INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

Washington, D.C.

Wednesday, July 14, 1999

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

INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE MEETING

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 10:00 a.m., before Ann Marie Federico, a court reporter and notary public in and for the District of Columbia.

C O N T E N T S

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, Walter Derenberg Professor of Trade Regulation, New York University School of Law

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

Steven Rattner, Deputy Chief Executive, Lazard Frères & Co., LLC

Richard P. Simmons (telephonically), President and Chief Executive Officer, Allegheny Teledyne Incorporated

G. Richard Thoman, President and Chief Executive Officer, Xerox Corporation

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

Department of Justice Employees:

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

Donna Patterson, Deputy Assistant Attorney General, Antitrust Division

Department of Justice Employees (continued):

Constance K. Robinson, Director of Operations and Merger Enforcement, Antitrust Division

Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division

Other:

Randy Tritell, Assistant Director, International Antitrust, Federal Trade Commission

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

Thea Lee, Assistant Director of Public Policy, AFL-CIO

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

DR. STERN: Good morning. I would like to welcome everyone here. This is the fifth full Committee meeting of the International Competition Policy Advisory Committee. We've come a long way since our first meeting back in February '98, and we're working diligently to release our report by late 1999. You could do it any way you want -- but we're going to wrap it up.

Today we have an ambitious program ahead of us. Before describing what's on our plate, I would like to take a few minutes just to review our activities since our last full Committee meeting, which was in March. Since then the Committee has held two days of Spring Hearings, one on April 22nd and another one on May 17th. These round out the set of hearings that we held last November.

At our last set of hearings, we were especially honored by the presence of the Attorney General of the United States, Janet Reno, and by Assistant Attorney General of the U.S. for Antitrust, Joel Klein. They were able to join us and to make some opening remarks at our hearing back in May.

At our Spring Hearings, members of the Advisory Committee had an opportunity to hear from a number of distinguished representatives of business community organizations, bar associations and other groups that have been developing input for many months.

We also heard from individual U.S. businesses, economists, and several speakers who have been involved in providing technical assistance to developing antitrust authorities around the world.

Transcripts of those Spring Hearings are being prepared to be posted on the Advisory Committee's website, where you can also find transcripts of all of our past meetings and hearings plus a host of other useful materials related to this Committee's work.

If you have questions about how to access our website, the staff is obviously here to help you. Our Committee members have been very industrious in dedicating their energies to the meetings of our various subcommittees; we've divided ourselves into the trade and competition policy, multijurisdictional mergers, enforcement cooperation and, thanks to Rick Thoman, e-commerce.

Turning to our meeting today, let me give just a quick overview of the agenda that we've got this morning. Our opening remarks will be from my Co-Chair, Jim Rill, and then we will commence with the presentation from organized labor. Miss Thea Lee, Assistant Director of Public Policy at the AFL-CIO, will offer us the perspective of organized labor on areas under consideration by the Advisory Committee.

Then the Committee will have an opportunity to discuss multijurisdictional mergers, and our fellow member Tom Donilon will be here to lead that discussion.

We will then have a working lunch beginning at 12:30, at which time we will discuss the question of overlapping Federal agency review of mergers. Professor William Kovacic will join us, once again, to respond to the questions on this issue that were raised back in March at our full Advisory Committee meeting, when he made his initial presentation to us.

We hope you will be able to stay for lunch. Administratively our banker and gracious Executive Director, Merit Janow, should be given $15, for she has prepaid for the lunch out of her own pocket.

After lunch, we have scheduled a single afternoon session during which the discussion will focus on the interface between trade and competition policy as well as on international agency enforcement cooperation. And Jim Rill will kick that discussion off.

I would like to take a few minutes to welcome everyone in attendance in the audience. We deeply appreciate your interest in our work. Finally, I would like to note for the audience's purposes that this meeting is designed to receive input from the participants who have agreed to appear today.

Accordingly, we have stated in the Federal Register notice, which announced this meeting, that there will be no participation by the audience, or it will all be passive participation by the audience. Even though today's format does not allow for participation from the audience, we do welcome and indeed invite any reactions that you may have to our meeting in writing and, again, please contact our staff if you wish to submit any written comments to the Advisory Committee.

Before I cede the microphone to Co-Chairman Jim Rill, I would like to note that we have a very full turnout today of members, both present in the room as well as several on the telephone. All but one of our Committee members plan to be participating today, so I very much appreciate the input and the time spent.

Thank you very much. Jim?

MR. RILL: Thanks, Paula. I, too, want to thank the members of the Committee present, either in person or by electronic media. We are coming, as Paula indicated, we are coming down to the development of the principles, at least, and broad areas for inclusion in the report that we anticipate will be filed with the Attorney General and the Assistant Attorney General by year's end.

Now, by my calendar the fall ends somewhere around December 21.

DR. STERN: That's good.

MR. RILL: So whether one wants to say the end of the fall or year's end seems not the most relevant issue. The most relevant issue, of course, is going to be to develop within our own ranks a consensus on positions and transmit that into a scholarly but also directive report that contains positive, well developed recommendations to the Attorney General and the Assistant Attorney General, and also to other audiences to whom we will be directing our recommendations -- or at least directing our recommendations to the United States Government for its discussion, advocacy, potential negotiation with their colleagues in other jurisdictions of the world. And in that connection, we're pleased to see Sybille Frucht here as one of our more loyal attendees at this conference, representing the mission of the European Commission; and also to recognize Koki Arai who is newly appointed as the Japanese Fair Trade Commission member of the Japanese Embassy delegation.

As always, we're also glad to see Chuck Stark who is a senior, in terms of service, U.S. attorney involved in international antitrust relations and one

of the real architects of the 1991 U.S.-EU agreement, and many other things as well.

With that, we are delighted to have here our representative Thea Lee. And Paula, perhaps you want to make the introduction?

DR. STERN: Yes, Thea, I very much appreciate your coming, and we are particularly -- with the guidance of Professor Dunlop -- have been very anxious to bring into our consideration the positions of organized labor on this issue. Knowing of your very thoughtful policy work in the past, I think we are all very lucky that you've come today and have put your mind to this particular topic: the intersection of trade and competition policy. And with that, I turn the mike to you.

DR. LEE: Thank you so much, Paula, Mr. Rill, and members of the Advisory Committee and a particular thanks to Professor Dunlop, whose kind and persistent invitation resulted in my coming today.

We very much appreciate the opportunity to present the views of the AFL-CIO on these issues to this Committee and the very important work that you're doing.

What I hope to do today is focus on the key areas of concern to the labor movement, and I'll skim over some of the areas where there's less controversy, where we are in agreement with the positions put forth by the business community, the academics, and the government officials that you've heard from have already stated. I'm happy to clarify any of those positions in the question and answer, if that is necessary.

The labor movement recognizes the challenges that we face around these issues at the theoretical level, at the political level and at the practical level, and we wish you well in your task of summarizing the diverse views and positions that you've heard and providing the analysis that will guide the future policy.

These issues are of a lot of importance to both business and labor. As we see our economy increasingly integrated into the global economy on every level -- through the movement of goods, services, capital and people -- we find ourselves confronted more often and more compellingly with the need to address issues at the supranational level, and I think we've all seen in many of the different debates around trade policy that the concept of national sovereignty is no longer a simple one.

Having international rules and standards limits our sovereignty, as we can see, but then, so, too, does the absence of international rules and standards. In the area of competition policy, the issues that have been raised are those where having domestic antitrust law or merger law doesn't do us any good if we don't have some international counterparts. As our companies are transnational, and as their business is transnational, we need to also address anticompetitive practices at the international level. And the same is true of the trade agreements that we negotiate, that the USTR will negotiate. Those trade agreements don't work if there are anticompetitive practices in other countries that negate the benefits that we have spent a lot of time negotiating.

One of the things that makes this issue difficult is that it is an inherently political issue. It goes right to the heart of government interaction with

national businesses. There are major economic interests at stake, and we see the issues of economic nationalism, of governments rightly looking to protect their national firms or what they perceive as their national firms in conflict with the international obligations or international principles that might promote more efficiency and a better overall outcome.

You could summarize some of these issues as consisting of problems where the prices are too high or the prices are too low, but I'll try to go into a little more detail than that.

The labor movement has historically had an interest in seeing that corporate power at the national and transnational level is checked by appropriate government action. The question is how best to do that. One of the areas where we are in agreement with the work of the Committee and most of the people you've heard from is that it's a good idea to encourage countries to develop and enforce sound competition policy. That seems like the kind of thing that happens at a discussion level, rather than needing strict international rules. But some of the other issues that are not covered by trade policy -- transnational cartel behavior, monopoly and price fixing, transnational merger policy, and the anticompetitive behavior that blocks market access -- are not yet dealt with at the international area, but need to be.

Other areas of competition policy are covered by trade policy, like national antidumping laws or government subsidy policies. These are both dealt with at the national level and explicitly permitted by international rules.

The antidumping laws attempt to prevent predatory behavior,

deliberate underpricing designed to garner market power which is then abused and puts you back into the first category of transnational monopoly behavior.

One thing I want to talk about today that I don't think you have talked that much about is when we talk about national or international competition policy, one of the things we're talking about is the terms of competition.

What is fair competition, what is unfair competition, what is allowed by national rules or international rules, and what is not? In our view, this is very much a labor issue.

As I said, the trade laws today address a subset of terms of competition: subsidies and dumping. And the business community, with the support of the labor movement, has succeeded in identifying and classifying these forms of international competition as illegitimate. A government that subsidizes its export industries will come under international scrutiny, and may be faced with tariffs, compensating tariffs, countervailing duties, and so on. Similarly, the pricing policies in exports are very much under the discipline of international trade rules.

The question I would like to raise today for your consideration is whether the systematic violation of internationally agreed upon labor standards, core labor standards as identified by the International Labor Organization, by the United Nations, and by the WTO, in fact, is an anticompetitive practice, and in many senses is equivalent to a forced subsidy where workers are forced to subsidize the profits of the companies that they work for with the complicity of their governments. In these cases, the governments are complicit with the

companies in repressing labor rights, in artificially repressing the price of labor and doing so in an antidemocratic fashion, sometimes a violent fashion, often an illegal fashion. Governments often fail to enforce their own labor laws or fail to afford the rights that they have agreed to by international treaties or by the ILO conventions. There is little oversight to this question.

I know this hasn't really come under your jurisdiction. It certainly hasn't been a topic that the Working Group on Competition Policy at the World Trade Organization has addressed, but I think it does go to important international business issues and it's relevant.

This issue has been raised unsuccessfully in the Canada-U.S. context where there was early on an attempt by the Canadian labor movement to file a case against the United States alleging our Right-to-Work laws in the southern states were, in fact, an illegal and forced subsidy from workers to companies. If you look at the WTO language on subsidies, and if you consider that the government has a role in many cases in repressing internationally recognized labor rights, then you could see that you could at least make a decent argument that this is something which should be addressed by trade laws, should be addressed by international competition policy, and it's certainly relevant to the issues that you have addressed.

Now, all the problems that we've discussed have this in common: They can't be fixed purely at the national level. But the question is, how to fix them, at what level, and how do we best go about this? This is where you have given the bulk of your attention.

Many of the people who have spoken and testified before this Committee have talked about the World Trade Organization, and the beginnings of an attempt to address this issue at the WTO, through the competition policy working group. Most have been fairly skeptical about the value of competition policy negotiations at the level of the World Trade Organization.

We would add our skepticism to that you have already heard. This is not to say that this issue should never be addressed at the WTO. I think maybe one day it should. Like most issues that involve conforming national rules to international standards, it is best addressed at the multilateral level. At the moment, however, it's premature to do so at the WTO. The consensus is so far from existing and the national policies are so divergent that even to outline general principles is something that would be hard to do. To expect that there would be compliance with such rules, I think, is beyond where we are today.

We also share a concern that the current Working Group on Trade and Competition Policy at the WTO has gone in directions that are detrimental. We certainly do not want to see this competition policy working group used as an excuse to undermine U.S. antidumping laws. That is a serious concern for us, and to the extent that the countries that have participated in that working group seem determined to raise that issue, then that seems like another very important reason why this is not a good time to pursue this conversation in that forum.

But the broad conversation on international competition policy should continue at the international level. We would like to see labor rights be part of that agenda to the extent that it does continue.

In terms of the merger review and the premerger notification questions, it seems that the issues of transaction costs and the kinds of bureaucratic hurdles that companies need to go through in order to notify about a merger, including filling out forms for many different countries, are an inconvenience, but maybe not a major inconvenience (according to some of the business testimony).

It's important, I think, to streamline that process, but not at the expense of weakening the guidelines that are in place. We would not want to see a harmonization process for the premerger notification and merger review that had the result of weakening the standards that are in place now.

The final issue that I think is the most interesting and the most difficult is the one of anticompetitive behavior abroad, and the extent to which this acts as an export restraint.

We sign trade agreements and we implement them in good faith here at home only to find that our access to foreign markets is sometimes blocked by blatantly exclusionary or anticompetitive actions by governments in coordination with firms. I hope we'll have some discussion about this question because we haven't worked out all the answers, but it's very important.

In principle, some of these issues are covered by trade law. When one government nullifies the benefits that a country expects to get when it signs a trade agreement, that is actionable in principle.

We have also seen the disappointing result of the WTO case on Kodak-Fuji. This result would cause us to doubt whether this issue will be

addressed to our satisfaction effectively by the trade rules at this time.

The question I have is can we use U.S. antitrust measures more effectively than we currently do -- more consistently and more aggressively -- to deal with these kinds of actions abroad? I know you've had some discussion about that in this Committee, what U.S. law allows, what are the kinds of obstacles that we face right now. The two obstacles that have been identified include the difficulty of gathering reliable evidence without the cooperation of foreign governments, and then the second difficulty of imposing remedies extraterritorially.

It seems that the business community is a little bit wary of the evidence gathering side of things. That was one of the things that came up a few times in the testimony you've heard already, that the business community is worried about the confidential information that might have to be provided in this context. But it seems like that obstacle should be addressed squarely and that those concerns can be met. Certainly we would expect that any U.S. antitrust enforcement efforts would be able to keep that information confidential and the question is whether we can have that same confidence in foreign antitrust efforts here in the United States.

But that is a direction that we should explore. Since it seems like this conversation at the WTO level has been problematic, it is not likely to necessarily move in the direction we want. It seems to me that it puts us back for the moment, at least, at our national law. The question we face is how to make that national law more effective, certainly within the guidelines of the multilateral

trading system.

But let me just stop there. I hope we can have some discussion about some of these areas, and I welcome your questions and comments.

DR. STERN: Thea, thank you so much. That was a very, very thoughtful presentation and it reflects that a great deal of preparation was put into this. By looking at the work that we have done so far, and the diligence which has been demonstrated, finding the overlaps between emerging themes and organized labor's satisfaction with aspects of our work and how we're parsing our work is extremely reassuring; I just want to express my personal gratitude.

It's true that, to use your word, persistence, Professor Dunlop really carried through on our desire from the very, very beginning. He has also carried through on both Joel Klein and the Attorney General's desire to make sure that we heard your voice, and you have given us a very thoughtful presentation -- it's not like we've just touched base. I think we've really joined the conversation, to use your words, so thank you very, very much. It doesn't surprise me, knowing of your diligence.

I wanted to open up the floor to questions or comments from any of the members at this point.

MR. RILL: Well, let me also echo my Co-Chair's admiration for the obvious preparation time that you put in and your familiarity with the record that has been developed to date. I myself would be embarrassed to have a test between you and me as to who is more familiar with the record. I think that's very useful.

A couple of questions. You're concerned that the Trade and

Competition Working Group at the WTO, the one that's headed by Professor Jenny, is off, I think you said, in a wrong direction with concern being expressed from some quarters on antidumping. You also suggest that it is, I think you used the word premature, for the WTO to get into any kind of prescriptive discussions of competition policy issues or principles.

That view has been expressed in other quarters. Conversely, we do have heard views expressed that the WTO should play an even greater role. So this is an issue that we need to deliberate among ourselves.

You also indicated, though, that there's a need for some further discussion, at least, deliberation on the international scale of competition policy, basic standards and so forth. Some of that, of course, goes on within the OECD's Competition Law and Policy Committee and the Trade Committee, the Joint Working Group in the OECD.

We have heard the concern that the OECD is too narrow of a forum, 29 countries. Some have described it as an elite group. I wonder if you have any thought as to where this discussion that you're calling for might take place. Not WTO, OECD is too narrow.

Is there some possibility that, for example, a special forum, let's not call it an organization, but a forum for the discussion of the competition policy that would be more broadly based, perhaps, than the OECD but work on OECD principles might be something that could bear fruit, a fairly useful purpose, if you want to comment on that.

DR. LEE: Yes. I think that's a good idea. It's interesting that today

we think of this issue as being one that affects primarily the industrialized countries, and that's one of the reasons that the OECD, the U.S., Europe and Japan have been the key players in the competition policy discussion. But I think that will change as the developing countries become more closely integrated into the global economy. The issue that also has arisen about the transition of state-owned enterprises to the private sector and some of the issues around monopoly will affect the developing countries, so if possible it would be desirable to have a forum which included both developed and developing countries for this discussion.

The developing countries rightly resent when they come into a conversation after all the decisions have been made and then they're asked to sign on, and their particular concerns, which are different from those of the industrialized countries, have not been addressed or are addressed in a backhanded manner.

I think that's not a bad idea, to have a special forum. It could even be a voluntary forum so the countries that have concerns and that have strong opinions about this could come together in a lower pressure environment than the WTO.

The WTO is never going to be a low pressure environment. It's one where there's a lot of politics and a lot of posturing, and a lot of trading off, as you all know, where countries raise difficult issues on purpose in order to make progress in some other totally unrelated area, so I think that a separate forum would offer some advantages, and would be a good direction to explore.

I also just want to say one word of thanks to Andrew Shapiro who helped me get prepared for this and was very helpful in guiding me to the various transcripts. It would be remiss of me not to say that.

MR. RILL: Thank you for that answer.

Let me just ask you to elaborate, on another comment you made, regarding an attempt to get rid of some of the frictions in merger notification: multiplicity of jurisdiction, multiplicity of information, different timetables. We've heard a lot of testimony that these issues are a real problem, and we're going to be discussing that later on this morning among other merger-related issues.

You suggest, I think, quite rightly in my own view, that that kind of procedural friction removal doesn't undercut the substantive work being done in the merger review process, and I think that's right.

It seems to me that one of the topics that could be discussed at the forum that we're hypothetically developing as we speak would be the standards issue because there is a concern that not everybody in the world has the same consumer welfare standard that has been adopted in the United States, and that seems to me to be an issue worthy of discussion. There may be areas where we want our government to be in a position to advocate a consumer welfare standard so that perhaps more parochial national standards that may -- we heard may be developed in other jurisdictions -- could at least be made more transparent, and if possible, addressed. I wonder if you have a thought on that.

DR. LEE: I think that would be very appropriate to raise issues that

may not have come up and convince other countries of the rightness of that in this kind of harmonization discussion.

There is always a danger in the harmonization discussion that countries have whatever they have and they're not willing to talk about changing it, but if you had a forum that was relatively open and you could share information about the benefits of the consumer welfare standard, that would be appropriate.

MR. RILL: A number of our members, particularly from the business community, Ray Gilmartin, Rick Thoman and others have said that transparency is key at least at the first level to understand what the standards of other jurisdictions may be, and I gather you agree with that.

DR. LEE: The transparency is something that we have pushed very hard in a lot of different forums, that certainly it's a bare minimum in terms of what countries need to interact intelligently and what businesses need to interact in other countries, that transparency should always be pushed as far as possible.

MR. RILL: I think your discussion of labor standards as a form of subsidy, inferior labor standards as a form of subsidy is an issue that will be a matter of public policy debate for sometime. Am I understanding you correctly that where those substandard -- standards exist, they are government imposed.

DR. LEE: Government tolerated in some cases.

MR. RILL: Whether tolerated or even imposed, this type of issue may be one more for government negotiations in the trade area perhaps rather than in the competition, private restraint focused area that we're to some degree, I think, focused on in this Committee.

Do you agree with that?

DR. LEE: I raised the issue to see where it will end up. I don't know. Certainly this is an issue we've raised in the market access discussions that we would very much like to discuss at the WTO, in some ways the opposite of competition policy.

There is also no consensus, as you know, on labor standards, on even having the conversation. We haven't gotten as far as competition policy in the sense that we can't establish a working group on worker rights at the WTO.

We would very much like to do that and we have failed, and the U.S. Government has put this forth and has not been able to garner support from other countries to move forward. But many of the issues you address do have to do with government behavior and government rules that are inadequate in some cases, so --

MR. RILL: I think we would probably be remiss if we took an unduly narrow view of our own jurisdiction and the variety of areas such that we did not address, at least as an advocacy recommendation to the United States government, positions that we feel are governmental restraints overseas that limit the free flow of markets and a strong competition policy.

There are a number of members that feel the same way. So I think these are areas that we will at least review and recommend to our government that they engage in some fruitful advocacy with their counterparts and also, by the way, to look at ourselves and see that our own house is in order.

DR. LEE: Yes, always important.

MR. RILL: Thank you.

DR. STERN: Eleanor?

MS. FOX: Yes, thank you very much. I certainly enjoyed your presentation. I wanted to ask you about some possible tensions that you may see between labor rights and competition policy. So far you've been talking, I think, favorably about an efficiency and consumer welfare standard and yet you have also talked about the problem of putting pressure on labor rights and, in effect, exploiting labor.

I wanted to ask you about an issue that usually comes up in big international mergers, which is loss of jobs, and whether you and your organization have a concern about loss of jobs that you think ought to be included in analysis and also how you see your AFL-CIO interaction with the ILO and whether countries that have lower labor costs might consider that they have a comparative advantage that ought to be recognized in the world, and whether if that's so, cheaper labor goes together with efficiency and world competition.

So is there a tension there? Is there a problem of competitiveness that might have to be addressed by recognizing a common effort of efficiency, business and labor?

DR. LEE: Okay, that's an excellent question. And let me start with the big mergers, loss of jobs. It's always a concern in any particular case, what the job impact is going to be, but I'm not sure whether there is any broad policy statement. Certainly it's something that should be taken into account. It's one of the public policy considerations that any government will consider, but I'm not

sure what the general principle is. We understand there will be loss of jobs as companies merge and change their productive structure and their plans and so on. But I don't have a well thought-out sentence that would guide how merger policy should address job impacts.

MS. FOX: Yes, our competition policy today in the United States actually doesn't, and this is because of our efficiency/consumer welfare policy, so I just wondered what your reaction was to that.

DR. LEE: The other question about whether lower labor costs are legitimate comparative advantage and whether there is an efficiency aspect to that is an interesting point. What I would say is low labor costs in and of themselves are not objectionable.

Our goal is not to equalize wages across the world, but there are different kinds of low labor costs. There are different reasons why labor is cheap. Labor is cheap sometimes because it's plentiful, or because it lacks technology or capital to work with. It's cheap sometimes because of a low cost of living. But sometimes labor is cheap because the government has systematically set out to repress independent labor unions, or to keep the minimum wage below the poverty level, or to keep the growth in the minimum wage below the growth in productivity. There are very different kinds of cheap labor, and they operate in the international trading system in very different ways. The differences in factor prices that come about through differences in climate or factor endowment are a natural piece of the trading system. You can argue that these differences form the basis for the basic argument in favor of free trade, but differences in factor prices

that come from systematic repression are not efficiency promoting.

They are actually distortions in the international trading system. They distort choices about the location of production. Unfortunately, the international trading system doesn't recognize that this is a problem, so we have no rules, we have no minimum international standards on labor rights.

So, for example, one country is beheading labor leaders every week, or tossing them in jail and mutilating them, and hiring 5, 6, and 7-year-old children who are enslaved essentially, sold by their parents to produce carpets for export to the United States.

Another country is allowing unions to organize and observing other internationally recognized workers' rights. These countries are side by side. They are competing in the same international trading system, they have the same access to international markets. One of them has lower labor costs, but not through any legitimate comparative advantage. This is the difference that we have tried to put forth, that repression creates inefficiency, not efficiency.

The current set of trade rules creates perverse incentives where the worst actors can reap large economic benefits. These bad actors have no scruples, no morals, no judgment even, no concern about, let's say, the future of these kids, whether they're going to grow up to be productive members of society, or whether they will be crippled by the time they're 15, or blinded. In fact, a world without rules rewards the worst actors, and that that is an inefficiency.

The same thing could be said about the environmental standards, too. To the extent that there are externalities that are not taken into account by the

pricing system, allowing the worst violators of environmental standards to have the same access to markets that the good players have encourages the violation of environmental standards, e.g. the poisoning of streams.

One of the issues that we have raised that maybe people aren't always aware of, is that this is not an issue that the U.S. is trying to impose on poor countries.

This is an issue that the workers of the world, the unions of the world have agreed on. We have a basic consensus internationally among labor unions that labor standards belong in trade agreements.

The International Confederation of Free Trade Unions (ICFTU) that represents about 124 million workers in 143 different countries, mostly developing countries, has worked very hard to develop joint statements on this issue. The ICFTU has held a lot of regional symposia where African, Asian, and Latin American trade unionists have debated and discussed these issues. In many cases their governments are not receptive and are not representing the workers or the unions of their countries when they come to an international forum and say they don't want to talk about labor standards in the context of trade agreements.

