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REGULATOR'S ROUNDTABLE

Panel Discussion

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MODERATOR:

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DISCUSSANTS:

Joseph Seon Hur, Secretary General, Korea Fair Trade Commission

William Kovacic, Commissioner, U.S. Federal Trade Commission

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Gerald Masoudi, Deputy Assistant Attorney General, Antitrust Division,
U.S. Department of Justice

Hideo Nakajima, Deputy Secretary General, General Secretariat, Japan Fair
Trade Commission

Proceedings

James F. Rill: I present again Philip Lowe.

Philip Lowe: Thank you, Jim. Having spoken first this morning, I'm not going to run through everything which is on the priority list of the European Commission at the moment. I would like to talk a short while about convergence, policy convergence, substantive convergence, and finally convergence on cases. And perhaps maybe make one or two remarks, which I'm sure Tom would agree with, by the way, in relation even to the IT sector.

I believe that all the authorities represented at this table and here in Washington can take some comfort from the efforts which we have been making to promote a consistency and convergence in our antitrust practice, whether it is in the area of mergers, anti-cartel enforcement, other aspects of antitrust such as the treatment of transfer of technology, and unilateral conducts. But we have made progress in these areas to different degrees, and there are several levels at which you can do it. The first is to establish the basis of different legal frameworks. Nevertheless, we need some convergence in the statement of our policy objectives and how in relation to those particular areas of mergers, cartels, and unilateral conduct, we intend to pursue a policy.

I think here what is comforting is that, first of all, in the area of mergers, we have had tremendous progress towards the over-arching goal of promoting consumer welfare with an increasingly effects-based approach on our analysis of any transaction. We have been able to produce, for ex-

ample, guidelines in the EU on horizontal mergers. If the titles were changed and you put “U.S.” instead of “European,” I do not think anyone would be remarkably shocked and surprised if the DOJ and the FTC were actually conforming to our guidelines and vice versa. Your guidelines date from some years ago, and maybe as Tom says, we need to update from time to time. Your guidelines also have the virtue of being much more succinct than ours. Maybe we have qualified things too much but, frankly, if you hold the guidelines up to the light in terms of substantive content, I do not think you will find much difference.

We have something in preparation, which—possibly in the area of mergers—would cause some degree of divergence which represents our attitude to vertical and conglomerate mergers. Now, just as we have done in the area of unilateral conduct, I must say I am very gratified to have persuaded Mary Monty to let me launch the review of Article 82 and unilateral conduct in that area. We have drafted a paper on the guidance we might give to a handling of conglomerate and vertical mergers, and we will put that out for public consultation at the beginning of next year, after we have had our consultation with our own national competition authorities.

Do not forget that the Commission is a competition authority acting in complement to the work of our twenty-five national competition authorities. It is equally incumbent upon us to give some degree of leadership for convergence inside the EU. And that responsibility, arguably, can be harnessed to promote greater convergence outside the EU, which I think we are doing.

I remember Charles James saying to me years ago, “Well, if you do produce guidelines on conglomerate and vertical mergers, I hope it will be a blank page.” But the attempt to define the policy is, after all, a contribution to convergence in itself. If we are not able to write something which is convincing, then we will certainly hesitate against producing guidelines. That being said, if we are not convinced by them, or if you are convinced on your side that they are useful, maybe the idea of having some degree of guidelines is not so stupid. But let’s wait for the debate to bud.

On the cartel side we have made tremendous progress. The best practices which Scott outlined this morning are also receiving some kind of response inside the EU. The interest is to develop similar, more effective ways of dealing with companies involved in leniency and immunity through direct settlements. Notwithstanding the fact that we have a patchwork of different sanctions regimes inside the EU, we certainly have in the medium term to develop a framework which allows us all to pursue our anti-cartel efforts in the most effective way possible. This arguably calls for a great deal of effort in all agencies in the world to deepen our exchange of information in a way which is compatible with the rights of all parties.

Unilateral conduct is an area where it clearly looks as if we disagree fundamentally. I am personally of the view that the principles in our discussion paper—the emphasis on an effects-based approach, the emphasis on

the competitive process for the benefit of consumers and not on competitors—could easily have been endorsed and were endorsed by Tom just now.

