INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE MEETING

Washington, D.C.

Wednesday, March 17, 1999

This document constitutes accurate minutes of the meeting held March 17, 1999, by the International Competition Policy Advisory Committee. It has been edited for transcription errors.

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James F. Rill	Paula Stern
Co-Chair	Co-Chair

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Washington, D.C.

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Taken at The Carnegie Endowment for International Peace, Root Conference Room, 1779 Massachusetts Avenue, N.W., Washington, D.C. beginning at 1:50 P.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

Thomas E. Donilon, Partner, O'Melveny & Myers

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

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

Raymond V. Gilmartin, Chairman, President and Chief Executive Officer, Merck & Company

Department of Justice Employees:

Joel I. Klein, Assistant Attorney General, Antitrust Division

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

Other:

Debra Valentine, General Counsel, Federal Trade Commission

William E. Kovacic, Professor of Law, George Washington University Law School

No members of the public made an appearance or presented written or oral statements.

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: 20

Reports or other documents received, issued, or approved by the Advisory Committee: None.

P R O C E E D I N G S

(1:50 p.m.)

DR. STERN: We have a stalwart group that's assembled, and our stalwart staff has also given me some remarks which I would like to use to welcome this group to our fourth full committee meeting of the International Competition Policy Advisory Committee.

Since we last met in December the staff has been hard at work developing documents that are designed to aid our understanding today in going forth with those policy choices in the three main areas, multijurisdictional merger review, the interface of trade and competition, and enforcement cooperation.

I'd like to take just a few seconds to lay out how we're going to proceed today. After we hear from our Co-Chair, Jim Rill, we will hear from Assistant Attorney General for Antitrust Joel Klein, and then we'll turn to our first session, which will be a discussion of multijurisdictional merger review issues. At tab A in your briefing book, which I trust everyone has, there are several staff-produced documents which contain various proposals for improvement in the multijurisdictional merger review process. These documents include possible best practices to guide multijurisdictional merger review, as well as a possible framework for international agency cooperation in the review of multijurisdictional mergers.

The documents in tab A also discuss possible reform of the U.S. merger review system in the context of reform efforts globally. Co-Chair

Jim Rill has agreed to lead off that discussion with his reactions to those staff documents.

Then at about 3:00, Advisory Committee Member Eleanor Fox, who is participating by telephone, will deliver remarks describing the current state of substantive divergence and convergence between the antitrust laws in the U.S. and the European Union.

After Eleanor's presentation, I will kick off our discussion of the several approaches for addressing private restraints or hybrid restraints that inhibit market access. The documents that relate to that discussion are in tab B.1. During the second session we also will talk about the use of positive incentives to encourage enforcement cooperation with other nations, and we hope to finish by 4:30.

This meeting is designed to get input from our esteemed Members. As we stated in our Federal Register notice, there will not be participation by the audience. We are pleased with the attendance of the interested public. Our format, however, does not provide for participation, though we would very much welcome, after today's meeting, hearing from you in writing. You may contact our staff who are sitting over there if you wish to submit written comments to the Advisory Committee.

With those preliminaries underway, Mr. Rill.

MR. RILL: Just very briefly, I'm not particularly a horse-racing aficionado, so I'm probably using the wrong metaphor, but I think we're in the back stretch. We are by no means in a position to, as a Committee,

suggest consensus views, outcomes or recommendations, but we are definitely beginning to formulate potential directions not only in terms of issue-spotting but issue-resolution, at least for discussion purposes.

So I think we are making this turn into the back stretch, and increasingly we're going to need to put concrete foundations into these issues and develop a structure that can be shared with the industry members. So today I think what we're going to do for the Committee Members is to identify issues and possible approaches. As the staff says in some of its memoranda, not necessarily expressing the views of the speaker or even the author of the memoranda, but at least putting on the table the directions in which the final report, due at or about the end of this year, might take.

So I think it's heating up, ladies and gentlemen, and I think that as we proceed further the shape/form of the Committee's work is going to be first adumbrated and then structured, depending, of course, on the views of each and every one of us.

Joel.

` MR. KLEIN: Thank you, Jim. Let me add my welcome to the Committee Members, our staff, guests, and first really express great thanks to staff for the fine work that's been done in anticipation of the meeting. I think the working papers, although as Jim said they bear a level of anonymity even uncommon in Government, nonetheless the working papers I think do provide a very good set of proposals for open and candid discussion, and I think reflect the fact that serious work has been done.

Obviously, I want to thank Merit for her leadership in that regard and thank Jim and Paula for their constant efforts to both attract the right people to come before the Committee and to make sure that the process moves forward from -- where do you go, from the back stretch into the home stretch, Jim?

MR. RILL: I think you go into the near turn, or something like that.

(Laughter.)

MR. KLEIN: Just to take a second to kind of bring you up to date on developments, in terms of the issues in international enforcement, the issues that we're working on and focused on here. Even as we study, the world moves forward. Some key developments this week, we signed a cooperation agreement with Israel. I think that reflects the first in several of what will be smaller country cooperation agreements. As most of you know, our principal agreements have been with the EU, Canada, Australia, and Germany. This is obviously a first, if you will, in terms of smaller countries.

We're working hard with the Japanese in terms of trying to see if we can come together in a cooperation agreement, which would be significant. We have several other smaller countries that we're working with.

Second, our first positive comity referral, that is the concerns that Sabre raised with respect to market access in Europe, in terms of

computer reservation systems, has now been analyzed and the European Union has issued its conclusions and a statement of objections, finding several violations that they have identified. They have not agreed with all the submission that were made in the positive comity referral, but they did find certain violations, and I think that reflects that the process can work, has worked in that instance, but I'm sure there will be ample opportunity to discuss and further dissect the first test case.

In that respect, the Antitrust Subcommittee of the Senate Judiciary Committee is going to be holding a hearing probably sometime in April or May to look at these issues in terms of positive comity and the intersection of antitrust and trade policy. We are working with the Europeans on issues relating to the WTO. In that respect, since the whole Commission resigned the day before yesterday, our phone calls are, like, with respect to Eleanor, still on hold but I'm advised that the Belgians will reappoint Karel Van Miert, who is not a target of the underlying investigation.

DR. STERN: And the British are going to reappoint Sir Leon Brittan.

MR. KLEIN: Sir Leon, in today's Financial Times, declared this a true crisis. But all the issues, actually, that he was really concerned about are important in terms of what we're looking at, because they are increasing international trade frictions that obviously have to be thought about in terms of the work of this Committee.

Finally, our international cartel enforcement program continues to basically move ahead with further developments, new cases, new filings, and as far as we can see the amnesty program, the fact that we have had several successful cases, has led to really an increased growth of people coming forward and our ability to develop new and increasingly, I think, important cases.

So this has been a very dynamic time at the Division, and we will continue to be in the international arena. We have OECD meetings coming up in May, and obviously we are going to gear toward the WTO effort at the end of this year.

Again, I want to thank the Committee Members for all the time they have put in, and as we wind down the process toward the ultimate report we're going to be calling on each of you to make some tough decisions, to give us your candid advice, and to get this report to the Attorney General in good shape later this fall.

Thank you.

DR. STERN: Thank you. I was hoping that Eleanor would get back on. Eleanor, are you back on?

MS. FOX: I'm back on.

DR. STERN: Okay. Well, you missed a lot, because Joel just gave us an overview.

MS. FOX: I couldn't hear.

DR. STERN: I'm just trying to pull us all back together.

I will stop while I am at least at a standstill and just quickly ask Merit, are there any comments that you want to make before we turn to the first thing?

MS. JANOW: No. I would welcome us just jumping into the discussion. Thank you.

DR. STERN: Jim, you are going to lead us in our discussions on the multijurisdictional merger review issues, number 1, and then I take note that Professor William Kovacic is here, and will be making a presentation.

MR. RILL: First of all, let me say that much of the work in this area has been done by Tom Donilon, and Tom, I hope you can pitch in at any time if the spirit moves you to agree, disagree, correct or amend.

What I want to do today is to provide basically a checklist of issues that we've heard presented to the Committee and some potential approaches to those various issues in the context of mergers, joint ventures and industry collaborations. The thought here is to pull together into one format for discussion purposes, and I hope we do have some discussion, all the four papers that were presented and developed by the staff, which I think are all quite excellent.

We will call on Bill Kovacic to discuss his excellent paper at an appropriate point when we're dealing with multiagency merger review, and leave the possible resolutions on the table so that we can discuss them further in Committee meetings or subgroups or perhaps one-on-one as we

begin to try and formulate a consensus.

Now, in doing the issue-spotting, I'm reluctant to deal with it -- we don't have a professor -- well, we do have a law professor here. That worries me, but in dealing with issue-spotting I don't want to suggest that I've been overcomprehensive. I think there are probably other issues to be put on the table, and as they arise, that's fine, we'll put them on the table and we'll discuss them and try to resolve them.

It seems to me that there are at least two reasons why this Committee should deal with mergers in the global competition context. One is, because of the proliferation of merger review regulations and statutes around the world, there is a need, I think, to serve the public interest by effectuating better merger review, better process and better outcomes, that can be arrived at through perhaps better coordination and unilateral improvement of technique within the agencies.

That better objective, better in quotes, also could be synthesized as to the suggestion that an outcome that's more serving of the public interest, consumer interest, can be achieved through this kind of coordination. That is objective number 1.

And of course objective number 2, not inconsistent with that, would be an attempt to eliminate the frictions, or at least minimize the frictions in the system that raise costs to merging parties and the system itself through, again, the proliferation of merger review jurisdictions.

Those at least are two objectives with the Committee's work. I

think that the volume of law problem is a significant one. It's been put to us by Barry Hawk, and also referenced in a paper presented to the OECD on its common merger proposal by Joe Winterscheid, who's in the room with us today. It is a serious problem that relates to the process in merger review.

And let me suggest that while we're a committee that has been formed with the purpose of advising the Department of Justice as to possible courses of actions to take in the context of global competition, I think it's going to be very likely, inevitable, that some of our advice is going to spill across oceans, and certainly national boundaries to be read and considered or not by agencies outside the United States, not by any means to be considered as gratuitous.

At the very least, it would be recommendations to the Department of Justice and hopefully the Federal Trade Commission as to its advocacy role and its role in international negotiations.

Let's talk for a little bit about process. First of all there are a variety of pre- and post-merger notification requirements around the world. We've heard it before, hear it again, approximately 60 jurisdictions and counting have some form of merger notification requirement.

One of the threshold problems is that it's not at all clear from jurisdiction to jurisdiction what those requirements are. The United States has been at this since 1977 after the enactment of the Hart-Scott-Rodino Act of 1976, and even there, novel questions arise.

In some jurisdictions there's no effort made to clarify what the

filing requirement is. It seems to me a useful international function for the U.S. to urge transparency in notification requirements.

Some jurisdictions deal with worldwide turnover, irrespective of whether or not there's any nexus of commerce or assets in the jurisdiction in question. Some skeptics would suggest that this results from a newfound way of revenue-raising. At least here, the United States' approach of having some link to sales or assets in the jurisdiction would seem to be a useful solution, and an appropriate role for advocacy for the United States.

One suggestion that's been made is that there be a limit on notification related to market shares. It's worth discussion. Personally, I think that would be very difficult to implement, because there would have to be some definition of the market, and that gets to be very tricky.

If it's left in the hands of some reporting parties they might suggest that there's never any overlap and that therefore the market share overlap would be zero. That might be an issue that's disputed by the agency, so perhaps raw sales would be good.

