1 INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

2 HEARINGS

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6 Washington, D.C.

7 April 22, 1999

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13 This document constitutes accurate minutes of the

14 hearings held April 22, 1999, by the International

15 Competition Policy Advisory Committee. It has been

16 edited for transcription errors.

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19 James F. Rill Paula Stern

20 Co-Chair Co-Chair

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14 Taken at the Center for Strategic and International Studies, 1800 K
15 Street, N.W., B-1 Conference Center, Washington, D.C., beginning at 9:00
16 A.M., before Ann Marie Federico, a court reporter and notary public in and for
17 the District of Columbia.
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1 APPEARANCES:

2 Advisory Committee Members:

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

4 PLLC

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

6 Merit E. Janow, Executive Director and Professor in the Practice of

7 International Trade, School of International and Public Affairs,

8 Columbia University

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

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

11 University

12 Eleanor M. Fox, Walter Derenberg Professor of Trade Regulation,

13 New York University School of Law

14 Department of Justice Employees:

15 Joel I. Klein, Assistant Attorney General, Antitrust Division

16 Other:

17 Debra Valentine, General Counsel, Federal Trade Commission

18 Members of the Public Who Made an Appearance and Presented Written or

19 Oral Statements:

20 Panelists: Confidential Information Sharing:

21 Klaus F. Becher, Associate General Counsel, DaimlerChrysler AG

22 A. Neil Campbell, McMillan Binch

23 Janet L. McDavid, Hogan & Hartson LLP

1 Panelists: Confidential Information Sharing (cont'd.)

2 Phillip A. Proger, Jones, Day, Reavis & Pogue

3 Panelists: Representatives of Trade Associations:

4 American Forest & Paper Association - Maureen R. Smith, Vice President,

5 International

6 The Business Roundtable - Robert C. Weinbaum, Assistant General Counsel,

7 General Motors Corporation; Thomas B. Leary, Hogan & Hartson, LLP

8 National Association of Manufacturers - Stephen Bolerjack, Counsel,

9 Antitrust and Trade Regulation, Ford Motor Company

10 U.S. Chamber of Commerce - William Blumenthal, King & Spalding

11 U.S. Council for International Business - Thomas M. T. Niles, President

12 Panelists: The Role of International Institutions in Competition Policy:

13 Joe Phillips, Organization for Economic Cooperation and Development

14 Mark A. A. Warner, Organization for Economic Cooperation and

15 Development

16 Panelists: The International Antitrust Law Committee of the ABA Section of

17 International Law and Practice:

18 Donald I. Baker, Baker & Miller PLLC

19 Michael H. Byowitz, Wachtell, Lipton, Rosen & Katz

20 Paul S. Crampton, Davies, Ward & Beck

21 Daryl A. Libow, Sullivan & Cromwell

22

23

1 IN ATTENDANCE:

2 Advisory Committee Staff:

3 Cynthia R. Lewis, Counsel

4 Andrew J. Shapiro, Counsel

5 Stephanie G. Victor, Counsel

6 Eric J. Weiner, Paralegal

7 Estimated Number of Members of the Public in Attendance: 30

8 Reports or Other Documents Received, Issued, or Approved by the Advisory

9 Committee:

10 International Bar Association, Exchanges of Confidential Information

11 Between Antitrust Enforcement Agencies, Preliminary Observations

12 Prepared by a Working Group of the Antitrust and Trade Committee

13 of the International Bar Association

14 International Chamber of Commerce, ICC recommendations to the

15 International Competition Policy Advisory Committee (ICPAC) on

16 exchange of confidential information between competition authorities in

17 the merger context, prepared by the Commission on Law and Practices

18 Relating to Competition

19 American Forest & Paper Association, Presentation by Maureen R. Smith,

20 Vice President, International, American Forest & Paper Association

21 The Business Roundtable, Statement of Robert C. Weinbaum, Office of

22 General Counsel, General Motors Corporation, on behalf of The

23 Business Roundtable Task Forces on International Trade and Investment

1 and on Government Regulation

2 National Association of Manufacturers, Testimony of Stephen D. Bolerjack,

3 Counsel, Antitrust and Trade Regulation, Ford Motor Company, on

4 behalf of the National Association of Manufacturers

5 U.S. Chamber of Commerce, Comments of the U.S. Chamber of Commerce

6 United States Council for International Business, Comments of the United

7 States Council for International Business (USCIB) on International

8 Competition Issues to the International Competition Policy Advisory

9 Committee, May 27, 1999; Preliminary Comments (Oral Statement) of

10 Ambassador Thomas M. T. Niles, President, USCIB

11 OECD, Speech by Joanna R. Shelton, Deputy Secretary-General, OECD,

12 "Competition Policy: What Chance for International Rules?" (Nov. 25,

13 1998), submitted by Bernard Phillips

14 ABA Section of International Law and Practice, presentation by Members of

15 the International Antitrust Law Committee (Don Baker, Mike Byowitz,

16 Paul Crampton and Daryl Libow)

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1 P R O C E E D I N G S

2 MR. RILL: Let me welcome everyone to the April 22 hearings
3 of the International Competition Policy Advisory Committee and express my
4 thanks to those of you who will be appearing today, and to the press and others
5 in the audience. This is actually the second wave of hearings. We also had a
6 hearing scheduled for tomorrow but were ousted by the crowds of the 50th
7 anniversary of the North Atlantic Treaty Organization. A few of us in the
8 room remember when that was signed.

9 The Committee's hearings today were really prompted by a
10 number of very thoughtful papers and views that have been presented to us.
11 Also, they have been prompted by exchanges at the last hearings -- those
12 hearings took place in November and focused on a variety of issues that are
13 going to be discussed and illuminated today.

14 Today's hearings will progress with four separate sessions.
15 Session 1 on confidential information sharing; Session 2 on presentations by
16 various representatives of trade associations which have been particularly
17 knowledgeable and interested in the work of the Advisory Committee; Session
18 3, which now has become basically an OECD session -- we at our November
19 hearings had participation by a number of governments interested in the
20 merger, trade and competition and enforcement cooperation areas. Today we
21 will hear from two representatives of OECD -- representing 29 governments --
22 and finally Session 4, a presentation by the representatives of the International
23 Law and Practice Committee of the American Bar Association, which has met

1 with us on a couple of occasions and done a great deal of work in this area.

2 Before recognizing the first panel, I would like to acknowledge

3 the Committee members who are present: John Dunlop, Eleanor Fox, and my

4 Co-Chair, Paula Stern, and our erudite and extraordinarily competent leader,

5 Executive Director Merit Janow.

6 Again, before recognizing the first panel, I would like to call on

7 Paula for any introductory comments she may have and then turn it over to

8 Assistant Attorney General Klein, who is the father of this effort.

9 DR. STERN: I would like to just second the welcome to

10 everybody, particularly those who have come from so very far, and say that we

11 are closing in on a number of the issues. We feel we have made an enormous

12 amount of progress thanks to the input of individuals like yourselves. Your

13 individual input has been extremely valuable and I am looking forward to a

14 very fruitful day, and of course on May 17th we will resume the hearings that

15 we have postponed that had been scheduled for tomorrow. And I am now

16 looking forward to hearing from the father of the Committee, Joel Klein.

17 MR. KLEIN: Thank you. It's often been said that victory has

18 many parents and defeat is an orphan. I am happy to have sired this enterprise.

19 I hope I feel that way on the day the final report comes out. For the time

20 being, actually this really was the Attorney General's ultimate decision and she

21 deserves a great deal of credit, because I am sure there were a number of

22 people out there who said to her as they said to me: Well, why would you

23 unleash at least a dozen people who are not in your employ, and who are

1 independent and tough-minded people with a lot of knowledge and background
2 in this area to go out and make a report that will tell the Department all sorts
3 of things that it ought to be doing with respect to international antitrust
4 enforcement?
5 I think it reflects, truly, her sense of security and her willingness
6 to reach out to some of the finest, most talented people in the field to bring in
7 recommendations in an area in which, frankly, there are not easy and obvious
8 answers. And I think it's not typical in government to go out and put this much
9 responsibility and this much power, frankly, in the hands of an advisory
10 committee.
11 Everything I have seen about the process confirms to me that the
12 judgment that the Attorney General made was right. The hearings that were
13 held last fall, I think, were really landmark hearings. The bound transcript
14 that's come out of that is a document in and of itself worthy of careful
15 attention and study. And I anticipate the report we're going to get later this
16 year from this Committee is going to be really a true landmark report in the
17 issues of globalization of antitrust enforcement, and the intersection of trade
18 and competition policy.
19 Let me tell you, it could not come at a more timely point in our
20 history. Even as the Committee does its work, this area keeps growing and
21 exploding. You wake up this morning and you see the proposed merger
22 between Deutsche Telekom and Telecom Italia. And that is simply a harbinger
23 of what we are going to see in the next five to ten years. People who do not

1 think we are going to see a spectacular increase in global mergers along the
2 lines of these $50-$100 billion-plus deals in the next four to five years should
3 not be allowed to go online by themselves during day trading.
4 (Laughter)
5 This is as obvious as it is compelling. It's going to raise some
6 very, very complicated issues. I am sure, as we sit here now, people
7 throughout the world are thinking about the implications of this particular
8 merger and, indeed, what it does to the ongoing relationships between Sprint
9 and Deutsche Telekom, and France Telecom, a transaction that the Division
10 actually reviewed and conditioned when it originally took place.
11 Beyond this merger boom that we currently see and will continue
12 to see, I cannot tell you because it's confidential, but I can indicate something
13 about the nature of the Division's work in cartel enforcement, international
14 cartel enforcement. Again, this reflects truly a sea change in antitrust
15 enforcement. The nations of the world have come several standard deviations
16 in terms of their levels of cooperation between what we saw in 1993 and '94,
17 when we did the DeBeers/GE cartel case, to what we're seeing now. And it's
18 frequently been reported that we have somewhere around 30 active grand juries
19 looking into international cartels. What's not as well known is the magnitude
20 of the volumes of commerce that are affected by these price-fixed industries.
21 And for those of you who often hear in academic debates
22 questions about whether there is a need or not a need for antitrust enforcement,
23 the fact that this could be debated anywhere proves to me that there is not

1 enough reports going on in the academies. But when you think about this and
2 look at the fact that, with effective global worldwide antitrust enforcement,
3 there are at a minimum, I believe, 20 or 30 huge ongoing international cartel
4 conspiracies that are taking, I believe, billions of dollars annually out of the
5 U.S. economy, the need to be as effective in the international setting as we are
6 in the domestic setting is absolutely critical. And the work of this Committee
7 will obviously have an impact on that as well.
8 And finally, it could hardly be more timely in terms of the issues
9 at the intersection of trade and competition policy -- which I will tell you are
10 some of the most difficult and sensitive issues both in terms of thinking
11 through the policy and, indeed, of thinking through the politics. And I will
12 look forward to the report of the Committee in that respect.
13 In the meantime, we have now got actually our first at least
14 partial result of our first positive comity referral on the computer reservation
15 system that we referred to Europe -- to DG-IV -- with respect to Sabre's
16 concerns about market access in Europe. At this point, DG-IV has issued a
17 statement of objections that is a kind of Notice of Proposed Finding of
18 Violation to Air France. In the meantime, Sabre has resolved its disputes in
19 terms of the private negotiations with respect to Lufthansa and SAS, all of
20 which suggest that positive comity can be and will be a modest but important
21 player in the issues at the intersection of trade and competition policy.
22 At the same time it's obviously essential, from our point of view,
23 that competition policy remain soundly based in key antitrust economic

1 principles and that the issues at the border of trade and competition policy not
2 be clouded in any way that undermines or erodes effective antitrust
3 enforcement. In that regard, we're looking toward the end of this year to
4 another round at the World Trade Organization. And while there will be a
5 wide variety, I'm sure, of different views, for the United States I think this is
6 really one time where the Goldilocks policy -- which is we don't want it to be
7 too cold or too hot -- is going to be a critical balance.
8 And what I mean by that is, I think it is very important that the
9 WTO keep a key oar as probably, in many respects, the most inclusive global
10 organization that will be looking at the range of issues at the intersection of
11 trade and competition. I think they have got to remain a key player in this
12 evolving process which I think we have to take a long-term view about. And at
13 the same time I don't think they are ready for dispute resolution. And so, what
14 I want to make sure is that we both continue to empower the WTO efforts in
15 this area while at the same time we don't prematurely reach some model of
16 dispute resolution or hard negotiations which could in the end do more harm
17 than good. So that will be a role that we will play, I believe, aggressively. Of
18 course, we will await the recommendations of this Advisory Committee as we
19 continue to refine our thinking in detail in all of these areas.
20 I just want to leave -- this is actually a little longer than I
21 typically do this, because last week I had to sit and listen while all these people
22 associated with the American Bar Association spoke at their annual Spring
23 meeting, so I figured this is my shot to make them sit and listen while I speak.

1 But none was more eloquent than Phil, who had to try to manage 2,000 people
2 who had, it seemed to me, each gone to about 2,000 cocktail parties before they
3 showed up. He handled it. He said, in one of the lines that will sort of live
4 forever, he said, “We're going to introduce the front table, and I would ask
5 only one thing, that you hold your applause until the end.” And what
6 everybody on the front table said is, you should ask only one thing, “Would
7 you be kind enough at least to applaud?” I think you managed some success in
8 that.
9 But I close by telling you that, actually, I think as we move
10 forward, the need for the work of this Committee, the thoughtful engagement
11 that is likely to grow out of the enormously fine work that has occurred, is so
12 critical now that, whatever else, I will credit the Attorney General not just for
13 her foresight but for her brilliance in timing. Because this is the right time for
14 this report. Let me again thank you Jim, Paula, the members of the Committee,
15 and also Merit and the members of her staff, who have just done a terrific
16 amount of very, very good work. I am personally much in your debt and I'm
17 sure the Attorney General shares that as well. Thank you.
18 MR. RILL: Joel, thanks very much. We are personally very
19 much in your debt for the support and leadership you have given us, as well as
20 the resources that we have available to us, a truly superb staff. Cynthia
21 Lewis, Andrew Shapiro, and Stephanie Victor, who work tirelessly to develop
22 papers and think-pieces for our input. And also as a matter of my own
23 observation privilege, Sarah Bauers of our firm, who also has contributed an

1 enormous amount of time and insight into this project.

2 With that, we'll just turn to the first panel. At our last hearings
3 there was a great deal of discussion on the issues related to the sharing of
4 confidential information which is necessarily implicated in all of the subjects
5 that we're dealing with: mergers, trade and competition, and cartel enforcement
6 cooperation. And interest was expressed by the Committee members and by
7 the panelists in having a more detailed exploration of those issues. So today
8 we have representatives of three organizations that volunteered, I will use that
9 term advisedly, to present papers and views on the issue of confidential
10 information.

11 The IBA group is represented by Neil Campbell, of McMillan
12 Binch in Toronto, an award-winning student, an award-winning professor, the
13 Rapporteur of the Global Forum, and if you don't know what that is, you need
14 to read some of his papers, which are truly excellent. Let me commend a
15 recent paper that was put out on international merger control, the recent book
16 that was put out on international merger control by the Global Forum.

17 The ICC, International Chamber of Commerce, will be
18 represented by Klaus Becher, who is associate general counsel for
19 DaimlerChrysler. Klaus has been in the antitrust world for 15 years, is a
20 member of the ICC's Commission on Competition, and is head of a task force
21 of the International Chamber of Commerce that was put together to present
22 views to us on this subject.

23 The third presentation is a panel of the leadership of the

1 Antitrust Section of the American Bar Association. Let me emphasize that
2 today they're speaking for themselves based on their enormous expertise and
3 not expressing the view of the American Bar Association, the Antitrust
4 Section, and possibly their partners. But I can only say that having been
5 through the bureaucracy of the American Bar Association, we understand that
6 position fully and are delighted to have the views of such expert panelists.
7 Phil Proger, of Jones Day Reavis & Pogue, the current chair of
8 the Antitrust Section, and a longtime practitioner in antitrust, is one of our
9 panelists of ABA Antitrust Section leaders. And the other is Jan McDavid, of
10 Hogan & Hartson, who is the incoming chair of the ABA Section of Antitrust
11 Law. I'm privileged to have worked and known both of them as friends and
12 respected colleagues for more years than probably any of the three of us care
13 to think. But they bring to this panel a unique expertise in international
14 mergers, trade and competition, and enforcement issues.
15 So without introducing each, take the time you need to give us
16 your views and if it's agreeable we'll save the questions until all the panelists
17 are through. So, Neil, if we may start with you. Actually, Neil, I'll reverse
18 that for a minute because I understand Jan has to leave. You don't? Okay.
19 Then we'll save the questions to the end. And Neil, if we could have your
20 views, then go to Klaus and Phil and Jan.
21 MR. CAMPBELL: Jim, thank you very much for the kind
22 introduction. And good morning to you, and all the Committee members and
23 guests. It's a great honor and privilege to come and speak to this group,

1 particularly when we hear the Assistant Attorney General explaining what he
2 thinks the significance of the work of this Committee is.
3 And, Jim, as you have said, the history leading to us being here
4 this morning is some discussion about information-sharing issues at the
5 November Advisory Committee hearings. And I can say on behalf of the
6 International Bar Association, the IBA, that they very much appreciated the
7 invitation to provide input into that process. And what the IBA has done
8 through its Antitrust and Trade Committee is strike a small working group. I
9 think I have to make the same caveat that you made for others, and that is that
10 what you will hear this morning are the views of the working group of three,
11 which have not gone through the protocols of an IBA formal policy statement
12 approval.
13 My colleagues in the working group are Terry Calvani, of the
14 Pillsbury, Madison firm, who I think is well known to many people here, and
15 had hoped to be with us this morning but has been called away and asked me to
16 give his regrets. And John Davies, from the Freshfields firm in Brussels, who
17 was not able to come this morning also asked me to give his regrets. They have
18 both given me carte blanche to go ahead and speak to the written material
19 which we have made available to the Committee last week. What I propose,
20 therefore, to do is to simply touch on some of the highlights in that material
21 without speaking to all of it in detail. But I will be happy to take questions on
22 any of the more detailed points.
23 What I would like to do is to highlight five areas. First what we

1 think are the four key points that we would want people to think about in broad
2 brush in this area: to spend a little bit of time on what we see as the
3 stakeholder incentives in this particular area; to discuss some things that we
4 feel are sensible and appropriate general principles: to spend a moment on
5 what we think is the most difficult issue, which is the question of notification
6 and prior authorization before confidential information is shared; and finally,
7 to speak briefly about waivers of confidentiality, which is the area that we feel
8 is most promising for very significant progress in the short term.
9 We have made an assumption not stated in our written material
10 that the protection of confidential information of companies is an important
11 thing. The assumption here is that there are not only compelling private
12 interests that make this important but that there is a compelling public interest
13 in protecting that confidentiality. I won't say a lot about that fact. On
14 occasion I have encountered people who may express some doubt about that.
15 If that assumption is one that the Committee does not share, I would be happy
16 to speak to it in more detail. But we took that as our point of departure.
17 From that we began to think about where we are currently, in
18 terms of the practice in the sharing of confidential information as the three of
19 us have seen it and experienced it. That experience is based in all of our cases
20 as being lawyers in private practice who advise companies in merger and
21 criminal and other cases which, as was said in the introduction, are clearly
22 becoming increasingly international.
23 The first point that I would like to emphasize is a relatively

1 unhopeful one, and that is that we do not think that there is going to be rapid
2 progress on non-voluntary exchanges of confidential information unless
3 agencies and their governments are prepared to introduce legal frameworks
4 with relatively stringent and serious safeguards for the protection of that
5 information. The basic reason for that conclusion is that private parties in the
6 business community in most countries are going to be unlikely to perceive
7 significant benefits in the non-voluntary settings and will have very significant
8 concerns about the protection of privacy and fairness.
9 Our second conclusion is much more optimistic, and that is that
10 we believe that there is great scope for continued expansion of the use of
11 voluntary waivers in merger cases and in some non-merger cases, particularly
12 in the process of parallel settlement negotiations with multiple agencies. We
13 are hopeful here because in those particular situations we see potential for
14 significant benefits to both the enforcement agencies and to the private parties
15 who are involved in the process.
16 Our third conclusion, or perhaps recommendation would be a
17 better characterization, is that in trying to make waivers more useful and
18 acceptable, we think it is particularly important that waivers be truly voluntary
19 and that they do not become an automatic activity. The issue around
20 voluntariness is that, in the context of a merger and many other situations, the
21 enforcement agencies have very significant practical leverage which results
22 from the discretion that individual officials have in the activities that they
23 undertake on a day-to-day basis in the investigation. We think that this is a

1 subject not much talked about that deserves some serious attention if we are to
2 recommend a real enhancement in the use of voluntary waivers. With respect
3 to waivers not becoming automatic, the concern is that waivers actually be
4 requested and used in situations where there is, in fact, some real benefit to
5 agencies and to the parties giving the waivers. There is a risk that, if waivers
6 become habitual, they may be used in situations where they, in fact, expand the
7 time and cost of an investigation process rather than reduce it.
8 Finally, we note that there is very substantial variability right
9 now in the legal and in the practical levels of confidentiality protection in
10 jurisdictions around the world. Without naming names, we would have very
11 serious concerns about exchanges of confidential information going into
12 certain jurisdictions. There are other jurisdictions where the legal and
13 practical degree of protection would be much higher and the level of trust and
14 confidence would accordingly be much higher.
15 And so what we would suggest for the United States as it thinks
16 about going forward in this area would be to look ideally at a system that will
17 be multilateral rather than a series of checkerboard bilaterals, but that would
18 begin with jurisdictions in which there is a long history of cooperation to work
19 from, where there is a high volume of cases to make the effort worthwhile, and
20 where the other country and agency has a clear and well-established domestic
21 track record on confidentiality. Over time, we would expect that more and
22 more of the jurisdictions would come into a position of meeting those kind of
23 criteria and could be added.

1 Let me now turn for a moment to the stakeholder incentives. It
2 was our analysis of the two primary stakeholders which has led to a number of
3 the conclusions that I have spoken about. From the perspective of enforcement
4 agencies, we see significant benefits and no particular downsides to very broad
5 scope for sharing of confidential information to facilitate enforcement in all
6 cases -- merger cases as well as non-merger cases.
7 From the perspective of private parties, the position is quite
8 different. There are cases, particularly mergers, where possible time and cost
9 savings can be very, very significant. And this ties into broader issues that the
10 Committee is looking at about how to make cross-border merger review more
11 efficient.
12 I should actually digress to make a side comment that I meant to
13 make in the introduction: we have had the benefit of reading a number of staff
14 papers on a number of subjects, and while we were not speaking to those in
15 detail, the three of us did want to say how much we were impressed by the
16 scope and quality of analytical work that the Committee staff have been
17 undertaking. There do seem to be some very, very useful and promising ideas
18 being considered.
19 Coming back to the comment on private parties, there is scope
20 for advantages, particularly in merger cases, and in other settlement
21 negotiations. But there are also, as you will have heard and will hear from the
22 ICC, a number of very significant -- at least perceived and sometimes real --
23 concerns, and a number of those are listed in our written material. I will just

1 touch on a couple of them here.

2 One is simply the risk that increases every time you have

3 information in multiple locations. It's the commercial business risk of

4 disclosure of highly confidential information, and it is a particular feature of

5 antitrust that you are working with marketing and strategic planning

6 documents of the highest business sensitivity to organizations in many, many

7 of the investigations.

8 The second area is the incremental legal risk that companies face

9 when confidential information which is potential evidence is disclosed to other

10 jurisdictions. This is particularly significant where there are substantial

11 differences between the legal systems in question. There are many similarities

12 currently but also many significant substantive differences, as we all know,

13 between the European and the American system or the Canadian and the

14 American system, and even more when you consider some other jurisdictions.

15 I think the Committee should consider that, to people outside the

16 United States, the United States system is seen as a system that carries

17 enormous legal risk in terms of the potential penalties, including criminal

18 penalties, as well as the potential for private actions and treble damages and

19 simply the time and cost of legal proceedings. That will be a factor as people

20 outside the United States think about confidential information flowing into the

21 United States.

22 So we would say that private parties are seldom going to be

23 motivated to expedite or enhance sharing information in what might be called

1 “violation” cases -- be they criminal conspiracy cases or other non-merger
2 cases -- unless they are working towards a parallel settlement negotiation.
3 Thus, we conclude that in non-merger cases, legislation and international
4 agreements that have really substantial safeguards that will give private parties
5 a comfort level about the protection of confidential information would be
6 needed to facilitate information sharing. If the agencies and governments are
7 not prepared to address those issues, we think there will be significant
8 resistance to making progress on non-voluntary exchanges. On the other hand,
9 we conclude that the use of waivers in merger cases is one where there is very
10 significant scope to make progress in the short term. Indeed there is a lot
11 already happening there.
12 I would like to turn briefly to some of the general principles that
13 we felt should be considered in this area. They are set out in some detail in the
14 written material, so I'm just going to touch on them. One is with respect to the
15 use of the confidential information and the basic ideas that it is used only for
16 the designated purpose of advancing a particular investigation.
17 We also make a number of more detailed suggestions that were
18 actually inspired from commercial confidentiality agreements, which are very
19 commonplace in all sorts of transaction settings. We think they have some
20 useful concepts in terms of the disclosing party having discretion but not
21 obligation to disclose information, requirements to return information, and the
22 idea that there need to be remedies or sanctions if the agencies do not, in fact,
23 adhere to the legal requirements that surround the protection of confidential

1 information. I think this is something that was touched on in what I regard as
2 the seminal discussion of this whole area, which is the 1991 report of the
3 ABA's International Antitrust Committee. We also comment briefly on how
4 information should be treated. I'll touch only on one point there, which is the
5 concept of national treatment -- that foreigners should not be discriminated
6 against relative to domestic companies.
7 The third principle is no downstream disclosure, and in our view
8 this is the most fundamental item. It is again not one we thought of originally
9 but one that was identified by the ABA's 1991 report. At a minimum it means
10 a track record of no leaks and no free flow to other federal or to subfederal
11 government agencies. But it also, to get a complete closed loop in the
12 downstream, means closing off the ability of third parties to drag information
13 out of the receiving agency using access to information laws or using discovery
14 rules. We're not persuaded that there is any system in the world currently that
15 has a complete closed loop with no downstream disclosure. Any shortfall from
16 that raises an issue that is of concern to private parties in a particular case,
17 whether it is a voluntary or non-voluntary exchange.
18 The fourth point is the preservation of legal privileges. This is a
19 detailed and difficult area. The basic points we would like people to think
20 about here are that there may be privileges that belong to the agencies but also
21 privileges that belong to the private parties involved in having provided
22 information. We think that what makes sense is a “highest common
23 denominator,” where the privilege can be claimed at the highest level available

1 in either the receiving or the disclosing jurisdiction.

2 The fifth point is that the receiving agency should be under an
3 obligation to assert whatever confidentiality and privilege claims can be made.
4 We think at that stage there is also a need, when the third party is seeking
5 information by discovery or access to information laws, to have a notification
6 mechanism so that the private parties affected also have the opportunity to use
7 their best efforts to protect their information, which may include disclosure
8 subject to an appropriate protective order.

9 Finally, we strongly encourage the use of policy statements in all
10 of the jurisdictions that would be involved in this type of process. They would
11 play an important role in fostering the overall transparency of activity of
12 agencies in this area. Such statements could usefully set out in plain language
13 what the confidentiality laws and policies are in a short and clear way, as well
14 as the treatment of privilege and other issues of discretion that an agency may
15 have in dealing with exchanged information.

16 I would like to comment briefly on notification and prior
17 authorization, which we expect will be the most controversial and critical issue
18 in any attempt to introduce non-voluntary legislated information exchanges. In
19 light of the time, I won't speak to this in a lot of detail. But in the questions I
20 can elaborate with some examples, in particular from Canada. I think
21 basically the agency concern here is that notification and/or prior
22 authorization, whether by a judge or some other official, before an exchange of
23 confidential information occurs will either be burdensome to the conduct of

1 investigations or there will be the loss of the surprise element, which may be
2 important for the effectiveness of the investigation.
3 We have not heard either of those arguments really articulated in
4 a way that is terribly persuasive -- or any other terribly persuasive arguments
5 about why there can never be notification or prior authorization. There is a
6 delicate balancing issue in cases where there is a real threat of destruction of
7 evidence or some other prejudice to investigations, but those, I think, are
8 relatively rare cases objectively considered.
9 I would like to end, then, with our thoughts on the area where we
10 would hope to see short-term progress. That is in the use of voluntary waivers
11 of confidentiality which, as the Committee knows, are now a significant feature
12 of modern merger practice and have been used in a few non-merger cases that
13 are well known.
14 As I said at the outset, the question of what is voluntary is, in
15 our view, a very critical issue. What we would like to see is that when
16 agencies are requesting waivers, they identify potential benefits, such as
17 opportunities to save time and cost in an investigation. It would be
18 constructive to identify the areas where parties under investigation or parties
19 to a merger may find it in everyone's interest to have a waiver. The waiver
20 may relate to documents or discussions and it may be a blanket waiver or a
21 restricted limited waiver.
22 What we are concerned about is that agencies not use pressure or
23 threats or implied threats of, for example, slowing down the review of a

1 merger, broadening the scope of an investigation, or other things that can be
2 done and are difficult to control at the practical day-to-day level. We don't
3 have full answer to this area of unease, although we do think that one helpful
4 step would be in the policy statements that we referred to earlier: for an agency
5 to say as a matter of policy that it will not use threats of prejudice in the law
6 enforcement investigation by delay or whatever would be helpful as a matter of
7 policy.
8 In terms of more concrete ways to move forward I think what we
9 see right now in waivers is relatively simplistic and somewhat lacking in
10 standardization, and that there would be room to develop model waivers that
11 are perhaps more balanced than the current waiver -- which basically tends to
12 say “we waive all our rights” -- not particularly balanced from the perspective
13 of the private party. In light of some of the things we have touched on earlier
14 about the way in which confidential information may be used and treated, the
15 treatment of privilege, and the assertion of confidentiality and privilege claims,
16 if agencies were prepared to look at a model waiver in which there were some
17 commitments from the agencies with respect to the way in which they would
18 use and treat the information and approach the protection of it, that that would
19 very significantly enhance the attractiveness of waivers to private parties who
20 are asked to think about giving them.
21 That I think is where I should stop in terms of the summary of
22 the views we have come to. I would be happy to take any questions. Thank
23 you.

1 MR. RILL: Neil, thanks very much. I'm sure that all of us have
2 a number of questions which we'll defer until all the panelists have an
3 opportunity to speak. Next, Klaus Becher.
4 MR. BECHER: First I would like to thank the Committee for
5 inviting the International Chamber of Commerce to present its views in this
6 hearing. ICC has formed a working group which I have the honor to chair. We
7 have been operating in a very tight time frame and we had the first meeting in
8 the beginning of March. So I have to add a caveat which Neil also has added
9 with his remarks. We have not a formally-adopted ICC position, but at least
10 we have been able to come up with a draft paper which will be distributed
11 afterwards.
12 I'm working for DaimlerChrysler and I can state actually, from
13 my own experience, that the increasingly international nature of business
14 transactions has not only resulted in a growing number of mergers and
15 cooperation projects but also in a growing number of jurisdictions you have to
16 deal with when you want to get such a merger or another transaction approved.
17 In response to this, it's understandable that competition
18 authorities are examining means of cooperation to facilitate and coordinate
19 their respective review and their investigation and decision-making processes.
20 The business community certainly recognizes the potential
21 benefits of such cooperation, but the business community has also been greatly
22 concerned by one of its main elements, which is the exchange of confidential
23 corporate information.

1 Confidential information supplied by companies to competition
2 authorities in the context of merger reviews or antitrust investigations often
3 includes extremely sensitive information relating to the strategy of the
4 company, its investment plans, and its marketing roles and methods. To give
5 you an example, in the merger proceedings relating to the merger between
6 DaimlerChrysler, we had to provide our marketing plan for the next five years
7 relating to passenger cars both to the authority in Brussels and to the Federal
8 Trade Commission in Washington. And the parties are certainly highly
9 interested that these marketing plans not become known to their competitors.
10 Indeed, if such information falls into the hands of competitors of
11 the company involved or into the public domain, which is even worse, this
12 could have serious adverse consequences on the competitive position of the
13 company or its share market value. This risk is not theoretical, especially
14 when information is sent to countries where the company providing the
15 information faces strong competition, especially from state-owned companies
16 or in the context of mergers when share prices are especially volatile. ICC,
17 therefore, applauds the initiative of the International Competition Policy
18 Advisory Committee in addressing this issue and in inviting the international
19 business community to contribute to its work in this area.
20 We have been working for several years on issues arising out of
21 the increasing cooperation between antitrust authorities which have an impact
22 on business. ICC has issued a paper in 1996, which is called the ICC 1996
23 Statement, setting out business concerns relating to the exchange of

1 confidential information between antitrust authorities and also suggested
2 safeguards to reduce the risks of prejudice to the companies concerned. ICC
3 has now been asked by ICPAC to submit views on its core concerns arising
4 from the exchange of confidential information and recommendations to address
5 these concerns.
6 As to the scope of our draft paper, we will focus on information
7 exchanged in the merger review context, and I will explain later why.
8 Cooperation between authorities in the merger area is increasing substantially,
9 as multijurisdictional merger transactions become more common. To ensure
10 transparency and predictability for both companies and authorities involved in
11 multijurisdictional merger notifications, ICC feels that it is essential to have
12 internationally agreed standards accepted by authorities as well as by
13 companies, which would be integrated into multilateral as well as bilateral
14 agreements.
15 With respect to the non-merger area, we make reference to the
16 ICC 1996 Statement, which will be attached to our draft paper on exchange of
17 confidential information. The 1996 paper pointed out that although certain
18 overarching competition law principles are generally accepted in major trading
19 countries, considerable differences in the international antitrust laws still do
20 exist.
21 Some members, especially in North America, did not feel that
22 further convergence of these laws needs to be a precondition for information
23 exchange. Other ICC members, particularly in Europe, felt that with the

1 current low level of convergence, cooperation between antitrust authorities
2 should not include the exchange of confidential information. Being a European
3 lawyer, I would like to point out some of the differences which actually have
4 caused the European ICC members to feel different from their North American
5 colleagues.
6 These differences are also set out in the 1996 paper. Most
7 important is that the EU competition system is an administrative
8 prohibition-based system, which actually encourages companies to file a large
9 quantity of business information to obtain exemptions and immunity. The U.S.
10 system is an essentially litigious system driven by private parties, where less
11 business information is regularly supplied by companies.
12 While in the U.S., which extends its antitrust jurisdiction to acts
13 having an effect of its export commerce, antitrust offenses can lead to criminal
14 penalties and treble damages, antitrust offenses are purely a civil matter in the
15 EU, and the European Commission's jurisdiction is limited to acts implemented
16 and effecting competition within the EU.
17 Another area of difference which is of particular concern to
18 business is the extent to which competition authorities are able to resist
19 disclosure to third parties. In some jurisdictions the competition authority
20 could be obliged to disclose information for the purpose of legal proceedings
21 involving third parties. Despite these differences, ICC members were,
22 however, unanimous in their concern that any confidential corporate
23 information exchanged should be properly protected. The 1996 paper stressed

1 that companies should be given prior notification before any proposed
2 information exchange, and recommended several other safeguards.
3 The ICC 1996 Statement also pointed out that alternative forms
4 of cooperation to information sharing agreements, such as ad hoc cooperation
5 with the company's consent, could help avoid some of the problems discussed.
6 Now to the exchange of information in the merger context. Of
7 course, companies have an interest in reducing the administrative burden,
8 costs, and delays resulting from multijurisdictional merger reviews. I said this
9 morning to Janet McDavid in the DaimlerChrysler merger we had to file in nine
10 different jurisdictions, and I felt ashamed because Janet told me that she is
11 working on a case where 27 different jurisdictions are involved. And I am
12 afraid that this number may even increase in the future when countries learn
13 more about competition laws and enact their own national laws.
14 Companies have an interest in ensuring that the decisions given
15 by different authorities are consistent, which is not difficult in a case which
16 does not involve any substantial antitrust issues, like the DaimlerChrysler
17 merger, but which may be difficult in cases which involve 27 jurisdictions with
18 27 different views.
19 To the extent that the exchange of certain information could help
20 ease the problems associated with multijurisdictional merger review,
21 companies are often prepared to consent to authorities exchanging their
22 confidential information and to accept the risks associated with this in the hope
23 of a speedier, more consistent, and less costly and burdensome merger review

1 process.

