

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION

IN THE 21ST CENTURY

Tuesday, March 26, 2019
9:00 a.m.

FTC Headquarters
600 Pennsylvania Avenue, NW
Washington, D.C.

1	FEDERAL TRADE COMMISSION	
2	I N D E X	
3		PAGE :
4	Welcome	3
5		
6	Introductory Remarks	7
7		
8	Implications of Different Legal Traditions	
9	and Regimes for International Cooperation	16
10		
11	Panel: Implications of Different Legal	
12	Traditions and Regimes for International	
13	Cooperation	32
14		
15	Promoting Sound Policies for the Next Decade	82
16		
17	Panel: Promoting Sound Policies for the New	
18	Decade	91
19		
20	Panel: Effective International Engagement:	
21	Foreign Agency Perspectives	145
22		
23	The FTC's Role in a Changing World	203
24		
25	Panel: The FTC's Role in a Changing World	217

1 WELCOME

2 (8:59 a.m.)

3 MS. WOODS BELL: Good morning. Before we
4 start the day, a few nonsubstantive reminders. Please
5 make sure to silence your cell phones. If you want to
6 go out for lunch, please remember you will have to go
7 back through the security protocol. We do have a very
8 lovely café upstairs, so feel free to go up to the
9 café, as you do not want to exit the building.

10 The men's restroom is located to the left;
11 the women's just past the elevators, also to the left.
12 If an emergency requires you to leave the conference
13 room but remain in the building, please, please follow
14 the instructions provided over the building's PA
15 system.

16 If an emergency requires evacuation, a
17 building alarm will sound and everyone should leave
18 the building in an orderly manner. Follow the exit
19 signs closest to the nearest stairwell. Please do not
20 use the elevators. After exiting the building, please
21 go to the corner of Constitution and 7th Street and
22 report to an emergency assembly area.

23 If you notice any suspicious activity,
24 please alert building security. We should also let
25 you know that any actions to interfere or attempt to

1 interfere with the commencement or conduct of the
2 event or the audience's ability to observe the event,
3 including attempts to address speakers, are not
4 permitted. Any persons engaging in such activity or
5 behavior will be asked to leave. Anyone who refuses
6 to leave voluntarily will be escorted from the
7 building.

8 FTC Commissioners and staff cannot accept
9 documents during the event. We do welcome you,
10 however, to submit your written contributions
11 following these proceedings.

12 This event is photographed, webcast, and
13 recorded. By participating, you are accepting your
14 image or anything you say or submit to be posted to
15 FTC.gov or on regulations.gov or on one of the
16 Commission's publicly available websites.

17 Now, question cards, should you have
18 questions during the day, will be floating around.
19 Please feel free to give them to the staff and they
20 will be brought up to the front.

21 And with all of those announcements, I would
22 like to introduce Randy Tritell, Director of the
23 Office of International Affairs.

24 MR. TRITELL: Thank you very much, Deon.
25 Welcome back, everybody. Welcome to everybody

1 watching on webstream as well. For those of you who
2 were following yesterday, we had a terrific first day.
3 We had very engaging discussions on international
4 cooperation and on applying our laws and policies to
5 new technologies.

6 I'm very excited about today's sessions,
7 which will examine the implications of different legal
8 traditions and regimes for international cooperation,
9 promoting sound policies for the next decade. Then
10 some of our leading international counterparts will
11 share perspectives on effective international
12 engagement, and we'll have a concluding panel on the
13 FTC's role in a changing world.

14 Later today, we'll hear a presentation by
15 Commissioner Christine Wilson, but now it's my great
16 privilege to introduce Commissioner Noah Phillips.
17 Noah joined the FTC in April 2018, and those of you
18 who follow the Federal Trade Commission will know Noah
19 has already made his mark here. Noah previously
20 served as Chief Counsel to Senator Cornyn on the
21 Senate Judiciary Committee and also advised the
22 Senator on legal and policy matters including
23 antitrust, constitutional law, consumer privacy,
24 fraud, and intellectual property.

25 Noah has been a great supporter of the FTC's

1 international competition, consumer protection, and
2 privacy programs. In fact, he has already been
3 personally involved in our efforts at the OECD's
4 Competition Committee and in our privacy work on the
5 International Conference on Data Protection and
6 Privacy Commissioners.

7 We are very grateful to Commissioner
8 Phillips for taking time to participate in this
9 hearing, and are looking forward to your remarks.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INTRODUCTORY REMARKS

2 COMMISSIONER PHILLIPS: Thank you, Randy.
3 It's a real honor to be here with all of you today.
4 We had some time yesterday to visit with some of the
5 folks who have come in for this and for spring
6 meeting. So very much all of you being here and the
7 folks who are paying attention online are a testament
8 to the quality of the work that Randy and his office
9 and Hugh's office at OIA do every day.

10 I'm really thrilled to be here inaugurating
11 the second day of our hearings on the FTC's role in a
12 changing world. I have to give the caveat that
13 everything I say is just my opinion and not
14 necessarily the opinion of my fellow Commissioners,
15 but I hope that a lot of them share the views of what
16 I'll express today, and that is, fundamentally, that
17 our international efforts, both on the antitrust side
18 of the house and on the consumer protection side of
19 the house, are critical to our agency's success and I
20 think, more broadly, important to the United States
21 and to the well-being of consumers around the globe.

22 We hope that they assist our sister agencies
23 around the world in doing what they do. And all of
24 that means that what we do, both as a consumer
25 protection agency and as an antitrust agency and, in

1 particular, I would argue right now antitrust and
2 privacy, what we do has international ramifications.
3 And that means that we need to take seriously what we
4 do, we need to think carefully about what we do, and
5 we need to do what we are doing today and the day
6 before, examine constantly and critically what we do
7 to make sure that it lines up with best practice, that
8 it reflects the best research, that we can be a model.

9 Competition enforcement has proliferated
10 over the last several decades. In the early '90s, the
11 number of regimes were about 20 around the world, and,
12 today, fewer than 30 years later, we have over 100
13 additional jurisdictions, bringing the total to about
14 130. At the same time, forces that include the
15 internet, smartphones, and connected devices are
16 bringing consumer protection and antitrust issues
17 together and also spreading out on a worldwide basis.

18 The world is globalized, and the global
19 emphasis on both competition and consumer protection
20 underscores the need for us to consider not only how
21 our efforts affect domestic policy and behavior but
22 also, as I said before, the international
23 ramifications of the work we do.

24 During my tenure as a Commissioner, I've had
25 the opportunity to engage in a number of international

1 efforts on both sides of the house, that includes
2 traveling abroad for competition and consumer
3 protection conferences and participating in ongoing
4 debates. Randy mentioned OECD in Paris and ICDPPC in
5 Brussels. Just a few weeks ago, I was in Santiago,
6 Chile for the APEC data privacy subgroup meetings.

7 These meetings are critical. They're
8 critical to ensuring the protection of consumers, and
9 they're also critical to ensuring that we have
10 mechanisms in place to facilitate international
11 commerce which yields global growth. That's important
12 for US citizens, and it's important for citizens of
13 countries around the globe.

14 There are many areas that demand the FTC's
15 attention on the international front, but I want to
16 highlight just a few. On consumer protection, first,
17 technology allows all sorts of activity to cross
18 borders. Now, that's sort of a neutral statement on
19 its own. It fosters beneficial interaction, but it
20 also makes it easier for unlawful activity to spread
21 internationally and frustrate law enforcement efforts.
22 Frauds can be bigger, and chasing down fraudsters can
23 be harder.

24 We need to continue our efforts to work with
25 international partners, both through multilateral

1 institutions like OECD and APEC, and through direct
2 partnerships. We need to work with them to identify
3 trends and bring enforcement actions together that put
4 an end to scams, frauds, and other activities that
5 harm consumers here and abroad.

6 To that end, the Commission has repeatedly
7 called for making a law in the United States known as
8 the SAFE WEB Act permanent, giving us the tools we
9 need on a forward-looking basis to work with our
10 international partners. I have actively supported
11 these calls, my colleagues have actively supported
12 these calls, and we all believe that SAFE WEB is
13 critical to our international relationships and to our
14 consumer protection agenda.

15 Further, we need to support privacy and
16 international data flows both by working toward the
17 interoperability of data privacy regimes, building out
18 tools like the APEC cross-border privacy rules. We
19 have right now a lot of legislation going on
20 internationally, most notably in Europe, the GDPR, but
21 including efforts here in the States on Capitol Hill
22 to craft a privacy bill.

23 Different countries are going to take
24 different approaches, but that's not going to stop the
25 world from engaging in international commerce, and it

1 shouldn't do so. The demands of consumers include
2 both privacy and all the benefits that we derive from
3 cross-border data flows. We here at the FTC must and
4 will continue to work on the Privacy Shield,
5 facilitating data transfers with the EU, and
6 continuing our efforts and partnership with the
7 Department of Commerce.

8 And more broadly, as we in this country
9 engage in a debate about the future of our privacy
10 system, we must also remain engaged in the robust
11 international debate, sharing our experience with
12 others and learning from their experiences. Though
13 some may think we don't do privacy in the United
14 States, we have, in fact, been doing privacy since the
15 1970s with the introduction of the Privacy Act and the
16 Fair Credit Reporting Act, which we enforce, one of
17 the first privacy statutes in the world. The lessons
18 we have learned are important, both domestically and
19 internationally.

20 On the competition side, we likewise observe
21 today international M&A and conduct that transcend
22 borders. As our world becomes more interconnected, it
23 is common to see more than one competition enforcer
24 analyzing the same or similar mergers or behavior.
25 And as our participants today will discuss, different

1 enforcers are often products of different legal
2 regimes and traditions, which can affect how they
3 investigate, analyze, and ultimately seek to remedy
4 the conduct or merger before them.

5 In my experience, enforcers often work well
6 with one another to share information and best
7 practices and to avoid impairing one another's ability
8 to vindicate their own laws. This is an important
9 part that all of us as government servers play in
10 giving voice to the democratic process and allowing
11 the laws to function. When analyzing the same
12 conduct, for instance, enforcers can often obtain
13 parties' consent to share information with one
14 another. And organizations like the ICN and the OECD
15 are instrumental in providing fora outside of
16 individual cases where important substantive
17 discussions can take place.

18 I was speaking just last night with Isabelle
19 de Silva, and we were talking about merger review in
20 France versus the United States, a conversation that
21 we began nearly a year ago. That is a very live
22 discussion right now in Europe, and the US, I think,
23 has a lot to offer with respect to how our regime has
24 worked. You can like it, you can dislike it, but I
25 think it really offers an important lesson how to look

1 at a merger once it's been consummated, which was one
2 of the things that we talked about.

3 It is critical, then, that we, as enforcers,
4 continue these efforts. While some differences
5 between outcomes across jurisdictions are to be
6 expected, unwarranted inconsistencies, for instance
7 where deviations are not justified by clearly
8 established rules or traditions about which we'll hear
9 today, can raise serious concerns, and they can call
10 into question the validity of efforts not only in the
11 jurisdiction at issue but really others as well.

12 For instance, we have seen due process
13 concerns being raised by the actions or alleged
14 failures of certain jurisdictions and allegations that
15 various jurisdictions are employing competition laws
16 not to foster competition -- the well recognized goal
17 of those regimes -- but to vindicate other values,
18 like protecting national champions.

19 If true, such conduct threatens to create an
20 appearance to the public that rather than focusing on
21 consumers and competition, which we should, enforcers
22 are reacting to and maybe even seeking to one-up one
23 another. This perception can undermine our global
24 efforts to protect competition and consumer welfare.
25 The US has an important role to play in preventing the

1 misuse or co-optation of competition laws.

2 We benefit from the oldest, most experienced
3 antitrust regime in the world. The Antitrust Division
4 of the Department of Justice has been enforcing
5 antitrust laws since the Sherman Act was promulgated
6 in 1890. And the Commission here has been protecting
7 consumers and competition since it was established in
8 1914.

9 Given this rich experience, our actions are
10 closely monitored by foreign authorities, particularly
11 newer regimes looking to build their own experience
12 and to establish their own enforcement policies and
13 priorities. This is a testament to our agency's
14 dedication and hard work, but it also, as I said
15 before, a tremendous responsibility. Both where we
16 excel and where we fall short, it is likely that
17 others may follow. It is, therefore, critical that we
18 continue to act with the utmost respect for the laws
19 and for the goals we are tasked with enforcing.

20 Our reputation as thoughtful, rigorous
21 enforcers depends on our continued commitment to
22 bringing solid cases, following due process, and
23 advocating domestically and globally. These hearings
24 are another important step in furthering these
25 international efforts. I look forward to hearing from

1 the participants today and in written comments on how
2 best we can target our resources on these important
3 questions, and I thank everyone again for being with
4 us today. Thank you.

5 (Applause.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 IMPLICATIONS OF DIFFERENT LEGAL TRADITIONS AND
2 REGIMES FOR INTERNATIONAL COOPERATION

3 MR. TRITELL: Thank you, Noah, for a great
4 start to our second day. As Commissioner Phillips
5 noted, in our international work, we deal with
6 agencies that operate in a vast range of legal systems
7 and economic systems, with different histories and
8 cultures and different levels of development. How
9 does that affect our ability to cooperate and to
10 promote what we view as good policy?

11 To answer that, we start the day with a
12 panel on the implications of different legal
13 traditions and regimes for international cooperation.
14 And to get that panel off to a great start, we're
15 going to lead in with a presentation from the Deputy
16 Assistant Attorney General of the US Department of
17 Justice for International Affairs, Roger Alford.

18 Roger is not only an antitrust expert but an
19 international law scholar, on leave from the faculty
20 of Notre Dame Law School, where he is Concurrent
21 Professor at the Keough School of Global Affairs and a
22 Faculty Fellow at the Kellogg Institute for
23 International Studies. Roger previously practiced
24 with a law firm in Washington, DC and served as a
25 legal advisor to the Claims Resolution Tribunal in

1 Zurich, as a law clerk of Judge James Buckley of the
2 DC Circuit, Court of Appeals, and to Judge Richard
3 Allison of the Iran-United States Claims Tribunal in
4 The Hague.

5 I have had the great pleasure of working
6 closely with Roger on our shared international
7 antitrust projects, and I'm delighted to welcome him
8 now to address our hearing. Roger.

9 MR. ALFORD: Let me thank Randy and Bilal
10 and all the others at the FTC for helping to organize
11 this event, and I'm so thrilled that among the many
12 roundtables and topics that you're focusing on that
13 you're spending two days on international engagement
14 and cooperation. So I want to thank you, Randy and
15 Bilal, for the chance to speak here with you today and
16 to give the Department of Justice perspective.

17 As all of you know, the DOJ and the FTC work
18 extremely closely with one another in international
19 arenas, and so we're constantly in discussions and
20 dialogues and strategy sessions about how we should
21 promote our shared values with respect to
22 international engagement and cooperation, so thank you
23 for the opportunity to be here. And I want to just
24 say that I think these hearings are incredibly useful
25 for engaging in serious reflection on broad issues of

1 antitrust enforcement, and it will definitely help to
2 promote sound antitrust policies.

3 So the Antitrust Division is closely
4 following the hearings, and we are happy to contribute
5 our perspective to the rich collection of views that
6 have been shared with diverse experts here yesterday
7 and today. Today's hearing focuses on the agency's
8 shared commitment to global engagement, a topic that
9 is of critical importance for the success of our
10 mission to protect and promote competition.

11 And on the topic of global engagement, I
12 think that it would be useful and interesting for me
13 to just provide briefly perspectives on the Antitrust
14 Division's experience in the past year working with
15 our international partners. Case cooperation
16 continues to be critical to our enforcement efforts,
17 particularly for mergers notified in other
18 jurisdictions.

19 In the past year, the Division cooperated
20 with 14 international agencies on 16 different matters
21 and, as has been true for a number of years, our
22 largest cooperation partners are the competition
23 agencies of the European Commission, Canada, Mexico,
24 Australia, and Brazil.

25 In some cases, the level of cooperation has

1 been extraordinary. For example, in the Bayer-
2 Monsanto merger, our team worked closely with eight
3 different authorities on the analysis of the merger
4 and the proposed remedies, which, given the nature of
5 agricultural markets, required that we work hand in
6 hand with other jurisdictions in fashioning the
7 remedies.

8 Cooperation with several agencies involved
9 weekly calls at staff and management level and the
10 front office coordination on the timing and the
11 remedies. And, ultimately, we resolved the matter by
12 requiring one of the largest divestiture remedies in
13 Division history.

14 As is obvious from this summary, it is
15 amazing how far we have come in a few short decades.
16 Fortunately today, we live in a world that has largely
17 embraced market-based economies. With that embrace,
18 the world generally has accepted the need for civil
19 liberties, including fundamental due process. And
20 while we still have a far way to go, it is truly
21 remarkable how far we have come since the end of the
22 Cold War in promoting economic and political freedom.

23 By the mid '90s, as Noah just mentioned,
24 most countries recognize the virtues of market-based
25 economics, and with that recognition came the

1 realization that antitrust laws are crucial to protect
2 the integrity of free markets. Twenty-five years ago,
3 over 60 countries representing more than 80 percent of
4 the world's GDP have enacted antitrust laws. As
5 Assistant Attorney General Anne Bingaman noted, this
6 development represents enormous progress in agreeing
7 on the ideal shape of the playing field. But leveling
8 the field in today's global economy means more than
9 adopting antitrust laws, it means enforcing them.

10 And today, more than 130 jurisdictions,
11 including every major economy, have adopted
12 competition laws. Even as the world has embraced the
13 need for antitrust laws to promote market integrity,
14 countries enforce their antitrust laws consistent with
15 their own procedural conditions. Today, I want to
16 highlight some of the differences between common law
17 and civil law jurisdictions and between prosecutorial
18 and administrative systems.

19 There are almost twice as many civil law
20 countries than common law traditions in the world, not
21 to mention countries that rely upon Islamic and
22 indigenous law as well. Therefore, one can expect
23 some variation in the ways that different countries
24 enforce their antitrust laws. As Oliver Wendell
25 Holmes said in his famous treatise on the common law,

1 "The law embodies the story of a nation's development
2 through many centuries, and it cannot be dealt with as
3 if it contained only the axioms and corollaries of a
4 book of mathematics."

5 There are, however, some axioms that
6 transcend every tradition. Just as every language has
7 a grammar, every legal system has a set of common
8 principles. Despite our many differences, there is
9 unity at the core with respect to fundamental due
10 process and diversity at the margins respecting
11 national traditions of enforcement.

12 While I normally speak about the unity
13 across legal systems when I travel around the world, I
14 want to speak today about our diversity. Let me start
15 by briefly highlighting some features of the Antitrust
16 Division's operations as an example of a prosecutorial
17 system in a common law jurisdiction and then contrast
18 that with civil-law-based administrative systems. And
19 as you know, the Antitrust Division is a law
20 enforcement agency responsible for investigating and
21 prosecuting civil and criminal antitrust violations.

22 In civil matters, the Division is authorized
23 to bring lawsuits in Federal District Court to enjoin
24 violations of the antitrust laws. The Division does
25 not have the authority to issue by itself an

1 enforceable decision or order to enjoin the conduct at
2 issue. When the Division brings a lawsuit to enjoin
3 antitrust violations, a court reviews and bases its
4 decision on the evidence presented by both the
5 Division and the defendant. At trial, the Division
6 bears the burden of proof and will need to prove its
7 factorial allegations by a preponderance of the
8 evidence.

9 Criminal antitrust enforcement
10 investigations typically involve proceedings before a
11 Grand Jury, which is tasked with deciding whether
12 sufficient grounds for issuing an indictment exist,
13 that is, whether there is probable cause that a crime
14 was committed. When an indictment has been issued,
15 further proceedings are conducted before a Federal
16 District Court where the Division has the role of
17 prosecutor. The defendant has the right to a trial by
18 jury, where the Division bears the burden of proving
19 the allegations beyond a reasonable doubt.

20 Investigations in an administrative system
21 are conducted fairly similarly to investigations in a
22 prosecutorial system. Agencies typically are
23 authorized to request or seize evidence and
24 information from the parties as well as from the third
25 parties, and the agency bases its decision on the

1 evidence obtained through the investigations.

2 The process leading from investigation to
3 ultimate enforcement decision, however, varies by
4 jurisdiction. In some jurisdictions, parties have the
5 right to request a formal hearing before an
6 enforcement decision is issued, while others simply
7 provide for an opportunity for the parties to submit
8 written statements. However the process is designed,
9 the key point is that the agency rather than an
10 independent judge makes the enforcement decision.

11 Administrative enforcement decisions
12 themselves generally are subject to judicial review.
13 In most jurisdictions, the court reviews the agency's
14 enforcement decision for legal and factual error.
15 While courts conduct their own legal assessment, they
16 tend to review factual findings based on the agency's
17 record and often do not themselves take evidence.

18 The required standard for factual findings
19 varies. Evidence may need to be reliable or
20 consistent or convincing or some combination thereof.
21 In the EU, for example, the European Commission is
22 required to base its decision on convincing evidence
23 or a cogent and consistent body of evidence, which
24 means that the evidence must be factually accurate,
25 reliable, and consistent. However, in administrative

1 law systems, courts tend to defer to antitrust
2 agencies' economic assessment to a significant extent
3 by applying a less rigorous standard of review with
4 respect to economic issues or matters of competition
5 policy.

6 So as you can see, the differences in agency
7 procedures between different enforcement systems can
8 be noteworthy, and these differences also can have a
9 real impact on decision-making by agencies in their
10 respective systems. So let me just briefly summarize
11 some of those differences with respect to
12 admissibility of evidence, burden of proof, and
13 standard of review.

14 One difference that many observers note is
15 that administrative systems rely on a less rigorous
16 standard with respect to admissibility of evidence.
17 As a prosecutorial agency in a common law
18 jurisdiction, the Antitrust Division needs to
19 critically consider not only the strength of our
20 economic theories but also ways to prove our theories
21 at trial through admissible evidence.

22 The rules of evidence thus have a
23 significant impact on the types of evidence on which
24 we rely in building a case. For example, the Division
25 needs to consider which company documents or

1 statements by executives of the parties we could
2 introduce without running afoul of the hearsay rules.
3 Similarly, with respect to complaints by customers or
4 competitors, we need to determine to what extent such
5 complaints can be used as evidence at all as opposed
6 to inadmissible opinions.

7 In an administrative system, agencies
8 typically have much greater leeway as to the types of
9 evidence that they take into account in making their
10 decisions. For example, hearsay rules do not apply in
11 agency proceedings, and courts and civil law
12 jurisdictions usually do not have such rules in place
13 either. Administrative agencies also tend to give
14 more weight to third-party statements, in particular
15 statements of competitors, which, if not inadmissible
16 altogether, are considered with heavy skepticism in
17 prosecutorial systems.

18 While enforcement decisions by
19 administrative agencies are typically subject to
20 review by a court of law, the deference to this agency
21 is different than how courts treat agencies in a
22 prosecutorial system. In a prosecutorial system, the
23 antitrust agency is the plaintiff and has the burden
24 of proving its allegations in court. In an
25 administrative system in contrast, the agency is the

1 respondent at the review stage. The target of the
2 enforcement actions bear the burden to demonstrate
3 that the agency's decision is based on errors of law
4 or fact.

5 Agencies thus have different perspectives
6 based on their respective burdens in court. In a
7 prosecutorial system, the agency asks itself whether
8 it has sufficient admissible evidence to convince a
9 judge. In an administrative system in contrast, the
10 agency assesses whether its determination is likely to
11 be overruled on appeal. On the margins, this tends to
12 create a lower threshold for bringing enforcement
13 actions in civil law jurisdictions.

14 Finally, standard of review. In addition to
15 the procedural posture, there are significant
16 differences when it comes to the standard of review.
17 In a prosecutorial system, like the United States, the
18 courts review the allegations in the complaint de
19 novo, without deference to the agency's views. In
20 essence, the agency is in the same position as any
21 other private plaintiff.

22 The Antitrust Division, for example, does
23 not receive deference from federal district courts.
24 Under the Chevron doctrine, courts will defer to a
25 reasonable agency interpretation of an ambiguous law

1 that a regulatory agency is tasked to administer. And
2 in our -- it provides that courts will generally defer
3 to a regulatory agency's construction of its own
4 regulations. The Antitrust Division, however, is a
5 law enforcement agency, rather than a regulatory
6 agency, and thus Chevron and Auer do not apply when
7 the Division brings a lawsuit to enforce the antitrust
8 laws.

9 In administrative systems by contrast,
10 courts tend to give at least some deference to the
11 enforcement agency's views or even largely defer to
12 the agency with respect to certain issues, in
13 particular economic assessment and matters of
14 competition policy.

15 In the EU for example, to the extent that a
16 decision of the European Commission touches on policy
17 matters or entails complex economic assessments, the
18 European courts will conduct only a marginal review,
19 which is limited to checking whether the relevant
20 rules on procedure and on starting reasons -- stating
21 reasons have been complied with, whether the facts
22 have been accurately stated and whether there has been
23 any manifest error of assessment or misuse of powers.

24 So as you can see, there are significant
25 differences between prosecutorial administrative

1 enforcement systems in civil and common law
2 traditions, and these differences may result in a very
3 different dynamic in enforcement proceedings. In a
4 sense, some characteristics of administrative systems
5 and civil law jurisdictions create incentives in favor
6 of enforcement, while prosecutorial systems impose
7 higher burdens of proof on enforcement agencies.

8 In the United States, decisions to block
9 mergers or enjoin conduct are ultimately up to the
10 courts. Even where the Division has significant
11 concerns about harm to competition, as it did with the
12 AT&T and Time Warner merger, the courts are the
13 ultimate decision-makers. The benefit, however, of
14 our prosecutorial system is that it requires the
15 Division to engage in careful evidence-based analysis.

16 There is nothing inherently wrong with
17 either approach, but recognizing these differences
18 will help agencies in different systems better
19 understand each other. Indeed, having different
20 systems in place, which at times may reach different
21 results, creates incentives for agencies to critically
22 assess their own work.

23 The key point in all of this, however, is
24 that the differences between various enforcement
25 regimes do not prevent our agencies from reaching

1 consensus on fundamental issues of antitrust
2 enforcement. With respect to antitrust procedures,
3 there is unity at the core and diversity at the
4 margins. We respect both our national traditions and
5 transcendent axioms of procedural fairness.

6 In this respect, I want to close by
7 highlighting the initiatives for the multilateral
8 framework on procedure, which the Antitrust Division
9 has developed with other leading agencies, including
10 the FTC, in our work around the world. This
11 initiative aims to establish fundamental due process
12 norms for antitrust enforcement and to achieve
13 commitments from participating agencies to abide by
14 these norms.

15 The proposal identifies approximately a
16 dozen universal principles that are widely accepted
17 across the globe. The proposal complements these
18 substantive provisions with strong adherence,
19 cooperation, and review mechanisms designed to ensure
20 meaningful compliance. Since we announced our
21 initiative in June of last year, we have had meetings
22 and discussions with over 50 antitrust agencies from
23 around the globe, including agencies from both
24 prosecutorial and administrative systems, from both
25 common law and civil law systems, from both large and

1 established agencies, as well as younger and smaller
2 agencies.

3 We reached broad consensus with all of these
4 agencies on the fundamental due process principles set
5 forth in the proposal. And over the last few months,
6 we have worked closely with our partners to evaluate
7 ways to implement our initiative through the
8 International Competition Network, the ICN. The text
9 that resulted from this process, the Framework on
10 Competition Agency Procedures, incorporates the
11 substantive principles of the MFP and combines these
12 principles with review mechanisms that closely
13 parallel the mechanisms in the MFP.

14 The proposal is expected to be adopted by
15 the ICN in the next few weeks, and we will continue,
16 of course, to promote the MFP, in addition to the ICN
17 framework, for those agencies that are unable or
18 unwilling to sign the ICM framework.

19 Adopting this text, which will be open to
20 all competition agencies worldwide, both the ICN
21 members as well as nonmembers, will be a remarkable
22 achievement. It will send a clear signal that
23 antitrust agencies across the globe, despite the
24 differences between their proceedings that I discussed
25 earlier, are committed to procedural fairness, and it

1 will reflect international minimum standards that even
2 nonsignatories should recognize.

3 Our Procedural Fairness Initiative is only
4 one example of successful international cooperation
5 across different enforcement models and different
6 legal systems, and we have successfully cooperated
7 over decades on numerous enforcement matters with
8 many partner agencies across the world. Better
9 understanding of each others' systems, including our
10 differences, will further improve cooperation and help
11 to find common ground.

12 As two eminent antitrust scholars have
13 noted, "Convergence of procedure, no less than
14 convergence of substantive law, enhances respect,
15 regard, and legitimacy and, thus, the sympathy of
16 nations." Thank you very much.

17 (Applause.)

18

19

20

21

22

23

24

25

1 IMPLICATIONS OF DIFFERENT LEGAL TRADITIONS AND
2 REGIMES FOR INTERNATIONAL COOPERATION (PANEL)

3 MR. STEVENSON: I'd invite the speakers for
4 the next panel to come up, please.

5 All right. Good morning, everyone. I'm
6 Hugh Stevenson from the FTC. We turn now to our "Back
7 to the Future" panel, in some sense. We are spending
8 a lot of time, I think here, looking forward at the
9 common challenges that we face, but we did want to
10 take a moment, at least, to think and look back, in a
11 sense, at the effect of the larger legal traditions,
12 the big picture system differences that we have and
13 how they might affect the development of policy, the
14 development of cooperation and enforcement.

15 And this implicates a number of issues,
16 and it can be, indeed, at even the constitutional
17 level, what values are fundamental, can be at the
18 administrative law level and procedural differences
19 as Roger Alford just talked about in the context
20 of competition. It can be in the context of
21 institutional design, and one of the challenges here
22 is to step back a little bit from the front-line,
23 practical issues that we face here and explore some of
24 the sometimes underappreciated ways in which these
25 underlying, big-picture differences of systems can

1 result in challenges for us in moving forward in a
2 common way.

3 And with that, I turn it over to my
4 comoderator.

5 MR. O'BRIEN: Thank you, Hugh. Good
6 morning, everybody. With us today is an impressive
7 panel of professors -- and I emphasize professors, as
8 particularly well-suited to our comparative-law type
9 discussion this morning. You can read about just how
10 well-suited they are in their impressive work and
11 credentials in the online hearings materials.

12 One quick reminder, we may have time for
13 audience questions at the end of our panel and, even
14 though we're dealing with a panel of professors, you
15 don't have to raise your hand. We have some notecards
16 in the room available for those questions.

17 All right, well, if you didn't already know
18 it coming into today, it was certainly evident
19 beginning yesterday with Chairman Simons and Bill
20 Kovacic's remarks yesterday to open our international
21 hearing right up to today's comments by Commissioner
22 Phillips, DAAG Alford. Indeed, my colleague, Hugh,
23 just now -- it's not much of a spoiler alert here, the
24 FTC is not alone on its enforcement and policy fronts.
25 There are scores of counterpart competition, consumer

1 protection, and privacy law enforcers around the world
2 that address the same policy issues and increasingly
3 the very same conduct that the FTC does. Yet even
4 with a significant enforcement and policy overlap, the
5 legal foundations and frameworks and approaches for
6 our international partners are often very different.

7 So we're going to begin this discussion by
8 asking each of our speakers to help identify some of
9 these important systematic and institutional
10 differences that may affect enforcement and policy
11 development.

12 All right, to be clear, each one of our
13 panelists probably could teach and probably does teach
14 an entire course on these types of differences. So
15 I've got to apologize right up front for holding them
16 to the impossibly efficient task of just five or six
17 minutes opening here. But I'm going to start just to
18 my left with Professor Christopher Yoo from the
19 University of Pennsylvania. Please start us off with
20 your thoughts about systematic differences.

21 MR. YOO: Well, thank you very much to the
22 Commission, Hugh and Paul particularly, for inviting
23 me to be here. And I'd actually like to thank Roger
24 Alford for actually setting such a great foundation
25 for the panel that's about to occur. I could

1 criticize him for stealing some of what I have to say,
2 but that's the ultimate compliment, I suppose.

3 I do think there is a profound difference
4 between common law and civil law traditions, some of
5 which I'll get to building on some of the stuff Roger
6 said. But to begin with, though, one underappreciated
7 difference is the radical variation approach in
8 education. So in almost every other country in the
9 world, legal education is done as an undergraduate
10 discipline, taught in large lecture classes. What
11 does this mean? You don't develop the same facility
12 for engaging in critical thinking, but in the much
13 more profound way, the ability to do interdisciplinary
14 work, to have taken even a rudimentary course on
15 economics or technical subjects generally is
16 unavailable to almost every lawyer in the world.

17 You don't see the kind of joint degrees that
18 flourish in the US and have been successful at the
19 University of Pennsylvania. Seventy percent of our
20 students graduate with a joint degree or a certificate
21 from a different school. And that style of education
22 is almost alien in every other jurisdiction.
23 Interestingly, Japan and Korea attempted to institute
24 reforms to make graduate education possible in an
25 attempt to make their counselors more effective at

1 understanding the needs of their clients and make them
2 more effective advocates. We've discovered that, in
3 fact, the success of that is intimately tied to bar
4 passage rates and certain types of evaluation, lead
5 law schools to essentially become large bar prep
6 classes for the entirety of their existence and the
7 ability to do that kind of work disappears.

8 And in addition to the educational system,
9 many of the judges essentially enter their profession
10 immediately after being anointed as lawyers and move
11 up a civil service ladder, having never tried a case,
12 never having done a damages action from the other
13 side. I think this lack of experience with other
14 disciplines limits and affects their facility to
15 engage with, say, effects analysis, economic
16 reasoning, and other things that have become the bread
17 and butter of much of what we do in competition law
18 and actually feeds into my mind to the dispute that
19 happens in Europe between the more doctrinal
20 approaches championed by countries such as Germany and
21 the attempts to instill effects analysis in ways that
22 are done in the US and the UK and other countries in
23 Europe.