A couple of things. One is, there are some jurisdictions in which the notification itself is related to and in fact establishes the jurisdiction for merger review. That's not the case in the United States. The mere fact that a merger or a joint venture is not subject to Hart-Scott-Rodino reporting doesn't create some immunity. It creates some practical questions as to the feasibility of enforcement, but it certainly doesn't immunize the transaction. It's probably a good thing that there not be a

link, a tie, between notification and jurisdiction.

There is perhaps a good argument to be made, and this would apply directly to the United States as well, towards a broader information requirement to be contained in the initial filing. It could include some documentation.

It could, as Joe Winterscheid has suggested in his paper, include a list of the 15 largest customers and the 15 largest suppliers. It could conceivably call for a more discrete listing of products than one gets under the standard industrial classification.

It could even call for analytical documents, nonprivileged analytical documents, that relate to the competitive consequence of the merger beyond merely those required under the current form. The thought being here is that it might be a way of getting the agencies to better determine what mergers really deserve a closer look and what do not, other than what's gotten from the simple filing.

Whatever is ultimately required, there's a lot to be said for trying to, I think, bring about some convergence in notification forms -- a project that to some extent is now underway at the OECD, or now developed by the OECD, to minimize the burdens.

I think that the second request problem in the United States transcends global competition. It applies to domestic mergers as well as it does to international mergers. I do think there's much to be said for the notion that it's a lot worse of a problem, a lot more serious of a problem for

international mergers simply because of the location of the offices that have to be searched under the current regimen, scattered around the world, and the extent to which dealing with companies' headquarters abroad and explaining this particular problem to them I think exacerbates the issue with respect to foreign mergers.

Similarly, I think that the issue of translation arises. Currently the U.S. agencies require that documents be translated into English at the cost of the submitting parties.

It seems to me that the agency should bear some of that burden. It might be well for the agencies to regularly retain people that have translation capabilities in at least the predominant commercial languages -- I won't try and specify what those are, I'll offend somebody -- to carry that cost, rather than requiring the parties to do it. Also another possibility would be to limit, at least in stages, the request of foreign language documents to be submitted, so that there could perhaps be a summary submitted and then leave the agency the option to request some underlying documentation if they really want it to reduce the burden.

We've also heard testimony as to the need for coordination on timing and on firm deadlines. I think that's an area we're going to look at. In the EC, of course, there is firm deadline. Once the Phase II analysis period runs, the merger is either determined not to be in the Community interest, or is cleared.

In the U.S., it varies depending on the bulk and burden and

timing of the filing in substantial compliance with the second request. Some can be done well under the EU timetable line, and some have taken more than a year to comply with the second request. I think work can be done to coordinate timing.

Turning from the procedural to the substantive, and naturally they are going to overlap, it seems that there's been an overwhelming, overarching concern with a need for transparency. Before we go into the various substantive problems, let me lead by saying that I think Joel and my immediate predecessor, Anne Bingaman, are probably correct insofar as believing that total convergence of antitrust is not likely in the near future.

I think substantive convergence of antitrust across the board is not something any of us will see any time soon, and I think the reasons for that are fairly obvious. That is, the historic, cultural, jurisprudential, foundations of other jurisdictions are quite different from ours and from each other's.

Nonetheless, that does not suggest that we shouldn't know more about what those differences are and what those substantive standards are than we do at the present time. I think there are mechanisms to achieve greater transparency in the systems that exist today, the intergovernmental systems that exist today, that can facilitate at least an exchange of underlying principles -- I'm now talking about merger review, but this could go into other areas as well -- and a means of exchanging views as to whether or not those issues can be gradually resolved or coordinated in the

course of time.

We can talk about how that might be done in OECD and WTO and elsewhere, and we'll turn to that in just a minute.

With respect to some inherent differences, and I'm sorry Eleanor rang off on this, but I think she'll be talking about it when we connect her again, we are taking a look within the Committee at the underlying differences among the various, at least major, jurisdictions in substantive standards both for mergers and for trade and competition, and asking for considerable help in those areas.

As I said, there are agencies out there that are doing the same thing, and I wonder the extent to which those agencies might be brought into play to deal with these various substantive issues.

The OECD in the Competition, Law, and Policy Committee provides a very excellent forum for the exchange of views leading, under Joel's leadership, recently to a protocol or a recommendation on hard-core cartels. To review merger standards and in the same vein possibly dominant position issues seems to me very worthwhile.

Now, the OECD has been criticized as an elite club. The elite club is now 29 and counting, with a bunch of observers. So, how elite is elite, but nonetheless, it's been accused of being an elite club by, I guess, those who aren't in it, and I think there's much to be said for expanding the conversation, expanding the deliberation.

There is out there the WTO Trade & Competition Working

Group. As the head of the competition agency from Spain, Luis de Guindos Jurado, told us, not every antitrust issue is a trade issue, and I think that applies pretty clearly in mergers. I think you made the same point, Ray.

Nevertheless, the group is there. To the extent that it's populated by antitrust experts -- it's certainly headed by one, Fred Jenny from France -- it has the breadth of membership and potentially the expertise to at least in the merger area bring about a fruitful exchange of views. I think it's something we probably ought to be taking a look at.

It's a shame there aren't others. I mean, because I am sensitive to what Luis de Guindos said, is the trade agency the proper organ that ought to be looking at merger review? Well, what else is there, and maybe that's something we ought to look at. It's certainly something that possibly the TransAtlantic Business Dialogue could put on its agenda.

Is a discussion of harmonization of merger review feasible? We have to look at the question. If we start looking, though, towards some form of detailed negotiation for a merger code, it seems to me we're going to run into the problem that I indicated at the beginning, and that is that there are so many differences in approaches, history, underlying social and economic policy that at best we'd become a cropper and at worst we might create something that nobody would really like.

But there are avenues, other than the multilateral avenues, for cooperation, and I think this is probably going to be a big part of what we're going to be looking at in our report.

Joel mentioned the bilateral agreements, five now, and each of which contains provisions for notification and cooperation of merger review, as well as in other areas. They provide for both traditional and positive comity and notice to the other party where a review is being undertaken by the notifying party of a merger, and where that review might affect the interest of the other party through any one of a variety of contact points.

It seems to me that we ought to look at whether these so-called soft bilaterals could be extended to more detailed areas of interest, like providing for the exchange of confidential information. Certainly there's improvement that probably could be made in the exchange of public information, although that's gone very far in the last few years, I think thanks in large measure to the work done by Joel and Bob Pitofsky and their staffs. But, I think that increasingly, as large firms at least cutting across national boundaries, have engaged in merger and joint venture activity, they have found it in their interest to waive confidentiality protections so that information can be shared.

When we had our hearings in November we had a panel of legal experts that deal with global, transnational mergers, and almost uniformly they indicated that their clients were not terribly concerned, particularly balancing the benefits with exchanging information with those jurisdictions that have a sophisticated and reasonably responsible merger review process.

To that end, we've asked the International Bar Association,

American Bar Association, and International Chamber of Commerce to take a look at this issue separately, or they've said separately, and provide us with expert solutions as to the downstream protections that might be extracted in exchange for the greater opportunity of the reviewing agencies across the world to share confidential information.

The next step, and one I think we'd like to examine, would be shared staffing in merger review. I know that certainly in some mergers that I'm familiar with, WorldCom/MCI, for example, I wouldn't call it necessarily shared staffing, but there was a great deal of close cooperation between the staff of the Department of Justice and the staff of the European Commission. I think that facilitated a smoother process to everyone's benefit, including the parties, those who were not real happy with the merger, and the government agencies.

I think everyone that was close to that transaction viewed that as a very fine paradigmatic example of what good cooperation could be, and we're looking for other examples. We need to know what the limits are, we need to know what the problems are with that.

One of the more, I would say -- I think far out is a little unfair -- suggestions that has been put to us is that there be a broader use of, shall we call it traditional comity. Responsive, again, to the concerns that have been raised both from the standpoint of public interest and the standpoint of efficiency, which I might equate with the public interest, to the volume of law and the multiplicity of agency review, is there not some

latitude for a lead agency process in which the interested jurisdictions would agree that some one particular jurisdiction having the primary interest would take the lead in the investigation?

And it certainly would not necessarily always be the United States, or even most often, perhaps, the United States that would take the lead in that review. The other agencies I think with some information-sharing ability would track that investigation, let the lead agency proceed with its investigation, look at the remedy, if indeed one is appropriate, and determine whether or not that would obviate the need for an in-depth, independent, further burdensome, perhaps outcome-different review by a nation that might have a lesser interest in the outcome of the case.

This is actually a proposal that was put to me in rather formal terms by Leon Brittan in 1989, I guess late of the European Commission. While it's not appropriate for a formal treaty, it may be something we can examine to put some more efficiency and outcome consistency in the approach.

Remedies are, of course, a particular issue, and staff and others who are thinking about it need to do a bit more work on this in deciding what are the remedy opportunities for those particular matters that don't have a direct, immediate asset nexus to a particular jurisdiction, not a factory, not a research center, just sales. This issue, of course, was kicked around in the papers in the Boeing-McDonnell Douglas case, and I think we need to take a look at how those might be better coordinated.

I know that the FTC in its Federal Mogul case indicated that they took some action in a particular area that hopefully was of concern to the U.S. but also was noted to be of concern to the Federal Cartel Office in Berlin. I know that the Justice Department refrained from taking action in the AC Nielsen case because it said that the European Commission really had satisfied its concern. So, is there more opportunity for that kind of remedial coordination?

All of this I think is fairly obviously something that goes across national boundaries, and I hope that in our deliberations we don't sound very much like we're being another U.S. group preaching to foreign nations, because whatever we may say I hope is universally useful.

Actually let's say hope it's universally useful and at least addresses the U.S. advocacy function in its world negotiations, which is part, I think, of the jurisdiction of our advice.

There are particular U.S. issues that I think give pain and anguish not only to U.S. parties but foreign parties and governments as well. One of those is, of course, the second request monstrosity -- I don't mean to be pejorative, unduly -- that cuts across boundaries.

But another issue is, here in the U.S., the issue of multiagency review. It's very difficult for countries, parties abroad to understand, although they may face much the same problem themselves. You have, let's say, a transnational telecommunications merger that's reviewed by the Department of Justice from its competition perspective, cleared, and then

reviewed again by the Federal Communications Commission, in many instances covering the same issues. There are other examples.

What I'd like to do now is ask Bill Kovacic, who at our request and our charge has developed a paper on this particular subject, to describe what your findings are. Bill.

MR. KOVACIC: I'm grateful to the Committee for the opportunity and the honor of participating in the process, and want to thank the Committee Chairs and indeed Merit and the staff, Cynthia Lewis in particular, in overseeing my research, and I also want to thank Robert Cushmac, who's here today. Robert's been my research assistant for 2 years at George Mason, will graduate in May, and has been enormously valuable reading the vast literature on foreign developments that bear upon this process, and I'm grateful to Bobby for his help.

The specific issue, as Jim mentioned, that I've been looking at is the question of the impact of multijurisdictional review within a single country upon possibilities for international harmonization. As you mentioned, Jim, I think the problem is most severe in industries that might be called transitional industries in the sense that they've been moving from a regime of comprehensive public utility regulation to deregulation that necessarily brings together the two worlds of traditional antitrust oversight and regulatory oversight, communications, energy, and transportation perhaps being the best examples.

