# INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE MEETING

Washington, D.C.

Friday, September 11, 1998

This document constitutes accurate minutes of the meeting held September 11, 1998, by the International Competition Policy Advisory Committee. It has been edited for transcription errors.

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James F. Rill Paula Stern

ICPAC Co-Chairs

INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

MEETING

Washington, D.C.

Friday, September 11, 1998

Taken at The Carnegie Endowment for International Peace, Root Conference Room, 1779 Massachusetts Avenue, N.W., Washington, D.C. beginning at 10:00 A.M. EST, before Bryan Wayne, a court reporter and notary public in and for the District of Columbia.

APPEARANCES:

Advisory Committee Members:

Merit E. Janow, Executive Director

James F. Rill, Co-Chair

Paula Stern, Co-Chair

Thomas E. Donilon

John T. Dunlop

Eleanor M. Fox

Raymond V. Gilmartin

David B. Yoffie

Department of Justice Employees:

Joel I. Klein, Assistant Attorney General

Antitrust Division

A. Douglas Melamed, Principal Deputy Assistant Attorney General

Antitrust Division

Donna Patterson, Deputy Assistant Attorney General

Antitrust Division

Gary Spratling, Deputy Assistant Attorney General

Antitrust Division

Charles S. Stark, Chief, Foreign Commerce Section

Antitrust Division

APPEARANCES (Continued):

Other

Debra Valentine, General Counsel, U.S. Federal Trade Commission

No Members of the Public made an Appearance or Presented Written or Oral Statements

IN ATTENDANCE:

Advisory Committee Staff:

Cynthia R. Lewis, Counsel

Andrew J. Shapiro, Counsel

Stephanie G. Victor, Counsel

Eric J. Weiner, Paralegal

Estimated Number of Members of the Public in Attendance: 35

Reports or Other Documents Received, Issued, or Approved by the Advisory Committee: None

P R O C E E D I N G S

(10:00 A.M.)

DR. STERN: I would like to welcome each and every one of you here, particularly the Committee members. There are some who are going to be joining us at different times during the day.

This is our second full Committee meeting. I'm Paula Stern; I'm Co-Chair, along with Jim Rill, of the International Competition Policy Advisory Committee. We're very honored to have here this morning the Assistant Attorney General for Antitrust Joel Klein, who will be speaking to us in a minute. And I'd like to also introduce to you Merit Janow, who is the Executive Director of the Committee.

I'm mindful that we are meeting both in this smaller group here as well as in a public group. And I would like to welcome the members of the public who are in attendance, and want you to feel included.

Since our inaugural meeting back in February, the Advisory Committee has been very busy. Members have engaged in outreach to a number of prominent business organizations, to law firms, and to other experts. Tom Donilon, who should be joining us soon, Eleanor Fox, Jim Rill, Merit Janow and I have had several productive meetings both in New York, with law firms that handle an impressive array of international mergers with antitrust implications, and just this week Jim and I have met with a number of D.C. law firms to get their input.

We thank very much in particular John Dunlop, Ray Gilmartin,

Steve Rattner, who is not here, and Dick Simmons, who we were planning to see but who apparently had a personal event that is going to prevent him from coming this morning. But they have all made important and useful suggestions to guide this outreach effort to the public.

I would like to introduce the staff. Our Committee staff has grown since our last meeting in February. At the first meeting you met Stephanie Victor, (and you might just wave), who is now counsel for the Advisory Committee. And since then we have two additional attorneys, Cynthia Lewis, from Skadden Arps' Brussels office and Andrew Shapiro, from Covington & Burling. In addition, a paralegal, Eric Weiner, is assisting the Advisory Committee and has been very hard at work.

They're now fully constituted as the staff and they have been developing outlines to help structure our discussions and provide a skeleton for the eventual Advisory Committee report. You all have received this big black briefing binder for this meeting which contains annotated outlines reflecting a lot of the staff's sifting and sorting.

I'd like to note, at this time that in order to gain input for our members, we have issued in the Federal Register the announcement for this meeting. There will, however, be no active participation, per se, of the audience. We're please that you're here as interested members of the public, but the format does not allow for participation from the audience.

Welcome Tom. Just getting the preliminaries out of the way.

We would welcome, however, any reactions you have to today's

meeting in writing. So please contact one of our staff if you wish to submit written comments.

Just to lay out a road map very briefly on how we're going to proceed and where we have come heretofore. At our first session, back in February, you recall we had the Advisory Committee receiving formal presentations from a number of Department of Justice officials about the issues under consideration by the Advisory Committee. Today we have a different format. And I hope by the end of today's meeting we will have the opportunity to hear from each and every member, his or her views regarding the issues that were raised in the outlines that you received before Labor Day.

Our first session this morning will address the interface of trade and competition policy. As I mentioned a moment ago, Dick Simmons has unfortunately been called away, and we are asking Merit Janow to read Dick Simmons' remarks that were prepared in advance by him. As you can see from the outlines -- the interface of trade and competition policy gives us a wealth of policy options. And we can go through that -- after we have heard from Joel, who is patiently waiting here.

But quickly, we will then move on from trade and competition to deal with enforcement cooperation. And that second session will begin at noon with a working lunch and will discuss enforcement cooperation issues. Jim Rill will begin that discussion. And Gary Spratling at the Justice Department, who you may remember spoke to us at the last meeting has, yet again, taken a red-eye from California to join us for the enforcement cooperation discussions.

We will then move on to our third and final session at about two o'clock, where we will discuss the multijurisdictional merger issues. Tom Donilon has been graciously willing to kick off that discussion. And we are expecting that Debra Valentine, General Counsel of the Federal Trade Commission, along with Chuck Stark, who I see is sitting out in the audience, Chief of the Antitrust Division's Foreign Commerce Section, will join us and will be available to answer questions regarding the level of information sharing that is currently ongoing between antitrust authorities and to discuss tasks of dealing with different jurisdictions in multijurisdictional merger review.

Let me close by saying that you'll find, in tab C of the binders, that the Advisory Committee is organizing hearings in November where we have an impressive array of talent who have agreed to participate, including representatives from a number of competition authorities from around the world. It should prove to be quite an event and of course we're looking forward to that.

At this time, I would like to turn the podium over to Jim to see if Jim would like to make some welcoming remarks and then we'll turn to hear from our esteemed colleague and leader, Joel Klein.

Jim?

MR. RILL: I think there is nothing left to say as we alternate chairing these meetings. For a change -- that normally wouldn't stop me -- but today it's going to stop me and I'm going to turn it over to Joel Klein.

MR. KLEIN: People said there were no more miracles left in the world. I thought that when Paula said, "And now we'll turn it over to Jim to see if

he wanted to make some comments," I thought my schedule just got messed up. Paula, I'm delighted by your opening comments and Jim's lack thereof.

MR. RILL: Not necessarily in that order.

MR. KLEIN: It's an honor for me to be here today and, first of all, to extend my welcome to all of you in the public and as well as the members of the Advisory Committee and the staff.

I have stayed closely involved over the summer months with the really extensive work that has been done under the leadership of Paula and Jim and really with Merit and the staff, not just in terms of the outreach. But a great deal of research, analysis and discussion has gone into preparing the background papers. And I had an opportunity to read them in detail this weekend. I must say they're enormously impressive and I think should focus not just our discussions today but the work that lies ahead in the year to come.

I'm grateful; and I want to say to the staff in particular, this is really first class high quality work and you should be proud of it. It's in the best traditions of what I think the Antitrust Division represents and I'm glad to see that you've lived up to those standards. So, I am very pleased.

In terms of what's going on in the Division in the international area, nothing has abated. If anything, I think some very interesting lessons were learned in the WorldCom/MCI merger. I think in the end it was a great success story in the way that we and the European Community were able, effectively, to collaborate. But, like many successful joint ventures, there were some bumps along the road in terms of both the efforts to play one jurisdiction off against

another and some of the other involvement in terms of the press and even the Hill, as we worked through this.

Having said all that, I think the work with DG-IV and the telecom section of the Division was really very professional, very successful, and a real meeting of the minds on competition policies -- and what I think people like my friend and colleague, Eleanor Fox, would call part of the ongoing evolution of de facto substantive convergence. That is, the mode of analysis, the thinking, the identification of the competitive problem really came together, I think, quite forcefully there and led to a strong and important conclusion.

We are, as well, working hard on our first positive comity referral. As most of you know, we made an assessment that airline computer reservation system issues in Europe raised concerns in terms of market access involving certain practices. We made a referral to DG-IV. They accepted the referral and that process is ongoing. We have spent time working with our colleagues in Europe to move that process ahead. And I look forward to a resolution of that matter in the not distant future.

Beyond that, we have a series of important bilateral meetings coming up with the Japanese and Koreans which will be our first bilaterals, really, since some of the major economic shifts in Asia. And my anticipation is that some of those economic shifts and some of the new leadership we've seen in these countries will create a climate in which there will be greater opportunity for further discussions about effective international cooperation on competition policy and indeed to continue, as Ray Gilmartin and I were talking about, to

continue the other half of the dialogue -- which sometimes gets left out on our part but it's certainly key to trade and competition issues. And that is not just antitrust enforcement but to sink a real marker for competition policy, deregulation, open markets and increased innovation. And we're beginning to see at least the vocabulary in terms of our bilateral discussions moving with increasing enthusiasm in that direction.

Two other quick points I should note before closing. This week we ended, I think as we talk the jury has gone out or the judge is instructing the jury, in the case against three individuals in the international lysine conspiracy, where we did prosecute three individuals from Archer-Daniels Midland after the company pled guilty and was assessed a $100 million fine. But that trial, actually, and the evidence that was introduced, is going to raise, I think, some important issues in terms of understanding both the complexity of enforcement at this level and the nature of the problem for the American economy. And we will certainly be using materials from the trial, that are now in the public domain, as part of our educational opportunity and our educational efforts on a worldwide basis.

Finally I do want to commend the Committee for the hearings that will be coming up later this fall. They have really put together an all-star cast of international leaders who have agreed to come before the Committee and to talk about their perspectives on these very, very important issues. I just actually, before coming here, I just took a call from Dieter Wolf, who is the head of the German antitrust authority, and he was pointing out that he was eager to be here

and have an opportunity to share his thoughts with us. But, in addition, in probably one of the two or three most well attended international meetings, the meeting he holds every other year in Berlin, next year he's really going to take off on our agenda and use that as a two-day seminar to basically broaden the international interest in the concerns of this Committee.

So I think the efforts are working. I am enormously grateful for the time that the many, many talented busy people on this Committee have put into the effort. I sit here with exceptional confidence that these labors will bear great fruit for the administration of the United States and, indeed, those concerned with international competition policy and antitrust enforcement. So, I thank you all very much.

DR. STERN: Joel, thank you very much for those gracious remarks, particularly about the staff and the hard work that's gone on. This is, I guess, the first chance to showcase what has been happening behind the scenes since our February meeting. And I know we all very much appreciate those kind words, particularly coming from someone who is so highly respected.

We're going to now turn -- and I think we're actually on schedule -- to the Trade and Competition Interface discussion. We did flip things around and are opening with Trade and Competition, although the book may not show that. Which tab, actually is Trade and Competition?

MS. JANOW: 1 -- A 2.

DR. STERN: A 2. As you can see from those outlines, the interface of trade and competition policy requires examining a wealth of policy

options. Among those we have to consider are how to achieve our core objectives, how to craft policies that deter anticompetitive restraints; that reduce barriers to effective prosecution of anticompetitive restraints with adverse effects on the United States; to address the problems of lax discriminatory enforcement and to increase transparency. And finally, as a core objective, to promote effective competition in jurisdictions that do not yet have competition laws.

Among the policy options the Advisory Committee may wish to consider are one, unilateral enforcement of antitrust laws against foreign market access restraints. Secondly, enhancing the bilateral cooperation, some of which Joel made reference to in context of Europe as well as in discussions with other countries, enhancing that bilateral cooperation through expanded positive comity agreements and through traditional comity approaches. Naturally, a combination of unilateral and bilateral trade solutions can be envisioned and are being considered.

In the policy options that come under the rubric of international initiatives, we have Eleanor Fox's proposal for the development of core principles advanced through international fora or agreement. In addition, international initiatives will cover new or expanded dispute resolution mechanisms. We've had a number of speakers in the past throw some ideas out in that area. Additionally, there are possibilities of pursuing expanded plurilateral agreements, not just bilateral agreements, as well as developing initiatives at the World Trade Organization beyond the idea of a dispute settlement mechanism that some have proposed be conducted by trade organizations.

Another very important issue to this Advisory Committee concerns how governmental restraints themselves should be handled and whether this is a competition policy issue for the Committee to consider.

These are some of the highlights that we should bear in mind as we go through this morning's discussion. Merit Janow, our Executive Director, has worked long and hard in this field for many, many years. We all know her well, and today she gets to do some additional work that was not what was on the schedule, and that is to try to represent Dick Simmons. Dick Simmons is not here today. Dick had prepared some remarks and Merit is going to see us through those and give an opening to the discussion on the interface of trade and competition.

MS. JANOW: I have just a moment ago received these remarks that were prepared by Dick Simmons so I will apologize to you in advance for what can only be a stilted delivery given the limited time that I've had with it. As you will see, I'm in the peculiar position of noting approvingly of my own writing.

And so I will start reading at this point.

"Quoting from the June 19 draft memo from Merit Janow, which should be circulated to a wider audience, it's worth repeating what was stated under the heading The Interface of International Trade and Competition:

'As many formal barriers to trade have been reduced or eliminated around the world, international policy attention is increasingly focusing on the role of private anticompetitive restraints of firms that can foreclose access to

markets as well as government practices that may have such effects. Indeed, economic globalization has come to mean that competition problems increasingly transcend national boundaries. And the international organizations such as OECD and the WTO, as well as bilateral intergovernmental groups are engaging in debate about the extent to which private anticompetitive practices are in fact blocking access to markets around the world and what should be the appropriate policy responses.

'And the Trade and Competition Subgroup of this Advisory Committee is considering the nature of the market access problem and what policy actions might usefully be undertaken to address those problems. In other words, how can the U.S. more effectively address barriers to foreign markets that stem from private restraints to trade and investment.'"

Dick Simmons goes on to say, "In attempting to define the problem and identify the issues, at the May 18 subcommittee meeting, there was extensive discussion after a presentation of an overview and discussion paper on trade and competition. And to summarize, that discussion on May 18, focused on three points; the first was to consider the nature and magnitude of market access problems and whether expanded international policy initiatives are warranted.

"There appeared," in his view, "to be general consensus that anticompetitive practices do impede American firms from selling or investing abroad. It should be pointed out that while there was general agreement in this matter that the level of anticompetitive practices can and do adversely affect American firms. The level can vary significantly, depending on the nation and

the region of the world.

"It was also clear that it was extremely difficult, if not impossible, to quantify the impact of such practices with any meaningful precision. I would add that, depending on the company and its focus, producer of proprietary high technology, whether it is produced in the country in question or (as compared to a commodity) was produced by many countries, one could arrive at completely different answers. And input on this matter from all of the members of this Committee, I believe, would be very helpful.

"The subcommittee was in agreement that the best policy initiatives would be those that focused at opening all nations to free competition -- assuming that other distortions do not exist.

"In my letter of December 23 to Merit, I suggested that the level of anticompetitive practices can and do vary depending on the nature of the economy of the nation involved: in nonmarket economies where there is no body of laws which prevent anticompetitive practices; in developing nations which protect home market companies from foreign competitors; in developed nations which, although similar in form to the United States, may act in groups with other nations to protect home markets. The so-called East of Burma agreement is an example of such practices.

"The second point of discussion in the subgroup meetings focused on areas of divergence and complementarity that exist in the objectives, reach, instrumentality of trade and competition policies. And third, it identified four possible approaches to international competition policy problems. Possible

approaches, which were discussed and which are summarized, are also in the binders sent out for this meeting. Those options are included; and I won't review them in detail, but some comment may be useful.

"The policy options range from what I will call ‘soft options’ to ‘hard options.’ In the soft category -- and I mean only in using the word soft that international cooperation bilaterally or multilaterally is essential if progress is to be made in eliminating anticompetitive practices through this policy option.

Whether it be through positive comity, the pursuit of international agreements, the convergence of competition laws throughout the world or other forms of voluntary normalization of different country laws in this area -- my personal opinion is that progress will be very slow indeed.

"I should also add that positive comity should be pursued as an affirmative step towards removing restraints. This should not be construed to suggest that such policy options are not, in my opinion, valuable options. It does suggest that to achieve meaningful progress in this area, other options may also have to be suggested or, in the final analysis, utilized.

"At the other ‘hard’ end of the policy option spectrum is the unilateral enforcement of antitrust laws as a ‘chip’ to be played at the appropriate time. If violations of U.S. antitrust laws were prosecuted or the threat of prosecution existed for potential violations -- even those which occurred outside the United States -- if the participating parties conducted business in the United States -- this might prove a means for moving the entire process forward.

"The Advisory Committee is soliciting and receiving the views of

experts in the legal and economic fields in an effort to examine the impediments to such effective enforcement. The recent price fixing cartels identified and prosecuted by the Department of Justice, in the case of -- in graphite electrodes, (which my firm is directly involved as a customer) -- is an example of a worldwide cartel. The fact that U.S. antitrust laws involve criminal penalties, I believe, promotes the unraveling of such anticompetitive practices. A policy initiative which would promote criminal penalties in other nations' antitrust laws could be a strong tool in developing a more uniform culture in avoiding such practices.

"Other related anticompetitive practices include: private restraints among foreign producers limiting exports to home markets; domestic cartels limiting exports; government restraints with or without private involvement authorizing or encouraging private cartels; government use of regulations to restrict competition, whether it be through price or through large store regulations, such as in Japan; and home market use of intellectual property controls. These are a few examples.

"The Committee has determined that governmentally imposed restraints are within its purview and will study the incidents and implications and remedies, including such issues as foreign sovereign immunity and act-of-state defenses.

"It was concluded that input from other interested bodies would be constructive, and a draft document was provided to us in June as a possible questionnaire to be sent out to interested organizations and individuals. Then, a

question which needs to be discussed is: What is the appropriate recourse if progress is not achieved, or that which is achieved is not effective?

"Once again, the United States might, under those circumstances, consider the use of government or private antitrust action. This option has obvious problems associated with it, including the difficulty of access to witness and documents. It also has the potential for increasing international frictions. The application of U.S. law to foreign companies which do business in the United States, regardless of whether the anticompetitive practices occur in the United States, would not diminish tensions. It might, however, facilitate such cases.

"The U.S. government or private antitrust cases might be pursued under the foreign country laws, of course, but the effectiveness of this option depends on the availability of private actions and the practical accessibility to the foreign court system.

"An approach could be the use of an international organization's dispute resolution mechanism under those facts. As I understand it, the WTO's jurisdiction over private restraints remains unclear. However, the WTO could serve as a venue at arriving at an agreement on core principles. Another policy option which the Committee should examine is: How or if trade laws and trade law mechanisms should apply in situations other than government restraints? Such remedies may themselves be anticompetitive.

"Finally, let me close by saying the world has changed significantly since we last met. Many of the large economies of the world, particularly the Asian nations, and Japan as a special case, Russia, and now

several South American nations, are facing severe economic and currency crises which become liquidity crises and result in severe economic contractions. I would suggest that the world trading system may well be under a great deal of strain. Meaningful progress in the areas that we have discussed this year in this Committee may be far more difficult to achieve in the present situation than we could have anticipated just a few months ago.

"Depending on which scenario one selects, the outcome of current difficulties -- whether it be in Japan, China, southeast Asia, Brazil, Argentina, Russia -- and the resulting effects on Western Europe and the U.S. economies over the next 12 to 18 months, point out that the need for this Committee and for constructive remedies to the world's trading system will be even more important."

That concludes his remarks.

DR. STERN. Merit, do you want to add any parenthetical remarks? Or footnotes?

MS. JANOW: I think not at this moment. I would rather hear from our Committee members.

DR. STERN: Me too. I would like very much now to open the floor to comments. We're going to try to focus on trade and competition policy. The Chair recognizes Ray.

MR. GILMARTIN: Thinking about some of Dick's comments that you read, but also really looking behind the tab in the binder on Trade and Competition Policy, just a couple of, I guess, observations or reactions.

One is that in the material it suggests that there's no magic bullet.

And based on our own experience as a company working in this area and also as a -- working within a trade association in this whole area of competition policy -- that we should certainly agree based on our experience that there is no magic bullet. So therefore, it may not be a question of choosing one policy option over another, as it is that each policy option has a role that will be of varying degrees of effectiveness, but, nonetheless, probably should be pursued or used at one time or another.

Just, drawing on our own experience, it's not clear that market access is the significant issue, and whether or not, say, U.S. companies are disadvantaged over any other local companies because of a lack of competition policy or lack of a competitive market. As an industry -- the U.S. is the only truly market model in the world for pharmaceuticals. Every other market in the world, really, is based on price controls. And so we're at a stage in which we're trying to convince governments and regulatory agencies, ministries of health and politicians, that market competition is a source of economic growth and a means of stimulating innovation.

