MR. TRITELL: Good afternoon. I'm Randy Tritell, and I'm the Assistant Director for International Antitrust in the FTC's Bureau of Competition, and thanks to all of you stalwarts who have stuck it out for this panel.

We're going to try our best to make it worth your while, and Judy's told me that she's tried to help out by giving everybody a little shot of sugar to get them through the homestretch.

I would first like to, or I guess I should say I'm obligated to, echo the words of many previous speakers you have heard during this symposium in saying that the remarks that I am going to make are my own and are not necessarily the views of the Federal Trade Commission or any Commissioner; in view of today's
panel, I should probably add or any former Commissioner
or any Commissioner of another agency or any former
Commissioners of another agency.

It's a pleasure for me to participate in this
panel for many reasons, and it's fitting that the panel
on the international aspects of the FTC's mission follows
immediately upon the panel on intra-government relations
within the U.S., and it's also fitting that in the last
panel of the program symbolizing the FTC's role in the
new frontier field of international antitrust. Or so I
thought.

Here I was fancying ourselves pioneers in the
brave, new old world of antitrust gone global, but that
was before I ran into our resident historian, Mark
Winerman, who took me aside and suggested we pay a visit
to, for me, an almost foreign corner of the FTC known as
the library.

There Marc introduced me to some dusty, dog-eared
books from when the FTC was but a gleam in the eye of Louis
Brandeis. Even then, Congress was charging the nation
agency with FCC with studying international competitive
issues.

There in the Commission's annual reports and
other volumes, from days long before there was an OECD,
ICN and other conference venues, were the FTC's early
forays beyond our borders. Some of these are rather
notable.

For example, it turns out that one of the new Commission's first activities was to hold hearings on the ability of U.S. firms to compete in foreign markets and barriers thereto. Hence, the Federal Trade Commission held hearings on what was later to become, on its recommendation, the Webb-Pomerene Act, and Congress charged the FTC with its administration. We're still getting a big bang from the buck from this statute. For having a grand total of 11 remaining Webb-Pomerene associations, this statute attracts attention all over the world, as I am regularly reminded by foreign governments and NGOs at international conferences.

The Commission's annual report of 1917 included a section called "Foreign Trade Conditions," noting that Congress had specifically placed in the jurisdiction of the Federal Trade Commission the investigation of trade conditions with foreign countries relating to combinations in trade.

By 1920 the Commission had established an Export Trade Division to whose activities it devoted eight pages of its annual report, including a section on extraterritorial jurisdiction, which I previously thought was a brand new issue.

In 1929 the Commission investigated 106 complaints concerning alleged unfair practices affecting
the foreign trade of the United States.

By 1938, the Commission reported, under Section 6 of the FTC Act, on antitrust and unfair competition laws in foreign countries, with sections on 32 such countries.

You might say the FTC was doing international antitrust in a manner of speaking, but not the substantive matters that we know now are at the heart of it all like, say, international cartels.

That's around the point where Marc introduced me to the studies the FTC undertook in the 1940s of international cartels. Of course back then the issues must have been a lot different because they spent a lot of time studying a cartel in a commodity called petroleum.

The Commission issued a detailed report pointing to competition problems in the sector, but when they tried to publish the report, something quite strange happened. It became caught up in politics. Fortunately, times have really changed!

So our field is not so new after all, but it's still exciting, and we're lucky today to have such a stellar group to enlighten us further on the international dimension of the FTC's work.

With that, let me turn to my co-moderator and colleague in the International Division of the Consumer Protection Bureau, Hugh Stevenson, for some opening remarks.

MR. STEVENSON: Thanks, Randy. Hugh Stevenson.
I'm the Associate Director of the Division of International Consumer Protection, and I make the same disclosure Randy does.

Having said that, I would say we've saved the best for last here when we really can focus on the issues untroubled by too big an audience, but I think it's really an important topic and really the sort of forward looking topic, and I had the same caveat like Randy.

At some point, Mark Winerman accosted me with these same dusty volumes and actually sort of set me right too, and there were some interesting issues back in the day of people misrepresenting products as made in France. This was seen as a marketing advantage at the time.

The issues have changed somewhat in international consumer protection. I think in looking at the larger view, as Randy has suggested, a lot of the issues we deal with are newer and indeed on the consumer protection side, we're kind of the younger sibling in the international area things, having gone even more recently a lot, and we're trying to, of course, make up for lost time.

Historically a lot of the issues we've been dealing with in advertising and marketing have been in a national or even local level. The marketplace has
become more globalized though. Of course as the Internet in a lot of ways makes the world smaller, it makes the work of international consumer protection larger, and we've seen this in the complaints we've received increasingly from foreign consumers or about foreign companies or about evidence that may be in another country or about money that's being taken from somebody here but it's been moved to another country, and an increasing number of the issues that we see have some international dimension, telemarketing fraud, crossing borders, web fraud of course, spam where it can be sent to anybody from just about anywhere, a lot of the phishing problems that have been talked about recently also can have an international component, privacy issues.

This raises a lot of new challenges for us, some practical or enforcement challenges, how do we chase the people across the borders, how do we cooperate with these agencies?

That means engagement with a lot of foreign agencies, foreign counterparts, and then on the policy front, many of the issues that we have that are very challenging we've heard about the last two days, considering the domestic context, now can take on an even greater international dimension.

That means engagement with our counterparts in
the kind of alphabet soup of international organizations
and the other folks who are thinking about these same
issues, and we're trying to build on what we've learned
on the competition side and enter into more
arrangements, developing more systematic ways to share
information, complaint databases, working on
partnerships, memorandum of understanding with other
agencies, working on legislation that's now pending in
Congress, the International Consumer Protection Act,
working in other organizations to think about how our
approaches compare and work with approaches taken by our
counterparts in other countries, and these are some of
the issues I think our panelists will address today so
let's turn to them.