The specific problem I think is how to achieve international

consistency and harmonization when there are major possibilities for divergence within a single country's competition policy system, broadly defined.

If you can't define with a certain amount of precision and confidence a national competition policy, it makes it difficult to achieve harmony with other countries, and indeed limits the ability to achieve predictability in the decisions made by foreign parties undertaking transactions in a single country.

This problem arises I think not only in the United States but in many countries. At the national level in many nations there's a tension between the traditional antitrust overseer and sectoral regulators, particularly true in Germany, I think, today, where the creation of a new independent regulator to oversee postal and telecommunications services bumps up against the jurisdiction of the cartel office.

There's also an inevitable tension in many countries between the national competition policy regime and regional authorities or state authorities or, indeed, in some instances municipal authorities, so the problem on the table crosses many national boundaries, and achieving harmonization I think will force any number of countries to address the issue.

Let me simply take a specific example, that of telecommunications, that I think reveals some of the difficulties. At the federal level, to look at the federal dimension first, we do have oversight by

the federal antitrust agencies. If it's a telecommunications transaction it's almost certain that the Department of Justice will have clearance to examine the transaction and will use the Clayton Act, Section 7, as the principal substantive vehicle. The Hart-Scott process imposes a time limit, at least on the decision about whether or not to seek preliminary injunction.

Suits in the federal courts are prosecuted under a preponderance of the evidence standard, and the basic test is whether or not there will be an anticompetitive effect. The government's burden of proof is to demonstrate a probability that a merger may substantially reduce competition, to show that there will be an adverse effect.

By contrast, the Federal Communications Commission, which in no sense is bound by the outcome of the Justice Department's inquiry, also has a competition mandate that fits within its public interest jurisdiction. But how do they differ?

The FCC works under no time clock. There's no limit on its process. Indeed, the parties know that they must seek in many instances the affirmative approval of the FCC before they proceed.

The FCC's decisions, of course, are reviewed by the courts of appeals under what is at least nominally a deferential standard of review. FCC officials, including at least two members of the Commission itself, in the past year have said that the FCC in applying its public interest standard insists that there be a demonstration that competition in fact has been enhanced, which suggests that a transaction that merely posed a neutral

effect, much less an anticompetitive effect, would not survive review in this instance.

If we look at the federal level alone, the impact is the FCC's form of oversight is necessarily more restrictive, that’s simply because the substantive test is potentially more demanding, that is, show a positive impact on competition and, in effect, there's less chance of effective judicial review.

Because mergers are time-sensitive, because there is no time limit on the FCC's review, the possibility that an enforcement position that's predicated on a more expansive notion of competition policy -- to take an example, a comparatively aggressive use of potential competition theories -- would ultimately make its way to review by, say, the D.C. Circuit, is comparatively remote.

Why? Because most parties will not wait the time that it takes to get that kind of review, whereas if the Justice Department ultimately pursues a theory that the parties disagree with, there will be a collision in the federal district court within a relatively predictable time frame.

If we move to the state level there is an additional layer of complexity. The Attorneys General of the individual states, as we know, can sue as persons and can invoke Section 7 of the Clayton Act. The public service commissions of every jurisdiction in which the parties do business, also operating under a public interest standard, also have the ability to review the transaction.

Today's news accounts reported that Bell Atlantic in its transaction with GTE had received approval from the New York State Public Service Commission. One report noted that New York was the 24th state regulator to either approve or decline jurisdiction over the transaction. The companies still await decisions, this account said, from 15 more affected states. As they say in the law business, 24 down, 15 to go.

Not all of those jurisdictions will exercise expansive review, but the big state PUC's will, and again, in no sense are they bound or limited by the outcomes of the review by the FCC in this instance or by the Department of Justice or by the state attorney general. The public service commissions are independent actors in this respect.

The last layer of review is that we have the possibility of private lawsuits. That is, competitors can invoke standing under the antitrust laws to sue as well.

What I find striking in this process is that none of these actors are bound by the decisions of the others. That is, in no instance does an enforcement choice, except in rare and limited circumstances, preclude the party in question from proceeding independently. Thus, if one were to ask, what is the U.S. policy with respect to telecom mergers, one would have to say, it depends on which actor one is looking at. To predict outcomes would require looking at this mosaic as a whole and anticipating outcomes in specific instances by reference to the possibility of multiple oversight.

Some possible solutions. Let me simply conclude by suggesting

ways of achieving greater simplicity in this mechanism, increasing predictability and, perhaps, improving transparency in the outcomes of individual forums to take the binding solutions, that is, the solutions that would involve a greater deal of compulsion and control, all of which would involve some form of legislative change by Congress.

At the federal level, one solution in these overlapping areas is to dedicate the competition policy oversight role to a single body. Who might that be, sectoral regulator or traditional antitrust authority?

Why give it to the sectoral regulator? Well, if we drew the Venn diagram of oversight involving telecom oversight, the Justice Department scrutiny would be a circle that fit completely within the FCC's jurisdiction under the public interest standard.

The FCC has a broader mandate. It has in a sense more restrictive enforcement possibilities because of the more limited possibility for judicial review. The potentially timeless nature of its oversight, that might be a reason to give it to the FCC.

My own suggestion would be that that would be a bad outcome for two reasons. One, our historical experience in giving that kind of responsibility to sectoral regulators has been unsatisfying, to say the least. I simply point to the examples of DOT oversight in the eighties of airline mergers and the Surface Transportation Board, known in beach boy style as the Surf Board, to have been comparatively unsatisfying approaches.

In part, that's because I think the competition authorities not

only have greater expertise by a considerable margin, but a much keener sense of the policy issues, a greater ability to work in this area.

Can the sectoral regulators accumulate some of that expertise? Surely. The FCC is no doubt better able to do this in an era in which they have Tom Krattenmaker and Bill Rogerson than in a time that they didn't. Despite the great confidence I have in the judgment of those two individuals and others who work with them in terms of institutional analytical comparative advantage, DOJ is far ahead, as is the FTC, in areas in which it faces overlap.

The alternative would be to give the competition policy role exclusively to the antitrust authority and to reserve for the sectoral regulator the ability to apply the other public interest factors. Would you still have parallel or seriatim review? You would. I suggest that this mechanism would press the sectoral regulator to make more transparent and more visible the other public interest factors on which it decides to adjust the terms of transactions, and I think that would be a good thing.

In looking at the states, to put my own preference on the table, where you have broad-ranging national transactions that affect competition policy as a whole, I do not see a constructive role for state governments also exercising review of those transactions. Preemption for the truly national transaction would seem appropriate. State oversight would be reserved for transactions which chiefly have intra-state effects. I would similarly divest from the public service commissions the ability to perform a

competition policy review, again forcing them to make more transparent, perhaps, the noncompetition factors on which they would review transactions.

When one goes beyond these binding approaches, there are softer approaches that look like informal comity mechanisms. Greater consultation among the agencies, seminars, conferences, discussions would have the tendency over time to produce more common analytical techniques, perhaps to encourage the FCC and state public service commissions, much as FERC has, to issue their own merger guidelines that make explicit their own competition policy framework and analysis.

The last possibility is simply to wait patiently for the process of convergence within the courts, at least with respect to competition policy principles. There probably will come a day in which the Supreme Court again takes a substantive merger case. This hasn't happened since 1975, but if you ask yourselves what is the law of the U.S. with regard to mergers, pose the question, is Brown Shoe still the law of the United States? Perhaps you've had this conversation with foreign competition officials. If they ask you that, you say, well, yes, but no. Yes, that's what our Supreme Court did, but no, they might not do it quite the same way again. How do you know? It's intuition, or a hunch.

Well, your merger guidelines aren't consistent with it. Well, yes and no. Are your merger guidelines law? Well, yes and no. Do parties have to take account of these? Well, yes and no.

And in a number of instances, the courts ultimately will resolve some of these ambiguities. Even if the courts did so, that would not solve the tension between the sectoral regulators and the antitrust authorities. There are certainly a number of steps we could take to achieve on a less formal basis convergence between the different domestic schemes.

MR. RILL: Bill, thanks very much. Now, I think just a couple more comments, and we'll open it for discussion among the Committee Members, and I'd like Professor Kovacic to feel free to participate, as well as our guests from the Department.

We have a lot of work in progress, Bill. Bill's study has just been handed to us today. I referred to the ABA, IBA, ICC work that's being done, and we are receiving regularly, and would encourage the flow to continue and expand, papers from interested parties here and abroad on the topics that I've talked about, and other topics as well.

One of, I think, the more important tasks that we've undertaken is an analysis of some of the cases that have global ramifications, some of the merger cases resolved by consent, and we've identified the parties and counsel in some of those leading cases, and hopefully we can get some advantage from their practical experiences.

That only touches the surface of the continuing work that we're doing. What we've tried to do today is lay out, certainly not a blueprint but, if you will, going back to the law school exam metaphor, at least an issue spotter, and possible approaches to those issues that I think we're going to

be looking at, not to the exclusion of others, and some of these may drop off along the way. So, with that, I think, we want to open it up, Merit, to any comments you may have, and other Committee Members, Tom and others as well.

MS. JANOW: Thank you, Jim. I appreciate very much the work that Bill Kovacic has undertaken for us, and I think I'll reserve comment in the interest of hearing the views of Committee Members on the papers and the ideas that you've advanced.

DR. STERN: Other comments?

MR. DONILON: Just a couple of quick comments. Bill, that was a terrific presentation. I think we have the right baskets of issues in front of us as a committee, and if there are others we need to identify them now.

I think we have the right goals of reducing transaction costs for the U.S. entities, reducing friction between and among jurisdictions, in multijurisdictional/multination review, and at the same time obviously protecting the consumer's welfare and advancing substantive convergence.

I think we've got the right goals in the basket reflected in the papers that have been done, a core set of principles for advancement. I think we have the right approach to that, not as a code to be adopted worldwide, but as a set of best practices that can be promulgated and pursued through agreement and negotiation between the United States and other countries.

Hart-Scott-Rodino reform I think is correctly part of our mandate here, given its impact on international mergers, special impact in a lot of ways.

I would -- I don't know if this is appropriate or not -- I would encourage the agencies, if they have views on Hart-Scott-Rodino reform, to forward them to the Committee. I do think the Committee is going to make recommendations in that area, and if the expert resources in the government have views on that I would encourage them to make them known here. There are some proposals in the papers which could have a significant impact, including increasing the thresholds and perhaps seeking to find a way to have hard deadlines for merger reviews, as well as some of the other things.

With respect to multinational review and cooperation, I think we've got some good proposals. I, as one member, am skeptical about, Jim, traditional comity, given the obligations that a national antitrust enforcer has in terms of protecting national consumer welfare.

And last, I think that today we've really opened up an important aspect of this, multiagency review in the United States. I wanted to ask a question, if I might at the end of my remarks, to Bill, to ask you to try -- because I know you do this in your formal paper, but for the record here -- to talk a little bit about the impact of domestic multijurisdictional review on the international scene. That is, on our efforts to reduce friction among national reviews and to advance substantive conversion.

MR. RILL: Bill.

MR. KOVACIC: I think one difficulty is that as part of any multinational effort to achieve consistency on substantive principles or upon process, it seems to me that a key ingredient of that is to be able to make a credible commitment about the scope of one's own law, and to be able to speak effectively for one's own country, and in the area of, say, transition industry transactions, that's extremely difficult to do.