Nonetheless, to get those ideas across -- so, I guess, the first option that we're already pursuing to try to do this is -- would fall under the heading of “international initiatives” and really trying to arrive at core principles; and transferring knowledge across markets around the world to reach agreement on core principles with regard to health care delivery, and stimulating innovative pharmaceutical industries. So, in arguing for the importance of market competition -- and describing to various parts of government, as well as those

who are involved in a legislative process -- and in the case of Japan, the members of the Diet -- the importance of market competition.

So, core principles -- and although we see it as a very long-term and difficult process, nonetheless, when you look back over the last couple of years, we've made progress. Therefore it certainly is a worthwhile option.

The other thing, too, is, in supporting us in these efforts has been the advocacy of the U.S. government in terms of -- in its role of advocating the importance of open markets, of free trade. And that has shown up really in the, I think, more specifically for us, in sort of enhanced bilateral cooperation. Things like the Trans-Atlantic Business Dialogue, in which decisions are discussed and barriers therefore removed. But also as a means of educating everyone about the significance of these kinds of issues. And, at times, the potential for unilateral enforcement, as a means of gaining attention, has also played a role as well, I believe.

So it's not a question, as I said, of one option over the other. I think all of them have application.

The final thing I would say is that, in the whole issue of trade and competition policy, I think it's important to be very clear about what are really trade issues as opposed to competition issues and getting the right issues and the right forum. Because, I think that taking a competition issue into a trade forum when it really doesn't apply, doesn't take us very far or actually, I think, can be detrimental to what we're trying to accomplish. So I think it's important to sort out what are really legitimate trade issues as opposed to competition issues.

Dick is concerned about time in his remarks. I think we've got to take a long view here. And it's a process of continuing to build relationships based on these core principles. And, I think, if we can agree as to where this all should end up -- which is the approach we're taking, say, with market competition in the health care system, and try to reach an agreement on that -- then every action that's taken can be evaluated in that context.

Then also, an option, that isn't included here, that we are pursuing as an industry, which may not apply specifically to our task, is that, in effect, the legislation that's passed in these countries that have a big impact on regulation, competition and so on, is a very important element to consider. And so, therefore, in our efforts in Japan to stimulate market competition, we are literally working with members of the Diet in their home districts, if you will, to educate and alert them to what the opportunities are and the potential. So that's another avenue of establishing core principles, if you will.

DR. STERN: Extremely helpful. Lots of different avenues, to use your word, to "pursue." I have some questions I'd like to ask, but I'd like to hear comments from the rest of the Committee, preliminary reactions to the outline? Are we on the right track in spelling out these approaches? And do you want to talk about core principles in further depth here?

MR. DUNLOP: Well, I, perhaps, know the least about this of anyone. Let me give you a view about it which goes this way. I think it may well be that a lot of market access questions are in the eye of the beholder as much as they are in reality. That poses some very hard issues. And therefore, my

experience in other fields has taught me that maybe the way we develop these principles is to take a problem that somebody thinks is important -- health care for example -- or access of construction firms -- and assemble a panel -- I guess I would want some lawyers but not too many, but also some economists -- to kind of do a fact-finding exercise to lay out what we know about the problem.

This is a very large universe, trade and competition, so you try to get people informed about particular areas where you might have some ideas of wanting to do something.

And after, I would like to see some numbers. This question of the magnitudes is a problem that Richard Simmons rightly comments on how difficult it is. So get a group of people to study an area in various places that you see and just put it out for public review. I happen to think that transparency in this area, as you've said before -- David and I were talking about this morning -- is in itself an important matter and, by the way, exposing some problems to more public scrutiny and to the scrutiny of various kinds of governmental bodies -- so transparency may itself be helpful, in some circumstances, as a practical matter.

But, I would rather see our principles come out of a series of such long-term fact reports. So this is the situation in health care; or in pharmaceuticals and health care; or this is what it is in construction; or this is what it is in some petrochem problems -- and so to build from the ground up with the exposure of a careful set of facts about what's going on and then try to develop your principles from that. That is the kind of thought I had since this topic is so large, encompasses so much, and I regard the principles as many miles above the

real world, that it would be useful to try to put a little more content into it as we go down the road. Anyway, that's one reaction.

MR. YOFFIE: I think you're going to see a lot of overlap in people's comments because there are common themes that are emerging. The first relates to the question of data.

We still don't have a clear sense of what the data is, what the scope is, what's included, what's excluded. And that really gets specifically to Ray's comment about trying to find ways to separate trade from the competition problem. Until we understand the core data, it's hard to make that separation and know how the significance of the competition piece. It requires trying to get a sense of the boundaries between these areas? And where there are not boundaries, part of our recommendations should also focus on U.S. government recommendations regarding collaborative efforts between trade authorities and antitrust authorities.

But we shouldn't ignore the internal U.S. governmental dynamics here, where the boundaries tend to be very murky. And one of the things that might be extraordinarily positive in the long run is to create more effective internal mechanisms of dealing with these problems as they emerge. Because if we treat these purely as a competition problem, then there's inevitably going to be conflict in jurisdictions and that's going to ultimately reduce the effectiveness.

Second, the notion of core principles is an idea that is worth pursuing. But we should think of core principles as a long-term policy solution. We should not expect it to have really short term implications, particularly in the

world that Dick Simmons was outlining. Nonetheless, if we're thinking of this as a 10 or 20 year process, it is certainly appropriate to start building that foundation, and obviously Eleanor has written about this. It is certainly an appropriate thing to start this Committee with, once we have the data.

Third, I also agree that transparency is really fundamental to everything we do here. Jagdish Baghwati described this as the Dracula Effect, which is, you expose these things to light and many of them disappear. And I think that's a good analogy for us to focus on. And many of these anticompetitive areas are, in fact, invisible. The simple fact of making them transparent might make it possible to reduce their impact.

We also talked about how you might make them transparent and that gets to my next point which is we must create the right set of incentives to make all these policies work. I think incentives have to have two forms: a positive set of incentives and a negative set of incentives.

Dick talked about the negative incentive, meaning using the unilateral policy to coerce people. I'm not sure I see anything in these proposals that really focus on positive incentives, which are what are the things that we are going to do to make it a positive inducement for some of our trading partners to work with us in these areas. I don't have any solutions but I think that has to be a critical piece of the solution.

As part of that process, for example, I was mentioning to John about the transparency concept: that if we were to create panels, for example, to investigate, then we should be considering having foreign members of the

antitrust commissions of these countries being part of these committees; so that we make them part of the process, and it is not purely a U.S. imposed negative incentive. Ultimately, I don't believe we're going to get the kind of cooperation -- from Japan and Europe in particular -- with only negative incentives.

MS. JANOW: May I ask a point on the data question, because it's reiterated by several Committee members? This is a vexing matter. I think, for our part, we have reached out to a number of trade associations and are developing questions and hopefully this will provide an opportunity for firms to respond with their own experiences, and provide as much detail as they wish to provide.

But as you mentioned the data issue, could you elaborate a little bit on what you think of as being the kind of -- that would be "hard" and quantifiable to help access the magnitude of the harms associated with private restraints because most of what tends to be raised, of course, is anecdotal industry and sectoral evidence?

MR. YOFFIE: This is a hard problem, and we are not going to get adequate econometric data to provide us with welfare implications of these restrictions. I do not have any illusions about that. A lot of it is going to depend on industry-level data.

I'm not thinking about quantifying welfare implications, but you can get some sense of the size of the sectors that are potentially affected by restrictions; the industry trade groups do assessments of potential trade effects. You can get a sense of the orders of magnitude. But it's going to be by sector, I

suspect. I don't think there's any other way to do it. Then we can identify some very large sectors -- health care, construction or other industries that have historically been identified with trade problems of this type.

We need to have some sense of the industries that are effected; the revenues; the trade; employment. And then we can get into some of the details of the kinds of problems that exist within those sectors: whether they are anticompetitive or whether they are purely trade related.

DR. STERN: Right. Let me just put in a plug for -- on behalf of the whole Committee -- to the public. As Merit says, it's been vexing to try to get even anecdotes, much less any kind of data. And we are constantly calling trade associations, representatives of various sectors, academics, trying to come up with more information, particularly in this area, but just generally. So if there are trade associations who have information that would bear on any of our examinations, and if we have not contacted you, please know that this is recognized as a big problem for us.

MR. GILMARTIN: I was going to say that -- picking up on John's comments and also yours -- is that it occurs to me that as an industry, as we pursue the objectives we have for creating a more receptive environment for business, when we separate competition policy and trade, this may be oversimplified -- but when we're talking about trade -- that's when we're talking about access and the opportunity to participate in the market. And our big issue there is intellectual property. And that's handled through TRIPS and the enforcement reports. That's an area of access.

When we go to Japan and talk about competition policy, we're not talking about access. We're not making the point that we're trying to open up markets or anything like that. We're talking about what the benefits are, in terms of economic growth and innovation to Japan, of creating market competition, a more competitive market in pharmaceuticals. So we're not arguing the point that we're being denied opportunity or markets because Japanese companies are as effected by these policies as we are. In fact, we ally with Japanese companies; particularly the ones that are the most innovative and would benefit from full market competition, as a means to work within Japan to create a more competitive marketplace.

So it's the harm basically to the patient; it's the harm to the economic system; it's the harm to innovation that we're arguing. We're trying to deal with anticompetitive behavior so we have better access. We get a good reception for that. I'm not sure on the access stuff that you get that good a reception because it's often in the eyes of the beholder. It's sort of like an "I've fallen and I can't get up" type of attitude. That is why it needs some help.

DR. STERN: This is very important in terms of what the U.S. government can do in terms of positive and negative incentives. Later we'll have a discussion on what the U.S. government does in assisting other countries to draft competition laws, often in the merger area. We're seeing a proliferation for a variety of reasons. Maybe, we're promoting the proliferation of different merger laws. But there are things that the U.S. government can be doing in these bilateral discussions to promote the principles of competition and expand the

focus on merger regs, to these basic economic principles.

The other incentive I was thinking of is the IMF. Perhaps there is a silver lining in this cloud of the Asia crisis. It is dawning on authorities -- Korea is a good example. Joel says that the Department will have more conversations with people that may be even more open to these ideas and recognize that a more open economy is a more healthy economy. It may be that Merit can give us a little insight on this.

MR. GILMARTIN: May I make another point? Then the data that we're using to argue our case, that we've collected, is that the U.S. pharmaceutical industry is the most successful industry in the world. It discovers about half the world's drugs, growing rapidly and creates jobs. We do that because these enabling conditions are present in the U.S.

So, we say to the Japanese government, “We have them, you don't; your industry is underperforming.” Similarly, if I go to Europe, it's the same message, “You have some of these, but there are a lot you don't; you're at a disadvantage.” Since we're confident we can compete in the world, we're looking to create the same kind of conditions abroad that exist here that make us as successful as we are here. We're trying to do that in all parts of the world. And if Japanese competitors and European competitors benefit from that? Fine, because we'll just beat them in the marketplace.

By defining the problem that way -- about competition -- that may be the data that you collect. It's different in terms of how industries prosper in some environments.

DR. STERN: That is very important: this whole push towards deregulation, particularly in bilateral trade discussions. Charlene Barshefsky says she's going off to Japan next week. I certainly hope the emphasis will be on the deregulatory message. There are other messages that I think may come through louder and clearer, but this message that economies, even in the developed countries, are made stronger and sharper through deregulation, through this insertion of competition, is, in effect, a trade mission. At the same time, it is also an antitrust mission or a competition policy mission that the U.S. government should pursue more.

MR. GILMARTIN: One last point, and I don't mean to dominate on the pharmaceutical industry, but basically we're saying there are five reasons that we are the best in the world. I don't make it that blunt, but one of them is because of the support of basic research in this country. But also intellectual property protection; free markets; appropriate and transparent and regulatory environment; and access to global markets. These are the enabling conditions that allow us to innovate and create jobs, contribute to economic growth, and to discover breakthrough drugs for the patient. So that's the basic message that we hammer on and it's very -- the reason I mention it is some of what you're talking about is that government, U.S. government, in other situations can make those same --

DR. STERN: I wonder if other sectors, say the construction industry, and others have done --

MR. DUNLOP: I doubt it. Some I do know, but that's one of my

notions about fact finding. Find out what people have done, thought, rather than put a finger up in the air.

May I raise a different sort of a question that may help us? As I was looking over our binders, in section D-3, on page 7 at the top, there is the following comment about the matter of a study being done by -- under section 1504 of NAFTA. And what is says is this; “Establishes working group on trade and competition.” That's a -- a term we were talking about -- “establishes a working group on trade and competition to make recommendations on further work as appropriate within five years of entry into the force of the agreement. These recommendations are due at the end of '98.”

That's not so long from now. I'm wondering if we can get some idea about what NAFTA has in mind and whether that, under the same title, anyway, would be of some help to us in thinking about the parameters of this problem?

DR. STERN: We'll make sure the staff follows up on that.

MR. RILL: Eleanor, actually, has been participating in the 1504 Working Group. So, maybe she could add something to John's question.

MS. FOX: Chuck Stark, who is here, has actually been participating more than I have because the working group is a government -- intergovernmental -- working group. They will have a report, I'm told, by the end of this year and we should look at it with great interest and we'll see if it moves us along. I've done some background work for the ABA, and continue to do some, to try to be of help to the working group.

DR. STERN: Is it broken down by sectors?

MS. FOX: No. It probably will relate to the trade and competition interface of the three countries -- Canada, the United States and Mexico -- and whether more and different kinds of cooperation may be envisioned on this regional basis.

MR. DUNLOP: Let me raise the question. Take the whole trucking industry. We're all well aware of the enormous rows that have been created in that situation, whether the truck's from Mexico, the weight regs of people who drive, how far you're going to let them drive, all this kind of stuff. I don't know whether that's trade or competition, but I assure you it's contentious.

I'm wondering what that piece of paper has to say to us as we, it seems to me, seem to tackle the same problem but essentially on a global basis.

MR. RILL: I'd like to come back if I may to David's point on data. There, actually, is a wealth of information available. There is a lot of data out there on a sectoral basis across a large number of industries. I could rattle off -- autos, glass, paper, semiconductors -- industries which have been at the forefront of concern over trade limitations. Those data are generally statistical data showing import flows, and export flows, production information and comparing the situation with country X with the situations in countries Y and Z.

A lot of it emerges in papers filed with the International Trade Commission, papers filed with the Commerce Department and Commerce Department studies. We did some work on this, Merit knows well, during the Structural Impediment Initiative talks with the Japanese. At the end of those talks

we got into sectoral discussions.

It's interesting information and there are data. They don't get beyond actual numbers of what goes in and what comes out of various countries. With the limited, albeit highly qualified staff that we have, I wonder how much we want to get into those data, because underlying that I don't see -- at least I haven't been able to find data that relates the import information to restraints of trade. Perhaps its easier with governmental than private restraints, but none of the data can really tie the two together so readily. Maybe we can look at those data, see what are there, and then talk further among ourselves to see if we want to pursue it further? There's plenty out there. I don't know, necessarily, what we do with it after we take a look at it.

MR. YOFFIE: Some of the sectors you mention probably would not fit our definition here. I would imagine autos would be an example of a very large sector where antitrust concerns would not be the primary ones. They would be more traditional trade access issues. I'm just guessing.

MR. RILL: There were inquiries made with respect to limits on distribution of automobiles in other venues.

MR. YOFFIE: I suspect the Structural Impediments Initiative would probably have more of the data than we would want. Precisely because it was going after the kinds of restrictions that this Committee has the power to look at. I think it's a very good source. And the question is: Is there, in fact, some evidence of anticompetitive behavior, separate from purely market access questions?

MR. RILL: What we're doing -- I guess what we're doing, as Paula indicated -- we are trying to see what we can get from various trade associations and various sectors. Also sources of data, we hope, will come out of organizations that are not sector specific. But questionnaires are being prepared, reviewed and being sent out to get a sense of this type of problem. The U.S. Council on International Business and the Business and Industry Advisory Committee to the Competition Committee at the OECD are participating in these efforts as well.

Sometime in the Spring, when we have to sit down and start thinking about what we're going to write in our report here, we ought to be seeing what we're getting out of that as well. I don't know of a source where we can get a statistical fix on group boycotts in country Y. I wish --

DR. STERN. And we're also getting the cooperation of the Committee for Economic Development in circulating the questionnaire. And, again, a plug: If anybody would like a questionnaire or has some suggestions of other organizations, we are really trying hard to reach out.

MR. RILL: It's a really important question you raise.

MS. JANOW: I think, as Jim is saying, we have seen recurring incidents of complaints about barriers to market access stemming from private restraints or some combination of private and public restraints. And this is being actively debated in international fora and the traditional characterization of such problems, as was commented on here by Dick Simmons, is either non-enforcement or lax enforcement or discriminatory enforcement with respect

to those jurisdictions that have competition laws and market access or private restraints arrangements, as in markets that don't have competition laws.

I suspect this Committee will have to think through those policy responses even without a full comfort level on the data. I'm concurring with Jim on that point. It's still important to consider what does one do in environments that don't have these laws? Do you think it is best to push for their creation as a matter of U.S. government advocacy? You have described so well the leadership of an American company, in your case, showing the benefits to the domestic economy of the measures. That's not always the nature of the complaint. Sometimes the complaint is that there is government support or encouragement of private arrangements that are designed to block foreign or that are designed to expropriate foreign technology. So there is a range here, and I suspect that range needs to be a medium-term perspective as well as a short-term perspective about what needs to be done.

MS. FOX: I want to say a few words to carry that theme further. I do have a lot of respect for data, so what I'm about to say does not indicate I don't always want more data. But life is short, the life of the Committee is shorter, and global markets are becoming more global every day. And more and more we see that nations are treating the problem as national. But markets are larger than national boundaries. In view of globalization, it's very important to develop some core principles that recognize the true dimension of problems. We need, first, a vision from the top of each problem. Whether it's a market access problem or a merger problem, the real boundaries are not national boundaries.

And we need, secondly, principles to deal with nation-to-nation conflicts, not the least to head off the shifting of competition problems into a trade war. So, first, we need to see the whole picture and grapple with it and, second, to have some rules in place to solve conflicts among nations.

If we are going to think about broader-than-national interest, about international problems as international, first of all, I want to say it's not altruistic. We ourselves are benefited by looking at the problem as a world problem, trying to remove barriers, open markets to competition, and prevent cartels to the extent it's consistent and feasible with nations' proper interests to protect their own public.

So we shouldn't really be thinking only in terms of labeling American firms' opportunities abroad, though of course we think about that, but we should be thinking more about the openness of markets. We also, I think, have to think of the integration of trade and competition problems even while we think of the separation of trade and competition problems and the separation of some governmental problems from private problems. I think we have to move to really seeing and dealing with them together.

I think one of the problems of the Kodak/Fuji dispute was that our existing system forces us to disaggregate what is government and what is private. And we don't see the whole picture and there's no place we can go to deal with the whole picture at once. It might look much different if it were a whole problem of governmental involvement and encouragement plus the private action. Rather, today: half a problem goes here, to the WTO; and half the problem goes there, to

the competition agencies.

MR. RILL: Can I react to that and make a couple of other comments that have been prompted by the excellent comments by the other speakers?

I don't want to lose sight of the transparency point. I think that's critical. And I think, just based on my own experience in SII and in other matters that I've handled, transparency is an enormous barrier: transparency of what other governments are doing and sometimes transparency of what our own government is doing.

In that connection, I think, a step in the right direction is the positive comity approach. I think it is slow moving, but I think that if we take a look at the 1998 U.S.-EU agreement, with its reporting-back mechanisms, I think those will move us in the right direction towards transparency of activity between various jurisdictions here and abroad.

What I hear on positive comity, on the negative side of the positive comity issue, in our travels, has been one, “Well, okay that's a stick where foreigners can beat on our guys.” Well, "So what?" is my reaction to that. There is a reciprocity in positive comity. And, two, it’s an excuse for inaction. I think we have to examine that one. And it seems to me that if it's an excuse for inaction then it's a failure. And I, being one of those at the creation of positive comity in 1991, would view that as a great loss. But rather than that, I think it's an engine for action. I think once a serious positive comity effort is made, once there's a formal referral and action on the other side that would be positive, or action here

on a referral to us that would be positive, positive comity will be viewed as a success.

But what we have to deal with, as a Committee, is this: What happens when positive comity breaks down, when there is a dissatisfaction by one side or the other as to result? I think that's where it becomes an engine for action because, I think, it leads to greater political acceptability to consider what Dick Simmons says in his statement: unilateral enforcement. That having tried positive comity, and it not being successful, then there's some political stigma removed from unilateral enforcement. At least that's a thought we might want to examine. While we examine also, possibly, the removal of some of the barriers, practical barriers, to cross border enforcement and what steps we might recommend.

