liberalizing and privatizing, so that that's the basic thing. We should not forget about it. But beyond that, when there are still problems as far as market access is concerned, indeed, we feel very strongly, as other colleagues here said, that this should be sorted out on the basis of bilateral cooperation or hopefully in the future also more prone to more multilateral cooperation and not otherwise, at least as long as procedures and possibilities are available to do so.

So basically speaking, that is our position. Having said this, I think the Kodak/Fuji case showed that there is a need to try to go down this road. And I would welcome that particularly also in Asian countries, and in light of what's happening there now and some of the problems which have to be cured, that one of the lessons to be drawn from them would be to have a genuine full-fledged competition policies and authorities which are able to look after that. And in doing that, I'm confident that also where there are problems of market access: they can be sorted out. Perhaps not as rapidly as one would like, but at least then there is hope for doing so.

Ladies and gentlemen, I would like before finishing to make one additional point. Again, the cooperation, and I'm particularly talking about cooperation between the U.S. and the European Union, is really developing very well. We are privileged enough a few months ago to sign an additional agreement with Janet Reno and Joel Klein.

There is one area where we cannot just pretend to save. That's when we have to tackle airline alliances. And the problem is on both sides of the ocean so I'm not only pointing to the fact that this is being handled by the U.S. Department of Transportation, which does not look into such cases in the first instance from the point of view of competition policy. But there is some kind of problem, on our side as well, because the European Commission has not been given until now specific instruments to tackle such cases.

We are doing so, as you know, but according to a lengthy, complicated procedure where we have to work very closely together with national authorities. That's not the problem as such. The problem is that it is so extremely complicated and therefore it takes a lot of time. It's too time-consuming, so it's not efficient. It's not good for the airline business to have to wait too long, and so on and so on. Therefore I would like also to put that on notice, so to say; that perhaps one should reflect upon the question of how to improve things, but again on both sides of the ocean, not just on this side.

MR. RILL: Karel, thank you very much. There is so much meat in the statement that I hope we can come back to these topics this afternoon in the last panel.

Just three quick points. One, starting in reverse, the issue of multiagency review of transactions at least in the U.S. and perhaps elsewhere is very much on the agenda of this Advisory Committee.

There are numerous issues raised by multiagency review. In fact, two Commissioners of the FCC have recently questioned whether it is really

necessary for the FCC to duplicate the competition role of the Department of Justice. This is from two Commissioners of the Federal Communications Commission.

Secondly, personally, I think that exchange of confidential information is a logical next step if it can be done with adequate protections. I think it would have been very difficult to resolve the issues in the WorldCom/MCI matter had it not been that the parties waived confidentiality exchange between the U.S. and the Commission.

Finally, with respect to the extension of the WTO Working Group, I think there is more of an inclination among certain elements of the business community to see the group continue the work in the path that it's on now, and some review is being given to that. I personally think that the work that's, and this is a personal view, that the work that's gone on so far should not be interrupted at this point.

Unfortunately, a decision will be made before this Advisory Committee makes its recommendation, but that isn't going to prevent us from making our individual views known, as I have just done. Thank you very much.

Frederic, this seems like a good lead for you.

DR. STERN: Should we hold the specific questions until after the break? Because I have a particular question for Karel, and I know you have got a scheduling issue.

MR. RILL: When do you have to leave, Karel?

MR. VAN MIERT: 3:30 this afternoon.

MR. JENNY: Thank you very much. First, I will mainly address the issue of the interaction between trade and competition. And second, I want to offer the usual disclaimer that I'm speaking neither for OECD nor for the WTO, but only as a French representative.

Of course, there is a commonality between the views that I will express and some of the things that have been said before. I want to start from the comment that was put forth by Joel Klein that there is an increasing divorce between the extension of the geographical scope of economic markets and the limited territorial scope of regulatory activity and competition enforcement and that this is the major challenge which is put to us by globalization.

I would add to this that further trade and investment liberalization measures, privatization and deregulation movements, as well as the adoption of domestic competition laws, are necessary conditions but not sufficient conditions for the development of competitive and efficient global markets. And that it is this combination of conditions which creates the challenge.

On this challenge, I would like to make three points. First, why should we worry about international competition now and what are some of the environmental reasons for attacking this issue now? Second, in which forum should this question be taken up? And third, what should we expect?

There are several reasons that I think justify the fact that this issue is particularly important now and that some kind of resolution of those issues is necessary. The first is the most obvious, the development of competitive and efficient global markets requires, first, some kind of instrument to make sure

that behind-the-border public or private anti-competitive practices do not in fact replace the trade barriers which governments have endeavored to eliminate.

Secondly, the development of competitive and efficient global markets also requires instruments to fight transnational anti-competitive private practices, even where they do not create a trade problem. Thirdly, attention must be paid to the fact that as domestic competition laws are enacted in more and more countries, the transaction costs incurred by global firms tend to increase, and we should make sure that those transaction costs do not cancel out the efficiency gains that one would expect from the globalization process.

But beyond those general reasons, I would add several other reasons. I think that the current Asian financial crisis provides a unique window of opportunity to try to tackle the problem of trade and competition. The Asian financial crisis has taught us that globalized capital markets and financial markets need to be subjected to some kind of discipline at the global level and that a mosaic of domestic regulations with widely different rules and levels of enforcement exposes the world economy to systemic dangers. And I would venture that what has been shown to be true in the area of financial markets is also, to a certain extent, true in the area of goods and services markets.

The Asian crisis has also taught us, at least taught many countries which were reluctant to engage in market-oriented reforms or to rely on competitive market mechanisms at the domestic level, that there is a cost, sometimes a dramatic cost, of ignoring the benefits of competition. The experience of Korea is from its own point of view particularly striking, and what

is also striking is the extent to which Korean officials are willing to recognize that the fact that they did not pay enough attention to competition is the source of the recent dramatic developments both on the financial markets and in the real economy.

Now, to a large extent, this story also applies to other nations such as Indonesia, Malaysia, and possibly Japan. So I think the Asian financial crisis offers convincing proof to countries which were reluctant to rely on competitive market disciplines to ensure their economic development that they were wrong. Therefore this is a particularly appropriate time to capitalize on possible changes of attitude on the part of those countries and to think about ways and means to ensure that the competition discipline also applies effectively to global markets. Not tackling this issue now might very well lead, in my opinion, to a backlash against the globalization of markets.

The third reason I would say is offered by recent developments in Latin America. A consistent lesson to be learned from countries like Mexico, Venezuela, Brazil, and Argentina, in my mind, is that on the one hand there is fierce domestic resistance to the elimination of domestic anti-competitive public regulations. And that on the other hand the creation of competition authorities in those countries plays a very important role in this respect because through their advocacy function these authorities are constantly challenging such regulations.

I emphasize this point because I know that the business community often argues that the problem of market access is more a problem of

domestic regulation than a problem of anticompetitive practices. I respectfully submit that the creation of competition authorities is one of the important ways to bring about the elimination of behind-the-border domestic public regulations limiting market access, and that in countries where such institutions do not exist there is little support for deregulation of domestic product and service markets.

By the way, this is precisely why, in the context of the OECD examination of the deregulation process, a lot of attention is being paid to competition policies and laws and to the effectiveness of the advocacy effort of the competition authorities.

The fourth reason why I think we should address the issue of international trade and competition now lies in the proliferation of domestic competition laws in a great many countries. Although this development is generally considered to be positive by most of the people around this table, there are two areas of concern which have been voiced, notably by the business community. First, the fear that domestic competition laws could in certain countries be misused or used strategically to protect domestic interests against the interests of foreign importers. And second, the fear that the multiplication of national competition regimes would greatly increase the transaction costs for global firms, most notably with regard to mergers. I want to say that these arguments have sometimes been used against any effort to promote competition laws and policies abroad.

I would submit that looking at the issue in this way may be missing an important point. The issue is whether the consideration of the problem

raised by competition in the context of globalizing markets is more likely to lead to satisfactory solutions than the refusal to consider these problems and letting the proliferation of uncoordinated competition laws run its course.

From that point of view, I would submit that the consideration of the issue of competition problems created by the globalization of markets, whether in the context of the establishment of cooperation mechanisms or in the context of a multilateral agreement, is more likely to introduce some discipline in the process by facilitating peer pressure, by inducing a process of soft harmonization among competition regimes and by allowing the adoption of best practices in the enforcement of competition laws than doing nothing in the face of the proliferation of competition laws.

The fifth reason, and I will stop here on this point, lies in the interest that some countries, and in particular the United States, have shown for the issues of bribery and corruption on the one hand and the promotion of good governance on the other hand. Although I would not go so far as to say that the problem of corruption can be subsumed to the problem of competition, there is consistent evidence that the lack of competition discipline increases the scope for corruption and that, conversely, the adherence to strict competitive principles limits the scope of corruption.

The link is obviously that most of the actions that public officials might take when accepting bribes are ones that will be anticompetitive and provide for some form of rent to the giver of the bribes, for example through the granting of exclusive or special privileges. Having said that, I think that this

issue should be urgently considered.

The second question is: In which fora or forum should we address the problem of trade and competition in a globalized world? You will not be entirely surprised by the idea that I think these issues should be addressed both at the OECD and at the WTO. It is not because I have some role in both those organizations. However, I think we should recognize that there are two types of problems which may warrant different instruments.

First, some practices -- such as export or international cartels or some transnational abuses of dominant positions or some mergers -- may have an anticompetitive effect abroad without necessarily creating a trade problem or trade friction between the country in which the firms which have adopted the practice or have decided to merge are located, and the country in which the anticompetitive effects are felt. In such cases, it's highly conceivable that voluntary cooperation between competition authorities will be a tremendously useful tool to eliminate those practices.

And I would say that this is what OECD is all about: promoting this kind of cooperation. Tremendous work has been done at the OECD, first under the leadership of Joel Klein, when he was heading the Working Party on International Cooperation, and now under the leadership of Konrad von Finckenstein. Since some of the Resolutions or Recommendations have been talked about, I won't go into this.

I will say, as has just been mentioned I think by Karel Van Miert, the most sensitive issue in this area -- which has been raised by the

business community -- is that of the exchange of confidential information. As antitrust authorities, we must recognize that the possibility of such exchanges would greatly enhance the prospect for fighting the type of anticompetitive practices which I just mentioned, but that such exchanges are at present difficult or impossible for a variety of reasons, including the difficulty of agreeing on the definition of confidential information, differences in our legal systems as to how such confidential information is to be treated in competition proceedings, and the differences in our legal systems regarding the sanctioning of competition law violations -- mentioned by Konrad earlier. I think this is the most urgent work that needs to be undertaken at the OECD: to analyze how we could get a grasp on, or handle the issue of exchange of confidential information.

But cooperation between competition authorities is not necessarily sufficient. Indeed there is a second category of anticompetitive practices that we have to consider, and those are transnational competition problems which also create a trade problem and prevent trade liberalization, such as, for example, import cartels. Sometimes the biggest domestic abuses of dominant position will have the object or the effect of protecting domestic markets, et cetera. And I would also add to this category public regulations which prevent markets from being open.

For such cases, I submit that international cooperation is unlikely to be sufficiently efficient to dispose of the problems. So in short I would submit that there are two types of transnational problems and that the tools for the two types are not necessarily the same, but for the second type of problem some

kind of discipline must exist among countries, and that OECD is not a forum which is particularly suited to finding such discipline but the WTO might very well be.

A word, if I'm not too long, on what's going on in the WTO Working Group. I will only, of course, offer a few personal comments since the report of this Group will come out shortly and will be sent to the WTO General Council so everybody can decide for himself how the work of this Group should be assessed.

First, I just want to emphasize that all member countries of the WTO are invited to participate in the Working Party, and that indeed a very large number of countries have actively participated. As you know, more than 100 extremely interesting written contributions have been submitted from a wide variety of countries, both developed and developing, countries which have a competition law or countries which do not have one or do not care to have one.

The depth of analysis attained by the Working Group was, I would say, unexpected in some circles, at least by those who believe that a reflection on the interaction between competition law and policy and trade policy was doomed to fail in a trade organization. I think the reason for the success is the fact that the trade and competition officials in each country have had to come to a common understanding of one another before presenting their contribution to the Group. This has led, I think, in the context of the Group, to a much better understanding of and coming together on, the interaction between trade and competition.

Another area of interest is the fact that it has been quite clear from the discussion that it is legitimate for countries to have different competition laws in view of the differences in their level of economic development, of the differences in their legal systems, and of their various social and political concerns. This aspect of the discussion has, in my mind, moved us clearly away from the vision which was implicit in some of the early academic work on the issue of trade and competition.

But beyond this, it is probably the interest of a great many developing countries to have competition policy as a tool of development, the most interesting changes can be seen in the context of reticence that was shown by some other developing countries. For countries which did not understand what competition law or policy could contribute to their development, quite a lot of evidence was presented showing how they could themselves be the victims of international anticompetitive practices.

I cannot say that there is unanimity of views on the desirability of complementing trade or investment liberalization measures with the adoption of competition policy or on the appropriate instruments for promoting competition, but I think it's fair to say that there is certainly a better understanding of the issues raised by the interface between international trade and competition than when we started two years ago.

I would like to take this opportunity to briefly address the issue of antidumping. As we all know, this is a particularly sensitive issue in the context of the WTO and some are reluctant to see this pedagogical exercise

continue for fear that they would eventually lead to the questioning of appropriateness of trade remedies in the multilateral context. On this matter, this sensitive matter, I would like to say three things.

First, as far as the Working Group is considered, and without prejudging, it was always understood in accordance with the Singapore Declaration, that the establishment of the Working Group did not in any way implicate that negotiations would be undertaken on the issue of trade and competition in the context of WTO. As I have mentioned, the success of the Group, what I see personally as the success of the Group, has been the fact that delegates have clearly understood that this was purely an educational process and therefore have focused on analytical issues rather than on the possibility of negotiations.

When we look at the work of the WTO group, which has encompassed a very broad range of topics -- and I will name a few: the relationship between trade policy and competition policy; private practices which impair trade and competition; the relationship between trade liberalization, competition and economic development; private practices which impair international trade and competition; the impact of regulatory policies and trade policy on competition; intellectual property rights and trade and competition; investment liberalization and trade and competition, among others -- one sees that the work of the Group has not degenerated into a simplistic discussion of the wisdom of trade remedies and their alleged inconsistency with competition.

First, half of one of our seven sessions was devoted to the

impact of trade remedies on competition, and this represents not much more than 5 percent of the written record of our work, which is probably an accurate description of the proportion of the time devoted to this topic during our sessions. The reason for this is not that we have tried to sidestep the issues. Second, as a matter of fact, we had a very clear and frank debate on this. While the proper use of trade instruments remains an area of concern for many countries which have different visions and sensitivity on this issue -- just as the proper use of competition policy or law is a legitimate concern of other countries -- it must be clearly understood that it is not the dominant focus of the Group, much less its exclusive concern.

Third, differences of appreciation on this particular issue, as far as I'm aware, existed before and independently of the discussion on the interaction between trade and competition policy. Thus, a legitimate question to ask is whether discontinuing the discussion would in any way change the sensitivity on this topic.

Fourth, at a more analytical level, I would mention the fact that if a discussion of the competition issue in the multilateral context serves the purpose of convincing trading countries of the benefits of competition, one must ask whether it is likely to decrease or increase the tension on the use of trade remedies. And I would venture to reply to this point by saying that a discussion of the interaction between trade and competition could lead to clear benefits for countries which are most attached to the antidumping instrument, not so much by prompting a change in their antidumping regulations but by reducing the number

of cases in which they have to use their instrument to protect themselves against such destructive practices. I do believe in effect that as the global market becomes more competitive, dumping will become more restricted and that there will be fewer cases of dumping in the first place.

This leads me to my third main topic. I will be rather short on the last point: What can be achieved through a discussion of the interface between trade and competition in the international fora?

I think it's abundantly clear from the previous discussion what can be achieved in the context of OECD. The value added of this work could also be considerable: to define best practices or common approaches to the enforcement of competition law thus contributing to a soft harmonization process and a higher level of legal security for firms operating in the global market.

There is also no doubt that cooperation between competition authorities can in some cases allow the cooperating countries both to solve a competition problem and to avoid trade frictions.

But I think that the potential value of further discussions of this issue in the multilateral context is also significant. At the preliminary stage where we find ourselves, they undoubtedly contribute to a better understanding of the benefits of competition in countries which do not have competition law and policy instruments. Beyond this, it should be recognized that, given the nature of the WTO, and in particular its trade dimension, further discussion of the issue in this forum would probably have to be focused on the competition and trade interface. Indeed, the WTO, in my view, may not be a perfectly adequate forum to

promote the adoption of domestic competition laws of general applicability in countries which do not have one. Possibly UNCTAD and OECD are more appropriate vehicles for this. However, it is a perfectly adequate forum to explore the ways in which member countries could further explore the issue of anticompetitive practices which have an international trade dimension and lead to trade frictions.

Thus in the context of the WTO, a question which could be usefully debated is whether the customary barriers concessions made by the members of the multilateral community should be complemented by commitments to ensure that the trade liberalization measures they have agreed to are not defeated by public behind-the-border practices or by tolerated private practices which defeat the purpose of their trade liberalization commitments, and what kind of instruments, if any, would be relevant to achieve such a purpose.

I think that we can already find in some WTO agreements, or some WTO GATT-related agreements, some answers to this question. And of course, one thing to do is to ask oneself whether those instruments that already exist could be generalized and expanded. I will finally note that framing the question in these terms, and those relative terms in the multilateral context, is not only more logical, given the goals and the missions of the WTO, but also may alleviate the fears or reservations of countries which do not feel they are ready to adopt a competition law for purely domestic purposes, much less to adopt uniform domestic minimum standards of domestic competition laws.

I would like to finish by expressing my deepest appreciation

for having been invited to address this very important and interesting panel. Thank you.

MR. RILL: Thank you, Frederic. I look forward to reading those comments in somewhat more detail. A number of people would find very interesting among other things the Working Group's focus or lack of particular focus on antidumping issues, in case anyone missed it.

We are about a half an hour running overdue and I put that entirely on the responsibility of the moderator this morning. I'm going to borrow five minutes at least from the break and see if we can't cut the break down to 10 minutes and I'll probably borrow some time from lunch to get us back on schedule. So 10 minutes.

(Break.)

MR. RILL: Our next speaker is Dieter Wolf from the German Federal Cartel Office.

MR. WOLF: Dr. Stern, Mr. Rill, it's a pleasure for me to be here. I feel honored to participate in this hearing. I offer my compliments to you for having convoked this meeting and having prepared it so perfectly.

We will, of course, hold discussions, and are doing so already, on various aspects of the topic, “protection of competition and international cooperation,” which is why I would like to concentrate in this first round on one point that is causing me particular concern at present, and I think others, too.

The subject that I currently consider to be of growing

importance in international competition policy is global concentration and our reaction to it. The extent of the current wave of mergers is considerable both in the United States and in Europe. As with the notifications under the Hart-Scott-Rodino Act or under the European Merger Regulation, we at the Bundeskartellamt in Berlin are also witnessing a growing number of cases.

In 1997, a new record was reached with 1,750 notified mergers, and the numbers for the first eight months of 1998 show that we will again reach this figure, if not exceed it. The focus of real mega-mergers still lies in the United States, but the number of transnational mergers is clearly increasing. Daimler/Chrysler is probably the best example of this.

The reasons for the recent wave of mergers are closely linked to the general trend of globalization. They lie in the liberalization of markets which have been regulated or insulated until now, in the massive progress made in information technology which favors the creation of global networks, but also in a trend towards global sourcing, and to the presence of enterprises in all the important partial markets of the world. But whether all these mergers will in fact bring about the alleged economies of scale and scope is of course open to dispute in individual cases. This is also true of the question whether an increase in profit in the wake of mega-mergers can actually be attributed to efficiencies, or simply to an increase in market power.

However, we are not gathering to discuss individual cases. I'm just stating that the current wave of international mega-mergers raises two questions. Firstly, whether the current concepts of substantive merger control

suffice to adequately address the competitive concerns raised by large mergers. Secondly, whether the existing competition law systems at national and supranational levels, with their limited geographic fields of enforcement and implementation, are adequate. Certain merger projects that affect all continents are probably already rather too large for national merger control regimes to handle. The question therefore arises of how to ensure that the law can be enforced in the future vis-à-vis the global players.

These questions are in stark contrast to what is or has been discussed at the international level until now. Current discussions -- and your meeting of today is the exception -- current discussions about international cooperation in competition matters take no account of concentration and almost exclusively revolve around the question of fighting hard core cartels. This applies to the discussions within the WTO Working Group on the interaction between trade and competition policy but, above all, to the many bilateral agreements on competition matters. The most recent example in this context is the positive comity amendment to the U.S.-EU cooperation agreement which explicitly leaves aside merger control.

In the course of our meeting this afternoon, we will return to bilateral agreements, but allow me to make one comment for the moment. It seems doubtful to me that focusing solely on combating cartels is justified. Irrespective of the undoubted harmfulness of cartel agreements, we must accept that cartels are almost permanently subjected to centrifugal forces and are therefore unstable. Mergers are something completely different. Structural deterioration resulting

from concentration is, as a rule, irreversible. In theory, it could be addressed by means of divestiture, but I do not need to point out that divestiture is a highly problematic and rather ineffective instrument of competition policy. Mind you, I'm not against us jointly combating cartel agreements, I'm simply saying that this alone is not enough.

Now, we will probably reach agreement more quickly on the necessity, or at least desirability, of subjecting real mega-mergers to international control than on the question of how we should put such control into practice. Allow me to make just a few cursory remarks in this connection.

According to the minutes of the first meeting of this Committee, on 26 February, Assistant Attorney General Klein spoke of three ways of addressing international competition problems: the extraterritorial application of national law, bilateral treaties geared towards the idea of positive comity, or a multilateral set of rules. I agree with his analysis, excluding the first variant as one which could be regarded as legitimate, but I agree with this analysis.

I would like to take the opportunity to say a few words in favor of a multilateral approach. I do not think that we can achieve effective protection of competition in the long term solely by bilateral treaties. The firms' endeavor to be present in as many markets as possible the world over highlights the limitations of that approach. If we wanted to make do solely with bilateral agreements, we would probably be unable to keep abreast of developments. Since it often takes longer to negotiate political agreements than to extend entrepreneurial activity, we will probably lag behind.

I am not against setting up as far as possible a bilateral network of agreements, but I think that in view of its shortcomings we should think about a multilateral system of merger control too. Nobody is claiming, interestingly enough, that multilateral cooperation is wrong. They just say that the time is not ripe yet, those who are against it. However, this argument was never convincing enough to stop people thinking about things in the first place. In the light of the latest wave of mergers, it is more likely the case that we do not have as much time as we originally thought.