MR. TRITELL: With that, let me introduce our
first speaker. I said at the outset that I was
delighted to moderate this program for several reasons,
and one key one is the opportunity to introduce my
former boss, colleague and friend, Terry Calvani.
I'm sure most of you know Terry, whether from
his scholarship when he was a professor of law at
Vanderbilt, from his colorful appearances at antitrust
conferences around the country and the world, from his
antitrust practice at Pillsbury Winthrop, and mostly
from his seven memorable years as a Commissioner and
Acting Chairman here at the Federal Trade Commission
where I had the great privilege of working with Terry.

As most of you know, Terry is now once again a Commissioner, but this time with the Irish Competition Authority, making him to my knowledge the first person to serve as a Commissioner in two countries -- the very personification of globalization.

Terry's portfolio includes responsibility for enforcement against criminal cartels. Earlier I mentioned the FTC's history with the Webb-Pomerene Act. Well, it turns out that Terry has a special fondness for Webb-Pomerene associations and in fact has even recently taken the trouble to send each one of them a letter inquiring about their activities in the Emerald Isle. In a recent lecture Terry displayed a PowerPoint presentation of the courtyard of the prison in Dublin in which executives of such associations carrying on cartel activities in Ireland can get their daily exercise.

Ladies and gentlemen, Terry Calvani.

MR. CALVANI: Thank you, Randy. I'm delighted to be back here, and I thank you for that very gracious introduction.

Our conference organizers, have suggested the themes conflict, cooperation and convergence in international competition policy. When I left the Federal Trade Commission in September of 1990, conflict characterized much of the interaction among national competition authorities.
Cooperation was the new, but largely unrealized objective, and convergence would have meant precious little to anyone at the FTC.

Now, some 15 years later, conflict among national competition authorities is rare. Cooperation is the order of the day, and convergence is not only in everyone's lexicon but is actually taking place. Thus in a relatively short period of time, the international enforcement community has changed significantly.

As we pause to reflect on the history of the Federal Trade Commission, I would like to review these three themes and offer thoughts on what we might expect 14 years hence.

The 1986 Leeds Castle Kent Conference well illustrates conflict. The agenda included extraterritoriality, blocking legislation, claw-back statutes and the like. The United Kingdom was to be represented by senior officials of the Office of Fair Trading. As the conference approached, the OFT was instructed by the Department of Trade and Industry to stand down. Senior representatives of the DTI rather than the OFT would represent the United Kingdom. As the dramatis personae changed, we learned that the OFT was not trusted by its ministry to adequately represent UK interests. Evidently it was feared that OFT officials would not stand up to American trustbusters. Today that story
sounds silly, but times were different and conflict was commonplace.

Cooperation? Well, there wasn't much. I cannot identify a single important case where there was serious multinational cooperation during my entire seven year term as Commissioner, but I can recall instances where there was a significant lack of cooperation, sometimes on the part of the U.S.

Institut Merieux, for example, involved a merger of a Canadian and French firms, neither of which had productive assets located within the United States. Employing the effects test of jurisdiction and an actual potential competition theory, we required the divestiture of a Canadian rabies vaccination business without even notifying, much less consulting with the Canadian authorities, and as you might expect the Canadians were livid. Today such an event is inconceivable.

As for convergence, I don't think I'd heard the term much less used it during my tenure of office. To sum up, conflict? Yes. Cooperation? No. Convergence? Not yet an idea.

Change was in the air when I left the FTC in 1990. I think I am safe in saying though that my international experience at the FTC was not significantly different from any of my predecessors. My successors, like Commissioner Thompson, on the other
hand, have had a very different experience.

Let's look at conflict. One can attribute the conflict during my term to a variety of sources. The effects test was certainly important. Very vocal opposition to the test was voiced from Sydney to Ottawa to London and places in between.

Foreign governments adopted laws and other policies designed to frustrate U.S. efforts to exert extraterritorial jurisdiction. Yet extraterritoriality, in reality, was a bit of a whipping boy. The real conflict was that the American faith in antitrust was simply not shared abroad. The exercise of extraterritorial jurisdiction by the United States simply highlighted the difference in attitudes. Today, competition policy is no longer an American commodity.

Skeptics will focus on episodic conflicts between authorities today. Truth be told, conflicts will never completely disappear. The United States itself has achieved a broad based consensus on substantive antitrust, and yet U.S. courts often find themselves in disagreement when interpreting the very same statutory language. My point is that conflict, while not eliminated, is much less common.

Cooperation, on the other hand, is very common -- so common that I will mention it only briefly. In a U.S. context, it is embodied in formal instruments,
including soft cooperation agreements, but also mutual
legal assistance treaties, and, of course, the all vowel
stature that I can never get quite right. More
importantly, cooperation has become part of the every
day fabric of international antitrust enforcers.

International cartel enforcement is so common
that countless continuing legal education programs have
been hosted around the world devoted to educating
counsel on how to deal with this new environment.

The combined raid by over 200 officers of the
United States, Japan, Canada and the European authorities
in eight countries at premises around the world on 12
February 2003 is an excellent example of the current state
of cooperation.

Near the end of my term in 1990, the
Bundeskartellamt hosted its semiannual cartel conference in
Berlin. Sir Leon Brittan, now Lord Brittan, took the
occasion to suggest that the time was ripe to reconsider
international antitrust convergence. A moribund subject
since the failure of the Havana Conference years earlier, he
initiated a discussion that has been the subject of
countless programs since.