That is, if the national competition authorities were to go and speak before an international audience and say, this is the state of competition law, and these are the policies we are following, a necessary footnote to that would have to be that we are not the only institutional actors, and we lack the ability necessarily to commit the U.S. competition policy framework as a whole to abide by specific principles. So I think it impedes the ability to speak with a clear and reliable voice overseas in talking about matters of substance and policy simply because the process is so fragmented.

I think the other difficulty, of course, is to try and encourage other national Governments perhaps to heed our own preferences about simplification. For an observer -- and again I think my sense is not different from those of you who have worked with transition economy officials in particular -- they're interested in the same issues of institutional design, and they will frequently pose the question: We've studied your system, and we've looked at the allocation of responsibility. Should we do it your way?

And I think the answer that I am most familiar with hearing is, don't do this at home. That is, you don't have to draw the organization chart with the same arrangement.

I think it does in some instances limit the effectiveness of our efforts to suggest optimal institutional designs in this way as well, because there is a presumption that many observers approach in dealing with us that, having done this over 110 years, through experimentation and adjustment, that we have the right design. So to speak more effectively on those issues as well, I think it would be helpful to achieve somewhat greater convergence domestically.

MR. RILL: Any other members?

MR. GILMARTIN: I really don't have a lot to add. I agree that from my experience and perspective that the issues as outlined are certainly on target, and I think the various approaches that have been proposed as possibilities towards resolving those issues have promise.

As you said, there's a lot of work yet to be done to work through those, but the whole idea of just summarizing in terms of the certainty or predictability, rather, predictability and transparency and timeliness are the key ingredients to being able to get these things done. I think that the issues you have identified relate under those categories.

DR. STERN: Well, I just want to make it very clear that I agree with you, Ray, and the others who have complimented the staff in preparing us for this discussion today. I think we have come an incredibly long way,

and I think the questions posed have been the right ones. I think that the various precis we have here for different draft proposals for reform are extremely helpful. I think the staff has really moved the ball down the field.

I appreciate also hearing the comments about the multiagency review, because I'm very mindful that once we start preaching reforms from a U.S. Advisory Committee, that we have to make sure that our glass house is at least somewhat shatter-proof. There are a lot of issues that complicate unnecessarily advancing the principles that we're recommending. I think that that may be where some of the most politically difficult statements that we'll have to make will be made, and in effect preaching to our own institutions. And so, having that grounding is extremely helpful.

It's very convincing to me, if you look at the way we try to negotiate with other countries, just on G-7 and growth rates and macroeconomic policies, we've had a lot more moral ground to stand on since we got our budget deficit under control. I think we are in a position to be more influential going forward. If we don't really get a good hard look taken at our own multiagency problems I think we're really undermining all the proposals that the staff have made up till now.

So I think they're equally important, what you've laid out here today, from at least a political and diplomatic point of view. I mean, we can fill the report with 25 pages of proposals for multijurisdictional review, and if we don't have those necessary additional pages about what we do here at home, I think we're in danger of having a lot of dust being gathered on some

very fine proposals, but with no action coming forth.

MR. KOVACIC: And I would only add again, Madam Chairman, that the dilemma is confronted by many of our foreign counterparts as well. That is, I think even in the abstract, that if we go through the European Union and look at the efforts that each country is undertaking to resolve this tension, I suspect it would be a matter for discussion that they would welcome as well, and if we have good answers they'd probably be willing to think about them too.

MR. RILL: Doug, you wanted to make a comment.

MR. MELAMED: Yes, two questions about Bill Kovacic's analysis. The first question is this: Leaving aside the issues of private plaintiffs and states, as a practical matter, how serious is the problem of multiagency federal review?

I have in mind the following proposition -- this may or may not be correct -- that the problems that Jim and Bill referred to earlier, of certain agencies that have perhaps done an imperfect job of merger review, have almost consistently been mistakes that we regarded as mistakes of under-enforcement, and that's predictable in a sectoral regulator.

But I wonder whether, when you move to concurrent jurisdiction, as we've now moved in the airline industry, for example, where the antitrust agencies as well as the sectoral regulator have the authority to challenge mergers, if we don't substantially eliminate that problem both by having the competition agency do the review and perhaps thereby inducing

the sectoral regulator to be a little more vigilant.

So I wonder whether in substance, at least in this country, concurrent review isn't a virtually complete answer to the problem of mistaken enforcement decisions and whether, apart from that, in terms of the international problem of yet another toll booth to go through, there's less there than meets the eye if the problem is that the sectoral regulator is not a vigilant regulator.

The second question is this: If you take as given -- an assumption some of us might think is undesirable -- but if you take as given the fact that certain kinds of transactions are going to be reviewed by sectoral regulators for nonantitrust reasons -- an interest in national ownership of important industries, or protecting employment or the environment, or whatever it might be -- is there a loss, from the standpoint of competition policy, in not having the sectoral regulator charged, at least nominally, with also considering competition interests, so that it has a principled way to discount noncompetition interests, or to put competition interests in the balance, in deciding whether and how to intervene in transactions that from a competition point of view might be desirable?

MR. RILL: Bill, do you want to have a shot at that?

MR. KOVACIC: I guess I'd start in thinking about concurrent oversight where the oversight authority is not congruent, where the mandate or the charter is not congruent. I do begin with the assumption, I take at face value the FCC's suggestion that the public interest standard as they've

applied it requires a positive effect on competition. That is something more demanding in a sense that traditional antitrust, Clayton Act oversight would mandate.

I ask myself, why entrust two gatekeepers with competition policy powers where one's charter or scope of competition policy is simply a subset of the other? That is, what is the purpose of going to two groups where the second group in the process, the sectoral regulator here, does have the capacity to say the competition policy officials didn't go far enough and we're going to insist on something more.

I guess I would feel more comfortable about this, for example, if the basis for going further were more explicitly and clearly stated. Here I have in mind a transaction like Bell Atlantic-NYNEX, where it would be helpful to know, I think, for an outsider why the FCC and on what specific basis the FCC's competition policy assessment concluded that perhaps a more robust role for intervention was appropriate.

I do think your suggestion that taking competition policy out of the mix might diminish the sense of urgency to make trade-offs, to have all of the relevant variables in one equation, and to realize and appreciate how an adjustment in one variable affects the other. I think that's a very important concern.

Perhaps a possible solution would be to give, in addition to exercising the exclusive competition policy authority, to give the competition agency a place at the table to comment and observe on that

process, and to remind the party of what concerns are present.

I think what happens by having them together, rather than coaxing trade-offs to be made explicitly, is that the consideration of the noncompetition policy factors is, in fact, submerged.

That is, rather than reading the opinion, or seeing an analysis, or seeing a deliberative process in which the agency says, “here's the competition factor, and we're willing to trade that off to get some of the social benefits,” I think that the analysis in practice has become more obscure, and that instead of highlighting the trade-offs, the trade-offs in fact tend to be masked.

So I suppose even if the agency would not be compelled to make the trade-offs itself, I think it would focus attention, and I don't doubt the legitimacy, necessarily, of the noncompetition factors. A representative democracy could easily choose to make those important variables.

But I think my concern is that with the existing mechanism that does not impose any significant discipline on the sectoral regulator to make the trade-offs expressly, taking competition policy out of the mix might coax a more specific discussion of precisely why certain limitations are imposed, or coax a more precise definition of what the noncompetition calculus would be.

MR. RILL: I guess I fully agree with what Bill is saying. I guess I don't see the safeguard against an overly generous review of a merger is enhanced in any way by having the regulatory agency have

authority over competition review.

It seems to me that the specialized function of the regulatory agency to deal with subjects such as universal service can be just as well focused against a background of a binding competition-based decision by the antitrust agency without any real loss of the interplay that you're concerned about, but that's only an individual view.

DR. STERN: May I ask you to throw some more light on this question. You mentioned in your opening remarks that the FERC has published their own merger guidelines. What other independent regulatory agencies that deal with sectors have done the same?

I think that that would be useful for me to know, and I think it also is responsive to this debate right here about the role of multiagency reviewers who may not be as transparent and as articulate about when they're making a decision based on competition and when they're making it based on other considerations such as public interest or employment or the other points that you were making.

So this transparency in the form of merger guidelines and other kinds of guidelines would be useful for me to know about, and might enhance the proposals going forward.

MR. RILL: I think it would be useful to look at that -- this is a footnote -- other agencies have got them, maybe not so much in the merger field, but I think the general experience with other agencies getting into antitrust guidelines -- I think of the Bureau of Alcohol, Tobacco and

Firearms trying to do Robinson-Patman Act guidelines, and albeit somewhat controversial, I'll mention predatory pricing guidelines by yet another agency has not always been a happy experience that we might want to endorse, but we ought to at least know what's there.

MR. KOVACIC: I believe that FERC stands alone among the federal sectoral regulators in having their own merger guidelines.

DR. STERN: But as a proposal going forward, as you refine your comments with the staff, I think that and other additional “guides to the perplexed” would be helpful.

MR. KOVACIC: I would say that an approach that probably stands between the more sweeping legislative preemption or reallocation of authority that I suggested as an option and purely less formal efforts at discussion and persuasion to encourage the agencies in fact to issue such guidelines I think would be a useful step, if only because the process of doing so would make more transparent their intentions.

I would feel much more comfortable with the Federal Communication’s analytical process if the public interest formula were distilled into a fuller statement that included, perhaps along the lines that Doug was alluding to, a statement that said, here are the factors we consider and this is how we do it, even if it were a very general, preliminary policy statement that said, this is what we see the scope of the factors to be, and here at least qualitatively are the weights we attribute to them, and this is at least a first stab at describing how we trade them off, what's the

hierarchy.

MR. RILL: I think you make an overpowering argument for your more sweeping proposals. One other option, of course, would be simply to have the agency, if they indeed are to get involved in competition analysis and merger review, to say and mean that they're following the 1992 Horizontal Merger Guidelines of the Department and the FTC, and explain if they should deviate.

DR. STERN: May I -- Joel, were you going to say something? Please.

MR. KLEIN: Go ahead.

DR. STERN: Well, this can wait, if -- in terms of getting into it if, Joel, you still want to talk about the multiagency review, but I was going to make a more general comment on public statements that refer to the staff report about transparency and articulation of the decisionmakers at the FTC and the Department of Justice.

There are a number of suggestions both in making the procedures more transparent, as well as the substance that goes into a decision, and there's some talk about making more public speeches. I would like to hear the view of the Committee at some point on how much more we might want to recommend be stated in public comments made by the FTC and the Department of Justice.

There's been some movement, positive movement, but at least based on my experience chairing the International Trade Commission, which

admittedly did make other types of decisions that were more of a binary decision rather than a discretionary negotiation with the parties. Nevertheless, I think that there may be room for more transparency, and I would just invite other members of the Committee, if they haven't already, to take a look at what the staff is recommending in their discussion papers and see if they think that's enough.

I'm going to keep on pushing on the matter, but I am glad to see the staff is as responsive as they were in their papers.

The other point I was going to make is on page 6 of the staff papers. There's a reference to the desire to make sure that the review processes should be nondiscriminatory, but yet at the same time in the discussion of transparency of law enforcement and substantive review there was a discussion that reviewing agencies should be required to publish reasoning for the decisions whenever undertaking decisions involve foreign assets, or foreign persons are parties to the transaction.

Now, this is discrimination, but more in favor, as opposed to against foreign parties, and so maybe we need to be a little more discriminating when we use the word “discriminating” so it's very clear what we are talking about here, so that we're not inconsistent.

