

INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

Washington, D.C.

Friday, November 19, 1999

This document constitutes accurate minutes of the meeting held
November 19, 1999, by the International Competition Policy Advisory
Committee. It has been edited for transcription errors.

James F. Rill

Co-Chair

Paula Stern

Co-Chair

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1 INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

2 MEETING

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6 Washington, D.C.

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8 Friday, November 19, 1999

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12 Taken at The Carnegie Endowment for International Peace, Root
13 Conference Room, 1779 Massachusetts Avenue, N.W., Washington, D.C.
14 beginning at 10:00 a.m., before Sue Ciminelli, a court reporter and notary
15 public in and for the District of Columbia.
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1 APPEARANCES:

2 Advisory Committee Members:

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

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

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

7 Zoë Baird (telephonically), President, John and Mary R. Markle Foundation

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

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

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

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

15 Department of Justice Employees:

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

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

19 Other:

20 J. Michael Farren, Vice President, External Affairs, Xerox Corporation

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

22

1 IN ATTENDANCE:

2 Advisory Committee Staff:

3 Cynthia R. Lewis, Counsel

4 Andrew J. Shapiro, Counsel

5 Stephanie G. Victor, Counsel

6 Eric J. Weiner, Paralegal

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9 Estimated number of members of the public in attendance: 25

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11 Reports or other documents received, issued, or approved by the Advisory Committee:

12 None.

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P R O C E E D I N G S

(10:12 a.m.)

DR. STERN: The order of the day is a discussion on trade and competition first, and Merit is going to lead that discussion. Joel is coming for lunch at 12:30. Jim Rill is going to be leading our discussion on mergers.

The room is booked until 8:00 o'clock tonight, but I'm not going to be here until 8:00 tonight.

MR. RILL: If I am, I'm asleep.

DR. STERN: And I want to thank everybody for coming. And we have Dick Simmons on the phone. Thank you very much for standing by, Dick, and I think that there is no other blessings that are needed. We can't say prayers since this is a federal meeting.

And turn it over to Merit, who has been a fabulous, fabulous guardian of all of our work of the last couple of years, and has delivered us, with the help of her staff -- Andrew, Cynthia, Stephanie -- wonderful sets of papers for us to pore over. I think that should be it.

We do have members of the interested public who are certainly welcome here, but we ask that they not participate directly in our discussions today. We would rather you put it in writing.

Merit.

MS. JANOW: Thank you very much.

This is the last scheduled full Committee meeting at present, and we've had a number of productive subgroup meetings on each of trade and competition, mergers and

1 enforcement cooperation generally.

2 So what I thought I might do to start us off this morning is to briefly summarize
3 some of the key points of discussion in the subgroups that are also main points of coverage
4 in the draft chapters, with the understanding that nothing is final, and that this is our
5 opportunity for comment across areas. There will be further substantial revisions to these
6 drafts, but this is an opportunity to have a wide-ranging discussion both on substance, but
7 also on presentation and style and so on, and what I'm going to report are not conclusions of
8 the Committee, but directions recommended by the subgroup and embodied in the report in
9 draft form.
10

11 So if we can bring closure to some of these directions, that would be a very
12 useful day spent. We hope long before 7:00 that that will be achieved. But we'll start with
13 trade and competition.

14 Our drafts are very lengthy, and we are intending to have a very snappy first
15 chapter, I'm hoping, that might incorporate our main perspectives and recommendations.
16 It's also been suggested to me that maybe we have a very short introduction that's a kind of
17 global scene setter, and I think that it would be terrific if in the course of today's discussion, if
18 there were themes or ideas that were felt to be particularly prominent to emphasize in that
19 start, that we take this opportunity to raise those.
20

21 In the trade and competition chapter and the discussions, clearly we have
22 incorporated the goals that started us off, that is to expand and deepen cooperation, to
23 increase transparency, to ensure that U.S. policymaking structures are up to the challenge of
24 the next century, as well as to think broadly about international perspectives such as

1 developing more of an international perspective on reducing parochial actions of firms and
2 governments, fostering soft-harmonization of systems, developing improved ways of
3 resolving conflicts, and developing consensus on broad practices.

4 Those are the broad goals, if you will, that I think are contained in this chapter,
5 although much of it is looking at the intersection of trade and competition and hence the
6 market access issues.

7
8 Let me just briefly recap that discussion. We have spent a lot of time in this
9 draft discussing and defining the scope of the problem and hence identified at length some of
10 the sectoral examples that have surfaced, the views of different business groups, the
11 discussions at multilateral and international fora, the academic literature, and the views that
12 have come before us in our own hearing process.

13 From all of this, we have defined the problems that subgroups and Committee
14 have concurred on the importance of defining problems broadly, to include both private,
15 governmental and hybrid. There is an expanded discussion in the governmental exemptions
16 and exclusions, should anyone wish to comment more on that section.

17
18 This discussion of the scope of the problem has suggested that the problems are
19 real, they're not geographically limited, and that they require expanded policy initiatives in the
20 U.S. and internationally.

21 The chapter discusses differences in approach between trade versus
22 competition tools in addressing economic distortions that arise from different sources and
23 areas where trade and competition tools and objectives can be complementary along the
24 way with respect to those different types of distortions.

1 I think all of our subgroup members have been of the view and the Committee
2 has expressed the view that there is no single approach that responds to all aspects of
3 competition problems facing the United States and the global economy and one needs to
4 focus on a variety of approaches simultaneously. In that universe, we have a substantial
5 discussion of bilateral agreements, but in particular of bilateral agreements with positive
6 comity, and these have been characterized in our discussions as useful and important first
7 steps on the importance of building on the U.S.-EU relationship.
8

9 An example, it's been suggested there may be ways to improve a structure of
10 positive comity provisions, and perhaps these shouldn't just be limited to bilateral
11 instruments. There may be a possibility of more OECD or other internationalization efforts
12 with respect to positive comity, that they could be deepened and broadened, and that it's
13 important that they be allowed to mature.
14

15 We have also had, I think, an extensive discussion of unilateral tools and an
16 extensive discussion of the cases that have arisen, governmental cases, and the draft is
17 suggesting that the effective utility and availability of this instrument as a meaningful remedy
18 appears to be quite limited with respect to export restraints.
19

20 That is to say, there have been not so many cases. It remains an important part
21 of U.S. policies, and the chapter is not supporting any amendments with respect to U.S. law
22 or unilateral enforcement measures.
23

24 It discusses problems of an evidentiary nature and it suggests that there may be
some value in additional empirical work or analytical work, perhaps in collaboration with
private groups or even foreign governments, in understanding both the scope and the

1 evidence of private restraints that impact access to markets and international trade.

2 Of course, the final and substantial part of this chapter and our deliberations
3 have been focusing on multilateral initiatives, what should be the objective of such initiatives
4 and what are the approaches that could be taken. The discussion of the World Trade
5 Organization starts off by suggesting that there are two extremes that the Committee has not
6 so far thought were useful. One extreme would be to try and achieve a harmonized set of
7 rules subject to review or administration at some sort of global level. I think there has been
8 no enthusiasm for that proposal, nor the view that purely national approaches are sufficient to
9 remedy all problems of a global competition nature; that there is an opportunity to design
10 more international instruments or methods or deepen the interest in the world in doing so,
11 and that this is an opportunity that should not be lost.

12 And the draft suggests some incremental measures and some constructive
13 measures that the WTO can play that are mostly of an educative, consultative nature to
14 deepen awareness and build more consensus. There are a number of specifics under that:
15 perhaps a continuation of the working group, perhaps increasing the competition
16 competence within the WTO system, perhaps some competition reviews of countries that
17 have competition laws, which is already being done, and areas where the U.S. and the EC
18 can compete more fully. Although they appear to be in tension on the specific question of
19 what should be done at the WTO at this moment, have many, many areas of overlap and
20 congruence and that those should be built upon.

21 Over the longer term, we've been talking about the possibility that there are
22 hybrid problems, where there are problems that clearly stem in some way from a
23
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1 government action, but are not clearly government action, that require more consideration.

2 The report is not suggesting, and the discussion has not seemed to suggest, a
3 consensus on the notion that private restraints should be covered under any WTO
4 framework. But there has also been extensive discussion, I think, by the subcommittee, that
5 because all competition problems are not trade problems, and because there is an increasing
6 interest in the world in increasing the role of markets, as well as many issues that cut across
7 countries for which international discourse would be beneficial, that one should not take all
8 problems and issues to the WTO, which may not be the optimal fora. It is an important
9 forum where some useful discourse is occurring. However we need to think more
10 ambitiously about what is the optimal forum, and hence there has been a discussion of a
11 possible competition forum of some kind that would not be a big bureaucracy, that would in
12 fact be member-driven, initiative-driven, that would be inclusive in membership, and could
13 be a kind of virtual organization or it could be G-7-like in that it meets regularly, maybe not
14 annually but regularly, and doesn't have a G-7 staff, but it has bureaucratic support and so
15 forth.
16

17
18 So I think those are the range of things that we have been talking about, and so
19 I open it up to comment and general discussion.

20 DR. STERN: I am mindful that I have made marginal notes all through this
21 wonderful chapter and have sent them to the staff. I just want to make sure that they are
22 looked at. And I promise to do that with the rest of the chapter, too. I didn't fax it off
23 yesterday.
24

 I think it is encyclopedic in scope and detail, which I think is extraordinarily

1 valuable to have in a publicly available document where the facts at least can be agreed upon
2 so that light can be shined on the policy recommendations and focused on just the policy
3 recommendations.

4 There's been so much debate out in the public about using, if you will, the trade
5 laws to resolve a lot of anticompetitive problems, particularly with regard to market access
6 for U.S. producers trying to penetrate other countries, in particular Japan. So that having all
7 of this law and history and discussions of cases available is very worthwhile.

8 Organizationally, I don't want to get rid of any of it. I just think that sometimes
9 it's going to be hard for the reader, and we want to attract a reader beyond just the
10 aficionados and the antitrust lawyers and those who have written papers at different OECD
11 meetings. There is a way of mechanically putting a lot of the discussion of the cases either in
12 footnotes or in an appendix, letting the recommendations rise out of presentation perhaps by
13 putting in italics whenever we say the Committee recommends, so that at least it stands out.

14 And we might even precipitate all of those recommendations. I think we have
15 already done that mechanical exercise where we have the recommendations in a separate
16 list. I think, though, I want to encourage our readers to go beyond just the separate list. I
17 really want them to go into these chapters.

18 I know that, Merit, you were talking about making sure that we have a very
19 good -- you didn't use the word executive summary, but just for shorthand -- executive
20 summary. I find this extraordinarily valuable. So I want to make sure that we don't just
21 spend a lot of time editing the first chapter and making a list of the recommendations and
22 then have this all as appendix. I would like to be able to see a more integrative approach.

1 Now, I'll leave that. That's my kind of presentational comments, and I think I'll
2 stop on the substance right now to see if there are others who want to make a general
3 statement. I guess my one general take-away, one last general take-away, has to do with
4 presentation as well.

5 There is obviously a lot of frustration built up over the years about the role
6 antitrust law and enforcement has with regards to market access. And as a consequence, I
7 think there has been great use of Section 301, a lot of jawboning, unilateral action by our
8 trade bureaucracy.

10 I would like the reader to take away from all of this work that there is an
11 opportunity to use positive comity, the antitrust bureaucracy, if you will, to affirmatively now
12 listen to the angst, the frustrations of many of our producers, frustrations also aimed at the
13 Justice Department oftentimes, the sense that the Department of Justice in the past, for a
14 variety of reasons, has not acted.

15 But today, today 1999, you've got this positive comity agreement between the
16 U.S. and Japan that was just signed after 20 years of negotiation. I would like to put a point
17 substantively in this paper that it be a recommendation by the Committee to the Justice
18 Department that they, if you will, exercise affirmative action and affirmatively invite parties
19 who feel that they have the evidence, that there has been violations of the antitrust laws
20 according to our interpretation, U.S. government interpretation, and that really challenge our
21 trading partners and the partners who have just signed this agreement in Japan to
22 demonstrate the value of that agreement.

24 It's a little bit of advertisement. I think that word "advertisement" was used, that

1 the OECD has a paper that is very useful. But I think that we need to be very pointed when
2 it comes to the U.S. angst by producers with regard to this.

3 We have had other recommendations to build on 301, to do other stuff, and the
4 take of this paper is that those aren't as valuable as they could be, and so we need to really
5 point to where we do think there can be serious action by the U.S. government to deal with
6 these problems. So that's my biggest substantively plea.

7
8 I think when people read this chapter they're going to say, well, what really do
9 they want to do with market access and with Japan as well as other countries. I think it's to
10 affirmatively push positive comity and affirmatively push the Justice Department to
11 affirmatively push the positive comity approach.

12 MR. RILL: Eleanor?

13 MS. FOX: I'll go after you.

14 MR. RILL: No. I'll go after you. No, I'll go ahead.

15 Addressing what Paula said, I think "aggressive" is overstated, but a more
16 active stance with respect to the powers that exist in terms of positive comity might be useful.
17 I think as we talk about positive comity -- and by the way, let me say I think the chapter is
18 very well done. A lot of editing's going to have to be undertaken, but still it's all there.

19 Just a couple of thoughts. With respect to positive comity, I think you should
20 notice that the chapter makes some recommendations as to the strengthening of positive
21 comity agreements consistent with some recommendations made by representatives of the
22 business community in the hearings before the Senate Judiciary Committee several months
23 ago. It's interesting to note those recommendations, basically more transparency, use of
24

1 discovery powers, greater reporting and the like, have been picked up by the draft report,
2 and I want to add my endorsement to those suggestions.

3 It's also noteworthy, I think, that those suggestions were commented on
4 favorably by Chairman Pitofsky of the FTC.

5 We expected probably more out of positive comity when it was first installed
6 than has been proven out, but I think that may be as much a commentary on our own
7 impatience as on the ultimate long-term efficacy of positive comity.

8 I agree with Paula, I do think the enforcement tools of the United States, of
9 Justice and FTC and private actions, may well have been underutilized and I think there has
10 been perhaps more trepidation and timidity shown with respect to the ability to use those
11 tools that exist than may be warranted.

12 I agree with Paula that I think that the Japan agreement and the Brazil
13 agreement and the proliferation of positive comity agreements provides an opportunity to
14 move on both fronts and provide more credence and weight to the notion. I recognize it's a
15 delicate issue and one that has to be undertaken without throwing the baby out with the bath
16 water, without undermining the concept of positive comity, so that we do not adversely
17 affect the relationships that are so essential that we become the victim of our own aggression.
18

19 So that's something I think that the nation has to be careful about and we in
20 recommending policy to the nation have to be careful about that, too.

21 I think I'm not clear actually where we're headed on Section 301. In reading
22 the chapter, it's not been -- and maybe Dick will want to comment on this, but it doesn't
23
24

1 seem clear to me where we're headed on it. But 301 has its limitations, so 301 has its
2 limitations. Maybe we can point that out and move on, without being judgmental about it. If
3 that's all we're doing, that's fine and we should be clear that's all we are doing.

4 Some comment has been made -- and again maybe Dick will want to comment
5 on this -- about the role of the Department of Justice at the table. I think it's important to
6 have the Department of Justice at the table in all of the competition matters that are within
7 the purview of this Committee.
8

9 Implicitly, I'm not commenting on whether they should be at the table in
10 antidumping or countervailing duty cases because those issues are beyond the purview of
11 this Committee. I think we ought to make clear that they're beyond the purview of this
12 Committee because if we don't people are going to say, well, have you ignored --

13 MS. JANOW: It's in the introduction.

14 MR. RILL: But I think from my own experience, I think there is even general
15 agreement from USTR and Commerce that our presence at the table is helpful rather than
16 disruptive in various competition and trade matters. I think we ought to recommend that that
17 continue.
18

19 I'm not, John, so hung up on what structure that takes. I mean, sure, I'd love to
20 have a Department of Trade and Competition as a retirement job, but a lot of things have to
21 happen before that happens, like maybe a personality transplant. But apart from that, I think
22 the function and the presence is important, however it's worked out.

23 And I think you made some very valid points at our last meeting that we could
24 get hung up on the structure and undercut the substance.

1 Other than that, I think the chapter is very much in the right direction. Oh, one
2 other thing. Paula touched on it, that we've had a lot of suggestions -- I guess Merit did --
3 had a lot of suggestions for possible legislative amendments and we don't really pay much
4 attention to them.

5 I think we should at least say that we've had these particular proposals and we
6 as a group -- and I think this is certainly the consensus of the group -- do not recommend
7 their enactment at this time, because I think we're not, we are not fair to the people who
8 spent an awful lot of time putting together these proposals and putting them to us. I think in
9 particular of proposals made by Alan Wolff and Dick Cunningham.

11 That's a personal view and I don't feel strongly about it, but I think it's a bit
12 truncated if we don't at least touch on them.

13 Now you're going to tell me that I haven't read the report, but that's okay.

14 DR. STERN: Yes.

15 MS. JANOW: No, I was going to be a little more delicate. I was just going to
16 say that there are some actual draft legislation that we haven't commented on, but I think
17 some of those ideas we have briefly commented on.

18 So do you think it's important to speak to draft, or to legislation that may have
19 passed one house but not both, and so on?

21 MR. RILL: I think our function is to recommend wherever we see it fit to
22 recommend. I think on that legislation, sure, any view on that is going to be something of a
23 lightning rod. But if we have a feeling on it, develop a consensus, and say that we think other
24 courses of action are more profitable, we probably ought to say so.

1 MS. FOX: I wanted to make some very general comments about where this
2 chapter fits in the scheme of the report. And to begin, what I want to say is I think it would
3 be unfortunate if we take up this issue as if the problem were that U.S. exporters are
4 foreclosed from foreign markets and we need a better way to get in, because I see that as
5 just symbolic of a much broader international picture that we ought to be looking at, and the
6 international picture is that we ought to be looking at how we can enable world competition
7 to take place without barriers so that the world markets are open and there is free trade and
8 competition in the world markets.
9

10 This leads me back to what I view as our initial question and maybe an
11 introduction, and also it leads me back to say that the issues that were entrusted to us, the
12 three of enforcement, mergers, and trade and competition, do fit within a very general
13 framework and that very general framework requires us to look ahead at competition,
14 innovation, and the world. We have to look ahead 25 years or so and we have to think
15 about e-commerce as helping to open up the world; and the trade liberalization, of course
16 through the WTO, is part of this enabling of opening up the world; and that we want to
17 enable the actors who are providing the goods and services to have free range in the world.
18

19 Then once we think about it that way, we do realize, at least I do realize, that
20 there are some problems about having only national law and having world markets, and we
21 have to find ways to connect the enforcers being national and the law being national and to
22 lift nationalistic blinders off.

23 So the trade and competition point, as the market access point, is one point in
24 this bigger picture, and a very important point in the bigger picture. I agreed with everything

1 that Jim and Paula Said

2 The way the chapter is structured now, it's not hinged to the broader picture,
3 and in addition it leads into WTO in a way that I'm going to say I think has to be unbundled
4 and unbundled up front. And this is why. To talk about the unbundling, I want to say first
5 that when a lot of people talked about the trade and competition issue for WTO they weren't
6 talking about just a market access issue. I don't mean just, it's a very important issue.

7
8 The way the conversation has evolved in the WTO with the trade and
9 competition group, interaction between trade and competition in the WTO, is the following:
10 that there are all of these world competition issues out there and competition is basically for
11 liberalization and trade is for liberalization, therefore WTO is the forum for talking about this
12 great range of competition issues, which are virtually all of the issues we've been surfacing as
13 points that have to be met, to try to make national law more compatible with the challenge of
14 global markets.

15 MR. SIMMONS: Hello.

16 DR. STERN: Hello.

17 MR. RILL: Who's on? Dick Simmons?

18 MR. SIMMONS: Hello.

19 DR. STERN: Who's on, please?

20 MS. FOX: He can't hear us.

21 DR. STERN: Can you hear us?

22 Hello?

23
24 MS. BAIRD: Hello.

1 DR. STERN: Hi. Can you hear us?

2 MS. BAIRD: I couldn't for a while,

3 but now I can.

4 DR. STERN: Is that Zoe?

5 MS. BAIRD: Zoe. Hi.

6 DR. STERN: Hi. Okay.

7 Is Dick Simmons still on?

8 (No response.)

9 DR. STERN: Dick must have gotten frustrated by that, too. So maybe you
10 should call him.

11 We're sorry, but we're happy you've joined us. Did you just join us?

12 MS. BAIRD: Well, I've been just sitting here in silence for a while, but I'm
13 delighted. I figured eventually, since they told me the conference was in progress, that I
14 would get joined in. I really thank you for letting me participate by phone.

15 DR. STERN: Okay. Well, we're on trade and competition policy and Eleanor
16 Fox is making some of her initial comments on that whole chapter. We'll proceed. Eleanor.

17 MS. FOX: Hi, Zoe.

18 So my thought about WTO, in view of the way the conversations have evolved
19 in the WTO working group, is to put some part of the WTO conversations at the very
20 outset, to say there are a panoply of world competition issues. Some people are talking
21 about them as if they all belong in the WTO.

22 And there are many concepts that are being talked about that are concepts that

1 we would in theory adopt, like transparency and nondiscrimination and involving all
2 interested members of the world in the conversation about world competition problems.
3 And after we talk about the concept of the world, and that some of these things are
4 happening in the WTO, we might refer to the fact that we're going to revisit the WTO
5 question in the trade and competition area so that we don't have to put something heavy on
6 WTO at the front.

7
8 But we might signal the fact that there are, there is this great number of issues
9 that we think have to be dealt with in someplace, in one place or another, and we might
10 emphasize our skepticism at the outset that we're not so sure that the WTO is the right place,
11 but these are issues we're going to be talking about throughout the report.

12 MR. GILMARTIN: Having participated on the Subcommittee, I very much
13 agree with the direction of the report and would address a lot of the issues of competition
14 that we encounter as an industry and so on. Basically, the way that I would summarize it
15 from my perspective is that there is much wider agreement today than there may have been
16 10 years ago about the role of competition in stimulating economic growth and stimulating
17 innovation, and so there is a different audience out there, but yet there is still probably pretty
18 wide variation when people start talking about competition what they really mean by that.

19
20 So therefore continuing to work to build a consensus around that in a soft
21 harmonization way is of great value, and the Department of Justice I think could play a role
22 in that separately from the enforcement arm.

23 And that the -- so I think that competition policy as a way of stimulating
24 economic growth is in the process of displacing the old industrial policy, which tended to be

1 more, you know, develop lead industries and things like that. So in that environment it
2 provides an opportunity, therefore, to create a forum for soft harmonization of the type we're
3 talking about.

4 It also creates an environment for positive comity based on that kind of context.
5 And I think we're suggesting this as a much more effective way of proceeding, although not
6 necessarily the only way because there are a variety of ways, but probably over the longer
7 term, looking out 25 years, a more effective way of dealing with these issues of trade and
8 competition and market access and so on, and that along those lines we are saying it's
9 important to distinguish between what is -- what are problems with competition and what
10 are the problems with trade, and that it be very clear about that a lot of these things that are
11 called market access or trade issues are really issues around competition. They affect local
12 industries as well as the U.S. industry; and that because we want to maintain that distinction,
13 create a forum where we can focus on competition, that we're suggesting, although the
14 WTO has a role in terms of education, we really should have a separate place to talk about
15 these things, and therefore continue to distinguish them, rather than running the risk, which
16 they are now, of blended, and as a result of blending them we're not very successful in
17 addressing them.

18 So I think that that's my sort of short summary, if you will, of where I think we
19 came out as a Subcommittee. I'm very comfortable, based on our own experience, that
20 that's very much in the right direction.