This Spring, we were able to celebrate the 50th anniversary of GATT, the forerunner of WTO. The World Trade Organization is based on the concept of multilaterality and most-favored-nation treatment instead of bilateralism and regionally insulated economic blocs. Who would have thought 50 years ago that 132 members emerged from the 23 GATT founders, with a further 30 countries including Russia and China applying to join. I think it would be worth discussing the idea of an international competition organization that protects the global market also against private restraints of competition and monopolization after the abolition of tariffs and state barriers to trade, even if that will take time. But for me the question of choosing or establishing an institution for international merger control is of secondary importance. I would deliberately like to leave that question open.

I am also open to suggestions about whether discussions should be conducted within the WTO or whether perhaps the OECD or another body would be the right venue. I can well imagine holding them within the

framework of the WTO, for this would best reflect the idea of multilateral cooperation. A point in favor of the OECD, however, could be that all its members already have a rather rich experience of merger control systems. My concern is that the discussion is held at all. The venue and the institutional considerations to be made are -- as I said -- only of secondary importance.

Now I can already see that some of you are about to raise another objection to this. If we ever achieve a joint set of rules for the control of mega-mergers, and then discover that they have been violated at some point, how on earth should we penalize this violation? It's more than daring to think that a supranational institution would have the powers to enforce its decisions in the individual states and to impose sanctions against violations. Such an institution that is reminiscent of a “global police force” would probably be quite undesirable. After all, we should not respond to the creation of mega-mergers by setting up mega-authorities.

Let me speculate a bit. It occurs to me that the signatory states of a merger control agreement might agree not to grant civil law effectiveness and legal protection to mergers that violate such an agreement. Ineffectiveness is a recognized legal consequence of restrictive agreements in many of the world's competition laws and, if desired, could harmoniously fit in with the legal frameworks of the individual states. Above all, it would not require any supranational enforcement measures on national territory. It would not actually require any state enforcement measures at all, but could be left completely to private litigation. It would be effective, however, for no enterprise

or its shareholders can be expected to tolerate such a degree of legal uncertainty.

I would like to leave you with these thoughts for the moment. After all, I did not come here to present ready-made solutions but to stimulate discussion. Perhaps you will allow me to conclude with the following remark:

Competition policy was given the name “antitrust policy” and not “anti-cartel policy” in its country of origin, the United States, and the restraint of competition by monopolization in Section 2 of the Sherman Act was, from the very beginning, treated as the equivalent of the restraint by contract in Section 1. In principle, the Sherman Act is chiefly directed against trusts. Focusing exclusively on the battle against international cartels would mean ignoring one of the two pillars of classic competition policy, the battle against trusts or monopolies. The introduction of antitrust law was a pioneering achievement by the United States for the development of the law in the world. We non-Americans have in the meantime learned our lesson and, although very grateful for this, we are taking the liberty of politely reminding our former teacher of that very fact. Let us take this step together.

Thank you very much.

MR. RILL: Thank you very much, Dieter. We stand reminded. I think, again, that you have raised a number of questions that should be examined in the panel discussion. Just to put down a point, though, while it's true that the 1998 agreement between the U.S. and the EC specifically dealt with non-merger issues, it did not replace the 1991 agreement insofar as the 1991 agreement did make some advances with respect to notification and cooperation in

the merger area. And as Karel has pointed out, the number of notifications has increased significantly between the U.S. and the EC in the merger area. Now, that may reflect not so much the agreement as the pace of mergers, but I think the agreement has something to be said for it. I see Chuck Stark in the audience. Please nod in the affirmative if what I just said is correct, thank you.

MR. WOLF: I'm not criticizing.

MR. RILL: No. No. I don't take it as criticism. In fact, if it were criticism, we would welcome it.

If we could now turn to Commissioner Itoda or Deputy Secretary General Kojima. Commissioner Itoda.

MR. ITODA: Thank you very much. It's a great honor for me to participate in this imminent meeting, for me in particular -- the SII, Structural Impediments Initiative, talks which took place over 10 years ago which Mr. Rill, you were a Chairman at that time, and Ms. Janow, who was also involved and was with the USTR at the time -- to be able to be here in front of you and to speak to you is a great honor to me.

In response to increasing globalization of corporate activities, it is recognized in Japan that it is necessary to enforce competition law from an international perspective based on broad cooperation with the competition authorities of foreign countries. So I will, based on Japanese experiences, talk to you about our activities.

First of all, anticompetitive activities in the Japanese market violate Japan's competition law, even if the party is a foreign company. However,

it is necessary for the foreign company to have a domestic presence in Japan in order for an administrative disposition to take place to eliminate the violation.

In a recent case, administrative action was taken against a Canadian company that was engaged in exclusionary trade practices in Japan. Because it had representatives of that company in Japan -- Japanese attorneys located in Japan -- we were able to take an administrative action.

Second, in this case, the investigation and the collection of information outside Japan was not particularly necessary, so the Fair Trade Commission of Japan was able to adjudicate the case by itself. But with most cases involving a violation by a foreign company, extensive cooperation with the competition authorities of the home country of the company is necessary. Irrespective of the actual occurrence of a violation, the competition authorities of nations must build cooperative liaison relationships through the following methods. One: mutual understanding of the competition laws and their actual enforcement in each country, and this is accomplished through regularly scheduled bilateral exchanges of information and opinions and joint training of officials; and exchanges of information and opinions concerning the competition laws of nations in the OECD, WTO and other forums. Two: provision of prior notification procedures for individual cases, such as the use of notification procedures of the OECD and other communicative measures. Three: creation of an environment that facilitates effective cooperation in investigations between nations. Four: conclusion of bilateral cooperative agreements, including a cooperative provision to facilitate investigations and a positive comity provision to eliminate violations

effectively and to avoid sovereignty issues.

Turning now to corporate mergers. Corporate mergers that affect two or more nations, especially mergers of foreign companies that affect competition in the Japanese market, are concerns of Japan's competition law. However, Japan's competition law had lacked legal jurisdiction for this type of corporate merger since enactment of the law, and these mergers were not illegal under the prior law. Due to an amendment of the Antimonopoly Act enacted just this year, mergers of foreign companies are illegal if competition in Japan's market is substantially restrained, and the amendment allows the imposition of necessary measures. This enforcement will begin January of 1999.

According to this provision, foreign companies that propose to merge will be evaluated in the same manner as mergers between Japanese companies. The threshold for providing notification to the Fair Trade Commission is based on the level of sales for the foreign companies in Japan. A merger plan must be notified to the Fair Trade Commission before implementation of the merger if one of the parties has sales of at least 10 billion yen (approximately $87 million) and the other at least 1 billion (approximately $8.7 million) in Japan.

In this manner, in Japan, there will be legal concerns in the future about mergers of foreign companies. Regardless of notification, when a merger affects competition in the Japanese market there will be an investigation to determine whether the merger violates Japan's Antimonopoly Act. The Fair Trade Commission will collect the necessary information concerning the merger. Because that information generally exists in a foreign country, we will collect the

information by seeking the cooperation of the competition authorities of the home country of the companies. Additionally, if the merger violates the Antimonopoly Act, we will request necessary measures to eliminate restraint of competition in Japan's market. In that event as well, we will exchange opinions with the competition authorities of the respective nation and engage in consultation.

But in any case, Japan is still a developing nation with regard to the application of competition law to mergers of foreign companies and we will endeavor to study this matter from now on. But given that the receipt of information from the home country of the companies proposing to merge and cooperation in investigation will be essential, and that if it should be necessary to request measures to eliminate restraints of competition, consultations with the competition authorities of the other nation will be crucial, so it is important to build a consensus on the method of cooperation between nations using a forum such as the OECD Committee on Competition Law and Policy (CLP).

Next, the problem of entry barriers caused by anticompetitive activities in foreign countries. These types of anticompetitive activities which occur in foreign markets adversely affect the interest of consumers in the countries in which the anticompetitive activities are committed. These acts directly violate the competition laws of a nation and as a result the competition authorities of the nation have strong concerns. Therefore, we believe that it is appropriate and effective that the competition authority of that nation directly enforce their own competition law to eliminate the activities that hinder market entry. Indeed, this should be an obligation for the authorities.

On the other hand, if a company of a nation encounters entry barriers to a foreign market, then it is the home country of that company that fully understands the damage caused by these barriers and itself suffers damages from them. Therefore, it is natural to request that the country in which the anticompetitive activities are taking place should eliminate the activities and the requested nation should address the matter.

In that case, direct application of competition law by the country of a company that has been hindered in entry is not deemed appropriate because there are concerns over: whether, one, competition has actually been hindered in the company's domestic market; two, whether the sovereignty of a foreign nation may be violated; and, three, whether an investigation may be difficult and inefficient and other problems may arise. So it may not necessarily be the best approach.

Now, if we recognize that the activities of the companies of many nations are increasingly globalized, then it is axiomatic that the close cooperation between the competition authorities of foreign countries is required. I believe that the approach to the cooperation would be developed in stages and will be varied. For example, in the case of Japan, we believe that the use of opinion exchanges at multilateral conferences, such as the CLP of the OECD or UNCTAD or the WTO, and the use of the notification procedures promulgated by the OECD are extremely significant in building cooperative relationships among nations.

Additionally, at the bilateral level, it is necessary to have forums for regularly scheduled exchanges of opinion and information. Japan

currently has regularly scheduled conferences with nearly 10 nations. Of these forums, the association with the United States is of the longest duration, having been maintained for 20 years.

Additionally, the culmination of a cooperative agreement between two nations is of course significant. Japan has recently begun preparations that will lead to the conclusion of its first cooperative agreement with the United States. In that sense, we are looking forward to the discussions in the second session. As we have just begun preparations for this agreement, I can only state my personal opinion and in general terms. But I do believe that what is essential to conclude the cooperative agreement are: well-balanced, substantive provisions, or prohibitive provisions; mutual understanding of the differences in the nature of competition laws of both countries, such as criminal as opposed to administrative; and also a positive comity clause to avoid sovereignty issues; and effective cooperation in investigations to the extent allowed by domestic law.

Now, there is the multilateral issue. Judging from the current state of the competition laws of nations, the adoption of specific measures for the standardization of competition law across nations would be extremely difficult at present. The level of competition law will decline if standardization is rushed. However, if we worked tirelessly toward the establishment of minimum standards as a long-term objective, that in and of itself should serve to raise the level of competition law and this cooperative effort between nations, I think, is significant.

In particular, rather than competition law as a whole, specific clauses such as those concerning hard core cartels may lead to realization of

minimum standards. Moreover, the establishment of joint forums, in which all nations can participate in the resolution of disputes concerning competition law, will also not be easy considering the major differences in the level of competition law between nations. Therefore, while preparation of common competition rules for countries in the future will be important, for the present I think it is more realistic for us to work with one another towards solutions based on mutual understanding. For that reason as well, a forum for regularly exchanged views between nations and the culmination of bilateral cooperative agreements will be indispensable.

And finally, in conducting a cooperative relationship with the United States concerning competition law, the Structural Impediments Initiative talks held in 1989 and 1990 were extremely significant. With the SII as a trigger, the competition law of Japan was upgraded in terms of systems and enforcement in part due to the talks. However, mere cooperation between competition authorities was not sufficient to accomplish this. Rather, competition law was discussed on a government-to-government basis.

For the United States, the Department of Justice was joined by the State Department, the U.S. Treasury, the Department of Commerce, the U.S. Trade Representative, and other entities on the U.S. side, while the Fair Trade Commission of Japan was together with the Ministry of Foreign Affairs, the Ministry of International Trade and Industry, the Ministry of Finance and other Japanese government agencies. Of course, DOJ and FTC led the debate.

But another reason for the success was that we discussed

competition law itself rather than focusing on the problems of individual industries and companies. The philosophy of competition law was always present in these sessions. In this way it may sometimes be necessary that in order to promote cooperative relationships effectively, that each nation has a mutual understanding of competition law. So in that sense, I am convinced that all of the economic policies of each nation must be made understandable from the competition law perspective.

My explanation may have been insufficient in certain areas, so Mr. Kojima, my colleague, will make supplementary remarks.

MR. KOJIMA: I would like to make a few additional comments concerning the three approaches or options, namely the unilateral approach, bilateral approach, and multilateral or plurilateral approach. With regard to the first option, that is to say unilateral approach, Mr. Itoda has already explained how Japan applies our competition law, the Antimonopoly Act, to foreign enterprises. In this connection I will refer to the U.S. Antitrust Enforcement Guidelines for International Operations.

The 1988 Guidelines took the position that, regarding U.S. export trade or export commerce, the application of U.S. antitrust laws would be limited to cases in which there was harm to U.S. consumers. The revised Guidelines state that the Department of Justice and the Federal Trade Commission would take appropriate enforcement action against foreign anticompetitive conduct that restrained U.S. exports, whether or not the conduct results in direct harm to consumers.

Japan Fair Trade Commission, as well as the Government of Japan as a whole, made reservation on this point and our position remains the same. Such antitrust enforcement for the purpose of protecting U.S. exporters may result in a deviation from the purpose of the competition laws, which is to maintain competitive markets.

We are of the view that in order to deal with anticompetitive conduct in foreign territories effectively, while avoiding violation of sovereignty of countries concerned, efforts should be continued to establish bilateral or multilateral international rules to address such anticompetitive conduct. Until the establishment of such rules, anticompetitive conduct should appropriately be dealt with by competition authorities of the countries where such conduct takes place.

As Commissioner Itoda has already explained, Japan has not concluded any competition cooperation agreements, but we have entered into negotiation with the United States authorities. I see here today in the audience the two tough negotiators from the U.S. side: Mr. Stark of the DOJ and Mr. Tritell from the FTC. We are determined to conclude this agreement as soon as possible on a mutually agreeable text.

Apart from such bilateral arrangements, in respect to criminal investigations, including those for anti-monopoly cases, the government of Japan can extend assistance to law enforcing authorities of other states on a reciprocal basis in accordance with the International Investigative Mutual Assistance Act.

As to the multilateral approach, we highly valued the

contributions made by the OECD for many years. Earlier this year an OECD Council Recommendation Concerning Effective Action Against Hard-Core Cartels was adopted. In this respect we appreciate the initiative taken by Mr. Klein as a proposer of this Recommendation.

Following the Singapore Ministerial Meeting in December 1996, the Working Group was established at the WTO, and we have been discussing interaction between trade and competition. Professor Fels and Professor Jenny, and other members here, have eloquently described the interaction between trade and competition. At the coming session of the Working Group later this month we are going to discuss how the Working Group should proceed from now on.

Japan is in favor of continuing the work of this Working Group for another half year. Since the Working Group is regarded as an educational process, as Professor Jenny mentioned, we should take up any issues which any member raises concerning all aspects of interaction between trade and competition. This will include trade measures affecting competition as well as competition policy affecting our trade in a balanced manner. We also consider that the possibility of making international common rules on competition law and policy should be studied, examining merits and demerits of such rule-making.

Thank you, Mr. Chairman.

MR. RILL: Thank you very much, both of you. And Commissioner Itoda, on behalf of Professor Janow and myself, we appreciate your comments of being willing to be able to come back and deal with us after the SII

talks. I think they were productive.

I'd also like to acknowledge the presence of another one of our leading negotiators in the SII talks: former Commerce Under Secretary Michael Farren, who was also a core representative of the U.S. in those talks. And I think he came here just to hear you. But I think we can get into the discussion in more detail as we go along.

I would put on the table a question you may want to refer to later: that is to get a little deeper into your concept that the notion of positive comity requires a balance of law and a balance of enforcement process between the parties to the agreement. It would be interesting to hear a little more about that.

But for now, if we could go to President Fernando Sanchez Ugarte from the Republic of Mexico.

MR. UGARTE: Thank you, Mr. Chairman. I want to thank the International Competition Policy Advisory Committee for the opportunity granted to me and the Federal Competition Commission of Mexico to express our views. We consider these very important topics today with regard to future developments in competition policy.

As it has been noted here, the world is becoming increasingly globalized as a result of, on one hand, the national trade agreements that have removed many of the previous restrictions on the free flow of trade and investment between nations and on the other hand, due to the unilateral decisions taken by many countries convinced that it is in their own best interest to have markets that

are free and efficient. This process has not been concluded yet. There are still many obstacles and the ghost of protectionism is still haunting the world and ready to take over if we let it loose.

Globalization represents a major improvement for the economic well-being of the world as a whole. It poses, however, important risks that have to be reckoned with and managed. The financial crisis that we are living with today is a vivid example that globalization can lead to rapid transmission of the financial problems in one country to its trading partners first, and then it can extend rapidly to other countries, even affecting the world economy as a whole. It's true for the financial sectors and markets; I think it's also true for other markets. That is why competition policy has to be analyzed now in a more global context.

Globalization means among other things that the world markets are interconnected. We cannot now treat the national market of one country as isolated from the rest of the world. The same is true for an economic agent. Major corporations of the world operate today globally and they design strategies to face competition across national borders. This is all very relevant for the design of competition policy on a global economy.

Let me mention now briefly what in my view are the most relevant issues regarding this subject. First, I think that competition policy has been less active than other policies like trade and investment policies, regional integration, intellectual property protection, and deregulation in promoting world competition. The scope of competition policy has been, with some important

exceptions, strictly national and the role of the competition authorities has remained mainly territorial. The advocacy role of antitrust authorities has been mainly restricted to the promotion of competition within national borders. I think it is time that this changes, that competition policy takes a more active role in the promotion of world integration.

Second, even though markets are becoming increasingly global, antitrust problems are involving more than one country at a time. We are living today with a trend of mega-mergers, where multinational corporations are joining forces with other very large multinational corporations to become more competitive and so that they can face the challenges of global competition. This represents major efficiencies that can be directed in this process, however, it also poses serious risks for competition.

Many mergers of today involve more than one national jurisdiction and this calls for a concerted action among the respective antitrust authorities. Some important examples have been pointed out here. In the case of Mexico, I think that we have been having very interesting cases involving mergers between companies doing business in Mexico and the United States. One example that I find particularly interesting is the one of two railroad companies: the Union Pacific and Southern Pacific. It is interesting because it really does not represent two companies that are doing business in Mexico. These are companies that are strictly doing business in the United States.

However, the impact of this merger was significant to Mexico because most of the railroad traffic between the United States and Mexico is

conducted by these two railroads. So I think the fact that the U.S. authorities took remedial action, not only with regard to competition issues that were relevant for the U.S. but also for international trade, I think was quite significant or quite important.

Third, as markets become integrated and corporations become multinational, monopolistic practices become global. The cartels of today are not limited to the borders of one specific country, so the enforcement of competition laws requires a multinational effort. Certain business conduct taken by an economic agent in one country can now affect the markets of other countries. And there is no way in which effective enforcement of competition law can be done without international antitrust enforcement. As a result, restraints in effective world markets pose a major threat to the overall efficiency of the world economy as a whole.

As Joel Klein was pointing out, one interesting case that illustrates this point is that of Archer Daniels Midland. It basically had serious implications for international competition and I think that cases like that will become more prevalent as globalization progresses.

Fourth, the relative size of corporations is growing over time. What seemed a large corporation five years ago today is really a very small company. Business size is especially relevant for countries that are relatively small or even medium-sized countries. It becomes harder and harder to counteract anticompetitive acts of major multinational corporations that in many instances are probably even larger than one country taken individually.

So these major corporations, just by mere size, can threaten to stop the economic progress of a small or even a medium-sized country so that antitrust enforcement can become very vulnerable to the threats of multinational corporation. This again calls for the concerted action of respective national antitrust authorities.

The fifth point I want to raise has to do with the criteria that different antitrust authorities apply in order to determine whether in different situations there is a violation of their respective laws. And I think that even though there has been great progress in this regard, the view that most antitrust authorities apply is still restricted to the national markets and to the national economies. And I think that a lot of efforts should be made in order to standardize more the procedures used by antitrust authorities on the one hand, but also make these more compatible with international trade and the process of globalization that we are living today.

Sixth, and this is a point that has been raised by many of the previous speakers, we have very different and contradictory standards to judge anticompetitive practices. If these take place within the corners of one country, we apply antitrust legislation, or when these anticompetitive practices takes place across countries, we are applying antidumping legislation, and we have here a problem of asymmetrical treatment and of different methodologies being applied for what appears to be a similar problem.

I know that this is a very touchy and sensitive issue. I don't want to waste more time because it's complicated. One suggestion I could make is

instead of thinking that one law should prevail over the other, maybe we should try to harmonize the methodologies that are being used under antidumping legislation and competition law so that they both become compatible.

Seventh, most of the multilateral trade agreements that are being signed today do not contain specific or very elaborate chapters in competition. And most of the cooperation between competition authorities is taking place outside these trade agreements. This, however, is changing very rapidly and regional world trade organizations are becoming increasingly concerned about the effect of competition restraints of world trade and investment. Here I think it's also interesting to bring out the Mexican experience.

First, with respect to NAFTA. As you know, NAFTA contains a very limited coverage of antitrust problems. Article 1504 of NAFTA is, I would say, limited. And the experience that we have had under this Article is still, I would say, unsatisfactory. We have had of course opportunities to meet twice a year and that's welcomed. However, I think that the progress has not been what I expected and I think that more work should be done under Article 1504.

Mexico is currently negotiating several trade agreements, including one with Israel and another with the European Community. And I would say that, in all these agreements we are considering more explicit antitrust provisions and I think that this is going to be very important for the deployment of a more effective antitrust policy in accordance with trade and liberalization remedies.

Eighth, national antitrust legislation is usually permissive

about monopolistic practices conducted by nationals of one country that take place outside the country's own territory. The majority of nations do not penalize such practices and some nations even allow some protections to take place. I think this is very damaging in the case of horizontal restraints, probably less so in the case of vertical problems, and I think that this could change. And I know it's also politically very touchy, but it's a step that sooner or later we have to take. We cannot condone anticompetitive actions that are taken outside the jurisdiction of one country. I think that it is important to change our views.

My final comment has to do with how markets are changing, how technology is influencing the shape and the working of these markets. We see today that it's very difficult to predict how new technological developments are going to change international trade and therefore I think that many of the positions that antitrust authorities are taking today are going to be influencing how markets will develop in the future. The example here is of course Microsoft, a case that is being reviewed by the American antitrust authorities. And I think that you have a great responsibility here. Whatever you decide is going to really change the face of electronic commerce forever. So this is an important responsibility and I know that you have the knowledge and the depth of view to take a good decision, but I think that it will be important that you take the viewpoints of other countries, of other antitrust authorities, in understanding what problems may arise in other jurisdictions regarding the decisions you are going to take in this specific case.