2 To foster this mutually beneficial cooperation between

3 companies and competition authorities, however, it is essential that a high

4 degree of trust in the will and the ability of competition authorities to ensure

5 the protection of such information is extended.

6 We have to keep in mind that information exchange is only one,

7 but a very important, element in the broader framework, and other approaches

8 to ease problems arising from multijurisdictional merger review must also be

9 pursued. These include reduction of the information required to the essential

10 minimum -- right now I think the antitrust authorities go exactly in a different

11 direction -- harmonization and transparency of substantive and procedural

12 requirements to the extent possible; clear time frames; and more frequent use

13 of what we call negative comity, that is, when authorities decline to exercise

14 their jurisdiction.

15 This principle may assume changes to national legislation, but

16 from a business community point of view we should discuss not only positive

17 comity but also negative comity. I'm only afraid that no country has the

18 courage to enact laws which provide for negative comity. This can probably

19 only be done on an international treaty basis, if at all.

20 We have then discussed principles for the exchange of

21 confidential information in multijurisdictional merger cases, and the ICC

22 Working Party, at this stage, recommends that the following set of principles

23 should be applied when confidential information is exchanged in

1 multijurisdictional merger cases. And these principles should be integrated
2 into multilateral and bilateral agreements.
3 As to the preconditions for exchange: confidential information
4 should only be exchanged with the consent of the parties involved from whom
5 the information was obtained. Where such information is the property of a
6 third party, authorization should also be obtained from that party.
7 The terms and conditions under which the company consents to
8 the exchange should be set out and agreed by the company and the competition
9 authority supplying the information.
10 The second precondition: information exchange procedures
11 should be fair and transparent and carried out in consultation with the
12 companies owning the information. For example, companies must be given the
13 opportunity to explain any information transmitted which could be
14 misinterpreted.
15 A further precondition: the competition authority requesting the
16 information should have exhausted its own administrative possibilities for
17 obtaining the information independently before making the request. The next
18 precondition: any exchange of information should speed up the investigative
19 process rather than lead to extra delays.
20 Next precondition: information exchanged should be subject to
21 conditions of confidentiality in the receiving jurisdiction, at least as stringent
22 as those of the jurisdiction supplying the information. Legal safeguards in the
23 receiving jurisdiction should ensure that information exchanged will not be

1 disclosed to third parties.

2 Last condition: the principle of reciprocity should be respected.

3 That is, the competition authorities supplying and receiving the information

4 should both agree to follow the same rules regarding the exchange of

5 information.

6 The next subject we discussed was the scope and duration of

7 information exchange. Information should be considered to be confidential

8 when firstly the owner/provider company itself defines the information as being

9 confidential; or secondly, the information is considered to be confidential or

10 subject to legal professional privilege by domestic legislation of the supplying

11 or the receiving authority. We do not claim that information has to be treated

12 as confidential when it's publicly available, of course.

13 The information for which consent is required for exchange

14 should be precisely identified and consent must be sought for any modifications

15 to the scope of the information exchange.

16 We believe that the identification of confidential information for

17 exchange should be done on a case-by-case basis and suggest that it would be

18 difficult to identify categories of confidential documents that agencies could

19 share under a waiver as suggested in the ICPAC staff draft protocol on

20 international agency cooperation.

21 Of course, should information exchange be limited to the

22 necessary minimum, the transmission of information must be limited in time

23 and be returned to the owner or respective provider company after the agreed

1 time period elapses. All notes and copies of the information must be destroyed
2 to prevent institutional knowledge.
3 To the circumstances of disclosure: the company should be
4 informed of the identity of the authority or the authorities to whom the
5 information would be sent, the terms and conditions under which the supplying
6 authority was providing information to the other authority; the national rules
7 governing the use of the confidential information which would bind the
8 receiving authority, and last, but not least, the date of the proposed disclosure.
9 We also feel that we need to establish conditions for the use by
10 the receiving authority of the information exchanged. The use should be
11 limited to the purpose and to proceedings for which the company providing the
12 information agreed to its transfer. Secondly, information exchanged should not
13 be disclosed to any parties outside the receiving authority, in particular
14 third-party plaintiffs, other agencies or governments. Legal safeguards should
15 be put into place to ensure that such information will not be disclosed to third
16 parties.
17 ICC has serious concerns about information being supplied to
18 any jurisdiction without these safeguards. Where such an unsatisfactory
19 situation exists, authorities in the receiving jurisdiction must commit to
20 resisting attempts by third parties to obtain information from them, including
21 by invoking all available privileges and exercising any prerogatives under
22 Freedom of Information legislation.
23 Next condition: the information exchanged should be subject to

1 legal professional privilege when it would be considered as deemed so under
2 the rules of either the supplying or receiving jurisdiction.
3 We then focus on a scenario where the agreed terms of exchange
4 are not respected. If terms and conditions under which a company agreed to
5 information exchange are not respected, it should have the right to obtain the
6 immediate return of the information from the receiving authority and not be
7 obliged to provide further information.
8 We also feel that it would be desirable for the company to have
9 the possibility of seeking judicial relief, including orders for the return of all
10 or part of documents or information provided, and constraining the use by the
11 foreign authority of all or part of the documents or information. However, we
12 are aware that mechanisms to make this possible in an international context are
13 still not in place.
14 As to the confidentiality waiver agreement between a company
15 and a competition authority, Neil has already touched on issues which we also
16 discussed. We suggest that the following elements should be included in any
17 agreement in which a company party to a merger consents to a competition
18 authority providing its confidential information to another competition
19 authority.
20 First, the identity of the authority to whom the information will
21 be sent. Second, the date of the proposed disclosure. Third, the date on which
22 the information will be returned together with an understanding that all notes
23 and copies of the information with the receiving authority will be destroyed.

1 Fourth, the purpose for which the information is being exchanged. Next,
2 precise identification of the information to be exchanged, together with an
3 understanding that further consent will be sought if the scope of the
4 information to be exchanged is modified.
5 Next point: a description of the national rules governing use of
6 the confidential information by the receiving authority. Then the terms and
7 conditions under which the supplying authority is providing information to the
8 receiving authority, which should include undertakings by the receiving
9 authority that the use of the information will be limited to the purpose and to
10 proceedings for which the company providing the information agrees to its
11 transfer; and that the information exchanged will not be disclosed to any
12 parties outside the receiving authority, in particular third-party plaintiffs,
13 other agencies or governments. And it will resist attempts by third parties to
14 obtain information from it, including by invoking all available privileges and
15 exercising any prerogatives under Freedom of Information legislation.
16 Last: a provision that in the event that the terms and conditions
17 under which a company agreed to information exchange are not respected, the
18 company should have the right to obtain the immediate return of the
19 information. The company should not be obliged to provide further
20 information, and the authority should make no further use of the information in
21 question. It would also be desirable for the company to be assured of the
22 possibility of obtaining judicial relief as discussed, but ICC has also stated
23 that the required mechanisms are still not in place.

1 Again, thank you for the opportunity to be involved in the
2 discussion of a highly fascinating subject. ICC is certainly prepared to
3 continue discussions in this field, which hopefully will lead to a solution which
4 is satisfactory to both the antitrust authorities and the business community.
5 Thank you.
6 MR. RILL: Thank you, Klaus. I'm sure we'll have questions,
7 not only today but down the road as we formulate our own recommendations
8 that we'll be addressing to the ICC. Thank you for the very thoughtful input.
9 Jan, Phil, how do you want to proceed?
10 DR. STERN: Excuse me, before you do, I am wondering if you
11 have any paper that accompanies your statement. Okay. Thank you.
12 I've been spoiled by my experience at the International Trade
13 Commission. I always like to have prehearing briefs or something so that I can
14 prepare questions, so I'll have to listen to you more carefully.
15 MR. PROGER: The Section of Antitrust Law is preparing
16 papers. We hope at the May 17th hearing, when the two ABA panels appear,
17 that we will have permission to present those papers. Jim, as a past Chair of
18 the Section knows, we have to go through ABA procedures to present the
19 papers, but we are working on that process.
20 MR. RILL: And it makes the federal government look like a
21 smoothly running operation.
22 MS. McDAVID: It does.
23 MR. RILL: Let me acknowledge the presence of another one of

1 our Committee members, Tom Donilon, who joined us here a little while ago.
2 Tom is with O'Melveny & Myers and is a former high-ranking State
3 Department official.
4 DR. STERN: If I might just say, if my request has any
5 assistance or any weight at all, I would appreciate having something in writing
6 on the 17th. Thank you.
7 MR. RILL: Phil?
8 MR. PROGER: Jim and Paula, thank you for having me again.
9 It is a privilege to be here. I do want to acknowledge that working with Merit,
10 Cynthia, Andrew and Stephanie has been a real delight. And Merit, I greatly
11 appreciate the assistance and cordiality that you have provided. I might say on
12 a personal note, it is kind of a privilege to be here today testifying before
13 Eleanor Fox. Eleanor started me in the Section. I worked for her, I will not
14 say how long ago, Eleanor, but it was on the original Hart-Scott-Rodino
15 legislation.
16 At the outset, I am obligated to issue a disclaimer on behalf of
17 Jan and myself. We appear here today as individuals and not as Chair-Elect or
18 Chair of the American Bar Association's Section of Antitrust Law. Our views
19 are our own and not the views of either the American Bar Association or its
20 Section of Antitrust Law.
21 I guess we all wear a lot of hats here. I must say that Neil and
22 Klaus were kind enough to provide their papers to us in advance. I do not
23 know if they are aware, but I am a member of both their organizations, and I

1 was proud to be a member when I read their excellent papers. They are both,
2 to quote Neil's partner, Bill Rowley, first rate. And I will not try and repeat
3 the various considerations, recommendations, and ideas expressed in them
4 other than to say, I do sincerely believe they are very well thought out and
5 cover the issues excellently.
6 So with that said, let me see if I can provide a little bit of a
7 different slant. When I testified last, I indicated that I was skeptical that there
8 is a significant issue of confidentiality in multijurisdictional transactions and
9 investigations. Given the differences worldwide in our substantive laws and
10 processes trying to create a system in which there is non-voluntary mandated
11 disclosure will create a lot of problems, many of which I think are difficult
12 even to foresee today.
13 Neil made the comment that many non-Americans look at the
14 U.S. adversarial system with concern and horror. I can assure you, Neil, that
15 many Americans feel the same way at times about our system. We have a
16 different system of enforcement, and in that system those being investigated by
17 the respective agencies must be aware of two things that are somewhat unique
18 to the United States, although maybe one of them has a parallel in the
19 European Union.
20 One is we do have a system of private litigation, and while one
21 can argue that compulsory mandated disclosure to enforcement agencies would
22 not be turned over to private litigants, in point of fact private litigants are a
23 little bit smarter than that. What they will do is go to the court and they say to

1 the court that the parties have already produced this information to the various
2 enforcement agencies. Just compel the parties to give us what they have given
3 already the various enforcement agencies.
4 Moreover, the information that you have been compelled to give
5 may be beyond the scope of what a private litigant in the United States may
6 otherwise be entitled to discover. So I think the underlying linchpin of our
7 litigation system poses some considerations that ICPAC should carefully
8 consider before recommending compulsory disclosure.
9 Secondly, and to some extent there is a parallel with the
10 European Commission and the Member States, we have in the United States
11 multiple sovereigns. Not only can the federal government, either the Federal
12 Trade Commission or the Department of Justice, conduct investigations, but
13 also can one or more states. Usually the federal agency and the states
14 cooperate in their investigations, but not always. While the existence of
15 private litigation and multiple sovereigns does not make mandated confidential
16 disclosure impossible, it does complicate the process.
17 In addition, there are at times different public policies than
18 purely competition. And these other public policies, which often are non-
19 competition policies, can raise significant problems when information has been
20 turned over to competition enforcement authorities, but now are available for
21 other uses. So disclosure, particularly in situations where it goes to
22 organizations that have not established the history of somewhat apolitical
23 dedication to competition principles, raises serious concerns.

1 And there are reasons why, in representing zealously a client,
2 that may not be in the best interests of the client.
3 One, it can affect, frankly, some of your tactics in defending
4 your client. There may be reasons why at a particular point in time it would be
5 premature with respect to one party to turn over information that is perfectly
6 mature and appropriate with respect to another party. Two, it could broaden
7 the scope of either a private litigant's case or another competition authority's
8 case by providing information to them that really is outside the core scope of
9 their investigation, but now raises issues that they feel that they must look into
10 even if tangential. So it adds burden and expense.
11 Nevertheless, If ICPAC feels that there should be a
12 recommendation of some mandatory disclosure, I would suggest that some of
13 the following considerations be considered.
14 One, I think there should be greater transparency in how the
15 enforcement process works and under what context information will be
16 disclosed by and between competition authorities.
17 Two, there should be improved awareness and transparency of
18 confidentiality protections which apply in foreign jurisdictions. If we're going
19 to go down this road, I think that the jurisdictions involved need to be open and
20 transparent on their laws and make it clear when you provide confidential
21 information what your protections are, what your rights are, and what the
22 process is to protect your rights.
23 Three, there have been a few statements by senior competition

1 authorities suggesting that failure to agree to waive confidentiality protections
2 may create an adverse inference. I think that it must be very clear that such an
3 inference is not appropriate and that there may be perfectly legitimate reasons
4 why a party may not want to waive national confidentiality protections to allow
5 enforcement agencies to exchange and share the party's confidential
6 information. And I have tried to enumerate reasons, such as private litigation
7 in the United States or the use of the information for non-competition reasons,
8 why parties may be reluctant to waive confidentiality.
9 Four, any exchange of confidential information on a mandatory
10 basis must fully maintain and protect the attorney-client privilege. That, I
11 think, is fundamental to our system of jurisprudence in the United States, and
12 to due process.
13 Five, if there are to be mandatory disclosures or waivers, they
14 should be limited in scope, while reducing the volume, not increasing the
15 volume that a party must in aggregate produce. I think there is a real danger
16 that we might end up with the lowest common denominator and everyone seek
17 their own Christmas ornament. And thus, in fact, the parties end up with
18 increased burden.
19 And if the documents are produced, then there must be a clear
20 understanding of the limits on their use and that there use is for competition
21 law enforcement purposes only. If there is going to be mandatory disclosure,
22 there must be no right of the parties receiving the information to further
23 disclose them to other parties without permission.

1 Finally, I think that there should be some ability of the parties
2 involved to receive notice before any exchange or disclosure is made. Parties
3 should have an absolute right to be able to obtain a review before a neutral
4 decision maker, such as an Article III Judge in the United States, before their
5 documents originally obtained through mandated disclosure are turned over to
6 a third-party.
7 Right now the enforcement processes in the United States and
8 the European Commission, particularly with respect to merger enforcement,
9 are different. The European Commission approach is much more front-ended,
10 while the U.S. approach, with our second request and ultimate potential
11 litigation, is more back-ended. Timing differences should be acknowledged,
12 and the parties should have some right to have some say over the timing.
13 Last, if we are going to go in the direction of mandated
14 disclosure and sharing among enforcement agencies, we are probably better off
15 with bilateral negotiation, initially with the European Commission, and using
16 what develops from that negotiation as a model. But I would only do so if
17 there is a limitation placed on DG-IV's requirement of transferring information
18 to Member States. But if that could be dealt with and if we are going to go in
19 this direction, despite what I view as some significant pitfalls, I think bilateral
20 negotiations principally with DG-IV is probably the starting point.
21 I thank ICPAC for the opportunity to appear here today. You
22 have a difficult task and I hope that my comments are helpful. Thank you.
23 MR. RILL: Thank you, Phil. Jan?

1 MS. McDAVID: I'm going to speak principally from my
2 perspective of having been involved in a number of multinational mergers,
3 including the one to which Klaus referred in which we are filing in 27
4 jurisdictions, which is the "mother of all multinational mergers," as well as
5 civil investigations, principally, as well as based on one or two criminal
6 proceedings.
7 In addition, I participated with Jim Rill, my colleague Tom
8 Leary, and Bob Weinbaum in providing input to the Division and Federal
9 Trade Commission on the IAEAA. We were particularly interested in the
10 provision that excepted Hart-Scott-Rodino material from disclosure pursuant
11 to what we call the "Vowel Act," because it is otherwise unpronounceable,
12 based on concerns of disclosure of confidential information, particularly
13 among the European Commission and its member jurisdictions. I think most of
14 those fears have not materialized, but it was an absolutely legitimate concern
15 at the time.
16 I want to compliment both Neil and Klaus on their excellent
17 papers. There really are some very important but subtle points in there that I
18 hope the Advisory Committee will pay attention to as you proceed to your
19 recommendations.
20 The data gathered in a merger investigation, as Klaus has
21 already explained, truly are the crown jewels of a corporation, current and
22 forward-looking strategic planning data and marketing data, the disclosure of
23 which could be incredibly damaging to the company on a competitive basis or

1 even in a political context. I've represented foreign companies in the United
2 States, and I’ve represented American companies in foreign jurisdictions, and
3 there is always a fear that if you are not a national of the regulating authority,
4 you are going to be treated differently somehow than nationals may be treated.
5 My foreign clients have been worried that they will be subject to
6 greater regulation. My American clients in Europe are worried that a
7 European firm may secure an advantage over them as a consequence of
8 information they disclose or, perhaps, that a decision may be made in a matter,
9 and may have motivations that are not entirely on the merits. And the
10 confidentiality of the information is in many ways the linchpin of all of that,
11 because this information is so sensitive.
12 The parties' objectives in consenting, as they often do, to the
13 sharing of information I think are important to consider. In my experience the
14 issue of time and of cost savings is rarely actually realized. What really
15 happens is that everybody gets more than they might otherwise get. The
16 Federal Trade Commission or the Department of Justice will want everything
17 that is disclosed, all the filings that are given to the foreign authorities, and the
18 foreign authorities will want some of what is given to the United States
19 agencies.
20 What you really gain perhaps is the ability to coordinate the
21 timing of the decisions at the various agencies so that you're not going to be
22 gamed between decision points. And you are more likely to assure consistent
23 analysis and consistent outcome and probably an outcome that is more likely to

1 be on the merits and less likely to be politically motivated. Assurances of
2 confidentiality, as all the other speakers have said, is absolutely critical to
3 this.
4 The risk of inconsistent privileges in different jurisdictions can't
5 be overemphasized. Here, for example, we have the problem that material that
6 would be testimony before a grand jury taken under waivers or assurances of
7 confidentiality or immunity arrangements may be transferred to the Canadian
8 government under the MLAT and then come back into the United States for use
9 in civil litigation.
10 The European Union has different rules with respect to the
11 attorney-client privilege than the United States does, and those differences are
12 very significant. And so, for example, we are often concerned that
13 communications by inside counsel are not recognized as privileged in Europe,
14 although they are recognized as privileged in the United States. Those
15 materials may, through the back door, become available to the American
16 agencies when they would not otherwise have been, as a result of the exchange
17 of information.
18 All of the waivers that I have been involved in, and there have
19 been many, are all "one off." And that is an important point I think, and I
20 would emphasize as the others have, desirability of transparency and some
21 protocols in this area to minimize the need to engage in a one-off negotiation
22 with respect to every transaction.
23 In this regard, as Phil did, I would like to point you to the

1 protocol that exists between the federal agencies and the state attorneys
2 general. It is often the subject of additional negotiation, but the protocol at
3 least provides a uniform starting point for all of those negotiations, and I think
4 we all learned something from each of those negotiations. The states are even
5 talking about modifying their protocol based on the many negotiations they
6 have had with private parties and the things they have learned. A great deal
7 more transparency about what sorts of provisions are commonplace and how
8 you deal with issues like the protection of the attorney-client privilege in the
9 context I described would be very useful to the parties and to the business
10 community.
11 Today my clients have been willing to agree to waivers of
12 confidentiality principally with respect to the major jurisdictions, such as the
13 European Commission, the Canadian government, the Australian government,
14 and the New Zealand government, which have an established track record of
15 confidentiality. I think there would be far greater reluctance to share
16 information with authorities that don't have that track record and in whom they
17 may not have as high a level of confidence in the protection of their
18 information.
19 And finally, I would note that although there have always been
20 in my experience excellent protections with respect to confidentiality of the
21 data, the differences in the way proceedings are handled do create certain
22 suspicions and concerns on the part of parties who are involved. For example,
23 in Europe it is far more commonplace for the regulators to articulate their

1 concerns publicly in the press. That is obviously done on information they
2 have gathered in the investigation. That raises some significant concerns on
3 the part of parties who are involved in the process. I have clients who recently
4 sent their chief executive officers to meet with Commissioner Van Miert, only
5 to discover a room full of reporters and photographers -- which wasn't exactly
6 the way they anticipated conducting the meeting. Those sorts of experiences
7 do lead to suspicions on the part of American companies that perhaps there are
8 risks with respect to their information, which are their crown jewels.
9 MR. RILL: Jan, thank you very much, and thanks to all of the
10 panelists. I would just like to start with one thought for any panelist, and that
11 is: there is a desire to assure that downstream protections are available to
12 confidential information exchanged, whether it's in a voluntary or non-
13 voluntary context, but let's assume it's voluntary. Even there, there is a desire
14 for downstream protections, and I think the U.S. law is pretty well developed
15 there. If a problem arises principally where litigation pops up, and even then
16 there is availability of in camera treatment, maybe there is something that
17 could be done in such a situation.
18 I'm not aware of any situation where there has been leaks from a
19 U.S. enforcement agency to other agencies, particularly in the merger context.
20 And there is law that prevents Hart-Scott-Rodino materials from going to the
21 states. I don't know, Phil, that your comment about sophisticated plaintiffs,
22 while certainly a factor, relates so much to information sharing. Once one
23 agency in the U.S. gets that information that's susceptible to at least some

1 demand from plaintiffs for that information the law is fairly clear, but the law
2 is not quite so well developed, I think, in Europe.
3 And the problem that concerns U.S. businesses about
4 downstream protection in Europe is the fact that merger information goes to
5 the Advisory Committee, which consists of representatives of every Member
6 State. In many instances mergers have to be voted on by the full Commission,
7 which involves commissioners from at least every Member State, sometimes
8 two. And there is not, I think, any fully developed downstream protection in
9 those contexts. And I wonder if there is any way for such protections, starting
10 with you, Klaus, if you want to address that particular issue?
11 MR. BECHER: From the EU point of view I think there is
12 downstream protection guaranteed, but you are right, the more people get
13 involved, the more people know about confidential information, the higher the
14 risk is that this confidential information will practically not be not protected.
15 To my knowledge, it's the practice of the merger task force of
16 the European Commission to inform the Advisory Committee, the members of
17 the Advisory Committee, to an extent which is absolutely necessary, but this of
18 course can require that they have to disclose confidential information,
19 especially when you talk about strategic plans. So there is a risk. From a legal
20 point of view, the information is protected, but we all know and also people
21 who deal with commercial confidentiality agreements know, that these
22 agreements are on paper in the first place and are a reminder to the parties not
23 to disclose such confidential information.

1 But once you have to disclose confidential information to
2 anybody, I think you have to be aware that there is a risk that this information
3 will not be confidential in the future. There are authorities which are well
4 respected, and I fully believe that the Federal Trade Commission is a very
5 respected authority which will not disclose and has not disclosed confidential
6 information. There are penalties for disclosure of highly confidential
7 information. And there has been no leak in Europe so far, but the risk is there.
8 MR. RILL: Phil, you were going to say something, you were
9 going to jump on a comment of mine.
10 MR. PROGER: I would never jump on a comment of yours.
11 MR. RILL: That's perfectly all right. It won't be the first.
12 MR. PROGER: I really do think this is a bigger problem than is
13 being acknowledged. In the United States, we have developed a process to
14 protect the rights of parties in an investigation. And I feel pretty comfortable
15 with the European Commission, and most, but not all, of the Member States.
16 But we are not talking about cooperation only between the U.S. and the EC.
17 We are talking about increased cooperation among a proliferation globally of
18 enforcement agencies that now number, according to Bill and Neil, over 80
19 enforcement agencies.
20 MR. RILL: That was two years ago.
21 MR. PROGER: With 24 more in the works. Most of those
22 jurisdictions do not have the history of procedural and substantive due process
23 that exists in some of the more developed nations. Most of those countries do

1 not have the history of the separation of competition issues from national
2 issues, such as trade or employment.
3 For example, if we mandate that the parties must waive
4 confidentiality protections, I could foresee a time when parties may be required
5 by an appropriate enforcement agency, possibly based on a request from
6 another jurisdiction, to produce information or even create information for that
7 other jurisdiction. It is not unusual today under the HSR second request --
8 which is not subject to Article III judge review -- for the parties, in order to get
9 their deal through, to reprogram computers, databases, and produce
10 information that a party in private discovery could never obtain. But once
11 produced, there will be some judges that say, “You've got it. You've done it.
12 Produce it.” Thus, given how easy it is to file these lawsuits, I think there is a
13 real danger here.
14 MR. RILL: I don't think there is any question that there is a
15 concern. Paula did you --
16 DR. STERN: I have a couple of questions.
17 MR. CAMPBELL: Jim, could I just briefly comment on the
18 exact question you raised, just two concrete examples of what no downstream
19 closed loop concept means to me? With respect to Europe, it would actually
20 mean that it would rule out information coming from a foreign agency going to
21 the Advisory Committee Member States. And the way you would get through
22 that is a Member State that wanted to come into this kind of information
23 sharing agreement, that has committed its own domestic people, would then be

1 in a position in an appropriate case to get it. But otherwise that subset of
2 information would be held only for the Commission.
3 MR. PROGER: Could I just ask you one question, Neil? Would
4 you also amend that to say that not only that, but also that the Commission or
5 the Member State does not even know of the existence of the information?
6 Because if they know of the existence of the information, they can go to the
7 parties and say, “Well, we know you gave it to them; give it to us.”
8 MR. CAMPBELL: Yes, and maybe I will answer that in terms
9 of my one U.S. illustration, which is the discovery problem that you've so
10 accurately described as a very real problem. You don't solve that unless you
11 amend something to throw up an affirmative barrier in the discovery rules so
12 that the private party cannot discover the agency with respect to inbound
13 information received from a foreign agency, and that the private plaintiff
14 cannot discover the company -- or the U.S. affiliate of the company that gave
15 the information internationally -- on the indirect basis of “give-us-whatever-
16 you-gave or whatever-went-through-to-the-U.S.-agencies.”
17 Jim, I don't know what the U.S. experience has been, but there is
18 a live Canadian case in a criminal matter in a follow-on private litigation
19 where the Competition Bureau was third-party discovered by the plaintiff. And
20 the Bureau didn't even resist the discovery, at least initially. But even if it
21 had, it would probably have been ordered to produce. We have the same
22 problems with our discovery rules in Canada.
23 MR. RILL: Failure to resist discovery is not a good way to get

1 sharing of information.

2 We should probably relieve this panel in about ten minutes or so.
3 But I want my colleagues to have the opportunity to ask some questions. As a
4 courtesy to the next panel, we probably need to keep the answers short.

5 DR. STERN: In fact, if you wish to answer after the hearing,
6 that would be fine with me as well.

7 MR. RILL: I misspoke, though. We have actually, this panel,
8 we have until 12:00, so we're not under any time duress.

9 DR. STERN: Okay, good, because I would like to hear from
10 individual remarks.

11 You all represent a great deal of practical experience. These
12 questions could all be answered by each and every one of you. So in the
13 interest of time and efficiency to the extent that you have amendments or
14 addenda or separate views, if you will, please feel free to just jot those as
15 informally as you want down on paper afterwards. That may be one practical
16 solution.

17 Let me tell you where I'm going, and let me repeat that any one
18 of you can answer the questions. I am looking for those areas of overlap
19 amongst you and your colleagues whom you represent. And there is overlap in
20 both the written testimony as well as in the testimony we have heard spoken
21 today. I am therefore looking for those areas, if you will, where there is not
22 overlap, where there is controversy, where there is not a consensus as to the
23 advisability of sharing of confidential information.

1 And let me therefore start with one question I would like to -- I'll
2 give you all three questions basically, and then you can perhaps organize your
3 responses individually.
4 First, we're always searching for leaks. Your practical
5 experience of any leaks of any information, all of which would be prejudicial.
6 So I just want to ask for any experience of anything that you know in any
7 jurisdictions, not just the United States.
8 Second, I would like to hear the extent to which the existence of
9 the Economic Espionage Act of 1996, which provides for criminal prosecution
10 for trade secrets that are stolen, acquired improperly, has any bearing at all on
11 your discussions or your considerations.
12 The third question goes to those individual companies or
13 countries or sectors which would be more reluctant to share, to have
14 confidential information exchanged or shared. In other words, we have heard
15 from Dr. Becher that there are those in Europe, although Phil Proger in his
16 opening statement started to sound like a European company in his concerns. I
17 turned to Jim and said that. I think we both agree. It was beginning to sound
18 that way.
19 So I'm wondering, are there particular sectors that have
20 problems with exchange of merger confidentiality? Has DaimlerChrysler itself
21 had experience that makes you chary of this? Is it possible that there are
22 certain governments which are suspect more than others? Is it possible that
23 those sectors which have been government-owned or industries that have been

1 government-owned are more reluctant to share? In other words, I would like to
2 narrow, based on your practical experience, those areas where there's greater
3 reluctance to share.
4 Finally, I had one small, tiny question about New Zealand and
5 Australia, and that is: Is there a different arrangement of confidentiality in the
6 merger area in New Zealand from Australia? Don't they consider themselves
7 now, because of the New Zealand-Australia trade agreement, to be one market?
8 I had the impression from one of the statements that they considered
9 themselves to be two different markets and to have two different arrangements
10 potentially for confidentiality. I invite anyone to jump on that.
11 MR. RILL: Merit, you suggested that we collect questions?
12 MS. JANOW: That would be one possibility.
13 MR. RILL: Why don't we go ahead --
14 DR. STERN: That sounds like a lot of questions right there.
15 MR. RILL: I think we should try these, and then see where we
16 go from there.
17 DR. STERN: Good. Good.
18 MS. McDAVID: I'm not aware of circumstances in which
19 company data has actually been leaked, but I'm aware of many circumstances
20 in which inside deliberations of agencies in the United States and in foreign
21 countries appear in the press. Exactly how it happened or who did it is
22 impossible to find. It drives the business people absolutely crazy. And you
23 can't ever trace it to anyone because everyone will deny that they are the

1 source.

2 MR. RILL: Of course, it does wonderful things to stock prices.

3 MS. McDAVID: Absolutely. It has all kinds of implications. It

4 does make the business people chary about being responsive.

5 One of the experiences that American businesses have had is that

6 their data have been well protected in the United States. So the concerns that

7 many businesses had back when the Hart-Scott Act was enacted, that it would

8 start appearing in The Washington Post and The New York Times the next day,

9 did not materialize, and they fell back into a fair level of confidence. But

10 every once in a while there is one of these circumstances where stuff starts

11 showing up routinely in the press.

12 DR. STERN: And the Economic Espionage Act of 1996?

13 MS. McDAVID: The circumstances I'm talking about are

14 probably not subject to that because we're not talking about company data,

15 we're talking about here are the issues on which the agency is focusing: here

16 are the outcomes that are potentially possible in the agency. That sort of thing

17 is very damaging.

18 MR. RILL: Here's what the staff is recommending?

19 MS. McDAVID: Exactly.

20 DR. STERN: My question went to confidential information that

21 are the “crown jewels,” to use your words, of individual companies.

22 MS. McDAVID: I'm not aware of those circumstances, those in

23 which information has appeared in the press or been leaked. But I'm simply

1 not aware of it, I'm not saying it didn't happen.

2 MR. BECHER: For DaimlerChrysler, I can concur. I'm not

3 aware of any leak of confidential information in any antitrust proceedings to

4 which we have been a party. I should add that if we provided highly sensitive

5 company information, like strategic plans to antitrust authorities, we have

6 provided these plans to highly respected antitrust authorities, like the

7 Department of Justice, the Federal Trade Commission or the European

8 Commission in Brussels, or the Federal Cartel Office in Berlin. These are

9 authorities with long-standing experience which follow due process.

10 And I certainly would be very reluctant to provide this kind of

11 highly sensitive information to other jurisdictions. I won't name those

12 jurisdictions now but I can imagine a lot of jurisdictions in which I personally

13 would be very reluctant to provide strategic plans and other materials.

14 DR. STERN: Very helpful.

15 MR. CAMPBELL: Your three questions. First of all, leaks. I'll

16 confine the answer to Canada. The answer is the Competition Bureau doesn't

17 leak. It has an excellent track record. But again, that's talking about purely

18 confidential documents. Jan has made a useful observation about discussions

19 of information that comes out in confidential documents.

20 MR. RILL: Let me try and clarify that right now. That type of

21 leak typically doesn't relate to confidential business information. It's the

22 deliberations of the staff. The issue that's confronting us today isn't one that

23 covers that particular situation, as reprehensible as it is.

