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COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

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WELCOME

(8:59 a.m.)

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

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Commission's publicly available websites.

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

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

MR. TRITELL: Thank you very much, Deon.

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

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

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

Noah has been a great supporter of the FTC's
international competition, consumer protection, and privacy programs. In fact, he has already been personally involved in our efforts at the OECD's Competition Committee and in our privacy work on the International Conference on Data Protection and Privacy Commissioners.

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

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

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

We hope that they assist our sister agencies around the world in doing what they do. And all of that means that what we do, both as a consumer protection agency and as an antitrust agency and, in...
particular, I would argue right now antitrust and privacy, what we do has international ramifications. And that means that we need to take seriously what we do, we need to think carefully about what we do, and we need to do what we are doing today and the day before, examine constantly and critically what we do to make sure that it lines up with best practice, that it reflects the best research, that we can be a model.

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

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

During my tenure as a Commissioner, I've had the opportunity to engage in a number of international
efforts on both sides of the house, that includes
traveling abroad for competition and consumer
protection conferences and participating in ongoing
debates. Randy mentioned OECD in Paris and ICDPPC in
Brussels. Just a few weeks ago, I was in Santiago,
Chile for the APEC data privacy subgroup meetings.

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

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

We need to continue our efforts to work with
international partners, both through multilateral
Institutions like OECD and APEC, and through direct partnerships. We need to work with them to identify trends and bring enforcement actions together that put an end to scams, frauds, and other activities that harm consumers here and abroad.

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

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

Different countries are going to take different approaches, but that's not going to stop the world from engaging in international commerce, and it
shouldn't do so. The demands of consumers include both privacy and all the benefits that we derive from cross-border data flows. We here at the FTC must and will continue to work on the Privacy Shield, facilitating data transfers with the EU, and continuing our efforts and partnership with the Department of Commerce.

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

On the competition side, we likewise observe today international M&A and conduct that transcend borders. As our world becomes more interconnected, it is common to see more than one competition enforcer analyzing the same or similar mergers or behavior. And as our participants today will discuss, different
enforcers are often products of different legal regimes and traditions, which can affect how they investigate, analyze, and ultimately seek to remedy the conduct or merger before them.

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

I was speaking just last night with Isabelle de Silva, and we were talking about merger review in France versus the United States, a conversation that we began nearly a year ago. That is a very live discussion right now in Europe, and the US, I think, has a lot to offer with respect to how our regime has worked. You can like it, you can dislike it, but I think it really offers an important lesson how to look
at a merger once it’s been consummated, which was one
of the things that we talked about.

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

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

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

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

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

Our reputation as thoughtful, rigorous enforcers depends on our continued commitment to bringing solid cases, following due process, and advocating domestically and globally. These hearings are another important step in furthering these international efforts. I look forward to hearing from
the participants today and in written comments on how best we can target our resources on these important questions, and I thank everyone again for being with us today. Thank you. (Applause.)
IMPLICATIONS OF DIFFERENT LEGAL TRADITIONS AND REGIMES FOR INTERNATIONAL COOPERATION

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

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

Roger is not only an antitrust expert but an international law scholar, on leave from the faculty of Notre Dame Law School, where he is Concurrent Professor at the Keough School of Global Affairs and a Faculty Fellow at the Kellogg Institute for International Studies. Roger previously practiced with a law firm in Washington, DC and served as a legal advisor to the Claims Resolution Tribunal in
Zurich, as a law clerk of Judge James Buckley of the
DC Circuit, Court of Appeals, and to Judge Richard
Allison of the Iran-United States Claims Tribunal in
The Hague.

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

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

As all of you know, the DOJ and the FTC work
extremely closely with one another in international
arenas, and so we're constantly in discussions and
dialogues and strategy sessions about how we should
promote our shared values with respect to
international engagement and cooperation, so thank you
for the opportunity to be here. And I want to just
say that I think these hearings are incredibly useful
for engaging in serious reflection on broad issues of
antitrust enforcement, and it will definitely help to promote sound antitrust policies.

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

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

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

In some cases, the level of cooperation has
been extraordinary. For example, in the Bayer-Monsanto merger, our team worked closely with eight different authorities on the analysis of the merger and the proposed remedies, which, given the nature of agricultural markets, required that we work hand in hand with other jurisdictions in fashioning the remedies.

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

As is obvious from this summary, it is amazing how far we have come in a few short decades. Fortunately today, we live in a world that has largely embraced market-based economies. With that embrace, the world generally has accepted the need for civil liberties, including fundamental due process. And while we still have a far way to go, it is truly remarkable how far we have come since the end of the Cold War in promoting economic and political freedom. By the mid '90s, as Noah just mentioned, most countries recognize the virtues of market-based economics, and with that recognition came the
realization that antitrust laws are crucial to protect
the integrity of free markets. Twenty-five years ago,
over 60 countries representing more than 80 percent of
the world's GDP have enacted antitrust laws. As
Assistant Attorney General Anne Bingaman noted, this
development represents enormous progress in agreeing
on the ideal shape of the playing field. But leveling
the field in today's global economy means more than
adopting antitrust laws, it means enforcing them.

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

There are almost twice as many civil law
countries than common law traditions in the world, not
to mention countries that rely upon Islamic and
indigenous law as well. Therefore, one can expect
some variation in the ways that different countries
enforce their antitrust laws. As Oliver Wendell
Holmes said in his famous treatise on the common law,
“The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

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

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

In civil matters, the Division is authorized to bring lawsuits in Federal District Court to enjoin violations of the antitrust laws. The Division does not have the authority to issue by itself an
enforceable decision or order to enjoin the conduct at
issue. When the Division brings a lawsuit to enjoin
antitrust violations, a court reviews and bases its
decision on the evidence presented by both the
Division and the defendant. At trial, the Division
bears the burden of proof and will need to prove its
factorial allegations by a preponderance of the
evidence.

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

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

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

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

The required standard for factual findings varies. Evidence may need to be reliable or consistent or convincing or some combination thereof. In the EU, for example, the European Commission is required to base its decision on convincing evidence or a cogent and consistent body of evidence, which means that the evidence must be factually accurate, reliable, and consistent. However, in administrative
law systems, courts tend to defer to antitrust agencies’ economic assessment to a significant extent by applying a less rigorous standard of review with respect to economic issues or matters of competition policy.

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

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

The rules of evidence thus have a significant impact on the types of evidence on which we rely in building a case. For example, the Division needs to consider which company documents or
statements by executives of the parties we could introduce without running afoul of the hearsay rules. Similarly, with respect to complaints by customers or competitors, we need to determine to what extent such complaints can be used as evidence at all as opposed to inadmissible opinions.

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

While enforcement decisions by administrative agencies are typically subject to review by a court of law, the deference to this agency is different than how courts treat agencies in a prosecutorial system. In a prosecutorial system, the antitrust agency is the plaintiff and has the burden of proving its allegations in court. In an administrative system in contrast, the agency is the
respondent at the review stage. The target of the enforcement actions bear the burden to demonstrate that the agency's decision is based on errors of law or fact.

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

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

The Antitrust Division, for example, does not receive deference from federal district courts. Under the Chevron doctrine, courts will defer to a reasonable agency interpretation of an ambiguous law
that a regulatory agency is tasked to administer. And in our -- it provides that courts will generally defer to a regulatory agency’s construction of its own regulations. The Antitrust Division, however, is a law enforcement agency, rather than a regulatory agency, and thus Chevron and Auer do not apply when the Division brings a lawsuit to enforce the antitrust laws.

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

In the EU for example, to the extent that a decision of the European Commission touches on policy matters or entails complex economic assessments, the European courts will conduct only a marginal review, which is limited to checking whether the relevant rules on procedure and on starting reasons -- stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. So as you can see, there are significant differences between prosecutorial administrative
enforcement systems in civil and common law traditions, and these differences may result in a very different dynamic in enforcement proceedings. In a sense, some characteristics of administrative systems and civil law jurisdictions create incentives in favor of enforcement, while prosecutorial systems impose higher burdens of proof on enforcement agencies.

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

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

The key point in all of this, however, is that the differences between various enforcement regimes do not prevent our agencies from reaching
consensus on fundamental issues of antitrust enforcement. With respect to antitrust procedures, there is unity at the core and diversity at the margins. We respect both our national traditions and transcendent axioms of procedural fairness.

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

The proposal identifies approximately a dozen universal principles that are widely accepted across the globe. The proposal complements these substantive provisions with strong adherence, cooperation, and review mechanisms designed to ensure meaningful compliance. Since we announced our initiative in June of last year, we have had meetings and discussions with over 50 antitrust agencies from around the globe, including agencies from both prosecutorial and administrative systems, from both common law and civil law systems, from both large and
established agencies, as well as younger and smaller agencies.

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

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

Adopting this text, which will be open to all competition agencies worldwide, both the ICN members as well as nonmembers, will be a remarkable achievement. It will send a clear signal that antitrust agencies across the globe, despite the differences between their proceedings that I discussed earlier, are committed to procedural fairness, and it
will reflect international minimum standards that even
nonsignatories should recognize.

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

As two eminent antitrust scholars have
noted, “Convergence of procedure, no less than
convergence of substantive law, enhances respect,
regard, and legitimacy and, thus, the sympathy of
nations.” Thank you very much.

(Applause.)
MR. STEVENSON: I’d invite the speakers for the next panel to come up, please.

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

And this implicates a number of issues, and it can be, indeed, at even the constitutional level, what values are fundamental, can be at the administrative law level and procedural differences as Roger Alford just talked about in the context of competition. It can be in the context of institutional design, and one of the challenges here is to step back a little bit from the front-line, practical issues that we face here and explore some of the sometimes underappreciated ways in which these underlying, big-picture differences of systems can
result in challenges for us in moving forward in a common way.
And with that, I turn it over to my comoderator.

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

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

All right, well, if you didn’t already know it coming into today, it was certainly evident beginning yesterday with Chairman Simons and Bill Kovacic’s remarks yesterday to open our international hearing right up to today’s comments by Commissioner Phillips, DAAG Alford. Indeed, my colleague, Hugh, just now -- it’s not much of a spoiler alert here, the FTC is not alone on its enforcement and policy fronts. There are scores of counterpart competition, consumer
protection, and privacy law enforcers around the world that address the same policy issues and increasingly the very same conduct that the FTC does. Yet even with a significant enforcement and policy overlap, the legal foundations and frameworks and approaches for our international partners are often very different.

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

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

MR. YOO: Well, thank you very much to the Commission, Hugh and Paul particularly, for inviting me to be here. And I’d actually like to thank Roger Alford for actually setting such a great foundation 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
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
discipline, taught in large lecture classes. What
does this mean? You don't develop the same facility
for engaging in critical thinking, but in the much
more profound way, the ability to do interdisciplinary
work, to have taken even a rudimentary course on
economics or technical subjects generally is
unavailable to almost every lawyer in the world.
17 You don't see the kind of joint degrees that
flourish in the US and have been successful at the
University of Pennsylvania. Seventy percent of our
students graduate with a joint degree or a certificate
from a different school. And that style of education
is almost alien in every other jurisdiction.
23 Interestingly, Japan and Korea attempted to institute
reforms to make graduate education possible in an
attempt to make their counselors more effective at

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

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

The other big difference is the one that
Roger already raised so well, is the difference
between adversarial and inquisitorial traditions. We forget -- one of the things that's different about the law is usually the judge does all the questioning of the witnesses and dictates how the proceedings unfold. And it's interesting, it's what we discovered is this is then grafted, as Roger set up so well, onto an administrative decision-making apparatus where we assume that the administrative agencies get all the benefits of the traditional civil law judge, even though they lack the same degree of independence and they lack the same degree of relationship with the overall decision-making process.

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

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

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

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
13 MR. O’BRIEN: Thank you for that start.
14
15 Next, we’ll turn to Professor Francesca
16 Bignami from George Washington University. What are
17 your thoughts on identifying some of these important
18 foundational differences between regimes?
19
20 MS. BIGNAMI: Well, thank you very much for
21 the invitation to be here today. It's a real
22 privilege to be able to speak to this audience about
23 the comparative law of regulation and the regulatory
24 process, so it's great to be here.
25
26 In my brief time here, I'm going to focus on
27 an important concept that's been used to capture the
28 differences between regulatory systems, and that is
29 adversarial legalism. And as I say this, I realize
how much my comments are exclusively applicable to consumer protection and data privacy and not to competition because of the choice that was made early in the establishment and creation of the US system to go for the prosecutorial model and not the administrative model. So this really applies only to the regulatory areas of consumer protection and privacy.

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

And the claim is that American regulatory law is a lot more detailed and punitive than the law of other jurisdictions, including European jurisdictions. When it's implemented by government
bureaucracies, it's done through adversarial formal procedures inside the bureaucracy and outside the bureaucracy subject to extensive court challenge. And, most importantly, from the perspective of outsiders, there is a lot of private enforcement directly through the courts using tools such as class actions.

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

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

So I think we can all say that we, given
this audience, know what adversarial legalism is, but
what's an informal regulatory style? Well, that's the
UK Information Commissioner's Office predecessor, the
Data Protection Registrar, which existed from 1984 to
1998. It had no administrative inspection powers. It
always had to go through the criminal process. It
only had one real administrative sanction, and it
could sue in court based on criminal procedure, but
only for a very small set of privacy violations.

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

Now, to conclude, what I'd like to do is to
flag here something that will be coming up later, and
that’s in my own research, which investigated this regulatory style hypothesis using data protection as a case study. I find that since the 2000s, the contrast between adversarial legalism and the informal regulatory style is less stark than before, and that's because European administrative agencies have acquired significant enforcement powers, and they are more strategic and deterrence-oriented in how they use those powers.

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

MR. STEVENSON: Thank you very much.