So I think that my comments can be summarized into one or two suggestions. The first one has to do with cooperation, international

cooperation. I think that even though cooperation in antitrust matters has been limited, has been mainly bilateral and that still many countries, including Mexico, do not have bilateral antitrust agreements, I think it is important that this process of international agreements becomes more extensive and that countries undertake these kinds of agreements at a faster pace than we are seeing today. And I think it is important that the U.S. takes an active role in promoting bilateral agreements. Mexico is willing and wants to start negotiating an agreement with the United States, and I think that it's important that the U.S. takes a very active role in this regard.

Second, with regard to regional agreements, I think that it is also important that these agreements do incorporate more extensively these antitrust remedies and disciplines and that antitrust policy becomes an integral part of the overall trade liberalization process. And here again I think that the agreement that Mexico is apparently negotiating with the European Union is a good example, and I think that we should encourage that kind of approach.

Finally, with respect to multilateral cooperation, I think that the OECD is doing a very good job in getting a good number of antitrust authorities together, exchanging views. And I also think that it is important that the World Trade Organization becomes active when reaching a consensus regarding how to incorporate antitrust remedies and disciplines in different trade agreements and the overall conduct of international trade.

Mr. Klein mentioned at the outset of this hearing, that this is a cartel of antitrust authorities. Of course, we are the authorities, and nobody can

challenge what we are doing here. I think that given the process of globalization that we are living in today, it will be very difficult to counteract the kind of anticompetitive behavior we are going to be facing with the integrated world if we don't have this kind of setup where the antitrust authorities work together for the same purpose, which is really trying to counteract anticompetitive practices but taking not only the national economy perspective but the world as a whole.

Thank you. Thank you very much for your time.

MR. RILL: Thank you very much. And we look forward to your continued participation.

Our next speaker will be Luis De Guindos of Spain.

MR. DE GUINDOS: Let me start first of all by thanking this Committee for the opportunity to address and participate in such an important and I am sure valuable meeting. In this, I promise you, brief intervention, I want to deal with two issues in particular. The first of these is how we as competition authorities can enforce and enhance competition in an increasingly global economy. And the second, and much more specifically: the phenomenon of mega-mergers.

In the last few decades, national markets have been increasingly opened up for trade and foreign investment, and have undergone far-reaching liberalization processes. As market forces come increasingly to the fore, so the demand for antitrust action augments. Competition policy tools have to be developed and competition authorities have to enforce them more actively, particularly in those sectors where liberalization is underway.

At an international level, the liberalization and deregulation of national markets, along with technological revolution, have opened the door to a globalization process with wide-ranging repercussions. As it has been stated previously here, as internationalization steps up in the corporate sector, firms increasingly operate in more than one country. So logically their conduct and practices can affect more than one market. It is obvious, then, that the control of a prohibited practice or the authorization of a particular conduct may involve national competition authorities from different countries or jurisdictions. And this makes cooperation between competition authorities increasingly necessary.

It is important to stress, however, that cooperation is not so much about firms from different countries as about the impact of determined conduct on consumers in different national markets. And the market effect of such conduct must be the key issue in deciding the need for cooperation.

Before analyzing the scope and instruments of cooperation, it is useful to consider the main material restrictions we now confront and will continue to be faced with in the near-term future. These are primarily: first, that the majority of cases we deal with have no significant impact on different national markets; second, that not all countries are equally affected by plurinational cases; and, finally, that the amount of material and human resources devoted to competition policy varies from country to country. And we have to be realistic on this score: the lack of resources is often a serious obstacle to cooperation development.

But despite these limitations, it must be clear to everyone that

as globalization intensifies, cooperation between competition authorities becomes more essential than ever. So what steps do we need to take to enhance international cooperation? From our standpoint, the main ideas behind cooperation guidelines should be as follows. Firstly, in the vast majority of cases cooperation is still at a very "primitive" stage, and there is still enormous scope for the development of relatively simple but productive cooperation mechanisms on an informal basis.

Secondly, the number of formal bilateral agreements concluded is, likewise, relatively small considering the number of countries with some kind of antitrust system in place. Bilateral cooperation, therefore, can and should be developed further. We feel its most important advantages are that cooperation can focus on the areas of greatest need and be adapted accordingly. In this way scarce resources can be better allocated. Additionally, bilateral mechanisms and agreements are the starting point for more ambitious projects. We should remember that in other fields, such as trade relations, multilateral cooperation systems were only developed after decades of bilateral agreements.

Differences between systems make multilateral cooperation an even more difficult task. But in any case, the directions to work in are the following. One, to look for common core principles, at least with regard to the anticompetitive conducts that cause most harm. Some of these principles could be extrapolated from the mechanisms used in bilateral agreements. Two, to work towards the convergence of methodological approaches in dealing with antitrust cases, starting from the exchange of experiences and information-sharing in

general. And finally, as far as possible, to set up cooperation mechanisms along the lines used in bilateral agreements.

When discussing cooperation in the antitrust field, a number of factors must be taken into account. For example, the varying nature of the institutions applying antitrust rules and also the goals and the nature of those rules, remembering that their essential aim is to prevent conduct which distort the function of the market and ultimately to safeguard the public interest from the illicit action of firms. And of course we also have to bear in mind the precise boundaries of each national system. Each country imposes its own limits on the exchange of information and the defense of third-party rights. Some cases may even involve questions of national interest. And finally, cooperation can never proceed at the expense of national sovereignty.

Bearing in mind these principles and these realities, we do not see the WTO as the best forum for channeling multilateral cooperation in competition matters. WTO is not the natural home of competition authorities, and our view in this respect is that the OECD is a more suitable forum to work on common principles and approaches in the competition field. The ends and means of the WTO are not the usual ones for antitrust policy and may even be in flat contradiction, as the WTO's aim is to foster international trade through the dismantling of protectionist trade regimes on a reciprocal basis.

We do not therefore accept the idea of a multilateral framework within the WTO, whereby governments agree to apply competition policies in line with a set of common rules, backed by the appropriate

problem-solving mechanisms when these are not properly observed. In short, we do not understand multilateral cooperation in antitrust matters as an instrument to force countries to reduce market entry barriers arising from the anticompetitive practices of firms. We believe this is not the only aim of multilateral cooperation, nor the best means to achieve the goals we have set ourselves.

Finally, let me say a few words on the mega-merger phenomenon. The idea has taken grip that we are about to see a proliferation of merger operations between big-sized firms. The competition authorities have been called on to take a more active role in this process in two different ways, by enforcing control instruments and by strengthening international cooperation. The competition authorities need to be both wary and prudent in any intervention they make. Mega-mergers are a natural consequence of the globalization process. As markets become wider, firms seek to increase their size to preserve their market power and capitalize on potential economies of scale and scope. So mega-mergers in this sense are the fruit of globalization. This phenomenon may turn even more acute in the case of the European market, as monetary union kicks in. The implementation of a single currency speeds up the unification of markets and therefore adds further fuel to the merger trend.

But there are other factors potentially responsible for the alleged mega-merger wave. For instance, companies too are exposed to wealth effects which drive them to take over other firms, particularly in the mature phase of the business cycle. Consequently, we must not forget that merger rounds normally entail a cyclical component.

To conclude, then, mega-mergers must be regarded as a logical consequence of a whole range of factors, and, importantly, as a symptom of market dynamism in pursuit of ever greater efficiency. Of course, the competition authorities must be alert to the possible creation or enforcement of dominant positions as a result of such operations, and cooperation between competition authorities must be welcomed as a useful and necessary means to this end. Nevertheless, we must also take care to avoid any kind of intervention that could deter market dynamism or prevent firms from improving their economic efficiency. Otherwise, there is a very real risk that we as competition authorities could actually impair economic growth and damage consumer welfare.

Thank you very much.

MR. RILL: Thank you very much. Those are views that I think will turn out to be somewhat controversial as the discussion goes forward, for which I thank you. Our final speaker, I was going to say this morning but it's no longer morning, is Ignacio de Leon, the superintendent of the ProCompetencia in Venezuela.

MR. DE LEON: Well, first of all, I would like to express my deepest appreciation for being invited to this very interesting international conference on competition. And I will have to say first that I will try to be very brief. I would try to put my ideas on competition in line with everyone's need to go for lunch. I'll try to subject myself to the schedule. There have been many interesting things that have been said before and I would like to address them again. This is a problem of being the last speaker at a conference, speaking on

behalf of Venezuela.

MR. RILL: We'll reverse the alphabet the next time.

MR. DE LEON: Let me set the stage first of all for you who don't know perhaps the Venezuelan experience. Venezuela has a competition statute since 1992, and there has been an interesting enforcement procedure that has been in place in Venezuela dealing with all antitrust areas and mergers ever since. At the supranational level, Venezuela is bounded by Decision 285 of the Andean Pact. This decision resembles Articles 85 and 86 of the Treaty of Rome in the European Union. However, this is a decision that has not been enforced effectively because of internal contradictions in the decision itself, particularly the fact that when this decision was made it was made to very closely resemble the Andean antidumping decision, Decision 283, because there wasn't guidance as to what competition policy was about at the time. That was in 1992.

This decision is in the process of being revised nowadays, according to the new thoughts. What I would like to emphasize here is the fact that, from a transnational point of view, Venezuela -- although subject to Decision 285 -- is not subject to an effective, if you allow me, international set of rules. That probably was not a problem beforehand but nowadays it is because our international trade, particularly with Colombia, our principal commercial partner, has increased dramatically over the years of this last decade. And that probably emphasizes at the microlevel what the consequences are of not having an effective transnational decision governing cases that would involve restrictions on trade imposed at this level. To explain the implications of what I'm saying here, maybe

I should give you an example, because we have many examples dealing with this problem. But a sugar case is the one in particular that I would like to emphasize here.

This case basically refers to a restriction which is being imposed by sugar cane refineries in Colombia and in Venezuela, according to which they have divided our national markets. The interesting thing here is that Colombians are more efficient in producing refined sugar but they don't sell it refined, they sell raw sugar to our Venezuelan refineries, and in this way they allocate our national markets. What is even more interesting at this point is that this agreement has been reinforced by a government restriction that has been implemented by the Colombian government according to which no sugar can be imported from Venezuela into Colombia. That is a restriction which has been in place since Venezuela, for reasons that have nothing to do with our competition rules, decided to open up our trade with Central America for the import of refined sugar.

What I'm trying to emphasize here is that there are two problems in this matter concerning international competition. The first one is the need for effective cooperation, or even better, a supranational body dealing with these restrictions. If that is not possible, cooperation among national antitrust agencies will perhaps provide a solution for that. And also the second important thing here is that probably this example which is being reproduced in other sectors, like maize and rice, and now even in services like transportation, has been a consequence not only of the agreement entertained by private firms, in this case,

sugar refineries, but also it's been reinforced by restrictions that are being put in place by governments themselves.

In fact, we have had a tremendously hard time convincing our government, the Venezuelan government, not to reimpose or block our imports of sugar from Central America because that's the only way in which in the short run we can see that this problem does not get even worse. So the question now that I would like to address here, is to what extent is it possible for national antitrust agencies to cooperate and develop this cooperation more intensively.

What I see is a problem, a Prisoner's Dilemma if you will allow me, whereby each national agency might be tempted to give preferential treatment to the respective national firms.

The first solution, as I said before, is to create a supranational body, surveying the integrated market, and that probably is the reason why the European Union experience is so exceptional at this point in having provided a tremendous breadth of solutions for problems involving transnational cases within the European Union.

Now, the problem with implementing this solution in cases where there are no supranational institutions in existence, is that creating a common appraisal of substantive issues affecting competition might be somehow difficult because it entails a common perspective on public and economic policy issues which are unlikely to be found outside of the realm of an economic integration process. But we are faced with the problem of globalization anyway and there has to be some answer for this. So the second best solution, in my

opinion, is of course cooperation among antitrust agencies.

However, this is not so simple. Because in order for this cooperation to be successful, as I see it, there is a great demand for independence on the side of each national antitrust agency from its own government, so that the Prisoner's Dilemma problem that I mentioned before is not being reproduced via the influence exercised over antitrust agencies by their respective ministry. Probably this is something that is not a big problem in developed countries, but in developing countries, I can assure you that we are constantly threatened by the influence that our governments want to exercise on our activity. So the competition agencies must be isolated from that influence somehow.

And on the other hand, I see two further problems dealing with the harmonization of substantive principles. The first one, of course -- I should say both of them deal with the definition of competition itself. There is no consensus really about what competition is. Is it a process of finding new information and markets, or is it a structural question, or what is it in fact?

The first aspect of this has to do with the nature of the restrictions introduced because on this side, there is a tendency to assimilate competition or anticompetitive conduct with those restrictions introduced by firms exclusively. And in our own experience in Venezuela, and probably that happens as well in other developing countries, the fact is that, as I mentioned before, our restrictions on trade are very frequently a consequence of government-imposed restrictions and the sort of regulation that prevails in our institutional environments. This is why Venezuela has taken a tremendous interest in

developing, for example, white papers, reports exploring the opportunities of enhancing competition by restructuring the regulatory environment in particular sectors like electricity, transportation, and other sectors, as well in our culture, even education, in order to make public schools compete among themselves.

And on the other hand, and this applies at the international level, a thing that one has to tackle here is the forbidden word: antidumping. And the question here is to what extent antidumping and countervailing policies are, particularly antidumping, are dealing with restrictions imposed on fair trade, or to what extent do they create another restriction on trade? This is something that deals with one of the aspects that I see in which there is no substantive harmonization so far and which will have to be dealt with if we really want to harmonize our substantive principles and antitrust matters internationally speaking.

The second one has to do with a particular concern that I have in the sense that I don't see it very well reflected in the concerns of innovation within antitrust theory. The analysis of antitrust generally focuses on markets which are already known, but innovation refers to the creation of new markets, new products, that therefore deal with what I would call unknown information.

And of course, I am very well aware that antitrust theory has evolved over time in order to deal with this aspect, but still I don't see it very well reflected in the sense that, as I see it, innovation process is basically one which is evolving and changing constantly, whereas the dynamic analysis enforced on their

antitrust theory basically deals with a close-ended view of the world in which the authority has all the information needed to enhance social welfare. So if you allow me, there is an epistemological question involved here and this is a question that hopefully will be tackled by the WTO Working Group and their studies for the ongoing process of analysis of international antitrust and innovation.

So in closing, my guess is that it is possible to look for consensus on different grounds, at least in the short run, on grounds not dealing with substantive antitrust principles. It is unlikely that that could happen. Of course it is desirable that it will be the case. But in this area perhaps it's more realistic for all of us to think about setting duties for international agencies to exchange information about enforcement practices which might create sort of a convergence process in order to think about harmonization of these principles in the near future.

Secondly, perhaps, there is an even more fertile ground for harmonization in those aspects dealing with the procedural aspects of competition enforcement, basically the way in which the rule of law is respected. Because here we do have a consensus about the need of having a rule of law and the way in which we enforce our competition laws. And that will cover, of course, things like data collection, access to evidence, minimum length of procedures, the evaluation of the evidence presented by the antitrust authority and the parties, and the transparency of the procedures.

As a conclusion, I would say that successful cooperation on the international level among antitrust authorities depends on their commitment to

the goals realistically set, and we can advance in that direction. But there are still many questions ahead of us to be resolved at the practical and theoretical level, and these questions will have to be addressed before further success is achieved.

Thank you very much.

MR. RILL: Thank you very much. I look forward to your further participation as well.

That concludes an extraordinarily valuable presentation of views. I think we want to resume in 30 minutes so that we don't lose the participation of those who will proceed with our next roundtable on cooperation agreements, specifically, to discuss cooperation agreements, a roundtable panel that will be moderated by my colleague, Professor David Yoffie. We can start at 1:30, if that's agreeable. I think it may be more difficult on the audience than it is on the panelists, but the panelists have worked harder.

(Recess.)

MR. RILL: In the interest of getting the most benefit from Allan, who I think is on his way in, and Karel, both of whom must leave somewhat early, what I would like to do is promptly turn it over to Professor David Yoffie, who will moderate the next panel on cooperation agreements. The panelists will be from competition authorities who have in place cooperation agreements with the United States: Allan Fels, Konrad von Finckenstein, Karel Van Miert, and Dieter Wolf. But I would invite those of you who have comments, including members of the Committee, relating to the pros, cons and recommendations for international cooperation agreements simply to put your namecard up at any time

and David will recognize you. And I'd also like to acknowledge the arrival of Jerome Gallot, the Director of the DGCCRF, from the Republique Francais, who will make some comments at the conclusion of this panel on cooperative agreements. So David.

MR. YOFFIE: Thanks, Jim. Let me also start by saying that we will be rejoined by other participants who spoke this morning after about an hour or so, but the purpose of this roundtable discussion is to hear from those jurisdictions specifically who have negotiated bilateral agreements with the United States. And what we are interested in hearing about is your perspective on your jurisdiction's experiences with these bilateral agreements, and more specifically, what are the next steps that we should be looking for in international cooperation.

This panel is designed much more as an open discussion, rather than just recitations, and for more interaction between all of the panelists and the members of the Committee. I would also like you to feel free to compare your experiences in bilateral antitrust enforcement with the United States with any experiences you've had with other jurisdictions to the extent they are relevant. Let me pose the specific questions I would like to throw out to the four of you for consideration. Some of them are fairly obvious.

First, the Committee would find it beneficial to understand where you have seen both positive and negative experiences in enforcement cooperation with your existing bilateral agreement with the United States. In particular, we are interested in getting some sense of to what extent has the bilateral agreement been necessary to provide for that enforcement? In other

words, is it possible that we could have had similar enforcement, similar arrangements without these agreements in place? That would help us identify which parts of the agreements are most useful for going forward.

In addition, we would like to know which of the areas have the greatest need for cooperation. There are a variety of different areas within antitrust enforcement, some which require agreement and some which may not. Are there bilateral instruments that are necessary or desirable means of strengthening cooperation? In particular, are there things we need to do vis-à-vis sharing confidential information or waivers that might be useful more broadly in the antitrust enforcement context?

Lastly, I'm going to throw out another question which I'm posing specifically to the Committee, which is to think about positive incentives to try and induce greater cooperation between the United States and all other jurisdictions. In particular, Konrad von Finckenstein raised the question this morning about treble damages and the problems that they cause. One of the questions that we have raised in this Committee is the idea of whether there is a way for the United States to share some of the penalties or fines that are assessed as part of these antitrust actions with the cooperating agencies, and would those kinds of positive incentives be useful and induce changes in behavior as part of our ongoing activity. So on that note, I would like to throw out these questions to you. I see that on that last comment, people were either positive or negative.

DR. STERN: Particularly in developing countries, we heard this morning that there was a need for greater budgets, et cetera.

MR. RILL: I don't see a lot of laughter from the Department of Justice right now.

MR. YOFFIE: I should say the Department of Justice has not received this idea enthusiastically, nor are we certain that the U.S. Congress will.

MR. RILL: But Joel also said this morning that this is an independent committee.

MR. YOFFIE: But the idea is rather than just looking for the negative implications of antitrust, are there more positive things we should share between the United States and foreign agencies? And of course one would assume that would go both ways, not just for the United States paying money but potentially the other way as well. Let me just open the discussion, open up the floor. I don't have any particular order for the panelists, so I will allow them to volunteer as they see fit.

PROFESSOR FELS: I happen to be first on the list so I will say something and let me say that we'll be in on the sharing of the treble damages in Australia. Nothing would delight us more.

I have a paper here which I'll also give to you as I did this morning, and perhaps because it's the first one after lunch, I'll just begin with a story. When I was first appointed to my job in 1991, I called on Anne Bingaman to say how Australia was always willing to cooperate with the United States in every respect. Now as you know she is an extremely polite person and it took her at least two minutes before she politely mentioned the Westinghouse case in which, once that case was underway, Australia, and a whole lot of other countries,

passed blocking legislation to make sure that the extraterritorial reach of U.S. antitrust law did not apply in our country or any other.

Fortunately, I had in my pocket a copy of the Mutual Assistance to Business Regulation Act that we had just passed. This legislation facilitates cooperation between enforcement agencies in the business regulation area between Australia and the rest of the world, and which Anne took away and read and I believe it was one of the important bases for your own legislation, where legislation is pretty similar in our country and yours.

We actually had this legislation quite a while ago, but what essentially happened in Australia was that in areas like securities law, tax law, and so on, it's just been taken for granted that there would be this type of cooperation. For some reason, it lagged in competition law. It so happened that when we were drawing up our laws, the people writing it were people who dealt with competition law issues and so they just automatically wrote in provisions about competition, taking it for granted that it would be something that everyone would agree about, but it turns out that it is for some reason far more controversial than some of the other areas.

So let me just go through the short paper that I have prepared. Obviously mutual assistance in enforcing antitrust laws is an important recent development linked with globalization which leads to a greater likelihood that the illegal aspects of a single course of anticompetitive conduct may occur in more than one country. Similarly, information, including evidence or individuals who can assist investigating illegal behavior, may not be located in the same

jurisdiction in which the contravention occurs, so there just have to be ways in which competition agencies can help investigate contraventions that extend into, or occur in, other countries. The Agreement between Australia and the U.S.A. is designed to take up such a role. The status of the Agreement incidentally, is that in Australia we have to follow some rather complicated processes to get the agreement of the state and territory governments and various other people.

We have gone through all of those stages, and there have been no substantial objections to this process, and the government is about ready to sign. It's not signed off yet but it's about ready to sign, and the fact that we had an election recently, unfortunately, caused a further delay. But we are hopeful that the final signature will be attached very, very shortly.

This Agreement demonstrates our commitment, as well as the U.S.A.'s to two-way cooperation in the enforcement of competition law. It will facilitate the exchange of evidence, enable the parties to assist each other's enforcement activities and investigation of possible breaches of the law. It provides for each country's competition authorities to cooperate in obtaining evidence of anticompetitive activity, to facilitate administration and enforcement of each country's competition laws, and notify the other party's competition authority about anticompetitive activities that may warrant enforcement activity. This ensures that information, evidence and witnesses that may be in Australia, yet are needed to prove an antitrust case that damages competition in U.S. markets or hurts U.S. consumers, are available to U.S. antitrust agencies, and of course vice versa.

Australia's law, incidentally, has a whole bunch of other laws about consumer protection but they are not part of this Agreement. We did have an Agreement in 1992, or we still do, between Australia and the U.S., relating to cooperation on antitrust. The new Agreement builds on the earlier one, and on the generally close relationship that has developed over the years between the DOJ, the FTC and the Australian Competition and Consumer Commission. We already have informal mutual assistance arrangements with New Zealand and with Chinese Taipei. Because of the requirements of the U.S. International Antitrust Enforcement Assistance Act of 1994 such arrangements with the U.S. need to be in the form of a treaty.