24 The other big difference is the one that
25 Roger already raised so well, is the difference

1 between adversarial and inquisitorial traditions. We
2 forget -- one of the things that's different about the
3 law is usually the judge does all the questioning of
4 the witnesses and dictates how the proceedings unfold.
5 And it's interesting, it's what we discovered is this
6 is then grafted, as Roger set up so well, onto an
7 administrative decision-making apparatus where we
8 assume that the administrative agencies get all the
9 benefits of the traditional civil law judge, even
10 though they lack the same degree of independence and
11 they lack the same degree of relationship with the
12 overall decision-making process.

13 We're going to talk about implications in
14 the next round of questions, so I'll save some of the
15 more detailed comments for there, but what you
16 discover is that, in fact, the difference between
17 adversarial and inquisitorial traditions go far beyond
18 what happens in the courtroom. There's actually a
19 whole social construction of the profession where --
20 which becomes very clear when other countries,
21 particularly European countries, have attempted to
22 graft adversarial trappings on top of what has
23 traditionally been a civil law system and have largely
24 failed, because it has a lot to do with how clients
25 are retained, the resources they're given, and the

1 whole interaction with the system in ways that are
2 much more problematic.

3 And the last point I'd like to make is one
4 regarding the other aspect of the Commission's
5 jurisdiction, which is consumer protection. There's a
6 longstanding difference between the views of privacy
7 and data protection between the US and the EU
8 encapsulated by James Whitman in his famous Yale Law
9 Journal article as a difference between a dignity-
10 oriented vision of privacy and a liberty-oriented
11 vision. And to some extent, it can also be followed
12 in terms of human rights versus liberty.

13 It's interesting, I always think of this as
14 being encapsulated by the right to be forgotten, and
15 in Europe it really accords two individuals the great
16 ability to curate their own lives. As any parent will
17 know, my children would love the ability to curate
18 their own life to my eyes, and it's worth a laugh, but
19 it's the problem that's associated with that, which is
20 there is a certain amount of control, which is,
21 perhaps, healthy, but a lot of it should be outside
22 the individual's control and, in fact, it runs in the
23 US afoul of a First Amendment principle, which is a
24 First Amendment right to speak truthful facts.

25 And so what you see is also, though, is I

1 actually think that, in many ways, sometimes it is
2 overdrawn because even if you characterize it as a
3 human right under the EU system, there is a notion of
4 proportionality as any right we have in the US, they
5 can be waived, they can be alienated, and they can
6 give way to larger concerns. That's somehow often
7 lost in the discourse. There is a European discourse
8 criticizing the notion of balancing, and you see that
9 in the First Amendment here, but that is the larger
10 question about how we do that, and I think that is a
11 fundamental problem of law.

12 MR. O'BRIEN: Thank you for that start.

13 Next, we'll turn to Professor Francesca
14 Bignami from George Washington University. What are
15 your thoughts on identifying some of these important
16 foundational differences between regimes?

17 MS. BIGNAMI: Well, thank you very much for
18 the invitation to be here today. It's a real
19 privilege to be able to speak to this audience about
20 the comparative law of regulation and the regulatory
21 process, so it's great to be here.

22 In my brief time here, I'm going to focus on
23 an important concept that's been used to capture the
24 differences between regulatory systems, and that is
25 adversarial legalism. And as I say this, I realize

1 how much my comments are exclusively applicable to
2 consumer protection and data privacy and not to
3 competition because of the choice that was made early
4 in the establishment and creation of the US system to
5 go for the prosecutorial model and not the
6 administrative model. So this really applies only to
7 the regulatory areas of consumer protection and
8 privacy.

9 Now, what is adversarial legalism? Well,
10 American and European regulators very often pursue
11 similar policy objectives in areas such as consumer
12 protection but they use different means to get there.
13 And these means are sometimes called regulatory
14 styles. And what's the American regulatory style?
15 Well, Robert Kagan, a law and society scholar at
16 Berkeley, called the American regulatory style
17 adversarial legalism. And that's a concept that
18 applies both on the books and in practice, so it's a
19 concept that's based both on how the formal powers of
20 regulators operate as well as the way in which they
21 deploy those powers.

22 And the claim is that American regulatory
23 law is a lot more detailed and punitive than the law
24 of other jurisdictions, including European
25 jurisdictions. When it's implemented by government

1 bureaucracies, it's done through adversarial formal
2 procedures inside the bureaucracy and outside the
3 bureaucracy subject to extensive court challenge.
4 And, most importantly, from the perspective of
5 outsiders, there is a lot of private enforcement
6 directly through the courts using tools such as class
7 actions.

8 Now, according to Kagan, and this was based
9 on research from the 1980s and 1990s to a large
10 degree, European jurisdictions were not adversarially
11 legalistic. And what were they? The answer is
12 informal. They were informal in the sense that public
13 authorities were engaged in forward-looking,
14 compliance-oriented mediation with regulated parties,
15 and they were informal in the sense that the courts
16 were not used by private parties to directly enforce
17 regulation bypassing regulators.

18 And I'd like to briefly illustrate this
19 difference. I'm conscious of my time here. But I
20 would like to briefly illustrate this difference with
21 the example of the Data Protection Registrar. I think
22 a very suiting fitting here, because I know that the
23 Information Commissioner's Office was here and is
24 participating here in these proceedings.

25 So I think we can all say that we, given

1 this audience, know what adversarial legalism is, but
2 what's an informal regulatory style? Well, that's the
3 UK Information Commissioner's Office predecessor, the
4 Data Protection Registrar, which existed from 1984 to
5 1998. It had no administrative inspection powers. It
6 always had to go through the criminal process. It
7 only had one real administrative sanction, and it
8 could sue in court based on criminal procedure, but
9 only for a very small set of privacy violations.

10 So if it didn't do much by-the-book
11 enforcement, what did it do? It settled complaints.
12 It was an ombudsman. To just take one year, in 1998,
13 the UK authority received 4,173 complaints and it
14 undertook to resolve all of them. And as for private
15 litigation, there were only three recorded cases in
16 that time period, again, 1984 to 1998. And this is
17 not only a good example because a UK agency
18 illustrates the informal extreme of this informal
19 regulatory style, even among European agencies, but
20 also illustrates how consumer protection law today
21 still works to some extent, especially in the northern
22 jurisdictions where the ombudsman model is still quite
23 prevalent.

24 Now, to conclude, what I'd like to do is to
25 flag here something that will be coming up later, and

1 that's in my own research, which investigated this
2 regulatory style hypothesis using data protection as a
3 case study. I find that since the 2000s, the contrast
4 between adversarial legalism and the informal
5 regulatory style is less stark than before, and that's
6 because European administrative agencies have acquired
7 significant enforcement powers, and they are more
8 strategic and deterrence-oriented in how they use
9 those powers.

10 And so, here, the convergence, however, is
11 not complete, and I do not find a lot of class action,
12 other kinds of enforcement, litigation by private
13 parties in the courts. And I'll conclude there.

14 MR. STEVENSON: Thank you very much.

15 We'll turn next to Professor Philip Marsden
16 from College of Europe and ask you to share your
17 perspectives on some of the important institutional
18 differences that you think affect this international
19 work.

20 MR. MARSDEN: Thank you so much. Well, it's
21 not so much the institutional differences that are
22 impeding the ability to act internationally. To me,
23 it's a growing criticism of any of the current models
24 being adequate to handle the new technological
25 challenges, whether they are prosecutorial agencies or

1 administrative agencies, whether they're independent
2 or whether they contain some expert discretion and
3 political accountability.

4 So this criticism crosses all legal regimes,
5 whether civil code, common law, or administrative
6 model. And the problem to me that the critics see is
7 not the differences among the institutions; it's that
8 the critics want a different kind of intervention, and
9 the noise they're creating is drowning out a lot of
10 the signal achievements of international cooperation.

11 So in the last years, particularly reacting
12 to the power of the tech giants, we hear calls for
13 less independence of decision-making, more political
14 influence, and greater and faster intervention. And
15 this has fueled what I will call an antitrust -- the
16 leave campaign, as in leave the current relatively
17 permissive approach, leave the consumer welfare
18 standard, take back control. This is populist-led
19 with a disdain of experts and impatience at waiting
20 for evidence.

21 And in this view, independent decision-
22 making and economic analysis have allowed too much
23 power in the hands of too few, so leavers argue for
24 more intervention, for focusing on structural harms
25 relating to economic dependency, for infusing

1 competition law with such standards -- Germany,
2 France, Belgium, Austria, Japan already have those,
3 South Africa is moving that way -- and leavers argue
4 for structural remedies like price caps and market
5 share caps or breakups.

6 And some jurisdictions are already creating
7 new rules where none have been before. We've seen
8 institutions that still lack merger control bring
9 injunctions to pause mergers pending review but with
10 no expertise on merger control within the agency.
11 We've seen one government enact laws to prevent
12 digital companies from selling their own products on
13 their own platforms, laws that actually just protect a
14 domestic rival. Now, these are not particularly
15 welcome developments in terms of the rule of law and
16 due process or economic rationality, but this is about
17 responsiveness, not analysis.

18 Now, there's another narrative, and that is
19 the remain narrative. This is expert-led. It notes
20 the benefits of digital developments for consumers and
21 for small businesses, as well as the potential harms,
22 and it has two voices with one message, and the
23 message is there's no need to do anything. The first
24 voice is from the large tech firms, and they say
25 there's nothing to look at here, move along,

1 competition is a click away.

2 The second voice is from authorities who say
3 there's nothing to look at here, move along, antitrust
4 and merger control are fit for purpose, thank you very
5 much, just maintain evidence-led inquiries. And the
6 enforcers say we have leveraging theories, we have
7 cases against preinstallation; we have cases against
8 tying; we have cases against self-preferencing, just
9 do more of those cases, but don't do anything more
10 radical to the antitrust laws or you will jeopardize
11 innovation incentives and investment.

12 Now, it's difficult to see how leave and
13 remain can ever agree on anything, so is there a new
14 approach, a third way? And in my little island off
15 the French coast, Her Majesty, the Queen, used this
16 phrase "common ground" -- can you just find some
17 common ground -- in describing the political leave and
18 remain face-off. And this approach questions both
19 narratives. It questions the chicken little leavers
20 and says the sky isn't falling actually because of
21 digital developments, there are huge benefits from
22 them and innovation.

23 Equally, many of our antitrust theories of
24 harm are just old wine in new bottles. So traditional
25 competition law analysis and narratives of leveraging

1 and exclusion can handle many of these complaints, but
2 it isn't true that we should just move along, that
3 there's nothing to look at here. Clearly, competition
4 is not truly a click away. Clearly, data is not
5 sunshine, not in a world of walled gardens, and,
6 clearly, competition authorities should not be chicken
7 little running around with their heads cut off, but
8 they shouldn't be ostriches either with their heads
9 down in complete denial.

10 Cases are slow. Cases are few and far
11 between. Fines are huge and blunt. And there's no
12 guidance for industry. So we have to get both faster
13 as well as taking a longer view. We have to get
14 better at assessing harms to potential competition,
15 particularly from so-called kill zone acquisitions.
16 We have to develop our ability to assess harms to
17 dynamic competition. We have to develop a faster
18 ability for interim relief and act quicker when we
19 can, but those are actually just tweaks in the bigger
20 picture. Do we need to build a more progressive
21 antitrust, no matter what legal regime or legal
22 institution? Can we find common ground on which to
23 build a principled basis for procompetitive
24 regulation?

25 So I'd suggest that in some of these

1 markets, when a market tends toward one or only a few
2 firms, policy interventions beyond standard antitrust
3 are often required. So one idea we explore, in our
4 Furman Report, *Unlocking Digital Competition*, is that
5 we suggest setting some codes of practice, agreeing
6 with industry and government, acceptable norms of
7 competitive conduct on how firms with strategic market
8 status should act with respect to smaller firms and
9 consumers who depend on them.

10 This all has a similar aim to antitrust
11 enforcement, but given the challenges to antitrust
12 in fast-moving markets where cases are always likely
13 to conclude and after years and years, our pro-
14 competition approach is to agree some rules up front
15 with a more rapid system to resolve disputes, and I
16 favor arbitration and large fines.

17 So to build common ground on a possible ex
18 ante approach, we need to start that dialogue right
19 now, and I think these series of hearings in
20 Washington today is an amazing place to start. Thank
21 you.

22 MR. STEVENSON: Well, thank you for that
23 invention. We'll leave it for a moment and maybe come
24 back to it, but next we go to Professor Zhang from the
25 University of Hong Kong and Kings College London to

1 offer her perspective, please.

2 MS. ZHANG: Thank you, Hugh. So good
3 morning. It's a great privilege for me to speak here
4 before the FTC and with three distinguished academics
5 on my panel.

6 So to respond to your earlier question, I
7 think the fundamental differences that affect the
8 enforcement agencies are the institutional constraints
9 in which they operate. Now, to quote the Nobel
10 Laureate Douglas North, "Institutions are the rules of
11 the game in a society," and, so, I believe that no
12 antitrust agency can really operate in a vacuum
13 without facing these institutional constraints.

14 In today's panel, I will give two examples,
15 one about Europe and one about China. Let's start
16 with Europe. There are often complaints from
17 practitioners that you have heard that the EU courts,
18 and I mean the Court of Justice and the general court,
19 very deferential to the European Commissions. But the
20 question is, like, why is the court so deferential to
21 the commissions? You often hear the argument that the
22 reason is because you believe in the ultraliberalism
23 thought, and so according to the ultraliberals, no
24 competitor -- in order to preserve a competitive
25 market, no competitor should dominate any other

1 competitors.

2 But I think that ultraliberalism does not
3 really explain many of the variants that we have
4 observed in competition law in the EU. For instance,
5 why do you see in some cases the court is more
6 deferential but in other cases they are not? So these
7 are the questions that actually drove me to study the
8 court a few years ago in Luxembourg. And what I found
9 is that one reason has to do with legal traditions, as
10 some of my panelists have mentioned.

11 So, as you know, the EU court consists of
12 judges appointed from 28 member states with varying
13 legal traditions, consistent both with common law and
14 the civil law jurisdictions. And, in fact, the most
15 common legal tradition in Europe is the French model,
16 which traditionally places great emphasis on the state
17 power and relegates judges to a more subordinate and
18 bureaucratic role. And as you're familiar with this
19 contrast with the common law model where judges are
20 afforded with great discretion in interpreting the
21 law.

22 So my intuition is this may have an impact
23 on how they would look at competition cases. So I
24 created -- I collected all the cases decided by the
25 general court since its inception in 1989 until 2015.

1 And my coauthors, Jingchen Liu and Nuno Garoupo, we
2 examined our data set, and we studied whether there's
3 an impact of the legal tradition of the judges on the
4 case outcome. And, interestingly, because of the
5 general court level, the case allocation system is
6 random. This allowed us to draw some statistical
7 analysis and draw some causal influence from our
8 regression analysis.

9 And what we found is that the legal origins
10 in which the judges were born do have a positive
11 correlation with the case outcome, and more
12 specifically, if a judge comes from a country whose
13 administrative law is heavily influenced by the French
14 model, the decision is more likely to favor the
15 European Commission than the judges from any other
16 country.

17 So I think that partly explains, you know,
18 why you see from the ideology level why the court is
19 more deferential to the Commission. And maybe in a
20 later -- my other career, I can talk about there are
21 other factors that will drive this trend.

22 Now, after talking about the EU, let's go to
23 China. A few years ago, I wrote an article about how
24 -- about bureaucratic politics in China's antimonopoly
25 law. And I took a very close look at how the

1 operation of the bureaucratic -- bureaucracy in China
2 and incentives of the government actors involved would
3 have an impact on China's antitrust enforcement. And,
4 for instance, those of you who have filed mergers in
5 China, we often have complaints that the merger review
6 process is very protective in China, particularly when
7 it comes to those very high-profile transactions.

8 Sometimes the parties may end up abandoning
9 the deals because the review process is too long, and
10 the most recent example being Qualcomm's proposed
11 acquisition of NXP. So why does the merger review
12 take so long? I mean, well, of course, China is a new
13 regime, but what I've found during my research, and
14 actually is already no secret to all the practitioners
15 here, is that one of the reasons that led to this
16 delay is that the merger authority regularly confer
17 with other agencies, government actors who have an
18 interest in interfering with the transactions.

19 Now, a few years ago, I had the question, I
20 mean, why would the agency have an interest in
21 conferring with other agencies? Wouldn't it limit its
22 discretion in making the decision? So my research
23 actually -- what I found out is that this is actually
24 a default rule for government agencies to make
25 decisions in China because at each bureaucratic level,

1 agencies need to make consensus. They make rules by
2 consensus. If they all agree, the decision is
3 automatically ratified by the top.

4 Otherwise, the upper level would need to
5 step in to make the decisions or to allow the matter
6 to be dropped until further consensus could be
7 reached. And you see this mechanism design helps
8 create some sort of checks and balance among the
9 Chinese administrative agencies, but it also explains
10 why some of the practitioners have complained about
11 why you see the long competition factors will
12 inevitably find their way into Chinese merger
13 decisions because of this default consultation
14 process.

15 So I will stop here, and I look forward to
16 the stimulating discussion with my fellow panelists
17 and the audience. Thank you.

18 MR. O'BRIEN: Thank you, Professor Zhang. I
19 mean, who better than a panel of law professors to
20 lead us through a round of issue spotting, and a
21 particular interesting one at that? What we're going
22 to do now is to return to some of these identified
23 differences with a focus on their implications to try
24 to explore how the FTC can better understand and
25 address differences in ways that strengthen our

1 enforcement and particularly our policy development.

2 We heard a little bit about -- or rather a
3 lot about some of the distinct dynamics of
4 administrative versus adversarial systems. That might
5 be a good place to return to, and I'm going to come
6 back to you, Professor Yoo.

7 MR. YOO: Thank you again, Paul. So this is
8 where I think the Deputy Assistant Attorney General
9 Alford's remarks set up things so beautifully is that
10 we see this difference between inquisitorial and
11 adversarial systems, which, you know, we create
12 certain areas where there's going to have different
13 policies so we can have a hard time meshing.

14 So, for example, by definition, the
15 inability to directly question witnesses under
16 inquisitorial systems eliminates any really, for
17 example, right of cross-examination, but, in fact,
18 what you see is often a different -- the level of
19 disclosure of the record, a definite ability to
20 interrogate the evidence, submit counter-evidence in
21 ways that is quite limiting and very -- quite hard to
22 accommodate.

23 In the competition law context and actually
24 in the consumer protection context, as has been noted
25 earlier by Francesca and others, transplanting this

1 onto administrative decision-making creates another
2 level, which is you now have the same style of
3 evidence presentation and evaluation but not conducted
4 by a judge but by an administrative official. And you
5 have that administrative official in a context where
6 they're going to, as Roger noted so nicely, get
7 extremely deferential judicial review.

8 Now, where this comes from is quite
9 complicated. As Angela noted, part of it is from the
10 French administrative law tradition where they give a
11 great margin of appreciation for executive action.
12 Generally, I actually think a large part of it is from
13 the inability of judges to deal with economic
14 evidence, which is quite similar to what we
15 encountered here 34 years ago and have largely
16 addressed through a large-scale effort of judicial
17 education and the like. But as of right now,
18 essentially, EU judges evaluate for manifest error.
19 And that is a pretty deferential standard that
20 essentially waives all review.

21 Now, the other problem is in addition, they
22 lack an institution analogous to US administrative law
23 judges. So, in fact, you have a fusion of the same
24 personnel that do the charging investigation and
25 prosecution decision and the adjudication decision.

1 Now, I don't mean to overdraw that. For example, here
2 in the Commission, all actions are officially the
3 actions of the Commissioners, but below that we do
4 have a separation of functions and ex parte
5 communication rules that are meaningful.

6 There is a decision coming out of the
7 European Court of Human Rights, not the EU courts, in
8 the Menarini decision that says that you have a right
9 to fair trial, and that means a separation of
10 personnel and that, in fact, if that's not meaningful,
11 there has to be plenary judicial review. And I know
12 for a fact that many -- DG Comp is quite worried about
13 this because they don't have the separation of
14 functions. And the question is does the deferential
15 level of judicial review that takes place satisfy the
16 ECHR's obligation to under -- to provide a fair trial.

17 And so that's all looking under this. And,
18 in fact, what you see also, which I think is nice --
19 is missing is what Francesca points out, which is the
20 style of American administrative law that allows
21 transparency, public participation, and other values
22 that we have built in. I know people from other
23 jurisdictions who I've spoken to really appreciate US
24 administrative law because everything is on the
25 surface of the decision -- the history, the arguments,

1 the responses to the arguments.

2 There has to be the responses, otherwise you
3 can make an argument just to say, uh, no, don't give
4 any reasons, you actually can't really engage that
5 way. They have certain things such as the market
6 tests and other similar mechanisms that have been
7 developed in other jurisdictions that start to
8 replicate that but not completely.

9 And the last comment I'll make on the data
10 protection side, the most interesting innovation in
11 Europe is the growth of the independent data
12 protection authority, which is independent not only of
13 the Commission but of the member states. And I think
14 that in many ways, independence is a good thing. You
15 also do worry that some enforcement official will
16 attempt to make a political career out of making cases
17 there. And with 28 of them across the EU, every
18 institution should have some other institution looking
19 over its shoulder. I mean, that's something we've
20 learned over time. They eventually have the courts,
21 but it's not clear that that structure of complete
22 independence is ultimately salutary.

23 MR. O'BRIEN: Thank you. Do any of our
24 other panelists want to react to any of those
25 comments?

1 Or, if not, we can then go on and maybe
2 return to Francesca Bignami. And you talked in
3 particular about the example of privacy in the EU and
4 this idea of the regulatory style. And part of that
5 is how the administration, how the agency or the
6 regulators act, but it also is what the rest of the
7 environment is like.

8 And I wonder if you could comment more on
9 that, in particular on the sort of relevant
10 environments for litigation in the areas you've
11 studied. I noticed one of the questions we got from
12 the audience was sort of what role could collective
13 redress play or does play or should play in these
14 areas, which I think ties to this idea or issue of the
15 relative roles that the administration -- the
16 regulator plays, not just vis-a-vis the courts but
17 vis-a-vis private actors, a collective redress, or
18 self-regulation.

19 MS. BIGNAMI: Yeah, thanks. And as I
20 briefly alluded to earlier, I do think the contrast
21 that was earlier drawn between adversarial legalism
22 and informal regulatory styles has been diminished
23 over time. And that's based on an in-depth study I
24 did of data protection enforcement in Italy, Germany,
25 the UK, and France that was published in 2011. And so

1 really it's based on changes in the 2000s, which then
2 have continued over time.

3 And so what I find there is that the entire
4 adversarial legalism package has not made its way
5 across the Atlantic. What has made its way across the
6 Atlantic is tougher agency enforcement that's more
7 strategic and legalistic in approach. And so going
8 back to the EU DPA, the Data Protection Authority,
9 what's now called the Information Commissioner's
10 Office, in the 2000s, they acquired administrative
11 investigation powers and sanctioning powers. And they
12 started using them, and then they dropped more or less
13 the ombudsman function.

14 But -- and these are changes that have
15 occurred since the '95 directive and that are just
16 accentuated now that we have the GDPR and we have all
17 the attention to enforcement powers in the GDPR. But
18 what I didn't see was a lot more litigation and class
19 actions and collective actions. And I think that this
20 is a trend that will continue and that is evident also
21 in the consumer protection area.

22 I was interested to hear yesterday's
23 characterization of the EU system, where there, too,
24 consumer agencies in the member states have to have
25 bigger and tougher enforcement powers, but the

1 collective action part of it has been sputtering along
2 and hasn't been extraordinarily -- is not
3 extraordinarily rooted yet at least. And I think
4 that's largely because of the hurdles to litigation in
5 areas where you have diffuse harm and small individual
6 claims.

7 And so what does this mean for international
8 cooperation? I think that was also part of the
9 question here. And that is that I think that it
10 should be, to be quite frank, easier for the FTC to
11 cooperate with its European counterparts because they
12 now have a more similar regulatory philosophy, so
13 they're not all ombudsmen, but they really do have
14 more of a strategic, deterrence-oriented philosophy,
15 and they also have the powers independently as
16 administrative authorities.

17 And so I do think that it should be easier
18 to cooperate, especially also because we see there's a
19 certain degree of centralization that's occurring in
20 Brussels. It's a very gradual process. Power rests
21 still with the member states, but there's a certain
22 degree of centralization with the consumer on the
23 consumer side and the data protection side. And so it
24 also should be, you know, one-stop shop, right? It's
25 Brussels. You don't have to go to all 27, 28,

1 whatever you want to say, but, you know, it's a one-
2 stop shop.

3 MR. STEVENSON: Thank you.

4 Do others have comments -- so part of that
5 comment goes to some trends of convergence in some
6 ways but not in all ways and not necessarily at least
7 now in the sort of class action area for just one
8 example. I wonder if other panelists had comments on
9 the trends they see in convergence or divergence in
10 these areas, particularly as a regulatory style.

11 Mr. Marsden, please?

12 MR. MARSDEN: Sure. Well, I think there's
13 increasing divergence in some areas. And agencies are
14 struggling in trying to throw different tools at
15 different problems because the problems are changing,
16 so which model is best? But it's difficult to choose,
17 and much depends on the law traditions in each
18 jurisdiction and, frankly, on what works best where.

19 But I began working in competition law in
20 Canada 30 years ago during a time when every
21 jurisdiction and every institution that was interested
22 in competition law looked to the American federal
23 agencies for guidance -- the prosecutor and the
24 administrative enforcer.

25 Now, that attention has waned for various

1 reasons, and a lot of attention has turned to DG Comp
2 and a couple of national authorities in Europe in
3 particular. And that's fine. We like a competition
4 of competition policies. And to use the words of the
5 International Competition Network, we like informed
6 divergence, which, therefore, puts a premium on
7 agencies in terms of transparency of their decision-
8 making.

9 Other agencies are either directly following
10 DG Comp in some follow-on, fear of missing out types
11 of enforcement, or sometimes they just feel
12 emboldened, it seems, to introduce and try out new
13 theories of harm and procedural tools that even DG
14 Comp would not be so bold to use, even with its lower
15 standard of judicial review.

16 But if you at the FTC can do so without
17 compromising your principles and your theories of
18 harm, and if the evidence lets you, I would recommend
19 that you be bolder. Be bolder in your enforcement.
20 Be bolder in the markets you choose to intervene in.
21 Industry will look to you. Your public legitimacy
22 will grow. And others may follow your uniquely more
23 flexible tools, more comprehensive studies of markets,
24 more target enforcement, and be able to see and
25 understand your policy choices better.

1 And to echo Bill Kovacic from yesterday, all
2 authorities all around the world should be doing more
3 of a writeup of their case closing statements. In the
4 UK, we call these "no grounds for action" statements.
5 So when you decide not to enforce, industry and other
6 enforcers and the public can readily see why if you
7 readily write this up. And they can guess where safe
8 is. And it also takes any political fuel out of the
9 fire from complaints against the FTC and others about
10 where's your big tech case, you know, why aren't you
11 acting, like the one or two protesters outside the
12 door here today.

13 So more clarity on closure statements also
14 puts future complainants on notice and frees up your
15 enforcement pipeline. So I would just say use your
16 incredibly strong international ties. Remind your
17 brothers and sisters in the world of the agencies that
18 evidence matters; robust, economics-led theories of
19 harm matter and that you all still matter. And you
20 can help MAGA, make antitrust great again.

21 (Laughter.)

22 MR. STEVENSON: Okay, Professor Yoo, can you
23 top that?

24 MR. YOO: So, I guess like Philip, but
25 perhaps less colorfully, I do see divergence

1 substantively. In antitrust, we'd seen a convergence
2 in terms of collusive action and in terms of merger
3 review but differences in single-firm action. The
4 single-firm conduct is getting more divergent, not
5 just with the EU and the US but other places. Also,
6 on the consumer protection side, GDPR marks a very
7 distinct pole, and I see that pulling in different
8 directions.

9 In some terms of centralization, as
10 Francesca says, I think that's changed in the last two
11 to three years. In fact, what you see -- people in
12 Brussels always complain that they spend a lot more
13 time in the member states in the authority that they
14 wield. It's very clear that that's decentralizing now
15 in a very important way and that I think Philip's
16 quite right, the national competition agencies,
17 certainly ones, are becoming much more important.
18 And, also, I think the institution of the independent
19 data protection enforcement agencies is going to make
20 that look quite different.

21 And then the last thing is, you know, I
22 think that Philip started to talk about values. We're
23 doing a study on due process comparing China, the US,
24 and the EU. And we put a normative framework. We've
25 actually pulled the social science literature about

1 norms of conflict of interest, promotion of economic
2 growth, perceived legitimacy of the government,
3 control of the bureaucracy, and control of special
4 interest groups. And these are all values very much
5 promoted by the kind of procedural values, and we're
6 hoping that through mechanisms like the ICN, the OECD,
7 where all the privilege of speaking, to try to
8 generate more of a consensus along the lines that
9 Roger spoke about in the multilateral framework for
10 procedures to really to try to build a consensus of
11 norms and get the groundwork down on a general level
12 so we can start to add greater detail.

13 MR. STEVENSON: Thank you. We've got a
14 question from the audience that to some extent
15 Professor Marsden's comments anticipated. It was
16 asking about US agency decisions being often
17 criticized for not being transparent enough or not
18 allowing meaningful participation, and can you comment
19 on this, which to some extent, I think you have, and
20 compare it to other jurisdictions.

21 So I wonder if there are any comments from a
22 comparative point of view on that issue of
23 transparency, which I think also comes up in
24 connection with the description of the adversarial
25 legalism analysis.

1 MS. BIGNAMI: And so I do want to underscore
2 that when I talked about little role for courts in the
3 European model that's emerging, I don't mean judicial
4 review of agency decisions. I mean private
5 enforcement of regulatory statutes. And so with
6 respect to judicial review of administrative decisions
7 -- and this goes to the transparency issue -- now that
8 there are powers, there also is accountability.

9 And so there has been a real emphasis on
10 establishing internal processes within data protection
11 authorities to ensure participation rights and due
12 process rights. And there's also been a lot more
13 challenge in the courts. And we see that -- you know,
14 we've seen that since the 2000s. And here, I wanted
15 to use the example of the French data protection
16 authority, CNIL, which acquired new powers in 2004.
17 And to impose the new orders and fines, it had to
18 develop opportunities within the agency for
19 adversarial dispute settlement because they had to
20 give those firms that were subject to the injunctive
21 orders and the possible fines an opportunity to be
22 heard. And we would all expect that from a due
23 process rule of law system.

24 And then, you know, outside the agency, it
25 was subject to significant challenge within the

1 Conseil d'État for how it exercised those enforcement
2 powers. And one good example is that when it tried to
3 use its new onsite inspection powers, it was
4 challenged, and it lost in front of the Conseil d'État
5 based on Article 8 of the European Convention of Human
6 Rights. They said that it was not -- the Conseil
7 d'État, the administrative court in France, said that
8 CNIL was not complying with the right to privacy. And
9 they had to throw out huge numbers of inspections,
10 administrative orders, and fines because of that.

11 So I do think that there is a pressure
12 towards transparency and a fair bit of adversarialism,
13 if I can use that term, to describe the European
14 system once there are effective powers. And so that's
15 my thought on the transparency issue.

16 MR. STEVENSON: Thank you.

17 Philip, did you have a thought?

18 MR. MARSDEN: Just very briefly. I mean,
19 I've worked in a number of competition authorities.
20 When I was at the CMA, we had a range of fidelity
21 rebates cases against dominant firms. And on the
22 transparency point of view, I mean, in the ice cream
23 sector -- impulse ice cream sector -- we closed down
24 a case and we wrote it up really fully. That's
25 helpful, I think, because the Italians had a very

1 similar case with similar parties, and they brought an
2 infringement action. And they wrote it up obviously
3 as they had to.

4 Now, some people could say, well, okay, does
5 that mean the UK is lighter, it goes more easier on
6 dominant firms or fidelity rebates cases or accepts
7 different kinds of evidence, or did the facts just
8 differ or what? Well, now, you can read both
9 decisions -- one essentially a case closure and one an
10 infringement -- and work out whether it was the facts
11 or whether it was a different doctrine. I think that
12 just helps.

13 Naturally, though, even though I'm a lawyer,
14 I would always be grabbed by the lawyers in the legal
15 service within the Competition Markets Authority
16 whenever I wanted to write up a case closure because
17 they rightly said, that's going to hamper our
18 discretion and you've got to be careful there. So you
19 can do it carefully, but I think you can write it up
20 with a balance there to make sure you're giving some
21 more guidance to industry. So that transparency
22 really helps, especially in an international
23 environment.

24 MR. O'BRIEN: Thank you, Philip.

25 Christopher, one more comment, and then I'm

1 going to turn to Professor Zhang.

2 MR. YOO: So I think that I would say
3 transparency has been converging a little bit and
4 getting better. I think that the Intel case is a good
5 example of where the failure to disclose meetings with
6 adversaries led to a harmless error finding that
7 nonetheless changed the practice of DG Comp because
8 they realized it is error and they can't count on it
9 being held harmless the next time.

10 You see things like the UPS decision to
11 start to scrutinize more about economic reason, which
12 I think are beneficial. There are still things that
13 are missing. Early access to case files before
14 decisions are made until they're fairly late. But
15 what's quite interesting is you talk about closing
16 cases. There's an interesting aspect of EU law, which
17 is a complainant can get judicial review of a decision
18 to close a case, which puts an agency in a difficult
19 position with an ambiguous case, which you can neither
20 prove to prosecute nor prove to close.