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

MR. MARSDEN: Thank you so much. Well, it's not so much the institutional differences that are impeding the ability to act internationally. To me, it's a growing criticism of any of the current models being adequate to handle the new technological challenges, whether they are prosecutorial agencies or
administrative agencies, whether they’re independent
or whether they contain some expert discretion and
political accountability.

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

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

And in this view, independent decision-
making and economic analysis have allowed too much
power in the hands of too few, so leavers argue for
more intervention, for focusing on structural harms
relating to economic dependency, for infusing
competition law with such standards -- Germany, France, Belgium, Austria, Japan already have those, South Africa is moving that way -- and leavers argue for structural remedies like price caps and market share caps or breakups.

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

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

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

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

Equally, many of our antitrust theories of harm are just old wine in new bottles. So traditional competition law analysis and narratives of leveraging
and exclusion can handle many of these complaints, but
it isn't true that we should just move along, that
there's nothing to look at here. Clearly, competition
is not truly a click away. Clearly, data is not
sunshine, not in a world of walled gardens, and,
clearly, competition authorities should not be chicken
little running around with their heads cut off, but
they shouldn't be ostriches either with their heads
down in complete denial.

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

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

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

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

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

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

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

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

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

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

So my intuition is this may have an impact on how they would look at competition cases. So I created -- I collected all the cases decided by the general court since its inception in 1989 until 2015.
And my coauthors, Jingchen Liu and Nuno Garoupo, we examined our data set, and we studied whether there's an impact of the legal tradition of the judges on the case outcome. And, interestingly, because of the general court level, the case allocation system is random. This allowed us to draw some statistical analysis and draw some causal influence from our regressional analysis.

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

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

Now, after talking about the EU, let's go to China. A few years ago, I wrote an article about how -- about bureaucratic politics in China's antimonopoly law. And I took a very close look at how the
operation of the bureaucratic -- bureaucracy in China and incentives of the government actors involved would have an impact on China's antitrust enforcement. And, for instance, those of you who have filed mergers in China, we often have complaints that the merger review process is very protective in China, particularly when it comes to those very high-profile transactions. Sometimes the parties may end up abandoning the deals because the review process is too long, and the most recent example being Qualcomm’s proposed acquisition of NXP. So why does the merger review take so long? I mean, well, of course, China is a new regime, but what I've found during my research, and actually is already no secret to all the practitioners here, is that one of the reasons that led to this delay is that the merger authority regularly confer with other agencies, government actors who have an interest in interfering with the transactions.

Now, a few years ago, I had the question, I mean, why would the agency have an interest in conferring with other agencies? Wouldn't it limit its discretion in making the decision? So my research actually -- what I found out is that this is actually a default rule for government agencies to make decisions in China because at each bureaucratic level,
agencies need to make consensus. They make rules by consensus. If they all agree, the decision is automatically ratified by the top.

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

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

MR. O’BRIEN: Thank you, Professor Zhang. I mean, who better than a panel of law professors to lead us through a round of issue spotting, and a particular interesting one at that? What we're going to do now is to return to some of these identified differences with a focus on their implications to try to explore how the FTC can better understand and address differences in ways that strengthen our
enforcement and particularly our policy development. We heard a little bit about -- or rather a lot about some of the distinct dynamics of administrative versus adversarial systems. That might be a good place to return to, and I'm going to come back to you, Professor Yoo.

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

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

In the competition law context and actually in the consumer protection context, as has been noted earlier by Francesca and others, transplanting this
onto administrative decision-making creates another level, which is you now have the same style of evidence presentation and evaluation but not conducted by a judge but by an administrative official. And you have that administrative official in a context where they're going to, as Roger noted so nicely, get extremely deferential judicial review.

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

Now, the other problem is in addition, they lack an institution analogous to US administrative law judges. So, in fact, you have a fusion of the same personnel that do the charging investigation and prosecution decision and the adjudication decision.
Now, I don’t mean to overdraw that. For example, here in the Commission, all actions are officially the actions of the Commissioners, but below that we do have a separation of functions and ex parte communication rules that are meaningful.

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

And so that's all looking under this. And, in fact, what you see also, which I think is nice -- is missing is what Francesca points out, which is the style of American administrative law that allows transparency, public participation, and other values that we have built in. I know people from other jurisdictions who I’ve spoken to really appreciate US administrative law because everything is on the surface of the decision -- the history, the arguments,
the responses to the arguments.
There has to be the responses, otherwise you can make an argument just to say, uh, no, don’t give any reasons, you actually can’t really engage that way. They have certain things such as the market tests and other similar mechanisms that have been developed in other jurisdictions that start to replicate that but not completely.

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

MR. O’BRIEN: Thank you. Do any of our other panelists want to react to any of those comments?
Or, if not, we can then go on and maybe return to Francesca Bignami. And you talked in particular about the example of privacy in the EU and this idea of the regulatory style. And part of that is how the administration, how the agency or the regulators act, but it also is what the rest of the environment is like.

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

MS. BIGNAMI: Yeah, thanks. And as I briefly alluded to earlier, I do think the contrast that was earlier drawn between adversarial legalism and informal regulatory styles has been diminished over time. And that's based on an in-depth study I did of data protection enforcement in Italy, Germany, the UK, and France that was published in 2011. And so
really it's based on changes in the 2000s, which then have continued over time.

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

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

I was interested to hear yesterday's characterization of the EU system, where there, too, consumer agencies in the member states have to have bigger and tougher enforcement powers, but the
collective action part of it has been sputtering along and hasn't been extraordinarily -- is not extraordinarily rooted yet at least. And I think that's largely because of the hurdles to litigation in areas where you have diffuse harm and small individual claims.

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

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

MR. STEVENSON: Thank you.

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

Mr. Marsden, please?

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

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

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

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

But if you at the FTC can do so without compromising your principles and your theories of harm, and if the evidence lets you, I would recommend that you be bolder. Be bolder in your enforcement. Be bolder in the markets you choose to intervene in. Industry will look to you. Your public legitimacy will grow. And others may follow your uniquely more flexible tools, more comprehensive studies of markets, more target enforcement, and be able to see and understand your policy choices better.
And to echo Bill Kovacic from yesterday, all authorities all around the world should be doing more of a writeup of their case closing statements. In the UK, we call these “no grounds for action” statements. So when you decide not to enforce, industry and other enforcers and the public can readily see why if you readily write this up. And they can guess where safe is. And it also takes any political fuel out of the fire from complaints against the FTC and others about where's your big tech case, you know, why aren't you acting, like the one or two protesters outside the door here today.

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

(Laughter.)

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

MR. YOO: So, I guess like Philip, but 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
norms of conflict of interest, promotion of economic
growth, perceived legitimacy of the government,
control of the bureaucracy, and control of special
interest groups. And these are all values very much
promoted by the kind of procedural values, and we're
hoping that through mechanisms like the ICN, the OECD,
where all the privilege of speaking, to try to
generate more of a consensus along the lines that
Roger spoke about in the multilateral framework for
procedures to really to try to build a consensus of
norms and get the groundwork down on a general level
so we can start to add greater detail.

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

So I wonder if there are any comments from a
comparative point of view on that issue of
transparency, which I think also comes up in
connection with the description of the adversarial
legalism analysis.
MS. BIGNAMI: And so I do want to underscore that when I talked about little role for courts in the European model that's emerging, I don't mean judicial review of agency decisions. I mean private enforcement of regulatory statutes. And so with respect to judicial review of administrative decisions -- and this goes to the transparency issue -- now that there are powers, there also is accountability.

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

And then, you know, outside the agency, it was subject to significant challenge within the
Conseil d’État for how it exercised those enforcement powers. And one good example is that when it tried to use its new onsite inspection powers, it was challenged, and it lost in front of the Conseil d’État based on Article 8 of the European Convention of Human Rights. They said that it was not -- the Conseil d’État, the administrative court in France, said that CNIL was not complying with the right to privacy. And they had to throw out huge numbers of inspections, administrative orders, and fines because of that.

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

MR. STEVENSON: Thank you.

Philip, did you have a thought?

MR. MARSDEN: Just very briefly. I mean, I've worked in a number of competition authorities. When I was at the CMA, we had a range of fidelity rebates cases against dominant firms. And on the transparency point of view, I mean, in the ice cream sector -- impulse ice scream sector -- we closed down a case and we wrote it up really fully. That's helpful, I think, because the Italians had a very
similar case with similar parties, and they brought an infringement action. And they wrote it up obviously as they had to.

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

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

MR. O’BRIEN: Thank you, Philip.

Christopher, one more comment, and then I’m
going to turn to Professor Zhang.

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

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

And I wonder that -- you know, I understand the impulse to give the guidance, but there can be a trap. One of the solutions we have is the Tunney Act or the modified Tunney Act that the FTC is subject to about settlements. The EU got a lot of criticism for
the early attempts to settle the Google cases without public participation.

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

MR. O’BRIEN: Thank you, Professor Yoo.

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

MS. ZHANG: Okay. Let me perhaps start with the Chinese authority. You know, as you know, the
Chinese authority is a little bit more than 10 years old and still relatively a new regime. And I know that there have been a lot of exchanges between the US and EU authorities with the Chinese authority, particularly on providing feedback and comments on the substantive law of drafting, but I know that there is actually less exchange in regard to the procedural aspects and how to create best practices for due process and procedure. But I think that due process and procedures matter crucially regarding Chinese antitrust enforcement.

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

And why would a company do that? And what I've found during my research is that on several occasions, especially in early cases, one agency called the National Development and Reform Commission, the NDRC, which is the former antitrust agency in
charge with price-related antitrust conduct, they like
to employ what I call strategic public shaming
strategy. So if a firm does not cooperate quickly and
due to the agency's demand, the agency could leak such
information proactively to the state media outlet.
And so this would expose the firm to a high level of
publicity and potentially the firm will suffer. Its
top performance will suffer.

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

So you can imagine the kind of pressures
that executives will be subject to when their firms
were subject to antitrust investigation in China. And
this, I think, also possibly explains why the kind of
bizarre phenomenon in China, why firms will actually
volunteer to cooperate with the agencies and volunteer
to offer to reduce prices, because there's no legal
requirement in China as to whether, when, and how an
agency disclose an investigation. So this becomes a
very powerful weapon for the agencies to put pressure
on the firm in order to have them conform to its
demand.

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

MR. O’BRIEN: Sure, go ahead.

MS. ZHANG: Okay.

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

MS. ZHANG: I think my impression as a
scholar studying EU competition law for the past five,
six years, is that we have often -- we've seen too
much of this argument trying to explain the divergence
between US antitrust law and EU competition law based
upon philosophy, which is the so-called, you know, EU
is driven by different philosophical thought, and it’s
overliberalism, which is different from us. But based on my empirical observations and studies, I have doubts about how much ultraliberalism really have much practical relevance. And so my suggestion is really to urge the FTC and the US authority rather than taking more like a top-down approach -- rather than taking a top-down approach, take a kind of like bottom-up approach to try to understand who are the institutional actors involved here and what are their real incentives.

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

And my findings, which actually were published in a law review article called "A Faceless Court," are actually quite disturbing because I found that, you know, there is not -- first of all, the
judges in the EU are very well paid. This is not a problem, but it becomes a problem when there is a lack of safeguard for judicial appointment. And so some of the judges who are appointed are political appointees, and then they're not necessarily competent to do the work. And, also, these judges have very short tenure, unlike judges here in the United States. And the turnover rate of the judges is very high.

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

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

So I want to urge the FTC to take a more bottom-up approach, really understand the
institutional actors and their incentives behind these cases. I think that will give us a better and more complete picture of what's going on here.

MR. O’BRIEN: Thank you, Professor Zhang.

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

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

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

You know, you don't necessarily have to go the full hog and create an ex ante, procompetitive code like I’m suggesting through our Furman Report. That’s something to discuss, but I think the agencies, which are getting a lot of traction here around the
world, are the ones that have a range of tooth. You
don't want a competition watchdog with only one tooth,
right? You need more tools. All right?

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

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

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

The only thing I'd say is, what was our test
of success? Our test wasn't switching. Our test
wasn't to see whether, you know, people were switching
banks. You know, it’s very clear evidence that
British people switch their spouses more than they
switch their banks.

(Laughter.)

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

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

MR. YOO: So in terms of best engagement,
best practices for engagement, it's funny, Paul, you
and I have worked on the ICN on the agency
effectiveness working group. The idea always has been
to start with procedure because we believe that would
be easier. And I think that it’s still probably true
in many ways it's easier. I still wouldn't call it
easy. And so we deal with these -- the multilateral
framework that the Justice Department is supporting
and the FTC is supporting. We deal with the OECD and
My reaction to, though, this guidance is I think they're important in terms of commitments. They necessarily are general, a bit on the general level. And so I think that we should continue those engagements, but what I really see are rare opportunities when a country is changing its procedural practices.

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

At the same time, it’s interesting. You may or may not know, China recently amended its administrative litigation law that changes the terms of judicial review. And we're actually seeing the first cases of judicial review and one in which they lost. It was reversed on appeal, but they did lose in the trial court. And that’s actually when we had local officials, we asked how many times they had been challenged in court, and the answer was literally
And so we’re starting to see those trickles, but the interesting thing also, the appeals now to go to the administrative court in Beijing, the appellate court. They have a different sensibility about administrative law, and, for example, the Securities Reform Commission in China just instituted what we would think of as ALJs. So there's a different form of advocacy, which is picking the moments where you see it in the country.

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

MR. O’BRIEN: Thank you, Professor Yoo.

Professor Bignami, you have our final words.

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

And I think we're out of time, but I did
want to mention that I think that the one very productive way to engage with our foreign partners is to experiment, as Brandeis would say, with different methods and different policy aims and different ways of accomplishing the very same goals that both systems around the world generally tend to have, so experimentation and exploring different approaches I think is extraordinarily healthy within the United States and internationally.

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

(Applause.)