Our attitude to IP is not in substance different. The court, our own court, has only made reference to disclosure in exceptional circumstances. For example, lack of information, not intrinsic innovation, frustrates innovation because the question is asked in some sectors, to what extent is innovation to be left in the hands of one company, or does the innovative process require, in fast-moving industries, some degree of disclosure. We can disagree about that, and we probably will disagree from time to time on specific cases in all these areas of merger analysis and unilateral conduct—perhaps because the actual effects in our jurisdictions are different and we may arrive at different remedies.

However, on the issue of iTunes, I have expressed myself in public very strongly on exactly the same lines which Tom Barnett has done today. And on the issue of Microsoft, which I have a very deep knowledge of, after listening to this poor Austrian girl who was held captive by a kidnapper for eight years, I sometimes feel that both Microsoft and the Commission might be giving interviews very soon about how it was during these periods of combined captivity. The affection between us grows everyday as a result. Just look at one or two aspects which are shared on the U.S. side. The first is you have a consent decree in relation to inter-operability between PCs and servers and you are still in the process of obtaining compliance in relation to that consent decree. We have a decision, which is similar in nature, but it was a decision and not a settlement, which is about compliance on inter-operability between servers and servers.

As I have said, you can argue about whether being able to speak from one server to another is a major issue of intellectual property. Perhaps there is something hugely innovative in being able to speak to someone else in order to communicate, to develop the market, to develop innovations. I personally have the view that there are plenty of things which result from industry standards where you can actually develop a communication language which does not infringe or frustrate innovators. We are totally convinced, as well, of the need for technologies and the innovative process, but we have to make sure that companies behave in a way which is ultimately best for the consumers, and I think both the U.S. Consent Decree and the Microsoft decision in the EU go in that direction.

We should look at more substantively the one area where we disagree: the issue of bundling of functionalities into the operating system and media player. We have never insisted that there should be no marketing of an integrated product to consumers. We have only said (and Microsoft already provided it to us, by the way) that Microsoft should provide, if the original equipment manufacturers (“OEM”) wanted it, an unbundled version which the OEMs could perhaps then base their competitive offer to consumers.

It does not seem to us, unfortunately, that OEMs in the IT field have this business model. They almost become commodity chain producers.

They do not develop the market in that way. They expect the new functionalities to be built into the operating systems or into the features of the microprocessors. That is the way the market seems to be working. We are taking account of that.

Although there are differences on the issue of intervention to prevent innovation from being frustrated, we need to argue them out. While we would generally agree that the IT area is one which requires careful analysis before any intervention, that does not mean per se legality for the unilateral conduct of every corporation in the IT area.

James F. Rill: Thank you, Philip. Mr. Nakajima.

Hideo Nakajima: Thank you very much, Mr. James Rill. It is a great pleasure to be here in such a distinguished symposium this afternoon. I would like to take this opportunity to speak about the major enforcement activities of the Japan Fair Trade Commission.

Last year, the Anti-Monopoly Act, which is our basic competition law, was amended and became effective at the beginning of this year. The changes brought about by the amendment were quite significant, particularly in terms of the Japan Fair Trade Commission's ("JFTC") capabilities to detect, investigate and punish anti-competitive activities. The rigorous enforcement of the amended Anti-Monopoly Act is now a number one priority for us at JFTC.

Before I explain the major thrusts of that amendment and the current enforcement status, let me take a few minutes to brief you about why we amended our Anti-Monopoly Act. The primary reason for the amendment is quite obvious. There has been no end to the violations of our Anti-Monopoly Act, particularly by cartels. We have seen many repeat offenders, and repeat offenses. Of course, anti-competitive activities have been substantially preventing our economy from benefiting from the operation of market mechanisms. This includes not only supra-competitive prices on taxpayers/consumers, but also by delaying or impeding our economy's efficient response to changing economic climates, including globalization and innovative technological innovations.

While the harms of those anti-competitive activities are obvious, it is not easy at all to eradicate such anti-competitive activities in our nation. First of all, it has been said that the cartels symbolize or illustrate some aspect of traditional Japanese culture focusing on harmony or solidarity, and a sense of relief held by the major Japanese firms by doing what everyone else does. Also, there have been a number of bid-riggings which have been induced, initiated, or organized, or coordinated by government or public sector officials who are on the procurement inside and former governmental officials employed by companies which are in a position of submitting bids. Such connection between the government and private sector, business and government, has been seen as at the heart of Japan's economy and makes it much harder to eradicate anti-competitive activities.