Lord Brittan suggested the WTO as the vehicle,
but the idea enjoyed little progress without the
active cooperation and support of the United States.
Such support was not forthcoming.
Former Assistant Attorney General Klein summed up the U.S. position in his "If It Ain't Broke, Don't Fix It" address to the 1999 Cartel Conference, but there was another unspoken reason for the U.S. position. Unsaid was the U.S. fear that convergence would lead to populist antitrust divorced from economic underpinnings. It had been a long way from the likes of Von's Grocery and Schwinn, and there was little interest in returning.

Attorney General Janet Reno convened the International Competition Policy Advisory Committee in October of 1997. The committee's final report highlighted the costs associated with divergent antitrust policies and the need for greater convergence.

The final report signaled change when it recommended that the United States explore the creation of a new venue where government officials, as well as private firms, NGOs and others could consult on matters of competition law and policy.

Just before leaving office, Assistant Attorney General Klein delivered another address, which many read to mean a change was taking place in Washington.

The ICN, the International Cartel Network, was born on October 2, 2001. In its short life, it has accomplished much. One of its initial efforts was the identification of best practices in the merger review.
process. The fruits of these labors are nothing short of dramatic.

The work of the merger working party was important in the decision of 12 jurisdictions, including Ireland, in modifying, amending and changing their merger process. This is successful convergence taking place real time.

The enlargement of the Union on May 1 highlights additional convergence. As a condition of entry, the new accession states had to adopt competition regimes modeled on Articles 81 and 82 of the Treaty. Now, whether these Member States otherwise would have opted for different competition laws cannot be said, but the adoption of laws in ten countries based on a single model is a significant step toward convergence even if a bit forced.

Informal convergence is also taking place. Merger policy within the EU is much more akin to that in the United States and North America generally than it was a few years ago. The revised EU merger regulation reflects this convergence. The treatment of unilateral effects and the role of economic analysis are but two examples.

New merger guidelines, which recognize the role of efficiencies and speak of consumer welfare, look very similar to those of the United States. The abandonment of
the EU Notification Regime is yet another example of soft convergence.

So where are we now? Conflict rare; cooperation, the order of the day; and convergence in center stage.

What about the future? The grand question is whether we will see the emergence of an international competition regime as some have advocated. Lord Brittan and Commissioner Monti have endorsed some, albeit as yet ill-defined, regime within the WTO, and although these sentiments have not found fertile ground within in the U.S. government, the idea is not without American supporters.

Although the U.S. is active in promoting convergence in the working groups of the ICN and elsewhere, I see nothing that leads me to conclude that the overall approach by the U.S. is likely to change in the short-term. Since U.S. participation is probably a necessary, but insufficient, ingredient the question of whether a world antitrust order will emerge strikes me as premature. Perhaps it will, but not within the next 14 years.

Rather, the next two decades will likely continue to present challenges, and although my paper discusses several, I would like to mention just two, one substantive and one process oriented. The first I call differences in creed.
While there has been much consensus building, consensus has yet to be established on substantive law. When comparing substantive issues between Europe and North America, there is little disagreement today on cartel policy. The treatment of mergers, while less homogeneous than cartels, is very similar. True, there are non trivial differences in the treatment of vertical restraints but nothing of really great moment. Only in the area of single firm behavior are the differences dramatic.

Take price predation for example. U.S. law requires that a plaintiff established that the defendant sell below cost, using some version of an Areeda-Turner test, and that the plaintiff establish that the defendant is able to recoup the cost of predation. Intent is not important. European law, on the other hand, appears to be much more concerned about predatory pricing. For example, in the AKZO case the Court of Justice found that prices above variable cost could still be predatory. Average variable cost could still be predatory if accompanied by an intent to eliminate a competitor and the Court declined to require proof of recoupment. In doing so, the Court expressly rejected the Areeda-Turner test. This may appear about as far as one can get from U.S. current law, but is it?

This may be more a difference of form than substance since a firm must be dominant in the EU in the
first place before issues of predatory pricing can even arise.

I must say I am cautiously optimistic. Focusing again on predatory pricing, U.S. law was far more wobbly than that of the European Union not that many years ago. The legacy of Utah Pie, suggesting an average total cost standard, enjoyed a very long ride in the United States.

The evolution of U.S. antitrust law from an intent rules based system to one grounded in industrial organization economics took a generation, but there was nothing particularly American about that development because the dismal science does not respect flags or frontiers. Seeds sowed within the academy by Aaron Director and others sprouted and took hold over time. While economics came late to European competition enforcement, it has come, and over time it will have the same effect.

Turning to a process issue, I asked whether American antitrust federalism isn't the poster child for bad policy. U.S. lawyers have not been bashful about criticizing the cost associated with the internationalization of merger enforcement, but non U.S. lawyers are quick to point out that their American colleagues have little to complain about.

As one European lawyer recently observed:
"U.S. lawyers complain about having to notify an American transaction in Romania but force me to vet a deal between two European companies before the antitrust regulators not only in Washington but in Santa Fe, Des Moines, Tallahassee, Albany, Portland, Seattle, and Sacramento."

The virtues of convergence seemingly have escaped notice in the United States. What is to be done? Our keynote speaker, Judge Posner, suggested that state antitrust enforcement rights be limited, but he acknowledges that legislation is necessary to accomplish this. Absent support by State Attorneys General, any reform proposal would be dead on arrival in Congress.

Clearly this situation undercuts the U.S. ability to call for more rational approaches abroad. One of the biggest challenges to American competition policy is to find a solution for this problem. These issues pose opportunities for U.S. officials, and it remains to be seen whether they are up to the challenge.

In conclusion, the international competition environment today is vastly different from that at the end of my term in 1990. The late Dr. Wolfgang Karrte, former president of Bundeskartellamt, used to refer to the international enforcers assembled for cartel conferences in Berlin as his competition family. While
a bit of an overstatement at the time, it is likely to become much more a reality in the coming years. Thank you.

(Applause.)

MR. STEVENSON: Thank you.