21 DR. STERN: Thank you very much.

22 MR. DUNLOP: May I make a couple of comments. Just as you are now

1 proposing an introductory chapter or section in which you say what we're going to do, I
2 think it is important to include in that what you are not going to do. Your point about 301 is
3 only one of those point, but I want to come back to the statement at the bottom of 3.2 and
4 suggest that that statement be incorporated up front with a change which I will comment on.

5 The statement that I'm referring to says: "There are a variety of practices that
6 may be reprehensible, illegal or offensive under U.S. or foreign law that can fundamentally
7 impact the nature of competition within the market or internationally, but which are not part
8 of the discussion herein." Then you say: "Substandard wages, employment standards,
9 utilization of child labor, or lax environmental regulation are two such examples."

11 I have no problem with that at all. Indeed, I encouraged you to say that before.
12 But I also suggest to you that it may be excessive labor standards. Certain combines
13 between longshoremen and stevedoring companies may have quite an impact on trade. So
14 my own point is I don't mind the substandard.

15 I do think that's important, as you know, Merit, in view of the discussions that
16 are taking place this coming week in Seattle, where all hell is going to break loose on this
17 issue of combining or trying to separate trade issues from labor and environmental standards.
18 We're going to have big demonstrations there and the whole conference I think is in
19 jeopardy over that issue.

21 So my first point is that this element, both ways, needs to be put up front along
22 with 301.

23 Perhaps the only other comment -- I agree with most of what you have done --
24 other, more substantive suggestion that I want to comment on is that -- and I use your

1 summary to identify it at page 3 -- one potentially useful step would be for the U.S.
2 government to sponsor or undertake a study of the magnitude of global trade problems that
3 stem from private or hybrid anticompetitive restraint support.

4 Now, I have real doubts about the capacity of people to do that, frankly. Also,
5 it is kind of a shot at one period of time where this is very much an evolving pattern. And I
6 guess my proposal in the framework of the report is that if you were to establish this
7 competition forum, which is a part of the recommendation, that continuing responsibility
8 might be put there, so that you have a kind of ongoing picture of this situation.

10 I also think that the relationship between antitrust lawyers' and judges' standards
11 and the economic profession is as far apart as it has ever been and growing wider.
12 Therefore, I have reservations about who would do such a study.

13 But I think if you're going to have that forum, my own view is that the ongoing
14 aspects of that are appropriate subject matter.

15 MR. GILMARTIN: I think that's a very good point.

16 DR. STERN: I do, too.

17 Are there further thoughts now, digging deeper?

18 MS. FOX: Yes. On trade and competition, I have two thoughts totally
19 unrelated to each other. One is, as we all know, the United States might not have totally
20 open markets and the European Community every year writes a report about the United
21 States barriers to market access. I certainly would want to reflect problems at home if we
22 are talking about free access in the world. It always has to be reciprocal. I don't know
23 whether that was reflected anywhere, but I think maybe it should be.
24

1 Now, the second --

2 MR. DUNLOP: Could you tell me some of the, since I don't know, some of
3 the points which are made by such people?

4 MS. FOX: Maybe, Paula, you know better than I. There are booklets that the
5 EC publishes every year, and you might --

6 DR. STERN: Well, I don't read them carefully. I'm mindful that we have a
7 representative out in the audience. But I think it was actually done as a response to our
8 legislative mandate that the USTR publish annually a list, estimate of trade barriers overseas,
9 and I think it was a little tit for tat.

10 But as I recall, there's a lot of concern about some of our state and local
11 jurisdictions and the buy-America and the buy-local. Those are the things that stick out in
12 my mind, but you may have something more in mind.

13 MS. FOX: No, I don't really. But actually that would be very appropriate, to
14 mention that we're saying that there are excessive state -- we said it in the sense of nation
15 state, but state -- trade-restraining laws abroad. Our states also may have excessive
16 restraints, and to the extent that we're proposing talking about this further and trying to
17 ratchet it down, it comes within the same picture.

18 We don't even have to be very specific. I mean, I would say, especially if it is
19 laws that we can look at that seem to us on their face to be excessive state laws, we could
20 cite a page or so.

21 I had another, different kind of comment to make on trade and competition, and
22 that is this. I apparently would go further than the Committee and I might write a page or
23
24

1 two essay to say that I think on the market access-trade and competition point we ought to
2 be, or at least I would be, out front a little more, that I do think that private anticompetitive
3 restraints that bar markets are the other side of the coin from public anticompetitive and
4 unjustified restraints that bar access, and that when nations sign on to the WTO and they
5 agree to keep their markets open, they ought to be agreeing to keep their markets open and
6 free from the unreasonable private restraints as well.
7

8 And I did have a proposal, which I don't think was adopted by the group, but I
9 would probably write that into a small essay, I mean really small, a page. I would also
10 include in that that I think that we ought to have harsher obligation on countries to eliminate
11 public restraints.

12 I here would go back to the Fuji Film decision in the GATT-WTO to say the
13 following: In that case, the panel said that among other reasons why the United States didn't
14 have a case was because we had no right to expect the government to get rid of laws that
15 we knew were in place when they signed up.
16

17 I think that that should be eliminated. I mean, if there is a law that otherwise is
18 inconsistent with a member's obligation to keep its market open, the complaining country
19 should not have to prove that the law wasn't there when they signed up. They should be
20 able to contest it.

21 DR. STERN: Oh, I think that's a very useful point, particularly as so much of
22 the concern, legitimate concern that some people have with extending the WTO's purview
23 into the competition policy area, is that countries that don't have the same philosophies as we
24 do on competition are going to sign up to some WTO thing and get a stamp of approval that

1 they are now WTO competitive and yet they really aren't. So I think that's a very useful
2 point.

3 MR. RILL: Eleanor, I wonder -- you make two points. One is that a
4 signatory to a WTO agreement should agree to get rid of private restraints that impair
5 market access, as I understand it. That may be the subject of a separate paper.

6 I don't know that you'd need a separate paper to say that a WTO member
7 should undertake to get rid of public restraints on market access. I think that's consistent
8 with what -- I mean, the paper might be modified and you might have some editorial
9 comment, but I don't know that that point is particularly inconsistent with anything that's in
10 the draft.

11 MS. FOX: It's not inconsistent, but it was never adopted into the draft. So I
12 thought that you all weren't in favor.

13 MR. RILL: My view is it would be appropriate to adopt that into the draft. I
14 may not agree with you on your first one.

15 MS. FOX: That's great. Fine.

16 MR. RILL: So we'll see.

17 DR. STERN: John?

18 MR. DUNLOP: There is one other question I think that I have and that
19 concerns the processes of the WTO. I come to this at page 7 of your summary, point 3. I
20 do think that the proposal that the WTO develop some nonbinding mediation in the handling
21 of its disputes is an important development that that organization needs.

22 This litigation process seems to be formalistic and so on, and in bodies that are

1 trying to work problems out some kind of experts who serve as mediators rather than judges
2 -- I don't mind arbitrators. After all, I'm a lifelong founding member of the National
3 Academy of Arbitrators. But my own view is that increasingly many disputes are better
4 resolved, particularly national disputes, by some kind of group of people who have expertise
5 in the subject matter and can facilitate agreement.
6

7 So I think in several places that kind of notion is worth making in my view,
8 rather than leaving the state of play in the kind of litigation process that is so frustrating and
9 so time-consuming.

10 MR. RILL: John, I think that's right. I fully agree with what you said. You
11 mentioned, though, that that was within the framework of a recommendation related to the
12 WTO. Actually it's related to a recommendation in the context of the global forum.

13 MR. DUNLOP: Yes.

14 DR. STERN: Yes.

15 MR. RILL: I think that's an important difference.

16 MR. DUNLOP: Yes, I agree. But that doesn't keep me from emphasizing the
17 point.
18

19 MR. RILL: No, no. And I agree with you. I just wanted to be clear you
20 weren't putting it in the WTO context particularly.

21 DR. STERN: Further comments?

22 MR. RILL: Have we lost Dick?

23 MR. SIMMONS: No, I'm back. I was cut off at your end for about 12
24 minutes.

1 MS. FOX: That's because I accidentally pushed the mute button. I apologize.
2 I'm very sorry.

3 DR. STERN: Eleanor, she had a lot of things she didn't want you to hear.

4 MR. RILL: Don't take it personally, Dick. It's just business.

5
6 (Laughter.)

7 MR. SIMMONS: No, no. I'm permitted to take it personally. I'm paranoid.

8 MR. RILL: Dick, when we had the opportunity, you were very kind to share
9 with Paula and me your views, and I wondered if you wanted to share them with the group
10 at this point, with the Committee at this point.

11 MR. SIMMONS: Well, I think that Jim and Paula -- Paula, you touched on
12 and Jim touched on 301 and the fact that we really ought to say something.

13 Secondly, I express some concerns over the role of antitrust being carefully
14 contained to areas of competition, and I, Paula, for your and Jim's benefit, I reminded you of
15 situations where Justice has taken as a matter of policy a position in opposition to the use of
16 certain of our trade laws by American companies.

17
18 Thirdly, I did talk about market access and specifically discussed the issue of
19 Japan, which is in my opinion -- while we may not have a smoking gun, we have everything
20 else but in the case of a number of commodity products such as plate glass and specialty
21 steel.

22 I also discussed with you the cartel that has existed for several years between
23 the European Community and Japan that rule out of bounds their markets and leave the
24 United States market as a free zone for both trading groups. I reviewed some statistics with

1 you and gave you a copy of that testimony, which I had just recently given.

2 But I think you've touched on most of these things. I'll be interested in seeing
3 the last, the next draft, if that is the last draft. The final point I made is if you want to have
4 more than the academic and legal community read this, a great deal of effort has got to be
5 put into the executive summaries, with perhaps references to portions of the report that can
6 be referred to for more detail, so that we can get, as Paula pointed out, as wide a readership
7 as possible.

8 MR. RILL: I think, Dick, I don't know whether you were on or not, but Paula
9 made the point that perhaps the U.S. DOJ and FTC might be more ambitious --

10 MR. SIMMONS: Yes, I was on for that.

11 MR. RILL: -- in their referrals under positive comity, and she mentioned
12 particularly the Japan situation.

13 MR. SIMMONS: As a pragmatist and with the new agreement that's been
14 signed between the United States and Japan, it would seem to me that the efficiency of
15 positive comity should be tested. Will it really work? How will nations that are parties to it
16 respond, both us and them?

17 And until that occurs, I think it's difficult to be overly optimistic about whether
18 or not market access, which is private limitations as well as hybrid limitations in the case of
19 Japan, will actually disappear or be reduced.

20 DR. STERN: Zoe, do you wish to make any comments on this chapter?

21 MS. BAIRD: I don't, but thank you very much.

22 DR. STERN: Merit, I have some other thoughts, but you want --

1 MS. JANOW: No, I think that's enormously helpful, so I appreciate all of your
2 comments.

3 I'd like to also raise the possibility of a discordant view here, namely I think the
4 idea of an international forum is a great one, but there are a lot of proposals that have been
5 directed there in this chapter. So I think John has raised the question implicitly, should that
6 not come to pass, are there things that should come to pass independent in the event that a
7 forum is not created?
8

9 In other words, all the ideas we've developed shouldn't all hinge on the
10 existence of a forum.

11 DR. STERN: Absolutely.

12 MS. JANOW: If you believe in the ideas, is it better piecemeal than not at all?
13 I think the sense of the group is yes.

14 DR. STERN: Yes, definitely.

15 MR. GILMARTIN: That's a good idea.

16 DR. STERN: Go ahead.
17

18 MS. FOX: Yes. I have one more point, but it wasn't related to Merit's last
19 one.

20 DR. STERN: Merit, have you got more? Do you want to push on?

21 Why don't you let Merit just get those things, consensus problems.

22 MS. JANOW: The discussion of 301, Jim, you're absolutely right, is
23 descriptive in this chapter. It isn't in any way prescriptive or normative. There is an effort to
24 be respectful of its ambit of existence in the fourth chapter, which is simply to say that it has

1 had its raison d'etre with respect to governmental restraints. It has certain benefits for those
2 who trigger it because they can bring issues out to the world stage.

3 If you look at -- I'm trying to find the exact reference -- 4.6, that trade policy
4 can rely on anecdotal and inferential data, and that there are benefits to this that have few
5 parallels in the antitrust context, but the Committee has not endorsed that same methodology
6 being applied with respect to private restraints.
7

8 I just want to make sure that we're comfortable with that kind of
9 characterization. I think it is fully respectful of 301's utility and effectiveness with respect to
10 governmental and its political nature which can be helpful in intergovernmental disputes. But
11 it is not suggesting that that methodology be applied to private restraints.

12 MR. RILL: I think that should be made clear. You might want to move that
13 kind of governmental restraint to a back stage settlement process, political nontransparent.
14 You don't want to move that over into the resolution of private restraints, at least I don't.

15 MS. JANOW: That is a subject some feel keenly about, so I just want to make
16 sure.
17

18 DR. STERN: I think the question -- I'm glad you did surface it. It sometimes is
19 a thin line between what is a commercial dispute and what is fodder for government
20 discussions and negotiations. And I have been there before and have seen that when at least
21 the government gets involved in putting on the agenda for government-to-government
22 discussions, a dispute, things sometimes get resolved that otherwise just would not have
23 gotten surfaced.

24 In other words, it ups the ante. And in other countries enforcement may not --

1 may be more politicized than it is in ours. And I don't want to send any signals that we are
2 handcuffing the U.S. government in those instances where it can be helpful to up the ante in a
3 politicized enforcement or lack of enforcement inaction overseas, even in a private situation.

4 I'm thinking of -- I'm thinking of a couple of cases that I've been involved in.
5 This is different from actually bringing a case under 301. It's actually either putting it in the
6 National Estimate of Trade Barriers. I don't want our government to be handcuffed and
7 have another government come back and say: "Well, you shouldn't put that thing on a topic
8 of discussion or in that list of trade barriers that you publish every year because that's a
9 private thing; we think that's a private dispute."
10

11 I'm just, I'm a little worried that I don't want to send that signal. There is, you
12 know, there is jawboning that we do and it has been helpful.

13 MR. RILL: Mostly in the governmental context, though, I think.

14 DR. STERN: Well, but that's the point. The other country comes out and says:
15 Excuse me, but we'll be happy to talk to you on government constraints, but this is a private
16 commercial dispute between two different companies.
17

18 MR. RILL: That was certainly the position that the government of Japan took
19 on the photo film case.

20 DR. STERN: Right. And it's been taken in a number of other cases I've been
21 involved in.

22 MR. RILL: On the other hand, you look at other situations when I think there
23 has been jawboning, more or less effective jawboning -- whether it's effective in the long run
24 economically or not is another issue, but effective at least in the dispute resolution. Well,

1 take aluminum, where there was a government to government resolution ultimately by
2 government in effect negotiations.

3 The question whether or not that type of thing might be more transparent is the
4 only question I have. As to -- I don't know. Maybe there's something you can write on this.
5 I'm a little unclear as to where you want to go.

6 DR. STERN: What I was trying was to hesitate -- was to temper the
7 enthusiasm for signaling in the paper a new sentence that says: As for 301, we want to make
8 clear that we just want -- that this should not get into, the government should not get into the
9 purview of private disputes, if you will. Only limit it to hybrid or colorably government
10 anticompetitive acts.

11 And I'm just saying you got to be real careful on how you write it, because I
12 don't, I don't want to unilaterally disarm in those areas where sometimes jawboning does
13 help. And it particularly helps when another country just throws back with us that, oh well,
14 that's a private dispute, and so no enforcement gets done over there and our government just
15 sits there and says, well, we have to sit on our hand because we have this recommendation.

16 MR. RILL: But maybe that's where positive comity comes into play.

17 DR. STERN: Oh, yes. That's why I wanted to affirmatively push the positive
18 comity.

19 MR. RILL: And you're very much on the record there.

20 DR. STERN: Okay.

21 MS. JANOW: Can I ask you a question about that, Jim. There are problems
22 that are a mix, that this Committee has identified of both public and private. So to the extent
23
24

1 that there is a governmental dimension that is clear, there is no ambiguity as to 301's
2 jurisdiction.

3 MR. RILL: That's right, that's right.

4 MS. JANOW: There may be ambiguity as to 301's effectiveness, but that's
5 separate. But sometimes foreign governments' response, and I think this happened in the
6 film case, is to say: This is private, so we don't have to engage on this.

7
8 MR. RILL: That did happen in the film case.

9 MS. JANOW: That did happen, and I think to say that there should be a
10 demarcation between public and private restraints is not to say that governments, foreign
11 governments, can evade responsibility by deferring it to a competition agency who may be of
12 uncertain effectiveness.

13 MR. RILL: You headed where I was headed.

14 MS. JANOW: Okay.

15 MR. RILL: And that is the fact that I don't think anybody, least of all I,
16 advocate a sitting on the hand or for that matter throwing up the hands approach --
17

18 MS. JANOW: Right.

19 MR. RILL: -- to dispute resolution. What we're talking about is the scope of
20 301, not the efficacy of 301.

21 You raised a point I think that may be another point worthy of consideration in
22 the chapter. That is where we may not be sufficiently clear -- we may not be sufficiently
23 clear -- as to what we consider kind of a hybrid restraint.

24 DR. STERN: Yes.

1 MR. RILL: Doug Melamed, when he was here I think at one of the very first
2 meetings, suggested that we might want to take a careful look at what we mean by hybrid
3 restraints and where the antitrust laws or the trade laws might appropriately intervene. I
4 think that's -- we could have a long discussion of what that means right now and it would be
5 interesting perhaps to two or three of us.

6 But the fact of the matter is we don't, I think, try and draw a line, even by
7 exemplar, as much as maybe we should. We have run into situations -- we need to take a
8 look at this. We have run into situations where people, foreign businesses, have said this is
9 something encouraged by the government, therefore it's a government restraint. That
10 wouldn't get you to first base under the U.S. antitrust laws. Wickard versus Filburn. How is
11 that?
12

13 The fact is that there are other forms of governmental intervention, blessing the
14 standard. How far do we want to go with this? I think where you do get into government
15 encouragement or government blessing of a standard without thorough review, the Ticor
16 situation, the government, our government, may have more than just positive comity to deal
17 with.
18

19 But I think we can't take this point in a vacuum without setting up the predicate
20 of what constitutes the hybrid restraint.

21 MS. FOX: May I say a word on that, because it fits into my rejected proposal
22 in this way.

23 MR. RILL: Uh-oh, am I going to agree with you now?

24 (Laughter.)

1 MR. RILL: I've got to reconsider what I just said.

2 MS. FOX: You're not going to agree with me. But we don't want to be in a
3 situation where a government can say, look, it's not my restraint, it must be private, and the
4 private can say, oh look, it was encouraged by the government, so I'm off the hook.

5 If we had a stronger government obligation to at least have and implement a law
6 that is going to prevent private restraints of trade that unreasonably block its market, you
7 actually bring the two together and you shift. The government is going to have less of a long
8 string to get off the hook; it's going to be responsible for more.

9
10 DR. STERN: You're shifting the burden.

11 MR. RILL: I may end up agreeing with you, actually. Then you'll have to
12 reconsider your position.

13 DR. STERN: No. I think both of these points are really very, very valuable. I
14 don't know what it means in terms of work, more work on defining what we mean by
15 hybrid. Do you want to refer us to the first time we use the word "hybrid"? Because, quite
16 frankly, there are other places, and I have circled them, where there are legal terms and
17 terms of art which have to be defined the first time, because there are a lot of nonlawyers
18 who are capable of understanding these concepts, but who may not be familiar with the
19 particular legalese or the legal terms.

20
21 MS. JANOW: The chapter's treatment of hybrid restraints says, one way of
22 looking at the problem is to say: This would not have occurred but for some antecedent
23 action of the government that may or may not rise to the level of ongoing governmental
24 supervision or regulation. So it's not state action, but it can still distort the market.

1 If there was, say, delegation of authority to licensees and the result of that was
2 exclusionary, it could be a hybrid restraint. And there are a few examples of that sort.
3 Now, the GATT -- and this has been mentioned in the draft -- has had to consider this
4 question in the semiconductor case and in the film case in the context of what is a
5 government measure.

6 And in the semiconductor case, the panel argued that if there was reasonable
7 grounds to believe that the governmental measure created sufficient incentives to persuade
8 private parties to conform their conduct to the nonmandatory measure and the effectiveness
9 of the private conduct was essentially dependent on this nonmandatory action taken by the
10 government, then it constituted a government measure.

12 So I think that this is an evolving jurisprudence. The film takes it slightly farther,
13 although it didn't reach that conclusion of a violation with respect to the facts of that specific
14 case. So query: Can we -- do you think we should button this down further?

15 MR. RILL: Yes, I think some examples would be helpful.

16 MR. DUNLOP: May I make the obvious suggestion, namely that when you
17 introduce the concept of hybrid you go on and have a brief discussion that there are varying
18 proportions and forms of involvement, decrees and so on. So you start out with not one
19 simple matter --

21 DR. STERN: A spectrum.

22 MR. DUNLOP: -- but a range, a spectrum.

23 MR. RILL: You've got a rich, if not -- and I think that's right, John. You've got
24 a rich, if not altogether absolutely crystal clear, body of law from which you can extract

1 some examples on active state and foreign sovereign compulsion in the U.S. I think, using
2 those examples, it would be worthwhile to clarify what we're talking about.

3 MS. FOX: I think actually examples are very important and that there is not a
4 definitional problem if you just look to see what you are doing. So for example, all we mean
5 to say is there are certain things that ought to be caught by GATT-WTO and certain things
6 that ought to be caught by private antitrust law, and we just should say when they should be
7 or should not be exempted.
8

9 And we might say they shouldn't be exempted just because they're encouraged.
10 We can recognize the fact that certain government restraints provide a background that
11 makes it much easier to cartelize or restrain trade. We know that.

12 The United States, we know that. We don't make those laws illegal. We just
13 look at the fact that these structures have existed. Like in Japan, the retail store law, which
14 is being abolished as of March, I think, or May. But having a big retail store law in place
15 makes it much easier to monopolize or cartelize, and that's a background fact we always
16 take into consideration as to the structure of the market.
17

18 So we don't bog down, we're not really creating a new beast. We really are
19 considering all of the facts on the private side. We consider the structure, which can include
20 government restraints. On the public side we have to know when the government is and isn't
21 on the hook.

22 DR. STERN: That's one issue. You then had an additional issue, which is to
23 state that governments have an affirmative responsibility or --

24 MS. FOX: Just to have a law that

1 prohibits, they could say anticompetitive or they could say unreasonable market-blocking
2 private restraints, as long as they implement it. They put it into their law and they implement
3 it as they are true to their own law and nondiscriminatorily; then they have carried out their
4 obligation.

5 And there may be no good remedy unless they don't have the law in place.

6 And this is where, yes, Jim and I have argued as to if there's no good remedy is it better to
7 have such a law or not. I've been of the view that it advances us to have it in place even
8 though we recognize that it's going to be almost impossible -- not quite impossible; almost
9 impossible -- to prove a violation of the obligation if they have the law in place.

10 Does it advance us to say, but you had that obligation, you have it? One thing it
11 does do is make more government responsibility, and the government responsibility will be
12 harder to evade for, for example, a Fuji-Kodak when they say: Oh, it wasn't I; it was the
13 private. Well, you had the obligation to monitor your own market.

14 DR. STERN: Particularly in light of the finding by the panel, I think it's very
15 important for us to urge what you are saying, that governments have this law in place. The
16 question then becomes what happens here in the United States? Does that then require us
17 affirmatively to have the Department of Justice go through the whole inventory of all of our
18 laws?
19 laws?