Therefore, we believe it is essential to take a rather holistic or comprehensive approach. First of all, it is necessary to improve our bidding system and procedure, particularly in the public sector. Secondly, it is important to address anti-competitive conduct induced and led by public sector officials or former public sector officials. We need to critically review the practice of their employment by the private sector after their retirement from the public sector, as well as the regulation oriented relationship between the public and the private sectors. Actually, the government has been tackling these issues recently—particularly through its government-wide structural reform.

But in spite of those efforts, however, it seems that there has been no end to anti-competitive activities, and there have been a lot of repeat offenses, particularly regarding bid-riggings. Strong voices have been raised amongst the public for much stricter enforcement. There have been greater public understanding and concerns for the harms of anti-competitive activities and the necessity of prosecuting them more severely.

It is against such a background that the Anti-Monopoly Act was amended last year. As I said earlier, by amending the act, JFTC's capability to detect, investigate and punish anti-competitive activities has been much enhanced. First, the amendments allow JFTC to detect and investigate the cartels more effectively through a leniency program. Second, the amendment introduces the JFTC's first criminal investigation powers, which is expected to enable us to file criminal accusations much more aggressively. Before the amendment, the number of cases of which JFTC files a criminal accusation with the public prosecutor general about the infringement of our Act was quite limited.

Our Anti-Monopoly Act was actually enacted in 1947. Since then, the last 60 years, only 16 cases have been criminally prosecuted based upon JFTC's accusation. In the last 20 years, this was, on average, one case in every two years. The main reason for such a rather inactive criminal accusation by the JFTC was its insufficient investigation powers. Before the amendment of last year, the JFTC was not given any compulsory investigation powers for criminal prosecution.

To punish those undertakings which have violated the act more severely, the rate of administrative surcharge has been increased and even higher or later now to be imposed to repeat offenders. The basic surcharges rate were raised by the amendment from 6% to 10%. And with repeat offenders, 15% of the charges are now to be imposed instead of 10%. If we estimate the harm from gains by cartels in Japan, based upon the data between 1998 and 2000, the average rate of price increase by cartel activities is estimated to be around 16%. As I said earlier, after the amendment we can now impose 10% of surcharge rate, and for repeat offenders we can impose 15%. So I believe that the increase by the amendment will be able to more effectively deter the formulation of cartels.

In this connection, let me briefly touch upon on several measures other than public antitrust enforcement. Among the background of growing voices for stricter sanctions on cartels, the ban on participation in public works projects by violators has recently been expanded up to a maximum of two years. However, after the amendment introduced the leniency program, the Ministry of Land, Transportation and Infrastructure, which is a main ministry in charge of public works in our country, issued a guideline that the period of such of a development is to be reduced to half for successful leniency applicants. Such treatment for these applicants is expected to encourage leniency applications.

Secondly, there are actions brought by local governments. As you know, in Japan, the private enforcement of competitive law has not been active. However, more actions have been recently brought by local governments, which have suffered from cartels, concerning the public works projects. Most of them are follow-on actions of JFTC's administrative dispositions, such as cease-and-desist orders. Reflecting the recent growing concerns held by the local public on the damage arising from cartels, such damage claims brought by local government tend to increase in number. This trend will become an additional deterrent to cartels.

Eight months have already passed since amendments to the Anti-Monopoly Act became effective. We believe that, so far, we have had a good start of implementing our amended act. First, the JFTC investigated bid-rigging cartels in the construction projects of sewage treatment facilities. We brought a criminal accusation with the public prosecutor general against eleven companies and eleven executives earlier this year. This was the first criminal case in which we exercised our criminal investigation powers given by the amendment. This case is now further being investigated by the regional prosecutor's office.

We saw as many as twenty-six leniency applications for the first three months, from January to March this year. And just last week, we imposed a surcharge on those companies implicated in the bid-rigging cartel concerning the project of the tunnel ventilators ordered by the Metropolitan Highway Public Corporation. This case was actually initiated by leniency applications. Several companies applied for the leniency program. So the first one was granted total immunity from surcharge, and second and third were given a deduction of surcharge by 30 percent, as our rules stipulate. This was the first application of our newly introduced leniency program.