MR. STEVENSON: So now I think we take a brief break, and we start again in about 15 minutes. Thanks.
PROMOTING SOUND POLICIES FOR THE NEXT DECADE

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

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

Thank you.

COMMISSIONER WILSON: Good morning, everyone, and thank you. I think when she says that I have a long bio, it means that I can't keep a job, so thank you for presenting that in a positive light. And it is good to be home. It's great to be back at the FTC. It is a wonderful institution that does
fantastic work for consumers in the United States and
great work cooperating with our colleagues abroad, so
it’s a pleasure to be back.

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

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

He also roped me into helping to prepare
submissions to the OECD, to the WTO, to the
International Chamber of Commerce, and a number of
other organizations. I also had the good fortune
to work with Jim on the International Competition
Policy Advisory Committee, including preparing
recommendations that ultimately became the
International Competition Network that we know and love today.

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

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

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

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

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

So these technology firms are now at the center of the next great debate, whether we should abandon or at least radically alter traditional antitrust principles to address what many believe to be a technology problem. So you see a lot of discussion of this issue even in the mainstream press.
In the news last month, we saw that organizations in several other jurisdictions, including the UK and Australia, have issued reports recommending significantly changing their respective competition regimes to expand their authority over big tech companies. And here at home, we see similar calls for big changes from wide-ranging structural and behavioral remedies to changes in the underlying goals of antitrust law.

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

And, oftentimes, these calls are accompanied by conclusory statements asserting that the American economy is less competitive than in some ill-defined
golden age of yore. And sometimes these claims are even supported by rudimentary statistics measuring the total number of mergers, the valuation of these mergers, or the size of the largest businesses or even the share of “the e-commerce market” controlled by the largest online retailers.

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

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

And, finally, should we return to the days of the US Supreme Court cases -- Pabst Brewing and Vons Grocery -- when antitrust analysis began and ended with a simple rule tied to a simple number, such
as prohibiting any increase above a given concentration threshold?

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

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

So comparing notes with our international partners has at least two benefits. First, it helps each agency, including the FTC, sharpen its own
analysis. And, second, it helps us identify areas for collaboration, and if appropriate, convergence. Given the importance of these discussions, we are fortunate to have strong teams in charge of international cooperation.

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

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

And we also benefit from exchanging ideas in order to promote convergence with our international partners through both bilateral relationships and
multilateral organizations, including the ICN, ICPEN, and the OECD.

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

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

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

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

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

Tad Lipsky, who has been at the Department of Justice, the FTC, and the private sector. Professor Daniel Solove of George Washington Law School, who is an expert, especially on policy issues in the privacy area.

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

We have Justin Macmullan of Consumers International, who represents a very important
And, finally, Pablo Trevisan, who is a Commissioner of the CNDC, the newly rejuvenated competition agency in Argentina who is addressing these issues more or less in realtime.

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

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

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

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

MS. MOREIRA: Thank you very much, first of all, for this opportunity. I think this sets a very interesting practice. I would start by talking a little bit about, well, promoting sound policies. And I believe based on the experience of the organization I represent here, the UN Conference on Trade and Development, which happens to be the focal point both for competition and consumer protection within the UN system, that some policies need to be based on the comprehensive knowledge and understanding of market
functioning and especially taking into consideration the digital era that we are living in; also, understanding the implications that technology brings. That is to say, the opportunities, the challenges, the risks both for a competitive process and also for consumers. This means that some policies should be evidence-based, and these should rely on several different instruments that can be combined.

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

Now, from this, I would say that sound policies should be able to identify best practices and promote and lead to the exchange of information and experiences, fostering mutual learnings, and promoting some sort of convergence or organization. I would say that in the UN and from UNCTAD’s point of view, we are
the custodians of two interesting and important international instruments: the UN set of competition principles and rules and the UN guidelines for consumer protection. The set was adopted in 1980. The guidelines for consumer protection were adopted in '85 and lastly revised in 2015. Both were consensually adopted.

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

The UN set on competition also establishes a framework for international cooperation, and it was followed by the UNCTAD model on competition, which is from '93. And it really corresponds to a template of the main topics, that’s topics and provisions that I would say a standard competition law should address, supporting coherence and convergence. Again, the model law was also discussed and agreed and, of course, benefitted very much from the input and from
the advice and suggestions of more experienced agencies, namely already at that time the FTC. The UN guidelines for consumer protection, especially because they were revised more recently, cover a wide array of topics, some of them really current challenges like e-commerce, financial services, dispute resolution and redress, of course international cooperation. And I would say that in both cases both instruments underline the importance of cooperation, obviously at the international level but also at regional and bilateral level, and not only in the framework of formal international or regional organizations but also through informal networks across the world.

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

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

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

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

So, given the enormous diversity that's already been mentioned in the legal and regulatory systems and the other relevant characteristics of the various competition regimes around the world, achieving the best economic outcomes for consumers across all world jurisdictions is going to require a broad variety of approaches. There's not going to be a one-size-fits-all solution.
I'm going to address this problem based on, I have to say, a career-long experience in antitrust and competition law. And I'm the kind of person that just clicks on those. You know, we use cookies, and so please read our privacy policy. I never read any of that stuff, so I don't know anything about privacy or consumer protection either, but from the antitrust perspective.

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

But, secondly, when a competition discipline was proposed as one of the four Singapore issues -- this was in the WTO Ministerial Conference of 1996, another proposal for a multilateral discipline that's also gone pretty much nowhere. We've also had over 50 years' experience with a number of multilateral groups. I think most prominently the OECD Competition Committee, which together with its predecessors, goes back well over 50 years, and also the ICN over the last 18 years. And, of course, there's the UNCTAD
group of experts on restricted business practices, which I imagine dates possibly all the way back to the '60s.

MS. MOREIRA: Eighties.

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

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

However, number three -- and I say this as
somebody who was at Ditchley House, the conference in 2001 that took the recommendations of ICPAK that Commissioner Wilson described and turned them into a concrete proposal for the ICN. Multilateral organizations are not a plausible framework for disciplines that would reduce substantially the unnecessary costs, the complexities, and the other frictions of compliance that multinational businesses face, nor are they likely to lead to any enforceable protection for fundamental rights of defense in jurisdictions that have weak rule-of-law traditions or inadequate antitrust agency procedures or to expunge protectionist elements of antitrust systems that have polycentric objectives. Binding disciplines are required for this purpose.

And let me -- I see that my time is essentially up. Let me just conclude by saying -- and I can explain this further to the extent anybody is interested -- I believe that the search for a viable international discipline to remedy the serious deficiencies in international antitrust enforcement should be initiated on a bilateral basis, preferably between the US and one or a very small number, like one or two, jurisdictions that are strategically friendly to the US, that follow a genuine economic-
spaced approach to antitrust in practice rather than as mere lip service, and that have a highly developed legal system that generally seeks to achieve accurate judgments, in part by ensuring adequate rights of defense. Thanks.

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

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

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

All that developed in the ’70s and through
the ‘90s and has largely tapered off these days. The history there was the US adopted a sectoral approach, which is a series of different laws to regulate different sectors in different ways. This approach was favored by industry at the time. There were a lot of gaps and crevices, and some folks found themselves not regulated, and everyone had their particular law that regulated them the way they wanted to be regulated. And, you know, folks were happy with this general state of affairs, at least in industry.

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

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

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

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

Now, California has recently passed a new law, so everyone is looking at California. Might as well be another foreign country, but again what we don't see are the eyes at the federal level. The only entity at the federal level that had been making a lot of progress, doing a lot of activity, has been the
FTC. The FTC stepped into this void, this weird sectoral system that the US has with this fragmented regulation, and through Section 5, which has the broadest jurisdiction of any type of law that we have to regulate privacy and security, captured and regulated through a number of consent decrees a lot of different companies. And I think that the FTC has built a considerable body of jurisprudence.

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

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

MR. STEVENSON: Thank you, Dan.
We turn next to John Pecman, formerly from Canada's Competition Bureau to offer his thoughts.

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

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

So I would like to open my statement today by quickly highlighting three areas of good works undertaken by the Bureau using soft law approaches to further international concurrence. The first was through bilateral relationships. The Bureau has established extensive networks of cooperative
relationships with many competition agencies around the world, and these are based on bilateral cooperation agreements. These agreements enable staff to cooperate with agencies abroad on individual cases, technical assistance, and on developing competition policy.

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

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

And another example is our alignment of merger review processes with the US. Canada modified its investigatory powers to include supplementary
information requests similar to the American second request, and aligned our 30-day timing procedures. Obviously, this collaborative approach has a significant number of efficiencies, not only for the review but for merging parties.

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

The second area is leadership in the multilateral fora such as ICPEN, ICN, OECD, where soft convergence is a top priority for all these agencies. And the Bureau is a founding member of the ICN and acts as its secretariat, with tremendous support, I may add, from the FTC. The Bureau was currently the cochair of the ICN agency effectiveness working group, and in this regard, something that I think is extremely important, led the creation of the economist subgroup and economist workshops, including the first joint workshop between the ICN, OECD, and CRS in Seoul, Korea last year. We strategically advanced the economic subgroup to promote a normative approach to
economic analysis for determining anticompetitive harm, the foundation for competition analytics. The Bureau also participates regularly at the OECD and the ICPEN processes.

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

A good example of this tool in action is the recent USMCA, which has not been ratified but agreed upon, for the procedural fairness article on this provision dealing with competition policy. It requires each of the parties to enforce their respective competition laws through transparent laws, procedural rules by conducting investigations within reasonable time frames and by providing opportunities for legal representation. In other words, similar rules can be established through trade agreements. And I think it is an important consideration as we go forward.
So we've made significant progress, you know, through soft convergence. However, the dual drivers of globalization and the new digital economy in conjunction with populism have increased tensions, in my view, among competition agency and the risk of divergent approaches to competition law. So the time, in my view, is ripe for considering new approaches. And I might get to that later because my time is up.

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

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

MR. MACMULLAN: Thank you. And thank you to the FTC for the invitation as well. Before I start, I should just explain who Consumers International are for those of you who don't know us. We're the membership organization for consumer groups around the world, and we have more than 200 members in over 100 countries. We represent them in international decision-making, policymaking forums, and also increasingly with companies that are operating in global markets.
Throughout our history, we’ve supported the development of international soft law through organizations such as the United Nations, the OECD, the G20, and other international bodies. At its best, we believe soft law combines the expertise of stakeholders from around the world to define agreed principles and best practices. And it’s a valuable reference point for those within government, business, and civil society who are advocating for improvements to consumer protection and the establishment of common approaches.

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

However, it should be said that demonstrating this impact is difficult. And although it might be a challenge, as far as we know, relatively little is done to actually monitor how soft law contributes to positive change. This could be a useful step if it’s possible to monitor it, and it
would help us understand when soft law is most effective, and it could inform future approaches.

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

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

This is a challenge for international work that has traditionally moved at a slower, more cautious pace, building on tried and tested national approaches. It's worth noting that it took 30 years to agree to the first comprehensive revision of the UN guidelines for consumer protection, and it took 16
years to deliver a revision of the OECD guidelines on e-commerce. However, the fact that both these revisions were agreed in 2015 and 2016 respectively and other initiatives such as the OECD work on AI and IOT do demonstrate a change in pace and a willingness to tackle new issues.

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

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

Finally, the need to address emerging issues
and the need to deliver impact create a strong argument for working more with other actors working with multi-stakeholders. As you would expect me to say, consumers and organizations always have a valuable role to play, but with the right protocols, the private sector also has a valuable role to play. There is also a strong argument for intergovernmental organizations to work more closely together. Consumers International works a lot with international standards bodies. And, also, as has been mentioned, the trade agreements are increasingly important for consumers as well. So my time is up, so I better leave it there.

MR. STEVENSON: Thank you, very much.

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

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

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

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

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

And I think we can spend not only five
minutes but maybe years discussing why. And we may
find some common issues between some certain Latin
American countries why this is happening. But as for
Argentina, I would say issues such as due process that
were mentioned this morning, very much by the
Commissioner Phillips and also by Roger Alford, many
of us have been talking about due process.

It might be boring for my colleagues.

Sometimes we are discussing at the Commission we are
sort of an interdisciplinary commission, three
economists, two lawyers, so sometimes I discuss on
issues of due process that maybe I get some passion on
that and the economists look at me, well, what are you
talking about.

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

So as Roger Alford said, I mean, there is
some unity at the core and definitely some diversity
at the margins, but there are some common concepts we might all agree on. And I think also, in that sense, we may have a very solid and clear legislation, but history reminds us, Argentina, that you may have a very nice law, but if the implementation and the enforcement of that law is not good, the policy will not be good.

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

So what we have done at the Commission, as Bill Kovacic put it some three years ago when we were sharing a panel at NYU, we have been rebuilding the house while living in it at the same time. When we got into the Commission, honestly, it was a difficult situation but a very encouraging situation, but with this multilateral cooperation, we realized we were not in a silo. And so all that work we've been doing,
coming back to the international arena and going back
to international -- best of international practices,
participating on the OECD, the ICN, the World Bank, et
cetera, et cetera, really helped us a lot to get back
on track quite in a speedy way.

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

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

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

MR. DAMTOFT: Okay, thank you, Pablo and the
panelists. So it's no secret to the FTC, we have been
proponents to varying degrees of a number of soft law
approaches and instruments in order to bring policy
together. And to this, I hear two themes running in
the background. One is come together; and the other,
by the same authors, is he's a real nowhere man. And
I wonder if we could sort of go down quickly and
expand a little bit more on the pros and cons of, you
know, of the soft law approach as to a more hard law
approach. And I’ll start out with the “come together”
man with John.