Further, on transparency, and this is kind of a wild thought, purely personal, which I guess by definition is wild, and that is: Whether or not we should think in terms of getting some kind of dispute resolution mechanism in place, à la WTO -- binding arbitration.

But is there something to be said for nonbinding consultation by a third party? John, you and I talked about that, I think, at the break of the last meeting. There are a lot of bumps in the road, as I guess Joel said in another context on the way. But that certainly would enhance transparency if people went at it.

The OECD's 1986 recommendation, reviewed in 1995, provides a possible forum for non-binding mediation through the OECD Committee: the OECD now with 29 nations and counting. I think it's something we ought to look

at.

The only other thing I would say is that, I think, there is a very valuable discussion here on the interface between the trade issue and the competition issue. It's very difficult. It's difficult, as David says, within our own government. Some of us thought that perhaps USTR, from time to time, is doing antitrust work. And I suspect USTR thinks that antitrust is sometimes doing trade work.

I don't have a ready answer to this, but we need to look at it and we need to look, I think, beyond that. It's too easy to say government restraints, that's trade, and private restraints, that's antitrust. There's so much of a blend, we probably need to look at some of the ancillary issues, as Joel has said. We need to look at where government compulsion and foreign sovereign immunity end, and how broadly we should recommend to the Department and others to examine those doctrines and their continued vitality in a globalized economy in hybrid governmental private relationships that exist throughout the world.

Those are my reactions to the very helpful thoughts that have been thrown out this morning.

MR. DUNLOP: Now I raise the question on this matter of principle -- I wonder if you have an answer to it. I need to know whether, when you say the principle of openness in trade and all that, does that mean -- and a lot of the world is a Third World -- does that mean you are inherently by principle opposed to the infant industry argument?

MS. FOX: No, it doesn't.

MR. DUNLOP: Then how do you combine the industry argument with free trade?

MS. FOX: That's a good question, and here I also want to bring in transparency, that Jim recognized, because transparency of derogations can be one of the most important things one can do in dealing with specific fact examples -- it could also help us combine the conceptual with the reality.

Specific fact examples that have happened in the past include, of course, U.S. trade with Japan and claims that we can't get into Japan. Future examples might involve developing countries.

I think that we could do well by having a general principle that is most tightly linked with the trade principle. Here I'm going to focus on the WTO, just to say a word about how certain market access questions are on the other side of the coin of trade restraint that are now prohibited. If one wants to be part of the world trading system -- if a country wants to be part of the world trading system and have the benefits of open markets around the world, as already now given by the WTO, then it seems to me that that country also ought to be saying, "I guarantee that I won't make restraints that are inconsistent with the WTO; and I also guarantee that I'm not going to sanction business firms making those restraints so other people can't get into the market."

If there's a particular problem about developing countries where they might need governmental protection, say for an infant industry, I would say they should be free to make transparent derogations; and if derogation is important to the national interest and is not really a beggar-thy-neighbor spillover

type of thing, then they should expose this as what they're doing. There should be a register for these derogations. I think there should be a register for countries' cartels so at least it becomes transparent, and then maybe the derogation will disappear. In any case, we can see what we are debating about and even can think about what future rules to make to constrain derogations.

You could have the possibility of a consensus of nations that either they will have an antitrust law that will prevent anticompetitive blockages of markets or they will assure, otherwise, that there are no anticompetitive blockages of markets. Hong Kong, for example, might assure no anticompetitive blockage of markets even without a competition law, if it has a totally free economy where the market won't let the firms engage in such restraints. That's one example.

The particular market access problem is so linked with what countries are bargaining for when they enter the world trading system that there really ought to be some undertaking of open markets in the first instance, plus transparency for derogations.

MR. RILL: Madam Co-Chair, if I may, just for a second. The OECD, of course, has issued a Hard-Core Cartel Recommendation, as I think Joel mentioned as he was very instrumental in putting that through. We should be aware, at this Committee level, that the WTO ship is either going to be sunk or somewhat further out on the ocean well before we submit a report. Because the Working Group on Trade and Competition, headed by Frédéric Jenny in the WTO, is due to be renewed or not at the end of this year; and is due to submit reports as to whether or not it will be renewed. I don't know that there's a

mechanism for us to have an input into that, but I throw it on the table because maybe we would want to advise the Department of Justice on that issue, that fairly sensitive issue.

MR. DONILON: This is not an area where I have a deep expertise, so I wanted to ask a couple of questions and make a couple of points. The first point is, although it may be difficult to get data, I think it's important for the Committee to at least define the problem with precision that it's addressing. And I think we should do some work on that. I would like to better understand exactly what problem we're trying to address here, what conduct by private firms would constitute something that we would like to see addressed.

Second, with respect to the role of the Division and law enforcement agencies: I think it's an important question to try to better unpack. What are the real world capabilities of the antitrust authorities for addressing this? The Antitrust Division does not negotiate access to the WTO on behalf of countries. It doesn't negotiate trade agreements. It brings cases.

And what would a complaint look like? What would a hypothetical complaint look like here? What are the challenges? We have Chuck Stark here who might be able to talk to us a little bit about this. Chuck, I assume there are real challenges here as to bringing a case against -- against what conduct? What does it look like? And we need to really try to understand what this section of the background paper means, what this option means in terms of unilateral enforcement. Is it real? What would have to be present for a complaint to be brought? Is it something as a matter of policy if a complaint is possible to

be drawn? Is it something we would recommend? Does it risk politicalization of the Department and subject it to that kind of pressure?

My instinct tells me that actual complaints brought in this area by the Justice Department would face real practical limitations -- as is outlined in the background paper -- and would be quite limited. Which brings me to agree with Ray's initial comments, which is: the way to go with this is to look at long-term multiple approaches -- bilateral, multilateral and government advocacy, both in the private sector and government sector.

To do that, as he said, we need to decide, I think -- and this would be my next recommendation -- on a place for the Committee to focus; decide where we want to end up. What are the core principles that we can endorse to the United States government? And then lastly, think about concrete ways in which to advance those principles over the long-term. Where and how should they be advanced?

Again, those are comments from someone who doesn't have a lot of deep experience in this. But I do think we need to define the problem, realize the limits or understand at least the possibilities and limits of antitrust enforcement here, and then think about concrete ways in which we can advance a set of core principles that we might work through.

DR. STERN: That's very helpful. The questionnaire, which will be on our website soon, is offered in our tab 2. So it's D 2. I think that will get to you. And if you get to the page, where it says background material in the discussion -- 3. D3. It's Background Material and Discussion Questions. Is that

where I had it? No. I moved my finger. Here it is. It is Background Material Provided, Questions Presented and it's right after the list of business outreach organizations contacted. So that is at D2.

And on page 2 of that background material, one and 2, there are a series of -- 3. Page 3 of the questions. E3. Trade and Competition Policy Interface Issues and the questions are on pages 3 and 4.

Tom, you've called our attention to it. What is it that we're asking? And if you've got further suggestions, this can always be improved.

Now your point about what the Justice Department is doing about law enforcement, what else can it do --

MR. DONILON: What can it do?

DR. STERN: What can it do? And you talked about bringing cases. But they also might negotiate positive comity agreement with others, and extend outreach to other countries.

MR. DONILON: The reason I brought that up -- that, I think, is correct and would be part of the multiple approaches point, which is advocacy by the government and by United States private sector. But where I wanted to try to get a better feel, because, quite frankly, I don't have a feel for it, is: What do we mean by saying that we should at least consider -- explore -- the option of unilateral enforcement, which would be bringing actual cases against specific conduct and specific parties? As a practicing attorney, the first thing I would do is look at the complaint against my client and try to figure out whether it stands. And I'd like to get a feel for whether or not -- what the Justice Department will do

with that.

MR. RILL: Tom, there are cases. There are cases that have been brought. And we've asked the Department to advise us of the number of enforcement actions that, in whole or in part, related to conduct overseas, affecting both incoming, but particularly, outgoing commerce. I think we asked this at the first meeting. I haven't seen anything yet but I'm sure they'll give us that. That will be at least a partial answer.

In addition, part of our road show discussions with other law firms is eliciting that kind of information. All of which is by way of saying, I think, your question is really pertinent and one we need to get in up to our elbows.

MS. JANOW: Can I add just a footnote on this point? Jim also took the lead, he didn't in mention it in this instance but, in the Antitrust Section of the ABA. That was specifically a question we asked of them, was to try and provide us a chronicle as well as an assessment of these so-called export restraint cases, not only those involving the government, which is not a terribly long list, I should note, and is also not terribly recent. With perhaps a case list partly of the barriers or the difficulties of litigation.

We have in these outlines spoken to the difficulties of litigating -- prosecuting these cases when transnational cartels are involved. We haven't done that explicitly in the export restraint case. Gary Spratling will be with us later, as will Chuck Stark. I think those difficulties become even more complicated when you're talking about an export restraint situation and maybe what you're also suggesting is that we might usefully develop a background paper to think about

those difficulties in the export restraint context.

So, I think there are things underway that will help us on that, or at least provide some background.

MR. RILL: I think that's going to be covered, at least in part, in the paper that we're going to be getting from the ABA Antitrust Section. One of the thoughts that was given to us, as you recall, at one of the law firm visits was -- we're not limited to advising just Executive Branch action. If there's legislation we think is appropriate, we can certainly -- maybe nobody would listen to us -- but we can certainly recommend it. If there are impediments to enforcement, either cartel enforcement or if we find there are impediments to other types of civil enforcement, and we think that's a problem, we should examine it, identify it -- I think this is your point, Tom -- and then recommend ways that it might be remedied.

MR. GILMARTIN: Picking up on Tom's point, as well, about defining the problem, particularly in this area here. And as you noted, Merit, there are a lot more, sort of, trade and competition interface issues being brought forward in the trade arena. And one of the things that we should probably examine would be sensitivity to the point that you made Eleanor, because the trade arena has been a very effective and high profile activity. To what extent are problems being defined to take advantage of that vehicle? Now these are really competition problems, which is what you were talking about.

What happens when they get in the trade arena and they start developing the case and it's not there because you can't make it a trade case?

Now -- and if there was a parallel effort on competition, if you will, that that was a venue by which you could really deal with these kinds of issues, then we get the problem defined properly and then would be more effective in resolving it.

DR. STERN: When you stop and think about it, the U.S. Trade Representative has traditionally sat as a cabinet officer. It sits in the White House and gets ambassadorial rank. All of this because Congress made it so important. This was a creature of the Finance Committee and Ways and the Means Committee. So it's an interesting point. Are we now at a stage in our economic history that we are wanting to enhance the competition policy role as a public policy priority of the United States in the international arena?

MR. RILL: That's a really good question I think, and one that we should address. I would certainly support giving the Assistant Attorney General for Antitrust a cabinet rank.

DR. STERN: Ambassadorial too!

MR. GILMARTIN: If you define the problem the other way, everything starts moving, just to an extreme; all competition becomes some big part of the WTO, which doesn't seem, necessarily, the right way to go.

DR. STERN: It may be the tail wagging the dog.

MR. GILMARTIN: The result of people trying to attack their market access issues and what they think might be a very effective arena, as opposed to what's the right WTO --

DR. STERN: That is a very good point.

MS. FOX: I want to say something further to Tom's very good

question about what are we talking about, because this trade and competition question can be very broad. I want to start tackling that fight, talking more about why are we here, and to say something about what the European Commission is doing --

DR. STERN: I hope you will also -- I do feel like we need to address -- I don't want to cut you off, but you're the core principle person. And if we can get a few core principles at least articulated, that's your assignment.

MS. FOX: Okay. I could do that. But one thing I wanted to say -- this relates to trade and competition and it relates to U.S. and the world, it relates to the EC and the world -- there are others, that is, not Americans, who are much farther than we are, having done more thinking and resulted in papers and proposals. They are farther along in thinking about internationalizing competition law. They recognize that because problems are international and supposition that, because problems are international, we need to internationalize competition law.

A piece of that is trade and competition, sort of narrowly defined, that is: barriers to market access, both public and private. That's just one piece. Then there's this big problem about: Do we need to and do we want to internationalize competition law?

If we proceeded to internationalize competition law, rather than internationalizing at the point that trade meets competition, we might end up in a totally different place. We might end up with -- even if you ended up with something and you might shoot down everything -- you might end up with a new kind of collaboration, not in the WTO, that talks about international problems. Or

there's some core principles of open markets and derogations, and what do you do about competition law on an international basis.

The reason I am mentioning this now is because there's a huge debate in the world going on -- and the European Commission and many Europeans and a number of others envision internationalizing competition policy in the image of EC law. Those are two different things. One: international competition policy. And when you do it, of course you do it to be more like whoever you are. And the Europeans are very far out in front in putting forward this idea that there are problems that need an international solution. And they are also kind of expanding the scope of the European Community solutions through association agreements and trade agreements.

And my point is that if we're not part of this debate, we default. Maybe in some cases the European laws are better than ours. I think they are with respect to state action within the European internal market. On other points our laws might be better than theirs are. But we're not engaging in the debate.

My fear is, if the United States stands back and says, “We can do whatever we want to; we have our unilateral remedies if we don't like what's happening on in the world,” and we're afraid to go into the international arena because we will get co-opted by trade policy or foreign competition policy, I'm afraid that is going to lead us to the default position. We will find an internationalization of antitrust and, whatever it is, and we will not have been architects.

DR. STERN: That's a superb statement, and may even suggest that

we have been using the wrong term in, “the interface of trade and competition.” Maybe we should be reshaping the definition of our examination to the “internationalization of competition law.” And the EU not only may be shaping it in its own image, but also exporting it to central Europe, eastern Europe, and in negotiations with Latin America and other countries. Thank you, Eleanor.

I'm sorry, Tom?

MR. DONILON: I was going to add half a sentence to what Eleanor said. Not only that we are not part of the dialogue, but that the dialogue doesn't have the benefit of our hundred years’ of experience. In this area we've seen a lot of pendulum shifts and swings in our antitrust enforcement/competition law. And I think that we have a lot to bring to the -- a lot to bring to the table, I think -- that’s number one.

Number two, that's something I should have mentioned in talking about long term approaches. It's not clear to me that the lesson that every country will learn from the events of the last year, that the international economic system will be to open their markets, it may be -- they may learn other lessons. But to the extent that other countries, over the long haul, do develop open markets, we have a very highly stylized and deep relationship with most of our current trading partners -- between market economies. But as other countries develop market economies, I think it's important to get the core principles established and try to get out in front of development of these market economies with ideas that make some sense.

MR. YOFFIE: I just wanted to make a couple of quick points.

One, to come back to the painful subject of data. If we don't get a good sense of the orders of magnitude that are involved here, our ability to recommend remedies will be limited. In other words, we can recommend stronger remedies if we can argue that this is a bigger problem.

DR. STERN: We thought this was all going to be in the Harvard Business School data bank.

MR. YOFFIE: I want to make sure we think about this connection between data and remedy. If, in fact, we can see a few anecdotal examples here and there, then we are likely to conclude that positive comity, for example, might be the most we can reasonably recommend under current circumstances. If, on the other hand, we can argue for a trend or argue that there is widespread evidence of the existence of these problems, we can make the argument that more important or severe actions can be taken.

I want to make sure we don't miss that link. I want to make sure we remember when we are having people at our hearings in Washington in November, that we ask the foreign competition authorities, in particular, what they want from the United States. Because that is something that gets us into this realm of positive incentives. What are the things we may be able to offer as part of any new set of guidelines, whether it be international, multinational or even in terms of bilateral agreements that we're going to be able to offer?

MS. JANOW: Well, if I may -- since my job as Executive Director is to try to operationalize some of your thinking in some drafts that come back to you -- just challenge a couple of notions that come forward to help me

think about how we do that. First, David you caused me to challenge yet additional comments. Let me just point to one.

Eleanor: the internationalization of competition policy. I think that naturally leads to the question, and I'm hearing concurrence on the importance of that framework, of: What are our objectives? What might be U.S. objectives with respect to the internationalization of competition policy? The European proposal, which may not be a consensus proposal, but their proposal has suggested some sort of international rules or principles, whether at the WTO or elsewhere. And so that's on the table to be addressed.

But I think there is a debate as to whether the internationalization of competition policy needs to take that form or -- that form meaning some effort to reach a harmonized set of agreed-upon rules, which, as Eleanor said, would be in the European model. Is the U.S. objective here to develop it's own advocacy for its set of rules at the international level, or might the United States' objective in the internationalization of competition policy take other forms?

I think that's an important issue. What are our objectives with respect to the internationalization of competition, and how would we -- this goes to your point, Tom -- make it concrete? I think this Committee perhaps needs to debate that issue a little bit more.

And then David, I just wonder on this point -- I'm remembering, for so many years in the trade context, arguing about issues, for example, like supercomputers, if I may say, where you couldn't say that the trade effects associated with supercomputer sales were that significant, but the perceived

consequences of the loss of that market were. So I'm wondering, even -- if there's an analogy here -- even if we're not able to give a sense of the order of magnitude of commerce affected by anticompetitive restraints, does that really limit this Committee in thinking about remedies?

MR. YOFFIE: In the case of supercomputers it was externalities, and everyone had a clear sense of what those externalities are. There, again, you were identifying relatively large scale effects: just not in the particular area that was being traded. So any way you look at it, you have to identify some effects that are going to be important to the economy.

So, I don't think that these things are mutually exclusive. You can have, potentially, small industries -- particularly in high-technology, where the potential effects would be very widespread -- and that would be sufficient at least to argue that maybe more severe or impactful remedies are required.

MS. FOX: As usual, Merit, your questions are very probing and really important. I want to say a word about our objectives vis-à-vis what seem to be European objectives.

As you've mentioned, the European proposal seems to envision, ultimately, common rules for the world. I'm against that. It begins, however, with a very fruitful framework for building blocks of positive comity and cooperation, transparency -- which is one of the keys in the European internal market, but particularly with government restraints -- and nondiscrimination.

I take Tom Donilon's point about our experience over a hundred years and about the swings of the pendulum on substantive law. This is so

important. Nothing should be written in stone at a world level; you can't dissolve the stone. Things change, society changes, needs change. Different societies may need different rules or nuances; the same society may need different rules at different times.

My thought is we should, first of all, engage -- that is the U.S. should, and it is not now -- engage in conversations about how to internationalize. There is a need for internationalization that fits the scope of world problems, and a need for articulating, in general, an open market, free market rule, certain rights of derogation, transparency of derogations, restrictions on excessive government protective or beggar-thy-neighbor restraints, and dispute resolution.

And I'll give you one example of a law that I think is in need of internationalization: the Canadian merger law. The law says that mergers that are anticompetitive are potentially illegal. But they could be defended if Canada gains more than it loses. This includes producer gains from exports. If the producers and consumers in Canada have a net gain, the merger is okay in Canada even though the world suffers a net consumer loss.

That’s a nationalistic way to look at a merger that has international effects. If U.S. consumers are hurt by a Canadian merger, their harm, as well as Canadian consumer harm, either should not be offset by Canadian producer benefits, or all consumer and producer benefits should be taken into account. But if you literally apply Canadian law, it's discriminatory and shouldn't be allowed.

This is probably the tip of the iceberg. There are probably many

other national laws and their applications that look in this direction, because law is national. And nations are looking out only for their own immediate interests. Yet we're all better off if the standard is world welfare subject to what nations agree are rights to derogate. That's the kind of principle that I'd be looking towards.

I think it's very important to advocate that no detailed principles be written in stone. On the other hand, it's okay, it seems to me, to advocate adoption of an antitrust law against cartels. You can import the OECD recommendation itself, without all the exceptions. And you could advocate adoption of law forbidding anticompetitive mergers with serious spillover effects.

The form could be a framework directive in the tradition of the EC, as advocated by the EC Experts' Report. A framework directive would lay out the objectives and say: All countries must pursue these objectives. All countries undertake to adjust their national law to implement these objectives, and no country may have discriminatory law.

MR. RILL: Is the WTO the right forum in which the discussions to this end should take place?

MS. FOX: Not necessarily. I think the problem -- or opportunity -- is that the WTO is there.

MR. RILL: The elephant's on the table.

MS. FOX: Yes, and there's an additional problem that -- and you can tell me whether this is the dog or this is the tail -- but there is one distinct issue which is a trade/competition issue: and that's the market access issue. We

could agree, in the context of the WTO, that countries should not allow unreasonable restraints on market access by government or private parties. One could say that's the only trade issue. But we do have this problem of internationalizing to fit the modern world.

DR. STERN: Only the WTO issue.

MS. FOX: Thank you. The only WTO issue. We could say that's a legitimate concern of the WTO. Everything else is new and different. It's not trade. It stems from the fact that globalization of markets has internationalized competition problems.

DR. STERN: Eleanor, you've been a wonderful, wonderful, clairifier and resolver, perhaps, of a lot of these conundra that we have been discussing, including defining “this elephant” called the WTO.