Also, regarding the leniency program, the program is a really powerful investigative tool in gathering evidence, not only in detecting cartels. As you may suppose, usually those companies under investigation are very much reluctant to submit to us the necessary information vital to us. However, leniency applicants have been found really cooperative with us and well-prepared to present to us whatever information we require from them. This is, of course, exactly what we have expected from these applicants and one of the main reasons why we tried to introduce a leniency program.

Nevertheless, we still have been very surprised—but of course happy—to actually find such a sharp difference of attitude of the companies under investigation.

In closing, let me refer to the survey conducted by us at the beginning of this year. According to our survey, most of Japan's larger companies which do business over the world have pointed out that, in terms of antitrust enforcement, the United States is the strictest jurisdiction, followed by Europe. Japan is the third. By the amendment, our enforcement power has increased considerably. We will make every effort to crack down on anti-competitive activities by rigorously enforcing our amended act. Thank you very much for your kind attention and patience.

Joseph Seon Hur: Thank you. We have had a commission since 1981, so this year we celebrate our 25th anniversary. Over this time, the Korea Fair Trade Commission has successfully promoted competition.

Let me say a little bit about cartel regulations. The cartel attack is number one of our priorities in our enforcement report. And we have a very proud result on that. During the last five years, we have successfully prosecuted about 500 cases. In the mid 1990's and the last five years, we have put a lot of emphasis on cartel regulations. For example, in the last year, 2005, we had twenty-one cases and imposed surcharges of \$235 million.

And also, there are some comments on leniency programs. We introduced the leniency programs in 1997, much earlier than Japan's, but it was not so effective. During that time until 2004, we had only seven cases for leniency application. We improved these leniency programs in April of last year. The first applicant has automatic exemptions without any review. The second has about 30% reductions. And also we introduced the amnesty plus.

Let me give you some numbers of the leniency program in application since 2005. In 1997 to 2004, we had only seven cases like I told you before. After revising our leniency program last year we have had eleven cases already. About 40% of all cartel cases were initiated with the help of our leniency programs.

However, the Korean businessmen are very reluctant to participate. So the foreign investor companies come first. They break the silent cartels. And then later the Koreans come.

Last year, also we have increased that the maximum surcharge rate from 5% to 10%. Also last year, we have created a cartel bureau, solely concerned about collecting the information on the cartels. And also we have created economic teams. I mean the economics groups to support that economic analysis.

Presently, we are putting our resources to the attack on abuse of the market power because in the Korean market, we have a very high level of market concentrations. For example, the top three concentration ratio averages in 1999 were 75%, and it was reduced to 61% in 2003, but we are not

satisfied with that. So we have a lot of practice of abuse of market-dominance in Korean industries and also we have some long tradition of government needing or government hiding the industries. So they have built up the old incentives of the dominance, obvious, or cartel psychologist. So this is the frontline to put our army on.

Also, we have aggressively imposed our law to the multinationals of market-dominance, like the Microsoft cases. We do also the extra-territorial application of our law to international cartels. Thank you very much.

William Kovacic: It was twenty years ago this fall that I first stood in the law school classroom to teach class, and it is because the co-host of this event, George Mason University, gave me a chance to do that. They took me out of private practice in the summer of 1986 and gave me a chance to do what I love until I got this job I love the most. So it is an enormous honor for me to be part of an event that is hosted by the University that set me on the path without which I could not get to do what I have enjoyed so much.

What I would like to do is to talk about three challenges that I think my agency and the competition policy system face for the coming year that I regard as being the most urgent. It involves a mix of these current activities and other events or developments that are just getting underway.

The first and in some ways most important, I think, is to use the Section 2 hearings and other events that are taking place that are related to this, the Antitrust Modernization Commission hearings being one, to achieve a deeper, better informed understanding about why the defaults in the U.S. system are set the way they are. Why have we had a steady dramatic progression towards a more permissive regime.

At one point, Robert Kennedy, the Attorney General of the United States, announced that he had just indicted not only a company, but individuals for oversupplying the market in Los Angeles with bananas. He was about to bring a case that would indict individuals in the company for selling milk below-cost in New England. We have come a long ways since the time the department was using the criminal power inherent in Section 2 to police limits on single-firm behavior.