We turn next from the Emerald Isle to the Land Down Under. It is my great pleasure and honor to introduce Professor Allan Fels. Professor Fels is former head of what's known as the ACCC or the Australian Competition and Consumer Commission.

The ACCC, like the FTC, combines both competition and consumer protection functions in a single agency, and Professor Fels led that agency with distinction certainly as a figure well known in these areas internationally and also very influential at home.

Exhibit A for that proposition is this book that I actually had the pleasure to read about Professor Fels fortune and power and describes its many encomiums and describes him as one of the most influential people in Australia at the time, although I noticed that one of the first quotes they give is someone giving the opinion that he's rather mischievous, but in any event, a very important figure we will see. Professor Fels?

MR. FELS: Okay. Well, I'm going to just talk briefly about competition strategy, following a little bit in the lines of Bill Kovacic, doing a couple of
Comparisons of the U.S. and the rest of the world, a few words on consumer protection, and then applying the strategy analysis to international competition questions.

So in any competition agency, in any government agency there are a number of key questions that you always have to ask: What should be done? What needs to be done? What would be of value to the public?

Then you also need to ask, Well, what may be done? What is actually permitted by legislation to be done, and also what can be done? That is, what are the administrative resources at your disposal? What are the laws at your disposal to achieve what should be done?

Finally a question of ever growing importance in government everywhere, not only in the competition area, what requires cooperation from other organizations and entities in order to achieve the public venue that one is seeking to achieve?

Now, I'm going to use those questions, I've set up a little model which is of use for policy agencies. In passing I think it is relevant to a number of the questions that have been asked in this conference and builds a little bit on Bill's paper. Then I'm going to more ambitiously apply it just very briefly to the international theme.

One of my points is that most policy discussions
tend to focus on just one of those variables, a heated
discussion about what should be done with little
reference to what the political environment says may be
done or what is administratively possible or what
requires cooperation from others to get results.

Now, competition is very relevant to
international competition and policy, so there, just
said the same in slightly more convoluted language.
What one is trying to do is achieve public value.
That's what ought to be done and one depends upon the
political environment or what I call the authorizing
environment to allow a government authority to do that,
and then there is another question of what can be done,
the actual operating capability.

So just talking about each of those variables
for a moment, I said the aim is to try to get some
public value, so in the case of competition law, what is
the public value?

Well, of course, the first thing in value is
some kind of output, and here I've suggested maybe its
successful prosecution, and then that leads to the
outcome of a competitive economy, and that is of public
value, so that's one theme that is gainful, but
typically in the field of government as distinct from
the private sector, it's not just output.

There's also public value in the processes that
we follow, and so there is a considerable value attached
to following a fair process, and that leads to greater
trust in government, and that has the value of proper
use of government power, and also may be fairness, so
that's very quickly an idea of what is public value.

Then I mention the notion of an authorizing
environment, a political environment. In any strategy
analysis looking ahead, you have to have a look at what
is driving the environment that authorizes the laws and
regulations and so on under which you operate, and
that's driven by various forces that I've set up there,
and it's a very fickle kind of environment. It can
change quickly, so any look ahead at strategy has to
have a look at how the political environment may work.

Then the operating capability, that's simply the
laws and the resources that someone has to carry out
their tasks, and besides looking at those variables, you
have to look at their interrelationship, and sometimes
they're all kind of lined up. There's no disequilibrium
as shown there, but I do just mention that very often
you find that there's an equilibrium at a low level of
public value, in other words, the regulators doing
nothing much. That's what the political environment
wants, and they've got their resources just to do that.

More interesting is when there is some kind of
misalignment. Now, in that realm, I've suggested that

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maybe the public value being pursued by the regulator 

exceeds the actual mandate from the authorizing 

environment. Something like that happened in Australia 
when the regulators stepped up the litigation rate very 
heavily. This brought it into conflict with the 
political environment, and I've heard mention of similar 
conflicts over the last few days, and I just mention 
that sometimes the regulator can change the authorizing 
environment by education, by advocacy and so on, and 
bring them into line that way.

   Just on the advocacy discussions that I've heard 
here, I really think that if we're looking ahead at the 
FTC over the next 20 years, it's really important to 
look at how advocacy is done in the rest of the world 
because it is done differently. In the EU the 
Competition Commissioner sits at the table of all the 
Commissioners when all decisions are being made about 
transport and energy and agriculture and has a direct 
input into the law making process.

   In Korea, Taiwan and some other Countries, quite 
often the head of the Competition Commission is a member 
of the Cabinet and gets a say in the making of the law, 
and it contrasts very much with the model we hear of 
here where the competition bodies are not involved in 
the making of the law. They go along hand and hand and 
sort of make a submission.
It's a very different power situation from the rest of the world, and I do very much caution against U.S. people advocating the U.S. advocacy model in other countries when it is possible. I mean, advocacy is terrific, but the possibility of being able to be involved in the making of the laws is very important. Some might say, We're a federation. What can we do about states?

In Australia, a federation, we do it differently. There is a federal review of all anti-competitive state laws, and if they are found to be anti-competitive and not in the public interest, the States are subjected to a severe financial penalty by the federal government. So there are other ways of looking at advocacy, which I think the FTC should look at in coming years.

Now, the next possibility is that the regulator hasn't got the operating capability to achieve the public value. It hasn't got the resource of the law, and of course the classic examples is the EU. It's been loaded up with tasks, but it just doesn't have the people. What can it do?

Well, it can't get a bigger batch of things to settle. It can squeeze a bit more out of the operating capability by cutting back on notification and getting higher output in that fashion, and there's another possible solution, but I do think a lot of discussion of
policies tend to ignore the operating capability restriction, and they should build it into policy analysis.

Now, the next variable I just want to introduce is that of coproducers. Sometimes to achieve public value, you need the help of other people. You need the help of coproducers, and in the EU for example, another way of getting value is to use national regulators to help the Commission get some results.