MR. RILL: Joel, and then I think Debra wanted to make some comments.

MR. KLEIN: I just wanted to make two quick comments. Bill, as you think about this, I think the one point that is at least worth thinking

about elaborating is the difference in a situation where we have concurrent merger review, such as with respect to the FCC or the FERC, and where we have an advisory role, such as with respect to the Surf Board, and/or on international airline alliances.

And as you think about that, also think about, for example, how one deals with certain kinds of competition-related externalities that don't fit into the merger guidelines, for example, open skies agreements, and how one circumnavigates that set of problems.

Because I think a more particularistic analysis of at least the four agencies that we do a lot of -- well, not a lot of work with, but that we do concurrent or advisory work with, the Department of Transportation, FERC, the FCC and the Surf Board, may present different challenges, different problems. They may call for a unified solution, but they may not.

And Tom, to answer your question about Hart-Scott and where we are, as you probably, or doubtlessly know, the Chairman of the Judiciary Committee, Senator Hatch, asked the Attorney General about this very issue on Friday, so your concerns are timely. The Attorney General has obviously requested our views with respect to that set of issues, and after we share them with her we will be glad to share them with you as well.

(Laughter.)

MR. KLEIN: But as they say in Daisy Clover, you're going to hear from us.

MR. RILL: Debra.

MS. VALENTINE: I think my comments are going to Joel's initial point. From the U.S. government perspective, I personally have no problem, quite frankly, going out and advocating either a Justice-type model of an executive agency or a Commission-type model of an independent bipartisan agency as the “best” competition agency for a particular country. And I would even argue that for different countries one may be better than the other.

There are countries in which there is little judicial expertise, where antitrust has no stature within the business community, and there is little case law on antitrust, and it would probably be a very good idea to have an independent competition regulator developing some case law and not having case law being made by private parties.

On the other hand, countries that have some buy-in by the business community into antitrust may well want an executive-type agency, with a prosecutor that could obtain criminal penalties and send people to jail.

But I think this is all, in a sense, a number of desirable experimental laboratories, and I don't think you want, in an antitrust context, to suggest that there is only one answer for various countries with various cultures and various traditions. I really think the same thing is very true -- I don't think the verdict's in yet -- for regulatory agencies.

I mean, you've got Australia doing all its regulating out of the competition agency. Whether that competition agency will ultimately be

compromised by being not just substantively but politically responsible for resolving regulatory issues is an interesting question.

I actually think Doug has a very good point. I come from an agency that also does consumer protection, but that consumer protection is (thankfully) infused with competition principles and with the ideas of our economists. There is value in having agencies that are not actively engaged in pursuing competition values, nonetheless leaven those non-competition interests with competition principles. I think Joel and Doug are absolutely right. You find it in banking as well. And FERC when drafting its merger guidelines also kept close the 92 DOJ/FTC Merger Guidelines. But you may well have unique issues in transition industries that the guidelines don't address or predict.

Finally, I think the transparency part is absolutely critical. Thus, while there is no one model and you should not all have the same guidelines, if the noncompetition agencies get into competition analysis, transparence is a very legitimate thing to be asking for from everybody.

MR. RILL: We're going to hear from Merit now, then we're going to pick up, I hope, the telecom industry willing, we're going to hook up Eleanor.

MS. JANOW: I just have a question. I wanted to ask you, Tom, to help us think about the traditional comity skepticism that you put on the table. A lot of the work that we've done has tried to identify steps that could be taken to expand cooperation of a more formal and informal

nature, and the extent to which reviewing agencies could or should take into consideration both positive externalities and negative externalities of mergers on foreign jurisdictions. And so, I would just invite you to give us now or later more of your thoughts on how far we can go, in your view, on agency cooperation in a comity context or some other.

MR. DONILON: The point I was making was a fairly simple one. I think we should strive to try to reduce friction, strive towards procedural and substantive convergence. I think substantive convergence will follow procedural convergence over time, and that we should do as much work as we can in terms of shared workload.

I think shared investigations is a good idea, but the bottom line, though, is at the end of the day, I think, that will have to be in the form of processes, and informal division of labor.

If you had principles which called for a formal divestiture, if you will, of jurisdiction with respect to a particular transaction -- I would interested in Joel and Doug's reaction to this -- I think at that point you've crossed the line. That an antitrust enforcer has an obligation to his or her nation, and where there's an impact on a particular transaction, I think formally giving up that role to another country is not tenable.

At the end of the day, our antitrust enforcement authorities have to be able to stand up publicly and stand up in front of the Congress and indicate that where there is an impact they reserve the right to act, and have acted, and don't yield on that to another nation's laws.

MR. KLEIN: Different people have different views on this, but my views are very close to Tom's, so even if you said, for example, the impact of a merger was going to be ten times as great in country A as it would be in country B, if you're the head, or if you're the agency responsible for antitrust enforcement in country B, and this is going to have an anticompetitive impact in your market, you are going to certainly feel the need to take a look at it.

There are sometimes, Tom, national interests -- this came up in the Boeing-McDonnell Douglas area, where there was a defense component, and that is the time in which at least it's a matter of discretion, not a matter of defeasance of jurisdiction.

One might think about saying that is such a priority, national policy that simple antitrust enforcement principle is not enough, just as domestically, obviously, its one factor that is taken into account when one does a defense merger.

But by and large, I think it would be very hard to mandate rules, that said, as a matter of jurisdiction, as distinguished from a matter of good judgment, if I had a merger and I wasn't inclined to block it as it had a small impact on the United States and a large impact on another country, I would spend a lot of time before I did that, but that's a different thing from saying I would simply throw my hands up and say it's your call.

DR. STERN: Thank you.

MR. DONILON: May I make one last point?

DR. STERN: Sure.

MR. DONILON: As a general matter, listening to Bill's presentation I am reminded, American industry has obviously tuned itself up over the last decade and a half in amazing ways, and antitrust law, since the passage of the Hart-Scott-Rodino Act in the late 1970's, has tuned itself up dramatically substantively.

But I think we owe a hard look as to whether or not we're as tuned up as we can be procedurally in terms of reducing transaction costs and reducing friction, particularly in light of what Bill said today about the industries that could be particularly affected here being these industries in transition, which meant an awful lot to our economy, telecommunications, transportation, where product cycles can be less than a year in some cases.

So I guess I would encourage the Committee to really drill down on these issues of process as an obligation we have both to American industry and ultimately American consumers.

MR. RILL: Okay, let's hook up Eleanor and move ahead.

DR. STERN: I find it interesting, your comments about the sovereignty issue, because I keep thinking of you at the State Department and all the times when you probably had to argue in multilateral negotiations that the U.S. had become a party to, that we were having to kind of give up our sovereignty --

MR. DONILON: Not me.

DR. STERN: -- to get something. You were never in on that,

huh? You were the minority?

MR. DONILON: I think the idea here of an annual report is not bad -- if you're an antitrust practitioner, I think you have a very good idea of the rules of the game, and from the Justice Department, the Federal Trade Commission.

There's a lot of material that's put out. There are informal mechanisms, including conferences, the ABA gatherings, which have become very, very important information-imparting mechanisms in the antitrust world.

But two points. The idea of bringing all that together every year in a formal compilation by the competition agencies might not be a bad idea. It's all available with an overall introduction to it as to goings on that year. It might not be a bad idea.

That's done informally at various gatherings, you know, the head of the Antitrust Division and the chairman of the Federal Trade Commission will review the year, for example, but it might not be a bad idea to consider to do this formally, to have a formal compilation put out by the Justice Department, let's say, of speeches, presentations, with an overview of the goings on that year.

The second point is, I think that Bill's point about guidance from some of the noncompetition agencies is a very, very good point. Again, as a practitioner you are much more uncertain on that field than you are in the DOJ or FTC field.

MR. MELAMED: Just one quick note. I think we shouldn't lose sight of one thing, especially the Justice Department, and I think it's probably true of the Commission as well.

We think of ourselves, not as regulators, but as law enforcement officials. Therefore, when we don't bring a proceeding, even though we've investigated the matter, we don't explain why. There are good reasons for that, but it means that we shouldn't delude ourselves into thinking that there's going to be some idealized form of transparency in which everybody's going to be told why we didn't challenge a merger.

DR. STERN: No, that's why I said, I understand that you've got a lot more discretion here than some of the other agencies like the one that I used to head, but I think that there are some creativity, and if you put yourselves in the shoes of folks who are not practitioners every day, or from overseas, are not --

Eleanor?

MS. FOX: Yes.

DR. STERN: Okay. We are happy to hear you. I hope you also can hear us.

MS. FOX: I can. So far, so good. Thank you.

DR. STERN: Good. We have reached that point where we were hoping that you would get to the U.S.-EU discussion. Merit, if you want to say something, go ahead.

MS. JANOW: Yes, thank you. We took the liberty of

discussing with Eleanor some possible questions that she might speak to with respect to substantive differences between the United States and other major jurisdictions, so while the EU is an obvious major jurisdiction, please, Eleanor, feel free to draw in other jurisdictions where relevant in your remarks, and let me just circulate a set of questions you might find relevant.

DR. STERN: Now, in terms of time, I think we are running a little behind.

MS. FOX: Okay. You can either tell me how little you want me to take, or I'll start and try to be concise.

DR. STERN: I think that if you aim for between 10 and 15 minutes, no more than 15, because we have a lot of other material to cover as well, we know where we can get you, and we do want to have the opportunity for the other members to participate in the other two areas. We've only gone through the very first one on multijurisdictional mergers.

MS. FOX: Okay. So I will just start.

DR. STERN: Yes.

MS. FOX: All right. The question is, what are the substantive differences between the major systems, which are principally the U.S. and EU, and do they matter, why do they matter, and what is the value of working towards more harmonization and coordination.

So I will start out reflecting principally on differences between the U.S. and the EU law, and those countries, which are many, that have followed the EU model. What I'm going to do is talk about different areas

of the law, first, monopolization and abuse of dominance, second, horizontal contracts and combinations, third, vertical, and fourth, mergers. Those are the major areas.

We might talk at a little greater length about merger review standards, and then finally a summary of what matters.

Take the first, monopolization and abuse of dominance. The U.S. system and the EU system are somewhat different, although they have a great deal of similarities, and frankly, I don't think there has been any big conflicts that have caused any disturbances on both sides of the ocean. There have been some potential ones.

The U.S. standard on monopolization is much more narrowly consumer welfare-oriented, and much more, I'll say indulgent towards, but I don't mean that to be judgmental, but much more sympathetic towards competition by the major firms, even by the monopoly firms. So, as far as U.S. law is concerned, we want all firms to compete, and even if they're monopoly firms we want them to engage in hard competition. And, if by engaging in hard competition on the merits they wipe out small companies, that's just a cost of competition.

Turning to the EU model, the abusive dominance standard comes from a different tradition. In fact, it comes from a more regulatory tradition and a tradition that looks very much at competitors, and competitors' opportunities. So, the EU question of abuse of dominance will first ask, is the firm dominant? It will find dominance at relatively low

percentages of the market compared with our finding of monopoly power. It might be, for example, found at 40 percent of the market if the other competitors have half as much and less.

When a firm is dominant, it has many duties. It has duties to deal with customers that have been continuing customers, and it also has duties not to take measures that lock out any significant part of the market, for example, by exclusive dealing contracts.