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

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

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

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

So, I think there are a lot of benefits from this extraterritorial application. And touching on Tad’s point regarding a bilateral partner, I think Canada and the US have many things in common in terms of level of trust between our agencies, the nature of the laws, our legal system, and I think we could benefit from a similar extraterritorial framework as we see currently being used in Australia and New Zealand.
And lastly, returning and recognizing that there is -- comity is available, deferral -- deference to other jurisdictions to resolve competition cases. So having said -- given these recommendations as a pro and a positive way of advancing cooperation, I still take issue with Tad suggesting that binding commitments or something a bit stronger beyond soft law is -- might not be feasible. I think it could be. And I think returning to the WTO and using that and maybe creating a permanent secretary there, if not at the ICN, to help compliance with international standards or the development of international standards.

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

MR. DAMTOFT: Well, more harmony than I thought.
Tad, what do you think?

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

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

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

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

No antitrust agency put into a voluntary organization is going to reform itself no matter how much agreement there is within that organization.
It’s going to require -- the analogy I like to use, there was a day not so long ago when all international air transportation was cartelized. If you were flying internationally on a passenger aircraft, your fare was set by a price-fixing agreement, lawful as set by international treaty among all the international air carriers.

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

They would have been laughed out of that organization because that was the cartel, or IATA, I guess, was technically the cartel. They went to a couple of countries, I believe Belgium and the Netherlands and some southern Mediterranean countries. On a bilateral basis, they worked out these open skies agreements. And they were so successful that now most of our part of the world has open skies treaties.
MR. DAMTOFT: Thanks, Tad. That's a great example.

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

MR. DAMTOFT: Okay.

Justin, how does this all sound to you?

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

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

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

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

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

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

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

This approach got a lot of criticism at the time. There really weren’t any teeth or any enforcement to it until the FTC stepped in. And the FTC stepped in and started saying that if you made a
promise in a privacy policy that you subsequently violated, the FTC would bring an action that's a violation of Section 5, a deceptive trade practice, and the FTC would do an enforcement.

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

And, now, today, we have something a lot more sophisticated where what companies promise, they understand that they have to keep those promises or there are consequences. So we've seen a hardening of the law a little bit and a fusion to some extent between a soft approach and a harder approach that I think has done a lot of good. I think it still can be improved, but basically without the hard edge that the FTC brought in, the teeth, I don't think it would have
succeeded. I don't think it would have been meaningful. These policies would have been rather empty unless the FTC did what they did. And so I think it took this regime and made it come to life in a way that I think it would not have had the FTC not step in.

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

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

So soft law can be ambitious. Soft law can really -- well, I would not say just fully grasp the gold standard but can really move towards that
direction. And this is how it is so interesting that coming back to some of the previous speaker’s comments, for instance, of course, the work of WTO, the working group on trade and competition, on the competition field was mentioned but because of the discussions within WTO, because of the OECD recommendations, because of the UN set on competition and UNCTAD model on competition, we moved, as we heard yesterday, Bill Kovacic mention from a dozen of jurisdictions having competition law to over 130 jurisdictions having adopted competition law and policies, and these include several developing countries and countries with economies in transition.

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

They also provide, I think, guidance. And, of course, you mentioned, a lot of colleagues have mentioned, of course, the ICN, in which I also had the pleasure of working in the early days, so to speak.
And I think providing convergence in a flexible way, I think, is extremely important.

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

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

Finally I would just say that I don't think there is any opposition. I understand, well, Tad, if I may say so, passion, passionate arguments for bilateral cooperation, I thought John Pecman’s article was really excellent. And I can only support this call for more ambition. But as you can imagine coming from an organization that has 194 members, that is
member-driven, where all countries, I would say, we are the world so to speak or we represent the world, but with so many different nuances, with so many different priorities, one has to understand that soft law can, of course, be combined with hard law initiatives, I think bilateral and regional initiatives.

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

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

(Laughter.)

MR. STEVENSON: John Pecman, please.

MR. PECMAN: Just if I may, and just a bit of a different perspective. I’m going to be putting on my private sector hat now. It allows me to speak on behalf of my clients, obviously. Businesses that face 133 referees with different variations of rules, it's a very expensive process of regulation, quite frankly. So international standardization, I think,
is important from that perspective, increasing
transparency and predictability.
And in my view, and I understand that people
are worried about the lowest common denominator, but I
think international standardization, if it's not, you
know, too soft, it does pick up the performance of
agencies if they have to meet this new international
standard, so I just wanted to bring that private
sector perspective, how important it is for us to get
more efficient at what we're doing. It's extremely
costly.

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

But is there some work that is better done
there as opposed to in bilateral situations, or in a
smaller setting of more like-minded countries, as
sometimes the OECD has described -- maybe I’ll, in
fact, pose the question to Teresa for a brief comment.
Is there a sort of reaction as to what works well in
one setting versus the other?

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

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

In any case, this bilateral, more ambitious
experience set a standard. But in the end, and we
talk -- I would go back to the private sector perspective. In the end, aren't we just -- aren't we
aiming to assist countries, I would say governments,
but also trying to create better opportunities, namely
for business? So create opportunities that will lead
again to economic growth and sustainable development
in countries, creating predictability.

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

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

MR. LIPSKY: I'm shocked --

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

MR. LIPSKY: Well, I'm really shocked that
you'd let me have the microphone again, but thank you.
Let me try to state it as succinctly as possible. We
have had more than 50 years of multilateral
coopration in international antitrust. It has done
some incredibly useful things, all of which serve the
common united interests of government antitrust enforcement officials who want to enforce government antitrust law as it is written in their jurisdiction. And that's exactly what the ICN and the OECD have been doing.

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

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

MR. STEVENSON: Let me ask our colleague from Argentina, for example, how that resonates from his perspective.
MR. TREVISAN: Well, going back to Bill Kovacic's phrase, I mean, rebuilding, when we were rebuilding, or we are rebuilding the house while living in it at the same time, we were so-called -- I mean, the President of our country really said, hey, you have to go back to the international arena and see what is happening out there. And in that sense, I feel that we got into the DeLorean and then sort of back to the future sense in the sense we are rebuilding the house, we get into the car, go to the international organizations, listen to what is happening, which are the hot topics, what's next, what are the general consensus, et cetera, et cetera. And that really helps us a lot because we are not -- we're not in the silo in the sense of when we were trying to rebuild the house.

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

But, also, I need to stress that bilateral cooperation is also very, very important for us because as Teresa said, we do have similar cultural
ties, similar situations, similar problems. Needless
to say in specific cases, we have the same cases and
it happens with all the general -- in general with the
agencies. We do sign the NDAs. We exchange
personnel, senior people from our teams going to the
COFECE, to the FNE, to the CADE. We have received a
lot of visits from the FTC. And so I think -- I mean,
I am not in a situation to say what is best. But I
think in our case it's definitely both are really
helping us to reshape and rebuild the competition
house.

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

(Laughter.)

MR. DAMTOFT: Which is so the FTC has put a
fair amount of resources over the last 20 years into
technical assistance, to helping other agencies
develop. And so the question is, you know, is this a
valuable thing for us to do? Is it a little too
preachy, or is this something that really makes a
difference? And I’ll start with Pablo, and then we’ll
get a couple of other perspectives and give other
people a chance to clean up on the last topic as well.
MR. TREVISAN: Thanks, Russ. Definitely I think it's really helpful for an authority like ours in the sense, as I said, at the beginning, when we got into the office in the beginning of 2016, there was a lot to be done. And I’m not saying this because I’m here at the FTC, but the first who came to Argentina down there to the Commission was the FTC team. And I recall that we had trainings and programs and workshops in 2016, '17, '18.

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

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

MS. MOREIRA: Well, technical assistance is
actually -- well, we call it technical cooperation, so encompassing technical assistance, advisory services and obviously capacity building, it is one of our key areas of work in both policies. I think it is extremely important because we, through these activities, are really able to promote sound policies. This is based on a multi-stakeholder approach, meaning that, of course, we strengthen, we advise on adopting and revising laws and on the strengthening of capacities and setting up of institutions to actually implement them. But I think it is very important to underline the advocacy and awareness-raising activities to other key stakeholders like the judiciary. We heard in the previous panel like how some judges -- administrative court judges typically may not be familiar with economics to actually understand competition cases. That is a very, very important activity for us in a number of developing countries.

But I would also talk about private sectors, especially SMEs or small business associations and civil society organizations, not just the consumer organizations that are affiliated with Consumers International, of course, but other kind of civil
society organizations in order to what? In order to really foster understanding and generate greater acceptance to the benefit of these policies because Tad, for instance mentioned a lot enforcement. I think the policies and what I call mainstreaming competition and consumer policies is really the ultimate challenge. And for that I would say international organizations, formal organizations or even bilateral agreements are better placed because they really imply commitments from the government to then reach out and get and gather information, but also disseminate all of this.

I would like also to say that through technical assistance one can really promote convergence, harmonization, and build trust as we heard from Pablo. And I would end just saying that the FTC has played a major role in both policies, fields in our technical assistance projects. We are extremely grateful for this. They have shared intelligence, experiences, interactive tools, presented other initiatives, namely in Latin America and the African continent. And I can only expect you to remain as actively involved in this activity, especially in cooperation with UNCTAD. And I'm looking at Randy for this. Thanks.
MR. DAMTOFT: John, I know you were starting
to give a fair amount of thought to this when you were
a Commissioner. What’s your perspective?

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

If I could render one comment, and I know
there are significant and bilateral resources being
thrown at this area by the US, Australia, and ASEAN
for example, Germany as well is very active in terms
of technical assistance. I think where you may see a
lot of overlap and redundancy in some of the
technicals, I think there could be a bit more
harmonization bilaterally or working and making sure
there isn't, again, redundancy with the multilateral
fora like UNCTAD and others, OECD, that are providing
technical assistance. I think everyone’s just out there doing it, and I don’t know if there’s coordination. And so to the extent that that can be done would be something I think that would improve this important aspect of convergence.

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

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

It really is a global landscape with privacy these days, with every year seeing more and more countries enact privacy laws. So I think that a multinational approach to this is really essential. I think that there needs to be an increasingly global standard that a company can build its practices around.
because it's not easy to comply with all the different regulations, especially because a lot of it is about how you build a program to -- that implicates everything from how you define what personal information even is.

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

I think we have a lot of important things to say and an important voice, but I think we need to step forward and say that and really develop some of the strengths of certain things in the US approach because I like the GDPR a lot, but it's not perfect. There are certain things in the approach here in the United States that are actually, I think, more workable and are good and should be promoted. But for
that, I think we need to plausibly step forward and present something on our behalf about how our approach, you know, addresses a lot of the issues that are key to privacy and security protection worldwide. So I hope that we’ll take that role.

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

(Laughter.)

Mr. Stevenson: But I hope you all join me in thanking all of our panelists for an excellent job today. Thank you.

(Applause.)

Mr. Stevenson: And we now break for lunch. (Lunch recess.)
EFFECTIVE INTERNATIONAL ENGAGEMENT:
FOREIGN AGENCY PERSPECTIVES

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

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

This session should really prove particularly interesting as it’s going to allow us to hear directly from our foreign agency counterparts on what they find makes for effective international engagement. We’re eager to learn from our sister agencies about their successful strategies and tools for engagement with foreign counterparts and, of course, we’re also interested in hearing their perspective on what has not worked as well and why with a view to seeking how we might further develop the FTC’s international tools and programs to ensure that they are fit for purpose for the 21st Century.
We’re really honored to have this incredible slate of seasoned enforcers from truly diverse backgrounds to provide their insights on these issues. Their impressive biographies are listed on the website as well as outside in print copy. So I’m really just going to give a brief introduction starting with those closest to us and moving down the table.

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

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

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

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

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

And last, but truly not least, is Steven Wong, the Privacy Commissioner in the Office of the
Privacy Commissioner for Personal Data in Hong Kong.

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

With that, I’m going to turn to Deon to kick off our session.

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

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

Please, over to you, Paula.

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

I think in Brazil our main tools for successful international cooperation are our MOUs that we’ve signed with over 20 jurisdictions and our interactions in multilateral and regional fora. Through these tools, we’ve been able to not only foster relationships, but also cement existing ones and really consolidate best practices and promote legislative change within Brazil. And I think we can
talk more about this later on but that’s the highlight.

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

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

Then what we’ve also found is the right fora, there’s an African dialogue that is also supported by the -- promoted and actually supported by the FTC. And what that has helped us to do is to realize that the problems are pretty similar across the different countries and the region and so just getting that sense of understanding and getting to share notes and then building relationships that you
can leverage on to gather information sometimes.  
Also, to at least just discuss experience and provide  
context has been very helpful. Thank you.  

MS. WOODS BELL: Thank you very much.  
MR. HAN LI: Han Li, thank you. Thank you,  
Deon.  

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

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

MS. WOODS BELL: Thank you very much. I  
have to congratulate you all. You’re moving quite  
swiftly. You did have more time. So if anybody wants  
to revel in the comments and then circle back to our
previous colleagues, please do feel free.

Chris?

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

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

But I wanted to reflect on some of the strategies we found or some of the approaches we found that have been quite useful in terms of making the most out of those fora. I wanted to highlight just two or three of those. The first thing I think I’d like to highlight is I’ve called it focusing on outcomes. Two or three years ago, the CMA was the president of ICPEN. I think one of the things we
wanted to make a concerted effort to do when we took over the presidency was to focus on outcomes. And I suppose how I describe it is that there was an awful lot of very useful discussions happening and we wanted to shift debate slightly in terms of moving it from kind of what have we done to what can we do together given what we have done.

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

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

And the third area I think which has been
very helpful is looking inwards as well as looking outwards. And by that, I mean thinking about the wealth of what we do at the CMA and making sure that we’re joined together in thinking about how they supplement each other and can be used on the international arena, but also thinking about the UK as a whole and making sure we’re joined up there.

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

So I shall stop there.

MS. WOODS BELL: Thank you very much.

Rainer, what can you add to the conversation here?

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

International corporation on all three fields, whether it be data consumer protection, data
protection, but also competition enforcement, is an essential part of our international and day-to-day enforcement strategy. So we would not be successful enforcers would we not have our international outreach and cooperation.