So we view some of the work we do in our advocacy on this issue as trying to give voice to concerns that workers in developing countries have. These workers want the basic right to organize independent labor unions. We try to use whatever political or economic leverage we might have from being here in the United States to empower and provide space for them to do what they need to do in their country. And the ILO, the International Labor Organization, does

incredibly important work and we are very supportive of the work of the ILO.

We have been supportive of the Clinton administration's initiative to give another $25 million to the ILO to help build technical capacity in developing countries, to help them get the resources they need to improve enforcement and to improve standards.

We don't see the ILO as a substitute for addressing these issues in the trading system, but rather as a necessary complement, something that must happen at the same time. At the end of the day, if there's no economic incentive for governments and companies to address the issue of labor standards violations, then it's unlikely to happen. The failure to identify unacceptable terms of competition in and of itself undermines the sovereignty of nations.

For example, in the United States, our ability to put in place and enforce good high labor standards, and our ability to encourage unorganized workers to organize unions successfully is undermined, if every time we do that, the company picks up and moves or threatens to move to a country that doesn't have those same rights. It was a long answer to a short question.

MS. FOX: Thank you very much.

You were talking about terms of competition, but that is not necessarily competition policy as such. So do you see the relationship of your argument as related to the world trade system just as competition law might be related to the world trade system but not necessarily issues that we should take into account?

DR. LEE: In terms of competition policy, it depends on whether

you would see that as essentially a subsidy or not a subsidy. It could come under the rubric of competition policy, but probably it's in a separate realm in terms of the international trading system.

The labor unions have been accused of being monopolies themselves, but of course the government, by intervening in labor markets, by repressing independent labor unions, is in fact creating monopsony. Where you have a single or a very small number of employers, and the government chooses to intervene in that interaction to support the employer over the workers and to ensure that the workers do not develop a countervailing power to bargain effectively with their employer, this would seem to fall in the competition policy area. Probably the primary place where it belongs is in the market access and trade discussions.

DR. STERN: Are there other questions?

MR. THOMAN: Have you done any quantitative analysis to estimate how many -- as you look at the world, how many workers fall into the category you mentioned that are unfair competition as opposed to general foreign workers of lower wage levels? Because one of the things that's striking is just a piece in the Financial Times this morning that talked about how the poor countries are continuing to lose wealth to the wealthier countries.

I guess in the last 80 years, we have gone from the poorest countries to the 1 to 3 wealth to the most wealthy to now it's 90 to one wealth. So the wage factors alone aren't driving the actual wealth. Those discrepancies seem to be increasing in terms of the wealthy countries. So how big a problem is this? Is this

10 percent of the work force that have these kind of unfair social examples? Is it 50 percent?

DR. LEE: I don't know the answer to that question, but it's a good question. Part of the issue is that you have two very different sectors, the export competitive sector and the informal and domestic sector. We know that a lot of labor rights violations occur in the domestic sector in which case they're not really relevant to the trade policy debate. They're relevant to the ILO or to other kinds of issues that need to be raised.

So it is probably a smaller subset of workers who are in that set of super competitive exporting, the export processing zones and the export assembly areas where there is systematic denial of rights.

We know there are certain countries that are particularly egregious in this area. China, for example, is an export powerhouse and has not a single independent labor union operating. The Chinese government has acted very aggressively to jail and suppress independent labor advocates, even people who have worn T-shirts advocating independent labor unions or put out newsletters talking about problems of unpaid back wages. Those kinds of people are seen as a threat to the system in China and have been jailed.

I don't know the exact figures you mentioned, but the report that you mention, is that the UNDP’s new report, the United Nations Development Program?

MR. THOMAN: I read it in the FT this morning.

DR. LEE: I was looking at the UNDP report yesterday, and I think

it's very interesting and very disturbing. It goes back to this issue about efficiency and world competition.

The question is whether as we tear down trade barriers and enhance the mobility of capital, we're leading to a generally happy situation where poor countries get richer, poor people in all countries are given opportunities and are able to engage in the global economy, and so on, or whether we have something else that we're creating. What the UNDP report very troublingly says is that the increased liberalization and the absence of the kinds of rules and standards that we're talking about has increased polarization between countries and within countries. This is not the outcome that we seek from trade liberalization and capital liberalization. A country like Mexico, for example, which is definitely engaged in the global economy, it's engaged in the North American Free Trade Agreement and the WTO has experienced falling wages over the last 15 years or so.

The Mexican minimum wage has lost something like three-quarters of its purchasing power, and workers are definitely not gaining their share of the prosperity that comes from integration in the global economy. To the extent that that's the case, I think we do have an obligation to say, the world trading system is not working for workers. We need to enforce core labor standards, thus allowing workers to organize unions when they choose to do so and to use that method to try to garner their share of the prosperity that comes from global integration.

We also have to change attitudes pretty dramatically so that the domestic employers and the domestic governments accept it as a challenge.

MR. GILMARTIN: Just a quick question. Do you have a sense on the international, in the international arena what the attitude of labor is towards competition policy in general, say as opposed to industrial policy? What's the best way to create jobs?

The argument which you make about exports and being able to enter competitive markets, the U.S. certainly is going to export very successfully.

DR. LEE: So --

MR. GILMARTIN: I'm really asking about the attitudes, say, outside the U.S. about competition policy, what your sense is about that.

DR. LEE: Labor movements outside the U.S.?

MR. GILMARTIN: Yeah.

DR. LEE: In many cases, particularly in Europe, you'll find that the labor unions are going to have positions that are similar to their governments. So to the extent that the governments are interested in a particular angle on this, for the most part, that's where the labor unions will be, but beyond that I don't have a good sense of the specific position of any particular national labor center.

It's not something that's been thoroughly discussed, but it probably should be. Maybe at the Seattle ministerial, this is one of the issues that will be addressed more thoroughly by the ICFTU.

DR. STERN: Further questions? I again want to thank you very, very much. You have been not only an important advocate but more an explicator of a lot of these positions that labor has taken. You've related it very much to our work and the scope of our work, where it works within our scope and where it

may belong elsewhere, and the questions also have helped elicit even further understanding. I think this has been an incredibly worthwhile hour well spent, and I thank you very, very much.

DR. LEE: Thank you. Thank you, Paula, Jim, and the Committee for your attention and for the invitation.

MR. RILL: Thanks for coming.

DR. STERN: Next on our agenda -- you're welcome to stay, Thea, if you want, but I have a feeling you've got a few other things to read back at the office.

Next on our agenda is the multijurisdictional merger review discussion and our fellow member, Tom Donilon, has agreed to give us initial remarks, and I think we're all prepared. The floor is yours.

MR. DONILON: Thanks. Merit, which document do members of the Committee have in front of them, the draft, chapter?

MS. JANOW: I think all members have a copy of the notional structure of the report and the members of the merger subgroup have a copy of the merger paper, but the merger specific paper has not been distributed to all members.

MR. DONILON: The staff has prepared a number of recommendations. Let me see if I can describe them generally, and Merit, obviously pitch in where you think we need to go deeper than I go here.

The general approach of the staff, and I would recommend general approach of the Committee should be to achieve a number of policy objectives.

Just to try to set some context.

Number one is to try to reduce as best we can transaction costs associated with the procedural requirements of merger review. We've heard now a lot of testimony before the Committee about the increase in what we're referring to as the sheer -- I guess Barry Hawk used the phrase initially -- the sheer volume of merger control law that now must be considered by a company or companies doing international transactions.

We're going to be joined by Bill Kovacic later. Maybe he could even join us now if he'd like to pitch in on this, because he has also spoken about and written a lot on the increase in sheer volume of law that companies face around the world in trying to do a transaction.

DR. STERN: Excuse me. Bill, would you like to join us at the table? Your name has now been invoked three times on the record, twice when you weren't here, and -- there we go. Okay, sorry, Tom.

MR. DONILON: I think that we've correctly been focused on trying to reduce transactions costs for American companies trying to do deals, trying to do transactions.

Second, we've tried to I think, and the proposal will address this, tried to the best we can to avoid inconsistent results that might be presented to entities doing transactions, international transactions, which of course can add to costs and uncertainty, and in some cases, failure of transactions that one jurisdiction, including the United States, might find not to be anticompetitive but nonetheless because of inconsistent results, you may be in a situation where a

transaction fails because another jurisdiction has found difficulties. We want to try to have consistent results and also not wildly incompatible remedies where transactions are allowed to go through conditioned on certain remedies.

And last, our goal has been to try and develop a set of proposals that can promote so-called harmonization, both procedural harmonization and substantive harmonization over time which I think is obviously a laudable goal in this age of international transactions.

With respect to procedures, which I'll talk about first, the staff has put forth -- and I think we can divide this up into, again, three areas -- procedural reform, substantive issues, and overlapping jurisdiction in the United States in reviewing mergers.

The last is the most substantive and for me after looking at the materials and thinking about it, maybe the most important at the end of the day, and Bill I know is going to speak to that today. That is the situation where a transaction being reviewed in the United States has to run through multiple agencies before it can be approved. This has resulted, in my experience, in quite a bit of transaction costs here in the United States and delay, particularly in Telecom and other industries. I know Bill will talk about that today.

On the procedural side, these are fairly technical issues, I think, and so I'll try to push through them fairly quickly because they really do fall in the realm of the Hart-Scott-Rodino aficionado class, which is well represented in the room, but I don't know how much time we need to spend on all these things, but they can be important.

The staff is looking at four or five areas of procedural reform efforts. It's an interesting question as to what you do when you come upon what you think might be the best way to go that may result in some change in the U.S. law, it will result in a lot of changes in foreign practices. One of the things that this Committee needs to think about is how the United States goes about operationalizing that? How do you go about advocating these changes in a way that's most effective around the world in order to promote our overall goals of reduced transaction costs, not having incompatible remedies and results and ultimately some degree of procedural and substantive harmonization.

The first area is the first issue that a lawyer, a practitioner, a banker faces when he or she is working on a deal, and that is notification thresholds. When does the transaction have to be reviewed by the relevant competition agency in a particular country.

These thresholds are in some cases not very transparent, and there's a lot of uncertainty about that in my experience and practice, and I think we heard a lot about that from practitioners, and secondly, the thresholds vary quite a bit.

The staff in its papers is recommending, I think correctly, that thresholds be transparent and that there be a pretty cogent nexus between the reviewing jurisdiction, reviewing country and possible impact on that country as opposed to just worldwide assets and very little local contact with the reviewing country.

There's also been discussion of raising the threshold amount in the United States. It currently is $15 million. There has been discussion before this

Committee of raising it to $50 or $100 million with automatic adjustments for inflation. This is obviously a serious issue.

Now, Merit, I think our preliminary review of the data shows, though, that it wouldn't affect very many international transactions -- that less than five percent of the transactions reviewed, I don't know if it's by both agencies or just by the FTC.

MS. JANOW: It's by both.

MR. DONILON: By both agencies, less than five percent of the transactions where second requests were issued are transactions under $100 million.

MS. LEWIS: We're working on getting data for international transactions. But the smaller transactions tend not to be international transactions, they are more domestic. Certainly with respect to enforcement actions, few international transactions valued at less than $100 million were challenged in 1998.

MR. DONILON: Although there has been a lot of discussion about this, there doesn't appear to be a lot of impact in the international area of the transactional amount.

Secondly, and maybe presenting even more of a difficulty, I think, is that the agencies' budgets are directly related to filing fees. Therefore any increase in the threshold amount would, I take it, result in a reduction in the agencies' budget.

There's been discussion before the Committee of recommending that

the FTC and Antitrust Division budgets not be so dependent on filing fees. I think that is probably a more rational way to budget antitrust enforcement, but at least this Committee member doesn't think, given the current budget situation, such a proposal would likely be taken on, frankly.

I would be interested in what other people think about that. I think that the funding source issue is a very difficult issue to change, I think. I think, again, I would be interested in hearing other people's comments on that.

MR. THOMAN: Do you know how much we're talking about, what's roughly the scale of the filing fees?

MR. DONILON: I don't know what the absolute dollar contribution of the budgets is, but we certainly have people here who might.

Chuck, do you know?

MR. STARK: I don't.

MR. RILL: Maybe Connie Robinson, Director of Operations, Antitrust Division would have a thought on that.

MS. PATTERSON: This is Donna Patterson. I think by next year it will be the bulk of both agencies' budgets.

MR. DONILON: Connie, do you know what the absolute dollar amount is?

MS. ROBINSON: It's getting close to 100 percent.

MS. PATTERSON: It's getting close to 100 percent of each agency's budget.

MR. DONILON: What kind of dollars is that?

MS. PATTERSON: I don't know the exact budget numbers, but it's probably around $200 million.

DR. STERN: What did you say?

MS. PATTERSON: Around $200 million for both agencies.

MR. RILL: Aggregate?

MS. PATTERSON: Aggregate, yes.

MR. THOMAN: A much smaller number is a more manageable issue.

MR. DONILON: Right. No, I think that's a fair point that we're not talking about a huge amount of money.

MR. RILL: It doesn't compare to the defense budget.

MR. DONILON: So with respect to thresholds, I think those are really the key issues. Transparency, objective thresholds with a nexus to the jurisdiction that's reviewing the transaction, the issue of raising the dollar threshold in the United States and the implications of doing that with respect to the agencies' budgets which we've now heard, although it's not an absolute large dollar amount, it does approach 100 percent of the budget for antitrust enforcement.

MR. YOFFIE: Tom, one quick question. Even if it's only less than five percent, would it still make sense to raise the number? In other words, why do you want to have that five percent being reviewed if we don't really think it's necessary for international transactions under $100 million?

MR. DONILON: I think that's fair --

MR. THOMAN: We're talking about less than five percent of --

DR. STERN: It's likely to grow.

MR. YOFFIE: You're only talking about small transactions. I'm just again posing the question, even if it doesn't have a big impact or maybe especially because it doesn't have a big impact, it won't have a big impact on the budget and therefore it takes the burden off some number of companies that probably just shouldn't be reviewed.

MR. DONILON: Let me correct myself on that as I read the documents that we've been provided -- less than five percent of the transactions valued at less than $100 million receive second requests.

MR. RATTNER: Less than five percent of all the transactions or less than five percent of transnationals?

MR. DONILON: Less than five percent of all transactions valued at less than $100 million, according to the data that's been given out by the enforcement agencies, resulted in the issuance of the second request.

MR. RILL: I don't think those data divide between national and international.

MR. DONILON: No.

MR. RATTNER: And what percent of transactions over 100 million receive second requests? What does the five percent relate to?

MR. DONILON: It's about the same, I think.

MS. FOX: Yes, yes.

MR. RATTNER: What does that tell us, then?

MR. RILL: They're about the best I can recollect, and I'm sure there are people in the audience who have better data than I. Of the 4,000 to 5,000 filings most recently, I think the FTC has issued about 50 second requests and the Department has issued about 120. Enforcement actions -- abandonments, consents, adjustments in the transaction or cases are about -- I'm sure they'll correct me if I'm wrong, about 30 a year per agency.

MR. DUNLOP: Mr. Chairman, why don't we --

MR. RILL: Hearing no correction, that's a ballpark.

MS. ROBINSON: Jim, if I could just correct the second request number. Fiscal year '98 should be 79 at the Justice Department. Fiscal year '99 to date, we've issued 50, which is almost 10 percent less than we had about this time last year.

MR. RILL: So we're talking about 80 then, not 120?

MS. ROBINSON: Right.

MR. DUNLOP: Mr. Chairman, why can't we get a written report on this data that we can all look at and study?

What's the total number of requests and how many are second requests, how many involve international, how many are purely domestic?

MR. RILL: I think for the large part, that's a good idea, and I think for the most part that's readily available. When you get down to carving out between international and domestic, you have a definitional problem you have to deal with, what is international. I don't know that we need to get into that when it does create a problem.

DR. STERN: I think your question now stands as a request to the staff, and I'm sure we will be getting it very quickly.

MR. RILL: Basically the ballpark that we just discussed is how the breakdown is between filings, second requests, and enforcement actions.

MR. DUNLOP: And has that changed over time?

MR. RILL: Yes. A lot more filings.

DR. STERN: So we would need to see the trend numbers.

MR. RILL: Second requests are not too much greater, frankly. Enforcement actions, somewhat greater, although when one compares something that I'm familiar with, fiscal '91, to current filings, current enforcement actions, there is marginal change, not tremendous change.

MS. JANOW: Could I just put in one footnote. We'll provide you all the data that we have, Justice and FTC has been very helpful in giving us some data, but as Jim points out the differentiation between domestic and international is not a differentiation, I gather, that the data picks up, and as you know, there have been many international deals that don't involve foreign parties and so on.

MR. RATTNER: It may not get picked up by the filing data, but the data we use picks it up in terms of just activity out there. I mean, we can tell you how many of the deals and different size categories. The way we typically define it is one non-U.S. party constitutes a non-U.S. deal.

MR. RILL: Then could you break it down even further than that, Steve, if there are two U.S. parties, is there a foreign asset that's involved or foreign sales.

MR. RATTNER: That we can't do, but maybe somebody else can.

MR. RILL: That's where it gets more complicated. I think you're right. You can surely define it by parties.

DR. STERN: Steve, if you could help us out, it would be interesting to compare your data with the data that the government has provided.

MR. RATTNER: That's easy.

MS. JANOW: There is an exemption, though, for foreign parties, and that is something that we've also been emphasizing, Tom. This is a recognition in the U.S. system about the effects of the transaction in the United States, which recognition is not reflected in all jurisdictions of the world that require notification. In fact I think in the staff recommendations are just that, that that kind of recognition of the effects within the jurisdiction be picked up by others to help reduce the volume problem.

MR. DONILON: That makes good sense. I think Professor Dunlop makes a good point that we should all look at the data in front of us.

The data provided to the merger subcommittee indicates that although the absolute numbers of second requests is not large compared to the number of filings, as was just pointed out to us by the agency representatives, the data that we have, as I look at it, does indicate that 38 percent of all second requests, again, is based on a low number, but almost 40 percent of the second requests that were issued were issued in transactions valued at less than $100 million.

Now, again, we're working on a small base, but nonetheless, a fairly

significant percentage of the transactions that do receive second requests are transactions that are valued at less than $100 million. I think that's the kind of data we can study.

Again, maybe Steve and his firm can help on trying to identify what percentage of those have characteristics that we could fairly say would be an international transaction.

MR. RATTNER: It's also true, Tom, that well more than 40 percent of the transactions are less than $100 million. I don't know that number, but I'm sure it's 60, 70, 80 percent.

MS. FOX: We may want to get data at a $75 million benchmark, a $50 million benchmark -- to see whether there is a big drop-off.

MR. DONILON: I will tell you, though, based on my practice that in a transaction valued at less than $100 million, the issuance of a second request is a fairly significant event.

MR. RILL: I would like to say that in any transaction, the request is a fairly significant event.

MR. DONILON: I think that's a fair point. In a massive international merger that has vast impact on the United States and around the world, you know when you can enter the deal as counsel that there's going to be a second request in all likelihood because the agencies have responsibility to examine it just on sheer size and significant overlap, but, again, I think on a transaction of less than $100 million, the issuance of a second request, it's a significant event.

DR. STERN: Which leads to the next question: we now know that that's a significant event and obviously the agencies know it's a significant event. By dropping or by raising the level, are we really removing some what would be very significant transactions from the necessary scrutiny?

MR. DONILON: Let me say two or three things about that, and I would yield to the enforcers or former enforcers who are present here.

Point one, you can have a small transaction that could have a significant impact in a fairly narrow geographic area that might not be small being less than $100 million, the relevant geographical area being fairly small, and those consumers would feel it, I take it that we would probably hear from the enforcement agencies that these are in limited geographic areas.

DR. STERN: Uh-huh.

MR. DONILON: Secondly, we have the issue of, if you do raise the threshold, you have the funding issue.

Third, counter to that is, of course, that the agency does not rely in any way on the actual filing of an HSR in order to be able to investigate or take up a competitive problem.

The other side of that is, of course, would the agency be notified in a reasonable fashion, in a timely fashion about a transaction before it was carried out if it were that small. I think those are the competing issues.

MR. RILL: Tom, let me interrupt, while we're on a couple of issues that you've raised before they slip my mind. One, comments that were made in one of our prior meetings, I think it was the past meeting that the whole issue of

the Hart Scott, and I'm sure you're going to get to the second request issue, is really not an international issue, and perhaps it should be one that the Committee should not address.

I don't agree with that. I think it may be more than an international issue, but it's certainly an international issue, and I think there are international implications that make it even more of an intense issue for international purposes.

We've heard the chairman of the FTC and others make speeches as to how extensive the international nexus is with the merger review, cases of the mergers that are reviewed by the FTC and presumably by the Department, particular translation issues, particular locational issues, such as multiple location issues as well as multiple filing issues that I think make it, among other things, at least an international issue of significant proportions. That's my view, we should address the issue.

On the question of filing fees, I don't think we ought to, without considering what we're doing, make a recommendation that would be picked up on and jeopardize the continued existence, viability, and enforcement strength of the agencies.

I think that very well might be the view of a lot of the people around the table. This is a very intense political issue right now, policy issue, not a partisan issue by any means, but one that the chairman of the Senate Judiciary Committee is focused, and others are focused as well.

I think that everyone would agree in the abstract that the filing thresholds are way too low. I think that if we advocate raising those thresholds, at

least my own view is that we have to take a strong position that some mechanism has to be found to maintain the agency's enforcement budget at a responsible level, possibly current levels.

There are several ways to do it. I'm not sure that any -- I'm just not sure that any is politically realistic. One that's been suggested is to simply take the agencies off the filing fee trough and have them have a general budget. I think that the OMB and Congress are going to find that hard to do. Regardless of the size, $200 million is a statistical accident, but still having been there and dealt with OMB, small numbers are not missed by them.

Secondly, another possibility is to raise filing fees for those companies that do have to file once the threshold is raised. I don't know what the business reaction to that would be.

On the other hand, I know that that would, in effect, require legislation, and to the extent that there are those in the Congress that view the filing fee as the tax, that may also raise a political policy argument.

That doesn't stop us from suggesting that the thresholds are ridiculously low, and I think the agencies would agree with that, but I think in doing that, we have to take cognizance of the fact that any simple increase in the threshold is going to jeopardize the agencies' performance, unless Congress and the administration are willing to take the countervailing action of maintaining the agencies' budget in some other way.

MR. YOFFIE: Jim, I must be missing something. If we raise the threshold, doesn't that in fact mean that there will be less work done by the

agency?

MR. RILL: No. Because you look at the number of transactions that are actually reviewed. Again, I don't know the number, but I think there are a lot of transactions, and most of the transactions that are reviewed are above a threshold that we might raise it to.

Secondly, as Tom points out, if the agency is aware of a transaction, even though it's not notified, that has anticompetitive consequences possibly through newspaper reports or competitor or customer complaints, you are still going to have to do the work to review the transaction without the benefit of filings and fees.

I don't know how mathematically that model would give you the exact numbers as to how it would work, but I think it would not significantly reduce the work of the agency.

MR. YOFFIE: You are identifying an even greater inefficiency than at first appears: Essentially taxing small transactions in order to support the overall budget of the agency. If that's correct, it makes a stronger case for moving in this direction and finding another mechanism to do it. The idea that you take small companies, you tax them in order to support all these other activities, can't be the most efficient way to run an antitrust policy.

MR. RILL: I couldn't agree with you more, but we are where we are.

DR. STERN: Tom, you thought we were going to get through this procedural stuff real fast. Do you want to go on?

MR. DUNLOP: May I ask a question? Who sets the filing fees?

MR. DONILON: Congress.

MR. RILL: Legislative action sets the filing fees.

MR. DUNLOP: When was the last time they set them?

MR. DONILON: I don't know.

MR. RILL: It's been amended. The filing fee's been amended.

MR. DUNLOP: No, I meant the filing fee. When?

MR. DONILON: I don't know the answer to that question.

MR. DUNLOP: I would like to know.

MR. RILL: Does anyone from the Department or the FTC know the answer? Connie?

MS. ROBINSON: My best answer is the last filing fee amendment would have been in '96.

MR. RILL: '96 and it went up to 45?

MS. ROBINSON: $45,000.

DR. STERN: Tom, these were initial remarks. I don't know what happened.

MR. RILL: This is a session in which we are supposed to talk to each other so I don’t see any problem.

MR. DONILON: I think that is exactly the right approach. I guess, though, we got two baskets here to talk about with respect to thresholds.

One is what we think is an optimal system that the United States should advocate, and I think there would be general agreement on that --

transparency and objectively based thresholds that's known and has some nexus to the jurisdiction reviewing would seem to me to make good sense. And as I said, the Hart-Scott-Rodino foreign persons exemptions as an example of that that our government should advocate. The other basket of course is changes that might be made to our thresholds and I take it these are on the table, increasing the thresholds.

I agree with Jim that if we're going to increase the threshold that we need to have a funding proposal. I would be interested in reactions to increased absolute filing fees on large transactions in order to make up for this, but you do have a circumstance here where you have transactions in the $50 million range that have the same filing fee or are subject to second requests in an economy which David can talk to and Steve can talk to more expertly than I can where lots of companies at this size are trying to get footholds.

MR. THOMAN: Mr. Dunlop pointed out what a marvelous precedent this is. If the IRS could -- if we had to pay filing fees to the IRS, for example, think -- this is a wonderful precedent for all sorts of things.