20 I mean, is there an additional --

21 MS. FOX: No, because we clearly have such a law in place.

22 DR. STERN: Okay, fine.

23 MR. RILL: I was thinking the other way around, Eleanor. And we might as
24

1 well take a minute and talk about it a little bit. Your proposal is that in the framework of
2 WTO there be an agreement on the part of a countries that accedes to the WTO that it have
3 a law in place and that it implement that law.

4 MS. FOX: Yes.

5 MR. RILL: Implementation of the law is, as you know as well or better than I,
6 is a matter that's not always quite clear.

7 MS. FOX: Yes. That's why --

8 MR. RILL: Let me just play out the thought.

9 MS. FOX: Procedural due process and private action.

10 MR. RILL: And then to have some sort of review body suggest that the
11 government of Lower Slobovia, to bring back Al Capp, hasn't enforced its law, and the
12 WTO review panel says Lower Slobovia has systematically not enforced its law, does that
13 mean then that we can keep Lower Slobovian brandy and blue cheese out of the United
14 States under a WTO proceeding?

15 And isn't there another way of cutting this, and that is to create some level of
16 transparency within the global forum, for example, or plan B if there's a plan B, whereby
17 there are transparent public reviews of countries' antitrust vitality to produce transparency,
18 rather than to put it into a framework that tends to resolve disputes so that the consumers of
19 one country injured by nonenforcement receive their sanction by injuring the countries of the
20 offended -- the consumers of the offended country by not being able to drink brandy and
21 eat blue cheese?

22 MS. FOX: Well, two responses. One, I never wanted a remedy that is
23
24

1 retaliatory. The remedy would be an action in your own jurisdiction if there are some assets.

2 This is the footnote 159 problem.

3 I think that it's illegitimate enforcement unless you have an agreement, but if you
4 have an agreement it's not illegitimate. So I would never have trade remedies.

5 But, number two, I think that if you have a competition review mechanism it
6 ought to be hinged to an obligation. And if the nations have an obligation to have a law in
7 place and to implement and enforce it, that's exactly what then would appropriately kick in
8 for a competition review committee.

10 Without any obligation, I don't even understand how a competition review
11 committee can go into another country and say: You did this right, you didn't do this right. I
12 would actually think there's more due process rule of law if, yes, you have a rule, yes, you
13 have or haven't implemented.

14 So it's soft, it's jawboning, but it could be productive.

15 MR. RILL: That's not, that's not -- at least that's better than preventing us from
16 drinking brandy and eating blue cheese.

18 MS. FOX: I don't approve of preventing us from doing almost anything.

19 MR. RILL: But one model that at least ought to be perhaps looked at in the
20 context of what you are talking about is the country review mechanisms, which have been
21 cut back a good bit, I guess, in the OECD, where there is a periodic review.

22 MS. JANOW: They exist at the WTO.

23 DR. STERN: They exist at the WTO and they are more robust.

24 MR. RILL: On antitrust policy?

1 MS. JANOW: Yes. In the context of the TPRM, trade policy review
2 mechanism, competition has come into some reviews. They look at it as I think in a kind of
3 straightforward way, what's the law look like, is it transparent, does it look
4 nondiscriminatory. It's not looking at particular matters.

5 MR. RILL: I just want to unhinge it from the WTO, at least over time, given
6 our proposal.

7 DR. STERN: I see your point. But I don't want to, again, disarm before we
8 have got something in place.

9 MR. RILL: That's fair.

10 MS. JANOW: Yes. But I want to be clear I'm understanding this exchange on
11 the question of, if it is nonretaliatory, then it's not really a matter of dispute settlement in the
12 WTO sense.

13 MS. FOX: Not unless you didn't have the law or you didn't have the due
14 process or didn't have procedures for private parties, if you didn't have the law in place you
15 promised to have in place. You can talk about a possible obligation if you have a pattern of
16 nondiscrimination, but I just really think it could really be a talking subject, but I don't expect
17 any really litigation on that.

18 MS. JANOW: Well, do you want to embed that into a forum that is designed
19 to have its obligations subject to dispute settlement?

20 MS. FOX: I don't see why not, because it depends what you make subject to
21 dispute resolution. So for example, I cited NAFTA Article 19 before. You're just looking
22 to see whether the country has properly applied its law in a credible way and not a
23
24

1 discriminatory way. That's the end of the review, and I think it's helpful to have such a rule.
2 So I wouldn't think that you would have to have an intrusive dispute resolution mechanism to
3 have a skeletal possibility of one.

4 MS. JANOW: I guess all I'm putting squarely on the table is this idea: if we're
5 thinking about the evolution of the World Trade Organization as distinct from this
6 competition principle, does one want that institution to have a robust dispute settlement or
7 does one want to develop principles under it that are in a sense not judiciable in the same
8 sense of most of WTO rules?
9

10 MS. FOX: I think that TRIPS might be soft ground to try to plant anything on
11 or stand on. But isn't that the kind of tradition that TRIPS is trying to establish, that there's
12 not a lot that's justiciable, there's only a point at which you might violate TRIPS, but there's
13 an awful lot countries can do before they could even possibly violate TRIPS.

14 For example, if they have an antitrust law that allegedly violates TRIPS they can
15 go really far in their antitrust law that does takes away some intellectual property rights
16 before it would rise to a level of a dispute point in WTO. And I thought that was a legitimate
17 way of looking at dispute resolution under WTO. It doesn't have to be breathing down your
18 back. It could give you a whole lot of latitude before you come to the point of no return.
19

20 MR. RILL: I'm not sure I know where that gets us.

21 MS. JANOW: Well, I do think that there's been a moratorium on enforcement
22 for less developed countries under TRIPS and that moratorium is coming to an end in
23 theory.
24

MS. FOX: But it didn't have to be a less developed country. It could be EU.

1 It could be anything, any country.

2 MS. JANOW: I think those dispute settlement provisions fully apply with
3 respect to those jurisdictions that were not subject to the moratorium.

4 MS. FOX: This is my point. They apply, but the EU can go a long way in
5 using antitrust even in ways that will, some people would say, encroach on intellectual
6 property rights before they're going to be called to account for it, because they have the
7 freedom to do what they want in their own way as long as it's credible and
8 nondiscriminatory.
9

10 So therefore, the --

11 MR. RILL: Where does that get you if they have that much latitude?

12 MS. FOX: Well, it gets me to a model that I thought was an appropriate WTO
13 model, that I won't worried that the WTO -- I know you're not saying that the WTO should
14 breathe down the backs of everybody, but I wasn't worried that it doesn't breathe down the
15 backs.
16

17 MR. RILL: I mean, I don't know where that gets us if there's that much latitude
18 -- I know what you're talking about -- in the TRIPS agreement before it ever kicks in.
19 Where does it get us to put something like that into a trade dispute resolution, a trade dispute
20 resolution organization?

21 MS. FOX: I'm trying to frame a principle that I think fits very much in the
22 world trading system of market access. I mean, I think it really fits precisely into a world
23 trading forum, and I think that it's useful to have a rule that will cause countries to at least
24 have regard to the law and steer their conduct in a certain way even if it's not robustly

1 enforced. And that's the point where, does it have to be robustly enforced? Because the
2 principle I'm proposing doesn't get close scrutiny and I think it shouldn't, because I think
3 countries should have leeway in deciding what is a good rule of law and how to apply it
4 against private restraints that close their market.

5 DR. STERN: I have no problem with what Eleanor is suggesting and
6 referencing it, not only with regard to our world forum, our world competition forum, but
7 also with regard to the WTO.
8

9 MR. RILL: I guess my problem is I don't fully understand it.

10 DR. STERN: Well, maybe we should talk offline then and then go on to
11 something else.

12 MS. FOX: Maybe we should. I had one other point I wanted to mention
13 about 15 minutes ago that circles back to something Dick had said. Maybe I should bring it
14 in right now.

15 DR. STERN: Well, let's see.

16 Do you have any other things?
17

18 MS. JANOW: No, no, thank you. That would be great.

19 MS. FOX: You talked about glass and an EC-Japan cartel which I think was a
20 private cartel from Europeans and Japanese that would rule their markets out of bound but
21 leave the United States as a free zone.

22 DR. STERN: I think he was talking about steel.

23 MS. FOX: I'm sorry. Whatever it was, steel. Whatever it was, I wanted to
24 make this comment and it's about seamlessness. When there is a cartel in Japan or EC-

1 Japan and that cartel results in less output sold and higher prices in those cartel countries,
2 and then there's a stream of very low inputs coming into the United States, I believe that this
3 is a seamless question and the United States is interested. And this happened in Japanese
4 electronics.

5 I don't think as a matter of policy it's a full answer to say, as the Supreme Court
6 did say in Matsushita, well, we can't look at the Japanese economy, even if it's closed and
7 even if price is raised, and these are good low prices in the United States, so we want them
8 to come in.

10 As a public policy matter, everything is seamless and that cartel abroad that
11 causes the distortion of prices lower than our companies can bear in the United States is part
12 of one picture which ought to be enabling cartel enforcement of us in foreign markets. I
13 mean, we ought to be able to get at and we should have jurisdiction over the cartels in
14 foreign markets that cause that seamless distortion.

15 And when we're blocked out of foreign markets, it's not just a blocked out of
16 foreign market problem. It's really a world competition seamless problem.

17 DR. STERN: So what should the Justice Department be doing with those kinds
18 of fact situations? Do you think they need to exercise positive comity?

20 MS. FOX: Well, yes. What it should be doing, of course, this is the question,
21 and we may not be --

22 DR. STERN: Did I ask the \$64,000 question?

23 MS. FOX: We should have a world understanding. This should be on our
24 world agenda, that there should be some world understanding that somebody should have

1 the right to take care of enforcement of that cartel. And our firms -- I mean, our enforcers
2 should have the right to take care of that cartel.

3 MR. RILL: But Eleanor, it seems to me that that fact situation you just raised,
4 and Dick adumbrated, is embraced within the 1995 Guidelines of the Department of Justice
5 and the FTC as --

6 MS. FOX: Yes, but the problem is the unilateralism.

7 MR. RILL: -- as an area where the Justice Department would or the FTC
8 would feel free to take action.

9 MS. FOX: The problem is that the focus even of those guidelines is: the
10 problem is that our exporters can't get into the foreign market. And why do we care about
11 our exporters? Do we really care about the Japanese consumers? This is a very narrow
12 way to look at the problem. It's not the whole problem.

13 The whole problem has to be taken care of in an international forum, and if we
14 surface the whole problem rather than this small and not representative piece of the problem,
15 then you could see it's a world competition problem and there ought to be at least a world
16 understanding that we could help one another out in the enforcement against this world
17 cartel. So even though the high-priced goods aren't coming into the United States, it's a
18 U.S. problem.

19 DR. STERN: But Eleanor, just to get back to what we're doing today, are you
20 saying that you want to add a recommendation with regard to the discussion on the world
21 cooperation forum that basically articulates what you're saying?

22 MS. FOX: What I'm saying is maybe -- it was maybe said too subtle -- I think

1 that we ought to surface what are real world and intertwined problems.

2 DR. STERN: Do you want to do it in the context -- do you want to say it
3 specifically at that point in the chapter where we talk about the world competition forum?

4 MS. FOX: I think I would like to do it -- yes. I would like it do it under world
5 competition forum, but I'm not so sure world competition forum belongs under market
6 access. That is a small piece. That's the competitive protection piece of the problem.

7
8 DR. STERN: Well, that's a presentational question which I think goes back to
9 one of your earlier points, and I think that's a point well taken, that we just need to see --
10 you're shaking your head affirmatively here, Merit.

11 MS. JANOW: Sure.

12 DR. STERN: I mean, you can take care of that.

13 MS. JANOW: Well, we can certainly try. I think if there's an introductory
14 section of the whole report that talks about global perspectives and global problems and the
15 beginning of the trade and comp says part of this problem is market access, but part really is
16 much broader than market access. So maybe it requires being broken out even further.

17
18 But I'm not quite sure where to go with your substantive point.

19 MS. FOX: The substantive point is we have to see more things as seamless.
20 I'm not going to come to the support of an American electronics industry that's simply faced
21 with competition, and that's not my point and that's how a lot of people see it. But there's
22 political pressure that always comes in at that point. When the low-priced imports as a
23 result of a cartel abroad start hurting the Americans, there's a political pressure.

24 But I just think everything ought to be seen more seamlessly and that you do

1 that in an initial few pages, and then by the time you come to a market access question you
2 see that the market access question is not about protecting our exporters. It's not really
3 about only these particular exporters getting their right to get into this market. It's a world
4 issue.

5 DR. STERN: I think that's correct, Eleanor, and it relates also to Ray's point
6 that the world has shifted. Competition, the value of competition in enhancing growth, is
7 seen differently. This really does go to the writing of the paper. I don't think we have any
8 substantive disagreement on this.

10 MR. RILL: On that statement, certainly.

11 MS. JANOW: On the remedy issue and the responsibility, where should
12 responsibility reside? Could we exchange paper on that?

13 MS. FOX: It actually comes back into our cartel chapter, that we should take
14 seriously cartels that don't look like they're targeted
15 at our market. There's another example that some friends in the European Community in the
16 Competition Directorate gave me. They said: We're seeing an awful lot of cartels that look
17 like -- they say they're carving out the United States and the EU, and they're cartels that are
18 seriously affecting less developed countries directly, but they might not merely be carving out
19 the United States and the EU. And we have an interest against those cartels.

21 DR. STERN: Well, this gets to my earlier point about affirmative action. Just
22 what affirmatively do we want to be recommending either by action by the Justice
23 Department for their cognizance or cognizance of this world cooperation forum. I guess my
24 view is to lean on affirmative action. Affirmatively say that as the world does become more

1 seamless these anticompetitive activities do spill over the border and do have and will
2 ultimately have some impact on our own national interests.

3 So I agree with you on this and it may be that, as Merit just said, you may have
4 to do some writing on this to get that language into the paper. I encourage you to do it.

5 MR. RILL: Where are we?
6

7 MS. JANOW: I think it sharpens the focus. So I think we've covered a lot of
8 ground very efficiently this morning.

9 DR. STERN: We are in fact at 10 until 12:00. What's our timetable, Merit?

10 MS. JANOW: Well, we have until 1:30 to discuss trade and competition
11 issues, including the role of the Department of Justice and foreign economic policy. We
12 have discussed that in part already. I don't know if we need to spend more time, but there is
13 a set of issues that are raised here about antitrust being at the table and an elevation in a
14 more formal role and an expanded profile in international matters, although not to the
15 detriment of preserving an enforcement agenda separate from that process.

16 I think those have all been discussed. Now, e-commerce is something we
17 could turn to.
18

19 DR. STERN: I think it's a good idea that we do so, because we touched on e-
20 commerce in a certain sense when we were talking about the seamless point. Ray in the
21 very beginning in his statement, I think -- I don't know if you used the word the "Internet."
22 There is a discussion within the e-commerce paper which has the tones of twenty first
23 century and the changes that will necessarily make actions that in the past looked like they
24 were just of significance only within national borders and were the national purviews of that

1 particular country, instead now have major implications for consumers and producers in
2 other countries.

3 So I think that the e-commerce paper -- which was eight pages long, am I
4 right? It's just an eight-page long paper?

5 MR. SHAPIRO: Yes.

6 DR. STERN: Yes.

7 MS. JANOW: I wonder if we might -- Mike, would you care to join us for this
8 discussion?
9

10 DR. STERN: Mike, do you want to highlight anything in particular that you
11 think needs more attention, more emphasis, stronger statements, weaker statements, or any
12 problem areas?

13 MR. FARREN: Well, I thought it was very well done. I had two thoughts on
14 it. One, I think it would be helpful to have more of an emphasis, even though it's reflected in
15 the paper, of the benefits that e-commerce could bring to consumers. I think
16 understandably, since the issue was how to deal with problems of competition arising from
17 e-commerce, there was more of a negative tone of how to police problems rather than sort
18 of starting out -- and it's referenced, I mean, it's discussed that consumers will significantly
19 benefit, that there will be greater access by producers and markets, that there will be better
20 understanding of consumers on prices and alternatives. But I think that could perhaps be
21 emphasized more specifically.
22

23 The other, I guess two just quick points: One, the paper indicates that enough
24 is not yet known to warrant specific legislation or regulation, and that in fact specific

1 countries attempting to regulate aspects of e-commerce could in fact be against consumer
2 interest and a market inhibitor. That's referenced certainly.

3 But I think it may also be helpful to go to the question, which is currently the
4 view of the U.S. private sector, that at this point government should be conclusively showing
5 forbearance on regulation. And that's stated, but I know some of my colleagues in the
6 information technology industry in reading this probably would conclude that it's not stated
7 conclusively enough. So I think that would be helpful.

8 In fact, that's not just a U.S. view. In the Global Business Dialogue in Paris in
9 September, representatives of European, Japanese, other countries, private sector, all took
10 that position collectively. So it's not unique to U.S. business. So I think that would be
11 helpful to state.

12 MR. RILL: Is there a formal statement that was issued by the forum?

13 MR. FARREN: Yes.

14 DR. STERN: Maybe we'll cite it.

15 MR. RILL: Can you make that available?

16 We'll cite it. In fact, Mike, if you circle language or provide language it would
17 be really helpful. I'm mindful of how much we've got to do in the other chapters.

18 MR. FARREN: The other thing which is somewhat related, I think the paper
19 does a good job of citing ancillary issues like privacy that will come up in a competition
20 setting, particularly given the role, for example, of the U.S. Federal Trade Commission on
21 the issue of consumer interest in privacy.

22 Given the fact that it appears there will be an EU-U.S. agreement on safe
23

1 harbor, it may be important to try to capture some of that and reference the approach that is
2 being used on the issue of safe harbor guidelines, meaning, and I'll mention that in a second, I
3 think it may relate to some of the other things that could be addressed more broadly on
4 competition.

5 But if you reference the fact that one way that disparate regulatory regimes or
6 approaches is being handled between the EU and the U.S. is for the U.S. and the EU to in
7 fact agree that if certain private approaches to regulation or the policing by producers or
8 service providers in the U.S. meets a certain standard, then in fact it does create a safe
9 harbor so that the EU regulation will not create an impediment to U.S. companies operating
10 freely in a trans-Atlantic marketplace.

12 I think referencing safe harbor and trying to capture what finally does come out
13 of that agreement will be helpful, because I think the approach to privacy and the creation of
14 a safe harbor agreement which relies on self-regulation on the U.S. side or a unique U.S.
15 approach to regulation on issues associated with competition may be a good way of
16 approaching some of the other areas of disparate regulatory approaches.

18 I just mention that. It's not obviously yet concluded, but it may be a very
19 interesting approach that could be handled elsewhere. Professor Dunlop might have some
20 thoughts on that because it almost goes to a self-regulatory arbitration approach outside of
21 specific judicial or international agreement. And again, it's not yet concluded, but I think
22 going back and looking at the approach of safe harbor and having it referenced would be a
23 good idea.

24 DR. STERN: It's going to be a U.S.-EU agreement on safe harbor?

1 MR. FARREN: On privacy.

2 DR. STERN: On privacy in the Internet?

3 MR. FARREN: Correct.

4 DR. STERN: What's the timetable?

5 MR. RILL: Same question.

6 DR. STERN: What's the timetable?

7 MR. FARREN: Well, of late -- it's being negotiated by Ambassador Aaron
8 and John Mogg, and by all reports they're very close to coming out with --

9 DR. STERN: What are the consumer groups going to say about that, that you
10 have some sort of a special carve-out safe harbor on privacy and you have this mediation?

11 MR. FARREN: Remember, the dispute on privacy is whether or not the EU is
12 prepared to accept that the U.S. approach to protecting consumer private interests raises to
13 the same level of safeguards or protection as the EU directive does.

14 The issue of safe harbor basically says the EU recognizes that BBBOnline and
15 other approaches of self-regulation and certification does in fact at least at the outset look as
16 though it does in fact achieve the same level of protection or at least they're prepared to
17 accept that as a going-in position. So if a company, Company X, were to adopt the U.S.
18 approach of self-regulation -- here is how we intend to protect consumer privacy; we're
19 going to announce it, make consumers aware of it; we'll sign up to certain principles; we'll be
20 subject to audit by those private sector entities, we'll be subject potentially to disbarment
21 from that certification if we don't achieve it -- then the EU is prepared to say those U.S.
22 companies that meet those obligations and in fact sign on to those private regimes will be
23
24

1 judged to meet the same level of protections required under the directive and able to operate
2 freely between the U.S. and the EU market. That's my understanding of this.

3 DR. STERN: Very clear.

4 MS. FOX: I'm wondering what would be an antitrust problem for which that
5 would be a safe harbor? I'm having a little hard time seeing the antitrust problem unless it's a
6 standards antitrust problem, but I don't see that it would be an antitrust problem.

7
8 The reason I'm raising that is I think that maybe there is some areas we
9 shouldn't wander into so specifically when there are many other areas of, say, self-regulation
10 of insurance companies, or self-regulation of sweatshops. And then I come to the question:
11 Why e-commerce as opposed to everything else?

12 MR. GILMARTIN: One thought just listening to this, what Michael is saying, is
13 is there a larger principle here or process that's in play that we could point to as a way of
14 dealing in a general way? You alluded to that at the outset, in terms of how to deal with
15 these kinds of situations where regulatory practices, you know, carried too far would end up
16 as anticompetitive behavior, and how do you work that out.

17
18 So if there's something in this process here about who talked to whom, how did
19 it get started, and then what does that suggest as a model generally.

20 MR. FARREN: It's another approach to comity.

21 MR. GILMARTIN: Yes, exactly.

22 MR. FARREN: I'm just saying, it would be important, I think, to reference the
23 approach to safe harbor. And again, Eleanor's point may be correct. You may not want to
24 take it too far, to draw any conclusions from it. But I think having the process that's being

1 used on the privacy question may in fact be useful later on when other issues arise.

2 DR. STERN: I actually have a very basic question here, which perhaps
3 Professor Dunlop will have to give me a tutorial on. The whole use of mediation by private
4 companies in disputes in an international context versus our paper which talks about
5 government authorities and how they relate and when they come into play, with regard to
6 anticompetitive issues at least, is there a general statement that we want to make or a general
7 reference putting this thing in perspective, that there are models of arbitration or mediation,
8 international examples that Mike has just talked about in this emerging area of privacy, but
9 which is already ongoing in the world already, which we just haven't even referenced even in
10 a footnote?

12 MR. DUNLOP: If I'm not mistaken, a former Stanford Professor who is now
13 head of the Negotiation Project at Harvard Law School came to fame -- his name is Robert
14 Mnookin -- came to fame by mediating out the suits between IBM and Toshiba that settled
15 as a result of his involvement. That sort of thing goes on often.

17 DR. STERN: I think we should talk about that, don't you, Professor Dunlop?
18 At least put it in perspective, or put what we're saying in perspective?

19 MR. DUNLOP: Well, I was willing to settle for adding to the WTO this,
20 mediation as an alternative to litigation. But by the way, I think, Mike, that I'd like to see on
21 this, because as you and I know this thing is so much under change and so rapid, the same
22 point that I made before: that this is an area in which some kind of ongoing forum to study
23 or to follow it.

24 This idea of one-shot action on these things where the world is changing rapidly

1 is nuts. What we need is to position our institutions to be following and studying and
2 reporting. At some point you may have a breathing space or a plateau to do something on,
3 but it seems to me that is --

4 DR. STERN: Evergreen.

5 MR. DUNLOP: -- underlies the points you were making.

6 DR. STERN: Yes, we'll have to constantly be reinventing and adding on.

7 MR. DUNLOP: Instead of doing a one-shot study like this commission or
8 Committee.

9 DR. STERN: Yes, right.

10 MS. JANOW: I just put a little bit of a framework of this discussion. I mean,
11 an e-commerce subgroup was formed because there was perception that there were areas
12 of dynamic change in the economy, exemplified but not defined by e-commerce, that
13 warranted attention and require us to at least ask: are there competition questions that are
14 arising here that require new approaches?