A lot of the EU abuse of dominance cases are foreclosure cases, where the dominant firm, like Hoffman-La Roche, might have exclusive dealing contracts that would set off from other competition a not insignificant share of the market.

So the biggest difference there is that the European model does look at unreasonable exclusions of competitors. There are a whole lot of things that can be said, but I think I'll just go on and touch base with all of these other kinds of restraints, and then you could ask me questions, okay?

DR. STERN: Good.

MS. FOX: All right. Now, horizontal contracts. First, with regard to horizontal contracts that are cartels, there's pretty widespread agreement in the world that hard-core cartels are bad. The United States is the clearest per se regime. Some regimes have public interest defenses, some regimes have crisis cartel and depression cartel exemptions, but basically there's a wide area where cartels, being agreements by competitors to stop the competition between them, are illegal.

When you go past the cartel contracts and get to other contracts between competitors, systems treat them differently. The United States is the most analytical, trying to find out whether that contract is harmful to competition from the viewpoint of consumers, which usually means, does it raise the price to consumers?

Other jurisdictions have a little different window for analysis. For example, in the EU, contracts between competitors, if they are big competitors, are usually within this area that we say is caught by Article 85(1), and then they require vetting before the European Commission as the companies hope to get an exemption. So right away, with a very low threshold, the companies are at the mercy of the Commission, and the Commission might say, well, you didn't need this provision, and this provision is too restrictive, and if you get rid of this, and this, you can get an exemption.

So you have very quickly a kind of bureaucratic process where the Commission has the upper hand and does not need to prove that each one of these restrictions is harmful to consumers.

There's another variation of that, and there's some signs that this Article 85(1) is not tapping as much as it used to, but still, there is this difference.

Let me go on to vertical restraint law. Vertical restraint law, U.S. and EU is very different. There are ways in which it is coming together, but will probably still remain to a large extent very different.

Let me say first what I mean by vertical restraint law. For example, restraints in the course of distribution. A manufacturer tells its distributor the territory within which it must sell, or the customers or the price at which it must sell.

When a manufacturer tells a distributor that it may sell only within the territory of France, and they may not go outside of France, and it's going to have another distributor in Germany, and it may not go outside of Germany, that is seen as the worst kind of restraint in the EU. It's a vertical division of territorial markets, and it prevents the flow of product even the same product/the same brand. It prevents the flow of that brand across Member State lines, and preventing the flow of product across Member State lines is the most serious restraint, because it is thought to impair the market integration process and to re-erect the barriers between and among the Member States.

The U.S. view on that is totally different. The United States has a consumer welfare view, and it will look to see what is the competition on the inter-brand level. If there's a lot of competition on the inter-brand level, almost anything a firm does is going to be fine, as far as the U.S. law is concerned, except we still have a per se rule against retail price maintenance, so that the manufacturer cannot agree with the distributor as to the price at which it will sell.

That's the one exception to this sort of wide-open analysis where most vertical restraints are legal. If there's a lot of inter-brand

competition, almost all vertical restraints in the United States are legal.

If there's not a lot of interbrand competition, then there is room for vertical restraints to restrain competition in ways that will cause harm to consumers.

In the EU, of course, there are many other kinds of vertical restraints, and some of those vertical restraints could be exclusive dealing contracts. Exclusive dealing contracts or a requirements contract, or contracts that have similar effects, are one of our greatest concerns, I think, because that kind of contract could possibly block access to a market. So, that's the kind of restraint that Kodak worries about when it tries to get into Japan, or Guardian Glass worries about when it tries to get into Japan.

So the law on exclusive dealing contracts is very important to us, and here's where, again, U.S. practices are somewhat different from most of the rest of the world. The United States requires an analysis that will look to consumer harm, so it wants to ask whether by this exclusive dealing contract the firm is getting market power and going to hurt the consumer.

The Japanese law, incidentally, asks whether the restriction unfairly deprives competitors of opportunities that they cannot easily get because of the restraint.

The EU law is more similar to the Japanese law, which would prohibit vertical restraints that are foreclosing restraints when it considers them unreasonably foreclosing of opportunities of competitors.

Now, going on to mergers. There's sort of a core of merger law where almost all countries at least have laws that say, a merger to monopoly, or a merger to single firm dominance, when there's single firm dominant market power, is illegal.

Now, some countries have some exceptions. The next step is, what about a step down, and what about a merger that entrenches oligopoly, is that illegal? It is in almost all places in the world except the EU. The EU has its own law because of the politics of getting a merger regulation into the EU law, which it obtained in 1989. The law itself prohibits creating a dominant position where the effects may harm competition. There's litigation right now to determine whether that’s broad enough to prohibit oligopolistic dominance.

There was a Court of Justice opinion a year ago, the Kali und Salz case, which says in principle it's possible for the EU law to prohibit a collective dominant position which you might think also would cover oligopoly generally. But it goes on with a lot of the elements that the challenger will have to prove, and you can see that it's going to be very much harder to prove in the EU that a merger creates a collective dominant position than it is to prove in the U.S. that a merger creates market power by reason of entrenching oligopoly.

I've touched the major points of law, and let me mention some of the defenses that some jurisdictions will allow in merger law. Again, I don't think these defenses make major differences in most cases.

Most jurisdictions now have a failing firm defense, copying the U.S. law. Some jurisdictions have efficiencies defenses, but it's a question as to what that means, because you could think about efficiencies only if they inure to the benefit of consumers, or you could think about any efficiencies, even if they just go into the pocket of producers and don't enure to the benefit of consumers.

Right now, the U.S. law seems to be that if there's a defense, it's only a defense that enures to the benefit of consumers.

Canadian law allows a defense even if the efficiencies enure to the benefit of producers. Canadian law also will count as a justification for a merger if the merger increases exports, which leads me into the fact that some other countries also will allow what I will call national industrial defenses to merger cases.

They might say, this merger is good for our country and therefore we should just let it by. So, there are a few countries that will either allow anything to be part of the merger analysis, and other countries, like Germany, that will say, the merger has to be analyzed on competition grounds, but then it can go to a minister who may say, this is good for Germany, we'll let it through.

DR. STERN: Okay.

MS. FOX: That's basically what I wanted to say about the substantive standards, so shall I stop there, and if you want me to say something about global harmonization, I'll do that.

DR. STERN: Eleanor, thank you very, very much for your clear description of these major differences. It will keep us in good stead as we go forward.

We need, however, to move on to the other topics that we planned to cover this afternoon before we adjourn at 4:30 -- trade and competition policy interface, as well as enforcement cooperation. Naturally, both of these do relate very much one to the other, and indeed, I wanted to ask the staff as we start in on this trade and competition policy section to think about those principles that relate to substantive standards that were discussed in the paper in tab A, and how much they overlap, or are sometimes even identical to some of the substantive principles which are spelled out in tab B.

Staff work relating Tab A and Tab W would make it a lot easier for anyone reading, and it will also, I think, give us a distillation going forward. Naturally, many of the principles are the same, and so we need in a certain sense to continue to tease out the issues under all three areas, yet at the same time we ought to start synthesizing some of these principles.

The staff once again has done a fabulous job of pulling together many of the contributions that have come from literature, from actual testimony that we have heard several months ago, and from materials that continue to keep coming in even as we speak, and therefore didn't get into the tab B, but which are available. We want to assure the public that they will get a very careful integration into our thinking as we go forward.

Maybe you're looking at a letter that you haven't seen. That includes a letter which I got yesterday, which I've discussed with Andrew. I think that we have a number of basic questions which have been thrown into one paragraph on page 1 of tab B, and I think that should help us as we start this discussion. I hope that we'll elicit some views from the other members.

Some of the questions include this fundamental matter of how to define blockage in the marketplace. There are some who talk about market access, and mean one thing when they say it, and then there are some economists and others who talk about market accessibility, and feel that those are fundamentally different matters. I know the staff has tried to pull together principles for agreement, substantive principles to tackle blockage in the marketplace. But I think until we decide what we mean, whether we're trying to achieve market access or achieve market accessibility, we may be talking past one another.

Market access problems tend to be thought of in the context of trade measures, which sometimes can divide up and allocate access to a market in the name of remedying the problem. It is argued by economists that doing so may in fact reward inefficient competitors, and will discourage exit by those who are inefficient but who still have market allocation that has been assisted through trade negotiations or trade agreements between different countries.

So I think we need to tackle that problem, and I would like to know if any of the members want to discuss that issue. I don't want to force

people to talk about those things that they're not prepared to or really care to, but that's one which I think is very important.

And I think it helps define many times the differences that seem to exist institutionally between the trade officials and often the antitrust competition policy officials. If we don't tackle that problem, I think we're going to be discussing recommendations for institutional reforms or new protocols or new treaties or new agreements and we might be able to get all kinds of agreement on how to make them look neat and fair and transparent, but they may really skirt what, I think, is a fundamental issue that this Committee should try to tackle. I just throw that out to see if anyone wants to pick up on it.

MS. FOX: I would, Paula, if there's no one there who wants to.

MR. RILL: No, there aren't, go ahead. Go ahead, Eleanor.

MS. FOX: All right. I feel that David Richards, using market accessibility --

DR. STERN: Richardson.

MS. FOX: Richardson, sorry. To use the word market accessibility to distinguish himself from those who say, I cannot get into Japan. I'm entitled to get into Japan. I should have an X percent share in Japan, because I have an X percent share in the rest of the world, other than my home country.

He wants to distinguish himself from that kind of approach, and he wants to say, this should be an economic approach. So he's simply

saying, what you want to be sure is that there are no anticompetitive restraints, public or private, that are keeping people from competing on their merits to get into the market. It may be the case that a U.S. firm doesn't get a huge share in another market, and that does not signify that the firm is denied market access. You have to look further.

Now, if you look at it this way, it's really a question of proof that what must be the thing that is denying you the market access to be justiciable, for it to be a good claim in this world trading system.

DR. STERN: Well, what is the “blockage”?

MS. FOX: Yes. You look at the blockage, and you have to analyze the blockage, and you have to find, for example, that yes there is this cartel with the boycott, or yes there are these vertical agreements, and if you look at them under competition law you find out that they are anticompetitive and illegal, but you would have to go so far and do that. You can't just rest on saying, I can't get into this market, I get into every other foreign market, therefore I've been denied access.

I see it as bound up with the proof.

DR. STERN: Yes. Is that how we wish to define market blockage as we go forward when we start to set up recommendations for dealing with the problem?

MR. RILL: I think we have to address each and every one of these issues and define whether or not we want to pick up on the various proposals that have been put to us.

It seems to me, as Eleanor points out, Richardson comes closer to antitrust tests, although I'm not sure that his tests are entirely antitrust tests. That may be more sympathetic to some sort of remedy than based on a pure antitrust analysis.

I think we want to look also at the context in which Diane Wood, when she was a Deputy Assistant Attorney General, put the case in her paradigm speech on market access.

I think there's a variety of ways to look at it. I don't know that we're ready to say at this point, this is the way to define market access. I think it's a very challenging and I think very difficult question to come to.

DR. STERN: I think we should try to, but I do think we need to consider this further.

MR. RILL: We have to do it, yes.

MR. GILMARTIN: I think the experience in our industry probably relates more to -- would fall into the category of, in terms of, as is defined here, as market accessibility, as opposed to market access, and that I think our sense is that a lot more progress would be made in the areas of competition policy than it would be in terms of trade policy.