MS. FOX: I think that it's incumbent upon us to point out the perverse incentives and the over taxation and come up with another budget proposal, not just for ourselves, but because of recommendations from the world at large, everybody has copied us, they are copying us. The agencies see how fruitful it is to get lots of people to file, and this has increased the proliferation in the world. And I think also that the thresholds should be raised and that I would like to hear a proposal for calibrating the fee to something related to the amount of

work that the agency is expected to be doing, in some gross way at least, of which might mean that for easy transactions that are not looked at further because they're just not anticompetitive, there is almost nothing that would be charged against them, but for complicated transactions, that's a cost of the deal, but not to subsidize the rest of the operations of the agencies.

MR. THOMAN: Tom, I know you're trying to get off this, but there also is the image that presumably the EU and other equivalent bodies, however we agree the limits should be in the U.S., there is a reciprocity across with other non-U.S. regulatory. I mean you hate to have the situation where we raise our limits and theirs get other -- so there is an issue of what theirs are today and reciprocity.

MR. RILL: There is a gross difference between our thresholds and the EC thresholds. EC thresholds are much higher. However you don't have to worry about filing in the member states.

MS. FOX: There is a difference in philosophy as to why the EC adopted their thresholds and they purposely first set them at a point to not to catch too many. They're also engaged in trying to not catch too many and to leave those below their jurisdiction to the member states as a sovereignty matter.

MR. THOMAN: But if you go back to the notion -- we're trying to save money and time. The more you have one standard, one test, et cetera, the easier it is to get back to those objectives.

MR. DONILON: I think that's a good list of issues on thresholds and one that may be fruitful.

DR. STERN: Does everyone know where we are on the outline? It might make everyone more on the same --

MS. JANOW: Well, we're not exactly following the outline.

MR. DONILON: We're not exactly following the outline, I'm doing a summary.

MR. RILL: The answer to your question is no.

DR. STERN: I think I know where I am.

MR. DONILON: I couldn't tell you where we are on the outline.

MR. YOFFIE: Merit, do you have the more detailed version that Tom is working off of for those of us not on the merger subcommittee?

MS. JANOW: The answer is yes. I'm not sure we have a full set of copies, but I can certainly give you mine, but I think the core issues are indeed identified in the skeletal outline. I wasn't sure Tom was working through it necessarily.

MR. DONILON: Why don't we move on to the next basket of procedural issues which is the amount of time that a jurisdiction gets to review a transaction and how that time period is triggered, which is pretty key.

Again, there are two areas to discuss here. One is what are best practices, if you will, that the United States should enunciate and try to see adopted around the world, and secondly, what does that mean about our own practices. Once we identify the best practices, what changes do we think we should be recommending for our own government.

The staff view, and I think I agree with it, is that we should try to do

our best to develop common time frames. There are lots of different triggering events around the world, including definitive agreement requirements, which is that you have to have a definitive agreement before you can file, that's the case in the EU, and in some cases actually post execution filing deadlines. And there are some jurisdictions with very long review periods or in fact no firm deadlines for ultimate review.

The staff, and I agree, believes that the United States with respect to best practices should focus on what's been called outlier jurisdictions, that is, countries with very disparate triggering events and initial review periods. So in the United States, for example, this wouldn't require anything.

In the United States, you can file with the enforcement agencies prior to having a definitive agreement. You can go in anytime after the execution of a letter of intent between the firms.

In other places around the world, including the EU, there is the definitive agreement requirement, and we have rather lengthy review periods. I don't think that that is a very controversial, and most of the people agree, a very controversial procedural change to advocate, that is eliminating the definitive agreement requirements and seeking to eliminate post transaction filing requirement.

Bill, do you agree with that approach?

MR. KOVACIC: I do.

MR. DONILON: The other issue with respect to timing is the length of the review period. In the United States it's the 30 day initial review

period, and a second review of 20 days after compliance with the second request is reached.

We have talked at the Committee about whether we should encourage firm deadlines for the second review or not, and that's an issue I think still open, a four or five month deadline for completing a second phase review. I don't know if Committee members have views on that. Eleanor?

MS. FOX: I think it is probably a good idea. I heard a lot of conversation on it when we visited law firms, but there was some dissension.

MR. RILL: I think when you look at what's going to be helpful and what isn't obviously in this type of procedural reform, this idea of having a fixed time frame was something that came up early in our discussions, as you recall, and we went around, some of us, talking to a lot of people, including relying on our own experience with mergers and second requests, and there certainly was not a uniform view that even if this were adopted, it would be particularly helpful.

I think we need to look at our notes and review our position on whether or not that would be a useful modification. I think the question we face is: is this something that we think would be practical so far as the agencies are concerned, that's not a deal breaker, but certainly a factor to be taken into account, and is this a change that merging parties would believe might eliminate the frictions in the system. I'm kind of having second thoughts about that.

DR. STERN: The minute you get to the question of harmonizing with other jurisdictions, if this is what we're trying to achieve --

MR. RILL: This would generally take us in the direction of the EU.

DR. STERN: Exactly. That's a consideration, too.

MR. RILL: The points raised by the staff and by the structure of the U.S. is that the EU isn't quite so document crazy as we are.

MS. JANOW: I just had one footnote. I think in our own staff prepared papers that the focus has been on whether or not there is a possibility of imposing some disciplines on the time periods rather than focusing on any particular time period, that is to say, the EU model or another. For example, the Canadians have used 14 days for noncomplex matters, 70 for complex, 150 for very complex, so that the firms know the kind of guideposts of what to expect. I think we have been thinking more, at least in some of the informal drafts and discussions, not about a legislative deadline necessarily but more understanding of what would be the associated time frame so that if very complex issues were raised, agencies would not be constrained in going beyond some artificial deadline. So that's the balance that's been tried, that we've been working with.

MR. YOFFIE: What's the downside to the EU procedure?

MR. RILL: For one thing, it's been picked up in our discussions, is in EU procedure, once you get into phase two, the four-month phase, that is the rule. You cannot close within that time, under the merger regulation, that's the time period.

A number of parties, and certainly to some extent my own experience, people that we talk to that do a lot of merger work believe that having a fixed limit within which closure cannot be accomplished would probably extend in many instances, second requests, the time frame within which the merger may

close. We've heard testimony --

MR. YOFFIE: Jim, isn't that one easy: you set a five-month maximum as opposed to a five-month minimum?

MR. RILL: You could do that. The question then becomes how do you decide what is the maximum. That's something that could be worked out. We have heard testimony from the FTC and also from the Department that even in the case of second requests, the vast majority of second requests do not reach their full-blown substantial 200 boxes or a thousand box compliance.

Normally it's worked out more often than not worked out within the time frame, and I think a lot of lawyers handling mergers would, I think, agree with that and want that flexibility to close sooner than the outer time frame and review model.

MR. THOMAN: As a practitioner, and John I know has done this a lot more than I have, but I've been involved in two or three of those, which were borderline in terms of whether they would have been permitted or not.

What you get into then is discussions of well, if it doesn't close, who's going to bear the cost. The further out that can be, so then you get a discussions of what is the worst case? Well, the worst case is if it's seven or eight months, certainly in technology, is a lot worse -- a business that floats for eight months is a lot worse than a business that floats for four months. So you very quickly get to numbers which say, gee, I can't -- the worst case is so awful that I can't countenance it. That's the kind of issue that in my experience I have had two or three that could have turned out like that.

MR. RILL: That's certainly true in high tech.

MR. THOMAN: If you have four, or five, at least you could calibrate.

MR. RILL: No, that's a good comment.

MR. YOFFIE: Jim one other comment, too. It used to be trade policy didn't have any deadlines, either. If you remember back in the 1970s, countervailing duty and dumping suits could be stretched out sometimes for years, and with the changes in the trade laws, which did set very strict deadlines on the procedures, I think that has produced much more efficiency in the handling of these activities. I agree with Rick that if you set a maximum deadline we could potentially get much more efficiency in the process. Everybody understands the deadlines they are working under and if it is closing earlier, we create the option to make that possible. In terms of a recommendation, even though it requires a legislative change, it seems to me that's directionally correct.

MR. RILL: Nothing to stop us from making legislative recommendations.

DR. STERN: Plus marrying that with some of these regulatory guideposts a la the Canadian experience which also will insert a little more certainty, but it's not a certainty, it’s a little more predictability.

MR. DUNLOP: Right.

MR. DONILON: By the way, we heard testimony from the Federal Trade Commission that the average second request investigation was resolved in about four months. So we could point towards the average now.

MR. RILL: Somewhat less than 50 percent required substantial compliance, substantially less?

MR. DONILON: Right. And on the other hand, testimony that was a surprise to me was, and indicates I think a seriousness of purpose at the FTC in terms of picking transactions for second requests is that approximately 60 percent of the second requests over the last five years did result in enforcement action. So they were focusing on transactions where there really were issues.

MR. RILL: I think we're going to get a paper from DOJ on this, too. My understanding is something like 30 percent is the number for DOJ, that I've heard that. There's a reason for a hearsay rule.

DR. STERN: Maybe you should get some competition between the agencies for a higher number.

MR. RILL: Or lower.

MS. FOX: But we have to know how many were aborted as a result.

MR. RILL: I think that's included within the enforcement number that the FTC gives, ones that have been abandoned, modified, fixed, consents, challenged in litigation. That's all within that 60 percent number. At least that's my understanding from Bill Baer.

MR. DONILON: I guess then the consensus seems to be that we have a pretty good consensus on best practices to be advocated but it also seems to be a consensus to take a hard look at hard deadlines on the second phase; is that fair?

The next in a basket of procedural issues is what do the agencies ask

for in the review and how useful is it. In the United States, obviously, the DOJ and the FTC conduct merger reviews in two steps with an initial filing and information provided under the Hart-Scott-Rodino form, and then the second request which can include information that the agency needs to look at the transaction further.

It's my understanding that the Federal Trade Commission is looking at revisions on the Hart-Scott-Rodino form to make it more useful in review.

Merit, is that true?

MS. JANOW: Yes. They have been in an ongoing process -- I think it's our understanding that that continues at this time.

MR. DONILON: Because there is -- in my experience, you know, some unnecessary information that's asked and a lot of useful information. It's very SIC code based, which in every case is not a very accurate description of what's going on.

A proposal that has been talked about in front of the Committee -- I think we probably, by the way, on that should try to get in concert with the FTC revision effort. They obviously have a lot of experience on this, and if they're moving in a particular direction, perhaps we can help push that along in our report.

A proposal that's been put in front of the Committee with respect to filing, though, is a proposal which would have kind of a short form-long form approach to this. That is, if parties can come in and demonstrate that any overlap between the parties is less than 20 percent, I think we've been talking about Merit,

then there would be much less of an information request, I guess would be the idea.

If, in fact, the combined share is above 20 percent, the HSR form would require up front a set of information that could illuminate the competitive issues.

Do you want to talk about that any further, Merit?

MS. JANOW: I would like to invite Cynthia to elaborate, but I think the basic notion here was simply that there may not be adequate information to make these determinations from the initial filing requirement, so can one in essence ensure that there is adequate information to get those deals off the table that deserve to be off as quickly as possible. That's the objective. And one -- and this is particularly true with respect to foreign jurisdictions, and again that is part of the focus here, that can require information with respect to areas where there is no overlap, so I think both aspects of that are what we have been speaking to, but let me ask Cynthia if she wishes to elaborate with respect to the 20 percent or other?

MS. LEWIS: What we've tried to do with this proposal is reduce initial filing burdens, particularly for transactions that raise no competition issues. For example, the proposal would eliminate from the initial notification forms extensive information requests concerning non-overlapping products, such as market information relating to the acquiring party's individual market shares above 25 percent. We've also tried to devise a mechanism to get information up front in the initial review period so that -- at least in the U.S. -- the agencies can

quickly resolve the competition issues or better focus requests for additional information. The agencies would not have to go on a fishing expedition at that point because they would have a lot of the key competitive information up front to enable them to craft a more narrowly focused request.

MR. DONILON: I think that's something worth exploring with the agencies to get their reaction. You know, in a transaction where you know that there are competitive issues, typically the merger team representing the parties will go almost immediately upon filing to the agency and say, we know you're going to have some questions, we would like to get this done in the 30 day period, the Hart-Scott-Rodino form doesn't give you what you need here, we know that.

We want to voluntarily start to work with you right now in order to demonstrate that there is not an issue, and the agencies typically work in concert with the parties to try to accomplish that in the first 30 day period, that being to make a determination that there is not a serious competitive issue. What the staff proposal, I take it, would do would be to try to formalize that, that the agencies and the parties wouldn't be relying on kind of this dance that happens between merger counsel and the agencies where merger counsel spends a lot of money sitting in a conference room discussing the issue of should we call the lawyer working on this or not? If we call him or her, are we going to tip them off that we think there is a problem with the transaction?

I think in most cases, experienced merger counsel will call and identify themselves as representing the parties. But, in some cases, I don't think that happens, and you get a delay, and you may get a second request because you

have just let it go too long.

You haven't engaged the agency, the agency hasn't engaged with you in order to try to identify things. I would be interested in the agency reaction though to that kind of formalization of what happens really in practice.

Now, one reaction might be that maybe 20 percent is too low, that in fact the agencies might not be seeking lots of information, but I think we should really explore that.

DR. STERN: Do you want to do that now? Do you want to get comments?

MS. JANOW: I think maybe we were generating a few questions here. Perhaps move on if you don't mind.

DR. STERN: Good.

MR. DONILON: The last issue with respect to, what kind of information we have asked for is translation expense which can be quite expensive. There are proposals that we've discussed about asking the agencies to take on foreign language experts to review foreign language documents and then those experts could ask the parties for whatever -- to translate specific documents as opposed to translate a mass of documents.

There's also been a discussion about the parties being able to provide summaries to the agencies if requested by the staff within a certain time frame.

It is expensive, in my experience, but I guess I am ambivalent about this proposal. I think that asking the agencies to hire additional skill sets is a

significant request that may not be the top of their priorities.

Secondly, as I think the statement against interest as a practitioner, if I were an enforcer, I would not rely on the lawyers for the parties to provide summaries of documents in a potential enforcement review. Every person has his or her own summary of a document, and lots of times these document reviews depend on a line instead of notes or something like that. I don't know that that's really wise, but the translations issue is obviously an issue, because it is a big expense potentially in an international transaction.

DR. STERN: I have a technical question. How soon will computers be able to make translation a less costly consideration for documents?

MR. THOMAN: We do it now. We do a lot of work in Europe on documentation. We do the EU Patent Office documentation in most languages. But it's not perfect. What the state of the art now is, we have software which will give you three ways of translating something then you need a human to go through it and cross out two of them so what you get is about an 85 percent improvement of speed over full blown translation around that 80 or 85 percent, but you still need a human interface to choose because often there are the same words that mean things in multiple languages.

DR. STERN: Sure.

MR. THOMAN: What you then do is, is if you are with a pretty high confidence, there are pieces that can be done word for word but very often you have to go to three options, but we do that as a business. We do that for a lot of car companies, for example, electronics companies, we have to do foreign

documents in multiple languages and we literally -- we digitize them and print them out just in time to be dropped in the boxes, whatever product, wherever they're going, whatever country.

DR. STERN: Is this a Xerox service?

MR. THOMAN: This is a Xerox service.

DR. STERN: Do you have a lot of competitors? I shouldn't have asked that here.

MR. RILL: Strike the question.

DR. STERN: You don't have to answer that.

MR. RILL: The answer is yes.

DR. STERN: I'm sorry. I guess I wanted to know how prevalent this technology was, if technically we're going to get quicker or sooner fix than we realize.

MR. THOMAN: It will be a little while because it's complicated literally a word for word with pretty much certainty. So you'll always need a human interface. The key is to limit the human interface. IBM spent a lot of time on this also and had trouble, the same trouble. Both of those two have spent huge amounts of time and effort.

DR. STERN: Uh-huh.

MR. YOFFIE: I think realistically we're talking three to five years before you can expect something of the level which a lawyer would be comfortable with.

MR. THOMAN: Right. It may be longer because they have been

saying that about voice now for -- three to five years ago -- they have made a lot of progress, but it was still -- it was going to be now, but it's not now yet.

MR. YOFFIE: Translation is easier than voice.

MS. JANOW: I don't know, but two years ago, I reviewed a Japanese computer translation of Hamlet. Japanese to English, To Be or Not To Be was to have or perhaps I have not, so I feel three years might be ambitious.

DR. STERN: I don't expect poetry. There is a difference between translating with all due respect, to legal briefs, I don't -- I have never seen one that I would call poetry. So, I mean, there may be a level of acceptability. The point is there may be some -- technology may help us and we should anticipate that in our recommendations.

MR. DONILON: The next set of issues falls in the basket of transparency, and again transparency is a principle which I think could be something very fruitfully advocated by the Committee, that is trying to get as much publication of requirements, as much clarity for practitioners and businesses around the world to use.

We can talk about what the best venue is for doing that, but I think it's obviously, from a practitioner's point of view, from a business person's point of view, that would be quite a useful thing to promote.

We have also talked about basic principles that can be advocated by various fora in the United States in merger review. Again we have talked about those.

With respect to the United States itself, we have had discussions

about how the U.S. agencies might be more transparent, in their deliberations. I, as a practitioner, find a lot of transparency. I find there is agreement with other folks on the Committee, I think, that there is a lot of information about how the United States enforces merger law. We have guidelines, we have speeches by practitioners, we have a very useful interaction between the ABA Antitrust Section and the agencies where these things are fully, pretty fully ventilated, but in order to be a semi-fair presenter, some of the ideas that have been talked about really fall into two areas.

One, the question presented is, should an agency before it presents a second request make a short statement of its issues. A short statement, theory of its case, what's bothering it in specific, what markets are bothering the agency and why the 30-day termination period hasn't just been allowed to lapse and why the transaction can't just close. That's one question.

Second, Paula, you've asked about this on a number of occasions, should the DOJ and FTC be required to publish the reasoning for their decisions where they don't go forward. They obviously do when they do go forward, they go to court and publish it extensively.

Again, I think that the agencies in the United States do a lot. The FTC, for example, I think has very useful material to aid public comment on settlements that it might propose. There are annual reports and other things, but these are the two issues that have been raised most directly, should before a second request is issued an agency be required to make a short statement of the case and to tell you formally what's on their mind and secondly, should in some

cases, and if so what cases, should the agencies be required to issue an opinion of some sort.

MR. RILL: It seems to me that it would be wrong probably to require the agencies to do this in every case investigated, but I think the agencies could probably do, maybe at just the margins, a somewhat better job of articulating in cases that are doctrinal or paradigm cases in their own judgment, reasons why a particular merger was permitted.

Connie is here so I'll flatter her. The articulation regarding the L'Oreal case in some of your speeches was quite good, and I tried to do some of that, I would only advocate more of it. I think even where there are consents reached, the Commission now could further improve its statement in aid of public comment in the consents than it does now. Justice is under a little bit more of a burden because they have to get court approval under the Tunney Act for its consents, but the Commission doesn't have that burden. It's very modest in attempts to put it to the agency to make this request, focus on the agency, but it's less burdensome and perhaps more useful than requiring that every case investigated, all 80 some odd Justice Department second requests, 60 some odd FTC second requests where there's no enforcement action, to have a meaningful statement, that would make a good contribution.

On the second request statement, I think internally staff should have that obligation to the operations office and the bureau directors, and the agencies indicate that they do have that now.

I think we ought to think hard about -- I don't know how to come out

on this, but I think we ought to think hard about what benefit really would be achieved by requiring some public statement at that time of the second request being issued, both from the standpoint of the parties and the possible impact on financial markets or elsewhere on the deal by having the agencies come out and say, we're concerned that in this particular market there very likely could be a substantial lessening of competition. All the arbitrageurs are running around doing what arbitrageurs do. I wonder if that's a real benefit; compare that with just the fact that the issuance of a second request is sometimes disclosed by the parties anyway. I haven't really thought that through. I see a concern that could be raised there.

Secondly, I wonder how articulate real agency definitions of the particular problem would be. It isn't going to help very much to say we're issuing a second request because we think there may be a problem under section 7 of the Clayton Act. I'm not suggesting the agencies would do that, but in past history I have seen that sort of problem of supporting FTC, DOJ subpoenas.

So I don't know. I'm questioning how much good that would really do and whether there is a downside aspect to it.

MR. DONILON: I guess my view is somewhat in line with yours, Jim, is that I fear that these kinds of statements would become highly stylized and there would be a form that would develop within the agency as to what you give the parties when you're about to issue a second request.

Secondly, I would be interested in agency reaction to this, if the agency is preparing to go to court, are they going to want to give you a statement

of their case before they're ready?

MR. RILL: Well, I certainly think that's something that we have all wondered about.

DR. STERN: I think my take on this is very similar to Jim's. That where there are speeches that have been made, if there is a way to encourage that in these important shifts in doctrine, it should be done. On the second request, I think we should probe the questions that you've mentioned. I think they're very good ones, with reference to court considerations that impact agency decisions.

The burden, administratively, may not be so great because within the bureaucracy, there is this communication going on. Sharing that with the parties is different from sharing it with the public. There might be a proviso that only the interested parties, not the stock market, and the arbitrageurs would be signaled as to the thinking.

MR. RILL: It's a real problem. And you're right, it's a real problem, the second request in the U.S. is an abomination. The agencies would agree that in many instances the second requests as issued are enormously costly, time consuming, and often in my own experience and I think the experience of a lot of people who do a lot of merger work, by and large you can find out pretty much what the agency staff are concerned about and what they're looking at.

In the meantime, that good working relationship is done against this backdrop of a huge thunder cloud of a second request which goes well beyond those discussions, and that maybe the reason why Ann Malister, who is here, tells us that in, I don't know, pick a number, 80 percent of her second requests there is

not substantial compliance and that negotiation bears fruit. But there is still the thunder cloud, and the parties have to worry about complying with that in case the negotiation breaks down, and that's something that really cries out for a solution which I don't have right off the top of my head.

MS. JANOW: I was just going to put an international context to this. I think the recurring theme in all of these specifics has been if the U.S. is going to be an advocate for reform in foreign jurisdictions, then you should get our own house in order, and that has therefore stimulated focus on these particulars, including the question of transparency. But frankly, the issue of transparency has been emphasized in our hearings as a problem around the world of great significance, including the underlying rationale behind merger review as being opaque in many jurisdictions, far in excess of any problems that may exist here.

So I just wanted to get back to the context in which this issue and others have been, I think, raised and also the particular point of focus, Tom, that you just emphasized which is issuing statements or -- I think also in the context of the fact that the U.S. officials tend to issue guidelines and have speeches and a variety of expressions so the public can understand, although maybe not fully in the second request context, and that doesn't exist everywhere in the world. And so perhaps more of these underlying rationales for merger review around the world need to be made transparent and greater efforts at being clear as to what policies are and criteria are for review.

DR. STERN: I'm glad you brought that back because this is not a

criticism. Making these recommendations is not necessarily a criticism of the U.S. agencies, but it is a set of recommendations which are stimulated by the desire for transparency so that there won't be abuse. Sunshine is the ultimate disinfectant. We may not have abuse here, but if we are being copied in our rules and regulations by other nations, then if we had the provisions for greater transparency, others who were copying our rules and regulations will pick up those provisions for transparency as well. It may eliminate abuse in other systems.

MS. FOX: Those are very good points. I want to mention one piece of it and then come back to the larger point that Merit made.

The pieces regarding whether the agency considers short statement of issues before a second request is issued, I wondered is there any serious problem of the agencies issuing a second request because they're really not ready at the end of the first time period, and so if there is a serious problem, then requirement of their focussing very specifically on what they're very seriously concerned about might be a very useful requirement.

Now, just coming back to the important points that Merit just made, this is a general transparency point, and general transparency as to countries' standards and what they analyze. This ties in with an issue we'll come back to maybe at the end of the day on whether there should be a freestanding or a competition forum, and this subject matter might apply across all issues of competition law, certainly not just to mergers, but mergers is an important part of it.

We need to know what are, in effect, the guidelines and modes of analysis of every jurisdiction and how they deviate. So I would just be in agreement that guidelines are excellent, speeches are excellent. I also think sometimes it's very important to have particular facts building around us rather than just come down to have agencies around the world talking very specifically about how they apply their law to particular facts, and that could be done around a table at a general freestanding competition forum.

MR. DONILON: That's an ultimate issue. I don't know whether it should be forum discussing it, but I think given -- I heard a very powerful presentation that Bill gave I think it was a year ago at the ABA on this sheer increase in volume of regulation around the world, and given that, I think we would be wise to try to get ahead of this and really find a way to push very hard for transparency and agreed-upon principles and kind of no surprises because the best thing, American companies will be investing in places, buying company places that we can't really -- that are not very prevalent right now I think as we go forward.

MS. FOX: Could I say something about the difference between transparency and agreed-upon principles? They are obviously two different things, and I know, the idea of agreed-upon principles does run through this and I think people in most jurisdictions will say, yes, I would like agreed-upon principles, if it can be my way.

I'm generally in favor not of even, well, harsh or aggressive advocacy to sell our own principles. I'm much more in favor of transparency of

countries' different choices, and so I think it's really fine for us to say this is the way we do it, and this is the standard we have, and we'll tell you why it works very well for us and why we think other systems impose cost, but I myself am not very happy to go further and say that other models are wrong or improper, but they ought to be transparent. I would say that they're wrong and improper only if they're parochial and with spillover effects.