MR. RILL: I thought you were talking about me.

DR. STERN: No, Jim. I'm not getting “partisan” here. The WTO organization has also been the magnet for groups wishing to achieve other goals. Take the trade and environment debate at the WTO. Take labor and trade issues; some say why not the ILO, the International Labor Organization? The reality is that trade has become such a successful route, politically, as well as in other ways. And the WTO has grown beyond, perhaps, what its original missions were. But there aren't any competing institutions.

It is, as Eric reminds us, the witching hour. And I would like to thank everyone for his or her contribution. Now we are going to switch gears and go into both the lunch hour, but it is a working lunch. Ordinarily I'd like to give

everyone a chance to give closing remarks, but I think that would be redundant. And we'll have opportunities to continue the discussion as we go into International Law Enforcement Cooperation as well as Multijurisdictional Merger issues. So we will take a quick break. But Merit is not going to let us do that.

MS. JANOW: I am. I really am. Just a footnote. We are preparing a set of questions, solicitations for papers on each of the three subjects, including this one. So if I could ask, before anybody leaves today, to be sure to take that with you so you react to it. We'll pass it out. That was one point.

Second, we've mentioned before also the hearings. I know you can't necessarily speak to your calendars today, but if you have subjects on the hearing schedules that are particularly interesting to you, if you could just alert me and then I can work with your offices about the dates and so on. We have such a spectacular group coming and all of them are very much interested in being able to interact with you that, to the extent your calendar permits, it would be marvelous if you could reserve some time over those three days. Thanks.

DR. STERN: Thank you. Okay. We'll take a five-minute break, 10-minute break.

(Recess.)

DR. STERN: We get an opportunity to talk and eat at the same time. And we're now going to move on to item two on our calendar: Enforcement Cooperation. And we have the good fortune of having our Co-Chair, Jim Rill, lead off this discussion. And Gary Spratling is here now, having earned the red badge of courage for taking the red-eye again. And, also taking note that, Chuck

Stark is also here and available. Jim, would you do us the honor?

MR. RILL: Sure. Let's get right into it. Obviously, extraterritorial enforcement or, really, enforcement cooperation in the cartel context is one of the three legs of the Committee's responsibility. I want to start by not going over the turf that we plowed through at the last meeting, but to express my profound thanks to the Department of Justice, and, in particular, Deputy Assistant Attorney General Spratling and his senior counsel, Scott Hammond, who both have been very, very forthcoming and helpful, in giving us a cornucopia of statistical data relating to the Department's global cartel enforcement program. Just makes me wonder where were they when I was there, but never mind that. The fact is just to review some of the statistics.

DR. STERN: I was just asking, are the statistics going to be made public? I guess so.

MR. RILL: He said it's an update of what was presented February 26. So, if that was public, this is.

DR. STERN: The public is waiting to hear it.

MR. RILL: The fact is that --

MR. SPRATLING: The first section, Jim, is an update, but the other stuff is new.

MR. RILL: I appreciate that. The discussion earlier this morning, Gary, focused, in part, on a desire to obtain some kind of data to give us an empirical assessment of what the scope of the trade and competition area problem might be. Based on the information that you've given us already, I don't think

we're going to have that same unsatisfied thirst in this area. And if we do, I'm sure you'll come forth with more.

Just to rattle off a few of the numbers: 30 current sitting grand juries are looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries. The activity is even broader than these numbers reflect, according to the information given to us -- implementing cartel meetings are suspected to have occurred in 60 different cities in 25 different countries, including most of the Far East and nearly every country in Western Europe. I suspect some in the United States.

The volume of commerce in some matters reaches over a billion dollars a year in some matters; and others, over $500 million a year. And in over half of the investigations, well over $100 million a year of commerce is affected by the suspected cartel activity.

I feel so much chagrin that the comparison numbers that the Department provides compares fiscal year 1991 with fiscal '97 and fiscal '98. And the --

MR. SPRATLING: Well, Jim, the seeds of a successful prosecution, after all, are sewn much earlier.

MR. RILL: Ever the diplomat. But I'll go ahead and say what they said about us. In fiscal '91, only one percent of the corporate defendants in cases brought by the Division were foreign -- that doesn't count Californians, right Gary? And in fiscal '97, 32 percent of the individual defendants were

foreign based; '98 to date -- not much time left -- 64 percent of corporate defendants were foreign-based and 30 percent of individual defendants were foreign based. That's an awesome number.

To David's request for statistical data, I think we have a wealth of it in the international cartel area. In fiscal '97, the Department had a record breaking $205 million recovery in criminal fines, almost 500 percent higher than the level imposed during any previous year -- at least I've got company. And in fiscal '98, over $245 million in criminal fines already have been recovered. I don't know as of what date this information is.

MR. SPRATLING: That's as of yesterday, Jim; but we hope the figure will go up before the end of the year.

MR. RILL: With about two weeks running.

$450 million in fines have been imposed since the beginning of fiscal year '97. Nearly $420 million, or over 90 percent, of the fines have been in connection with international cartel activity. I think in fairness we'd like to know the percentage against U.S. firms and the percentage against foreign firms and how that might divide out.

MR. SPRATLING: We will provide that.

MR. RILL: The fact, I think, we should recognize, also, and I think it's a very important fact in our outreach as a Committee and in our deliberations as a Committee, is that the parties injured by the cartel activity are, at least in the first instance and quite often in the last instance, business firms -- principally customers of the cartel’s co-conspirators.

And since the beginning of fiscal '97, the Division has prosecuted international cartels affecting over $10 billion in U.S. commerce. And, of course, as I indicated at the outset, there are 30 grand juries looking at international cartels that have not entirely finished their work. So this is really a number in progress.

Specifically, in the lysine area, worldwide sales affected approximately $1.5 billion; $650 million in the U.S. This is a very important feed additive for the agricultural economy in the U.S. Citric acid: worldwide sales approximately $1.2 billion; U.S. impact over $1 billion.

Now let’s talk about cartel activities currently under investigation. Looking at the shipping industry, where U.S. sales are over $200 million in services; metals over $750 million; construction contracts over $220 million. These are matters that are still being looked at.

MR. SPRATLING: Which is the reason they're not more specifically defined.

MR. RILL: I appreciate that. A good amount of the work that still remains to be done is very difficult -- in the trade and competition area -- I think, it’s already done, in large measure, by the Department for us in the cartel enforcement area.

It's not hard to answer the question, “Are transnational cartels a problem?” The numbers speak for themselves.

The question then becomes: What is there for this Committee to do? And I think one would want to look at the obstacles to effective enforcement

cooperation. Some of our partners I think are concerned. By partners I mean, not my partners, I mean foreign national colleagues are concerned about information being transmitted to the United States, in a variety of contexts, and being used for purposes other than the designated purpose for which the information was asked. How do we address that?

There are issues that have been raised as to foreign sovereignty. The Japanese government opposed the prosecution efforts of the United States against the conduct occurring overseas that was prosecuted in a criminal context in the Nippon Paper case. The United States prevailed in that litigation. Access to documents as well as to witnesses continues, I think, to be raised as an impairment to fully effective enforcement.

I know that Assistant Attorney General Bingaman, in several speeches following the General Electric/DeBeers case, which the United States lost at trial, suggested that part of the reason for the unsatisfactory result was the inability to obtain testimony of witnesses located overseas. And that, again, is a question as to whether this should be viewed as a problem by the Committee and what remedies should this Committee suggest to address that problem?

There's also the question of obtaining extradition for those overseas who have been indicted. We have extradition treaties with a variety of nations. Few of them mention antitrust as an extraditable offense. Is that something we should look at? Are there adequate border watches? Is cooperation with the INS fully effective in reaching individuals that are subject to investigations, or, for that matter, under indictment entering the United States, to

find them?

I think part of the problem, to the extent there is a problem, is that other countries are not fully in tune with criminal enforcement of antitrust offenses. Only, I think, eight countries in the world, other than the United States, have criminal sanctions for antitrust competition violations. I think Canada, of course, is one that does; Japan does. There have been some prosecutions in both of those countries. So the investigative cooperation may be limited by the extent to which foreign countries are willing fully to cooperate with us, a nation which has a very active criminal enforcement program.

I think conversely, there has, at least in our conversations, been some concern expressed with the cooperation that can arise by an outflow of information from the United States to countries that may have serious penalties. I think the government, as you said, Gary, won a very important victory in the recent Balsys case regarding the application of the Fifth Amendment, which was held in a different context not to apply to self-incrimination concerns arising under the laws of a country other than the United States. I think it's a concern raised more as a policy matter, in case there are serious sanctions overseas, maybe even arising under non-competition laws, perhaps fraud laws or other laws that would be uniquely severe. That would be a matter of concern to the United States companies' willingness to provide information if it would wind up in the hands of foreign enforcement officials, a subject we should probably look at.

How can we improve enforcement? I think this is another subject that the Committee needs to look at. First of all, assuming we do want to improve

enforcement and, at least, that's my own view. The US-Canada MLAT -- Mutual Assistance Legal Treaty -- works well. We can use more input as to how it has worked. But I think agencies on both sides of the border have extolled its effectiveness. I don't know that the MLATs with other countries have been so effectively implemented or that their coverage is so antitrust-express as with the agreement with Canada. We need to know that before we can recommend the expansion of the MLAT approach.

Confidentiality concerns arise in a variety of contexts. They arise in the merger context, they arise in the trade and competition context, and they certainly arise in the cartel enforcement context. On the other hand, I don't know if I personally have a lot of sympathy for the confidentiality concerns of people who get together in hotel rooms and rig prices. I can see why they would want to keep that confidential. But the public policy rectitude seems somewhat lacking in those circumstances.

The Department has endorsed and supported the OECD Hard-Core Cartel Recommendation. I think that's probably a positive step. Are there further steps in the core principle convergence area that would apply to cartel enforcement that would be useful for this Committee to recommend? There is, on the table, a proposal to raise criminal fines from $10 million to $100 million for corporate offenses. I'm not sure I even right now know the status of that. It may be a while before that issue is addressed. You want to say something on that, Gary?

MR. SPRATLING: No. The legislation is being held up until we

get the comments of interested parties and then we expect it to go forward.

MR. RILL: And the Judiciary Committee would be the one to consider that legislation. I'll leave that there. The Advisory Committee, the staff, Paula and I, and Merit have met with a number of business, legal, and academic types to try and get our arms around this problem and get the advantage of personal experience and economic and legal scholarship, and I think we're going to do that significantly more. We have worked closely with Gary and Scott and the DOJ staff, and we really are getting, I think, superb help in information from you all, but we need to continue that.

Some thoughts. It seems to me that the case for the scope and magnitude is well on the way to being made. This is an issue; and we should recognize what the Department's done in this area. I think we need to look at bilateral and multilateral agreements both on substance and process to determine whether we should encourage the Department and the United States government to enter into these. At the same time, we should address legitimate confidentiality concerns and penalty concerns, if they are legitimate, that are raised by people that we talked to in the U.S. as well as overseas.

And then I think we need to look at ways, if we believe it should be made more effective, as to how enforcement can be made more effective. In addition to legal assistance treaties, perhaps extradition treaties and other ways that we can break down -- recommend breaking down some of the barriers to witness and document production, discovery, and enforcement that may still exist. Having said all that, I think the record indicates that whatever impediments there

are have not stood in the way of the very strong, powerful, global antitrust enforcement activity against hard core cartels, for which Gary and his colleagues and Joel should be, in my opinion -- speaking as only one member of the Committee -- strongly applauded. That's it, as an opener.

DR. STERN: Thank you so much, Jim. We have all had an opportunity to look again at the outline in the book that the staff has so carefully pulled together covering all of this. And Jim has been good enough to bring us up-to-date. I open the floor now to any comments, reactions, guidance, direction, advice from the members. Eleanor?

MS. FOX: I have a small question on data. Gary, is there data -- this is in my -- Jim's saying that great deal of the harm of international cartels are to businesses. And my question relates to competitiveness. Is there any data showing the costs to our businesses that are doing business in international commerce, and the extent to which international cartels are handicapping U.S. firms in international commerce? How much are overcharges impairing the competitiveness of U.S. firms? Do you think that will be a useful statistic to look at, if we could get it?

MR. SPRATLING: We haven't tried to get that because our focus is on the -- we know there is that downstream effect, either in terms of the impact on consumers or in terms of the impact on the victimized companies' abilities to compete in whatever markets they're competing in. We recognize both of those downstream effects.

But to the extent that we collect information, most of it is

anecdotal, some of which Jim referenced in his opening remarks. We are looking at the extent to which prices are increased to the victims of these conspiracies. And we know that, of those that we've prosecuted thus far, most are businesses.

Consumers don't buy lysine; very large poultry and pork producers buy lysine. Consumers don't buy citric acid. Coca-Cola, Pepsi Cola are all companies that process foods using citric acid. Consumers don't buy the marine construction services; the oil companies buy the marine construction services. Consumers don't buy graphite electrodes, but the steel companies buy graphite electrodes to make steel. We have much anecdotal evidence, some of which Jim mentioned.

In one of the industries that we have not specifically described -- we just called it the construction industry -- in one of those industries there was a markup on a 200 million-dollar bid of 70 percent. There was a -- we have markups in a series of bids in an industry where we have one prosecution thus far, and we expect other prosecutions -- there were consistent markups on bids, up to 40 percent, after the conspiracy started. And so we have that type.

You know in other conspiracies, we can identify from the point the conspiracy started as to the amount of increase that occurred right away. Not all conspiracies are perfect. Sometimes there's fluctuations and there's cheating and some outliers that conspirators can't control. So, there is some fluctuation.

So, to the extent that we collect the evidence, it's at the point I have just described: that is, the immediate victims of the conspiracy. We know that, in the vast majority of the cases we prosecuted, they are businesses -- they are U.S.

businesses. And of course one of our difficulties here has been -- we all said this at our very first meeting -- one of the difficulties is convincing people of the seriousness of this problem.

I suggest that the businesses that have been injured as a result of these cartels which we've uncovered -- because otherwise they wouldn't have known about it -- they now appreciate the seriousness of this. They have examined the extent of what their injury is. They have now undertaken lawsuits to try to recover damages for those injuries. So, they appreciate the process.

And in some of our sentencing there's indications that the judiciary is increasingly appreciating the problem. At a sentencing hearing that Joel Klein and I attended last Tuesday, involving some unusual circumstances that I don't think we need to burden the record here with, the government was actually seeking a lower fine against a corporation than the court had indicated it might impose. It's pretty unusual for the government to be seeking a lower fine. I can go into that privately with some people as to why that was the case.

But at the sentencing hearing, the judge said, after imposing a higher fine, the judge said something like, "I recognize the extraordinary cooperation that this firm gave to the government investigation. Indeed the government has called it a 'vital' investigation. But in spite of that, this is a serious crime. This company stuck its hands into the pockets of American businesses and consumers as surely as if it had robbed them. We've got to deter this type of conduct."

That's music to my ears of course but the fact is that there is not

necessarily a general appreciation in this country, and certainly not in foreign countries, as to the seriousness of the problem.

So one of the reasons that we provided the type of information that we have to the Committee, besides, of course, just simply complying with the request for information, is that we are trying to establish that case as well.

DR. STERN: If we could extrapolate from the data that you did provide us, in response to Eleanor's question, which was how much is this perhaps impacting overseas competitiveness of United States companies. You had for example the citric acid. You said worldwide sales of citric acid was 1.2 billion. The conspiracy was to have affected over 1 billion dollars in commerce in the U.S. We know that the other 200 million was in sales overseas. I mean, there may be some -- if you just kind of look at the material, if you could just go back and just take a look. You may already have some of this information. But I don't want to belabor this point now because we've got a lot of other people who want to talk. So we can follow up on how to get the data.

MR. RILL: Eleanor, just to tag onto your question. We do have some of the staff and the Department putting together private actions that are pending in the wake of government prosecutions, that probably we ought to talk to some of the people that are representing some of the companies. Many of them are class actions.

MS. FOX: Of course it's possible that everyone in the world is overcharged, which is also a problem. Or it's possible that there are unique U.S. barriers to make it possible to overcharge the Americans. Either way it's bad.

MR. SPRATLING: Just so we don't have a misperception here, the international cartels, of course, are worldwide. They involve all of the major producers, and so the U.S. producers that are significant are conspiring with the major producers in other countries. They're conspiring to sell all the volume they want at a particular price. And so, in that sense, it's not the situation where you would think: How are the U.S. producers being harmed by international competition?

They've carved up the world. They have sat in a room and carved up the world, and decided what prices they're going to sell at. They are selling all they want at whatever price they want. So it's not the situation where you have a discreet agreement not engaged in by other major producers that may be impacting world producers. But instead it is the U.S. producer involved with other producers involved in a single worldwide cartel.

MS. VALENTINE: Alan Wolff's group has been urging Congress to get that very data. So you might find something there.

DR. STERN: I'm delighted to welcome Debra Valentine, who has joined us, representing the other major agency sharing competition policy jurisdiction, the Federal Trade Commission. And I appreciate all the cooperation we've received heretofore.

MS. FOX: Just to add to the very good list of problems that we're working on, I want to add one other item that may be a subject for international or multicooperational agreement. That is, state action that permits, encourages or authorizes cartels. And here, I would first point out, it's interesting that the

OECD Recommendation, which says member countries should prohibit cartels, makes an exclusion for cartels that are okay under the country's laws. Perhaps the Justice Department had to make that exclusion to get the agreement.

I think there's a next step. I think it's possible that nations could agree what is appropriate state action endorsing a cartel, and what isn't. The transparency provision in the OECD Hard-Core Cartel Recommendation should be useful. It will provide us with hard data. It may give us a basis for discussing: Are there some kinds of state action that should be permissible because they're protecting proper state interests and others that aren't?

An example that I would cite for us to think about, and perhaps to focus our thought and discussion, is the uranium cartel case that was litigated about 20 years ago. The United States had an embargo against enriched uranium. The embargo order -- in the wake of prior U.S. encouragement of world production -- resulted in huge surplusses in the world. Many nations took steps for orderly marketing. Some of them assigned quotas, for example, Canada assigned quotas to companies producing on Canadian territory. Whether Canada and other nations sponsored further cartel agreements was shrouded in secrecy. The United States charged ahead and sued private cartel members, much to the anger of the countries that were part of the background of orderly marketing. And the United States created a lot of enemies in the course of it.

So my thought is we could examine which of those actions are appropriate in a world system and which ought not to be, and perhaps come up with a recommendation prohibiting firms from hiding behind Act of State

defenses unless their country's order is clear and transparent, and you can see exactly what the country ordered and you can see exactly how, if at all, the private parties went beyond the country's order.

MR. RILL: Ray, something you were saying this morning about the encouragement of deregulation in open markets -- I know that in the SII talks and even the continuing ones, there's a continued effort reaching some acceptance, the elimination of the so-called recession cartels and some of the government sanctioned cartels in the government of Japan. Maybe we can pick up on what you were saying this morning about the positive incentives to take a look at, possibly, where those sanctioned cartels not only are illegal, but also counterproductive. And that, I guess, consumer welfare in their own countries is part of our ambassadorial mission. Perhaps you can comment on that.

MR. GILMARTIN: I don't have enough specific information about that to say much about it. But I think the general principle is what is the economic harm that's been done.

DR. STERN: I guess I don't quite understand, Jim. Recession cartels, at least in Japan, which are permitted under the WTO as a safeguard for temporary purposes, are ipso facto retarding competition by putting quotas on restrictions of imports into the Japanese market for a period of time. So, I don't understand.

MS. JANOW: I think one of the ways in which cartels have been challenged is that cartels of this sort were often designed to deal with structural decline but they weren't being used for that purpose. They were being used to

protect industries going through a cyclical downturn. The effort was to eliminate those temporary recession cartels and I think most of those are gone in Japan. And I don't know of their application elsewhere, particularly, but I guess that gets to the question I had which Eleanor was talking about: perhaps you have in your mind what are appropriate and inappropriate state action type defenses? I mean, this cyclical structural would be one example, perhaps.

MS. FOX: Actually, if Canada ordered the companies that were producing on Canadian soil to abide by mining quotas, that should be fine. However, if it orders them to boycott Westinghouse, that shouldn't be fine. The companies that boycotted Westinghouse claimed state action. There are ways you can draw the line one way or another. There might be choices to be made, but I think there will be some things that will clearly fall on the side of what is permissible and what is not. Transparency of state action would be extremely helpful. The lack of transparency was a big problem in the uranium litigation cases because nobody knew exactly what Canada ordered. It wanted to help its companies at one point, and tried to shield them behind its state action by holding its own orders in secrecy.

DR. STERN: Using these state ordered cartels is a mask for special treatment.