15 And surely e-commerce by definition is global. So we have a discussion of this
16 issue that is framed around e-commerce, but I think the intention of our discussions was not
17 to have it defined and to ask the bigger questions and then -- and not be too conclusory
18 about what were the right policy approaches or even define the problems that these
19 developments might create of a competition policy nature.

20 And so this is how it's framed, as traditional antitrust problems that might rise,
21 network problems, and sort of hidden mercantilism. And one of our members who's not
22 here today asked that we consider whether the Committee wanted to be more (or less)

1 conclusory with respect to the options that one might identify or recommend with respect to
2 emerging problems.

3 I think, Mike, you've just suggested in some sense an answer to that, suggesting
4 that at least there be consideration that the hands-off forbearance option not just be
5 identified as one of six or seven, but get particular attention. But there are other options such
6 as more international discourse, development of guidelines without legislation, and ongoing
7 international consultations, which could occur at the world competition forum, John, as you
8 were suggesting.

10 So I just thought it might be worth us taking a moment to be of a mind as to
11 how these issues should be framed in the report and how far does the report want to go with
12 respect to any recommendations.

13 DR. STERN: Ray, do you want to address this, because I think it relates to
14 your earlier comments.

15 MR. GILMARTIN: Well, I'm just thinking about, well, not so much e-
16 commerce for us, but just thinking about using e-commerce and maybe some other examples
17 as what kind of processes or mechanisms have to be set up to deal with the potential
18 anticompetitive behavior or hybrid behavior that could lead to limited competition, and are
19 the ideas that we're coming up with robust enough to deal with e-commerce.

21 I'm just thinking here about -- and we're not in this -- genetically modified
22 organisms, what does that raise in terms of different set of concerns by people, and what is
23 the potential of regulation and hybrid action that really may be aimed at a totally different
24 objective than simply worrying about what GMO's actually do to the world.

1 So, you know, that's another innovation and so on, this technology that's
2 introduced, that raises all these same kinds of issues. There's privacy in this case, it's
3 something else, and how do you deal with that? And it is a global issue as well.

4 MS. FOX: I also think that this should be brought in exemplary if it fits. And I
5 want to say a word about Michael's model and then I also want to say a word about your
6 colloquy, Paula, with John on mediation.

7 What I heard your model as was mutual recognition. It was a way of mutual
8 recognition where the countries involved would have trust in one another, and it should fit
9 under that because mutual recognition of regulation is one way to avoid talk of a higher level
10 of regulation. I think it's an interesting model under mutual recognition, but only if -- this is
11 why I asked about the antitrust problems -- only if you're not already accelerating the
12 anticompetitive behavior that you're allowing.

13 That's why I think it's very important to know what is the antitrust problem that
14 the standard is allowing. But I think it's very important to talk about mutual recognition when
15 we talk about accelerating regulation in the world.

16 DR. STERN: Before you go on to your next two points, we talk in here
17 somewhere about the standard-setting process which can be anticompetitive. As you
18 remember, we had testimony on this, and the genetically modified organisms and other
19 technologically driven innovations are all related here. It's helpful that you call it the mutual
20 recognition and relate it to standard setting.

21 I am really wondering if we are doing ourselves a disservice by having this as a
22 separate paper, if you will, the e-commerce thing, because I really feel that presentationally
23
24

1 we're talking about how to make government authorities capable of dealing with
2 anticompetitive activities in a fast-developed emerging global economy. So this chapter that
3 we haven't quite yet seen may solve all of our problems that Ray talked about, which
4 sometimes get touched on here, but I just -- and which the seamlessness topic that you
5 talked about earlier.

6 I just feel that we need that stage-setter so very much, and it will be an
7 important thing that we'll all need to look at when it gets sent to us.

8 MS. FOX: Yes, the integrative aspect? One thing we might want to surface is
9 which side do you want to make the error on? When you have something so new and
10 dynamic like e-commerce and all sorts of new innovation, do we want to come out and say
11 you should be liberal on the side of letting it through? You should not make the error on
12 holding it back?

13 Maybe you don't agree?

14 MR. RILL: I don't know that it goes that far, though, that we're saying that we
15 should be liberalizing or overly permissive. I think what the draft is saying -- I think what the
16 draft is saying is that one doesn't want to be overly restrictive and one needs to be cautious
17 in this dynamic situation, not only to be overly restrictive but also to avoid anticompetitive
18 use of regulation --

19 DR. STERN: That's the hidden mercantilism.

20 MR. RILL: -- as a trade barrier.

21 MS. FOX: That's right. Oh, yes, I'm not denying that.

22 MR. RILL: And therefore I think -- I don't know. I'm not sure what Paula is

1 suggesting, but I think we ought to think this. I'm not exactly sure where it goes, but I think
2 we ought to keep this as illustrative of several points: antitrust can deal with a dynamic
3 economy, we need to be wary of overregulation, and we need to be wary of the use of
4 regulation as a trade barrier, as mercantilism.

5 And e-commerce is such a dynamic example of it that I think it can stand in
6 there in an appropriate place.

7 MS. FOX: This is what I was saying. I think Michael's point is how to
8 minimize the government intervention against it, which is really compatible with you let it
9 work its way, you don't hold it back. If there's going to be government regulation, you try to
10 get it as low level as possible.

11 MR. GILMARTIN: Yes, but let me just give you an example on the other side
12 that people maybe feel uncomfortable with in terms of calling it liberalization, is that the --
13 what kind of clinical studies does one require in every country to approve a drug? You'd
14 like mutual recognition, you'd like harmonization worldwide of that.

15 It's not something that people are going to say, we want to automatically let the
16 technology flow. You want to be liberal about it. So what is the mechanism by which you
17 can talk about these things and resolve these differences and so harmonize, say, between
18 Japan, the European Union and the U.S., for example, on this?

19 MR. DUNLOP: I think I do very much agree with Jim that this should stand as
20 a separate volume, partly because people are asking about it, but also because it stands as
21 an illustration of the technological development which is happening in many fields.

22 You talk about the limitations of standard-setting as an inhibiting thing. Your

1 idea of mutual recognition is another way of doing it at this stage; maybe at a later stage, go
2 back to some comment. But I would think you could tack it onto four as it is now, but I do
3 think that it has merit on its own.

4 MS. FOX: I was a little more skeptical of that and I was more on the other
5 side, thinking --

6 DR. STERN: Me, too.

7 MS. FOX: -- that we don't want a Christmas tree with lots of things hung on it.
8 And its importance is as important as other new technologies. I mean, this is one very
9 dynamic technology. It's important as technology, unleashing technology.

10 MR. GILMARTIN: Right. And you know, there are some speakers that you
11 see at various places that are already talking about that the information technology revolution
12 be supplanted by the biosciences revolution. So the whole set of issues that we're talking
13 about around e-commerce, ten years from now we won't be talking about that any more.
14 We'll be talking about issues that relate to the bioscience revolution and what's the
15 appropriate level of regulation, how do you provide safety, how do you stimulate the growth
16 of this exciting new field and things like that.

17 So we've got to be able to be general enough to embrace that as well as the e-
18 commerce activity, which I think is what you're suggesting.

19 MR. DUNLOP: Yes.

20 DR. STERN: I agree with you. And Merit, I don't know what you're going to
21 do. And I think Mike and Rick will be important in terms of how expansive.

22 MR. GILMARTIN: It might be a great case study. You know, it's sort of an

1 exploded example of multiple things that are going to occur.

2 MR. RILL: An example of multiple aspects.

3 DR. STERN: I think it would be better that way.

4 MR. RILL: Well, I think it serves that purpose almost as written. The only
5 question is where to put it and the predicate to put on it.

6 DR. STERN: Yes, exactly.

7
8 MS. JANOW: Here's a thought. I don't know if it's a good one. But if this
9 chapter, "Preparing for the Future," is really things that require action internationally, then
10 perhaps the world competition forum concept is really better housed in that framework as a
11 global problem, and that chapter three is more of a market access discussion and among that
12 also are these new challenges, and then things that are also fundamentally domestic
13 adjustments, and that goes to the role of DOJ in foreign policy as well as the sectoral overlap
14 question in mergers.

15 DR. STERN: Sounds good to me, Merit.

16 MS. JANOW: Just a thought.

17 MR. RILL: That's fine.

18 DR. STERN: Yes, it sounds good to me.

19 MS. FOX: Could I have a word on mediation.

20 DR. STERN: Yes. I interrupted you so we could get on to that. But now let's
21 go back to that.

22 MS. FOX: This is a skeptical note on mediation. Here is where I want to refer
23 to what used to be our law until recently. It used to be the case that arbitrators could not
24

1 arbitrate antitrust issues, on the theory that antitrust issues are about public policy and the
2 parties are going to make a settlement that's good for them and not good for the general
3 public or welfare.

4 Now, there was an exception made in a case about eight years ago now which
5 said, at least in international disputes, we're going to allow mediation. In my view the reason
6 was because people were seeing a lot of cases that were really private case, they were
7 usually contract disputes with a distributor who was terminated, and it wasn't a real antitrust
8 case.
9

10 So the Supreme Court when it made this decision, it doesn't want to hold up the
11 parties from resolving what was really a private case. But I want to make a distinction
12 between some cases that are really public and private. If you had an auto parts supplier
13 trying to sell their auto parts into Japan to an automobile company and the automobile
14 company says, okay, you end your action and I'll buy X hundred dollars from you or X
15 thousand dollars from you a year, that's a private settlement that's not in the public interest if
16 there is a market barrier problem and a real global problem.
17

18 If you take the steel cartel problems, if they ever surface into the courts, they're
19 real public problems. So do we really want arbitrator-mediators dealing with those
20 problems in accordance with what injured parties will accept or do we prefer to have some
21 framework for rule of law litigation?

22 MR. RILL: Eleanor, I haven't seen any suggestion that there be arbitration.

23 MS. FOX: Mediation. Sorry, mediation I meant to say.

24 MR. RILL: Mediation, nonbinding, policy-related. I have seen nothing on the

1 table that suggests arbitration that results in this kind of settlement that you're talking about.

2 If it were, I would oppose it, too.

3 MS. FOX: But I meant to say one further thing, which is that I see mediation as
4 cutting the baby, trying to bring the parties to a point where they both think it's great, like
5 your automobile parts supplier -- I think it's great to get X amount of business into Japan --
6 and then you have maybe what turns out to be the same as a private interest settlement.
7

8 MR. RILL: What I guess is -- and you raise a point here that's something that I
9 believe I focused on when I was thinking about this proposal that was put on the table.
10 There is some drawing here on the OECD recommendations that gets into that area. And
11 the issue there really is a government to government mediation that the governments may
12 well bring into play, experts to look at your point, is the law implemented, what is the law?

13 It could also be used in a private dispute, I suppose. But I think it is a way of at
14 least clarifying and adding some transparency and some thoughtfulness to the resolution
15 without any binding, let's cut the deal and to hell with the consumer, type of arbitration. That
16 just isn't contemplated, I think, by the report or the chapter.
17

18 MR. DUNLOP: I did mean mediation. Now, I do want to -- take an
19 international area, the ILO. There you have a committee of experts which has authority to
20 impose a solution on a country. Now, the ILO's new Director General is very much more in
21 favor of mediation, of trying to work out problems, as I think I am.

22 But your principle has gone up in smoke in the United States because we are
23 now arbitrating law. The Gilmer decision of the Supreme Court of '91, I am authorized to
24 handle a dispute over whether somebody was sexually harassed by a company, a company

1 and employees. I arbitrate those cases. I can arbitrate those cases.

2 Now, somebody can take my decision if it violate public policy to a court, but
3 my commission report of '93-'96 was instrumental in pushing the arbitration of employment
4 law in the United States. That is a growing development, an enormous development.

5 So I would not myself rule it out, although my proposal was solely with respect
6 to mediation.
7

8 DR. STERN: But is there more that we should be saying in this report about
9 what is happening in the world with regard to mediation on anticompetitive issues?

10 MR. DUNLOP: I don't know that, and therefore I have nothing more to say
11 than that the process of the WTO and other efforts to resolve these matters might consider
12 appropriate mediation efforts, which can be more timely or shorter, which have many other
13 advantages, as they do in our own national picture.

14 But there has been an enormous advance in arbitration in public law in this
15 country.
16

17 DR. STERN: Well, I would like to be able to say that at a minimum, and I
18 don't know any more about what is going on in the rest of the world. You know, it may be a
19 topic that we can't research at this late date and I should have surfaced it two years ago.
20 But to the extent that some reference and light can be shed on it, I think it would be useful.

21 And by the way, I was -- this paper came to my attention -- I was at a
22 conference a couple weeks ago -- by this Marico Zampeti. It's on "Settling Competition-
23 Related Disputes: The Arbitration Alternative in the WTO Framework," and it's on market
24 access stuff. I sent it to the staff as soon as I got it. Last week or so I e-mailed it over.

1 MS. JANOW: We'll find it.

2 MR. RILL: Sounds like required reading.

3 MS. JANOW: Sounds terrific.

4 MR. RILL: Questions will be asked.

5 MS. JANOW: I don't know if we have Dick and Zoe on the line, but before
6 we close out this e-commerce I just want to make sure we have an opportunity to get their
7 views, if they are on the line.
8

9 MR. SIMMONS: This is Dick Simmons. I'm still on the line. I did want to
10 make a comment on e-commerce.

11 DR. STERN: Please, sir.

12 MR. SIMMONS: I think that e-commerce offers the best hope yet of breaking
13 down some of the market access limitations that I have seen in my career, some of which
14 we've talked about this morning, since private market access limitations have to have a
15 formula for success. There has to be a distribution agreement that prevents, for example, the
16 Japanese companies from importing, say, American steel or European steel or whatever. E-
17 commerce offers the way of getting around that distribution cartel.
18

19 I have never been more optimistic about the fact that markets that have been
20 closed to my company and industry over a very long period of time will as a result of e-
21 commerce offer a great opportunity to be able to bypass the limitations that have prevented
22 us access in the past. I think this is the greatest opportunity to gain access to many countries
23 in the world.

24 The second point I would make is that I really think it's too soon for anyone to

1 try and determine what the problems will be. We're too new into this on a global basis and
2 it's going to take at least a couple of more years, in my opinion, before we are in a position
3 to at least identify what the global problems are. Are countries behaving in a fashion that
4 would limit e-commerce access to their nations, causing them to do some of the things that
5 are outlined in the e-commerce eight-page paper?
6

7 Until we understand what those restraints will be, it may be unwise of us to try
8 and predetermine what kind of policies we should develop in that area. Those would be the
9 two points I'd make.

10 MS. BAIRD: This is Zoe, if I could jump in on this one. I was very
11 comfortable with what's said in the paper. I will say that, contrary to my wise colleague who
12 just commented before, I wouldn't want to suggest that we think we can take a wait and see
13 attitude. I think that you're absolutely right that we won't know how all this develops and
14 how other countries act, but my own view is that a huge amount of the market structure and
15 concentration that will take place will take place in the next three years, and that it's
16 important that there be an active process in thinking about the issues.
17

18 I mean, I thought your paper did a very good job in where you came out. I
19 think it's really important that there be an active process of defining these rules and being
20 attentive to how it will all shake out. But you know, we will see a radical adjustment in the
21 use of, for example, the Internet. Where 70 percent of the users today are American, by
22 2005 70 percent will be non-American.

23 But I think that the ownership -- it's just like the Europeans have given up on
24 thinking that they're going to touch hardware, that it's going to be American hardware and

1 they have just accepted that fact. I think that a lot of the major market concentration issues
2 are going to be decided very quickly here.

3 DR. STERN: With reference to Dick's first theme, in his optimism of the
4 importance of the Internet and e-commerce in breaking down barriers, what in effect he's I
5 think saying is that the market will be more perfect, there will be less imperfections because
6 there will be more knowledge by more actors, just like you get Ebay and everything else
7 now. You can auction off just about anything because anyone can be part of that open
8 auction.
9

10 So where the threat comes is through the introduction of imperfections back into
11 the marketplace, often by regulators, government regulators, in the name of a lot of other
12 competing, sometimes legitimate and sometimes not legitimate, goals.

13 We have written the paper very much without that kind of economic
14 terminology and reference, but it may be useful to also reference market perfections and
15 market imperfections, in a footnote if nothing else.
16

17 MS. JANOW: I think that's right, Paula, because one kind of market
18 imperfection I think is the fact that, while you have markets being created -- you've
19 mentioned steel as one example -- you know, it's also true that in other countries they have
20 their auctions, they have their own software, their own auction in their own language. So
21 they're not necessarily tapping in -- the users who might be the beneficiaries are in a closed
22 system created for that country.

23 So the competition that may be created in the United States in a market doesn't,
24 I think, automatically create a global market for that auction.

1 DR. STERN: You're talking about like China; there are only certain people
2 who are authorized.

3 MS. JANOW: Or even in Japan, it's a Japanese language utility that's used.

4 DR. STERN: I see. That's very interesting.

5 MS. FOX: I just wanted to say, to supplement your remark, Paula, that I think
6 Zoe was saying watch out for the private as well as public constraints.
7

8 DR. STERN: Yes, okay. Another form of imperfection.

9 MS. FOX: That's right.

10 MR. RILL: That's what I was hearing.

11 DR. STERN: Further comments?

12 (No response.)

13 DR. STERN: Well that's great. It's actually 12:30. We're expecting Joel
14 momentarily, I believe. Is this a good time to break, I think, for lunch and then we take up
15 with you chairing, Jim, our discussion on mergers, is that right? Oh, enforcement first.

16 (Whereupon, at 12:30 p.m., the meeting was recessed, to reconvene the same
17 day.)
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1 AFTERNOON SESSION

2 (12:57 p.m.)

3 DR. STERN: Joel, thank you so much for giving us this responsibility, and
4 thank you so much for selecting Merit as Executive Director.

5 We have had a fabulous morning, thanks to really good substantive work
6 represented in this staff here, and we just wanted to get your input.
7

8 REMARKS OF HON. JOEL I. KLEIN,
9 ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION,
10 DEPARTMENT OF JUSTICE

11 MR. KLEIN: Thank you. First of all, I would like the minutes to reflect what
12 Paula just said, because when history is written there'll be a big fight at this point as to who it
13 was precisely selected Merit.

14 (Laughter.)

15 I'm glad, at least for the time being, you're prepared to acknowledge that.

16 MS. BAIRD: Joel, I also wanted to warn you that someone is on the phone.
17

18 MR. KLEIN: Hi, Zoe.

19 MS. BAIRD: You're not being taped.

20 MR. KLEIN: Okay. Well, there'll be no fight. Everybody claims that they're
21 responsible for your involvement.

22 A couple of just quick things. I have not, I told Merit, I haven't worked through
23 all of the latest materials, but I did spend some time last night reading in them, if you will, and
24 they really are terrific. I mean, you ought to be enormously proud of the scope, the depth,

1 the sophistication.

2 I think, while there are some points that will be controversial certainly with the
3 Division and with the Federal Trade Commission, I think it is clear that you will make a
4 monumental contribution. I have no doubt about that. So in that sense it's very gratifying.

5 We will, of course, sort of read through carefully and continue to assess the
6 specifics. But it's a very serious and major and I think historical contribution. In that regard,
7 obviously the people at the table deserve a lot of thanks, but I want to personally thank the
8 staff. You guys have done just a terrific, terrific job.

10 Second, I just want to say a couple of things, because these are extraordinary
11 times. Our timing for the delivery of this project could not have been better. What's going
12 on in global antitrust enforcement now is just unbelievable in terms of both the sense that
13 there is a stronger and greater commitment to the endeavor; the old issues of territoriality
14 and sort of overly aggressive this or not aggressive enough that seems to be moving away, in
15 my view, toward an increasingly strong consensus about both the importance of antitrust
16 enforcement in the twenty-first century and the need to solve the kinds of problems that this
17 Committee will be addressing.

19 Just to mention a couple or three highlights: First of all, there's no question
20 there's a sea change in global perception as a result of the series of efforts that the Division
21 launched culminating in the Hoffman-LaRoche and BASF guilty pleas, coupled with the
22 ADM prison terms. Throughout the world, this thing has changed now.

23 The number of people we are meeting with globally to follow up on cartel
24 enforcement is extraordinary. The resources, you can see a perceptible shift, not just in the

1 EU but in Member States, in Asia. Yesterday there were two in Japan that came in in this
2 regard.

3 And every day -- when I leave here, I've got a series of meetings on
4 cooperation with X country this afternoon on international cartel matters. And it's just truly
5 extraordinary. It's truly extraordinary.

6 The second thing that is much, much more modest in impact, but important, is
7 the maturation of the EU-U.S. relationships on merger review. I think you saw at our last
8 bilateral we really moved beyond process issues to start to move toward one of your
9 recommendations on substantive convergence. We're actually going to have our first
10 working committee to deal with fundamental issues, the tough issues in merger review, not
11 when we go two to one.

12 You know, as I always use in my speeches, people can argue about Boeing and
13 McDonnell Douglas Aircraft; nobody would seriously argue about a merger between Boeing
14 and Airbus in terms of its anticompetitive impact. But there are a series of very tough
15 substantive issues that we are going to start to meet about, not the least of which is what is
16 the threshold for suit, how likely or how certain a predicted effect needs to be.

17 Issues of potential competition have become very important in a deregulatory
18 environment, the kind of issues we looked at in Bell Atlantic-Nynex, that we're looking at in
19 current merger cases involving where you have people who are breaking out of prior
20 regulatory structures. It's going to happen in electricity. It's happening in Europe. Issues of
21 innovation markets, R&D markets, in industries characterized by paradigm shifts, such as a
22 lot of the technology industries are, and the whole set of issues at the intersection of the
23
24

1 following two propositions, neither of which are there self-evident answers to, and so we
2 have footnotes in our guidelines on them in order to say we don't know the answer.

3 The first is how you really balance efficiencies versus anticompetitive effects,
4 and how you take those into account; how you deal with efficiencies in one market versus
5 effects in another market; and lastly, how you deal with real efficiencies that are, because of
6 market structure or other factors, unlikely to be passed on to consumers, that are likely to
7 end up in shareholder benefit or perhaps increased R&D which may ultimately inure to the
8 benefit of consumers.
9

10 So I think that's a significant step forward and I'm delighted that the EU has
11 pushed ahead in that effort. Beyond that, again, I think the day-to-day working relationship
12 on multijurisdictional merger review is terrific.

13 The third area continues to remain a complicated one, and we have the WTO
14 coming up on the trade and competition issue.

15 For our part, I think it was a very modest but significant first step that we are
16 about and will, I think, have a successful denouement on our first positive comity referral. I
17 think Jim in his private capacity, as well as a leader who floated this idea, deserves a lot of
18 credit for the concept and for its implementation.
19

20 We have made clear to Japan that if there are appropriate antitrust-grounded
21 positive comity cases, we are ready to triage, screen them, and make referrals to the
22 Japanese under our recently signed antitrust agreement. So this is an idea that is beginning
23 slowly to take hold. We've said the same things, obviously, to the Brazilians and the Israelis,
24 in our recent agreements. And, while it is by no means a complete solution, it's nice to see

1 the small steps begin to take root.

2 As for the WTO, I will give you the latest news, and I will give it to you only
3 because it's thoroughly unhelpful. If indeed it were significant --

4 MR. RILL: Why should it be any different than your other news.

5 (Laughter.)
6

7 MR. KLEIN: If indeed it were significant, I would be far more reluctant to
8 share it. Not with the folks out there. I'd be glad to tell them, but with the people at this
9 table I'd be much, much, much more reluctant.

10 DR. STERN: That's transparency gone too far.

11 (Laughter.)