MR. THOMAN: The question is if we could take our procedures and modify them 10 percent and make them totally congruent, there's an issue I think beyond transparency, if you could agree on those areas of which by little effort you could move to a common standard.

MS. FOX: Yes.

MR. THOMAN: I think that's what we're talking about. There were probably a fair number of those.

MS. FOX: I was talking substance at the moment. Yes, on procedure particularly I see there's room to move. As we did in TRIPS. I mean, the United States really moved in TRIPS first to file as opposed to first to invent in order to get the greater good. And we should identify areas where we think there is room for improvement, but we're not about to adopt the EC substantive standard on mergers nor are they prepared to adopt ours, and I think in cases where we suspect that's true, we should have a separate --

MR. RILL: Closer for them than many other jurisdictions are to each other and to us.

MS. FOX: That's right, that's right.

DR. STERN: I was just going to say on these transparency and publishing features or publishing doctrinal changes, that in the globalized economy that making what might be an ad hoc speech at an ad hoc conference on a given date may be picked up by some in the inner circles, but if we're trying to internationally make these doctrines clear, I think we should be encouraging it.

MR. DONILON: There are terrific websites that the DOJ and the FTC have right now.

DR. STERN: Right, we talked about that.

MR. DONILON: But maybe a formalized publication of key speeches which I don't think is done, is it? I think you typically have to collect the speeches on your own. You have to collect it on the websites but maybe a formalized annual compilation of key documents would be a useful example to set.

DR. STERN: And it doesn't have to be like an annual report. It can be a continuing report in which you post it as it is delivered.

MR. KOVACIC: I wanted to add a couple of suggestions about steps to improve the quality of decision making and indeed to establish processes to collect information over time that permits this kind of inquiry to continue in the future.

One technique that's being used in the transition environment as a condition of receiving assistance from groups such as the OECD is for the enforcement agency to submit to audits after the fact -- that is to have external advisors do two things. One is to audit workloads and to audit the flow of work

through the agency. That's the macroscopic perspective. But the second, much more specific step -- and I think more illuminating -- is the host country's agreement to submit to the detailed review of specific enforcement initiatives.

The host country's competition authority agrees to have a group of outside observers come over a period of days and examine in great detail the decision to prosecute or not to prosecute for a specific matter and to examine what information was collected. These types of audits, I think, have been enormously informative to the enforcement officials, but also over time I think an ambition of these is to make available in the public domain at least some form of redacted assessment of what's taking place.

MR. RILL: Bill, is there anything written on this? Any reaction from the emerging economies, any report on this?

MR. KOVACIC: Nothing they have committed to paper, but I know that this has been an enormously informative instructional tool for them, and I would suggest that if we're looking at best practices, that's not a bad idea to use generally.

DR. STERN: How about the U.S. being subjected to such art?

MR. KOVACIC: I would do it in an instant. I would just finish by saying the counterpart to that, a weak variant of it is that in the late 1960s and early 1980s, with encouragement from Congress, the FTC funded after-the-fact assessments of selected enforcement initiatives in the area of vertical restraints and the FTC's Xerox monopolization case.

The Commission retained outside consultants to have access to the

Commission's own internal deliberative records and to prepare assessments, the results of which in each case were published.

Jack Kirkwood, who was the planning director of the FTC's Bureau of Competition, oversaw this effort. I was in Jack's office at the time. You can imagine this caused a great deal of discomfort, especially among the litigation staff who thought this was a good way to saw your own legs off. If you were going to do an assessment, you could do three things: you could learn you did a good job, you could learn that nothing happened, you could learn something bad happened. Two out of three weighed against doing these on a regular basis. But the results were enormously informative. I think they taught us a lot about the appropriate course of doctrine.

This was a form of audit -- an after-the-fact evaluation. While I could go on at length about the methodological problem of doing these, I think it offers a technique for feeding back into the policy-making process an assessment of things such as, are you asking for the right information, what information do you ask for that you actually use, what's your intuition about substantive policy?

These are possibilities, and one of them indeed is perhaps a best practice that emerges from approaches that donors are imposing on transition economies in developing their own systems.

MS. JANOW: Who funded that, Bill?

MR. KOVACIC: The FTC paid for its own evaluations. We got desperately poor assistant professors of economics and imposed pre-13th amendment wages on them and extracted a pre-13th amendment level of effort,

but these have been extraordinarily valuable policy-making tools as a result. As a way of imposing discipline on the decision making progress, collecting the kinds of information we're talking about, and ultimately revealing more about what actually happens inside the decision making process, these were enormously informative tools.

DR. STERN: And how did the interested parties feel, other than the FTC?

MR. KOVACIC: We had long chats.

MR. THOMAN: I didn't know about it. If I had known about it, I would have wanted to read it.

DR. STERN: Now he really does.

MR. THOMAN: There's an internal legend inside Xerox on what it did, now I want to read what the FTC said it did.

MR. KOVACIC: What's interesting is Tim Bresnahan was a junior academic at Stanford, and Tim did the assessment of Xerox. Basically the main requirement was that you could not disclose nonpublic information in the publicly available version, but for the internal version it was a no-holds-barred assessment of what was taking place.

MS. FOX: Bill, could you tell us which countries in transition have submitted to the reviews.

MR. KOVACIC: I know that it's taken place in Poland, Hungary, and I am just mentioning the officials who have described for me the process they've gone through, Ukraine, Russia, Czech Republic. I suspect there are others

as well. OECD has been the principal forum for doing this, and it usually consists of a panel of three or four outsiders who come in for three to five days and meet in a setting such as this. The enforcement agency says we're going to take you through start to finish what we did and why we did it, and the aim is to have a no-holds-barred assessment and evaluation internally of the decision to prosecute and what could be done better.

MR. DONILON: There are some remaining process issues. My recommendation would be that the Committee members look at them in the paper that's going to be circulated on this, I think this probably would be the most efficient way to do it because I think that the issue that Bill is going to talk about today, agency overlap, is potentially one of the most important, agency overlap and review of mergers is one of the most important that we can discuss. So I guess I will stop my initial remarks at this point.

DR. STERN: Tom, that was really very helpful.

MR. RILL: Great job.

DR. STERN: Great job, you're right, Jim. Why don't we take a break at this moment, get some lunch, and continue on with our working lunch.

MS. JANOW: I think we might lose some people. I think our next task is a drafting task, so we will have everything that we'll try to put this in a prose that's understandable, not just in truncated outline form, and circulate it to everyone.

DR. STERN: Okay, thank you very much. So far so good.

(Recess.)

DR. STERN: We would like to open up the individual conversations to a unified conversation and start our working part of the working lunch, and I'm choosing my words very selectively and slowly, recognizing that we are going to have this conversation directed by Professor Kovacic, so we are now ready, if you are, Bill.

MR. KOVACIC: I hadn't had a chance to ask Tom before whether he had any specific suggestions about how best to go over some of the possibilities.

DR. STERN: Well, Tom, a question has been put to you in your absence.

MR. KOVACIC: I was just going to ask Tom if he had wanted to make some general observations about the multi-agency review issues.

MR. DONILON: Not really, Bill. Just to say that it obviously is a very big issue and I think one that is quite important to international transactions, and it will become increasingly important to those transactions in industries that are consolidating around the world. This is a very large and important issue I think for this Committee to try to get its arms around.

MS. JANOW: Could I add a quick note? I think we have also invited Professor Kovacic to give us an unvarnished a view as possible of where this is a problem and where it's not a problem, and to the extent that one can point to sectors or reviewing agencies that have an international feature of where these problems are surfacing, that would be particularly welcome as one of the suggestions we made.

MR. KOVACIC: Right. I thought what I would do is perhaps with both of your suggestions in mind to start by speaking generally about where the problem does arise, thinking about Federal, state, and local participation in the process, then to talk about some of the specific difficulties that arise in particular categories of transactions and then to finish by thinking a bit about models for simplification.

It's become apparent I think when you look at the U.S. landscape that there are a number of different instrumentalities involved not only at the Federal level but at the state and local level. The principal concerns substantively arise in the what might be called the transitional industries, industries that formerly had been subject to comprehensive oversight with respect to rates, entry, terms of service and are now emerging into a less regulated environment, with telecom and energy being the most important candidates. These are the areas where I think the greatest difficulties have emerged.

In both of those areas, and telecom is probably the best example, it's now clear that there's active participation for any single transaction by a host of authorities, not simply at the Federal level, but at various political subdivisions as well.

For the typical telecom transaction, there is oversight traditionally by the antitrust overseer, in this case the Department of Justice, the Federal Communications Commission, the state attorneys general, the state public service commissions of every jurisdiction in which the firms do business, and I think last of all, and perhaps most startling in the case of the recent cable transaction

involving AT&T and TCI, the city of Portland exercising its authority and its oversight over cable franchises has decided to impose a requirement that AT&T provide certain kinds of broadband, high speed Internet access as a condition of getting local approval for their transaction.

In a way, I think, the most obvious general national competition and international competition policy concerns arise at the Federal level, but I think it is probably simplifying the problem too much to think that the state oversight, especially by the major state public service commissions, and here I'm thinking about New York, Illinois, California, just to pick a few, doesn't affect the ability, the incentive and interest of international players in the telecom market to undertake specific transactions.

And while I hadn't thought until two weeks ago about the local dimension, where you do have cable system operators, and to the extent that the cable system operators are seen as an alternative to the traditional regional Bell operating companies because they provide another wire to many of the ultimate users, the local oversight could have an effect as well. Chairman Kennard of the FCC has expressed his dismay at the District Court decision in the city of Portland case as well, but I suspect the city of Portland and other jurisdictions will fight every bit as aggressively as they did to get this result to preserve it over time.

I think the reason that this does become a problem, even with the state and local overlay, is that for the same reason that these networks are important because of their network effects, decisions by political subdivisions such as state or local governments, to the extent that they limit the ability of the

network to be developed, to develop consistent standards, consistent product offerings, to the extent that you impose conditions on different pieces of the network, it limits the ability of the parties to achieve the network-like benefits that would come from these transactions.

I suppose one way to think about the Portland intervention is to say if the citizens of Portland want to impose controls on themselves that are ill-conceived, there's a self-correcting political mechanism in place there that keeps that in check. Yet to the extent that part of the logic of the AT&T and TCI deal is to create a broad based national or regional alternative to the traditional local phone service providers, letting the City of Portland make this kind of policy judgment has broader regional and national, perhaps, even international implications as well.

So I think while I'm inclined to think that thinking about the problems at the Federal level is perhaps the place to start, I'm hesitant to say that the state and local effects are not significant, particularly in light of the fact that these political subdivisions do have the ability to impose restrictions that affect the desirability of proceeding as a whole.

I want to identify a basic policy decision that's implicit, I think, in looking at the process for merger review. Why have differences in approach emerged? It's because the substantive standards that are being applied and the substantive mandates differ from jurisdiction to jurisdiction.

If we were to draw a Venn diagram, the antitrust role would be a distinct circle inside a much larger set of concerns that the sectoral regulators such

as the Federal Communications Commission or, indeed, the state public service commissions bring to bear on these issues. A question that arises as a matter of substance is what should be the appropriate tools for making policy involving mergers in the telecom, energy or other regulated sectors.

It's clear that there's a strong preference embedded in the organic legislation of these sectoral bodies that competition policy concerns as we would define them are not all that counts, that there is an array of other considerations that ought to be part of the analysis. One question is whether, as part of their review of a variety of other factors, they should revisit issues decided by the competition policy agencies or should they be able to conduct in the first instance a new and fully independent assessment.

Let's say it's the latter circumstance that truly takes place today. And it is also apparent in carrying out this role that the sectoral regulators have more powerful tools to obtain adjustments to the transactions. What's the source of that greater power? Well, a broader charter, to be sure. That is a charter that's beyond the standards encompassed in the Clayton Act and its jurisprudence.

Second is related to process, and this I think lends itself to a very specific possible adjustment. There are no time limits on the decision making by sectoral bodies such as the FCC or FERC or the state public service commissions. This is a focal point of legislative debate at this moment.

There are proposals by Congress to cap the process, really drawing on the same intuition that the Committee discussed earlier in talking about Tom's presentation about time limits and caps on the merger review process.

Why is the absence of time limits very important? For transactions of this kind, and I think Rick referred to this before, the question that the merging parties have to ask is how long do they want their money and their transaction to be on hold before it's completed?

In the case of FCC or state public service commission review, the answer, if you ask how long can this go, the answer is there's no outer bound on the process. That gives the decision-makers tremendous leverage. It means in particular that competition policy or other concepts that might not survive review in the courts, if you had to get them there, gain more efficacy because the agency has the opportunity to say we will simply wait you out. That is, we will wait until you accede to some of our requests for concessions.

There's a political safety valve. You can go to the Hill, you can apply pressure which certainly these bodies do as well, but when a proceeding is pending, there's no particularly effective way to move things along. The ability simply to wait makes theories that might be difficult for the Department of Justice to succeed with in a PI action in the U.S. District Court in the District of Columbia much more important and requires the parties to take them more seriously.

So one specific adjustment that in a sense might harmonize this process and tend to unify the competition policy standards that are being used is to cap the amount of time that the sectoral regulators have to do their job.

Let me give you a specific example. It's apparent that the sectoral regulators are more fond of potential competition theories and more sanguine

about the capacity of potential competition theories to provide a foundation for evaluating transactions than the antitrust agencies are. Potential competition has an uncertain future in the courts, and it's had an uncertain past. But it's apparent that a foundation for FCC analysis is to rely heavily on it.

Well, you ask yourself, how well would you do if you had to take on a transaction and impose a broad array of restrictions based on a potential competition theory.

My judgment is that might have a very difficult ride through the D.C. Circuit, and ultimately through the Supreme Court, depending upon how broad a set of demands were imposed. But that judgment day is never going to happen in this process because I think it is highly unlikely that a telecom service provider would take the year-long, at least, trip through the FCC, then an additional year perhaps through the D.C. Circuit to finally get judgment day.

In effect where mergers are concerned, the merging parties know that the sectoral regulators hold the high cards, and the high cards in many ways consist of simply having the ability to wait out the other party.

So one implication of this might be to cap the amount of time that the sectoral overseers have.

Another issue, another problem that I think arises in the process is one of transparency, and it involves, in part, the relationship between the competition policy agenda, the traditional antitrust agenda, and the other features of the jurisdiction of the overseeing agencies.

I suspect many of you have watched the hearings and deliberations

in front of the FCC and FERC. The tone of those proceedings is very striking. I sat in a generic session, I was one of six people on a panel. And each one, as they went around the table talking about the competition policy issues of three major telecom deals that were before the Commission, said “this is what I want the parties to do for my constituency and my group.”

I felt that by the end of it it was incumbent upon me to start my comments by saying, “I want high speed broadband Internet access as a condition of the deal going ahead.” If I didn't ask for something I would have let down the team and didn't belong on the panel.

I think what is apparent in the process is that the FCC, as part of its public interest mandate, believes that it is appropriate in reviewing mergers to use the merger review process to impose these kinds of conditions.

Now, there has yet to be, by way of transparency, I think, a clear definition from the sectoral regulators about the standard that they impose. Is the standard one of, if the transaction is likely to be anticompetitive, it's forbidden or do the parties have an affirmative obligation to show what will help?

You can discern in the statements of some of the sectoral regulators both points of view. But it's apparent that there is much greater ability to use the merger review process to accomplish the noncompetition policy agenda in place and fulfill those aims, then there would be if the agency, for example, were told to conduct a rulemaking.

If you want to impose requirements on service providers under your jurisdiction, do a rulemaking and make them do the following things. That would

be much harder to accomplish.

I think the reason that they like the merger jurisdiction so much is that it is an excellent vehicle to accomplish this because rather than being in the position of imposing something on an unwilling party who doesn't have to acquiesce, you're in the position of confronting a very impatient party who desperately wants to get through your gate and is much more likely to accommodate your request.

I suppose a minimalist possibility that might come forth, and we mentioned earlier the possibility of guidelines, would be that where sectoral regulators want to exercise their authority and have a competition policy component as one of several different variables, it might not be asking too much to say, you have to make clear in guidelines precisely how you're going to conduct that analysis, and perhaps to suggest what weight is to be given to different factors and how you plan to trade them off.

Those things I would suggest basically do not appear in the formal proceedings or even the speeches of the decision-makers in question.

DR. STERN: May I interrupt you and ask. You started by saying you were focusing on energy and the telecom. In other words, on the Federal Communications Commission and on the Federal Energy Regulatory Commission. You're now making some general recommendations for standards.

Are there other agencies that we ought to be thinking of as you go through this besides the FERC and the FCC?

MR. KOVACIC: I think my generic suggestion would be that

wherever an institution is operating under a public interest standard, that lends itself to consideration under a host of different variables, that the decision making process, that the general standards ought to be spelled out perhaps in guidelines, perhaps by other means, but that that decision making calculus has to be made transparent.

DR. STERN: Well what are the other agencies then?

MR. KOVACIC: The other bodies that have a similar mix of concerns, I would include the Surface Transportation Board, if we have another suggestion about them, but if the status quo prevails, that would certainly be such a body.

I would like to see the same thing from the Department of Transportation to the extent that in deciding whether international route authority and carrying out those negotiations in deciding when routes can be transferred, to have more precise and transparent their decision making calculus --

MR. RILL: The FMC?

DR. STERN: Maritime?

MR. KOVACIC: Absolutely. I think the banking regulators, by way of a best practice model, the banking regulators, I think, have done a comparatively good job of making more transparent their decision making criteria, and the approach they use to resolve possible tensions that arise.

MR. RILL: There you have a reverse trump card, you understand. That is if Justice challenges a bank merger, it gets an automatic stay, so the trump card tends to run in favor of Justice, capital J.

MR. KOVACIC: Yes. That leads to one suggestion I have in looking at one approach for achieving a unified set of competition principles across different sectors. I would in each instance allow the Department of Justice or the Federal Trade Commission to establish the minimum floor for competition policy standards. That is, in the case of the Surface Transportation Board, I would allow the Department of Justice to veto specific merger decisions that it felt didn't satisfy those requirements.

Likewise, I would give them a comparable role in dealing with the Department of Transportation. To the extent that, as a general starting point, wherever a sectoral regulator shares authority or in this -- at present, in fact, has complete authority as the Surface Transportation Board does, I think it would be highly valuable to have the antitrust overseers at least exercising the ability to insist on concessions that satisfy the competition policy interests of the Clayton Act.

Perhaps I could turn to the more difficult issue that we raised in an earlier session, which is what is the appropriate allocation of authority under the existing mechanism. That is, you can imagine several possible models which would distribute decision making authority in different ways. You could have a sectoral regulator that in parallel with the antitrust agency decides competition policy issues de novo and is in no way bound by what the competition authority ultimately decides to do, especially if the antitrust agency decides not to prosecute.

Bell Atlantic/NYNEX is maybe a model of how that could play out.

Although the Department of Justice chose not to prosecute, the FCC did impose significant conditions, as did some state governments. That's the status quo model with parallel proceedings. It becomes most important where the competition agency decides not to prosecute.

Another model is to divest the sectoral regulator completely of a competition policy-making function. That is to say, you can't revisit these issues. These are reserved entirely to the Department of Justice. If you want to carry out a review of the transaction, you have to do so on other grounds.

Doug Melamed, at our last session, raised the question, does packing the competition policy mission together with the other variables temper reliance on the other variables? If you have a competition policy culture or criterion embedded in the decisions of the sectoral regulator, does it tend to cause the sectoral regulator not to use the other variables in too expansive or unprincipled a way.

And I think you could look at historical experience that suggests that's happened, and I think perhaps the relationship between consumer protection and competition authority at the FTC provides an example. The competition policy mandate and experience have probably influenced the consumer protection mission in ways that are probably desirable.

I want to suggest another possibility. That is, if you make the noncompetition policy variables much more explicit and put the spotlight on them, it's harder to use them in the way they're used now. My hypothesis now is that under the rubric of talking about competition policy, everything else comes

in, and it's not explicitly highlighted and treated separately.

A suggestion I might make is that if you want to treat those variables, you certainly can, but perhaps you do that in a rulemaking. I know the political science answer would be a rulemaking would be much harder to accomplish than doing it in the context of the merger, but that doesn't necessarily dictate that you would not use the rulemaking instead as a matter of good policy.

Let me mention two other models quickly. One model that has some antecedents in other countries is that the competition policy authority always gets a place at the table, at the sectoral regulator, and gets to veto decisions that don't satisfy competition policy standards. The competition policy authority doesn't make an independent decision, but it's able to cast aside decisions that from an antitrust perspective are not robust enough.

And the other alternative, sort of the last box that one could draw is you fold all of the traditional regulatory functions into the competition agency. There's one country that's doing this in an expansive way now, and that's Australia.

The Australian Competition and Consumer Protection Commission has a single institution, and if you look at the organization chart, the traditional regulatory functions appear as a subdivision of the competition authority. If you ask the Australians, and my main source of knowledge about experience comes from listening to Allan Asher and his colleagues on the Commission, they will say the experience has been wonderful, but then of course, what else could they say, especially since Allan helped to design this mechanism?

But I think the one issue that they identify as being a real issue for concern is that if you put these functions together, whose culture is ultimately going to guide the decision making and behavior of the institution? Does the regulatory capacity of the unified body become subordinate in its attitudes and its preferences to the competition policy ethic or, to use a pejorative antitrust characterization, does the regulatory approach of the regulators "infect" the entire agency so that instead of having the pro competition approach, you have an incumbent-oriented, help-out-the-existing- service-provider attitude that spills over into other areas of decision making?

DR. STERN: What's happened in Australia?

MR. KOVACIC: I think because of the existing attitudes of the Commission, of the existing commissioners, when you look at their decisions day in and day out, they've been robustly pro-entry, pro-competition, maybe even to the extent of slighting some of the traditional reasoned objections that natural monopoly regulators might have to doing things too fast.

DR. STERN: And the sectors that are on there are transportation, energy, and communications?

MR. KOVACIC: Transportation, energy, communications. I don't know if they pick up other sectors such as water, but the most important of the sectors that we would usually put in the traditional regulated camp are under their jurisdiction.

MS. JANOW: Agriculture?

MR. KOVACIC: Agriculture is the universal third rail, and nobody

touches it except at their peril.

But I think -- maybe to rank solutions again, to finish by summarizing solutions, and then to address questions and comments, I think you can array them from one pole that involves relatively, extremely modest forms of adjustment, that I think would be valuable, to those that involve more robust institutional change.

The more modest solutions I think involve coaxing more transparency out of the process and relying on what we referred to in the earlier paper as basically the domestic equivalent of soft convergence processes in the international world. What do those consist of? More transparency by way of issuing guidelines: that the FCC, for example, the Surface Transportation Board, the Department of Transportation should do what the Federal Energy Regulatory Commission has been doing, which is to articulate their decision-making process in guidelines and to spend much more time in individual decisions explaining precisely what it's doing and why, and most important, how it's making trade-offs between noncompetition and competition-oriented variables.

As part of that soft convergence process, you could rely on the continuing kinds of connection discussion that have taken place internationally. Why does the European Union's competition system look so much more like ours than it did 25 years ago? Not because we're adopting their practices, but because they've been moving in many respects toward ours. The best example is that their market definition guidelines looks strikingly similar to the U.S. merger guidelines model. That didn't happen because of a binding treaty or requirement. That

happened simply through a process of continuing interaction and discussion.

I would predict that over time that that would provide a unifying influence here as well. That is, even if one didn't touch the system at all, that will continue to happen over time. Maybe to push it by requiring at least the guidelines be issued and decision-making processes be made more explicit would be a way to give a further push in that direction.

The more robust possibilities -- and I for my own part, I'm persuaded that these are attractive, but there's no inexorable principle that would dictate that this be so -- I would think where competition policy concerns are at issue, I would reserve that decision to the antitrust regulator, to the antitrust overseers, and have the sectoral regulators take a subordinate position.

What would this mean day in and day out? It means divesting the FCC, FERC, the Surface Transportation Board, the Department of Transportation of their ability to review mergers on the basis of competition policy concerns. So that jurisdiction would be removed from their oversight if the Department of Justice makes that choice. I would be quite confident of the Federal Trade Commission in the deals it handles to do the same.

Answering that really forces, though, and perhaps it's beyond the mandate of the Committee, but implicit in that preference is a decision that relying on more expansive competition policy notions that would not survive the test of a preliminary injunction action in front of the district courts is not appropriate. That is, what I'm basically saying in making this suggestion is that I would prefer not to have the FCC to have the ability in general terms to say, "We know the

Department of Justice would not litigate on this theory, but we would, and, oh by the way, we know we'll never have to, because we'll never find ourselves in a courtroom having to defend that position."

Implicit in what I'm saying is that there should be a single competition policy standard administered by the antitrust agencies.

There is an intermediate position, if we're not going to change the existing allocation of authority, is to remove the biases that are embedded in the system by reason of procedural features of the system. Most important, to put a limit on the deliberations of the sectoral regulators. That is to say, you simply can't use the possibility of continued deliberation as a way to extract further concessions, and that if you cap the amount of time that the sectoral regulator has, that brings closer the possibility that you would have effective judicial review. And by effective, I mean judicial review that gives the merging parties a chance to pose the same kind of challenge that they might be able to pose if it were a preliminary injunction action.