I think what happens is that competition policy gets confused with trade policy because there is a mechanism through the USTR and other agencies to do something, to try to do something about it, to try different avenues, but I think that accessibility is more the issue than access, and based on my experience, heading more in the direction of looking at

competition policy is the way to go.

Because I'm uneasy, based on our own industry experience, with this idea of you're entitled to a certain market share. We're entitled to -- and therefore, your measure of whether there's market access or not is based on how your share is doing in that market versus some other market, because no one is entitled to a particular market share.

MR. DUNLOP: May I raise a question? I must say that's a distinction, it seems to me a very specialized one, that doesn't convey a meaning in common sense.

Let me take a case that has been analyzed extensively in the literature by one of my colleagues, again, introduction of products into Japan. How much of it is the U.S. people may not adequately speak the language? How much of it is they may not be able to service well the products that they are introducing? How much of it is that there is a distribution system that has kind of control of the situation, and therefore makes it difficult to get into that market?

I could go on, as this colleague of mine did, and write in detail about this, and I'm not clear from the use of these words what is meant by access and what is meant by accessibility in the few illustrations, I could add to them, all of which you might say end up in an appearance of not being able to have a share of the market in some country.

Now, how am I supposed to get instructed about this?

MR. MELAMED: Yes, I want to make a comment which really

I think follows on the one John Dunlop just made. And it is really to disagree, I think, with Eleanor to the extent that she said the difference is one of proof.

It's one of proof if we have a clear understanding what is the competition standard by which we're judging accessibility and therefore saying, well, access isn't the proper measure, we have to prove accessibility.

In this country, as Eleanor pointed out earlier, we're rather forgiving of, for example, vertical distribution restraints, in part -- for lots of cultural reasons, but in part because we think they offer certain efficiencies without creating market power.

There was, for example, a recent case in Chicago where each of the two major daily newspapers had exclusive access, one to one of the major wire services, the Washington Post/L.A. Times, and the other to the other wire service, and a third newspaper said, I can't get into this business in the face of these parallel restrictive agreements.

The Seventh Circuit said -- there were no conspiracies going on here, horizontally, between the wire services or the newspapers, and since each of these restrictions was efficient, the whole package is efficient, and as to the newspaper, the disadvantaged newspaper, that's tough.

Now, I happen to think that was the right result in that case. I believe that's the right principle, but one, I suppose, coming at it from the perspective of EU vertical restraints law, as I understand it, might say parallel efficient vertical practices, the effect of which is to create, as it

happens, not by discriminatory application but just as it happens, an obstacle to a foreigner to get his goods sold in that country, might be regarded as undesirable.

But I don't think we can ignore the distinction between those two regimes by saying it's a problem of proof, because it's a question of proof of what? What is the standard? Are we talking about an efficiency-based standard, in which case a lot of would-be entrants to markets are going to have to take their lumps, probably for the reasons John Dunlop outlined, or are we talking about standards that are explicitly designed, even at the expense of some efficiency, to make it easier for would-be entrants to enter foreign markets.

MS. FOX: I have my hand up for whenever -- I'll get in the queue.

DR. STERN: Go. Jump in. No hands, no holds barred.

MS. FOX: Oh, okay. This is what I think. First of all, I frankly, I wouldn't adopt the word market accessibility. It's David Richardson's term that nobody else is using, and I think that the concept is a market access concept, but that what I think we ought to do is to highlight the fact that there are certain practices that are anticompetitive under the law of the country where the certain practice is taking place that also happen to have the effect of making it more difficult for a foreigner to get into that market, and for that reason alone you can call it a market access restraint, but it doesn't matter about that kind of terminology.

What matters is that you know what the rule is you're going to apply when you say the business is not illegal. As you know, I have been saying that I think the right way to handle that problem is by a choice of law rule. When you're in Europe, you ought to have the benefit of the European rule. When you're in Japan, you ought to have the benefit of the Japanese rule. It's like a national treatment. They can't treat you worse than they treat their own, and when they're in the United States, they get the treatment under the U.S. law.

I don't think that we ought to be taking a position that the U.S. law ought to be the rule for the world, or that we ought to knock our heads together to get a common rule for the world.

MR. RILL: Well, it gets a little more difficult, doesn't it, Eleanor? Let's take the situation of Japan. First, we ask a country to enforce its laws when we would not enforce the law against that particular practice even though, under the laws of that country, the practice might be illegal.

I put to you the Japanese distribution guidelines, which are far more rigid than any way we would treat vertical restraints in the United States, and the Japanese don't enforce them anyway.

MS. FOX: Yes. You see, I think that's not a real problem, because I think the Justice Department, as a matter of its own policy, is not going to ask unless it believes that it's also illegal under U.S. law.

On the other hand, a company -- say it's Guardian Glass that is

doing business inside Japan. It should not be treated discriminatorily by Japan, and I don't see any problem with it saying I'm entitled to national treatment in Japan, so I think it's a problem that doesn't come up.

I also think that virtually everything that has been raised as a problem has been a common core problem. If it violates U.S. vertical restraints law, it probably violates vertical restraint law all over the world, because we have the highest threshold. It's hardest to violate the U.S. vertical restraint law. So if it violates U.S. vertical restraint law, it violates it everywhere in the world. When we're complaining, we're almost always complaining about something we think violates even U.S. law, that's why I think this isn't a problem.

MR. MELAMED: Eleanor, accepting all that you've said for the purposes of the discussion, and that is to say that the real principle that ought to be applied is one of nondiscrimination and national treatment, who on behalf of the United States ought properly to be the champion of U.S. citizens and U.S. corporations in urging foreign governments to treat them that way? Is that a matter for the competition agencies? Is it for the State Department? For the USTR?

MS. FOX: That's an interesting question. I think it's really up for grabs. It could be that if countries agreed to have a world agreement that countries enforce their antitrust law and -- that they have it, that they enforce it especially when it impacts on market access -- maybe then such an agreement would say that either a country that feels its citizens are harmed

could complain at the parens patriae, and then it could either be trade or competition people.

I think that there's a certain benefit of having competition people, because of their greater familiarity with competition law, even if it's Japanese competition law, but there's nothing written in stone as to who it should be, because I think it's a question of our exporters right to get into another market. I really think it's not our antitrust interests but our trade interests that we're really concerned about.

DR. STERN: Well -- go ahead.

MR. RILL: The issue of national treatment, Eleanor, was raised before the OECD Competition Committee over a year ago, and the Business and Industry Advisory Committee and others were asked to comment on how do you see the issue of national treatment? Is there discrimination on a national basis? And the overwhelming, almost universal answer is no, that most countries, at least the countries that they were talking about, purely from a standpoint of enforcement of competition -- I mean, intellectual property law is something quite different, but in competition law there was pretty much generally nondiscriminatory national treatment.

I think in terms of the statement of Anatole France, I mean, in France, the rich and the poor alike can sleep under the bridges of Paris.

MS. FOX: Aha. But if Japan is saying look, I'm not imposing my law even when the Japanese are hurt, even if it's a market access or exclusionary restraint problem. I think that that ought to be a problem. I

think we ought to say, well, you can't do that. I think you've got to enforce your law, at least when you're hurting other countries.

MR. RILL: But it's not a national treatment issue, it's a nonenforcement across the board issue.

MS. FOX: Yes, but I'd say that's not an issue if I'm simply saying that if you're in Japan you ought to be able to invoke the Japanese law. That's all I'm saying. If they're not enforcing it as to anybody, that's another problem.

They should have a duty to enforce when it affects the rest of the world, and when they have the duty to enforce, the violation of it should get judged by -- by what? That's what we're talking about, by what, and I'm saying, I think it's only logical if you get judged by whatever they define and formulate and hopefully will make transparent and clear, their own principles and methodology for analysis of what constitutes an anticompetitive vertical restraint.

DR. STERN: Well, the proposals to enhance the U.S. Trade Representative's Office, or trade authorities in this area, to respond to Doug's question about who should be --

MS. FOX: The champion.

DR. STERN: -- the champion, who should be pursuing this, those who feel that it is not being championed at all, or adequately, say, “well, give it to the USTR and we'll make it into a trade issue, and then we can use sanctions which will really get people's attention.”

My view is that in the past you see laws get changed by Members of Congress who are reflecting pressures of discontent from their constituents, or interests. Sometimes the laws are there just to get the attention of the administering authority, who may not be exercising its authority. Therefore, I'd put out on the table, for the sake of argument, the notion that if the Department of Justice did exert itself more, you might not get as much pressures from the Congress, and at the USTR, to get into judging what is and what isn't a blockage in another country.

So, isn't this kind of an invitation for the Justice Department to, if you will, self-initiate? I guess my question is, do we have an historical record on what the Justice Department has done in the past in this area, and does it --

MR. RILL: Well, we do have a record, which I've been given this list of cases by Chuck Stark, and it does -- one of his questions -- maybe Doug would want to --

MR. MELAMED: I thought you were doing nicely, Jim. Go ahead.

(Laughter.)

MR. RILL: We do have a record, and Joel said at the outset that we do now have some action with regard to your old referral in the computer reservation system case.

DR. STERN: Right, the Sabre case.

MR. RILL: And we have at least a Statement of Objections

from the EC, according to the press reports. We need to know more about that, Joel himself said.

But I have to say, just as the one who erased Footnote 159, we were very cautious when we did that to explain that the first rule was, we weren't going to take action if it didn't violate our law, and we probably weren't going to take action if it didn't also violate the law of the country where the conduct was appearing, and then the effect of course under the statute would have to be substantial, and that we would ask the country where the conduct's occurring to take action. This embodies, for example, the positive comity concept, I think outlined very substantially in Justice's and FTC's 1998 revised agreement with the European Commission.

I think Alex Schaub said at a recent ABA conference that there's a lot of thought occurring, and that we're in a new era, a new field of experiment, and I think we're wrong, and I say this with some caution myself, wrong to expect results overnight in this era of positive comity, but I think there is a need to examine and show somewhat, perhaps greater results than we've seen so far.

DR. STERN: Proactivity.

MS. JANOW: I would like to offer one observation. Doug, you may disagree with this characterization, but it seems to me that if you look at agency conduct, trade agencies by their nature engage in public jaw-boning with respect to foreign governmental practices that are thought to be constraining market access, and sometimes that works. That is to say, it

convinces the foreign government to adjust themselves in some fashion, even without going through a formal legal procedure.

That kind of conduct is not commonly undertaken in the United States by the Justice Department. It's more common for some foreign competition authorities to have concerns expressed, I think, in a more informal public manner, but I don't think it's a common U.S. DOJ policy to publicly criticize private arrangements in foreign markets, so it's a different sense of agency mission, I think, stemming from this perception of being an enforcement agency versus a public advocate, and so there is a different starting point.

The question is, does this Committee think that that traditional U.S. posture is an appropriate one or needs to be adjusted in light of a global market environment in some fashion? I wanted to put that on the table.

The other question I would put on the table is: I think this Committee has already looked at other proposals and considered the extent to which you would be willing to have any kind of international body at the WTO, or a separate body, look into the actions of national agencies with respect to particular competition or antitrust matters, and the view has been expressed here that one must give a high degree of deference to a jurisdiction in the application of our laws.

So in your hypothetical, Eleanor, if there was non-enforcement in Japan, would you have an international body looking at that in a

particular case, or considering the broad question of whether Japan is applying its law, or would you be at a more general level of consideration? And, if so, what would that level of generality provide you by way of remedies to real world problems?