Obligations. The proposed Agreement requires that each party's antitrust authorities shall, to the extent compatible with that party's laws, enforcement policies and other important interests, inform the other party's antitrust authorities about activities that appear to be anticompetitive and that may be relevant to, or may warrant enforcement activity by, the other party's antitrust authorities.

Furthermore, each party's antitrust authorities shall, to the extent compatible with that party's law enforcement policies and other important interests, inform the other party's antitrust authorities about investigative or enforcement activities taken pursuant to assistance provided under the Agreement that may affect the important interests of the other party.

Of course, nothing in the Agreement requires the parties or their respective antitrust authorities to take any action inconsistent with their

mutual assistance legislation. So as to the types of assistance, antitrust authorities may request assistance to provide or to obtain evidence in relation to breaches, or potential breaches, of their respective antitrust laws.

Particular assistance contemplated by the proposed Agreement includes, but is not limited to: disclosing, providing, exchanging or discussing antitrust evidence in the possession of an antitrust authority; obtaining antitrust evidence at the request of an antitrust authority of the other party, including taking the testimony or statements of persons, or otherwise obtaining information from persons; obtaining documents, records, or other forms of documentary evidence; locating or identifying persons or things; executing searches and seizures and disclosing, providing, exchanging, or discussing such evidence; and providing copies of publicly available records, including documents or information in any form in the possession of government departments and agencies of the national government of the requested party.

Now, it's to be noted that assistance may be provided under the proposed Agreement whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the requested country. In other words, the fact that it's not illegal in our country doesn't mean we can't cooperate. Importantly, the Agreement provides that antitrust evidence obtained pursuant to the Agreement shall be used solely for the purpose of mutual antitrust enforcement assistance between the parties.

The only exceptions are where such use or disclosure is essential to a significant law enforcement objective and the executing authority

that provided such antitrust evidence has given its prior written consent to the proposed use or disclosure, and where the antitrust evidence obtained pursuant to this Agreement has been made public consistent with the terms of the Agreement.

The proposed Agreement shall not give rise to a right on the part of any private person to obtain, to suppress or to exclude any evidence, or to impede the execution of the request made pursuant to the Agreement. Further, nothing in the proposed Agreement compels a person to provide antitrust evidence in violation of any legally applicable right or privilege.

However, the parties to the Agreement may decline requests for assistance on the grounds, amongst other things, that execution would exceed the party's reasonably available resources that wouldn't be authorized by domestic law, or that it would be contrary to the public interest of the requested party.

Turning to confidentiality, under the proposed Agreement U.S. antitrust authorities and the Australian Competition and Consumer Commission will be able to share information obtained in the course of their investigations. The agencies may also provide each other with investigative assistance in order to obtain information, evidence, or testimony for use in antitrust matters.

However, in all instances, the information is subject to strict provisions for the protection of confidentiality and is to be used only for law enforcement purposes. The Agreement sets out the manner in which assistance can be provided, and the security, if necessary, which will be afforded such information.

In accordance with the requirements of the U.S. International Antitrust Enforcement Assistance Act of 1994, the proposed Agreement contains strict provisions to ensure that commercially sensitive information is protected. The proposed Agreement sets out at some length the procedures designed to prevent the unauthorized release of confidential information, and provides that each party shall to the fullest extent possible with its laws, maintain the confidentiality of any request and of any information communicated to it in confidence by the other party under the Agreement.

Further, the Agreement provides that each party shall oppose, to the fullest extent possible consistent with its laws, any application by a third party for disclosure of confidential information provided in accordance with the Agreement.

By entering into the proposed Agreement, each party specifically confirms that the confidentiality of antitrust evidence obtained under this Agreement is ensured by its national laws and procedures pertaining to the confidential treatment of such evidence. An annex to the proposed Agreement sets out relevant confidentiality laws.

Further, it's agreed that unauthorized or illegal disclosure or use of information communicated in confidence under this Agreement is a ground for its termination by the affected party in accordance with certain procedures. The disclosure of confidential information, or any information, may also be avoided under the proposed Agreement by denial of assistance in whole or in part on the grounds of public interest. That provides a safeguard against any kind of

fishing expeditions.

I should just also briefly mention we have mutual assistance arrangements in place with New Zealand and with Chinese Taipei. We work closely with the New Zealanders. We have a cooperation and coordination arrangement in place, and on a regular basis we exchange and provide information regarding investigations and research, speeches, compliance education, amendments to the law, human resource development, and corporate resources.

The assistance available under the Australia-New Zealand arrangement includes: providing access to information in the files of the requested agency, including confidential files, except where that information can't be disclosed in accordance with the law of the requested agency or where it would require the disclosure of information which has been provided to the requested agency on the basis that it must not be disclosed -- incidentally, we couldn't pass on information obtained under the U.S. treaty to New Zealand; preparing witness statements, formal interviews and obtaining information and documents on behalf of the requesting agency; and coordination on behalf of certain enforcement agencies.

That operates concurrently with the mutual assistance laws that exist between Australia and New Zealand and also with the OECD agreements, and it ties in with more general agreements between Australia and New Zealand on harmonizing business law.

We signed an agreement between the two countries on harmonizing business law as part of our close economic relations. In 1990 we

extended the application of our misuse of market power -- or abuse of dominance and monopolization provisions -- to markets in New Zealand, as well as Australia, and they did the same. This was complementary legislation. As a result, provisions against misuse of markets power extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand, irrespective of where the conduct takes place. Our court, the Federal court, can sit in New Zealand and the New Zealand court can sit in Australia to deal with any action under those provisions.

So that's a short summary of the Australian position and the Agreement is actually embodied in some available material, which you may or may not have had the opportunity to see, but which I have a copy of here. Thank you very much.

MR. YOFFIE: Thanks so much. We can continue in alphabetical order if you want. So Konrad?

MR. VON FINCKENSTEIN: Thank you very much. I don't have a paper like my colleague from Australia. I thought this was a discussion and we were going to share experiences; do let me do it along these lines. We very much value the agreement we have with the U.S., and as you know, we initialed one with the EU that will hopefully be equally well-functioning.

First of all, let me talk about our cooperation on criminal matters. We can exchange information with the U.S. under our law. We can actually give you confidential information for the purpose of advancing our own investigation. So, if in order to conduct an investigation in Canada, that means we

need to release confidential information to you, we can do that. And we have, of course, the Antitrust Cooperation Agreement of '95 with the U.S., which provides for notification, consultation, cooperation, and which we use quite actively. And finally we have the Mutual Legal Assistance Treaty, which is cemented on both sides by domestic legislation and under which we can make a request to you to use your traditional procedures to seize evidence in the United States and vice versa. You can make one to us, we can go to a Canadian court and request an order to get the evidence for you.

Generally it works very well. First, we are better able to find out what's going on in a particular case. Very often you have the information before us or vice versa. We have had criminal cases on both sides and we can share that information. We can coordinate our activities, we can coordinate the investigation, and coordinate the searches in order to avoid duplication. And sometimes we learn from each other how to approach cases, and how to conduct certain activities. There is a series of cases demonstrating that this cooperation works, on the whole, very well. We have had cases emanating from Canada, cases emanating from the U.S., some of which have resulted in fines or convictions on both sides, some on one side or the other depending on where the activity took place and where the evidence was. And of course, it's a great help in terms of preventing any evidence from being destroyed.

On the not so positive side, timing is sometimes very difficult to coordinate because we have different procedures. In our view, yours are more cumbersome than ours, and I'm sure your view is the reverse. There is also a

problem of attitude that needs to be overcome. It's an educational process. Having enthusiastic investigators on a case now suddenly having to notify another country and coordinating with them, throws them off their track. It's a burden. It's a nuisance that you don't need, and so it's an incentive not to do it if possible, or to do it late rather than early.

This problem exists equally on both sides. I'm not pointing any fingers here. It is just that one has to start thinking of these things in terms of there being crimes committed on both sides of the border and laws needing to be enforced on both sides.

And then there is also the question of leniency. A lot of these cases result in guilty pleas on the basis of negotiations. We have different leniency policies, and they need to be coordinated. We have to talk to each other, et cetera. There is no general rule, we do it on a case-by-case basis, but we have had problems trying to work some of these procedural difficulties.

On the civil matter side, as I mentioned before, Section 29 of our Act is really quite a barrier. We cannot share any information with you except for the purpose of our own investigation, and we cannot ask for any favors. So effectively on the civil side, most of the cooperation is on mergers where we notify each other and where we share information that is in the public domain. We do a lot of talking in terms of market definitions, and in terms of theories of the case, or trying to find out how a particular industry actually functions in the U.S. as opposed to Canada.

And we also work out our merger remedies, especially when

the case requires a remedy that can be effected in the United States. We can piggyback on a U.S. remedy and have it apply to Canada too; or it may require a parallel consent order in Canada, but often the main negotiation is done in the United States. And thanks to this cooperation, very often the United States can address implicitly Canadian concerns so that the resulting order can serve on both sides of the border. To the extent the case is the other way around, we can do the same thing. But the economic reality dictates that most of these cases create the biggest problems in the United States rather than in Canada.

One way of getting around this problem, not a very elegant way, the lack of ability to exchange confidential information, is to ask the parties to provide the information they have given us and we can ask to get a copy of the filing made in the other jurisdictions, and we do that. This is a very complicated and a very expensive way of doing it but right now that's essentially the way we deal with it.

As I mentioned in my opening remarks, I feel strongly that we should address the IAEAA legislation and try to amend our legislation regarding confidentiality so that we can take full advantage of that Act.

And we are also working, as I mentioned, in terms of positive comity, on an agreement similar to the one that you have with the EU, because we believe that in terms of antitrust, positive comity is a very elegant way to sidestep extraterritorial questions. And unfortunately they do arise quite often. If we have a mechanism that let's us avoid them, I think it works to both our advantages.

I hope that this addresses your questions.

MR. YOFFIE: Thank you.

MR. VAN MIERT: Thank you very much indeed. First of all, I would like to say that the agreement which was reached in '91 indeed helped us a lot to develop cooperation, because one shouldn't forget that the European Union being composed by 15 different Member States, each having national competition authorities, it's not an easy thing, unless you have an agreement, and a framework within which you can cooperate. And I think in reality, it went beyond what was expected at that time. It went beyond what could be expected because it allowed both sides, I think, to develop in good trust cooperation and where our people learned to work together, as if it was something very natural.

And I'm often struck, myself. Every week I have hours of discussion with our officials about many, many files; every week there is at least one file where we discuss the cooperation happening between us; eventually where problems might occur. But, also, I want to hear what is a relevant market definition which is being used here, is a corporation functioning well? It's just part and parcel of our normal day-to-day work. So I was astonished myself, I must say, to discover that it went to such an extent already.

Now, as I indicated earlier, it doesn't mean that from time to time we don't have problems, but perhaps let me first make another point. One should also be aware of the fact that we are updating our policies very much together with the Member States. We had a lot of discussions in recent years. We are now for instance indeed reforming, so to speak, our policy concerning vertical restraint. It will be completely different compared with what has been the case

until now. We modified also the merger regulations to some extent. We are thinking about other areas of competition. So it's ongoing business and we feel very strongly that after our experiences we need now to update our policies, and in doing so, we obviously will take into account the experience which happened elsewhere, in particular the experience of the Member States, obviously, but also in the U.S.

And I know that some of our people are also thinking about horizontal agreements and perhaps what should be done about it to update them as well. So also it's not just about cooperation case-by-case. It extended in a natural way to other things as well. And I absolutely welcome that because it helps us. And hopefully it can help others that built the case-by-case handlings that we have been discussing with each other on the basis of the experience we have that we also try to bring about a kind of soft harmonization, as we call it in Europe. We never succeeded and I think it was a rather wise policy not to impose on Member States the harmonization of the national competition system. But it happens in practice, gradually, softly, but it happens.

And I feel that something similar starts to take place on an international scale. Obviously in the first instance with the countries with which one has a cooperation agreement. And I'm very happy that very soon we'll have another candidate as well and others will shortly come next.

Having said that, ladies and gentlemen, let me now very rapidly again go through some of the problems we have from time to time. Indeed the rules might be different and the cases to illustrate that can lead to not only

different conclusions but create a rather complicated situation. But we are not going to be able very soon to correct things like that. Perhaps one day both sides might adjust one or another thing, and again, it might be part and parcel of a kind of soft harmonization but we shouldn't be too ambitious about what that is going to solve.

One of the major other problems I was mentioning already is the timing. We are caught, as you know, by deadlines and we can't get out of that. If we just refrain from taking a decision it will be an authorization so we have to act. So we might be under heavy pressure from time to time from that point of view, while on the American side one is still further investigating the case and it might need a few extra months. So as I hinted this morning, if something could be done about that, I think it could be extremely valuable.

Another thing I would like to mention that we touched upon as well, if things could be -- let me put it this way. On the side of the European Union, there is one competition authority working very closely together with the national competition authorities. In the U.S. -- well, two authorities, but this is working out very well, the problem is not there. But there are some other areas: airlines, maritime field.

We discussed for years and years how to sort things out and the fact that the shipowners were not really combined with our competition rules but also all the time referred back to what was happening in the U.S. and pretended that we should adjust to what was happening in the U.S. Well, we said: Look, we are scrutinizing these cases from the point of view of competition policy,

not from the point of view strictu sensu of maritime policy. That's another thing. And therefore it was highly complicated. I think again, eventually after years of discussions, we succeeded to bring our positions nearer to another, but it was extremely complicated and it was not very helpful in order to sort out things which we now decide were blatant breaches of Community law.

So if, apart from what I said about airlines, now this was I recall the case of maritime issues and again this all leads, I think, in the direction of having the competition issues covered, either by one authority or by authorities which can work together in a way that is coherent and starting from the same principles and the same concerns and preoccupations.

Now, ladies and gentlemen, let me perhaps to wind up, make the following points. Again, beyond the normal cooperation, what we see happening is that there is a kind of division of work, of labor. And this is welcomed as well. All of us have constraints as far as human resources are concerned, and for instance, I must admit that in order to call people as a typical committee, we lack resources. There's a lack of resources. So it's always a decision where to put priorities and the next day, suddenly another case is coming in and eventually you to change priorities. So if we can further enhance this, I think it will be a help for all of us.

I was mentioning already the Nielsen case, even if it was outside the formal comity procedure. But even the actual Microsoft case is illustrating that point. Because otherwise we might well have been also, let's say we eventually might have taken a decision to start a case ourselves. Since it is

being dealt with in the U.S., there is no point in doing so as long as we feel that it's handled in accordance with some of our own concerns. And therefore, we don't open our own case. There might be other complaints on other points and it remains to be seen what we are going to do about it the day it will eventually be on our table. But for the time being I don't see why we should open a similar case ourselves. That would only occur the day one would be dissatisfied with the outcome. But unless -- such is not the case, there is no reason why we should do so.

It's not always easy to explain that, because we have been asked, over and over again, why don't you open up a case? There is no need to. Because it's being cared for. We will see what the outcome will be and we are rather confident that it will be in line with what we think needs to be done and I guess that the outcome will be such that it's not going to apply only in the United States, but it will be, so to speak a kind of global effect. If that wouldn't be the case, again, then we have to start our own investigation.

I wanted to say that, ladies and gentlemen, because again I think it's extremely important, that if a competition authority is caring properly for competition issues, particularly in cases which have global significance, that if it's being done in line with the preoccupations of others, there is no need for others to start to duplicate the work. And obviously that should go both ways.

Now, the last thing I wanted to mention, ladies and gentlemen, we talked about confidential information, the exchange of confidential information. I indicated already that on the side of the European Union, we still

need some more time to convince the industry to go along with it. We need to be able to give some answers to some real questions.

Part of the debate is irrational, I would say, and it has more to do with old-fashioned reactions than with actual problems. But if, well, that's the perception of some companies or at least part of the industry, even that needs to be cured and therefore you need some time. But we would very much like to, at the end of the day, indeed to find some kind of solution to that and being able to go beyond what is already possible actually.

But this leads certainly to the need, ladies and gentlemen, to discuss the correct answers we should be able to give to the industry. Given the difference of rules, difference of procedures, there are already questions and I would like very much, together with our national authorities, to see to it that we can in a convincing way, trustworthy way, give these answers to the industry, and then I'm sure things will develop in a way that the next step can be envisioned.

As for the rest, ladies and gentlemen, we are using the full extent and the full scope of the actual Cooperation Agreement. As it happened a few weeks ago, we discussed, for instance, how to allow officials from one authority to be part of at least some parts of the procedure on the other side, for instance, to be part of the hearings, and I think it's worthwhile and very welcomed. We decided on a level of DG-IV, that indeed we would extend these kind of possibilities, again in the framework of the actual Cooperation Agreement because if you have to deal with mergers, our officials are extremely attuned to confidentialities, so one must be careful. It should remain within the boundaries

which have been fixed but again, apart from that we would like to use every possible possibility in the actual and in the present scope of the Cooperation Agreement.

So ladies and gentlemen, I think I went through most of the points I wanted to raise, but one thing is absolutely clear, it's absolutely sure, this Cooperation Agreement we developed since '91 has been a very successful one and what needs to be done in addition can be built on the actual experience and even more than that, the day-to-day trustworthy, almost natural cooperation which has developed on the basis of this agreement. Thank you very much.

MR. YOFFIE: Thank you. Dieter Wolf.

MR. WOLF: Well, I'll start by supporting what Karel Van Miert said about the effect an agreement as such can have and has had. We have had the same experience and we had it with our bilateral agreement also. That agreement is much older, and it must be said that it doesn't cover in the same way the topics as the comity agreement between the EU and the U.S. does. But it created that atmosphere of confidence and that's of course valuable as such.

It is now time for our agreement dating from '76 to be revised. We are involved in discussion with the U.S. to do that. We would adapt it, I guess, very much to what has been achieved at the European level with your country. I was asked whether I could imagine that the same positive effect in cooperation could have been reached without a bilateral agreement. I have already answered that question.

If I look only at the text, I would admit that theoretically the

same degree of cooperation could have been reached without that formal agreement, but the fact that the agreement exists has led to much closer cooperation. That is somehow a cautious answer to your question. I must admit that we also have very close relations with some countries where we do not have such a bilateral agreement. For instance, with the British. We do have a bilateral agreement with France. It is also much older than the U.S.-EU agreement. I would say that this agreement had the same positive effects we observed in the U.S.-German cooperation. It doesn't go much further than the bilateral agreement between the United States and Germany.

I wouldn't go too much into details about the ongoing negotiations for an amendment to that agreement. The key question for me and what I guess is also ultimately important, is whether one integrates that agreement into a general treaty on mutual legal assistance in criminal matters, which is one legal possibility, or whether one establishes a special agreement for competition matters: in that case, including cooperation in the field of merger control.

In line with what I said this morning, I'm very much for the latter solution. I wouldn't like to have a split-up regulation. Things are complicated enough already. To have two different agreements, one covering cartel matters under criminal or quasi-criminal aspects and another one under civil law and merger control aspects would not be an ideal solution. But I must say our respective Ministries of Justice, for the time being at least, are discussing that first possibility, too.

Of utmost importance, also with respect to merger control, is

the solution we find in the question of exchanging confidential information. And for a long time, I have had the feeling that we are discussing that matter, not recognizing a basic deficiency. We are discussing it too much on the surface.

What is confidential information really? Is it only information which must be treated as confidential because it represents property rights of the parties, because it is sensitive material? And who decides this question? Or is confidential information just information which has been declared confidential just at the discretion of interested parties? This is quite a difference.

And my feeling is that most of the so-called confidential or sensitive information is simply information that has been declared as confidential, sometimes even for strategic reasons, to make it even more difficult for the respective authorities to deal with. And in addition the difficulties are caused partly by different legislation in that field.

That's not a criticism, that’s just a statement. My impression is that in the United States, the decision whether information is sensitive or not is more at the discretion of the parties than in my country. I dealt personally with merger cases within the Ministry, even cases of ministerial authorization and things of that sort. And of course, the parties came with the position that everything they told us was confidential. Highly. And my answer to that was, “You are asking for something aren’t you? How can we imagine that I am able to justify the green light you are asking for without reasons for it?”

Since when is turnover confidential information? Since when is market share confidential information? So the deficiency I see in that respect is

that we are always talking about protection and the impossibility of exchanging such information, without making a distinction between information which really must be protected and other information.

I listened this morning, as I usually do, with interest to what you said about the excellent degree of cooperation on merger control between the Commission and the U.S. And that's my impression too. You are not able to exchange confidential information in that field. How is it that the cooperation still is so excellent?

MR. VAN MIERT: The waivers.

MR. WOLF: Yes. But the waiver is already a result of that pressure I was talking about. Right?

MR. VAN MIERT: That's right. Exactly.

MR. WOLF: So I think that is a key question, whether we just accept the position of industry that everything is confidential, or whether we put a question mark behind that from the very beginning. And so my proposal would be to bring experts together, perhaps even with partners from industry in the second stage, who deal with that question, specifically with that question, and make up a list or a synopsis or whatever of information which is more or less always asked for, for instance, in merger cases.

You need to know what the market share is. You need to know what the turnover of the parties are. You need to know what types of links there are between the enterprises. You need to know about the resources, financial and other resources the parties have available. If those things are

regarded as confidential per se, things get difficult. Perhaps your legislation doesn't allow it, but if you came to the conclusion that the information is not necessarily confidential, I would predict that 80 percent of the difficulties would already be solved.

Then in most cases of merger control, for instance, you would get along without the exchange of so-called confidential information, because then the information you exchange is not confidential, which does not mean that it may be published by the authority. It only means it can be transferred, in the German sense. It can only be transferred for official purposes. But in that case, it is legitimate and necessary, of course, if you cooperate, to exchange it.

I think that old story about confidential information needs a new approach, a real new approach, otherwise we even run the risk of establishing by means of a network of bilateral agreements, different definitions for sensitive or confidential information. That makes things in the end, well, just insoluble, hmm?

So to my mind, I think it's high time that we look deeper into that question and as you are collecting possible advice on/for your institutions, you should look into your actual legislation. This stems from a quite different motivation and has led to a degree of protection of information which is counterproductive to a certain degree, I would say, if you allow me to. So as you asked me to, I have touched on an area of the greatest need for cooperation. This is one in my view.

Positive incentives. I do not know whether your proposal

honestly meant -- the answer is spontaneous, of course. From my legal understanding I would have doubts whether Germany would be allowed to accept parts of that treble damage because under German law, even under constitutional aspects, it's hard to believe that we could establish such legislation in Germany.

Your treble damage legislation is a mixture, in my view, again, no criticism intended, it's a mixture of civil law, the compensation for a real damage, and criminal law aspects, and that mixture would at least be doubtful under German law. Under German law you are only allowed to ask for and to compensate for a real damage, not a treble damage with a punitive effect. Under German law, you are only authorized to punish an individual under criminal law or other law of that sort, but not under civil law, so that's my answer to that question. I would have doubts whether we could accept such an offer.