To make one single procedural change, in short, would be to limit the period of their review, because the ability to simply go on without a well-defined terminus to the analysis converse a tremendous amount of leverage on the sectoral overseer.

DR. STERN: Have you completed your presentation?

MR. KOVACIC: Yes.

DR. STERN: Thank you. I was thinking about what would be left of the independent agencies stripped of the competition policy responsibilities or

review opportunities. That's not, I guess -- should not be a concern of this Committee, but I still was trying to think if that would leave those agencies more or less captors of the sectors that they would be overseeing.

MR. MELAMED: Can I say something? It would enable me to make another minor comment that I want to make about this point, which I thought was very wise.

I think when we use the term -- when it's been used in the last 15 minutes, competition policy or competition objectives -- it potentially encompasses two different notions, and we ought to surface the distinction. When the antitrust agencies enforce antitrust laws, they ask the question, is the merger anticompetitive? Does it injure competition and make something worse?

I think when the regulators answer that question, at least as a practical matter, they're asking a different question, which is, does this provide an opportunity for us, the agency, to do something that we think will promote competition? For example, require a phone company to open up its market, even though the merger doesn't create a problem of that particular type.

It seems to me that this distinction explains much of the differences between what the regulatory agencies have done and what the antitrust agencies can be expected to do. It also could contain a germ of an answer to your question which is, yes, the sectoral regulators can continue to try to promote regulation by, as Bill said earlier, promulgating rules of general application and addressing institutional issues that are quite different from identifying transactions which make things worse.

DR. STERN: Right. But would they be less empowered? Yes, it was stated by Bill.

MR. MELAMED: They would be less empowered in the context of merger review. They might be liberated actually to refocus their energies.

MR. KOVACIC: I think on the question of capture, in some sense are they -- how does this affect their vulnerability to being captured? And in the traditional political science concern and certainly the traditional antitrust critique of traditional sectoral regulation is the problem of capture.

DR. STERN: Right.

MR. KOVACIC: And capture in particular by incumbents who become absolutely deaf to requests by prospective entrants or others to change conditions of entry and service.

DR. STERN: Yes.

MR. KOVACIC: One response that I see a lot in the newer literature about the transformation of some of these agencies is that capture is harder to do because the number of industry participants in these sectors is so much more diverse with so many more conflicting interests than one has before. That is, the traditional strength of antitrust oversight has been is that it has been hard to capture the antitrust agencies because there are so many people coming to your door step, and who's going to capture you? In the Telecom area, maybe that's become more difficult because of who's coming to your door step now. Well, you have got the regional Bell operating companies, you have the local exchange competitors, you have the Internet folks, you've got the -- a whole host of

competitors. And in the energy sector you have the power exchange companies, you have the energy service providers, you have the generators, you have the distributors. It's simply a much more fractured and contentious universe of industry participants which I think has made it harder for any one group to capture the institution as a whole.

DR. STERN: Reflecting deregulation by those agencies themselves. It is because you've had deregulation. For example, in the communications area, you get more actors, and so the original sector and the original participants in the sector who were part of the designers of the law that set up the agency have, by virtue of the deregulating activity of that agency, created this proliferation of competitors. It suggests that there should never be another sector-specific agency set up.

MR. KOVACIC: I think at a minimum it would suggest that there be structural limits on the perpetuation of the status quo.

DR. STERN: Yes.

MR. KOVACIC: And that is-- one structural limit is that you sunset existing regulatory mechanisms or that you force the reevaluation of traditional assumptions about whether entry is feasible or not feasible. I mean, in many ways for the sectors in question, they've deregulated out of necessity rather than necessarily out of choice, although the FCC made certain choices in the 1960s with long distance that had a formative influence, and were the result of managerial choices by the commissions themselves.

DR. STERN: Likewise with the FERC.

MR. KOVACIC: Yes. That is, the fact that you can build small, highly efficient generation units now that you -- that the model of a highly centralized generation tier technically no longer has the same foundation that it did before.

I would be nervous about having a sectoral body that was not governed by structural limits that tend to extend the status quo and did not have a robust role for the competition policy authority to override basic judgments that the sectoral regulator makes about some of these issues.

MR. RILL: I wonder, Bill, to turn the table over, how -- assuming a legislative mandate that gave responsibility to the competition agencies who were making the competition decisions in a merger context -- how much thought has been given to the extent to which regulatory agencies might evade that by making competition decisions, imposing regulatory requirements based on those competition decisions which they're not supposed to be making, and putting it under the rubric of universal service or some similar non-competition-related social policy under which the regulatory agency operates.

Having wondered that, I don't know that we have to answer all the questions within this framework, but it is a matter of some concern, to me at least.

MR. KOVACIC: To sharpen the point even more, what prevents the sectoral regulator from saying I don't have competition policy authority, but I have consumer protection authority?

DR. STERN: Right.

MR. KOVACIC: And what is the best protection of consumers?

Well, it's rivalry. That's what I'm seeking now. So I'm going to do something differently.

I suppose one antidote to that is to attempt to unify the decision-making processes. That is, one approach is to put the Department of Justice or the Federal Trade Commission, which does cable transactions, has done energy-related transactions, to put them at the table in the process, and to allow them to impose this competition policy floor.

MR. RILL: I don't know what at the table means, whether it's in a deliberative context, but I suspect some of that goes on informally to the extent that ex parte rules don't block it, and ex parte rules generally don't apply in these types of merger context.

On the other hand, at the table could mean that they can appear before the regulatory agency. I wonder, just a rhetorical question, if Department of Justice representatives would comment on how effective they've been before the Surface Transportation Board in their formal appearances on mergers. I think the answer -- the record speaks for itself. So I don't know what --

MR. KOVACIC: I think that at the table means the ability to veto decisions on competition policy issues that are not --

MR. RILL: Well, that's the same as saying leave the competition issues to the Department of Justice or the FTC. The other possibility which I would, at least I personally think would be very dangerous, probably bad, would be to give either the Department of Justice or the FTC the regulatory powers so they become an Allan Fels/Australia type operation. I think that puts more of a

burden on them, and it tends to undermine the, if you will, the integrity, the sanctity of competition principles. Now, I want you to know that at a recent seminar I have been accused by my colleague, Tim Muris, of having a Ptolemaic view of the universe, with antitrust in the center and everything else circulating around it. I'll defend that position, too.

MR. KOVACIC: I share your opposition to giving the competition policy agencies the other sorts of functions. By other sorts, I mean what I would call the social policy agenda that goes beyond competition policy. I think the dilemma that we face in talking about institutional choice is that there are certain functions that the competition agencies historically have been institutionally ill-situated to perform, but have been forced to address by reason of the kinds of problems that come before them.

Anytime you're going to make a decision about access to a bottleneck facility or an essential facility. Anytime you're going to become involved in resolving vertical issues that have tremendous horizontal dimensions -- which simply describe the most serious problems you have in these sectors -- if you're going to decide to resolve those problems, you inescapably get drawn into the question about defining access terms and overseeing them, and the Department of Justice --

MR. RILL: Having been there and done that, I can empathize with the difficulty.

MR. KOVACIC: The Department of Justice, as a result of its experience mainly with telecom, has been drawn step by step into the process of

doing that as a matter of course. To the extent that if we were to talk to colleagues at the Federal Communications Commission or FERC circa 1985, 1990, they would say these guys are stealing some of our functions. That is, more and more they are doing the sorts of things we used to do.

So how do you solve that? Either you give the antitrust authorities a more robust role in developing the institutional ability to do these kinds of things, which makes them more expressly regulators, but regulators within a narrow bound of looking at access pricing and nondiscrimination conditions. Or, another possibility is that the antitrust regulators make the decisions about basic competition policy frameworks and then they hand off implementation to the traditional sectoral regulators who have more experience at doing these kinds of things.

MR. RILL: Can I switch you just one second, and then I am finished. As I say, we don't have to answer all of the details and the devil may be in the detailed questions about an evasion of a principled competition responsibility in the Division or FTC. I am somewhat, not so much concerned as intensely curious, as to the nexus of this issue as to global competition. Let me, just for example, pick up on your initial comment regarding the City of Portland. Let me, rather, take an example of say, the State of Missouri, to pick one in the middle, which imposes under its enforcement authority particular divestitures in a grocery store merger, speaking hypothetically, that may be beyond, say, what was imposed by the Federal Trade Commission.

This is a multi-enforcement problem. It probably has zero global

nexus. Have you done any work or can you cite us to any work that shows a relationship between the difficulties, time or result-related, arising from the multijurisdictional review problem that relates specifically to global competition?

MR. KOVACIC: I haven't done and I'm not aware of an assessment that's tried to take -- first, to do something that the Committee alluded to earlier today, that is to take, for example, a medium timeline from announcement of the transaction until completion, for transactions generally. Versus, say, telecom or energy, which is where the issues have come up most frequently. Or to do a separate assessment where you have to sort out separately transactions with a major international dimension and those that don't. I don't know of an effort to --

MR. RILL: I don't, either. It would be interesting to find one. There are anecdotes from when the European Commission and Justice Department cleared the MCI/WorldCom merger, and they're both U.S. companies, but the issue was global Internet backbone, U.S. and European global Internet backbone. If anybody knows of any studies that can tie this to international, I would definitely like to see it. But all I know is anecdotes. Big ones, but anecdotes.

MR. THOMAN: Along the same lines, just to follow up. Again, I'm a nonlawyer. This may be a very naive observation. But certainly in Europe you hear the complaint about the lack of clarity about when Justice and when the FTC get involved. And so whether there's an issue about overlay, overlap between those two agencies that needs transparency, at least clarity --

MR. RILL: There is an issue there, Rick, and one that's been

discussed for years.

MR. THOMAN: I've certainly heard that from the European side. I don't know how informed it is.

MR. RILL: And it's a factor, I think, in my own experience it is a factor, that sometimes arises from the U.S. side. I think conditions are a lot better now than perhaps they have been at times in the past, but I think there is generally a pretty good, quick clearance relationship. But the problem is historic. There was a report done by the ABA which I think we ought to make available to anybody who wants to look at it, back in 1988, '89, of the FTC. It culminated in the Kirkpatrick II report. It concluded, that, well, if we had to do it over again, we wouldn't have two federal agencies charged principally with enforcing the same antitrust laws.

When Bill Baxter came on board at the Department of Justice in '81, he and David Stockman decided, wouldn't it be a good idea to abolish the FTC? And all hell broke loose in Congress. And I know, that's going on almost 20 years ago, but still, it was political dynamite, and I think any proposal of that sort here would be political dynamite. I'm not averse to political dynamite, but I think it's been studied so much --

MR. THOMAN: I wasn't necessarily saying -- I am just arguing the issue from a non-U.S. viewpoint. The more we can be clear and transparent, in which case, which goes to which or how soon it takes, the easier it is for to us ask other countries to do the same.

MR. RILL: I think that's a valid point, Rick, and I think just

suggesting that transparency or, as to which agency handles which type of transactions --

MR. THOMAN: Right, right.

MR. RILL: -- would be an improvement. Again, my own experience is it hasn't been a great difficulty in recent years. But there are all kinds of horror stories and, you know, one-time anecdotes of, we got a second request only because the agencies couldn't decide which agency had it until the 29th day. I think that does not occur often; the fact that it may occur at all is bad. But I think your transparency point is well taken.

DR. STERN: Eleanor, I would like to keep on this subject. Is this on this? FTC, DOJ?

MS. FOX: No, not FTC, DOJ. No, go ahead.

DR. STERN: Okay. We didn't hear what you thought.

MR. KOVACIC: Well, I'll do the typical initial academic's dodge, and I'll describe the models. There are two models. I can imagine three possibilities at the Federal level -- status quo, which involves possibilities for competition with some coordination, and I think there is a competition. A competition that exists, not perhaps in a terribly obvious way, but one exists with possibilities for innovation and improvement between the two institutions.

A second possibility is to have enforcement exclusively through an executive branch department with responsibility for international criminal/civil matters, which would be the Department of Justice.

The third option is to take all functions save criminal and

international liaison and put them all in an independent regulatory commission. Most of the world does the third. We are truly unique in doing both. Which makes the most sense?

I guess, if I think about the Federal Trade Commission in theory, I would have picked the Federal Trade Commission option, but my own sense in the 85 years of empirical experience is that --

MR. RILL: That you've had?

(Laughter.)

MR. KOVACIC: Is that that's not been a success. Although I keep wandering back to that image when I think about -- I don't encourage this as everybody's bedtime reading, but the legislative history of the FTC does a good job in the abstract of explaining why you would want the FTC to be your competition policy authority, because it talks about administrative processes and changes that perhaps give you a faster path for resolving urgent matters in areas such as high tech where you might want faster results.

An expert body that would do certain things differently, wouldn't be bound by, limited by the constraints of traditional Federal District Court litigation, with this wonderful synthesis of economic knowledge, legal knowledge, accountant specialists, experts. Everyone has their own judgment about how that experiment has worked, but I'm afraid I have a very gloomy view of it.

MR. RILL: I'm not going to rise to the bait. It would take the rest of the afternoon.

MR. KOVACIC: No, I would say a country legitimately and

sensibly could decide it wanted to diversify the portfolio to do what we have had, which is an experiment. I think the experiment does have some fairly powerful implications, and they would dictate unifying in a single institution, and that would be the Department of Justice. But I admit to schizophrenia on that issue, but if I had to vote, that would be it.

MR. RILL: Good academic response.

DR. STERN: That's a very helpful response. But help me with the international and the criminal. That was the second model. Describe that to me again.

MR. KOVACIC: I'm assuming that no independent regulatory commission in our political science could act on behalf of the head of state, nor could it act as the prosecutor in criminal matter, so there's inevitably going to be a residual policy-making authority in the executive branch.

DR. STERN: Right. In the executive branch.

MR. YOFFIE: And here you mean by international -- what? Because that's obviously critical to this Committee.

MR. KOVACIC: It would be the ability to negotiate treaties, to speak formally on behalf of the Government of the United States when it goes into an international forum, and to engage in cooperative relationships that require the formal approval of the United States.

MR. RILL: May I just follow up one second on this same point. From a standpoint of weighing important frictions, important opportunities for accomplishment, would you say that the greatest problem relates to the dual

enforcement between FTC and Justice or the dual competition responsibilities between either FTC and Justice and the regulatory agencies treading on that same ground?

MR. KOVACIC: I think to a great degree, differences in policy between the two Federal competition agencies have largely been eliminated. I do think there are instances in which the outcome can be determined, depending upon where you go. These occur in some instances at the margin, but those are rare. But I think because of the conscious efforts, really going back 50 years, to make sure that there were not great discontinuities from 6th and Pennsylvania to 10th and Constitution, that those discontinuities were been limited, has been enormously successful. I think the possibilities for inconsistency are much greater when you go to the sectoral areas. But I would say it is the very success between the Federal agencies in eliminating differences in policy that raises the question: Why have two?

MR. RILL: But I think your answer is that the greater problem by far is between the antitrust agencies and the regulatory agencies?

MR. KOVACIC: Unmistakably. I think there is unmistakably a complication -- a real cost of having two Federal antitrust agencies is that you have to identify the preferences and respond to the tastes of two sets of public officials.

MR. RILL: Well, that can be intramural within any given agency as to which section you land in. I think I have your answer.

MR. KOVACIC: Unmistakably. Yes. It is the relationship of the

sectoral overseers that is much more of a concern. And think of it this way: If you had to explain to someone outside the country about the difficulties associated with identifying differences in outcome, depending on whether the deal goes to the Commission or to the Department of Justice, that's a much easier conversation to have than the telecom official who says, "I'm thinking of buying some assets in the U.S. Tell me what I'm in for." That is a much longer conversation.

MR. MELAMED: Can I just interject a thought? I think the substantive differences are the critical ones. There is a transaction costs problem of multiple review where you don't know which agency is going to have it, but I agree with this colloquy that the critical question is a substantive one. The problem of substantive differences of the sectoral regulator is inherent, whenever you have a sectoral regulator charged with merger review unless, of course, you simply say, "Apply the antitrust laws."

The very task of doing merger review is an invitation for the regulator to impose a tax on the transaction to achieve some regulatory objective. I think that is the problem. The problem is, are competition or economic efficiency objectives disserved by having government agencies in a position to impose taxes on otherwise benign transactions?

DR. STERN: Well, fair enough. All right. I was trying to challenge that assertion by thinking that there may be additional remedies available within the sectoral agency to advance competition that are not available in the on-or-off merger -- permit or not.

MR. MELAMED: It may be that it's important, then, that you give

real flesh to the word remedies.

DR. STERN: Yes!

MR. MELAMED: That is to say, you require the sectoral regulator to identify the problem that is created by the merger --

DR. STERN: Right.

MR. MELAMED: -- and to show a rational relationship between the remedy and that problem, rather than a relationship between the regulatory remedy and some other regulatory objective.

DR. STERN: Right. Well, that should be something we should amplify in our recommendations -- that when clarifying the roles and separating the roles, competitive competition-enhancing roles, of DOJ/FTC, on the one hand, and the sectoral agency on the other. It's the remedies and how they are applied and towards what aim they are applied that needs to be transparently described.

MR. DONILON: As Doug is saying it's not just the remedies, it's the law that's being applied as well. That's the problem -- going to Jim's question, your question, which Rick raised first about FTC versus DOJ, at least the FTC and DOJ enforce the same law --

DR. STERN: Yes.

MR. DONILON:-- you know, in large part.

MR. RILL: Well, the FTC has gotten more sensible about Section 5. We hope.

MR. DONILON: But I think the panel is right. The discussion you have with an international client about transactions being reviewed in the United

States is quite simple. You may have detailed instructions about how it might proceed, at the FTC or DOJ, given the different procedural routes and paths that it can go down, but the law is going to be the be the same. The substantive law is going to be the same. And the problem that Bill has identified, I think, a pretty clear one, is that the competition law itself -- not just the remedies, what they might ask from parties, but the law itself -- is different. In pursuit of the same goal that doesn't affect the competition policies.

DR. STERN: Well, to put a point on this: assume that the FTC was applying the same law but it had within its powers as the Congress gave it, as the sectoral regulatory agency, additional powers that would allow it to add remedies or attach remedies to advance the same law that may not be within the realm of DOJ and/or the FTC.

MR. DONILON: Well, then it starts to look more like the sectoral regulator. I mean if the --

DR. STERN: Well, I'm just asking: Do they have remedies?

MR. DONILON: They have remedies -- I think that there are adequate remedies to address competition law problems, but other social engineering issues, policy issues, are not the province of the competition law enforcers.

DR. STERN: Right.

MR. DONILON: And I wouldn't recommend giving them those powers. They ask the question, as Bill puts it, is this transaction going to be injurious to competition and therefore injurious to American consumers.

DR. STERN: Yes. Right.

MR. DONILON: They don't ask the question, here, we have an opportunity here with a transaction before us to do some policy things we want to do and advance some social issues that we want to advance. You know, let's decide what those are, despite the fact that there is absolutely no competition injury that results from the deal.

DR. STERN: Well, I think I understand what you're saying, but what I was trying to just hypothetically ask: What would be the impact if they were looking at exactly the same law, considering just the competition, would they have additional remedies, additional to that which the DOJ and the FTC have?

MR. KOVACIC: I think the way I would put it is, I think the set of possible remedial solutions would be the same for both. That is, the Department of Justice could go to a Federal District Court and say, I want an injunction that would require the parties to do X, Y, and Z, and it would be the same set of solutions that the sectoral regulator would generate.

What's different, I think, is that in principle, the FCC and FERC are institutionally probably better capable to effectuate some of these solutions than the Department of Justice or the Federal Trade Commission acting alone, or in the case of DOJ going to the Federal district judge and saying, "This is how you ought to put it in place."

Many commentators have pointed this out: It's the reason why when you look at early formative cases that generated the essential facilities doctrine,

cases like Terminal Railroad or even later cases like Otter Tail -- in Terminal Railroad, this is the bridge across the Mississippi River with the terminal facilities on either side. It's a collective effort to charge higher prices to those who were not members. The Supreme Court says you have to provide non-discriminatory access. You can't collude to impose a price disadvantage.

And the issue comes up, well, who is going to decide what the right price is? Who's going to monitor the nondiscrimination requirement? The Supreme Court says, "Uhh-- there is the ICC over there. They can handle it." Very quickly they walk off stage. They say there is another institution that can do this.

In Otter Tail, when the Supreme Court faces another issue about access, to an integrated network by an unintegrated party, and says you have to provide access, and the question comes up, "Well, are you saying that the Federal courts now are going to monitor under the terms of an antitrust decree access and terms of access to the network?"? The court says, "Well, it's the Federal Power Commission, they're going to handle it."

In each instance the Court had comfort in imposing a decree with highly regulatory implications by saying there is a collateral Federal institution who does that kind of thing, and without explaining how they're going to do it, they can take care of it.

DR. STERN: Well, you see, that's my point, and that's where I was going. I was guessing, and that's why the Australians have come up with one agency. That's a good reason why.

MR. DONILON: Exactly.

MR. RILL: But I wish we could bring Connie Robinson up to the table and have her explain her experiences in, in effect, of being in charge at the senior staff level enforcement of the AT&T decree, where FCC's responsibility in many respects was transferred to the Department of Justice, which is, I think, inevitable in an essential facility access type of case which is brought by the antitrust agencies. It was not there, by and large, for the FCC to make those compliance decisions based on nondiscriminatory, equal access obligations that were imposed on the telephone industry as a result of the 1984 decree.

DR. STERN: So you invented it.

MR. RILL: So the antitrust agencies -- well, I don't claim credit. But the agencies --

DR. STERN: No, I meant “one invented”. I didn't mean “you”.

MR. RILL: The antitrust agencies had the responsibility to make those decisions, and I suspect in appropriate cases those are the decisions that have to flow from the responsibility of the antitrust agency.

MR. MELAMED: I think -- this is just conjecture -- that this particular problem is not likely to be of huge importance in the merger context. You can imagine a merger that is justified by enormous efficiencies and results in the creation of a new essential facility, and then you have an access issue. But it takes some imagining to get there. Most of the access cases, like Otter Tail and AT&T, were not merger cases. So I suspect that, as a practical matter, concerns about the ability of the antitrust agencies to fashion effective remedies for

problems created by mergers are likely to arise when the problem created by the merger is not a competition problem.

Let's say for some reason a merger creates a realistic basis to think that the goal of universal service will be disserved. Well, then, maybe you do want to have a sectoral regulator who can say, that, although that's not a competition goal, it is an important public policy, and we want to have a merger-specific policy to deal with an merger-specific problem. But that's not quite the same as saying that we need a sectoral regulator to deal with a competition problem.

MR. KOVACIC: The best example I can think of of a decree that has the first of the two categories of potential problems that Doug mentioned is the British Telecom-MCI consent decree which has a fairly elaborate set of nondiscrimination and access-related controls, but --

MR. RILL: AT&T/McCaw was the same way, although their decree was abrogated by the law.

DR. STERN: Imposed -- the British Telecom imposed by --

MR. KOVACIC: By settlement.

MR. RILL: Same thing with AT&T and McCaw.

DR. STERN: But this was not because the FCC was pushing that?

MR. RILL: No.

MR. KOVACIC: No.

MR. MELAMED: These are both vertical cases, but you're right, they did raise the access issues.

MR. DONILON: One model, Bill that arises out of the comments that Doug just made that you didn't discuss would be -- but I want to get both your reactions to it -- would be what about not just having the DOJ and the FTC get the trump card on competition policy. What about wholesale removal of merger from the sectoral regulators? What falls out of that proposition?

MR. KOVACIC: I think Doug's earlier remark touched on this. What it means is that sectoral regulators will have to find other occasions and mechanisms for effectuating some of the social policy decisions that now are carried out through merger review, and that to the extent that mergers implicate these other issues, the sectoral regulator will have to undertake other proceedings to cure the ill effects.

MR. DONILON: And they would have to do so expressly and not in the context of approving the merger? Or protecting competition?

MR. KOVACIC: That's right. This means that the role of the review is simply to avoid harmful transactions and that benign -- competitively benign or procompetitive transactions go ahead. If there are adverse distributional effects, or if there is a dissatisfaction with the existing distribution of benefits and costs, or other adverse effects given the -- measured by the larger set of aims that motivates the agency, those have to be carried out through different modes.

MS. FOX: I wanted to go back to the discussion of a little while ago. You made several really important recommendations, a list of possible recommendations. And I'm going back to two of the possible recommendations. One we discussed a little bit, which is giving the antitrust agencies the sole

authority to determine the competition issue, and secondly, I wanted to put back on the table that where there are noncompetition values and goals to be implemented, and the sectoral authority is making a decision based on them, it ought to be very clear about what it is doing, transparency as to that.

I was very interested in the distinction that came out in your colloquy with Doug in which Doug, you said, interestingly, that the sectoral authority will be asking the question or may, among other things, ask the question: Does this vetting of the merger provide us with the opportunity of doing something procompetitive? This is also something Paula was talking about.