In the U.S.A. system, I've always thought of the authorizing environment, the public value, the operating capability, all at fairly high value, and also reasonably well aligned, it seems to me that the issue I keep hearing about at this conference is a coproducer and do coproducers value in the field of competition really deliver? Isn't that the big issue here?

The question about state laws, state regulators, other regulators, overseas regulators, do they in some way inhibit the achievement of public value? Isn't that the big policy question, and on the question of consumer protection, well I've just expressed my thoughts on that again in this strange language of circles and so on, but basically consumer protection policies are kind of a coproducer of value.

It may at times complement or it may conflict with competition policy. There are some interesting
questions about whether you should integrate the
functions of one body. I believe that is the way to
maximize the joint value of the activities, and one
point which I don't think has been mentioned so far is
that there is a huge political benefit in integrating
competition and consumer policy because the consumer
protection actions build general public support for the
agency and help carry it through its more unpopular
decisions when it rejects mergers in unpopular manner or
does other unpopular things. The political credit it
builds up for competition through consumer protection policy
is extremely important.

On the international side, it seems to me
that there is considerable public value to be achieved from
curbing international anti-competitive behavior, cartels,
mergers, market power, all those trade and competition
issues that we keep hearing about, and also in the field of
intellectual property law, there are numerous restrictions
on international trade and copyrighted and patented
products, which I've always found extremely hard to see any
justification for.

Certainly in terms of my way of looking at
things, there would be public value from doing something
about all the international restrictions on competition,
so one of the options: One is each country goes it
alone.
Now, that doesn't change something because not
only can your own actions help you, but also if there's
a place like Australia that you can sit back, and if the
U.S. or the EU breaks up cartels or mergers, that brings
a benefit to you.

I repeat the point, the extraterritorial
approach seems to work badly and it harms cooperation.
I did mention a lot of countries want to do something
about international cartels but permit their own export
cartels is somewhat contradictory.

So in terms of my diagram, if you go it alone,
then the potential value that you want to achieve can't
be achieved because of the insufficient operating
capability, so the actual capability is less than what
is required to get results.

Convergence, I think we've already heard about
it. I just mention that convergence is fine. It is
having a bit of an effect, but still many countries have
weak laws or, more importantly, they have laws that are
not being seriously applied. They may come to do that but
at the moment they don't.

Convergence doesn't itself do much to address
the global problems. It's more something that's
happening domestically. It still leaves the global
questions to be resolved, so what is happening is that
instead, we're getting more cooperation in many, many
forms.

It, too, has some limits. First of all, the simple fact is that the political environment does not permit too much cooperation. It imposes severe limits on it. Many countries do not have agreements. There are few agreements between developed and developing countries, and even the agreements that you find, even the very serious one between Australia and the U.S., the IEAA, that has a number of letters, for example, it doesn't cover mergers, and there's some public interest exemptions, so cooperation is good, but it's still got a long, long way to go.

I'll just signal that cooperation is a way of harnessing coproducers, but there are limits on it from the authorizing environment, and so the potential of cooperation has still a long way to go before being realized.

What is very important though, in this as in every other area of government now, and as we heard in the previous session, particularly from Commissioner Harbour, what is really important is not to have a big argument about who should do what, whether you're talking about the federal regulators versus the states or the federal competition agency versus the industry regulators or the U.S. and the rest of the world, it is actually to work on making cooperation work better.
There's a body of learning now on how to make cooperation work better in government, and this should be a really big focus for the future. I believe at the FTC and everywhere else, it is the best not so much to argue about who owns the patch but, whatever it is, to work harder on making it work well.

On multilateral agreements, I suggest that the actual operating capability is negligible at the moment because there isn't the political support for multilateral agreements, and I've also then made even smaller the circle of the world competition authority and suggested for the whole subject of having a world competition authority should be seriously revisited at the repeat conference that will be held at the 180th birthday party of the FTC.

I want to mention an area that has gone disastrously wrong in this world. Those of us who are competition policy people feel trade policy is an area of competition policy, but one that has gone disastrously wrong, and we really need to do something about all the legislative restrictions on international trade. They are the biggest barrier to global economic welfare. I'm afraid that cartels have come second in importance. That has to be part of the agenda.

I will say finally and I'm only a quarter way through my speech, finally I'll just mention that in many ways the formal cooperation these days is less
important than informal, and my conclusion is at the/moment we're making some progress but there's a
political problem about cooperation.

Bilateral cooperation is the way forward, and
that we need to work harder on making sure that that
works well. Thank you.

(Applause.)

MR. TRITELL: Thanks to Terry and Allan.

Allan, I made a note next to your remarks to
make sure you're invited back to the FTC's 180th Anniversary
Symposium.

It's now my pleasure, after these two interesting
papers, to present our first discussant, Professor David
Gerber. Professor Gerber is a leading scholar in the
international antitrust field, currently the Distinguished
Professor of Law at Chicago Kent College of Law. David has
been a member of law faculties across the United States as
well as in Germany and Sweden, and has practiced law in both
continents.

His most recent book is "Law and Competition in
the Twentieth Century Europe: Protecting Prometheus."

David, after listening to these two provocative
papers, we look forward to hearing your observations and
insights.

MR. GERBER: Thanks very much, Randy. It's a
real pleasure to be here. As I look at the group there
are a lot of people here still. We weren't sure whether we would be down to three by this time or not, and I'm glad to see so many people are staying around.

I want to comment on two themes that have come up in the prior discussions. One is European modernization because that's such an important part of the entire international picture, and the other is U.S. antitrust on the world stage. Both, in my view, shed some light on discussions we've had in other contexts today.