12 MR. KLEIN: As we sit here right now ten days out, we have an event
13 obviously coming up which will begin to focus everybody's view. But we've got the
14 President and Romano Prodi meeting soon, and that will foreshadow some of what's
15 expected in this round.

16 It is going to be a very interesting round. You all followed, as I did, the China
17 accession, which I think was really a true tribute to Charlene Barshefsky's talents, skills, and
18 perseverance. I really believe in some ways it was an enormous personal triumph for her.

19 Having said all of that, there are a lot of contentious issues in the mix. Among
20 the -- not among the most contentious is competition policy. That's not to say it's not
21 contentious. It's just not as contentious as a lot of the other issues.

22 At this point, the EU still supports and believes they have to have negotiations,
23 modest to be sure, but negotiations. The U.S. position is that negotiations are unacceptable,
24

1 but that we would like to have a rigorous, more expanded, working group moving toward, if
2 you will, less academic, more hands-on kinds of efforts. So that is the current posture of
3 both parties and, as I say, that hasn't changed and I suspect won't change until the final days
4 of negotiations. We will obviously be privy to that, but it will be very fast-moving.

5 So that is in a very quick thumbnail. But I just have to say, it's just to me -- I'm
6 a person who sort of believes that you can actually feel movement in history. What's going
7 on in global antitrust right now -- I just delivered a satellite speech in Israel the other day to
8 300 people at a conference that was as exciting and as interesting in a tiny country like that.
9 This year's Fordham felt different to me from past years' Fordham. Next week, the week
10 after next, there's a big conference in Korea on international antitrust enforcement.

11 So I think when you guys are ready to launch, it is going to be -- truly, the
12 timing couldn't be better and its significance is going to be overarching.

13 So I can answer any questions, but not predict.

14 MR. RILL: Joel, on the merger -- not necessarily related, and certainly not
15 related entirely and perhaps not even predominantly, to the international scene -- there has
16 been some legislation proposed on the Hart-Scott-Rodino. I don't know whether you want
17 to comment on that at this point, the Hatch proposal.

18 MR. KLEIN: Yes, it's out there. There are two parts to it. There is the basic
19 set of amendments on thresholds and fees. And again, it's a complicated issue, but we
20 would be willing to and certainly could live with and be willing to support --

21 MR. RILL: They're revenue neutral.

22 MR. KLEIN: -- revenue neutral fee adjustments. I don't think that's a serious

1 problem.

2 I think the second piece to that legislation is just a bad idea. I think of all the
3 things -- the notion that we would have some access to the courts during merger review
4 processes -- I think, frankly, either it wouldn't be invoked very much, because people don't
5 want to protract the process. But second, I don't know how a judge is likely to figure out,
6 when you're not doing the case, what the likely benefit of production would be versus the
7 burden.
8

9 To be truthful, as one who does a lot of this, a lot of times I can't figure it out
10 and I know a lot about the underlying case. I mean, to some degree it is in the nature of
11 discovery that you are making some very loose predictive judgments.

12 And I also don't think -- I think it'll be gamed by people who have -- for
13 example, if it is in your tactical interest to draw the process out, which it may be. I mean,
14 there may be things, you know, you can imagine when you have two or three different
15 companies pursuing the same company, there may be time issues that actually enable you to
16 make tactical use of it.
17

18 So none of it seems to me to be very salutary. Having said that, I'm totally
19 nondefensive about the fact that there are times, I'm sure, when the breadth of our second
20 request is greater than it should be. I don't think that's a major piece, but I think it happens.
21 And I don't think it's an abuse in the sense that it's malevolent. I think people are cautious,
22 they want to cover the waterfront, and I would like to find ways inside the Division to triage
23 cases more effectively.

24 But this seems to me to be really disproportionate and very misguided.

1 MR. RILL: I wonder how much it really would be used.

2 MR. KLEIN: If it wouldn't be used, it wouldn't be so bad. But that's hardly an
3 argument for legislation. But I think that's right. I'm not sure it would be used. But that's --
4 I mean, that's not a good argument to legislate, which is nobody would use it.

5 And the resource implications for us -- if we've got to have a lot of people in
6 court fighting about discovery requests -- would be just dreadful, just dreadful. So anyhow.
7 But you know, they've got a lot of strong support, industry support, for it, which I'm sorry
8 about. But there is, so I don't know what will happen. It's obviously -- I think it's unlikely to
9 pass this week, is my impression; that all the doing has been done already and this piece
10 hasn't been done. So I don't think it'll get thrown into the budget process.

12 DR. STERN: Joel, one of the things that we talked a lot about this morning is
13 this notion of a World Competition Forum which would deal with a lot of the issues which I
14 guess folks would like to think, some folks would like to think the WTO could deal with.
15 My personal feeling is, of course, that the WTO, and particularly the dispute settlement
16 mechanism, is overwhelmed with so many other problems, and that those who would like to
17 see negotiations at the WTO on competition policy may be well-meaning, but may be
18 misguided; and that there is a lot more practical approach that can come out of a virtual
19 forum like World Competition Forum, and a lot more practical results can come out of the
20 exercise of positive comity in those cases where you do have bilateral agreements on
21 positive comity.
22

23 My personal concern is that the headlines' take, that the U.S. and the EU are
24 disagreeing on whether competition policy should be negotiated, makes the U.S. look like

1 we're just obdurate and that we don't have other outlets to deal with these problems, such as
2 positive comity when it comes to market access or such as the soft convergence when it
3 comes to the merger cooperation and cartel enforcement that you are telling us about; and
4 more emphasis, rhetorical emphasis, on some other options other than the WTO negotiations
5 on competition policy might at least put the U.S. government in a better rhetorical public
6 relations light.
7

8 That's not a question, but it's an expression of concern that I have.

9 MR. KLEIN: Well, it provokes a response. So let me say, first of all, I think
10 there are two parts to what you said. The first part I agree with and I think it's very
11 unfortunate. I need to think through how to deal with it. That is, somebody said to me the
12 other day: Well, you're supposedly a visionary --

13 DR. STERN: Right.

14 MR. KLEIN: So how could you be on this side of this issue? Now you look
15 like you're intransigent, obdurate, etcetera.

16 DR. STERN: Right.

17 MR. KLEIN: I yield to no one in my commitment to being a visionary.

18 (Laughter.)

19 MR. KLEIN: What I find the most baffling about this process is I cannot get
20 my friends, the people with whom we work and have the best professional relationship, I
21 cannot get them to explain to me what it is they want. That is, I don't know. I can
22 understand a model that said we should be able to bring cases, say if country X rebuffed a
23 claim, a market access claim, we should be able to bring them to review for dispute
24

1 resolution before the WTO. I can understand that model. Nobody wants to go anywhere
2 near there.

3 I guess I could understand a model, but I don't think you need negotiation to
4 say, and I don't know that it's a good idea or bad idea, that everybody should have an
5 antitrust law. But I don't know yet -- what I find baffling is what is the vision that animates
6 those who want to start this process, other than -- and Sir Leon I found astonishing, said:
7 Well, let's start it and see what comes of it. And I sort of said that I had learned when we
8 do things, you don't start it and see what comes of it; you have a vision of where it's going to
9 come out.
10

11 So I agree with you, Paula. I think the perceptions are not good and I'm not
12 happy about them. But I don't quite know how to change those perceptions, given that
13 there's nobody that's a proponent of this that has a view of, either in a stepwise basis or not,
14 of where they want to go.

15 Now, the second point you make is a more complex point and that is, I
16 wouldn't want for political reasons people to think that somehow we were going to abandon
17 the WTO as a forum legitimate to competition policy. I have concerns about a trade-based
18 forum and how it becomes a trade and competition-based forum. But I think if we were to
19 strike out with a separate world competition organization or authority or something like that,
20 that could be a perception of -- it could be viewed hostilely.

22 Second, I think from our point of view and other countries' point of view is the
23 question of how much money would you be prepared to invest in such an activity. If you're
24 going to get it off the ground, it has to be well funded. My own experience has been, with all

1 the pressures we have with funding multinational and international organizations and the
2 general political disfavor, it would be a hard time to a significant new undertaking.

3 So my own current view is that a serious project at the WTO that moves in the
4 direction of peer review and that tries to recapitulate the kind of efforts we have successfully
5 achieved at the OECD, that would take them from a 30-country to a 150-country basis,
6 would really be significant. And that seems to me to be easy in a five to ten-year agenda.
7

8 Out of that, one could develop principles on multijurisdictional cooperation,
9 principles on sort of the basic dimensions of the enforcement effort, principles on state aid,
10 those kinds of things. But all of that seems to me really what one wants to think about it, not
11 sort of to negotiate-to now. That would never happen. So that I think is a really ambitious
12 program, to be truthful. But I don't think it's a negotiation at this point.

13 MR. RILL: Can you keep that out of a negotiation, though, if you put that much
14 into the WTO? Your answer is going to be yes. Should we worry about that?

15 MR. KLEIN: Well, I've never said that -- markets are moving fast, the world is
16 moving fast. I'm not saying that there would never be some form of competition negotiation
17 in the WTO. But I think the combination of really doing the basic -- this organization is
18 completely unexposed except in a couple of narrow, highly regulated sectors to competition
19 policy, IP and telephony. So you really have to sort of do a little walk before you even think
20 about running.
21

22 And I am enough of a believer in the Heisenberg Uncertainty Principle to know
23 that how you come out at the end of the process will be affected by the process. So I'm not
24 looking now to define negotiations. If you had a serious five-year engagement on a working

1 party, a lot of things will happen. The world will change, your report would come out and
2 that will stimulate a lot of debate and discussion. And this working party will begin to see.

3 This e-commerce chapter you did, I thought, was really very interesting and
4 very good, because, you know, right now what the world is focusing on is: How do you
5 transform the basic marketing paradigm from one that people understood to one that for
6 most people is completely alien, this worldwide Internet commerce business?

7
8 So all that's going on and we have plenty of time to worry about the end game.
9 We haven't even begun to think about the beginning game, I think. So that's where I am.
10 Again, I don't know what's driving the opposite view and I've spent a lot of time talking to
11 people about it.

12 MR. RILL: When you say the opposite view, you mean --

13 MR. KLEIN: That we should negotiate.

14 MR. RILL: -- the British view.

15 MR. KLEIN: No, no. It's the view of the EU.

16 MR. RILL: I mean it just as shorthand, the British view.

17 MR. KLEIN: It's the EU view. It's the Commission's view. It's supported not
18 by a lot of countries, as far as I know.

19 MR. RILL: Canada, apparently.

20 MR. KLEIN: Canada.

21 DR. STERN: Well, there may be some obviously negotiating games going on
22 and other things that we may need their help on.

23
24 MR. KLEIN: That's to me one of the great fears, I've always said.

1 DR. STERN: Exactly.

2 MR. KLEIN: Our enterprise is a little bit like Dartmouth College. We have a
3 long history but not much power. I'm deathly serious about this.

4 MR. RILL: Some of us would object to that statement.

5 MR. KLEIN: Which part, the Dartmouth?
6

7 MR. RILL: It's a small college, but there are those of us who love it.

8 MR. KLEIN: Thank you. You can love it all you want, but you have no
9 power, only the power of thought, and that's what worries me. That's what worries me. It's
10 not like Harvard, for example.

11 DR. STERN: Oh, good God.

12 MR. KLEIN: That's what worries me, is that if you start to think about the
13 contentious issues in the WTO, that are really very powerful issues, you would hate to have
14 us be on the bottom of some checklist.

15 MR. DUNLOP: May I ask you a question that's come up a number of times
16 this morning. In the e-commerce field, but in a number of others, we have your sense of a
17 rapidly changing world. This report of ours and yours comes out now, but a year from now
18 one might have a different view about some of the elements in some ways.

19
20 So is there more formal mechanism in the U.S. government that could be put
21 together to kind of follow these developments in a more systematic way. You don't want to
22 set up another one of these things in three years, and yet in three to five years this
23 international competition stuff is going to be very, very different than it is now. At least it
24 gives the likelihood of that.

1 So what is the internal mechanism? Is this something you let a new
2 administration do, or you try to formalize it? Do you try to put together a standing
3 committee?

4 There are suggestions in the report of some study of competitive conditions
5 around. That is a hell of a chore. My question really is what kind of ongoing, other than
6 your own, efforts are there for following these developments at this critical time in the
7 international, where so many things are evolving?

8 MR. KLEIN: I think it's a terrific question and, to be honest with you, John, I
9 haven't given it very much thought. But I think it is something that both this Advisory
10 Committee, I, and ultimately the Attorney General should give a fair amount of thought to.
11 That is: How do we implement and how do we follow up on the recommendations from this
12 report?

13 I have very, very tentative ideas that I'd like to think through and talk through.
14 But I think we would be derelict if at the end of the process we didn't have a much better
15 answer to your question than the one I gave you right now. So keep at it.

16 MS. FOX: You know I want to follow up all of those interesting remarks on
17 trade and competition, which I agree with almost all of. Just to press it a little further, well,
18 maybe one statement: The way I hear the Europeans, they actually are very attached to their
19 own system which has incorporated some GATT principles of transparency and
20 nondiscrimination and process. And as a first step building block they want to put into the
21 WTO building blocks of positive comity, transparency, and nondiscrimination.

22 Then others go further and are looking towards seeing how far we can get for
23
24

1 principles. So a number of us think that -- well, I think a number of us think the GATT
2 principles are good principles, not necessarily to be adopted in the WTO, and that this wide
3 range of antitrust issues really doesn't belong in the WTO, including even the technical
4 assistance, which is kind of hanging nowhere when there is not a competition competence in
5 the WTO, and yet there's technical assistance possible packages not hanging onto anything.
6 They're sort of free-standing.

8 So we think of these as lots of issues that are world competition issues, and
9 some people link them to WTO on the theory that trade is supposed to be liberalizing,
10 competition is supposed to be liberalizing, so all of competition belongs in the WTO.

11 I think Paula said this before. We just feel that it seems counterproductive and
12 probably perverse to bring all of antitrust into the WTO just because it's supposed to have
13 this liberalization connection, but that leaving it without a place to go is probably playing into
14 what is already the U.S. image of recalcitrance. It's the U.S. image of nationalism with
15 respect to antitrust, and the nationalism is: We'll do it our way because we can do it our way
16 and so we'll just go and do it our way.

18 I think there's a need for recognition that there are some international issues and
19 they require a world conversation, and that WTO doesn't fit them. That's why. At first we
20 were hoping this would be viewed as very positive, that it would be viewed as explaining
21 why the competition issues aren't trade issues and why there's a need for an international
22 forum, and why the OECD is too narrow because it's not inclusive of the less developed
23 countries, which is a very big issue in the world.

24 Then I guess we were really disappointed to hear that there is a lot of this idea

1 of disturbance with the possibility of a new forum. We weren't thinking of a forum that
2 would even have to be funded except for maybe your agency and other agencies holding the
3 meeting on a rotating basis. But it would be a place to go, a place for people to have issues
4 and to air issues and to structure debate on the issues.

5 So we were thinking of it as a nonformidable type forum in recognition that
6 there is this whole range of issues.

7
8 MR. KLEIN: I don't want to -- I'm just giving you the current perspective
9 based on the way I see the sort of moving pieces. I'm not saying that in any way to throw
10 cold water on this notion. It would be nice to find an appropriate forum to do the kind of
11 thing you're doing.

12 I would caution you against trying to do it too much on the cheap. That would
13 be -- if you want to do something that's sufficiently important, then you ought to try to figure
14 out exactly the opposite of what I said before, which was: despite the reluctance to fund new
15 global organizations and the like, if you think this is important then you want to make sure
16 that it has a sufficient wherewithal. Otherwise people won't go.

17
18 The OECD, I think, hung in the balance and then it turned a corner. I think it
19 was doing very little for a long time. It was an academic think tank, sort of, and probably a
20 reasonably attractive place to have a cocktail party. But I really don't think it was
21 meaningful organization. I at least, my own participation was affected by the sense that they
22 moved toward a much more sort of effective organization.

23 If you want to have a global organization, you want to make sure that it has the
24 wherewithal and the staff to do the things, not just to be an enlarged Fordham. I'll give you

1 the best example of all. Of all the worldwide things that ever happened, Eleanor, the single
2 best one was our nearly 30-nation Cartel Workshop this fall, because the enforcers came
3 out. It wasn't the leadership. And people came from all over the world. From Africa they
4 came, they came from Latin America. It was not just the key handful of major industrial
5 powers.

6 I think that had an impact that would be far greater than a talking heads group.
7 So I think if you really want to move this concept, then I think you need to build sufficient
8 support and push it. But somebody has to figure out the politics of how that intersects with
9 the WTO. That's something that will have to be figured out, obviously, after Seattle because
10 there are legitimate WTO interests in one piece and that's much larger.

12 But I think if you're going to go there we ought to go there seriously.

13 MS. FOX: The one piece is market access? When you said there are
14 legitimate WTO interests, you mean market access?

15 MR. KLEIN: Well, all the things that will impact trade. Market access is one,
16 but for example some mergers, multijurisdictional mergers, you can have a trade impact.
17 And so people -- if I were going to argue for a broad berth, one could see there are global
18 cartel arrangements that might have trade impact as well.

19 So the question of how you define it will become important. But I agree with
20 you that most of global antitrust enforcement is not at the intersection of trade and
21 competition. I believe that.

22 MS. FOX: But if you include mergers that seems to me to bring in almost
23 everything that's trade-restraining across borders, because if you're including what raises
24

1 prices in the world, as opposed to very visibly frustrates the trade movement into say Japan,
2 then I think we are talking about all of antitrust as trade-related.

3 MR. KLEIN: That's the argument. I don't view it that way, but one could
4 certainly make an argument.

5 MS. FOX: That's the argument.
6

7 MR. KLEIN: You could think of mergers that would be blocked -- it could be
8 an acquiring of a domestic company by a global company -- which could be blocked for
9 domestic protection reasons and would raise trade issues, right. I don't see most of this as
10 being trade-based and I don't think that most of what concerns people in international
11 antitrust enforcement is trade and competition-related. I just don't.

12 DR. STERN: I agree with Eleanor's point on that, just in terms of, you know,
13 that the merger stuff relates more, if you will, to investment, whereas WTO has been mostly
14 focused on goods, trade in goods and access to markets for goods and/or services. So I
15 mean, to me there's an intellectual problem there.

16 MR. KLEIN: I think everybody ought to revisit this issue after we come out of
17 Seattle. I don't think this can get thrown in, in other words, into the mix in Seattle.
18

19 DR. STERN: Oh, no.

20 MR. KLEIN: I don't think this is going to be part of the discussion.

21 DR. STERN: Oh, no.

22 MS. FOX: No.

23 MR. KLEIN: And we'll see. We'll have a sense of what the next steps could
24 be.

1 DR. STERN: We're trying to be part of, if you will, the solution to this
2 conundrum with this, what we're tentatively calling a World Competition Forum. But maybe
3 it ought to be called the "U.S. Department of Justice Competition Forum" and you'll get 30
4 countries to come from all over the world. There was clearly -- your Cartel Workshop was
5 a great success, as you said.

6 MR. KLEIN: Oh, It was off the charts. It was off the charts. It's really
7 changed. You see, people -- this is where I think sometimes the generals are designing an
8 insignia for the flag while the troops are winning the battle on the field.

9 DR. STERN: Yes, amen.

10 MR. KLEIN: That's what happened here, I think.

11 DR. STERN: Amen.

12 MR. KLEIN: These people are really -- I mean, Gary and his people are out
13 there meeting country by country now doing stuff. People are coming here asking for
14 cooperation on specific investigations. I mean, this is actually working.

15 But I don't think it's -- I think it's one piece again of a much larger piece.

16 DR. STERN: And this thing with the soldiers and the generals has to do with
17 the PR and positioning. There is all this stuff going on down here that is very constructive
18 and we, our generals, if you will, are looking very obdurate.

19 MR. KLEIN: Well, just me. I mean, all the rest of you are looking quite
20 reasonable in comparison, I think.

21 DR. STERN: No, Joel, not you. You look great on the front page of the
22 paper.

1 MR. KLEIN: No, I wasn't talking about me.

2 DR. STERN: I'm thinking about a few other generals besides you.

3 But I wanted to ask about positive comity --

4 MR. KLEIN: All right, it's the last question I can take.

5 DR. STERN: -- which is another lesser visible, lesser known, but very
6 constructive area. I wanted to ask about, if you will, timetables. There are so many
7 timetables built into various recommendations. We're not making them at this point in our
8 particular recommendations, but new legislation, and there's always how to get the USTR to
9 work and operate after they've gotten a petition within a certain number of months or years,
10 etcetera -- in effect, Congress and others frustrated with inaction.

12 How do you force or encourage action by individuals such as yourself who
13 have the discretion to either act or not? This has been the major frustration of many
14 companies over the years when it's come to market access when they feel they have had
15 complaints with regard to Japan and others in getting just -- now, you have raised your
16 footnote 159, but then you still have this issue about the discretion to act or not.

18 How do you signal activity, and how do you assure people that there will be
19 kind of affirmative work being done when there are some very legitimate reasons why one
20 doesn't trigger a referral?

21 MR. KLEIN: I have been as clear as I can in this respect, Paula, that I view it
22 as a priority and I view -- and I have said and I've met with a variety of people who have
23 these kinds of concerns, and I have said if you're prepared to do the work to bring in a basis
24 for us to believe there are antitrust type violations that are at the core of the issue, we will

1 pursue this aggressively.

2 DR. STERN: But after you, Joel. I know: "Après vous, le deluge?" But there
3 are, when you're talking about recommendation for the future, for the next generation?

4 MR. KLEIN: It's the kind of thing, first of all, of all the things you do, there's
5 going to be clear Hill concern. I don't think there's an assistant attorney general that I know,
6 from Jim Rill through Anne Bingaman through myself, who would not have given priority to
7 this particular area.

8
9 I think if I saw a lot of businesses come forward with tangible substantial access
10 complaints that were being ignored, I would worry about it. But I don't think that's going to
11 be the case. I think the incentives are the other way. I think the problems may be the kind
12 of problem you ran into is in SABRE-Amadeus, which just got dragged out at their end.

13 DR. STERN: Yup, on their end.

14 MR. KLEIN: In fairness to them, that's happened to us, too. I mean, you can
15 get in the middle of an investigation, and I've done some that take a lot longer than I would
16 have liked. But I don't think yet the problem will be that we won't pursue it.

17
18 DR. STERN: What about then at the other end?

19 MR. KLEIN: Again, my sense is --

20 DR. STERN: Is there anything you can do about it?

21 MR. KLEIN: Well, my sense is we did -- we and DG-4 both learned from the
22 last round and I think there are ways we could move it more quickly and I think there are
23 ways we would move it more quickly. But it's a new idea. But the initial burden is going to
24 have to fall on those businesses that allege.

1 MR. RILL: You incorporate a lot of at least the timetable and transparency
2 issues in the 1998 agreement.

3 MR. KLEIN: We do.

4 MR. RILL: Which is certainly a step in the right direction.

5 MR. KLEIN: We're moving it forward.

6 MR. RILL: There are other steps, I think some of the proposals that were
7 made in the hearings, Senate hearings, which were modest proposals.

8 DR. STERN: That was with Europe. So you're saying we need to now start to
9 negotiate with Japan?

10 MR. KLEIN: Well, we need to first get a -- we need to get a case. If there is
11 a case, we'll pursue it. I don't think there's anybody who, if they thought they had a bona
12 fide case to refer, wouldn't refer it.