This is really very interesting. For example it could be the case of the antitrust law as decided in Marine Bank Corporation makes life too tough for the antitrust enforcers, and that therefore the antitrust enforcers might not win in court against a Bell Atlantic-NYNEX, but maybe the sectoral regulator could say the burdens of the plaintiff in the antitrust court are really too tough and therefore we decide that this not go through as a matter of public interest because we think there's an important potential competition question, and we can't prove as a matter of probability that Bell Atlantic will come into NYNEX's territory, but there's a good chance, and could say, we therefore stop the merger, I should think.

So I mean, I thought that actually fit into where Paula was going, and that might be good or bad, depending on how sound antitrust law is.

Now, I wanted to make a couple of other comments that deviate a little bit from that thought. One is right on that point. Sometimes when a sectoral agency thinks it's doing something more competitive, it might be doing something

anticompetitive, and so perhaps that merger should go through because it wasn't anticompetitive and the sectoral authority decides what I just said, and wants to abort it on competition grounds. I should think that the agencies ought to at least have input if the sectoral authority is still focusing on competition itself. This is one point.

Now, a lot of the colloquy actually reminded me of linkages to certain international issues, and now I'm off on a different track here. One is that whatever is our discussion on the relationship in the United States between antitrust and the sectoral regulators might have reverberations in other parts of our report.

Some merger laws, like Poland, would balance anticompetitive effects against any other kind of economic advantages. The authorities are always saying, "Well, I have the opportunity to stop this merger. Let me see what good things I can do for Poland. I might impose binational obligations or infrastructure obligations. "

And here if we do make a recommendation in this section about being very clear about the additional factors and variables that are being added to the debate, we could also make that recommendation later on in our report.

DR. STERN: Yes.

MS. FOX: Then the other international connection I wanted to make came up in my mind when you were talking about the relationship between the antitrust authorities and the sectoral regulators on issues that are hybrid issues, such as access and nondiscriminatory access. This is exactly, now in the

transnational context, a kind of issue that come in telecoms annex to the GATT's agreement and competition law.

And there is a question as to who is going to be making the decision as to what is the abuse of dominance when a telecom company doesn't giving access or is allegedly not giving nondiscriminatory access. And I think that however we deal with the issue here also might be carried over to a recommendation in the international market access part, when there are competition principles embedded in WTO agreements. So it might be helpful, and if you have further thoughts, now or later down the line, as to how that issue ought to get determined when it comes up in the WTO context, that would be helpful.

DR. STERN: Okay.

I would add one more thing that I would ask you to think about that in light of the time, we probably can't get into the discussion, but I wanted to put it at least on the record. Jim, talked about the international function, and you asked the question, what do you mean by that. My thoughts started to come, "well, representation in negotiations," but I was thinking about the interaction between the Department of Justice and the U.S. Trade Representative.

So I think I would like to hear what you have to say on that after you've had some time to think about it because we do need to go on.

Again, Bill, you've been just terrific in stimulating this discussion and really boring down into the deep significant issues, and we thank you very, very much. It's been a great day, so far so great, Merit.

We're conscious of the next agenda item, which is trade and competition interface and enforcement cooperation discussion, and while Jim Rill will be handling the initial remarks, I am aware also that Rick Thoman has been good enough to volunteer to give us a report on the e-commerce subcommittees work.

MR. RILL: I think we should go with Rick.

DR. STERN: Do we need to take a break first?

MS. JANOW: I was going to welcome Dick Simmons. Are you here with us?

MR. SIMMONS: I am.

MS. JANOW: Terrific. We haven't had a moment to welcome you. I thought we should do that before we move into another subject area.

MR. RILL: Let me just say that the 4:30 deadline is going to have to be a firm one for me, at least, so we're going to have to finish at 4:30 regardless, and maybe reconvene, but I think a lot of us had planned around the conclusion time of the agenda.

DR. STERN: Absolutely. We've been pretty good about the ending time. Sometimes the beginning time --

MR. RILL: The beginning time gets a little tricky. But I think I would like to cede my opening time to Rick.

DR. STERN: If it's all right with you, Rick, we'll just continue, and if people wish to excuse themselves individually, they might. So, if you're ready, we're ready.

MR. THOMAN: Sure. Well, I'll make this short. I don't think it's a big subject that's worth more than the five or so minutes I'm going to talk, but I don't think we have much more than five minutes to say at this point.

We had, I thought, a very good meeting in New York. A number of us were there, a number of people from the industry were there. I think around e-commerce I would like to make five points if I could. The first is that we all know, I think increasingly more today than when we started this off, that e-commerce is an area that's going to be very, large, very important, and is only beginning to assume the scale that it's going to be several years from now. There's no question that almost every company is now trying to think of what its e-commerce strategy is. That was not the case six months ago or nine months ago.

The other thing that's characteristic about e-commerce, other than the fact it's growing very quickly, is that it's very, very complex in terms of what we're talking about, and that's because it's probably the first economic capability that isn't geographically focused. And that makes it very difficult to think about in the context of what we're here today to talk about. And I say that in the sense that you can imagine the problem of selling a Japanese product on an American server on a German network over a website which is located in some other country to a French consumer. So you've got so many areas that you can touch in terms of where does the transaction actually take place, that it's more difficult. So that's the first comment I would make, is that it's a very large and very important area and yet is extraordinarily complex in terms of the traditional, we make a product here and we sell it there mentality that I think the original trade theory grew up in.

Secondly, it's important because it's likely to change pretty dramatically competitive balances, not only between companies and industries but the way things are done, and in a whole series of ways. We all know, for example, that to sell things through a sales force costs roughly 20 to 25 percent of revenues, to sell things on the Internet costs one percent of revenues. So your ability to disintermediate competitors is pretty dramatic.

The ability to do 24-hour service in a country that traditionally maybe had closed its stores for social reasons or other reasons is another area. So simple access. What it allows in a sense, you could argue what it allows is the ATM model applied to anything. The ATM model is a wonderful model, in which your customer becomes your employee, you don't pay him for the work, and he gets convenience and cost for it. In a sense that's what the Internet becomes.

And so I think that the fact of the change of competitive balance is important because that leads in a way to certain of the antitrust implications. I think the paper that we wrote here, that somebody wrote, it's a very good paper, talks about really three of them. The first of them is, I think, the one that's potentially the most dangerous, which is sort of a hidden mercantilism. It's very easy to argue that I will not allow e-commerce to operate in my country because I do not want to give access to private financial data of my citizens to allow it to operate. And that's a hard one to argue because privacy is extraordinarily different from place to place, if you do any kind of service on financial research, if you lived in southern Europe and for centuries have been trying to escape the king's

tax people, you have a great understanding of what privacy means. The Swiss banks have lived off to it for years. So that's a very real difference from country to country, and yet it's also a very nice handle to not allow things to happen that would tend to upset encumbrance, we're doing things the way that the thing is, is now.

So there's a real issue I think around how you can deal with that issue of hidden mercantilism in a straightforward manner because ultimately it's a very emotional, difficult issue around privacy. I might add we're seeing it with regard to genetic foods and other things. It's a bit of the same issue, I would argue.

Obviously there are potential network externalities. I won't go into that, but to the extent you have people with very strong positions that are allowed to leverage those, you have the ability to create monopolies or quasi-monopolies. They're not there today, but that's a potential issue.

And then you have all the traditional antitrust problems in the new area such as cartels, price signaling to clients, sales, all the other things which you could argue if they're secret, there is a risk of it. If they're very open, there's a risk of it. But none of the traditional issues go away.

So all of those reasons, I think, the antitrust implications of e-commerce are all of the things that we currently have to worry about plus some new ones.

The fourth comment I would make is that the enormous growth in this area -- but the thing I've learned around my life in technology is that the great

law of technology is the law of unintended consequences. It's very hard to know in a big, new technology precisely what's going to happen. But we know there is going to be enormous capabilities to do different things with this media which will evolve in ways we can't see and there will be consequences of we can't foresee today at all easily.

And I think that as we talked about our options, and I think the paper mentions them here, it's a very difficult area. Because I think there's a school of thought, certainly in my industry, that says this is a wonderful industry, let's just not regulate it and everything will be fine. I think most people in industry would clearly accept the fact that there are clearly areas around consumer protection, et cetera, which isn't our area here today, that are issues, and we're beginning to see that in the United States, people buying all sorts of unlicensed drugs on the Internet, things like that.

So I think the do-nothing issue is one that is dangerous, because the danger of a do nothing is that ultimately something will happen and there will be some kind of kneejerk reaction regulation which probably isn't appropriate.

On the other hand, there's another set of thought which is to say let's go out and sort of create an environment, negotiate an international agreement. The problem is I don't know if we know what it is yet. It's growing so quickly, it's so early, that it's hard to know that you wouldn't inadvertently do something without knowing which is difficult. So I think we sort of, to a degree, coalesce what I call the third way, and I hate to say that given Tony Blair and Schroeder's recent issues, but which I think really relate to the notion, if you don't know where

it's going, probably you can agree on some principles and possibly a process around it. And we need to think through what that looks like, or might look like, or at least elements of that, which at least give us some sense of comfort that it's generally in the right direction.

And I think as I talk to a number of people in the room, I think that's where they are. But that's I think a summary. I'll just stop here. That's about my five minutes.

DR. STERN: Oh, that's terrifically helpful. Comments, questions?

MR. RILL: Rick, do you -- I'm sorry, go ahead.

DR. STERN: Eleanor?

MS. FOX: I just wondered if you had anything in mind on principles and process?

MR. THOMAN: No, not yet. There's been a lot of good work done in different places. You don't have to start from ground zero.

MR. RILL: I think anything along those lines would be very helpful. I suppose one concern that this seamless commerce breaks across the lines would have would be the Balkanization of regulation, not merely mercantilistic motivated Balkanization, but simply a multiplicity here of regulation whether the antitrust and consumer protection would seem to be more egregious, more inhibiting, more seismic than it would be perhaps in a more traditional industry. That's something we may want to comment on with more information.

MR. THOMAN: There is the other element, which is that you could

argue that -- could you argue whose regulation applies, in an area of consumer protection, et cetera.

One of the concerns when you talk to people in the small business area is -- for a large company like ours, you know, we can figure out on an e-commerce site how to send things to France and Germany and comply with everybody's regulations.

A small business company really can't. One of the issues you'll hear in the small business community is that unless there is some thought about how these services are delivered in multiple countries, it becomes difficult for the smaller business community to participate because they don't have the resources to tailor their product offering to the regulatory and legal aspects of all these different countries, so they would much rather have a set of regulations which says the manufacturers site law prevails, and of course when you talk to the French and the Germans and the Italians about that, because it's essentially a U.S. phenomenon today, they're not very excited about that, but there is an interesting issue between the smaller business and the larger business and their ability to tailor their offerings for all the different environments which are the same.

DR. STERN: This is always the issue with standard setting and international standard settings: what's the best way to have harmony that doesn't disadvantage particularly the small or the new entrant?

My only request is again to get on the record just that the staff make a point of looking at what is being worked up in the U.S. Trade Representative's office with regard to e-commerce and in particular the ACTPN, the President’s

Advisory Committee on Trade Policy Negotiations.

MR. THOMAN: We can do that.

DR. STERN: Yeah, because some of these common principles of the work. That may have been what you were referring to in this instance with work already done on it.

MR. RILL: I think that just from my own view there is a lot to be said for a separate -- whether it's a chapter or a very large section of a chapter on market frictions on this particular issue, and I think any help that you, an expert in the field can do to add --

MR. THOMAN: I would be glad to do it.

MR. RILL: -- to our deliberations on that, I would certainly appreciate it. Thank you.

MR. THOMAN: Okay.

MR. YOFFIE: I just wanted to raise a question, maybe get a reaction from Doug. There are two ways we can think about the problem. One is as an e-commerce problem. I want to pose the question --

MR. THOMAN: That's correct. That's a fair -- I agree with that.

MR. YOFFIE: -- which may or may not be e-commerce related, I think is a more important way to frame it.

MR. THOMAN: I was using shorthand. That's a better way to frame it.

MR. YOFFIE: But the reality is a lot of the problems you describe might be covered under traditional trade policy and not competition policy.

What's really different about the Internet and information technology gets to the number two problem you outlined, which is network externalities. This is a global problem when we talk about network externalities. We rarely talk about U.S.-specific networks but rather something that cuts across the globe and therefore is at the heart and soul of what this Committee is about, but it's also at the heart and soul of antitrust policy domestically as well.

At lunch we were talking about Microsoft because if you think about the Microsoft case, that's as much a global case as it is a U.S. case. The question really becomes we're thinking about the question of network externalities and the implications for monopoly, and whether traditional antitrust law as we think of it and the way in which we process antitrust cases today are, in fact, appropriate in this new world.

This is the question that has been raised a thousand times in the press over the Microsoft case. I never heard the Department of Justice's view was on this, whether we really think existing antitrust law is adequate to deal with the problems of the Internet economy.

MR. MELAMED: It seems to me there are two forms of that question. I think I know which one you had in mind, but I want to make sure.

One is, we're dealing in a world of rapid change. Usually there is something technological in there. There is no way that the law, the government and the courts with their cumbersome process can keep up with that. I don't think that's what you meant.

I think what you meant is something else, which is -- in a world of

network externalities, with a likelihood of serial monopoly rather than rivalry, does it make sense to talk about competition also.

MR. YOFFIE: I meant the second, but the first is one of the implications of the second.

MR. THOMAN: The first of the reasons is why we can't regulate it now, one of the reasons.

MR. YOFFIE: Part of the question is whether or not, pursuing a traditional antitrust policy because things are changing so fast. In other words, pursuing a traditional antitrust policy to solve the second issue, will that work in a world in which there is constant change and too many things are changing during the process of a trial or putting a case together or so forth.

MR. MELAMED: Let me give you a 30-second preview of the six or seven-week discussion we could have on that question.

My own personal views about the speed of change, is that, even if it were so significant that we would agree that you can't rely on antitrust litigation and remedies to solve practical problems in real institutional or market contexts, you can still look to antitrust enforcement to articulate rules that ought to be complied with and the violation of which, for example, could expose someone to private damage remedies.

As to the second question -- which is what happens to the body of rules in the face of the increasing importance of the network economy -- well, that's a big question, but let me just anecdotally address it this way.

It has been suggested at various ways in relation to the Microsoft

case, why should there be rules about predation in a winner-take-all market because there's going to be a winner anyhow. My own view is that you may have to think a little harder, but of course you can have rules, for example, that would help you identify which of the rivals ought to prevail in the winner-take-all market, and what are the means of competition that are likely to result in efficient resolution of that rivalry versus an inefficient resolution.

I don't think antitrust is knocked off the boards in these markets. They just present a new set of facts we have to think about.

MR. YOFFIE: I was actually posing a different question: do we have to think about new antitrust rules? We're agreeing that rules may be appropriate and useful. But the question is, are the existing rules appropriate and useful or do we need to be thinking about how to redefine those rules for the context in which you just described?

MR. MELAMED: I think the existing, broad concepts and statutes are perfectly adequate and that they will and ought to continue to evolve as they have for a hundred years, recognizing that there will be lags before they catch up with new learning and new institutional settings. But this is a huge conversation.

MS. JANOW: I would like to ask this Committee to give us some guidance on how we answer these questions, not at this moment, but I think even the perhaps less difficult analytical questions that you suggested of traditional practices using a new medium pose many challenges in terms of the effective enforcement that we haven't begun to really talk through or think through anyway. So how this report might both spot the issues and raise the questions that need to

be addressed and perhaps lay out a suggested methodology or approach for government officials and interested publics to think about these issues over time, we very much need your input on because I think there is no template here, and while we can be informed of what other agencies are doing like USTR, surely, and others, I don't think there is a depth of scholarship on this or industry statements or et cetera, so we really, I think, could extend the charter of this Advisory Committee very substantially.

DR. STERN: Looking for work, Merit?

MS. JANOW: No, I'm actually not. It's a plea, but also I think this is one where we need lots of ideas.

MR. GILMARTIN: You know, based on what's already happened, since everything is moving so fast, there have been lots of events that have occurred as well, and when people talk about the Internet, it's generally in the broad terms that we just talked about it so far -- something is happening, it's going to be big, but in terms of what's actually happened, what specific cases or instances do we have that would suggest that the rules or the way the world works now doesn't apply? Can we just use some specifics as to what is so different than what's happening now that present rules don't apply?

MR. THOMAN: There was a privacy directive passed in October by the EU.

MR. GILMARTIN: Even without the Internet, that affects us just by mailing patient data across the Atlantic.

MR. THOMAN: But there was some belief on the part of U.S.

administrative people that at least partly that that was a defensive measure to allow Europe to keep its level playing field at a very low level while they got their technology act together. That's precisely this.

MR. GILMARTIN: In my industry that never occurred to us. What we saw was a difference of privacy issues about how to handle patient confidentiality, medical research and things like that. And it was a difference in attitudes about privacy and how one regulates that, not any sort of underlying conspiracy here to frustrate.

MR. THOMAN: There is a real reality that you described, there is also a belief that there could be more dangerous motives, and who knows what's right.

MR. GILMARTIN: But that's pretty traditional stuff, just a different --

DR. STERN: Just a different example. Just like as you said, genetically modified.

MR. GILMARTIN: The GMOs.

MR. THOMAN: Exactly.

MS. FOX: Could I make a couple comments, just trying to work my way to Merit's questions.

There are a lot of very different issues here. There are regulatory issues that are not competition issues like privacy regulation, but Rick is posing the basic problem of state action that restrains trade so that nations might take mercantilistic action that restrains trade. This area, if we want to treat it

separately, raises those problems. Those problems, however, do run throughout competition policy as opposed to competition law and we might want to take that on.

Other observations I just wanted to make. We could ask the question on the competition field itself, what are the additional opportunities for restraining trade and using leverage in ways that are likely to harm consumer welfare and efficiency. We must also ask what are the additional opportunities for increasing competition, by passing --

MR. GILMARTIN: Knocking down barriers.

MS. FOX: Knocking down barriers, that's very important. David raised kind of the dual questions or problems.

One is that the very fast-paced change of technology could make traditional relief always too late, and therefore, some argue today that in such high tech, fast moving areas, and this is high tech, fast moving. The Internet is an example. Some argue that therefore antitrust can't deal with it. But I'm just getting some reasons why he thought antitrust could still do something. This is a very important issue on the table today.

MR. RILL: I'm sorry, I just wanted to react to what you're saying.

MS. FOX: Yes.

MR. RILL: What it does is put on antitrust, traditional antitrust concepts, the burden of being alert to emerging technologies and perhaps the domination of emerging technologies that would require quicker action and application of antitrust principles --

MS. FOX: Right. Yeah.

MR. RILL: -- which creates an enormous burden on antitrust. I can think of examples, but it would involve some special pleadings, which I don't think is appropriate to do right now.

MS. FOX: But quicker antitrust relief is actually a very important idea that more expeditious antitrust relief is maybe an important idea that we should think about, saying something about, so on the one hand, getting substantial structural relief or injunctive relief might be rather late.

I think you, Doug, were suggesting, I might be putting words into your mouth, but tell me if I am, that there are still remedies at the end of the case that a court can order even if it's possibly too late for important structural relief, setting forth clear rules of law that should not be violated that can be very important in controlling conduct next time.

MR. RILL: Or even this time.

MS. FOX: Or even this time, and in the future, maybe at least that.

MR. YOFFIE: Let me try to answer Ray's question directly because I think it was a very fair question: why is this different from anything else, and as I said, a lot of the neomercantilism isn't different. It's the same.

DR. STERN: It's just “neo.”

MR. THOMAN: It's driven, though, by the ability to force change quickly creates a much more potential -- reflects a reaction, I think.

MR. YOFFIE: The ability to --

MR. THOMAN: The speed and cost advantages.

MR. YOFFIE: It's faster, it's lower cost, on a much larger scale because these technologies are scalable essentially on a global basis at zero cost.

MR. GILMARTIN: Right.

MR. YOFFIE: But the last piece that I was focusing on is the winner-take-all network externality argument. This says that once a competitor gets to a certain threshold that there are going to be self-reinforcing dynamics which leads him to get essentially 100 percent of the market, and if the Department of Justice or the FTC then comes in, it's too late because there are no real effective remedies at that stage. Customers have already adopted the standard for the technology, even if it was achieved through predation. The problem is you can't reverse it. It's just too late or too difficult.

And that's basically the argument that's been made around the current case with Microsoft and Netscape, which is Microsoft started to move very aggressively in the fall of 1996, the DOJ files the case in May of '98. By that point in time, they've already gained 50 percent share, and while the case has been tried in the last 12 months, Microsoft's gained another 10, 15 percent market share points, and is starting to look as though we are at that point where the market is tipped and remedies may or may not have any effect. Because it's global in nature, the question becomes: do existing processes and procedures allow us to adequately address --

MR. GILMARTIN: Yes.

MR. YOFFIE: -- adequately address these kind of dynamics? Not that there shouldn't be rules, but is it going to be effective or are we going to see

more and more potential monopolies emerging? We then go through a long, drawn-out trial with no real remedy at the end.

MR. MELAMED: Two thoughts. One would actually be a conditional thought.

If a premise of what you're saying, and I would love to have the six weeks to carry on this dialogue, is that we have these network industries in which winner-take-all outcomes are pretty much preordained by the structure of the industry, then the problem can't be what you just said a few seconds ago, which is we're going to see more monopolies emerging. That's the end of the premise.

The question becomes, are we going to see the right winners, and is there a role for antitrust to have something to say about the rules of competition that will help us have a higher -- there is one more component that comes into this where you start with e-commerce, rapid change, global networks, winner take all, and that is, these are global phenomena which obviously pose to take us back to what, the courts, a huge additional burden on antitrust or competition agencies, not only for the obvious process reasons, if you could get evidence to prove about who did what to his home page, you know, in Slovakia, but who ought to. Even in Boeing-McDonnell Douglas, we all had some intuition about where was the center or the centers of gravity of interest. Who had a legitimate stake in that battle? Which agency or agencies are supposed to deal with the kind of problem you're talking about should take out government obstacles and just talk about private conduct screwing up a global market. Another dimension.

MS. FOX: Related to what you said, Doug, I think there's

underlying that idea, if there is a winner-take-all result, there are to be rules as to legitimate ways to be the one that takes all, if one must take all, and those rules are appropriately litigated. I went further than what was said, there might not be winner take all or the life of the winner might be shorter or longer. Rules, for example, without definition, some kind of open architecture rules or some kind of rules that allow more contestability might assure that the life of the winner will be shorter. One other thought is, even if there is a winner take all and long-term winner scenario, there is still the possibility of using leverage and related markets or not, and like applications markets, and there could be more need for rules that would allow open architecture on those related markets. This gets you into areas of rules of leverage and our antitrust laws might be less robust than some might wish in leveraging that doesn't lead to monopoly in those related markets.

MS. JANOW: I would like to take off this point if I may and ask David, who I know has done so much work in this area, David, you raised, I think, the question of whether or not if the courts move too slowly, and this structural situation is different in response to Ray that there needs to be a different approach that maybe is agreed to at the international level or maybe national legislation in focus.

Why would we have any confidence that what would be arrived at those two possibilities, if they had a structural feature to it saying, no market dominance, for example or some, would be any better? Is there any reason to think it would be an advantageous approach?

MR. YOFFIE: This is why I started our discussion at our

subcommittee by saying do nothing as the first option, precisely because of that fear. But let me come back to something that John and I talked about yesterday or whatever the day was, Monday on the phone, which is that this is an area in which these dynamics are just emerging, and the reason there is not much research is that there's not much history, so it's very difficult to be able to say with any precision how we should be able to get specific policy recommendations at this stage.

However, I think those of us who are engaged in these areas now believe that if there is any issue that's going to be critical in the next millennium, this is going to be it, but it's not clear that this Committee can say definitively, here are the appropriate recommendations other than we may need to do a lot more study and two or three years from now we actually might be in a much better position because we'll have at least five years of history rather than three years of history behind us to be able to draw some very specific kind of recommendations. I would be very hesitant, given the history of our experience to date to make specific recommendations at this stage. I think that's probably what Doug is saying, too. It just isn't clear.

MR. THOMAN: But there may be principles we can feel comfortable with, there may be a process we can specify that helps us get to that point. I think that's -- I'm reluctant to sort of say, it's too complex and too early to do nothing about it because then nothing will be done. I guess I would like to try to be a little more forward looking if we can without being categorical. I think you're right, we don't know a lot.

MR. YOFFIE: I'm not worried about the complexity. I'm more

worried about the history.

MR. THOMAN: Right. Right.

MR. YOFFIE: But do we have enough confidence in the underlying dynamics, in our understanding the underlying dynamics?

MR. THOMAN: I would agree with you, we don't.

MS. FOX: I think even raising these questions can be very valuable, and I want to throw one other in to the list we've discussed, which is what is antitrust harm in a context like this because, as we know, the paradigm of neoclassical price theory, consumer welfare harm just might not fit, and yet there might be a market harm.

DR. STERN: This is terrific. I agree with both of you all. Just trying to pose the questions, just articulating questions is helpful, framing the issues, even if we aren't categorical, to use Rick's term, in recommendations. So, this conversation has been terrific. And Eleanor's point goes back to a question I wanted to ask you, David, and it also relates to your concern about history of that. We don't have research.

But do we have, though, examples of a winner-take-all paradigm, which you have invoked, in other technologies? What have been the relevance of antitrust laws in dealing with that? There should be some history in other winner-take-all technologies.