The second steady progression I would like to talk about is merger policy. Coming out of the 1960's, the frontier which the government fought case was to stop a merger that reduced the number of market participants from twelve to eleven. Today, the frontier of concern with which in some instances the government hangs on with its fingernails when it goes in the court is to police the boundary that is set at four to three, or perhaps three to two.

How did this happen? The conventional story is that the Chicago School did it to us, that it high-jacked the thinking of enforcement agencies in courts and generated the results that we have observed. That is a fundamental error. It inflicts our own assessment of how this happened and

worse, in our discussions with our European counterparts, because I think they so often accept the story. It impedes our efforts to understand how our systems differ and why. Because the real story in parallel to the Chicago School story, what I call the double helix of the modern DNA of U.S. Competition Policy, is that the Harvard School was indispensable to this development.

It was Phil Areeda and Don Turner's article in 1975 on predatory pricing that transformed the way the courts in competition agencies think about exclusionary conduct. It emphasized short-term benefits of aggressive competition. It emphasized the resiliency and adaptability of competitors and customers to make adjustments in the face of exclusionary practices. It was Don Turner and Phil Areeda in their treatise, especially the first three volumes in 1978, that reward so much of a careful rereading, even before Bob Bork came out with the *The Antitrust Paradox*.

Areeda and Turner were saying three things that resonate throughout the development of modern antitrust policy. First, beware of the private treble damaged plaintiff. Areeda and Turner said, "Courts ought to exercise their discretion to de-treble in close cases and at a minimum ought to exercise enormous care to ensure that the damages awarded correspond precisely to the competitive damages caused by the specific practices that were thought to be impermissible."

It is Areeda and Turner who said that standards, to use the phrase that resonated through that time period, that antitrust policy should be administrable. The elegant theoretical design has to be ready enough to withstand the typical courtroom and enforcement environment of uncertain facts, and the limitations of both enforcement agencies and courts.

And it was Areeda and Turner that said in the case of exclusionary forms of behavior, the dominant firm's capacity to continue to innovate should not be discouraged. Those three defaults are implanted in the U.S. intellectual framework before Bob Bork shows up with *The Antitrust Paradox* in 1978. Areeda and Turner beat them to the punch. And indeed in 1976, it is Phil Areeda's paper titled *Antitrust Violations without Antitrust Damages* that provided the very basis for the Court's analysis in *Brunswick* less than a year later.

And it was only a few years later than that that Phil Areeda made it fashionable to laugh at the essential facilities doctrine by authoring his paper, *An Epithet In Search Of Limiting Principles*, not a flattering characterization of the theory that had emerged in both the lower court opinions and suggestions by the Supreme Court.

What do we understand if we see the double helix clearly? We see why many of these impulses are so powerful and durable in the U.S. systems. You could chase every Republican out of the boundaries of the United States today and you still have Justice Breyer on the Supreme Court acquiescing in the approach that we see in *Trinko*. And to see it clearly is to identify the policy bases and skepticism about certain institutional fea-

tures that really provide the foundation for the U.S. system today, and without which the Chicago revolution could not have taken place: concerns about administerability, concerns about private rights of action, concerns about dominant firm incentives to compete.

My hope is that the Section 2 hearings that take place now will draw into focus much more clearly those ingredients of the U.S. system, and—by highlighting them—will really identify the institutional challenges that the U.S., or I think other systems, might face in deciding exactly what the equilibrium of policy ought to be. If the Section 2 hearings are nothing more than an opportunity for my friends and acquaintances to come and revisit the models that they have displayed in many hearings over time, and it is simply reformulation of the papers given before, that will be an arrogant, boring exercise and we should be ashamed of it.

But the only useful contribution is to add something more by way of facts and analysis to the assessment not simply of what the technical doctrinal approach ought to be, but how we got where we are. The second challenge in question, is whether the government agencies are going to abandon Section 2 of the Sherman Act. Tom mentioned the possibility of challenge. It is going to disappear. It is going to disappear in tandem with limitations on private enforcement. Do you realize the last time the Supreme Court interpreted Section 2 in the context of a government enforcement case was in 1973? If you are keeping score, that is 33 years ago.