1 MS. McDAVID: But doesn't it makes the business people
2 wonder? It makes the business people wonder whether their data are secure.
3 MR. CAMPBELL: John Davies, if he were here, would describe
4 a recent experience he had in which a draft of a Form CO was filed with the
5 European Commission and a first stage Hart-Scott-Rodino filing was made,
6 and almost instantaneously thereafter the parties were receiving questions from
7 the U.S. agency which could not have conceivably been formulated without a
8 briefing of the concepts in the draft Form CO. Which is not to say that the
9 actual document -- but a Form CO has extensive information about views of
10 markets and so on which allowed, apparently in this case, the U.S. agency to
11 be briefed on a set of issues and perspectives arising out of a confidential
12 submission in Europe.
13 DR. STERN: Again, that was a leak between the two authorities
14 and without a protocol existing on the sharing --
15 MS. McDAVID: Had there been a waiver in that circumstance?
16 MR. CAMPBELL: No, this was before there was a formal Form
17 CO, which as you know is sometimes filed in draft. That would be the
18 comment with respect to leaks in practice. I can't speak to your Economic
19 Espionage Act, but the observation I would make is that I think the general
20 concept of there being sanctions for leaks is something we recognize in all
21 areas, some deterrence is important. I do believe that the 1991 ABA report had
22 a very important observation when it said that the presence of sanctions in
23 various jurisdictions is a pretty important concept --

1 DR. STERN: Including the criminal sanction?

2 MR. CAMPBELL: Whether criminal or not, but sanctions that
3 are applicable to the agencies and the officials therein. And with respect to
4 Canada you would struggle hard to find whether sanctions exist and what they
5 would be. There might be creative ways to find them but they are not clear and
6 obvious. I'm not sure what the position would be in other jurisdictions.

7 I think the third question is a very interesting question with
8 respect to areas of focus. My own view, having raised this with our working
9 group, is that you will not find this cleaving out in a big difference between
10 sectors. This is a cross-sector issue for the business community. I certainly,
11 in my practice, see it almost universally from all business clients, and that
12 won't narrow it for you.

13 With respect to the observation about government-owned
14 entities, yes, that creates a special additional level of concern. It's often raised
15 with respect to Europe, but despite having privatized a lot we still have some
16 government entities in Canada where people could legitimately have an
17 additional concern about who the Competition Bureau might talk with and what
18 they might say.

19 With respect to countries, in our written material what we have
20 suggested that would be useful from the perspective of the United States is to
21 start with the EU and Canada and some of the significant EU Member States.
22 We did not choose to name names within the EU, but I think the criteria we
23 have suggested would be helpful guidance: that is, their own domestic track

1 record as perceived from afar; the volume of cases; etc.

2 DR. STERN: Any other comments? Phil?

3 MR. PROGER: I am aware of what might be a few instances,

4 but because of attorney-client privilege I cannot really say much about it. I'm

5 not sure that helps you very much.

6 Let me just say that I've had one instance where a colleague

7 contacted me maybe a year after a deal had been closed and said, “I think I

8 have something of yours.” It turned out it was my client's five-year business

9 plan. It was Bates-stamped with our production number. However, the other

10 party had a copy of it, as did other law firms and consultants. This colleague

11 who was, I believe, acting with integrity, was returning it to me because he or

12 she had gotten it from their client, which was a direct competitor. But to this

13 day, I do not know how they got it.

14 I think there have been a few instances, not many, where

15 information has been -- I don't know if the correct word is leaked but certainly

16 produced -- by state attorneys general or by members of Congress. But,

17 overall, I would say that I think the issue is not how much leakage there is

18 today because I think everyone is very careful about confidentiality and I give

19 high marks to the agencies.

20 Nevertheless, as Jan points out, it is always distressing to see

21 the staff's recommendation on the front page of the Wall Street Journal. But in

22 terms of absolute information, I think people are trustworthy in the United

23 States and in DG-IV, and I do not think you are seeing a lot of leaks there, but

1 they can happen. You are talking about a lot of information, and now you are
2 going to proliferate that process, and I think that raises the concerns we have
3 been discussing.
4 MS. McDAVID: You have raised an important point about
5 Congress, because there is an exception to the confidentiality rules for the
6 Hart-Scott Act for the Congress. The agencies, God bless them, try not to give
7 them the documents. They try to go brief them orally. But that is a real
8 Achilles heel of the American system.
9 DR. STERN: Should that exemption be renewed, recommended
10 to be renewed?
11 MR. PROGER: It would be preferable if there was no exception
12 to the confidentiality rules for the benefit of Congress. If Congress wants
13 documents, they have independent means to compel disclosure. But I doubt
14 that eliminating the exception is doable politically.
15 DR. STERN: What sanctions would you suggest? Not just from
16 members of Congress. If you have thoughts afterwards on sanctions
17 appropriate or any of these, please feel free.
18 MR. RILL: The one that at least gives a minimal level of
19 protection is there has to be at least a request from a Committee Chairman or a
20 Subcommittee Chairman. Now that may be small solace, but at least
21 hypothetically and we know none exist, a single rogue congressmen can't go
22 rummaging through the files without a Subcommittee or Committee approval.
23 MR. CAMPBELL: One of the questions that those of you who

1 are here may know the answer to but I don't -- the IAEAA is an interesting
2 piece of framework legislation, and allows the creation of bilateral agreements
3 which can themselves have various negotiated condition -- I don't know
4 whether under that legislation the United States could enter into a bilateral
5 agreement that put its agencies in a position where the received information
6 would not be disclosed to Congress or to private parties in discovery, or
7 whether those other legal overlays will override what you could do in the
8 mutual assistance agreement? But there is the scope in theory to create rules
9 applying to this kind of cross-border exchange of information that are different
10 -- a little more restrictive -- than your general domestic confidentiality
11 regimes.
12 MR. RILL: Just reading the IAEAA, to respond to that question
13 in theory, the IAEAA depends on what's in the agreement. And there can be a
14 provision in the agreement that provides that we will not give this to the
15 Committee on the Judiciary, even if it should vote unanimously to request the
16 agreement. Now these agreements are circulated for comment in the Federal
17 Register for a period of time, and the suggestion that, as a practical matter, the
18 agreement would ever be adopted with that provision in it seems to make that
19 kind of extra legal agreement unlikely.
20 MR. PROGER: Jim, it is far more likely that rather than
21 restricting Congress or a Committee of Congress from lawfully obtaining the
22 information, there be a requirement that ensures that they have to abide by the
23 confidentiality provision.

1 MR. RILL: That's in the statute. It is in the statute that you
2 have to abide by your own confidentiality rules with respect to shared
3 information. I think the notice idea that you all came up with is certainly a
4 good one that could be incorporated in any agreement. By the way, the
5 agreement with Australia I think is going to be formally signed by May 27th.
6 DR. STERN: And not New Zealand?
7 MR. RILL: I think it's Australia.
8 DR. STERN: I do too, and this leads to my next question.
9 That's a question that was on there. If you have any insight, please let me
10 know.
11 But I did want to follow up the question with Phil, in which you
12 were talking about DG-IV and limiting its ability to pass on confidential
13 information to Member States.
14 Is there a constraint within the EU that limits such a limitation,
15 that would not permit such a limitation, that you were suggesting? Just as we
16 have, because of our separations of powers, certain obligations to share things
17 from the Executive Branch with Congress, I'm wondering if the DG-IV is also
18 obliged to share certain information? So how much can one actually limit?
19 Now, that's a kind of a constitutional question for the EU, but it would be
20 helpful to know an answer to that to see whether your suggestion is a practical
21 one.
22 MS. McDAVID: I think it would have to be imposed by the
23 European Commission itself because today I don't believe that is possible

1 under the operations of the Commission.

2 MR. BECHER: I don't think it works today because the

3 Advisory Committee plays a role in any merger control proceedings. They

4 have the right to know the information which is important for the decision.

5 And this information may contain business secrets. And so from my point of

6 view right now, there is no way to avoid that the EU Commission or the merger

7 task force as part of the EU Commission will pass on confidential information.

8 It will have to pass on confidential information to the members of the Advisory

9 Committee. And then the members, of course, are the Member States. So the

10 confidential information is then also with the Member States or the respective

11 competition authorities.

12 But still, a legal safeguard is built in. From a safeguard point of

13 view everything is okay, and as Neil said, the track record in this respect is

14 good. We don't know everything, but nothing has been published in a negative

15 sense. So the track record is excellent. And as to the system, you have to

16 change the system within the EU to come to a solution which you suggested.

17 MR. PROGER: There are two different considerations. One is

18 the potential that the information might be disclosed to the Member State

19 competition authority, but also there is the potential that the information is

20 disclosed to other parts of the Member States' government that deal with trade,

21 employment or other considerations.

22 MR. RILL: Let me turn to the other members of the Committee,

23 and Merit has questions, and I think Eleanor does, too. Merit, if you want to

1 go.

2 MS. JANOW: I have two questions and one plea. First on the

3 question, I would like to shine a little more attention for just a minute maybe

4 on attention in objectives that were suggested here. Dr. Becher, you made the

5 point about the value of exhaustion of administrative possibilities for obtaining

6 information. In other words, an exhaustion of independent requests.

7 And my question to you there is: whether or not, if you have an

8 exhaustion principle in place, whether you are not putting that potentially in

9 tension with your shared interest in reducing the burden on the merging parties

10 and the delays of multijurisdictional merger review? So how do you, in your

11 mind resolve that tension, implied by exhaustion, as well as the problems that

12 may stem from the fact that a document may be outside of the jurisdictional

13 reach of the requesting agency? So that's the first question.

14 The second question is about waivers. The staff attorneys,

15 particularly Cynthia Lewis, has been working hard to develop some prototypes

16 to get reactions from the bar. I'm wondering if there is a way that this could be

17 privatized -- here comes the plea -- if this is a, I think, a consensus point that

18 all of you were saying? I'm wondering if we might develop some model

19 waivers, restrictive waivers, or if each of your groups might play with that in

20 more elaborated fashion and work with us? Because I think each of you are

21 saying that this is important, and also each of you are identifying the

22 transparency requirements that would be introduced by each jurisdiction,

23 including with respect to the specific handling of that information pursuant to

1 procedures in the jurisdiction being contained within the waiver itself. And if
2 so, I see this as something that perhaps is advanced through a privatized
3 initiative as well. Thank you.
4 MS. McDAVID: Going first to your second point, Merit,
5 absolutely, we can work with you on that. The agencies have their own
6 models, but most of us add bells and whistles to them. But we would be happy
7 to work with you on that through the bar.
8 On your first point, it's an issue that has come up with respect to
9 the state attorneys general, where the issues are very similar. One of the major
10 benefits that we achieve when we signed the protocol with state attorneys
11 general to have a combined investigation is that they don't initiate separate
12 process, and we don't have to engage in duplicative and different kinds of
13 searches which add enormously to the cost.
14 And this is a bigger issue probably with the United States as
15 foreman of the investigation, which is so document intensive and data
16 intensive, as opposed to the European model which tends to be more
17 presentation intensive. But that is one of the major advantages we secure when
18 we enter into the protocol, is that we basically provide the states what we give
19 to the federal agencies.
20 MR. RILL: Other comments? Neil?
21 MR. CAMPBELL: Yes. Maybe I'll take the second first as
22 well. Time was an issue for us and so we didn't get into the detail of waivers,
23 but I will go back to my colleagues and see if we might do a second phase here.

1 I think that is something we might be able to contribute some further thoughts
2 on.
3 With respect to your first point, on perhaps not long and detailed
4 reflection, Jan, we felt there was a difference internationally versus the U.S.
5 federal-state protocol where we felt that was actually a fine example of getting
6 something, if you want, in each direction, and it will have a nice set of in-built
7 incentives to encourage people to work with it. If you think of Venn diagrams,
8 though, you are in that case dealing with a little circle -- or 50 little circles --
9 within a big circle, typically looking at the same underlying law. If you look
10 internationally, you are dealing with a set of nonoverlapping circles with
11 different legal frameworks which makes it more difficult for a particular
12 jurisdiction to stand down or stay in the background. And so we weren't
13 convinced, though maybe we didn't try hard enough, that we could find the set
14 of incentives that would make that kind of a process work in an analogous way
15 in an international setting. But if others can find those kinds of reciprocal
16 incentives, I think that's useful to consider.
17 I think your question also touches on another area of tension
18 which is important to keep in mind, and that is the question of what is
19 voluntary. The U.S. has a particularly large view about what documents are
20 relevant and across borders in terms of getting things. For example, last year
21 our firm helped on a second request search of facilities in Canada, and people
22 were in Taiwan searching offices and so on.
23 One of the dynamics with respect to documents that may be

1 different between jurisdictions is the question of leverage -- where an agency
2 says, “We want the Canadian filing, we want the European filing, please give it
3 to us.” This is a different point, but analogous to the leverage issue we raised
4 earlier with respect to voluntary waivers. It is one of those in-built questions
5 about how the merger review procedural structures work. The U.S. has one
6 that has got, in my impression, a fair bit of leverage in the hands of the
7 agencies.
8 MR. RILL: Phil?
9 MR. PROGER: Several points. One, as Jan said, the Section
10 would be happy to try to help on a model agreement.
11 But if you do that, let me suggest something else, which is
12 getting the agreement in and of itself is a start, as exampled by the compact
13 with the National Association of Attorneys General, but it doesn't go all the
14 way. Let me give you two considerations.
15 One, I had a situation where one state opted out of the compact,
16 and said that they were going to, therefore, issue their own subpoena, which
17 they did. Specification one was, “Give us everything that you gave to the
18 Compact states.” And then thereafter, there were numerous other
19 specifications. So the benefit of the Compact was, as practical matter, lost.
20 Two, if you're going to have that type of agreement, the country
21 must have procedural safeguards and there has to be someone that a party can
22 petition, who is a neutral party, if the agreement is not being honored. There
23 has got to be sanctions for failure to honor the confidentiality. Having an

1 agreement that is not enforceable is of little value.

2 Last, and I do not think least, I am still concerned that you risk
3 that you are going to be dealing with the lowest common denominator and you
4 are not going to reduce the burden.

5 So no one has made a compelling case that in practice there is a
6 lot of reduction of the burden. And in the end consumers pay for this. There
7 are enormous expenses in these transactions, and someone ends up paying for
8 them, and in some situations the companies absorb them, but in many
9 situations it is passed on to consumers.

10 MR. RILL: Shareholders are people too, aren't they?

11 MR. PROGER: Shareholders today are people. Shareholders
12 today are often state teachers' retirement funds or other similar pension funds.

13 MR. BECHER: May I make one more comment relating to the
14 exhaustion principle?

15 I think the important message we want to convey with this
16 principle is that, first of all, each antitrust authority should think about its own
17 administrative possibilities rather than going to the other antitrust authority.
18 It's the easy way to just ask the other antitrust authority, "Give us everything
19 you have received," rather than really thinking, "What do we really need under
20 our jurisdiction and why don't we ask under our jurisdiction the respective
21 party to provide the information?"

22 There is obviously some fine tuning necessary as far as timing is
23 concerned, because if you need cooperation among antitrust authorities

1 because you want to have the same result, which is actually in a merger case
2 always clearance, then of course you will not ask for exhaustion of the
3 administrative processes and then you identify the respective confidential
4 information which has to be exchanged so the antitrust authorities can sit
5 together and discuss the substance.
6 MR. RILL: Eleanor?
7 MS. FOX: My question goes to a subject we haven't discussed,
8 which is the scope of confidentiality, and I want to say that against a certain
9 background which is this: There are clear tensions in regard to this problem.
10 Information can be very much in the public interest, agencies having
11 information can help them to enforce better, and of course on the other side,
12 the crown jewel problem is very distinct.
13 From my past life as a litigator I recall certain overclaiming
14 confidentiality, and I think it might be useful for us, if and when we propose
15 protocols, if we also tackle the problem of what is confidential. So it's too late
16 in the day to really be asking for responses right now, but I think it would be
17 very useful to have a view of confidential that isn't overbreadth.
18 I want to add one other point. I know, at least since my
19 association, that the ABA Antitrust Section has been always so concerned
20 about, and I would be interested to seek, viewpoints -- that is, members on the
21 Task Force who are also speaking from their own positions, which might be as
22 private plaintiff lawyers and even state attorneys general, because they might
23 see the public interest in a little different way and it would be interesting to

1 engage in that debate.

2 MS. McDAVID: I can provide you with input on that because

3 we are dealing with it right now in a matter that will probably involve the

4 production of roughly 30 million pages.

5 Deciding on a page-by-page basis what is confidential and what

6 is not is an enormous expense and burden on the parties, in addition to the

7 burden and expense that they are already bearing of the identification,

8 production, and copying of those data. And I think it is that which is more

9 likely than anything to lead to overidentification of things as confidential,

10 because you have to necessarily make very gross judgments --is this public? If

11 it's not, we'll treat it as confidential -- because anything else is, as a practical

12 matter, simply impossible.

13 MR. PROGER: Let me challenge you, Eleanor. Why should the

14 parties have to bear this burden? You are compelling me to produce

15 information that I otherwise would not put in the public domain. Why am I not

16 entitled to a simple presumption that my information is confidential?

17 MS. McDAVID: That's absolutely true.

18 MR. CAMPBELL: I can give you, very quickly, the Canadian

19 approach to this on a domestic basis. There is a provision of the Competition

20 Act which says that anything in the merger filing or anything in the request for

21 an advance ruling certificate in relation to a merger or anything obtained using

22 compulsory powers (search and seizure or subpoena powers) is confidential

23 unless it has otherwise been made public. And it is a simple rule that doesn't

1 relate to the crown jewel-like nature of the document. It is simply the way in
2 which it arrives in the possession of the agency.
3 It has a bizarre defect at the moment, which is anything that you
4 would want to give voluntarily to the Competition Bureau in Canada has no
5 form of statutory protection, no matter how confidential it really is. This leads
6 sometimes to rather odd results. But from the point of view of Phil's comment,
7 that if you were being compelled to produce it, the Canadian default is, it's
8 confidential.
9 MR. RILL: You can always require them to compel you to
10 produce it even if you're doing it voluntarily so that you get the safeguard.
11 I don't know that we as an Advisory Committee can get into
12 defining specifically what is confidential information. I think we've got enough
13 in front of us. I think most of the jurisdictions that are deeply involved in
14 merger review, not all 60 or so that have some merger review authority, have
15 exactly what you're talking about as a presumption of confidentiality. You can
16 put my next dog license in your Hart-Scott-Rodino returns, and it's
17 confidential in that context. I'm not saying that there aren't a multiplicity of
18 reasons why those presumptions exist, but the fact is by and large they do.
19 Tom?
20 MR. DONILON: I don't want to keep these folks any longer
21 than I have to. I just want to make two quick points and I'll ask one question.
22 One is that I agree with the observation. My observation from working with
23 American business persons is that there is a high degree of confidence in the

1 American agencies with respect to confidentiality, and I, like you, don't know
2 of an instance, frankly, where confidential data has been disclosed. You can
3 counsel a client with some confidence that that will be the case and that
4 cooperation is in their interest and they can be reassured.
5 Second, I think there is increasing confidence, although not full
6 confidence, in the EU. And I don't know enough about the Canadian situation,
7 I haven't been counseled on that situation. I imagine it's similar. But not the
8 same degree of confidence obviously beyond that as Phil was saying. I think
9 that's a very important point. Second, I think a protocol developed, Jan, with
10 the bells and whistles of experience is a useful thing for the Committee to put
11 together.
12 Third, my question, and it goes to the bottom line. I think, Jan,
13 your testimony really goes to our core burden here. The burden of this
14 Committee with respect to any specific recommendation seems to me is whether
15 it meets our goals of reducing transaction costs, enhancing efficiency, and
16 encouraging harmonization in the merger field specifically.
17 What I heard you say, and Phil actually said it more applicably,
18 is that your testimony would be that, in fact, a mandatory system of disclosure
19 of confidential information between or among reviewing jurisdictions or
20 pursuant to a formal protocol, in your view, would not be superior to the
21 current system of waivers sought by lawyers representing companies and
22 individual transactions, and that you have not in your experience and the
23 experience of the Section seen time reduced, cost reduced. It has helped, as I

1 heard you say, in certain tactical ways or in certain transactions where the
2 parties see that they can get a coordinated response and perhaps a better
3 response.
4 But as a general matter such a recommendation or such a system
5 would not reduce transactions costs and may cause other problems and may in
6 fact increase transaction costs with each reviewing jurisdiction wanting to have
7 an equal amount of documents to plow through. Did I hear you right?
8 MS. McDAVID: You got it right, Tom. There are benefits, but
9 transaction cost reductions is not likely to be one of them. In fact, my
10 experience is in some ways, quite apart from the production of the data in
11 multiple jurisdictions, the coordination among counsel in multiple jurisdictions
12 that is required as a result of the coordination, because they're all talking to
13 each other -- you can't say one thing to one and a different thing to another,
14 when you're dealing, as we are, with 27 filings -- is a real burden and an
15 additional cost. We're not talking to every one of them on a regular basis, but
16 we deal, not quite daily, but certainly every other day, with European and
17 Canadian counsel.
18 MR. RILL: John, do you have any question or comment?
19 MR. DUNLOP: Well, let me ask, out of the total number of
20 cases of mergers in the United States, first, and then, if you want in multiple
21 jurisdictions, in what fraction of those cases is this problem of agreement
22 under the existing system on data a problem? And what fraction is a chore to
23 be done, but on the whole pretty well worked out? I don't know if you

1 understand.

2 MR. RILL: The agencies have made some comment on that.

3 MR. DUNLOP: Is it clear what I want?

4 MR. RILL: It's clear to me.

5 MS. McDAVID: It's not routine, I think, is the answer. It is
6 rare -- well, probably rare is an overstatement, but it's certainly not in the
7 routine cases, it is in the biggest cases with multinational dimensions. With
8 4500 or 4900 filings a year, first of all the agencies only investigate 300 of
9 them in the United States. So you have to start with that 300 as your real
10 subset. And of the 300, I can't tell you what the percentage is.

11 MR. RILL: Bob Pitofsky said that 50 percent of that 300
12 involved an international dimension, but whether that means international
13 coordination I don't know. So it's some subset of 150 that would be involved
14 in some kind of detailed exchange of information --

15 MR. PROGER: One reason why the numbers statistically are
16 low is because most of these transactions have no competitive concern and
17 should not --

18 MR. RILL: Most of the 4,500 --

19 MR. PROGER: -- and therefore should not have this tax in the
20 first place. But in those transactions that are multijurisdictional, there is a
21 significant concern. I also urge you not to limit your deliberations to mergers.

22 MR. RILL: I think you can rest comfortable that the Advisory
23 Committee is not going to consider that this is a de minimis problem.

1 Otherwise we probably wouldn't be spending this amount of time on it.

2 Just one comment on Phil's comment. I appreciate what you're

3 saying -- that we really need to look beyond mergers -- and I'm grappling

4 myself, and I'm sure my colleagues are, as to whether there is sort of a

5 separate section of the report on sharing of confidential information that

6 transcends all three areas. In the merger area, I've been told and I know of no

7 instance where information submitted subject to a merger review has resulted

8 in prosecution by a U.S. agency. I know of no instance. Maybe there are

9 some.

10 MS. McDAVID: I know where there was a civil enforcement

11 investigation, but not a criminal investigation.

12 MR. RILL: But it's quite unusual that that would happen.

13 There is nothing to prevent it from happening, but I think your point is well

14 taken. You cannot deal with sharing of confidential information in a vacuum.

15 I'm not sure exactly how we're going to deal with it. But the fact that maybe

16 there are only 150 cases or a subset of 150 where the issue of cooperation

17 among agencies arises doesn't mean it's not the most important subset of cases,

18 generally, and that's something we have to deal with. Neil?

19 MR. CAMPBELL: I have a couple of very brief bits of

20 Canadian anecdotal information. I think, of Canadian mergers probably half

21 have a cross-border element, and in the case of Canada, that is almost always

22 involving the United States. I had a recent case in which we were working for

23 an American company acquiring a plant in Canada. The target company had

1 no assets in the United States, and we made our filing with the Canadian
2 Competition Bureau. Our client had no facility in Canada but was selling
3 products into Canada. The first thing the case officer said was, “We're going
4 to want to talk to the Americans, have you done your HSR filing yet?” We
5 said, “No. There is no filing in the United States and there would be no reason
6 for the United States to be interested in the transaction because there are no
7 assets there.” And a week later he was still talking about wanting to talk to the
8 U.S. enforcement agency simply because they’re conditioned now to
9 cross-border cases.
10 Another anecdote, Jim, with respect to the scenario you just
11 described. We did see a case in which parties did a swap transaction: where
12 one company bought a business in Canada and sold a business in
13 Massachusetts to the same parties, so it was back-to-back transactions in
14 different local markets. This came to the attention of the Competition Bureau
15 as a merger, but when they became aware of the back-to-back transaction in
16 the U.S., they opened a criminal investigation into the possibility that this was
17 a market allocation. And having opened a criminal investigation, they were in
18 a position where they could have, under the Mutual Legal Assistance Treaty,
19 have forwarded all of that information to the U.S. agency. I can't say that it
20 occurred, but it is possible for certain types of mergers and other arrangements
21 that look like joint ventures which under Canadian law are ambiguous as to
22 whether they are mergers or criminal. So Phil is quite right, there is a
23 crossover.

1 MR. RILL: Maybe when the FTC issues its joint venture
2 guidelines it will all be clear.
3 I think we've caught up with the time and we can take a break
4 now until noon, when the next panel actually is scheduled to appear. Let me
5 thank all of the panelists very, very much. This presentation has been most
6 helpful. I want to echo Paula's comment to invite you, urge you, to submit any
7 individual or collective written views you have, subject to whatever
8 bureaucratic limitations are imposed, and they would be very much respected
9 even as individual views.
10 DR. STERN: Yes.
11 MR. RILL: I think each of us individually may have some
12 questions we would like to pose to you, and feel free do that informally or
13 formally as our schedule permits. Thanks for the time, the obvious effort you
14 have put in, and we look forward to further working with you. Thanks a lot.
15 We'll take a break until noon.
16 (Recess.)
17 MR. RILL: If we can get ready to go with our second panel. I
18 want to move along because we have some panelists that have some very tight
19 timetables.
20 Let me call to order the second panel. And what we have here is
21 a group of overall business organizations and one very broad, very impacted
22 product organization with a lot of experience in this particular area. I will
23 introduce them in the order in which they will present.

1 Bob Weinbaum, a member of the Office of General Counsel,
2 General Motors Corporation. Bob is a Michigander, a graduate of the
3 University of Michigan law school, a former chair of the Antitrust Section of
4 the American Bar Association, speaking today in his capacity as representative
5 of the Business Roundtable. Bob, being a Michigander, is also a Detroit
6 Tiger's fan, and is feeling very good about their having swept the Yankees
7 three straight over the weekend.
8 Tom Niles will be our next presenter. Tom, as of a month or so
9 ago -- two months now, how time flies -- is President of the U.S. Council for
10 International Business. Tom is known to many of us, when I was the Assistant
11 Attorney General, he was Ambassador to the European Union. He has also
12 been Ambassador to Canada, Assistant Secretary of State for Europe and
13 Canada, Ambassador to Greece, and, of current interest, served in Belgrade
14 and Moscow twice. Tom is going to be the second speaker and will be
15 representing the U.S. Council for International Business.
16 Our third speaker, just going down the line, will be Maureen
17 Smith, who is Vice President of the American Forest and Paper Association.
18 Maureen is also a former colleague, Deputy Assistant Secretary of Commerce,
19 and one of the top workers in the trenches of the Structural Impediment
20 Initiative negotiations with the government of Japan, which we participated in
21 for three years during the Bush administration.
22 After Maureen, we'll call on Steve Bolerjack to speak on behalf
23 of NAM. Steve is antitrust counsel for Ford Motor Company, recently

1 involved in a major international transaction, and also a graduate of the
2 University of Michigan law school. I don't know about his sports affiliations.
3 And finally, Bill Blumenthal will represent the U.S. Chamber of
4 Commerce. Bill is one of the leading lights of the antitrust bar, a very
5 respected colleague, has had numerous chairs in the Antitrust Section of the
6 American Bar Association, and is a partner at King & Spalding in Washington.
7 So Bob, we'll start with you and if we can all remember the next order, we'll
8 just go on from there.
9 Again, as with the prior panel -- and let us know when you have
10 to leave, both Bob and Tom -- we would like to hold the questions until after
11 the presentations are made.
12 MR. WEINBAUM: Thank you, Mr. Chair, Madam Chair,
13 Madam Executive Director, and members of the Advisory Committee. It's a
14 privilege for me to be here representing the Business Roundtable to present our
15 views on some questions that we know are of a great deal of interest to you.
16 I would like to say at the outset I appreciate your
17 accommodating my schedule so that I'm able to get down to Florida for my
18 son's wedding festivities over the weekend.
19 MR. RILL: You should definitely not miss that flight.
20 MR. WEINBAUM: That's right.
21 I also appreciate the fact that the panel has invited business
22 people and representatives of business organizations to appear before you. I
23 think it's exceedingly important that you get some of your testimony directly

1 from the horse's mouth rather than filtered through our hired mouthpieces, very
2 able counsel, but at the same time I think the perspective is sometimes a lot
3 different. So in that sense I'm personally very appreciative.
4 I would like to start by indicating that two task forces of the
5 Roundtable, the Task Force on Government Regulation and the Task Force on
6 International Trade and Investment have been considering the work of your
7 Advisory Committee since late last year. And we decided that the best way to
8 go about trying to get some input from our membership was to develop a
9 questionnaire.
10 We developed this questionnaire, and to our pleasant surprise 54
11 members of the Business Roundtable, which is roughly a third of the
12 membership, did respond. The questionnaire went directly to the CEOs from
13 Jack Smith and Phil Condit, who were the chairs of the respective task forces.
14 We kept the questionnaire simple, one page, to maximize the prospects that we
15 would get responses.
16 Today I would like to share with you the results of the
17 questionnaire because I think it may give you a sense of what at least members
18 of the Roundtable business community think on some of the issues that you're
19 grappling with.
20 The first section of the questionnaire dealt with problems
21 experienced with multijurisdictional reviews of mergers or acquisitions. Given
22 the likely composition of the sample and the size and scope of the many
23 Roundtable members from a variety of industries, it was surprising to us that

1 only 30 percent of the respondents reported that they experienced problems
2 with multijurisdictional merger reviews. Among those that reported problems,
3 most identified difficulties with the burdens of the process -- 94 percent. More
4 had difficulties there than with the substantive rules, where 56 percent said it
5 was an issue.
6 Obviously some have problems with both. For those members
7 that did report problems associated with multijurisdictional reviews, only 43
8 percent considered those problems so harmful or so costly that they would
9 want to have the solution lie with the negotiation of some sort of an
10 international agreement.
11 Overall, 11 percent of those responding favored bilateral
12 negotiation covering these multinational merger reviews. Less than 4 percent
13 favored a solution at the World Trade Organization.
14 The second section of our questionnaire inquired into members'
15 experiences with market access barriers attributable to foreign antitrust-related
16 business practices. The percentage of members that experience these barriers,
17 31 percent, was approximately the same as those reporting problems with
18 multijurisdictional merger reviews. And the percentage favoring the
19 negotiation of an international agreement was also about the same -- 47 percent
20 for market access issues and 43 percent for multijurisdictional merger review
21 issues. And I might add if you haven't read it, we've attached the questionnaire
22 results to the statement which was filed a few days ago with the Advisory
23 Committee.