MS. FOX: Countries tend to come to the aid of their companies when they find themselves in trouble. That was a part of the problem in Uranium. The UK, Australia, Canada and France were all mad at the United States; they thought that we had overstepped our bounds by just going ahead and suing. So

they were circling their wagons. If countries agreed to a set of rules -- what's permissible and what's not, and what information must be posted -- we'd have fewer problems. During the uranium litigation, there was a huge problem of extraterritoriality and the legitimacy of attaching government-sponsored cartels that led to the Foreign Trade Antitrust Improvements Act of 1982.

DR. STERN: David?

MR. YOFFIE: I just had a question of clarification. Is this piece of the Committee focusing on transnational cartels or all cartels? I thought that domestic cartels would have fit under the heading of trade and competition, and that here we were specifically looking at transnational --

MR. RILL: I think that's right, David.

MR. YOFFIE: -- where firms across different countries were working to conspire to raise prices.

MR. RILL: I think it's the global or the transnational conspiracy issue that's focused on in this segment of our work.

DR. STERN: Yeah, but we didn't have a chance to talk about everything we needed to this morning.

MS. FOX: But to clarify that, if French, South African, British and Canadians are conspiring to raise the price of uranium into the United States -- I mean this, to me, fits transnational --

MR. YOFFIE: That would fit the transnational.

MS. FOX: -- oh, okay, yeah.

MR. YOFFIE: I was just trying to separate something where --

DR. STERN: The recession cartels --

MR. YOFFIE: -- recession cartels in Japan --

DR. STERN: Right.

MR. YOFFIE: -- which may affect the United States but in most cases probably don't impact U.S. companies trying to do business in Japan, but wouldn't necessarily fit into what we're talking about here. That's why I was confused by where we were --

MR. RILL: I see where you're at. Right.

DR. STERN: Right. That's why --

MS. FOX: I think it could fit both places, and we shouldn't limit ourselves.

MR. YOFFIE: No, no, I agree.

DR. STERN: -- but we need to discuss that.

MR. YOFFIE: I would put the recession cartels under trade and competition because they really affect market access. Unless the Japanese firms happen to have a monopolistic position in some product like ceramics where a few Japanese firms dominate production and then raise prices for all consumers around the world.

MR. RILL: Well, that's, I mean, that's the nexus, to the extent that this cartel activity inhibits, if you will, the inbound freight into the U.S., I think that would be of a concern to the hard-core cartel area. So it's probably a bit of both.

MR. YOFFIE: A real borderline case. The DRAM case in 1987

would have been a borderline case as well. Though again, there you have problems where the U.S. government in fact encouraged certain kinds of action.

DR. STERN: Right.

MR. RILL: I mean, yeah, that's a bit of a tricky one because it's government involvement on both sides.

MR. YOFFIE: That's right.

MS. FOX: But that's state action.

DR. STERN: Well, it might be useful for the staff to take a look at the safeguard provisions/recession cartel provisions in different countries, and get us up-to-date. There have been changes for example in Japan on recession cartel. And what are the transnational effects of recession cartels, so we can know the extent to which this is a problem or not.

MR. YOFFIE: I think we need to sort those out, but I think the big problem here is in fact a problem of transnational cartels by largely private entities.

DR. STERN: Yeah.

MR. YOFFIE: So government-sanctioned activity is a piece of it but that's not really the big problem. The big problem is firms getting together in relatively narrow segments and figuring out ways to raise prices to consumers around the world.

I wanted to come back to something I suggested last February again. It may be more mercantile in its approach, but this is a collective goods. All consumers are benefiting from our action and one of our problems is that we

get a lot of free-riders at the edges and we don't have a way to get the foreign governments to work with us. It's not clear that they necessarily are going to get any of the benefits.

So I come back to the question of positive incentives, which is: Should we be looking at formal recommendations that would create bounties --

DR. STERN: Yeah, right.

MR. YOFFIE: -- potentially for foreign governments to identify firms and cases that might be useful for us and, second, some sort of formulas for sharing the penalties associated with the prosecution of these cases? This could be a powerful incentive if we raise the bounties to $100 million. If you start to say to certain governments around the world there are material benefits to you if we prosecute and win this case, and we have a formula for making that happen, we may create the incentives that will make this a little easier to execute.

MR. RILL: I was looking for something radical to say in this area, and you've done it. That's terrific. I don't mean that as anything other than a compliment. It's a fascinating area.

DR. STERN: Particularly in the developing countries if they're in a squeeze on, budgetary squeezes -- like Indonesia.

MR. YOFFIE: You might identify in developing companies a lot of people willing to -- cooperate with the bounty system or with a sharing of the penalty system.

DR. STERN: Interesting.

MS. FOX: I wonder if you could give South Africa enough

incentives to prosecute diamond cartels? South Africa has no interest because its big business and its producers gain so much. Would your incentives work in that area?

MR. YOFFIE: It may not work in South Africa but it might work in Zimbabwe or half a dozen other African countries which are major diamond producers and part of the central selling organization of DeBeers. In other words, it doesn't have to be in South Africa.

DR. STERN: Exactly, to break the cartel.

MR. YOFFIE: The whole point is that a cartel by definition is several players. We're not talking about monopoly positions. The way you break up cartels or any kind of oligopoly is by providing incentives to the peripheral players. And that's exactly what you'd be trying to do here.

DR. STERN. The weak underbelly. Do you want a percentage of that, for that idea?

MR. YOFFIE: Absolutely. I'll take my commission.

DR. STERN: Okay. Well, I think that's -- thank you. I see Gary taking notes.

MR. SPRATLING: It's an interesting idea. The idea of incentives is of course the -- it is the positive side of the forbearance. What we offer as an incentive for people who do come forward in terms of offering no-jail deals, very favorable dispositions and, perhaps most importantly to a lot of the individuals involved, immigration relief in connection with them coming forward which otherwise they wouldn't have -- so they can maintain their status as a freely

traveling international business person. And so it's those types of incentives that get people to come forward, because before we did those things, nobody came forward.

DR. STERN: Yeah. Well, this is an incentive for enforcement cooperation by authorities in other countries. Yeah, it's great.

MR. SPRATLING: I understand, and that's what I'm saying. It's analogous to that. And just because of the -- we have even looked at the aspect of providing a bounty reward system for domestic conspiracies. Because of the difficulties just within our own country in effectuating something like that, I can't imagine our Congress authorizing part of the collection of our fines going to some other country. I can't imagine that, but that doesn't mean you folks can't recommend it.

But I wonder if something more practical might be to talk about the benefits to them as a result -- if we had a way to share confidential information, which is one of the proposals that I know staff has recommended. That is, if there was a reciprocal basis for sharing confidential information so that the benefits of our investigation -- they make a referral to us, we do all the work. Just imagine if right now we had the ability to dump information in various countries who have antitrust sanctions in place. They quickly would get their own reward by riding on -- your coattail theory -- riding on our coattails of development and prosecution.

So there may be a way to achieve the incentive without the direct, and perhaps more difficult, approach of hanging a bounty on them.

MR. RILL: Go ahead. I want you to discourage us from taking a look at the direct approach.

(Laughter).

I think it's creative and I think it's done in other areas and I think we ought to look at it.

DR. STERN: Well, they're not mutually exclusive, what you're suggesting.

MR. RILL: The approach that Gary raises is one that is there now in the cooperation area and they should realize this is good for them because they'll get information too. I mean, we can go beyond that.

MR. SPRATLING: Well, the thought is there, but the implementation mechanism isn't there.

MR. RILL: Yeah, and that's what we're looking at for the international agreement benefit.

MS. JANOW: Could I ask a clarifying question? If you look at the countries that have criminal antitrust, it's an unusual mix. I mean, you have the U.S., Argentina, Canada, Mexico, South Korea, Austria, Brazil, France and Japan. So it's a kind of surprising mix. How important do you think that comparable criminal sanctions are in effecting enforcement efforts with respect to hard core conduct?

MR. SPRATLING: If I were a witness right now I would ask you to read the question back, because I think there are two different dimensions of it. Let me just split it up. My answer is different depending upon whether or not

you're talking about really achieving effective deterrence of cartel activity, versus assisting us in cooperation.

I do not believe thatcriminal penalties need to be available in foreign countries in order for countries to cooperate to a greater extent. Now obviously the availability of criminal penalties will effect the due process -- will effect the discovery that the country can conduct -- and if there were criminal penalties available, they would have stronger discovery provisions which would assist us to a greater extent in the investigation. But I don't think that's essential. I think there are steps besides that. I'm being careful here too because I don't want to violate the ground rule that Co-Chair Rill set up in terms of stifling creative thinking here. So --

(Laughter).

MR. RILL: Those are unilateral ground rules.

(Laughter).

MR. SPRATLING: So sure, if all countries in the world thought that antitrust violation were serious enough that they should be treated with criminal penalties, would that be tremendously helpful both in terms of deterring cartel conduct and in terms of making available the type of discovery in those countries that if shared with us would help? Sure, that's a perfect world; that's Utopia.

But short of that, I think that there are -- again discussing a range of possibilities here -- I think that even without countries going to the criminal sanctions, that there are bilateral agreements providing for the reciprocal

exchange of confidential information that would be tremendously helpful.

For example, the EU has had, in the past, information which probably would have been very significant in our investigations but there's an inability to share it. The EU has no criminal authority. They were still able to acquire the information, obtaining information as a result of what we call “dawn raids” and they call inspections.

MR. RILL: I think they call them dawn raids, too.

MR. SPRATLING: I used that expression at a DG-IV meeting recently, and they said, “Well that's okay between us, but please don't say that publicly.”

(Laughter).

DR. STERN: And so you didn't.

MR. SPRATLING: I'm aware that there are press here. But it's a term that is used colloquially. But in any event, I hope you understand my point there. Even a civil enforcement authority can develop information that if we had the ability to receive it and provide it on a reciprocal basis, would be very helpful.

MR. RILL: Gary, there's a related issue on the paucity of criminal statutes overseas, not exactly the same, but where a country doesn't have criminal penalties for competition violations for even hard core violations, the constituents of that country are concerned that any information going to a country like the United States that has a very aggressive criminal enforcement program, any information say, related to a merger is somehow going to filter from another Deputy to you and then will be used aggressively by you to bring what the

constituent of the other country would consider to be a draconian criminal prosecution. I think that stifles some sharing of information.

Now, there are two ways to address that, I suppose. One is to recommend to the country with the concerned constituents -- let's call it, the country, the UK -- that they institute a criminal antitrust law, and I think that probably would be about as useful as the Children's Crusade.

The other is for the Department to generate some level of confidence that the kind of information requested for one purpose isn't used to produce criminal investigations and prosecutions, subject to whatever exceptions there may be. Again, this is something that you and I talked about, but I think it's a worthwhile subject.

MR. SPRATLING: And I think that's something that's entirely workable. It's in the discussion draft for today. The statement I'm about to make is in the discussion draft and I can't immediately put my finger on it. But, to date, none of our international cartel prosecutions have been initiated as a result of information produced in connection with a merger review. None. And I know that there's a perception that there's a great danger in that, that the type of information produced for purpose of merger review will result in cartel prosecutions but, to date, not one of ours is the result of that.

DR. STERN: It's my impression, actually, from talking with some practitioners, particularly in Europe -- we had these conversations, I think, only yesterday -- that that is a diminishing concern based on, just as you said, on the experience that it has not happened. And there's been so much more merger

cooperation between the authorities. So that may be more of a red herring.

MR. RILL: I wish we could kill the red herring.

DR. STERN: Exactly. And so that's why --

MR. SPRATLING: One of the reasons why it probably remains an issue is that there are examples domestically where the reverse is the case. We have engaged in very large prosecutions in this country that were developed as a result of, where we got the leads as a result of information in merger reviews. But we have not done this in international --

DR. STERN: And would you suggest any kind of tying of our hands in order to -- although I think it is increasingly a red herring.

MS. VALENTINE: Gary, if you could actually make the commitment that in no way would you ever use any, let's say, 4(c) information that was provided in a transnational merger, that sort of foreign concern and fear and vague apprehension is much easier to cabin-in in many ways in the criminal area, where it's just you as the prosecutor. In the other area, which is the spillover to the private actions, we can say all we want -- that we never, never, never give information, you know, to third parties; that it never leaks -- and people will still think that it does. But, you know, the Wall Street Journal is there and the private attorneys, you know, plaintiffs' lawyers are going to pick it up.

Actually yours -- non-use of certain information in the criminal area -- I think that would be real simple to cabin-in.

DR. STERN: Well, Congress would feel that that's a good idea. It's a matter of tying your hands. So it's a policy issue.

MR. SPRATLING: I assume, Debra, that what you're talking about is tying our hands with respect to information that came from a foreign jurisdiction.

MS. VALENTINE: Right. Right.

MR. SPRATLING: Because a transnational merger -- if we had access to the information anyway and a U.S. company was involved in that --

MS. VALENTINE: No, I'm not trying to over-tie your hands.

DR. STERN: I think it's something that --

MS. JANOW: Let me just underscore something. Why would this be in the U.S. interest?

MS. VALENTINE: Well, because others would then agree to share information with us because they wouldn't have to fear that if their information were given to us, we would immediately hand it over to Gary so he could prosecute them criminally.

MS. JANOW: Yeah, that's what I'm just trying to underscore. Because if it is the case, even though these cases haven't emerged in the transnational context, the question I'm raising is: Would we be tying our hands inappropriately?

MS. VALENTINE: Well, we could get it independently.

DR. STERN: Okay. I think we've seen both sides of that argument, which I think is clearly important. Are there other areas we want to pursue?

MS. FOX: Merit, you had mentioned this to me some time ago.

There are a number of blocking statutes. Blocking statutes are meant to frustrate discovery. When they are set into motion it's a race to the bottom. Of course it would be nice not to have blocking statutes so I was thinking: Should we be thinking about incentives to get our trading partners to lift their blocking statutes or not to apply their blocking statutes? In fact, the more we build trust among our agencies, and the more we agree on what's appropriately extraterritorial and impermissibly extraterritorial, the more we might hope to lift the pressures that cause blocking statutes to be invoked.

DR. STERN: That's a very good point. You just don't have the concern and, therefore, you don't have the need and you've built up this whole level of trust based on experience. Is that something that's for negotiation? Is that something that should be on a list of negotiating matters in the cartel enforcement area?

MS. FOX: I would have to think further about it but, at the least, blocking statutes should be on a list of negative measures, because they’re nationalistic, race-to-the-bottom type law. And I think there should be an objective: In the middle or long run, we should try to get consensus within the world system that would dissipate the need for nationalistic action. So right now it's just a list. I don't know.

DR. STERN: Well, I ask this again for the staff to think about more after this meeting: Can we design a model treaty in international competition law, in the internationalization of competition law? What are the various things which we would want to see negotiated?

MS. FOX: Well, as a matter of fact, perhaps once nations have a positive comity agreement which says they are going to assist one another in discovery, it becomes much more inappropriate for them to have laws that say: But when we want to, we're going to block you from discovery.

DR. STERN: If you're going to do one thing, you need to adjust the other.

MS. FOX: Yes.

DR. STERN: And we've only seen the action on the positive comity direction.

MS. VALENTINE: So in a sense, Eleanor, wouldn't almost any cooperation agreement or positive agreement be an implicit override of a blocking statute, to some extent?

MS. FOX: It might be. It should be. But for government actions only, not for private actions.

MS. VALENTINE: That's fair.

MS. FOX: And it should be, but it may not be.

MS. JANOW: And it would only therefore apply in circumstances where one invokes positive comity, would it not?

MR. RILL: It seems to me that this is an area that transcends the cartel enforcement area and gets into the trade and competition area as we were talking about this morning. One of the objects -- and it applies to both areas-- one of the objects of the effort we're looking at now is: What are the practical/ procedural -- and they're not always the same -- impediments to cooperation in

enforcement efforts against foreign anticompetitive conduct?

MS. FOX: Right. And, we have to ask: What are the causes of resistance to cooperation? The blocking statutes stem from perceived inappropriate extraterritoriality.

MR. RILL: One of the concerns that is continually raised is that what, eight countries plus the United States have criminal penalties. I know of only one that has treble damage sanctions. I leave that implication on the table.

DR. STERN: Well, some things we may be able to propose -- I mean, there are going to be sets of recommendations as well as identifying impediments. So that's why I was suggesting that we ought to take a look at all three areas in the scope of this study and see where there might be proposed negotiation initiatives.

MS. FOX: Right. And picking up what Jim just left on the table, we must have in mind that there are some things that we could offer to get rid of blocking statutes but the cost would be too high. For example, if we were to dilute our treble damage penalties against hard core cartels, that would be counter-productive. We may choose not to sacrifice important tools of deterrence, even though the sacrifice could dissipate a blocking effort.

MR. RILL: We've had some papers that have been prepared by Dan Rubinfeld, previous to his current incarnation, looking at the extent to which treble damage -- or multiple damage penalties in this instance -- in the antitrust area are symbolic of over-enforcement or a result of over-enforcement.

I think the conclusion is they are not, but I think we should

circulate those papers to the Committee and you all take a look at it and give us your own thoughts. We can recommend anything, including de-trebling. I'm not sure we're prepared to do that, but at least we can propose anything that we find to be desirable.

DR. STERN: Merit, are there areas that you and the staff feel needed delving-in deeper for greater clarification, that are on your wish list?

MS. JANOW: No. I think we've covered a broad waterfront. I myself very much appreciate this point about thinking of incentives and those things that we could do that would be attractive to foreign jurisdictions. I think the statistics are marvelous. Thank you Gary, very much for that. I think a little more difficult, though, is for us to assess the extent to which blocking and clawback statutes, things that are clearly objective impediments to effective enforcement, are surmountable. That's not a quantitative objection, it's a qualitative one. And my perception is that although those are real obstacles, they can often be surmounted. Maybe, Gary, if you just offered us, you know, a generalized comment as to how serious an impediment those are. Clearly in a more perfect world their elimination would be useful, but as we try and think about what would be the price, we need to also assess the consequence of their existence.

MR. SPRATLING: Well, they remain very serious impediments. I was very appreciative of Jim's remarks when he said it's not hard to conclude that international cartels are a problem and I'm glad that our statistics at least show that. But if any of you sat in my chair for just a short time, I don't mean

here, I mean at the Department of Justice -- sat in my chair for just a short time, you would have a perception of a problem that is so much greater than anything that we can provide you statistically.

The reason for that is one of the things that we just focused on recently as a measure of the seriousness of the problem, that we shared with Jim and Paula recently, is that in approximately one half of the matters that we investigate a conspirator, in an attempt to obtain leniency from us on the sentence that it will receive, provides us evidence of a cartel in a completely different industry.

Now, when you couple that along with the results of our amnesty program, which is where most of our international cartel cases are coming from, those are also situations where someone is coming in and telling us about a cartel that we don't otherwise know about. So, you take in combination those two facts, and you know that we are just catching the tip of the iceberg here. But we're catching it in situations where someone is cooperating. I mean, they are trying, they are provided amnesty, and therefore they're making witnesses available that we otherwise wouldn't have access to. They are making documents available that otherwise wouldn't be in our jurisdiction.

In that situation or in the plea agreement situation where the person is seeking leniency and a better deal, they're doing the same thing. And so it is the attempt to get the deal and the incentives that we've set up -- which are new incentives. One of the reasons it wasn't happening in 1991 was because we didn't have these incentives, the incentives we've set up for people to come

forward and to make these deals as they're coming forward and they -- and because of their cooperation we circumvent the traditional obstacles.

But if we're going at a matter -- We've got some we're going at, we have got a grand jury investigation that's been going for more than three years; we're nearing the end of the statute of limitations on an international conspiracy that is some of the most egregious conduct you can imagine -- affects billions of dollars -- and we can't break it. We can't break through it because we can't get the discovery. We can't get hold of witnesses and it's a lack of cooperation of one country, it's a blocking statute of another country and so on. We can't get to it.

And so they represent very real obstacles. And if we didn't face some of these obstacles in cases, Jim said -- I tried to write down what Jim said towards the end. He said whatever impediments exist, they have not stood in the way of strong enforcement by the Antitrust Division. Well, this -- without the impediments what we have been doing would look like child's play -- we would really be out there. I mean, I said it in another context once when a member of the defense bar said something to the effect that you guys are just knocking the cover off the ball. Well, it may appear that way. But in another sense, we're not even getting the ball out of the infield.

MR. RILL: You're not up to 62 homers yet?

MR. SPRATLING: No, we're not. We're not. And we're in the early innings of a game. And so anything that the Committee can do, in terms of the recommendations that have been suggested for consideration by staff, in terms of reciprocal agreements and encouraging bilateral agreements and encouraging

reporting by countries -- whatever incentives we can offer -- and encouraging reporting by foreign governments of international cartels that affect U.S. commerce, or assistance in our investigation, any of those things will dramatically improve our international enforcement effort and will really help American businesses and consumers.

DR. STERN: Okay, Gary. I feel like we should get out the flag and salute it. That was very, very forceful and puts the whole discussion in perspective.