First a little bit on the modernization of European antitrust law. Terry Calvani talked about the European situation as being part of both convergence and divergence, and his discussion of this is a little bit more extensive in the paper, but at one level we've got an obvious tension.

If you look at Europe as a whole, it is getting closer to the United States, so in that sense there's a kind of convergence basically on two lines. There's more strictly and narrowly defined economic analysis and there's more of an effort to generate private actions, even though it hasn't gone very far. The new structuring of the European communities antitrust laws has moved in that direction, and therefore there's less conflict and more cooperation.

That seems to be the picture, but it's a bit
more complicated, and it deserves a couple of comments.

First, the changes in Europe are enormous and untried for the non-specialist. I think non-specialist in the United States have not perhaps noticed or given this sufficient weight. The member states, since May 1 of this year, are now the primary enforcement agencies in Europe. That is the 25 member states, some of whom are very, very new of course, are the primary enforcement agents throughout Europe. The idea is that everyone will now apply EU law at least in most cases (not all cases do they have to) this will create a degree of uniformity, and consistency will be maintained. A degree of coherence will be maintained in two ways.

One by virtue of the Commission's capacity to essentially promote coherence -- for example, by taking cases away from national authorities, by commenting on what should be done, and by essentially pushing the Agency to do things the way they're supposed to do as far as the Commission is concerned, and second by a network arrangement.

There's going to be a tremendous amount of flow of information, within this network of competition officials in Europe, and the idea is not only that this flow of information will inform people, but that it will be providing a kind of format for creating consistency. Nobody knows really whether either of those will work.
well.

We assume they'll work well. We think they'll work well. Everybody's betting that eventually somehow these will work. It's been going since the first of May. There are a lot of little things that are happening, and some things people aren't so happy about it, and it's not quite clear just where all that's going to go.

So from this perspective, we need to think about the tremendous importance of it, about the tremendous degree of change that's involved and also about the questions about just how this mechanism will work.

So when you take those things and you put them together with some major differences in how people in the various parts of the European community, European Union, think about competition law, things may all become uniform, but right now there are some quite large differences.

There are, for example, major differences with regard to how much economics you use and what kind of economics you use and how many resources you have to support an economic analysis. It may be possible to get all that quite uniform, but for a very long time there are going to be very interesting implications for American lawyers.

It's going to be more difficult to predict
outcomes, not in all cases, but in many cases it's going
to be more difficult to predict outcomes. It will be
more difficult to identify relative differences within
Europe. The differences will not be big ones and
obvious ones about substantive law. They will be
minor. How much does one competition authority believe
in economics and want to pursue economics by putting in
all the resources that are necessary? Do they have
sufficient resources to do it and so on?

Is there a degree to which procedural uniformity
can be achieved? At the moment the Commission has said
in its modernization, "We're not worrying about all the
differences in procedures," so as you have it right now,
you have 25 national systems with often completely
different procedural systems applying the same substantive
law. Outcomes are likely to be influenced.

Advantages for lawyers are likely to vary. A
great deal of detailed analysis is going to be necessary
to figure out at least in big cases what you should do,
how you should do it, why you should do it and so forth,
and finally it's going to create difficulty in terms
of identifying differences relative to the U.S.

There is an assumption that Europe is getting
closer to the U.S. In some ways, as I indicated, it is
with regard to substantive law matters, the use of
economics. It is the hope that there will be more
private enforcement actions, but still enormous
procedural differences remain. Fundamental procedural
differences still exist.

As to the use of economics, the Commission itself
is becoming more advanced. I'm not so clear what the
member states are going to be able to do about all of
that. Some won't have the resources, and what will
happen there is another question. Don't forget also
that antitrust is still something you have to sell in
parts of Europe at a certain level, not that it's
nonexistent, but "how far it should go?" "Will
businesses cooperate with it?" and so on. So there's a
risk that there will be some assumptions about
uniformity that don't hold.

Okay. Then the second point and that involves
U.S. antitrust on the world stage. Terry's paper and
some of the general discussions we've heard have a fairly
positive picture. There's growing convergence. There's
positive value for all, fewer distortions on global
playing fields, fewer conflicts.

For U.S. lawyers it's seen as positive on a
variety of fronts. Everybody is getting closer to the
United States. More like us, more convergence. Are
they the same thing, more like us and more convergence?
Maybe so. The picture is fairly complex actually.

We talk about convergence. At one point, at one
point not very long ago I may add, convergence simply
meant everybody sort of at least pays a lip service to
antitrust, and they have an antitrust statute. Now we
have a hundred of them, 60 of them in the last five or
six years or eight years.

   Well, if convergence means anything, it means
you're converging towards some point, and if it's just a
question of having a similar substantive law, maybe
there's a degree of convergence there, but when we look
more carefully at it, the convergence begins to become
a little bit less clear.

   If the question is, "Are we getting closer?" Is
the rest of the world getting closer to the U.S. model?
Well, maybe a little bit, sort of, kind of. In terms of
more economic analysis, what do we mean by that?
Everybody says, of course, there's economic analysis.

   What do we mean by economic analysis? We've
heard today that what is generally considered the right
way to do things in the United States now is really only
being approached (and that indirectly) in Europe. There's
a different question on some levels.

   The rest of the world doesn't pay a lot of
attention to that by and large. A major difference is
with regard to unilateral conduct. Norms on Cartels do
not show major differences, but, again, how far we go in
this. How it actually is going to work is not terribly
So, more private suits? Is that the other part of the American model we think there's convergence towards? Yes, but not very far. The United States system believes very much in private enforcement. Europe is beginning to say, "This would be nice," although I think there's very little experience with private enforcement in the Europe so far, so it's really quite questionable whether we got a serious convergence there at all. There's much to the convergence theme. It's an important theme down the road, but it needs to be analyzed in a nuanced way.