21 And I wonder that -- you know, I understand
22 the impulse to give the guidance, but there can be a
23 trap. One of the solutions we have is the Tunney Act
24 or the modified Tunney Act that the FTC is subject to
25 about settlements. The EU got a lot of criticism for

1 the early attempts to settle the Google cases without
2 public participation.

3 One last thought I forgot to mention.
4 Angela mentions French administrative law, and that is
5 the touchstone for a lot of it. One of the
6 interesting things is the incomplete reception in
7 other countries of French administrative law. The
8 modern trend in recent years is that's actually become
9 much more searching in terms of judicial review of the
10 agency action, but that development within French
11 administrative law has yet to percolate throughout the
12 rest of the EU. So they tend to follow, if you will,
13 a dated conception of administrative law that is too
14 deferential, and if they update it, you may find more
15 search in judicial review.

16 MR. O'BRIEN: Thank you, Professor Yoo.

17 Professor Zhang, I wanted to return to your
18 useful earlier comparative examples involving both the
19 EU and China. Given the institutional realities that
20 you had identified there, what do you think successful
21 engagement might look like with the Chinese
22 competition authorities, with the EU? Take it,
23 whatever you'd like.

24 MS. ZHANG: Okay. Let me perhaps start with
25 the Chinese authority. You know, as you know, the

1 Chinese authority is a little bit more than 10 years
2 old and still relatively a new regime. And I know
3 that there have been a lot of exchanges between the US
4 and EU authorities with the Chinese authority,
5 particularly on providing feedback and comments on the
6 substantive law of drafting, but I know that there is
7 actually less exchange in regard to the procedural
8 aspects and how to create best practices for due
9 process and procedure. But I think that due process
10 and procedures matter crucially regarding Chinese
11 antitrust enforcement.

12 And those of you who have practiced cases in
13 China, you see that there are actually very few or
14 almost no major appeals against any decision made by
15 Chinese authority. And what's more bizarre is that
16 companies not only promise to rectify the conduct
17 immediately, they also volunteer to reduce prices for
18 their products, even before the agency announces its
19 decision. So this is something that you never see in
20 any other jurisdictions.

21 And why would a company do that? And what
22 I've found during my research is that on several
23 occasions, especially in early cases, one agency
24 called the National Development and Reform Commission,
25 the NDRC, which is the former antitrust agency in

1 charge with price-related antitrust conduct, they like
2 to employ what I call strategic public shaming
3 strategy. So if a firm does not cooperate quickly and
4 due to the agency's demand, the agency could leak such
5 information proactively to the state media outlet.
6 And so this would expose the firm to a high level of
7 publicity and potentially the firm will suffer. Its
8 top performance will suffer.

9 And in one example that I studied about, an
10 infant formula case, a case involving several infant
11 formula manufacturers, I found that one manufacturer
12 called Biostime, which was subject to the worst public
13 exposure, actually lost over one-third of its market
14 capitalization within a seven-day window upon the
15 agency's announcement of its investigation. It's not
16 the decision. And, actually, this kind of market
17 sanction far exceeds the ultimate antitrust fine that
18 it received, even though this firm did receive a very
19 high antitrust fine. Actually, the highest antitrust
20 fine among all the firms.

21 So you can imagine the kind of pressures
22 that executives will be subject to when their firms
23 were subject to antitrust investigation in China. And
24 this, I think, also possibly explains why the kind of
25 bizarre phenomenon in China, why firms will actually

1 volunteer to cooperate with the agencies and volunteer
2 to offer to reduce prices, because there's no legal
3 requirement in China as to whether, when, and how an
4 agency disclose an investigation. So this becomes a
5 very powerful weapon for the agencies to put pressure
6 on the firm in order to have them conform to its
7 demand.

8 I can also say briefly about Europe, right,
9 yeah?

10 MR. O'BRIEN: Sure, go ahead.

11 MS. ZHANG: Okay.

12 MR. O'BRIEN: And I also want to just put
13 our other professors, our panelists, maybe to start
14 thinking about -- as you briefly address the EU, maybe
15 others will think about the similar -- sort of
16 universalizing this question. What similar successful
17 engagement in a diverse world look like for the FTC.
18 But go ahead, please, on the EU, please, yes. Sorry.

19 MS. ZHANG: I think my impression as a
20 scholar studying EU competition law for the past five,
21 six years, is that we have often -- we've seen too
22 much of this argument trying to explain the divergence
23 between US antitrust law and EU competition law based
24 upon philosophy, which is the so-called, you know, EU
25 is driven by different philosophical thought, and it's

1 overliberalism, which is different from us.

2 But based on my empirical observations and
3 studies, I have doubts about how much ultraliberalism
4 really have much practical relevance. And so my
5 suggestion is really to urge the FTC and the US
6 authority rather than taking more like a top-down
7 approach -- rather than taking a top-down approach,
8 take a kind of like bottom-up approach to try to
9 understand who are the institutional actors involved
10 here and what are their real incentives.

11 I speak a lot about the EU court, and the
12 reason is because we're seeing really growing
13 convergence between the US and the EU authorities at
14 the agency level, but the divergence -- and you see
15 the gap -- to a large extent remain at the court,
16 right? So we actually know very little about the
17 court. Who are the decision-makers and how those
18 decisions were made? And that's the reason that drove
19 me to Luxembourg to study the court and to find out
20 who are these judges, how they're appointed and how do
21 they make decisions.

22 And my findings, which actually were
23 published in a law review article called "A Faceless
24 Court," are actually quite disturbing because I found
25 that, you know, there is not -- first of all, the

1 judges in the EU are very well paid. This is not a
2 problem, but it becomes a problem when there is a lack
3 of safeguard for judicial appointment. And so some of
4 the judges who are appointed are political appointees,
5 and then they're not necessarily competent to do the
6 work. And, also, these judges have very short tenure,
7 unlike judges here in the United States. And the
8 turnover rate of the judges is very high.

9 So all these factors result in the fact that
10 these judges rely heavily -- many of the judges rely
11 heavily on their law clerks who tend to stay in the
12 court very long and know the EU law very well. Okay?
13 So this heavy reliance on the law clerk -- and also a
14 significant percentage of law clerks actually were
15 seconded from the European Commission, so they will
16 return back to the Commission after they finish their
17 stint at the court.

18 So you can see the close revolving door
19 between the EU court and the Commission. I mean, all
20 these things raise conflict issues. And, also, it
21 partly, I think, explains why you see the court is
22 very heavily reliant on the Commission and actually
23 sometimes quite deferential to the Commission.

24 So I want to urge the FTC to take a more
25 bottom-up approach, really understand the

1 institutional actors and their incentives behind these
2 cases. I think that will give us a better and more
3 complete picture of what's going on here.

4 MR. O'BRIEN: Thank you, Professor Zhang.

5 I'm going to turn to Professor Marsden next
6 and actually just open it up to everyone. We're under
7 five minutes left on our panel.

8 This idea, this broad idea, successful
9 engagement in a diverse world. Professor Marsden, why
10 don't you start for us.

11 MR. MARSDEN: Sure. So we've heard various
12 suggestions. One would be essentially public shaming,
13 a return to that. We've heard sort of extortion
14 through the commitments process. I suppose you could
15 do that if you'd like. We have heard of just relying
16 on prosecution. I started out as a prosecutor. I
17 think it's a wonderful model, but it's very surgical,
18 you know? And as we heard from Roger and others, it's
19 very difficult sometimes. And so that's why agencies
20 are becoming a bit more creative.

21 You know, you don't necessarily have to go
22 the full hog and create an ex ante, procompetitive
23 code like I'm suggesting through our Furman Report.
24 That's something to discuss, but I think the agencies,
25 which are getting a lot of traction here around the

1 world, are the ones that have a range of tooth. You
2 don't want a competition watchdog with only one tooth,
3 right? You need more tools. All right?

4 And so if you have market study powers,
5 market investigation powers, that can allow you to be
6 more nuanced in your analysis, still driven by
7 economics and the evidence, but then also more
8 creative in your remedial approach.

9 So my final point would be in the UK I was
10 deputy chair of our banking investigation. We were
11 under a great deal of political pressure to break up
12 the big four banks. We decided on the evidence that
13 that wasn't justified. It's an extraordinary remedy,
14 and we didn't have the extraordinary evidence, but
15 also it wouldn't be helpful. It wouldn't actually
16 have driven more competition in that sector.

17 And we decided instead of breaking them up
18 to open them up through open APIs and open banking
19 model. And we've seen some increased engagement with
20 consumers in that regard in new choice products, in
21 new things, even the incumbents have been introducing
22 new products, whereas before they were just sitting on
23 their IT and not doing very much.

24 The only thing I'd say is, what was our test
25 of success? Our test wasn't switching. Our test

1 wasn't to see whether, you know, people were switching
2 banks. You know, it's very clear evidence that
3 British people switch their spouses more than they
4 switch their banks.

5 (Laughter.)

6 MR. MARSDEN: We didn't want divorce. We
7 wanted engagement. We wanted consumers to be more
8 engaged with their banks. And that's what we're
9 seeing through a more forward-looking remedy that goes
10 with the technological times, and I think that's
11 something where creative agencies with multiple powers
12 can really do some good.

13 MR. O'BRIEN: Thank you, Philip. Let me
14 come back to Christopher and then Francesca for some
15 final thoughts.

16 MR. YOO: So in terms of best engagement,
17 best practices for engagement, it's funny, Paul, you
18 and I have worked on the ICN on the agency
19 effectiveness working group. The idea always has been
20 to start with procedure because we believe that would
21 be easier. And I think that it's still probably true
22 in many ways it's easier. I still wouldn't call it
23 easy. And so we deal with these -- the multilateral
24 framework that the Justice Department is supporting
25 and the FTC is supporting. We deal with the OECD and

1 the ICN.

2 My reaction to, though, this guidance is I
3 think they're important in terms of commitments. They
4 necessarily are general, a bit on the general level.
5 And so I think that we should continue those
6 engagements, but what I really see are rare
7 opportunities when a country is changing its
8 procedural practices.

9 And a good example right now is in China.
10 With the unification of the three agencies, they have
11 three procedural codes they have to turn into one.
12 And so one way or the other, this is a natural
13 opportunity for them to look for the best practices.
14 And, in fact, we're on an -- the project that I'm
15 working on with a Chinese and a European partner is
16 trying to do exactly that.

17 At the same time, it's interesting. You
18 may or may not know, China recently amended its
19 administrative litigation law that changes the terms
20 of judicial review. And we're actually seeing the
21 first cases of judicial review and one in which they
22 lost. It was reversed on appeal, but they did lose in
23 the trial court. And that's actually when we had
24 local officials, we asked how many times they had been
25 challenged in court, and the answer was literally

1 zero.

2 And so we're starting to see those trickles,
3 but the interesting thing also, the appeals now to go
4 to the administrative court in Beijing, the appellate
5 court. They have a different sensibility about
6 administrative law, and, for example, the Securities
7 Reform Commission in China just instituted what we
8 would think of as ALJs. So there's a different form
9 of advocacy, which is picking the moments where you
10 see it in the country.

11 Korea is actually redoing its enforcement
12 procedures right now. But also, move it beyond
13 competition law and privacy to make it a general issue
14 of administrative law and good government by tying
15 into other bars, other constituencies, I think, could
16 be a very effective advocacy move, and it's one that
17 we're trying to explore.

18 MR. O'BRIEN: Thank you, Professor Yoo.

19 Professor Bignami, you have our final words.

20 MS. BIGNAMI: I just wanted to mention that
21 I think that the view of the European Court of Justice
22 as presented here was somewhat dated and it has
23 changed significantly since the establishment of the
24 general court in the late '80s.

25 And I think we're out of time, but I did

1 want to mention that I think that the one very
2 productive way to engage with our foreign partners is
3 to experiment, as Brandeis would say, with different
4 methods and different policy aims and different ways
5 of accomplishing the very same goals that both systems
6 around the world generally tend to have, so
7 experimentation and exploring different approaches I
8 think is extraordinarily healthy within the United
9 States and internationally.

10 MR. STEVENSON: Well, thank you very much.
11 I hope everyone will join us in thanking our panelists
12 for a great discussion. Thank you.

13 (Applause.)

14 MR. STEVENSON: So now I think we take a
15 brief break, and we start again in about 15 minutes.
16 Thanks.

17

18

19

20

21

22

23

24

25

1 PROMOTING SOUND POLICIES FOR THE NEXT DECADE

2 MS. WOODS BELL: Colleagues, welcome back
3 from the break. We're about to begin. It's my
4 pleasure to introduce Commissioner Christine Wilson.
5 Christine is a Commissioner here at the FTC. She
6 previously served as the Chief of Staff to Tim Muris
7 and also as a law clerk in the Bureau of Competition.
8 So it shows that all your diligence and efforts here
9 at the agency is quite something that pays off. Thank
10 you so much for coming back home, Christine.

11 She also worked as Senior Vice President -
12 Legal, Regulatory and International for Delta Airlines
13 and as a member of the antitrust practice for Kirkland
14 & Ellis and O'Melveny & Myers. She also worked for
15 Assistant Attorney General James Rill. And she just
16 has a bio so long, again, like so many of our other
17 colleagues, we can't go on, but we welcome her now to
18 provide comments here at the international hearing.

19 Thank you.

20 COMMISSIONER WILSON: Good morning,
21 everyone, and thank you. I think when she says that I
22 have a long bio, it means that I can't keep a job, so
23 thank you for presenting that in a positive light.
24 And it is good to be home. It's great to be back at
25 the FTC. It is a wonderful institution that does

1 fantastic work for consumers in the United States and
2 great work cooperating with our colleagues abroad, so
3 it's a pleasure to be back.

4 So our next panel is going to discuss how to
5 ensure that we have sound policies in place for
6 international cooperation in the next decade. Before
7 I begin, first I need to give the standard disclaimer
8 that the views that I express are not necessarily
9 representative of those of the Commission or any other
10 Commissioner.

11 And second, I should give a little bit of
12 perspective about myself. As was mentioned, as a
13 young associate, I had the privilege and good fortune
14 to practice law with Former Assistant Attorney General
15 James F. Rill. And he is the one who instilled in me
16 an appreciation of the great importance of
17 participating in international competition dialogues
18 and participating in events and activities like this.

19 He also roped me into helping to prepare
20 submissions to the OECD, to the WTO, to the
21 International Chamber of Commerce, and a number of
22 other organizations. I also had the good fortune
23 to work with Jim on the International Competition
24 Policy Advisory Committee, including preparing
25 recommendations that ultimately became the

1 International Competition Network that we know and
2 love today.

3 And then as Chief of Staff to Tim Muris, I
4 had the privilege of helping to launch the ICN, along
5 with Randy and lots of other folks here and DOJ and
6 around the world. And I've watched with pride the
7 growth and success of the ICN over the ensuing years.
8 I must say that the work of that group has exceeded my
9 loftiest expectations, and I know I'm not alone in
10 marveling at the good work that has been done under
11 the auspices of the ICN.

12 And so with this background, I have faith in
13 the ability of jurisdictions to nurture constructive
14 dialogues, both in the bilateral and multilateral
15 settings, and to achieve, through cooperation, sound
16 policies on antitrust enforcement issues. But, of
17 course, it wasn't always this way.

18 When I first began practicing international
19 competition policy, I was eagerly preparing the final
20 report for ICPAK and very excited about the work that
21 we were doing. And I remarked to one of the
22 relatively senior partners at the firm, this is
23 fantastic, you know, here's what we're doing. We're
24 doing all this great work, and it's going to be so
25 exciting and so impactful for international

1 competition policy.

2 And, you know, maybe the senior partner was
3 frustrated that I didn't have time to work on his
4 matter, but he responded in a very frustrated tone of
5 voice and indignantly, there is no such thing as
6 international antitrust. So to protect the guilty,
7 I'm not going to disclose his name, but, boy, was he
8 wrong. Today, antitrust law has a clear international
9 dimension, and its internationalization reflects a
10 number of factors, including an increase in the number
11 of jurisdictions with antitrust laws and the
12 increasingly global scope of many industries.

13 And this growth has been coupled with a
14 second significant development, the growing
15 digitization of our economy. Apart from Microsoft,
16 many of today's business titans didn't even exist when
17 I graduated from law school. Not to date myself, but
18 the internet and email also didn't exist when I
19 graduated from law school, but that's another matter.

20 So these technology firms are now at the
21 center of the next great debate, whether we should
22 abandon or at least radically alter traditional
23 antitrust principles to address what many believe to
24 be a technology problem. So you see a lot of
25 discussion of this issue even in the mainstream press.

1 In the news last month, we saw that organizations in
2 several other jurisdictions, including the UK and
3 Australia, have issued reports recommending
4 significantly changing their respective competition
5 regimes to expand their authority over big tech
6 companies. And here at home, we see similar calls for
7 big changes from wide-ranging structural and
8 behavioral remedies to changes in the underlying goals
9 of antitrust law.

10 For example, Senator Elizabeth Warren
11 recently proposed rules that would break up technology
12 companies with annual global revenues of over 25
13 billion. And for smaller companies, she would impose
14 regulatory behavioral mandates. Others have called
15 for revisions to the antitrust laws that would require
16 enforcers and courts to consider whether the
17 challenged conduct takes into account a wide variety
18 of factors not typically considered in mainstream
19 antitrust enforcement, including fairness, reducing
20 income equality, reducing jobs, benefitting smaller
21 businesses, and protecting competition, workers,
22 customers, and suppliers.

23 And, oftentimes, these calls are accompanied
24 by conclusory statements asserting that the American
25 economy is less competitive than in some ill-defined

1 golden age of yore. And sometimes these claims are
2 even supported by rudimentary statistics measuring the
3 total number of mergers, the valuation of these
4 mergers, or the size of the largest businesses or even
5 the share of "the e-commerce market" controlled by the
6 largest online retailers.

7 And all of this analysis is very flawed from
8 a standard antitrust perspective, but nonetheless is
9 rolled out to support a wide variety of assertions
10 about the lack of competition in our economy. So all
11 of this is to say it strikes me that we are at an
12 inflection point, and we do have important choices to
13 make. So to name three, should we abandon our present
14 focus on a single goal of antitrust? Currently, the
15 consumer welfare standard in favor of a standard that
16 requires us to weigh several different factors,
17 including some of those that I just named?

18 Should we abandon our present reliance upon
19 economic principles to inform our understanding of
20 whether a given merger or trade practice is
21 anticompetitive?

22 And, finally, should we return to the days
23 of the US Supreme Court cases -- Pabst Brewing and
24 Vons Grocery -- when antitrust analysis began and
25 ended with a simple rule tied to a simple number, such

1 as prohibiting any increase above a given
2 concentration threshold?

3 As I've said in a number of recent speeches
4 and statements, I, myself, would answer each of these
5 questions with an emphatic no. But regardless of my
6 views on substance, I have confidence that we are well
7 equipped to study these questions and to reach sound
8 conclusions. And perhaps more importantly for today's
9 purposes, I also have confidence in the ability of the
10 international antitrust community, including the many
11 bilateral relationships in multilateral institutions,
12 to examine these important questions in a constructive
13 way.

14 So this debate highlights the value of
15 international engagement in the good work that Randy
16 and his team do here at the FTC. Discussing these
17 questions with our international partners is
18 especially important in today's interconnected
19 antitrust environment. The antitrust rules that we
20 adopt in the United States may have repercussions
21 abroad, and antitrust rules adopted by other
22 jurisdictions may affect us here in the United States.

23 So comparing notes with our international
24 partners has at least two benefits. First, it helps
25 each agency, including the FTC, sharpen its own

1 analysis. And, second, it helps us identify areas for
2 collaboration, and if appropriate, convergence. Given
3 the importance of these discussions, we are fortunate
4 to have strong teams in charge of international
5 cooperation.

6 Here at the FTC, Randy Tritell and his team
7 do yeoman's work, managing our extensive network of
8 bilateral relationships with sister agencies around
9 the globe. Our Office of International Affairs leads
10 our daily cooperation on competition, consumer
11 protection, and data privacy cases in order to reach
12 compatible analyses and outcomes where possible.

13 OIA is also instrumental to the success
14 of our other international initiatives, including
15 our international assistance missions and our
16 international fellows program. And even more
17 impressively, the office maintains high quality over a
18 very large volume of initiatives. In 2018, the FTC
19 conducted 24 international assistance missions and
20 hosted 10 international fellows from foreign agencies
21 here at home. And Roger Alford has done similar
22 excellent work over at the Department of Justice.

23 And we also benefit from exchanging ideas in
24 order to promote convergence with our international
25 partners through both bilateral relationships and

1 multilateral organizations, including the ICN, ICPEN,
2 and the OECD.

3 So in conclusion, there's a growing
4 international debate about whether and how to revise
5 the antitrust laws, particularly as they apply to the
6 digital economy. Given the potential impact that
7 changes in antitrust law would have upon large global
8 businesses, it's critically important that we think
9 through these issues together with our international
10 partners.

11 Thankfully, we can lean on Randy and his
12 team and his counterparts at other agencies around the
13 world to facilitate this discussion and help us to
14 identify areas for further collaboration. Of course,
15 this meaningful international collaboration is no
16 small victory and certainly something I wouldn't have
17 predicted more than 20 years ago.

18 And now, I will turn it over to our
19 panelists to advise us on how to make the next decade
20 of international collaboration even more successful.
21 Thank you.

22 (Applause.)

23

24

25

1 PROMOTING SOUND POLICIES FOR THE NEXT DECADE (PANEL)

2 MR. DAMTOFT: Well, while everyone is
3 gathering, thank you very much. Good morning. I'm
4 Russ Damtoft with the FTC. My comoderator is Hugh
5 Stevenson, who you saw earlier this morning. I would
6 like to quickly introduce our panel and then go on to
7 our discussion.

8 To my left is Teresa Moreira, who is the
9 Head of the UNCTAD Competition and Consumer branch.
10 She is truly a renaissance woman on this because she
11 does both competition, consumer protection, and has
12 history on both sides in her home country in Portugal
13 as well as DG Comp.

14 Tad Lipsky, who has been at the Department
15 of Justice, the FTC, and the private sector.

16 Professor Daniel Solove of George Washington
17 Law School, who is an expert, especially on policy
18 issues in the privacy area.

19 John Pecman, equally a renaissance man.
20 He's with Fasken now, but we invited him here because
21 of his history at the Competition Bureau in Canada,
22 where he was Commissioner of Competition and did just
23 about every job that could be done there.

24 We have Justin Macmullan of Consumers
25 International, who represents a very important

1 perspective.

2 And, finally, Pablo Trevisan, who is a
3 Commissioner of the CNDC, the newly rejuvenated
4 competition agency in Argentina who is addressing
5 these issues more or less in realtime.

6 To kick this off, I would like to go back to
7 thinking of Commissioner Wilson's remarks about having
8 worked with Tim Muris. Tim Muris told a story about
9 imagining global commerce as being a football game.
10 You can decide if that's American or European
11 football, it doesn't matter. And instead of there
12 being a single referee on the field, imagine that
13 there were 130, each of whom have their own rule book,
14 either yellow flags or red yellow cards to show. And
15 what kind of game would this be if we had 130
16 referees?

17 How to resolve that conundrum, how do we
18 deal with the fact that we have a number of different
19 systems with the different cultures, as was discussed
20 this morning? We're going to ask our panelists to
21 bring some wisdom to this, and we're going to start
22 the same way with five minutes each for each panelist,
23 and then we'll go on and ask a few more pointed
24 questions.

25 Hugh, anything?

1 MR. STEVENSON: Sure. I think we'll turn
2 now to our panelists and get their statements. And
3 this, I think, ties well into the discussion we had
4 earlier, which was about the world in which this
5 nightmare of a football game that Russ describes and
6 also having sort of hundreds of agencies now between
7 competition and privacy and consumer protection. We
8 have the various divergences in legal traditions and
9 regimes that we heard a little bit about this morning.
10 And so the challenge here, I think, is how do we
11 achieve, then, in this environment coherent policies
12 that protect consumers while protecting the benefits
13 of global commerce.

14 And we'll turn first to Teresa Moreira to
15 address this challenge. Thank you.

16 MS. MOREIRA: Thank you very much, first of
17 all, for this opportunity. I think this sets a very
18 interesting practice. I would start by talking a
19 little bit about, well, promoting sound policies. And
20 I believe based on the experience of the organization
21 I represent here, the UN Conference on Trade and
22 Development, which happens to be the focal point both
23 for competition and consumer protection within the UN
24 system, that some policies need to be based on the
25 comprehensive knowledge and understanding of market

1 functioning and especially taking into consideration
2 the digital era that we are living in; also,
3 understanding the implications that technology brings.
4 That is to say, the opportunities, the challenges, the
5 risks both for a competitive process and also for
6 consumers. This means that some policies should be
7 evidence-based, and these should rely on several
8 different instruments that can be combined.

9 I think yesterday somebody talked -- I think
10 it was you -- on behavioral insights and behavioral
11 economics, which I think are so interesting, namely --
12 well for both competition and consumer policies. But
13 also, we heard about market studies and inquiries for
14 competition law and policy. Also, stakeholder inputs,
15 ensuring that a wide range of providers, so to speak,
16 of information, of knowledge, of research, those
17 colors, business, civil society organizations, and
18 through instruments like these public hearings and
19 public consultations.

20 Now, from this, I would say that sound
21 policies should be able to identify best practices and
22 promote and lead to the exchange of information and
23 experiences, fostering mutual learnings, and promoting
24 some sort of convergence or organization. I would say
25 that in the UN and from UNCTAD's point of view, we are

1 the custodians of two interesting and important
2 international instruments: the UN set of competition
3 principles and rules and the UN guidelines for
4 consumer protection. The set was adopted in 1980.
5 The guidelines for consumer protection were adopted in
6 '85 and lastly revised in 2015. Both were
7 consensually adopted.

8 And why is this relevant? Both recognize
9 the contribution of, on the one hand, competition law
10 and policy and on consumer protection for economic
11 growth and sustainable development, although they
12 recognize what I would call a development dimension,
13 that is to say the need for these policies to be
14 implemented according to social and economic features
15 of countries, namely developing countries, and
16 countries with economies in transition.

17 The UN set on competition also establishes a
18 framework for international cooperation, and it was
19 followed by the UNCTAD model on competition, which is
20 from '93. And it really corresponds to a template of
21 the main topics, that's topics and provisions that I
22 would say a standard competition law should address,
23 supporting coherence and convergence. Again, the
24 model law was also discussed and agreed and, of
25 course, benefitted very much from the input and from

1 the advice and suggestions of more experienced
2 agencies, namely already at that time the FTC.

3 The UN guidelines for consumer protection,
4 especially because they were revised more recently,
5 cover a wide array of topics, some of them really
6 current challenges like e-commerce, financial
7 services, dispute resolution and redress, of course
8 international cooperation. And I would say that in
9 both cases both instruments underline the importance
10 of cooperation, obviously at the international level
11 but also at regional and bilateral level, and not only
12 in the framework of formal international or regional
13 organizations but also through informal networks
14 across the world.

15 This is really a most important avenue to
16 better address global issues across the world, and I
17 would like just to end these initial remarks saying
18 that I'm very happy to say that the FTC has provided
19 very important and significant contributions in both
20 policy areas, not only in UNCTAD, but also based on my
21 previous experience while a representative of
22 Portugal, namely in the OECD Committee for Consumer
23 Policy, where I, myself, and other colleagues learned
24 very much about its leading experience, especially in
25 the digital world. Thank you very much.

1 MR. STEVENSON: Thank you, Teresa.

2 We turn next to Tad Lipsky from George Mason
3 to give his views on the subject. Thanks.

4 MR. LIPSKY: Thanks, Hugh. And thanks,
5 Russ. Thanks very much to the Commission. It's a
6 great privilege and honor to be here and to be back
7 among various colleagues and especially when I was
8 here they didn't have this fabulous, blue-lit
9 background. I mean, just picture Ronald Reagan
10 between those two flags. It's really quite an
11 impressive setup here.

12 So I also want to mention just briefly that
13 I am tagged with my affiliation with the Scalia Law
14 School of George Mason, with which I'm very, very
15 proudly associated, but these remarks are simply my
16 own. They might coincide with the views of somebody
17 else, but that would be a wild coincidence.

18 So, given the enormous diversity that's
19 already been mentioned in the legal and regulatory
20 systems and the other relevant characteristics of the
21 various competition regimes around the world,
22 achieving the best economic outcomes for consumers
23 across all world jurisdictions is going to require a
24 broad variety of approaches. There's not going to be
25 a one-size-fits-all solution.

1 I'm going to address this problem based on,
2 I have to say, a career-long experience in antitrust
3 and competition law. And I'm the kind of person that
4 just clicks on those. You know, we use cookies, and
5 so please read our privacy policy. I never read any
6 of that stuff, so I don't know anything about privacy
7 or consumer protection either, but from the antitrust
8 perspective.

9 We've already seen two failed attempts to
10 secure a broad, multilateral competition law
11 discipline. First, in the Havana Charter that would
12 have created the International Trade Organization
13 immediately after World War II, which failed as a
14 general matter, primarily because the United States
15 would not assent to it.

16 But, secondly, when a competition discipline
17 was proposed as one of the four Singapore issues --
18 this was in the WTO Ministerial Conference of 1996,
19 another proposal for a multilateral discipline that's
20 also gone pretty much nowhere. We've also had over 50
21 years' experience with a number of multilateral
22 groups. I think most prominently the OECD Competition
23 Committee, which together with its predecessors, goes
24 back well over 50 years, and also the ICN over the
25 last 18 years. And, of course, there's the UNCTAD

1 group of experts on restricted business practices,
2 which I imagine dates possibly all the way back to the
3 '60s.

4 MS. MOREIRA: Eighties.

5 MR. LIPSKY: Eighties, okay. But given our
6 experience with these multilateral groups, I think
7 that the lessons are pretty clear at this point. One,
8 the world is not yet ready and possibly will never be
9 ready for a binding global approach to competition law
10 convergence.

11 Second, the multilateral agency
12 organizations, thinking particularly of the OECD
13 Competition Committee and the ICN, producing voluntary
14 but unenforceable recommendations, are very helpful in
15 a number of significant respects: in establishing
16 professional connections among antitrust agencies and
17 their personnel, in smoothing day-to-day case-handling
18 chores like discovery in the formulation of remedies
19 in multijurisdictional antitrust matters, and for
20 providing very essential support to newly established
21 antitrust agencies that are fighting their way up what
22 everybody knows is a very long and arduous learning
23 curve as to how to adopt and effectively enforce an
24 antitrust regime.

25 However, number three -- and I say this as

1 somebody who was at Ditchley House, the conference in
2 2001 that took the recommendations of ICPAK that
3 Commissioner Wilson described and turned them into a
4 concrete proposal for the ICN. Multilateral
5 organizations are not a plausible framework for
6 disciplines that would reduce substantially the
7 unnecessary costs, the complexities, and the other
8 frictions of compliance that multinational businesses
9 face, nor are they likely to lead to any enforceable
10 protection for fundamental rights of defense in
11 jurisdictions that have weak rule-of-law traditions or
12 inadequate antitrust agency procedures or to expunge
13 protectionist elements of antitrust systems that have
14 polycentric objectives. Binding disciplines are
15 required for this purpose.

16 And let me -- I see that my time is
17 essentially up. Let me just conclude by saying -- and
18 I can explain this further to the extent anybody is
19 interested -- I believe that the search for a viable
20 international discipline to remedy the serious
21 deficiencies in international antitrust enforcement
22 should be initiated on a bilateral basis, preferably
23 between the US and one or a very small number, like
24 one or two, jurisdictions that are strategically
25 friendly to the US, that follow a genuine economic-

1 spaced approach to antitrust in practice rather than
2 as mere lip service, and that have a highly developed
3 legal system that generally seeks to achieve accurate
4 judgments, in part by ensuring adequate rights of
5 defense. Thanks.

6 MR. STEVENSON: Thank you very much for
7 that. Also, a reminder that we have, I think,
8 question cards for people if they're interested in
9 asking our panelists any questions.

10 With that, we turn next to Dan Solove from
11 GW Law School. Again, we appreciate GW Law School's
12 support for this event. I think we've had Professor
13 Solove, Professor Bignami, Professor Kovacic
14 yesterday. Professor Solove, we turn to you.

15 MR. SOLOVE: Thanks for having me here. So
16 my focus is on privacy and security law. And the
17 story is that since the '70s through the '90s, the US
18 played a leading role in the development of privacy
19 law. Reports coming out of the US, the famous ATW
20 report, and the Code of Fair Information Practices,
21 all to a series of various sectoral laws regulating
22 privacy, and in the '90s the rise of the FTC jumping
23 into this area, starting to do enforcement under
24 Section 5 for privacy and security issues.

25 All that developed in the '70s and through

1 the '90s and has largely tapered off these days. The
2 history there was the US adopted a sectoral approach,
3 which is a series of different laws to regulate
4 different sectors in different ways. This approach
5 was favored by industry at the time. There were a lot
6 of gaps and crevices, and some folks found themselves
7 not regulated, and everyone had their particular law
8 that regulated them the way they wanted to be
9 regulated. And, you know, folks were happy with this
10 general state of affairs, at least in industry.

11 The problem with the sectoral approach is
12 that the sectors don't stay the same. They change.
13 And now a lot of industries are dabbling in other
14 industries and are finding themselves overlapped by
15 three or four different laws, three or four different
16 regulators, and various other states pouncing in, so
17 the landscape has become very complicated, and we're
18 kind of stuck in this situation.