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

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

I will try to focus my remarks today more on the work that we do in competition enforcement because
that is the only field where the Commission actually
has direct and exclusive competence. We only
coordinate the work of our consumer protection
authorities and of our data protection authorities.

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

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

We have the second level, which is the ICN
and OECD. The ICN, as such, is a success story in
itself from 14 authorities that created it in 2001.
And, now, I think we are at more than 100 members.
And the third level is bilateral cooperation
where we have technical competition cooperation with a
number of agencies, our first generation agreements. The first one we had was with the US, with the FTC and DOJ, with Canada, Japan and Korea. We now also have started to have second generation agreements that allow us actually to really exchange evidence on specific cases. We have that with Switzerland and we’re quite advanced in our negotiations with Canada and with Japan.

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

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

MS. WOODS BELL: Excellent.

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

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

We pursue effective international engagement largely through, one, what we call the established channels. The other one is the ad hoc channels. The established channels originate from the three international agreements or arrangements Hong Kong had entered into, and that is the APEC Cross-Border Privacy Enforcement Arrangement. The second one is the Global Privacy Enforcement Network Action Plan and the third one being the International Conference for Data Protection and Privacy Commissioners Global Cross-Border Enforcement Cooperation Arrangement, a
very long name. The acronym is ICDPPCA.

(Laughter.)

MR. WONG: Still very long.

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

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

MS. WOODS BELL: Thank you. Fascinating.
So from that discussion, we got a panoply of different opportunities to pursue engagement with foreign counterparts, administrative agreements and MOUs, multilateral frameworks looking at technical cooperation as a tool, new laws that come into force and to provide new powers; focusing on outcome-driven determinants and then looking at collective harm seeing where we might find common ground; coordinating with other sister agencies and then taking a look to minimize the risk and avoid divergent outcomes.

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

MS. SILVEIRA: Just picking up on some of the things that they said, I think one of the issues that was pointed out by Chris at the CMA is the issue of what can we do together. So I think that’s something that we’ve been particularly interested in at the regional level. As you know, Brazil has had an interesting development in the past few years and we’ve reached a certain level of maturity due to international cooperation that we received from our counterparts, from more developed agencies. So we
feel that, right now, it’s our duty to also help other agencies in the region, especially those that are either reviewing their antitrust laws or with newly-developed agencies to also reach this level of maturity.

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

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

Tunde?

MR. IRUKERA: Yeah, thank you. One interesting thing that I’ve learned from these is there are quite a number of regional cooperations that already exist. And what a coincidence. In Africa, at least in West Africa, and even the entire continent, we’re on the cusp of learning that. Only recently, the ECOWAS, which is the Economic Community of West African States, established its own competition authority in Banjul, Gambia. That has become operational only in a matter of months.
The whole continent is also negotiating its own continental free trade agreement, which has been signed by many countries. Nigeria hasn’t and we’re still working on that. As a matter of fact, the second round of the negotiations, which includes the competition law aspect, is just about starting. So it’s interesting to hear what these regional experiences are so that at least we can watch out for that as we go.

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

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

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

(Laughter.)

MR. HAN LI: Yeah. But I think, for us,
because we’ve been doing competition for a number of years and a lot of dual agencies in the world, we were able to leverage on our contact base to learn the consumer side much quicker, including of the FTC. We had a senior economist, Janis Pappalardo, she came down last year and did a session with all our staff and it was great. We have done work with the Australians, as well as the UK CMA. So again, because we already had the contact base in competition, it was very easy to leverage on to consumer.

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

MS. WOODS BELL: No, that’s completely fine. I think we’re moving in the right direction. So with all those comments on the record, what we’ve done is now we’ve picked up three buckets and we’re going to move over to the three buckets. And it’s actually great that Han Li -- that you started to mention that because we’re going to look at domestic priorities and how they might motivate international engagement. We’re going to look at some differences and similarities and explore a little bit more, if you
have a competition regime or if you have consumer regime, and what that’s like. And then, finally, we’re going to look at regional multilateral fora and maybe dip our toes into bilateral issues if we have enough time.

Liz?

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

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

(Laughter.)

MR. WARNER: It’s quite easy, I think, at first blush to kind of say that’s a quite selfish approach to international engagement, I suppose my reflex on that is I think that it makes an awful lot
of sense. At one level, we’ve got limited resources, so we need to focus somewhere. But, also, I think looking at our domestic priorities, we wouldn’t be doing our job properly there if we’re not thinking about the international dimensions. It’s not a great outcome for the consumers we’re seeking to protect if we just move the problem along, for example, or don’t have sister agencies.

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

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

MS. SILVEIRA: Yes, I tend to agree with Chris. I think our domestic priorities truly do
influence our international engagement. I think Brazil is very good example of that and our recent OECD accession is an example, I mean, a crystal clear example of how international cooperation be used to further domestic engagement.

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

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

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

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

    Another way in which domestic priorities motivate our international engagement is through the
cases that we’re currently handling. So for example, there are several new issues that are coming up right now in Brazilian antitrust law. We have a globalized era, we have a digital economy, and a lot of the problems that we’re seeing in Brazil, a lot of the new conducts that weren’t there before, maybe five years ago, ten years ago, are also being seen around the world.

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

So minimizing errors, not impeding innovation is something that we’re very attentive to.
This is something that has been very helpful through international cooperation.

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

But I’m going to pass over to Deon right now for our next theme.

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

And we’re going to ask Commissioner Wong to follow up with some observations after you talk. And I want to give a nod to Commissioner Trevisan, who mentioned building a house while you live in it. I think both of you, in your instances in Nigeria and in
Singapore, you’re going to have to build your houses while you live in them. How are you going to manage this, gentlemen?

MR. IRUKERA: I’ll let him go first. Maybe I’ll --

(Laughter.)

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

(Laughter.)

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

So I think there is a lot of complementariness. One of the things we started
doing is market studies with consumer protection
people inside. In fact, the recent one which we
just completed on online travel has a very heavy
consumer focus on that, things like drip pricing
and that kind of stuff and subscription traps.

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

MS. WOODS BELL: Thank you.

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

(Laughter.)

MR. IRUKERA: Essentially, the point comes
down to they have moved from the more technical and
precise area to the more intense and less predictable
area. You would think that that would mean a bumpier
ride. But, in reality, moving to something quite technical and very precise is relatively bumpier in many respects.

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

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

One thing that we recommended and thought would be in the law was a transition period. It turns out that the law that came out didn’t have that
transition period. And so we literally had to wake up
the next morning and start figuring many things out.

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

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

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

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

MS. WOODS BELL: All right. Excellent.
Commissioner Wong, I don’t know how many
eyes you sleep with open or closed, but if you want to
comment on Singapore or Nigeria’s comments, we would
welcome.

MR. WONG: Yes. In Hong Kong, the people of
Hong Kong has been enjoying the consumer protection
for more than 40 years. It’s one of the longest
authorities in Hong Kong, you know, protecting the
interest of the public. People in Hong Kong don’t
realize that they have privacy effectively protected
by my office until recently. Because of the cross-
border incidents and the -- they were woken up by the impact not on only personal data, but on the economy as a whole.

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

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

Privacy rights, recently, they have been catching up very fast. They know how serious the issue could be. And just a couple of days ago as
reported by I think the CNN, I don’t know whether it’s real news or fake news. But --
(Laughter.)
MR. WONG: They talk about that China will lose up to 5.5 trillion US dollars in economic growth if they don’t brush up their privacy protection law. So that’s a very serious warning. In fact, they have been doing some -- we have been liaising and sharing our experience with the Mainland Chinese authorities recently.

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

MS. WOODS BELL: Thank you. I’ll quickly pass over to Liz.

MS. KRAUS: I was going to say one of the interesting themes that I think everyone has hit on in that last question is one of relationship building as one of the most important assets. And we touched in the introductions on developing relations through
MOUs, through regional and multilateral fora. So I thought I would like to hear from Rainer, if he’s still awake down there, and see what you might have to say on those points.

MR. WESSELY: Both eyes wide open.

(Laughter.)

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

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

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

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

In the ICN, if you look, we are cochairing the cartel working group there, but we also are very active in all the other working groups. I think, most
importantly, we are in the steering committee and similarly also in the OECD. We try actually to set the agenda forward-looking to identify the topics that will be the enforcement problems of the future and sit together and want to address them already as soon as possible.

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

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

And it’s curious that in -- prior to our memorandums of understanding, we didn’t truly cooperate. So this is a case where the MOUs didn’t really cement an existing relationship with most
countries, but it truly fostered a relationship. This relationship has been very fruitful. I mean, we get together every two years officially, even though we do also interact, and very meaningfully, when we see each other at the OECD, when we see each other at the spring meeting.

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

And one of the issues that the BRICs countries have been working on and is proving to be very useful is on digital economies. So we have a digital economy working group that gets together once a year. And I was actually taking notes here on Rainer’s talking about the working groups because -- and, also, I think the human glue issue is truly
central because this is what works. Our experience in international cooperation is that what really proves and what really brings more knowledge to CADE is having the people that are working on the cases meet with the people that are working on the cases in other jurisdictions.

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

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

So I think the regional cooperation, for a country like Brazil, when you think of regional
cooperation, we think of Latin America. But for Brazil, specifically speaking, it’s not so much Latin America, but regional for us would be Latin America plus BRICs, I think.

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

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

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

So one example I’d like to draw on is some work we’ve been doing on personalized pricing. It’s been causing a fair bit of debate in the UK and we naturally thought about it from the competition and consumer side and thinking about where the problems
and where the harm might arise and what way it might
most effectively be tackled.

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

MS. WOODS BELL: Thanks, Chris.

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

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

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

MS. WOODS BELL: Wow. That’s powerful.
Okay.

MR. WONG: Because as a regulator, I always
come across lawyers banning -- you know, the placard
saying that this is confidential, you can’t reveal to
anybody else. And I said, I’m a regulator, I’m
investigating your client’s case. And so -- okay,
well, you asked me to keep quiet.

(Laughter.)

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

Tunde, what hasn’t worked well?

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

(Laughter.)

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

I think the platforms for accessing information seem robust and good. But the specifics that sometimes are very critical seem to present quite a potential challenge. Sometimes because of local legislation, again because of priorities. So you might have a regulator who doesn’t have the kind of
information you’re looking because what’s a big problem to you is not a big problem in that environment. And then you think about what it will cost them to start looking for that information when they don’t have need to pursue it.

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

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

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

MS. WOODS BELL: All right. Paula? I’m failing in my job, though, guys. It was very hard
with all these compelling comments to cut you off. So please self-regulate.

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

And the problem in Brazil is that all defendants in a case have to be served before the case can actually begin. So what happens is either the case is on pause for, you know, maybe five years, or what we will have to eventually do is, after a number of years, we have to remove certain individuals from this case and open a separate case for them so that we can move on with the investigation. Because, otherwise, we have a cartel investigation that begins seven years after we initiate the case, and the case is usually initiated maybe five years after the conduct is discovered, and so that’s maybe 10 or 15
years after the fact. And that’s already way too late. So what we truly need to find a way to move forward with this is how to serve process.

MS. KRAUS: I think that’s a problem we all share.

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

MR. WESSELY: You can go first.

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

And then another competition authority in our region is China passed leniency provisions and that would greatly facilitate cooperation. But,
again, I think the domestic politics is getting in the way.

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

MS. KRAUS: Rainer.

MR. WESSELY: Thank you. Well, as I said before, I think we have managed to overcome some of the problems of the cultural differences, speaking the same language, which doesn’t mean that it’s always easy to overcome, also, structural differences. And I think what we see is we have different concepts, we have different concepts of state, as Steve already mentioned. We have different legal systems. We see, for example, when we looked at China, they have a different -- when we make our merger assessments, they have a different concern of state-owned enterprises.

And we experience it very, very closely just now when it comes to our second-generation agreements, actually.

As you know, for us, privacy is a very high
good. It’s protected as a constitutional right. So when we want to enter in these kind of really far-reaching agreements with third partners, we have to make sure that when we exchange evidence actually then on the ground, that the protection of the data of the persons, the data subjects, concerned is actually also protected once it is passed over to the other authorities, and that there is a sufficient redress mechanism in place.

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

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

And since we skipped over Chris, I thought
maybe I would just give you the floor for a minute.

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

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

And through taking those different stages of the case together, you identify potential differences; 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.

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

Why don’t we go first to you, Han Li.

MR. HAN LI: I think it’s two-way. I think
15 within ASEAN, we are doing a lot of capacity building,
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.

(Laughter.)

MR. HAN LI: So I’ll just call it GIZ.

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

MR. HAN LI: It’s a German technical
25 assistance program. And, also, the Europeans have
come in last year, and so have the Canadians. So we’re still waiting for the Americans, actually. But --

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

(Laughter.)

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

MS. WOODS BELL: Thank you very much.

Stephen?

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

But the issue of privacy, for example, data privacy, has become so prevalent as a topic for discussion, not only amongst the organizations
themselves because of the heavy fines they are being threatened, but also amongst the citizens in the Mainland. But they lack the requisite trust.

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

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

At the end of the day, perhaps, like ASEAN,
APAC and the EU, we might, you know, wish to come to some sort of multinational treaty on which the economies can join and have reference to.

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

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

MR. IRUKERA: I mean, well, we’re pretty young.

MS. WOODS BELL: No pressure, no pressure.

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

The European Union provided quite some
support in developing the legislation. So that’s also
a channel that we look to to depend on. So, yes,
quite some relationships. And then, obviously,
relationships that are just like conversation, more
like with UNCTAD and a few others. I am relatively
comfortable with what I think is going to be a great
network of support from more experienced, mature
organizations.

MS. WOODS BELL: Thank you. Well done.