1 The respondents preferred bilateral negotiations to multilateral
2 negotiations to address antitrust-related market access problems. In fact, only
3 one of the 54 respondents favored negotiation of a WTO agreement to address
4 these access barriers attributable to anticompetitive practices.
5 Market access barriers are by their very nature targeted at
6 specific industries, and it's not particularly surprising that most Roundtable
7 members did not encounter problems in this area. Still, these barriers pose
8 significant problems for the companies affected and do call for appropriate
9 action by the U.S. Government. We want to emphasize that our questionnaire
10 dealt only with the one category of market access barrier. That is,
11 anticompetitive practices. Foreign anticompetitive practices.
12 Our members' answers in this area, in our judgment, in no way
13 bear upon the Business Roundtable's position concerning other types of market
14 access barriers.
15 I would like to now turn to some policy recommendations we
16 would like to make with respect to international competition. The Business
17 Roundtable recommends that the U.S. Government take constructive
18 incremental steps based on shared experiences, bilateral cooperation, and
19 technical assistance to other companies in order to develop an international
20 culture of sound antitrust cooperation and enforcement. We therefore make the
21 following specific policy recommendations:
22 First, we consider that the negotiation of a WTO competition
23 agreement would be unnecessary and potentially counterproductive at this

1 time. First there is no meaningful international consensus on the competition
2 policy goals that would be advanced at the WTO. Second, we question whether
3 the WTO has the institutional competency at this stage of its development to
4 deal with anticompetitive practices that are for the most part perpetrated by
5 private actors as opposed to national governments. Third, we're concerned that
6 certain developing countries might use such negotiations to disturb the
7 carefully crafted multilateral balance embodied in the WTO anti-dumping
8 code.
9 Finally, since linkages between competition and trade have not
10 sufficiently developed, it would be difficult to determine how the relevant
11 issues might be effectively tackled in a multilateral trade context.
12 In the event there is a consensus to preserve a role for the WTO
13 in this area, we believe a more constructive approach would be to establish a
14 new work program on competition policy to assist the governments in framing
15 competition policy issues, exchanging information and viewpoints, and
16 providing technical assistance for the development and enforcement of
17 appropriate antitrust laws.
18 This recommendation, as you know, is consistent with the
19 previously expressed Roundtable position.
20 We also suggest that the United States continue to take a
21 bilateral approach to international competition policy issues. Pursuit of
22 additional bilateral agreements tailored to the similarities and differences
23 between the national regimes involved we think is the most constructive

1 approach for dealing with competition policies and market access problems
2 confronting U.S. companies in key foreign markets.
3 Furthermore, even though they may focus on matters of process
4 initially, bilateral agreements offer an excellent opportunity eventually to
5 promote greater harmonization or convergence of national policies.
6 The following are examples of bilateral initiatives which we
7 think should continue to be encouraged:
8 First, we like the idea of continuing to promote the principle of
9 positive comity. Encouraging countries to enforce their own antitrust laws
10 where appropriate will help ease international tensions arising from
11 extraterritoriality. Positive comity also provides a sensible systematic
12 approach to fact gathering, reporting, and bilateral consultation among
13 competition authorities.
14 At the same time, the Roundtable believes that U.S. authorities
15 should continue to exercise extraterritorial antitrust jurisdiction where foreign
16 relief is not forthcoming, substantive violations are presented, the standards
17 for U.S. jurisdiction are met, and effective relief can be obtained.
18 We recognize that sovereign states may continue to have
19 different views on various substantive antitrust policies, but the differences
20 should be overtly expressed rather than implemented by inattention. It is not
21 inconsistent, in our judgment, with national sovereignty for two nations to take
22 steps that make it easier for each one to hold the other to its word. Suppose
23 that private conduct in one nation violates the overt laws of another to the

1 detriment of citizens of another nation. If the public authorities of the first
2 nation do not take appropriate action for some reason, they should at least be
3 willing to facilitate extraterritorial enforcement of laws entirely consistent
4 with their own.
5 The experience of PPG industries, a Roundtable member,
6 illustrates this principle. PPG has pointed out that a tightly controlled
7 oligopoly of Japanese flat glass manufacturers has been permitted to severely
8 restrict access to domestic distribution channels through unilateral and
9 coordinated exclusionary conduct. The conduct included enforced quotas for
10 the purchase from Japanese producers, tie-in sales requirements, exclusive
11 denial of product advertising space in domestic trade publications, and
12 coercive financial leverage. To date neither MITI nor the Japanese Fair Trade
13 Commission has addressed the problem, despite compelling evidence of
14 conduct that their own law does not condone.
15 In this kind of a situation, it is appropriate for U.S. antitrust
16 authorities to step in and assert their authority to prosecute foreign
17 anticompetitive conduct. We also think that it is important to continue to
18 negotiate MLATs. Such agreements promise to substantially enhance the
19 ability of U.S. authorities to prosecute anticompetitive practices as I described
20 before. We think it is important to strengthen international enforcement of
21 private antitrust actions.
22 And finally, we think it is important to continue to expand
23 technical assistance to developing countries to aid in the drafting of national

1 antitrust legislation, the implementation of effective enforcement regimes, and
2 the refinement of investigatory techniques. And the Roundtable has set forth in
3 our paper some suggestions, areas where we think it is important to pay
4 particular attention as we go forward to assist in the development of
5 enforcement regimes.
6 Finally, we think that premerger and preacquisition reviews
7 conducted by multiple countries have the potential to subject American
8 businesses to substantial transaction costs, and I would like to spend just a few
9 minutes talking about this.
10 As I pointed out, our member companies do not appear to regard
11 these costs to be so great as to warrant the negotiation of an international
12 agreement. This does not mean that these problems are not of concern for the
13 companies that reported them or that this Committee's attention to this area
14 would be misplaced. To illustrate with an analogy, we cannot conclude that
15 there are no second request problems with respect to Hart-Scott-Rodino simply
16 because second requests are relatively rare. Mergers with an international
17 dimension are becoming increasingly common and for many of our members the
18 full impact of these developments may not yet have been experienced, and we
19 heard this morning that when we are filing in 9 or 26 countries and the
20 prospects are great for those numbers to be enhanced, there are going to be
21 substantial costs for business.
22 In the area of multijurisdictional merger reviews, we're
23 particularly interested in the promotion of best practices. Admittedly,

1 multilateral negotiation of a code of best practices is probably not feasible at
2 this time. The most realistic ultimate outcome might be some consensus on
3 principles looking to unilateral adoption in whole or in part by various
4 sovereign authorities. To move the process along, it would be helpful to
5 develop a set of best practices in consultation with U.S. antitrust agencies,
6 select foreign authorities, and private experts around the world. The objective
7 would be not to negotiate a protocol but, rather, to develop and circulate a list
8 of recommended best practices along with explanatory comments and perhaps
9 alternative viewpoints. These are the kinds of things where we think would
10 lead to an incremental improvement in how the respective jurisdictions go
11 about their merger review obligations.
12 In addition, the Business Roundtable supports steps to obtain
13 greater transparency in antitrust enforcement. We have already alluded to this
14 concept in our discussion of positive comity. I want to stress the importance
15 of holding a nation to its word. Whatever substantive standards a nation may
16 apply to its merger review, those standards should be publicly expressed and
17 applied consistently. Again, it would be helpful to begin at home and continue
18 to expand the information flow from our own agencies on the standards they
19 apply. Our agencies are doing a good job but there is always room for
20 improvement.
21 That concludes the remarks that we would like to present to the
22 Advisory Committee. There is some further detail in the paper itself, and to the
23 extent you have any follow-on questions or concerns beyond any questions you

1 would like to address to me today, we would be happy to furnish
2 supplementary information to you. The Roundtable is privileged to be able to
3 participate in the work of the Advisory Committee, and I thank you all.
4 MR. RILL: I want to thank you very much and thank you for
5 your efforts and your colleagues' efforts in putting together the questionnaire.
6 I think that will be very helpful to us in our deliberations as well as, of course,
7 your comments today. Tom.
8 MR. NILES: Thank you, Mr. Chairman.
9 I'm pleased to have the opportunity to present the views of the
10 United States Council for International Business on the important international
11 competition policy issues before the Advisory Committee. I might just note
12 that the Council participates on the international side of these issues through
13 our affiliations with two organizations -- the International Chamber of
14 Commerce where we represent U.S. business and also in the BIAC of the
15 OECD -- we participate actively in both of those organizations.
16 MR. RILL: Tom, I want to interrupt and commend the U.S.
17 Council for the work it has done in this area. Your organization deserves a lot
18 of credit. I also want to recognize your colleague, Nicole Domencic, who is
19 here today and has done a lot of work in this area and it has been very helpful
20 to us.
21 MR. NILES: I can't take any personal credit for that because,
22 as you've noted, I've only been with the Council for a couple months, but
23 Nicole has been working on this for quite a while, and my predecessor, Abe

1 Katz, was actively involved.

2 We will be giving the Committee a more lengthy paper. I'll try

3 to keep my remarks short since we don't have a lot of time and there are other

4 people who have important positions to present as well.

5 I will briefly comment on three key issues: trade and

6 competition, enforcement cooperation, and the merger review process.

7 On the question of trade and competition, I might say we agree

8 with the Business Roundtable position that it would be at the very least

9 premature to begin any effort in the WTO to negotiate a multilateral agreement

10 on the relationship between trade and competition policy. We support the

11 continuation of the educational mandate that the WTO currently has with the

12 working group on trade and competition. We believe that the working group

13 should focus on the importance of transparency and national treatment, and in

14 addition to consideration of enhanced cooperation should also consider

15 appropriate measures and safeguards to protect the confidentiality of

16 proprietary business information from improper disclosure.

17 On this confidentiality issue I might note that one aspect of the

18 WTO that should be kept in mind is that with 134 members, the WTO would

19 not offer the sort of protection of confidential information that the participants

20 in the earlier panel this morning were particularly concerned about.

21 Obviously, a lot of those WTO members outside the OECD group would not

22 have the sort of system that would provide protection for confidential

23 information; one more reason why we think it would be very premature to get

1 involved in the effort to negotiate a competition policy agreement in the WTO
2 at this time.
3 It is very much, we believe, in the interests of business and
4 government alike to reduce duplicative and multijurisdictional enforcement in
5 competition laws in the name of providing more certainty in competition policy
6 and keeping down the cost of compliance. In this respect, USCIB members
7 generally believe that positive comity can be an effective enforcement tool.
8 Here we share the views expressed by the representative of the Business
9 Roundtable. Positive comity, we believe, can be used effectively when the
10 United States Government would be willing to defer jurisdiction where a
11 problem can be effectively resolved by another country.
12 However, in cases where private restraints and foreign markets
13 appear to be impeding the export of U.S. goods or services, United States
14 antitrust authorities should defer jurisdiction only if in doing so, it is certain or
15 nearly certain to result in effective enforcement action by the local authorities
16 that will eliminate those private restraints. I might say from a personal point
17 of view, I am a little bit concerned about the idea that we should proceed
18 extraterritorially in enforcing our antitrust laws, given some of the experiences
19 I had over my career in the Foreign Service, most notably the Laker antitrust
20 case in 1983-84, and the difficulties that particular case caused in our
21 relationship with the United Kingdom, a country that feels very strongly about
22 the issue of extraterritorial application of United States laws, including in the
23 area of competition policy.

1 Increased enforcement cooperation raises another important
2 issue of concern to our members, and that is the protection of confidential
3 business information and the exchange of information between antitrust
4 authorities. Here we share the concerns of the panel in the earlier group; and I
5 mentioned the problem that would emerge if indeed something were done on
6 competition policy beyond the educational effort underway in the context of the
7 WTO.
8 The final area I will address this morning is multijurisdictional
9 merger review. Our members continue to express concern on a number of
10 issues relating to mergers. For example, USCIB members agree with the
11 ICPAC's suggestions that competition authorities should not rely on filing fees
12 for funding. The issue of thresholds is also challenging for business, and some
13 of our members have suggested the need for the review of our own
14 Hart-Scott-Rodino thresholds.
15 USCIB members feel that the proliferation of merger notification
16 requirements in countries developing competition laws is increasingly
17 burdensome for business. Translation: the filing requirements can be costly,
18 especially for U.S. businesses with substantial overseas operations. It's not
19 unheard of that a multinational corporation with a proposed merger would be
20 today required to file in 20 or 30 jurisdictions, and this will certainly continue
21 to increase. For example, a merger such as that announced yesterday between
22 Italia Telecom and Deutsche Telekom, and the earlier one between Daimler and
23 Chrysler.

1 In the merger area we believe that national governments and
2 organizations such as the OECD can assist business by increasing the
3 transparency of information regarding existing notification regimes and
4 pending notification initiatives. Here we share the view expressed a moment
5 ago by the representative of the Business Roundtable. Merely identifying and
6 periodically updating information on merger laws in foreign jurisdictions and
7 making such information readily available would be a great service to the
8 business community. USCIB members believe the merger notification process
9 in any jurisdiction should be tailored so as to avoid imposing any unnecessary
10 transaction costs that do not have a direct correlation to effective competition
11 law enforcement concerns in the effective jurisdiction.
12 In this respect we support the OECD-BIAC recommendations
13 with regard to the OECD project on the harmonization of merger notification
14 requirements. We support the position that to the fullest extent possible
15 information required to make an initial filing should be limited to information
16 normally maintained by the parties in the normal course of business. When a
17 transaction does raise serious competitive issues, the request for additional
18 information, of course, may be necessary and even expected. As was stated in
19 the BIAC recommendation to the OECD, proportionality should be a guiding
20 principle in all jurisdictions which have or are considering merger notification
21 requirements.
22 In conclusion, let me summarize a few of the recommendations
23 of the USCIB, the ICC and BIAC, which I presented to you this morning, albeit

1 in rather condensed form.

2 Business advocates greater transparency of antitrust laws and
3 procedures across all areas of competition policy. Regarding trade and
4 competition, we support the continued and important analysis of trade and
5 competition issues at the OECD, the WTO, and the ICC. We do not support
6 moving toward an international framework on competition rules at this time but
7 encourage increased bilateral cooperation and the use of positive comity.

8 Regarding the protection of confidential business information in
9 the exchange of information between authorities and antitrust cooperation, we
10 emphasize the importance of notice to business before sensitive information is
11 exchanged by antitrust authorities in an investigation. On mergers, our
12 members support efforts to create a more transparent and efficient process that
13 will increase certainty in the filing process and keep transaction costs down.

14 Finally, the USCIB commends the Advisory Committee for its
15 work, and we look forward to continued cooperation with you. Thank you very
16 much.

17 MR. RILL: Tom, thanks very much. Very comprehensive
18 statement. I look forward to reading it in some detail. Undoubtedly we will
19 have some questions here and hereafter. Maureen.

20 MS. SMITH: Thank you very much.

21 Before I begin I would like to express our appreciation on behalf
22 of forest products industry for this opportunity to speak with you today, but
23 more broadly to express our appreciation for the tremendous effort that you

1 have been making to come to grips with the issue of competition policy and
2 particularly for industries like ours where anticompetitive practices and
3 especially other governments' toleration of anticompetitive practices is a
4 genuine bottom-line issue which goes to our ability to sell our products and
5 increasingly globalized international market.
6 Today what I think my role on the panel is to kind of drill down
7 and give you a very specific example of how the toleration of anticompetitive
8 practices by the government of Japan in the paper market, as our colleague
9 from the BRT pointedly made, is that these typically take place in individual
10 product sectors, and give you a clear view of exactly how it works in practice
11 to deprive us of market access, and why existing trade policy tools really do
12 not get to the problem.
13 First of all, let me make the point that the Japanese paper market
14 is terribly important to our ability to compete on a global basis. It is, after the
15 United States, the world's second largest producer and consumer of paper and
16 paperboard. Nevertheless, import penetration in this sector in Japan is the
17 lowest anywhere in the world. In 1998, imports from all sources in this
18 product category accounted for just under 3.9 percent of Japanese paper and
19 paperboard consumption, and imports from the United States represented only
20 1.7 percent of consumption.
21 As I'm going through this I have to ask Merit's particular
22 tolerance because I'm sure that she knows a lot of what I'm saying, at least as
23 well as we do or anybody else, having been responsible for this issue over time

1 in the USTR. But as I'm giving you these numbers, I have to emphasize that if
2 you were to chart those figures for the past decade, and I believe for the past
3 two decades, you would find that they vary plus or minus one-tenth of one
4 percent at every stage of the business cycle, at every level of yen-dollar
5 relationship, and across all variations of major macro indicators. So one has
6 to come to the conclusion that there is very remarkably little sensitivity to
7 market factors in this sector.

8 To put it in perspective, though, even a one percentage point
9 increase in U.S. market share would be worth $400 million in additional U.S.
10 export sales to Japan. So the fact that we've not been able to move those
11 numbers at all over the past 20 years makes it clear how much sales our
12 industry has lost over this period of time.

13 Behind that, however, what I think needs to be said for this panel
14 is if you look at the traditional barriers to market access, the Japanese case in
15 the paper industry is a pretty good one. Tariffs are very low, two to three
16 percent, and in paper particularly you don't encounter issues of standards or
17 other traditional nontariff barriers. So one has to look for an explanation why
18 this particular segment of the economy appears to be immune to market
19 factors.

20 Our conclusion is that competition in the Japanese paper market
21 has been suppressed historically, by both governmental and private action
22 which have made access for imported products extremely difficult with the
23 unique exception of those products that are not produced domestically.

1 And particularly the U.S. paper industry believes that this is
2 attributable to an array of anticompetitive business practices. And as I go
3 through this list you will see some parallelism with the list that our colleague
4 from the BRT referred to describing the situation in the flat glass industry.
5 First, a complex and largely closed distribution system; second,
6 interlocking relationships between members of the keiretsu which include
7 manufacturers, agents, wholesalers, trading companies, printers, publishers,
8 other end users, and financial institutions. These relationships result in
9 exclusionary business practices restricting the entry of new suppliers including
10 imports.
11 I might shed a little personal experience with you here. We have
12 an office in Japan, and I tried to ensure that all of our programs and
13 promotional literature was printed on American paper. I wanted to use it as an
14 additional promotional tool to have a little logo at the bottom of it that said
15 printed on high quality U.S. paper.
16 Every single printer in Japan that we contacted told me that they
17 would charge me a 50-percent, a 200-percent premium if I specified imported
18 paper. And that just gives you an example of how this works, that even where
19 a consumer is sold on the quality of the paper that they want to specify, and
20 again we're talking about a very high quality paper here that we would be using
21 for these publications, because of the relationships, the printers will not even
22 entertain that request. Every barrier was put in my way, and to my chagrin I
23 did give up.

1 DR. STERN: They didn't say that the printer press would be
2 broken if U.S. paper went through the press.
3 MS. SMITH: No, they didn't say that, but they said, and
4 furthermore even if you want to pay that premium we will not guarantee that
5 we will meet your deadlines. They threw every single obstacle in my path so
6 that, as I said, even I at the end of the day had to back down, and say, I give
7 up, just print it so that we can get a brochure about a promotional event before
8 the promotional event is even over. I just wanted to share that with you.
9 And reinforcing all this or the enforcement behind all this is the
10 financial ties between manufacturers and distributors, preferential bank
11 financing even for uncompetitive companies, a lack of transparency in
12 corporate purchasing practices, and finally and most directly, inadequate
13 enforcement of Japanese antimonopoly laws.
14 Again, as Merit knows very well, in April 1992, the U.S. and
15 Japanese governments, thanks to her excellent efforts, concluded a five-year
16 agreement on measures to increase market access for foreign firms exporting
17 paper products to Japan. And while there was no explicit recognition on the
18 part of the government of Japan that one of the problems in the market were
19 anticompetitive practices, among the remedies that were stipulated in that
20 agreement was the development of antimonopoly law compliance programs by
21 distributors, converters, printers.
22 Concurrent with that agreement the Japan Fair Trade
23 Commission undertook a study of the paper distribution system from the

1 perspective of competition conditions. This report, which was released in June
2 '93, again fits the pattern that is typical of many such JFTC surveys in that it
3 did not identify specific actionable violations of the Antimonopoly Act but it
4 did cite certain aspects of the paper distribution system which it found to be,
5 quote, problematic.
6 These include the capital relationships, again that we've cited
7 between manufacturers, distributors, and wholesalers; the use of oral
8 agreements to determine the terms of a transaction; the traditional after-sales
9 price adjustment. And imagine the difficulty of competing when your
10 competition in Japan does not submit a written bid in terms of price. And
11 furthermore, that bid or the price that is paid can be revised several months
12 later so that you have no ability to access the system on a competitive basis.
13 What has been the effect of this particular provision of the paper
14 market access agreement? Well, one positive benefit is that now rather than
15 the unwritten understandings, there are actual written contracts. However, our
16 understanding again based on people in the marketplace is that these are still
17 subject to subsequent readjustments, so it's more of a, if you will, cosmetic
18 improvement than a real improvement in the conditions of competition.
19 Overall, however, the marketplace effects of the agreement
20 regrettably were very disappointing. And again it is our view that this is due
21 to the fact that there was no change whatsoever in the JFTC view of the
22 anticompetitive practices in that industry.
23 On the contrary, there is a case to be made that the toleration of

1 these anticompetitive practices accompanied an explicit restructuring policy in
2 the Japanese paper industry. And again this is a pattern that is very familiar to
3 those of us who have worked with Japan.
4 In terms of working with MITI, in 1994 MITI developed a report
5 prepared by a study committee on basic issues in the Japanese pulp and paper
6 industry, which those of us who have worked in this know as an elevation plan.
7 And the objective was to restructure the Japanese paper industry in a way that
8 would turn it from fundamentally an import substitution industry based on the
9 domestic market alone to an export-oriented industry designed to serve regional
10 markets.
11 If you think about the competitive position of the Japanese paper
12 industry where they depend to a large part on imported raw materials and
13 where they depend entirely on imported sources of energy, the idea that you
14 would entertain ambitions to become export-oriented makes it clear that this
15 cannot be accomplished without substantial help from the government. And
16 that is exactly what has happened over time.
17 Even though, as I have mentioned, it is a very high cost producer
18 and notwithstanding the fact that the domestic market was growing at only 2
19 percent, Japanese companies initiated projects to add capacity equivalent to
20 1.7 million metric tons of new paper and paperboard capacity. The major
21 players in the industry underwent a, quote, consolidation, which substantially
22 strengthened the position of the leading producers and minimized direct
23 competition.

1 And finally, several paper companies obtained special treatment
2 under Japan's business reform law. Whenever there is a reform in the title of
3 Japanese legislation, my experience has been that the objective is not in the
4 direction of reform but rather to return to protectionist and industry promotion
5 policies that have worked in the past. But at any rate, under the business
6 reform law, they received special tax credits and approval by the JFTC for
7 cooperation with other companies in the industry in the course of this
8 restructuring.
9 The Japanese press at the time made it very clear that companies
10 would cooperate to inject capital into weaker elements of the industry so that
11 at the end of this plan, again, supervised by MITI, the Japanese paper industry
12 would be strengthened and capable of being an export industry.
13 The results in the marketplace are very, very clear. Since the
14 restructuring was completed, paper and paperboard exports from Japan in
15 1998 increased by an incredible 14.8 percent. At the same time, imports
16 declined precipitously. This I think is certainly a case for our industry, but my
17 purpose here today is not to tell you our problems in the Japanese market. My
18 purpose here today is to present to you an example, one window on the
19 Japanese model which we believe is particularly important, not just because of
20 the impact on our industry, because it does serve as a model for other countries
21 in the region which are following the export-led growth model. And we only
22 have to look at the way similar practices are being applied in Korea and in
23 China to recognize the importance of coming to grips with the specific aspects

1 that I have identified in our sector.

2 So we have developed some recommendations for your

3 consideration that might assist in dealing with these. They are based on our

4 experience under the agreement, and based on our experience in the

5 marketplace of long standing, we have come to the conclusion that clearly the

6 Japanese government has been unwilling to enforce its own Antimonopoly Act,

7 and indeed that the toleration of these practices has served to advance their

8 industrial restructuring plans.

9 First, it is suggested that U.S. enforcers could request follow-up

10 surveys in some of the sectors that have been surveyed in the past, including

11 paper. The object of these surveys should be to assess compliance with Japan's

12 own Antimonopoly Act. And the suggestion is that these be interactive surveys

13 to the extent that we wish to avoid a repeat of the past when they were a

14 whitewash of existing practices, but that there be some standards and some

15 expectations established at the beginning as to the thoroughness of the surveys.

16 Second of all, U.S. enforcers could request the Japanese

17 government's cooperation with a U.S. investigation of conduct in Japan that is

18 hindering exports from the United States. We're not suggesting at this point

19 that this be directly tied to enforcement action, but we do think that a joint

20 investigation in this area would be useful.

21 U.S. enforcers could help educate Japanese enforcement

22 authorities and Japanese companies on the value of comprehensive

23 antimonopoly law compliance programs and encourage their adoption by

1 Japanese companies. This might be also a useful undertaking by some of our
2 broader-based business organizations.
3 We attempted to do something like this in our sector, and the
4 normal language barrier was complicated by an absolute inability to
5 communicate these concepts of compliance, the kinds of compliance programs
6 that all of our companies understand and vigorously support.
7 A compliance program in the Japanese paper industry means a
8 statement in the files that says the Japanese manufacturing company is in
9 compliance with the Antimonopoly Act. That's their idea of a compliance
10 program. So I think that some real education in this area would be very, very
11 helpful. But it is a major undertaking. As I said, we have tried it, and the
12 groundwork is not there.
13 It's suggested that U.S. enforcers could work with U.S. agencies
14 responsible for compliance with existing trade agreements to determine
15 whether conduct that constitutes noncompliance with such agreements amounts
16 to an antitrust violation, and I think generally we do support very close
17 collaboration between our trade authorities and our antitrust enforcement
18 authorities.
19 And finally, U.S. antitrust enforcers might consider supporting
20 amendment to U.S. antitrust laws clarifying their application to conduct
21 outside the United States which hinders access to foreign markets.
22 Thank you very, very much.
23 MR. RILL: Maureen, thank you very much. I hope you can stay

1 with us because I have some questions. But I would like to, before we break
2 for lunch, give us an opportunity to ask any questions we might have for Tom
3 because I understand you have a time problem. Can you bear with us for a few
4 minutes to answer a few questions.
5 MR. NILES: I'm fine, if anybody has any questions now.
6 MR. RILL: Let me just open up with a question. I see an
7 interesting parallel on a question that Paula asked earlier. I see an interesting
8 parallel between your views and those of the Business Roundtable, and
9 skimming through some of the other statements, it seems to me there is a
10 commonality of interest here in the business community which I find
11 gratifying.
12 MR. NILES: Not surprising, since their members are, generally
13 speaking, our members.
14 MR. RILL: That doesn't always work.
15 MR. NILES: It doesn't always. But not surprising.
16 MR. RILL: I wonder if you feel that the Council and BIAC have
17 been effective in making these views known to governments and
18 intergovernmental organizations, starting with the U.S. Government. I'm not
19 asking for a report card on your own performance, but whether there are
20 improvements that could be made in overall relationships so that the U.S.
21 business views can be adequately expressed in international communities.
22 MR. NILES: I don't have the impression that we have a problem
23 in this area, and I know we particularly appreciate the opportunity to present

1 our views to this Committee, because I think it's somewhat unusual that
2 business views are presented in this way. It's probably a practice that could be
3 more widely adopted across the range of U.S. Government activities, but we
4 certainly appreciate this opportunity.
5 I don't have the impression in this particular area, the area of
6 competition policy, that our members feel that positions adopted by U.S.
7 Government officials, whether in the OECD or in the WTO, are counter to the
8 views of business.
9 MR. RILL: That's good to hear.
10 MR. NILES: That doesn't always apply.
11 MR. RILL: I understand.
12 MR. NILES: For example -- well, I won't cite other cases, but
13 there are plenty of them.
14 MR. RILL: Let me acknowledge the presence of Debra
15 Valentine, the general counsel of the Federal Trade Commission and formerly
16 the head of the International Commerce Section of the Federal Trade
17 Commission, and former partner of Tom Donilon.
18 MS. VALENTINE: I would be interested in asking Tom one
19 quick question before we leave you.
20 First, one thing to perhaps assuage some concerns, which is that
21 I also remember fondly the Laker days, and those I'm sure were not easy ones
22 for you. In fact, there was --
23 MR. NILES: We won it.

1 MS. VALENTINE: Yeah, I know.

2 MR. NILES: We and the State Department did.

3 MS. VALENTINE: -- an interesting evolution in the way that
4 other countries are looking at their antitrust laws and far more, including the
5 EC notably and quite strongly in a very recent decision, are accepting the
6 concept of extraterritorial effects.

7 MR. NILES: Or you can say that they're following our bad
8 example.

9 MS. VALENTINE: Or that we could be correct and they are far
10 more acknowledging it or accepting of it.

11 But what I wanted to ask you about really was your push for
12 positive comity and what you thought that could actually cover and
13 accomplish, where you thought that would really work and whether you were
14 even -- because you used it as a potential method or means for eliminating
15 multiple reviews, transaction costs -- and where I thought you were first going
16 was actually to be talking about it in the merger area where it's obviously much
17 more difficult to do.

18 MR. NILES: No, I wasn't referring to it in the merger area,
19 although it might indeed some day come to that, given the number of mergers
20 and acquisitions which are crossing the international borders. For example
21 between the European Union and the United States and Japan, every major
22 acquisition in one of these jurisdictions has significant effects in the other. At
23 some point, given the number of mergers and acquisitions that we're likely to

1 be looking at downstream here, we might want to think about whether the
2 principle of positive comity could be applied in some way to mergers and
3 acquisitions. But that's not our position. I'm just raising that as a possibility.
4 MR. RILL: Or even traditional comity.
5 MR. NILES: Not negative comity, though, as we heard earlier.
6 MR. RILL: I think I prefer calling it traditional comity and
7 positive comity. Paula?
8 DR. STERN: I have some questions for those who have testified
9 so far, and I want to say that it's really gratifying to see the business
10 community coming forward. We have really worked to prime this pump, and
11 it's finally very good to hear from representatives directly who are in the
12 business community. That goes to Robert Weinbaum's point. I'm sorry he is
13 not here, and I know that he will, however, be reviewing the transcript.
14 I would invite each and every one of you to take the opportunity
15 after this hearing if you have further thoughts, further questions or further
16 responses to your questionnaires, et cetera, to share them with us because this
17 has been one of our primary objectives as a private independent advisory
18 group, to reach out, outside of the government to encourage responses because
19 this is not a government group. This is an independent advisory group that is
20 sponsored by the government.
21 The questions that I have relate to some of the topics that we
22 talked about in the earlier panel today, and the fact that there has been this
23 coincidence of positions is very helpful to the advisory group to know what

1 consensus may be emerging in the private sector about the role, for example, of
2 the WTO.
3 Particularly you, Ambassador Niles, and Mr. Weinbaum's
4 testimony overlapped in stating the concern that the WTO not negotiate an
5 agreement. And you, in your testimony, specifically talked about an
6 educational role exclusively, and that you do not support the establishment of
7 WTO principles or rules.
8 I would like to ask you to dive a little deeper here with me. The
9 existing WTO services agreement has competition principles embedded in the
10 telecommunications segment of that agreement, so the WTO is already, if you
11 will, a little bit pregnant when it comes to principles. And I'm wondering if it
12 is the position of your organization or of the business community that those
13 competitiveness principles have been a mistake, that we should negotiate to
14 remove them, or alternatively they may, in fact, be a very good first step that
15 should be built upon in other sectors in the services area, such as other
16 telecommunications or regulated industries or formerly government-owned
17 industries that have been privatized, such as the energy sectors or other sectors
18 in distribution, transportation, delivery services, and whether, indeed, one
19 should even take that principle and bring it out of the GATT services
20 arrangement and apply it into nonservices area, into the goods area. So I wish
21 that you would talk to me a little bit more about that aspect of the WTO's
22 experience.
23 MR. NILES: Sure. Our position on the role of the WTO or

1 competition policy in the WTO, intersection between trade and competition
2 policy, is not based on the view that the WTO should never get involved in the
3 subject but, rather, it's premature to try to do it today, in part because, at least
4 in our view, there is no consensus among WTO members as to what that might
5 be and what might emerge from this process. And indeed the working group on
6 trade and competition policy may ultimately, we don't know when that is, lead
7 us to the point where we might, indeed, see sufficient consensus to negotiate a
8 more general agreement. So we're not saying don't do it ever. We are saying it
9 would be distinctly premature to undertake such an effort now, and it would
10 simply accentuate or bring to the fore differences between WTO members.
11 There is also the issue I mentioned about confidentiality of
12 information. If we got hypothetically into an information exchange with the
13 134 members of the WTO, we would have a major confidentiality problem on
14 our hands, much beyond anything we have experienced before. In fact, as we
15 heard today, the exchanges we have now on a bilateral basis with OECD
16 member countries work quite well from the confidentiality point view. So we
17 feel that it would be premature but we shouldn't say never, but I'm not sure
18 when ever might be.
19 For example, within the time frame of the next multilateral trade
20 round, the millennium round, which we hope will be initiated in Seattle in
21 December, we would certainly not see this as the time to begin to have anything
22 more than an educational effort in the WTO on competition policy practices.
23 Now, in terms of what was agreed on GATT's agreement on

1 telecommunications, that really was a very specific agreement with some very
2 unique characteristics where you were dealing with sectors, which in most
3 countries, though not the United States, were state-controlled sectors where
4 you didn't have any degree of competition at all, even the degree at which we
5 were in 1986 at the beginning of the Uruguay round, when competition had
6 developed within the U.S. telecommunications sector as a result of divestiture.
7 So it was necessary there and certainly this is a positive element. But I don't
8 think those principles could necessarily be applied today across the range of
9 activities in the WTO.
10 DR. STERN: Do you feel that they should be looked at?
11 MR. NILES: We don't have any problem at all with that. But
12 another thing, our members who are in one aspect or another of the
13 telecommunications business aren't all dissatisfied with what was done in the
14 WTO on telecom, but we don't feel that the situation is propitious today to
15 generalize from that agreement into other sectors.
16 DR. STERN: So there should be a standstill on applying
17 principles, competition principles potentially to any other sectors and services?
18 MR. NILES: No. We don't want to move back from what was
19 achieved in the Uruguay round, but we don't feel at this point that we want to
20 move forward into other areas.
21 MR. RILL: One other point to the question, it's not clear
22 exactly how well it's worked in the telecom area, but I'm not qualified to speak
23 to that.

1 MR. NILES: Nor am I.

2 DR. STERN: That's why I was asking if you have experience --

3 MR. NILES: I'm not qualified on that either, Jim, but I would

4 think that the fact that we haven't heard any complaints from our members,

5 which include major telecom providers, service providers, equipment

6 providers, suggests to me that it is probably working pretty well. The more

7 you hear about it --

8 DR. STERN: Well, I would venture to guess that the USTR will

9 be working on other sectors, and so it's very interesting to hear that --

10 MR. NILES: You mentioned transportation. I dare say that's

11 one sector they won't be working on. Excuse me.

12 DR. STERN: I mentioned delivery services. And distribution.

13 MR. NILES: Well, civil aviation is an interesting area, but I

14 have a feeling that if we raised civil aviation, others would raise shipping.

15 DR. STERN: Well, since we'll be hearing -- I think we were

16 planning to hear from representatives from UPS tomorrow, but that's been

17 rescheduled. So it's very helpful to hear your comments from the overall

18 organization.

19 MR. NILES: This is an area in the United States that is highly

20 competitive. FedEx and UPS are around the world providing services very

21 effectively and profitably. There are others sectors, shipping, where we're not

22 so --

23 DR. STERN: May I just --

1 MR. RILL: I'm sorry.

2 DR. STERN: I think your position is very clear, and I
3 appreciate your going down to other possible roles which you feel the WTO
4 should not -- or the U.S. Government, I guess, should not venture.

5 My question to Maureen Smith, my dear colleague, is if you
6 would comment, please, on the experience that you are having to date with the
7 U.S. Government, and whether you feel that there is a role -- the government is
8 adequately equipped to take up this issue with the Japanese government absent
9 the market access agreement which is now defunct. This is a very dramatic
10 presentation.

11 MS. SMITH: Thank you.

12 Actually, we have, like I'm sure several other organizations,
13 responded to the Federal Register notice regarding the reinstitution of Super
14 301. And one of the priorities that we identify is to look at the paper market
15 access agreement and the role of anticompetitive practices in failing to reach
16 our objectives in that agreement, and making the point that the government of
17 Japan was not one day within the five-year term of that agreement found to be
18 in compliance by the U.S. Government. And now that there is no agreement for
19 them to be not in compliance with, we do not think that that is a basis for
20 assuming that they are in compliance.

21 We think that there is still a compliance issue out there. And in
22 view of the fact that this is about a $40 billion market and our normative share
23 of that market should be about $4 billion every year as opposed to last year we

1 sold about $650 million, we think that gap of about $3.5 billion a year merits it
2 being one of the Super 301 priority practices. So thank you very much for the
3 question.
4 MR. RILL: It didn't sound like you were prepared for the
5 answer.
6 DR. STERN: You're very welcome.
7 I understand from my colleagues, that's why the notes were
8 going back and forth, excuse us, that we will be convening this panel again
9 after lunch, but I know Maureen told me she wasn't staying for lunch, so I was
10 trying to get my questions in.
11 MS. SMITH: I will certainly stay and make myself available for
12 questions.
13 MR. RILL: You'll be back then when we reconvene. This is
14 probably a very good time to break for lunch and reconvene. We can do it in
15 45 minutes. 2:00?
16 (Recess.)
17 SESSION TWO
18 MR. RILL: Our panelists are ready, so I guess we should be as
19 well. While we're waiting for Bill to show up, let me acknowledge the presence
20 Tom Leary, who has joined us representing the Business Roundtable. Bob
21 Weinbaum, for reasons he explained, had to leave. Tom, I've known for only
22 about 30 years. He's been at it much longer than I. Tom's a partner in Hogan
23 & Hartson. This is Hogan & Hartson day. We had Janet McDavid. Tom was

1 a chief antitrust counsel for General Motors for a number of years. Before
2 that with White & Case, and since that for about the last ten years with Hogan
3 & Hartson.
4 MR. LEARY: 16 actually.
5 MR. RILL: So he's got tenure.
6 He is one of the real antitrust scholars and practitioners of our
7 time and has represented the Business Roundtable for more than 20 years.
8 DR. STERN: I certainly hope you will pick up on the question
9 then that I put to Bob Weinbaum in his absence about what the BRT's position
10 is regarding principles, WTO principles, and the applicability of that notion in
11 the telecom area, the services area.
12 MR. LEARY: The same question.
13 DR. STERN: Exactly. I would be very interested in getting the
14 BRT's position on that.
15 MR. RILL: While you're thinking of your answer to that
16 question, we're going to be hearing from Steve Bolerjack and Bill Blumenthal.
17 MR. LEARY: Not today.
18 DR. STERN: That's fine. But it's important in light of the
19 dialogue that we did have that we get the record complete.
20 MR. LEARY: Sure.
21 MR. RILL: Steve.
22 MR. BOLERJACK: Dr. Stern, Mr. Rill, members of the
23 Committee, the National Association of Manufacturers thanks you for the

1 opportunity to address you regarding its concerns about U.S. international
2 antitrust policy. I also want to echo the appreciation expressed by the
3 representative of Roundtable that you have taken the time and the effort to
4 assure involvement by representatives of the business community at these
5 hearings.