19 The other thing is that Congress has largely
20 ground to a halt. Congress used to be very active in
21 privacy, passing a lot of laws. Now, really since the
22 2000s, has been largely quiet. Here and there
23 touching up a law, doing a little here and there, but
24 nothing that major. Nothing like it did in the '70s
25 to the '90s. And I don't see much activity in

1 Congress in the future, so that's the world we live
2 in.

3 In the meantime, the rest of the world has
4 really taken charge in privacy, especially the
5 Europeans. The Europeans passed a very powerful new
6 law, the GDPR, the General Data Protection Regulation,
7 came into effect last year with very severe penalties.
8 All the companies that I've talked to and know about
9 and hear about, they all are looking overseas.
10 They're looking over to Europe for guidance. They're
11 building their privacy programs based on what the
12 Europeans are saying.

13 Essentially, the Europeans are their
14 regulator for most global businesses, you know, asking
15 them, hey, where do you spend your time on. Eighty,
16 90 percent of their time is on the GDPR. So really
17 essentially now the world is focused elsewhere. The
18 US has lost its leadership role. People don't look to
19 the US that much for guidance in this.

20 Now, California has recently passed a new
21 law, so everyone is looking at California. Might as
22 well be another foreign country, but again what we
23 don't see are the eyes at the federal level. The only
24 entity at the federal level that had been making a lot
25 of progress, doing a lot of activity, has been the

1 FTC. The FTC stepped into this void, this weird
2 sectoral system that the US has with this fragmented
3 regulation, and through Section 5, which has the
4 broadest jurisdiction of any type of law that we have
5 to regulate privacy and security, captured and
6 regulated through a number of consent decrees a lot of
7 different companies. And I think that the FTC has
8 built a considerable body of jurisprudence.

9 There are now calls, very interestingly, in
10 industry for a comprehensive privacy law. Folks look
11 at this landscape, and I find it very interesting how
12 significant the call is in industry and the desire for
13 a comprehensive privacy law. I don't think that's
14 likely. Just politically, I think it's very difficult
15 for Congress to do that, so I think the answer is
16 going to lie with the FTC.

17 I think that, you know, the future, if the
18 US wants to take a leadership role, is that the FTC
19 has to step up and has to play that role. The FTC is
20 in that position already based on what it has done,
21 and I think it is the logical choice for the US to
22 unify its law, to pull itself together to be the
23 leader, but I do think that calls for an even stronger
24 role for the FTC to play.

25 MR. STEVENSON: Thank you, Dan.

1 We turn next to John Pecman, formerly from
2 Canada's Competition Bureau to offer his thoughts.

3 MR. PECMAN: Thank you, Hugh, and thank you
4 to the FTC for this invitation to speak about a
5 passion of mine, which is international cooperation
6 and convergence. And I was a big advocate while at
7 the Bureau, and I continue to be one. But to begin, I
8 want to note Makan Delrahim's speech called "Come
9 Together: Victories and New Challenges for the
10 International Antitrust Community," where he refers to
11 the Beatles, the "come together."

12 And when I speak about international
13 cooperation and convergence, I like to quote John
14 Lennon, his song "Imagine." And don't worry, I'm not
15 going to sing it. My line is "Some say I'm a dreamer,
16 but I'm not the only one." And that kind of
17 encapsulates what's been driving me and advancing the
18 agenda here, working with my counterparts or formerly
19 my counterparts around the world.

20 So I would like to open my statement today
21 by quickly highlighting three areas of good works
22 undertaken by the Bureau using soft law approaches to
23 further international concurrence. The first was
24 through bilateral relationships. The Bureau has
25 established extensive networks of cooperative

1 relationships with many competition agencies around
2 the world, and these are based on bilateral
3 cooperation agreements. These agreements enable staff
4 to cooperate with agencies abroad on individual cases,
5 technical assistance, and on developing competition
6 policy.

7 For example, the US criminal MLAT has
8 permitted the US, DOJ, and the Bureau to conduct joint
9 price-fixing investigations. And the very first one
10 was fax paper back in the '90s and also enabled the
11 continuation of parallel investigations. Regrettably,
12 there is no operational civil MLAT which permits the
13 sharing of confidential information between Canada and
14 the US as it pertains to merger review without a
15 waiver from the parties or reviewing abuse or civil
16 deceptive marketing practices investigations.

17 We also work with our counterparts through
18 developing policy convergence. And a good example is
19 the document produced with US agencies entitled "Best
20 Practices on Cooperation in Merger Investigations"
21 that puts out a good template for the entire
22 community.

23 And another example is our alignment of
24 merger review processes with the US. Canada modified
25 its investigatory powers to include supplementary

1 information requests similar to the American second
2 request, and aligned our 30-day timing procedures.
3 Obviously, this collaborative approach has a
4 significant number of efficiencies, not only for the
5 review but for merging parties.

6 And, of course, technical assistance. Staff
7 exchanges is something we rely on to build bridges. I
8 like to point to the staff agreements that we have
9 with the ACCC, which has facilitated the sharing of
10 best practices by exposing senior staff to each other
11 as investigative and analytical approaches, as well as
12 the executive management functions.

13 The second area is leadership in the
14 multilateral fora such as ICPEN, ICN, OECD, where soft
15 convergence is a top priority for all these agencies.
16 And the Bureau is a founding member of the ICN and
17 acts as its secretariat, with tremendous support, I
18 may add, from the FTC. The Bureau was currently the
19 cochair of the ICN agency effectiveness working group,
20 and in this regard, something that I think is
21 extremely important, led the creation of the economist
22 subgroup and economist workshops, including the first
23 joint workshop between the ICN, OECD, and CRS in
24 Seoul, Korea last year. We strategically advanced the
25 economic subgroup to promote a normative approach to

1 economic analysis for determining anticompetitive
2 harm, the foundation for competition analytics. The
3 Bureau also participates regularly at the OECD and the
4 ICPEN processes.

5 And the third area of importance in terms of
6 convergence is international trade agreements. Trade
7 liberalization and competition law share an objective
8 of promoting efficient allocation of resources, create
9 strong incentives for innovation and productivity.
10 The Bureau advocates for competition considerations
11 and agreements to ensure that the benefits from trade
12 liberalization are not offset by anticompetitive
13 business conduct.

14 A good example of this tool in action is the
15 recent USMCA, which has not been ratified but agreed
16 upon, for the procedural fairness article on this
17 provision dealing with competition policy. It
18 requires each of the parties to enforce their
19 respective competition laws through transparent laws,
20 procedural rules by conducting investigations within
21 reasonable time frames and by providing opportunities
22 for legal representation. In other words, similar
23 rules can be established through trade agreements.
24 And I think it is an important consideration as we go
25 forward.

1 So we've made significant progress, you
2 know, through soft convergence. However, the dual
3 drivers of globalization and the new digital economy
4 in conjunction with populism have increased tensions,
5 in my view, among competition agency and the risk of
6 divergent approaches to competition law. So the time,
7 in my view, is ripe for considering new approaches.
8 And I might get to that later because my time is up.

9 MR. STEVENSON: Thank you very much. I
10 should point out that John has also written an article
11 that talks about some of these ways forward, which I
12 think is really worth a look.

13 We turn next to Justin Macmullan from
14 Consumers International to offer some perspectives
15 from that part of the world. Thank you.

16 MR. MACMULLAN: Thank you. And thank you to
17 the FTC for the invitation as well. Before I start, I
18 should just explain who Consumers International are
19 for those of you who don't know us. We're the
20 membership organization for consumer groups around the
21 world, and we have more than 200 members in over 100
22 countries. We represent them in international
23 decision-making, policymaking forums, and also
24 increasingly with companies that are operating in
25 global markets.

1 Throughout our history, we've supported the
2 development of international soft law through
3 organizations such as the United Nations, the OECD,
4 the G20, and other international bodies. At it's
5 best, we believe soft law combines the expertise of
6 stakeholders from around the world to define agreed
7 principles and best practices. And it's a valuable
8 reference point for those within government, business,
9 and civil society who are advocating for improvements
10 to consumer protection and the establishment of common
11 approaches.

12 Over time, and we've heard this from other
13 panelists, it does have a significant impact on policy
14 by influencing global ideas and conversations, but
15 also in a more formal sense by providing a framework
16 for national legislation and regulation. And in
17 today's world where markets are increasing connected
18 across borders and many countries face the same
19 challenges, this is particularly important.

20 However, it should be said that
21 demonstrating this impact is difficult. And although
22 it might be a challenge, as far as we know, relatively
23 little is done to actually monitor how soft law
24 contributes to positive change. This could be a
25 useful step if it's possible to monitor it, and it

1 would help us understand when soft law is most
2 effective, and it could inform future approaches.

3 So, whilst we recognize the benefits of soft
4 law, we also support efforts to identify new ways to
5 increase impact. And I'd like to briefly highlight
6 three areas. The first is the need to respond to the
7 exponential pace of change that international -- so
8 that international work remains relevant to the
9 challenges facing consumers.

10 The development of international soft law
11 needs to stay ahead of the curve in order to remain
12 relevant, helping authorities and other actors to
13 tackle new and emerging issues so that consumers do
14 not have to deal with the risks themselves. In
15 today's context, this means addressing issues such as
16 the central role of data and the intermediary
17 platforms in markets, the impact of consumer IOT
18 devices and AI-enabled services, the emergence of new
19 and growing markets such as peer-to-peer economy.

20 This is a challenge for international work
21 that has traditionally moved at a slower, more
22 cautious pace, building on tried and tested national
23 approaches. It's worth noting that it took 30 years
24 to agree to the first comprehensive revision of the UN
25 guidelines for consumer protection, and it took 16

1 years to deliver a revision of the OECD guidelines on
2 e-commerce. However, the fact that both these
3 revisions were agreed in 2015 and 2016 respectively
4 and other initiatives such as the OECD work on AI and
5 IOT do demonstrate a change in pace and a willingness
6 to tackle new issues.

7 Ensuring relevance also requires impact and
8 an ability to translate high-level international
9 principles for national systems and real-world
10 markets. There are many resource that exist to help
11 with implementation, and a simple point is that many
12 of them could be better known and more widely used.
13 But in addition, programs and practical resources need
14 to be developed with the stakeholders that will use
15 them in order that they're relevant to their context,
16 particularly where resources are limited and
17 frameworks and institutions are either new or haven't
18 been established.

19 Impact can also be delivered through the
20 marketplace. It's not an alternative to regulation,
21 but by working with companies, it is a way to deliver
22 impact for consumers in markets now whilst regulation
23 is being developed. It can also go beyond the
24 standards required in regulation.

25 Finally, the need to address emerging issues

1 and the need to deliver impact create a strong
2 argument for working more with other actors working
3 with multi-stakeholders. As you would expect me to
4 say, consumers and organizations always have a
5 valuable role to play, but with the right protocols,
6 the private sector also has a valuable role to play.

7 There is also a strong argument for
8 intergovernmental organizations to work more closer
9 together. Consumers International works a lot with
10 international standards bodies. And, also, as has
11 been mentioned, the trade agreements are increasingly
12 important for consumers as well. So my time is up, so
13 I better leave it there.

14 MR. STEVENSON: Thank you, very much.

15 And we turn to our final speaker, Pablo
16 Trevisan, from Argentina's competition authority to
17 give us his perspective, please.

18 MR. TREVISAN: Thanks, Hugh, and thanks,
19 Russ, for the invitation. And obviously thanks to the
20 FTC for this opportunity to explain and let you know
21 what we are doing in Argentina specifically. The
22 usual disclaimer, as a caveat, the opinions are mine
23 and only mine and not necessarily those of the
24 Commission where I'm a Commissioner.

25 (Laughter.)

1 MR. TREVISAN: But, I mean, when we were
2 discussing this over the phone, I thought, well,
3 this is very stimulating and encouraging being
4 discussing -- I mean, discussing all these issues.
5 But let me take you back to the basics in a certain
6 way, at least from my perspective from a country like
7 Argentina who has a lot of virtues but we have also
8 some problems and issues to resolve.

9 One of them might be antitrust public policy
10 or competition policy. Just in a minute, Argentina
11 has had some sort of competition law since 1923. It
12 was not the first country in Latin America to have
13 some sort of competition law. It was maybe the
14 second, but it was definitely one of the first
15 countries in our region to have some sort of
16 competition antitrust policy.

17 We had some significant reforms, mainly in
18 the '80s and in 1999. In the last constitutional
19 reform, antitrust and competition policy got a
20 constitutional status in Argentina. And last year, we
21 got a new competition act. So the question here is
22 why are we still struggling to get competition law a
23 solid public policy in Argentina and why this lack of
24 enforcement.

25 And I think we can spend not only five

1 minutes but maybe years discussing why. And we may
2 find some common issues between some certain Latin
3 American countries why this is happening. But as for
4 Argentina, I would say issues such as due process that
5 were mentioned this morning, very much by the
6 Commissioner Phillips and also by Roger Alford, many
7 of us have been talking about due process.

8 It might be boring for my colleagues.
9 Sometimes we are discussing at the Commission we are
10 sort of an interdisciplinary commission, three
11 economists, two lawyers, so sometimes I discuss on
12 issues of due process that maybe I get some passion on
13 that and the economists look at me, well, what are you
14 talking about.

15 But, anyway, in that sense we definitely
16 need to work on these issues. And in that sense, I
17 think the devil is in the details in the sense of
18 rules of proceeding, again going back to Commissioner
19 Phillips' notes. So we need to get back, and as
20 Philip Marsden said, I won't use your MAGA, M A G A,
21 but MAPPA, make antitrust public policy again in
22 Argentina. That's absolutely necessary to get a
23 coherent policy afterwards.

24 So as Roger Alford said, I mean, there is
25 some unity at the core and definitely some diversity

1 at the margins, but there are some common concepts we
2 might all agree on. And I think also, in that sense,
3 we may have a very solid and clear legislation, but
4 history reminds us, Argentina, that you may have a
5 very nice law, but if the implementation and the
6 enforcement of that law is not good, the policy will
7 not be good.

8 So you don't only need that solid
9 legislation but also a strong enforcement, an
10 independent authority, interaction between
11 authorities, and when I say authorities, not only
12 competition, consumer protection, privacy, and also as
13 well sectoral authorities but also international
14 authorities, and obviously multilateral organizations
15 and the ones we were mentioning. And, also, one other
16 thing that was issued here in the previous panel,
17 transparency of our decisions.

18 So what we have done at the Commission, as
19 Bill Kovacic put it some three years ago when we were
20 sharing a panel at NYU, we have been rebuilding the
21 house while living in it at the same time. When we
22 got into the Commission, honestly, it was a difficult
23 situation but a very encouraging situation, but with
24 this multilateral cooperation, we realized we were not
25 in a silo. And so all that work we've been doing,

1 coming back to the international arena and going back
2 to international -- best of international practices,
3 participating on the OECD, the ICN, the World Bank, et
4 cetera, et cetera, really helped us a lot to get back
5 on track quite in a speedy way.

6 So we have a new competition act, as I said
7 since May last year. And in that process, the
8 competition commission, the CNBC, took a very
9 important role while drafting the bill. Then we
10 discussed that bill at the executive level, and we
11 also got two years of discussion with the legislature
12 and advisors in Congress until we got that law.

13 So we had also increased the quantity of our
14 cases, multiplying by five approximately, the cases we
15 decided every year and also the quality of the cases
16 in my opinion. We have issued also some guidelines
17 and which we got a lot of help from multilateral
18 organizations and also agencies like the FTC, the DOJ,
19 et cetera.

20 So I will stop there because I think my time
21 is off, but that's what I wanted to say.

22 MR. DAMTOFT: Okay, thank you, Pablo and the
23 panelists. So it's no secret to the FTC, we have been
24 proponents to varying degrees of a number of soft law
25 approaches and instruments in order to bring policy

1 together. And to this, I hear two themes running in
2 the background. One is come together; and the other,
3 by the same authors, is he's a real nowhere man. And
4 I wonder if we could sort of go down quickly and
5 expand a little bit more on the pros and cons of, you
6 know, of the soft law approach as to a more hard law
7 approach. And I'll start out with the "come together"
8 man with John.

9 MR. PECMAN: So I'm going to jump into some
10 of the recommendations I have in my paper that I
11 coauthored with Duy Pham in terms of some, I guess,
12 positive aspects of using what I call softer law
13 because some of these recommendations are commitments,
14 but you have an option of jumping in. And some of the
15 recommendations included creating joint investigative
16 teams, JITs, using the EU framework that's currently
17 in place for combating crimes across member states. I
18 think that is one way of promoting convergence through
19 investigative harmony.

20 Second through the use of the multilateral
21 cooperation instruments that had been used by IOSCO,
22 which is the international body for security
23 regulators. And we see that obviously with the MFP
24 spearheaded by the US agencies. That approach, I
25 think, helps speed up the convergence across

1 jurisdictions.

2 The third proposal is a common marker system
3 for leniency programs used by agencies around the
4 world to combat hard-core cartels. Again, working
5 together on investigations harmonizes practices and
6 policies in my view. And, of course, there are a lot
7 of efficiencies as incentives for participants in
8 these programs.

9 A fourth proposal is the extraterritorial
10 application of competition laws that we see takes
11 place currently in Australia and New Zealand where
12 there's mutual recognition of each other's competition
13 laws and to the point where they no longer have
14 antidumping legislation against one another. They use
15 predatory pricing under their competition laws to deal
16 with those types of issues.

17 So, I think there are a lot of benefits from
18 this extraterritorial application. And touching on
19 Tad's point regarding a bilateral partner, I think
20 Canada and the US have many things in common in terms
21 of level of trust between our agencies, the nature of
22 the laws, our legal system, and I think we could
23 benefit from a similar extraterritorial framework as
24 we see currently being used in Australia and New
25 Zealand.

1 And lastly, returning and recognizing that
2 there is -- comity is available, deferral -- deference
3 to other jurisdictions to resolve competition cases.
4 So having said -- given these recommendations as a pro
5 and a positive way of advancing cooperation, I still
6 take issue with Tad suggesting that binding
7 commitments or something a bit stronger beyond soft
8 law is -- might not be feasible. I think it could be.
9 And I think returning to the WTO and using that and
10 maybe creating a permanent secretary there, if not at
11 the ICN, to help compliance with international
12 standards or the development of international
13 standards.

14 I think right now we see, I think, a lot of
15 deviation from consumer welfare principles as
16 mentioned by Commissioner Wilson, public interest
17 considerations, differentials in how abuse of
18 dominance is treated. Even in the consumer protection
19 side, there are deviations now that are emerging. So
20 maybe pushing -- I mean, we've done a lot with the
21 development of competition laws over time through soft
22 convergence. I think the time is now for moving to a
23 stronger approach.

24 MR. DAMTOFT: Well, more harmony than I
25 thought.

1 Tad, what do you think?

2 MR. LIPSKY: Well, John's comments are
3 interesting. I don't have much time, but let me just
4 say that, John, I thought your description of the
5 further advances in soft law cooperation or in
6 different forms of cooperation, that may be something
7 similar to JIT or IOSCO. I think that those kinds of
8 things are possible as an extension of the current
9 multilateral frameworks because the multilateral
10 agencies consist of governments who enforce, and the
11 participants in those entities are all enforcement
12 agency officials.

13 So it's like any other business. You're
14 going to get together and figure out how to advance
15 your common interests, but the kind of change that's
16 needed to further harmonize international antitrust
17 today is very much contrary to the fundamental
18 interests of some of those competition agencies. I
19 can name you a number of competition agencies where I
20 would say your procedures are totally inadequate to
21 assure objective and accurate decision-making, and you
22 need to make a fundamental change. You might want to
23 read, for example, there are some very famous
24 contributions by John Temple Lang, a former DG
25 Competition official and a former European hearing

1 officer, making some of these critiques of the
2 European system.

3 There is another very famous contribution by
4 Ian Forrester, a very distinguished gentlemen at the
5 bar of Scotland, the Queen's Counsel, as I recall, who
6 is now a judge of the general court. I was really
7 hoping that he would be released on March 29th to talk
8 to the ABA about due process, but it doesn't look like
9 that's going to happen. But in any event, I totally
10 support -- I think soft law is probably a misnomer
11 because law has some element of compulsion.

12 But if you're talking about the OECD and
13 you're talking about the ICN, there is no law
14 involved. It is voluntary cooperation. And I'm not
15 saying it's a bad thing, but it's not a binding thing.
16 And because many of the reforms needed in
17 international and antitrust right now, not only as I
18 think you would support, John, purging these
19 polycentric objectives that are -- especially ones
20 that are sounding in trade protection, but also
21 remedying some of these fundamental due process
22 problems.

23 No antitrust agency put into a voluntary
24 organization is going to reform itself no matter how
25 much agreement there is within that organization.

1 It's going to require -- the analogy I like to use,
2 there was a day not so long ago when all international
3 air transportation was cartelized. If you were flying
4 internationally on a passenger aircraft, your fare was
5 set by a price-fixing agreement, lawful as set by
6 international treaty among all the international air
7 carriers.

8 We don't have that anymore except in certain
9 distinct parts of the world. And the reason we don't
10 is that when the United States deregulated and
11 discovered how wonderful competition was in bringing
12 the benefits of improved efficiency of airline
13 operations to consumers, and the United States began
14 to advocate the so-called open skies approach, meaning
15 competitive international aviation, we didn't go to
16 the international civil aviation organization and say,
17 hey, everybody, competition is great, let's do it.

18 They would have been laughed out of that
19 organization because that was the cartel, or IATA, I
20 guess, was technically the cartel. They went to a
21 couple of countries, I believe Belgium and the
22 Netherlands and some southern Mediterranean countries.
23 On a bilateral basis, they worked out these open skies
24 agreements. And they were so successful that now most
25 of our part of the world has open skies treaties.

1 MR. DAMTOFT: Thanks, Tad. That's a great
2 example.

3 MR. LIPSKY: So this is the -- I realize I
4 have gone on beyond my time, but I just need to say
5 that's the model. We need to start with the gold
6 standard and we can only achieve a gold standard
7 agreement with a very, very limited, maybe one
8 negotiating partner and then build out from there.

9 MR. DAMTOFT: Okay.

10 Justin, how does this all sound to you?

11 MR. MACMULLAN: I mean, just in terms of
12 consumer protection, on the face of it, it sounds
13 really appealing to have, you know, high standards of
14 consumer protection consistent around the world
15 required by law. But in the real world, I mean, just
16 looking at what's achieved through soft law, soft law
17 is all -- someone yesterday used the phrase "lowest
18 common denominator." And that's the danger. We
19 already have a little bit of that in relation to soft
20 law. If this was hard law, then I'm sure the bar
21 would be reduced lower.

22 I've got a colleague who takes great delight
23 in counting the number of times "as appropriate" or
24 "if applicable" are used in soft law.

25 (Laughter.)

1 MR. MACMULLAN: But, you know, it's an
2 illustration of the need for flexibility, and that's
3 in soft law, which isn't binding, it's voluntary. So
4 I'm sure if we were talking about hard law, then what
5 we would achieve would be far less than the sort of
6 high standards that we were aiming for.

7 Interestingly, this is quite a current
8 discussion because through the commerce trade
9 negotiations there is a discussion around consumer
10 trust. And there is potential there to call for some
11 form of using the WTO mechanisms to support consumer
12 protections. But certainly at the moment the majority
13 of our members would favor a nonbinding approach that
14 just supports the current regulatory cooperation
15 that's going on rather than creating any sort of
16 binding commitment through the new negotiations.

17 MR. STEVENSON: Actually, maybe we can go
18 next to Dan Solove to offer his perspective on privacy
19 in terms of how this approach sounds and whether that
20 makes sense from that perspective. And while I'm
21 asking, I'll also raise a question that has come from
22 the question cards about whether the extraterritorial
23 approach that has been taken in the GDPR is something
24 that others should be looking at as part of a hard law
25 approach or whether a different approach would be

1 appropriate.

2 MR. SOLOVE: Certainly. Well, the question
3 -- I'll just do that question quickly. I think that,
4 you know, the GDPR as well as other law such as
5 California now are increasingly taking an
6 extraterritorial approach, increasingly applying
7 beyond, you know, to any business that is doing
8 business in that jurisdiction, even if they're not
9 physically located there. And I think that's a
10 feature of the privacy laws to come. I think we're
11 going to see that more and more and more because, you
12 know, basically physical presence doesn't matter as
13 much anymore these days.

14 In terms of soft law, I think a very
15 interesting story in privacy, and that is in the, you
16 know '90s and early 2000s, industry pushed very
17 heavily for self-regulation for privacy online. And
18 they started to do things voluntarily like put out
19 privacy policies and make these promises about how
20 they're going to use data and how they're not going to
21 use data.

22 This approach got a lot of criticism at the
23 time. There really weren't any teeth or any
24 enforcement to it until the FTC stepped in. And the
25 FTC stepped in and started saying that if you made a

1 promise in a privacy policy that you subsequently
2 violated, the FTC would bring an action that's a
3 violation of Section 5, a deceptive trade practice,
4 and the FTC would do an enforcement.

5 This turned what was a rather toothless
6 self-regulatory, you know, somewhat, you know,
7 meaningless set of statements and empty promises into
8 something that started to have teeth, something that
9 now started to develop, in a more meaningful way
10 because the FTC stepped in and hardened it a little
11 bit. It's still soft in that, you know, companies had
12 a lot of leeway in terms of what they voluntarily
13 decided to promise or not. But over time, we saw that
14 the kinds of promises started to evolve, basically
15 taking in common practices. We started to see an
16 evolution there.

17 And, now, today, we have something a lot
18 more sophisticated where what companies promise, they
19 understand that they have to keep those promises or
20 there are consequences. So we've seen a hardening of
21 the law a little bit and a fusion to some extent
22 between a soft approach and a harder approach that I
23 think has done a lot of good. I think it still can be
24 improved, but basically without the hard edge that the
25 FTC brought in, the teeth, I don't think it would have

1 succeeded. I don't think it would have been
2 meaningful. These policies would have been rather
3 empty unless the FTC did what they did. And so I
4 think it took this regime and made it come to life in
5 a way that I think it would not have had the FTC not
6 step in.

7 MR. DAMTOFT: Okay. And let's turn to the
8 last word of this topic with Teresa. I heard the
9 reference to all of the "if applicables," and since
10 I'm working with Teresa on a project now, that was
11 resonating with me a bit.

12 MS. MOREIRA: Yes, yes, very interesting. A
13 lot of things come to mind. Well, first of all, as
14 you can imagine, working for the UN Secretariat, I can
15 only highlight the advantages of soft law instruments.
16 Although nonbinding, I will recognize this, I would
17 like to underline the fact that the revised UN
18 guidelines for consumer protection on one side and the
19 revised OECD recommendation on consumer protection in
20 e-commerce, in which I had the pleasure also of having
21 been involved obviously with the FTC colleagues are
22 far from establishing the lowest common denominator.

23 So soft law can be ambitious. Soft law can
24 really -- well, I would not say just fully grasp the
25 gold standard but can really move towards that

1 direction. And this is how it is so interesting that
2 coming back to some of the previous speaker's
3 comments, for instance, of course, the work of WTO,
4 the working group on trade and competition, on the
5 competition field was mentioned but because of the
6 discussions within WTO, because of the OECD
7 recommendations, because of the UN set on competition
8 and UNCTAD model on competition, we moved, as we heard
9 yesterday, Bill Kovacic mention from a dozen of
10 jurisdictions having competition law to over 130
11 jurisdictions having adopted competition law and
12 policies, and these include several developing
13 countries and countries with economies in transition.

14 So this persuasion is effective. I will
15 agree, it takes more time, not all will adopt it or
16 grasp the challenges and the content and the details
17 at the same time, but I think soft law can play a very
18 important role because it will tend to illustrate, to
19 highlight the experience of the most advanced
20 jurisdictions, so success stories. And everybody
21 wants to follow and to replicate success stories.

22 They also provide, I think, guidance. And,
23 of course, you mentioned, a lot of colleagues have
24 mentioned, of course, the ICN, in which I also had the
25 pleasure of working in the early days, so to speak.

1 And I think providing convergence in a flexible way, I
2 think, is extremely important.

3 Of course I will, again, go back to the UN -
4 - the UNCTAD tools that I mentioned. I think it is
5 very important that this one, since it is not a one-
6 size-fits-all, it's able to really reach out to
7 countries that have different levels of development
8 that face additional challenges but still are eager in
9 a lot of cases to use these two policies to -- well,
10 to promote economic growth, sustainable development,
11 and better consumer welfare.

12 I can also say that I think soft law
13 instruments can really enhance the authority between
14 brackets of the most experienced agencies or
15 countries. And this can translate into significant
16 policy influence. So this is a multiplier, so to
17 speak, in again soft, so smooth, but I think very
18 effective way that should be mentioned.

19 Finally I would just say that I don't think
20 there is any opposition. I understand, well, Tad, if
21 I may say so, passion, passionate arguments for
22 bilateral cooperation, I thought John Pecman's article
23 was really excellent. And I can only support this
24 call for more ambition. But as you can imagine coming
25 from an organization that has 194 members, that is

1 member-driven, where all countries, I would say, we
2 are the world so to speak or we represent the world,
3 but with so many different nuances, with so many
4 different priorities, one has to understand that soft
5 law can, of course, be combined with hard law
6 initiatives, I think bilateral and regional
7 initiatives.

8 And, again, this mention of the regional
9 trade agreements, for instance, or regional economic
10 cooperation frameworks, I think it's extremely
11 valuable because this is also the only way we can in a
12 way mainstream competition and consumer protection
13 policies.

14 MR. STEVENSON: Thank you. And we worked in
15 "We are the World" there, I noticed, as well as "Come
16 Together" in terms of our song titles.

17 (Laughter.)

18 MR. STEVENSON: John Pecman, please.

19 MR. PECMAN: Just if I may, and just a bit
20 of a different perspective. I'm going to be putting
21 on my private sector hat now. It allows me to speak
22 on behalf of my clients, obviously. Businesses that
23 face 133 referees with different variations of rules,
24 it's a very expensive process of regulation, quite
25 frankly. So international standardization, I think,

1 is important from that perspective, increasing
2 transparency and predictability.

3 And in my view, and I understand that people
4 are worried about the lowest common denominator, but I
5 think international standardization, if it's not, you
6 know, too soft, it does pick up the performance of
7 agencies if they have to meet this new international
8 standard, so I just wanted to bring that private
9 sector perspective, how important it is for us to get
10 more efficient at what we're doing. It's extremely
11 costly.

12 MR. STEVENSON: Thank you. Well, we had
13 raised the question with our panelists, which we have
14 gotten into a little bit already, of what are the
15 advantages relatively speaking of investing effort in
16 multinational organizations as opposed to bilateral
17 approaches. Actually, we've already heard something
18 on that. I wonder, though, if people have thoughts on
19 where there are particular opportunities they see to
20 focus on one versus the other. Teresa's comments that
21 she just made suggested there is still scope for work,
22 as appropriate anyway, in the multilateral
23 organizations.

24 But is there some work that is better done
25 there as opposed to in bilateral situations, or in a

1 smaller setting of more like-minded countries, as
2 sometimes the OECD has described -- maybe I'll, in
3 fact, pose the question to Teresa for a brief comment.
4 Is there a sort of reaction as to what works well in
5 one setting versus the other?

6 MS. MOREIRA: Thank you. Well, of course, I
7 think you need -- you tend to need multinational as
8 you had asked frameworks, so to speak, to address
9 global challenges. I think global challenges demand
10 international solutions that should be discussed and
11 crafted in an international setting, whatever that is.
12 So I'm not even talking only, of course, of UNCTAD, I
13 would say.

14 Now, this is not incompatible with this idea
15 that I fully support that like-minded countries, if
16 you allow me the expression, may, of course, because
17 they share similar systems, they have similar
18 standards, they have a close trade and economic
19 partnership, are better placed to be more ambitious,
20 to go forward. And the examples of the US and Canada,
21 I think, or Australia and New Zealand, for instance,
22 which are often quoted, namely by John's paper, of
23 course are very good.

24 In any case, this bilateral, more ambitious
25 experience set a standard. But in the end, and we

1 talk -- I would go back to the private sector
2 perspective. In the end, aren't we just -- aren't we
3 aiming to assist countries, I would say governments,
4 but also trying to create better opportunities, namely
5 for business? So create opportunities that will lead
6 again to economic growth and sustainable development
7 in countries, creating predictability.

8 So this means to say that you would need to
9 aim for an international multilateral setting.
10 Otherwise you will be very limited. Obviously in the
11 digital era, you tend to look global and not regional
12 or bilateral.

13 MR. STEVENSON: Right. How about that
14 point, Tad. This is a global era, and there you are
15 focusing on airline regulation.

16 MR. LIPSKY: I'm shocked --

17 MR. STEVENSON: I mean, here we are in a
18 digital world. It's a big place. So how can we take
19 that sort of narrow approach that you're advocating?

20 MR. LIPSKY: Well, I'm really shocked that
21 you'd let me have the microphone again, but thank you.
22 Let me try to state it as succinctly as possible. We
23 have had more than 50 years of multilateral
24 cooperation in international antitrust. It has done
25 some incredibly useful things, all of which serve the

1 common united interests of government antitrust
2 enforcement officials who want to enforce government
3 antitrust law as it is written in their jurisdiction.
4 And that's exactly what the ICN and the OECD have been
5 doing.

6 But no jurisdiction wants to be told you may
7 not exercise this prerogative, issuing a complaint,
8 for example, or reaching a judgment before you have
9 presented the evidence to an independent judicial
10 officer or administrative law judge who agrees with
11 you. That is something that no competition agency
12 will ever voluntarily seek to place a limit on its own
13 jurisdiction. And as a matter of fact, most of them,
14 when the opportunity is presented, they say, oh, we
15 can't do that. That's not the way our law works.