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

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

MS. SILVEIRA: Thanks, Liz. Well, first of
all, I’d like to commend the FTC on your efforts on
international cooperation. I think the international
coopration that the FTC has in Brazil has been not
only very intense -- we’ve had people here, you’ve
sent people there. We’ve had a lot of, you know, “pick up the phone” cooperation, talks about cases, and that’s been extremely helpful.

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

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

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

(Laughter.)

MS. KRAUS: Tunde?

MR. IRUKERA: Thank you very much. And I completely agree with Paula. I think the FTC is doing quite a phenomenal job, truly investing in other
agencies, and the work you’re doing to actually
maintain those relationships is amazing. Because two
things that come to mind when I think about the FTC,
you can resort to them and their resource. So that’s
very important.

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

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

MS. KRAUS: Thank you. It’s an excellent
thought.

Han Li?

MR. HAN LI: Yes. I think we have always
recognized I think the FTC’s leadership role in
international organizations like ICN and OECD. We are also beginning to see FTC or the US taking a bigger interest in our region. This Friday, there’s a panel at ASEAN at its spring meeting that I think is no doubt coordinated by FTC, and I think we look forward to more such partnerships.

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

MS. KRAUS: Thank you.

Chris?

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

I think also, on a consumer protection point
of view, we have a particular mandate in the UK to focus on issues causing problems with market-wide practices, and as a result we’re investigating market-wide issues rather than single, individual cases. And, again, that deepening understanding of the broader picture I think is a really valuable kind of asset when you’re taking issues and cases on an international arena. And that’s something that I think is something worth reflecting on.

MS. KRAUS: Thank you.

Rainer?

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

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

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

And, finally, what I think is a takeaway is we focus very much on the multilateral cooperation, also on the bilateral cooperation. But what we should also not forget is probably that we also raise awareness internally, within our organization, that we have these capabilities, that we do all this because actually the people working on the ground on the cases, they have to spot that there is an international dimension to their case and they have to know how to react, how to bring this forward, and how to actually then exchange it with other authorities. Because we might have the best cooperation in the world, but if people working on the cases don’t realize it, then it doesn’t help.
MS. KRAUS: Super point.
And Commissioner Wong?

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

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

So it is in this era, digital economy, it’s very difficult to comply with the legal requirements if we have restrictions about cross-border transfer, localization, or a consent-based system of transfer. So what we need is international engagement, effective international engagement. And, thankfully, FTC has played a leading or vital or pivotal role over the
last few years, and bearing also in mind that the USA, EU are the top two or top three trading partners of Hong Kong. So we have a lot of connections with the Americans and especially, you know, in the view of data incidents.

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

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

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

Well, with that, we’re going to conclude this panel. We want to thank you very much. We’ve left some questions on the table. We’ll deliver them
to Randy. Maybe he knows all the answers, anyway.

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

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

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

(Applause.)

(Brief break.)
THE FTC’S ROLE IN A CHANGING WORLD

MR. TRITELL: Welcome back from the break.

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

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

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

Ladies and gentlemen, from the FTC’s Office of Congressional Relations, Derick Rill.

MR. J. RILL: Oh, my God.
(Applause.)

MR. D. RILL: Thank you, Randy, for this absolute honor to introduce Jim Rill for our next session titled, “The FTC’s Role in a Changing World.”

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

MR. J. RILL: Cut it short.

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

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

As for awards, in 2012, Mr. Rill received
DOJ’s -- and I quote -- “highest antitrust honor, the Sherman Award, for his outstanding lifetime contributions to the protection of American consumers and the preservation of economic liberty.”

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

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

Please welcome, as Randy calls him, “the Dean of the US Antitrust Bar,” my dad, Jim Rill.

(Applause.)

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

(Laughter.)

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

I want to talk in what time is left for
really what I see as the challenges in front of the FTC and, indeed, in front of the agencies of the Federal Government, in international cooperation and international enforcement, to lay the groundwork for the panel that follows and to give some humble, if somewhat, I would say, radical suggestions for going forward.

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

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

But in front of the Archives building,
there’s the podium with the platform, “the past is history,” and in this particular case of international cooperation and the work of the FTC, the past is, indeed, history. The role of the FTC in international cooperation really cannot be overemphasized.

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

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

Technical assistance. The technical assistance provided by the Federal Trade Commission and the United States Department of Justice goes all the way back to 1990, and possibly before. In 1990, as the Soviet Union collapsed, the countries of Eastern Europe threw off the bonds, the Federal Trade Commission and the Department of Justice sent missions -- often joint missions -- to places like Budapest,
Prague, Warsaw, and other cities around the newly emerging free market systems of Central and Eastern Europe.

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

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

The KORUS agreement contains a competition chapter, which just the other day has been invoked by USTR by calling for consultation with the Korean
antitrust agency on the ability to obtain evidence and
to appeal, consider that evidence and rebut it. We’ll
see where that goes.

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

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

The link between intellectual property and
antitrust isn’t a bad place to start. A focus can be
made on noneconomic goals in certain nations and the
influence of state-owned as well as state-supported enterprises. In 2017, the US Chamber put together a group of so-called experts -- I was on it, so that’s why I say “so-called” -- which issued a report which suggested that the ICN form a working group that focuses on state-owned enterprises and state-supported enterprises. Why not a joint FTC/DOJ effort in that direction?

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

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

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

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

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

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

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

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

(Laughter.)

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

Let me switch for a minute to another form...
of cooperation, and that’s interagency cooperation. I suggest that there’s a lot of room for cooperation between the two antitrust agencies. The 2017 guidelines on international enforcement, international cooperation, they’re jointly issued, jointly issued by DOJ and FTC. The suggestion in there that applies to what the agencies do, not to what one agency does or what the other agency does, but what the agencies do -- specifically, one of the provisions is they may engage in general discussions with foreign authorities on matters where only one authority -- that is, the foreign authority -- has an open investigation.

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

What about cooperation and coordination with the other non-antitrust agencies of the Federal Government? I recognize that this can bring in other, from a domestic standpoint, what seem to be foreign
ideas, ideas that antitrust is not particularly comfortable with. I went through three years of working with the USTR and the structural impediment initiative talks with the Japanese. I understand some of the problems of that relationship. But these agencies, they have a good bit to offer in many respects.

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

Now, the chamber report that I mentioned to you suggested a cabinet level committee to deal with antitrust policy. I, frankly, don’t think that’s a great idea. But I think the antitrust agencies themselves can informally call together, as needed, and listen to and reflect on the -- I’m getting the flash that the time is up; I’m almost through -- that can bring in expertise and considerations which can well inform the antitrust decisions that are being
made by the antitrust agencies. We can have a ramification across technological issues facing industries with which the Commission and the DOJ might well be unfamiliar and national security interests which can be vital to the welfare of the country.

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

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

So with that, thank you very much for your
time. I appreciate it. And I look forward to hearing the panel.

(Applause.)

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

(Brief pause.)
THE FTC’S ROLE IN A CHANGING WORLD (PANEL)

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

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

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

All of our previous sessions have raised
many questions on our panel. We’ll try to find at
least some of the answers.
To do that, we have an absolutely world-
class, stellar panel. And so we’re delighted to be
joined by -- and I’ll do this alphabetically -- Bojana
Bellamy is the President of Hunton Andrews Kurth LLP’s
Center for Information Policy Leadership.
Terry Calvani with the Freshfields Law Firm
is also a former Commissioner and acting Chairman here
at the Federal Trade Commission, where I had the great
privilege to be able to work with him, and has an
almost unique experience of also having been a member
of another international agency, a member of the Irish
Competition Authority.

Eduardo Perez Motta is Senior Partner at the
SIA Law and Economics Firm and he is the former
President of the Mexican Competition Authority,
COFECE, and, also, a former Chair of the International
Competition Network.
Rod Sims is the Chairman of the Australian
Competition and Consumer Commission.

And Andy Wyckoff is the Director of the
OECD’s Directorate for Science, Technology, and
Innovation.

Let’s start with some general principles for
a good agency. So to be effective as an enforcer or a policy leader, one has to have an institutional structure and institutional principles that undergird the agency. To frame our discussion, I’d first like to turn to Bojana for her thoughts on what makes for an effective agency, especially operating in the international arena.

Bojana, I know that your experience is primarily from the privacy world, but from our discussion, I know that your thoughts reflect principles that I think everyone will find relevant to their substantive areas.

MS. BELLAMY: Thank you, Randy, very much. I’m delighted to be here. In fact, you know, this whole session is called, The FTC Role in Leadership in the Changing World, and the fact that we are having this discussion across a number of experts from different countries and also different areas, like competition, consumer, and privacy is really a sign of that leadership. So really, thank you so much for organizing this and, of course, for inviting me as well.

We, at the CIPO, have done a project looking at what constitutes an effective regulator in this new world of the fourth Industrial Revolution, of course,
from the privacy perspective. The feeling was that we have been advocating for a very long time for need for countable, corporately, digitally responsible organizations on one side. And then we were thinking so what does the world look like from the side of regulators in this new innovative world with disruption, technology, that is bringing exciting innovation every day? How can regulators really step up and be effective?

The work very much resonates with what I have actually heard this morning, Randy. Your fantastic panel on the comparative legal traditions, and Professors Bignami, I think, and Marsden have talked a little bit about that. So what we have found is that to be an effective regulator, regulators need to step up and be strategic, prioritize their engagement, thought leadership, actions versus potential enforcement, and be very transparent in how they conduct their regulatory policy. Very much risk-based as well. So “selective to be effective” was a great wording that was said actually by former Information Commissioner Richard Thomas.

The second point is that constructive engagement should be favored over the enforcement and enforcement should be used, of course, for those who
deliberately, repeatedly keep breaking the rules and not wanting to engage with a new regulator. This constructive engagement, of course, requires some innovative thinking, innovative regulatory policy. And so we looked at things like, for example, regulatory sandbox, which first started with the Financial Service Authority in the UK, but has been picked up by the UK Information Commissioner as well as the Singapore Commissioner. I’m kind of thinking this is an example of how the constructive engagement can be formalized in a more formal way.

But, of course, it is important that constructive engagement is a town goal. You can’t just have an effective regulator. You have to have an accountable organization who is ready to engage with regulators. This is really what we felt was really needed in this new world.

Now, the final point is that an effective and new regulator has to also build bridges with other regulators internationally. And I know we will be talking more about this.

Our final point of our research work was relating to the incentives. And we felt that effective and smart regulators should be incentivizing, rewarding those organizations that step
up and are able to deliver compliance in a new way and go beyond compliance. And I think it will be really interesting to discuss what could these incentives look like. I think we’ve seen some in the past from FTC. So as I’m speaking about this, I’m kind of thinking FTC was pretty much there with this. But, of course, this isn’t just about FTC; it’s about other data protection regulators that operate globally in this connected world, and they’re increasingly having to cooperate.

So our message was very much not just for FTC, but for the other regulators really stepping up in this new world.

MR. TRITELL: So that is getting us off to a great start, Bojana, and I’d be interested in other’s reactions to those points. And, also, turning it back to the FTC, what can we learn from the experience of other jurisdictions in this area and how can we apply that to our work?

Let me first ask Eduardo, based on your experience both with the Mexican agency and in your interactions with agencies around the world through the ICN.

MR. MOTTA: Thank you, Randy, and thank you for this invitation. If you allow me, I consider that
there are five elements that basically characterize a
good -- a well-designed -- let's put it that way -- a
well-designed agency in competition.

First, it has to be independent. It has to
be independent from the Executive Branch, from the
government, from the -- but what is -- that is part of
it. But it has to be independent because its only
obligation is to apply the law. They do not design
the law. The design of the law is part of the
government and the legislative consideration and
jurisdiction.

Obviously, the concept of independency goes
hand by hand with the specific characteristics of the
jurisdiction. I remember having these discussions in
an OECD table a few years ago with some colleagues
from Denmark, and they were saying, well, I mean, why
are you insisting so much on the independence? We're
not having that problem. We have never had -- we have
never faced that problem with the executive branch.
They have always respected our work decisions. And I
said, well, I mean, if you come from Mexico, you would
think differently.

At that time, that was not a major risk.
Today, that's a major risk in Mexico. So,
fortunately, in Mexico, the Competition Authority is
constitutionally independent. So it’s as independent
as the central bank or as the Federal Reserve here in
the US. So it depends on the culture of the country
and it depends on the realities they are going to
face. But that’s -- what I consider that that --
regardless of where you -- the reality in which you
are based, independence is a key element.

Second, you have to be perceived -- and you
have to behave in a neutral way. You have to be
perceived as an unbiased authority. You have to treat
everyone with exactly the same line. That’s not an
easy issue, and that -- it is very important because
that goes very much in line with what the economic
agencies consider the way that you are behaving.

Number three, you have to be, obviously,
technically strong. You have to be technically solid
as an agency. And I think you have to behave very
much in line with best international practices.

Number four, you have to be efficient.
Efficiency goes basically with the way you design the
incentives within the agency. And that is very
important. That is crucial. You have to have the
right incentives in the way you design the agency’s
design.

And, finally, transparency. Transparency
and accountability. That’s crucial. You have to be a very open communicator all the time with the practitioners, with the public, with the economic agents, with, obviously, other agencies internationally. And I completely, totally agree with Jim when he was saying that you have to be very communicative within the agencies of your own country.

MR. TRITELL: Thank you, Eduardo.

And I think it’s interesting that Bojana, coming from the privacy world, Eduardo, coming from the competition world, have defined principles that I think are quite generally applicable across the spectrum of what we do.

Are there others who would like to come in on this topic? Rod?

MR. SIMS: Well, I will just add a couple of other points because I completely agree with the points that have been made. But I think a regulatory agency has got to be and be seen to be a strong enforcer. It has got to be taking people to court and be seen to be doing that, as well as doing market studies, where markets aren’t working as they should. I think they are complementary things to do that have the regulator doing their job properly. So that’s one thing I would add.
And the other thing I would add is that I think the regulator has got to be a constant communicator. It can’t just be doing things. It’s got to tell people what it’s doing. Otherwise, it’s just not doing its job. And part of that is, I think, as an advocate for competition. If the competition regulator -- I mean, whereby the competition regulator and the consumer regulator, if we’re not advocating for competition and advocating for consumers in Australia, nobody else is. So we have to be a constant advocate.