MS. VALENTINE: You want evidence and cooperation from a country and that country might either have an interest in entry into an IAEAA agreement, even if they're just going to be getting civil evidence; let's say they don't have criminal powers. Or they might be interested in an MLAT for other reasons: tax or securities reasons. I mean, is there any way of really pushing countries that might want agreements like that with us -- maybe not even for the reasons that you want them -- that we could work with in terms of trying to crack open some of the countries?

MR. SPRATLING: I don't know, and I would turn to Chuck Stark, who is the expert in this area and who has worked on developing so many of these agreements, as to what incentives -- if he's still here.

DR. STERN: Let's take a break now. We're going to resume at 2:00 for the discussion on Multijurisdictional Merger Issues to be led by Tom Donilon. If he gets back before 2:00, I suggest we start as soon as we can. So don't go too far away. Thank you very, very much. Thank you, Gary.

MR. SPRATLING: Oh, you're welcome. Thank you.

(Recess.)

DR. STERN. That is the sound of applause, Tom has arrived. Okay. We're ready to resume. We still have our quorum. I'm afraid we may start to lose people.

Thank you so much, Tom, for being willing to begin discussion of the third and last leg of this three legged stool. And we've also got Doug Melamed here and Donna Patterson. And Chuck has decided to actually show his face at the table. So we're ready to roll. We've got the Justice Department and the FTC ready to intervene and comment. But Tom Donilon, as our stalwart member, has volunteered to come forward and open up the discussion on multijurisdictional merger issues.

MR. DONILON: Thank you. I apologize for being late. I am glad to see our colleagues from the Justice Department and Federal Trade Commission here. I think there's a lot of information we need to explore as we start on this to make sure we're not reinventing the wheel or are not totally aware of everything that's actually being done in the area of cooperation and merger review.

A couple of opening points. First of all, there's a lot of very good existing information on this. Eleanor has done a very good paper, which has been circulated to the Committee. The ABA several years ago had a Special Committee which did a lot of good work on these issues and Merit I know is following up with the ABA with additional projects here. There have been a

couple of good EU explorations of these issues and I think they provide a good resource for us in terms of issue spotting.

As I see it, and I'll just try to kick off the discussion, Paula, as I see it, the question presented would be this: At a time of unprecedented international merger activity, and merger activity in general -- mergers, acquisitions and joint ventures in general -- and the resulting multijurisdictional review that takes place, how can the United States government best pursue three goals? One, how to reduce the transaction costs involved in merger review for United States, United States companies. Two, how can the United States best reduce the friction that might come about between jurisdictions engaging in multijurisdictional review. And three, how best can the United States government promote substantive antitrust law convergence, via unilateral, multilateral and bilateral efforts or actions.

The setting, I think, is important to understand as well before we get into some of the details as to why we find ourselves in this situation. And it really has two or three elements. One is globalization. The force of technology and trade barriers coming down and market economies on the rise, at least until the last few months, around the world, has produced unprecedented levels of economic activity generally. And this economic activity obviously manifests itself in a lot of different ways including in companies' ability to organize themselves on a global basis in the most efficient way that they can.

The level of economic activity, the level of merger activity is seen in the statistics in 1997. There were 10,700 mergers. The value of which was 50

percent over the value in 1996. According to a recent speech by Bill Baer, currently half of the mergers analyzed by the FTC have some international component to them. Many involve interaction between the competition authorities of this country and the competition authority of other countries.

When you combine the forces behind this globalization and increased economic activity with another fact, you have the problem that we're trying to address. And that factor is something that Barry Hawk went over with us, he calls the problem the sheer volume of competition regulation, and Eleanor has identified that in her recent paper as well. By the way, much of this is encouraged by the United States. And of course when you have increased economic activity, and an increase in the sheer volume of merger regulation, you have a lot more multijurisdictional merger review.

Today the staff reports indicate that some 60 jurisdictions maintain some level of merger review process, whether it's in the form of mandatory prenotification or voluntary notification or post merger review. And with that comes the need for companies and antitrust counsel to engage in, literally in some cases, global review of merger notification requirements. It could involve in a not atypical merger of a large international company looking at a couple of dozen jurisdictions as to requirements and actually having to file some sort of form in 7-10-12 jurisdictions. That's not an atypical case today faced by United States companies and their antitrust counsel.

Of course, with this comes the pitfalls that we're trying to address, the cost, increased cost, potential pitfalls to closing, and obviously in some cases,

outright conflict. Of course the best example of that is Boeing. Although, as I'll discuss in a minute, my own personal view and this view has been formed largely by an article by Debra. The conflict chances are actually overrated I think. I think in most cases these things work quite well. But we can do better.

Just to open it up, I would see the issues in four baskets. The first basket is, I think, we can generally call harmonization. The paper that is presented by the staff indicates this is the first basket of issues. And this includes the obvious things, but most importantly, harmonization of forms and procedures and information requests.

You have lurking in there, as I said, forms with the two principal types that companies face, the United States form and the EC form. One quite front loaded but with a less of a burden as you go along in investigation. The EU, the EC form. One not front loaded at all but a process that could become quite burdensome at the second phase of the United States approach. But the bottom line of course is that the forms are quite different and the requirements are quite different and is there a way to form harmonization?

That's one of the things that we want to talk to our government representatives about, as to what the prospects are for that, what the difficulties would be, hurdles and barriers to doing that. I'm not sure exactly -- from a personal perspective -- what the cost of that is to the United States companies. But it would seem to make sense that if you can make progress in terms of reducing transaction cost, you should do so. Then there is the issue of thresholds. When do you have to file or what are the filing requirements. That's a

complicated issue here in the United States because of the relationship between thresholds and budgets at the Federal Trade Commission.

Third of course is timing. There are various time frames that are set forth in statutes around the world. Some of them are quite precise. Some of them are so imprecise that you're not really sure if you can close or not close on a transaction. But again, I'm on the key countries with competition laws. There are different time frames and is it possible to bring them into harmony? And last I think here would be information requested in the forms; and again, that's a point to discuss in the general topic of harmonization. I think that's the first basket.

The second basket of issues, I think, would come under the topic of cooperation among merger review entities. Notice, dialogue, relief coordination, deference, comity, and one of the most difficult issues, information sharing. It sounds like a fairly uncomplicated thing at the front end, that two jurisdictions will be reviewing the same transaction that you would be able to share information. Of course that's not the case with respect to confidential information absent a waiver and the two most highly developed -- in the jurisdiction with the most highly developed relationship, the United States and the EC, there are still quite strict limitations on the exchange of information, and with good reason in some cases.

Why not have a free flow of information between entities? There are issues lurking there of privileges which are treated differently in different jurisdictions. And how do you justify those in an information exchange regime? It's obviously clearly one that we need to look at.

I, for one, think the cooperation on an informal basis spurred on by the formal arrangements that are in place, the EC/US arrangements that Jim Rill negotiated and put in place in 1991, under those regimes, my experience and practice has been there's quite a bit of informal cooperation between the EC and the United States. Joel Klein, this morning in his opening remarks, mentioned a transaction that Jim and I are quite familiar with, the WorldCom/MCI transaction. I think there was quite a bit of useful interaction between the United States and the EC, and they ended up endorsing the same remedy in generally the same time frame. That is the second basket.

The third basket is dispute resolution when the jurisdictions come to different conclusions about the review of the same merger. And the fourth basket is convergence on substance. My own personal bias, if I can take the opportunity to throw all of my own personal biases out in this presentation, would be this: That actual cooperation and procedural convergence ultimately leads to substantive convergence and I think that's the case between the EC and the United States that there has been a convergence in substantive analysis.

With that, Paula, that's how I see the general issues. I'm not sure that's totally comprehensive. I certainly haven't tried to unpack each of those. I think it's a reasonable list to start with.

DR. STERN: I totally agree. It was very, very helpful. Comments? Reactions to --

MR. DUNLOP: Can I make a suggestion? One thing I would like to hear, from our government representatives, is what is the current degree of

cooperation between the United States and other jurisdictions and their judgment? Is it formal enough? Does it happen when it needs to happen? And second, are there efforts under way within the government to think about reduced transaction costs on the first basket of issues, the harmonization basket?

DR. STERN: I agree. And the other thing I would like to put on the table is a thought that came up in discussions yesterday, I believe it was, that Jim and I had the opportunity to participate in which I guess comes under your third basket of substantive convergence. That is the suggestion that one other form of bridging, in addition to just getting procedural cooperation, which then should lead to substantive convergence, is on the question and definition of relevant market. How much that can help move into levels of agreement, between the U.S. and the EU at least, toward some ultimate convergence?

MR. DONILON: I left out one thing, which is, I indicated that I thought, in the last point here, that cooperation, procedural cooperation, working together would ultimately lead, I think, to substantive convergence. But that's between highly developed competition authorities. And one thing I haven't talked about, which Eleanor can talk about in some length, it is one of the themes in her paper, is the source for competition laws for developing countries. Where they're looking and how we can try to get ahead of the curve on that.

DR. STERN: So we can ask the government folks, too, what they're doing in terms of proselytizing, and whether they are contributing to the problem by proliferating more of these reviews or contributing to the solution through, perhaps, some effort to come up with a middle ground that would work

for the entire world, including taking into account the EU model that you quickly spelled out for us, at least as far as the forms are concerned.

So Doug, if you and Chuck or Donna want to -- and Debra. That's right. Debra's over here. That's right. You're on the right side of the table. Please jump in. It looks like you're ready to jump.

MR. MELAMED: Let me if I can go, before answering some of these questions, comment a little bit on what Tom said at the outset with respect to the goals. Although I think that his analysis is very useful, I'm not sure that he got the goals in exactly the way I would have put them. The three goals, as I understand it, were reducing transaction costs, reducing international friction and promoting substantive convergence. I would have thought that an additional goal, and a very important one, is promoting the sound resolution of merger issues -- sound antitrust policy.

You could look at that as a fourth goal, or I suppose you could wrap it in to the other three. You could restate one, for example, not to mean just reducing transaction costs, but reducing enforcement costs, and you can define enforcement costs to be the sum of transaction costs and the costs of enforcement errors, and enforcement errors would include both false positives, that is to say challenging a merger that really wasn't anticompetitive, and false negatives, letting a merger go through when you should have challenged it.

Another way, or perhaps an additional way, to take account of sound policy as a goal would be to revise the third of Tom’s goals so that it didn't read promote substantive convergence, but rather read promote the widespread

adoption and enforcement of sound antitrust policies. I think, in a way, that's the root of the problem, in part because it means that differences between competition policies are not just political questions up for negotiation and compromise and in part because it may be that what is sound competition policy for developed economies or large economies, such as the United States, would not be sound competition policy for an emerging economy or an economy of a different culture.

To the extent that, for either reasons of differences about what is sound competition policy or for other reasons, there are substantive differences among nations about what they think they ought to be doing in the area of competition policy, we have a potential for conflict. That, I think, is the fundamental reason that we are here today.

A couple of thoughts in response to Paula's questions, and I'll let my colleagues elaborate. My sense is that cooperation among agencies, particularly with our sophisticated counterparts in Europe, and in particular in Canada, is really very effective, and there are good working relationships, both interpersonal relationships between the staffs and substantively among them.

It is also my sense that, at the professional staff level, there are fewer differences about what is sound competition policy and about how to assess any particular merger, than would appear if you were to ask the agencies to negotiate a common code or even a common premerger notification form. When you put the questions in the abstract, you isolate differences in national style and perhaps differences in substantive policies. But when you get down to the

concrete, and ask what's really the problem with a particular merger and how do we solve it, my impression is that, in the day to day work of the agencies, there is a high degree of good will and procedural cooperation, just as Tom surmised, and that that good will and cooperation leads to a kind of substantive agreement at least with respect to the application of competition principles to the particular case at hand. There is therefore reason to believe that more and more cooperation on specific cases will lead to some kind of de facto convergence among the different competition authorities. My colleagues may want to elaborate.

MS. VALENTINE: I fully, fully, support everything that Doug said, and I guess you had one other part of that, which was: Is the cooperation different, shall we say, with more sophisticated, experienced authorities than our work with less experienced authorities. For the most part, I guess all of it is very fact based, practical, cooperation. With the EC we can talk like brothers and sisters and basically can talk about things like market structure and barriers to entry and even about types of market definitions in industries; that dialogue seems to automatically click. With the fair number of South American countries, they're asking absolutely the right questions, but it will be much more, for example, can you get me a case that explains dominance or monopolization in a way that is useful given these facts, or what can you tell me about essential facilities in this area.

They're not questions like: How do you deal with small retail stores from an employment perspective? I mean, they're really very serious competition based issues. When we get into your tougher questions about what

do you do, I guess one question is how much you all are willing to take on and push. We obviously thought hard at the OECD about whether we can agree on some sort of common form, and immediately you run into a problem with committed national interests. There is a huge constituency here that believes in the HSR process and believes in the HSR form as it is, and even believes in SIC codes to determine whether there are overlaps in proposed mergers.

There's obviously a strong EC commitment to its form, and a lot of this is in legislation that we can't just change overnight. So, in a sense, it seems to me that you and/or businesses have to think about what really matters most.

One of the things that I was struck by when you first started thinking about this was the thresholds. I think the one thing that Barry Hawk said that I thought was brilliant was: You know what my hugest transaction cost is -- the thing that takes me the longest to figure out -- simply whether I should file or not. That seems to be something that we, in fact, ought to be able to do something about.

Thresholds that are vague or unclear aren't particularly useful for us or any country, and they're certainly not useful for you. And I was actually surprised in reading through your materials, Merit, to see how broad and vague, particularly the eastern European standards were, Poland, Romania.

What I wonder about there is whether in fact the EC can't exert some more persuasion or pressure on these countries. Because obviously they want to join the EC, and they thus far have set out to adopt EC-like laws. There's no particular reason to make thresholds so low that you capture every merger that

ever occurs on the face of the globe. But the trouble is you always love what you've got. We can't say that Congress hasn't asked us to work hard at our thresholds, and are they keeping up with inflation and things like that. Yet we still are finding problematic transactions at those lower thresholds. One thing that I'm finding sort of interesting is in tricky areas like software and IP where you have intellectual property assets that may not yet have much value, and yet the combination of two firms with IP with little value now, but the whole market tomorrow, can be a huge problem. So I'm not sure I'm going to say our thresholds should go away, but we should at least seek clarity in thresholds and thresholds that are related to the impact of a transaction on that country. I guess -- this is no offense to Eleanor's great one world jurisdiction, but another interesting thing about your comments throughout was, in fact, you did seem to be always asking why are these countries looking at the merger and is there an effect on them? And I did have a sense that there was almost a concession that, in fact, national competition agencies each do have a right to be looking at mergers in and affecting our country and nobody was saying we should hand over Boeing and McDonnell Douglas to a world merger review authority to pull a straw out and decide whether Boeing or Airbus was going to win.

So I guess I would pick a couple things to focus on, like thresholds. Time frames I'm sure are also very, very important for the business side. That, though, would take a real push from the business people precisely because our time frames are set in legislation and the EC has a somewhat different system in hard law as well. So I'd pick my battles, I guess, in terms of

how to do this. Because it's not easy.

MS. PATTERSON: I basically agree with Debra that those are basically the two items that would make the most sense. At least, from my experience in private practice. It is whether you have to file, and then lining up all the time frames that are the tricky problems. Just filling out a form may be a little onerous, but that's really the least of it.

MR. STARK: The only thing I would add to that, and I think it's implicit in what's already been said, is just to note: We've had discussions in the OECD as you know and occasionally bilaterally about the issue of bringing more consistency into the forms and filing procedures in the U.S. and other jurisdictions. And one thing that always becomes clear in these discussions is that the choices that each country makes in terms of what it asks on its form and the threshold it chooses are all interwoven with the other aspect of the system. It's not an easy matter, for example, simply to choose between U.S. filing forms and EC filing forms without also affecting other choices. For example, the level of thresholds in the U.S. are very low relative to EC thresholds and go hand in hand with our choice of having a very low -- small amount of information in our initial filing and the possibility of more information later. The EC, by contrast, holds to a relatively small number of transactions, and so the relative burden of asking for more information up front is in the aggregate smaller, and so many of these considerations are interwoven, and also go even more deeply than that into one's philosophy of merger enforcement; the degree of interventionism that one chooses, the nature and manner of intervention and so forth.

This is not, I think, intended to be inconsistent with anything that's been said, but I think there is this other dimension that needs to be taken into account in looking for solutions.

MS. VALENTINE: But I think there's still room for them to accomplish something. Even-- I mean, obviously we did not adopt a federal system. Thankfully Tom does not have to make a decision between filing with 10 states or the feds. We have the feds. And we've got an efficient federal-state protocol. And the EC did adopt a very different system there which is partly why the EC's thresholds are high, and you've got member states running around in the ground floors cleaning up the smaller pieces. You still could, at least, ask or hope that countries would have clear thresholds and thresholds that are related to the impact of any transaction on them. You know, regardless of whether you set up at a higher or lower threshold, or a national or federalist sort of system.

MR. RILL: I have a couple of observations if I may. One, the problem is going to get more difficult, not easier, with -- I forget Barry's words-- but the proliferation of merger control, notification forms, and I don't think we should give up on the notion of trying to deal with Tom's first basket.

In the cooperation area, I'm a little perplexed. I heard when I was at DOJ, I continue to hear some concern that the ability to share information is limited by confidentiality statutes, protections here and else where. The IAEAA does not apply to mergers, or at least it doesn't apply to Hart-Scott materials. What I'm hearing today is that that's not a real problem, and that cooperation can be perfectly effective without any modification of confidentiality protections here,

or for that matter, elsewhere.

MS. PATTERSON: Assuming the merging parties want there to be cooperation. That's something that parties gain.

MR. RILL: What I'm hearing is -- that's an important part. If there's a waiver of confidentiality protections, then there's not a problem because it's waived. But I'm hearing that it's not a problem even where it hasn't been waived. If that's the case, then we can get that off our agenda and go on to think about other things. Before we do that, it would be very interesting from both Debra's jurisdiction and Chuck's to know precisely what is being shared now. I mean, obviously not in specific cases, but what information do the agencies feel that they can share now with our foreign counterparts, so that this cooperation can go as smoothly as it is, without our needing to tamper with the system or recommend tampering with the system to break through confidentiality restrictions by suggesting a modification to the IAEAA or whatever.

MR. STARK: There are different modalities of cooperation. What may be an adequate level of cooperation for one transaction, may just not do the job in another transaction. The recent WorldCom/MCI transaction that we've already talked about --

MR. RILL: That was a waiver.

MR. STARK: -- Precisely right. Because of that waiver, we were able to engage in close coordination with DG-IV. It would have been wholly impossible in the absence of that waiver. The cooperation in that case would have been considerably different and more limited, and I think that would be less

effective had we been unable to operate as closely together as we did because we weren't inhibited in sharing information that the companies had provided.

MR. RILL: What I'm hearing you and Donna say is that absent a waiver it is a real problem.

MR. STARK: Absent a waiver, we certainly could not cooperate as closely as some cases would seem to call for.

MS. VALENTINE: I can try to give some examples at a slightly less abstract level. What we share is what I might call agency confidential information, and what we don't share is obviously company confidential information. There are times when you can talk somewhat abstractly about product markets or geographic markets, and if you both say, gee it looks like in this particular transaction the product markets would logically be X, and you both come up with the same thing without seeing or sharing any of the confidential data on which you're basing it, you're fine. If you end up with different approaches and interpretations, and there's no sharing of confidential information, you're totally stuck. You don't even know where to go with each other for the next step. That's one place where you sort of get bogged down. So as long as you have very like minded authorities thinking along similar lines, even without being able to share confidential information, it occasionally can work by sort of perfect chance, everyone's thinking alike. But there are many things that we may not know about their markets, and they don't know about our markets that we can't share, and we start coming up with different approaches, and we can't figure out why the other one is thinking about it that way.

The second problem is in the remedial area. There we often get to a point where it's pretty clear that one or the other of us wants a slightly different remedy, but without being able to truly share confidential information, we can't come up with perhaps the remedy that would work for both authorities and in fact be best for the parties and not impose conflicting obligations on them. So there are times when we've come up with beautiful remedies that satisfy everybody's concerns because we have had the information and there's been a waiver. And there have been times when the parties will go through the whole remedial process with the EC, maybe hoping that they'll have to give less there, even though they knew that we had a bigger problem. They'll come to us, and they'll find out that yes in fact they have to give up more and then they have to go back to the EC and renegotiate the whole thing.

MR. RILL: But just a quick follow-up on that, waivers are obviously very important. Without being company specific, do you find that there are more difficulties getting a waiver from a company located -- domiciled overseas than there is from a United States company? The reason I ask is that in some conversations I had with some in-house counsel and others in the context of ICC, U.S. Council and other meetings, there's a real reluctance to encourage information sharing with the United States; suspicion that it will get to the states; suspicion that it will get to other private treble damage litigants; suspicion that it will somehow be leaked; none of which, in my experience, is justified, but nonetheless is there. And I wonder how much of a practical problem it is to get waivers from companies located overseas.