16 And that's why there is this need for the
17 imposition of disciplines that are inconsistent with
18 voluntary international cooperation. And that's why I
19 say that the way to approach that is not through a
20 voluntary organization in any sense. It's to approach
21 through, you know, a bilateral or very small number
22 situation like US, Canada or --

23 MR. STEVENSON: Let me ask our colleague
24 from Argentina, for example, how that resonates from
25 his perspective.

1 MR. TREVISAN: Well, going back to Bill
2 Kovacic's phrase, I mean, rebuilding, when we were
3 rebuilding, or we are rebuilding the house while
4 living in it at the same time, we were so-called -- I
5 mean, the President of our country really said, hey,
6 you have to go back to the international arena and see
7 what is happening out there. And in that sense, I
8 feel that we got into the DeLorean and then sort of
9 back to the future sense in the sense we are
10 rebuilding the house, we get into the car, go to the
11 international organizations, listen to what is
12 happening, which are the hot topics, what's next, what
13 are the general consensus, et cetera, et cetera. And
14 that really helps us a lot because we are not -- we're
15 not in the silo in the sense of when we were trying to
16 rebuild the house.

17 So in that sense, I think multilateral
18 organizations such as the OECD, the ICN, UNCTAD, all
19 those organizations, like we've been going to these
20 panels or programs, and it's been very rich for us in
21 the sense of learning and also getting our own
22 experience.

23 But, also, I need to stress that bilateral
24 cooperation is also very, very important for us
25 because as Teresa said, we do have similar cultural

1 ties, similar situations, similar problems. Needless
2 to say in specific cases, we have the same cases and
3 it happens with all the general -- in general with the
4 agencies. We do sign the NDAs. We exchange
5 personnel, senior people from our teams going to the
6 COFECE, to the FNE, to the CADE. We have received a
7 lot of visits from the FTC. And so I think -- I mean,
8 I am not in a situation to say what is best. But I
9 think in our case it's definitely both are really
10 helping us to reshape and rebuild the competition
11 house.

12 MR. DAMTOFT: Well, this actually leads to
13 another -- our last question we wanted to talk about
14 here. Also inspired by the Beatles, in this case,
15 Help.

16 (Laughter.)

17 MR. DAMTOFT: Which is so the FTC has put a
18 fair amount of resources over the last 20 years into
19 technical assistance, to helping other agencies
20 develop. And so the question is, you know, is this a
21 valuable thing for us to do? Is it a little too
22 preachy, or is this something that really makes a
23 difference? And I'll start with Pablo, and then we'll
24 get a couple of other perspectives and give other
25 people a chance to clean up on the last topic as well.

1 MR. TREVISAN: Thanks, Russ. Definitely I
2 think it's really helpful for an authority like ours
3 in the sense, as I said, at the beginning, when we got
4 into the office in the beginning of 2016, there was a
5 lot to be done. And I'm not saying this because I'm
6 here at the FTC, but the first who came to Argentina
7 down there to the Commission was the FTC team. And I
8 recall that we had trainings and programs and
9 workshops in 2016, '17, '18.

10 As we speak, right now, we're having other
11 trainings with the OECD, but, I mean, the FTC's
12 assistance, technical assistance has been very, very
13 useful for us. I remember we -- I mean, not only
14 making good friends like Russ, Randy, Elise, Leon, I
15 mean, all the people at the FTC, but we've been
16 learning a lot on multisided markets, how to approach
17 certain mergers, unilateral conduct. So in that
18 sense, we went through together with the FTC to very
19 specific phases of our work on a daily basis. So I
20 think definitely, yes, this is good.

21 MR. DAMTOFT: And, Teresa, you work with a
22 lot of newer authorities, developing countries on both
23 the competition and consumer side. What's your view
24 of the value of technical assistance?

25 MS. MOREIRA: Well, technical assistance is

1 actually -- well, we call it technical cooperation, so
2 encompassing technical assistance, advisory services
3 and obviously capacity building, it is one of our key
4 areas of work in both policies. I think it is
5 extremely important because we, through these
6 activities, are really able to promote sound policies.
7 This is based on a multi-stakeholder approach, meaning
8 that, of course, we strengthen, we advise on adopting
9 and revising laws and on the strengthening of
10 capacities and setting up of institutions to actually
11 implement them.

12 But I think it is very important to
13 underline the advocacy and awareness-raising
14 activities to other key stakeholders like the
15 judiciary. We heard in the previous panel like how
16 some judges -- administrative court judges typically
17 may not be familiar with economics to actually
18 understand competition cases. That is a very, very
19 important activity for us in a number of developing
20 countries.

21 But I would also talk about private sectors,
22 especially SMEs or small business associations and
23 civil society organizations, not just the consumer
24 organizations that are affiliated with Consumers
25 International, of course, but other kind of civil

1 society organizations in order to what? In order to
2 really foster understanding and generate greater
3 acceptance to the benefit of these policies because
4 Tad, for instance mentioned a lot enforcement.

5 I think the policies and what I call
6 mainstreaming competition and consumer policies is
7 really the ultimate challenge. And for that I would
8 say international organizations, formal organizations
9 or even bilateral agreements are better placed because
10 they really imply commitments from the government to
11 then reach out and get and gather information, but
12 also disseminate all of this.

13 I would like also to say that through
14 technical assistance one can really promote
15 convergence, harmonization, and build trust as we
16 heard from Pablo. And I would end just saying that
17 the FTC has played a major role in both policies,
18 fields in our technical assistance projects. We are
19 extremely grateful for this. They have shared
20 intelligence, experiences, interactive tools,
21 presented other initiatives, namely in Latin America
22 and the African continent. And I can only expect you
23 to remain as actively involved in this activity,
24 especially in cooperation with UNCTAD. And I'm
25 looking at Randy for this. Thanks.

1 MR. DAMTOFT: John, I know you were starting
2 to give a fair amount of thought to this when you were
3 a Commissioner. What's your perspective?

4 MR. PECMAN: Well, I think from an
5 individual agency's perspective obviously requires
6 funding to do it. And, unfortunately, the Bureau did
7 not have access to a USAID or, you know, a larger
8 government initiative for technical assistance, but we
9 did, where we could, contribute multilaterally to the
10 various fora, as well as through MOUs where we target,
11 whether it be India or an ASEAN country and usually
12 through staff exchanges and sent people for a period
13 of time and have them come visit to Canada, again, for
14 deepening ties and also to help shape policy and
15 procedure in the other jurisdiction. It's invaluable.

16 If I could render one comment, and I know
17 there are significant and bilateral resources being
18 thrown at this area by the US, Australia, and ASEAN
19 for example, Germany as well is very active in terms
20 of technical assistance. I think where you may see a
21 lot of overlap and redundancy in some of the
22 technicals, I think there could be a bit more
23 harmonization bilaterally or working and making sure
24 there isn't, again, redundancy with the multilateral
25 fora like UNCTAD and others, OECD, that are providing

1 technical assistance. I think everyone's just out
2 there doing it, and I don't know if there's
3 coordination. And so to the extent that that can be
4 done would be something I think that would improve
5 this important aspect of convergence.

6 MR. STEVENSON: We have just a couple of
7 minutes left. Maybe, Dan Solove, I might ask you to
8 comment from a privacy perspective on this issue, both
9 of the technical assistance and also our earlier
10 discussion about looking at when to engage in certain
11 multilateral versus narrower bilateral engagements
12 from the point of view of privacy issues.

13 MR. SOLOVE: Certainly. Well, I would say
14 that certainly technical assistance is a great thing.
15 Privacy and security involve technology and some very
16 difficult challenges, especially designing technology,
17 and so to the extent the FTC can be involved in that,
18 I think that's great, as well as coordinating among
19 all the different regulators out there worldwide.

20 It really is a global landscape with privacy
21 these days, with every year seeing more and more
22 countries enact privacy laws. So I think that a
23 multinational approach to this is really essential. I
24 think that there needs to be an increasingly global
25 standard that a company can build its practices around

1 because it's not easy to comply with all the different
2 regulations, especially because a lot of it is about
3 how you build a program to -- that implicates
4 everything from how you define what personal
5 information even is.

6 And if you have 50 different definitions, it
7 gets very consuming for figuring out how to inform
8 employees, well, when is the data covered and not and
9 by what and where. So, I think the coordinating
10 multinationally is essential. And I think that really
11 depends on, you know, the US taking a real leadership
12 role in this. And I think that -- you know, I hope
13 that we will take that greater role. I think Europe
14 has really taken a huge step forward with the GDPR.
15 And other countries are coming in and they're modeling
16 their laws on the GDPR. So that is becoming the
17 global standard.

18 I think we have a lot of important things to
19 say and an important voice, but I think we need to
20 step forward and say that and really develop some of
21 the strengths of certain things in the US approach
22 because I like the GDPR a lot, but it's not perfect.
23 There are certain things in the approach here in the
24 United States that are actually, I think, more
25 workable and are good and should be promoted. But for

1 that, I think we need to plausibly step forward and
2 present something on our behalf about how our
3 approach, you know, addresses a lot of the issues that
4 are key to privacy and security protection worldwide.
5 So I hope that we'll take that role.

6 MR. STEVENSON: Thank you very much for
7 that. I have to say, as the author of many such
8 phrases, I found all of this both applicable and
9 appropriate. And I really appreciate -- although
10 never in the same sentence.

11 (Laughter.)

12 MR. STEVENSON: But I hope you all join me
13 in thanking all of our panelists for an excellent job
14 today. Thank you.

15 (Applause.)

16 MR. STEVENSON: And we now break for lunch.

17 (Lunch recess.)

18

19

20

21

22

23

24

25

1 EFFECTIVE INTERNATIONAL ENGAGEMENT:

2 FOREIGN AGENCY PERSPECTIVES

3 MS. KRAUS: Well, welcome back from lunch
4 for those of you here onsite. And good afternoon and
5 welcome back to those of you on the web. We are back
6 to our hearings on the FTC's role in the changing
7 world.

8 My name is Elizabeth Kraus. I am the Deputy
9 Director for International Antitrust here at the FTC,
10 and I'm delighted to be comoderating this session on
11 Effective International Engagement with Deon Woods
12 Bell, Counsel for International Consumer Protection
13 and Data Privacy here at the FTC.

14 This session should really prove
15 particularly interesting as it's going to allow us to
16 hear directly from our foreign agency counterparts on
17 what they find makes for effective international
18 engagement. We're eager to learn from our sister
19 agencies about their successful strategies and tools
20 for engagement with foreign counterparts and, of
21 course, we're also interested in hearing their
22 perspective on what has not worked as well and why
23 with a view to seeking how we might further develop
24 the FTC's international tools and programs to ensure
25 that they are fit for purpose for the 21st Century.

1 We're really honored to have this incredible
2 slate of seasoned enforcers from truly diverse
3 backgrounds to provide their insights on these issues.
4 Their impressive biographies are listed on the website
5 as well as outside in print copy. So I'm really just
6 going to give a brief introduction starting with those
7 closest to us and moving down the table.

8 First, we have Paula Farani de Azevedo
9 Silveira from CADE, Brazil's agency, and she's a
10 Commissioner there.

11 Next, we go to Tunde Irukera, the Director
12 General from the Consumer Protection Council of
13 Nigeria.

14 Following Tunde is Han Li Toh, the Chief
15 Executive and Commissioner of the Competition and
16 Consumer Commission of Singapore.

17 Following Han Li is Chris Warner, who is the
18 Legal Director of the Competition and Markets
19 Authority, the CMA, from the UK.

20 The tall man after Han Li is Rainer Wessely,
21 who is responsible for EU-US cooperation in
22 competition and justice policies at the Delegation of
23 the European Union to the United States.

24 And last, but truly not least, is Steven
25 Wong, the Privacy Commissioner in the Office of the

1 Privacy Commissioner for Personal Data in Hong Kong.

2 As with our other sessions, for those here
3 in the audience, we will take questions from our
4 audience and have note cards available in the room
5 that will be passed out for your use.

6 With that, I'm going to turn to Deon to kick
7 off our session.

8 MS. WOODS BELL: Thank you, Liz. And thank
9 you to our esteemed panelists.

10 So we're going to start off the first round
11 with asking our colleagues to please share your key
12 strategies and tools that you've used for successful
13 international engagement. We're going to ask you to
14 be brief because we'll come back with other questions.

15 Please, over to you, Paula.

16 MS. SILVEIRA: Thank you, Deon. Thank you,
17 Liz.

18 I think in Brazil our main tools for
19 successful international cooperation are our MOUs that
20 we've signed with over 20 jurisdictions and our
21 interactions in multilateral and regional fora.
22 Through these tools, we've been able to not only
23 foster relationships, but also cement existing ones
24 and really consolidate best practices and promote
25 legislative change within Brazil. And I think we can

1 talk more about this later on but that's the
2 highlight.

3 MS. WOODS BELL: Thank you very much. Over
4 to you, Tunde.

5 MR. IRUKERA: Well, thank you very much. I
6 am wearing two different hats now, so I'm going to
7 talk a little more on what our experience has been,
8 which is actually an old law that was repealed about
9 two months ago. So that provision there still has an
10 equivalent in the new law. And essentially there is
11 actually statutory mandate to cooperate with other
12 agencies internationally. And so proceeding from
13 that, essentially in fulfilling the mandate you have
14 to work with other agencies. And one of the things
15 we've used a lot is, again, like she said, the
16 memoranda of understanding. And we have one with the
17 FTC and another agency in Nigeria.

18 Then what we've also found is the right
19 fora, there's an African dialogue that is also
20 supported by the -- promoted and actually supported by
21 the FTC. And what that has helped us to do is to
22 realize that the problems are pretty similar across
23 the different countries and the region and so just
24 getting that sense of understanding and getting to
25 share notes and then building relationships that you

1 can leverage on to gather information sometimes.
2 Also, to at least just discuss experience and provide
3 context has been very helpful. Thank you.

4 MS. WOODS BELL: Thank you very much.

5 MR. HAN LI: Han Li, thank you. Thank you,
6 Deon.

7 I fully agree with what Paula and Tunde have
8 said about MOUs and the interactions and international
9 fora. I just want to add one additional piece which
10 has been very useful for us, which is the regional
11 free trade agreements. In particular, I see Rod Sims
12 in the audience. So I want to highlight the ASEAN,
13 the Australian-New Zealand free trade agreement.

14 Under that free trade agreement with the ten
15 member states of ASEAN, including Singapore, we have
16 the CLIP Program, which is the Competition Law
17 Implementation Program, and to which Australia and New
18 Zealand have provided very significant support and
19 assistance to the member states of ASEAN, including
20 secondments, expert placements, capacity building,
21 e-learning. So I think that's been very good for us.

22 MS. WOODS BELL: Thank you very much. I
23 have to congratulate you all. You're moving quite
24 swiftly. You did have more time. So if anybody wants
25 to revel in the comments and then circle back to our

1 previous colleagues, please do feel free.

2 Chris?

3 MR. WARNER: Thank you very much. First of
4 all, thank you for inviting the Competition and
5 Markets Authority here today. And I should add the
6 caveat, as other speakers have, the views I express
7 are my own and not necessarily the views of the CMA,
8 although, like others, I hope they're not going to be
9 too misaligned.

10 I wanted to take a slightly different slant
11 if I may. I mean, the CMA is very active in the
12 international arena. We participate in the
13 international European consumer enforcement networks
14 and in international European policy networks and we
15 do a whole range of bilateral works and technical
16 assistance and secondments and things that we can talk
17 about in a bit more detail as we go through.

18 But I wanted to reflect on some of the
19 strategies we found or some of the approaches we found
20 that have been quite useful in terms of making the
21 most out of those fora. I wanted to highlight just
22 two or three of those. The first thing I think I'd
23 like to highlight is I've called it focusing on
24 outcomes. Two or three years ago, the CMA was the
25 president of ICPEN. I think one of the things we

1 wanted to make a concerted effort to do when we took
2 over the presidency was to focus on outcomes. And I
3 suppose how I describe it is that there was an awful
4 lot of very useful discussions happening and we wanted
5 to shift debate slightly in terms of moving it from
6 kind of what have we done to what can we do together
7 given what we have done.

8 I think that -- people in the room will be
9 able to correct me, but I think that has identified --
10 there has been a shift in how to identify some
11 opportunities to work together and it feels it's
12 brought agencies together. A good example was some
13 work on online reviews that we did, which I can touch
14 upon later, where we took the project that we had done
15 in the UK and we helped the ICPEN members roll out
16 some guidelines for a number of parts of the industry
17 which can be rolled out across the globe.

18 The second thought is that we're focusing on
19 the harm. So I think given there's a range of
20 divergences across the world, it's been very helpful
21 to focus on the harm rather than legal infringement
22 and that's enabled us to focus on areas of common
23 ground rather than areas of differences. So I think
24 that's something worth doing.

25 And the third area I think which has been

1 very helpful is looking inwards as well as looking
2 outwards. And by that, I mean thinking about the
3 wealth of what we do at the CMA and making sure that
4 we're joined together in thinking about how they
5 supplement each other and can be used on the
6 international arena, but also thinking about the UK as
7 a whole and making sure we're joined up there.

8 Just one example is last year we had a
9 conference involving all the organizations involved in
10 competition and consumer policy across the UK to see
11 what we could do better on the international frame
12 arena and there were 20 organizations in the UK alone
13 who have got international touch points in those
14 arenas. And I think it was really striking to
15 everyone who participated that there were so many
16 touch points and just the potential benefits of
17 working together more collaboratively.

18 So I shall stop there.

19 MS. WOODS BELL: Thank you very much.

20 Rainer, what can you add to the conversation
21 here?

22 MR. WESSELY: Well, first of all, thanks for
23 having me.

24 International corporation on all three
25 fields, whether it be data consumer protection, data

1 protection, but also competition enforcement, is an
2 essential part of our international and day-to-day
3 enforcement strategy. So we would not be successful
4 enforcers would we not have our international outreach
5 and cooperation.

6 The main objectives that we see in this kind
7 of cooperation is that we want to be, first of all,
8 able to quickly address violations together with our
9 international partners, also in order to increase
10 deterrence. We want to be able to minimize the risk
11 of conflicting findings, for example, when it comes to
12 merger assessments and when it comes to remedies. And
13 we want to make emerging authorities efficient and
14 effective enforcers in their own rights.

15 I have to admit that we, in the EU, probably
16 are very privileged in that regard because
17 international cooperation is built in our system. We
18 work on daily basis with the consumer protection
19 authorities, with the data protection authorities, and
20 with the competition enforcers of 28 member states and
21 we work in 24 different languages so that provides us
22 a very good training ground also for the broader
23 international context.

24 I will try to focus my remarks today more on
25 the work that we do in competition enforcement because

1 that is the only field where the Commission actually
2 has direct and exclusive competence. We only
3 coordinate the work of our consumer protection
4 authorities and of our data protection authorities.

5 When it comes to competition enforcement,
6 there's a significant number of cases where we work
7 together with international partners. If you look at
8 the period between 2016 and 2017, we coordinated with
9 other agencies in more or less 55 percent of our
10 cartel, of our antitrust, and of our complex merger
11 investigations.

12 Looking at the three different types and
13 levels of cooperation, I think, most importantly, we
14 have our European regional cooperation, that's the
15 European Competition Network, the ECN, which is
16 probably as close as it can get in terms of
17 international cooperation because we enforce the same
18 rules and we have to make sure that we have the same
19 interpretation of our rules.

20 We have the second level, which is the ICN
21 and OECD. The ICN, as such, is a success story in
22 itself from 14 authorities that created it in 2001.
23 And, now, I think we are at more than 100 members.

24 And the third level is bilateral cooperation
25 where we have technical competition cooperation with a

1 number of agencies, our first generation agreements.
2 The first one we had was with the US, with the FTC and
3 DOJ, with Canada, Japan and Korea. We now also have
4 started to have second generation agreements that
5 allow us actually to really exchange evidence on
6 specific cases. We have that with Switzerland and
7 we're quite advanced in our negotiations with Canada
8 and with Japan.

9 We have a lot -- and Paula already referred
10 to that we have a lot of MOUs -- we call them nowadays
11 administrative agreements -- with all the BRICs
12 countries. So we have them with Brazil, Russia,
13 India, South Africa, with China, as well as with
14 Mexico. We have technical programs with some states.
15 We have technical cooperation with Asia. And we have
16 more references to competition also in our trade
17 agreement. So we have competition chapters in 14
18 trade agreements around the world.

19 To sum up, we see that we have a very, very
20 close network in our international cooperation, which
21 I think has allowed us over the years to speak the
22 same language amongst enforcers. That does not mean
23 that we always say the same things.

24 MS. WOODS BELL: Excellent.

25 Commissioner Wong, please.

1 MR. WONG: Thank you. Given the fact that
2 my office is an entirely independent statutory
3 authority, regulatory authority, independent of the
4 government, and also the fact that Hong Kong has a
5 very different system, including a different legal
6 system from the Mainland of China, we do have the
7 benefits of having unique advantages or attributes in
8 relation to data protection.

9 I must emphasize that my office is
10 responsible for personal data only. Privacy is
11 regarded as a fundamental human right in Hong Kong.
12 But I don't have any authority over competition or
13 consumer protection. There are different bodies
14 regulating these issues.

15 We pursue effective international engagement
16 largely through, one, what we call the established
17 channels. The other one is the ad hoc channels. The
18 established channels originate from the three
19 international agreements or arrangements Hong Kong had
20 entered into, and that is the APEC Cross-Border
21 Privacy Enforcement Arrangement. The second one is
22 the Global Privacy Enforcement Network Action Plan and
23 the third one being the International Conference for
24 Data Protection and Privacy Commissioners Global
25 Cross-Border Enforcement Cooperation Arrangement, a

1 very long name. The acronym is ICDPPCA.

2 (Laughter.)

3 MR. WONG: Still very long.

4 These established mechanisms provide the
5 means and the tools for cooperation, in particular in
6 relation to the sharing of information and also, to a
7 certain extent, the sharing of evidence as well. But
8 we do enter into ad hoc arrangements with individual
9 DPAs, for example, Australia, Holland, and sometimes,
10 on previous occasions, we've entered into ad hoc
11 arrangements with the United kingdom and the FTC on
12 specific cases. Now, bear in mind that Hong Kong is
13 also an international trading center, international
14 financial center, logistics center like Singapore.
15 You know, we are at the top of everything in the
16 world. And that's why.

17 Somehow people in Hong Kong are involved in
18 the data breach incidents, for example, the
19 multinational data breach incidents. We have an
20 interest in those cases. So we manage to get into
21 some informal ad hoc arrangements with the states or
22 jurisdictions concerned. Certainly, this is something
23 that we can pursue further in order to refine the
24 framework or the network of international cooperation.

25 MS. WOODS BELL: Thank you. Fascinating.

1 So from that discussion, we got a panoply of
2 different opportunities to pursue engagement with
3 foreign counterparts, administrative agreements and
4 MOUs, multilateral frameworks looking at technical
5 cooperation as a tool, new laws that come into force
6 and to provide new powers; focusing on outcome-driven
7 determinants and then looking at collective harm
8 seeing where we might find common ground; coordinating
9 with other sister agencies and then taking a look to
10 minimize the risk and avoid divergent outcomes.

11 We've taken a look at those, and I don't
12 know if you, Paula, or you, Tunde especially because
13 we started over here and you were quite swift, do you
14 want to respond to anything any of your colleagues
15 have said?

16 MS. SILVEIRA: Just picking up on some of
17 the things that they said, I think one of the issues
18 that was pointed out by Chris at the CMA is the issue
19 of what can we do together. So I think that's
20 something that we've been particularly interested in
21 at the regional level. As you know, Brazil has had an
22 interesting development in the past few years and
23 we've reached a certain level of maturity due to
24 international cooperation that we received from our
25 counterparts, from more developed agencies. So we

1 feel that, right now, it's our duty to also help other
2 agencies in the region, especially those that are
3 either reviewing their antitrust laws or with newly-
4 developed agencies to also reach this level of
5 maturity.

6 So what can we do together? We've been
7 helping a lot of agencies through international
8 cooperation to revise their soft law, revise their
9 legislation. We've been doing a lot of capacity
10 building and I think that's something that's extremely
11 important in international cooperation. That's
12 something that we have to continue to build on.

13 MS. WOODS BELL: Thank you. Thank you very
14 much.

15 Tunde?

16 MR. IRUKERA: Yeah, thank you. One
17 interesting thing that I've learned from these is
18 there are quite a number of regional cooperations that
19 already exist. And what a coincidence. In Africa, at
20 least in West Africa, and even the entire continent,
21 we're on the cusp of learning that. Only recently,
22 the ECOWAS, which is the Economic Community of West
23 African States, established its own competition
24 authority in Banjul, Gambia. That has become
25 operational only in a matter of months.

1 The whole continent is also negotiating its
2 own continental free trade agreement, which has been
3 signed by many countries. Nigeria hasn't and we're
4 still working on that. As a matter of fact, the
5 second round of the negotiations, which includes the
6 competition law aspect, is just about starting. So
7 it's interesting to hear what these regional
8 experiences are so that at least we can watch out for
9 that as we go.

10 MS. WOODS BELL: All right. I think we have
11 opportunity for one more colleague to respond. Han
12 Li, you also moved very swiftly. Do you have any
13 thoughts? We'll go deeper later, but just your
14 initial impressions, please.

15 MR. HAN LI: Actually, I thought it was
16 interesting for us because we've just started the
17 consumer protection not even one year, and I was
18 sharing with Tunde. They've been doing for 20 years,
19 but they've just started doing competition. So it's
20 quite nice we can have a very good mutual exchange on
21 that.

22 MS. WOODS BELL: Conveniently, we seated you
23 side by side, right?

24 (Laughter.)

25 MR. HAN LI: Yeah. But I think, for us,

1 because we've been doing competition for a number of
2 years and a lot of dual agencies in the world, we were
3 able to leverage on our contact base to learn the
4 consumer side much quicker, including of the FTC. We
5 had a senior economist, Janis Pappalardo, she came
6 down last year and did a session with all our staff
7 and it was great. We have done work with the
8 Australians, as well as the UK CMA. So again, because
9 we already had the contact base in competition, it was
10 very easy to leverage on to consumer.

11 MS. KRAUS: That kind of picks up on the
12 human glue issue that was raised yesterday and how
13 developing the relationships actually fosters further
14 relations and convergence and cooperation. But I'll
15 flip it back to Deon.

16 MS. WOODS BELL: No, that's completely fine.
17 I think we're moving in the right direction. So with
18 all those comments on the record, what we've done is
19 now we've picked up three buckets and we're going to
20 move over to the three buckets. And it's actually
21 great that Han Li -- that you started to mention that
22 because we're going to look at domestic priorities and
23 how they might motivate international engagement.
24 We're going to look at some differences and
25 similarities and explore a little bit more, if you

1 have a competition regime or if you have consumer
2 regime, and what that's like. And then, finally,
3 we're going to look at regional multilateral fora and
4 maybe dip our toes into bilateral issues if we have
5 enough time.

6 Liz?

7 MS. KRAUS: Terrific. Well, maybe I'll pick
8 up on the first theme that Deon mentioned and that's
9 the one of domestic priorities, motivating
10 international engagement. And, Chris, I've heard you
11 speak on this in the past, so maybe I'll pass the mic
12 to you to start off and then we'll get a little
13 dialogue going.

14 MR. WARNER: So a lot of the CMA's
15 international work is founded in its domestic
16 priorities. There's a lot of work we do around unfair
17 terms and the digital economy. So it got me thinking,
18 is that the right approach? And I've come to the
19 conclusion it is, obviously. It would be unfortunate
20 for me to say no.

21 (Laughter.)

22 MR. WARNER: It's quite easy, I think, at
23 first blush to kind of say that's a quite selfish
24 approach to international engagement, I suppose my
25 reflex on that is I think that it makes an awful lot

1 of sense. At one level, we've got limited resources,
2 so we need to focus somewhere. But, also, I think
3 looking at our domestic priorities, we wouldn't be
4 doing our job properly there if we're not thinking
5 about the international dimensions. It's not a great
6 outcome for the consumers we're seeking to protect if
7 we just move the problem along, for example, or don't
8 have sister agencies.

9 But I also think it makes an awful lot of
10 sense in terms of it's the area we spend most of our
11 time working on as an agency, and so it's where we've
12 got most to offer and the most to share where we can
13 provide in-depth knowledge and experience, which I
14 think is really good news for others. And a practical
15 level, I think in terms of getting sort of
16 organizational buy-in and support for kind of
17 international cooperation, it's where you can get most
18 bang for your buck as it were because the additional
19 workload is limited over and above your domestic
20 project work, but actually you can deliver quite a lot
21 of value and support more broadly.

22 MS. KRAUS: Thank you. I was wondering if
23 Paula might have anything to add to that.

24 MS. SILVEIRA: Yes, I tend to agree with
25 Chris. I think our domestic priorities truly do

1 influence our international engagement. I think
2 Brazil is very good example of that and our recent
3 OECD accession is an example, I mean, a crystal clear
4 example of how international cooperation be used to
5 further domestic engagement.

6 So what happened in Brazil was we, up until
7 2011, we had another competition law in which we did
8 not have a premerger notification regime. So we
9 needed several changes to our legislation; we needed
10 congressional approval; we needed support internally;
11 and we were having a very difficult time finding that
12 support. So at the time, the people at CADE and the
13 CADE president and the commissioners, what they did
14 was they decided to look outside of Brazil for best
15 practices, began benchmarking and decided to request a
16 peer review at the OECD.

17 The first peer review, very helpfully,
18 pointed out absolutely everything that was wrong with
19 the Brazilian competition system. And while some
20 outsider might look at that and say, well, how
21 humiliating for CADE, we actually found it absolutely
22 wonderful because that was a way that we were able to
23 go to the legislature and say, we need help. We need
24 to actually promote change in our legislation; we need
25 to enact a new law. And this truly helped us to

1 change our law.

2 And we've done this on several occasions
3 either -- this was the most -- the clearest example of
4 the way that we promoted a huge legislative change.
5 But we've also done this on a smaller level. For
6 several years, we've had difficulties in dealing with
7 the Brazilian Central Bank on mergers involving the
8 financial sector. The OECD has had several papers
9 published by several different countries on how these
10 countries have dealt with financial institution
11 mergers and how their competition agencies have been
12 interacting with their central banks.

13 So based on these reports that are issued by
14 our sister agencies and our counterparts -- and we've
15 been speaking to several of them -- we were able to
16 negotiate an MOU with our central bank, which was very
17 successful and which basically remedied basically all
18 of our problems. And, yesterday, we were able to
19 finally accept the invitation to become a permanent
20 member of -- an associate member of the Competition
21 Commission at the OECD. And one of the main obstacles
22 that we had precisely the review of financial
23 institution mergers.

24 Another way in which domestic priorities
25 motivate our international engagement is through the

1 cases that we're currently handling. So for example,
2 there are several new issues that are coming up right
3 now in Brazilian antitrust law. We have a globalized
4 era, we have a digital economy, and a lot of the
5 problems that we're seeing in Brazil, a lot of the new
6 conducts that weren't there before, maybe five years
7 ago, ten years ago, are also being seen around the
8 world.

9 And it's very helpful to be able to pick up
10 the phone and call our counterparts and say, you know,
11 what's the theory of harm? Does this make sense to
12 you? Does this conduct seem like it will affect the
13 consumer welfare in your country? And this kind of
14 exchange is very important for a competition agency
15 such as CADE because, in a lot of cases, this is the
16 first time that we're looking at a certain conduct or
17 a certain market, and having the experience of other
18 agencies that have already looked at these markets,
19 minimizes what I can only call growing pains. So it
20 minimizes errors. Mistakes made in the competition
21 area is ultimately very costly to the economy,
22 especially an economy such as Brazil which, at the
23 moment, is not growing as rapidly as it could be.

24 So minimizing errors, not impeding
25 innovation is something that we're very attentive to.

1 This is something that has been very helpful through
2 international cooperation.

3 MS. KRAUS: Those were absolutely terrific,
4 kind of spot-on examples. Because we want to move on
5 with a number of themes, I just note that they also
6 bring out a number of the issues that were raised
7 yesterday in relation to cooperation and also pick up
8 beautifully on the prior panel regarding the impact of
9 soft law and developing hard law. So thank you.

10 But I'm going to pass over to Deon right now
11 for our next theme.

12 MS. WOODS BELL: Thank you. We foreshadowed
13 this theme before. We want to go over to Tunde and to
14 Han Li and we want to talk about differences in having
15 a consumer protection agency that acquires competition
16 authority and having a competition authority that then
17 acquires a consumer protection agency. But, more
18 globally, what we want to talk about is how you use
19 your tools in one area and how they might influence or
20 inform another area.

21 And we're going to ask Commissioner Wong to
22 follow up with some observations after you talk. And
23 I want to give a nod to Commissioner Trevisan, who
24 mentioned building a house while you live in it. I
25 think both of you, in your instances in Nigeria and in

1 Singapore, you're going to have to build your houses
2 while you live in them. How are you going to manage
3 this, gentlemen?

4 MR. IRUKERA: I'll let him go first. Maybe
5 I'll --

6 (Laughter.)

7 MR. HAN LI: So I remember when my ministry
8 told me, hey, you know, you're going to take on
9 consumer protection, and I just want to tell you that,
10 you know, these consumer protection folks are
11 different from the competition people.

12 (Laughter.)

13 MR. HAN LI: So I wasn't sure what they
14 meant by that. But, I mean, I guess the first point
15 is that most of them are not lawyers or economists,
16 right? So that's obvious. So they have a different
17 background. But what we've been really focusing on is
18 the integration. And, actually, the agency from which
19 I learned a lot on integration was the ACCC in
20 Australia. One of the first visits I did was to visit
21 ACCC and Rod and Marcus were very good at hosting and
22 sharing everything which they did to integrate the
23 case team.

24 So I think there is a lot of
25 complementariness. One of the things we started

1 doing is market studies with consumer protection
2 people inside. In fact, the recent one which we
3 just completed on online travel has a very heavy
4 consumer focus on that, things like drip pricing
5 and that kind of stuff and subscription traps.