Perhaps what we really mean is that the U.S. model is the convergence point. If so, we need to ask how appropriate is the U.S. model? There's an assumption that is bantered about often among American lawyers and American administrators: essentially, that the American approach top antitrust is the right approach and everybody else should simply follow that approach. If they do, we'll call it convergence, and if they don't, we'll call it wrong headedness. I think this is a narrow-minded sort of perspective.

There are many factors that will influence the degree to which competition can be fostered by legal process: the degree of economic integrations, the market situation (in particular, how big is the market and
soon) how advanced is the market, the procedural context in which you have to operate, the institutional or political context in which you have to operate, the role of lawyers and the freedom of lawyers to do certain kinds of things, the resources of the lawyers.

All those things tend to affect how you can actually operate a competition law system, and I think it's real important that we think about that. I point out here, merely for example, to China, China's in the process of drawing up competition legislation, analyzing what the Americans do, what the Europeans do, what the Australians do, trying to figure out how it all works.

They're unlikely to come very closer to the American model. They are likely to come out close to the Europeans. Is that convergence? In some ways, yes. In some ways, no. My point simply is it's very important to think about that.

In conclusion then, when I think about the future of all of this, I think about the issues that I've brought up and the differences that still exist and need to be taken into account. In any event the future stage will look different than the stage that we've been thinking about.

Issues will be framed differently. It will no longer just be the U.S. and Europe as the primary basis for discussion about convergence and cooperation.
Essentially, U.S. and Europe have been the entire focus. The discussion will be much more fundamentally international. It will take into account Asian countries. It will take into account China and Japan and other countries in a much more significant way in the future.

The issue will no longer be, it seems to me whether to enact antitrust law or not, because clearly we'll have antitrust laws almost everywhere. The issues will be what sorts of substantive laws you have, how they can be enforced and implemented in ways other than through enforcement -- through advocacy action and so on.

It will no longer be just "are they like us or not?" and it may be better that way. It may be better for everybody concerned. The discussion it will no longer be primarily from American perspectives. Are they simply making the same mistakes we did"? is often a frame for thinking about what everybody else does. That will change.

So I think that U.S. agencies and lawyers will be the key to success with the antitrust idea in the world. We have a tremendous experience. We have tremendous resources and so forth. The degree to which that actually works will depend it seems to me, however, on how well Americans understand the differences that affect the way competition law operates elsewhere and can operate elsewhere and adapt its approach accordingly. Insisting on the U.S. model may mean that
in many places you simply don't get very far at all.

The FTC, in the last few years, has done a

wonderful job of trying to do these things with Bill

Kovacic and Randy Tritell, and I'm enormously impressed

by what they have done and where they seem to be trying
to go, and I wish them very well in getting there. I

think we all should. Thanks.

(Applause.)

MR. STEVENSON: We've just heard discussion of

the issues of cooperation and convergence and focusing

on the areas of antitrust competition law, and we turn
to our last speaker to address the competition and

convergence themes in the context of consumer

protection. It is a great pleasure for me to introduce

the next speaker, many of you already know, Mozelle

Thompson who has just finished a six year stint as a

Commissioner at the Federal Trade Commission.

I think it's fair to say its undisputed that he

has been a central figure in the development of the

international consumer protection area in the areas of

both cooperation and convergence.

In the convergence area, he represented the

United States and indeed shared the consumer policy

committee at the OECD, the Organization for Economic and

Cooperation and Development, and while there was one of

the driving forces behind one of the two sets of OECD
guidelines, one addressing consumer protection in
electronic commerce, and another protecting consumers
across borders against fraud and deceptive practices.

In the cooperation area, he was for several
years involved in what is know known as the
International Consumer Protection Enforcement Network,
ICPEN, which the competitive part of me has to know that
it actually predates the international competition that
we're going back to the early '90s, and he was involved
for several years then there and indeed led the FTC to
Europe's authorization, so let me turn it over to
Mozelle Thompson.

MR. THOMPSON: Good afternoon. Terry, I think
the fact everybody is still here is because I think half
the people think that we still work here, and therefore
they have to show up. They haven't gotten the memo yet,
but. It's good to see you all. You haven't changed
much in two weeks.

This is a very interesting topic for a couple of
different reasons. One is that a lot of what the FTC
does is oftentimes hard for the public to understand
because you're charged with predicting the future in
taking action on practices that people don't know, and
they've been victimized oftentimes, and so you're there
predicting the future, and this particular panel is
talking about predicting international cooperation and
convergence, about predicting the future, about things that could go badly with the public.

So that takes a certain kind of mind set. First you have to be an optimist. What it also tells me is that we have thrown around a few terms here, which I think I'm reminded of my public policy studies, which is that what it is depends on where you sit, that convergence in the context of international competition and consumer protection has meant various things.

It's meant certain vertical issue, for example, the difference between policy and practice because in some cases there are many countries where the people that do policies in these areas aren't the people who actually do enforcement in these areas.

Then it's also a relationship between central authorities and other enforcers. You heard a little bit the last panel talking about the relationship with states, and I think Terry talked a little bit about the changes that are now occurring within the EU on competition, between what happens at the European Commission and what are the powers that member states are going to be exercising.

So you see questions about cooperation and convergence vertically, but you also see another kind of cooperation and convergence, which not only takes place between those who are involved in policy and enforcement.
in various countries, but also the cross-pollination between competition and consumer protection because more and more people that are involved in both areas see that there are synergies involved because they both essentially deal with consumer welfare and consumer benefit.

In many instances, you see opportunities for both to work hand and hand, not withstanding the fact that sometimes it seems like the people in the Bureau of Consumer Protection and the people in Competition don't necessarily know what the other side is doing.

I will say in my time at the Commission, there was much more of an opportunity to see how both sides work together and especially in contraction to what we know.