MR. GILMARTIN: On the first thought, one of the things that we are doing as a company and also is an industry is basically going to places like Japan and the European Union, and even in the U.S., and promoting competition, and we're promoting competition because we point to the success of an industry and the competitive environment in terms of innovation and see, basically, market competition as an enabling condition for innovation, and that innovation does not exist where you've got markets that are not really competitive.

So it's interesting to contemplate that, rather than the Justice Department playing an enforcement role, or even a critical role of others' policy, is that just as we promote free trade as something that creates wealth, is there a role for the Justice Department, in conjunction with other competition agencies, to promote competition as something that creates wealth, so that you would start a process of competition rules and discussion.

That would then set up possibly an avenue where you could turn, was say that as an advocate of competition, can you help us, because you reach for the USTR really more for the jaw-boning than you do for the fact -- because you're not discriminated against compared to other local

competitors and so on, so just as a sort of, you know, someone who's promoting competition, that could we do that, could the competition agencies do that.

And if you talk to somebody, like Van Miert, for example, and you read his material, in that this orientation toward the welfare of the consumer, you might contemplate a shift away from, as I've said one other time, away from industrial policy as a way of trying to create wealth to one of, if we really focus on the consumers way of creating wealth there may be more of an orientation than had been historically, particularly in the area toward competition policy. I mean, these just are radical thoughts.

DR. STERN: No, I think it's a very interesting thought, particularly as relates to the discussion on the use of the World Bank and the IMF and others in which the U.S. is trying, through the Department of Treasury and other agencies to promote competition in, particularly, the developing countries, and the role that the Justice Department plays in these informal discussions with their counterparts in these 50 or 60 other countries, which are now adopting competition laws.

Doug, you wanted to jump in there.

MR. MELAMED: Yes, you're right -- I want to follow up and then come back to something you said. We do try to proselytize, if that's the right word.

We do it through the multilateral organizations like the OECD; we do it bilaterally; we do it with technical assistance.

Frankly, we don't have the resources to do all that we could usefully do. There are significant countries that are not quite yet at the level of developed major trading partners, but are close, and whose officials have literally been in my office sort of begging us for technical assistance, and we don't have the resources to begin to give them what they need. Even with countries that have less initiative in this regard, we still think it's important to proselytize, because it's part of our process of promoting effective world markets. We wish we had more resources to do it.

But even if we were successful, more successful than we've been -- and the EU is of course also proselytizing a somewhat different, but not entirely inconsistent approach to competition issues -- there is still a problem.

There's a problem in terms of our role in individual transnational disputes. Part of it I think starts, as I guess Merit was saying, with the fact that we are a law enforcement agency and not a regulatory agency.

I think holding fast to the notion that we're a law enforcement agency is an important part of keeping a firm boundary between private markets, on the one hand, and Government intervention in those markets, on the other hand.

But the problem is, if we're a law enforcement agency, then we can properly intervene only to the extent that we perceive possible violations of law, and that suggests two issues. One is that there has to be an understanding about the proper role of antitrust enforcement. I suspect

that today, in 1999, it would be small comfort to a number of firms that have been very concerned about what they perceive to be their lack of access to foreign markets, particularly Japan, to say that that might be the result of good competition policy. I don't think that would make them sleep better. They'd say, “Even so, I want my 10 percent of that market.”

So, to the extent that we are expected to be a champion of opening up foreign markets through enforcement of competition laws, we may wind up undermining sound competition policy.

Second, and this is pervasive, a company comes to us and says, “I can't get into market X. I have a worldwide share, including in what would appear to be similar markets in different parts of the world, of between 10 and 12 percent; and I have a .2 percent share in that market. It's been stuck there for 30 years. Something wrong must be going on.”

There is a serious question about what can we do -- about how confident can we be in judgments about the state of competition in that market without more facts, the kind of facts we would require before taking action in this country.

How do we get the facts? To what extent must we, in light of the practicalities of the international community, rely on foreign agencies to do our fact-finding and our analysis for us? And what do we do when we have reason to think that that agency is less vigilant, less competent, less committed to our vision of competition than we are?

MR. RILL: One of the underlying concepts of positive comity

is that the country where the conduct's occurring is better situated, assuming there is a will, to ferret out the facts that you're talking about.

One of the practical problems is they may not be either situated legally or willfully to do that work, and that presents us with a real conundrum about the future of positive comity.

MS. FOX: I'm raising my hand --

DR. STERN: Go, Eleanor.

MS. FOX: For whenever --

DR. STERN: Yes.

MS. FOX: I think that we ought to have a lot of anchors, that there ought to be a lot of fronts on which we move, and I think the Justice Department is doing a very good job in moving on a lot of fronts.

I think also it would be helpful to have -- I mean, I know this is controversial, but to have an agreement with trading nations to say they must have a law, and they must enforce their law, and they must provide in their countries access to harmed persons who could sue in their courts, or their litigation system, or the dispute resolution system, and that there must be adequate discovery, and there must be a good process and appeals.

Some of this is the kind of thing that's in the TRIPS agreement with respect to the taking of intellectual property, and so that would be another anchor, to try to anchor the competition law principle, and there could be several more.

I think that Shyam Khemani always talks about competition

advocacy and the nations of the world who have the competition agencies could all have networks of competition advocacy, and maybe there could be some pinnacle of that. I'm not sure. Maybe that's at the OECD or whatever, but there ought to be a strong network with lots of anchors from different directions enforcing the competition way of thinking.

DR. STERN: Let me just throw out another topic to see if we can elicit some views, and that is based on the work that the staff has done in pulling together these different proposals, some of them in the form of, for example, an idea for a competition treaty, some in the form of the WTO, acting, and the acting can take a number of different forms, including going so far as to engage the dispute settlement mechanism.

There were a variety of different proposals that were envisioned in the paper, and I wanted to at least give the Committee an opportunity to talk about what the role of the WTO should be.

I would just say for starters that the contribution that was made with the proposal for a competition treaty, if you will, with the possibility of a special international tribunal to be established under the competition treaty, it seems to me that some of those ideas can be incorporated within the WTO, but it not be a dispute settlement mechanism.

In other words, for antitrust questions, for competition policy questions, that you might have a tribunal or a mediator and it would be sponsored by the WTO, but it would be not be the same identical tribunal with the same approaches and rules as the existing WTO dispute settlement

mechanism, and so I throw that out because I didn't see the bridge necessarily being made in the paper as it was spelled out, and I wanted to know if any of the other Committee Members had views on the role of the WTO.

MR. DUNLOP: I would like to just comment on that. Recently, as I told you, I had the opportunity to talk at length with the new Director General of the ILO, who is coming into office around April 1.

They had a very formalistic committee of experts for many, many years, and a number of us have been talking with the ILO about putting in -- and that process, as usual, takes a lot of time, and people sit as if they had weeks and so forth, and what we've been -- and the DG seems to have been quite interested in, is to develop essentially a more informal or a more mediating role which doesn't foreclose the formal decisionmaking process, but it's the analogue of what's happening in the United States in the use of ADR in all kinds of procedures, particularly in employment law. There are a whole range of proposals developed through a commission I chaired several years ago, and Government agencies here in those fields are recognizing the need for ADR processes. For instance, the EEOC had 100,000 case backlog. Try to handle that. And so you try to build in now more informal mediating procedures with people who have some knowledge and expertise, who had some training in that process.

I think there's a chance of getting that sort of procedure under the ILO conventions, which you know, are very many, and I saw that brief

reference in the report we had. I really do think that that is a possibility and often where you don't get people so far out on the limb, you can work out a problem better, so it's something to be explored I think.

My own judgment is if the WTO is to have its jurisdiction in any significant way extended, or required to do more disputes, I think that is an absolutely essential element.

MS. FOX: I'm signing off. Thank you for inviting me.

DR. STERN: Bye.

MR. DUNLOP: Well, anyway, you asked for --

DR. STERN: No, no, I appreciate it.

MR. RILL: I just want to put a thought down, or a chip down, as it were. If we're going to have a body that's going to deal with competition and trade disputes, whether it's within the WTO or elsewhere, you need at least two elements. You need a common standard, and you need facts. You've got to deal with the fact that to resolve or deal with a case, you need facts.

The WTO or any other body isn't very well-situated to develop those facts at this point, and there is no common standard. Those are problems that I think are going to confront any international body that's going to deal with the concept of dispute resolution. Call it dispute addressing, or something like that, and it's still going to present the same problems.

There may be some latitude for informal nonbinding mediation

along the lines of the OECD Recommendation, which, footnote, has never been used, providing for conciliation, but any kind of international attempt to deal with the adjudication of these disputes on a competition policy basis is going to run afoul, I think, based on the problems that are confronted with lack of common standards and inability in any timely fashion to gather, assimilate, and determine the facts.

DR. STERN: Well, you know --

MR. RILL: Just a thought.

DR. STERN: Well, of course. I think we all agree on that, and you can't get to the end of the game until you've agreed on the rules in the beginning, and the proposal at least that we had gotten from Donald Baker on the competition treaty implies, or presumes, that the rules in the first instance would be enforced at one's own domestic tribunal, one's own courts, or in one's own agencies of the importing country that would act at the request of the exporting country.

And of course, then the question is who asks them to do that, and we've already had that discussion about whether the Justice Department might be playing an enhanced role, or barring that, whether pressures will spill over to get the USTR or others to play such a role, but I do think that it's important to see if this Committee wants to address a lot of the writings, speeches, proposals, you know, for a multilateral approach to some of these matters.

MR. RILL: We would be remiss if we didn't address them.

DR. STERN: I think so. Well, it would be good if we could also come up with some common --

MR. DUNLOP: What does address mean?

MR. RILL: Euthanasia is a way of addressing a problem.

(Laughter.)

DR. STERN: I think the tab B is livelier than euthanasia, and I think if we can get some feedback in the next weeks as to what of these proposals we liked and what we didn't in a consensual way, it would be good.

MR. DUNLOP: Why don't you give us the issues on which you want feedback instead of this book?

MR. RILL: John, I think that's a good suggestion.

MR. DUNLOP: I think that's a matter which I and at least some of my colleagues are willing to respond to, but without a more focused inquiry of the Committee I don't think you'll get it.

DR. STERN: I may be speaking out of school, but Cynthia handed me her cheat sheet for the tab A, which was very, very good. It really tried to boil down what was in that first tab, and I think a similar cheat sheet with alternative A, B, and C on like a Chinese menu so that we can circle which dish we want, I think that would be good. So I think we should try to do that, don't you, Merit?

MS. JANOW: I agree. I think it would be very useful. We'll generate something short, and appreciate any kind of feedback, even kind of

telegraphic.

I think our next phase is to be producing text to comment on shortly, rather than background papers to react to, and those should be I hope an iterative process.

I think that would be very helpful, and also some subgroup meetings on market access, how do we define it, what inferences do we want to draw from economic data, that is something I think that needs to be debated further, if any, as well as the e-commerce issue and competition policy.

DR. STERN: Okay. Well, I think that if there are no other requests or comments, we have covered quite a bit, and I really again want to thank personally every member who has shown up to participate. Ray and I were saying earlier that 90 percent of life is just showing up, and I would say a good portion of this report is going to be reflective of those who just show up, but we do urge for the sake of the public and those members who are not here who will read this record, further comments, because it is still an iterative process, and we still have a long ways to go.

So with that, I thank each and every one of you all for coming, and I thank the staff in particular, and this meeting is adjourned.

(Whereupon, at 4:30 p.m., the meeting adjourned.)