6 And in terms of the international
7 engagement, I mean, I mentioned Janis? She was really
8 useful. She came down for a week and she did a
9 workshop for us. That was great. She shared about
10 the Volkswagen case and how they got redress for
11 consumers. So I think -- yes, so as part of the
12 integration efforts, the international engagement has
13 really been very helpful and I think -- I mean,
14 certainly we're not all right because we've only been
15 doing this for one year, but I think we've really had
16 a good start.

17 MS. WOODS BELL: Thank you.

18 MR. IRUKERA: Well, thank you. It is proven
19 to everyone that he's had an easier ride than I'm
20 about to have.

21 (Laughter.)

22 MR. IRUKERA: Essentially, the point comes
23 down to they have moved from the more technical and
24 precise area to the more intense and less predictable
25 area. You would think that that would mean a bumpier

1 ride. But, in reality, moving to something quite
2 technical and very precise is relatively bumpier in
3 many respects.

4 The one thing that I think is somewhat
5 helpful is -- even I haven't been at the Consumer
6 Protection Council that long, just under two years and
7 then you get this graveyard shift. But what I think
8 has been helpful is that the way the statute was set
9 up before, it was relatively broad, and so I think
10 there was a particular provision that literally
11 addressed what was considered obnoxious practices in
12 the market, whatever was exploitative of consumers.
13 And so there was no way to broadly interpret that
14 without running into conduct that would be considered
15 anticompetitive.

16 So in some sense, we already have dipped out
17 feet in the mud somewhat. And because the law itself
18 was very long time coming, you had an agency that was
19 somewhat salivating and prepared for it. That's the
20 one thing. But the reality of waking up the next day
21 and looking in the mirror and finding something
22 entirely different has struck us.

23 One thing that we recommended and thought
24 would be in the law was a transition period. It turns
25 out that the law that came out didn't have that

1 transition period. And so we literally had to wake up
2 the next morning and start figuring many things out.

3 Industry is more concerned in the sense that
4 people who have done their businesses in a way that is
5 not necessarily illegal and then, all of a sudden,
6 there are laws that suggest that that's prohibited, so
7 there is lack of capacity, both from the regulator
8 side and many times even from industry side, where
9 there are lawyers or competition economists, so that's
10 an advantage. At least nobody seems to be far ahead
11 of the other person, you know, the real definition of
12 the bliss and ignorance where no one is ahead of the
13 other person.

14 But the relationships we have obviously have
15 become one of our most important assets, both
16 domestically and internationally. We have the
17 Securities and Exchange Commission that was already
18 looking at merger work from a finance standpoint. So
19 all that -- the new law repealed those provisions in
20 their law. So at least, the law may have repealed
21 their provisions, but at least it didn't take away the
22 knowledge. So the knowledge of those folks in the
23 Securities and Exchange Commission is becoming very
24 important.

25 The FTC is another example. The FTC luckily

1 is also an organization that does both things, and so
2 we have relationships within the FTC that can help
3 both ways. And obviously being at the African
4 dialogue with other consumer protection authorities
5 who also do competition work has been very helpful.
6 Then somehow, after I came to the spring meeting last
7 year, I met UNCTAD and ended up speaking in Geneva
8 later in the year and that helped with the
9 relationship.

10 So do I have everything I need? No. But do
11 I know whose doors to knock on? Yeah, I do. So I
12 suppose instead of sleeping with both eyes open, I
13 sleep with one eye closed.

14 MS. WOODS BELL: All right. Excellent.

15 Commissioner Wong, I don't know how many
16 eyes you sleep with open or closed, but if you want to
17 comment on Singapore or Nigeria's comments, we would
18 welcome.

19 MR. WONG: Yes. In Hong Kong, the people of
20 Hong Kong has been enjoying the consumer protection
21 for more than 40 years. It's one of the longest
22 authorities in Hong Kong, you know, protecting the
23 interest of the public. People in Hong Kong don't
24 realize that they have privacy effectively protected
25 by my office until recently. Because of the cross-

1 border incidents and the -- they were woken up by the
2 impact not on only personal data, but on the economy
3 as a whole.

4 The competition authority has not come into
5 place until I think couple of years ago. But the
6 three persons in charge of these authorities put their
7 heads together recently and we tried to work out some
8 sort of cooperation, saving resources and sharing
9 information, and this is agreeable. But we have
10 different portfolios, different legislative
11 frameworks, and different responsibilities. So
12 there's still some way to go before we can reach some
13 sort of an enforcement agreement and so on.

14 But we manage to cooperate with our
15 counterparts, if there are any, in the Mainland of
16 China or in the neighboring emerging economies. In
17 the Mainland of China, they do have a very strong
18 regime protecting consumers' interests. They have a
19 consumer protection authority and they're very
20 effective given number of people affected in the
21 Mainland. So we do envy that, you know. Consumers'
22 interests are protected well in the Mainland of China.

23 Privacy rights, recently, they have been
24 catching up very fast. They know how serious the
25 issue could be. And just a couple of days ago as

1 reported by I think the CNN, I don't know whether it's
2 real news or fake news. But --

3 (Laughter.)

4 MR. WONG: They talk about that China will
5 lose up to 5.5 trillion US dollars in economic growth
6 if they don't brush up their privacy protection law.
7 So that's a very serious warning. In fact, they have
8 been doing some -- we have been liaising and sharing
9 our experience with the Mainland Chinese authorities
10 recently.

11 With the neighboring regions like Macau and
12 other Special Administration Regions, you know, we are
13 talking about entering into some sort of MOU. And we
14 are wrapping up our MOU with Singapore. We have drawn
15 up MOU agreements with Korea. So we do plan to enter
16 into cooperation agreements, including sharing
17 information where appropriate amongst the economies
18 and regions in Asia in particular.

19 MS. WOODS BELL: Thank you. I'll quickly
20 pass over to Liz.

21 MS. KRAUS: I was going to say one of the
22 interesting themes that I think everyone has hit on in
23 that last question is one of relationship building as
24 one of the most important assets. And we touched in
25 the introductions on developing relations through

1 MOUs, through regional and multilateral fora. So I
2 thought I would like to hear from Rainer, if he's
3 still awake down there, and see what you might have to
4 say on those points.

5 MR. WESSELY: Both eyes wide open.

6 (Laughter.)

7 MS. WESSELY: If you allow me come to just
8 back one second on your previous question on domestic
9 priorities and influencing the international agenda.
10 I just wanted to add, and I owe that to my colleagues,
11 that having the GDPR in place now for almost one year
12 we see that this actually really heavily influences
13 our international outreach, not only in promoting
14 privacy legislation in other countries, but also to
15 cooperate in terms of enforcement when it comes to
16 privacy violations.

17 But if you look at the multilateral fora and
18 our cooperation there, I already mentioned our work in
19 the ECN, in the ICN and in the OECD. Certainly many
20 of the features that we have in the ECN, taking that
21 we enforce the same law, are not transposable to the
22 wider multilateral framework, but I think they can
23 still inspire and they can still help also to set the
24 agenda for these discussions.

25 We have features in the ECN which foresee

1 that if member states want to take antitrust decisions
2 that they have to notify that to us so that we can
3 consider the decisions before actually they are
4 adopted. We have established an early warning system
5 amongst authorities so that if somebody wants to take
6 up a new investigation, a new type of investigation,
7 he would notify to the other members of the ECN. And
8 we even share all our own decisions before we adopt
9 them through the advisory committees with the member
10 states.

11 But much more important is I think the
12 exchange that we see in the working groups in the ECN.
13 We have working groups on each and every topic and in
14 different sectors. So we actually have the people
15 that work on the cases, they come together and say, we
16 work on this and this, cartel or vertical agreement,
17 we work on forensic IT or in pharmaceuticals,
18 transport or financial sectors, they sit together and
19 discuss their cases and exchange and see whether they
20 are lessons to be learned. These kinds of discussion
21 certainly feed into our international engagement also
22 then in the ICN and in the OECD.

23 In the ICN, if you look, we are cochairing
24 the cartel working group there, but we also are very
25 active in all the other working groups. I think, most

1 importantly, we are in the steering committee and
2 similarly also in the OECD. We try actually to set
3 the agenda forward-looking to identify the topics that
4 will be the enforcement problems of the future and sit
5 together and want to address them already as soon as
6 possible.

7 MS. KRAUS: Thank you. The work in the
8 regional area of the European Competition Network, the
9 ECN, is particularly informative for us. And I think
10 I might turn to Paula because I know you've been quite
11 active in both regional and multilateral fora and
12 maybe you want to pick up on some of those points.

13 MS. SILVEIRA: Yeah, I was actually taking
14 notes here while Rainer was talking how we can learn
15 from that and bring that to our regional group. But I
16 think maybe what I can share is a little bit about not
17 so much our regional cooperation, but our BRICs
18 cooperation, which I think is an interesting kind of
19 cooperation because we're largely very different
20 countries, even though we're all in this kind of same
21 economic development stage.

22 And it's curious that in -- prior to our
23 memorandums of understanding, we didn't truly
24 cooperate. So this is a case where the MOUs didn't
25 really cement an existing relationship with most

1 countries, but it truly fostered a relationship. This
2 relationship has been very fruitful. I mean, we get
3 together every two years officially, even though we do
4 also interact, and very meaningfully, when we see each
5 other at the OECD, when we see each other at the
6 spring meeting.

7 We have a spring meeting of the Brazilian
8 bar, which happens every year in October in Brazil.
9 And last year BRICs countries were also invited to our
10 spring meeting and they attended and we had a closed
11 session at our spring meeting, and then we had an open
12 session with the bar. And this kind of cooperation
13 has been extremely important in order to foster not
14 only our own agenda, but also to be able to kind of
15 set the tone for the international agenda and what are
16 this issues that we, as developing economies and
17 transitioning economies, believe are most important at
18 this time.

19 And one of the issues that the BRICs
20 countries have been working on and is proving to be
21 very useful is on digital economies. So we have a
22 digital economy working group that gets together once
23 a year. And I was actually taking notes here on
24 Rainer's talking about the working groups because --
25 and, also, I think the human glue issue is truly

1 central because this is what works. Our experience in
2 international cooperation is that what really proves
3 and what really brings more knowledge to CADE is
4 having the people that are working on the cases meet
5 with the people that are working on the cases in other
6 jurisdictions.

7 For digital economy working group, for
8 example, that we have at BRICs, we have people from
9 our economics department, from our superintendents,
10 from the Commission, and we're not talking about high-
11 level employees, we're talking about the actual
12 technical staff. This is extremely important. We've
13 also been doing a lot of exchange programs, and this
14 is not only within BRICs but with other agencies.

15 So we've actually just had a member of the
16 FTC in Brazil for the past three months, and we hope
17 that this continues. Because it was extremely useful
18 for us and extremely helpful to have someone there to
19 help us in our day-to-day issues and really to just
20 have someone there to be able to consult with. We do
21 this not only by having someone there, but we've also
22 sent someone from our staff to other agencies, and
23 we've done this regionally in Latin America.

24 So I think the regional cooperation, for a
25 country like Brazil, when you think of regional

1 cooperation, we think of Latin America. But for
2 Brazil, specifically speaking, it's not so much Latin
3 America, but regional for us would be Latin America
4 plus BRICs, I think.

5 MS. KRAUS: Chris, before we move on to our
6 next topic, did you want to respond to any of this?

7 MR. WARNER: Well, I was just going to
8 briefly make one point if I may. We heard a few
9 minutes ago a lot about the cooperation between the
10 competition and the consumer side in terms of
11 procedure and substantive process and so on. But I
12 think it's important to think about bringing those
13 sides together at a substantive law level as well.

14 So for the CMA, being a joint competition
15 and consumer authority, we naturally -- when presented
16 with a new difficult issue, we naturally think about
17 it from both sides of the coin. And I think it's
18 important that we try to replicate that on a sort of
19 international dimension. So that's particularly
20 useful in terms of digital economy issues as well.

21 So one example I'd like to draw on is some
22 work we've been doing on personalized pricing. It's
23 been causing a fair bit of debate in the UK and we
24 naturally thought about it from the competition and
25 consumer side and thinking about where the problems

1 and where the harm might arise and what way it might
2 most effectively be tackled.

3 So what we did is we took a policy paper to
4 OECD, both to the consumer panel but also to the
5 competition panel. So we had separate discussions
6 there, getting different perspectives. We also
7 encouraged the two committees to discuss it
8 collectively. I think we found that really useful,
9 really illustrative. And I think it's always good to
10 bring different sides of the debate together to really
11 understand and -- we talked about common ground a
12 little while ago. I think it's surprising how much
13 common ground can be identified when you bring the
14 debate together.

15 MS. WOODS BELL: Thanks, Chris.

16 On your point of common ground, we want to
17 go to something that's very difficult to do. During
18 our conversations, you all shared with us really that
19 there are some frustrations, and we get down to it,
20 what hasn't worked well is something that we also want
21 to put on the table. We're not afraid. We want to
22 bring it to you, but we are running out of time. So
23 don't think it's because we're afraid, so we're going
24 to ask to you move quickly.

25 So we're going to go over to you,

1 Commissioner Wong. Can you talk to us in just very --
2 and we're going to time you, too -- quickly, on what
3 hasn't worked we well? And you'll have a chance to
4 put more on the record, but we really do want to hear
5 because we want to get it right and want to improve.
6 That's why we're here.

7 MR. WONG: What hasn't worked well, you
8 know, perhaps, you may term them as difficulties or
9 challenges, in my view, they are more than a couple of
10 them, including domestic legal restrictions, legal
11 systems, the government influence or institutionalized
12 design, the security issues or the communications
13 issues, no free flow of information in some
14 jurisdictions, no free flow of data or data
15 localization in some jurisdictions. And most
16 important of all, in my view as a lawyer, lawyers tend
17 to overclassify or misclassify the meaning of
18 confidential information.

19 MS. WOODS BELL: Wow. That's powerful.
20 Okay.

21 MR. WONG: Because as a regulator, I always
22 come across lawyers banning -- you know, the placard
23 saying that this is confidential, you can't reveal to
24 anybody else. And I said, I'm a regulator, I'm
25 investigating your client's case. And so -- okay,

1 well, you asked me to keep quiet.

2 (Laughter.)

3 MS. WOODS BELL: Well, we're going to come
4 back to you. We're not asking to you keep quiet, but
5 we're going to come back to you and let you get chance
6 to get in more on that.

7 Tunde, what hasn't worked well?

8 MR. IRUKERA: Well, I think Commissioner
9 Wong has actually -- he spoke for everyone.

10 (Laughter.)

11 MR. IRUKERA: Except, of course, I'm a
12 lawyer. But, yeah, the big challenge continues to be
13 information sharing. There is a platform that's
14 working, but whether we can get to the point where we
15 can truly fully really optimize -- and I think
16 everything works into that, if you see where we
17 started about domestic priorities. So the information
18 sharing would take on the shape or the character of
19 what the domestic priorities are.

20 I think the platforms for accessing
21 information seem robust and good. But the specifics
22 that sometimes are very critical seem to present quite
23 a potential challenge. Sometimes because of local
24 legislation, again because of priorities. So you
25 might have a regulator who doesn't have the kind of

1 information you're looking because what's a big
2 problem to you is not a big problem in that
3 environment. And then you think about what it will
4 cost them to start looking for that information when
5 they don't have need to pursue it.

6 But I think that to the extent that we can
7 find a way to still simplify that whole information-
8 sharing process to get around the data protection
9 issues, I think that that would be a very important
10 thing. I might note that in a previous investigation
11 once, that I was outside counsel and I was assisting
12 the civil division authority into what might be
13 collusion between two airlines on a certain route and
14 when they asked for information, one -- both airlines
15 were in Europe and they said the European data
16 protection laws prohibited transfer of information
17 that is --

18 MS. WOODS BELL: We said no fighting on the
19 panel, Tunde. I see Rainer getting ready to jump in.

20 MR. IRUKERA: Okay, Okay. But essentially
21 what it was was exactly the point he made, that the
22 exception to exchange of laws need to be the fact that
23 it's a regulatory activity.

24 MS. WOODS BELL: All right. Paula? I'm
25 failing in my job, though, guys. It was very hard

1 with all these compelling comments to cut you off. So
2 please self-regulate.

3 MS. SILVEIRA: I'll be very fast. What
4 hasn't worked in Brazil is that -- something that
5 hasn't worked for a very long time -- which is
6 basically service of process. So when we have mainly
7 cartel investigations and we have to serve companies
8 or individuals outside of Brazil, and for certain
9 countries, especially countries with information
10 privacy laws, it's very difficult to complete service
11 of process in these countries. And it will sometimes
12 take us five years, six years, seven years to complete
13 service of process.

14 And the problem in Brazil is that all
15 defendants in a case have to be served before the case
16 can actually begin. So what happens is either the
17 case is on pause for, you know, maybe five years, or
18 what we will have to eventually do is, after a number
19 of years, we have to remove certain individuals from
20 this case and open a separate case for them so that we
21 can move on with the investigation. Because,
22 otherwise, we have a cartel investigation that begins
23 seven years after we initiate the case, and the case
24 is usually initiated maybe five years after the
25 conduct is discovered, and so that's maybe 10 or 15

1 years after the fact. And that's already way too
2 late. So what we truly need to find a way to move
3 forward with this is how to serve process.

4 MS. KRAUS: I think that's a problem we all
5 share.

6 I actually want to move quickly from kind of
7 case cooperation difficulties to policy cooperation or
8 policy issues. And maybe I'll just tag team both
9 Rainer and Han Li, and see if you'd like to just have
10 a quick interjection on issues you're seeing.

11 MR. WESSELY: You can go first.

12 MR. HAN LI: Okay, thanks. I think I want
13 to speak on a regional level, Southeast Asia, and I
14 suppose Rainer will talk about the EU level. I think
15 the challenge is sometimes the member states' domestic
16 political considerations overshadow some of the
17 regional considerations. So to give a concrete
18 example, in ASEAN, one member state does not have
19 merger provisions for political considerations. I
20 know Hong Kong as well didn't pass the merger law
21 because, again, I think it was political
22 considerations. So I think these are impediments.

23 And then another competition authority in
24 our region is China passed leniency provisions and
25 that would greatly facilitate cooperation. But,

1 again, I think the domestic politics is getting in the
2 way.

3 And a positive example is in the case of
4 Thailand where they exempted state-owned enterprises
5 from competition law for long time, but since last
6 year, that's been brought in, so that's a positive
7 example of how it has worked out. But I think
8 sometimes these get in the way of regional integration
9 efforts.

10 MS. KRAUS: Rainer.

11 MR. WESSELY: Thank you. Well, as I said
12 before, I think we have managed to overcome some of
13 the problems of the cultural differences, speaking the
14 same language, which doesn't mean that it's always
15 easy to overcome, also, structural differences. And I
16 think what we see is we have different concepts, we
17 different concepts of state, as Steve already
18 mentioned. We have different legal systems. We see,
19 for example, when we looked at China, they have a
20 different -- when we make our merger assessments, they
21 have a different concern of state-owned enterprises.
22 And we experience it very, very closely just now when
23 it comes to our second-generation agreements,
24 actually.

25 As you know, for us, privacy is a very high

1 good. It's protected as a constitutional right. So
2 when we want to enter in these kind of really far-
3 reaching agreements with third partners, we have to
4 make sure that when we exchange evidence actually then
5 on the ground, that the protection of the data of the
6 persons, the data subjects, concerned is actually also
7 protected once it is passed over to the other
8 authorities, and that there is a sufficient redress
9 mechanism in place.

10 Other systemic differences are very
11 difficult to overcome. Again, when we think about we
12 run an administrative system, others have criminal
13 systems. And for us, it is a problem if evidence that
14 we hand over to a third country authority is used in
15 the criminal proceedings. So these systemic issues, I
16 don't want to say are impossible to solve, but will
17 take a bit longer, perhaps.

18 MS. KRAUS: Well, speak of solving, we're
19 kind of more on the optimistic side of the camp here
20 and don't want to end on negativity. So we thought
21 maybe we'd open up for about two or three minutes to
22 see if you have any suggestions, in addition to those
23 just made by Rainer, but to overcoming some of these
24 issues or impediments.

25 And since we skipped over Chris, I thought

1 maybe I would just give you the floor for a minute.

2 MR. WARNER: Thank you. So I think this may
3 be moving on to something we're going to talk about,
4 but I think a really effective way of coming out of
5 some of these difficulties is actually learning
6 through doing, actually cooperating and doing some
7 joint working.

8 Because I think sometimes it's quite
9 difficult to really process some of the difficulties
10 in the abstract. And sometimes only when you're faced
11 with a particular problem, you can work out the
12 solution and the way around it. And I think something
13 that we do, we've been involved in both at the
14 European and at the international consumer enforcement
15 level is -- so I'm taking something we call "sweeps,"
16 where we sort of take a case from kind of cradle to
17 grave, as it were, starting off sort of identifying a
18 potential issue that might be there that we go in and
19 investigate. We bring back the results together and
20 we work out how we can take action together and what
21 kind of action that could be like, what that would
22 look like.

23 And through taking those different stages of
24 the case together, you identify potential differences;
25 you identify the common ground; you identify the

1 solutions. And it can be a really fertile ground for
2 working together and sharing knowledge and developing
3 kind of new practices, and so on. And it can work
4 really effectively, I think.

5 MS. WOODS BELL: Thank you. That is a
6 perfect segue to something that one of our colleagues
7 from the audience raised, something that we had
8 discussed among ourselves. What kind of cooperation
9 or collaboration do you have with emerging markets,
10 emerging competition, consumer protection, privacy
11 authorities? Put differently, what kind of
12 relationships are you exploring between younger and
13 more mature agencies?

14 Why don't we go first to you, Han Li.

15 MR. HAN LI: I think it's two-way. I think
16 within ASEAN, we are doing a lot of capacity building,
17 and we have a lot of partners. I mentioned the
18 Australian-New Zealand CLIP Program. But we also have
19 the Japan ASEAN Integration Fund; the GIZ -- it's a
20 very long German word which I can't pronounce.

21 (Laughter.)

22 MR. HAN LI: So I'll just call it GIZ.

23 MS. WOODS BELL: Me either, by the way.

24 MR. HAN LI: It's a German technical
25 assistance program. And, also, the Europeans have

1 come in last year, and so have the Canadians. So
2 we're still waiting for the Americans, actually. But
3 --

4 MS. WOODS BELL: Hey, Jan was already there.
5 Come on, come on. Okay.

6 (Laughter.)

7 MR. HAN LI: But I think all these partners
8 have really been useful for capacity building, and the
9 actual, like I mentioned earlier, staff exchanges,
10 placements, both ways, you know, from the more
11 experienced agency to a newer agency, a new agency to
12 more experienced, and as well as workshops and all the
13 like. So I think it's really a very fruitful two-way
14 exchange and there's always something to learn.

15 MS. WOODS BELL: Thank you very much.
16 Stephen?

17 MR. WONG: Yes. We have experienced no
18 liasing or sharing experience with the younger
19 economies, including, you know, those in the Mainland
20 of China, because they don't have a similar framework
21 as we do, or as the EU does, or the Americans have in
22 their own jurisdictions.

23 But the issue of privacy, for example, data
24 privacy, has become so prevalent as a topic for
25 discussion, not only amongst the organizations

1 themselves because of the heavy fines they are being
2 threatened, but also amongst the citizens in the
3 Mainland. But they lack the requisite trust.

4 If they talk about this, they fear we are
5 trying to influence, you know, our line of thinking,
6 which is culturally different in relation to the
7 protection as a basic or fundamental human right. So
8 this is a cultural difference. And the same happens
9 in other emerging economies, and that's no -- because
10 they might misunderstand that we have, you know, some
11 hidden agenda and political ones included.

12 So probably I would suggest that in order to
13 pave the way, you know, the right way or the right
14 track, you know, for all the economies, emerging,
15 young or otherwise, you know, within the region,
16 perhaps we could help set up a multinational or
17 multijurisdictional database, for example, or some
18 sort of a repository of, you know, the best practices
19 and the related views. In the longer run, perhaps,
20 when we aim to reach some sort of a model arrangement,
21 model agreement, model classes, you know, to be
22 drafted and shared, introduced for the regional
23 cooperation, whether multilateral or bilateral
24 enforcement network or management.

25 At the end of the day, perhaps, like ASEAN,

1 APAC and the EU, we might, you know, wish to come to
2 some sort of multinational treaty on which the
3 economies can join and have reference to.

4 MS. WOODS BELL: Thank you. It harkens back
5 to the panel yesterday IOSCO maybe looking at an MOU,
6 amongst other things.

7 Tunde, can you share with us in a one-minute
8 response, newer, younger, before we wrap up with the
9 last question?

10 MR. IRUKERA: I mean, well, we're pretty
11 young.

12 MS. WOODS BELL: No pressure, no pressure.

13 MR. IRUKERA: The relationship, obviously,
14 with the FTC has been very helpful, and we're
15 inheriting or using two things with respect to the
16 competition side, the strong relationships we've had
17 on the consumer protection side, and the relationship
18 the FTC had with the Securities and Exchange
19 Commission in Nigeria. And the Consumer Protection
20 Council, I inherited a long relationship between the
21 FTC and the Council, including, especially, with
22 respect to regional capacity development and specific
23 bilateral capacity development in the FTC's fellowship
24 program. And that has been very helpful.

25 The European Union provided quite some

1 support in developing the legislation. So that's also
2 a channel that we look to to depend on. So, yes,
3 quite some relationships. And then, obviously,
4 relationships that are just like conversation, more
5 like with UNCTAD and a few others. I am relatively
6 comfortable with what I think is going to be a great
7 network of support from more experienced, mature
8 organizations.

9 MS. WOODS BELL: Thank you. Well done.

10 MS. KRAUS: Well, because we are so
11 interested in learning from our experts, and after
12 this extremely fruitful discussion, I wanted to give
13 each of you at least a minute or so to just provide
14 any ideas you might have on how we might best develop
15 the FTC's tools and international program for the
16 success of our international outreach, but, also, I
17 think our global initiative for, you know, good
18 enforcement.

19 So maybe we can just move down the line,
20 starting with Paula.

21 MS. SILVEIRA: Thanks, Liz. Well, first of
22 all, I'd like to commend the FTC on your efforts on
23 international cooperation. I think the international
24 cooperation that the FTC has in Brazil has been not
25 only very intense -- we've had people here, you've

1 sent people there. We've had a lot of, you know,
2 "pick up the phone" cooperation, talks about cases,
3 and that's been extremely helpful.

4 But what we would like to see -- and I think
5 this is something that we would like to see not only
6 with the FTC but with other jurisdictions as well --
7 is a possibility of exchanging more information and
8 maybe more confidential information on specific cases.
9 So with the US, I know that Brazil has an MLAT, but it
10 covers basically criminal investigations. So that's
11 not something we can exchange with the FTC. And the
12 FTC has a lot more experience than Brazil on
13 unilateral conduct, abusive dominance, and that's
14 something that CADE has been focusing on over the past
15 two years, and it's new to us.

16 So having the experience of the FTC,
17 especially because a lot of our cases are also cases
18 that the FTC has gone through, so that would be very
19 interesting for us.

20 MS. KRAUS: For us, too, trust me.

21 (Laughter.)

22 MS. KRAUS: Tunde?

23 MR. IRUKERA: Thank you very much. And I
24 completely agree with Paula. I think the FTC is doing
25 quite a phenomenal job, truly investing in other

1 agencies, and the work you're doing to actually
2 maintain those relationships is amazing. Because two
3 things that come to mind when I think about the FTC,
4 you can resort to them and their resource. So that's
5 very important.

6 The one thing that I might add, in addition
7 to the information sharing, which is quite perennial,
8 as it were is that you shouldn't substitute a
9 bilateral engagement with a country for a regional
10 engagement where that country also belongs. I think
11 engaging on those two levels is so important because
12 now you can see -- I mean, I'm using West Africa as an
13 example. We've got ECOWAS, we've got Nigeria, and now
14 we've got an African continental free trade agreement
15 coming up.

16 I think it's good to engage on the regional
17 level, but have a certain level of flexibility to also
18 recognize what the national priorities are so you can
19 engage on that level, also. I think with that you're
20 probably going to cover the entire space. Thank you.

21 MS. KRAUS: Thank you. It's an excellent
22 thought.

23 Han Li?

24 MR. HAN LI: Yes. I think we have always
25 recognized I think the FTC's leadership role in

1 international organizations like ICN and OECD. We are
2 also beginning to see FTC or the US taking a bigger
3 interest in our region. This Friday, there's a panel
4 at ASEAN at its spring meeting that I think is no
5 doubt coordinated by FTC, and I think we look forward
6 to more such partnerships.

7 Just to share, in 2015, in fact, we did a
8 course with the FTC in Singapore on competition
9 investment and transparency, together with the US
10 Small Business Administration. That was organized
11 under the Singapore-US third country training program.
12 So I think we look forward to, again, US leadership in
13 the region.

14 MS. KRAUS: Thank you.

15 Chris?

16 MR. WARNER: So a reflection from me is the
17 Competition and Markets Authority has a wide range of
18 tools, including market-based investigative tools.
19 And we find that having that lurk across the wider
20 picture, especially on kind of a no-fault basis, when
21 you're looking at failings of the markets rather than
22 failings of individual companies, is there a really
23 useful tool and a really useful platform to build on
24 in kind of international discussions.

25 I think also, on a consumer protection point

1 of view, we have a particular mandate in the UK to
2 focus on issues causing problems with market-wide
3 practices, and as a result we're investigating market-
4 wide issues rather than single, individual cases.
5 And, again, that deepening understanding of the
6 broader picture I think is a really valuable kind of
7 asset when you're taking issues and cases on an
8 international arena. And that's something that I
9 think is something worth reflecting on.

10 MS. KRAUS: Thank you.

11 Rainer?

12 MR. WESSELY: Thank you. I think I can very
13 much echo what was it before when I told my colleagues
14 in Brussels that I'm going to be on the FTC panel on
15 international cooperation, everybody said, pay
16 attention to what the FTC says, they are the role
17 model for international cooperation, so you can learn
18 a lot from them. And I think that has been certainly
19 true for the past.

20 I would just like to draw attention to a
21 certain kind of bilateral cooperation that we have
22 that we see that is very fruitful and successful. One
23 of them actually is with Brazil. We have an EU-Brazil
24 sector dialogue. We just had this this month in
25 March, three colleagues from CADE coming over to

1 Brussels, that was a very intense and very fruitful
2 dialogue.

3 And we entered into a program which we call
4 a technical cooperation program with Asia, with all
5 Asian countries, actually. We have had visitors in
6 this context from Japan, from Korea, from Indonesia,
7 and the Philippines. We have not had anybody from
8 Singapore or not from Hong Kong yet. But to Hong
9 Kong, actually, we sent one of our former colleagues
10 to your Competition Enforcement Authority which might
11 do the trick.

12 And, finally, what I think is a takeaway is
13 we focus very much on the multilateral cooperation,
14 also on the bilateral cooperation. But what we should
15 also not forget is probably that we also raise
16 awareness internally, within our organization, that we
17 have these capabilities, that we do all this because
18 actually the people working on the ground on the
19 cases, they have to spot that there is an
20 international dimension to their case and they have to
21 know how to react, how to bring this forward, and how
22 to actually then exchange it with other authorities.
23 Because we might have the best cooperation in the
24 world, but if people working on the cases don't
25 realize it, then it doesn't help.

1 MS. KRAUS: Super point.

2 And Commissioner Wong?

3 MR. WONG: Yeah, very quickly. As a
4 regulatory authority enforcing the law, the relevant
5 law in our regard, and this is about personal data
6 privacy law, we must emphasize that, you know, that
7 the enforcement must be fair. In this regard, we need
8 accurate information and intelligence, facts,
9 especially.

10 So in view of the cross-border nature of
11 data incidents, for example, you can name a few, and
12 also the absence of unifying enforcement laws and
13 practices effectively, you know, some of the
14 organizations might find shelter because of the
15 absence, because of the lack of the unifying
16 enforcement laws and practices for those who, for
17 example, misuse or abuse data, that doesn't belong to
18 them.

19 So it is in this era, digital economy, it's
20 very difficult to comply with the legal requirements
21 if we have restrictions about cross-border transfer,
22 localization, or a consent-based system of transfer.
23 So what we need is international engagement, effective
24 international engagement. And, thankfully, FTC has
25 played a leading or vital or pivotal role over the

1 last few years, and bearing also in mind that the USA,
2 EU are the top two or top three trading partners of
3 Hong Kong. So we have a lot of connections with the
4 Americans and especially, you know, in the view of
5 data incidents.

6 So apart from being an enforcer, we, as
7 regulators, should also play the role of a
8 facilitator, which facilitates the innovation and
9 economic growth without compromising the privacy right
10 enjoyed by citizens, streamline the processes, reduce
11 implementation cost, deliver compliance efficiency,
12 and support the continued growth of the digital
13 ecosystem, and the effective law enforcement and
14 beneficial use of data.

15 Now, as I mentioned earlier on, as part of
16 China, but with a very different ecosystem, including
17 a unique data protection framework, Hong Kong has
18 unique and irreplaceable attributes being part of
19 China in respect of, one, the free flow of
20 information.

21 MS. WOODS BELL: Thank you so much,
22 Commissioner.

23 Well, with that, we're going to conclude
24 this panel. We want to thank you very much. We've
25 left some questions on the table. We'll deliver them

1 to Randy. Maybe he knows all the answers, anyway.

2 We're going to take a brief 15-minute break
3 and invite those speakers who are on the next session
4 to please come forward.

5 Also, in other announcements, two silver
6 rings found, collect them at the table outside.

7 And thank you all very much for a super,
8 awesome, successful, phenomenal panel.

9 (Applause.)