MR. YOFFIE: Before we get to that, John and I are going to have to leave in a second. I wanted to throw out one other piece that Debra raised just to keep on the agenda. If we were thinking about the problems of mergers going forward for the next 10 years, the issue of compressing the time frame becomes more of an issue rather than less of an issue. In high-technology, particularly electronics, computers and software, the delays that are experienced in today's reviews can be deadly to the mergers themselves. If we start to extend those to multinational reviews, you potentially destroy their value. I think that's much less of an issue up to now because there haven't been that many significant electronic-based mergers, but that is likely to become more significant just because they are becoming larger in number and more important in the economy. Therefore compression of time frames becomes far more important going forward. I have seen through my position as a board member of Intel, that the Hart-Scott-Rodino process has led to significant destruction of value. Just that six or nine month process, which you would think would have been less, can lead to huge destruction of value because of the inability of companies to do what they wanted and the loss of business that happened in the interim.

DR. STERN: To add to that, we were hearing yesterday from one of the counsel involved in a number of mergers the point that there's a chilling effect on R&D, on melding cultures together, particularly in high-tech areas where the R&D scientists are important and they don't really know where they're going to be doing their science because physically they may have to move. These costs are hard to quantify, but as you said, they can destroy a great deal of the

value of a merger. And I think it's easier for business people to understand that problem than it may be for those who are busy in the trenches trying to fill out the forms and cross all the Ts and perhaps even prepare for a possible appeal of a regulatory decision.

MR. RILL: Former commissioner Terry Calvani, two of his former executive assistants are in the room, used to say that he would require every new lawyer and economist at the Federal Trade Commission and the Department of Justice to comply with a second request and to fill out a Hart-Scott form.

MS. VALENTINE: Just maybe one defense there for the agencies: Often the deals would be two years in the formation. Often there would be information requested that's not given. Often there will be suggestions for modifying proposed divestitures that are struggled with for a year. It happens on both sides and both sides are able to increase the speed of the process I'm sure.

MR. MELAMED: One thought from my perspective. I think this is a very important topic because we often hear from the parties that we're going to kill the deal. And I assume that is sometimes true. But it's very hard, from my perspective at least, to get our arms around it and to know when it's true and how much of it is true and so on. It might be, I think, very useful for this Committee to draw on academic literature or whatever and to be more precise about the magnitude of this effect, the circumstances in which it does or doesn't exist and so on.

DR. STERN: You're right. And that's part of our questionnaire

that we've sent out, please give us some examples and perhaps David you ought to give us -- well you've already put it on the record what you've just said, but if there's more elaboration based upon your experience --

MS. PATTERSON: I think those concerns are true in every industry not just high-tech industries.

MR. YOFFIE: There's a special problem in industries with very short life cycles. If the process of review goes through the entire cycle of a product, then a variety of things happen during that merger process: very highly qualified people leave, deals don't get completed, slippages can take place, and in some cases, in a matter of weeks or months. And if that happens, then you destroy value, which is not as true in the automobile industry or service industries or industries in which the cycles themselves are inherently slower and are much less contingent upon small events.

MR. RILL: I think Doug is right that we need to find a way to get our hands around it because I think it's a very thoughtful point. It's a good one.

MR. YOFFIE: It's a new problem. High-tech mergers have not been around -- there haven't been a lot of high-tech mergers that have been subject to these kinds of reviews in the past.

MR. MELAMED: Is this really different? Is it qualitatively different, from a public policy point of view, from the more old-fashioned problem that intervening changes in financial markets can crater a deal?

MR. RILL: I think it's more like a problem that quite often affects the acquired company, in a variety of industries which are particularly susceptible

to employee mobility and public reaction to a merger. I think of retailing, for example, where a delay after public announcement can cause a deterioration of the acquired assets.

MS. PATTERSON: And make it really not at all what the acquiring company wanted.

MS. VALENTINE: His problem is somewhat inherent to any product with a six month life cycle.

DR. STERN: It's additional. You can get the cratering of the stock market and the financial changes. And you can also get the customer's wondering if the company is still going to be around and be a reliable shipper and supplier. But then it's compounded when the product life is only six months old.

MR. STARK: I wonder whether the value to society is different than the case David described, in which the value is lost because some kinds --

MR. RILL: The whole issue is the question of the impact of delay of agency review to the extent that that has a negative effect.

MR. YOFFIE: Again, it's hard to know. In some cases there may be a loss of innovation, for example, because you acquire a work force that is no longer able to work collectively on the problem. That is a very hard quantifier.

DR. STERN: Has there ever been an attempt to measure?

MR. YOFFIE: No. We might ask Mike Scherer when he's here in November. If anyone had tried to do it, Mike would have been the one, I suspect.

MR. DUNLOP: Give him a ring on Monday.

MR. YOFFIE: Well, John and I actually have to catch a plane

back to Boston.

DR. STERN: Well thank you so much for your participation.

MR. RILL: I thought I had a question pending. I forgot what it was. Does anybody remember?

MR. STARK: You asked if there was a difference in foreign firms versus United States firms regarding waiver requests. I can't speak to the FTC's experience. I don't think ours is extensive enough to give you a reliable answer. Of the firms I can think of that have been willing to waive in those situations, the majority have been U.S. firms; the foreign firms I can think of are firms that are used to dealing on a global basis and have a history of dealing with the U.S. as well as foreign authorities. So their perspective may not have been a wholly foreign perspective in that sense. At the same time, though, I can't think off hand of any specific situations in which waiver requests have been denied either by U.S. or foreign firms.

MS. VALENTINE: I think what we tend to see is that, for the most part, there's no difference probably because these firms tend to be represented by the same sophisticated U.S. lawyers. In fact, what my sense is is that the more experienced the lawyers are in working both with us and DG-IV, the more likely they are to in fact agree to a waiver.

MR. RILL: Maybe this is a problem, like the discussion we just had, that is a deteriorating problem and one that's going away with more experience and greater comfort levels dealing with both agencies. I'm really reflecting -- things like comments of foreign organizations when the 1998 US-EU

agreement was put on the table. There was virtually a hysterical response, and I don't mean funny, from one of the foreign companies which I shall not name, that this was going to divulge trade secrets to the Attorney General of any one of the 50 states here. I think you're right. I think it probably is a problem that's going away and maybe it's not one that deserves a great amount of attention from this end but we need your input, and also input as to types of things that Debra is talking about, what is being shared now.

DR. STERN: I'd like to follow up on Tom's question. Chuck and Doug and the others of you can tell us what the status of negotiations to advance and formalize and build on cooperative agreements, which started to take form in '91 and again in the '98 agreement that was recently signed. It's my understanding, based on the federal register notice of U.S. Trade Representative, that, at least in the context of his Transatlantic Economic Partnership talks that President Clinton and Prime Minister Blaire kicked off in May of this year, that competition policy is on the negotiating agenda. Therefore, I would like to know what role Justice and the FTC are playing in shaping the U.S. wish list, the U.S. negotiating agenda with the European Commission in that negotiation. I guess the question was clear.

MR. RILL: The question was very clear. I'm just not sure of the answers.

MR. STARK: The easiest part of that question to answer while we are here is to the extent that these talks do involve competition policy, antitrust specifically, the antitrust agencies will be the ones who shape that agenda. But I'm

reluctant to be any more explicit about what that might be.

DR. STERN: I don't understand your response. What did you say?

MR. STARK: That I'm inhibited about being any more explicit about the content of what might be discussed in that context.

DR. STERN: Do we have a list of -- a wish list -- an interagency wish list for negotiation? Has it been drawn up?

MR. STARK: I don't know what I can appropriately say in response to that, Paula. I'm not trying to be coy. It's just that by custom, we don't tend to talk about, at least in the antitrust area where we have had antitrust negotiations in the past, the subject matter of those negotiations in advance of their conclusion. So I'm only responding by habit. I don't mean to be uninformative in that context.

MR. MELAMED: To the extent that what we think of as competition and antitrust-type issues are to be talked about, we are very much involved in developing the position of the United States. And, there is dialogue within the government as to what the broader wish list will look like.

DR. STERN: Is there a time frame? Does this Committee, in order to be relevant, need to be aware of the status. And if you're reluctant to talk about it in public, is it possible that we can get some sort of a briefing memoranda that gives us --

MR. RILL: As a lawyer, let me say this, Paula. We have a problem receiving confidential information because we can't protect it.

MR. MELAMED: I am not aware of any short-term event that will materially affect the relevance of this Committee's work.

DR. STERN: Because I understand that the TEP had an 18 month time table starting last May. Okay. I guess we'll have to define short term.

MR. RILL: Do you have anything to add to that answer?

MS. VALENTINE: No, but I'm happy to return to waivers.

DR. STERN: Go ahead.

MS. VALENTINE: I was just following up on your question.

MR. DONILON: It's my previous experience that the State Department with respect to negotiating positions, was that it should be made public way in advance of negotiations.

DR. STERN: Sir Leon has told us what he wants.

MR. DONILON: I have some more specific things I want to nail down to take advantage of the government representatives being here. One is on waivers and confidentiality. One of the principal recommendations of both the 1991 ABA Special Committee Report and of the Wood-Whish report was that steps be taken by countries to change legislation to allow greater exchange of confidential information. Is that something that we should look at hard because we've discussed there are a lot of issues lurking there if you really get into it. But is that something from the government's perspective, that is a useful thing for us to examine and spend some time on? I guess better put, would it be material in terms of effective merger review in a multijurisdictional setting, for you to have more ability to exchange confidential information without us seeking the waiver

of parties.

MR. STARK: I have to defer to the people on either side of me, and Joel, for that from a policy level. But I believe a little bit of history may be relevant to it. When we first developed the idea of what became the IAEAA, our initial proposals were not limited to nonmerger investigations. But in our discussions with both the Congress and business community representatives, it became clear that the limitation that eventually was incorporated in the bill was the only way in which we were going to get legislation. So we agreed to that limitation in order to get the information sharing leeway that we have in other areas.

MR. DONILON: But limitation -- it sounds -- I'm following up on Jim's point that the limitation hasn't been a huge barrier to effective multijurisdictional review to date.

MR. MELAMED: I think that the bottom line is that, purely from the standpoint of expediting cooperation among the agencies and perhaps both reducing frictions and improving the quality of their decisions, you would not want to have that limitation. On the other hand, as Debra points out, increasingly sophisticated counsel and sophisticated clients are consenting to the exchange of information and, thus, in effect, are working around the fact that we don't have a legal right to do it without consent. So you have to weigh the incremental benefit of changing the law against the likelihood of getting that change made.

MS. VALENTINE: I guess what I would add to Doug, as I pretty much agree with him, is that in the best of all possible worlds, you can propose

that all countries should enact statutes that allow them to share confidential information. We'd love to have IAEAAs with all sorts of countries, and so forth. As a practical matter, what you might be able to do that would be almost as effective, would be to come up with a sort of model waiver form. I think what we're finding -- sophisticated counsel is one thing, and they're happy to waive because they know what's going to happen and they trust us. I think if other less sophisticated parties and counsel understood better their rights; what in fact would be shared, what wouldn't be shared; that it would not be passed on, all the procedural protections that, in fact, it would facilitate the process. It doesn't have to be that this model would be used, but just that it would serve as a template that people could fall back on so they understood what it was all about.

MR. DONILON: I wanted to ask a question about timing. And I understand the number of enforcement issues that you might get into if you adopt a proposal like the one I talk about. What would be, do you all think, the practical implication of having a deadline on merger review, beyond the obvious one of it would have to be dealt with of the companies involved not cooperating fully within a relevant time frame. I assume you could address that and get extensions in the face of noncompliance. Obviously there are deadlines in the EC system, and I'm asking this without any prejudice, what would be, you think, the practical effect, the ability of the agency to actually do its job of having certainty, which I think there's a certain value to.

MS. PATTERSON: We have a deadline now which is keyed off the parties' compliance. Then we have 20 days. There are negotiated extensions

in many, many cases, although not in all that cause parties to understand the reality of our alternatives. We have to sue them. If they really think they can convince us not to sue them, they continue to talk to us rather than undergo that. I would be reluctant to have a deadline that didn't impose a deadline on the parties for their compliance because I think we have enough problems now with compliance that we try to work around. We need the information in order to do our job.

MR. RILL: I want to react to that. You're absolutely right. Legally there is a fixed deadline, 20 days after substantial compliance. Substantial compliance can and has been a bear. It is, I think, for purposes of the purview of this Committee, a particular bear in transnational mergers where you're dealing with locations around the world and translations. If the Europeans can make a decision, the European Commission can make a decision within a fixed time frame -- maybe four months after the beginning of Phase Two, isn't that the right number -- and subject to Tom's very important assumption that there's a way to make sure that the parties cooperate, and we'd have to work with that, why shouldn't this Committee at least consider whether or not a similar time frame might not serve two useful purposes. One is uniformity and the other is quite frankly, responding to the, I think we have to say not always wrongly based concerns of the business community that compliance with a second request is sometimes unduly burdensome and on occasion even documents that are submitted aren't always read.

MS. PATTERSON: Well, Debra graduated from law school and

she was a class ahead of me so I'll let her go first.

MS. VALENTINE: I don't think I'll take on the scope of the second request except to say that I think we are narrowing it more and being more careful in crafting it. But seriously on the time line, an arbitrary deadline, I think if we go back to Doug's reworking of what are our goals, that you probably would have more type 1 and type 2 errors. I think that there have been instances where we have had a little more time to look at a transaction than the EU has, and where we have gotten more sound economic result and/or a remedy is more precisely crafted and targeted at the real problem. I would not want to give up superior results for just arbitrary deadlines.

MR. RILL: Only comment I would make is -- I don't want to infringe on Donna's time. But the only comment I would make to that is that, presumably, there would be a way for the parties to voluntarily extend that time period.

MS. PATTERSON: Chuck appropriately just said to me that a big difference between the U.S. enforcements and the EC is that they have to make a decision. We have to be prepared to go to court tomorrow. There is that difference in our functions. But I think the scope of a second request and the difficulty in complying often gets used when it's not the real problem. My experience in private practice was if you're willing to be very open with the agencies and go in when you make the first filing -- and you do this all the time -- and start making your pitches and pull together what you know is the information that the agency really wants, you can expedite these things. They don't have to

take forever.

I think people get into struggles sometimes that are completely unnecessary because either the client doesn't want to do it that way, the lawyer doesn't, the agency, but I think these are solvable problems that don't necessarily have to do with whether second requests are --

MR. RILL: I think it's something we should look at.

MS. PATTERSON: And I don't disagree with that.

MR. RILL: The argument that you have to go into court, whereas all the EU has to do is in effect wave a magic wand and the merger dies, I'm not persuaded by that argument. You're ready to go up and recommend a challenge; you can fill out around the fringes. You're not blocked from getting further discovery. You're ready to recommend a challenge. I think you can do that in a reasonably -- and have -- in a reasonably expeditious time dimension.

MR. MELAMED: One comment on that. It is not just that the agencies need more time to prepare for the trial. In that sense, what you're saying is largely correct. But there's another dimension to the fact that we're engaged in law enforcement, not regulation, which is my shorthand. The focus on law enforcement is a discipline to our process that I don't believe necessarily exists elsewhere in more regulatory contexts. We don't just look at a few facts, take a few depositions and intuit that the merger is a good thing or a bad thing. We have to ask ourselves, how do we prove it? How is this going to look to a judge? How are we going to reconcile our position with the law? I think it's a healthy discipline on the agencies because I think it prevents them from being too hasty to

reach and announce conclusions. But it also means that we need a more detailed and labored process.

MR. RILL: I take your point. I just think it's one that we've heard enough from private practitioners and some of us from our own experiences that think this is an important issue and one that's particularly relevant to global mergers. And I appreciate your input as part of our looking at this.

DR. STERN: Right. And listening to some of the practitioners, I guess some of the arguments include the fact that often regulators on both sides of the ocean come out agreeing on the merits of a proposed merger. And practitioners comment that they feel that there is an increasing thoroughness on the part of other authorities as well. We have also been hearing that there seems to be increasing cooperation. So all of that suggests that there is convergence of standards. So if you have convergence there, it suggests U.S. authorities desire to prepare for going to court may not be dictating a difference in completeness that is conducted by different authorities. So we need to get the stories straight here. And we're now, I think, honing in on it.

MR. DONILON: I take it -- the point about the philosophical principle approach is an important point for us to understand. There's the Department and the Federal Trade Commission trying to do something; are trying to, through a disciplined process, make a law enforcement decision about whether they should act against private parties. I think his point is well said in addition to you have to go to court point. But nonetheless, I think it's something we should take a look at because you do hear from business, and among private practitioners

a lot about the cost of this process and the delay. And David made a good point before about that the increasing importance of that in the high-tech industry and I think it is, Doug, a qualitatively different issue than a financial issue when you have whole products that may or may not be created in a relevant time frame because the deal can't go through. Jim's point, in a period where we are having a dramatically increased number of multijurisdictional or multinational mergers, the burdens are increased because of document production, translation, et cetera. I want to correct one thing -- make a comment on one thing on the record here in response to, I think, what Debra said, about thresholds. I think it is a very important issue and one we should look at given that most mergers are not challenged. Although I take your point that you have seen mergers near the threshold nonetheless can have a significant impact, an adverse impact from a competitive point of view. You don't lose the ability, obviously, to take enforcement action against such a merger because there hasn't been a filing.

MR. RILL: That's a very good point. If the merger is going to cause a problem, I think the likelihood is overwhelming that you're going to find out about it from customers or competitors, even if there's not a filing. I don't think anybody's going to be so reckless in the face of a CID to close -- well, some might -- if you asked them for an opportunity to take a look at the transaction.

MR. DONILON: Admittedly --

MS. VALENTINE: It's a question of whether HSR should exist and whether Congress was actually right.

MR. DONILON: I want to respond to your point that we should

look at whether or not the thresholds here are too low. But you had a caveat to it, which is, in fact, there can be a transaction that can be in the low end of the threshold but nonetheless, in an emerging industry particularly a high-tech field, can be an important merger at the beginning of the creation of a product or a system. I just want to make the point we don't pass totally on it. You don't have the same leverage that you have but you don't have the inability in the law to challenge that merger.

MS. VALENTINE: I don't debate your legal point. Obviously, yes, we can challenge it. Would assets be scrambled? Would work forces be combined? Would confidential information be shared, et cetera, et cetera? Yes. So, all things being equal -- and we haven't really even gotten into whether all of these other countries should be having premerger notification laws -- I think, my personal belief is that premerger review really does serve a very important structural purpose and that preventing a new concentration before it happens is a lot more effective than trying to bring monopolization cases later.

I can understand why premerger review has become something of a gospel and why developing countries might well think it's worthwhile. Eleanor and I had a little sidebar before we started: Peru is an example where they haven't adopted premerger notification and they actually would like foreign investment and possibly some sort of breaking up of whatever, the 20 old families' intense concentration of assets. But at base I believe in premerger review.

MS. FOX: Did you want to make a proposal?

MR. DONILON: I was waiting for the response that they were

going to raise the threshold.

MS. FOX: Your first question, Tom, was how can the U.S. government reduce transaction costs for U.S. companies. We might expand the question to add: How can the government eliminate unnecessary transaction costs? We might try to eliminate unnecessary transaction costs for multinationals -- not necessarily U.S. companies -- and hope that other countries will do the same.

On the transaction cost problem, I participated in conferences with a number of our colleagues where we met with private bar, and one overriding problem seems to be multinational mergers require filings in so many jurisdictions, in so many inconsistent ways. Only a small percentage of those mergers result in competition problems, and a very small percentage is challenged. There has been a proliferation of premerger notification requirements, with agencies in many countries trying to do the same thing, trying to figure out whether the merger is anticompetitive (though of course sometimes markets differ and sometimes standards differ).

It seems rather bizarre to me to have so many costs, so many delays, for such little yield. Should we rethink thresholds? Maybe nations that represent only a very small share of a transnational market could waive their requirements. Maybe if, say, five of 10 filing jurisdictions are only marginal to the market, the marginal jurisdictions could accept mutual recognition of forms filed elsewhere, or simply no filing. Experts who do multijurisdictional filings all of the time should propose solutions that make practical sense.

Your second question was: How can the U.S. government reduce frictions between jurisdictions? And on that, were you mostly talking about substantive frictions? Let me hold that until last. I wanted to say a little more on that.

The third one, how best could we produce substantive convergence. I agree with everyone that a lot of substantive convergence has been produced. I think there are a couple of sides to this problem. One is that the jurisdictions that aren't so familiar with antitrust really want to learn. And the more we cross-fertilize the more they learn. And the more they are on our wavelength, or EC's, or whatever, they'll accept what the industrialized countries or the countries with a lot of experience are doing.