MR. YOFFIE: I'd like to open it up, and I know some individuals have some very specific questions. Eleanor Fox, in particular, wanted to ask a question.

MS. FOX: I first was inspired by Dr. Wolf to follow up on his last point, I also had a question I wanted to ask particularly to Allan Fels and Konrad von Finckenstein. Dr. Wolf, would it be different if the proposal is that various nations share in a fine that the government levies?

And let me put it this way, there is an international cartel the United States enforces within the United States. It has international effects. The fine could in theory, I suppose, represent in some proportion the total negative aspects of the cartel, and if that is so, then maybe the other nations who have

cooperated deserve a share. But the big change here is a part of a fine rather than a part of a private treble damage recovery.

MR. WOLF: You are absolutely right. In the latter case, I could imagine that such a share would be possible even under our law, but not under civil law.

MR. VON FINCKENSTEIN: I beg to differ on that one because it seems to me that implicit to the scenario that you are painting you have a court in the United States looking at conduct that is carried out within various countries and imposing fines. So it is either a ceding of jurisdiction by the other nations to the United States or an imposition by the United States of extraterritoriality. Either one I think is fraught with political difficulties and I don't think a scheme like that would be possible.

PROFESSOR FELS: Just on that point, just part of my initial enthusiasm. I have to admit that it would require some legislation by us, which would open up issues that have already been dealt with under a law passed sometime ago. And so I would just think to ask, I suppose, about opening up an issue, even where we are getting a so-called free gift from another country, so that would be one minor hesitation.

MR. YOFFIE: Let's emphasize that the idea here is not a free gift. There were two obstacles that were identified early on as to why the United States has difficulty incenting cooperation by various foreign authorities. One is a lack of resources which Karel Van Miert already raised. Many competition authorities around the world simply don't have adequate resources to pursue some

of the policy agendas of the Department of Justice on international cartels.

Secondly is the asymmetry of incentives which was raised on the Canadian side, that there is a problem where people perceive that the U.S. is going to get a disproportionate share of the benefit and they would have to still incur significant costs. So the question we were just trying to work through is: Is there a mechanism in which we could provide a way to reduce the resource requirements, in other words, pay for something which the United States does benefit from, and also try and share the rewards associated with any prosecution?

Now, the question of how one does it is still an open question, but the question at least I wanted to raise is: Do we actually help to solve these two obstacles, namely the resource constraints and the asymmetry of incentives? And if not, then we probably shouldn't pursue this idea.

MR. RILL: Let me just suggest that that's imaginative but I have questions as to the extent to which it can be done legally, although this Committee can certainly suggest changes in law. It seems to me you can deal with the confidentiality issue directly to alleviate some of the business concerns. The IAEAA provides that the party receiving the documents has to protect its confidentiality to the full extent of the law of the receiving party. How about adding a provision?

I don't need to be answered now but I want to put it on the table and maybe elicit an answer later, that the documents may not be turned over to any other agencies or jurisdiction. Now, that may create a problem within the EU, and I think there is a way of dealing with the national authorities so that they

can only have access to those documents for the purpose of advising the EU. If the documents are used in any formal proceeding, whether it's a court proceeding or a formal proceeding before DG-IV, notice has to be given on the use of those documents and an opportunity given to assert their confidentiality, and for confidential treatment in the proceeding, in-camera treatment.

And perhaps most significant, that not only can the materials not be turned over by the agency, but in the hands of either the party preparing the documents or producing the documents they will not be subject to subpoena by any third party, including a treble damage litigant in the United States, be it a state or other private party. That's a way of dealing with the treble damage issue.

There is a precedent for this under the census laws and at some point I think it would be helpful to us to have a reaction to that kind of proposal -- not necessarily now, because I think others want to speak.

MR. VON FINCKENSTEIN: Could you just clarify one point in the scenario that you just painted? You said if the documentation would be used for some prosecutorial function there would have to be prior notice. Prior notice where? In the country that had received it or in the country from which the information came?

MR. RILL: Well, in the country from where the information came. That the documentation is fully protected has nothing to do with the international cooperation issue. In the country that received the documents, there would have to be prior notice given to the party either producing or preparing the documents that there was an intention to introduce the document, say before the

tribunal, or before a public hearing of the DG-IV, giving the party an opportunity to say, “No, these are truly, truly confidential documents and we want in-camera treatment.”

It seems to me that may be a more direct, if imperfect way, of trying to alleviate some of the concerns of the business community, although I fully share Dieter Wolf's observation that much of this is strategic rather than a business concern.

MR. VON FINCKENSTEIN: That's an interesting scenario. But I think you would have to contemplate having that in-camera proceeding in the country where the documentation originates rather than the other one, because people have total confidence in their own system, and they would want to have the hearings there. But that's certainly something one could look at.

MR. RILL: It will be in the transcript and I invite comment on it.

DR. STERN: Well, that's a useful technical effort to try to deal with this question. But as I and a number of others have suggested, sometimes this may be a smoke screen. And the question then becomes: How do we deal with giving confidence to the public and to the parties in particular, that the information is going to be used legitimately, that the concerns that information that has been gathered in the past has been misused gives a false impression? It's a concern that may not really be fact-based.

Is there a role frankly that each and every one of you sitting here can perform? Because each and every one of you are the chief officials, are

dealing with these kinds of questions in your own countries, or in your own authority in the case of the EU. So that the business communities that have, if you will, slowed down the deepening of the cooperation, and who we can anticipate might continue to raise questions if they are not properly informed on what the facts have been -- isn't there something that each and every one of you, in addition to perhaps us as authors of the report to our Attorney General, might state on this?

Do you have examples, for example, data that shows those times when you have cooperated, that there has not been leakage?

If we have a track record, each and every one of you can, if you have an opportunity in your public comments to, help. I think this would be extremely important. I say this in particular in the context of the work that I have been doing not only here but in the TransAtlantic Business Dialogue.

From my viewpoint, the business community in Europe has been particularly concerned about not advancing too much the discussions of U.S.-EU coordination or even any discussions on competition policy for fear it will start a discussion that would expose confidential matters which they would like to keep under wraps. That's a little bit of a rhetorical question, but I do think that the purpose of this Committee is to advance what have often been technical discussions or discussions among regulators to a more public level, in order to incentivize and advance the cooperation which I think each and every one of us has said publicly is needed.

MR. WOLF: Well, I checked or rechecked that question, of

course, when I came here. So that is not spontaneous.

DR. STERN: Good.

MR. WOLF: It is just a sure fact with our experience of over 40 years now, we have not had a single case of leakage of information from our authority. I'm just saying that, not to praise our authority, we just didn't have a single case.

And that may be part of perhaps a different attitude to confidential information. If you in general do not see or acknowledge the market share or turnover as really being confidential information, and that question is then dealt with in the reasonings you have to give in your decision that would not be regarded as leakage, of course. As far as real confidential information is concerned, we have no single case.

I must add that it may be too simple just to talk about the discretion of who has to decide whether information is confidential or not. If you get information as a result of investigation, then it is very doubtful whether industry may argue that it's confidential.

It may be different if industry comes of its own accord and entrusts you with that information. Even in such a situation we wouldn't regard the market share as confidential information, but of course, the approach of industry entrusting or imparting information is a different one compared with the situation if we ourselves made the finding. Sometimes even drastically different. That's at least our situation, so again, to summarize the topic of leaked confidential information, we have not had a single case of leakage.

MR. YOFFIE: I have three people I would like to bring in, Karel, then Konrad, then Eleanor, and then I think we would like to open it more broadly to the rest of the panel.

MR. VAN MIERT: Thank you very much. First of all, Dieter, I don't think we have had cases, certainly not in the field of mergers, where there have been leakages. On the contrary, we handle now more than 800 cases since the beginning of the merger regulation and I can't recall one single case where there has been leakages of the kind we are discussing here. And also when we cooperated across the ocean, not a single problem as far as I can recall appeared.

It might be a difficult game obviously when you have to deal with cases like Boeing, because then it becomes public. And since the Commission is a political body, we are responsible to the European Parliament, you have to explain why you are doing things or why you are not doing things. So there is also a dimension of informing the public and those who are controlling about what you are doing. When it comes to individual cases, usually we can handle them in a confidential way.

Now, I was thinking about what Dieter said about trying to discuss the matter: What should be considered really being confidential? I do recognize the problem because we have that over and over again. Companies and the lawyers will try to convince us that almost everything is confidential.

MR. WOLF: “Dieter” as such is confidential.

MR. VAN MIERT: Yes, from time to time it's really

ridiculous. We have an official, an officer in DG-IV, to try and sort things out in a reasonable way, and if it's really confidential. And there, Dieter, from time to time, I must recognize that if it's about strategy and you have to assess what comes next, what is the most valuable things, how it's going to impact on the market structures, market shares and future -- this is very confidential stuff. I think we must recognize that.

But it would be worthwhile perhaps to have further discussions on this and try to, in our own practices, in a different practice to come nearer. Certainly we would be interested to be part of such an exercise.

Let me now very briefly come back to the question of fining. I was thinking about the most recent cases we have, and I must say, we have been fining a lot recently. This year it's certainly more than $600 million and it's not finished yet. So some more is in the pipeline. But I couldn't recall one case where this would have triggered the question you were just talking about.

For instance, we have fined very heavily, recently, the ship owners. It wasn't about trans-Atlantic trades, but mainly on denying the companies acting in Europe, American companies or European companies of Japanese companies, the benefit of individual service contracts. So in such a case I can't see how, first of all, I don't think there is -- there's no point in trying to come up with, unless Eleanor has another idea, but I can't see the point there. Because on the American side the policy is really a bit different and it was not really about cooperation, to discover and to undo a cartel of practices of this kind. It was something different.

Now, I was thinking about another case. Let's just for theory, for the sake of an assumption, say it's a world market, only two companies left, everyone is obviously free to think about companies where that could be the case, since that's a very transparent situation. One day, I'm not sure this might happen, but one day they will behave in a way which would trigger some concerns. And assuming that both authorities will do their job and I'm sure they will if such the case would occur, and then leading to some sanctions or fines at the end of the day. How would that work?

I fail to see the point, I must say, even in such a case, so therefore if you could convince me of the need, one, and secondly how it might operate because we have different rules. We did take over your leniency policy to some extent, and it's working by the way, but the rules are different. We have criteria to establish leniency and if it leads to minus 20 percent or 30 percent or 50 percent, eventually. But that's specific, that's specific. So on this point I must say, for the time being I fail to see if that's really a need, but perhaps I fail to see the point.

MR. Von FINCKENSTEIN: Just to the specific question of Dr. Stern regarding leakage. Like the Germans, we have not had a single instance of leakage since we have had the agreement with the U.S. And this is our second agreement. There was a precursor to this one. So we've got 15 years experience with it.

In terms of how to define confidential information, we have actually issued guidelines on what we consider confidential, and it's quite simple.

If it's given to us by the parties, it is confidential unless it's in the public record, and not only will it be treated as confidential, we will also try to invoke whatever legal mechanism is available to us to keep it confidential if a party tries to pry it out of us.

That, of course, doesn't take anything away from Dr. Wolf's point of trying to convince the parties that it's in their best interests not to have something confidential, but in effect to make it public because it might help explain the case and may be to their benefit, as well as to the benefit of the competition authority, if that information could be made public to explain how a decision had been made.

MS. FOX: I want to raise a different point regarding possible obstacles to cooperation, and I'm going to ask a question particularly to Dr. Fels and to Mr. von Finckenstein. Suppose another uranium cartel case happens tomorrow, and the facts are exactly the same as the first uranium cartel case. Meaning of course there was a U.S. embargo that did have a relationship to worldwide overproduction, leading to various nations, including allegedly Canada and Australia, being concerned about their own producers' overproduction and allegedly trying to help with orderly marketing.

So suppose in this case Assistant Attorney General Klein comes to each of you -- Mr. von Finckenstein after you have signed on to an IAEAA -- and says to you, “I understand that there are Australians and there are Canadians which I believe are involved in a cartel, and I would like you to get documentation and hand it over to me.”

And my question is, actually, it's not a facetious one, it's actually a deep one: Are we prepared today to deal with the kinds of problems that we had arising in the 1970s in the uranium cartel, are we prepared to deal with them in a way where countries will be comfortable, that rules of law are applied and there is no undue unilateralism? Are we prepared to handle it on a cooperative basis?

And if a problem turns out to be state action and orders by state and encouragement by nation-states, do we need more transparency as to what is a permissible state action order and what should be a transparent state action order?

So the first question is what would happen if Joel Klein goes to you under an IAEAA and says, “I would like this information?”

PROFESSOR FELS: Okay. Just before going on, I’d like to go back to the previous topic for one minute. We have not had any leaks either, and I will just make one other brief clarification, that in a merger, facts become public about it through leakages in firms. I'm not aware of any case where the leakages have come from agencies.

But turning to your question, I think Uranium probably would have been handled differently, but the treaty does provide that there is a public interest letter for a country, it does not have to cooperate. However, there is a difference this time around in that there is a more explicit tradeoff involved here, in that it is implicit, if not explicit, in the treaty that the cooperation by one side is a factor in the other side's cooperation.

In other words, if we decided that it was in our public interest not to cooperate, then the United States, in making its public interest decisions, would take that into account. Secondly, there have been changed attitudes, I think, on a very large scale which in fact have led us to adopt these laws. We adopted these laws after the Uranium case, and partly because of the Uranium case, although more generally because we thought it was just part of international business cooperation.

Oddly, I just wanted to mention that the Uranium case, in my view -- I'm not a world expert on that case, but in my opinion -- that case was a pretty unusual one because it was not a fully conventional hard core cartel case. What happened was that certain steps were taken, I believe, by the United States Government which seemed to be in effect trade measures directed against these other countries. That's how it started. Well, this is my evaluation of world history, but I think it is a correct one.

MS. FOX: That's right.

PROFESSOR FELS: As a result of these anti-trade type measures, a number of private firms then decided to get together and cooperate in a cartel-like fashion by way of a response. So that the intervention -- and then extraterritorial activity by Australia and the other governments -- was seen, rightly or wrongly, not as a normal cartel situation, but one where there was some provocative trade actions in the U.S.

So I would differentiate that from some situation where there is a standard hard core cartel. And of course, we signed the OECD agreement also

on hard core cartel cooperation.

The other thing I just wanted to touch on slightly of your question, but not entirely of the spirit of it, is that I can't stop myself from pointing out that all of us at the OECD recently signed up on a pretty important agreement to fight hard core cartels. But just about all of us have exemptions under our own laws for our own export cartels. I have not quite been able to reconcile those two points. There is another lesser point, which is that, one person's hard core cartel is another person's orderly marketing for farmers, crop scheme, and so on and so forth.

Having said that, I think we are very conscious of that latter point. I see some acceptability in making a distinction between hard core cartels and some of these other things for farmers. Some of them I see in a slightly different category. There does seem to be quite a lot of clear, hard core cartels to which we could all object and the U.S. cases at the moment provide some pretty good examples of ones which we would all cooperate to break up. So that would be my preliminary comment on your question.

MS. FOX: Thank you.

MR. Von FINCKENSTEIN: I find your question very difficult to answer given that we don't have an IAEAA agreement. We and the Japanese have to work out some modalities on this. And secondly, if you are going to blue sky like this, let's assume also that we would have by that point in time a positive comity agreement with the U.S., along the lines of the U.S.-EU Agreement. And I would hope that the U.S. would avail itself of that positive

comity agreement and therefore sidestep any extraterritorial issues. But I really can't answer that question in light of not having any source agreements in place.

DR. STERN: Karel, I'm glad you came back. I would like to ask you and others if you might comment now on the U.S.'s interagency process, Karel, because you may be leaving and the others should also comment, depending upon what the Chair wants to do now or later.

You started that. You raised this matter, I think. There are some references perhaps to the Department of Transportation. There was some discussion about the FCC. There is, of course, the relationship, a very, very close relationship between the FTC and the Department of Justice, and there may be other agencies. But we are looking for best practices everywhere procedurally. And this shouldn't be taken as an excuse to beat up on the United States here, but if you could give us some comments on how our interagency system is working in coordination with each of your authorities, that would be a useful comment from you public officials.

MR. VAN MIERT: Well, first of all as far as the cooperation between the Department of Justice and the Federal Trade Commission is concerned, I can only say that it's extremely positive on the level of the officials and on the highest level. It's no problem at all. Again, there might be a difference of opinion in one or another case but that's something else. But it's really a different game and that's why I did raise it, because we are talking about cooperation between us.

When other authorities are in charge, and when competition

concerns come in the second or the third place, and it's not just because we have this recent experience or even experience which goes back many years, but also because there is a danger even in the European Union to say look, since they are on the American side they will discuss airline business from the point of view of transportation policy and in the interest of American carriers, we should do the same.

So from time to time we are under pressure. And Dieter will recall that recently in Germany, because we scrutinized also the Lufthansa/United case and the minister concerned, the transport ministers, when they meet will say this is our business so let's keep out the competition people.

And I, although I don't overestimate the danger of that but be aware of that, because it might occur in other sectors as well. For instance, media. We have been accused over and over again because of the strong competition issue we have been taking and the decisions we have been taking constantly. We say, “Look, but this is about competition between the American system and our system so therefore it's a different kind of game, keep competition out of that in the first instance.”

And from time to time, you are back to the old-fashioned discussion about how champions, national champions, it used to be but now European and American champions -- so we must be aware that there is some kind of a danger of that type and therefore if we want to reinforce our competition concerns in the light and the spirit that we have been discussing this, also these questions are part of that. And that's why I wanted to make that point. Not just

one-sided.

DR. STERN: Yes.

MR. VAN MIERT: But it concerns others as well. That's the reason why I feel so strongly about it.

PROFESSOR FELS: I just had two short points about the ideal answer to this question. We, of course, have put out this paper and we think all of these industry agencies, so far as they are doing economic and competition work, it should be done by the competition agency. So we have closed down our communications agency and we do the work for it, and our energy regulators have been -- well, they've already gone at the national level. At the state level, it will eventually shift to us.

The second point I would like to make is that in any case under merger law, the competition agency should be predominant. There are a couple of cases, like banking, where there may be some special prudential or other reasons where someone else has to have a look at it, but they shouldn't use that to become involved in competition and public interest questions. I would say the same should apply to others.

MR. Von FINCKENSTEIN: Is that your thinking or a statement of fact?

PROFESSOR FELS: Well, it is the law. With respect to mergers, there are no exceptions in mergers. They all have to be covered by our competition agency, but it is hard to ask these other agencies to keep out, I know that.

MR. YOFFIE: Let me ask Dieter Wolf to also comment and then I'm going to turn it back over to Jim Rill.

MR. WOLF: What we are discussing now is just normal political life, I would say, everywhere. And we are not the only ones in this world and of course we are living to a certain degree also in a dialectic situation with other political interests. I have nothing against that permanent -- well, let me stay with that expression, dialectic process, provided that the competition authority has the last word, as you described it, Eleanor, and provided, Karel, that the competition authority has a, I would say, sufficient amount of independence.

Because the cases which are the decisive ones are always of economic and therefore of political importance. In those cases as a non-independent authority, you are lost. I'm not against political interference in cases where an overwhelming public interest calls for putting aside competition concerns.

Because that is also my view of the reality of life. There are cases, not very many but some are conceivable, where the public interest is paramount and I would prefer in such a case an absolutely transparent procedure which we have established in Germany. We have the possibility that the Minister of Economics can overrule a negative decision of the Bundeskartellamt. But he has to ask our independent monopolies commission for public advice. He has to hold a public hearing on the case, and then he may take the decision but it has to be taken in writing and that decision again is subject to control by the courts. This very high transparency has led to the following results: We have issued more

than 120 prohibitions of mergers within a good 25 years of control.

Politics quickly learned that it is not so easy to counter the arguments given by the Kartellamt for its negative decision, that the reasons of public interest are normally not strong enough to overrule it, so the number of cases of applications for special permission addressed to the Ministry of Economics have decreased more and more. In all, we have well over 100 negative decisions, altogether we received 16 cases of application for special permission, 6 of them were accepted by Ministry of Economics. So that's less, clearly less than 6 percent of our prohibitions.

I can easily live with such a relation. It's a good relation between the exception and the rule. Even if it had been double that, the relation would be in order. So that's the solution on our side. My fear is if you don't have such a valve to make cases of paramount public interest transparent, and that is how I understood your remark, then you run the risk that those reasons of public interest are introduced into competition reasonings.

And we are all lawyers and we have learned to argue and to cut those arguments correctly. That's our job. And then you get decisions which look like they are based only on competition grounds, but in reality they are influenced by those paramount public interest reasons, not saying it openly. And that's -- in my view -- that's second best.

MR. RILL: Let me, before Karel, you leave, I know Paula has some questions for you if you have a minute or two. After that, we are going to ask Jerome Gallot for his intervention and then have an open round table on all

topics that we discussed this morning. So Paula.

DR. STERN: Thank you very much. As a non-lawyer, I learned how to argue even before you folks who had to go to law school. I learned economics in school. My question is to follow up on a comment you made in your opening remarks this morning about the World Trade Organization, or a multilateral global mechanism, to use your words, that would not be an appeals mechanism, but would be some kind of a global surveillance to make sure that there was a national review and that there was not discrimination against foreign companies vis-à-vis domestic companies.

And I would like you to give me an example of a case or a situation that would use this mechanism. Do you feel that there have been practices or cases that have not been resolved because there has not been such a mechanism, and if so, what would they be? It's another way of asking, would the Fuji/Kodak case have been handled any differently?

The other question I just want to get on the table for you, and for everyone later at your discretion, is to respond to those procedural suggestions that both the U.S. might make and your own authorities might take to better harmonize our deadlines, and better harmonize our procedural reviews. I mean, there may be best practices that combine a little bit from some of us and a little bit from the U.S. And if you could think about that and provide it now or later, that would also be useful.

MR. VAN MIERT: Well thank you very much indeed. As far as the World Trade Organization is concerned, we indeed like to think that

since we would like to involve not just those already having competition rules and practices and competition authorities, but also those we need to convince of doing so, that therefore the World Trade Organization is for the time being the right forum. It remains to be seen what comes next. So that's a specific discussion.

I wouldn't for the time being say that it's just something inside the World Trade Organization. It's to be seen what might be the appropriate solution. But again, for many reasons, we feel that the World Trade Organization for the time being is the proper framework to start discussing these issues. And at a maximum of countries concerned. And today we see already -- and Sir Jenny is there --

(Laughter)

-- he knows much more about it than I do, because he is presiding over the works. But there is a lot of interest also from countries not belonging to the OECD. I think this is a positive point which should be taken on board.