6 The National Association of Manufacturers is an industry trade
7 group, the nation's broadest-based industry trade group. It has more than
8 14,000 members, for those of you who are not fully familiar with it. About
9 10,000 of those members are small manufacturers. They produce about 85
10 percent of all manufactured goods in the United States and employ over 18
11 million people. NAM attempts to enhance the competitiveness of
12 manufacturers and improve living standards by shaping a legislative and
13 regulatory environment conducive to U.S. economic growth and increase
14 understanding among policymakers, the media and the general public about the
15 importance of manufacturing.

16 The NAM strongly supports the U.S. antitrust law as affording
17 valuable protection from unreasonable restraints and a good supplement to the
18 workings of a free market. It also supports the antitrust or competition laws of
19 other countries provided they are enforced evenly and fairly. It has concerns,
20 however, that all too often foreign antitrust authorities are not even-handed in
21 their dealings with U.S. or foreign companies, and that their laws and
22 enforcement policies have motives different from the stated purpose.

23 I would like to start this portion of my remarks on the primary

1 international antitrust concern for NAM: premerger notification and
2 multijurisdictional merger review. In the United States we've been dealing
3 with the requirements of the Hart-Scott-Rodino Act since 1978. However, as
4 members of this Committee are well aware, within the last decade numerous
5 jurisdictions have initiated some form of merger notification so we are now
6 over 50, or at least that's what I heard from Chairman Pitofsky, that was in the
7 fall. Lord knows how many there are at the moment.
8 MR. RILL: He's been saying the same number lately.
9 MR. BOLERJACK: Oh, he hasn't changed? One of the reasons
10 is there is no good single source for finding which country has a merger
11 notification requirement, as has been pointed out.
12 Again, as you know, the procedural requirements vary greatly
13 from country to country. Numerous jurisdictions require a filing in the
14 absence of any domestic effect whatsoever, and this results in needless cost to
15 business and unfortunate delays. The causes of these costs and delays again
16 are well known. Many laws have very low thresholds based on worldwide
17 turnover. The time periods in which a filing must be made vary widely. They
18 are triggered by different events. The filings require different levels of detail
19 and different sorts of information not collected in the ordinary course of
20 business. And protection accorded confidential information submitted by
21 merging parties varies widely amongst the jurisdictions.
22 In addition, the concept of requiring a filing fee for this law
23 enforcement function, exported from the United States, creates conflicts of

1 interest at the agency and eliminates any incentive in the agency to seek
2 efficiencies and should be strongly discouraged.
3 A number of jurisdictions have laws with thresholds so low that
4 acquisitions unlikely to have any domestic effect on competition must be the
5 subject of filings and the serving of a waiting period. An example we proffer
6 is the Slovak Republic, in which -- don't chuckle -- in which the thresholds are
7 expressed in terms of the worldwide turnover of all merging parties, which
8 comes to about $9 million, and individual turnover of any merging parties in
9 excess of $3 million worldwide.
10 There is no requirement for any domestic effect on competition.
11 If one of the parties has no or minimal sales within the Slovak Republic a
12 notification is still required in theory. The waiting period is one month, but
13 requests for additional information toll that period and the authority typically
14 requests additional information several times in order to prolong the period.
15 Other examples you're probably aware of are Brazil and Poland.
16 The events which trigger the requirement that a notification be submitted and
17 the period for review vary widely, resulting in difficulty in coordinating the
18 filings, and it extends the period of what I will call competition law
19 uncertainty. Business's desire in this is certainty as to where the filings must
20 be made, and to identify any authority that may object to a proposed merger at
21 the earliest possible stage, so it may be dealt with.
22 Unfortunately in this instance an example would be Brazil,
23 which has an initial review period of up to 72 days. Notification must be filed

1 within 15 working days of signing an agreement. It used to be prior to closing.
2 They have now come out with a new opinion: if you have in your agreement a
3 provision that the seller will operate the business in the ordinary course, that is
4 an example of the buyer exercising control, and so they want the notification
5 within 15 days of signing the agreement.
6 The period can be extended for an additional 120 days if
7 additional information is requested. Other countries have similar
8 requirements. As you know very well, under Hart-Scott a filing need not await
9 a definitive agreement, it can be done at a very early stage. So the result is
10 that decisions by enforcers in these countries can follow the U.S. decision by
11 three, four, five months, and you're sitting in an area of uncertainty. The
12 example I would give you is a major merger, not mine, that is still under review
13 in Brazil, and it's been over a year.
14 In addition, there is no effort to achieve uniformity in the
15 substance of the information requested in the filings or the level of detail
16 required. The United States requires truly a minimum of information in a
17 Hart-Scott filing. They save for a second request their truly impressive desire
18 for detail. The European Union requires a significantly greater level of detail,
19 and most foreign countries, at least in my experience, tend to work off the EU
20 form and require that sort of information. But they vary greatly in the
21 background information which must be submitted, the level of detail provided,
22 and any connection with the transaction is sometimes completely absent.
23 You've never had fun until you've tried to figure out whether anyone in a major

1 multinational company has joined a trade association in Poland, and if so, what
2 their name and address is and the identity of all the other members. Even
3 though that trade association may have absolutely nothing to do with the
4 acquisition you're carrying out, the enforcers are frequently not willing to
5 waive the requirements, so if Hertz has joined a trade association of travel
6 agencies or rental car producers, an acquisition on the automobile
7 manufacturing side of the business would still require that seemingly irrelevant
8 information.
9 The recent effort of the Organization for Economic Cooperation
10 and Development in this regard unfortunately does not seek to establish a
11 single form, but rather a menu from which a meal, if you will, can be chosen.
12 You know you're eating at McDonald's, but there are still 10,000 combinations
13 and permutations. Another problem is the requirement that the acquisition
14 document, which is rarely a basis for objecting to a transaction, be translated
15 in its entirety. These agreements can take up volumes, and they almost never
16 have anything to do with any competition law issue.
17 So the NAM urges the Committee to recommend the first step in
18 addressing these problems is a revision of the Hart-Scott-Rodino Act and the
19 implementing regulations to eliminate exactly these same problems. Only then
20 can this country speak with authority on the problems imposed by other
21 regimes. The basic $15 million threshold has not been changed in over 20
22 years. If this had been adjusted for inflation using the CPI, it would now be
23 about $43 million.

1 The NAM recommends that HSR thresholds be increased
2 automatically on an annual basis, commensurate with the gross domestic
3 product deflator, an indicator of inflation in the entire economy. For 1998,
4 this translates into an HSR threshold of $26.68 million. The values contained
5 in the regulations should similarly be adjusted to account for inflation and
6 indexed to the GDP deflator to account for future inflation. It's noteworthy
7 that the fines for violating Hart-Scott are indexed to account for inflation, but
8 the dollar value for determining whether filing is required are not.
9 The Government statistics reveal that transactions valued below
10 $25 million will raise few, if any competitive concerns. In their report to
11 Congress for fiscal year 1998, the FTC reported they had received 1,235
12 filings on transactions valued at $25 million or less. The agencies initiated
13 second request investigations in only 11 matters or about nine-tenths of one
14 percent of those transactions. The remainder of the notifications received
15 clearance without much of an issue; in 95 percent of the cases neither agency
16 received clearance to even contact the parties.
17 The filing fees alone in the remaining 1,224 transactions cost the
18 acquiring parties $55.1 million, more in attorneys fees and the savings lost due
19 to the delay in implementing efficiencies that would have resulted from these
20 transactions. By the way, if the threshold was raised to $50 million, these
21 numbers do not change all that much except the number of transactions double,
22 the filing fee or single element of cost will double to $106 million, but rather
23 than investigating in a second request mode 0.9 percent of the transactions,

1 they investigate 1.2 percent of the transactions. Rather than not requesting
2 clearance in 95 percent of the cases, it dropped to not requesting clearance in
3 94 percent of the cases.
4 In addition, the Committee should recommend that any filing fee
5 or tax on transactions, which is what it truly is, should be delinked from
6 funding for the agencies. The existing linkage creates a conflict of interest for
7 the agencies, eliminates any incentive for them to achieve efficiencies by
8 reducing the workload generated by these unnecessary filings, and it exposes
9 them to a substantial funding cut in the event of a reduction in filings, which is
10 exactly what happened between '89 and '91, when filings dropped 40 percent.
11 It's all very well and good for to us to express disapproval of the Romanian
12 system, in which filing fees are used to provide bonuses for the employees
13 reviewing the transactions, but how different is that from the existing U.S.
14 system where the fees are used to fund the entire agency budget?
15 Another contribution the Committee could make would be to
16 encourage the Attorney General to institute efforts to harmonize international
17 merger notification procedures. There are a variety of alternative methods that
18 can be used, including efforts to try to achieve a common reporting threshold
19 and test for national effects, as well as a common form and waiting period.
20 The fact that there are numerous alternatives that could be discussed shouldn't
21 deter the parties from initiating these discussions because until discussions
22 start, no one will make any changes.
23 It would seem that the United States and European Union are

1 necessary parties to any such discussion, and NAM would suggest that initial
2 efforts toward an agreement should be limited to these two enforcers, and
3 possibly a few others, rather than trying to achieve a consensus with a
4 convention of 50 or more enforcement agencies in the room. Consideration
5 might be given to a system permitting less detailed reports with shortened
6 waiting periods for transactions the parties feel are likely to raise no antitrust
7 concerns, such as the Canadian system. It's also critical that the team studying
8 this should include business representatives, and we would hope the Committee
9 would consider making that recommendation also.
10 Our comments on trade and competition policy interface issues
11 will be brief. NAM also is concerned that far too often the enforcement
12 policies of other countries reflect an effort to protect domestic industry. The
13 Japanese flat glass industry represents an example of the Japan Fair Trade's
14 Commission failure to enforce its own antitrust laws. I think this group earlier
15 has heard a sufficient amount about this. I would just like to raise a couple of
16 points.
17 The two industries who are NAM members, who are very
18 familiar with this, are Guardian Industries and PPG Industries. They have had
19 very good success in other Asian markets. This is not a one-shot deal. They
20 have been trying to gain access for decades. The NAM is aware that U.S.
21 antitrust agencies have been in discussions with their Japanese counterparts
22 about entering into a cooperation agreement, similar in some respects to the
23 one in the European Community, and including the concept of positive comity.

1 Such an agreement would not be advisable until the JFTC acts to resolve these
2 outstanding competition issues in a manner that is both transparent and
3 credible.
4 The NAM expressed very strong reservations and concerns about
5 the International Antitrust Enforcement Assistance Act at the time of its
6 passage. Even in the face of the enactment of that law and our being here
7 today expressing a desire for harmonized standards, we wish to reiterate our
8 primary concern; specifically, the sharing of data and other proprietary
9 information furnished to U.S. antitrust enforcers that could be useful to
10 another country's domestic industry.
11 The example which -- I came in at the tail end of the discussion
12 this morning and did not hear all the comments about the European Union, the
13 Member State Advisory Committee, and furnishing all information provided
14 DG-IV to representatives of that Committee. That process raises significant
15 concern on the part of NAM and its member companies. We feel further action
16 has to be taken to keep such information confidential. Possibly shutting it off
17 at its source, which would be a recommendation to the Attorney General that
18 the enforcers in this country consider the suggestion that certain documents
19 should not be given to them except in a redacted form, and stop the insistence
20 that each and every document be provided; the position that if there is one
21 responsive document in a binder or book they be given the entire book, even
22 though the remainder are not related at all to the transaction at hand, but may
23 have very significant confidential information. The concern that parties

1 refusing to grant confidentiality waivers are attempting to obtain some
2 illegitimate procedural advantage is, I think, very, very often misplaced.
3 In conclusion, the NAM would like to thank the Committee for
4 the opportunity to be here today and express our position on this matter.
5 Anything we can do to provide further input to the Committee in the future we
6 would be very pleased to do. Thank you.
7 MR. RILL: Steve, thanks very much, and appreciate your effort
8 and the effort of NAM to bring a further business perspective to our
9 deliberations. I want to pursue, I'm sure the rest of the panel will as well,
10 some questions with you, particularly I think with regard to cooperation
11 agreements. But first let's hear from Bill Blumenthal.
12 MR. BLUMENTHAL: Mr. Chairman, thank you. I'm pleased to
13 be here today on behalf of the U.S. Chamber of Commerce, and the Chamber in
14 turn is grateful for the opportunity, as are the other business organizations, to
15 present its views to the Advisory Committee.
16 The Chamber is the world's largest federation of businesses. It
17 represents more than 215,000 businesses and organizations. Many of those
18 businesses are members of the other organizations from which you're hearing
19 today, so you won't be surprised to hear a substantial symmetry in the views of
20 the Chamber and those of the other panelists. I will try to keep the redundancy
21 down.
22 MR. RILL: Or perhaps the controversy up. I'm only kidding.
23 MR. BLUMENTHAL: As increasing numbers of sovereign

1 jurisdictions have elevated the role of competition policy in their domestic
2 affairs, the business community has faced an increasing burden of duplicate
3 enforcement and inconsistent standards. Now, as a general principle the
4 Chamber favors enhanced cooperation and increased harmonization as means
5 to reduce those burdens. But that principle has to be tempered by the
6 recognition that the desirability of harmonization is extremely sensitive to the
7 choice of standards by which that harmony is to be attained, and equally
8 important that cooperation is desirable only if appropriate procedural
9 protections are afforded the parties that are under investigation.
10 As you know, there are many issues that arise with respect to
11 multijurisdictional law enforcement and international cooperation. The
12 comments that the Chamber is going to be presenting today address those
13 issues, only those issues, really, that have provoked the greatest expression of
14 concern among our members. We take the occasion with respect to merger
15 issues in particular to reiterate the business community's belief that
16 transactions cost associated with the merger review process can be and should
17 be reduced, and can be reduced without subverting the legitimate objectives of
18 competition policy. And we will then turn briefly to a concern that arises in
19 both merger and non-merger contexts. We've already heard a fair bit about it
20 today, namely the potential that the confidentiality of sensitive business
21 information might be compromised amid international cooperation efforts.
22 Turning first to merger review issues: In light of the spread of
23 the disparate filing requirements around the globe, in light of the increasingly

1 complicated regulatory framework and the escalation of transactions costs, the
2 Chamber believes the United States can serve an important role by establishing
3 a benchmark for the rest of the world. Before the United States, however, can
4 legitimately lay claim to a position of global leadership in the field of merger
5 review, the Chamber's view is that the U.S. first needs to conduct a balanced
6 and candid assessment of its domestic requirements.
7 We identify several possible reforms that warrant consideration.
8 Most of these thoughts are not original. Indeed, as you will recognize, many of
9 them are derived from the prior views that have been expressed by members of
10 the Advisory Committee and by its staff. And our purpose as to those is to
11 express the business community's endorsement.
12 Before getting into specifics, I feel compelled to observe in light
13 of the populist origins and the Jeffersonian traditions of antitrust that there is
14 no inconsistency here between sound competition policy and the interests of the
15 business community. In particular, many and perhaps most of the antitrust
16 cases that have been brought every year relate to intermediate goods and
17 services, and as you know that means the purchasers are businesses. The
18 members of the organizations appearing on this panel account for a very
19 substantial portion of the consumption that occurs in the United States. And
20 with that let me turn to several specific observations with respect to merger
21 review.
22 First, the Chamber, too, shares the view that the number of
23 required filings in the U.S. should be reduced. The very large number of

1 transactions that require filings today results from updated filing thresholds
2 that have not been materially revised since the passage of the Hart-Scott Act in
3 1976. Based on historical indices measured by either inflation or perhaps a
4 better measure, the rise in the stock market, alternative measures of asset
5 value, the size of transaction threshold in particular is no longer in line with
6 economic reality. And the Chamber supports a substantial increase in that
7 threshold commensurate with the appropriate indices as well as an increase in
8 other conforming thresholds throughout the regulatory structure. We believe
9 serious consideration should also be given to indexing.
10 The second observation as to mergers, that the budgets of the
11 FTC and the Antitrust Division should not be dependent on merger filing fees.
12 As others have observed, Congress has come to rely almost exclusively on
13 filing fees for purposes of funding of not only merger enforcement, but also the
14 Antitrust Division's criminal enforcement activities and many of the FTC's
15 consumer protection activities. That has resulted in a cycle of dependency
16 with certain unfortunate consequences as a matter of public policy. They're
17 laid out in the paper. They're essentially the same that Steve identified.
18 The third observation as to merger policy, that the information
19 requirements of the second request process in particular ought to be narrowed.
20 The process as practiced in the U.S. is extremely burdensome. Our members
21 have observed that the information demanded by the enforcement agencies in
22 the U.S. during the second request process is almost invariably broader than
23 the information demanded by foreign counterparts during comparable

1 procedural stages. We recognize that to some extent this may derive from the
2 substantive merger statutes in the different jurisdictions. We also recognize
3 that there are substantial inherent difficulties in specifying with any precision
4 the manner by which merger reviews are to be conducted.
5 The second request process does have some difficulties that
6 ought to be remedied. Many of the burdens faced by the business community
7 arise not just out of the substantive information demands but also from
8 indefinite deadlines, translation requirements, various packaging instructions.
9 The typical 1.5 cubic foot carton, for example, is a packaging instruction --
10 not that that one is problematic, but it's illustrative.
11 Many of these considerations have already been identified and
12 described and assessed by the Advisory Committee staff, and I refer in
13 particular to the working draft proposals in a discussion drafted March 25.
14 Without intending to offer a blanket endorsement, the Chamber does believe
15 that the staff's views have very substantial merit and warrant serious
16 consideration.
17 The fourth observation with respect to merger enforcement, the
18 burdens associated with multijurisdictional reviews are not limited to the
19 transnational context. Within the U.S. itself there are individual transactions
20 that are often subject to multiple reviews by differing regulatory and
21 enforcement agencies at the federal, state, and I think even local levels. And in
22 many instances various U.S.-related agencies apply discordant and even
23 inconsistent standards. The Chamber does not use this occasion to urge any

1 particular plan or program as a remedy. We instead limit ourselves to the
2 simple observation that as the Advisory Committee is considering best
3 practices that might be adopted in a transnational setting, it also seeks to
4 identify approaches that have been adopted by hierarchies of jurisdictions
5 outside the U.S. as a means of reducing redundancy and burden here.
6 Let me quickly address confidentiality concerns, which arise in
7 both merger and non-merger settings. These are substantially the same that
8 Steve identified before, so I'll be brief. The Chamber recognizes the
9 importance for the ability of antitrust enforcement agencies to exchange
10 information. We also recognize that statutory language currently in place does
11 afford protection of confidentiality for most types of business documents that
12 are shared. There is, however, as you know, a movement that has been
13 underway to facilitate increased information sharing between governments, and
14 the Chamber fears the possible leakage of business information that could
15 occur and would have extremely detrimental effects on U.S. companies. While
16 we are not aware that any such leak or disclosure has occurred to date, that
17 should not reduce our attention to the potential severity of the problem. It
18 remains important to recognize that foreign countries maintain different laws
19 and different practices from our own, and that some of those could adversely
20 affect the security of confidential information that is in their possession.
21 In the Chamber's written remarks we lay out a number of issues
22 to which we direct the Advisory Committee's attention. With that, let me close
23 by saying the Chamber is grateful for having been given this opportunity to

1 present its views, and we very much look forward to the opportunity to work
2 with staff to elaborate on any questions.
3 MR. RILL: Thanks very much. Tom, do you have any
4 comments to make?
5 MR. LEARY: Well, maybe you wonder why the Roundtable did
6 not offer similar comments, and I guess there are two reasons for that. First of
7 all, the Roundtable is really a somewhat different organization than either the
8 NAM or the Chamber in that it has a much smaller membership. In other
9 words, we're talking about an organization with 165 members as opposed to
10 many thousands. And therefore we felt it was more appropriate to present to
11 you those concerns that had been affirmatively identified by our members. I'm
12 sure that every Roundtable member is a member of one or the other if not both
13 of those organizations, but they have a great many additional members as well.
14 I don't have any quarrel, and I am sure that our members have no
15 quarrel, with the substantive suggestions that were made by the other two
16 associations here, and we endorse them. I think with specific reference to
17 Hart-Scott-Rodino reforms, there is just one additional problem that I'm sure
18 we all recognize. It is encapsulated in one of my favorite political slogans.
19 There was a cynical old political boss a number of years ago who used to say:
20 "Never confuse what you would like to happen with what's going to happen."
21 And I'm afraid that's one of the problems we have with Hart-Scott-Rodino
22 reform. I'm not talking about tweaking the second request process. I'm talking
23 about changing the thresholds and so on and so forth.

1 In the present political climate, I just don't think anything like
2 that is going to happen unless we can figure out a way to do it in a
3 revenue-neutral way. I think probably everybody in this room agrees that
4 ideally there should be a disconnect between Hart-Scott-Rodino funding and
5 funding for the agencies. But politically that seems to be a nonstarter right
6 now. And I think we all have to think very, very hard about ways of getting
7 from here to there that are consistent with present political realities.
8 MR. RILL: Thank you, Tom. Let me see, Paula or John?
9 MS. FOX: I had wanted to ask some questions of Maureen
10 Smith, if I can. Thank you all for your presentations.
11 MS. SMITH: Thank you.
12 MS. FOX: I had two questions. The first is this. I'm sure
13 you've heard these arguments before. I hear these two arguments all of the
14 time, and I would like to know your response to them. The two arguments go
15 like this. Number one, you presented a very powerful case, but where are all
16 the other cases? Is your case typical or not? Another way of asking that
17 question is how big is this problem of blockage of market access by reason of
18 private restraints, and how do we go about finding that. The argument is we
19 don't have information, therefore it's not a problem.
20 The second argument that's made is very interesting, but it
21 doesn't make economic sense. Why would the Japanese, who need to get best
22 executions, say the big buyers of paper need to get best execution in the
23 marketplace, why are they going to deal with inefficient businesses, supplying

1 them or inefficient distributors distributing their product? Why is a bank
2 going to pour money down a black hole?
3 So part of that proposition is we don't really think it happens,
4 and if it's happening, then the Japanese, like everybody else in the world
5 feeling the harsh pressures of competition, are going to have to shape up and
6 get that best execution. So I would like to hear your responses to that.
7 My other question, if we get to it, is whether an instrument in the
8 WTO could help solve the problem by putting more pressure to enforce the
9 law.
10 MS. SMITH: I'll answer all three questions, how about that?
11 First, absolutely not. I gave you a specific case because each
12 episode or each case is different in the particulars, but I don't want to prejudge
13 his remarks, but I have a strong feeling that Steve Farrar tomorrow is going to
14 tell you a very similar story in flat glass. And let's not forget that a couple of
15 years ago the U.S. documented a very similar case in photographic film in
16 Japan, and you can go through the list of products. And what is remarkable is
17 the similarities in every single case and the way these anticompetitive practices
18 act to bar industries which are otherwise globally competitive from making any
19 headway in the Japanese market, so we're not unique. There are abundant
20 parallel kinds of stories.
21 Second of all, why would the Japanese economy as a whole or
22 why would individual enterprises tolerate this kind of inefficiencies? It doesn't
23 fit. What is the U.S. profit-maximizing model? Well, I don't want to appeal to

1 the chairman, but certainly the chairman and I participated in the SII exercise
2 with Japan over the years, which again documented one after another where the
3 Japanese economy as a whole is not economic efficiency maximizing. That is
4 not the objective. It is replete with cross-subsidizations.
5 So if we look at this model through our eyes, we are, indeed,
6 appalled. It does not make any sense. But just, for example, the one question
7 you raised, why do the Japanese banks pour money down a rat hole? What has
8 this whole financial crisis been about except for the fact that the Japanese
9 banks have continued to pour money down rat holes. Why was Japan in the
10 business of producing aluminum? The only thing that's crazier than Japan
11 being an exporter of paper and wood products is Japan being a producer of
12 aluminum. And, again, that was with the full connivance, support, direction of
13 the government of Japan. And at the end of the day because that really came to
14 a crashing halt at a moment in time, the government just told the banks, eat it,
15 and they had to.
16 So to Americans, it's pretty shocking, but this is not shocking in
17 the context of the way the Japanese economy as a whole operates. Every sector
18 is burdened by the collusive practices and the layers in the distribution system.
19 I mean, again, that is not unique to use. All I've done today is really pull it all
20 together and explain distribution system, financial arrangements,
21 suboptimization in terms of cost. This is how all these things that may not
22 make sense individually, how they all become a part of the strategy to protect
23 the domestic market to preclude import competition, and when combined with

1 an elevation plan turn an industry around to where they are an export-oriented
2 industry.
3 Your third question, this is a personal view because I will tell
4 you that our members have not arrived at a position on this. But almost
5 anytime that we have had a trade policy issue with Japan, the strong preference
6 on the part of Japan is to multilateralize it. That becomes all too often a least
7 common denominator approach, and it moves the forum to one where alliances
8 are possible with other offenders. The only way that the United States has
9 really made progress in changing Japanese policy and behavior is on a bilateral
10 basis where we can pursue our own interests with Japan and candidly where we
11 can use instruments such as the newly reinstituted Super 301 to pursue it
12 aggressively. Thank you.
13 MR. RILL: Paula?
14 DR. STERN: Thank you.
15 Well, I wanted to thank this panel for bringing a little humor
16 into this. I was thinking about the Department of Justice's cycle of dependency
17 which usually applies to drug addicts, I think. And also I wanted to commend
18 Mr. Bolerjack's comments in here that I thought were just priceless, as it were,
19 on page 6 that talked about: It's critical that our team here studying possible
20 harmonization include business representatives rather than just the law firms
21 representing them, since lawyers preparing the various notifications lack an
22 economic interest in reducing the cost associated with multijurisdictional
23 review.

1 I like that a lot because I'm not a lawyer, and also because we
2 did work really hard to penetrate that legal veil, as it were, to get to the
3 corporation and get to the individual business people.
4 MR. RILL: So now we have in-house lawyers instead of
5 out-house lawyers?
6 DR. STERN: I think it's a little closer to the bottom line, let's
7 put it that way. Their incentives are more aligned. Their economic interests
8 are more aligned. So I want to thank you very much for the time that you did
9 take to both cheer us up and to enlighten us as well.
10 My question kind of goes back a little bit to Maureen's points,
11 Ms. Smith's points, and that is whether you have seen in this paper industry as
12 well as all the other industries you just mentioned in response to Eleanor's
13 question, whether you have seen the practice of mergers and foreign investment
14 being discouraged in Japan that adds to the other examples of closeness that
15 you did talk about, the distribution system and the relationships -- vertical
16 relationships, the keiretsu. But I would like to ask you just to specifically talk
17 about the ability to invest in Japan in not only your industry or other industries
18 as well.
19 MS. SMITH: I have to confess I have no data with which to
20 respond to the question. On the one hand, we have not seen it specifically
21 being discouraged in my industry. On the other hand, haven't seen any major
22 effort on the part of our industry to acquire assets in Japan, so I really have no
23 data. I think taking it to a macro level, the point has been made repeatedly that

1 the incidence of foreign direct investment in Japan as opposed to any sampling
2 of OECD countries is really very, very low. And that perhaps might be looked
3 at on a cross-sectoral basis as opposed to an individual. But as I said, I
4 honestly cannot provide you with any specific instances in response.
5 DR. STERN: I know it has been looked at. I've been involved in
6 studies and in conferences. I think Robert Lawrence, in fact, did some work
7 when he was over at Brookings about seven years or so ago on this. But I
8 thought it was worthwhile to put it out as a question to each and every one of
9 the business groups that might be testifying for our purposes since we are
10 talking about mergers, and generally, in the context of developing countries,
11 we are thinking that the so-called competition policies authorities have their
12 own national champions that they are concerned about. But I just wanted to
13 bring it in and ask on the Japan side.
14 I know, for example, in the paper industry Scott Paper use to
15 have a partner, and it got out of the investment that it made years ago in Japan.
16 And it was my impression that Japan is made up of a zillion different paper
17 companies and that there has been, as you said, more consolidation of late, but
18 there had been a lot of competition amongst the individual paper
19 manufacturers, and their profit margins were extremely low as a consequence.
20 That and maybe other things. But I was wondering just what the story was to
21 date. I have no other questions at this point.
22 MS. JANOW: Just a question that we have perhaps been
23 circling a little bit. First I want to thank every panelist here very much for

1 your very comprehensive and thoughtful remarks and all the work that has gone
2 into being able to speak today by way of polling your membership. It really is
3 very important to us that you have undertaken that outreach and we're very
4 grateful and appreciative.
5 Several of you in the context of future policy suggested that the
6 WTO was not the appropriate forum for rules and dispute settlement but had
7 some role to play with some variation as to what role you saw. And yet I think
8 even in some cases the same organizations pointed out that there were markets
9 where American firms were not getting adequate access and suggesting that
10 those same firms were doing well elsewhere, suggesting that there was some
11 market blockage.
12 My question to you is, what kind of inferences do you think
13 should be drawn from what kind of data, both from an antitrust perspective and
14 from a trade policy perspective? In other words, what is the implication that
15 you're drawing from the fact that firms are doing well in some markets but not
16 in others; what does that lead you to by way of a policy recommendation with
17 respect to antitrust inferences of anticompetitive practices?
18 I direct that at Steve because I think you made that comment
19 directly.
20 MR. BOLERJACK: Let me try to answer briefly, then we can
21 get back to after talking to the Committee on a more detailed basis.
22 But I think the point that we were trying to make is that in a lot
23 of different industries -- it's not just paper. I work in the automobile industry

1 and other people in this room are very, very familiar with the efforts that were
2 gone through over a decade in attempting to change the effects of
3 anticompetitive practices. And please forgive me, it's frustrating that -- and
4 Eleanor also raised this point. In certain industries there seems to be trouble;
5 does it really happen all that often? You're not questioning that it's real, I
6 know that. I have heard others question that point. And so one struggles to
7 some extent to be responsive to the point, but I --
8 MS. JANOW: Let me clarify. I'm not challenging that it's real.
9 I'm asking an empirical question of what would you look to by way of indicia
10 of market closure in circumstances where you do not have complete evidence of
11 anticompetitive practices that might meet traditional antitrust standards of
12 evidence.
13 MR. BOLERJACK: Well, the simplest one, and I think it's been
14 relied on by all the speakers here, is the expected level of the market share of
15 these companies who are making products that are accepted anywhere else in
16 the world and that have sufficient share or at least a better share anywhere else
17 in the world than certain Asian countries where they choose to participate. It
18 would be expected that it would be lower in other countries where they chose
19 not to attempt to do business. That's number one.
20 I think the other thing you can look at is the efforts they have
21 put into gaining access, and obviously you need some information from the
22 individual companies in this regard. In our particular example, Ford Motor
23 Company in Japan goes back to the 1920s with the exception of the war years.

1 But there was a Model A built in Yokohama, decades and decades ago. I think
2 that should be some empirical evidence that would go to show that there may
3 be some collusive factors in the market.
4 I know there are other examples of folks talking about products
5 not being appropriate for the particular market. Ms. Smith answered that issue
6 very well. Standards for paper. The standards for paper are a very
7 straightforward thing. It's not a big consumer preference item. Advertising.
8 In any event, we can go through all these things, and as you go through this I
9 think you make the case as you look at the different industries, some of these
10 things certainly can be looked at as empirical evidence of a situation.
11 MR. RILL: There are a lot of studies that are out there that deal
12 with specific industries, and I think as you look at those they go beyond
13 disparate market shares and efforts. You can look at dealer contracts that are
14 available, look at rebate schedules, look at hidden rebates, look at tie-in
15 agreements, look at other market factors. I think it goes beyond some of the
16 things you talked about --
17 MR. BOLERJACK: You can look at the JFTC guidelines on
18 vertical restraints that basically --
19 MR. RILL: They would be much stricter than the U.S. law, if
20 they were enforced. But let me ask -- I'm sorry, were you set on your
21 questions?
22 MS. JANOW: Oh, yes, thank you very much.
23 MR. RILL: Let me ask Tom just a question, and then I want to

1 come back to Steve on a bilateral agreement with Japan.

2 Tom, the survey that the Roundtable ran, approximately 30

3 percent indicated there was a problem with restraints of trade obstructing

4 market access, and 41 percent of that 30 percent I guess suggested that it

5 would be appropriate to institute some form of intergovernmental agreement

6 that would deal with that issue.

7 MR. LEARY: Yeah.

8 MR. RILL: That's limited to private restraints in trade or did it

9 take into account hybrid restraints in trade?

10 MR. LEARY: The question was limited to private constraints. I

11 don't have with me the full text of the answers and it may be there was some

12 confusion there but the intention was to focus only on private restraints.

13 MR. RILL: We have had some testimony and I think members of

14 the Committee have some knowledge, too that there is some confusion where

15 the government encourages restraints in trade, is that a private restraint or a

16 governmental restraint? And in this country it would be a private restraint. I

17 think probably that application should apply elsewhere and that application

18 should be held elsewhere, too. It would be interesting to know, although

19 maybe the data aren't available for that.

20 I want to commend the Roundtable on putting together a survey

21 because it does, at least in part, address the question Eleanor raises, how

22 widespread is this issue. Apparently a substantial portion of respondents

23 thought it was an issue and a substantial proportion of those respondents

1 thought an agreement would be appropriate to deal with it.

2 MR. LEARY: I'll tell you what I'll do Jim, is go back to the raw

3 responses with that question in mind. We obviously did not want to provide

4 them because we didn't have agreement to do so, but I think we can answer that

5 question in a way that does not compromise --

6 MR. RILL: If that's possible, that would be helpful.

7 MR. LEARY: Sure.

8 MR. RILL: Steve, you indicated that you didn't think there

9 should be a bilateral antitrust enforcement cooperation agreement, along the

10 line perhaps of the EU model although that's not your words, with Japan until

11 Japan's Fair Trade Commission exhibits some greater commitment to

12 enforcement.

13 I wonder if there's not another side to that, and that is if you get

14 them committed to an agreement, there's more leverage to cooperate and

15 possibly give some strength to, say, the Department of Justice or the FTC in

16 pushing for enforcement in the more transparent context. I do wonder if there's

17 not another side to that story.