What explains the progression in the U.S. cases? Every Supreme Court decision involving Section 2 since then has involved a private treble damage litigant. The concern about trebling, mandatory trebling, hangs at the background of every one of those cases. So one might ask, “If the government enters the courtroom without that baggage, should it be involved in selected areas?” My own agency in the time since I came back in 2001 has made major bets on the answer that, yes, it should be. Two standard-setting cases:

One still before my agency is UNOCAL. UNOCAL settled on terms that basically permit the extinguishment and non-enforcement of patents at a basic consumer savings we estimate at about a half billion in a year, and if you are keeping score in the FTC going back to 1914, that is by far the most significant Section 2 enforcement matter the agency has brought. And again if you are tracking things historically, since 2001, the FTC has brought Section 2 cases at a faster rate than before. And indeed, the FTC Section 2 cases at that rate exceed the rate at which I brought them. You would have to go back to my predecessor to come up with a faster rate.

But what is at stake in these cases? None of them have been uncontested layouts, as you might have noticed. In fact, the FTC’s administrative adjudication cases have really simply gone unnoticed, and there is a real challenge here going back to concerns about the administrative capacity and the administerability, whether the commission can demonstrate in the context of the administrative process, without the overhanging of private treble

damages, whether it can formulate principles and bring to bear facts and analysis truly compelling to the review in courts.

Third and final challenge I want to mention is merger policy. Again, if you will accept my rough description of the progression of policy over time, here, too, my agency has two matters that I regard as extraordinarily important to the formulation of future policy. These include the resolution of the *Evanston* matter that is before my agency, and the appellate proceedings in *Chicago Bridge & Iron*, both of these two matters having been brought during by earlier time as the general council of the FTC.

What is at stake here for merger policy? Because we have seen a continuing attenuation of the zone of enforcement, what is at stake? On the one hand, we have a stream of experience from the cartel practice and enforcement that I do not think has directly informed the merger policy.

Mainly, we have lots of reason in the past decade to revisit the conventional assumptions that suggest the cartels are difficult to form, difficult to detect cheating, and hard to police. Maybe from what we have seen in the publicly available records involving matters such as vitamins, for example, that even though it is very difficult, if they are real carrots and prices to be added for doing it well, we will try hard. And to pay attention to the insights of Ronald Coase and Oliver Williamson, business people will apply the same ingenuity dissolving contracting problems that arise in legitimate transactions to solve coordination problems that arise in illegitimate transactions.

What else it at stake at drawing the line right? If you take lots of chances, especially in the high ether of four to three, three to two, two to one with contestability and entry, and you make mistakes you end up with dominant firms. At the same time, that the whole trend of development in abusive dominance is simply to say, "Do not intervene." So I think the determination of the appropriate equilibrium for merger policy remains an extraordinarily important issue both for the development of cartels over time and for abusive dominance in the coming year.

A final thought along these lines about merger policy. I think it points on the direction of the development, especially in specific sectors, of the importance of advocacy and research for the agency in the coming year. You may have followed in the petroleum industry, we hang by an eyelash, I think, in having some kinds of price controls for petroleum. Imagine what kind of signal that will send for competition policy. And if you are not a member of the petroleum sector now and you think, "Thank goodness it is not coming to my neighborhood," if it is a good idea for oil, why not for pharmaceuticals? Why not for having industrial machinery? Why not for automobiles? Why not in other areas in case of emergency?

And then we will simply back our way into other areas in which price controls are taxed in times of exigency might be a good idea. And the commission's ability in the current year to engage in the discussion with Congress and to indicate the difficulty associated with taking those steps is

an extraordinarily important challenge for not simply the sectors in question, but for the underlying approach we take to competition policy. Thank you.

James F. Rill: As always, Bill, excellent. Gerry?

Gerald Masoudi: Let me start by talking about a little saying. I know Tom Barnett had talked about the goose and the golden egg and information yearning to be free, and he did some research. I did some research on a saying of my own: "May you live in interesting times." This sounds like a nice thing to say to someone, but as it turns out it is some form of curse—a subject to which I will return a moment—and derives from the Chinese saying, "It is better to be a dog in a peaceful time than a man in a chaotic period."

I will not express an opinion as to whether that is true, but I am pleased to report that we are not living in as chaotic a time as we used to. I'm too young to remember the days when people were threatened with jail time for selling cheap milk.