MR. YOFFIE: True. We obviously have a previous history with Microsoft, so in operating systems, independent of the Internet. And we had a consent decree that was signed in 1994?

MR. MELAMED: Probably signed in '94, entered '95.

MS. FOX: Yes, entered in '95.

MR. YOFFIE: So we have some history, which is not a very positive history I think from the Department of Justice perspective. Would that be fair?

MR. MELAMED: That was before my time, but that's what they tell me.

MR. YOFFIE: So we certainly have one example in which the identical underlying economics would have been applied, and where antitrust authorities were directly involved in that question, and then there certainly are other industries. One that I cannot talk about publicly would be Intel. This is another example of a company that has some features of network externalities, again very closely connected to Microsoft, and has been subject to antitrust investigation by the Federal Trade Commission. So there are examples.

Even in other industries which would be more consistent with Eleanor's comment about they don't last very long, things like video games, Nintendo was an example of a case where many of the same dynamics applied but were obsoleted fairly quickly by future generation technologies.

DR. STERN: And that's good, that's where I'm driving: that it's almost a misnomer to call it “winner takes all” because “winner takes all” is in the first round or the second or third round, but how long is this boxing match? If another technology takes over. So it's --

MR. YOFFIE: If it's IBM and it lasts for 20 years, and if it's

Microsoft, it lasts for 20 years.

DR. STERN: But not Nintendo.

MR. THOMAN: There is a difference though. I would argue an Intel, a Microsoft, a Cisco, once they achieve that position, the switching costs are enormous. The switching costs of the game, you buy the new game, you throw the old game away, so there's a very different -- if you get to the choke point with high switch costs, then there is a characteristic in a way that David is talking about.

DR. STERN: Then that tells us something right there.

MR. MELAMED: There is another set of historical experiences, although quite different, it had some parallels, and that is the old-fashioned natural monopolies, with declining marginal costs. They were certainly winner-take-all markets; they had a somewhat different dynamic, but at least we have some experience with anticompetitive conduct and competition rules in those industries.

MS. FOX: In newspaper cases, including one with New England newspapers and there was only going to be one survivor.

MR. YOFFIE: But the economics of natural monopolies are very different than the economics of network externalities. We have to be careful. What Rick is talking about is what economists describe as complementary assets that are tied specifically to the underlying products.

Those didn't exist in the natural monopolies, and therefore the switching costs had a fundamentally different character to them. There are some different dynamics, but the computer industry historically is the one industry

where we've seen very long lived monopolies or quasi monopolies. IBM being the one that had the longest history, and again IBM continues to have about 60 to 70 percent of the worldwide mainframe market to this day. It still generates multi-billion dollars of net profits to the company, and still makes it one of the most profitable companies in the world, and that goes back to 1964.

DR. STERN: Well, I was thinking about the natural atrophy of a monopoly that if you do have a monopoly, the flabbiness is attacked if you have a new entry such as imports, in a traditional sense. Because we're in this globalized economy, it may be that we're lacking the potential of a new competitor to come in out of the blue, if you will.

MS. FOX: Space.

DR. STERN: Out of space. So, to that extent this is perhaps a new paradigm and a new set of problems.

MR. YOFFIE: What information technology does, though, is it creates the possibility of truly global monopolies, not --

DR. STERN: That's what I mean. That's what I mean.

MS. FOX: And who is the potential competitor.

DR. STERN: Exactly, except for someone from Mars.

MR. YOFFIE: Microsoft and Intel have between 85 and 90 percent of the relative market share in their segments on a global basis so when you think about new competitors coming out of the blue, it's generally got to be new technologies. It must be a substitution effect as opposed to an imitation effect, which makes it a fundamentally different dynamic.

DR. STERN: You need clarity.

MR. YOFFIE: I wanted to come back to Eleanor's point again and ask Doug because this question of consumer harm is the other major question that emerges with these dynamics. Microsoft is giving the product away for free, and has 100 percent of the market, then there's an obvious question of how do we measure consumer harm in this world, no matter how they got there.

MR. MELAMED: I just heard a story from a person who was trying to buy a car and the car dealer said, “Mr. So-and-so, I lose money on every car I sell,” and he didn't believe it. I think you might have misstated a little bit when you said they don't get any benefit from selling the product.

MR. YOFFIE: From Internet Explorer.

MR. MELAMED: Well, not from Internet Explorer; but it seems to me that the network story, as an antitrust story, is essentially this: The incumbent tries to keep potential rivals from having the access to the standards that enable the rivals in effect to take advantage of the network economies.

If the incumbent succeeds, he reduces the likelihood that the rival will displace him in whole or in part. That reduced likelihood might injure consumers, not because it will have a big price effect, but because it is likely to affect the amount and type of innovation and product quality available to consumers, especially if the rival was given a greater opportunity to flourish.

I don't mean to be glib about this, but I don't know why any of these notions are beyond the comprehension of a competition paradigm.

MR. YOFFIE: That's a legal question, which is --

MR. MELAMED: I didn't mean it to be.

MR. YOFFIE: That's precisely the question I was getting at which is, are those notions in fact adequately dealt with within the context of today's antitrust law?

MR. MELAMED: Antitrust law has evolved, it has changed a great deal in the last 30 years, certainly the last 100 years.

If we went into court tomorrow and articulated some of the ideas that I was attempting very briefly to summarize here, there is a certain probability -- maybe 40 percent, 60 percent, who knows -- that the first judge is going to say, I don't understand what you're talking about, plaintiff loses; but maybe the third time around, the plaintiff is going to win if his theory is sensible, and the law is going to evolve and catch up with new economic learning.

MR. RILL: I quite agree with that, I don't think the legal principles are the ones that are in question. I think maybe the enforcement tactics are in question. The fact assembly is in question, the ability that we have some certainty that you're identifying a market soon enough or perhaps too soon is in question, but it seems to me these have been the questions that have been with us to a lesser degree perhaps for a hundred years, and now it's a question that requires quicker action, but the underlying competition policy principles, it seems to me, are perfectly adequate to deal with it.

Microsoft -- the legal theory underlying Microsoft, I'm not principally involved in that case, it would seem to me to be fairly straightforward legal principles of tying/exclusive dealing as a mechanism for monopolization,

that it's not complex legal theory, it's legal theory that rests on cases like Lorraine Journal which go back 30 years, 40 years.

MS. FOX: That's what Bob Bork says, it's Lorraine Journal.

MR. RILL: Just because he said it doesn't mean it's necessarily wrong.

MS. FOX: I think there are more complex issues than Lorraine Journal.

MR. RILL: I happen to agree with him.

MS. FOX: I think there is a question as to what we have defined as consumer welfare harm is really the only market harm. I mean, I think it's possible that in an effort to confine our antitrust laws and to consolidate them that we have used a sort of proxy or symbol that may be or sound a little narrower than all market harms are.

I think that it's just going to be very useful to write a chapter laying out the questions and I think that it's probably too soon to come up with any answers, but I also happen to think that most of the antitrust problems, even applied to the new technologies, can probably best be decided in a ground-up way like our usual antitrust cases are, just lay the facts out there and the law is in a way elastic enough to meet the market circumstances.

DR. STERN: Well this five minute discussion has stretched -- I think, again, it's been a terrific discussion. We've been plowing new ground here.

Thanks to your stimulus, Rick. Thank you very much. We'll just see what comes next in our next meeting.

We're now going to move to the last item on the agenda, the discussion on trade and competition interface and enforcement cooperation. You guys are looking at each other.

MR. RILL: We're passing notes. Do we have to tell the class what the notes are about?

DR. STERN: Yes.

MS. JANOW: We're noticing the shortage of time.

MR. RILL: Let me just first of all apologize to Dick Simmons who has been on the line waiting patiently, I hope on the line.

MR. SIMMONS: Who, me?

MR. RILL: Because I know this is a subject that particularly interests him, and we have exactly an hour and 15 minutes to deal with it at this meeting.

DR. STERN: Right. Go ahead.

MR. RILL: What were you going to say?

DR. STERN: What Merit suggested I say, which is, Dick, is there anything that you wish to say?

MR. RILL: That's a good idea.

MR. SIMMONS: Thank you, there is on this particular subject, if I could step back for one moment. I think I heard most of Rick's comments on e-commerce, but if I could just make a short comment on that. If the 35 or 40 years since the Second World War is a period in which most of the changes throughout the world were focused in manufacturing and technology improvements, I think

the next 40 years are going to be driven by e-commerce, are going to be the first real change in the transactional kinds of relationships around the world. And one aspect of that, I think, falls into the trade and competition area because e-commerce may be the way to deal with some of the problems of access that currently are being discussed and do exist around the world because at least in a couple of countries, the distribution system is how access is denied or limited, and e-commerce bypasses it, and it may make moot many of the problems that all of us, several of us have had with regards to problems of access.

If you don't have to go through the constraint imposed by a distribution system by being able to use e-commerce, and I think we will be able to at different rates of change in different industries, then some of the problems of access I think will go away.

Now, if I could just offer a couple of comments on this section that you're now going to discuss, let me just preface it by saying that first of all, I apologize for not being there. Jim Rill, I think has some sense of why it's so busy the last six months. But with regard to paragraph I C and then 1 and 2, I become very uneasy without a very clear and specific understanding of what is being said here, and I can only display my uneasiness by asking questions which are rhetorical, don't have to be answered here, but which, Merit, I would really appreciate getting some clarification on.

For example, on paragraph C, sub 1, DOJ/FTC should have parity at the table with other agencies, e.g., Department of Commerce, USTR where issues of trade and competition are involved, and then it goes on to expand on that a bit,

and then in (C)(2) it talks about it and (C)(2)(a), and I would really like some clarification of what you -- whoever is drafting this part of it really means.

I also point out that political problems that this creates when you start to talk about taking turf away from, whether it be USTR or Department of Commerce or whomever, without a clear understanding of (1), for example, and (2)(a) where it says, U.S. and foreign companies must be judged under the same U.S. standard should not judge foreign companies under a different standard, parenthesis, by using trade remedies.

I would ask what does that mean, and I do restate my uneasiness if I read the wrong implication into that. So let me stop at this point and simply say that I do think you got to make very clear in your draft exactly what we're talking about.

MR. RILL: Dick, this is Jim. I think you've raised a good point, primarily I think on the lack of perhaps clarity with which these discussion points have been raised.

MR. SIMMONS: And, by the way, if I can, I'll refer to Intel, the title of that book, Only the Paranoid Survive, applies to me, too.

MR. RILL: Well, you're in good company. And I don't think there is a question of -- I don't think it's a question of attempting to grab jurisdiction from one agency to another, and let me give you the notion that underlies what you're looking at which has not been distributed beyond the working group, so it's not a document that's in the hands of the full Committee, nor is it an attempt to, other than put forward some ideas that have been raised in the hearings and in

intramural discussions among the working group as possible recommendations that the Committee might at the end of the day put on the table in its report.

Having said that, I think the thought here is really twofold. One, where national policy is being developed, the Department of Justice, given its experience and focus on competition policy issues should be in a position to articulate that experience and its positions in the deliberations of the Executive Branch on a par with the Department of Commerce and the Trade Representative, where private restraints are at issue (that is opposed to government restraints or hybrid restraints, which at the end of the day I think I would be defined as essentially private restraints encouraged by the government).

Therefore, the suggestion is that there be clear lines of delineation between -- and we're getting off of policy-making direction now and into enforcement technique, and remember this deals with enforcement issues, the hybrid restraint should be the responsibility of the antitrust enforcement agencies, and I would say conversely where there are government restraints involved, the enforcement responsibility vis-a-vis those government restraints should probably be preliminarily with the more traditional trade agencies, the USTR in particular, while the question of remedy then becomes, of course, one that would have to be developed.

With respect to the same standard, it seems to me that foreign companies should be judged under the same antitrust standards as U.S. companies. There should not be, and I'm sounding like I'm advocating this but I'm trying to explain what the language means, and it may well be at the end of the

session I would advocate something like this, but it means that there should not be a special antitrust rule applicable to a foreign company that's more rigorous or contains different remedial sanctions than the same antitrust rules that would be applied to a domestic company.

That's all in the world it means, and I think then we need to consider as you look at other proposals that have been put to us, the question of how one determines whether or not there's a violation of antitrust law and the question of whether or not the U.S. enforcement agencies should apply different antitrust principles either from the standpoint of substance or proof to a foreign situation as it does to a domestic situation, and I think that's really the sense of what (c)(1) and (2) of the outline mean. For those of you who don't have the outline, this discussion draft was circulated only among the working group, and simply suggests that the Department of Justice and the FTC should have parity at the table on trade and competition issues where competition policy questions are involved, and involving issues of private restraints, whether they're purely private or hybrid governmental private, the enforcement position of the Department of Justice/FTC should have priority over those of other agencies of the government.

Are you more confused or less?

MR. SIMMONS: No, I understand that, but going back an hour on so when the discussion was on the role of FTC, if I could play devil's advocate for just a moment, why shouldn't FTC ask for a seat at the table, too?

MR. RILL: That's a good question actually, and they might just do that, but --

MR. SIMMONS: They could set up an advisory committee, come up with a set of recommendations that FTC should play a more responsible role.

MR. RILL: And when I say they might just do that, I'm being a little facetious. I think the issue there is whether Justice is more appropriately structured to deal with the table in the Executive branch, being a member of the Executive branch and having a policy-making function within the Executive branch than an independent agency.

MR. SIMMONS: I understand that, but I was just trying to make the point and also, of course, the DOJ is not just asking for a seat at the table, they're asking for an equal seat at the table for the Assistant Attorney General for Antitrust.

MR. RILL: I think that's what's contemplated here.

MR. SIMMONS: My questions are not that I necessarily oppose them, oppose the proposal, I just want to make sure I understand it in its full beauty.

MR. THOMAN: It would be useful as we go forward to define what parity means. If parity means you're now adding a third party --

MR. SIMMONS: I'm sorry, I can't hear.

MR. THOMAN: It may be useful to define what we mean by parity as we think about this. If it simply means that everybody -- if we've added a third party to what is sometimes not even an easy discussion between two, we may not have helped our ability to formulate trade policy, so it may be useful, if we can be precise about where the role is greater or lesser, to the degree we can do that.

MR. RILL: I think there are two facets.

MR. THOMAN: You have done part of it here.

MR. RILL: I think what we've done is blended two concepts.

One, let's take an example where there's a perceived overseas restraint in a particular industry. Let's say it's a vertical restraint that appears to be historically governmental, emerging possibly into a private restraint, not clear as to the legal effect at this point, the government, let's say the President of the United States goes over to country X and raises the issue, and then in a matter of a meeting of the policy advisors to the President, the Secretary of Commerce or the Undersecretary, the Special U.S. Trade Representative or the Deputy Trade Representative discuss the issue and decide what the matter of policy is and what is the U.S. response to this particular complaint.

The thought there is that the Department of Justice would have its representative, whether the Attorney General who has multiple responsibilities well beyond this area, not merely so focused as the Trade Representative or the Undersecretary of Commerce, but has responsibilities well beyond that area should not be able to have at the table someone comparable to the Assistant Attorney General for Antitrust to take part in the give and take deliberation of the government's policy on that question.

MR. THOMAN: That's fair enough.

MR. RILL: And bring to bear a consumer, if you will, protection dimension and taking into account the Foreign Trade Antitrust Improvement Act, any export interest of the United States as it applies to competition policy. That's

one aspect of it.

The second aspect is then in the enforcement area. If it is determined that this is purely a governmental issue, whatever restraint exists, of course if no restraint is found then that's the end of it, but if a governmental restraint exists, then that presumably would be the province of the trade authorities.

However, if it's a private or hybrid restraint, the suggestion here is that the antitrust authority at the Department of Justice would have the principal responsibility to seek appropriate relief, enforcement action, either through unilateral enforcement activity in an antitrust case or negotiation through positive comity or some comparable action to attempt to relieve the harm that may exist.

Does that, Rick, answer your question?

MR. THOMAN: It helps. I was worried about a decision process. Parity sort of implies everybody agrees.

MR. RILL: There is only one ultimate decision-maker, and of course that's the President.

MR. THOMAN: Right, right.

MR. RILL: And it's the question of the seat at the table to have the input into the advice to the President.

MR. GILMARTIN: Is this -- is it fair to say that this concept, this approach or this idea comes out of some of the discussions that we've had about how trade policy sometimes gets confused with competition policy.

MR. RILL: I think that's a fair statement.

MR. GILMARTIN: And trade policy avenues that follow have failed, whereas the appropriate venue would have been competition policy, and that's some of the experience that we have.

MR. RILL: Well, it's difficult to get into this kind of discussion without dealing with specific cases, which is always risky, and particularly when one's been involved in specific cases, it gets even more risky. But I think one would have to question whether or not there had been -- whether there could not have been a greater competition policy, perhaps even enforcement or positive comity input into, say, the auto dispute that was ultimately resolved I think not very satisfactorily as a trade measure.

MS. FOX: I am a little worried about taking the competition authorities out of the discussion of state trade restraints.

MR. RILL: I don't think you take them out of the discussion. I think that's -- as I say, there's -- I sound like I'm making a recommendation. This is very premature for me to be making recommendations.

I'm probably trying to explain what consensus, not consensus even, but what thought has been put together here, and the notion is that they would not be taken out of play in the discussion of possible remedies to a trade restraint.

The only thought is ultimately if there is a trade issue to be resolved in negotiations, that would presumably be the priority responsibility of the trade authorities. And they could advise the trade authorities and probably would advise the trade authorities as to the consequences of any remedy, which I think has happened from time to time with more than a little mixed success over the

years.

I mean, historically the Department of Justice used to come into antidumping cases and say these are bad cases. Nobody paid any attention to them, and maybe that was the right way to go about it. But certainly they would advise on trade remedies. That's at least contemplated I think by this draft outline.

MR. SIMMONS: It was my clear impression, Jim, that in the early session, whether it be the first one or the second one, it was stated explicitly that DOJ in creating the Advisory Committee had no interest in involving themselves in unfair trade laws and the adjudication of them.

MR. RILL: The jurisdiction of the Committee does not extend to antidumping and countervailing duty issues.

MR. SIMMONS: That's right. So why would the Committee then make or even consider making a recommendation that would give justice and DOJ a seat at the table on an antidumping case.

MR. RILL: I don't think that's contemplated in the recommendation. It was contemplated here, for example, really in the context of market access.

MS. JANOW: Yeah. The use of the term trade remedies was speaking to 301, at least with respect to the draft.

MR. SIMMONS: I could even make an argument about 301 that at least on some aspects of 301. I do think it's important, if I can, to reemphasize this point, that where the Committee is going to consider recommendations that would expand the existing influence and authority of DOJ in trade and competition areas, that we work very hard to be as explicit as we can.

MR. THOMAN: That's sort of what I'm saying.

MR. SIMMONS: In defining what it is that we're trying to recommend.

MR. RILL: I think that's a good point, and there is a blur here in this draft that needs to be corrected.

MR. SIMMONS: As I say, it could be I just read it the wrong way or interpreted it the wrong way.

MR. RILL: No.

MR. SIMMONS: But I could read into it a fairly broad expansion of powers.

MR. RILL: No. It's perhaps a moderate expansion of influence. It's not intended to be a broad expansion of power. But your point is quite well taken that this could be drafted a lot more explicitly.

MR. SIMMONS: It seems to me that one of the most important parts of the Committee will be the deliberation on the specific recommendations. That goes without saying. Notwithstanding all the work that gets you to that point. But the people who draft those final recommendations will have tremendous influence over the final report.

MR. RILL: I agree.

MR. THOMAN: That's exactly my reaction on this I had questions about what parity meant and what issues that were. I think you can be clear on this. The way you described it I feel comfortable.

MR. RILL: Okay.

MR. THOMAN: Can I ask one other thing again. I've been closer to certain of these issues with a view lately, and I've been both concerned and impressed by how quickly inconsequential disputes can blow up to very large policy areas, I'm talking about bananas and hush kits and also how the fact that the working relationships that have been built over a decade or longer over time have managed to sort of get them down, so if you looked at all of them together, I think I once figured out it was half of one percent of our trade are disputes. Is the intention here that when DOJ has this exclusive jurisdiction in these private and hybrid restraints and immediately starts suing people, have we created again our traditional American legalistic response to things without an ability to consult and resolve disputes, you see what I'm saying?

MR. RILL: I see exactly what you're saying.

MR. THOMAN: Right.

MR. RILL: I think it's a real issue that is of concern and deserves some focus.

MR. GILMARTIN: Let me argue on the other side of that. Actually in the EU it's been quite effective to use the courts to hammer away at government restraint by using competition policy principles of the transparency directive, and in some encouragement along those lines by the EU in terms of saying it's like knocking down the Berlin Wall, in terms of banging away at government restraints in a way that increases the competition, so this is where competition policy and the role of the Department of Justice can be important. So I'm not as concerned as Dick apparently is or you're expressing about the expansion of

competition policy as a way of generating opportunities for market access.

Market access issues for us are competition related, government restraint related, not trade related per se. Trade remedies are inadequate, just don't apply.

MR. RILL: I think that Rick's concern is that possibly the use of the U.S. antitrust laws to break open markets could create diplomatic reactions or policy reactions that would be very averse, and I think the thought here, and at least the U.S. tradition has been to use that actual enforcement tool very sparingly, perhaps some would argue too sparingly, but that the principle which was expressed in '92 that when that authority would be used to in effect deal with restrictions on the U.S. export markets, U.S. export opportunities, it would be only used where there is, you go back and see speeches given when this was adopted by the then assistant Attorney General, that it would be only used in areas where clear violation of U.S. law, of probable violation of foreign law as well and where there would be obviously a very substantial effect on U.S. foreign commerce. There would be an opportunity, even without an agreement, an opportunity given to the local enforcement authority, the national enforcement authority where the conduct was occurring to take action should there be legal authority to do so and the will to do so illustrated, and that's basically the concept of positive comity, as its come to be called, and we're beginning to see some success, for example the computer reservation system case being the early test, some success with the use of positive comity.

MR. THOMAN: Again, you've been with this all along. I've just

been impressed with my last year of the Transatlantic Business Dialogue, how much has been accomplished through effective coordination of standards. It's really been quite remarkable. But I also saw what happened for a couple month period when people got focused on these small disputes, and the atmosphere got quite venomous in ways which would probably given the scale of disputes they were all out of proportion to what they were.

MR. GILMARTIN: Yeah, and I guess I've been interpreting the work in this area or in this section as really envisioning an approach to arrive at agreements on competition policy.

MR. THOMAN: That's what I'm arguing for. This may be a necessary last resort, as it were.

MR. GILMARTIN: It's really a set of principles that we can agree upon on competition policy between the EU and the U.S. on some of these things and then using positive -- not necessarily unilateral actions by the U.S. to try to break things open.

MR. THOMAN: That's why I'm concerned of whether this recommendation would give rise to that. I don't know that it would, I'm just asking the question.

MR. RILL: No, there is a suggestion here that at least the capacity for unilateral action ought to be somewhat strengthened, at least as a last resort, but it would be I think fairly clearly a last resort if the agreement breaks down.

MR. THOMAN: I’m comfortable with that if that is the way it is written. It seems to me that the notion of unilateral enforcement is not particularly

taken seriously abroad at the present time, and that at least there should be some thought given in our discussions to whether or not we would want to recommend to the Department and the FTC a strengthening of that tool, granted a last resort tool, beyond where it sits right now, so that we can have it there in the event that the other more accommodating avenues that were closed to us.

MS. FOX: Ray has suggested that maybe the groundwork be laid by agreement that legitimizes such an action, and I would support that, that if there is an agreement that legitimizes the action to protect export opportunities, then it of course becomes legitimate.

MR. RILL: Those kinds of agreements are going to be hard to come by because I think the U.S. jurisdictional view is somewhat broader than the view of foreign jurisdictions.

MR. GILMARTIN: To the idea of some sort of forum where competitive, even the example that was used earlier by Bill, that even just people getting together and talking about these things starts to bring convergence of policy.

MR. RILL: That's what we brought up in the first part of the day, the question to our first witness, that we ought to be thinking possibly about a world competition forum, not necessarily an organization, not necessarily with even negotiating authority, but at least in the first instance a discussion opportunity across a broad base of jurisdictions, but that's an overarching end of the day kind of possibility.

Dick, I'm sorry, do you have other points?

MR. SIMMONS: No, I just wanted to stress the point I had made in the broadest context, to urge that we try to be as specific and as detailed as we can so at least as we consider the final recommendations, we fully understand the import of them.

MR. RILL: Do you have a better understanding of where this draft was attempting to --

MR. SIMMONS: Yes, I think I do, but I still would like to see it in more detail the next time around.

MR. RILL: Oh, absolutely. Absolutely.

In the time left I suppose it might be worthwhile at least to highlight some of the thoughts that the staff and others have developed as to possible decisions or discussion points for this chapter or the section on trade and competition, and one of the areas -- first I think we need to look at our own home base and decide what recommendations we could make that would be internal to the U.S. Government and then turn on where we might advocate joint arrangements and then perhaps advocate some foreign policy issues.

One of the problems we've had is that we've not been able to really quantify the extent to which private and hybrid restraints really are a major impediment to trade. We have some anecdotes, we have a lot of anecdotes. Many of those anecdotes are not substantiated in these cases, and that's just a fact of life. They're described by some of our foreign colleagues as the bleating of our industry that's suffering because of its own incapacity to export. I don't think we can buy that.