18 MR. BOLERJACK: I think there is another side. I think the

19 reason for the position expressed by NAM is a history of seeming agreements

20 that turned rather amorphous as they are interpreted. Now I think that the

21 ability to enter an agreement provides the greatest leverage; trying to

22 encourage enforcement of an agreement with the Department of Justice

23 provides less. And say we have these appropriate issues. It's been brought to

1 the Department. We have absolute evidence. We would want to see you go
2 forward, and absent any action -- you may have more leverage in that limited
3 circumstance.
4 MR. RILL: That would put some transparency on the issue, I
5 think --
6 MR. BOLERJACK: Uh-huh.
7 MR. RILL: -- that really isn't there right now. Our experience
8 going back to SII, and I hate impose on our panelists, but we did make some
9 progress by putting the spotlight on the JFTC, modest progress perhaps, but
10 progress in strengthening the JFTC in some respects. And I'm wondering if
11 another step in that direction which might be welcomed by the JFTC would be
12 a bilateral agreement. I just put that out on the table as another view.
13 MS. SMITH: The analogy that occurs to me is that reaching an
14 agreement at this point is a little bit like marrying a drunk, convinced you'll
15 reform him afterwards.
16 MS. FOX: We won't forget that.
17 MR. RILL: You're on the record, Maureen.
18 MS. SMITH: Not directed to any individual at the table. But --
19 DR. STERN: It's precipitous. We've had a lot of problem here.
20 MS. SMITH: There's got to be some demonstration that the
21 JFTC has the willingness or the capability again to perform the duties implied
22 in the marriage contract here, and that's certainly lacking from everything that
23 I've seen. And I think that after such an agreement, the parties develop too

1 much of an investment, they become constituents and develop constituencies
2 for proving that the relationship is working. I think the only leverage, again,
3 continuing my metaphor here, the only leverage is before the relationship is
4 consummated, and that is to say we could contemplate such a relationship if,
5 and there were things like staffing and a pattern of effective action, et cetera,
6 et cetera. Then you would have won admission to what is now quite an
7 exclusive club. But to grant admission absent any of the credentials that we
8 would consider necessary or appropriate or that would bring any distinction to
9 the club, I just don't see it.
10 MR. RILL: Not to press the point again, the only thought that
11 occurs is that there hasn't been great evidence in Europe, for example, of while
12 it's a very active agency, of European actions being directed to what could be
13 considered a pure market access circumstance in which the alleged restraining
14 companies are purely European companies, which differentiates it from A.C.
15 Neilsen's wars with IRI where two American companies involved. The only
16 one that's happened now is the Statement of Objections, really more of a
17 complaint against Air France, purely for French consumers but also to
18 vindicate an American company's effort to enter the market. That's the first
19 one which relates to and is part of the progeny of the U.S.-European
20 cooperation agreement. So I only wonder whether or not the cooperation
21 agreement first might focus more light on a recalcitrant agency and force them
22 to operate more in transparency.
23 MS. SMITH: Two observations. One is that in terms of DG-IV,

1 in our sector two fairly recent developments that are interesting in terms of
2 market access, one being the finding, the report in the Enso/Stora merger. The
3 report is not out yet because it's still being translated into the various
4 languages, and so my wording here is perhaps a little imprecise or sloppy. But
5 apparently as a precondition, precondition being a very precise word, that's
6 why I say apparently or I say condition of approval, there was a requirement
7 that Enso and Stora undertake and get an undertaking from their respective
8 governments that they would not oppose the establishment of a duty-free quota
9 in certain paper products.
10 That, in our view, was a very, very interesting marriage of
11 market access and competition policy, and it is an argument that we have been
12 making for a number of years that the tariff in the case of Europe precluded
13 effective import competition in some of these areas. So that that's very
14 interesting to see the direction in which that's going to go and to see what the
15 report actually says when it comes out in the languages.
16 The second interesting thing, again coming out of DG-IV is this,
17 for people in my industry, bomb shell announcement now two weeks ago of a
18 major investigation into cartel activity and specifically price fixing again in
19 the paper industry. Again going to Enso and Stora and some others, and the
20 estimation is that this is going to be a potentially very, very large case. So I
21 just offer that as some indication.
22 And to return to your other point, there is at the moment a
23 consultative relationship, if you will, -- please, I am not directing this to you

1 because you certainly know this but for the benefit of the group -- a
2 consultative relationship between the Department of Justice and the JFTC,
3 which to me could be a vehicle for injecting transparency and all of those good
4 things, and if we want to we can develop a work plan or what have you for that
5 relationship, but I would not really elevate them to a partnership which the
6 bilateral would imply until, as I said, we get some performance or some
7 confidence-building measures from JFTC.
8 MR. RILL: Thanks very much. I think we're entrenching on the
9 time of the next panel. I want to thank this panel.
10 MS. SMITH: Sorry.
11 MR. RILL: It's not your fault, it's mine. I asked the question. I
12 think this panel has been very, very helpful to us, as Paula has said, bringing a
13 business view to the ICPAC. It has not been easy for you to pull all this
14 together, and we appreciate the effort that's been made by each and every one
15 of you. Paula?
16 DR. STERN: I wanted to ask Mr. Bolerjack who had said that
17 there perhaps should be a place where all interested parties could know what
18 the procedures are in this proliferating numbers of authorities. And I was
19 wondering if you thought that the repository should be at the OECD or at the
20 WTO or if you had any preferences. And I say that because I know we're also
21 going to be hearing from the OECD.
22 MR. BOLERJACK: I have no preference. What I would like is
23 some publication in a variety of languages that listed up-to-date statutes. That

1 was my whole point there.

2 DR. STERN: Thank you.

3 MR. RILL: Changing daily. That's part of the problem.

4 DR. STERN: Well, that's what the Internet is for. Maybe the

5 International Bar Association can have their own site and they can just put the

6 stuff on there.

7 MR. RILL: And underwrite it.

8 DR. STERN: Excuse me, but a Web site, you know, I think that

9 the costs of bringing the various people here probably would pay for it.

10 MR. RILL: Okay. Thanks very much to this panel.

11 (Recess.)

12 SESSION THREE

13 MR. RILL: Let's resume. I want to express my appreciation to

14 our next two panelists for changing their appearance schedule to be able to

15 present their views and the views of their organization today instead of

16 tomorrow, since tomorrow isn't going to happen, at least in our context right at

17 the moment.

18 We have with us for our third panel of the day, two

19 representatives of the Organization for Economic Cooperation and

20 Development, OECD, headquartered in Paris, consisting of 29 member

21 countries, a number of observers, a number of advisory committees, and

22 perhaps in the course of their presentation they will tell us something about the

23 OECD. It's been extraordinarily active in the area of international competition

1 policy and international trade policy.

2 Having said that, we have two former denizens of this side of the

3 Atlantic Ocean, currently employed by the OECD in Paris, currently officers at

4 the OECD. Joe Phillips spent eleven years with the Federal Trade

5 Commission, an attorney from Stanford, and has been employed by the OECD

6 since 1985. He is currently head of the Division of Competition and Consumer

7 Policy, where he's responsible for developing and coordination obviously with

8 the Member States, the agenda, the wide ranging agenda of the Competition

9 Committee of the OECD.

10 And Mark Warner, a Canadian and U.S. attorney, I believe,

11 formerly practiced law in Toronto, Canada and here in Washington, D.C., is a

12 legal counsel of the Trade Directorate of the OECD, so we'll see competition

13 and trade interface in the course of this panel. They're both very kind to give

14 us their views, and the views of their organization so that we can better be

15 informed and advise the Department of Justice and others on global

16 competition policy.

17 Joe, do you want to start off?

18 MR. PHILLIPS: We would like to thank the co-chairs,

19 executive director and members of the Committee for this opportunity to talk a

20 little bit about the work of the OECD at the interface of competition and trade

21 policy. Merit Janow asked me to address the role of international institutions

22 in the development of international competition policy, and the role of the

23 OECD and the Competition Law and Policy Committee in particular in the

1 trade and competition debate, and so I would like to begin with that.
2 I focus first on how the OECD works to promote the
3 convergence of competition law and policy throughout the world, on the
4 substantive issues of how we work to promote enforcement cooperation. I
5 would then like to have a brief digression on our work on regulatory reform in
6 the OECD which is a relatively new project and link that back into promotion
7 of competition law and policy, the debate we just heard about Japan. These
8 things are all connected.
9 I will then turn to how we work to an understanding and
10 agreement on the trade policy/competition policy interface and conclude with a
11 few thoughts on what I see as the -- and I hate to sound like this is taking
12 credit for too much here, but what I would call the leadership role, the
13 catalyzing role of the OECD in this debate. The OECD is not a very visible
14 organization to outsiders.
15 But behind the scenes I think the organization does play an
16 important role and I would like to share some thoughts on that.
17 On the convergence of substantive competition law and policy,
18 we work in a number of ways, and we have for years. We have produced
19 monographs that have been agreed most of the time by the Competition
20 Committee, topics like predatory pricing, vertical restraints, deregulation,
21 broadcasting industry, professional services, and so on. This, for many years,
22 was the bread and butter of the Competition Law and Policy Committee at the
23 OECD. More recently we have roundtable discussions, substantive

1 discussions, one off, on a broad variety of issues, whether it's regulation of
2 postal services, regulation of the broadcasting industry, banking, insurance,
3 substantive topics, analytical topics like the failing firm defense or analyzing
4 dominance and so on. These roundtables we publish, we put on our Internet
5 site. We also do framework papers. Previous presenters here discussed and
6 complained a bit about the recent work on mergers and framework for merger
7 notification. They were fairly critical, calling it -- it wasn't so much a
8 framework for a model form, but one person said provide a menu for thousands
9 of variations. Well, I'm not sure about thousands of variations, but for us it
10 was a big step forward to get to that stage, and we had lots of very good and
11 vigorous debate within the Committee, just to get to that point. And we'll be
12 doing more framework papers in the future. We have one underway on positive
13 comity that we hope will be finalized sometime soon. We have another one
14 underway that was sent to us, if you will, by our joint group on trade and
15 competition on rights of firms under competition law, which actually links
16 back into the trade and competition debate again.
17 If firms have the ability to bring a private action or to
18 effectively demand action from a competition authority, can't that provide an
19 avenue short of a trade dispute for many of the market access kinds of
20 questions that were presented earlier today? If a firm that's unhappy about
21 private restraints can either get into court or effectively force the competition
22 agency in the country to act, isn't that a better solution than having it
23 escalating into a trade complaint, a trade dispute?

1 We are outlining what we see as a menu for what we call rights
2 of firms or right to remedy under competition law, so you have some idea what
3 a reasonable menu of rights would entail. Beyond monographs, roundtables
4 and framework papers, we engage in a great deal of dissemination now of our
5 work product. In addition to traditional publications and free publications, we
6 use the Internet. We have recently come up with something we call the OECD
7 Journal of Competition Law and Policy, our objective there is to repackage
8 some of our best material in a way that abstracting surfaces and database
9 services like Lexis/Nexis will pick up. Again it increases dissemination of
10 these ideas.
11 Finally, and most importantly, we do a lot of work, what we call
12 outreach, dealing with nonmember countries helping them to develop
13 competition legislation, helping them to learn analytical practice, how to
14 review cases, working with the judiciary, how to review competition cases, and
15 I'll give you an example.
16 Development of legislation currently, we are working right now
17 with the government of China helping them as they draft a competition law.
18 We've been working with them a couple of years. I don't know when they will
19 be ready to finally pass that legislation, but they're actively working on it and
20 we work with them because it's something that's a very high priority for us,
21 that they have an effective competition legislation. In the past we worked with
22 countries such as Russia, Mexico, countries in Central and Eastern Europe and
23 Asia and so forth on the development of legislation.

1 Enforcement policy. We hold seminars, case discussion
2 seminars. We've been doing this in Central and Eastern Europe, the former
3 Soviet Union and Russia in particular for almost nine years now, and it's
4 probably one of our best efforts, one of our best ways of bringing about good
5 practice and a common understanding on how to look at fact patterns and
6 analyze them. We've begun doing that recently in Latin America and East
7 Asia. It's something we hope to continue for quite some time.
8 Finally, working with the judiciary. Once countries without
9 competition laws start enforcing them, cases percolate up through the courts,
10 and the courts are as ill equipped as these inexperienced staff members to
11 understand and to analyze a complex antitrust decision. And we've been
12 working primarily so far in Eastern Europe and Russia with the courts,
13 including supreme courts, the Supreme Arbitrazh Court in Russia, for
14 example. Last year we helped them as they drafted binding guidance under
15 lower courts for antitrust issues.
16 This year we worked with them -- well, this was also last year --
17 with very difficult issues that are presented in Russia's antitrust law. For
18 example, there are two articles in the Russian law that apply to government
19 officials, anticompetitive actions by government officials in the normal course
20 of their operations. And last year alone the Russian antitrust agency brought
21 1300 cases against government officials, for example, instances where a local
22 official imposed a high tax on a new entrant from another part of Russia,
23 protecting a domestic incumbent or local incumbent. Very interesting issues

1 on what are the boundaries of those articles. The antitrust agency brought a
2 case against the mayor of Moscow for alcohol testing requirements which de
3 facto discriminated against alcohol producers in other parts of Russia. They're
4 bringing interesting cases, and we do what we can to help them improve their
5 analysis and help the courts do their job better.
6 In enforcement cooperation, the next topic I would like to touch
7 on, we have produced recommendations on cooperation since the 1960s on
8 promoting enforcement topics such as positive comity, negative comity,
9 traditional comity. This was said earlier. But these are concepts that have
10 been promoted at the OECD for a long time. The most recent recommendation
11 setting that forth was in 1995.
12 We also have a recommendation on hard core cartels that was
13 adopted in 1998 to ensure the competition laws effective for the cartel's
14 country should cooperate in enforcing their laws and respect positive and
15 negative comity. We've discussed barriers to information sharing. We're
16 having discussions, further developing the concepts of positive comity because
17 there's a lot of confusion as to what it means. Adding to the confusion is the
18 fact that these discussions are held using more than one language, and
19 translating the concept becomes its own issue.
20 I promised a little digression on regulatory reform. The OECD
21 has had a project now for three or four years on regulatory reform. The
22 Competition Committee has been worried about regulatory issues for 20-some
23 years. Now the whole organization is concerned about it, concerned about

1 making economies more flexible, more competitive, more efficient, and has
2 begun a project whereby we are doing country reviews, looking at four
3 countries a year, looking at their regulatory policies, looking at their trade
4 policies from the perspective of regulation of their competition policies from
5 the perspective of regulatory reform, looking at particularly sectors,
6 particularly electricity and in this case telecoms. And in the first year we
7 looked at the United States, the Netherlands, and Japan. The Japan report was
8 just released, I think, last week. The press in Japan, the press reports that
9 filtered back to us said that this was conveyed in Japan as a hard-hitting and
10 highly critical report on Japan.
11 It argued, among other things for a tougher competition policy in
12 Japan, for more cartel cases by the Fair Trade Commission, for better private
13 rights of action to petition the agency, to bring the follow-on cases when the
14 Fair Trade Commission acts, to simplify proof of damages in follow-on cases,
15 and also to be able to bring directly in court in Japan action for injunctions
16 under the civil code. The report also said there are too few lawyers in Japan
17 and at the current rate of growth -- the maximum foreseeable rate of growth of
18 lawyers in Japan -- it will take 50 years to even achieve the penetration rate we
19 have in Europe.
20 MR. RILL: Paula would view that as a reason why they are
21 more efficient than we are.
22 DR. STERN: It shows that there's something wrong with the
23 market there.

1 MR. PHILLIPS: But from our narrow point of view, and, you
2 know, even though I'm a lawyer, I'm no fan of lawyers. But if there's going to
3 be more antitrust enforcement in Japan, the cost of bringing cases has to come
4 down, and for that you need more lawyers. There is a scarcity of lawyers, a
5 scarcity of judges. And so we say you need more lawyers, you need perhaps a
6 special chamber in the court system to hear antitrust cases. And so this whole
7 notion of increased avenues for private direct enforcement of antitrust laws is
8 raised in the report.
9 Now, we heard the previous panel. There is a lot of frustration
10 directed at Japan. So, I should also mention, and this is my personal view,
11 when regulatory reform will actually happen in Japan. I think we're some
12 years away, although the SII and other efforts, bilateral efforts, I think have
13 certainly been effective, and some of my Japanese colleagues at the OECD
14 have told me that over time they were persuaded by the need for stronger
15 competition policy.
16 Ultimately this decision to deregulate and strengthen competition
17 policy will come from demand within Japan. At some point there will be a
18 change but, as I said, I believe that will come internally, and when it comes, I
19 expect that there will be a great demand for deregulation and a great demand
20 for strong competition policy and for strengthening the Fair Trade
21 Commission. But I don't think it's there yet. That's a personal view.
22 Turning to the understanding and agreement on trade
23 policy/competition policy. I think this is related to what is the role of the

1 OECD in all think this. We have been working on this trade policy/competition
2 policy interface since the early 1980s, published reports on interaction of trade
3 policy/competition policy. We have had a joint group on trade and competition
4 policy since the early 1990s. They are sometimes under different names, but
5 there has been a joint group operating for a long time.
6 Some of the ideas that have been discussed first in that group
7 have come into kind of conventional wisdom, if you will. For example that I
8 hear in the WTO, by WTO delegates who have never been part of this group,
9 and I see a number of substantive items that have they talked about. One is,
10 and this is certainly not the case in years ago, that cases should not be
11 reviewed in WTO dispute settlement, that it is not an appropriate mechanism to
12 look at the complex factors of antitrust cases, that competition agencies, in
13 addition to enforcing their laws, play a very important role as advocates for
14 deregulation. I think people take this as conventional wisdom.
15 Ten years ago people weren't talking about the advocacy role of
16 competition authorities. Now they see how this can be a mechanism for
17 deregulation of economies. And regulatory reform in general. This is an idea
18 that -- I mean, it may sound silly in the United States, where people have been
19 deregulating for 20 years and have had an advocacy function performed by
20 DOJ and FTC for 20 years. It has been talked about in the CLP Committee for
21 nearly that long. But now it's something that's conventional thinking. Ideas of
22 positive comity that I mentioned earlier. Ideas of rights of firms, rights of
23 private parties to pursue to have the competition laws apply. And I think all

1 this comes from what I'd say is the proactive role of OECD. You cook up
2 ideas, not just by the Secretariat, but by delegates, they circulate around the
3 Committee and then move out into the wider world. It's liked a pond. These
4 ripples propagate, and obviously it's splashing up in the WTO.
5 And I'll mention just -- I want to save some time for Mark. I'm
6 afraid I've been a little too long here. The OECD is not pushing for
7 multilateral rules in the WTO or for that matter in the OECD. But one thing
8 we are doing is kind of looking at the alternatives so that if governments decide
9 to go down that route with the WTO they will have some idea of the pros and
10 cons of different options. And Mark is going to develop some of these options.
11 I think I have gone on too long, so I would like to stop there. Thank you very
12 much.
13 MR. RILL: Joe, thanks very much for your input. I have a
14 couple of questions for you, but one you might be thinking of is to illuminate
15 us a little bit on the speech that Joanna Shelton made fairly recently. Perhaps
16 Mark will address that as well. Mark.
17 MR. WARNER: Thank you. Let me share with you what a
18 pleasure it is to speak to this commission. For me it's like coming home; I
19 practiced law with a law firm across the street for a couple years.
20 I want to talk to you a little bit about our OECD Joint Group on
21 Trade and Competition, some standard work of our joint group on trade and
22 competition. I think Joe has done a very good job of explaining to you the
23 important work that the CLP does in developing a consensus on enforcement

1 standards that contributes to the convergence of competition policies around
2 the world. I wouldn't have earned my trip over here if I didn't also tell you that
3 the OECD Trade Committee also does some work, on regulation and regulatory
4 reform and on competition policy for some time.
5 I think the reason we have a Joint Group is that the OECD
6 leadership realized the organization would achieve certain economies both in
7 terms of standards of analysis and resources if we would pool our efforts. I
8 think the Joint Group has worked largely very well. But it has not always easy
9 because we are bringing together two different communities in our work each
10 with very different perspectives. For many years, as many of you know, there
11 was no World Trade Organization, no official institution behind the General
12 Agreement on Tariffs and Trade (GATT). The International Trade
13 Organization died on the operating table. So the closest thing the world had to
14 an institutional body for discussing trade issues was really the OECD Trade
15 Committee.
16 So our function is slightly different than that of the CLP. We do
17 develop ideas and publish monographs -- but it is tied closely to a negotiation
18 process down the road in Geneva. Now there is another institution in Geneva,
19 the World Trade Organization, and it is developing some ability to analyze
20 complex issues. Discussion and analysis do not fit naturally into the WTO
21 which is largely a forum for rule negotiation and adjudication. That is why at
22 the Singapore Ministeral Meeting in 1996, two working groups were created --
23 one on the relationship between trade and competition policy, the other on the

1 relationship between trade and investment. Because even within the WTO they
2 do not yet have the experience that the Trade Committee has acquired, as a
3 forum for preliminary negotiations or discussions of things that lead to the
4 negotiation of what we now call “new issues”. Among other key new issues, of
5 course, is the relationship between trade and competition policy.
6 So I want to take you through some of the ongoing work program
7 of our joint group on trade and competition policy. There have been
8 essentially three phases of our work. The first series of reports we did looked
9 at the legal or regulatory exceptions, exemptions or exclusions in the existing
10 competition laws. Luckily we don't have a translation here today -- but
11 exceptions, exemptions, and exclusions are all very different terms and used
12 very differently in different national laws. In many of our meetings
13 delegations were hung up on the meaning of those words.
14 That work culminated in the publication of a book by Barry
15 Hawk, which I think has received some recognition here in the United States.
16 It is a book that catalogs some of the exceptions and exemptions from national
17 competition laws of all our Member States, basically attempting to look at
18 where exceptions and exemptions might pose market access problems. I think
19 it really is a state of the art book, and the follow-on work that others are
20 looking at is to see how that framework might be applied to non-OECD
21 Member States. We are not doing that work, but others might look at that one
22 day.
23 We also have been looking for quite some time at the issue of

1 what we used to call the “rights of foreign firms”, until a little agreement on
2 investment met with some not great success last fall. So we now speak of
3 something called the rights to remedy in national competition laws.
4 That work in the joint group involved basically a notification
5 exercise asking our Member States whether they discriminate against foreign
6 firms. We received responses that I would have expected -- they do not
7 discriminate against foreign firms. Then we asked our Member States to
8 engage in a cross-notification exercise. And we received no responses. They
9 were not going to do discuss that in Paris because those are bilateral issues.
10 Then we threw out the challenge to the private sector represented
11 here by the chairman, Mr. Rill of BIAC, our Business and Industry Advisory
12 Committee, and said you tell us where are there market access barriers caused
13 by the nonenforcement or selective enforcement. And we are beginning to get
14 some very different results. Joe and I were talking about that this morning. I
15 think the Business Roundtable presentation this morning was extremely useful
16 to our work. We are going to want to learn from that presentation when we
17 return to Paris. Maybe even have that presented to us in a more formal format.
18 That was precisely the kind of information that we need in order to do the kind
19 of analytical work that the OECD Joint Group was set up to do.
20 We see that again as an example of the contribution that the
21 OECD can make, in terms of putting out ideas and letting things percolate up,
22 to the point that eventually people either have agreements or model laws. We
23 do not need the end point of an actual agreement at the OECD in order to be

1 successful. We work really in the building block stage of policy formation.
2 The second round of our substantive work led to the publication
3 of four papers this past fall and early spring, and those papers I'll just take you
4 through quickly. One paper looks at vertical restraints and market access and
5 really amounts to sort of an agreed framework for analysis. I think for the
6 first time there is an agreed framework among trade and competition
7 enforcement enforcers of the kind of substantive analysis that should be
8 undertaken to evaluate the effects of vertical restraints in market access
9 situations. Frankly, both trade and competition groups tended to agree to a
10 large extent that the modern basis of vertical restraint analysis in the United
11 States is the kind of approach that should be undertaken.
12 But I think it is fair to say that there were a number of questions
13 that remained outstanding. I think significant delegations or a significant
14 delegation raised the issue that perhaps there is a different kind of entry that is
15 provided sometimes by the foreign firm. Maybe that kind of qualitatively
16 different entry is not something that is entirely captured by the essence of the
17 analysis that is undertaken by competition enforcers generally. We did not
18 solve that question. That remains a question for further discussion and
19 thought. We did move the ball considerably down the field in terms of
20 developing a common framework for understanding vertical restraints that
21 should apply in the typical case. That is a good example of the kind of work
22 we can do that can reinforce other policy developments at the national level
23 and at some other level perhaps at some later stage.

1 Another paper we did related to our work on conceptual issues
2 relating to the interface between trade and competition policies. Here I would
3 bring to your attention three papers. Let me start with one we call
4 Complementarities Between Trade and Competition Policies. That paper
5 sought to look at the ways in which trade liberalization supports the goals of
6 competition policy by providing for open markets and for providing new
7 sources of entry.
8 We also looked at the way in which competition policy can
9 contribute to the goals of trade liberalization in terms of competition policy
10 enforcers leading the process for the demand for accelerated tariff reductions
11 in some cases. One of the examples we have was given to us from Canada. In
12 some enforcement cases in order to permit a certain merger that might
13 otherwise cause competitive effects in the market, the Canadians showed us
14 how they in effect agreed to let the merger go through on a number of
15 occasions if it could be demonstrated that they would apply for accelerated
16 tariff reduction. So we saw again how competition policy could further the
17 goals of trade liberalization. We saw the interaction, a mutually supportive
18 and reinforcing interaction, of trade and competition policies.
19 An important outgrowth of that work was when we discussed
20 something that Dr. Stern mentioned this morning, a paper on the Reference
21 Paper to the Basic Telecoms Agreement of the General Agreement on Trade in
22 Services (GATS). Our Member States asked us to look at the telecoms
23 experience as a specific expression of the trade and competition

1 complementarity. All the papers I am mentioning to you today are available on
2 our Web site, so I won't go into more detail, I would commend this paper to
3 you again.
4 The third paper we have produced is a paper on Consistencies
5 and Inconsistencies Between Trade and Competition Policies. That, again, as
6 the title would imply is a very controversial paper so I will let you read it for
7 yourself. We do look at certain trade remedies and aspects of intellectual
8 property rights.
9 The fourth paper that we looked at has to do with the
10 competition elements in international trade agreements, particularly in the
11 WTO agreements. We are not giving a legal interpretation of the existing
12 WTO agreements but rather trying to look at what could be said to be there --
13 what someone thinking creatively could see as competition policy provisions
14 that exist in the WTO already. We looked at the Telecoms Agreement. We
15 also looked at the GATS because the GATS, which underpins the Telecoms
16 Agreement, itself has two provisions that deal with competition -- policy,
17 Article 8 and Article 9. One deals with monopoly and leveraging, the other
18 deals with some amorphous concept of anticompetitive practices. There are
19 other older provisions that we looked at. Article II of the GATT of 1947 deals
20 with import monopolies. We also looked very closely at the national treatment
21 cases under Article 3.
22 It has been a very helpful process for, I would venture to say,
23 many of the competition delegates to our meetings to see that the people on the

1 trade side have actually been grappling for a long time with some of these
2 concepts and it was not simply a matter of teaching trade people about
3 competition policy, that in fact the trading world has been grappling with the
4 notion, in some cases a different notion of competition, for well over 50 years.
5 And I think that is part of that learning exercise which people not only benefit
6 from in Paris -- Paris is a great place to benefit from things -- but they benefit
7 from it because before they come to meetings in Paris they have to sit in an
8 interagency process and they have to discuss these issues. People who have
9 never sat in a room together and discussed substantive issues have to come to a
10 common position on the papers that we in the OECD Secretariat haggle over
11 too before they are presented to the delegates.
12 Those are the four papers that have been published and are
13 available on our Web site. The most recent line of work we have begun is
14 work on implications of merger review for market access. That paper will be
15 discussed again in our next meeting in May. We also have prepared another
16 paper on state trading enterprises or state trading companies and companies
17 with exclusive and special rights. Again that work is really only in the starting
18 stage, and so I won't go into any more detail on that. I just want to let you
19 know that is what we are beginning to look at.
20 What I thought I might do is then conclude by telling you about
21 our current work that we're make some progress on, and that is the work where
22 Joe ended his discussion, that is our work on options to improve the coherence
23 between trade and competition policies. That work on options has been

1 undertaken over the course of a two or three-year period, but we're now
2 beginning to, I think, achieve some common language and some common
3 understanding about framework that we should be using.
4 Of course I want to stress here again that we are not arguing for
5 the relative merits of any one option over another at this stage. We are simply
6 trying to tease out the advantages and disadvantages among a range of options
7 so that policymakers in capitals can at some point decide which options they
8 want to pursue.
9 Among the options that we have identified to look at are
10 convergence and peer review, very good examples of what Joe spoke about
11 earlier in terms of the work of the CLP. And I think there is very widespread
12 agreement that whatever is done in the trade and competition area to improve
13 the coherence between those two policies, convergence and peer review, will
14 remain a crucial element.
15 The second area that we have looked at as an option for dealing
16 with the coherence between trade and competition policies is bilateral
17 cooperation in the area of competition policy and the role that positive comity
18 might play in addressing and dealing with those problems.
19 The third option we looked at is something we call core
20 principles, common approaches, and common standards. And I want to come
21 back to that in a few minutes.
22 The fourth option we have identified is an option about
23 achieving some sort of plurilateral agreement on competition policy. We have

1 looked at that and I think there is fairly widespread agreement in the Joint
2 Group that it is not something that is likely to form the basis of the agreement
3 now, but as I have already said, we are not really weighing any of these options
4 at this stage.
5 Apart from a plurilateral agreement, which would consist of
6 some subset of countries, we thought also of a multilateral agreement or
7 something that might take place in the WTO. Again, clearly there are divided
8 opinions about that among our Member States and so we list that as an option
9 without really going into more detail. A subset of that WTO option would be
10 to find ways of building on the existing Trade Policy Review Mechanism, the
11 TPRM, as a mechanism for fostering competition policy. As a personal aside,
12 that did not receive a great deal of interest in a lot of our delegates, and I
13 thought that was somewhat surprising, but it is one of the options that we
14 looked at. It was also surprising to me that it was not necessarily the trade
15 people that were interested in pursuing that.
16 Also we are looking at questions of dispute settlement as an
17 option, but again dispute settlement only kicks in once you have come to
18 conclusions about some of the options that I have spoken about.
19 The seventh option we have looked at has to do with the
20 institutional setting for competition law enforcement. It really is not so much
21 an option, but rather a return to our work on the rights of foreign firms, which
22 Joe talked about, the work that we looked at in terms of promoting private
23 rights of action and access to remedy. The joint group has now temporarily

1 delegated or referred that work to the CLP to give the expertise of competition
2 law enforcers in the particular aspects of enforcing competition policies
3 through private remedies. We hope that at some stage that work will filter
4 back to the ongoing work that we have done on options.
5 Let me then turn to our work on the three concepts that I
6 mentioned in the third option I listed, the concept of core principles, common
7 approaches, and common standards.
8 It is clear that there is a terminological sort of divide among
9 many of our members in terms of what they want to do at the multilateral level.
10 So we spent some time trying to help to define what these terms could mean. In
11 the event that someone wants to pursue some point of multilateral agreement,
12 some people say, well, we ought to have an agreement that covers core
13 principles. Others say we ought to have an agreement that deals with common
14 approaches but not core principles, or common standards but not common
15 approaches. It has caused a lot of headaches.
16 So we have tried in our recent meetings at least to go one step
17 backwards and come to a common understanding of what these terms mean.
18 Having regard to the experience that we have built up in two contexts, in the
19 context of the trading world and in the context of the competition world
20 through the recommendations -- the OECD Council recommendations that have
21 been sponsored by the CLP.
22 I think we are again getting a wide degree of consensus now
23 about the meaning of these terms, although we will know really whether we

1 achieved that consensus in two weeks time when have our next meeting. But I
2 think it is fair to say there is an understanding that core principles could be
3 seen as principles of broad application that are rather general. Think of them
4 as being things like national treatment, transparency, most-favored nation,
5 nondiscrimination in the trading context. And you would think of these things,
6 as in a trading context, subject to dispute settlement, binding across the board.
7 Then we looked at the WTO Agreements and said we can identify a second
8 category, not that those agreements use the phrase common approaches but that
9 we can see that looking at those agreements, we can find different types of
10 agreements, agreements on the interpretation of Article VI of the GATT, the
11 anti-dumping agreement -- the word I don't like to use very often. There we
12 can find that countries are not shown an exact way, an exact dumping law that
13 they need to enact. Rather they are shown the kind of elements, the kind of
14 check lists that need to be included in a dumping law. We can say, therefore,
15 that we can see examples of a common approach, not a common standard, more
16 than a core principle, something that is more detailed. So there is something in
17 the middle.
18 Looking at the WTO agreements again, we can say we can see a
19 few examples of common standards and we look to what we call the TBT
20 agreement, Technical Barriers to Trade agreement or SPS agreement, which is
21 unpronounceable, having to do with standards. So we look at those things and
22 we see that there are very few examples in the WTO where we can find binding
23 agreements where countries that have more or less agreed to a harmonized

1 standard. But we can identify a few agreements like that. So we can again see
2 a difference between harmonization, which is a common standard, common
3 approaches, something less than that, and core principles, something more
4 general. Across the board we can ask what particular kind of competition
5 policy practice might fit into any of these categories.
6 And what we tried do was, say, look, we can also do the same
7 thing, by examining various OECD Council recommendations. We can identify
8 certain core principles and common approaches. We can identify no common
9 standards at this stage. But what is significant is that none of those are
10 binding. Nothing we do is binding in terms of the Recommendations of the
11 OECD Council. So we see an immediate distinction between the trading world,
12 which uses the three concepts in a binding way, and the competition world,
13 which uses the three concepts in a nonbinding way. What does that mean for
14 policy development? Stay tuned! But at least we think getting to that stage is
15 helpful.
16 One more thing that becomes obvious once you start looking at
17 these things analytically, in the trading world there are not that many common
18 approaches in the WTO agreements and there are not that many common
19 standards, either, and there are not very many common standards in the OECD
20 Council recommendations, and there are not very many common approaches
21 either. So you begin to sort of say, do you want to do something multilateral,
22 which leads you down the road to the conclusion that it is going to be hard to
23 do something more than at the core principle level. But that is for another day.

1 Getting the terminology straight is hopefully a useful starting
2 point for thinking about how we would, how we might bring some of these
3 things back into the discussion about competition policy on a multilateral
4 level. Again, those are just options and at this stage more terminology than
5 options, but we hope that it is a helpful discussion. Before coming here Joe
6 and I were in Geneva for a meeting of the working group, and it is quite
7 interesting to see that people are picking up on these terms, benefiting from our
8 papers, and again we hope that this proves helpful to the process as we move
9 on to Seattle and beyond. I will stop there, Chair.
10 MR. RILL: Thanks very much, Mark. Joe or Mark, do you
11 want to describe, and I think it picks up on some of the things that Mark was
12 saying, the statement made by Joanna Shelton, Deputy Secretary General, a
13 couple months ago that I think got a lot of attention on this side of the Atlantic,
14 at least.
15 MR. PHILLIPS: This is perhaps what I mentioned earlier an
16 example of the proactive OECD speaking out. In this case, Joanna Shelton,
17 speaking in a personal capacity, presented some views on competition policy
18 which asked for international rules, a topic which she was asked to address at
19 this Wilton Park Conference. And I should emphasize that she did not argue
20 that there should be international rules for competition policy. Rather, she
21 looked at three kinds of alternatives and assessed their pros and cons.
22 One alternative she looked at is we call the Munich code, a kind
23 of bête noir of this area: binding multilateral rules, cases reviewable and

1 dispute settlement and so on. And I think it's fair to say she concluded that
2 this wasn't on, it's not on for practical reasons, countries will never agree to it,
3 and it also shouldn't be on for very, very substantial reasons that as I
4 mentioned earlier, complex fact-intensive antitrust cases are full of
5 confidential information, are not amenable to being reviewed by an
6 international organization. And I think that view has become fairly widely
7 accepted among OECD countries.
8 She also looked at sectoral rules as we discussed earlier today,
9 the possibility of more sectoral rules with competition elements like basic
10 telecoms. And she pointed out some downsides there, that whereas we have
11 been promoting convergence within the OECD across national competition
12 policies, a variety of sectoral competition rules can lead to divergence within a
13 country and poses all kinds of problems, potentially. We can have abusive
14 dominance or market definition meaning one thing in telecoms and something
15 else in financial markets or what have you. She raised some real concerns with
16 going down that road.
17 Then turn to the notion of the core principles, and there I think
18 you have core principles, such as countries agree that they will each adopt a
19 competition law. The competition law will respect some basic WTO norms,
20 such as transparency or nondiscrimination, that the law would have procedural
21 provisions, due process provisions, such as the ideas I mentioned earlier about
22 providing rights to private parties, including foreign private parties to have the
23 law apply to conditions, protective petition rights to the competition agency or

1 the right to go into court directly.