13 MR. RILL: One of the problems with that, I guess -- and this is all abstract
14 right now -- is the notion, and this might only apply to Europe, some jurisdictions have a
15 threshold for starting an investigation considerably higher --

16 MR. KLEIN: Higher than ours.

17 MR. RILL: Considerably higher.

18 MR. KLEIN: Yes.

19 MR. RILL: And that makes for difficult application of positive comity.

20 MR. KLEIN: It does. On the other hand, it's so hard to make a
21 nondiscrimination claim. But that's their threshold.

22 MR. RILL: I'm not suggesting that. I guess all I'm doing is sympathizing with

1 the musician.

2 MR. KLEIN: Feeling my pain, I appreciate that.

3 MR. RILL: I've felt it in more ways than one.

4 MS. FOX: But doesn't this have to be the nature of the beast, because you two
5 would want to think of your own priorities. If you're called upon to investigate something
6 that doesn't look as serious as other things that you have on your agenda, you have to be in a
7 position to make a decision as to when you're applying resources and how much.

8 MR. KLEIN: Absolutely, absolutely.

9 MS. FOX: So this has necessary flexibility built into it. That's not necessarily
10 bad.

11 MR. KLEIN: I agree. I think this is not going to be the answer to all our
12 problems, but it is a good step in the right direction, will which will bear some fruit and take
13 some of the overcharged rhetoric out of the process on both ends. One, it will put the focus
14 on those businesses who are alleging antitrust-based market access problems to come
15 forward with the hard theories and evidence, not just we're not selling as much product as
16 we ought.

17 Second, it will change, I believe, the discussion because these kinds of referrals
18 among serious competition agencies, even though they're not necessarily one's highest
19 priority, have a different valence than the broad range of trade-based issues that arise.

20 So I think it has potential and it'll take some time to work through the kinds.

21 DR. STERN: What about, should there be something that says 301 versus --
22 that you should go first, you know, to this, if you have a market access problem, to the
23
24

1 Justice Department? Is there any, any hook in terms of which is a preferred route as a
2 matter of policy? Do we want to put in our legislation or in our recommendations what is the
3 preferred route?

4 MR. KLEIN: Well, I think it depends on what you see as the impediment to
5 access. If you think it's antitrust-based, I mean if it is a private market restraint, whether
6 vertical or horizontal or whether it's cartelized or distribution systems are locked up or
7 whatever, those are the things that I think are most prudently brought to us.
8

9 If they have to do with issues of state aid or other kinds of trade-based issues,
10 then those appropriate 301. Where it gets tricky is in a case like Kodak where it's hybrid --

11 DR. STERN: Yes.

12 MR. RILL: And different people have different views on that, and they could
13 have taken it anywhere and they decided to take it where they decided to take it and
14 obtained the results they obtained.

15 DR. STERN: But they made that decision based on some signaling as to what
16 was more likely to --

17 MR. KLEIN: Well, I wasn't privy to all of it.
18

19 DR. STERN: I know. Neither was I. That's why it's easy to talk about.

20 MR. KLEIN: All right. Keep up your work. You're so close to the finish line.

21 DR. STERN: Bye, Joel.

22 MR. RILL: Joel, take care.

23 DR. STERN: Should we move on? Do we want to take a break?

24 MS. FOX: Could I make a comment on Joel's comments? He certainly set my

1 mind thinking about how to structure a World Competition Forum, and one of the channels
2 my mind is thinking of is this. The Justice Department has been so successful with their
3 cartel conference, is there a possibility of a moving forward based on other countries'
4 comparative advantages? Because it cannot be the case that we are the one. You know,
5 these are world problems.

6
7 So is there a possible conception in there that X country has this to offer and
8 we'll have a substantive conference on it and we'll be floating an agenda at the same time -- I
9 don't mean floating; I mean surfacing an agenda at the same time -- which will say: and in
10 connection with this, these are major issues that are coming up and let's all come around and
11 talk about them.

12 DR. STERN: So we recommend that what country should have this forum?

13 MS. FOX: Oh, I mean, this is the possibility as we talk out maybe later,
14 because to talk about how a world competition forum can work that isn't heavily funded, but
15 that is very inclusive. I mean, I know that's for later. I just wanted to say those two things
16 because they were on my mind.

17
18 MR. RILL: That's an interesting point. The dichotomy it presents is they're not
19 going to fund it, but you need funds.

20 MS. FOX: Exactly, exactly.

21 MR. RILL: And that's a judgment that may or may not be correct. It may or
22 may not influence where we come out. It's an interesting point. There's no special funding
23 for the G-7.

24 MS. JANOW: But is it not the case, to expect something to get off the ground

1 only when it is fully funded is to ensure that it will not get off the ground?

2 MR. RILL: That's right.

3 MS. JANOW: So I think isn't that a bridging of these perspectives? I mean,
4 we sort of have to hope something will get started that will be seen as sufficiently valuable
5 that it can get some funding.

6 MR. RILL: Well, and on top of this he suggests broad competition issues being
7 taken up in WTO for five or six years. It occurs to me that that's not terribly effective,
8 either. If he's worried about staffing, I'd love to see the WTO staffers worry over a merger
9 review.
10

11 DR. STERN: Yes, really. And technical assistance, as you said.

12 MR. RILL: And technical assistance is, no pun intended, a foreign language to
13 them.

14 MR. FARREN: May I ask a process question? Is it the intention that of taking
15 the outcome from Seattle with respect to how the working group is ultimately either
16 continued or not continued and then to try to accommodate the concept of the world
17 competition forum complementary to that outcome?
18

19 MR. RILL: You mean is that what he's suggesting? I think that's what he's
20 suggesting, yes. I'm not there.

21 MR. FARREN: I thought that's what he was suggesting, and I guess I'm asking
22 by process is that the way the report will be progressing?

23 MR. RILL: I'm certainly not directed towards necessarily what comes out of
24 Seattle. I'm obviously interested. I think that may be where Joel's making a suggestion.

1 MR. FARREN: But the report will be post Seattle. so it will be a fact at that
2 point.

3 MR. RILL: Seattle will be a fact, exactly.

4 DR. STERN: I think that what we have in the recommendations stands no
5 matter what goes on in Seattle, quite frankly, for reasons which both -- well, I think all, well,
6 three of us said to Joel, or at least Eleanor, I think, echoed: The WTO is a newborn babe,
7 with not a lot of resources, and there is need here, regardless of what the WTO can or
8 cannot do. We've just got to, I think, move on with the recommendations.

10 It's ironic, actually, the U.S. government as a negotiating position is arguing for
11 expansion in the environment area and in the labor area, and not in the competition area. I'm
12 sure, I mean, that makes some a nice debating point, but I just think it's just that, it's an irony.

13 MS. JANOW: Or investment. The things that are most arguably trade-related
14 are the table.

15 DR. STERN: But I see why, and that's not meant as a criticism. I think that
16 there are also political realities that, quite frankly, dictate public support for trade policy, but
17 that gets into a whole other topic.

18 MR. RILL: We have enforcement?

19 MS. JANOW: I think so. Shall we jump ahead.

20 MR. RILL: Yes.

21 MS. JANOW: Okay.

22 MR. RILL: I'm ready.

23 DR. STERN: I'm ready.

1 MR. RILL: We're just going to do enforcement.

2 ENFORCEMENT COOPERATION DISCUSSION

3 MS. JANOW: I was going to again briefly talk about what's in this chapter and
4 what the subgroup has discussed and then let you jump from that into whatever dimension
5 you wanted to focus on.

6 This first chapter was envisioned as one that was essentially going to offer
7 perspectives. It's a backdrop to chapters that follow, although it's the only one that deals
8 with the cartel enforcement issue. So there is substantial discussion about what the goals of
9 the report are. There is a discussion of U.S. experience with international enforcement
10 cooperation in general and a review of the bilateral agreements and the IAEEA agreement.
11

12 The subgroup, everyone I think, has been generally supportive of these efforts
13 by the Department of Justice to deepen and widen countries with -- deepen the relationships
14 that it has with countries and widen the net of bilateral arrangements that exist. And so the
15 chapter has been supportive of that direction.

16 The chapter also examined this recent record of successful international cartels,
17 and discussed the incidence of these cartels and the lessons for the U.S. and the world.
18 There is some discussion of a number of recent highly visible cases that have been
19 extraordinary in their international character, in the volume of affected commerce, and in the
20 high fines.
21

22 That discussion then turns to what the subgroup has been considering : Are
23 international cartels increasing or just detection? Does it matter? And on this, it's really --
24 the group -- everyone has been saying well, you can't answer this definitively. You know,

1 there's some interesting scholarship of the immediate post-war period that suggested a huge
2 volume of international commerce was cartelized pre-World War II, probably not at as high
3 levels. But in any event, these cartels are large, they're significant, they appear pernicious, to
4 be negatively affecting multiple jurisdictions.

5 It appears that some of the policy tools that have been used recently are really
6 making a difference. Specifically, the amnesty, the amnesty-plus arrangements are creating
7 incentives for conspirators to come in.
8

9 There is also some discussion of how important has cooperation been in the
10 effective prosecution of these cases. Frankly, that's something that is really only knowable to
11 those involved in the Division. But one thing is clear, is that there are a couple of cases that
12 are on the record where there has been cooperation on actual enforcement matters and
13 those are referenced and discussed.

14 Second and perhaps more importantly, there's clearly more sympathy in the
15 world to this type of enforcement action and recognition of its significance. So even those
16 jurisdictions that have their own mechanisms like blocking and clawback statutes to inhibit
17 U.S. prosecution are not deploying those tools. In fact what you're seeing is some amount
18 of copycat enforcement efforts in their own jurisdictions. So you're seeing corporate leniency
19 programs developing around the world, not identical to the U.S. but influenced by the U.S.
20

21 It appears that there is an interest in strengthening enforcement vis-a-vis hard-
22 core cartels. Note the OECD. Note the strengthening of legislation in specific jurisdictions,
23 like the UK and elsewhere. And thus, this is a trend in the world that is very important, very
24 productive, and needs to be enhanced through cooperation and everything that can be done

1 to strengthen this recognition and increase this public awareness and increase the
2 transparency of national programs and their treatment with respect to these practices is
3 useful.

4 So that's what this chapter is suggesting. I think one of the more specific
5 recommendations in here is that in thinking about how to deepen cooperation between
6 authorities, one of the key backdrops to that is how do you enhance business confidence in
7 this cooperation. This gets to the question of the handling of confidential information and
8 particularly business confidential information and the transparency of that information that is
9 being handled.

11 That's a subject that is not just limited to the cartel area. It cuts across all areas,
12 and thus this first chapter has certain suggestions and realizes, recognizes, as the subgroup
13 discussion has, that there's a balance of interests and concerns here: the agency concern
14 about burden and delay; and the parties' interest in due process, which means notice and
15 transparency with respect to any exchanges of confidential information or conversations
16 about information -- confidential information -- that occur internationally.

18 So there are some very specific proposals that are advanced in the merger
19 chapter that come out of this discussion. But here there is the notion that has been very
20 important to I think a lot of testimony we've heard from business groups, from the bar, about
21 the importance that's attached to more transparency with respect to handling of such
22 information, including notice when possible with respect to exchanges that occur. And that
23 notice could be before or after the fact, depending on the specific circumstances, not a
24 blanket rule of before or after the fact notice.

1 So that's just to highlight, I think, one of the areas. The cartel area is one that
2 has some specific potential recommendations. This idea of building cooperation and
3 enhancing transparency with respect to the treatment of confidential information is the other.

4 Finally, there's been some discussion about the importance of positive incentives
5 to engender cooperation, some that have been debated by the subgroup and have been put
6 aside. For example, some have suggested that there need to be modifications to the U.S.
7 civil litigation system that are particularly objectionable abroad, like treble damages, class
8 action, private suits. The subgroup felt that the gains from any such adjustments were simply
9 not clear enough to justify any such modifications to the U.S. system in the name of
10 cooperation. So that's the position that's in the draft and I want just people to be aware of
11 that and comfortable with it; and that one generally be thinking about creating positive
12 incentives.
13

14 There has been some discussion of the allocation of some proportion of fines for
15 cooperation purposes, and in fact this has -- this is not a wild idea. That's done sometimes
16 in the civil litigation context, where fines have been used for educational purposes. So that's
17 the scope of things that I think is contained here.
18

19 DR. STERN: Who's in charge?

20 MR. RILL: You are.

21 DR. STERN: Oh, great. Jim, I'm going to call up tomorrow and ask the same
22 question and hope I get the same answer.

23 MR. RILL: Not the same answer. Maybe not the same answer.

24 (Laughter.)

1 DR. STERN: Eleanor?

2 MS. FOX: I'll make two different comments, one on procedure and one on
3 substance. Merit already said this and I'm just underscoring it. Merit mentioned that there
4 are certain aspects in the cartel chapter that we also are proposing in the merger chapter on
5 confidentiality and on work sharing.

6 We definitely should be building these links. It does make me think whether
7 there's another subject that is an overall subject rather than a cartel and separately a merger
8 subject -- procedures, work sharing, confidentiality -- not linked into cartel enforcement
9 because people aren't going to think first about work sharing.
10

11 I think the work sharing idea is very, very important, and it builds on what I
12 think is becoming a major theme of the seamlessness. One thing that I think is very
13 important on a substantive level that we try to do is to take the pressure off the United States
14 as the outlier that just wants to work alone and put the focus on "These are world issues.
15 We want to share responsibilities and we want to work together in the world in solving the
16 issues."
17

18 Work sharing on both cartels and on mergers is actually a fantastic way of
19 integrating the world from a workforce integration, and as we integrate the world, we have
20 people from various countries working on the same problem together, we do tend to see
21 things better, more clearly as the global problem rather than as a national problem. I think
22 that's very, very good progress.

23 Let me just say a word on
24 substance. This will maybe show my ignorance on what is and is not in the report. I don't
remember how far we went on thinking about the substance of an anticartel rule. When we

1 talk about cartels, we must talk about, of course, the importance of cartel rules and of
2 nations having anticartel rules, the problem of world cartels or cartels that block out parts of
3 the world, and that there's the world interest in getting rid of those cartels.

4 I think that we should highlight the OECD Recommendation on Hard-Core
5 Cartels and particularly highlight those areas that can be improved and should be improved
6 -- like take away "anticompetitive" before "cartel," "anticompetitive" before "hard-core
7 cartel" -- and try to narrow the exemptions and exceptions.

8 The Hard-Core Cartel Recommendation helpfully says that nations should look
9 and relook at their own exemptions and narrow them back and put things on the public
10 record. I think that's very important, that the world -- I think it would be really nice if there
11 was world agreement on that, that it wasn't just an OECD recommendation.

12 Some years ago -- well, it would be about 1981 or 1982 -- Bill Baxter gave a
13 speech talking about truth in cartelization, which I always thought was a great speech. It
14 discussed the idea that countries are going to have some cartels, they're going to be
15 authorizing some cartels; the first best step we can do is to have truth in cartelization. So if a
16 country has a cartel and, indeed, if a private individual joins a cartel and says, "I did this
17 because my country made me," we would have a lot of very good transparency on the front
18 end. We'd know what we're dealing with, we might be able to see better whether the cartel
19 is related to the so-called interest in having a cartel.

20 If we -- this is now a different issue -- if we did have any substantive rules in the
21 WTO, the number one substantive rule would be: Nations agree to have in their law a law
22 against cartels. If they decide nonetheless to have a cartel, it must be tailored to their own
23
24

1 purpose. It must be an internal market problem and it must be transparent. That actually
2 would be a very useful thing.

3 One final word is this: I think that most of the private impediments to world
4 trade are cartels in one form or the other, but they're cartels, they're not vertical restraints.
5 They're not usually monopolistic restraints, although they can be. If we do have world,
6 especially WTO, conversations, I mean such as market access conversations, that the
7 easiest thing to get consensus on would be that a cartel with a boycott that blocks market
8 access is illegal and the whole world ought to recognize that it's illegal. You can always give
9 a very narrow gateway for derogation, when a state says, "I had to do this because of this
10 problem, internal problem, and it's tailored to it."

12 So I don't remember that we did much on the substance of the cartels on the
13 cartel chapter. It was mostly about the enforcement aspects of it, but I think that the
14 substantive parts could get some useful attention.

15 MR. RILL: Let me pick up on that last comment, that it seems to me we're less
16 prescriptive, if you will, and less involved in making recommendations with respect to this
17 chapter than any other, and I think that's probably correct, probably as it should be.

19 I heard you when you said we lead off with this chapter to provide some
20 contextual background. But I wonder if we wouldn't want to rethink the possibility that this
21 chapter might be not first, but after the other two chapters. The other two chapters provide
22 more in the way of recommendations, more in the way of suggestions than this chapter,
23 which tends to, for the most part, quite frankly, endorse what the Government's doing and
24 saying do more of it.

1 MS. JANOW: With the exception of this confidentiality?

2 MR. RILL: With the exception of confidentiality, which really cuts across
3 frankly all three lines in different degrees.

4 MS. FOX: I wanted to say something related to what I said, although it seems
5 out of place after Jim. But I wanted to say this about exemptions and excessive nation state
6 trade-restraining action, which we've brought up in various areas.

7
8 The fact that states take action that facilitates cartels is the most important in the
9 cartel area. If we're proposing a principle or even a policy to try to cause states to limit
10 themselves from taking unnecessary trade- restraining action, cartels is the area where it
11 would be clearest. So if we're doing anything substantive on cartels, that's where it would
12 come.

13 MR. RILL: You mean like agricultural marketing agreements?

14 MS. FOX: Yes.

15 DR. STERN: Or escape clause actions in Japan, where you legitimately can
16 create a government cartel for a period of time for purposes of adjusting to import relief.
17

18 MS. FOX: Right. Now, some of that's been talked out in the world and
19 maybe lots of us would like to try to narrow it, and I don't mean to say it's all off balance.
20 But that's the kind of action. Some of us would like to prescribe it. But that's the kind of
21 thing that is so important to focus on in the world when you're talking about antitrust and the
22 world. It's the exemptions from and exclusions from cartel law.

23 MR. RILL: Which is not unique to countries other than the United States.

24 MS. FOX: That's a good point. I mean, that's a point that I think we ought to

1 be looking at. Yes, it's not unique. Yes, it brings us in.

2 MR. RILL: We do it, too.

3 MS. FOX: We do it, too. I'm happy to look for examples where we do it,
4 too, and say we oughtn't be doing it. I think that gives us a little more credibility when we do
5 that.

6 MR. DUNLOP: May I make one comment on the summary of this chapter, at
7 least, if I'm talking about the right chapter. At the bottom of page 3 of your summary, you
8 have "Government study" as the title. Then, of course, below you say that "Governments
9 and other experts have recognized." I don't know about the "other."

10 It seems to me that that's really maybe somebody's Ph.D. thesis topic, but that
11 the study of trying to decide how much of the recent activities of the Antitrust Division is the
12 result of greater number of cartels and how much is of greater attention to it, that doesn't
13 seem to me to be -- I don't mind if you want to say that experts consider or something, but
14 the notion that a government should study whether its activity is the result of its greater
15 vigilance or the greater reality, that whole thing seems to me of dubious virtue, if I may say
16 so.

17 I'll give you a different hypothesis. My earliest personal contact was with
18 Thurman Arnold, who was the Attorney General, and he argued to my union friends that
19 collective bargaining had a great many antitrust problems until the Supreme Court told him
20 where to go. And you know, you have these cycles. Now, how much of the cycle is the
21 aggressiveness of the Assistant Attorney General and how much is the world at large is a
22 very iffy kind of issue.

1 I don't mind your studying that, I don't think government --

2 MR. RILL: I'm not sure that's a global issue exclusively.

3 MR. DUNLOP: Well, anyway --

4 MR. RILL: I mean, there are a lot of us who look at that issue --

5 MR. DUNLOP: Yes. But I just put some question about that.

6 MS. JANOW: Thank you. Let me see if this conception responds. There has
7 been almost no scholarship on this question of international cartels today.

8 MR. DUNLOP: That would be a good --

9 MS. JANOW: And there was a lot on that pre-war period and then there has
10 been some on domestic cartels. Posner, for example, did a fabulous empirical analysis. So I
11 guess this sense of -- here you have these huge cases, one after another, and the report says
12 there should be more international attention to this problem. So this was just a mechanism or
13 suggestion on how to focus such attention.

14 MR. DUNLOP: I have no problems with that, but the title gives it away as a
15 government study at the top of it.

16 MS. JANOW: Right. Who'd want to read that?

17 MR. RILL: Right.

18 MS. FOX: Let me say a word in support of John. I don't think he meant it had
19 to be only government studies.

20 DR. STERN: No.

21 MS. FOX: I think that it is not material as to this, whether our observing so
22 many world cartels comes from the increased enforcement or increased cartels. I think there
23
24

1 can be, as you said, an interesting study of the phenomenon and its scope, its impact,
2 etcetera, and maybe as a footnote. Yes, the researcher can also look to see whether you
3 can detect trends of this sort, but this isn't the main question.

4 MS. JANOW: Right, I'm with you. It's badly crafted.

5 MR. RILL: You're absolutely right.

6 MS. JANOW: Thank you.

7 DR. STERN: Any other comments?

8 (No response.)

9 DR. STERN: I'd like to throw out just for quick discussion purposes this treble
10 damages issue, which is also discussed, if I'm not mistaken, possibly even in our chapter on
11 trade and competition. Was there some reference to treble damages?

12 MR. GILMARTIN: Yes.

13 DR. STERN: Yes, I thought so, because I made some marginal notes on that.
14 I certainly do not believe in, as I've mentioned this a third time today, unilateral disarmament.
15 I guess I'm a haggler. You talk of a number of reasons why treble damages -- the
16 Committee has decided that we don't feel that the risk-reward was not there, and I thought
17 that that was a good argument. Then there were some other arguments about not giving up
18 on treble damages.

19 I wanted to just put on the table the possibility -- do we know what page it was
20 on treble damages in the chapter on trade?

21 MS. FOX: It was at the point of saying in footnote 159 actions we considered
22 whether there should be a relaxation.

1 DR. STERN: Well, I guess we are --

2 MR. DUNLOP: Well, in the summary it's at page 3.

3 MR. SHAPIRO: Page 59, chapter 3.

4 DR. STERN: Chapter 3? Thank you, thank everybody.

5 Yes. I kind of wanted to kind of throw in the idea and discuss it that any
6 change should be done only on a country-by-country basis in exchange for countries
7 perhaps enforcing their laws rapidly when we give them a positive comity reference to them,
8 a positive comity complaint. I mean, that may be too cute by half, but --
9

10 MS. JANOW: Let me just clarify that the first chapter is speaking as a general
11 proposition.

12 DR. STERN: Right.

13 MS. JANOW: And the third chapter is considering export restraints, which
14 some have argued is a particularly narrow set of circumstances to consider de-trebling. So
15 the first is cartels, the third is --
16

17 DR. STERN: I'm sorry to mix that up.

18 MS. JANOW: No. I just want to clarify it.

19 DR. STERN: Yes.

20 MR. DUNLOP: But the language in the summary is a little bit ambiguous. And
21 I refer you to page 3 of the summary, because it says, "The Advisory Committee does not
22 believe that it is appropriate to amend the antitrust laws to remove treble damage liability in
23 cases where harm to U.S. export commerce is the only antitrust violation that is alleged."
24

Now, this is implying that, in other cases we are prepared to eliminate the treble

1 damages.

2 MR. RILL: Yes.

3 DR. STERN: Good catch.

4 MR. DUNLOP: I wanted to have you explain that a little bit more.

5 DR. STERN: Yes.

6 MS. JANOW: John, I thought you were the economist, not the lawyer on the
7 Committee.

8 DR. STERN: That's a good catch.

9 MR. RILL: No, I think he's the grammarian actually.

10 MR. DUNLOP: I've probably looked at more reports than you will in your
11 whole lifetime.

12 MS. JANOW: I hope that's true.

13 MR. RILL: I sense you're complaining.

14 (Laughter.)