10 (Brief break.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE FTC'S ROLE IN A CHANGING WORLD

2 MR. TRITELL: Welcome back from the break.

3 If everybody would please take their seats, we're
4 ready to proceed to our last session.

5 Again, I'm Randy Tritell from the Office of
6 International Affairs. And we are now approaching the
7 end of our two days of hearings, and we'll conclude
8 with the panel on the FTC's Role in the Changing
9 World. As the title indicates, this panel will focus
10 on the future, anticipating the challenges that the
11 FTC will face and seeking insights and guidance from
12 leading experts from the realms of data privacy,
13 consumer protection, and competition policy.

14 To lead us into our panel, there is no
15 better person to do that than one of the true greats
16 of the antitrust field, domestically and
17 internationally. That is Jim Rill. I have had the
18 pleasure and privilege of knowing Jim for several
19 decades, and I would have been honored to introduce
20 him to you properly, but as you will see, I'm about to
21 yield the floor to someone who knows Jim even longer
22 and better than I.

23 Ladies and gentlemen, from the FTC's Office
24 of Congressional Relations, Derick Rill.

25 MR. J. RILL: Oh, my God.

1 (Applause.)

2 MR. D. RILL: Thank you, Randy, for this
3 absolute honor to introduce Jim Rill for our next
4 session titled, "The FTC's Role in a Changing World."

5 Mr. Rill has an impressive resume, to say
6 the least. Summarizing his accomplishments is quite
7 the challenge. But I'll be brief as I'm told this
8 introduction counts towards his speaker time. He
9 wouldn't forgive me if I didn't give him enough time
10 to be able to talk.

11 MR. J. RILL: Cut it short.

12 MR. D. RILL: So quickly, here are some of
13 his career bullet points. Currently Senior Counsel at
14 Baker Botts, Mr. Rill served from 1989 to 1992 as
15 Assistant Attorney General in charge of the Antitrust
16 Division where he negotiated the US-EC Antitrust
17 Cooperation Agreement; issued in 1992, the first joint
18 FTC and DOJ horizontal merger guidelines; and, again,
19 provided counsel for the provision of those guidelines
20 in 2010.

21 He led the International Competition Policy
22 Advisory Committee, which spawned the ICN. Now, 130
23 member nations can trace their roots to the man Randy
24 Tritell called the "Godfather of the ICN."

25 As for awards, in 2012, Mr. Rill received

1 DOJ's -- and I quote -- "highest antitrust honor, the
2 Sherman Award, for his outstanding lifetime
3 contributions to the protection of American consumers
4 and the preservation of economic liberty."

5 Lastly, recognizing Mr. Rill's passion for
6 helping grow talented, aspiring antitrust attorneys,
7 DOJ a few years ago launched the Rill Fellowship,
8 which entails a 24-month appointment at DOJ for the
9 next generation of antitrust superstars who, like many
10 of Mr. Rill's current protégés, probably will end up
11 as DOJ antitrust chiefs or commissioners here at the
12 FTC.

13 You know, as incredible as all that iconic
14 stuff I just mentioned is what makes Mr. Rill so very
15 special is that he also found time to be as wonderful
16 and loving father as you'd ever meet.

17 Please welcome, as Randy calls him, "the
18 Dean of the US Antitrust Bar," my dad, Jim Rill.

19 (Applause.)

20 MR. J. RILL: Well, that leaves me
21 speechless, which I'm not known for being.

22 (Laughter.)

23 MR. J. RILL: Derick, thank you very much.
24 And, Randy, you blindsided me.

25 I want to talk in what time is left for

1 really what I see as the challenges in front of the
2 FTC and, indeed, in front of the agencies of the
3 Federal Government, in international cooperation and
4 international enforcement, to lay the groundwork for
5 the panel that follows and to give some humble, if
6 somewhat, I would say, radical suggestions for going
7 forward.

8 I'd like to talk about really in order of
9 policy and substantive contributions that the
10 Commission has made in international organizations,
11 about technical assistance programs to newly emerging
12 agencies, particularly in regard to the rise of new
13 technology, to the promotion of accountability in
14 international cooperation. It's one thing to have
15 guidance. It's another thing to be sure it's
16 followed. And then, finally, I'd like to talk not
17 only about international cooperation but domestic
18 cooperation, I think a challenge and something that's
19 vitally needed in the 21st Century.

20 We don't know where we can go unless we know
21 where we've been. As the saying on the front of the
22 Archives building indicates -- can you all hear me all
23 right? I'm fighting an allergy and my voice isn't as
24 resonant as it usually is.

25 But in front of the Archives building,

1 there's the podium with the platform, "the past is
2 history," and in this particular case of international
3 cooperation and the work of the FTC, the past is,
4 indeed, history. The role of the FTC in international
5 cooperation really cannot be overemphasized.

6 The work that the Commission's done in ICN
7 and OECD providing, I think, a remarkable set, for
8 example, of antitrust enforcement guidelines on
9 policy, procedure, transparency, and engagement, is a
10 real contribution to international cooperation. That
11 was adopted by the ICN, and it has been since updated
12 and improved and annotated.

13 Other guidance documents too numerous to be
14 mentioned follow in the merger field and the
15 unilateral conduct field and other areas, largely, not
16 exclusively, but largely fomented by, promoted by the
17 work of the Federal Trade Commission.

18 Technical assistance. The technical
19 assistance provided by the Federal Trade Commission
20 and the United States Department of Justice goes all
21 the way back to 1990, and possibly before. In 1990,
22 as the Soviet Union collapsed, the countries of
23 Eastern Europe threw off the bonds, the Federal Trade
24 Commission and the Department of Justice sent missions
25 -- often joint missions -- to places like Budapest,

1 Prague, Warsaw, and other cities around the newly
2 emerging free market systems of Central and Eastern
3 Europe.

4 That predated the work that the FTC has done
5 since that time. In 2017 alone, the FTC had a program
6 of conducting 38 programs of technical assistance in
7 22 jurisdictions. I won't name them all, but 38
8 programs in 22 jurisdictions of technical assistance.

9 Cooperative agreements. In 2018, the
10 International Antitrust Report, authored by Randy
11 Tritell, the FTC and DOJ played an active role in US
12 delegations to negotiate competition chapters in
13 proposed trade agreements. Highlighted among those
14 agreements, of course, are the new antitrust chapter
15 in the -- I guess call it NAFTA 2.0 -- in which the
16 parties agree to foundational principles of process
17 requiring transparency, early consultation, access to
18 information, and opportunity to appear before the
19 agency, and the right to judicial review. Should that
20 agreement be adopted, be confirmed by the Senate, it
21 would be a landmark agreement on the antitrust
22 cooperation and the trade agreement.

23 The KORUS agreement contains a competition
24 chapter, which just the other day has been invoked by
25 USTR by calling for consultation with the Korean

1 antitrust agency on the ability to obtain evidence and
2 to appeal, consider that evidence and rebut it. We'll
3 see where that goes.

4 So that's the very, very impressive history
5 that's been fomented by the Federal Trade Commission.
6 But what about looking forward? And let me, with
7 great respect and some hesitancy, make some
8 suggestions. First of all, it seems to me appropriate
9 to continue the work that's being done with the
10 international organizations to promote sound
11 principles of consumer welfare based antitrust
12 principles.

13 Much of the focus now has been on procedural
14 reform, as it should be. Let's take a look at what
15 can be done on consultation that leads to substantive
16 coordination and addresses the issues of the proper
17 effect that antitrust should have on the economy. A
18 little bit of evangelical work here is necessary. How
19 far it goes, I don't know, but we should not ignore
20 the need to, if you will, evangelize on substance and
21 discussions, negotiations in international
22 organizations and bilateral basis.

23 The link between intellectual property and
24 antitrust isn't a bad place to start. A focus can be
25 made on noneconomic goals in certain nations and the

1 influence of state-owned as well as state-supported
2 enterprises. In 2017, the US Chamber put together a
3 group of so-called experts -- I was on it, so that's
4 why I say "so-called" -- which issued a report which
5 suggested that the ICN form a working group that
6 focuses on state-owned enterprises and state-supported
7 enterprises. Why not a joint FTC/DOJ effort in that
8 direction?

9 National champions are, again, on top of the
10 mind, given the recent decision of the EC, for
11 example, to block the Siemens-Alstom merger, and the
12 objections thereto by the French and German
13 Governments. Why not address that issue?

14 Again, procedure is important. Procedure is
15 critically important, but you can have the best trial
16 in the world if they hang you for the wrong offense.
17 And it seems to me, that substance is a very
18 legitimate area for this kind of work.

19 Continue the technical assistance programs.
20 I don't think I need to -- I think I'm singing to the
21 choir when I say that. But consider, also, doing that
22 jointly with the Department of Justice. We started
23 out in 1990 doing it jointly. It seemed to work then.
24 Why not give it another try and work jointly with the
25 different but excellent skills brought in from both of

1 the agencies?

2 I would say convert these guidance documents
3 into best practice documents through the ICN,
4 particularly. The OECD issued best practice documents
5 and so did the ICN and merger notification and
6 procedure? Why not broaden that at least to put more
7 gravitas, if you will, substance behind the guidance
8 documents?

9 And then I would say continue workshops and
10 roundtables. I think the FTC's workshops and
11 roundtables in the ICN area have been paragons of
12 value. More is not a bad idea. Again, focusing on
13 substance.

14 Guidance is very well and good. But are
15 people actually following the guidance? Are nations,
16 are agencies following the guidance? We all know too
17 often that at OECD or at ICN the question is asked, do
18 you give transparency? Oh, yeah, next question. What
19 about some system of measuring accountability?
20 Radical consideration, perhaps, but I think this may
21 have been the initial thought, maybe still the
22 thought, behind the Department of Justice initiative
23 for the multilateral framework for procedure which
24 now, apparently, is going on a dual track, side-by-
25 side track with the ICN, according to recent speeches

1 by -- a recent speech by Roger Alford.

2 This is a DOJ initiative, but it's one I
3 think that the FTC can play a role in through the ICN
4 or support for the MFP. The agencies should work
5 together to find, formulate, develop a system for
6 measuring accountability and adherence to the guidance
7 documents which hopefully will become best practice
8 documents. Probably have to start on the voluntary
9 basis. Probably have to have companies sign on to it.
10 But it's worth exploring and worth exploring, I
11 suggest to you, jointly.

12 I'm not suggesting any sanction system. I'm
13 not suggesting trade -- God help us -- trade
14 sanctions. All I can think of is back in the day when
15 you traded off chicken for brandy, which way in the
16 past, I consider that a personal offense.

17 (Laughter.)

18 MR. J. RILL: But as has been said by a lot
19 of people, and I think it has a good bit of truth to
20 it, reputational effect can be very significant. And
21 holding out an agency for, I would say, gross
22 departure from globally accepted norms of procedural
23 or substantive agreement, principles, can have a
24 reputational effect.

25 Let me switch for a minute to another form

1 of cooperation, and that's interagency cooperation. I
2 suggest that there's a lot of room for cooperation
3 between the two antitrust agencies. The 2017
4 guidelines on international enforcement, international
5 cooperation, they're jointly issued, jointly issued by
6 DOJ and FTC. The suggestion in there that applies to
7 what the agencies do, not to what one agency does or
8 what the other agency does, but what the agencies do
9 -- specifically, one of the provisions is they may
10 engage in general discussions with foreign authorities
11 on matters where only one authority -- that is, the
12 foreign authority -- has an open investigation.

13 Why not have both deal with that issue? The
14 guidelines uses the word, plural, "agencies." This is
15 consistent with a recent speech in 2013 -- that's
16 recent in my vocabulary -- an article on antitrust
17 source, which I recommend to you, by then-Commissioner
18 Ohlhausen. So why not, for example, a joint work
19 program in the international sector, in addition to
20 the joint technical assistance, which has worked so
21 well in the past.

22 What about cooperation and coordination with
23 the other non-antitrust agencies of the Federal
24 Government? I recognize that this can bring in other,
25 from a domestic standpoint, what seem to be foreign

1 ideas, ideas that antitrust is not particularly
2 comfortable with. I went through three years of
3 working with the USTR and the structural impediment
4 initiative talks with the Japanese. I understand some
5 of the problems of that relationship. But these
6 agencies, they have a good bit to offer in many
7 respects.

8 Their expertise in particular industries is
9 very valuable, can be very instructive, can be very
10 useful. They can bring into play and bring into
11 understanding issues of national interest that are
12 sometimes beyond the antitrust agencies', at least,
13 professional focus -- national security being, I
14 think, paramount among those issues -- where the
15 antitrust agencies can cooperate with these other
16 agencies.

17 Now, the chamber report that I mentioned to
18 you suggested a cabinet level committee to deal with
19 antitrust policy. I, frankly, don't think that's a
20 great idea. But I think the antitrust agencies
21 themselves can informally call together, as needed,
22 and listen to and reflect on the -- I'm getting the
23 flash that the time is up; I'm almost through -- that
24 can bring in expertise and considerations which can
25 well inform the antitrust decisions that are being

1 made by the antitrust agencies. We can have a
2 ramification across technological issues facing
3 industries with which the Commission and the DOJ might
4 well be unfamiliar and national security interests
5 which can be vital to the welfare of the country.

6 Whatever decisions are being made on
7 antitrust that affect antitrust, the DOJ and the
8 Commission should have a seat at the table to explore,
9 conversely, the antitrust implications of industry
10 decisions being made at another level. And the
11 Commission, although not as part of the Executive
12 Branch, the Commission can bring a good bit to play in
13 the way of its expertise to those considerations. So
14 it should have the seat at the table.

15 So there's the issue of international
16 cooperation, which we've addressed, and I would
17 suggest to you equally important in the international
18 field is the issue of cooperation across the panoply
19 of the Federal Government, including our sister
20 agency, my alma mater, the Department of Justice, and
21 the other agencies of the Federal Government that have
22 a particular expertise and have much to offer in those
23 areas that can affect and influence and promote sound
24 antitrust enforcement.

25 So with that, thank you very much for your

1 time. I appreciate it. And I look forward to hearing
2 the panel.

3 (Applause.)

4 MR. TRITELL: Thanks so much, Jim. Let's
5 bring the last panel up to the table.

6 (Brief pause.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE FTC'S ROLE IN A CHANGING WORLD (PANEL)

2 MR. TRITELL: Well, thanks again to Jim Rill
3 for his, as always, insightful and thought-provoking
4 remarks which will help frame our discussion and will
5 also inform our thinking about how the FTC should
6 advance our international antitrust agenda.

7 We're going to organize this panel -- or try
8 to organize -- the discussion into four parts,
9 recognizing that the borders between them are going to
10 be somewhat porous. First, we're going to ask for
11 some thoughts on what makes for an effective
12 competition, consumer protection and/or data privacy
13 agency. We'll then consider how the FTC can be most
14 effective in its bilateral relationships and
15 cooperation.

16 Next, we'll take up the FTC's role in
17 promoting sound policy and, as appropriate, as
18 referred to on the previous panel, policy convergence.
19 And we'll conclude with perspectives on the role of
20 the FTC as a leader in thought and action in our
21 fields. We'll leave around 10 minutes for questions,
22 so, please, use the question cards that will be
23 circulating. And we'll try to leave a few last
24 minutes for closing thoughts.

25 All of our previous sessions have raised

1 many questions on our panel. We'll try to find at
2 least some of the answers.

3 To do that, we have an absolutely world-
4 class, stellar panel. And so we're delighted to be
5 joined by -- and I'll do this alphabetically -- Bojana
6 Bellamy is the President of Hunton Andrews Kurth LLP's
7 Center for Information Policy Leadership.

8 Terry Calvani with the Freshfields Law Firm
9 is also a former Commissioner and acting Chairman here
10 at the Federal Trade Commission, where I had the great
11 privilege to be able to work with him, and has an
12 almost unique experience of also having been a member
13 of another international agency, a member of the Irish
14 Competition Authority.

15 Eduardo Perez Motta is Senior Partner at the
16 SIA Law and Economics Firm and he is the former
17 President of the Mexican Competition Authority,
18 COFECE, and, also, a former Chair of the International
19 Competition Network.

20 Rod Sims is the Chairman of the Australian
21 Competition and Consumer Commission.

22 And Andy Wyckoff is the Director of the
23 OECD's Directorate for Science, Technology, and
24 Innovation.

25 Let's start with some general principles for

1 a good agency. So to be effective as an enforcer or a
2 policy leader, one has to have an institutional
3 structure and institutional principles that undergird
4 the agency. To frame our discussion, I'd first like
5 to turn to Bojana for her thoughts on what makes for
6 an effective agency, especially operating in the
7 international arena.

8 Bojana, I know that your experience is
9 primarily from the privacy world, but from our
10 discussion, I know that your thoughts reflect
11 principles that I think everyone will find relevant to
12 their substantive areas.

13 MS. BELLAMY: Thank you, Randy, very much.
14 I'm delighted to be here. In fact, you know, this
15 whole session is called, The FTC Role in Leadership in
16 the Changing World, and the fact that we are having
17 this discussion across a number of experts from
18 different countries and also different areas, like
19 competition, consumer, and privacy is really a sign of
20 that leadership. So really, thank you so much for
21 organizing this and, of course, for inviting me as
22 well.

23 We, at the CIPPO, have done a project looking
24 at what constitutes an effective regulator in this new
25 world of the fourth Industrial Revolution, of course,

1 from the privacy perspective. The feeling was that we
2 have been advocating for a very long time for need for
3 countable, corporately, digitally responsible
4 organizations on one side. And then we were thinking
5 so what does the world look like from the side of
6 regulators in this new innovative world with
7 disruption, technology, that is bringing exciting
8 innovation every day? How can regulators really step
9 up and be effective?

10 The work very much resonates with what I
11 have actually heard this morning, Randy. Your
12 fantastic panel on the comparative legal traditions,
13 and Professors Bignami, I think, and Marsden have
14 talked a little bit about that. So what we have found
15 is that to be an effective regulator, regulators need
16 to step up and be strategic, prioritize their
17 engagement, thought leadership, actions versus
18 potential enforcement, and be very transparent in how
19 they conduct their regulatory policy. Very much risk-
20 based as well. So "selective to be effective" was a
21 great wording that was said actually by former
22 Information Commissioner Richard Thomas.

23 The second point is that constructive
24 engagement should be favored over the enforcement and
25 enforcement should be used, of course, for those who

1 deliberately, repeatedly keep breaking the rules and
2 not wanting to engage with a new regulator. This
3 constructive engagement, of course, requires some
4 innovative thinking, innovative regulatory policy.
5 And so we looked at things like, for example,
6 regulatory sandbox, which first started with the
7 Financial Service Authority in the UK, but has been
8 picked up by the UK Information Commissioner as well
9 as the Singapore Commissioner. I'm kind of thinking
10 this is an example of how the constructive engagement
11 can be formalized in a more formal way.

12 But, of course, it is important that
13 constructive engagement is a town goal. You can't
14 just have an effective regulator. You have to have an
15 accountable organization who is ready to engage with
16 regulators. This is really what we felt was really
17 needed in this new world.

18 Now, the final point is that an effective
19 and new regulator has to also build bridges with other
20 regulators internationally. And I know we will be
21 talking more about this.

22 Our final point of our research work was
23 relating to the incentives. And we felt that
24 effective and smart regulators should be
25 incentivizing, rewarding those organizations that step

1 up and are able to deliver compliance in a new way and
2 go beyond compliance. And I think it will be really
3 interesting to discuss what could these incentives
4 look like. I think we've seen some in the past from
5 FTC. So as I'm speaking about this, I'm kind of
6 thinking FTC was pretty much there with this. But, of
7 course, this isn't just about FTC; it's about other
8 data protection regulators that operate globally in
9 this connected world, and they're increasingly having
10 to cooperate.

11 So our message was very much not just for
12 FTC, but for the other regulators really stepping up
13 in this new world.

14 MR. TRITELL: So that is getting us off to a
15 great start, Bojana, and I'd be interested in other's
16 reactions to those points. And, also, turning it back
17 to the FTC, what can we learn from the experience of
18 other jurisdictions in this area and how can we apply
19 that to our work?

20 Let me first ask Eduardo, based on your
21 experience both with the Mexican agency and in your
22 interactions with agencies around the world through
23 the ICN.

24 MR. MOTTA: Thank you, Randy, and thank you
25 for this invitation. If you allow me, I consider that

1 there are five elements that basically characterize a
2 good -- a well-designed -- let's put it that way -- a
3 well-designed agency in competition.

4 First, it has to be independent. It has to
5 be independent from the Executive Branch, from the
6 government, from the -- but what is -- that is part of
7 it. But it has to be independent because its only
8 obligation is to apply the law. They do not design
9 the law. The design of the law is part of the
10 government and the legislative consideration and
11 jurisdiction.

12 Obviously, the concept of independency goes
13 hand by hand with the specific characteristics of the
14 jurisdiction. I remember having these discussions in
15 an OECD table a few years ago with some colleagues
16 from Denmark, and they were saying, well, I mean, why
17 are you insisting so much on the independence? We're
18 not having that problem. We have never had -- we have
19 never faced that problem with the executive branch.
20 They have always respected our work decisions. And I
21 said, well, I mean, if you come from Mexico, you would
22 think differently.

23 At that time, that was not a major risk.
24 Today, that's a major risk in Mexico. So,
25 fortunately, in Mexico, the Competition Authority is

1 constitutionally independent. So it's as independent
2 as the central bank or as the Federal Reserve here in
3 the US. So it depends on the culture of the country
4 and it depends on the realities they are going to
5 face. But that's -- what I consider that that --
6 regardless of where you -- the reality in which you
7 are based, independence is a key element.

8 Second, you have to be perceived -- and you
9 have to behave in a neutral way. You have to be
10 perceived as an unbiased authority. You have to treat
11 everyone with exactly the same line. That's not an
12 easy issue, and that -- it is very important because
13 that goes very much in line with what the economic
14 agencies consider the way that you are behaving.

15 Number three, you have to be, obviously,
16 technically strong. You have to be technically solid
17 as an agency. And I think you have to behave very
18 much in line with best international practices.

19 Number four, you have to be efficient.
20 Efficiency goes basically with the way you design the
21 incentives within the agency. And that is very
22 important. That is crucial. You have to have the
23 right incentives in the way you design the agency's
24 design.

25 And, finally, transparency. Transparency

1 and accountability. That's crucial. You have to be a
2 very open communicator all the time with the
3 practitioners, with the public, with the economic
4 agents, with, obviously, other agencies
5 internationally. And I completely, totally agree with
6 Jim when he was saying that you have to be very
7 communicative within the agencies of your own country.

8 MR. TRITELL: Thank you, Eduardo.

9 And I think it's interesting that Bojana,
10 coming from the privacy world, Eduardo, coming from
11 the competition world, have defined principles that I
12 think are quite generally applicable across the
13 spectrum of what we do.

14 Are there others who would like to come in
15 on this topic? Rod?

16 MR. SIMS: Well, I will just add a couple of
17 other points because I completely agree with the
18 points that have been made. But I think a regulatory
19 agency has got to be and be seen to be a strong
20 enforcer. It has got to be taking people to court and
21 be seen to be doing that, as well as doing market
22 studies, where markets aren't working as they should.
23 I think they are complementary things to do that have
24 the regulator doing their job properly. So that's one
25 thing I would add.

1 And the other thing I would add is that I
2 think the regulator has got to be a constant
3 communicator. It can't just be doing things. It's
4 got to tell people what it's doing. Otherwise, it's
5 just not doing its job. And part of that is, I think,
6 as an advocate for competition. If the competition
7 regulator -- I mean, whereby the competition regulator
8 and the consumer regulator, if we're not advocating
9 for competition and advocating for consumers in
10 Australia, nobody else is. So we have to be a
11 constant advocate.

12 MS. BELLAMY: So I just wanted to come back
13 on one point. Rod, Eduardo, you have actually
14 prompted me. So what is, I think, different in this
15 world of fourth Industrial Revolution, and what should
16 regulators do is we that have this asymmetry -- and
17 somebody talked about informational asymmetry between
18 consumers and the tech world. But actually there is
19 asymmetry, regulators and this new tech world.

20 So what does it mean to be technically
21 strong? It means also having capabilities to
22 understand the technology and the world that we
23 regulate. We are now regulating the world of data and
24 there hasn't been anyone else who has ever regulated
25 data. This world is so different and new and so

1 changing that I think we need to completely step up
2 and reinvent ourselves as regulators. I'm speaking as
3 though I'm a regulator; I'm not. I used to be a
4 privacy officer in a company, but it's the same. You
5 know, internally, we, when we would deliver privacy
6 compliance, had to completely change, and regulators
7 have to change.

8 That's why I think this constructive
9 engagement, where there is a feedback loop of
10 reiterative compliance, learning from each other,
11 understanding, using sandbox, using citizens' jury,
12 this is something that ICO in the UK is doing now, is
13 actually something that would serve us better as
14 regulators at the moment because it is a new brave
15 world that we are regulating. And I think the old-
16 fashioned methodologies are just not going to cut it
17 anymore. So that's, perhaps, a challenge for us.

18 MR. TRITELL: All right. You've thrown down
19 the gauntlet, and I think we have Andy and Terry who
20 are also interested in coming in on this. Andy?

21 MR. WYCKOFF: She has certainly inspired me,
22 but so did Mr. Rill. I just want to combine the two,
23 really because we're just done with a very large study
24 at the OECD across 14 different policy committees
25 looking at what we call the digital transformation. I

1 think Bojana's comment is absolutely right, that data
2 now cuts through almost every area.

3 So going back to where Mr. Rill was it's
4 just that I think you need competition and consumer
5 protection authorities to begin to work with
6 departments of transportation, where there's a lot of
7 data, departments of health or agencies like NIH that
8 have a lot of data and don't necessarily understand
9 always the properties associated with the marketplace
10 as an FTC would.

11 MR. CALVANI: I don't want to be a skunk in
12 the wood pile, but I just can't resist the temptation.

13 (Laughter.)

14 MR. CALVANI: I think the FTC's record as a
15 regulator has been mixed, at best. And that's because
16 I don't think it is a regulator, nor do I think it
17 should be. I think the US agencies, unlike many other
18 competition agencies which have true regulatory power,
19 like the ACCC, the FTC and the DOJ principally do not.
20 They're law enforcement agencies; they're not
21 regulators like the Federal Reserve Board and the
22 Federal Communications Commission.

23 And while there is some residual powers, for
24 example within the FTC's organic statute with the
25 Magnuson Moss Act, where the FTC can look at a market,

1 find that it's not operating the way it would like to
2 operate, notwithstanding the absence of any violation
3 of law, it can do a market study, but a market study
4 plus, and then impose a regulatory regime that has the
5 force and effect of the law. And the agency was
6 fascinated with these powers in the 1970s. And I
7 think no one would disagree with me in saying at the
8 end of the day, the record was at best mixed.

9 I think in the United States, we're not
10 really regulatory agencies. We're law enforcement
11 agencies. And while that may seem like a semantic
12 difference, I actually think it does impact the way
13 that the agencies do behave and, frankly, how they
14 ought to behave. And I don't quarrel with agencies
15 that have mixed roles. The ACCC is a classic example
16 where the Australian legislature vested it with powers
17 that are broad based. And many other agencies are
18 like that, too. I don't think that's the role of the
19 US agencies.

20 MR. TRITELL: Good, we're off to a
21 rollicking start here.

22 Now, let's take these insights and focus the
23 lens on the FTC's bilateral relationship and
24 international cooperation. As we heard on our panel
25 this morning, we operate in a world where agencies are

1 housed in all different legal systems and economic
2 cultures and histories and powers. How can the FTC be
3 effective in operating in that environment? And,
4 also, are there things that we can learn from some of
5 the other systems and tools that other agencies may
6 have that can enhance the FTC's ability to be
7 effective?

8 Let me see if we can start off our
9 discussion with some observations from Rod, whose
10 agency mirrors our own in the breadth of our
11 engagement.

12 MR. SIMS: Well, it's hard to come up with
13 too many suggestions for the FTC because I think your
14 interaction within international organizations is
15 sensational. Your cooperation with various agencies,
16 at least as we experience, is terrific. So there's
17 nothing to say there, but to thank you very much for
18 that.

19 The areas of improvement for cooperation, I
20 think much better information sharing. I know that it
21 was mentioned earlier, particularly in Marcus'
22 section, trying to have the competition agencies more
23 emulate what IOSCO does in terms of information
24 sharing would be extremely helpful. And, also,
25 although I hesitate to give up our uniqueness, but

1 Australia has a treaty, an antitrust treaty with the
2 US that allows essentially the US agencies to act on
3 our behalf, which is stunningly powerful. We don't
4 use it that often because we don't have to use it that
5 often because people know we can use it.

6 And I think if that -- even though as an
7 aside, I really appreciate the uniqueness and I
8 hesitate to lose that status. But I think more of
9 that sort of cooperation would be just tremendously
10 powerful in making agencies more effective worldwide.

11 MR. TRITELL: Well, we'd like to make you
12 more of a path breaker than a unicorn in having more
13 of those agreements.

14 Andy, are you dealing with a lot of consumer
15 agencies and privacy agencies in the context of the
16 OECD? What do you see that we could bring into the
17 FTC to enhance our bilateral engagement and
18 cooperation?

19 MR. WYCKOFF: Again, I agree with Rod.
20 You're already doing a whole lot, and it's been really
21 -- you've been playing a leadership role at the OECD
22 for some time all the way back to 2003. We put out --
23 the best thing we have is a policy recommendation,
24 which is called a council recommendation, in the area
25 of guidelines for protecting consumers from fraudulent

1 and deceptive commercialization practices across
2 borders. That's really acted -- it was launched by
3 FTC and then FTC Commissioner Mozelle Thompson. And
4 that has stood the test of time.

5 We just reviewed it a few years ago, in
6 2018, and it set out a number of different modalities
7 that countries can follow to get this cooperation
8 going. We found that, you know, across 31 countries
9 we were looking at, only two didn't have something
10 pretty well established. So I think this is an
11 exemplary role. As was just said, there are some
12 limits here, though. We can always do better. This
13 is the OECD. We always encourage more. And that's
14 the implementation challenge, particularly with
15 sharing confidential information is difficult, and I
16 think this is an area for maybe further work.

17 MR. TRITELL: Great, thanks.

18 And, Eduardo, from the perspective of the
19 competition landscape that you observed from the ICN
20 and elsewhere?

21 MR. MOTTA: Yeah. Let me say that what I
22 could see from other agencies that could be used or
23 could be applied in the FTC, I will start with the
24 same general idea of the best design of an agency, how
25 you can use that best structure in order to be applied

1 in different jurisdictions. And I think independence
2 is still a very important element.

3 The way the Commissioners are selected or
4 are appointed is important. It's something that as
5 long as you could separate that process of decision
6 from political elements and you can put it in a more
7 technical area, I think that's going to be useful.
8 And I think that's something that has been seen in
9 different countries. And in Mexico, I think, is not
10 an exception of that.

11 I would say that the case of attribution of
12 merger cases would be also important. Something that
13 we didn't have in Mexico until recently, until 2014,
14 and something which you have been living with in the
15 US is the fact of having two agencies dealing with
16 this similar areas. That's difficult itself. In
17 Mexico, that started in 2013, with the basically
18 separation of competition application or competition
19 enforcement in the telecom's regulator.

20 Even though that is a little bit more
21 specific, there are some gray area where -- I mean, as
22 a practitioner -- and now I am on the other side of
23 the table -- it's difficult to understand who decides
24 what. And that's -- and I think there is much to do
25 in that line to give more clarity to the private

1 players and practitioners in general.

2 MR. TRITELL: We have a lot of private
3 sector stakeholders with a keen interest in our
4 discussion. Is there a constructive role that the
5 private sector can play in helping the agencies be
6 effective or in facilitating good cooperation?

7 MR. CALVANI: Well, just to make a couple of
8 comments. I mean, I think that the private sector can
9 play an important but limited role. The agencies need
10 to always be in the driver's seat, in my view. That's
11 not to say that there isn't a role for the private
12 sector. I think that there is. It can be a very
13 valuable sounding board for proposed changes and
14 regulation law and policy where -- provide information
15 that the agencies can take on board or not. But,
16 nonetheless, hopefully consider. I think that's a
17 valuable aspect.

18 Secondly, the agencies have -- the private
19 sector has resources that sometimes can be used to
20 augment those of the public agencies and the ICN's use
21 of NGAs, as I suppose is an excellent example there.
22 So I think there's an important role for the private
23 sector, but I think it is, as you phrased the
24 question, helping the agencies.

25 MS. BELLAMY: I sort of -- it's a little bit

1 of a tangential comment, but in privacy in particular,
2 one thing that we are seeing, unlike competition --
3 and I totally appreciate that -- is that the private
4 sector is playing an increasingly important leadership
5 role in shaping global responses to the diverging
6 privacy rules that exist globally. So we don't have
7 one privacy rule. We don't even have it in the US,
8 which we should, but that's a separate discussion.
9 But, globally, there isn't one.

10 What we are seeing is the multinationals
11 filling that vacuum and applying reasonably coherent
12 privacy requirements and rules wherever they operate.
13 And they have these accountability programs, privacy
14 management programs.

15 So I think there is something there, Randy,
16 that I think FTC should be exploiting and kind of
17 using that to also promote organizational
18 accountability. I actually don't think that
19 everything in privacy certainly can be solved by laws.
20 Technology is just too far out of the corral to be
21 able to be curtailed back. We need these different
22 methodologies to core regulate -- not self-regulate,
23 but core regulate -- through an accountability model
24 that can be also certifiable.