2 And she pointed out, I think correctly, that an agreement at that

3 level avoids many of the problems that you see in proposals like the Munich

4 Code because you needn't get into individual cases. You can readily decide in

5 dispute settlement if a country's adopted a law if that law contains these rights

6 and so on. And she further proposed that there might be something in addition,

7 there might be some kind of agreement, whether it's a common approach or

8 however we term it, on providing some guidance as to how you apply the law.

9 But she made the point that any additional agreement like that should not be

10 binding, should not be subject to dispute settlement. And I want add a

11 personal footnote to that, that if you really want it to be nonbinding, maybe it

12 need not even be in the WTO agreement. That could be outsourced. There is

13 plenty of guidance in national guidelines, in product of United Nations,

14 UNCTAD, the World Bank, OECD, that provide that kind of guidance. You

15 don't even need in a WTO agreement. But she didn't say that.

16 MR. RILL: Mark, did you have a comment on that?

17 MR. WARNER: I would come back to it and say that the speech

18 by the Deputy Secretary General was written a little bit before our work on

19 some of these issues had progressed in the Joint Group so that on some of this

20 stuff I would just caution that, you know, it's important when you think of

21 what is the OECD view, to keep that in mind. We worked hard on some of

22 these issues when we did our paper on Telecoms, which again was a specific

23 application of the Complementarities paper. I think that in the discussion in

1 the Joint Group by both the trade and competition authorities, there was
2 perhaps a little bit more receptivity to the sectoral approach, not across the
3 board, not as a replacement to an overall horizontal approach, but there was
4 the recognition that there is something of significance in the Telecoms
5 Agreement and while there are obvious caveats that had to be borne in mind
6 going down the sectoral road, that there might also be certain things we can
7 learn about even how one might approach a horizontal architecture by
8 examining the work that worked.
9 I think that is what I would say, again, rather than specifics,
10 more in terms of the sort of gradual and sort of incremental process as we think
11 and work through these things benefiting from our discussions among our two
12 sets of colleagues that our work will become even more precise, and maybe one
13 day germinate into an OECD Council recommendation much more than a
14 speech by one of the two Deputy Secretary Generals responsible for this file.
15 MR. RILL: We do have OECD recommendations on substantive
16 issues such as the hard core cartel recommendation which I think is a landmark
17 in OECD for getting into substantive areas. Let me see if my colleagues have
18 any questions. Eleanor?
19 MS. FOX: All right. Thank you. You've mentioned the
20 possibility of developing core principles. My question relates to relationship
21 between OECD and WTO or perhaps even a stand-alone agreement. Have you
22 given thought to whether there are some issues that belong particularly in the
23 WTO, like at the point of intersection of trade and competition, market access,

1 and of course telecoms, telecoms market access, it's a kind of market access,
2 it's a kind of access to an essential facility which is probably going to be with
3 cross-border implications. So have you given thought to whether there is any
4 reason if one thinks at all of an internationalization, any reason to do it
5 particularly in WTO for true and tight trade competition issues and elsewhere
6 or not at all or whatever for other issues?
7 MR. PHILLIPS: One thing I would say at the outset is the idea
8 of having an agreement in the OECD has not been discussed, and we have not
9 done any comparison of the relative advantages of WTO versus the OECD. It
10 has simply never come up. The other thing I would mention, just on a strictly
11 personal note, it's not something I would personally seek for the OECD. We do
12 very well, I think, promoting convergence, doing substantive discussions,
13 in-depth analytical issues, that kind of thing. That's our bread and butter. We
14 don't have a dispute settlement mechanism, don't have a tradition of that, and
15 so, I'll stop there.
16 MR. WARNER: I would reiterate that our work is optional at
17 this stage. We have not reached that stage of analysis where we have looked at
18 a possible WTO agreement. Instead we have listed sort of the continuum along
19 which our options work is proceeding, and at some point it may well be that we
20 will turn our minds more precisely to a question like that.
21 MR. RILL: Do you want to put in a plug for the June seminar?
22 MR. WARNER: Yes. In June, we will be holding a seminar on
23 the 29th and 30th of June for our non-Member States to engage our nonmember

1 countries and with our civil societies, environmental, labor and other groups
2 around the issue of trade and competition policy. We will have three different
3 panels. First we will look at the regulation in competition and trade. The
4 second panel will look at options -- the kind of work I have been describing --
5 generally, how would we get a degree of coherence between these two policy
6 areas. The third panel will then assume the option of multilateral rules and ask
7 what kind of multilateral rules, would be desirable, feasible. And again the
8 idea would be to have a broad representation of our non-members in the room
9 as well as having different elements of civil society who have not been part of
10 this debate to this point, but who will be part of this debate as we move on to
11 Seattle and beyond.
12 MR. RILL: Merit?
13 MS. JANOW: First of all I wanted to express my appreciation
14 to both of you for rearranging your calendars to be here today. It's really a
15 contribution. Thank you very much. I personally also have long admired the
16 OECD's contribution as the principle fora that has been thinking about
17 competition policies internationally for so long, and has always been an
18 intellectual testing ground for issues that were often taken up at the
19 multilateral level and so I really do appreciate your coming here today.
20 In the WTO Uruguay Round agreement on investment contains a
21 reference, as you know better than I, to look at the relationship between
22 investment and competition policy. And the one place where there has been a
23 real engagement on investment was at the OECD. And so my question to you,

1 which perhaps I apologize for sort of springing on you, but is how is
2 competition policy itself surfacing in the context of those investment
3 negotiations? Did it surface? If so, how and if you don't wish to respond now,
4 could we just get some sense of that at some point?
5 MR. PHILLIPS: I think we're getting ready to deal with
6 competition policy. For example, review the guidelines for multinational
7 enterprises, updating of those guidelines. There is a chapter in those
8 guidelines on competition policy for what it's worth. But as we all know the
9 negotiations ended and never took that up.
10 MR. WARNER: There was work also on state monopolies and
11 public monopolies in the Multilateral Agreement on Investment, MAI, or the
12 Multilateral Framework on Investment, MFI, but again, that work is sort of
13 stillborn as well. Work obviously continues on Article 9 in the WTO
14 Agreement on Trade-Related Investment Measures (the TRIMs Agreement).
15 There is clearly a linkage between the two WTO working groups that I
16 mentioned earlier. We have not addressed that linkage ourselves directly in
17 our work in the Joint Group, although that is clearly related to the kind of work
18 that we are doing. The same discussions about competition policy occur in the
19 working group on trade an investment as occur in the working group on trade
20 and competition policy. There are linkages there because of certain developing
21 countries have made the linkage expressly and they are the ones who have put
22 it on the table for discussion and negotiation and it will stay there for the
23 foreseeable future.

1 MR. RILL: Okay, thank you very much. Paula, do you have
2 anything?
3 MS. FOX: Could I ask one more? Never mind.
4 MR. RILL: Go ahead. We're only 20 minutes over.
5 MS. FOX: I'm steered back to your bread and butter. Perhaps if
6 there is not time you can think about answering in writing. Since you are
7 considering convergence of competition policies and you want to process
8 standards, I want to know your reaction to the fact or proposition that there are
9 various countries like the United States that are rather sharply
10 efficiency/consumer welfare focused and there are various other countries that
11 whether or not they say they are consumer-focused are fairness-focused. And
12 there is some argument, at least some people say that if you bring on stream a
13 law that is essentially a fairness law rather than a consumer welfare law, you
14 might degrade efficiency more than you add to it by including within that
15 vessel a cartel law. So I was wondering if you find this a problem and whether
16 you recommend that people have competition laws no matter what the
17 competition law said.
18 MR. RILL: In one word or less, no. I'm kidding.
19 MR. PHILLIPS: And I apologize for having dragged this over
20 time. Again, personally, I think the idea of the efficiency objective is going to
21 prevail around the world. I see it, for example, in our work on regulatory
22 reform, that governments are very concerned about having our economies to
23 better the OECD's economics department, studying the macro-micro link, a

1 good micro policy producing better macroeconomic performance, and that's all
2 about economic efficiency and I think it's going to sooner or later come out.
3 MR. RILL: Thank you both very, very much, and especially for
4 readjusting your schedules and the really good work you've done and that
5 OECD is doing. We undoubtedly will be having more questions to put to you,
6 if we can, as we work our way through this report.
7 Thank you both very much. Let's just stretch. Lock the doors
8 while we set up for the next panel.
9 (Recess.)
10 SESSION FOUR
11 MR. RILL: Okay, we're all set, most importantly our panel is
12 set.
13 MR. BAKER: I think what's important is that you all have
14 survived the whole day to be here to greet the panel.
15 MR. RILL: We're resilient in spite of our longevity, at least in
16 my case. Let me welcome our fourth panel of the day and express our
17 appreciation for your being here. This panel is a knowledgeable expert group.
18 I don't know whether I can say they are representing the International Law and
19 Practice Section of the American Bar Association or simply representing
20 themselves as leaders of the International Law and Practice Section of the
21 American Bar Association.
22 MR. LIBOW: I think, Jim, we're all current or former leaders of
23 the International Antitrust Law Committee of the International Section, and

1 any of the views that we have set forth today are not the views of the Section,
2 are not the views of the Committee, in Byowitz and Baker's case not even their
3 own views.
4 MR. RILL: We had a disclaimer earlier when some of the
5 leaders of the antitrust section said that it wasn't their partners' views.
6 MR. BYOWITZ: Having been quoted at a conference and
7 quoted in The New York Times on a deal as the reason why someone rejected
8 my client's unsolicited offer being the remarks that I had made at a
9 getting-the-deal-through conference of the ABA Antitrust Section, I started my
10 next speech by saying the views expressed herein are not necessarily my own,
11 and I've been doing that ever since.
12 MR. RILL: Did it work?
13 MR. BYOWITZ: They did of course misconstrue my views, and
14 I explained it at that speech and will not bore you with the details here, why
15 the New York Times article is wrong and my remarks at the conference really
16 meant that they should have accepted my client's offer rather than not.
17 MR. RILL: Now that we're into it, let me introduce you for the
18 benefit of the press and perhaps some of the panelists on the Committee who
19 don't know you all. I'll just go around the room and then perhaps Daryl you
20 can pick an order for the group.
21 Mike Byowitz at the end of the table here is a partner at
22 Wachtell, Lipton, Rosen & Katz, a longtime antitrust and global competition
23 practitioner, expert in mergers, has had officerships and council positions and

1 committee chairs in not only the International Law and Practice Section but
2 also the Antitrust Section of the American Bar Association. He has the honor,
3 as do several of us, of being an alumnus of the Department of Justice's
4 Antitrust Division, and someone I've had the pleasure of working with on a
5 number of matters, sometimes with a good result.
6 MR. BYOWITZ: I've learned a lot in that work with you.
7 MR. RILL: We have, both of us.
8 Don Baker who is next to Mike is an extraordinarily well known
9 international antitrust practitioner, a former Assistant Attorney General in the
10 Ford administration and spilled over into the Carter administration where he
11 gained fame by recommending the repeal of the Robinson-Patman Act, a
12 worthy goal. He has written widely and spoken often on antitrust and
13 particularly on international antitrust. Don also has been an officer of the
14 various bar associations that have a particular interest in the field. I'll give
15 you a plug, Don. I think one of the more comprehensive publications I have
16 seen is Rowley and Baker on International Mergers, which I think should be a
17 desk set for anybody practicing in this area. May I recommend you take up the
18 habit of pocket parts, put it on the Web site, and update it daily.
19 MR. BAKER: We're looking at that for the third edition. As to
20 what you have just said, we'll make sure it gets on the next dust cover.
21 MR. RILL: Paul Crampton is a partner at Davies, Ward & Beck
22 in Toronto and also an officer of the Canadian Bar Association's antitrust
23 section. I first met Paul when we were working together on merger guidelines,

1 the Canadians and U.S. were going forward at the same time. At that time
2 Paul was a senior official, I think special assistant to the director of the
3 Bureau of Competition Policy. And then went after that into private practice.
4 He is a very well-known Canadian lawyer.
5 Daryl Libow is a partner in Sullivan & Cromwell's Washington
6 office, which I suggest means he probably is one person at Sullivan &
7 Cromwell not involved in Microsoft. He is Co-Chair of the International
8 Antitrust Committee of the Section of International Law and Practice, and a
9 graduate of, in addition to Cornell Law School, Harvard undergrad and the
10 London School of Economics.
11 Daryl, do you want to suggest the order of presentation?
12 MR. LIBOW: Let me briefly explain what we hope to do today.
13 We're members of the International Section and all of us spend a great deal of
14 time representing foreign clients who have had experiences with the U.S.
15 merger review process. We thought what we hoped might be of assistance to
16 you and helpful to the task force would be to spend a little time talking about
17 the non-U.S. perspective of the U.S. merger review process and some of the
18 problems that foreign clients perceive or encounter in trying to get their deals
19 through the U.S. merger review process.
20 We have four separate topics that we hope to cover. Each of us
21 going to take a few minutes to take the lead on one of those topics, and then we
22 want to have a lively discussion amongst ourselves and with you about some of
23 the issues we're going to raise. I will just note that we all are very impressed

1 with the staff's draft working papers on some of these topics that came out in
2 late March. I think you capture a lot of the same issues that we are going to
3 talk about today. I think in a number of instances some of us would say you
4 should go further, probably in some instances not far enough or maybe too far.
5 We're going to start with Mike Byowitz, who is going to kick it off and talk
6 about the burdens of second requests in foreign transactions.
7 MR. BYOWITZ: A subject near and dear to every practitioner's
8 hearts.
9 Foreigners have the view, and I think correctly, that second
10 requests impose massive burdens on merging parties that are far greater than
11 are warranted in order to achieve the law enforcement objectives of the U.S.
12 authorities (which are to determine which deals to challenge). Foreigners
13 believe that second requests impose burdens that are considerably greater than
14 are imposed in second phase or what I can call globally second phase
15 investigations, that is, more intensive investigations by antitrust jurisdictions
16 abroad.
17 Now, I should say that the ICPAC staff report correctly notes
18 that the HSR form imposes burdens that are relatively modest, and I
19 underscore the word relatively, but relatively modest vis-a-vis some of the
20 foreign filing requirements. So the initial form in the U.S. is better, easier to
21 deal with even though it requires a lot of SIC code information. It's something
22 that a transaction-minded company can keep current, which is a good thing.
23 Even though it's a lot of work, you do it once and then you've got it for the year

1 until the base year changes, then you do it again. The transaction-specific
2 portions of the Form are relatively easy to deal with, and I say again relatively.
3 In any event, what I would submit is that getting to the second
4 request and the meat of what I want to talk about, the refusal of the U.S.
5 authorities to change the U.S. system, if that's where we end up, may have a
6 chilling effect on efforts to harmonize the procedural dimension of competition
7 laws.
8 The U.S. system, I believe, in second requests is an outlier
9 because of its very document-intensive nature. I know that some of the panel
10 members have had experiences with it directly and others by this stage in the
11 proceedings have heard the horror stories. I would just say very briefly that
12 nowadays parties are routinely in second requests forced to produce hundreds
13 if not thousands of boxes of documents, many of which have only a peripheral
14 relationship to the key issues in the case.
15 Some of the problem arises from that second requests call for a
16 comprehensive search for nonidentical duplicate documents; a little check mark
17 on a document that it went to a different person means that document's a
18 different document also which must be produced. Second requests cover
19 literally entry level people and people with very peripheral involvement with
20 the relevant products -- and sometimes even personnel that the staff attorney
21 would agree have no involvement with the relevant product, on the theory that
22 it can't be ruled out that the employees in question incidentally might have
23 received some documents of interest.

1 I would submit that that kind of system gives no weight to
2 burdens on parties and that's not appropriate. Normally you have a balancing
3 test between probative value or likelihood of achieving something useful versus
4 burden. There's no credit given for burden in the second request process.
5 Second requests also call for searches of electronically stored documents, and
6 anybody who has had to deal with the joys of what kind of archival tapes
7 people keep, what happens when you delete a message and put it into trash, is
8 not thankful, to say the least. That kind of issue is not something that when I
9 graduated from law school almost 25 years ago I had a burning to get at, and
10 I'm still not burning to get at that.
11 The cost of responding to second requests is very substantial in
12 terms of usually millions of dollars. The delay factor is considerable and has
13 an effect on the businesses of the merging firms that a lot of times is
14 unwarranted -- that is, not proportionate relative to the competitive concern the
15 deal may raise. You can have what is at the end of the day an efficiency
16 enhancing procompetitive deal that gets held up for months and the parties lose
17 out on substantial business prospects while their management is focused on
18 dealing with CID depositions, dealing with responding to second requests,
19 dealing with helping the lawyers develop substantive positions.
20 One of the problems with the U.S. system is that the length of
21 time is uncertain because it's based on responding to second requests. I can't
22 believe, if anybody has addressed this issue before, you haven't heard of the
23 perverse incentives that this creates on the part of the agencies or at least the

1 perception on a very substantial part of the antitrust bar that it creates the
2 wrong kind of incentives, as opposed to every other -- I think pretty much
3 every other system of which I'm aware which has a finite period of time. The
4 HSR period can be stretched out by staffs being not responsive to requests for
5 modifications of second requests.

6 I would say also that many experienced practitioners believe that
7 second requests are used for purposes that are not what was intended. They're
8 used to build a case as opposed to determining if a violation occurred. They're
9 used as one-way preliminary injunction case discovery. There is a perception,
10 and I believe foreigners have this perception to a considerable degree, that
11 second requests are sometimes used to create additional leverage on the part of
12 the agencies so that the agencies get divestitures that are greater than might be
13 warranted by the facts, or at least some people's view of the facts.

14 I will tell you that I advise my clients to respond to second
15 requests, notwithstanding all of that, because you must seize control of the
16 clock; if you don't, you're at the agency's mercy in terms of what relief you're
17 going to be giving them.

18 The burden I would like to focus on that really comes into play
19 with foreigners is the translation burden, which is very substantial. Anybody
20 who has dealt with second requests knows that most documents that are
21 produced in response to a second request have very little utility, and if there
22 are lots of them in a foreign language and having to translate them, which the
23 rules require, imposes enormous burdens. The staff has made a useful

1 suggestion which I do not think goes far enough, but a useful suggestion in that
2 regard.
3 What I would suggest is that I agree the agency should have
4 access to people who are proficient in foreign languages. What I would
5 suggest is that they retain foreign antitrust counsel either in cooperative
6 relationships with foreign agencies where there are many people who speak
7 foreign languages and/or through hiring foreign antitrust counsel to review the
8 documents in the original language, determine which ones have any utility at
9 all, and then translate those. I think the parties could be prevailed upon, given
10 the substantial expenses involved, to pay for a portion of that. But I would
11 strongly submit that it should only be a portion, because the agency's
12 appreciation of the burdens would be enhanced if they had to pay for some of it
13 themselves.
14 I would close by saying that the U.S. system imposes significant
15 burdens on deals involving foreigners. I'm aware of deals where people have
16 simply, because of the danger of getting a second request, cut the U.S. part out
17 of the deal (that I think at the end of the day would have been efficiency
18 enhancing) rather than go through the second request process. I am not
19 proposing a separate rule for transactions involving foreigners. I believe many
20 of the same issues are involved in transactions involving two multinational
21 U.S. companies. With that I'll stop.
22 MR. RILL: Thank you, Mike.
23 MR. LIBOW: If I could just add to what Mike was discussing.

1 Mike, I found that in a number of transactions involving
2 non-U.S. parties that they have become so terrified of the second request
3 process. Typically after they have gone through it once, they will immediately
4 ask to come in and find a fix or remedy and often give up more than is
5 necessary to give up or certainly give up the U.S. part of it which might not
6 have been justified under strict competition analysis, to avoid a second request.
7 And that is not a problem unique to foreign companies, but is perhaps
8 exacerbated in the context of foreign companies. We have very low thresholds
9 to require a Hart-Scott filing, so a lot of cross-border deals are picked up that
10 have very little to do with the United States, and I think there is a perception of
11 the tail wagging the dog in many instances.
12 MR. RILL: Those are abandonments even where there is no
13 perception of any competition problem?
14 MR. LIBOW: There might be a de minimis problem, Jim. Once
15 you get to the point where you're being told there is a second request or a
16 likelihood of a second request --
17 MR. RILL: Hopefully those wouldn't happen unless there is a
18 competition problem or the agencies aren't cooperating with each other, and
19 don't decide who has clearance until the end of the day.
20 MR. LIBOW: Hopefully.
21 MR. BYOWITZ: That is a problem. I'm glad you mentioned
22 that because that is a very serious problem. Four years ago the agencies very
23 highly touted the fact that the agency clearance process had broken down, but

1 they had fixed it. It is completely broken again, and getting your first phone
2 call from an investigating staff on the 28th or 29th day of the first waiting
3 period is not something that is helpful.
4 MR. RILL: Gee, I just got a clearance phone call and I really
5 need a second request because I don't know what this deal is all about phone
6 call?
7 MR. BYOWITZ: Yes.
8 MR. CRAMPTON: I think we're going to follow up on what
9 Mike just said. Just on this chilling effect point, I've been involved in a
10 number of discussions and even yesterday I was involved in one where U.S.
11 counsel for the vendor made it quite clear that a particular bidder is going to
12 get discounted by the vendor because the vendor perceives that the bidder's bid
13 is likely to entail a second request. As a foreigner, I find it surprising that
14 your process could get in the way of your industrial restructuring and put it at
15 a competitive disadvantage relative to the rivals of U.S. firms in Europe or
16 Asia or wherever.
17 MR. RILL: I think we have all had experiences where the cost
18 of complying with the second request appears to be so awesome and there's no
19 quick-look option that the deal's been abandoned. We all have had that
20 unhappy and really uncalled-for experience.
21 MR. BYOWITZ: And also it gets more difficult because
22 increasingly strategic use is being made of the whole HSR review process in
23 the United States. You'll get complaints from competitors, oftentimes not well

1 founded, and that will result in a second request because the agencies are very
2 responsive to potential witnesses, given their litigation orientation these days.
3 Sometimes you can get through those issues in the first 30 days but sometimes
4 you can't. When you can't, you go through the whole process. I've been
5 involved in deals where I've told clients, there is a 50/50 chance we will get a
6 second request, and on a deal where there's a 90 percent chance we will get
7 through without any divestiture.
8 MR. CRAMPTON: You might be interested to know that about
9 a year and a half ago the Canadian Competition Bureau adopted administrative
10 timed deadlines, and they positioned them as being a quid pro quo for user
11 fees, but it's worked rather well. They have three categories, straightforward
12 transactions they guarantee or virtually guarantee that they will complete the
13 review in 14 days. And they have a middle category that's ten weeks. And
14 then the most complex transactions would be five months. These are deadlines
15 that they impose upon themselves, so they don't require statutory amendment,
16 something very difficult to achieve. They are a form of soft harmonization.
17 Here we have something that has some potential for soft harmonization. I
18 know the Canadians specifically tried to harmonize that latter period with the
19 European five-month review period, so that's something that you may want to
20 think about.
21 MR. BAKER: Can I just add a couple things. One is, my work
22 probably compared with the others at the table is more balanced between
23 objecting to mergers and putting them through. Like everyone else I've

1 probably put more through than I object to but because I have so few conflicts
2 in the law firm I get to object more.
3 Mike's perception that someone objects and you get a second
4 request, I don't have as good a record as that. I'm sometimes pleased for
5 someone to issue second request. I think the staffs are a bit more reluctant. I
6 think an objector clearly does improve the chances of the agencies issuing a
7 second request.
8 The second thing is, I think that the real weakness in the U.S.
9 system is the absolute lack of any independent force in the process in terms of
10 determining substantial compliance or any other question. Give me a federal
11 magistrate or somebody who you can go into and say, look, this is ridiculous.
12 And that I think is more the problem than the fact of an uncertain deadline. I
13 have some sympathy for the agency that if they're subject to a five-month
14 deadline, then the merging parties can sandbag you on being very slow in
15 getting things out. But I'm totally with you on the point of you have to tell
16 your client, foreign or domestic, and it's worse when it's foreign, you've got to
17 comply with the second request because otherwise you lose the clock and that's
18 the only weapon you have in the whole process.
19 MR. LIBOW: Before we move on to another topic, unless you
20 have questions, there is one other point I wanted to make about the translation
21 requirement, which I think is a really onerous requirement on foreign parties.
22 Sometimes the agencies can use it substantively in that if you
23 have a company that's doing an acquisition in the United States and that

1 company has subsidiaries in Hong Kong and Japan and all over the place, if
2 you go in and you say you can't really mean I've got to translate all these
3 documents on this product in all these offices across the world. And as you all
4 have experienced they usually ask you to put together a flow chart to show you
5 the offices and who works where. They will say to you, fine, you don't want to
6 do it, let's accept a market definition of the U.S. market only, which can have a
7 fairly significant effect. It can take a weapon away that gives you the
8 opportunity to argue that there is a broader market and therefore you should
9 ignore the HHI numbers strictly in the U.S. market, so I think it can have a
10 substantive effect as well.
11 MR. BAKER: Or an efficiency defense or any number of other
12 issues.
13 MR. RILL: Merit has a question, and then I would like to move
14 on to the next topic. We can always come back to other questions on this
15 point.
16 MS. JANOW: I have a practical question I can't avoid asking,
17 given that at this table we have two former heads of the Antitrust Division and
18 others who have worked in the Division.
19 How will the agency be able to afford being able to undertake
20 this kind of enterprise? That is to say, hiring enough language-competent
21 lawyers to do a translation of key documents?
22 MR. RILL: Since you've put it to me as a former head of the
23 agency, I didn't know I was going to have to answer any questions. I would

1 say by being more discreet in what they ask for.

2 MS. JANOW: Okay, that's one answer.

3 MR. BAKER: The second thing I haven't thought through is that

4 you could possibly have a different fee structure for cases that involve

5 substantial numbers of foreign language documents. I agree with Mike's point

6 that the agency should be required on an incremental short-run cost basis to eat

7 some of the cost as a check, but the agency will still have to be supported out

8 of public funds and fees.

9 MR. BYOWITZ: It would probably save the parties money to

10 fund a substantial portion of that by agreement as opposed to translating. I

11 want to follow up on Jim's point because it is very important. You end up

12 arguing that foreign producers count because there will be a supply response

13 as a result of an attempt to exercise market power in the U.S., and you get a

14 request then for documents relating to everything about competition in

15 Germany and everywhere else abroad. Everything about competition in

16 Germany is not relevant to the key issue. If a focus was made on what's the

17 key issue about foreigners and what does the staff need to know about them in

18 the instant investigation, the universe of documents would be much, much

19 smaller than it is and then it wouldn't present that big a burden.

20 MR. CRAMPTON: Quite apart from the translation issue -- go

21 ahead, we can talk about this later.

22 MR. RILL: We can come back on this issue. I want to be sure

23 that before we run into the NATO celebrations that we cover all four subjects.

1 MR. LIBOW: The second topic is something I'm going to talk
2 about, which is what I see as the burdens of increasing state involvement, state
3 merger regulation of cross-border transactions. I don't want to overstate the
4 problem. I think to date state interference in cross border deals has occurred
5 in relatively few instances where it has had significant effect, but I think the
6 state attorney general has become more and more active domestically. Their
7 activism will undoubtedly extend to cross-border deals as well. I think this
8 provides some very significant problems. I think the concurrent jurisdiction of
9 federal regulation and state regulation in cross-border deals can be both unfair
10 and inefficient, and I do note that the staff's working paper noted this problem,
11 and I agree with them.
12 The thing that's interesting about state intervention or state
13 regulation of cross-border mergers is that in contrast to the multi-agency
14 review “problem,” which I think is a problem as well, for example if you had a
15 foreign airline that's trying to get statutory immunity for a transaction which is
16 essentially the same as a merger but you're prohibited from merging because of
17 foreign ownership restrictions, you not only need to get approval on immunity
18 from the Department of Transportation but obviously the Justice Department
19 actually has a very formalized role in the process as well. And you could have
20 a situation where the Justice Department could recommend X divestiture and
21 you'll find that the Department of Transportation may recommend X plus five
22 in terms of divestiture and the goal of the Department of Transportation
23 requiring X divestiture may not be competition related, or they may use the

1 transaction to leverage a trade policy, such as an “open skies” regime with a
2 foreign government.
3 In that situation, however, I don't think the United States is very
4 unique to a lot of foreign countries. I think the concurrent jurisdiction of
5 multi-agency review occurs in many places. I think where we're unique and
6 what really aggravates some of our foreign clients is the notion that the states
7 can intervene after the federal government has undertaken review, and I think
8 there really is no analogue to that. In Europe if the transaction reaches a
9 certain threshold it goes to Brussels and nowhere else. If the transaction is
10 below a certain threshold, yes you can have a number of Member States in the
11 European Union that might review a transaction, but if the Federal Cartel
12 Office in Germany approves the transaction, you're not going to get some
13 subdivision in Germany saying they'll impose an additional divestiture
14 requirement. Similarly, in Canada or Australia or Mexico, if the federal
15 government approves the transaction you'll not have provinces, its almost
16 unheard of that provinces will be imposing divestiture requirements.
17 So I think that it is a uniquely U.S. problem, and I think it is a
18 problem that grates on foreigners in deals particularly because their
19 cross-border dimension means there is already going to be a number of merger
20 clearances required, they may be required in Europe, Asia, as well as in the
21 United States. And there is a number of burdens that come from this. There is
22 the possibility of additional discovery burdens. We're all familiar with the
23 voluntary disclosure compact. I have had experiences where the state AG has

1 asked for documents beyond what the federal enforcement officials have done.

2 There is a substantive difference, too. There are actually a

3 number of substantive differences between the DOJ-FTC merger guidelines and

4 the state and NAAG horizontal merger guidelines and some of them are very

5 significant. Some of them go to fundamental philosophy as to how to look at a

6 transaction. And, there can be conflicting, although this is rare, there can be

7 conflicting remedies. One recent example, a very recent example, is the BP

8 Amoco transaction where the State of Ohio actually enforced remedies beyond

9 which the federal government, the FTC, had required, and that's an example.

10 What I think is a concern to many foreigners is that some of

11 these remedies are not purely competition driven. And I will quote a former

12 assistant attorney general of the Antitrust Division who once said: “State

13 attorneys general are often more interested in headlines than sound law

14 enforcement, have begun to use antitrust enforcement as a means of advancing

15 their political careers.”

16 MR. RILL: I don't think I ever said that.

17 MR. LIBOW: It wasn't you.

18 MR. RILL: I just wanted to make it clear.

19 MR. LIBOW: It wasn't Jim and it wasn't Don, that's all I'm

20 going to say.

21 MR. LIBOW: I think high level Justice Department officials

22 have recognized the issue, and I think the issue goes beyond, just to be fair to

23 state AGs, it's not just to advance their political careers, there are actual

1 different legitimate motivations. And in fact the NAAG guidelines actually
2 recognize in section 2 of the NAAG guidelines noncompetition-related issues
3 as something the state attorney general should look at.
4 And I think the final thing is -- and I have had foreign clients say
5 to me, to add insult to injury, Daryl, they make us pay for the investigation.
6 For those of you who have not had the joy and pleasure, the state attorneys
7 general will ask you in the consent decree to pay for the cost of their
8 investigation. I had one foreign client who likened it to the old form of
9 Chinese execution where the family was billed for the bullet.
10 I think it's not necessary, because federal regulatory officials
11 look at local markets as well. The Clayton Act specifically talks about a
12 section of the country in dealing with commerce, and I think it is not necessary
13 to have duplicative state review because I think the federal government should
14 and very often does protect local interests and localized markets.
15 The solution to the problem. I would propose that Congress
16 pass legislation amending the Clayton Act to preempt the state laws dealing
17 with international cross-border deals. And I think there is a difficult question
18 that can be debated which is what is the threshold. Is it only cases where the
19 Justice Department or the FTC have acted? What does it mean to act? If the
20 Justice Department or FTC reviews the transaction and doesn't issue a second
21 request, have they acted? I think this is a difficult question, but I would
22 strongly urge that we at least limit the opportunity for state attorneys general
23 to get involved. I think this is justified in the Foreign Commerce Clause. The

1 Supreme Court has said in a number of other contexts that the federal
2 government in dealing with international intercourse in commerce, the United
3 States should speak with one voice. I think this is a perfect example where we
4 can do that and I think that's something that should be considered.
5 MR. RILL: Let me just press you a little bit on that because I
6 think you raise an issue that's been an issue for a long time. You've got
7 Supreme Court law on the subject of the power of the states, but I wonder if
8 this is an issue that is one that is particularly or even largely germane to local
9 competition. It seems to me it's perhaps even more germane to domestic
10 competition situations. You raised the question of BP Amoco. What if BP
11 didn't happen to be a foreign-owned company, but instead was the Libow
12 gasoline company headquartered in Washington, D.C. that happened to have
13 stores, gas stations in Ohio, and Amoco headquartered in Illinois had gas
14 stations in Ohio, and those two companies had the only gas stations in Ohio
15 and the Federal Trade Commission, perish the thought, was asleep, looked at
16 it, took a pass didn't issue a second request.
17 Should the State of Ohio be barred from bringing an action to
18 vindicate the rights of the people of Ohio? And they can argue, yeah, maybe
19 they should, but does that make it an international transaction?
20 The second point. I question whether the states really do get
21 into, other than a situation with BP Amoco which I view as essentially a local
22 market, get into global mergers. States were not, insofar as I know, in
23 Worldcom/MCI or any of the major nonretail transactions.