Let me talk about a few things that I think promise to bring interesting developments to antitrust in my areas of responsibility—international, policy and appellate—and let me start with policy. First, as Bill Kovacic mentioned, we do have the Section 2 hearings going on. We have had a number of sessions already; we have covered refusals to deal and predatory pricing. Yesterday, we had a very interesting discussion on international issues, first from enforcers from the Americas, from Europe and from Asia, and also from practitioners and academics. I agree with Bill that it is important that we use these hearings to look at all sorts of interesting and novel ideas, not merely to rehash the same arguments of the past. We look forward to doing that in our upcoming discussions on practices such as bundled discounts, market share discounts, other forms of loyalty rebates, and also tying and exclusive dealing, among others. We think this is a good time for these hearings, given what is going on in Europe with the Article 82 discussion paper, which I will get to in a moment.

From the Antitrust Division's perspective, we think it is important to have clear and objective standards, not only so that firms know how to fashion their practices and their behavior, but also so that courts can decide cases in a way that will condemn anti-competitive behavior and permit competitive behavior, and so that agencies can know how to devote their resources. We think that hearing from attorneys and economists and enforcers in this area will be helpful to us, and we look forward to tackling the very difficult issues ahead.

In Europe, as I mentioned, we have the Article 82 discussion paper. Anyone who has read it, I think, will see that there are some areas where there is disagreement with how things are done in the United States, and this disagreement opens up potential areas for discussion. We have, along with the FTC, had a very productive discussion with our colleagues in Europe and we compliment Philip for undertaking this exercise.

We think it is imperative for businesses and private practitioners to know what the rules are in all the jurisdictions in which they do business, so that they can operate within the confines of the law and still try to innovate—even if they are big companies. They need to know what the rules are so that they can compete on the merits. We think that, again, this discussion paper along with our Section 2 hearings provide a much needed dialogue that will lead to interesting developments and, we hope, perhaps to greater convergence.

In China, we have the anti-monopoly law that is under consideration and many people have focused on the developments there. Many believe that the law may be finalized within the next year, and we will see how that develops. Representatives from the Antitrust Division and the FTC have made a number of trips to China and have had discussions with the Chinese. Tom Barnett last year traveled to China to participate in a conference on the anti-monopoly law. I traveled in March to visit with representatives from the National People's Congress, the Ministry of Commerce, and other agencies. Again, in May, I was in China with the FTC's Bill Blumenthal and representatives of the European Commission and the German cartel office, talking about the anti-monopoly law. I commented on intellectual property, merger notification and monopolization issues, while others raised other issues. We believe that our sustained discussions on development of the anti-monopoly law will be productive and that China will indeed have a good law, we hope, in the future.

On the ICN, we have also been doing a lot of work. Bill Kovacic mentioned mergers and merger policy; we have begun to look at the issue of substantive convergence. There has been a lot of work in the ICN on procedural convergence in the merger arena. We are now exploring whether there are areas of substantive convergence that are promising for ICN efforts. We will be talking with practitioners, with NGOs, and with other enforcement agencies, to determine whether there are areas that we can pursue and then make a decision as to how best to pursue those areas, if any.

Finally, on the appellate front, the Supreme Court last term decided three antitrust cases. So far this term, certiorari has been granted in two. There is of course the Bell Atlantic case, *Bell Atlantic v. Twombly*, which raises the issue of pleading standards. I'm recused from that matter, so I will not talk about it any further than I already have.

And then there is the *Weyerhaeuser* case, which raises the issue of single-firm pricing conduct on the buy side, i.e., predatory bidding. We look forward to the argument and the decision in both those cases, and we hope that this is again a productive Supreme Court term.

Now, about that curse I mentioned. Apparently, there is a series of curses; it is not only "May you live in an interesting time." Another in this series of curses is, "May you come to the attention of those in authority." And so, may I say to any of you who are contemplating violating the anti-

trust laws, I hope that you will come to the attention of those at this table. Thank you.

James F. Rill: I'm tempted to say all of us at this table, but I will not. Thank you very much for the panel and really, a wonderful presentation. It has been a superb conference. I, personally, have been very honored to be part of this. I'm sure all of us who had a part in it have felt its remarkable diversity of views, the geographic spread, the willingness of the important enforcers and the academics that have come and shared their time with us. So again, let me congratulate particularly George Mason for every year raising the bar to the level of quality that this conference has made available to us. With that, this conference is adjourned until, God-willing, next year.