MS. BELLAMY: So I just wanted to come back on one point. Rod, Eduardo, you have actually prompted me. So what is, I think, different in this world of fourth Industrial Revolution, and what should regulators do is we that have this asymmetry -- and somebody talked about informational asymmetry between consumers and the tech world. But actually there is asymmetry, regulators and this new tech world. So what does it mean to be technically strong? It means also having capabilities to understand the technology and the world that we regulate. We are now regulating the world of data and there hasn’t been anyone else who has ever regulated data. This world is so different and new and so
changing that I think we need to completely step up
and reinvent ourselves as regulators. I’m speaking as
though I’m a regulator; I’m not. I used to be a
privacy officer in a company, but it’s the same. You
know, internally, we, when we would deliver privacy
compliance, had to completely change, and regulators
have to change.

That’s why I think this constructive
engagement, where there is a feedback loop of
reiterative compliance, learning from each other,
understanding, using sandbox, using citizens’ jury,
this is something that ICO in the UK is doing now, is
actually something that would serve us better as
regulators at the moment because it is a new brave
world that we are regulating. And I think the old-
 fashioned methodologies are just not going to cut it
anymore. So that’s, perhaps, a challenge for us.

MR. TRITELL: All right. You’ve thrown down
the gauntlet, and I think we have Andy and Terry who
are also interested in coming in on this. Andy?

MR. WYCKOFF: She has certainly inspired me,
but so did Mr. Rill. I just want to combine the two,
really because we’re just done with a very large study
at the OECD across 14 different policy committees
looking at what we call the digital transformation. I
think Bojana’s comment is absolutely right, that data
now cuts through almost every area.

So going back to where Mr. Rill was it’s
just that I think you need competition and consumer
protection authorities to begin to work with
departments of transportation, where there’s a lot of
data, departments of health or agencies like NIH that
have a lot of data and don’t necessarily understand
always the properties associated with the marketplace
as an FTC would.

MR. CALVANI: I don’t want to be a skunk in
the wood pile, but I just can’t resist the temptation.

(Laughter.)

MR. CALVANI: I think the FTC’s record as a
regulator has been mixed, at best. And that’s because
I don’t think it is a regulator, nor do I think it
should be. I think the US agencies, unlike many other
competition agencies which have true regulatory power,
like the ACCC, the FTC and the DOJ principally do not.
They’re law enforcement agencies; they’re not
regulators like the Federal Reserve Board and the
Federal Communications Commission.

And while there is some residual powers, for
example within the FTC’s organic statute with the
Magnuson Moss Act, where the FTC can look at a market,
find that it’s not operating the way it would like to operate, notwithstanding the absence of any violation of law, it can do a market study, but a market study plus, and then impose a regulatory regime that has the force and effect of the law. And the agency was fascinated with these powers in the 1970s. And I think no one would disagree with me in saying at the end of the day, the record was at best mixed.

I think in the United States, we’re not really regulatory agencies. We’re law enforcement agencies. And while that may seem like a semantic difference, I actually think it does impact the way that the agencies do behave and, frankly, how they ought to behave. And I don’t quarrel with agencies that have mixed roles. The ACCC is a classic example where the Australian legislature vested it with powers that are broad based. And many other agencies are like that, too. I don’t think that’s the role of the US agencies.

MR. TRITELL: Good, we’re off to a rollicking start here.

Now, let’s take these insights and focus the lens on the FTC’s bilateral relationship and international cooperation. As we heard on our panel this morning, we operate in a world where agencies are
housed in all different legal systems and economic cultures and histories and powers. How can the FTC be effective in operating in that environment? And, also, are there things that we can learn from some of the other systems and tools that other agencies may have that can enhance the FTC’s ability to be effective?

Let me see if we can start off our discussion with some observations from Rod, whose agency mirrors our own in the breadth of our engagement.

MR. SIMS: Well, it’s hard to come up with too many suggestions for the FTC because I think your interaction within international organizations is sensational. Your cooperation with various agencies, at least as we experience, is terrific. So there’s nothing to say there, but to thank you very much for that.

The areas of improvement for cooperation, I think much better information sharing. I know that it was mentioned earlier, particularly in Marcus’ section, trying to have the competition agencies more emulate what IOSCO does in terms of information sharing would be extremely helpful. And, also, although I hesitate to give up our uniqueness, but
Australia has a treaty, an antitrust treaty with the US that allows essentially the US agencies to act on our behalf, which is stunningly powerful. We don’t use it that often because we don’t have to use it that often because people know we can use it.

And I think if that -- even though as an aside, I really appreciate the uniqueness and I hesitate to lose that status. But I think more of that sort of cooperation would be just tremendously powerful in making agencies more effective worldwide.

MR. TRITELL: Well, we’d like to make you more of a path breaker than a unicorn in having more of those agreements.

Andy, are you dealing with a lot of consumer agencies and privacy agencies in the context of the OECD? What do you see that we could bring into the FTC to enhance our bilateral engagement and cooperation?

MR. WYCKOFF: Again, I agree with Rod. You’re already doing a whole lot, and it’s been really -- you’ve been playing a leadership role at the OECD for some time all the way back to 2003. We put out -- the best thing we have is a policy recommendation, which is called a council recommendation, in the area of guidelines for protecting consumers from fraudulent
and deceptive commercialization practices across borders. That’s really acted -- it was launched by FTC and then FTC Commissioner Mozelle Thompson. And that has stood the test of time.

We just reviewed it a few years ago, in 2018, and it set out a number of different modalities that countries can follow to get this cooperation going. We found that, you know, across 31 countries we were looking at, only two didn’t have something pretty well established. So I think this is an exemplary role. As was just said, there are some limits here, though. We can always do better. This is the OECD. We always encourage more. And that’s the implementation challenge, particularly with sharing confidential information is difficult, and I think this is an area for maybe further work.

MR. TRITELL: Great, thanks.

And, Eduardo, from the perspective of the competition landscape that you observed from the ICN and elsewhere?

MR. MOTTA: Yeah. Let me say that what I could see from other agencies that could be used or could be applied in the FTC, I will start with the same general idea of the best design of an agency, how you can use that best structure in order to be applied
The way the Commissioners are selected or are appointed is important. It’s something that as long as you could separate that process of decision from political elements and you can put it in a more technical area, I think that’s going to be useful. And I think that’s something that has been seen in different countries. And in Mexico, I think, is not an exception of that.

I would say that the case of attribution of merger cases would be also important. Something that we didn’t have in Mexico until recently, until 2014, and something which you have been living with in the US is the fact of having two agencies dealing with this similar areas. That’s difficult itself. In Mexico, that started in 2013, with the basically separation of competition application or competition enforcement in the telecom’s regulator.

Even though that is a little bit more specific, there are some gray area where -- I mean, as a practitioner -- and now I am on the other side of the table -- it’s difficult to understand who decides what. And that’s -- and I think there is much to do in that line to give more clarity to the private
players and practitioners in general.

MR. TRITELL: We have a lot of private sector stakeholders with a keen interest in our discussion. Is there a constructive role that the private sector can play in helping the agencies be effective or in facilitating good cooperation?

MR. CALVANI: Well, just to make a couple of comments. I mean, I think that the private sector can play an important but limited role. The agencies need to always be in the driver’s seat, in my view. That’s not to say that there isn’t a role for the private sector. I think that there is. It can be a very valuable sounding board for proposed changes and regulation law and policy where -- provide information that the agencies can take on board or not. But, nonetheless, hopefully consider. I think that’s a valuable aspect.

Secondly, the agencies have -- the private sector has resources that sometimes can be used to augment those of the public agencies and the ICN’s use of NGAs, as I suppose is an excellent example there. So I think there’s an important role for the private sector, but I think it is, as you phrased the question, helping the agencies.

MS. BELLAMY: I sort of -- it’s a little bit
of a tangential comment, but in privacy in particular, one thing that we are seeing, unlike competition -- and I totally appreciate that -- is that the private sector is playing an increasingly important leadership role in shaping global responses to the diverging privacy rules that exist globally. So we don’t have one privacy rule. We don’t even have it in the US, which we should, but that’s a separate discussion. But, globally, there isn’t one.

What we are seeing is the multinationals filling that vacuum and applying reasonably coherent privacy requirements and rules wherever they operate. And they have these accountability programs, privacy management programs.

So I think there is something there, Randy, that I think FTC should be exploiting and kind of using that to also promote organizational accountability. I actually don’t think that everything in privacy certainly can be solved by laws. Technology is just too far out of the corral to be able to be curtailed back. We need these different methodologies to core regulate -- not self-regulate, but core regulate -- through an accountability model that can be also certifiable.

We have seen a great example in privacy in
so-called cross-border privacy rules that have been jointly adhered and approved in the APAC economies. The US is one of that. Those economies -- FTC has played a really important role in building these cross-border privacy rules which act as a minimum-based standard, if you like, across the APAC regions and enable companies to share data accountably and responsibly and, therefore, promote consumer trust and confidence in the digital economy.

And so I think those kind of accountability measures that are based on private sector stepping up, but with the regulator who is incentivizing and rewarding those kind of behaviors, would be really very, very important.

And may I also say, I want to remind all our colleagues here, we have had a very interesting project years ago, the so-called privacy bridges project, where we tried to bridge differences between regulatory approaches in Europe and US. One of the recommendations from that report came out to say that regulatory agencies should be doing not only joint enforcement, which we see at the moment, but also joint policy setting and potentially even joint guidelines. And I think this is something to also explore.
MR. TRITELL: Well, thank you, but you’ve mischaracterized your comment as tangential.

MS. BELLAMY: Sorry. I could go massive times --

MR. TRITELL: It is indeed central. And I think it’s a perfect segue into broadening our discussion from the realm of bilateral cooperation to more policy-oriented convergence. So with scores of agencies in the privacy and consumer protection and competition business, I think we all agree it’s impractical, unrealistic, and highly undesirable for each to be off on its own without any coordination.

At the same time, there is no unifying super national hard law in this area. There won’t be, I think, despite Tad Lipsky’s desire expressed earlier, and in my personal view, that’s a good development. But where does that leave us in terms of the ability to use what the previous panel discussed as soft law in promoting good practice and identifying best practices in spreading them? And what role can the FTC play in doing that?

So I’d like to ask everybody, really, what are the areas you think that are most important for the FTC to encourage convergence and how should they do that? And are there areas where they should avoid
preaching convergence because there’s room for experimentation? And are there less good practices that we ought to try to be warding off in the world?

So big question. And let me ask, Terry, if you can lead off our thinking on this.

MR. CALVANI: Well, I’ll just very briefly toss out some things that I think are important. I’d focus on the consumer welfare model, which I think has served us well over the last good number of decades in both Republican and Democratic administrations, and, which, frankly, is under assault at present.

I think due process is an area that all of us ought to be concerned with. While I don’t have any significant criticisms of the US system as it’s employed, due process is certainly lacking in other places around the world, and I think that there’s a great deal of very profitable missionary activity that ought to and can take place there.

I think in the area of privacy or privacy, however you want to pronounce it, it’s obviously something that all of us value. But that doesn’t mean that you raise your hand every time anybody says, do you want more privacy? I believe you always need to think about the interface between competition and privacy and strive to reach the right balance, and I
think that’s a very, very difficult challenge. It’s
easy to say, harder to make word. But I’ll just toss
those out as some ideas.

MR. TRITELL: Great. Well, let’s go down to
the end of the table. Andy, do you have thoughts on
areas ripe for convergence efforts?

MR. WYCKOFF: Yeah, I kind of expressed it
before. I like to think that organizations, such as
the one I work at, can bring this convergence, at
least show best practices, and once in a blue moon,
worst practices. It doesn’t happen as much as we
would like.

And to go back to I think a common thread of
this panel, I do think kind of a new factor production
for today is data. This raises some interesting
questions both for competition authorities, but data
protection and privacy. So there’s a convergence area
right there, I think, that I think FTC is perfectly
poised to begin to look at. And I think you’re going
to see this competitive advantage that’s associated
with data goes way beyond the companies we think about
today.

And I just think about more traditional
companies, such as John Deere, who are now making
creative use of data in many different markets
simultaneously. And there’s a bit of debate in some parts of the world who owns that data. Is it the farmer or is it John Deere? That’s just one dimension of this. But I think that is a convergence area that is worthy of attention.

MR. TRITELL: Rod?

MR. SIMS: Well, look, I’m going to slightly agree with Terry. I have to be careful how far I go here. But, I mean, I think promoting the consumer welfare standard is an important thing to do. I noticed James Rill mentioned national champions and I’ve been jumping all over that every time it gets mentioned.

So going back to my point about advocacy, we, and particularly I, have been a very strong advocate against national champions. Every time that the community mentions it, because they do just about every time there’s a merger, every time the Governments mention it, because they do every time they want to justify things they’ve done, and I think unless the competition agencies are jumping over that, nobody else will. So that’s where we absolutely need to be an advocate.

But the consumer welfare standard is obviously a sensible grounding for determining what --
and we are an enforcement agency -- what, as enforcement agencies, we should be focusing on and how do you separate procompetitive and anticompetitive behavior.

I guess the caution I would put with it, though, is I think in implementing the consumer welfare standard, which, as I say, we strongly adhere to, we just need to be a bit careful as we promote it around the world about the evidentiary burden we’re seeking to impose as well and the way we’re complicating cases. Competition policy -- I was very taken by Han Li’s point that competition is very technical, economic and legal, and consumer is not. Our consumer and competition staff are one. They melded into one and they both -- they’re all basically economists and lawyers, we’ve got a few ring-ins.