Then there's a final idea of convergence, which I think some of the people here on the panel have talked about, which is convergence of legal standards, including proposals that have been made from international competition authority, and there's been similar proposals that's been made at the TransAtlantic Consumer Dialogue having some omnibus consumer protection agencies that will be in charge of global enforcement.

I think what's happened in looking at the world, especially recently, is we've looked more toward
opportunity for cooperation and highlighted areas which
have a transnational or cross border component to it,
whether it's on the cartel side, on competition, whether
it's us looking at ECommerce or cross border fraud, to
look at areas where we have common interest with other
enforcers, and that transcends whether they're involved
in the policy side or on the enforcement side or whether
they're involved in the criminal side when there's a
difference, for example, in some countries, civil law
countries versus common law countries.

Being led by trying to find practical results
eventually will lead to strands of cooperation and what
many will say will be convergence because in some senses
that's the way that you're going to get beyond the
normal territorial political and cultural restraints
that may lead people to believe that because they're
cooperating that they're giving up something instead of
looking at an opportunity to gain something that will
benefit people who are victimized, wherever they may be
in the world.

So those are some opportunities that I see, and
what's happening now, you're seeing it right now at the
OECD. In another two weeks I know that Hugh and Randy
will be over in Paris, and it will be the second joint
meeting between the competition and consumer policy
committees, and these are the people who are involved in
the policy side.

The first meeting took place a year ago, when they talked about what are the general interests that those committees have, and we talked about consumer welfare. Now, people are going to talk about specific examples of practices and policies that they have seen that have a competition and consumer component and how they might work together in examining those issues and how they might move forward in informing each other's thinking about how to enforce the law or what legal changes have to be made.

I think that that's an opportunity. At the same time, there is a strong interest I've seen on both sides, competition and consumer protection, to have practical, tangible results.

If you ask me whether there's one tangible change that I've seen throughout the world, it is that more and more governments are trying to find out how they can be more publicly accountable and in doing that, trying to find areas in competition and consumer protection where they can actually show the public real results and plot a course for the future of where they might see more fruitful results from international cooperation. So that's where I see things going, and those are the opportunities.

Now, I think there's always this big contention
now, it's very funny actually, that the various alphabet, languages of various bodies trying to grab hold of this now, but I think what you see as interesting is a two pronged analysis.

One is with existing bodies, whether it be the OECD or for that matter the WTO or anyone else, to look at them carefully to figure out, Well, what are the opportunities presented by these organizations, and then being willing to say, There are some things that maybe we should take to another organization in order to get more practical results, for example, at the ICN or ICPEN where people are looking at a less formal way to cooperate.

So those are the opportunities, and it's a very interesting environment right now because the FTC is in a very unique position. We do both competition and consumer protection. We also do policy and enforcement that while there are other things that may not be as well, we have more of an opportunity here to talk in a more cohesive way about those issues than many other agencies in other countries.

If we can talk to other countries about what those opportunities are instead of preaching what they should do instead of talking about what they might be able to do and what our experiences are, I think the FTC will continue to have a very important role indeed, so
thank you.

(Appplause.)

MR. STEVENSON: I think we have time for just a little bit of discussion, and I would like to raise an issue that's been touched on I think by a couple of speakers. We have I think two folks here who used to work for agencies that combine competition and consumer protection, and one who was working for an agency that has solely competition functions, and I wondered if our panelists had thoughts on the pros and cons of that, of those two kinds of organizations of functions in government.

MR. FELS: Well, Tom, to my mind the two functions complement one another. That is, competition works better if consumers are informed and can exercise choices and understand competition better. Likewise, as was pointed out at lunch yesterday, a lot of consumer protection problems are basically viewed from a market functioning and computation analysis perspective to come up with the broad solutions, and that's most likely to happen if the two functions put together.

There are economies of scale and scope in mentioning those and not mentioning the political advantages.

MR. CALVANI: I really don't have anything to add to Allan's comments except to say that I think the
principal advantage I see to consumer protection bureaus is an infusion of economics that you don't see when agencies are separated.

As I look at the recent events in Ireland, the Irish consumer protection agency recently prosecuted groceries stores for selling baby food too cheap, even in the absence of any predation. That's a strange thing for a consumer protection agency to do, and I don't think you'll find that sort of thing taking place in a combined agency.

Similarly, I think that there are advantages, albeit less dramatic, that flow to competition agencies who have expertise in marketing and retailing and the like, so I think in general agencies that combine the two are better placed. I agree with Allan.

MR. THOMPSON: I think that it's interesting. I think that that's the natural assumption, but I actually think that we're in kind of a different position because we have been at the heads of agencies so that we tell people that they have to talk to each other on both sides of the fence within the agency.

I'm not sure, so the challenge is actually to make sure that there is an understanding in parts of the agency internally, that that actually happens because what could happen by natural operation is you a defacto wall that is not necessarily that much different than
what happens in a lot of other countries.

You've both alluded to something that's very important, and I thought that occurred at the OECD joint meeting that represented a pretty significant shift from what people may have seen in the past.

It was the first time that a lot of people on the competition side saw that consumer protection folks actually have much more of a market focus now than they may have had in the past, so that not to say that there aren't anomalies, but at least have much more understanding that they want to condition the market as good behavior versus bad behavior.

That I think is a pretty significant and important shift.

MR. GERBER: Just one additional thing on that. If you look around the world on this, especially to developing countries, countries where they're developing in an economic sense but are also developing competition authorities, the idea of having a consumer function attached to the competition law is often very useful.

It allows progress. It allows the amassing of otherwise often very scarce resources to get things going, so that's to be considered in the rationale.

MR. THOMPSON: It also covers your political butt.

MR. TRITELL: With that, thanks on behalf of
Hugh and me to our panelists and discussants, and to all of you for bearing with us.

(Brief break.)