25 We have seen a great example in privacy in

1 so-called cross-border privacy rules that have been
2 jointly adhered and approved in the APAC economies.
3 The US is one of that. Those economies -- FTC has
4 played a really important role in building these
5 cross-border privacy rules which act as a minimum-
6 based standard, if you like, across the APAC regions
7 and enable companies to share data accountably and
8 responsibly and, therefore, promote consumer trust and
9 confidence in the digital economy.

10 And so I think those kind of accountability
11 measures that are based on private sector stepping up,
12 but with the regulator who is incentivizing and
13 rewarding those kind of behaviors, would be really
14 very, very important.

15 And may I also say, I want to remind all our
16 colleagues here, we have had a very interesting
17 project years ago, the so-called privacy bridges
18 project, where we tried to bridge differences between
19 regulatory approaches in Europe and US. One of the
20 recommendations from that report came out to say that
21 regulatory agencies should be doing not only joint
22 enforcement, which we see at the moment, but also
23 joint policy setting and potentially even joint
24 guidelines. And I think this is something to also
25 explore.

1 MR. TRITELL: Well, thank you, but you've
2 mischaracterized your comment as tangential.

3 MS. BELLAMY: Sorry. I could go massive
4 times --

5 MR. TRITELL: It is indeed central. And I
6 think it's a perfect segue into broadening our
7 discussion from the realm of bilateral cooperation to
8 more policy-oriented convergence. So with scores of
9 agencies in the privacy and consumer protection and
10 competition business, I think we all agree it's
11 impractical, unrealistic, and highly undesirable for
12 each to be off on its own without any coordination.

13 At the same time, there is no unifying super
14 national hard law in this area. There won't be, I
15 think, despite Tad Lipsky's desire expressed earlier,
16 and in my personal view, that's a good development.
17 But where does that leave us in terms of the ability
18 to use what the previous panel discussed as soft law
19 in promoting good practice and identifying best
20 practices in spreading them? And what role can the
21 FTC play in doing that?

22 So I'd like to ask everybody, really, what
23 are the areas you think that are most important for
24 the FTC to encourage convergence and how should they
25 do that? And are there areas where they should avoid

1 preaching convergence because there's room for
2 experimentation? And are there less good practices
3 that we ought to try to be warding off in the world?

4 So big question. And let me ask, Terry, if
5 you can lead off our thinking on this.

6 MR. CALVANI: Well, I'll just very briefly
7 toss out some things that I think are important. I'd
8 focus on the consumer welfare model, which I think has
9 served us well over the last good number of decades in
10 both Republican and Democratic administrations, and,
11 which, frankly, is under assault at present.

12 I think due process is an area that all of
13 us ought to be concerned with. While I don't have any
14 significant criticisms of the US system as it's
15 employed, due process is certainly lacking in other
16 places around the world, and I think that there's a
17 great deal of very profitable missionary activity that
18 ought to and can take place there.

19 I think in the area of privacy or privacy,
20 however you want to pronounce it, it's obviously
21 something that all of us value. But that doesn't mean
22 that you raise your hand every time anybody says, do
23 you want more privacy? I believe you always need to
24 think about the interface between competition and
25 privacy and strive to reach the right balance, and I

1 think that's a very, very difficult challenge. It's
2 easy to say, harder to make word. But I'll just toss
3 those out as some ideas.

4 MR. TRITELL: Great. Well, let's go down to
5 the end of the table. Andy, do you have thoughts on
6 areas ripe for convergence efforts?

7 MR. WYCKOFF: Yeah, I kind of expressed it
8 before. I like to think that organizations, such as
9 the one I work at, can bring this convergence, at
10 least show best practices, and once in a blue moon,
11 worst practices. It doesn't happen as much as we
12 would like.

13 And to go back to I think a common thread of
14 this panel, I do think kind of a new factor production
15 for today is data. This raises some interesting
16 questions both for competition authorities, but data
17 protection and privacy. So there's a convergence area
18 right there, I think, that I think FTC is perfectly
19 poised to begin to look at. And I think you're going
20 to see this competitive advantage that's associated
21 with data goes way beyond the companies we think about
22 today.

23 And I just think about more traditional
24 companies, such as John Deere, who are now making
25 creative use of data in many different markets

1 simultaneously. And there's a bit of debate in some
2 parts of the world who owns that data. Is it the
3 farmer or is it John Deere? That's just one dimension
4 of this. But I think that is a convergence area that
5 is worthy of attention.

6 MR. TRITELL: Rod?

7 MR. SIMS: Well, look, I'm going to slightly
8 agree with Terry. I have to be careful how far I go
9 here. But, I mean, I think promoting the consumer
10 welfare standard is an important thing to do. I
11 noticed James Rill mentioned national champions and
12 I've been jumping all over that every time it gets
13 mentioned.

14 So going back to my point about advocacy,
15 we, and particularly I, have been a very strong
16 advocate against national champions. Every time that
17 the community mentions it, because they do just about
18 every time there's a merger, every time the
19 Governments mention it, because they do every time
20 they want to justify things they've done, and I think
21 unless the competition agencies are jumping over that,
22 nobody else will. So that's where we absolutely need
23 to be an advocate.

24 But the consumer welfare standard is
25 obviously a sensible grounding for determining what --

1 and we are an enforcement agency -- what, as
2 enforcement agencies, we should be focusing on and how
3 do you separate procompetitive and anticompetitive
4 behavior.

5 I guess the caution I would put with it,
6 though, is I think in implementing the consumer
7 welfare standard, which, as I say, we strongly adhere
8 to, we just need to be a bit careful as we promote it
9 around the world about the evidentiary burden we're
10 seeking to impose as well and the way we're
11 complicating cases. Competition policy -- I was very
12 taken by Han Li's point that competition is very
13 technical, economic and legal, and consumer is not.
14 Our consumer and competition staff are one. They
15 melded into one and they both -- they're all basically
16 economists and lawyers, we've got a few ring-ins.

17 But the point I want to make is we do
18 complicate competition cases and we do sometimes put
19 on a very large evidentiary burden on them. We've
20 just taken a case in Australia where the New South
21 Wales State Government put in place a system to
22 penalize, so they sold two ports to the one player,
23 which is a bad idea in the first place, and they put
24 penalties on the third potential port which was sold
25 to somebody else so it couldn't compete with the

1 ports they had sold. That's a case we took with great
2 -- glee is the wrong word, but enthusiasm is the right
3 word, and, of course, we were not there spending a
4 second trying to work out what the harm to consumers
5 are. It is patently self-evident that there is harm
6 to the competitive process and we took it on that
7 basis.

8 So I just want to make sure we're not
9 overcomplicating. As we promote the consumer welfare
10 standard, don't make it so technical no one wants to
11 touch it.

12 MR. TRITELL: Great.

13 Eduardo, would you like to come in on the
14 convergence point?

15 MR. MOTTA: Yes. Well, let me just put that
16 question in kind of a likely different background
17 which has to do with the role of the FTC today with
18 respect to international organizations. What's the
19 way or how I would like to see the FTC role at this
20 time, I mean, I go very much in line with what Rod
21 said. I think advocacy is a key element. Advocacy --
22 even though the agencies -- the competition agencies
23 are very much in -- they have the obligation to apply
24 the law and to enforce the law, they have a broader
25 obligation also to praise and to advocate for

1 efficient markets. And, today, that is something that
2 is at risk internationally.

3 The role of the FTC, as an advocate, a long
4 time ago -- well, not so long time ago, but it was
5 when the ICN was created -- and the grandfather of the
6 ICN was just present here -- it was precisely to
7 advocate for that internationally, to advocate for
8 efficient market-oriented policies through the
9 application of competition and enforcement of
10 competition law.

11 We are now living in a very difficult
12 reality internationally that puts at risk the
13 consideration of market policies and market efficient
14 -- the promotion of market efficient policies. So I
15 think this is the good moment to think about what
16 should be the next step for the ICN and what could be
17 the role of agencies like the FTC, like the DOJ or
18 even the European DG Comp in this area.

19 I think as they had this important role a
20 few years ago with respect -- in the creation of the
21 ICN, I think this is a good moment to think what
22 should be the next step for the ICN. In my view, the
23 next step for the ICN or the next reflection has to go
24 in line of a creation of an organization, more
25 formally a national organization, in order to keep

1 promoting markets to be efficient.

2 And I think the FTC is in this important
3 historic moment to take a decision of how to move
4 forward. If it's needed, if it's useful to think of
5 an international organization with a permanent
6 secretariat to defend the market-oriented policies,
7 how to do it, how the jurisdictions and the countries
8 that want to be part of that should be joining, what
9 kind of conditions should be designed in order to do
10 that.

11 MR. TRITELL: Well, thanks, Eduardo. You
12 left us still a little bit in suspense about next
13 steps and I know that you have a strong background as
14 well in the trade world from your days in the WTO, and
15 I may come back to you to see if you think the ICN's
16 "all antitrust all the time" motto is still apt in
17 today's world or we ought to be looking more broadly
18 at intersections with other such policies.

19 But, now, let me come back to Bojana to ask
20 how you think this convergence idea or agenda might
21 play out. Is it relevant in the world of privacy
22 authorities? And I would like to interject into that
23 a question from our audience, which is what do you
24 think is the greatest obstacle or the obstacles to
25 privacy agencies collaborating on best practices and

1 guidelines, especially between the United States and
2 the European Union, and how can we overcome those
3 obstacles?

4 MS. BELLAMY: Million dollar questions. If
5 only I knew this, whoever asked me that, I think we
6 would be very rich and we would solve all the
7 problems. But, seriously, it's a bit of a loaded
8 question, right, because we assume there are some
9 obstacles, and whoever has asked me, I think there
10 have been some obstacles and maybe, maybe some people
11 would say there's been a little bit of erosion of
12 trust between regulators in the EU and here on this
13 side of Atlantic.

14 Some people also may say there's been a bit
15 of -- we have different philosophies and, therefore,
16 we cannot focus on these differences as opposed to
17 something else. But I would like to be a little bit
18 more optimistic and I actually think there is a path
19 forward.

20 So first of all, there have been great
21 examples of this kind of bridging and collaboration
22 between EU authorities and the FTC in the context of
23 Privacy Shield. FTC has been a phenomenal not only
24 supporter, but a knight with a shield using the shield
25 really in the way that it is supposed to be used and

1 has hugely contributed to acceptance of Privacy Shield
2 as a proper transfer mechanism. For those of you who
3 are privacy geeks here, you know what I'm talking
4 about.

5 There's been a great collaboration between
6 some of the regulators in the EU and FTC through GPEN,
7 Global Privacy Enforcement Network. I think that that
8 shows that things can be done together. There are a
9 number of memoranda of understanding, as I understand,
10 between individual agencies in the EU and FTC. So
11 there are lots of these things that actually have
12 worked already.

13 Now, how do we move forward? I think there
14 is more that brings us together than actually pulls us
15 apart, and we have to both, on both sides of the
16 Atlantic, just like the privacy bridge project was
17 about, it was about finding an adapter. Like when I
18 come here -- and I really get annoyed with English
19 plugs. I hate English plugs. And we've got
20 continental plugs and British plugs and we've got
21 American plugs. But we have to have -- I want
22 electricity, but all these different plugs. So that's
23 what we need to find.

24 We need to find some plugs in between so
25 that we can live with these differences and we can

1 translate what we talk together. And that means
2 respecting each other's philosophies and backgrounds
3 and constitutional frameworks. It doesn't mean
4 imposing European values on the US. And, in fact, I'm
5 really emboldened by the European Court of Justice
6 Attorney General opinion on the case, which actually
7 relates to whether the right to be forgotten should
8 now be expanded globally at Google.com and, you know,
9 everywhere, including the US.

10 Well, frankly, that would bring a huge crash
11 of cultures and constitutional frameworks of First
12 Amendment versus privacy, and that's not what we want.
13 And the attorney general has very cautiously kind of
14 said, well, there has to be a limit to how far we can
15 apply these rules, even though it's a fundamental
16 right to data protection. So I hope the court is
17 going to uphold that.

18 And I think it is important that we, in
19 Europe, do not believe that our way is the only way
20 and I think we must be also humble to take on some of
21 the US best examples. But then the US also, we've got
22 expectations, the US federal privacy debate is going
23 to sort of stir up and come up with perhaps some new
24 ways of dealing with some of these issues. So I think
25 building on that respect for differences, but also

1 what brings us together is really a good way forward.
2 I talked about some of the joint policy initiatives.
3 I really think this would be a great way to bring us
4 together. Think about facial recognition or
5 blockchain or machine learning or Internet of Things,
6 drones, all of that would be amazing.

7 For example, a case study to bring us to
8 work on something which is proactive, which isn't kind
9 of reactive, confrontational, adversarial, but
10 actually we're creating something better for the world
11 ahead. Of course, cooperation and enforcement is
12 important and I think, as some in Europe, do not
13 believe any of the complaints end up in the right
14 hands. I think that's where the FTC can also help and
15 ensure that the EU-led complaints that are sent to the
16 US actually get heard properly and get enforced
17 potentially or there is a feedback loop back. I think
18 that would be helpful as well.

19 And then the final point I would like to
20 add, which is something around -- more around, as
21 Eduardo has said, about the leadership role of FTC. I
22 really think actually FTC has got something to teach
23 other regulators just because of its breadth and sort
24 of experience in being a tough enforcer. Those of you
25 who were in privacy for many years used to remember --

1 people used to say -- Europeans used to say, if only
2 we had the FTC enforcement in the European law that
3 would be the best combination.

4 So we always looked up to FTC as to how they
5 enforce the law, how they manage, and I think that's
6 something that FTC can really take on a great role,
7 particularly with European regulators, who now have
8 got similar enforcement powers. But, frankly, and I
9 apologize, I know it's going to be online, they don't
10 have the know-how, how to actually use these powers in
11 the best way.

12 We've seen some Draconian enforcement in the
13 EU without proper due diligence, without proper
14 process, without proper transparency and proper
15 lessons learned why that fine has been applied in this
16 way and why it hasn't been applied that way. And I
17 think this is something, Rod, I think you slightly
18 talked about that. That is where I think FTC can help
19 also, frankly, technically bring the other regulators
20 a little bit up to higher level simply because of its
21 standing and experience in enforcement.

22 MR. TRITELL: Thank you. I think we have a
23 wonderful example how your questions can really
24 stimulate the panel.

25 (Laughter.)

1 MR. TRITELL: So feel free, please, to find
2 those cards and send them up here and enhance the
3 show.

4 So we're talking about conversions and joint
5 projects of an exciting nature. One way to
6 potentially move those forward is through the vehicles
7 of international organizations. Our hearings have
8 touched many times on the OECD, ICN, ICPEN, we have
9 UNCTAD, regional organizations like APAC, various
10 privacy groups. There's a big menu of these venues,
11 but resources are finite.

12 Let me ask where in surveying that spectrum
13 do you think the FTC should allocate its resources and
14 what should they seek to accomplish in some of these
15 important international fora?

16 Rod?

17 MR. SIMS: Well, I wouldn't mind just --
18 I'll answer that question, but it's just backing up to
19 what --

20 MR. TRITELL: Or come back to any other
21 point, please.

22 MR. SIMS: Well, what Bojana just said, the
23 -- we notice this quite a lot in our consumer work
24 because we are a consumer and a competition regulator,
25 and because most of our staff do both competition and

1 consumer work, we don't separate them out. I think
2 we're fairly unique in that. But it just strengthens
3 that process, that know-how in competition, which
4 you've got to have to be in the game.

5 When you translate that into consumer work,
6 it's just so immensely powerful. I think, on average,
7 we would take larger companies to court for breaches
8 of consumer law than we do for competition law. We've
9 recently taken Ford, Hines, Apple to court for
10 breaches of our consumer law. We've got large fines.
11 Perhaps the biggest development in Australia is we've
12 just convinced the government, under the heading of
13 advocacy, to align the penalties for breaches of
14 competition law and consumer law. So now the
15 penalties will be the same. Previously, the penalties
16 were much lower for consumer law, which is a terrible
17 thing.

18 The harm you can do through misleading
19 consumers is visibly as bad as it can be from cartels.
20 There is just no doubt about that. I can give you
21 numerous examples. So I just want to back up that
22 point, that the strength of being the regulator that
23 does a number of things is important. I guess it
24 leads into my point that I think ICPEN is the
25 organization that perhaps needs that extra bit of

1 work, whether it's capacity building with new
2 jurisdictions, whether it's more coordinated action
3 amongst the members, whether it's common approaches
4 and practices, but really just raising up the profile
5 of consumer work.

6 I have to say I continually get irritated
7 when I'm at international meetings, you get the sense
8 that competition work is held to be in some way
9 superior to consumer work. That is complete rubbish.
10 They are equally important. If you want your market
11 economy to work for the benefit of consumers, you need
12 effective competition law and you need effective
13 consumer law. They can both equally do great harm.
14 And so I just think we've got to raise it up.

15 MR. TRITELL: I think you have a sub
16 silentio round of applause in the room there, Rod.

17 (Laughter.)

18 MR. TRITELL: Not to mention from Bojana who
19 mentioned privacy --

20 MS. BELLAMY: And privacy as well. So we --

21 MR. TRITELL: -- which we think of as part
22 of our consumer protection.

23 MR. SIMS: I can't talk about privacy,
24 but --

25 MS. BELLAMY: The three-headed Medusa. It's

1 the three heads, right?

2 MR. SIMS: But I would happily push it to
3 privacy, absolutely. Well, the same point applies and
4 it was Bojana's point that got me in there. The same
5 point applies.

6 MR. TRITELL: Would anybody else like to
7 come in on where we should focus our efforts in the
8 international organizations.

9 Eduardo, you talked about maybe we ought to
10 be going to the next step. So if you'd like to
11 elaborate on that.

12 MR. MOTTA: Well, yes. I could, in a very
13 general way, elaborate a little bit more on that. Let
14 me first -- let me start with the main features of the
15 ICN. The main features of the ICN, in my view, is
16 that it's a soft law organization, it's a consensus
17 organization. It's a consensus organization. That
18 goes very much in line with what happens in the WTO.
19 It could be risky, but that's the reality.

20 It's a beautiful system, organization, it's
21 a beautiful network. It uses, very efficiently, the
22 communication technologies and so on. And the main
23 products that are created by the ICN are this best
24 international practices standards, practical guides
25 and toolkits, and they organize workshops for members.

1 I mean, that's in a very general and a schematic way.

2 Well, the first question is that has been,
3 in my view, the ICN has been one of the most efficient
4 networks I have ever seen, international networks that
5 I have ever seen. When I compare how the ICN was
6 created and what was the situation in the context of
7 the WTO discussion on trade and competition, which was
8 one of the elements that provoked the creation of the
9 ICN, and if you see that, that was 2001 more or less
10 -- I think it was 2001 with 15 members in the ICN.
11 Today, they have more than 114 members.

12 In 2001, the WTO was working generally well.
13 We were in the middle -- in the start of a new round,
14 the Doha Round. At that time, the ICN was created and
15 the ICN has been much more effective, frankly, than
16 organizations like the WTO.

17 But my point here is that the international
18 context in which we are living is highly complicated.
19 I mean, there are a lot of nationalistic pressures,
20 national champions, pressure from different countries,
21 developed and developing countries at the same time.
22 That has become, I would say, a more systemic, risky
23 problem for markets. And that doesn't mean -- I mean,
24 the most important elements is how to show that
25 markets in a competition scenery is one of the most

1 important instruments you have in order to create not
2 only efficiency in your economy, but also equality of
3 opportunities for economic players, for economic
4 agents, but also at the same time a quality of
5 opportunities for consumers.

6 So in that situation is where I think it is
7 needed to give an additional impulse to an
8 international organization like -- or an international
9 network like the ICN. And maybe -- I mean, I'm
10 basically suggesting to reflect on the possibility to
11 create a new organization, a new international
12 organization of -- this could be consumer and
13 competition agencies. And that should be a more -- in
14 my view, should be a more formal organization in order
15 to generate an international pressure for the
16 evaluation and valuation of the importance of markets
17 in that context, in the context of competition.

18 So to think about the possibility of having
19 a formal and permanent secretariat, that makes a
20 difference because today what you have is the members
21 are the secretariat itself. So it's difficult to
22 differentiate what a jurisdiction is saying or what
23 the organization is saying because the word is the
24 same. So in my view, you need someone that is more
25 independent than the agencies in order to advocate for

1 competition in different jurisdictions.

2 It has to be a product, in my view, from an
3 international agreement with some cooperation
4 mechanism, but also some monetary mechanism. That's
5 the most -- I mean, this is a difficult task. I'm not
6 saying that it is not. It's a real challenge. But,
7 frankly, what we are living internationally is a
8 challenge itself today.

9 Sorry for taking --

10 MR. TRITELL: No, no, a lot of food for our
11 continued thought.

12 Andy, from the OECD perspective, what role
13 can you see from the OECD and how can the FTC
14 effectively engage within the OECD, for example, in
15 the consumer committee or in the privacy activities of
16 the organization?

17 MR. WYCKOFF: I'll touch on that in just one
18 second. Eduardo provokes me because my part of the
19 OECD has done a lot on telecom dereg, particularly in
20 Mexico. Here's maybe an example we can begin to think
21 about because we did something in 2012. It helped
22 inform the decisions in the regulatory reform that
23 went on in creating an independent regulator even
24 then. We followed up in 2017 and looked at
25 implementation. What really went on? And that's now

1 become a lessons learned that the rest of the region
2 now is beginning to look at. So I think there's a
3 model for what he's saying.

4 The FTC -- I speak under the Chair here of
5 my Consumer Policy Committee, Hugh Stevenson, already
6 plays a huge leadership role at the OECD. There's two
7 areas if I had to put on my Christmas list from FTC,
8 where I would like to see them push. One is on this
9 evidence base that many people have talked about. We
10 love statistics at the OECD and comparative --

11 MS. BELLAMY: Data.

12 MR. WYCKOFF: Data. Comparative indicators,
13 and can we begin to look at things as we get, for
14 example, like data breach laws from around the world.
15 Can we begin to compare these and get some -- it may
16 not be apples to apples, but at least fruit to fruit
17 to look at.

18 The other is really leadership work that
19 happened in 2010 again led by the FTC on our consumer
20 policy toolkit. I think they began to open the
21 thinking on both behavioral economics and the
22 informational economics, which I think is important.
23 And following up on that -- and we've begun to do some
24 work on consumer attitudes towards trust. It goes to
25 what people are saying. It may not be such big

1 differences as people think, but also doing some more
2 experimental work, such as on personalized pricing,
3 which we're beginning to see proliferate in many
4 different areas. These are areas where I think
5 there's a lot of international interest and where the
6 FTC could play a leading role.

7 MR. TRITELL: Well, leading right into our
8 next topic, which is the FTC's leadership role, I
9 think that there was a point in time when the FTC had
10 so much longer and deeper experience in some of these
11 areas that it was a default and natural leader. Now,
12 we live in a very multipolar world in all of these
13 disciplines, and it prompts me to wonder what does it
14 mean to be a leader in this environment. Is it
15 important for the FTC to be perceived as and to be a
16 thought and policy leader? If so, how can the FTC
17 exercise effective leadership internationally,
18 including on emerging issues and with agencies that
19 operate in very different environments?

20 So let me just run down the table for
21 anybody who would like to offer thoughts on this study
22 with Bojana.

23 MS. BELLAMY: Yeah, sure. So I've got a
24 very long wish list, which I will submit in writing
25 probably to my friends at FTC. But, Andy, to continue

1 where you kind of stopped, I would really love the FTC
2 -- I think there is some leadership vacuum first, let
3 me say, in the privacy regulatory community at the
4 moment, and I think FTC would be very well placed to
5 fill that vacuum, together with some other across the
6 world are kind of wanting to seek that new leadership
7 role.

8 So one area where I would like to see some
9 work would be in the area of fairness, fair
10 processing, fairness and unfairness, you know. In the
11 majority of data privacy laws we have requirements
12 with fair processing, yet nobody knows what it means.
13 Yet here, FTC statute and work is based on unfair
14 trade practices. There is unfairness methodology that
15 FTC can teach us a lot in this world of AI and machine
16 learning as to what creates harms to consumers, what
17 and how do we measure that and how we, as
18 organizations, think what is fair and what is not
19 fair.

20 I think this will be a great opportunity not
21 just for bilateral, multilateral regulatory
22 corporation, but together with the organizations who
23 are implementing this in the practice as well. FTC
24 anonymization test, again for those of you in the
25 privacy geek community is still standing the test of

1 time where frankly everybody else says there's no such
2 things as anonymous data because everything about me
3 doesn't matter. If you know who I am, but you know
4 everything about me, that's good enough to identify
5 me. Well, I think FTC has done some really great
6 thinking in the past and we need to revive that
7 leadership and kind of, again, convergence with some
8 others.

9 Risk-based approach to regulation and
10 enforcement and investigation is something that I
11 think FTC again is best placed to teach the rest of
12 the world. We live in a world where data is
13 everywhere. Every company, to your point, is today a
14 data company, Rod. I mean, I keep hearing this from
15 manufacturing companies to financial companies who say
16 we are data and tech companies today. So in that
17 world, we really need different ways of approaching
18 that.

19 And then a final point, I would like to say
20 that this whole topic of incentivizing what good looks
21 like and rewarding good behaviors, I think there is
22 something about that that we need to exploit more.
23 I've been head of privacy for a huge multinational
24 company for 12 years, and trust me, when we got good
25 praises from a regulator, that gave me a bigger

1 budget, that gave me more standing internally, that
2 got me to speak to the CEO and the board much quicker
3 than any penalty and any fine did.

4 I think realizing what motivates companies
5 and motivates people to behave well and be good
6 corporate citizens in this new interconnected world, I
7 think there is work to be done there. And I do
8 remember FTC consent decrees that I have read as I was
9 a practitioner, every single consent decree said to
10 me, here is how they reward companies who actually do
11 something while in privacy. That's what DOJ said.
12 Data -- I think somebody mentioned before, that's
13 what the SEC does, that's what US sentencing
14 guidelines do.

15 So I kind of feel there is this US body of
16 work and it's not even -- it's legal background and
17 framework that actually exists and can teach the rest
18 of the world how to use those incentives and rewards
19 for compliance in this new world where I think this
20 will be particularly useful.

21 MR. TRITELL: Thank you.

22 So as we go down the table and as I see the
23 hourglass time running low, thoughts on FTC leadership
24 and any other closing thoughts you'd like to include
25 in about a minute and a half each.

1 Terry?

2 MR. CALVANI: A minute and a half. Okay.
3 On the perception issue, you can go to Google and you
4 can find a gazillion people, not a gazillion, but a
5 large number of people that say that the US agencies
6 have failed to export the US view of competition law
7 and policy around the world. And I think, in some
8 sense, that's a red herring.

9 If you had asked yourself, have they been
10 successful in selling the treaty, absolutely. One
11 would expect them to be. I mean, the treaty you just
12 -- in Ireland, we just go Xerox Articles 101 and 102.
13 It's really easy to do. If you wanted to Xerox the
14 US, what in God's name would you do to do that? The
15 Section 1 of the Sherman Act is not very helpful.
16 It's a common law -- judge-made common law that we
17 have for competition law in the United States. It's
18 not a user-friendly exportable commodity.

19 The same thing is true on the process side.
20 Our legal process side is firmly grounded in the
21 adversarial process that we took from England where
22 the agencies, generally speaking, stand in the
23 position of the crown as a party plaintiff before the
24 courts. And it's obviously a hell of a lot easier to
25 sell the administrative process to jurisdictions who

1 owe their history to the continental system.

2 So I don't find the fact that Article 101
3 and 102 have been adopted around the world, I'd be
4 surprised if it hadn't been. I don't find it
5 bothersome that an adjudicative administrative program
6 has been adopted and the adversarial process hasn't.
7 I would be surprised if it were otherwise. I think
8 the agency has been very successful in focusing on
9 discrete and important topics.

10 We may have duplicated Article 101 and 102
11 in Ireland, but when it came time to look at our
12 merger guidelines, we basically -- I guess we're being
13 filmed here -- we basically Xeroxed the US guidelines
14 and tinkered with it a bit to make sure it fit our
15 system. So I think the perception, sometimes this is
16 a bit of a red herring. We've got to ask really what
17 are we talking about.

18 MR. TRITELL: Eduardo, what are we really
19 talking about?

20 (Laughter.)

21 MR. MOTTA: Well, I coincide with Terry. I
22 mean, the legal system makes a major difference. But
23 let me tell you in the case of Mexico. We frankly
24 used the -- I mean, when we started the negotiations
25 of NAFTA, we didn't have competition law at all. That

1 was a little bit more than 25 years ago. There was
2 not a competition law in Mexico. And we basically
3 used, with the help of the OECD, we basically used the
4 model of the FTC. So that's what we did.

5 So an element of leadership could be in very
6 specific elements, like -- I mean, we have an
7 administrative legal system, a completely different
8 legal system than the US, but we basically use the
9 same design of the FTC and that has been useful. We
10 basically use the knowledge -- the human capital from
11 the FTC. I remember the FTC helping the Mexican
12 authority to communicate with our judges. We created
13 a very important human capital in Mexico in the
14 judiciary to judge the decisions of the competition
15 authority. That was basically, even though the legal
16 system was completely different, that was an example
17 of how you could apply the knowledge of the markets,
18 the knowledge of the competition enforcement in
19 general itself. And it goes beyond the legal system.

20 MR. TRITELL: Rod?

21 MR. SIMS: In the interest of time, I'm
22 actually going to junk what I was going to say and
23 just I want to reinforce some of the things that
24 Bojana said. I think it's an extremely good idea for
25 the FTC to exercise leadership in the data field,

1 given it is the competition, the consumer and the
2 privacy regulator. That is a fantastic combination.
3 I had never met our privacy regulator in Australia. I
4 didn't know where they were. I didn't know who they
5 were until we did our digital platform inquiry, and
6 then I finally located them. They're in the same
7 building I work in in Sydney.

8 (Laughter.)

9 MR. SIMS: But I didn't know.

10 MS. BELLAMY: Oh, no. You met them in the
11 lift.

12 MR. SIMS: Sort of, yes.

13 (Laughter.)

14 MR. SIMS: So the fact that you're already
15 at one I think is something that can be worked on.
16 And I also want to support the consent of unfairness
17 in our digital platform inquiry. We are completely
18 looking to the US on that, not just the way the law is
19 done, but the way it's administered. If we were to
20 press for such a law, we would try and completely copy
21 the way the US is doing it.

22 MR. TRITELL: Andy, last word?

23 MR. WYCKOFF: I'll pull a trick from Rod and
24 actually build on a comment he made earlier. I think
25 after basically 40 years of regulatory reform and then

1 our economy's becoming more digitally based on the
2 internet, which it really empowers the end user in a
3 way we hadn't seen before, that the importance of
4 consumer policy needs to be underscored. I completely
5 agree, but I don't see it in many countries or at the
6 OECD for that matter. And so giving greater weight to
7 that and what that means, because we rely on them to
8 make markets in a way that we didn't 50 years ago.

9 MR. TRITTELL: One second left. Bingo.

10 Thank you. I will go over our time to thank
11 you for an extraordinarily informative and interesting
12 and fun discussion. Thank you all so much.

13 Please join me in recognizing our wonderful
14 panel in this discussion.

15 (Applause.)

16 MR. TRITTELL: And if you would stay where
17 you are, we're just going to have a few concluding
18 remarks to wrap up our hearings. Time has flown. Our
19 panel time has flown, our two days have flown.
20 They've been an extraordinary couple days. We had
21 high expectations. From my point of view they have
22 been roundly exceeded throughout the program. We've
23 had an extremely rich dialogue on the key issues that
24 the FTC faces today and those that will confront the
25 agency in the international aspect of our work, which

1 will continue to play an increasingly important role
2 as we seek to fulfill our consumer protection privacy
3 and competition missions.

4 None of this would, of course, have been
5 possible without a truly extraordinary amount and
6 quantity of work by a huge number of people. So allow
7 me a moment to offer a few words of thank.

8 First of all to Chairman Simons, joined by
9 our Commissioners, for conceiving these hearings and
10 supporting this hearing on international issues; to
11 the FTC staff far too numerous to name, especially
12 from all my colleagues in the Office of International
13 Affairs; to Bilal Sayyed and his team from the Office
14 of Policy Planning, who have run this and all the
15 other hearings; from the amazing group from my Office
16 of the Executive Director working mainly behind the
17 scenes whom you may have seen, though, at the back of
18 this room and outside this room, who not only made
19 this happen, but ensured that our program transpired
20 extremely seamlessly and professionally, thank you,
21 thank you.

22 To our panel moderators from the Office of
23 International Affairs, plus Ellen Connelly from OPP,
24 and to our faculty who came from around the world in
25 some cases just for this hearing. Thank you for

1 making the time and for all the preparation and
2 thought that went into making these panels so
3 productive and insightful.

4 We've learned so much from these sessions
5 and that learning will greatly inform our thinking and
6 the FTC's priorities and policies as we prepare for
7 the challenges of the coming years and decades.

8 Thanks as well to our audience and our
9 stakeholders whose views we welcome at all times and
10 especially in comments that we encourage you to submit
11 by the end of May as part of our hearings record.

12 That concludes our 11th session of the FTC
13 Hearings on Competition and Consumer Protection in the
14 21st Century. Please join us for our future hearings,
15 including our 12th hearing, which will focus on the
16 FTC's approach to consumer privacy, which will take
17 place at our Constitution Center in Washington on
18 April 9th and 10th.

19 We look forward to working with you in
20 furtherance of the FTC's critical missions of
21 maintaining competition and protecting consumers.

22 Thank you very much.

23 (Applause.)

24 (At 4:40 p.m., the hearing was adjourned.)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

I, Linda Metcalf, do hereby certify that the foregoing proceedings were digitally recorded by me and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the outcome in the action.

s/Linda Metcalf
LINDA METCALF, CER
Court Reporter