1 Third, whether the states have authority to get into a transaction.
2 I'm thinking now of Illinois Brick. Other than in those situations where there's
3 an actual direct consumer purchase because the state attorney general, at least
4 as insofar as he's enforcing the Clayton Act, stands only in the role of the
5 consumers of the states, so unless there is a direct consumer nexus, I wonder if
6 the state can bring an action. With all respect that's a very interesting topic. I
7 wonder if it's one that's particularly on our home ground.
8 MR. LIBOW: Let me react quickly to a couple of things you
9 said.
10 MR. RILL: Please.
11 MR. LIBOW: First, I think it's more of an acute problem in the
12 cross-border deal philosophically or intellectually because the Supreme Court
13 has recognized that there are greater burdens imposed on states under the
14 foreign commerce clause than under the commerce clause. And I think you can
15 make the argument that when it arises and you have a cross-border deal,
16 leaving aside your question of whether states have the power or not, I think
17 there is a much greater argument to be made as a matter of law intellectually
18 that the United States should speak with one voice.
19 I do think that there are a number of other instances where I've
20 found that states have gotten involved in cross-border deals. I've come across
21 one in Texas where the Texas Attorney General got involved in a deal
22 involving Mexico in an acquisition in the United States. I found instances
23 where the New England Attorneys General had gotten involved in a deal where

1 a foreign supermarket chain bought a U.S. supermarket chain, but I will grant
2 you those are all in the retail area, which is your point. That is where it
3 becomes more of an issue.
4 As to the Supreme Court precedents about states having rights, I
5 would note that the California v. American Stores decision, which I think is the
6 one you're probably focusing on, specifically addressed the equivalent of
7 Section 7 in a domestic transaction, it didn't reach the issue of cross-border
8 deals.
9 MR. RILL: That's true.
10 MR. LIBOW: Finally, I think it raises an interesting question
11 when the states have parens patriae jurisdiction only where they would be
12 permitted to bring an action where there wasn't “consumer benefits,” but I
13 think the potential is there and I think Congress could avoid the problem by a
14 amending the Clayton Act.
15 MS. FOX: A related question. This issue came up in a cartel
16 case in uranium in New Mexico, United Nuclear against General Atomic, in a
17 private action. And I wondered if you also recommend the preemption of
18 private action. New Mexico was a producer, not a consumer, and the New
19 Mexican Supreme Court said there was no preemption from federal commerce.
20 Would your concept lead us inevitably to say also that private
21 actions should be cut back?
22 MR. LIBOW: I think you make the argument that intellectually
23 flows from that. I would practically draw the distinction between the state

1 attorney generals who may often be motivated by other goals and the private
2 right of action, but I think you're right, from an intellectual point of view, it
3 flows.
4 MR. BAKER: I've wondered on this one. As I understand it,
5 we've had some trouble getting people interested in IAEAA agreements and so
6 forth. It seems to me that one of the possibilities is that we could include in an
7 international treaty negotiation the possibility of trumping the states on merger
8 enforcement decisions. So we're saying to Germany or somebody like this, if
9 you have one of these new modern antitrust agreements, one of the things we'll
10 give you is the treaty will say there won't be any local enforcement,
11 non-federal enforcement, and under the Migratory Bird case (Missouri v.
12 Holland), the federal government can trump the states.
13 MR. RILL: Was that an executive agreement?
14 MR. BAKER: There was a treaty.
15 MS. FOX: And the statute?
16 MR. RILL: If it's a treaty, it takes two-thirds of the Senate.
17 MR. BYOWITZ: The treaty has the same effect as a statute.
18 MR. BAKER: I don't know the answer on executive agreements.
19 MR. BYOWITZ: What I would chime in on this is that I think
20 the real issue you have to differentiate is between cross-border deals where I
21 don't think the states are really involved as opposed to what I call foreign
22 owner deals where foreign firms are involved to some degree. A German firm
23 buys a supermarket chain in New York and then buys a second one, why should

1 they -- my argument --

2 MR. RILL: Or perhaps a Dutch firm.

3 MR. BYOWITZ: Right. Why should they be treated any

4 differently than a U.S.-based firm.

5 MR. BAKER: Some nice person from Kansas City.

6 MR. LIBOW: My response would be, well, if the Kansas City

7 Supermarket Company wanted to buy a German or Dutch supermarket, they

8 would only have to worry about one set of regulators telling them what the

9 competition analysis is and what the remedy should be.

10 MR. RILL: I understand the equity of the point. You responded

11 to my questions whether we agree or disagree with the response, you've given

12 me some thoughtful answers. Paul?

13 MR. CRAMPTON: One aspect of what Daryl had to say that I

14 certainly think has an important international dimension is this whole area of

15 use of competition laws to promote noncompetition objectives. And it certainly

16 has been my perception, based on my reading about U.S. merger policy, that

17 the states do use their antitrust laws to advance noncompetition and

18 nonefficiency goals. To the extent that a lot of us in this room here and others

19 are spending an awful lot of time trying to convince other countries around the

20 world to use their competition laws or to enact competition laws to promote

21 competition and to use different policy instruments to promote noncompetition

22 objectives, I think it's critical that the U.S. show some leadership in this area.

23 And so, to the extent that somehow this Committee could be led to say

1 something or to take steps to reduce the extent to which the states use U.S.
2 antitrust laws to advance non-antitrust laws, I think that would be very
3 important.
4 MS. FOX: Do you think as a practical matter there is a way to
5 work with the states on a cooperation agreement and that that might be more
6 practical than the gain that we could get from preemption?
7 MR. LIBOW: I clearly think there is merit to that. The staff
8 recommended some of the ABA Special Committee Recommendations in 1991,
9 which are much less draconian alternatives. I'm trying to be thought
10 provoking. I do think it has the potential to be a significant enough problem
11 we ought to think about legislation. But I agree. I think there could be a
12 consultative process set up involving NAAG, the DOJ, the FTC, so perhaps
13 there can be some, you get in this one or you don't get in that one, we're not
14 going to look at this, if you want to look at this, go ahead, some type of
15 consultative process that might reduce duplicative investigations.
16 MR. RILL: One proposal that was put to us, the "us" hat I'm
17 wearing at the moment, is the old DOJ hat, where we negotiated the 1991
18 agreement, was that where the federal agency had looked at the issue, not just
19 taken a filing and let it pass but actually conducted an investigation and
20 thought the merger was okay or okay with some divestiture, any private
21 plaintiff including a state, goes further and brings an action under the
22 agreement the Department or FTC would have to at least appear as an amicus
23 and give its conclusions regarding the investigation. That seems to be a fairly

1 modest proposal. I won't go into the details of why that didn't get into the
2 agreement. It sounded to me sensible at the time.
3 MR. LIBOW: I think it is sensible.
4 One interesting point, there is a California Supreme Court case
5 that actually held -- this is not a cross-border deal, this is a domestic deal. But
6 actually held that the state antitrust laws were preempted in a transaction
7 where -- not a case where they took a flyer and let it go -- where the U.S.
8 government had investigated, entered a consent decree, required divestitures,
9 and the California Supreme Court held that it had so fully taken the space that
10 in that particular instance the California law should be preempted.
11 MR. RILL: All I'm thinking of is the possible persuasive effect
12 that that kind of brief might have on a court reviewing merger. It is a fairly
13 modest proposal to that extent.
14 I think we better move to the third topic.
15 MR. CRAMPTON: And that would be me. The principal point
16 that I'm going to make is that shifting the U.S. process away from an
17 adversarial litigation-oriented process towards a more consultative process
18 would help to achieve some of the best practices, I think, that are highlighted
19 in the staff document. If we step back and think about the HSR process as a
20 whole, first stage and second stage, I think most people would agree that it's
21 really not designed, it's not structured to facilitate, an expeditious resolution of
22 the issues, whether it --
23 (Laughter.)

1 MR. RILL: I'm not laughing at you. I'm laughing, I share your
2 pain.
3 MR. CRAMPTON: Yeah.
4 I think, first of all the initial filing doesn't require parties to
5 identify horizontal and vertical overlaps. If the staff doesn't identify these
6 overlaps, as a result of their review of the SIC code information or the 4C
7 documents, the transaction probably won't suffer the issuance of a second
8 request. Now, that raises the separate issue of type two errors.
9 Conversely, if they do identify, if something in their review of
10 the SIC codes or the 4Cs leads them to have questions about the deal, then
11 they're going to issue a second request without really knowing where their
12 specific concerns should be directed, and as a result the second request is
13 going to be a lot more expansive than the issues would warrant had they had
14 more information. And then a significant amount of time winds up being spent
15 negotiating back the second request after it's been issued. I think that that
16 process leads to an adversarial or litigation-oriented approach because the
17 merging parties have no incentive at all to take positions and address
18 horizontal or vertical overlaps, they don't even take positions on market
19 definition. I won't say they don't, but my understanding is they typically don't,
20 whether it's market definition, entry, market shares and other specific issues,
21 until much later in the process, and this in turn leaves the DOJ or the FTC to
22 its own devices based on limited information. It has to issue this large
23 information request, this overextensive information request, and that gives a

1 lot of foreign lawyers the impression that the FTC or the DOJ goes into hard
2 ball mode fairly quickly, and rather than trying to ascertain the facts, they're
3 really preparing for litigation.
4 Now, the adverse implications for foreign merger reviews would
5 be to the extent that U.S. counsel often quarterback the filing of submissions in
6 Canada and Europe and in other jurisdictions, they would be reluctant to give
7 us the green light to take positions that we would normally take up front on
8 market definition, market shares, barriers, and the like. And this results not
9 only in significant delays in our jurisdiction, but it also gets us off on the
10 wrong foot with our agencies, who are used to us taking these positions at the
11 outset of the process, and when we don't, the goodwill that would typically be
12 there evaporates rather quickly and they start wondering what our hidden
13 agenda is.
14 An alternative and less costly approach as identified in the staff
15 document is to require merging parties to provide at least sufficient
16 information in the initial filing, or if not in the formal filing, maybe in a
17 voluntary submission filed with the formal filing, to enable the agency to
18 ascertain the extent to which there may or may not be material horizontal
19 issues, material vertical issues, and then if so, to narrowly craft the second
20 request to those issues.
21 Now, I can give you some sense of the Canadian approach,
22 which roughly approximates something like that. I know many of you are
23 familiar with it. For those of you who aren't, it's a much more consultative and

1 open-door approach. It's similar to the European and Australian approaches.

2 Typically, we have a formal filing that people have to make, but

3 because of the consultative open-door orientation of our Competition Bureau

4 traditionally, parties go in with a supplementary voluntary submission.

5 Depending on the nature of the case, it could be a two-page letter (such as in a

6 completely conglomerate transaction) to a very substantial document that I

7 think you might call a white paper, which addresses in detail market definition,

8 barriers, market share and the like. The resulting process is much more

9 friendly in tone, flexible, fluid. It promotes goodwill.

10 It enables parties to cut to the chase much more quickly, and ask

11 much more intelligent questions, at least on the Competition Bureau's side of

12 the equation. It saves the merging parties the expense of responding to an

13 overly burdensome information request, so it really is a win-win process.

14 Another dimension to that process is the ability to go in and get

15 confidential guidance on a number of key issues, which is very helpful. And I

16 know that this is something that has recently been embraced down here and I

17 would simply encourage you to encourage the greater use of that, because it is

18 very valuable to merging parties. So really the bottom line is that perhaps the

19 U.S. process could move towards a more consultative, open-door approach,

20 and that should save parties on both sides of the equation significant costs and

21 burden.

22 MR. RILL: And I think that does reflect some of the thoughts

23 that were put together in the staff paper. Thank you for referring to them.

1 MR. BYOWITZ: Paul's topic and my topic have got to be
2 considered together because if you're going to adopt that reform, and I have to
3 go in and tell the staff that I've got a 30-percent market share, 25-percent
4 market share, today I'm getting a second request, and I would much rather hide
5 out in the weeds, particularly in the deals I referred to before where there are
6 enough players, there are supply responses, there is a 90-percent chance I'm
7 not going to have a problem at the end, but even if I take the whole first 30
8 days, particularly if I hit a time where a staff attorney's on vacation or they
9 have a clearance problem, I'm getting a second request, and they are so
10 burdensome that I'm not doing that.
11 MR. CRAMPTON: Maybe what you would need to do is adopt a
12 practice pursuant to which parties could take positions on a "without
13 prejudice" basis. I don't know whether that's something that might work, but I
14 gather that the reason why you don't take positions is because it can come back
15 and haunt you later in the process if you wind up in litigation. And maybe if a
16 practice were adopted that could permit parties to take positions that would be
17 potentially very helpful to everyone involved. This is what we often do in
18 Canada. We will often go in and say, look, even if the market is as narrow as
19 this, which we don't necessarily accept, but we are prepared to assume solely
20 for the purposes of facilitating an expeditious review, the market shares would
21 be low. But I gather that today people don't like to do even that.
22 MR. BYOWITZ: It's more than that. If you have bad numbers,
23 a lot of the issues that you win on at the end of the day are fact issues, and fact

1 issues are issues where a staff attorney can very legitimately look at you and
2 say: if everything you say is true, Mike, then I agree with you, but I don't know
3 that, so I've got to check, and that's a second request.
4 MR. BAKER: I think the other part of caution on this, and I've
5 seen this both in the government when people were filing things with me in the
6 pre-Hart-Scott period and in the post-HSR world, and that is very often one's
7 client will sound like you. "We ought to go in and tell them what the story is
8 and get on with it." And I'll say, but how sure are you of these key critical
9 facts -- because we're not going to look very good if we write a nice little letter
10 that says A, B, and C, and then by the time we get through interviewing, and
11 everyone delving into documents and things, we find that at the best this was
12 wildly overly optimistic and at worst it was just flat wrong.
13 So we get into the process of being cautious. The innovative
14 market definitions that are presented to the government are really quite
15 breathless. You would think that two banks not too far away on the same
16 street in the same town were in the same market, but you find one was in the
17 "east end" market and the other was in the "west end" market.
18 MR. CRAMPTON: You always have to pass the blush test.
19 MR. BAKER: What really may be going on is that there are so
20 many fewer of you in Canada that you're more likely to blush and then have to
21 come back the next time. I say this with a smile on my face, but it is true that
22 you know you're going to be back in the Bureau and when you tell them some
23 idiotic story, if you ever did, hypothetically, that you're going to hear about it

1 the next time you come back. Maybe lawyers in the United States could learn
2 from you.
3 MR. CRAMPTON: Our credibility definitely is on the line every
4 time we go in there, so we can't take the approach you describe.
5 MR. LIBOW: As a practitioner who spends most of his time
6 trying to get deals through the Justice Department and FTC, I like the first
7 phase of the Hart-Scott form. I think there are a few pieces of information on
8 it that are unnecessary in terms of some of the item 6 information and things
9 like that, but this gives you the flexibility to do what Paul wants if it makes
10 sense. You can always go in on day one, we have all done this, when you
11 announce a deal, you know it's going to be perceived as having big problems,
12 you go in on day one or before you even file and you lay it out for them and
13 you start working with them. Or if you've got a deal that's going to be
14 perceived as having a real problem, you know, you may put a white paper in
15 with your Hart-Scott filing pretty early in the process, but you retain the
16 flexibility to hide in the weeds as Mike said and a lot of deals slide through
17 that don't necessarily merit sliding through, but in this format you'll never slide
18 through.
19 MR. BYOWITZ: Also there needs to be a culture -- in Europe
20 and Canada there is a different sort of culture or relationship between the
21 enforcement agency and the merging parties and the bar. The level of
22 suspicion that exists by the agencies towards the bar in this country is very
23 unique in that regard, I believe, and it is troubling. And it doesn't exist in

1 every sector because when you deal with banking transactions, the culture in
2 banking deals here is European. It's very much a European culture because the
3 Federal Reserve is there and the Justice Department gets an automatic stay.
4 The Justice Department people don't see themselves as a litigator. They see
5 themselves as a responsible policymaker, and merging parties go in from the
6 outset and state everything, they file applications that have far more
7 information than any Form CO or Canadian filing or anything.
8 In defense industry deals nowadays because the Defense
9 Department is so concerned about competition and about understanding what
10 your products are, in those sort of deals you go in at the outset. I've gone in on
11 some defense deals before it's cleared and I've gone and talked to both antitrust
12 agencies because I want to get to them and I want to get ultimately to the
13 Defense Department, so I don't get questions on day 25 of the first waiting
14 period about what do you make and what does the other guy make, and they
15 better issue a second request in order to find that out. But the culture in those
16 other areas is unique, it's an un-American culture.
17 MR. RILL: Lest we say it has anything to do with the people at
18 the different agencies, I think it has to do with the structure of our system
19 which requires court appearances that are up for grabs which creates a level of
20 insecurity.
21 MR. BYOWITZ: I agree, Jim.
22 MR. RILL: Understandable insecurity at the agency staff level.
23 I don't think you're implying that this is --

1 MR. BYOWITZ: You're exactly right in that. The people at
2 Justice who do the bank deals either today or two years ago or two years from
3 now are going to be people behaving differently when they're in a litigation
4 mode because of the different culture and the fact that this really is an
5 adversarial system. Everyone wants to cooperate but this really is an
6 adversarial system.
7 MR. RILL: Let me put another thought to you, that maybe it's
8 voluntarily an option, but I think that doesn't work. That is, not to define
9 markets and markets shares, although this may do it, but have an option to go
10 in with customer lists, supplier lists, top ten, pick a number, top ten of each,
11 last three, pick a number of years strategic plans, they're going to ask for them
12 anyway if they look at the deal. The trade-off being that if the second request
13 is issued, you can still have the option to make your case and arguments during
14 the 30-day period. The staff would then have to specify with precision the
15 concerns that justify the second request and be bound by it in the second
16 request investigation. Think about it.
17 MR. CRAMPTON: That kind of touches on something that was
18 in the OECD model form. Which is, you don't go in with positions on market
19 definition but you go in and maybe identify lines of business.
20 Now, just one other --
21 MR. RILL: But there's got to be a benefit to that, and the
22 benefit would be forcing the staff to position itself on market definition and
23 other concerns in context of the second request, which I think would have an

1 automatic cut back on the scope of the second request or they would look
2 rather fulsome, in the worst sense of the word, in that market in their statement
3 of concern.
4 But I think we need to move to the next topic and then with the
5 time left we can come back to all the topics.
6 MR. BAKER: Okay. Well, you'll see what my colleagues left
7 over for me.
8 MR. RILL: Don, you'll always make use of whatever is left over
9 in a very, very good and useful way.
10 MR. BAKER: Okay. I wanted to talk about the interplay of two
11 sets of ideas. One is consultation among agencies, and the second one is public
12 information. So I put a title on this called “Transparency, Consultation and
13 Occasional Confusion.”
14 MR. RILL: I sense an article coming.
15 MR. BAKER: Basically we start from two fundamental points.
16 One is that consultation among government competition agencies on policies,
17 facts, case selection and relief is more likely to produce rational and consistent
18 public policy decisions across borders. We also start from the idea that public
19 information is important to a government of laws rather than pure bureaucratic
20 discretion, and that distributing information will tend to encourage more
21 consistent agency decision-making, and therefore to some degree limit present
22 and future discretion by the government enforcers. Some may think this is
23 good, some may think it's bad. This dissemination of information also will

1 tend to encourage better risk appraisal by those contemplating mergers and
2 those who advise them.
3 Now, let's take the interplay of these two ideas. Suppose the
4 agencies regularly consult with each other on both case and policy decisions
5 but issue little public information. Then you have a vast imbalance between the
6 two sides -- the public side and the private side of the table, in transactions.
7 And it seems to me you open up even more agency discretion because the
8 agency knows both what it knows and what the foreign agency knows and the
9 private parties don't know what's up.
10 In the alternative, let's suppose they issue a lot of public
11 statements, but they don't consult with each other. Then the private parties are
12 left more at the whim, sort of random chance -- because the chance that one
13 agency will go for this kind of relief and the other agency will go with the other
14 kind of relief. And the agencies are left with the situation that it's more likely
15 that the parties will tell them inconsistent stories as between Ottawa and
16 Brussels and Washington.
17 The third possibility is the agencies neither consult with each
18 other nor talk publicly, and then of course what you've got is a regime of
19 parochial, secretly exercised governmental discretion, which no one can think
20 is a terribly good idea.
21 I reach the conclusion that the only efficient solution is both
22 consultation and public information, and that the two are, in fact, related, that
23 confidence in the process requires consistency of results across borders, and

1 the visibility of seeing it.

2 Obviously the consultation process covers the full range from

3 quite formal consultations and notifications and the OECD process and so

4 forth to case-specific consultation under formal agreements. And I obviously

5 note that this is more in the criminal area than in the merger area. Under

6 formal agreement, Jim, the IAEAA agreements exclude mergers.

7 MR. RILL: No, no, they exclude the sharing of

8 Hart-Scott-Rodino materials, period. There are lots of other things that can be

9 shared.

10 MR. BAKER: That's a fair comment.

11 The next version is obviously case-specific consultations by

12 agreement and waiver of the parties as we had in Worldcom/MCI and so forth.

13 The next thing of course is the informal consultations that go on among staffs

14 of the different reviewing agencies. I don't know as a practical matter how

15 much there is of, “gee, I think you ought to ask those people about the reverse

16 spinning widget market” or “what kinds of trade flows there really are in the

17 product from A to B?” I don't know how much of that goes on. I should say I

18 suspect quite a bit.

19 The last thing is the interesting thing where the agencies use

20 their compulsory process to get the merger submissions that have been made to

21 each other. In other words using -- it's hard because of our timing for our

22 agencies to use the second request to get a Form CO response -- but it is

23 possible, obviously, for agencies to get these things from the merging parties.

1 We have this consultation process which is important, and it's
2 important on mergers, and I've tended to encourage that kind of thing. On the
3 whole business of sunlight and public pronouncements, it has seemed to me
4 that the important thing here is that the agencies in their communications play
5 it reasonably straight in the sense that the issue is sort of how accurate and
6 how specific the agency disclosures are.
7 I say this as the person who thought it was a good idea and still
8 thinks it was a good idea, to issue international guidelines way back in 1977
9 -- when it was the first time the agency had done anything quite like that
10 because the 1968 merger guidelines didn't have that level of guidance and
11 analysis.
12 Well, it was one hell of a fight internally because people didn't
13 want to take positions on things. And yet the guidelines were sort of
14 worthwhile. I had a funny time way at the end of my tenure after I was on the
15 way out the door, and I was speaking at the ABA Antitrust Section, and I sat
16 down to what seemed like an awful lot of applause, and my friend (and, it
17 turned out, successor) Bill Baxter, who was sitting next to me there says,
18 “Don, I don't understand why you're so popular with those people considering
19 how tough you are.” And I responded, “they don't care how tough I am as long
20 as I don't double-cross them with their clients.” I think one has to be sort of
21 careful.
22 Anyway, we've got several issues that you will hear highly
23 diverse viewpoints from our panel. The first issue which I know is one you

1 thought about, Jim, over the years, should the U.S. provide case-specific
2 explanation of decisions not to challenge substantial mergers -- which is a
3 Canadian and European practice?
4 And the second question of these four is: how useful is the
5 U.S.-required explanation of settlements, which has the effect of slowing down
6 the settlement process.
7 The third one is this: should the Hart-Scott-Rodino process be
8 quite so nonpublic? In a lot of countries the agencies or the companies have to
9 release information that something has been filed, and this has some
10 implications for objectors.
11 And the fourth is should the agencies be allowed to compel you
12 to produce by second request or CID what you have produced to foreign
13 agencies.
14 I have views on all these subjects, but I've talked enough so I'll
15 let my colleagues leap all over them and then I'll come back.
16 MR. RILL: Colleagues?
17 MR. LIBOW: This is one area where I would counsel restraint
18 in amending or changing our system. I think we would have a negative effect
19 from a practitioner's point of view if the Department or the FTC were required
20 to publish a decision as to why they did not go forward with the investigation.
21 I think the flexibility that the staff has now and the front office has, to decide
22 to let something go when something is borderline, they would be much, much
23 more hesitant to do that if they had to publish an opinion justifying that

1 decision. So from a practitioner's point of view I actually like the fact that
2 there's nothing published because we know what the standards are anyway. I
3 don't think you're going to learn that much every time there is a published
4 opinion and I think the other side would have a chilling effect.
5 MR. RILL: Let me press you on that if I may, sorry to
6 interrupt. I think you're absolutely right if you have a requirement that every
7 one of 4,000 some-odd mergers that don't get challenged there has to be an
8 explanation or even pick the number, the 200 second requests from both
9 agencies together as to why they don't all end up in challenges has to be
10 explained. I think the agencies could be encouraged, though, to make selective
11 disclosures or reasonings behind nonchallenged, invisible, or doctrinal cases,
12 difficult as it may be. I tried to do this in two cases, one was tires and one was
13 when Big 8 went to Big 6 in the accounting business. Now of course it's Big 5.
14 The fact is that one of those was a unilateral effects analysis and
15 one was a fringe capacity analysis which I think anticipated and put some meat
16 on our enforcement policy that made some sense. And I'm not saying, yea, me.
17 I'm saying this is something I think the agencies could do more of on a
18 selective basis where there is an important point made in a decision not to
19 challenge. I think in that sense Don is right, you are absolutely right to do it at
20 all, pick the number 4,100 --
21 MR. LIBOW: Second requests.
22 MR. RILL: It puts a bad burden on the agencies that would not
23 be particularly useful. I do think that the impact statements can be very

1 helpful. I think the FTC statements in aid of comment are next to useless,
2 although there has been some attempt at improvement made there. I think the
3 impact statements are more useful because they go to a court and they're
4 public. People get to comment on them in a court proceeding if they choose to
5 do so, so they have to be a little more forceful.
6 MR. LIBOW: The other point I was going to make, two quick
7 points, on the question of whether or not the agency should release a list of
8 second requests, I would be very much against that as well. I think it doesn't
9 really serve any purpose. It tends to encourage troublemakers.
10 Second, in many cases, particularly if it involves a public
11 company, they have to tell the shareholders there's a second request anyway. I
12 think in most large transactions involving public companies, everyone knows
13 there's a second request.
14 MR. RILL: I think the marginal value there is not equal to the
15 marginal downside. Competitors and customers know when a merger that
16 affects them is happening, whether there is a Hart-Scott filing or not.
17 MR. BYOWITZ: There's a real policy issue, which I have not
18 fully thought through. I worry about a system like the European system where
19 they're publishing opinions on every deal. They don't have that many deals, but
20 they're publishing an opinion on every deal and they're starting to cite their
21 opinions. We decided that in some other deal. You start getting into what was
22 decided before being the standard instead of what's going on in the marketplace
23 being the standard. That's a danger that I see in the system. It's a danger of

1 ossification over time, hardening of the arteries to a certain extent.

2 MR. RILL: I'm smiling so I don't cry. I find sometimes the other

3 side in our cases, we use that argument that it's been decided before. They say,

4 well, that was a different -- fill in the name of the agency.

5 MR. BYOWITZ: Well, that's why it's a tough question. I've had

6 that experience as well.

7 MR. RILL: Oh, yes.

8 MR. BYOWITZ: I thought I lost that argument in the last deal,

9 I can't lose both ends of it. Oh, yes, you can.

10 MR. RILL: Different people.

11 MR. CRAMPTON: It depends on the status of the decision or

12 the document that is being released. In Canada we have exactly what you

13 described, Jim. We have press releases and backgrounders, and the Bureau

14 may issue an eight-page backgrounder or it may issue a two-page

15 backgrounder, but it will issue a backgrounder in cases that have interesting

16 new wrinkles that wouldn't have been contemplated at the time of the merger

17 guidelines.

18 As a practitioner, and I know most of my colleagues in Canada

19 feel the same way, those press releases and backgrounders are extremely

20 valuable because they give you insight as to how the Bureau is looking at a

21 particular industry or a particular issues like the two that you just described.

22 Other tools we have in Canada that assist in that regard are the annual report

23 of the agency, where, again, there will be some discussion of specific cases,

1 although more recently because of budgetary constraints that's been getting cut
2 back and there have been a number of complaints about that. Speeches, you
3 know, back in the early --
4 MR. RILL: Speeches are useful. I think to cut to the chase on
5 this one, what we can do here as a committee is strongly recommend that the
6 agencies in the interests of transparency do something more on a voluntary
7 basis, if you will, and I think many people at both agencies would like to see
8 that done to the extent they don't use too many resources, make sure they're
9 right in their statement, don't box themselves in, and so forth.
10 MR. BAKER: One thing, Jim, that might be worth thinking
11 about is where -- and I am all for volunteerism -- where the agency ends up
12 looking at a merger that crosses international borders, I think that would be
13 useful to have an explanation. I think it would be useful, frankly, to have from
14 Canada and the U.S. what kinds of situations they end up looking at North
15 American markets for particular products and services as opposed to U.S. or
16 Canada markets.
17 MR. RILL: In the Boeing/McDonnell-Douglas case perhaps
18 under some duress you got a fairly comprehensive statement ultimately out of
19 the FTC on why it had decided not to challenge that transaction. Whether that
20 would have happened had Europe not done what it did, who knows.
21 MR. BYOWITZ: One of the policy aspects of this that is good
22 and that legitimizes -- I'll point to an example -- is the Department of Justice a
23 number of years ago, I think in a speech by Connie Robinson. The speech

1 discussed differentiated products analysis and discussed the
2 Maybelline/L'Oreal case, and the white pan bread case. What that did was
3 explain to the bar in very real terms that this analysis cut both ways, that it
4 was a new analysis that the agencies really believed in it (whether they should
5 or not is a different matter), but they really believed in it, and if it helped you
6 to say you weren't the next best substitute, you were a very different
7 substitute, one party from the other, you were going to get your deal through
8 on that if you could prove it.
9 MR. RILL: One of those cases was actually not brought, the
10 Maybelline/L'Oreal. So that is a good example of what we're talking about,
11 such as Connie Robinson's George Mason speech.
12 MR. BYOWITZ: I think it would be more in that there is a new
13 mode of analysis, this is what it is. Here's the case we didn't bring for this
14 reason where it cut one way, here's a case we did bring for this reason where it
15 cut another way.
16 MR. RILL: The threshold analysis, cutting-edge cases. We're
17 running out of time, let's run a few minutes longer. Can we jump to
18 fulminations on some of Don's other proposals.
19 MR. LIBOW: Don talked about consultation as well as
20 transparency. Everyone assumes that consultation is good, and I do think it's
21 good, by and large. But I think there is the danger, and again I'm talking
22 perception from non-U.S. companies and non-U.S. lawyers, that consultation
23 can have negative effects as well. And two areas where I would point to is I

1 think there is a perception, right or wrong, Boeing/McDonnell-Douglas being
2 the exception, that the consultation tends to raise or make more aggressive the
3 approach of the non-U.S. agency sometimes, and that there is often
4 encouragement for them to take a more aggressive position than they would
5 ordinarily take. Whether that's true or not I think there is some perception.
6 I have heard this from clients and I have also heard, for example,
7 and I think it would be inappropriate, for example, for the agencies to ask
8 foreign agencies to delay approving a transaction even though it was ready for
9 approval and complied with the time periods in the non-U.S. system in order to
10 give the agency more time and more leverage, and I think there is a danger of
11 that I think people ought to be conscious of that.
12 MR. RILL: That is a timing issue that's relevant to some of the
13 other things we have been talking about. We as a committee, Merit has asked
14 the counsel in a number of these trans-border transactions in which there have
15 been multi-agency review to comment to the extent that they can on the nature
16 of how those reviews were handled, and by and large I think that what we're
17 finding is that consultation is probably a good thing to get to a common result.
18 I don't want to go into what people say because I don't know I'm saying --
19 MR. LIBOW: On balance I think that's right. You could pick
20 some good examples of that. But there is a downside to it potentially.
21 MR. CRAMPTON: As long as you have safeguards and
22 protections on the receiving end.
23 MR. RILL: Let's assume there are adequate confidentiality

1 protections. We're talking about consultation qua consultation, not at this
2 point a very important question but nonetheless let's assume that there has not
3 been a waiver of confidentiality.
4 MR. BYOWITZ: I would just add that the need for transparency
5 is particularly acute in this area because the agencies know what they're doing
6 and really nobody else does. I would submit that they have really not made it
7 terribly clear to the bar and the business community, what the benefits are to
8 the bar and the business community of consultation. There are some
9 conclusory statements, there are some citation to a couple of examples, and
10 what's becoming the norm is that foreign jurisdictions are now saying, just like
11 state AGs are saying, check the box, in effect. We want you to waive
12 confidentiality. You have a right not to waive, and you don't necessarily have
13 to justify why it is you don't want to waive, but the world has moved in a
14 direction where you really do, where you're going to face a very difficult road
15 with the agencies abroad if you do not waive.
16 And I would just submit as a responsible matter of policy a little
17 bit more light should be shed on that process, and perhaps a little bit more for
18 the merging parties to understand. When you're dealing with people
19 cooperating, a European system where the complainants all have to be out in
20 the public at some point in time and a U.S. system where they're whispering in
21 the ears of the agencies behind the scenes and you don't even get a look at what
22 they're saying until, God forbid, you're in a preliminary injunction hearing.
23 MR. RILL: Once again it's the nature of the system that creates

1 a lot of that problem because of the very fact that the preliminary injunction
2 hearing is the specter at the end of the road, whereas in Europe there is a
3 theoretical court review but the agency decision is the ball game.
4 MR. BYOWITZ: Absolutely. If I want to wait three years for a
5 court decision while they translate the record into 15 languages, or whatever,
6 that's fine.
7 MR. RILL: I think we're going to be pretty close to ending if
8 there is any concluding remarks that, Daryl, you or your colleagues would like
9 to make. I would just like to say we're at end of a long day, and I really
10 appreciate the panel's input because it's been stimulating to all -- at least it's
11 been stimulating to me -- to get this interchange and get these views. We hope
12 we can continue to communicate with you. It's been very lively, if you know
13 what I mean, at the end of a long day. It's terrific.
14 MR. BAKER: Can I just say one last thing, Jim? We appreciate
15 being asked and made a part of your busy agenda.
16 You are in a position -- and I'm following up on your comment,
17 Mike -- to do what we aren't, and that is to ask the agencies to tell you what
18 they're really doing on the consultation process in the merger environment. I
19 am one who tends to think consultation is a good thing and I'm not particularly
20 sympathetic to parties being able to tell different stories in Ottawa and
21 Brussels and Berlin.
22 MR. BYOWITZ: That you can't do. That doesn't work
23 anymore.

1 MR. BAKER: But it is an interesting process, and I just think
2 you are in a position where you can ask them questions wearing your
3 Committee hats that we can't ask as humble supplicants before them.
4 MR. RILL: Some of us wear two hats.
5 Let me just say thank you all very much and thank you to my
6 fellow Committee members, particularly my Co-Chair, and Merit and staff for
7 putting together a terrific program throughout the entire day. Please note that
8 day two of these hearings has been rescheduled to May 17 at the American
9 Geophysical Union, 2000 Florida Avenue. Thank you all very much.
10 MS. JANOW: I just want to echo that thank you. This has been
11 a marvelous discussion and a terrific group. I really thank you very much.
12 We'll be looking forward to your submission in due course and hoping to get
13 your reactions to our drafts as we proceed.
14 MR. BYOWITZ: As you can tell from the discussion it will be a
15 challenge to it put together.
16 MR. RILL: Thank you. Thank you, audience.
17 (Whereupon at 5:54 p.m., the meeting
18 was adjourned.)
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