15 DR. STERN: She's just gone on strike. But anyhow, that needs to be clarified
16 in the summary. But can I go back?

17 MR. DUNLOP: Yes, go to the back.

18 DR. STERN: On the export restraint piece, as opposed to the cartel piece, I
19 am wondering if, this may be the wrong hook, but if we can figure out a way to, as I was
20 trying to push Joel on this, to push other countries, in terms of deadlines, when we do refer a
21 positive comity to somehow, to use David Yoffie's "positive incentives" as well as negative
22 incentives.

1 So I was thinking maybe that might be an opportunity for positive incentive.

2 MR. RILL: If you take action against this import cartel, we won't let our private
3 litigants sue you for treble actions.

4 DR. STERN: Yes. If you take action within three weeks after we send it to
5 you.

6 MR. RILL: I'll let you take that one on.

7 MS. FOX: You need Congress to do that.

8 DR. STERN: Well, I know. We're making recommendation for anything,
9 legislation and regulation.

10 MS. FOX: I wouldn't recommend that Congress do it, either.

11 DR. STERN: Okay. Well, that's why I'm throwing it out.

12 MR. FOX: First of all, I have a problem with our law applying in that case.
13
14 And most of the positive comity cases, or at least a lot of the positive comity cases, if they
15 have no impact on the U.S. market I really don't think our law applies.

16 But this is why it would be terrible to apply treble damage laws. They, the
17 defendant, doesn't think our law applies either. They're not doing their action with a view to
18 looking at U.S. law when they're doing it in their country and it involves blocking their own
19 market. It's very unfair to apply our treble damage law against them.

20 DR. STERN: So we'll say, okay, we won't if you just move quickly.

21 MS. FOX: Right.

22 DR. STERN: And then we won't have to fight over it.

23 MS. FOX: But I think -- but you see this is why I think it's also unfair to apply
24

1 our law against them, that it's really their law that applies. I think if we take on a treble
2 damage issue, we have to take it on at a much higher scale. And once we take it on at a
3 much higher scale, my view would be don't touch cartels or you're going have a resurgence
4 of the level of cartels that existed in 1940.

5 Then as to other than cartels, I would say: interesting thought, we should discuss
6 it. But these might be cartels. I think it's very dangerous to tinker with the cartel treble
7 damage.
8

9 MR. RILL: I agree with you on that.

10 MR. DUNLOP: Jim, may I ask you a question?

11 MR. RILL: Yes.

12 MR. DUNLOP: To what extent is the triple damages -- it sounds terrible -- a
13 cover for negotiating the amount?

14 MR. RILL: Well, as a practical matter --

15 MR. DUNLOP: My own guess would be that the triple damages, nobody gets
16 at it in a triple way. You deal with the total picture and so on. But what does happen?
17

18 MR. RILL: The general rule -- and there are so many exceptions -- but
19 normally you start the negotiations between the plaintiff and the defendant at the level of
20 actual damages, with the threat of treble damages: if you don't settle, then we're going to sue
21 you and we'll get treble, let's start with actual.

22 And the war is really over what are the actual -- I mean, the war is of course
23 over liability, but then the war begins over what are the measures of actual damages -- and
24 then the real war devolves into how much does the lawyer get.

1 MR. DUNLOP: Yes, I rather suspected that. And therefore in a sense the
2 only reason that I was impressed by the Canadians' comments about this in our testimony,
3 who objected to it, you may remember, is that it is really not literally applied. It becomes a
4 tool in the negotiations for practical purposes and therefore, so what?

5 MR. RILL: Well, but cases do go to trial and when they do go to trial you've
6 seen some real war stories about huge damage awards. I mean, there are cases, and
7 therefore that treble damage specter affects the negotiations and also I think has a great
8 affect on compliance.
9

10 It seems to me the real deterrent, once one gets past the fact that most
11 businessmen really don't want to violate the law -- a fringe may, but most really don't -- I
12 think compliance programs are built around the notion of the fear of individual criminal
13 liability and treble damage remedies. I think that's the negative, the negative influence, if you
14 will.

15 MR. DUNLOP: The electric chair is alleged to be useful in society.
16

17 MR. RILL: There are those who think that that's a great deterrent.

18 DR. STERN: For lawyers in terms of treble damages -- no.

19 Do we want to go any further on this chapter? Shall we move on?

20 MS. JANOW: We'll try and rejigger organization. There's also Eleanor's point
21 about a lot of the exemptions are cartels. I think it's an important point. We'll try and work
22 on that. There is a general discussion of exemptions as we've covered in chapter 3. How
23 much of those exemptions result in cartels that have offshore effects is -- I think we're going
24 to have a very hard time kind of breaking out this universe, other than to make a general

1 statement. So I just put a question mark in there. The subject of export cartels is briefly
2 touched on within the context of overall exemptions and exclusions.

3 And we've gotten some submissions from some who've utilized those
4 exemptions and those submissions are referenced in the report. Similarly, the notion of
5 overbroad exemptions, which is not to say that the firms from whom we received those
6 submissions are examples of overbroad, but simply to say that the issue of overbroad
7 exemptions is also referenced as a subject that should be discussed at the global level.
8

9 MR. RILL: I think it's worth putting a chip down. I think if you get into it in
10 great detail you're going to find yourself writing a huge treatise on exemptions, and I think
11 just putting a chip down is a good idea. I think that it's an advocacy point for the U.S. I
12 think where it becomes interesting and practical as an advocacy point and goes into the
13 trade and competition area is where it's not really an exemption, but it's more into the hybrid
14 area. And I think we need to work more on that.

15 MS. JANOW: Thank you. I think that closes out very successfully this
16 discussion.
17

18 DR. STERN: So now we're going to turn to multijurisdictional mergers.

19 MULTIJURISDICTIONAL MERGER REVIEW DISCUSSION

20 MR. RILL: Let me summarize where I think the working group on mergers is,
21 not necessarily in the order that's set forth. It seems to me that there's been a great deal of
22 focus on transparency and accountability, and I think that that can be well served by a
23 framework for cooperation, including a transparent protocol on how agencies actually
24 cooperate, global agencies in different jurisdictions may cooperate, in merger review both in

1 the context of a waiver and even where there's not a waiver. And we endorse that and
2 suggest that it be made very public.

3 One of the problems, of course, as arose in our discussion of cartel
4 enforcement, the issue of confidentiality and the need to instill further confidence in the
5 process, the safeguards of the receiving organization, the question of notice of transfer of
6 information, the desirability of having the receiving organization refuse to disclose unless it's
7 legally required to do so, for example in a court proceeding.
8

9 We don't think that some limitation on use is advisable -- a limitation on use
10 would be difficult to describe, hard to put into effect, therefore not advisable.

11 There are additional safeguards that are possible. They are spelled out in the
12 IAEAA, International Antitrust Enforcement Assistance Act, for those who are unfamiliar.

13 DR. STERN: After two years, I've figured it out.

14 MR. RILL: We think that one of the major improvements that can be made in
15 confronting the basic frictions in the system, which Tom Donilon has talked so much about,
16 can be ameliorated by greater cooperation. And one form of greater cooperation that can
17 facilitate greater commonality in timetables, review, and result is cooperation through work
18 sharing.
19

20 We talked about that a bit in the cartel area, too. But it seems to me that the
21 Justice Department and the FTC have made initial but nevertheless substantial strides in the
22 direction of work sharing and merger review.

23 One that I'm most familiar with because I was involved was WorldCom-MCI, in which
24 the staff of the Justice Department actually attended proceedings of the Merger Task Force

1 of the European Commission, information was freely shared as a result of waivers given by
2 the parties, and as I understand it the Federal Trade Commission and Justice have initiated -
3 - I don't know whether it's been put into effect yet, but have initiated -- a procedure
4 reciprocally whereby -- I think it applies to the European Commission; I don't know that it
5 applies elsewhere -- that reviewing officials from the European Commission can attend
6 appropriate meetings, high-level meetings in the Department and at the Commission, I think
7 in a meeting with the parties and the Assistant Attorney General; at the Commission I believe
8 it's with the parties and the Bureau Director.

10 They're not going to put the foreign enforcement officials under the same
11 enormous burden that those of us representing the parties have to do, which is five separate
12 meetings with five separate Commissioners, but at least with the Bureau Director.

13 We think these are solid steps, ones that should be encouraged, ones that
14 should be expanded, so that not only is there convergence of process but there is
15 consultation and convergence of remedy. One of the cases that intrigued me, not out of
16 personal taste, is the Grand Met case, in which the agencies had to struggle with preferences
17 in taste, I believe, with scotch in different jurisdictions in order to work out a remedy that
18 satisfied all, including hopefully the consumer.

20 I think as we get to this kind of cooperation, we're going to find greater
21 convergence and I think that greater convergence should be encouraged. I was intrigued
22 with Joel's comment today of a working group, which I suspect includes the Federal Trade
23 Commission as well -- I can't imagine that it wouldn't -- and the European Commission to
24 deal with issues of substantive convergence.

1 That wouldn't happen without the procedural convergence that's already taken
2 place. And I think we need, we as a Committee, need to know more about just what that is
3 and what it means and how it's going to work. But it seems to me that that leads to a
4 substantive area of drawing together which we see already between the U.S. and at least the
5 European Commission on merger review.

6 There's another thought and that is that there's a possibility in the context of
7 work sharing that we can move to another level. That is whereby assignment of work might
8 depend to some extent on the intensity of potential effect of the merger on the consumer
9 welfare, and that in some instances it might be appropriate and we would recommend that it
10 would be appropriate for an agency in one jurisdiction to take the lead in the investigation,
11 not exclusive, but to take the lead in the investigation, and for the other agencies to preserve
12 their options, but perhaps participate in the work of the lead agency, rather than initiate
13 separate but equal efforts, thereby I think at least having the prospect of reducing the
14 burden.

15 It seems to me that this could lead to a higher level of cooperation and one
16 which will produce a greater commonality of results. Nevertheless, obviously we're aware
17 of externalities and I think recognize the need to be flexible enough to recognize diverse
18 standards that might be applied for hopefully a limited number of reasons in merger review.

19 But I think we would recommend that noncompetition factors should not be
20 taken into account. Politics, large "P" politics as opposed to policy, should not have a role in
21 merger review; that laws should be applied on a nondiscriminatory basis, and perhaps in the
22 merger area particularly the non-consumer welfare-related interests of competitors should be
23
24

1 limited to the fullest extent possible. These are general principles we would hope that the
2 U.S. would advocate in its effort to bring about some convergence of merger review.

3 I think, going further towards having in effect a treaty, which was once
4 proposed to me when I was in office by Sir Leon Britton, a treaty that gives one jurisdiction
5 the total trump card on merger review based on a predominance of effect, would not be one
6 that this Committee would support; that it would go too far and would be generally, quite
7 frankly, politically unacceptable here and elsewhere.

8
9 Now, that's not a reason to reject it, but it also probably would not make a lot
10 of good sense to give away consumer interests, however subordinate those consumer
11 interests might be, to consumer interests in another jurisdiction, based on a balance of
12 hardships.

13 We think that, speaking again for the Subcommittee, we think that transparency
14 is a major, major issue here, that is in merger review. And I think that we have not been, we
15 the United States have not been, as forthcoming as we might be in describing the reasons or
16 the bases why a particular merger was not brought -- not so much why it was challenged,
17 although there are shortcomings there because, I think particularly the FTC, the consent
18 papers are not fully forthcoming as to the underlying basis for the complaint when there's a
19 complaint.
20

21 Justice, under the hot breath of the Tunney Act, has to be a little bit more
22 forthcoming because they've got to go to court to get a consent approved. But even more
23 than in the consents, where a merger is approved or a merger is not challenged, in particular
24 cases -- Joel likes to use the word "doctrinal cases"; I might suggest he uses it a lot -- but in

1 cases that have a precedential value and the merger is nonetheless not challenged, it would
2 be worthwhile, I think, for both FTC and Justice to describe the basis for the analysis and
3 the rationale why the merger was put through.

4 I know it's difficult. People are worried about confidentiality. They're worried
5 about, frankly, boxing the agency in, because if we say this wasn't challenged because of X,
6 why, then every party that's coming up is all of a sudden going to have an X merger. But live
7 with that; too bad.

8 I must say I tried to do it when I was in office with some two or three examples.
9 Other than those two or three examples, limited success in trying to do it. But I think it could
10 be expanded.

11 In respect to reporting requirements, second requests for example, there is a
12 thought on the part of the Subcommittee that some increased accountability would be useful,
13 and frankly it's a bit inchoate at this moment as to exactly what that accountability would
14 involve, but it could involve time periods and volume of production.

15 I think we can describe some parameters, but I'm not sure we can
16 micromanage the agencies to say exactly what those audits should comprehend. But some
17 level of greater information forthcoming on time periods and burden I think would be useful.

18 Which brings us to burden. The notification thresholds, I think everyone agrees,
19 FTC and Justice would agree, they're too low. And I think if there is a revenue neutral way
20 of adjusting the thresholds, quite frankly, without unduly penalizing companies simply
21 because they are big -- many big mergers have no competitive consequences; many little
22 ones do. But if we can find a way, if the government, if anyone can find a way of doing it

1 appropriately without causing the resources of the agency to be restricted as a result of
2 threshold modifications, we should do that.

3 And as we heard Joel today, the concept of the recent legislation introduced by
4 Senator Hatch and others I think he says is in the right direction at least, and I think we
5 should press more on that as that unfolds. It probably won't be enacted because not much is
6 going to be enacted this year.

7 There is considerable, considerable sentiment that filing should be divorced
8 from jurisdictional issues, and very considerable support for the notion that filing should not
9 be required where there is utterly no conceivable competition influence resulting from the
10 transaction.

11 A number of jurisdictions, a number of nations, have taken the worst of our
12 example and decided that filing fees are a great way to raise money, particularly from
13 outsiders, and therefore basing filing requirements and fees on global turnover, global
14 revenues, whether or not there is a penny of revenue in the country.

15 The other problem, and one that needs to be addressed -- and this is largely
16 through advocacy by the Department -- and that is the issue of not even knowing when one
17 has to file. I've been involved in this in a number of instances, and you can find the best
18 merger lawyers, because there are not many of them, the best merger lawyers in some
19 jurisdictions who can't tell you with certainty whether you've got to file in that jurisdiction.

20 I won't pinpoint the jurisdictions, but they're there. I think from the standpoint
21 of advocacy by the United States, that's a good place to focus.

22 There is a feeling that there should be, to the extent possible, a harmonization of
23
24

1 review periods, a harmonization of filing requirements to the extent possible, still recognizing
2 the underlying diversities that may exist on a statutory basis in various jurisdictions, and that
3 there should be a two-step process of an initial filing that provides basic information and then
4 a follow-up, if there is some question as to whether or not the transaction involves, requires
5 and promotes a further look. Do not get me wrong. This is not endorsing the U.S. second
6 request experience.
7

8 One of the areas we looked at and it applies very much to the United States is
9 the issue of overlapping jurisdiction. We had a paper by Bill Kovacic on that subject,
10 multiple agency review of the same transaction on competition issues.

11 I think that there are instances in the United States where that takes place and
12 we have talked about them. Examples include the FCC, where Commissioner Powell and
13 Commissioner Furchtgott-Roth both think that the FCC -- which has parallel authority with
14 the Department of Justice to review competitive consequences under somewhat different
15 statutory standards -- will proceed to review exactly the same competitive issues that have
16 been reviewed and passed on or remedied by the Department of Justice.
17

18 There are any number of other examples, some of which involve the Surface
19 Transportation Board approval of railroad mergers over the objection of the Department of
20 Justice, in one case at least giving the Assistant Attorney General, not this one, the back of
21 the hand, although I would have gotten it too and would have taken the same position as that
22 one, in opposing a merger with the kind of comment that, we don't worry about these little
23 picky things like competition and antitrust, we know how to run, or ruin, railroads.

24 And I think the same is true of the DOT's international air alliance authority.

1 For example, the Department of Justice objected to antitrust immunity in certain point to
2 point routes in the Delta-Swiss Air-Austrian Air-Sabena alliance and DOT overruled it.

3 These are very complex issues and I don't think anyone would want to -- well,
4 not too many would want to eliminate the regulatory agencies and their authority. But there
5 has to be, I think, something wrong in a system that involves two agencies looking at exactly
6 the same standard, duplicating their effort, and often coming to different conclusions.

7
8 This is not to say, for example, that the FCC should be divested of looking at
9 such issues as universal service. But maybe once the Department of Justice has found that
10 there is not a substantial injury to competition resulting from a merger under a Section 7
11 standard, that that would be a finding that would then be binding on the FCC, just by way of
12 example.

13 I think that, short of this kind of presumptive effect of the findings of the antitrust
14 agencies, there at least can be an advocacy of some kind of soft harmonization, joint review
15 between the agencies, and I think the fact is that much of that goes on right now. There are -
16 - maybe it's spotty, maybe it varies, I'm sure it varies from agency to agency.

17
18 I actually had a Department of Agriculture administrative law judge preclude
19 even testimony from one of my economists when I was head of the Antitrust Division on the
20 ground that he wasn't a person. Now, I leave you economists to respond to that one. It's
21 more technical than it sounds.

22 I think that the same problems exist overseas, and it seems to me that we're not
23 in much of a position to criticize the multiplicity of enforcement overseas without taking
24 cognizance of our own issues. One of the ones I think we need to look at in the U.S. is the

1 extent to which the states, the sovereign states of the United States, become involved in
2 merger review. They are going to do it. The Supreme Court said they're are going to do it,
3 and particularly where there's a tire hits the road kind of merger, like in retailing, there's an
4 impulse to do it.

5 But the fact is that, if there is litigation that follows, I think it would be useful for
6 the Department or the FTC to let it be known by an amicus brief that they approved the
7 merger and why, or did not challenge the merger and why.

8 I think that's particularly true as we have become -- as more and more of these
9 particular mergers, indeed in this industry, the retail industry, become more and more
10 involved with foreign-located competitors or companies, which brings us into the jurisdiction
11 of this Committee. Belgian and Dutch food retailers are acquiring U.S. food retailers.
12 British petroleum companies are acquiring U.S. petroleum companies, and they're scratching
13 their head as to why hypothetically the Governor of Alaska taking a position, or the state
14 legislature of Alaska taking a position, should worry them as much as the FTC does, and it
15 sort of may be hard to explain. But I'm not asking you to.

16 But I think then, to summarize in the merger framework, we're looking at closer
17 harmonization in the sense of working together, greater sharing of information subject to
18 confidentiality limitations, an attempt to take the friction out of the system in procedure by
19 bringing notification requirements as close together as we can, and attempting to harmonize
20 time tables, ultimately all working towards convergence, and then trying to get further friction
21 out of the system by advocating a more unitary within-jurisdiction review of competition
22 issues.

1 That I think it encapsulates where the working group came out, in
2 approximately 23 minutes. Are there comments or questions on this chapter?

3 DR. STERN: In the summary, you know, the stuff that we got that came first,
4 that weren't in the chapters, there was, to my mind, when the discussion of burden on
5 companies was mentioned, more talk about length than uncertainty, length of time rather than
6 uncertainty. It's my view that we should make -- we should articulate the burden to
7 companies, to their personnel planning, to their strategic planning, to their stock, that comes
8 from the uncertainty of when the review will come to an end as much to the length.
9

10 The word "uncertainty" is used more, I would say, in the chapter itself than in
11 the summary itself. But a lot of people are just going to read the summary. So tone really
12 makes a difference, I think, and really choices of tone, because I do think with the
13 Hart-Scott-Rodino, our own uncertainty, that when you ask a business person that's the
14 thing that they think about most. So I think we just need to signal that.
15

16 I think it's great that we have mounted all this evidence of what indeed are the
17 time -- how much time is in fact taken in the U.S. at the FTC and the Department of Justice.
18 The question of transparency, the articulation of doctrinal initiatives or decisions also goes to
19 certainty and uncertainty. So it's really a theme. It's not just -- it's a theme.

20 Those are my comments for now.

21 MR. RILL: Other comments? Eleanor?

22 MS. FOX: I have some comments that might be more idiosyncratic, so I was
23 waiting to see if others wanted to comment. Okay, I'll go ahead.

24 MS. JANOW: Can I just offer one contextual comment --

1 MS. FOX: Yes, please, yes.

2 MS. JANOW: -- that I hope isn't as idiosyncratic.

3 MR. RILL: There are those who think all of antitrust is idiosyncratic.

4 MS. JANOW: What Jim started off with outlining, I think we spent a lot of
5 time talking about the procedural features of merger control and I think talking about those
6 practices that are particular to the United States that are burdensome and expensive and
7 insufficiently transparent and those many practices in the world which are also.

8
9 This chapter does make a very conscious effort to examine both world features
10 and U.S. features, and to argue that the U.S. needs to lead by example if it's going to get
11 countries to re-examine their own practices. There is an interesting question about really
12 whether leading by example encourages countries to stand down on those features. But the
13 assumption here, presumption here, is at least it's your best hope.

14 But in any event, it makes good sense for us to do those things that make good
15 sense for us. That's the most important point. But I think this last bit of the chapter that you
16 started us out with, Jim, is really quite big picture. It's not just procedural harmonization, but
17 it's really as we talk about a more seamless system, to use Eleanor's term of art that Steve
18 Rattner has often encouraged, how far can an integrated system go in terms of merger
19 review.
20

21 So those first set of comments were a stepped up approach. One is a kind of
22 joint investigation, which is what happens now in the best of cases when circumstances
23 warrant. But others are much more integrated. So the Committee has occasionally asked
24 itself, where are we going beyond current policy? I think that area is very much going

1 beyond current policy, and it's benefited from a lot of hard work by Eleanor in her own
2 writings and a lot of input from a lot of sources -- and I acknowledge Cynthia and Sarah
3 Bauers and Christine Wilson, all of them focusing and helping us understand that literature
4 and thinking.

5 So if those of you who aren't as riveted on the merger matters might just
6 consider that last back end should you be compelled to read anything in this chapter, I just
7 wanted to direct you towards it.

8 MR. RILL: Or if not compelled, at least induced.

9 MS. JANOW: Induced. I'd like to compel. I'm happy to induce. Sorry.
10 Eleanor.

11 MS. FOX: Actually, that leads into my comments. Thank you.

12 It has been in the merger area, among others, that we probably should learn
13 some lessons from the past, and Boeing-McDonnell Douglas is definitely an area where we
14 might draw some lessons. Here I want to highlight a couple of points.

15 One is as we move more into a global integrated economy, if any one nation has
16 the power of prohibition, if we all have the power of prohibition, the most prohibitory nation
17 is going to win. This is not just a merger problem. It's also a monopolization problem,
18 where we might think that IBM was using perfectly good pro-competitive strategies and yet
19 the EC was about to enjoin its strategies and prior disclosures.

20 I think that we have to look forward to -- I don't mean in a nice sense, but in
21 the grabbing a handle on it sense -- we have to be looking forward to the fact that every
22 nation now feels enabled to investigate and take action against any world transaction.
23
24

1 That's an overstatement, but any nation that has impact within its nation feels
2 enabled to enjoin any world transaction. Sometimes there is more to be said for the
3 injunction and sometimes there's a lot to be said for the freedom of the transaction to
4 proceed. I think if we don't have common principles of law we probably ought to develop
5 some rules of priority.

6 So let me go back to Boeing-McDonnell Douglas and say this about it. There
7 are some mergers that, to the EC, for example, are offshore mergers or, to us, are offshore
8 mergers. Rightly or wrongly, I think that countries on whose soil the merger is, where all the
9 production assets are, does feel a little more entitled to have the say-so about that merger
10 than the foreign country. We could possibly think about having a rule of priority so that if
11 anybody's going to enjoin McDonnell Douglas-Boeing it's going to be us if we have a
12 credible antitrust system. That is, if we pass it through our usual system in a
13 nondiscriminatory way and we've come to a conclusion that is not anticompetitive.