Now what we have been seeing from time to time, because companies told us so, is that they had to notify their case to many national competition authorities. I remember the Grand Met/Guinness case. I don't exactly know how many competition authorities they had to contact and file in that case, but many, many, many. And I can remember some of the lawyers saying, “Look, from time to time we had to file a case.” But you know, they pretended it was on the basis of the competition authority, but in reality, it seemed to have something different. And practices which have not that much to do with normal competition

practices.

So since I learned that from lawyers -- I'm not going to make it public which country was concerned -- but I was rather impressed by their rather negative experience in some countries. So therefore, the fact that such a thing would exist and the possibility would be created to, how to appeal in an individual case, but the fact that way beyond handling competition policy, they are using competition policy, or eventually competition authority which is perhaps not that independent -- well, I think it's worthwhile to have such a thing.

And on the one hand, eventually you can go against practices which might happen and which are happening to some extent, and it's warning for the others not to develop in such a direction.

Now, the second question you are putting to me, again, as far as deadlines are concerned, I feel if one way or another we could harmonize -- no, harmonize is perhaps not the right word -- but to avoid that, from time to time there are such constraints that, you know, you have to take decisions, others are still looking at whether a remedy is needed or if a remedy is good enough.

We are sometimes in such a hurry, on both sides because also on the American side, if we have to make a decision, obviously it puts them in a disadvantaged position, if eventually we give our go-ahead on the basis of some conditions, and they are still investigating the case. And from time to time the other way around, because it happened, as well, that there was already a remedy being discussed on the American side and we were still in the process of doing so. Now, as it happened in the Dresser/Haliburton case, it was a case, we did take it

on board but it's not necessarily so all the time.

Another example I would like to give is the leniency program. We introduced on the basis of your experience this instrument, and it is not so much in line with European traditions, so it was not easy to get it across and even to convince my colleagues to do so. But we said, “Look, it functioned in the United States. It had some advantages. And since we have some trouble too, since we have to discover and to come up with the evidence of cartels and behavior of that kind, we cannot not go down to Switzerland where usually they set up their headquarters to operate cartels. So we have to find it another way.” Hopefully that comes next but that's a different story.

But many of our cartels operating mainly in the European Union are managed from Switzerland, over and over again. We will discover it in another way, but what I wanted to point out is that if something valuable is happening elsewhere, why not take it on board?

And again we both apparently feel now the need to think about horizontal agreements, why not do that together? What is refraining us from doing so? So that's the spirit in which I can see the need for one to learn from another and do it in due time. And so it's happening already. It's evolving.

DR. STERN: But the point about the timeliness that you have got a deadline that then pushes others, looking at it from a business point of view, I hope that --

MR. VAN MIERT: Yeah. I would strongly recommend to have deadlines. Because our experience, and again this is a positive one, and I

might perhaps recall we have two stages, the first stage is of one month. Ninety percent of the cases, and we're talking about big mergers, can be handled in one month. Also because usually companies, and we have this facility available to talk to our officials before notifying the case and trying to find out what's happening before.

No leaks, and I'm praying all day -- that's the only reason that I'm praying, by the way -- that we can keep it that way. Up until now, no leaks. No leaks. And this is useful for both of us because for the business community, they know what comes next. Probably they have useful exchange of views and information in an extremely confidential way.

And our officials, that the case is being notified or being made public, they can start to do their job. And then usually within one month, we can finish that case. We can even extend the period a little bit to be able to accept remedies in the first phase. That's extremely efficient. And for the companies concerned and the business community, having such an instrument available and creating legal certainty everywhere in the European Union, really that's something extraordinary.

And if it's a more complicated case, they know for sure within an additional four months the case has to be finished. So we feel that's a good experience. Some of our officials will say look, it puts some heavy, very heavy strain on us. That's true. But I would rather recommend such a system to everyone because it brings together efficiency and being able to take decisions in due time as in a modern economy should be the case. And by the way, that could

be a good reason also, but we talked about it already, to think about some of our other procedures, to streamline them and to try and make them more efficient. And so if the experience we gained in merger cases and the merger has been extremely beneficial, and leads to a positive spinoff in other areas of competition policy.

DR. STERN: Very helpful. Thank you.

MR. RILL: We are going to now hear from Jerome Gallot of the DGCCRF and following Director Gallot's intervention, we'll take a little break. Thank you, Karel. Thank you.

Jerome, you're up.

MR. GALLOT: Thank you, Mr. President and Mrs. President. Well, I'm personally delighted to attend this International Competition Policy Advisory Committee. And it's a great honor to join such a qualified and diversified group of people. As you said, I am in charge, I have been in charge of DGCCRF for 20 months now -- in France we share responsibility with Mr. Jenny and the Competition Council to deal with competition and merger problems -- and I am in charge, too, of the consumer policy and what we call fraud control, about food or wine, for example.

You are dealing with issues which are likely to have in the long run an important impact on our domestic enforcement activities. My country belongs to those which are more and more aware of the growing importance of the international dimension of competition policy and concerned about devising an appropriate response to this challenge. However, as a European Union Member

State, its situation is somewhat specific.

France, like its European partners, is deeply involved in a particular kind of cooperation, the cooperation with the European Commission. And as Dieter said, we have also a specific cooperation with Deutschland.

In the field of competition, the Commission is our primary middleman for all issues of common interest, should they be individual or regular regulatory ones. We carry out surveys on behalf of DG-IV as it does not have investigation powers as coercive as those on our own territories. We sit on advisory committees which have to give opinions on all projects requiring decisions, whether it be a matter of mergers or anticompetitive practice, and we are, of course, also deeply involved in all its legislative matters which have immediate repercussion on our national policy.

The Commissioner said we had a discussion about political restraints in the European territory. No doubt that this is not quite the kind of cooperation we are here to talk about; nonetheless, it does provide us with a particularly interesting experience in the ins-and-outs of an extremely close relationship with another competition authority. One could even pretend that at this regional level, European competition policy works as some kind of very sophisticated and very advanced multilateral framework with, of course, a coercive mechanism of enforcement.

Our views on the perspectives of multilateral cooperation, which I dare say are pragmatic, may be influenced by our experience in Europe. We certainly acknowledge the paramount interest of multilateral initiatives and

are keen to spur them on. We are also aware of the political constraints and technical hurdles that are to be overcome on this path, although endeavors will not be aimed, of course, at achieving something comparable to what has been done in Europe.

Our position is specific, too, as far as bilateral cooperation between national competition authorities is concerned. Between Member States of the Union, contentious matters of which the effects are not limited to one single national territory usually come under the Commission's jurisdiction. This clearly sets the practical and legal limits of our bilateral actions, even though we do cooperate on merger review. These bilateral actions within the Community will not increase until the Community policy reaches a much higher degree of decentralization, which is very important, I think. Indeed, for the time being, we are just beginning to decentralize affairs of which the effects are confined to national markets, but it is just the beginning and it would be better to go further.

Lastly, with regards to our cooperation with other countries, one must recognize that, at least up until the present time, the principal cases being dealt with equally fell to a great extent under the Commission’s competence. And under those circumstances, international cooperation issues are for us, by and large, Community issues. However, this means quite a lot. Each time that the Council of Ministers must intervene, we add our own competence and we do, of course, have interests at stake.

Our most immediate concerns on international cooperation are currently the definition of a common position at the World Trade

Organization, the authorization for the Commission to negotiate agreements with other countries, together with the following through and setting up.

Broadly speaking, our conclusion is that the time has to come to incorporate competition issues in WTO negotiation rounds. This is not an official position of my government, but this is my wish; we'll discuss later the official position of the French government.

We agree that it is necessary to launch a convergence process aimed at widening the geographic scope of competition policy and harmonizing its basic principles. Trade problems will be addressed insofar as they are linked to anticompetitive behaviors, with the only aim to preserve competition.

As for bilateral cooperation, positive comity must be, I think, the enforcement priority. We supported the conclusions of the 1998 arrangement between the United States and the European Union. We are now keen to see the way the Commission will use it. We do not expect any evolution of the content of current arrangements until a detailed assessment of them can be done on the basis of long enough period of enforcement. In the meantime, similar arrangements with other partners are conceivable.

These are the main features of our current position on what is going on in the field on international competition policy. I will lay them out more precisely, perhaps, later.

But let me underline once again my pleasure to be here. And I expect to learn from the experience of other countries represented in these hearings during these three days. Thank you very much.

MR. RILL: Thank you very much, Jerome. I think it's appropriate now we take, say a 10-minute break and then come back to an open roundtable.

(Recess.)

MR. RILL: We are going now into the third and final round of the enforcement day. I must say that the proceedings thus far have been absolutely superb, have given us extraordinarily valuable advice and information, and really have exceeded, if possible, our already high expectations for the input that we would receive from you high officials in the world of competition policy.

We are now going to go into an open discussion, a roundtable discussion as we call it in the OECD. And in effect, this will elicit from you and from our fellow Committee members questions, comments and observations that you may think, do think would be useful to us in formulating our own work product as it moves forward.

And it is actually work in process, so we have no foregone conclusions. We have heard some very interesting ideas today, and we expect to hear more as the afternoon winds down. So put up your namecards for recognition. Anyone who wants to talk on any subject, please do so.

MR. OLIVEIRA: I have a few comments about the discussions we've had. First, in my initial remarks, I did not emphasize the fact that many other people emphasized: the fact that the WTO group has represented an enormous contribution to world competition, to the dissemination of competition culture. This is an obvious thing to say, but it's important to say.

And I have had this kind of impression from many other countries in Latin America, and it's certainly the impression that we have in Brazil, that it could be very important indeed to continue the discussion in Geneva. And for some countries which are still developing their laws on jurisprudence, the meetings at Geneva may represent many years, in terms of saving many years in terms of experience and technical assistance.

The second point relates to the sensitive issue of antidumping which has been discussed in this group. We take a rather pragmatic and perhaps realistic view that this would not be an issue to be discussed at a more multilateral level. But for some regional blocs, it might be useful to think of ways of transforming antidumping instruments into competition policy instruments. And in fact, this is what we state in the Fortaleza Protocol of Mercosur. In the two-year period the plan is to transform antidumping instruments into competition policy instruments.

And finally, regarding competition information, the question that Mr. Wolf emphasized and the definition and treatment of confidential information, one thing that we introduced in our new internal rules at CADE is the possibility of the party to appeal CADE's decision whether particular information is or is not confidential.

I think that this possibility of applying transparency to deciding what is confidential or not may be an interesting way to deal with the problem properly and to divide what is by law confidential, which is something easy to identify, and in which circumstances a certain type of information is

considered confidential or not. I think that the opportunity for the party to discuss that in a transparent way and having the opportunity to appeal that decision is an important feature of competition regulation and merger review.

Thank you, Mr. Chairman.

MR. RILL: Executive Director Janow.

MS. JANOW: Thank you. I'd like to ask a clarifying question. We have had several representatives here argue for the development of WTO or multilateral capabilities. I think a distinction is being made between a form of procedural due process on the part of the application of national competition laws that might be reviewed at the multilateral level, although the substantive standards would not be, and at the same time the application of substantive deference to the national authorities.

For those who think that this kind of multilateral system should come into being, would you kindly evaluate what you see as the best possible outcome? The reason I ask is this: many jurisdictions do not have competition laws that are discriminatory on their face, and they have staff and laws in place and so, in this sense, have all the indicia of a working competition regime but nonetheless may not have an effective system.

Without the indicia of discriminatory practices, what would be the role of the multilateral organization in reviewing whether or not a competition regime was working? How in your view would the “best” multilateral system operate?

MR. RILL: Konrad?

MR. Von FINCKENSTEIN: Well your final question suggests that it is for a world dispute settlement mechanism to determine whether the regime is working. That was not exactly what I was addressing. What I was suggesting is that we have, at the OECD level, agreed on a lot of issues which form a broad base of consensus and which are really the basic ingredients for competition systems, such as rules against cartels, rules on merger review, and work-in-progress dealing with the rights of parties. We are also going to deal with abuse of dominance and we are going to deal with such things as a minimum institutional infrastructure.

If you have all of that together in a framework agreement, I suggested that a dispute settlement should only deal with issues such as whether you have implemented such a system or not. Now in order to implement it, you are going to have to adopt some normative standards. I don't think this will be anything more than using such terms as significant, reasonable, etc.

If countries adopt such a system of obligations, and if they have with it a positive comity agreement that you can then invoke, then if the positive agreement of comity doesn't work, it's a dead letter. It's all wonderfully enacted but it's not being acted upon.

And if positive comity doesn't work, the next thing is going to be some extraterritorial application, which is going to result in a considerable political confrontation. In order to avoid it, given that you have the system and given that you have the obligation of positive comity, I would actually expect the system then to change from being a dead letter to being an active one and actually

working.

I think there would be a momentum created. It is part of your obligation under the WTO. You have solemnly implemented it. You're now getting requests from other nations that are -- I think that it would be inevitable that momentum would be building up behind it. If not, then presumably in future rounds you would address the issue of enforcement.

And the only example that we have at the international level to address whether something is working or not is the NAFTA, where we have the two collateral agreements on environment and labor, which basically say your system is fine, but you have to apply it, and there is a whole elaborate procedure set out for testing it or not.

Would one want to adopt something like that in the antitrust future? Obviously if my method doesn't work, we might very well have to resort to it. Again, some people feel very negative about the NAFTA process. I'm not so sure that that's right because generally people are looking at whether the NAFTA provisions have resulted in litigation and so on, and they clearly haven't. But has the existence of the process actually resulted in better application of existing laws in all the nations or not? I think that's how one would have to measure it. I don't know whether anybody has determined whether the labor laws and the environmental laws of all three partners are now more rigorously enforced as a result of NAFTA. That would be the proof in the pudding as to whether such a process works or not.

MR. RILL: Yes, please. Bernd Langeheine from the EU has

taken Karel's spot at the table.

MR. LANGEHEINE: Thank you very much. I think we shouldn't forget that we have only had binding dispute settlement in individual cases, even in the WTO context for a very short time, and we shouldn't put too much burden on that system. I think, as my Canadian colleague said, the fact that you have certain basic rules and that you have certain structures in place already, normally, very much helps the process as a whole.

I think the real problem will be that if ever you want to proceed to some kind of dispute settlement on this, that the question will arise in a concrete case. You will not be able to verify this in a very abstract matter and it will be a very fine dividing line, to make sure that you do not proceed to second-guessing the substance of individual decisions, but at the same time, try to ensure that there is a certain basic structure that you want as a starting point.

MR. RILL: I would be very interested, and I think my colleagues would as well, in how you both, and perhaps others who see a role of this sort for the WTO, would draw the line between generalized principles and a failure to enforce in a particular case. Because one, at least, maybe I'm too American, but one gets to generalized principles by building up on the coral reef of dead sea animals a series of examples and individual cases, and that's common law experience.

I would be interested in learning now or later, in writing or orally, as to how you would draw that line because as you suggest, Konrad, you are looking at a country, a hypothetical country, with a very polished antitrust law

whose enforcement record has perhaps not been very vigorous. You are suggesting then that there is nothing to do with the law. Your positive comity referrals, at what point does one look behind the positive comity referrals to get to the enforcement commitment of that country, and who decides how that should be resolved? But before you answer, Dieter has got his card up.

MR. WOLF: Well, the German proverb, “Where there is no plaintiff, there is no judge," comes to mind. And you can trust in the supervision of the activities of an antitrust authority, as long as it issues prohibitions. Because then you will have interested parties which will defend their position before the courts.

I guess the thesis can be accepted that it may be as harmful for the antitrust authority not to decide as to have a prohibition which is incorrect.

And the courts do not help very much if there is no plaintiff. The parties are content with the positive outcome of their procedure. This somewhat difficult situation has led in my country to the establishment of the independent Monopolies Commission. It is an advisory committee with the right and the obligation to look into our files to detect whether we have cleared cases which should be prohibited and to submit every two years a report to Parliament about our activities or nonactivities.

That's a sort of control, and that idea has already been discussed at the European level, too. Not with any results for the time being, but it is not such a new idea. Transferred to Geneva, the role of the WTO could also be expanded to include such a task to produce a report. And to tell the interested

public that there were cases which should have been prohibited but have not been.

MR. RILL: It's a transparency issue.

MR. WOLF: Yes. It's a sort of transparency issue, and that may help to prevent a tendency of signatories establishing an antitrust regime but not implementing it.

MR. RILL: Of course, the OECD has had in place since 1986 a Recommendation which makes available to those who want to use it a conciliation service. To my knowledge, as far as I know, it's never been used.

Konrad, then also Mr. Sanchez Ugarte.

MR. Von FINCKENSTEIN: Let me take a stab at answering the question. You suggested a country pursuant to its WTO obligation adopts a state-of-the-art system but it's a dead letter. It doesn't do anything to enforce it. It seems to me that you cannot then take an individual appeal to the dispute settlement mechanism. You could, however, go to a dispute settlement mechanism if you have a pattern of conduct where there is a series of cases that have not been acted on, and then you would argue as you always do, before the WTO. You argue both the letter of the law and the effect.

And you would say the obligation is to establish an antitrust system. They have adopted the necessary law but it is not being used at all, so the effect of it is they are not living up to their obligations. Your obligation is to have a functioning antitrust system, not to adopt antitrust laws. And you know, it’s the same argument you make before WTO dispute settlement all the time. When you have a national treatment violation allegation, you find out that even though the

law may, on the face of it, be neutral and treat foreigners the same as domestics, actually the effect is discriminatory and therefore you are in violation of national treatment.

You would argue the same thing here. On the face of it you have compliance but in effect if you look at the way it works, you have noncompliance because you don't have a living, functioning antitrust system.

MR. RILL: I'd like to know more about it. Mr. Sanchez Ugarte.

MR. UGARTE: You asked me the question of the WTO for a discussion of international antitrust issues. I think that it's good that the WTO has taken sort of leadership in the sense that they are discussing these issues quite extensively and with all the countries involved in the World Trade Organization. However, I think that not all issues in antitrust are related to trade. I think that many things in antitrust do not necessarily involve trade. So that would be one point.

And the other point is that I feel that the WTO tends to be, in a way, a little bit defensive. After all, countries are sitting there trying to defend their industries, protect their economies as much as possible, of course, within certain bounds and certain limits that are set up by the general agreements. But there is, and this is my perception, that in general, antitrust authorities tend to be more open, more pro-competition, more vocal about opening or eliminating barriers to trade than what you have in the negotiating table of WTO.

I think it's good that they are discussing competition policy,

but I really do feel that there should be sort of a, like some independent or separate international entity that would take more as its main task the discussion of antitrust matters. Probably something similar to what you have with respect to intellectual property, where you have a discussion at WTO on the one hand, and on the other hand an independent institution, WIPO, that deals with intellectual property.

So I really think that we should consider sort of a, an umbrella organization. The OECD I think is doing a very good job, but not all the countries belong to OECD.

MR. RILL: You have other regional organizations, APEC and --

MR. UGARTE: APEC. However, if you add up all the memberships of these organizations, you would not encompass all the countries in the world.

MR. RILL: Clearly it would not. So you would find Frederic another group to chair.

(Laughter.)

MR. UGARTE: Maybe.

MR. RILL: Now that your namecard is up.

MR. JENNY: Thank you very much for that suggestion.

(Laughter.)

First of all, I want to be absolutely neutral as the Chairman of the WTO group, so I will not offer a vision of where the process should go, but

I was struck by the way the question was framed by Merit Janow. She said, "Well, we know that most competition laws are not discriminatory, and if they are not, then what's the value of having some kind of multilateral agreement dealing with this issue?"

I was struck because, on the one hand, inquiries within OECD countries about whether their competition laws are discriminatory or not tend to say exactly what you said, that there is no problem.

On the other hand, the business community, and some of the people who don't want to see the competition law issue being debated in the multilateral forum, argue that the reason they don't want it to be discussed in the multilateral forum is because in fact they don't want competition law to be disseminated across countries, because it will be misused.

But they also add that there are already some non-OECD countries which, in their opinion, misuse their law in a discriminatory way. There is a very large country in between Southeast Asia and Europe which is usually pointed to as being a typical country where there is an interesting market but where competition law is, in fact, used against the interest of the exporters and in favor of protecting its domestic market.

So one cannot, on the one hand, start from the premise that there is no discrimination in the competition law and policy tool, and on the other hand start from the premise that there is already some discrimination in some countries.

My second point is, is discrimination the whole thing? Isn't

transparency another issue? There are countries where when you make a complaint to the competition authority, the competition authority may respond or not respond, may choose to investigate the case or not choose to investigate the case.

It could make a difference if there was an obligation, at least in the context of international trade, that if an importer makes an allegation that market access is restricted for a variety of reasons, and complains to the relevant authority, the importer will be entitled to get a decision. And the decision will be established in a transparent way and possibly appealable.

And I'm saying this because I personally believe that merger control in France is not very transparent for reasons which have nothing to do with either Mr. Gallot or myself, but because the law sets a system which is not very transparent. And I can sense that there is a certain amount of frustration on the part of foreign firms whose mergers need to be reviewed by French authorities because they complain about the lack of transparency of the process.

Now, it doesn't mean that the process is used in a discriminatory way, but it means that they would be satisfied that it is not used in a discriminatory way if it was more transparent. So I do grant that any tool can be misused, that competition law and policy could be misused, but the real question is whether letting things proliferate, as I said this morning, is more beneficial to the interest of trade and competition than having a common discipline.

It may not be only the question of discrimination, although it

may exist; at least there are allegations that it exists. It may be a problem of lack of transparency. And the last point I wanted to make was that it would be interesting to know why in the Telecom Agreement, for example, it was thought useful to have a provision that prevents governments from using their state monopolies or the firms to which they give exclusive work from abusing their dominant position by restricting barriers to entry.

If it is felt that competition laws are not used in a discriminatory way, does that mean that this provision doesn't make any sense? Or does it serve a purpose? Maybe by studying that kind of agreement, nevertheless, one could find the benefits that conceivably could accrue from a competition regime which, as I said this morning, would have to be limited in the context of the WTO to the trade and competition policy interface, meaning only to practices which restrict competition and trade.

MR. RILL: The Telecom Agreement has a precedent but not one that's in operation yet. It depends on how the Telecom Agreement operates. The Telecom Agreement is always held out as the, perhaps, paradigm for a broader competition role for the WTO.

MR. JENNY: I'm not saying that it should be duplicated. In a sense it’s more advanced than what we are talking about. It's not been enforced yet, but it exists whereas what we are talking about is something that doesn't exist. I was not referring to the Telecom Agreement as something that should necessarily be followed. I was inviting the panel to think about why originally when the Telecom Agreement was negotiated, it was thought it could be useful to

have such a provision, what was the logic behind this. To try to see whether, in other agreements, there could be some benefit or there would be a lack of benefit in having a similar kind of provision.