There is a core, though, where there are different goals and we might claim that ours is the best. We might claim that we may know how to decide which are good mergers and which are bad mergers, but other countries might disagree. I really think that, at least unless there are significant spill over costs like raising consumer prices in the rest of the world, we should definitely let countries choose how they want to skew their merger law. If, to them, there is a principle of market access in mergers, we ought to let them apply their principles up to the point where they're sanctioning a merger that has significant anticompetitive costs, consumer costs, outside of their country. So I'm all for a lot of freedom of nations to write their merger law the way they want to; to write their standards the way they want to. There is one anchor. I think almost every country will say it's interested in looking at consumer welfare in one way or

another. Some countries apply different considerations as well.

I guess that also covers, in some way, Doug's proposition. We should promote sound resolution of merger cases. I think that it's really fine and good for us to be giving information to countries, like Indonesia or Bulgaria or whatever, to explain how we understand the merger law and what are the costs of disallowing mergers that have no anticompetitive effects. I think that's a very good thing that we should be doing.

As to substantive clashes, I think that one of the problems is national industrial policy, and national champions. And I think there's a possibility of an agreement among nations to not let anticompetitive mergers with large spill over effects go through for national industrial policy reasons. Mergers in one country or several countries may have large anticompetitive spillover effects in the world. I don't think the home country should “beggar its neighbors,” basically. I think also that when countries apply values that are not competition or even not consumer welfare values, they ought to make them transparent. I think it's very useful for every country to have guidelines so that people are clear what is the standard in that country. And if they are going to use national industrial policy trumps that may be permissible, like national defense, it ought to be out in the open.

I think there's a possibility, on clashes, of having some rules of priority, although they are very difficult to design. One can think about McDonnell Douglas. Should the United States have had priority on the question whether to prohibit the merger? I'm a little nervous when I suggest this because

the only claim for priority is that the assets are here and there are no assets in Europe. But the market is worldwide. There are a huge amount of sales into the EU, and there could be a clash of law. I think the best thing to do to prevent the clash is to make sure that countries talk out the problem.

If there's a rule against a national industrial policy trumps, it should be clear. Countries should stay in the antitrust framework and not slip over into the trade framework, and they should understand the nuances of one another's law. And if there is a clash, e.g. because of one nation’s extraterritorial relief, I think we probably need some kind of dispute resolution to keep that issue an antitrust issue and not let the dispute spill over into a trade war. I think that's all for right now.

MS. JANOW: Can I ask a clarifying question? When you spoke of foreign effects, were you suggesting that if there were no harm at home from the merger but the anticompetitive effects were felt abroad that the home jurisdiction should take that into consideration?

MS. FOX: I do, but I was saying something narrower because it would be extremely unlikely to have no sales at home. Suppose the Boeing/McDonnell-Douglas merger was price raising, but U.S. authorities support it because it creates a strong national champion.

We shouldn't be able to use national industrial policy if the merger is anticompetitive. Many people, especially in Europe, think that the Boeing merger was price raising, and that the U.S. was using industrial policy, though we weren't.

I think that where there are world anticompetitive effects that are significant, a nation should not allow the national champion trump. It's a much easier question if there were no sales in the jurisdiction at all. A country can decide, if there were no sales in the jurisdiction, that it is not going to act. It could decide that.

MR. MELAMED: Can I ask a question? What if you have a global market and two merger authorities looking at a merger among megafirms. Both agencies have what we all agree are legitimate, sound competition policies. The former gives a pass to the merger, having determined by its analysis that consumer welfare would be benefited by the merger. The latter does not dispute that conclusion. It simply says the efficiencies are not cognizable and, therefore, the merger violates the law. Is the latter entitled to prevent the merger?

MS. FOX: I would start out thinking -- either one has the right to have whichever rule it wants. What I would like to see, I've said this about Canada because Canada counts total welfare rather than a consumer welfare: If Canada wants to apply that formulation, it ought to apply total welfare to the whole area affected. So if a merger in Canada affects Canada and the United States, it should apply total welfare to Canada and the United States, not just take the sum of Canadian producers' interest and Canadian consumers' interest; that seems to be very unfair.

MR. MELAMED: Are you going to run for office in Canada on that platform?

MS. FOX: No. But nations might reciprocally come to an

understanding -- it's the same way nations have finally decided to keep lowering the trade barriers. There's always a political claim: I don't want to lower my trade barriers; I want to protect my industry against the foreigners. But when you have both sides saying: I realize there are joint gains to be made and there are more gains to be made by agreeing to end discrimination, yes it's possible the countries would agree.

Of course, we could allow clashes to happen and not mandate nondiscrimination. We could have one nation saying: it's okay for this merger to go through -- and sometimes the nation might support the merger. (We don't usually say we have a policy to promote a "cleared" merger; we say it doesn't violate our law.) Another country may say as to the same merger: it violates our law. It may give credible reasons why it violates that country's law. And as long as that country is not marginal to the transaction, I think it ought to be able to apply its law.

DR. STERN: I was trying to think of a hypothetical where you have two companies merging in the United States but they do not produce in the United States. I keep thinking uranium or nuclear reactors, where you have manufacturers who are doing that, but were just not -- I guess, the U.S. company might produce the turbines and the generators, but not produce the plants. I don't know if there's an example of where you have two home based companies not selling in the U.S. market. They're producing here but they're not selling.

MS. VALENTINE: That you can have easily. In the chemical industry you can have that. There is a fascinating case right now, involving some

German and Swiss companies with a mass urinalysis test that all U.S. employers use to screen employees.

MS. FOX: There is an example in Germany. The merging companies were producing in Germany and Italy. The merger would hurt China. This was steel tubing for oil wells and it was obsolete technology in the industrialized world. It was a difficult problem. Germany looked at it -- Dieter Wolf -- and said it's not our problem. Giuliano Amato looked at it and said it's unfair for our producers to go ahead and merge where the merger harms the less developed world. And the Italian Competition Authority actually ordered some relief. It was not to not merge, but licensing relief was ordered.

I think that is an interesting example and a good example. And I really think in the end you're going to have to start thinking globally on those mergers. This is my problem, because I don't know who is going to be the super authority, and I'm not eager to move to a super authority, but this really is a super authority question.

MR. RILL: Should we apply our law or the law of China in that case?

MS. FOX: Sometimes that question doesn't really arise. This was the merger of the last two companies in a field. By anybody's standard, it created monopoly power. Very often, and it is the same with a lot of vertical restraints, it's not a question of whose law to apply, because the merger or restraint is illegal by anybody's standard because it's a core restraint. I think that there's going to be, in the future some time, some way to view the problem in a cosmopolitan way

rather than in a national interest way.

MR. RILL: You think the United States would view with equanimity the notion that we should apply Italian merger law where there's no effect on the merger law in the United States but only in Italy?

MS. FOX: I think that, first of all, Italy or EU would take care of the problem.

MR. RILL: It's more of a law school exam question than a practical problem.

MS. FOX: On the China aspect, this was a merger to monopoly by anybody's standard. And it was clearly so, apparently. So it didn't matter. But China didn't have the law to stop it. You could say, I don't care about China; or you could say, look these are really world standards. We don't merge to monopoly. There was no national industrial policy. It's just private parties wanting to merge to take advantage of consuming nations that don't have competition law. It's a question. It's there, it's somewhat altruistic; but why do we have a bribery law that says we can't bribe foreign officials? It's because that is the way we do things.

MR. MELAMED: Instead of perhaps agreeing on substantive standards that allow each jurisdiction to take into account the interests of the whole world, which would be a massive undertaking, maybe Jim's notion of an effective law principle is the right one with one slight twist. You wouldn't have the United States enforcing Italian law. What you would do is use choice of law principles to say, if Italy is really upset about this merger, even though the United

States likes it, under these circumstances, Italy gets to win that one. In a different circumstance, the United States gets to win.

MS. FOX: I do think that choice of law is the solution to a lot of these problems. Especially, I think, choice of law is a solution to the following problem. We have an export problem; say exporting going into Japan; we are blocked out of Japan by private restraints in Japan. I have said before, I think that if there are companies in Japan on Japanese soil conspiring to close their market, it seems to me that under usual principles of choice of law, it's Japanese law that applies.

I think that's one way to think about the export restraint problem -- or, really, the import restraint problem -- that would solve most of the problems when people say, what's the law? It really is the law where the acts took place, where the effects took place, where the principal effects took place. It's the usual choice of law principle. You could say, if it comes down to the United States trying to enforce, in the U.S. court, the court should apply Japanese law, unless the defendants want to wave and say, okay, I'll take U.S. law.

MR. STARK: To some extent, aren't you basically saying that there are -- comity principles and making that operational by suggesting that those principles might be applied in any number of different courts.

MS. FOX: Comity? I'm not sure what you mean by that. I wasn't thinking comity. I was thinking agreement.

MR. STARK: But comity is -- principles that we described as comity principles are very closely related to choice of law --

MS. FOX: Oh, they are. Like we ask the Japanese to enforce and they sign the comity agreement.

MR. STARK: Or we decline to enforce or moderate our enforcement because, in fact, the interests involved are --

MR. GILMARTIN: I was going to say that, stepping back from the discussion, just thinking about it from say the perspective of a company or CEO that -- yes it's good to lower the transaction cost, eliminate friction, therefore, make the process more streamlined and so on. But at the end of the day, before you undertake any activity, the major concern is, will it be challenged? Is it doable? Can you get it done? And having some predictability about that because of transparency is probably the most critical question.

Beyond that, the mechanics of it, with sophisticated lawyers and experience and things like that, can be done. But the biggest damage that can occur is that you undertake something and because you didn't anticipate the challenge that came out of nowhere, because of a totally different mind-set or principles, that's the most damaging thing that can happen. So therefore, to the extent there's great uncertainty, that would have a chilling effect on mergers. So, therefore, predictability, I think, is something that is very important.

MS. VALENTINE: There were some interesting suggestions in the staff work here about encouraging transparency of reviewing authorities' work in terms of both reports on, let's say, the number of mergers reviewed, number challenged, issuing guidelines, issuing decisions where you took affirmative action, doing speeches, which I think would be of infinite value for

businesses.

DR. STERN: Would it be useful to have the WTO, if it's going to do anything in this area, and I am mindful that Joel has spoken out on some of his views on proposals for what the WTO ought to do. But, if the WTO is to do anything, it could be perhaps a repository of decisions -- while not necessarily a mechanism for settling disputes but --

MR. GILMARTIN: I think you would rather deal directly with the enforcement agency.

DR. STERN: If you don't have Romania set up to translate.

MR. GILMARTIN: Yeah, but you can deal with that.

DR. STERN: Everybody gets it on the Web these days.

MR. GILMARTIN: We can gain access to the information. So what Debra is saying about principles, guidelines, speeches, so there's some way to gauge what the reaction is going to be, is very helpful. And we can gather that information. People are involved in global mergers have presence, enough global presence that you really have access to that information and you can assemble it quite readily.

DR. STERN: So it is transparent?

MR. GILMARTIN: If they do. And what you can see down the road is more and more people get interested in this. If they are not -- the odds are that it would be pretty murky.

DR. STERN: If you're a member of the WTO, for example, there would be an obligation to achieve a certain level of transparency.

MR. GILMARTIN: Maybe there's another track among other agencies that are involved in this and which they work on competition policy. I'm just speaking very theoretically here.

DR. STERN: And I was trying to build on if there was a practical recommendation that would advance that.

MS. VALENTINE: A couple of comments on some of your issues, Eleanor. You're clearly searching for a way to reduce transaction costs in the filing area by handling multijurisdictional mergers differently, by sometimes creating exemptions for them from filing. I guess if you're going to be successful at doing that, I think one thing you've really got to think about is, how is it going to look politically when we are perceived as treating foreign companies and multinationals more favorably than domestics. And I think that's a hard sell, quite frankly. I cannot imagine the U.S. Congress buying into a system that made multinationals or foreigners file less often than they would be required to file here if they were domestics.

MS. FOX: You do it as a neutral principle, though, and say -- I'm probably saying the wrong principles, but trying to find some neutral principle -- suppose there's a merger and the merger is filed in jurisdictions of principal impact, if there's any impact. Then does it have to file again? Or should the United States and all other non-principal jurisdictions have to give mutual recognition to filings that have already been made, unless there's a separate market in their country?

MS. VALENTINE: It takes some real political persuasion is all

I'm saying. I don't object in any way to this agreement not to allow mergers for national champion purposes. I actually like that. On the other hand, I'm not sure I see how you draw the line between that and what you would permit, which is, presumably, to take nonconsumer welfare considerations into the merger review process.

So what if there were an employment/jobs creation rationale. At what level is that a legitimate employment consideration in your merger review process and at what point is that creating a national champion? I don't know how you're going to draw that line either. I'll be happy to agree to a national champion prohibition, but I'm not sure, unless you can enforce it, it's going to do a lot.

MS. FOX: It's the same thing. If the jurisdiction really thought it could preserve jobs by letting through a clearly anticompetitive merger that had large spillover effects in raising consumer prices abroad, it's exactly the same thing. I guess I'm struggling to put the transparency principle in the forefront, and sort of develop a record through the facts revealed by transparency -- to see the competition analysis separately, and then understand the weight of the “jobs trump” -- which never really works anyway, I mean it never really preserves jobs. But if an antitrust authority applies a jobs trump, I'd like to see it on the table.

DR. STERN: That's just what you were saying in the previous discussion with reference to the recession cartels, that, in effect, there may be derogations for infant industries, as long as it’s transparent. You want to get that as a minimum.

MS. FOX: Yes, and there's one other aspect, going back to Merit’s

and Paula's previous question. Suppose that in Boeing/McDonnell Douglas, the merger was price raising but we let it through because we thought it was good for us. The European Union brings proceedings and it tries to block it. I would construe circumstances like that to fall into an area where that first country has to recognize the right of the second country to block the merger because it's anticompetitive and price raising in their country. We shouldn't then start a trade war because the second country is going to block “our” anticompetitive merger.

DR. STERN: Do they have to say that they've done that for national defense purposes or national security, I should say, purposes?

MS. FOX: As a matter of fact, this is the one thing where, if the government -- the Pentagon, I guess -- had said from day 1: (I never noticed that they did this, incidentally, until after FTC closed the investigation -- but if they said from day 1) this merger is very important for defense; and if that was on the record when the FTC vetted the merger, I would think the national security concern would have been a legitimate trump. A country has to be able to claim national defense. It has to have breathing room in claiming national defense.

MR. RILL: It's not very likely, it seems to me, that a defense agency is going to put on the public record exactly why the merger is important for national defense, because they are dealing with top secret information.

MS. FOX: I'm not sure I would require them to. But if they had, then you come to the difficult problem. Again I'm assuming contrary to fact here, because it's a great example if you assume, contrary to fact, that the merger actually is price raising in the United States, because otherwise we don't have an

anticompetitive merger -- and we've said from day 1, we want it for national defense. And then you vet it. And half the sales are in the EU, and it's anticompetitive, and we don't want to stop it. That's difficult.

MS. VALENTINE: Eleanor, the EU did say that we are not going to touch any of the defense aspects of the deal. They literally said that. That was a comity gesture on their part. Now, what if, this goes back to Jim's problem, what if there was a spillover from the commercial into defense? Are you going to make them 'fess up and say it when the EU blocks the commercial side of the deal and not the defense side of the deal?

MR. RILL: We have this wonderfully secret electronic operation here that can only be done by the two companies together. And oh, by the way it's also useful in commercial, but we're not going to tell you what it is because it's critical to our national defense.

MS. FOX: The military assets -- our Pentagon, only, would have to pay for any price-rise. The military asset part of it was not a problem for the EU.

MR. RILL: Now we're talking two different things. We're talking Boeing/McDonnell Douglas, in which this did not arise, in a hypothetical situation in which it would. It is an area in which I think certain considerations would trump competitive situations here and maybe call for some --

MR. MELAMED: Why can't they be manifest in application of traditional notions of comity? Like we have today.

MR. RILL: If the other side respects its efforts.

MS. FOX: You have to believe that the other side respects our national defense argument and respects our representation that we couldn't have tailored the transaction otherwise to eliminate the national defense problem, and will respect our interest. We haven't been so great in respecting what other countries are doing.

MR. RILL: I think defense is almost easy. What if you get into employment considerations or foreign policy considerations.

MS. VALENTINE: What do you mean by foreign policy?

MR. RILL: Well, what if you have a hypothetical merger, an acquisition by a U.S. company, which is the first acquisition ever made since the Wall came down and the Soviet Union collapsed. It's very important to the foreign policy of the United States and of the home country that this acquisition take place. I'm doing a hypothetical now. And therefore --

DR. STERN. Is that where we take over the Red Army?

MR. RILL: Well, if you want it. That the president believes is that this investment is very important for U.S. foreign policy considerations. Doesn't he -- first of all, obviously, he constitutionally has the power to enforce the laws of the United States. Doesn't he, in that situation, have not only the authority but perhaps a valid public policy basis for telling the Attorney General, that even though there may be some imports from country X of product Y that would no longer compete with the domestic production of the acquiring company, not to bring that case?

MS. FOX: That is not only a question of prosecutorial discretion,

but it's a question of presidential power. Consumers Union against Kissinger raises that question of when the president agrees to an import restraint -- voluntary import restraint -- are the importing companies still exposed to antitrust laws?

MR. RILL: I'm really dealing with government enforcement. You're right. The president can only decide if the Justice Department will bring the case. Otherwise any court can throw out a private action case. So, you are right about that. But you haven't answered my government question.

MR. DONILON: The president would have the authority to -- the chief law enforcement officer of the United States to make a decision of whether to bring a case or not. Unless it involved a conflict.

DR. STERN : Well, we're getting to the witching hour and I want to make sure that everyone has an opportunity to speak and exhaust their fellow members with questions. We didn't talk about intellectual property rights so-called ancillary issues at the very end of this, but we will have an opportunity to pursue this. This is not our last meeting. In fact, what I'd like to do now is announce that the next time we meet officially we invite the attendance of as many members as possible to our hearings that will be held from November 2 to 4 -- here?

MS. JANOW: No. We thought we might have a substantial crowd, so it will be at something called the Geophysical Union.

MR. RILL: In Paris?

MS. JANOW: Regrettably not. And that's up near Dupont circle,

so it's quite close.

DR. STERN: Then our next meeting is December 16. And at the very last page in your book is a whole list of other meetings and plans. Staff members have carefully and diligently checked with our calendars and we very much appreciate the attendance of everyone and their contribution. So, Merit, you want to give the final benediction?

MR. DONILON: Can I raise one question, while we have the folks from the Federal Trade Commission and the Department of Justice here? I think it's very important for the government to review the materials that the Committee has and make requests to come see us. You see things that-- you see an agenda that's missing something or we're going in a direction where the government has --

MS. PATTERSON: They're very good about sending them to us.

MR. DONILON: I really think that the government should make frequent requests to come visit with the Committee, and to provide expertise and reactions, add agenda items and advise if they think we're going in the right or wrong directions. So, I appreciate that.

MR. MELAMED: I appreciate that, Tom. I think these materials, particularly the latest batch, are really terrific. And I appreciate the invitation.

DR. STERN: Thank you. Joel was very gracious at the beginning of the meeting and you've been very gracious at the end to praise the staff who have done so much hard work under the direction of Merit Janow, who will now give us the final benediction.

MS. JANOW: I won't be as ambitious as that. But I have a plea instead, a prayer of sorts. I got very good advice at the outset of this process, that maybe one way of advancing this process would be to develop a paper or papers that could be a kind of skeleton, and over time build on that. And that's what we have tried to do here.

So, I think that is what we will do, going forward, is build on this. So it's really important to get your input on parts of this, points of emphasis and de-emphasis, not only from our colleagues in the Division, but also from the members. Tell us if these are the right range of things that you would like to see covered in a report, eventually. That's one plea.

Second is, as we've mentioned repeatedly here, we have started an ambitious outreach effort. And I think you will see in our scheduling the hope that those business groups and interested parties that do submit comments to us might have their day to speak to their submissions in the Spring. So I'm expecting there will be a day of hearings in the Spring for those interested parties. That gives us a little bit of time. So those who have not yet organized along those lines, there is plenty of time to do that. So if you see -- and I'm saying this really to the public at large -- an interest here or groups that have not been properly identified or need to be, I think we have that Spring agenda item.

We also have on the agenda the notion of going abroad in the Spring. We need to know if this is a good idea, from your perspective, or not. If we did it in the Spring, at that point I'm expecting that the Committee's work will be far enough along to test out ideas to foreign audiences. That would be the

purpose. One could imagine a public process occurring abroad, of debate with experts and interested parties. Is that a good idea from your point of view, or a good idea that you could actually find time for? Those may be separate questions. I appreciate that.

So those are the sorts of things -- and of course we will be putting on the web very shortly a list of paper solicitations, any reactions that you have, and together finally on the hearings again please let us know your availability.

And I'll stop there.

DR. STERN: Great. Thank you all very, very much. This meeting is adjourned.

(Whereupon, the Advisory Committee meeting was adjourned.)