14 And I would say a fortiori another nation should not have the right to enjoin that
15 merger on grounds that are protecting competitors. I think that it's probably too late in the
16 day to try to work out systems of rules, but I think is one area where we must have a
17 conversation. I mean, it's a conversation to me for a world competition forum.

18 But we must recognize this problem and should probably think of developing
19 rules of priority. My tentative rule of priority would be to say what I just said: If a country
20 has a credible system and passes it through and all the assets are on its soil, another nation
21 can't enjoin it.

22 But I have a qualification to that: The nation that gets the right of priority on

1 injunctive relief ought to have the duty to count all costs in the world. It's just no longer
2 tenable for it to say: Well, as far as I'm concerned it's a good merger and I don't care what
3 costs it imposes on the rest of the world.

4 That's basically what I wanted to say. I just wanted to underscore this, if you
5 were Canada and you had a merger law, as Canada does, that counts benefits to Canadian
6 producers, it seems discriminatory for it to be able to say Canadian producers win more than
7 Canadian consumers lose, therefore I'm going to approve this merger and I don't want
8 anybody to touch it because of the possibility that it really does, on balance, hurt consumers
9 in the world.
10

11 MR. RILL: The only thing I would say, Eleanor, is, again to use a Joel term,
12 this is certainly visionary. But what you said was that the merger under your particular asset
13 location responsible enforcement test, the next jurisdiction, subordinate jurisdiction, couldn't
14 enjoin the merger on competitor protection grounds.

15 I think we would urge that that not be the standard anyway. Secondly, I think
16 that you would find really very strong objection and disagreement from, definitely from
17 former Commissioner Van Miert that that was the grounds. You can argue with him, but he
18 would say that was not the grounds on which we took action in Boeing-McDonnell Douglas.
19

20

21 MS. FOX: I know that, right.

22 MR. RILL: So then, but the point is you're going to get a disagreement as to
23 what really were the grounds.

24

MS. FOX: I think that channeling analysis along certain lines is helpful, even

1 though you're going to get certain disagreement within the channel. One of my main
2 objectives is to prevent a merger case from becoming a trade war case, keeping an antitrust
3 case an antitrust case.

4 MR. RILL: Which it almost did.

5 MS. FOX: Which it almost did. If certain American officials -- and I don't
6 mean antitrust people -- realized what the EU law was, they wouldn't have been so quick to
7 snap at the EU for thinking that the merger increased dominance, because according to their
8 usual analysis it did.

10 And that was one of the things that put it off track immediately, because it was
11 not trust. This goes back to the trust issue, which actually we should be building on, and we
12 would be in a whole lot of different ways, where there was not trust there was ready
13 accusation, that it's not into the trade war tranche very easily.

14 MR. RILL: When the Arkansas antitrust professor decided to get involved.

15 MS. FOX: Yes, right. So I think that one of the things that we have to do is
16 realize if we don't have international rules we're going to have clashes, and if we're going
17 have clashes we ought to be considering ways to modulate, to steer the conversation into an
18 acceptable antitrust conversation channel. And that's one of my objectives.

20 MR. RILL: Well, just let me go back to my fascination with the -- I guess it
21 was news that Joel, it's news to me, that Joel put out today, that there is a working party
22 with the EU on substantive convergence that gets into the efficiencies issue, and that they're
23 actually talking about balancing efficiencies against effects, looking at the pass-on
24 requirement or the pass-on emphasis that's put in even the current U.S. guidelines and being

1 prepared to examine cross-market efficiencies, which to me came as really kind of an
2 epiphany from the Department of Justice that you're willing to even look at that.

3 I think that really does bear a very close look for our report. And as I say, that
4 doesn't go nearly so far as you're thinking of going, but it gets more into this whole area of
5 substantive convergence and possible deference, particularly when you get into cross-
6 market efficiencies.

7
8 I mean, we're looking there at, okay, American consumer, you're going to pay
9 because company B is really doing wonders for efficiency, that'll do wonders for jurisdiction
10 C.

11 MS. FOX: In my view, that is a national choice, because if it's Spain or Israel -
12 - Israel is a good example. If Israel decides it wants to overcharge its consumers in order to
13 be more competitively efficient in the world, I think that's its choice.

14 I think that we only have the interest in the world market problem and if it
15 doesn't lessen competition in the world market we have no interest in saying you have to
16 apply a consumer welfare standard at home.

17
18 MR. RILL: Well, that's the argument. And if you're looking at world market
19 efficiencies, first of all there's a question of whether there are cross-market efficiencies or
20 whether there's a world market.

21 MS. FOX: Yes, right. Could I, more modestly --

22 DR. STERN: What have we been doing all day?

23 MS. FOX: Could I, more modestly than my last statement, just make a couple
24 of comments on factors that you laid out, Jim, because I thought everything you laid out was

1 about 98 percent terrific, maybe '99. You had a list of things that we say should not be
2 considered. Let me suggest a couple of possible modifications. Nations should not consider
3 noncompetition factors in their merger analysis. We probably should say except national
4 security.

5 MR. RILL: Yes.

6 MS. FOX: And here's where a bigger possible gap: unless it's transparent.
7
8 There are a great number of countries, like the Central and Eastern European countries and
9 a lot of others, that say the nation can balance advantages to it against harms. And if it's
10 going to bear most of the harms, I mean if the harms are going to haunt it too, but it's
11 decided that this merger is going to help prime its economy, I rally think that's up to it,
12 especially if it's transparent.

13 So we could say we'd strongly recommend noncompetition factors except
14 national security, but if countries insist anyway should be transparent.

15
16 Secondly, you said politics should have no role. And of course, while I agree
17 with that, we have to recognize the European Commission, which is a political body. Dieter
18 Wolf has properly suggested a spinoff of the competition directorate so it would be
19 nonpolitical, but he's not getting his way.

20 DR. STERN: Who did?

21 MS. FOX: Dieter Wolf in Germany.

22 MR. RILL: Yes.

23 MS. FOX: But as long as it's a political body, we could say no politics, but it's
24 a political body. I think that it would be really useful to have a rule, like I guess we do, to

1 say that people that lobby have to sign in and admit to it. That won't go very far probably,
2 but it's a very good rule.

3 Those were basically it.

4 MR. RILL: But I mean, it's not just the European Commission that's a political
5 body. Small "p". The Department of Justice is part of the Executive Branch of the United
6 States Government, and we are recommending in one chapter a seat at the table in
7 policymaking.
8

9 MS. FOX: That's right.

10 MR. RILL: So we are definitely recognizing and endorsing the role of the
11 United States Department of Justice as a small "p" political body. I think the transparency
12 point is a good one and then --

13 MS. FOX: You also made another real important point, is that policy is
14 different from politics. Lobbying is very offensive, I mean private interest lobbying. Maybe
15 sometimes you can't separate it. That's a problem.
16

17 MR. RILL: Well, I was at an advisory board meeting last night that you missed.

18 MS. FOX: Sorry. I wanted to go. Merit and I were at a conference.

19 DR. STERN: She was busy lobbying.

20 (Laughter.)

21 MR. RILL: Probably.

22 But the question of, I don't know that we even need to take, we probably don't
23 need to take, a position with this. There seems to be an increasing incidence of
24 congressional hearings -- mea culpa to some extent, but congressional hearings on particular

1 transactions. I'm not sure that I'm prepared to say that that's good or bad, but to say that
2 the Congress certainly has a right to be informed of major economic consequence in
3 particular major industries, is basically where the hearings have been. We had them on
4 Microsoft, we've had them on telecom mergers, lots of them on telecom mergers, depending
5 on the merger du jour. We've had them on airline alliances, BA and American Airlines.

6 I don't know. I think we have to take a hard look at what we mean by politics
7 --
8

9 DR. STERN: Yes. What are we saying there?

10 MR. RILL: -- shouldn't be involved, because we're certainly not immune from
11 policy inputs, at least insofar as the Department of Justice is concerned and I suspect even
12 our independent agencies.

13 MS. FOX: Oh, so what are we saying when we say politics has no role?

14 DR. STERN: What page are we at now on that?

15 MR. RILL: I don't know. I'm just talking to Eleanor. We have to be
16 somewhere.
17

18 MS. FOX: Jim recited it and I wasn't on the page.

19 DR. STERN: That's why I want to look at it if this is a --

20 MS. JANOW: Well, it's in a discussion of what are best practices with respect
21 to merger review. I think the first point you made is contained, Eleanor, namely to the extent
22 that noncompetition factors are influencing a competition review that should be transparent
23 and hopefully narrowly construed.

24 But do you know where the exact discussion is?

1 MS. LEWIS: We don't define it in this chapter at this point.

2 MS. JANOW: No, we don't.

3 DR. STERN: We don't define it or we don't state it?

4 MS. LEWIS: We haven't qualified it yet.

5 MR. RILL: That's probably something to work on.

6 DR. STERN: When that comes back, just would somebody flag it at least.

7 MS. JANOW: Sure.

8 MS. FOX: Maybe we should say base politics are prohibited, but all other is
9 allowed.
10

11 DR. STERN: Sordid politics.

12 MR. RILL: It's quite a difference between the President of the United States
13 making a decision based on national economic policy that a particular merger will not be
14 challenged. That's quite different from somebody making a decision at some departmental
15 level that a merger shouldn't be challenged because the convention of the XYZ party should
16 be held in ABC city, just to use a hypothetical.
17

18 DR. STERN: I don't think "politics" is a dirty word. So I mean, just let's see
19 what we're talking about here.

20 MR. RILL: Yes. I think whoever said there's politics and politics and policy.
21 The last time I looked, which hasn't been very recently, Article 2 of the Constitution gives
22 the President the authority to execute the laws of the United States, not the attorney general,
23 certainly not the assistant attorney general.

24 You're smiling and I know why. The action there is perfectly appropriate. It

1 might be good if it were transparent, it would be good if it were transparent.

2 DR. STERN: Yes.

3 Merit, what is it that you said that you would like to compel us to look at more
4 carefully?

5 MS. JANOW: The last part of this chapter is -- you know, we have used this
6 term, I think the subgroup has developed this term, "work sharing."

7 DR. STERN: Right. It's in there.

8 MS. JANOW: So I think it's a kind of very short set of pages, but from 89 to
9 94 is a kind of big picture, long-term, medium-term vision, and I think that's some of the
10 newest formulations that the subgroup's come up with.

11 DR. STERN: Okay, yes. And also, can I ask you to direct my undivided
12 attention right now to where we talk about transparency with regards to new doctrines that
13 may need to come out in some sort of public way.

14 MS. LEWIS: Page 75.

15 DR. STERN: Thank you. Facilitate greater transparency.

16 MR. RILL: I'm really impressed with the document handling at that level. You
17 guys are certainly well qualified to be third tier in an antitrust trial. I'm sure that's your
18 lifetime ambition.

19 DR. STERN: And this audit idea which is in here also, it looked like it was
20 more in there from the point of view of some exercise that was not organically involved on
21 an annual basis by the agencies. Rather, it's some sort of an outside audit that would come
22 in. Explain this to me, because I personally think that there is some value to some kind of an
23
24

1 annual report, if you will.

2 We talked about it being on the Internet. If those ideas are in here or they are
3 not in here or how are they --

4 MS. LEWIS: Transparency is a theme throughout the draft, where we talk
5 about HSR reform, we recommend annual reporting requirements -- the number of boxes
6 produced in second request transactions, the average length of review, translation
7 requirements, to try to make that more transparent and perhaps even change the perception
8 that all second request reviews take a long time when, on average, the agencies complete
9 their review well within four months.
10

11 We suggest an after-the-fact audit of select cases to identify what could be
12 done better, how the agencies could narrow the second request by looking at what
13 documents were actually used in the review, as well as at a PI hearing. Perhaps this will
14 enable the agencies to refine the model second request based on experience.
15

16 DR. STERN: Earlier this morning, I think I said that sometimes the
17 recommendations get lost and that even every time we say "we recommend" we italicize it
18 and it gets announced in some way. Because those are two important recommendations
19 and, particularly like on the model second request, I saw that reference in there and it was
20 on page 2-38, I think with reference to -- it's at the last sentence of a paragraph that starts
21 "The Canadian Competition Bureau." And then the last sentence says: "This could serve as
22 a useful model for other jurisdictions as well." It doesn't say the U.S., but I put in my
23 margins "How about for the U.S.?"
24

So there's some really good work in here, but I'm not real clear; as I said a few

1 minutes ago, what are we saying and what are we recommending?

2 MS. JANOW: Well, I think, as you might expect, we've spent so much time on
3 the text that the summary was thrown together relatively quickly.

4 DR. STERN: Sure.

5 MS. JANOW: So I think our next task is to very intensively do both, go back
6 to the text, make -- you have offered today a number of structural suggestions -- see how
7 that reconfiguration works. I think we have some new material to draft that's at the
8 beginning. I welcome any help in that that any of you wish to provide.

10 We'll also be very, very substantially altering the summary, sort of executive
11 summary first chapter, so that if that becomes the only thing that's read, you know, it offers
12 all the things that we think are critical to convey and a perspective about that. So the
13 summaries that you have gotten are by no means I think that document, but that has to be
14 done.

15 I think we're going to try and have this at least back to you and to get your
16 concurrence on it and those members who are not here today this year, if we can achieve
17 that. Maybe there'll be some spillover. I haven't heard today any significant points of
18 difference among Committee members, but perhaps there will be some we don't know of
19 yet.

21 So my hope is that we can get substantive concurrence by the end of the year.

22 DR. STERN: Okay.

23 MS. FOX: Have you gone off mergers?

24 MS. JANOW: No, no, no. Whatever else people want to ask.

1 MS. FOX: I have one point on mergers and one general point. My point on
2 mergers is, at least on the summary -- this is a statement that's on the summary, page 8,
3 number 4. Under work sharing: "No agency should be obliged to take into consideration
4 competitive harm or benefits that may be obtained outside the reviewing jurisdiction."

5 I think even if that's so, that we should be, especially with work sharing, try to
6 understand and appreciate the full transaction. And I think that it would be useful for us to
7 say we want to take the blinders off, we want to see the full transaction. We don't want to
8 just say, okay, this is my piece and I can tell you this is what happens in my piece, not a
9 problem. It's the broader view.

10
11 MR. RILL: I agree with that and I think what you've just read is kind of a
12 truncated and rather hasty and abrupt rejection of broader efficiency and effect analysis. I'm
13 on board with you. I think that's a good point.

14 MS. FOX: My other point didn't relate to mergers.

15
16 DR. STERN: Let me -- just going back to the colloquy that Cynthia and I were
17 having a minute ago, on that page 2-75, facilitate greater transparency, indeed, as Cynthia
18 was saying, on that first paragraph there are different steps for substantive convergence, and
19 for this reason greater transparency in each jurisdiction's merger review principles is
20 desirable, and then: "Examples of mechanisms that can be used to increase transparency
21 are. Individual jurisdictions could enhance transparency by issuing annual reports,
22 guidelines, speeches, and articles, case-specific decisions."

23 Well, I mean, are we recommending that that be done, and are we
24 recommending that it be done here in the United States? Or are we just describing the

1 conversations that we did have here?

2 MR. RILL: I took it as a recommendation.

3 DR. STERN: Well, me too.

4 MR. RILL: If that's unclear, it should be strengthened to make clear it's a
5 recommendation.

6 DR. STERN: This really -- and I feel your pain, staff. You've tried to put out
7 as much as possible without taking a vote on everybody and a consensus. But I think that
8 really should be much stronger.

10 MR. RILL: I think you're right. I have to say, Paula suggested that I might
11 have written the sentence in the footnote relating to the 1984 vertical restraint guidelines and
12 I looked at it and I said I wish I had. My hat's off to whoever wrote it.

13 DR. STERN: Well, but to focus on not just the footnotes, but on really
14 strengthening where we are actually coming down strong with regards to transparency in
15 publications and annual reports and where it applies not just in making other countries to
16 converge with us, but that we ourselves have to do it, too.

18 MR. RILL: I guess, Eleanor, you said you had a nonmerger issue?

19 MS. FOX: My nonmerger thought is simply this, something to think about and
20 not to drop about the WTO working group on trade and competition. There have been very
21 positive aspects of that working group in highlighting competition policy.

22 This is something Rob Anderson was telling us at the Columbia conference
23 yesterday, but we know it's true, that competition policy has achieved a much higher profile
24 in the world as a result of the WTO working group, and the very hard work they've done

1 and the solicitation of comments from all over the world. And all the countries are becoming
2 more interested in it.

3 This is a kind of competition advocacy. One of the things that some individuals
4 had advocated is to say that it's very important to have a competition advocacy role for the
5 world. One of the things, incidentally, that Rob Anderson of the WTO said yesterday was
6 don't underestimate the degree to which noncompetition people are learning more about the
7 importance of competition, including people from trade ministries around the world who go
8 back and talk to the people in their ministries. So the world is moving.

10 MR. RILL: Hopefully that will apply in the United States as well.

11 MS. FOX: Hopefully.

12 MR. GILMARTIN: But the world is moving to market competition.

13 DR. STERN: Yes.

14 MS. FOX: Yes, it is. The world is accepting competition. Those who don't
15 know about it want to understand better what competition policy means. There's a big
16 information gap, an education gap. That's not the point.

17
18 My point is that there has been a good facilitation role that the working group
19 has under operation. We don't want to dissipate that. We might want to shift some focus,
20 but if our effort to shift focus fails we might have decreased, we might have taken away
21 something.

22 Maybe a minor point I want to add, which is not exactly the same, which is I
23 really think we should give credit to the WTO and the working group. We should give
24 credit in my view to the European Union because I think the European Union is the one that

1 got this on the discussion agenda, and this has all been triggered because of their concept
2 which comes from their own Common Market of eliminating public restraints and trying to
3 have a more seamless market.

4 They've been in this world a lot and they're trying to sell it to the world and it
5 has a lot of useful aspects. They've been farther ahead than anybody else in pushing this
6 forward. They might not be going ultimately to the end that we see as the right end, but they
7 have been working in the vineyards of it and I think they certainly deserve a lot of credit.

8 MR. RILL: They certainly have done a good job of selling.

9 DR. STERN: Yes. I have no problem with that. This goes back to the selling,
10 because the Justice Department has done a darn good job, too.

11 MS. FOX: Yes, yes.

12 DR. STERN: And maybe people think more on that on the cartel fight and the
13 fact that that has galvanized others. So there's a lot of -- maybe we should just say hurray
14 for the good guys and maybe be specific in what we mean by that.

15 MR. RILL: Speaking of hurray for the good guys, I really appreciated Joel's
16 comments today about our work. I thought that was very nice.

17 MR. GILMARTIN: I think, you know, in terms of the thing about Merit's
18 comments earlier and also yours, Paula, as well, I think it will be helpful for all of us to be
19 able to step back from each of these areas that we've looked at in some detail and have
20 heard about the recommendations on and then have a chance to assess, what is the overall
21 impact of this working group, of this Committee, in terms of what is the real short list, if you
22 will, or high impact things that we expect to make a difference.

1 MR. RILL: That's a good point.

2 MR. GILMARTIN: I think it goes beyond just sort of structuring the report
3 and so on, in terms of what do we really want to push very hard and emphasize?

4 DR. STERN: Yes, the headlines.

5 MR. GILMARTIN: The headlines at the end of it. But even more than just
6 headlines, it's really how do we expect as a Committee to have made a real difference here?
7 When we started off, I think you started off, Jim, this whole Committee opening up by
8 talking about the last time that it was held and the kind of impact that it had, and can we
9 achieve that standard as a result of the work that we've done.
10

11 We can, I think, because there's been a lot of good work done, and I think it's
12 excellent. But now when we step up to the next level in terms of its significance --

13 MR. RILL: I anticipate that there will be a lot of attention paid to this report.

14 MR. GILMARTIN: Yes.

15 MR. RILL: A lot of people will be asking the question you're asking --

16 MR. GILMARTIN: Right.

17 MR. RILL: -- what is the bottom line that you people are recommending to the
18 U.S. government and, for that matter, to foreign governments? What's the bottom line?
19 What are the key points? There's going to be the inevitable press conference, the inevitable
20 Congressional testimony that's involved in it.
21

22 MR. DUNLOP: Can I raise a question in this forum. I don't want you, the
23 three of you at the head of the table, to answer the question, but it is not inappropriate in the
24 Committee's work at this stage to think about the release format, and subsequent -- and

1 secondly, what I was talking to him about, the substantive steps in the process. Not that we
2 should talk about it here, but that it seems to be incumbent on the management to deal with
3 that question pretty soon.

4 DR. STERN: Right.

5 MR. RILL: That's a very good, good call.
6

7 DR. STERN: Yes. If people are going to draw conclusions, we would like to
8 know -- we would like to direct what those conclusions are.

9 MR. DUNLOP: The management of the release of the report, its timing, its
10 format, its locale, et cetera, et cetera, et cetera, are well-known problems.

11 MR. RILL: And of course, while we advise, ultimately that's a decision that has
12 to be made by the Attorney General and the Assistant Attorney General. But we can have
13 some input into that decision.

14 Okay, Co-Chair?

15 DR. STERN: Do we want to have something in the report, in addition to the
16 recommendations and our encyclopedic discussions of our problems and precedents, do we
17 also want to be saying to Joel -- this goes back to your point and particularly as you raised it
18 at lunch when he was here -- what we think should be immediate follow-up?
19

20 And does it mean that we have to put our recommendations in priorities, you
21 know, the first three things you should do, and then there is the other? I mean, do we want,
22 in terms of management --

23 MR. RILL: We have to think about that.

24 DR. STERN: I know. That's why I'm just want to put the question out.

1 MR. DUNLOP: Well, I do think it would be helpful to talk it out.

2 DR. STERN: Okay.

3 MR. DUNLOP: I'm not talking about a section in the report.

4 DR. STERN: Okay. Sounds like another meeting.

5 MR. RILL: I think we need to think about it before we talk about it, and I
6 haven't thought about it. At least I have not yet given it a lot of thought.
7

8 MR. DUNLOP: It's a strange process.

9 DR. STERN: How about making you the chairman of a new subgroup?

10 MR. DUNLOP: No way.

11 MR. RILL: Which will have two more years to operate.

12 (Laughter.)

13 DR. STERN: That's right: delivery. This has been the birthing. Now you're
14 are in charge.

15 Well, all right. Is there more to be said?
16

17 MR. RILL: I think we've got great input. I hope the colleagues agree. I think
18 it's been a good meeting.

19 MS. JANOW: I think it's been terrific. I want to thank all of you.

20 MR. RILL: Zoe, are you still there?

21 MS. JANOW: No, she left a while ago, I think. But she was here for a long
22 while.

23 So thank you everybody. I'd like to make sure we thank our friends on this
24 table -- Stephanie, Sarah, Cynthia, Andrew, Eric, Christine. We had a little bit of late nights

1 -- actually, we've had quite a lot late nights for a while, and I'm very gratified to hear that
2 there is a feeling we're, as far along as we are, I feel we're not done. So we have some real
3 serious work to do, but I think it's achievable.

4 I want to thank all of you for all of your time.

5 MR. RILL: Merit, we want to thank you for superb leadership and tenacity.
6

7 DR. STERN: Absolutely. Intellectual rigor, good humor, patience.

8 MR. RILL: Emotional stability.

9 DR. STERN: God's gift to competition policy.

10 MS. JANOW: We might all meet again. I'm hoping that we will all meet again
11 collectively maybe when it comes time for release of this report. I think this may be our last
12 open deliberative forum of this nature. Thank you again.

13 DR. STERN: This meeting is adjourned.

14 (Whereupon, at 3:29 p.m., the meeting was adjourned.)
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