Now, as I said, I think, (a) that one cannot reduce the problem to the question of discrimination, and (b) that there are contradictory allegations about whether or not competition law and policy is used in a discriminatory way.

MR. RILL: Well, in a non-enforcement context, I go back to a comment I made in Geneva. You were there. Where there is not enforcement, there is no discrimination. The rich and the poor alike can sleep under the bridges of Paris.

MR. JENNY: Yes, but there is no transparency, and that might be a source of concern.

MR. RILL: We have Japan and then Eleanor. Japan had its namecard up I think first, I believe.

MR. ITODA: Now, as far as the dispute settlement mechanism at the WTO is concerned, if I may refer to that, in conclusion, I would say before we get to the WTO dispute settlement panel, it is important to have thorough discussions between the concerned parties, and the concerned nations before we get to that panel. That's my thinking.

Dr. Stern mentioned Kodak and Fuji. As far as this Kodak/Fuji incident is concerned, there is something that I'm quite mystified about still, and that is that the case had to do with Kodak stating that there are

competition restrictive practices in Japan, exclusionary practices in Japan, and our position was if that were the case, the Japanese Antimonopoly Act would be violated.

We asked that a complaint be filed with the JFTC; however, that did not happen. There was the Super-301 provision as a possibility and the process shifted toward the WTO dispute settlement panel. So if this problem had been a JFTC issue, there could have been more done between the U.S. and Japan. It might have been something that could have been done between the JFTC and this particular American corporation, Kodak. If there had been more communication between the two parties, the outcome might have been different.

Also, Mr. Rill talked about how you could have very sophisticated competition law and no enforcement, or not effective enforcement. In such a case, positive comity would not be very useful. I believe he has mentioned this. My feeling is that would not happen very often. That would be a rare occurrence that such a thing would happen.

Even if the competition law itself or the way in which enforcement proceeds is different among countries, I think that positive comity will work on the basis of the differences in the nature of competition law enforcement.

For example, think of the case where country A, say the United States, enforces its competition law mainly with criminal sanctions, while country B, say Japan, enforces its competition law mainly with administrative measures and few criminal sanctions.

In this case, enforcement of competition law in country B that is requested by country A through positive comity will be the one with administrative measures as usual. Even if the country B does not enforce the competition law through criminal procedures, it does not mean that positive comity does not work.

So the way in which enforcement takes place may be different, depending on the different countries, and I don't believe you were referring to this when you were talking about this, but the differences in the nature of enforcement need to be taken into account when you talk about positive comity.

In any event, this is something I also mentioned during the morning session, but if there is entry-deterring practice in a market of the importing country and firms of the exporting country have difficulty in entering the market, what is the effective way to deal with this?

In this case, if free activity by firms of the exporting country is restrained and the interest of consumers is injured, this case may be in violation of the competition law of the exporting country. However, this case also would be in violation of the competition law of the importing country because competition in the market of the importing country would be restrained and the interest of consumers there would be injured. Therefore, it may be more appropriate that the competition authority of the importing country enforce the competition law and eliminate the entry-deterring practice by firms of the importing country; since, for the importing country, the conduct is the one by the domestic firms in the domestic market, the competition authority of the importing country can make investigation

more efficiently and take legal measures for eliminating anticompetitive conduct more effectively, and unnecessary frictions regarding extraterritorial application of competition law can be avoided. Therefore, it would be appropriate that the exporting country request that the importing country enforce the competition law through positive comity.

The request by the exporting country is significant to the importing country, too, because in general the country which suffers entry deterrence tends to notice the anticompetitive conduct more easily than the country where the entry-deterring conduct takes place.

If that's the case, I believe this idea or concept of positive comity will be very effective in that situation. Thank you.

MR. RILL: You are quite correct. I was not referring to differences in enforcement structure and enforcement policy. I was referring to non-enforcement altogether. There may be some circumstances in which differences in enforcement policy could be tantamount to non-enforcement, and transparency would very much be helpful in identifying those situations.

I'd like to welcome to the table, belatedly unfortunately, Doug Melamed, Principal Deputy Assistant Attorney General in the Antitrust Division, Joel Klein's Principal Deputy. I think he is known to most of you. Doug, you should certainly feel free to participate to the extent you feel --

MR. MELAMED: I feel free. Thank you.

MR. RILL: Eleanor, you had your namecard up.

MS. FOX: I think I'll probably start with an observation and

then perhaps a question for your comment. This relates to possible deprivations of market access. It relates to the possibility that there are exclusions from market access where the antitrust law may not appear discriminatory.

Fred, I wanted to reflect on your suggestion, why do we have the abusive dominance provision in the telecoms agreement? Does that mean that we were worried about discriminatory deprivations of market access?

And as a reflection on that, it may be the case that we are worried about bars to market access and we don't care whether nationals in the same country are also excluded, but we feel that there is an anticompetitive exclusion. And that would mean that discrimination is not the whole problem, and maybe in a world of free trade, we ought to be concerned with anticompetitive exclusions, whether or not discrimination is the problem.

Now I just wanted to make a reflection about European Community law, which is concerned with unreasonable restrictions of market access among the nations and not necessarily dependent upon whether it was discrimination. And the question is whether, in the international context, we should be thinking of such concepts and whether we should be thinking about bringing together not just private restraints or hybrid restraints but just government restraints that are unreasonable and anticompetitive barriers to market access?

One of the cases in the European Union is the Danish bottles case, where certain Danish actors had gotten together on an agreement so-called, for environmental purposes, to exclude certain bottles that didn't conform with a

standard of about seven. And this caused a harm to trade because it was harder for people who bottled the beverages in nonconforming bottles to come into Denmark.

And the court said that environment is a very good purpose, it's a very important purpose but the environmental purpose could have been achieved in a less restrictive way and there is a real barrier to the flow of trade, and it was caused by private parties there rather than by government. In another case it might have been caused by government. It was not tailored to the policy reason that was a legitimate reason.

In the European Union, we see this combination, we see the treatment of public and private barriers, and we see the treatment without regard necessarily to whether the barriers are discriminatory. And I am wondering whether in a world context, we have a need to be thinking of a wholeness of the picture of anticompetitive or unreasonably anticompetitive public and private restraints?

And if we need to think of this as a whole and integrated problem, is there one place we ought to go or should we still have to go to antitrust on the one hand and WTO government restraint on the other hand? Or do you foresee some way of dealing with the public, private, unreasonable and anticompetitive restraints as one problem?

This could, for example, affect a Fuji/Kodak problem if the allegations of fact were true and a lot of people are skeptical -- and I'm not commenting on whether Kodak's questions of fact were true -- but in a case like

that, if the claimant's facts were right and there were exclusions and they were caused by private restraints but they are also caused by the combination with public restraints: do you see that we ought to be dealing with the problem and do you think that we ought to be dealing with it in a holistic way down the line?

MR. RILL: Frederic, it's all yours. She asked you the question.

MR. JENNY: It's not mine. Precisely because I'm chairing the group. So it's any of the other members.

MR. RILL: There is a converse to that question and that is whether or not you should have a total separation?

MS. FOX: Yes.

MR. RILL: Which is the other option. So that perhaps the trade people would keep out of the area of private and hybrid restraints and the antitrust people would stay out of purely governmental restraint. However, I understand there is a tough dividing line there. I would, of course, draw it in favor of the antitrust jurisdiction. That's a personal view, not a Committee view.

I'm sorry, Konrad?

MR. Von FINCKENSTEIN: It seems to me that you should deal with them sequentially. You should deal, first, with the public restraint and the WTO or whatever the chosen instrument is, to see whether the anticompetitive restraint that you allege is there is actually sheltered by the public restraint or not. So that once you remove the public restraint you will see whether the anticompetitive restraint still exists or not.

You can't assume automatically that because they exist at the same time that they exist independently. It may very well be that the anticompetitive restraint will fall to the ground once you have dealt with the public restraint. So I would think you should always do it sequentially.

MR. RILL: You're somewhat slower. But I guess -- Eleanor, someone else had her namecard up on this, too.

MS. JANOW: No, not on this. Go ahead.

MS. FOX: I just wanted to follow up on that. Because sometimes the question is how easy is it to get rid of the public restraint? If it's going to be hard to get rid of the public restraint, the public restraint becomes part of the market background for the private restraint and may make, for example, some vertical exclusive agreements that would not otherwise be unreasonably exclusionary, they might make the product restraint unreasonably exclusionary. So I see them as sometimes inextricably linked.

MR. LANGEHEINE: I think we all agree that regulatory measures can have restrictive effects, and it's desirable to get rid of these measures just as it is desirable to get rid of anticompetitive private behavior. I think we have to make a distinction, though. If there are other rules that allow you to get rid of this sort of public behavior, then that's fine, but if it is a restriction of competition caused by government action, things become very complicated.

And I recall, since you mentioned EU law so much, that this is one of the areas we tackled last and we still haven't really sorted out yet. And I

have been involved in a number of cases where we tried to do something about German insurance rules and about freight rates and other things where there were government interventions that caused restrictions on competition.

That is very difficult to tackle because invariably you have public interests involved and you get into the field of public policy, where you don't find as much agreement as you will find in other areas. So I think you would have to have some kind of a gradual approach and I think you can only divide the two if you have a means to get rid of the public restrictions through some other, maybe already existing WTO rules.

It's fine if you can do that first, but to mix the two and to try to tackle all kinds of private and public behavior at the same time or even mixtures where the two go together at the same time, that would be very difficult, at least as a first step. As systems develop over time, it will be possible and certainly if we, in the context of the WTO go into the direction of looking at private behavior, that will become inevitable. But I think that should not be one of the starting points of the debate. I think we should leave that for a later point in time.

DR. STERN: I would like to go to into another set of questions. I want to pick up on some comments that were made earlier this morning on proliferation of antitrust laws and rules around the world. And even you, Mr. Jenny, just have made some reference to concerns on behalf of some business groups that there is spotty enforcement of these rules and sometimes they are really masks for anticompetitive activities in a country.

One of the suggestions this morning was that the technical advice that is exported should be less in the form of new laws and more in the form, as I recall, of institution building. I think that was your point, Mr. Oliveira. Thank you.

In that realm, I am wondering if you could elaborate more? Because I do think that not just the WTO or the OECD are potential institutions that have an impact on what different countries do in the name of competition policy, but there is the World Bank, and the IMF and other regional banks that have, if you will, given technical assistance funds and contracts to write some of these laws that have proliferated around the world.

And I think the question that should come to us and we should at least try to tackle, is if there is going to be an exporting of the ideas for competition policy, are they best in the form of contracts for writing antitrust laws, or are they better in the forms of perhaps structural analyses or, as you suggested, doing analyses on institutions and looking to see how you maintain, for example, an independent integrity of antitrust policy or competition policy regulators?

I was talking with Mr. Fels, and I said, “Well how come you have been in office for so long? I mean, you have made some tough decisions, don't you have some fatal scars on you?” And he said, “Well, I have been in for five years, but I can be reappointed.” Well, as a Commissioner where I sat at the International Trade Commission, the fact that I had a nine-year appointment allowed me to be very independent, and I also didn't have to worry about getting

reappointed or making anybody happy or unhappy in my decisions because I knew I could not be reappointed.

Now that's a form of institutional practice which might be borrowed by other countries. So this is a long-winded question to ask if you would elaborate or if others might elaborate on your point, about the way in which competition laws are proliferating? Are there better ways that we could export the notion of competition to different economies?

MR. OLIVEIRA: Certainly. I think this is very important. I find that the type of technical assistance that provides funds for countries to write their laws and have their competition acts and so on, that certainly might be useful if the countries are willing to implement those laws, of course.

But I do not think that that should be the main focus, and I think that there are different ways in which one can export best practices and I would like to tell you about a few good experiences we have had. We organized in the recent past what we called international weeks with the participation of different competition enforcers from different countries and what they do is they observe what we do on everyday work at CADE.

This has proved very useful in the sense that it's not only a matter of discussing a particular clause, a particular article, but it's a matter of discussing and participating in our decision process. This is a peculiarity in the Brazilian system, which is that our sessions are public --

DR. STERN: Very peculiar!

MR. OLIVEIRA: -- and the reasons for a particular vote are

made public. We are carefully not publishing confidential data or things like that, but I think this helps and this makes it easier for foreign officers to participate.

DR. STERN: There is a record in effect that is made available to the public?

MR. OLIVEIRA: Exactly. And on our Home Page on the Internet, one can look for particular votes and information about the decision, so that also makes it easier for people to follow. I think also the one other experience that we would like to have this coming year in 1999 is to have a review by an international committee of our decisions of 1998.

DR. STERN: Who should review those?

MR. OLIVEIRA: We would like to hold a seminar, an international seminar in February, and we would like to invite different experts to participate and do that. Of course, all that requires funds, and I think that this kind of funding and this kind of activity is very, very helpful in introducing best practices and different types of ideas.

Another interesting experience was the discussion we had concerning our last resolution on mergers, that I presented this morning. We had the participation of two Argentine commissioners. Actually the president of the Argentine Commission and one other commissioner participated in the session and discussed with us.

We hope that for our upcoming resolution on our administrative guidance that we will have at the end of this month, that we will have other foreign participants as well. I think with this type of practice and also

the interchange, the exchange of officials, the agreements that we have with the universities that could be extended to foreign universities, all that helps to build up the institution and has very little to do with writing statutes or things like that.

DR. STERN: Indeed. Do you think there should be a role at the WTO and -- going beyond the Working Party -- should the Secretariat of the WTO help disseminate these best practices? Or be the worldwide repository for decisions made by signatory countries in their own competition policy matters?

We talked about this a little bit, but we also had a reference by somebody about the French system which is not as transparent, it was alleged. So I mean, should there be some obligation by members to participate by registering with a repository at the WTO on transparency and record keeping?

MR. OLIVEIRA: Well, I find that this kind of work that to a large extent, OECD does for the OECD members, and UNCTAD does for the developing countries, I find that the WTO could also do this kind of work. At an early stage I would not think about an obligation of members to review their policies, but I find that the exercise that OECD has of a policy review in a certain period of time would be very useful.

I find that if countries voluntarily are willing to be exposed to a review by a committee, for instance, as we would like to do in 1999, I think that that would be a good example and that would stimulate this type of discussion and this type of interchange. Perhaps in the future one could think that as a member of WTO, one would have to follow certain core principles in the legislation and in the jurisprudence. Perhaps it's premature now, but we could go

in that direction.

I would think of a system that would work on a voluntary basis, that countries would present their policies and the organization would analyze them and would give advice and expand best practices to other countries.

MR. RILL: I guess the one problem I have with the notion of the WTO, as to the wisdom-- and I trust this is a trade issue. Transparency is an overarching issue of competition policy regardless of whether trade is implicated or not. Maybe, I think the idea of a repository of -- everybody has mentioned transparency -- a repository of some best practices on transparency in some organizations, start perhaps with OECD but look to others, would be more comprehensive and perhaps more within the jurisdiction of the group than the WTO serving that purpose.

I admire very much the European Commission's willingness to give some description of why a merger was not challenged. It would be a very useful exercise for the United States to try and experiment with that particular bit of illumination of decision-making, clarification of decision-making. I think the Commission does an excellent job of that, but at this point I'm just not sure the WTO is the right body.

MR. OLIVEIRA: Well, there is, if you will permit me, a problem is that we do not have any other forum with all countries. The WTO doesn't have all countries but I don't know any other forum with more countries than WTO.

DR. STERN: Except the U.N.

MR. OLIVEIRA: So that's a problem. It certainly has some general principles that could be very well applied.

MR. RILL: Well, I think it's one of the functions of this Committee at least to undertake to identify what may be, from our standpoint, to have a consensus on best practices and on what goes out on our view as to what is a recommended --

DR. STERN: Transparency. And I think that the other thing which keeps getting forgotten and needs mention is institutional integrity. Independent institutions are perhaps in the eye of the beholder, but I think at least to one reporting how a decision maker is appointed to the job, and for how long, and under what circumstances, would be another way to bring about institutional integrity.

MR. RILL: Well, my only comment on the WTO, it may be it's an organization that may go well beyond the jurisdiction.

Please?

MR. DE GUINDOS: Mr. Chairman, an idea has come to mind. One of the main criticisms that has been made today, as to the International Monetary Fund and the handling of the recent crisis, is that it was too focused on microeconomic policy, discount policy, monetary policy, exchange rate ratings, etc. And that much more attention should be paid to supply side economics, let's say, macroeconomic issues.

DR. STERN: Yes.

MR. DE GUINDOS: We should bear in mind that the IMF

has a lot of, an immense amount of programs. I am taking into account the need to strengthen the microeconomic approach that has been also recommended, for instance, by Tony Blair in the case of the UK. Perhaps one possibility could be to have the World Bank or the IMF much more involved in commanding good practices with respect to competition policy to these emerging markets.

DR. STERN: Yes. It's a very good point. There is a whole dialogue going on among the financial ministers and their political leaders about how to reform the IMF so that there is more focus on the internal markets, the structures in each one of those. And there was a discussion a little bit earlier in the morning. In every discipline, people focus narrowly. The finance officials have their conversation, and then the antitrust lawyers have their conversation, and then the trade people have their conversation.

Someone earlier said this is a golden opportunity, it may have been you yourself, that this financial crisis is a time to relook at a lot of these areas. And the IMF may be just the institution that really ought to be challenged to focus more on competition policy.

MR. RILL: Sorry, please?

MR. UGARTE: I worked for the IMF for a couple of years.

DR. STERN: I knew you were going to say that.

(Laughter.)

MR. UGARTE: I really don't think that you should relate antitrust policy to loans and financing and standby agreements and so forth. One thing I admire about the OECD is that what you are getting there is a peer review,

I mean, the people that are judging you or that are analyzing what you do are people that do exactly the same job that you are doing. And I think that they know what the difficulties are and how easy or how politically complicated it can be to do something or other. I have the feeling that the IMF is sort of above the clouds --

(Laughter.)

MR. UGARTE: And for them, it's very easy to say, “Well, why do you do this?”

MR. RILL: That's through the clouds.

(Laughter.)

MR. UGARTE: I mean, I love the institution, but I have a feeling that peer review is very important. I think it's good that you are judged by people that do exactly the same thing that you do.

MR. DE GUINDOS: The difference with the IMF is that the IMF has money to support countries. That's a big difference.

MS. FOX: Just to add to that, the IMF sometimes, at least in -- Merit was going to say that. Go ahead, Merit.

MS. JANOW: Go ahead.

MR. RILL: One of you go ahead.

MS. JANOW: There is the possibility that when aid is not linked to functionality it can pervert incentives. Is that a concern?

In other words, if it's an element of IMF conditionality that a country has competition laws, some jurisdictions may pass laws quickly because it

turns on the financial spigot. Also, new laws, especially if they imply filing fees, produce the opportunity for rent-seeking behavior. As seasoned enforcement officials, how do you evaluate these factors?

I was also intrigued by Frederic Jenny's observation this morning that it was the right time to capitalize on a change of attitude, particularly in the Far East. What is the implication of that observation with respect to competition policy as such, as against notions of transparency and accountability in the financial context?

MS. FOX: It's related. It's a different point maybe, a more sympathetic point, that the IMF sometimes will require that nations adopt competition policy, and that the IMF will sometimes look to the World Bank to give the content because the World Bank has certain people in place who are experts in competition policy. And they themselves have this list of best practices. So I guess it's just a complementary remark.

DR. STERN: My point was that sometimes they may be focused too much on drawing up the legal code and not sufficiently on the independent integrity of the institution that is going to enforce that code.

MS. FOX: Definitely. But Merit's point is really different. And I would love to hear Frederic Jenny's response to Merit's question.

MR. RILL: Frederic?

MR. JENNY: Just on the first question, whether it's a good idea to have the IMF or the World Bank promote and disseminate competition principles. Well, there are several questions. First of all, there are some

countries who need the IMF and World Bank, and others who don't actually have so much intercourse with the IMF, but still possibly need a competition policy. For the second, I think it would be very interesting for your group to ask people, since the World Bank has been involved in promoting competition policy, to tell some of their experiences.

I don't know whether they would be as frank as they are when they talk privately, but I can recall some number of stories of the kind -- and I won't mention the country -- well, it's an African country where the World Bank has been recommending that they should adopt a competition law as a condition for getting funds, and it was very slow in doing it.

And then the one day the World Bank representative was there, in the capital of this country, and said, "Where are you?" And they said, "Well, we are still discussing what we should do." And then the representative of the World Bank said, “Well, I have with me the Belgian law.” And the guy from the Ministry says, "Oh, you want us to adopt the Belgian law? Fine!" without even reading it.

So, I mean, there is a limit to what you can expect. On the other hand, the institution, of course, the World Bank would be satisfied even if they adopt the Belgium law -- which doesn't happen to be a particularly good law, by the way -- but at least a condition will have been formally met, and it will be able to give the money that it wants to give.

So I'm skeptical of this and I'm also skeptical of giving the IMF or the World Bank the power to withhold money on the basis that the law is

not properly enforced. Because I don't see where the IMF or the World Bank would do a better job than anybody else, including the WTO.

Now on the issue of the Asian crisis, I think that my point was originally to say that, to promote cooperation in whatever form, you first need to have competition institutions and competition laws. And that it is true that there was a certain resistance and there is still a certain resistance on the part of many important countries and important traders on the world scene, and that having good will for the whole notion of competition is a very important element if one is going to talk about the issue at the world level or at the trading system level.

Now, it happens that you will see in the submission of Korea to the WTO, for example, how the Korean government expresses the fact it was just on the wrong track and that there has been a very heavy cost. And that when you look at the Korean situation today, you see that the President, the new President is really trying to promote competition but is faced with a highly concentrated industry and chaebols who are really resisting any attempt to deregulate the economy or to open it up to foreign competition. Which means that the solution of the problem, even if there's political will, is not obvious.

Now, I think that there are enough countries who are maybe not as advanced as Korea in realizing the virtues of competition, but are at least open to the questioning, such as Indonesia, even Malaysia, where we can clearly see that there is a tendency between, I would say, the modernist and the old guard on this issue, that there is a good prospect, I think, at this point in time, that a lot

of countries would be willing, given a little push, or given a little incentive, to adopt competition policy and competition laws. And particularly if this was in the context of a multilateral agreement.

I think one should capitalize on this. I don't mean to say that it would change competition law. I would rather say that those countries are ready to adopt, I would say, state-of-the-art or modern principles of competition law.

Now, again to point to the experience of Korea. The Korean Fair Trade Commission is charged with the enormous task, besides trying to promote as much competition as possible, of reviewing several hundred laws and decrees to try and track down every unnecessary competition-restrictive regulation that should be stricken out.