MS. JANOW: Burrrr.

MR. RILL: I heard that at the OECD meetings a week or so ago from another government whose name I shall not mention. But the fact of the matter is there are anecdotes, there are cases. I think one thing that the draft suggests is that there be a concentrated attempt to try and get some -- a governmental attempt to get some arms around the extent to which this really is a problem -- it may not be just the U.S. Government, it may be a challenge to foreign governments to do it.

MS. FOX: I know there is value in getting more evidence. I frankly think, and I think Frederic Jenny expressed this view in Paris, that people have collected a lot of evidence, and I know it is not methodical, but one could proceed on the basis of the knowledge that with the public barriers receding, private barriers are more significant restraints to market access, that where private anticompetitive barriers exist there ought to be a methodology to challenge them, and I myself am very comfortable with that idea because it seems to me if markets are closed by private anticompetitive restraints that this undercuts the spirit of the world trading system, and although it may not be prohibited now by the world trading system, to make the world trading system more nearly complete, there ought to be a methodology consistent with the WTO to attack them.

MR. RILL: I think you're right. I don't think it's incumbent on this Committee to try to do end game work to have a statistically acceptable sample to demonstrate the quantity of impact of private restraints on world trade.

MS. FOX: If there were fruitful bodies of knowledge to tap, I would

want to go ahead and do it, but I'm not so sure that there are.

MR. RILL: I don't see it. Not for lack of looking. But maybe the governments can continue to pursue some type of analysis. This is also what the draft suggests. It is also suggested that there be a strengthening of the U.S. capacity for unilateral enforcement in the appropriate circumstances we're talking about. We've talked a bit about that in our conversation a few minutes ago without getting into excruciating detail, the comments made by our first witness are really right on point.

One is, apart from the political issue of unilateral enforcement, what are the discovery impediments and what are the remedial impediments. The discovery impediments tend to be technical legal issues that probably ought to be looked at by lawyers, and we ought to have some assessment of it, how severe are they.

The remedial issues are ones that I think we need to discuss in the context of unilateral enforcement. Are there remedies that can be imposed that would cure the situation without doing adverse work on U.S. or other consumers and without raising undue political difficulty.

MS. FOX: I am not certain that I support beefing up our own ability to enforce the law to protect export opportunities. Incidentally, I think all enforcement is unilateral and I don't call it unilateral enforcement, but maybe I'll be overruled on that. But I think that we ought to suggest further what is in the positive comity agreements on the excluding nations enforcement and go further to suggest agreements to having viable procedural mechanisms within the

excluding nation so that there could be -- so that we could hopefully rely on enforcement by foreign nations and persons. And maybe making that unilateral, I mean multilateral if we, in the context of a possible world competition forum --

MR. RILL: Are you suggesting in that context the possibility of private rights of action?

MS. FOX: Yes.

MR. RILL: That's really what you're talking about?

MS. FOX: Oh, and government rights of action.

MR. RILL: Yeah. I can't imagine we would have a bilateral agreement unless there was a government right of action at least.

MS. FOX: Yes, a government right of action. I would prefer actually to see it ultimately multilateral in the context of freestanding competition for an agreement rather than -- probably rather than -- no, I withdraw that. I'm sorry. I wouldn't rather. I withdraw that. I do think that is the one point that really ought to be in the WTO.

MR. RILL: What is that?

MS. FOX: The market access right, that there is one point at the intersection of trade and competition which is the other side of the coin of public restraints and that is private restraints, and that really is the point that I think probably ought to be negotiated within the WTO.

MR. RILL: I'm not at all clear though what you mean. What specifically should be within the WTO?

MS. FOX: Oh, that nations should agree to have principles of law

against unreasonable barriers to access to their market and should agree have procedural systems whereby that right can be enforced.

MR. RILL: I guess the question I have is, all right, suppose there was that kind of agreement. Suppose we or someone thinks that that law is either inadequate or that the enforcement is inadequate. What then?

MS. FOX: That's where I think if there is a showing that the nation has not done what it has promised to do under this proposed agreement that there should be an agreement that the foreign nation should then be able to sue in its own courts applying the law of the excluding countries.

MR. RILL: I don't want to get into a technical discussion on that issue but who would resolve whether or not the nation adequately had an antitrust law and adhered to that agreement?

MS. FOX: At some point it could go to a resolution panel. Some points would be clear and some points would be gray area.

MR. RILL: This is similar, isn't it to what Konrad von Finckenstein proposed?

MS. FOX: Apparently, but I didn't read his proposal. But I was told --

MR. RILL: You weren't there?

MS. FOX: No, but I proposed this a long time ago, a few years ago in an article.

MR. RILL: Okay. Well, that's certainly something that needs to be discussed. The problem I would have with it personally as a first impression, or

second or third impression is that it falls upon a decision making body, an international decision making body, a supranational decision making body to make a determination whether or not a country has an adequate principal competition policy and even more difficult whether or not it has enforced that policy in an acceptable manner.

MS. FOX: There is a way to get around that, but it has its own problems, which is to allow a nation that claims that there is not an adequate system in the excluding nation to simply make the decision and then sue in Federal court, and let the other side challenge -- you know, you could have more self help.

MS. JANOW: Could I back us away from this particular and sort of put it in the context that I think we have been discussing this, which is not that any existing remedies would be withdraw -- that is to say, that Jim is making the argument that unilateral remedies, we might want to examine if there is room for them be strengthened. I mean surely that is a debate that is occurring in public policy in a wider community, but in addition to unilateral and bilateral, including through positive comity enhancements with more jurisdictions, what role for the WTO and what role for other initiatives, so I think with respect to what role for the WTO, I think what I'm hearing Eleanor is clarifying a position that you have written in numerous essays about an enhanced market access competition policy role for the WTO.

That is going further. It's been in your writings, it's not been in the staff-produced proposals or ideas. Ours have seen a much more incremental role

for the WTO as building up its competition expertise, possibly experimenting in sectoral areas that are deregulating, like Telecoms, continuing the activities of the Working Group, those kinds of incremental steps have been ones that we've been debating, but I think what you're suggesting is that we include an affirmative set of obligations with respect to competition and policy matters within the WTO, so I'm just putting that in.

MS. FOX: That's right, I certainly agree with all of those incremental recommendations, like certainly the WTO has to gain more expertise to answer the questions that will arise in the context of the Telecom agreement, and other agreements that mention competition law or abuse of dominance must do that. And certainly I think that either the Working Group on Trade and Competition must be continued or there must be another forum that's a little more freestanding to continue it.

MR. RILL: The thought may be that whether it's continued or not that there will be another forum to pursue the discussions at least of trade and competition issues and competition issues generally. Not all competition issues are trade issues.

MS. FOX: That's the really biggest point, the other forum would be under the banner of general competition issues. Trade and competition are a small part of that that have to be interacted with what is happening at the WTO.

MR. THOMAN: That's the world competition organization?

DR. STERN: Forum. Forum.

MR. RILL: Forum, whatever.

MR. THOMAN: My question there is who joins, why?

MS. JANOW: Everybody.

MR. THOMAN: What we heard was in hindsight, I think I heard our witnesses saying in hindsight, if we had to do it all over again, we would have one thing doing things rather than two, so I know we have an OECD and we have a WTO and we have a new thing. I'm not against it. I just didn't understand what it did. The OECD I know is a more technical area. The WTO has a issue, the knot there is trade, and so many people that have issues that it's hard to get things done, so is this a small select organization?

MR. RILL: I think quite to the contrary. I think OECD serves the small select organization purpose. Personally I would, these thoughts formulate as I speak and consider, but I think I favor something of this sort. I think it would be open to everybody, and it might well include, tentatively thinking out loud, it might well include private as well as governmental representatives in the discussion. In fact, I see almost no downside to that.

MR. THOMAN: It's useful to flesh out what it is and again whether cynically people review it as a place for the competition people to go because the trade have their WTO. I didn't understand the rationale.

MR. RILL: The rationale is to develop more consensus on competition policy, to develop more transparency on competition policy, to develop greater coordination and perhaps more agreements outside the forum, perhaps bilateral agreements and multilateral agreements down the road. Ultimately looking way down the road, maybe even to develop some kind of

general statements or maybe specific statements on substantive standards starting with the hard core cartel area that we would then recommend.

MR. THOMAN: I guess I just didn't understand.

MR. RILL: That's the thought.

MR. GILMARTIN: That's precisely the point, there is no question of competition to work on these things which I think are quite significant.

MR. THOMAN: That's true.

MS. JANOW: Sir Leon makes the point there are 80 jurisdictions with competition authorities, maybe some 60 with merger control, and there is no forum for those folks.

The trade and comp issues in a narrow band are being discussed in the WTO, but they're not talking about how do you create independent agencies, or what are the resources you need or how does one do technical assistance or what is the evidentiary requirements -- there are so many competition issues that have no home for comprehensive representation and discussion, but there are analogues, there is an international organization for securities regulators and they meet. Obviously there is intellectual property community that meets so competition policy doesn't have I think a forum. I don't think the organizational feature is as important as the deliberative. Unless there was consensus to create an organizational feature in which case maybe some organizational features could be. I think we've seen that in the APEC context where a small secretariat collected information, organized meetings, et cetera, so that was the concept.

MR. THOMAN: It's an interesting concept. I'm not being negative.

I like the idea of the private/public together. I've been again very impressed by the Business Dialogue.

MR. RILL: It partakes of elements of the TABD only in a broader geographic scale of OECD on a broader national scale, and perhaps beyond. OECD is essentially an intergovernmental organization with very restricted private input, and then it takes on the membership perhaps of the WTO only not with the sort of trade focus with all of the trade substantive issues that permeate the WTO, and that's just the thought that's put on the table for discussion.

DR. STERN: I would like to favorably react to the paper, the idea of the forum. I am not so sure about the private and public participants, and we can just think about it.

I did want to make a comment about another aspect of the trade and competition discussion which is the notion of building on the U.S.-EU agreements. I didn't see it amplified in the outline, and there is a reference to bilaterals on positive comity. The U.S. and the EU have been a model for other countries, the lattice effect. I see it addressed. There is a reference to improving bilaterals, and of course the U.S.-EU is an existing one so maybe that's where we were talking about, that's where it should go. But I just wanted to put a spotlight on the fact that we've talked about it in different hearings and meetings.

Ray mentioned it earlier today, but I didn't see amplification and I really had to search for a reference on U.S. international initiatives because there is more discussion in the plurilateral and multilateral organization arena, letter C, than there is on the amplification on this U.S.-EU model.

MR. RILL: I think that's a fair plan. Actually we're sort of there anyway in the flow of the discussion.

DR. STERN: Well, good.

MR. RILL: It will get us there in about three minutes.

DR. STERN: I knew Rick was going to leave at 4:00.

MR. RILL: Another thought is the unilateral issues we think -- maybe we think this is an issue that Eleanor has talked about and also we heard about earlier from Bill Kovacic and that is continued U.S. support for emerging market economies and developing a competition policy, whether it was through AID funding, we heard from the AID representative or otherwise, and I think there are other discussions we ought to have, thoughts we ought to have on the table.

We're obviously going to have not only another subcommittee meeting but another full Committee meeting I think on this subject alone so we have time to discuss trade and competition which we don't have.

MS. JANOW: My calendar's available.

MR. RILL: No, no, but your leadership needs to be there, too.

MS. FOX: Could I make an overall -- go ahead, I'm sorry.

MR. RILL: Just to get us to where Paula was. Some thought about the repeal of the Webb-Pomerene and Export Trading Act may be appropriate and I think we need to deal in the context of trade and competition or more generally with the issues of information sharing, which I think for current purposes in the time allowed gets us to the bilateral issue that you were talking about, but Eleanor --

MS. FOX: My general comment is Merit had encouraged us at an earlier meeting, and David had encouraged us at an earlier meeting, to take the kind of broad view of where we should be going in the world in view of globalization and internationalization and the place of competition, competition laws and disciplines within that broad view, and if one does that I think one looks at the world rather than what are the U.S. interests.

I'm a little concerned about saying let's do this in U.S. interests, let's see what the U.S. interests are and let's sell it to the world. I think that we might develop a more cosmopolitan tone of the whole enterprise. You know, you open up markets, you see where the markets are naturally and you try to develop a nonparochial policy that fits the whole market, and this way it's much more --

It's more cosmopolitan. We also will be and would be adopting a lot of ideas that the EU has already put on the table, and we really ought to be giving them credit for it and not just assuming we are reinventing the wheel because in view of the internal market of Europe, they've done an awful lot of thinking.

MR. RILL: That's a good drafting point. The structure here was designed principally, as far as I can tell, the structure was designed I think logically and perhaps not diplomatically to say, okay, here's what the U.S. can do, and then here's what the U.S. will want to negotiate with their foreign counterparts, but I think your point is well taken.

MS. FOX: It might be tone over substance, but this approach also pulls us out of our three boxes, you know, and we get a general concept, and we talk about the range of issues which don't always fall in the three boxes, and we're

sometimes talking about them under trade and competition, but they're not trade issues, and then we lay out the general framework, and we do the work in the merger area, and we do the work in the cartel area, and we do work in just general competition, like jurisdictional areas, and then we come to the trade issues which are a piece of the competition issues, and show the relationship in the direction with WTO.

MR. RILL: I think that's a good point. I want to get, before we run totally out of time, I want to get to Paula's point, the lattice notion is a good one. We have not gone into general, I think, encouragement of bilaterals because there are bilaterals beyond those which involve the U.S., Canadian, European, New Zealand, Australia, even more comprehensive.

I think that you go through this, you'll see that although the space is not great, there is -- the issues on bilaterals are touched upon, and I think there is now some experience being developed as to the effectiveness of the bilaterals, both in the formal exercise of positive comity and conceivably even in the less formal exercise of the positive comity but I think there are other issues that can be added to the bilaterals along the lines, Eleanor, you're suggesting. I think some input there would be very, very helpful.

The thought is that the first step in attacking private restraints that inhibit market access is for the maximum exercise of bilateral relationships, if they can be achieved.

Now that's a question that I think we would want to talk about because then we would be recommending to the Department a greater use in

expansion of bilaterals and I'm not sure where the Department is on that at this point. I'm not sure it matters where the Department is at this point.

MS. FOX: Would you think that's en route to multilateralizing?

MR. RILL: In time, perhaps.

DR. STERN: Yes, in time. Because we've anticipated that idea of at least the U.S.-EU relationship as a model for others for expanding out. It's a stepping stone.

MR. RILL: Rick, before you go, is there any comment?

MR. THOMAN: No, I think that's a great suggestion. I think we have jumped awfully quickly into the role of Justice. I think it's a good drafting point.

MR. RILL: It's certainly not intended to be parochial or jingoistic, but I think the point is well taken, it could be read that way. I think the reasoning was not to do that, I think the reasoning was to say logically, here's what we can do and here's what we have to do together.

MS. JANOW: Impulse was exactly the opposite, which was not to opine to others before we opine to ourselves, but I think that it is instead an introductory chapter that talks about competition policy and a global economy and its applications be that merger or trade and competition, subsequently.

MR. THOMAN: I thought it was a good paper. I just didn't quite understand some things.

MR. RILL: And understandably you didn't understand it. When I was raising questions, I was having a little trouble trying to forge through it

myself, and I can say that without criticizing anyone else other than perhaps in part myself, but I think we have tried to articulate that a little bit.

I think that the remainder of the paper deals with the types of organizations that might be involved in the trade and competition issue. We've talked about that pretty much all day, especially the OECD and the WTO, and now we're talking about a world competition forum. That essentially is the framework in which the current thinking progresses.

Now we have had a number of proposals put to us for a more aggressive role for the WTO, and perhaps a more aggressive position in the, let's call it the market access area, call it what it is, presented to us by some of the witnesses that have testified. I think of Thomas Howell, Alan Wolff's colleague, and Dick Cunningham, who would have a competition role, for example, the ITC which would produce binding conclusions on the antitrust agencies.

I think Dick Cunningham's view is that there would be some remedy for a systematic foreclosure that substantially lessens competition and I'm not sure how refined Dick has actually gotten with those proposals, but I think we owe consideration to those proposals. Personally I'm very skeptical of them, but that's just a personal view. I think we need to talk about those and deal with them as part of our deliberations in the Committee. I don't know, Dick Simmons, whether you have a view on that?

MR. SIMMONS: No. I am a natural born skeptic, as you know, but I would just like to see them all laid out there.

MR. RILL: That's what I'm suggesting.

MR. SIMMONS: No, I would like to see them laid out. It is very difficult, you have to understand where I come from. It is very difficult for me to look at things totally in the theoretical when it comes to government involvement.

I almost have to see pragmatic examples of the extreme boundaries that we're talking about because that's the very nature of the way the government operates. The best example to me is the recent decision by the government in the products which my company doesn't make but which we're interested in watching, and this is the suspension agreement on the steel just announced yesterday, I guess, with Russia when in fact these outrageous duties in the same cases were filed against Japan, a suspension agreement was also made with Brazil.

Now, if I were a Japanese producer, I would try to figure out some way of filing a suit against somebody for being discriminated against, even though our law, our antidumping laws permit our government to do that.

Jim, am I making the kind of point that --

MR. RILL: Well, you're certainly making a point. It's a strong policy point, and I think the policy point once again goes back to -- actually, you know what it does, Dick, it goes back to this whole overarching issue of transparency.

MR. SIMMONS: Yeah.

MR. RILL: And why is Peter not treated the same as Paul.

MR. SIMMONS: Here is a case where I think we're doing something that is offensive to one of our major trading partners, in this case Japan.

MR. RILL: And I think it's not altogether clearly articulated by the

government as to why these particular distinctions are made, and I think that the transparency issue --

MR. SIMMONS: So that's a little bit why I'm so skeptical. As you know, I've been involved in this process for so many years that I always try to beware the bearer of gifts, I want to know what's in the box.

MR. RILL: And that's a fair point.

MR. SIMMONS: So it seems to me that as we look at all these things, we should look at them all, not preclude any.

MR. RILL: I think some people have given some very serious thought to some of the alternative approaches to the market access issue. They've taken the time to prepare papers and come before us with proposals and come before other bodies such as the U.S. Congress with those proposals.

MR. SIMMONS: And you did mention the issue of private right of action just a moment ago, which is perhaps, you know, Arlen Specter is trying to gain some support for it. He won't, but he is going to try again.

MR. RILL: Well, I actually made an appearance before the OECD Competition Law and Policy Committee urging that private action would be something that should be encouraged at bilateral discussions as a mechanism for further relief, and I think that's another one we would want to lay out and consider.

MR. GILMARTIN: But I think, I'm speaking very theoretically here, but it strikes me that our discussions have been all along the line of not having to seek relief by using the government but how to set up a framework that

fosters competition and is enabling because along the lines of what Dick said, I remember Senator Moynihan said at a session I was at 15 years ago, he said be careful what you ask the government for because they can do to you in the same or great proportion as to what they do for you. So, I mean, when you seek relief from them --

DR. STERN: The curse of the Greek gods.

MR. GILMARTIN: That's what we're talking about.

MR. RILL: The other thing we need to focus on more in the trade and competition area is the extent to which we would want the Justice Department to engage in advocacy involving government restrictions on open competition.

It's certainly true in the intellectual property area where we do have at least a WTO agreement of questionable force, but in the intellectual property area, enormous restraints I think that are imposed largely by government, and here is an advocacy opportunity for the Department of Justice and a good reason for it to have a seat at the table --

MR. GILMARTIN: Right.

MR. RILL: -- in the trade and competition discussions. There are any number of other examples, we had a discussion of industry standards, you will recall, by Len Waverman and his colleagues that demonstrated in the cell phone area the standard which is to preclude anybody who wasn't an internal market player.

Those are areas I think that probably are as or more serious, have as much if not more serious impact on open competition as private or hybrid

restraints. That's something that we would be remiss if we didn't discuss and urge the government to focus on.

Paula, we've been through the outline. It's been very sketchy because of the really good discussions we've had before now, but I think what we've done is highlight the areas of discussion.

DR. STERN: Yes.

MR. RILL: I think we're probably going to need certainly another working group meeting and probably -- well, certainly another Committee meeting --

DR. STERN: Yes.

MR. RILL: -- after that on these subjects.

DR. STERN: I agree.

MR. RILL: Dick, we may even do it in Pittsburgh.

MR. SIMMONS: Thanks.

MR. RILL: I really would like to sit down with you on this thing. I think the working group would, too.

MR. SIMMONS: I would be glad to host it.

DR. STERN: Well, thank you.

MR. RILL: That's really where we are.

DR. STERN: Okay.

MR. RILL: We've hit the high points.

DR. STERN: It's been a wonderful day thanks to everybody's input and participation. I think we've been extremely lucky to have had such really

good discussion leaders, my Co-Chair, Jim Rill, Tom Donilon, Professor Bill Kovacic, Rick Thoman and also Dr. Thea Lee, and so unless Merit has some other administrative matters to give us, it looks like she's got some papers to give us, I'll turn it over to you, Merit.

MS. JANOW: Okay. We thought you might want to see a few things because you have nothing to read. We have gotten a lot of submissions from various folks, and so we have given you a list of them. If any of them interest you, then just ask us.

Also, the EU has, the Commission has advanced formally, I guess, its proposal on what it wants to do at the WTO.

MR. RILL: Yes.

MS. JANOW: And so we have --

MR. RILL: You're talking about the European Commission, not the Federal Trade Commission?

MS. JANOW: That's correct. The European Commission has submitted to the European Council its proposal on competition policy at the Millennium Round, so I duplicated a copy of that formal position for your consideration.

Eleanor, your piece in the Journal of International Economic Law is an interesting piece. We've made a copy of it.

DR. STERN: Do we have your copyright permission?

MS. FOX: Yes.

MS. JANOW: We did get a submission from Dewey Ballantine that

I'm bringing to your attention as well as a list, so if you would help yourselves.

Our next scheduled meeting is October 5th. Obviously that is in the distant future, and we will be turning to drafting something. I'm hoping as the next approach, we might be having a discussion around a draft as against sort of an outline. If you have a different suggestion as to approach, please let me know. And thank you very much.

MR. RILL: Do you think one day's going to be enough for that? Is that all we're going to be able to hold people?

DR. STERN: I think so. I think we should shoot for one day, and then see what happens.

MR. RILL: We've really got a lot to talk about today even without a draft in front of us.

DR. STERN: We certainly should get the draft in advance, and then if people would like to mark it up, we might think about shortcuts, sending out the draft in advance, having individuals if they wish to mark it up, and fax it back, you know, a week's time ahead, have the staff analyze the marginal notes, and put in those areas that they've identified where there's disagreement so as to focus our discussion. That's just off the top of my head, but you all may have some other ideas about how to cut through and get the input and synthesize it so that we're just talk about --

MR. YOFFIE: You might try to make it longer, I might suggest a somewhat an longer day. Once you have everybody here, you can keep them here for an extra hour or two.

MS. JANOW: How about two days?

DR. STERN: Two is not good.

MR. YOFFIE: If we stay until 6:30, that would be far better than trying to do two days.

MS. JANOW: Or the dinner before and then extending through? No?

MR. RILL: I don't think you would get much done at dinners.

DR. STERN: I agree with you, David. I think we should tell people what very clearly when we're going to begin in the morning and say that we're going to shoot for a certain closing time, but that we, unlike other meetings, will not be as punctual in ending as we have been in the past.

MR. RILL: I think that's announced in advance, that's fine. If it's not announced in advance, we make plans for after the meeting.

DR. STERN: Precisely.

MS. FOX: I won't be at the next meeting because I have classes the next day, so I'll just give extensive input.

MR. RILL: I don't know what the budget area situation is, but would it be more convenient to have it in New York rather than here?

MS. FOX: I could call in for part of it.

DR. STERN: I'm sure the staff will be reconfirming dates and times, and you'll be getting venues and you'll be getting further --

MR. DUNLOP: The only comment I would say out of experience is if we could have a draft a week ahead of time.

MR. RILL: That would be no problem.

MR. DUNLOP: And could we expect for those who volunteer to write you to tell comments on that, and then try to focus the discussion on issues that -- you're dealing with a big document.

DR. STERN: Absolutely.

MR. DUNLOP: There are a lot of issues of language and so on. Anyway, I would be speaking only for myself. If you get us something ahead, I could bring it to the meeting a memo which says what my comments on your draft.

DR. STERN: That would be wonderful. In fact, we might even ask you to send the memo in advance so that --

MR. DUNLOP: I don't know about that.

DR. STERN: Well, we'll send it to you two weeks ahead of time so that the staff will be able to synthesize --

MR. DUNLOP: Now you're negotiating.

DR. STERN: No, I'm not. My suggestion is so that your comments, along with Eleanor's and everybody else's will be synthesized by the staff, and they'll be able to see where there are differences.

MR. DUNLOP: My whole idea is that since in the end if you're down to the drafting stage, then words make a difference.

MR. RILL: Oh, yes.

DR. STERN: Good.

MR. RILL: Thanks, everybody, for coming.

DR. STERN: Yeah, thank you all. Thanks again to the staff. Nice work.

MR. SIMMONS: Thanks for letting me participate.

DR. STERN: Thanks for your time, Dick. Bye.

(Whereupon, at 4:30 p.m., the taking of the instant hearing ceased.)