Now, this goes back to my point again this morning. I mean, I was talking about Latin America, but it's not only in Latin America that we see competition authorities can have a role and an important one in deregulation. I mean, likewise in Japan. The JFTC has been reviewing a number of laws and making representations to other Departments on provisions which are unnecessarily restrictive of competition.

Now, there is this changing mood at a time when, and on the proliferation issue, I was going to use -- there are two favorite sayings on those issues. There is Jim Rill's pronouncement that “the elephant is on the table and it's not going to go away so we better do something about it.” And there is the EU pronouncement, particularly Jonathan Faull’s pronouncement, that “the train has already left the station” in talking about proliferation of competition laws. And

the question is not whether we can stop it, the question is whether we can do something about it that will bring some order to the process?

I believe that both pronouncements are pretty right, accurate descriptions of what happens. But the Asian crisis is important because it will lead to a new proliferation among countries which previously were not so intent on having competition laws, and that this may be a good time, particularly because there is often a market access problem associated with those countries, to try to capitalize on this, possibly in the context of the WTO, or any other context.

I mean, I'm not, I don't want to get into that discussion because the members here will decide eventually what they want to do with the group. But certainly this is not going to repeat itself very soon. I mean, this is a right time in a sense. There is more openness on the issue now from countries which were more antagonistic to the project than used to be the case two years ago, five years ago and certainly 15 years ago.

MR. RILL: Paula has a follow-up question. I just want to state on the distinction between Jonathan Faull's comment and mine is that he's much more involved in dynamic processes.

(Laughter.)

DR. STERN: Monsieur Jenny, on that point about the chaebols in Korea: Can't one argue that it's not just the financial crisis but it has been the role of the IMF and the private banks in forcing along these new attitudes that you are finding so enlightened? It suggests to me that there may be a way of channeling the IMF going forward in some of the ways in which British Prime

Minister, Tony Blair, has been giving speeches about a renewed IMF to deal with these problems. Not to take away from the WTO, but --

MR. JENNY: To be honest, I don't know. What is true is that: (a) there was a KFTC before the crisis; (b) the KFTC Chairman had cabinet rank before the crisis, and had the most terrible time trying to impose its views.

Now, it was already realized before the financial crisis that the country was not on the right track, that corruption was rampant and that this was also a product of a system that was disregarding competition incentives and profit maximization as we would like to see it.

So I think that one cannot say that the new mood is purely the product of the IMF, although I certainly believe that the financial crisis and possibly the conditions that have been attached to Korea have contributed to improving the situation.

DR. STERN: Sure. I mean, they had already become a member of the OECD so surely they were already thinking about competition policies in that context. But I wanted to compare the potential comparative advantages of one institution over another to see whether one was better equipped than the other.

MR. JENNY: I fail a little bit to see what there is to compare. Aren’t we comparing apples and oranges, between the IMF and organizations such as the OECD or the WTO?

DR. STERN: For example, we put on the table the example that the WTO, there is competition issues which may not be directly trade related,

and therefore the IMF, which is not a direct trade-related institution, might have a comparative advantage in looking at the issues more broadly. There are pros, cons, differences. I'm just trying to elicit as many of these distinctions as possible so that we can analyze this with some clarity.

MR. RILL: Doug Melamed has his mike fired up.

MR. MELAMED: This is in the form of a question addressed to you, Frederic, and obviously anyone else who might have a thought about it. I want to leave aside the issue at least temporarily that Paula was focusing on, which is what institution, what forum might be optimal. I want to take as a given your observation -- which, I guess in varying degrees, many of us have -- that this is a special time in terms of the interest throughout the world, and particularly in segments of the world that haven't previously shown a lot of interest, in competition policy.

I want to ask what the implications of that premise are for how we should proceed? I can imagine one variation -- that countries are very interested in the potential that competition policy might have for them, and they might be interested in developing their own unique version, suited to their culture and their economic needs and the like.

On this assumption, what is called for might be an enhanced and enriched international dialogue, in which countries with more experience in competition matters can share their experience with others in a variety of ways and help the others develop appropriate competition policies.

Another possible implication is that the time is ripe for a

discussion about international agreements, about competition standards and competition peer reviews and whatever might be included in international agreements to aid the process. I could imagine that agreements might lend structure to the progress and even that they might promote progress by giving comfort in the sense of all being in this together.

I could also imagine, however, that if we go beyond dialogue and into agreement, nations -- particularly those that are only tentative now about their commitment to competition policy -- might begin to feel threatened, and that that might inhibit the process of embracing competition policy. And I wonder whether you or others at the table have a sense of what really are the implications of the current international mood for how best to proceed, apart from the question of what forum or institution would be the best one in which to proceed?

MR. JENNY: The first thing I would say on this is I have done a lot of technical assistance in various countries. I remember one particular case where, with the World Bank and the French Ministry of Economic Affairs, we were in Africa talking to French-speaking African countries. And the Ministry official -- this was before Mr. Gallot, so he is not responsible for this -- was explaining how we had used competition law in France to strike out the price cartel among the plumbers.

Whereupon the representative from -- I can't remember which island it was, perhaps Cape Verde, raised his hand and said, “We don't have plumbers.”

The story got worse because after that the same official

explained how a price cartel between marriage agencies, you know, where you meet people to get married, had been struck down. And he was answering a question from a representative of a Muslim state who said that this is not the way things were done in his state and this was not very relevant either.

(Laughter.)

My point is about how to proceed. I think that talking to each other in the context of OECD is very valuable. We miss a point, which is we would not talk to countries which see competition from a different angle. And that the value of a large forum, whatever that forum is, is that it will bring some sense and rather than selling competition law and policy as you know it -- you realize that maybe it's more complicated than you thought. And it has to be tailored to the needs and the particular specificity of the country that you are talking about.

On how to proceed, I firmly believe that it's insufficient to talk within the confines of a small, or even of a large set of countries who are fairly homogenous in terms of development, of legal systems -- they have their differences but they are still closer together than they are to the rest of the world. So that's one observation.

The second one is that there are still a lot of countries which are on the verge of adopting a competition policy but have not quite decided to do it. I mean, they are more sympathetic to the idea of adopting competition principles and deregulation, but as I have said this morning, there is still resistance to this. I have a tendency to believe that they will be more convinced to adopt such competition policy and laws or to promote deregulation if it is in the

context of an obligation than if it's through pure discussion.

So I would also say the WTO has an element to contribute. The member countries have committed themselves to trade liberalization measures. If there is any relationship between liberalization and competition, this is the way to enter. It will not necessarily lead them to adopt domestic competition policy, but once they start having to deal with competition where there is interaction with international trade, there is a fair chance that they will continue in the logic of adopting wider competition law.

My last point is to say that I do not believe personally that minimum standards -- whatever that means, I'm not exactly sure what it means -- are useful. I'm quite convinced that it is not a good idea in the context of the world that the differences in legal systems, the difference in social, economic makeup and the difference in, even in a political sense are considered unimportant.

Laws are only the product of a system and therefore you have to adapt such laws to local reality. And this can only be done by a very large discussion among countries which have very different origins and very different makeups. So whatever the forum, I would say it has to be very international, more international than the OECD.

MR. RILL: Maybe they are multiple fora.

MR. JENNY: Oh, there are multiple fora.

MR. RILL: There are multiple fora; maybe multiple fora can be used.

MR. JENNY: Absolutely.

MR. RILL: Before we close up, I want to come back to an observation made very early on by Dieter Wolf that it's not the Sherman Anti-Cartel Act, it's the Sherman Antitrust Act, and we need to talk a little more on concentration, mergers, one of our topics. We spent most of our time, I think very profitably, very valuably, on practice, on conduct issues.

We have talked some about mergers. What I have picked up is a suggestion by Karel Van Miert when some of us have been thinking of the time period, the common time periods. We have talked about the sharing of confidential information in merger review. We have talked about transparency and decision making with respect to mergers.

I just want to invite the participants to let us know if there are any other comments or suggestions you would have with respect to particularly United States practices, if they may relate to other jurisdiction practices in the merger area.

MR. DE GUINDOS: Well, with respect to mergers, I would like to make a point. It's that next year, 11 European countries are going to merge their currencies, and as far as I know without prior notification to competition authorities, no? I don't know if this forum was involved or not.

But there is one point that I would like to raise. The final target of having a single currency in Europe is achieving an internal market and promoting the restructuring of the European economies in order to have higher economies of scale, higher economies of scope, and to gain efficiency.

The point that I would like to raise is that perhaps this will

give rise to a wave of mergers in Europe and of course that it will increase the interest of non-European companies in taking over European companies because well, with a larger market, you have an incentive to do it. But perhaps there is not a contradiction between the appearance of the single currency next year in Europe and the underlying intention of competition authorities to control much more the visible wave of mergers that this could give rise to.

This is a question that I would like to pose to my European colleagues.

MR. RILL: Anyone care to respond? Mr. Gallot, and then Dieter Wolf.

MR. GALLOT: Yes. Is it just possible to say one word about the non-transparency of the French system, the merger French system, just one word?

(Laughter.)

I don't know if it is transparent, but it is a system, so I think it's better than nothing, first. Secondly, we have a system which is quite original. There is no compulsory notification. There are only six people, six or seven people with me to deal with that problem in France, so it's not a big organization. So that's why we have no compulsory notification. We are happy not to have compulsory notification.

The Competition Council has only the responsibility to give advice if the French government asked it to give advice, unlike your case. Perhaps it's one of your difficulties.

We have about 25 or 30 decisions each year. I think progress has been made recently because the French Minister said that mostly he will try to take into account the advice of the Competition Council. I think it's new and it's better.

What I can say is that the Minister will take the decisions on my proposal. And effectively it's not a decision made by an independent authority, but I think we are making some progress, and we are just a little transparent.

MR. RILL: Dieter?

MR. WOLF: Well, I'll leave aside the comparison between the introduction of the Euro and merger control because I really can't see the link between the two events, I would only like to avoid a misunderstanding. And I was pleading for integrating merger control in some sort of an international system of the future, not of the near future, but of the future and to start talking about that question. We don't have the time to leave that question aside.

I am not by any means saying that mergers as such are a dangerous thing. I think most of them, more than 90%, that's at least our rate, are without any competitive problem. And it's an economic truth that mergers normally enhance efficiency, and that's why they take place. So don't misunderstand me, I am not against mergers. And I suppose that you are not formulating basic criticism of merger control as such at whatever level. What I tried to make clear this morning was that we are confronted worldwide with an enormous wave of mega-mergers which only up to now are not dangerous. I do not know of a single case which has already become a critical one. But looking

ahead a decade, it could well happen that we will be confronted with a degree of concentration in some markets which will not be so neutral anymore.

It's speculation for the time being. Predictions are always very dangerous, but I wouldn't see the biggest dangers on product markets. For me, a critical sector could be markets for financial services. Financial institutions -- because of the highly developed sector of information technology -- are already very much linked together.

They are very powerful enterprises, some of them at least, they are contracting 24 hours a day, seven days a week without any interruption, worldwide at zero time. That's reality. Still, we don't have markets where things get so narrow that it gets dangerous. But do we have the time to leave that question aside? And wouldn't it be too late, one day, to be confronted with a critical concentration?

For one thing is clear to me, in contrast to cartels, a dangerous concentration is irreversible for years. Cartels are much less stable. They are exposed to centrifugal forces. Their lifetime is much shorter. A concentration is something you have to live with once it is established. And therefore I think it's time to discuss some sort of a merger regime also at an international level, like we are discussing about cartels, hard core cartels. No more than that.

MR. RILL: It would be perhaps more difficult -- just a personal observation -- to have a total convergence of substantive principles in mergers than in virtually any every other area that we're talking about.

MR. WOLF: Right. Therefore it will take much more time, and perhaps even if one chooses WTO as the institution, it will start on a plurinational, not on a multinational level. You will start with a limited number, probably, of signatories of such a regime. But that's also a secondary question to me. My purpose is to get discussions started, not more than that.

MR. RILL: You have done that very well. Look at the namecards. Let's move down the table: EC, Mexico and Japan.

MR. LANGEHEINE: I think it's probably true that we will see a certain consolidation after the introduction of the Euro. I think we will see mergers in increasing numbers. The Commission, I think, has tried to do its job by bringing more mergers into the ambit of European merger control. It was a very slow and sometimes rather painful process. At least we have achieved some improvements. In cases where a merger has to be notified to three or more authorities, lower thresholds apply and I think that's a good sign.

For the rest, I think, it is very difficult sometimes for companies to notify mergers within the EC to eight, ten, or even more national authorities. So we have a lot of work to do within the EC. I'm not sure that it is something which is up to the EU, because there is something called the subsidiary principle. So it's only where certain phenomena have a cross-border effect or an effect that concerns several markets that you can do something about it.

I think that does not exclude that we can think about more homogeneity between the various national merger control systems. And I am sure that the Commission -- and I say this without having the cover of my

Commissioner here -- I am sure the Commission will come back on the question of thresholds and possibly try to extend them just a little more.

As regards time limits, I just want to supplement what Karel Van Miert said: that sometimes we suffer from strict time limits. But it also sometimes can have advantages that other authorities are still continuing to work on a certain case. And I think in some instances we have seen a range of remedies that were quite complementary at the end of the day, so a little competition in that respect might not be too bad.

And finally, as regards a possible, shall I say, wish list or improvements of things in the U.S., again, it's very striking when you look at something like the Boeing case, where the European Commission comes out with 50 or 55-page decision published in the Official Journal, whereas I think on the U.S. side there was a three-page press release setting out in a rather summary form the thinking of the authority concerned.

I'm not sure whether there is maybe some room for improvement there. I just want to sort of raise that point as a possible area where we might want to think further.

MR. RILL: Thank you. Mr. President?

MR. UGARTE: Yes. Thank you. With regard to the first question, you know the one raised by Frederic, I think that the monopoly of the central bank is the only real, I mean, the only monopoly I can think of that has good, solid justification in terms of economic efficiency. I mean, I don't think that we should discuss that too much.

Now, with respect to merger review, I think that is really one of the topics that is becoming increasingly important, at least for us in the Mexican Competition Commission. And well, we are all aware of this mega-merger trend and the implication that it has. However, I think that the type of communications that we have with other antitrust authorities, at least in our specific case, are not working as effectively as, in my opinion, they should be working.

I think that on the one hand that we have institutionalized the communication channels so that we can have more sort of automatic or more, well, automatic is probably the right word, ways of communicating.

MR. RILL: I'm going to put you on the spot on just that issue. I hesitate to bring it up, but you mentioned very early on the Union Pacific/Southern Pacific merger. Do you feel that your agency had the opportunity to participate as much as it wanted to; first, before the Department of Justice, secondly, before the Surface Transportation Board?

MR. UGARTE: I don't think so.

MR. RILL: I don't either.

MR. UGARTE: I don't want to raise that.

MR. RILL: Well, but you did.

MR. UGARTE: What I mean is in some of these cases, let me just refer to one that's very current, the merger of Grand Met and Guinness. Both the European Commission and the U.S. resolved this, what -- about six or eight months ago? Because of the lack of simultaneity in the procedures we solved this

case just a week ago or so.

And it just happens that for us all, we are sort of duplicating work, and probably a lot of the information that has already been, or these studies or the analysis that have been developed by other antitrust authorities could be shared.

Then I have the feeling that business is sort of following a strategic approach in how they present their cases to the different antitrust authorities. They go first and try to sort of feel the ground whether it's going to be passed or not, and they just move along and see how the next authority is going to react to the merger and so forth. In this particular case, we sort of feel left out. And it's not that it took more time for us to solve the case, but rather that we received all the information late and we had to analyze the case, and it could have been done in a more harmonious manner. I think that there are several other instances where this sort of example could be duplicated.

MR. RILL: The undertakings in the 1991 U.S.-EU agreement are the sorts of notification and consultation principles that might improve, I think, that situation. Or maybe, once again going back more broadly to bilateral or regional agreements, that might improve the situation, as might other processes. But I was very sensitive to the impact of certain mergers on the commerce in the Republic of Mexico, and I felt that there was not a full opportunity to -- either taken or available, one or the other.

DR. STERN: That notification wasn't provided for in the NAFTA?

MR. RILL: No, no, no, no. It was -- we are talking about a specific matter and really it's more, it gets back also to the question of separate regulatory agencies within the same country taking precedence over one another. But I'm somewhat reluctant to get into that case. I was involved.

MR. UGARTE: Yeah, but here, on the one hand, Article 1501 under NAFTA states that there should be cooperation between the competition agencies, but this article does not have any -- I mean, it's not applied in practice because there is no regulation and no rulings or whatever in order to apply Article 1501.

MR. RILL: Maybe we should recommend there should be. I don't know.

MR. UGARTE: Probably. I don't know. So that's the first point I want to raise about merger review. The second has to do with a business community. I mean, I think that we are sort of becoming a bother, in the sense that they have to be filing three, four, five different jurisdictions, very similar information, so I mean, we could try to help the business community by trying to make our filing procedures more uniform, our timing, the days that things have to be sent. I think that we can do a lot in order to improve the efficiency with which we can work vis-à-vis the merging companies.

DR. STERN: Do you think that if the U.S. and the EU came up with common deadlines and common procedures, that they would be adopted independently by other countries just because it would make more sense for their regulatory authorities? Or do you think it would take some sort of an institutional

push? After all, Mexico did a lot of its liberalization before it joined the GATT, in order to join the GATT, and before it ever thought of suggesting a NAFTA with the United States and Canada. So these things are done independently and unilaterally and are self-rewarding.

Do you expect that that would happen, too, if the U.S. and the EU got together in some way and came up with a kind of paradigm of best practices?

MR. UGARTE: Yes. I think so. Yes. For instance, on the one hand, the OECD has proposed some -- what is it, not exactly guidelines --

MR. RILL: Framework.

MR. UGARTE: -- for filing notifications. The uniform format.

DR. STERN: Yeah, that's the OECD.

MR. UGARTE: The OECD. I think some of the countries have accepted that.

DR. STERN: Well, I just wondered if there would be a snowball effect just from the U.S. and the EU --

MR. UGARTE: No, I think it would be quite useful to have, sort of, standards set up and have other countries follow up with the standards. Of course, I think it would be good to do some consulting with the countries involved.

DR. STERN: That would be nice.

MR. RILL: We are coming close to the witching hour; it's

close to Halloween. We have comments from Mr. Kojima and Mr. Oliveira and I think then we'll close up for the evening. Mr. Kojima.

MR. KOJIMA: I'd like to make two observations in connection with market access and also law enforcement. The first one is on positive comity. I think market access could be one consideration which might be taken into account in requesting the other country's enforcement of competition law. However, we shouldn't put too much emphasis on market access. In my view, basically speaking, the competition policy concerned on the side of the existing state should be the most important consideration in making a request to the other country. That's my first point.

My second point is, assessment of competition law enforcement and policy should be judged on the merit of competition law and policy itself, and not on the market access considerations. In this connection I'd like to quote some passage from an article by Professor Harry First, and I'm not indicating that I share fully the view of the author, although it's a very suggestive comment.

He says, "The government antitrust enforcement in Japan during the SII period is the most vigorous it has been since the initial years of the Antimonopoly Act; nevertheless it is commonplace to judge this enforcement as weak. This may be because the criticism of current enforcement often comes through the prism of SII and the trade goals of U.S. negotiators. If the question is whether SII succeeded in using Japan's antitrust law to open Japan's markets, the answer certainly would be no. This, however, should not obscure the real gains in

antitrust enforcement made during this period."

Thank you.

MR. RILL: Thank you. Mr. Oliveira.

MR. OLIVEIRA: I would like to emphasize two pieces of information. First, that we decided this Grand Metropolitan case a month ago. It's another example that we should do things simultaneously. It would be much more efficient. Second, the new regulation on mergers tried to do precisely that: to have a maximization of the intersection between what the OECD defined as a good notification form and what would work according to the Brazilian law. And I think that that leads to my comment.

I think that there is a demand for standards, not standards that countries would be obliged to follow, but that would serve as benchmarks. So I think that there is a real demand for that and that would certainly speed up the process of some harmonization and more efficiency in the short run.

In the medium run, however, I think that there is a problem in the sense that internally there is a free rider problem. There is a tendency for underfunding of competition bodies. There are no vested interests which will support competition agencies, independent competition agencies at the national level. At the international level -- and this, by the way, has a very important implication regarding the relationship between the competition agency and the regulatory agency -- because on the other hand, there are vested interests which are willing to support very strongly the regulatory agencies. So the asymmetry can already be seen in many jurisdictions, the type of support that the two

agencies have at the national level.

At the international level, there is a Prisoner's Dilemma problem, as pointed out earlier in the morning by Ignacio. Clearly competition policy is a very important device to guarantee trade liberalization, so if there is no external imposition of certain standards, there will not be implementation of competition policy, and will not be implementation of competition policy guaranteeing that trade liberalization.

So that, most likely, one will get a situation where countries will underimplement competition policy. But realistically this could be thought of in terms of a medium-run proposition and a long-run proposition. I think in the short run the multiple fora solution seems to be another great one. There is a real demand for standards for benchmarks, and I think that multiple fora could feed that appetite for standards.

MR. RILL: On that note, I think the discussion of the Guinness-Grand Met case leads me to conclude that it's probably approaching the cocktail hour. And I'd like to remind everyone that all the participants are invited to attend a reception at Joel Klein's conference room at the Department of Justice. Enter through the 10th Street entrance; that's between Pennsylvania Avenue and Constitution. And the conference room -- and I'm sure the guards will advise you, but it's to the best of my recollection 3107, or close enough.

MR. MELAMED: 3109.

MR. RILL: Close enough. There will be a sign outside, and you will see people. Tomorrow we'll start at 9:00. We have invited all of you

who are staying over, you are very welcome and cordially invited to attend a reception tomorrow night at my law firm from 6:00 to 8:00. 3050 K Street, 4th Floor, and you don't need a room number. And Paula?

DR. STERN: Yes. That's an opportunity to reiterate the cordial invitation I extend to all of you all, for a reception for all of the participants and panelists at my home on Wednesday night, from 6:00 to 8:00, assuming we get out by then. I think you have been given some directions which may have been a little circuitous, so you are being issued some new directions. It's only about 10 minutes from here.

MR. RILL: So tomorrow at 9:00, the reception tonight. And of course the public is more than welcome to attend and you are more than welcome to continue to participate.

I want to say, I cannot thank you all enough for your participation, which I think was wonderful. I think it has given us a lot to chew on. I hope that you'll write to us, call us with any further observations you have along the lines we've discussed today or anything else on your mind.

I'm delighted with the input we got today. And again, on behalf of the Attorney General, the Assistant Attorney General, the Deputy Assistant Attorney General and my colleagues on the Committee, thank you all very much.

(Whereupon, at 6:00 p.m., the hearing was adjourned, to reconvene November 3, 1998, at 9:00 a.m.)