But the point I want to make is we do complicate competition cases and we do sometimes put on a very large evidentiary burden on them. We’ve just taken a case in Australia where the New South Wales State Government put in place a system to penalize, so they sold two ports to the one player, which is a bad idea in the first place, and they put penalties on the third potential port which was sold to somebody else so it couldn’t compete with the
ports they had sold. That’s a case we took with great
-- glee is the wrong word, but enthusiasm is the right
word, and, of course, we were not there spending a
second trying to work out what the harm to consumers
are. It is patently self-evident that there is harm
to the competitive process and we took it on that
basis.

So I just want to make sure we’re not
overcomplicating. As we promote the consumer welfare
standard, don’t make it so technical no one wants to
touch it.

MR. TRITELL: Great.

Eduardo, would you like to come in on the
convergence point?

MR. MOTTA: Yes. Well, let me just put that
question in kind of a likely different background
which has to do with the role of the FTC today with
respect to international organizations. What’s the
way or how I would like to see the FTC role at this
time, I mean, I go very much in line with what Rod
said. I think advocacy is a key element. Advocacy --
even though the agencies -- the competition agencies
are very much in -- they have the obligation to apply
the law and to enforce the law, they have a broader
obligation also to praise and to advocate for
efficient markets. And, today, that is something that is at risk internationally.

The role of the FTC, as an advocate, a long time ago -- well, not so long time ago, but it was when the ICN was created -- and the grandfather of the ICN was just present here -- it was precisely to advocate for that internationally, to advocate for efficient market-oriented policies through the application of competition and enforcement of competition law.

We are now living in a very difficult reality internationally that puts at risk the consideration of market policies and market efficient -- the promotion of market efficient policies. So I think this is the good moment to think about what should be the next step for the ICN and what could be the role of agencies like the FTC, like the DOJ or even the European DG Comp in this area.

I think as they had this important role a few years ago with respect -- in the creation of the ICN, I think this is a good moment to think what should be the next step for the ICN. In my view, the next step for the ICN or the next reflection has to go in line of a creation of an organization, more formally a national organization, in order to keep
promoting markets to be efficient.

And I think the FTC is in this important historic moment to take a decision of how to move forward. If it’s needed, if it’s useful to think of an international organization with a permanent secretariat to defend the market-oriented policies, how to do it, how the jurisdictions and the countries that want to be part of that should be joining, what kind of conditions should be designed in order to do that.

MR. TRITELL: Well, thanks, Eduardo. You left us still a little bit in suspense about next steps and I know that you have a strong background as well in the trade world from your days in the WTO, and I may come back to you to see if you think the ICN’s “all antitrust all the time” motto is still apt in today’s world or we ought to be looking more broadly at intersections with other such policies.

But, now, let me come back to Bojana to ask how you think this convergence idea or agenda might play out. Is it relevant in the world of privacy authorities? And I would like to interject into that a question from our audience, which is what do you think is the greatest obstacle or the obstacles to privacy agencies collaborating on best practices and
guidelines, especially between the United States and
the European Union, and how can we overcome those
obstacles?

MS. BELLAMY: Million dollar questions. If
only I knew this, whoever asked me that, I think we
would be very rich and we would solve all the
problems. But, seriously, it’s a bit of a loaded
question, right, because we assume there are some
obstacles, and whoever has asked me, I think there
have been some obstacles and maybe, maybe some people
would say there’s been a little bit of erosion of
trust between regulators in the EU and here on this
side of Atlantic.

Some people also may say there’s been a bit of -- we have different philosophies and, therefore,
we cannot focus on these differences as opposed to
something else. But I would like to be a little bit
more optimistic and I actually think there is a path
forward.

So first of all, there have been great
examples of this kind of bridging and collaboration
between EU authorities and the FTC in the context of
Privacy Shield. FTC has been a phenomenal not only
supporter, but a knight with a shield using the shield
really in the way that it is supposed to be used and
has hugely contributed to acceptance of Privacy Shield as a proper transfer mechanism. For those of you who are privacy geeks here, you know what I’m talking about.

There’s been a great collaboration between some of the regulators in the EU and FTC through GPEN, Global Privacy Enforcement Network. I think that that shows that things can be done together. There are a number of memoranda of understanding, as I understand, between individual agencies in the EU and FTC. So there are lots of these things that actually have worked already.

Now, how do we move forward? I think there is more that brings us together than actually pulls us apart, and we have to both, on both sides of the Atlantic, just like the privacy bridge project was about, it was about finding an adapter. Like when I come here -- and I really get annoyed with English plugs. I hate English plugs. And we’ve got continental plugs and British plugs and we’ve got American plugs. But we have to have -- I want electricity, but all these different plugs. So that’s what we need to find.

We need to find some plugs in between so that we can live with these differences and we can
translate what we talk together. And that means respecting each other’s philosophies and backgrounds and constitutional frameworks. It doesn’t mean imposing European values on the US. And, in fact, I’m really emboldened by the European Court of Justice Attorney General opinion on the case, which actually relates to whether the right to be forgotten should now be expanded globally at Google.com and, you know, everywhere, including the US.

Well, frankly, that would bring a huge crash of cultures and constitutional frameworks of First Amendment versus privacy, and that’s not what we want. And the attorney general has very cautiously kind of said, well, there has to be a limit to how far we can apply these rules, even though it’s a fundamental right to data protection. So I hope the court is going to uphold that.

And I think it is important that we, in Europe, do not believe that our way is the only way and I think we must be also humble to take on some of the US best examples. But then the US also, we’ve got expectations, the US federal privacy debate is going to sort of stir up and come up with perhaps some new ways of dealing with some of these issues. So I think building on that respect for differences, but also
what brings us together is really a good way forward. I talked about some of the joint policy initiatives. I really think this would be a great way to bring us together. Think about facial recognition or blockchain or machine learning or Internet of Things, drones, all of that would be amazing.

For example, a case study to bring us to work on something which is proactive, which isn’t kind of reactive, confrontational, adversarial, but actually we’re creating something better for the world ahead. Of course, cooperation and enforcement is important and I think, as some in Europe, do not believe any of the complaints end up in the right hands. I think that’s where the FTC can also help and ensure that the EU-led complaints that are sent to the US actually get heard properly and get enforced potentially or there is a feedback loop back. I think that would be helpful as well.

And then the final point I would like to add, which is something around -- more around, as Eduardo has said, about the leadership role of FTC. I really think actually FTC has got something to teach other regulators just because of its breadth and sort of experience in being a tough enforcer. Those of you who were in privacy for many years used to remember --
people used to say -- Europeans used to say, if only we had the FTC enforcement in the European law that would be the best combination.

So we always looked up to FTC as to how they enforce the law, how they manage, and I think that’s something that FTC can really take on a great role, particularly with European regulators, who now have got similar enforcement powers. But, frankly, and I apologize, I know it’s going to be online, they don’t have the know-how, how to actually use these powers in the best way.

We’ve seen some Draconian enforcement in the EU without proper due diligence, without proper process, without proper transparency and proper lessons learned why that fine has been applied in this way and why it hasn’t been applied that way. And I think this is something, Rod, I think you slightly talked about that. That is where I think FTC can help also, frankly, technically bring the other regulators a little bit up to higher level simply because of its standing and experience in enforcement.

MR. TRITELL: Thank you. I think we have a wonderful example how your questions can really stimulate the panel.

(Laughter.)
MR. TRITELL: So feel free, please, to find those cards and send them up here and enhance the show.

So we’re talking about conversions and joint projects of an exciting nature. One way to potentially move those forward is through the vehicles of international organizations. Our hearings have touched many times on the OECD, ICN, ICPEN, we have UNCTAD, regional organizations like APAC, various privacy groups. There’s a big menu of these venues, but resources are finite.

Let me ask where in surveying that spectrum do you think the FTC should allocate its resources and what should they seek to accomplish in some of these important international fora?

Rod?

MR. SIMS: Well, I wouldn’t mind just -- I’ll answer that question, but it’s just backing up to what --

MR. TRITELL: Or come back to any other point, please.

MR. SIMS: Well, what Bojana just said, the -- we notice this quite a lot in our consumer work because we are a consumer and a competition regulator, and because most of our staff do both competition and
consumer work, we don’t separate them out. I think we’re fairly unique in that. But it just strengthens that process, that know-how in competition, which you’ve got to have to be in the game.

When you translate that into consumer work, it’s just so immensely powerful. I think, on average, we would take larger companies to court for breaches of consumer law than we do for competition law. We’ve recently taken Ford, Hines, Apple to court for breaches of our consumer law. We’ve got large fines. Perhaps the biggest development in Australia is we’ve just convinced the government, under the heading of advocacy, to align the penalties for breaches of competition law and consumer law. So now the penalties will be the same. Previously, the penalties were much lower for consumer law, which is a terrible thing.

The harm you can do through misleading consumers is visibly as bad as it can be from cartels. There is just no doubt about that. I can give you numerous examples. So I just want to back up that point, that the strength of being the regulator that does a number of things is important. I guess it leads into my point that I think ICPEN is the organization that perhaps needs that extra bit of
work, whether it’s capacity building with new
jurisdictions, whether it’s more coordinated action
amongst the members, whether it’s common approaches
and practices, but really just raising up the profile
of consumer work.

I have to say I continually get irritated
when I’m at international meetings, you get the sense
that competition work is held to be in some way
superior to consumer work. That is complete rubbish.
They are equally important. If you want your market
economy to work for the benefit of consumers, you need
effective competition law and you need effective
consumer law. They can both equally do great harm.
And so I just think we’ve got to raise it up.

MR. TRITELL: I think you have a sub
silentio round of applause in the room there, Rod.

(Laughter.)

MR. TRITELL: Not to mention from Bojana who
mentioned privacy --

MS. BELLAMY: And privacy as well. So we --

MR. TRITELL: -- which we think of as part
of our consumer protection.

MR. SIMS: I can’t talk about privacy,
but --

MS. BELLAMY: The three-headed Medusa. It’s
the three heads, right?

MR. SIMS: But I would happily push it to privacy, absolutely. Well, the same point applies and it was Bojana’s point that got me in there. The same point applies.

MR. TRITELL: Would anybody else like to come in on where we should focus our efforts in the international organizations.

Eduardo, you talked about maybe we ought to be going to the next step. So if you’d like to elaborate on that.

MR. MOTTA: Well, yes. I could, in a very general way, elaborate a little bit more on that. Let me first -- let me start with the main features of the ICN. The main features of the ICN, in my view, is that it’s a soft law organization, it’s a consensus organization. It’s a consensus organization. That goes very much in line with what happens in the WTO. It could be risky, but that’s the reality.

It’s a beautiful system, organization, it’s a beautiful network. It uses, very efficiently, the communication technologies and so on. And the main products that are created by the ICN are this best international practices standards, practical guides and toolkits, and they organize workshops for members.
I mean, that’s in a very general and a schematic way. Well, the first question is that has been, in my view, the ICN has been one of the most efficient networks I have ever seen, international networks that I have ever seen. When I compare how the ICN was created and what was the situation in the context of the WTO discussion on trade and competition, which was one of the elements that provoked the creation of the ICN, and if you see that, that was 2001 more or less -- I think it was 2001 with 15 members in the ICN. Today, they have more than 114 members.

In 2001, the WTO was working generally well. We were in the middle -- in the start of a new round, the Doha Round. At that time, the ICN was created and the ICN has been much more effective, frankly, than organizations like the WTO.

But my point here is that the international context in which we are living is highly complicated. I mean, there are a lot of nationalistic pressures, national champions, pressure from different countries, developed and developing countries at the same time. That has become, I would say, a more systemic, risky problem for markets. And that doesn’t mean -- I mean, the most important elements is how to show that markets in a competition scenery is one of the most
important instruments you have in order to create not only efficiency in your economy, but also equality of opportunities for economic players, for economic agents, but also at the same time a quality of opportunities for consumers.

So in that situation is where I think it is needed to give an additional impulse to an international organization like -- or an international network like the ICN. And maybe -- I mean, I’m basically suggesting to reflect on the possibility to create a new organization, a new international organization of -- this could be consumer and competition agencies. And that should be a more -- in my view, should be a more formal organization in order to generate an international pressure for the evaluation and valuation of the importance of markets in that context, in the context of competition.

So to think about the possibility of having a formal and permanent secretariat, that makes a difference because today what you have is the members are the secretariat itself. So it’s difficult to differentiate what a jurisdiction is saying or what the organization is saying because the word is the same. So in my view, you need someone that is more 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
become a lessons learned that the rest of the region
now is beginning to look at. So I think there’s a
model for what he’s saying.

The FTC -- I speak under the Chair here of
my Consumer Policy Committee, Hugh Stevenson, already
plays a huge leadership role at the OECD. There’s two
areas if I had to put on my Christmas list from FTC,
where I would like to see them push. One is on this
evidence base that many people have talked about. We
love statistics at the OECD and comparative --

MS. BELLAMY: Data.

MR. WYCKOFF: Data. Comparative indicators,
and can we begin to look at things as we get, for
example, like data breach laws from around the world.
Can we begin to compare these and get some -- it may
not be apples to apples, but at least fruit to fruit
to look at.

The other is really leadership work that
happened in 2010 again led by the FTC on our consumer
policy toolkit. I think they began to open the
thinking on both behavioral economics and the
informational economics, which I think is important.
And following up on that -- and we’ve begun to do some
work on consumer attitudes towards trust. It goes to
what people are saying. It may not be such big
differences as people think, but also doing some more experimental work, such as on personalized pricing, which we’re beginning to see proliferate in many different areas. These are areas where I think there’s a lot of international interest and where the FTC could play a leading role.

MR. TRITELL: Well, leading right into our next topic, which is the FTC’s leadership role, I think that there was a point in time when the FTC had so much longer and deeper experience in some of these areas that it was a default and natural leader. Now, we live in a very multipolar world in all of these disciplines, and it prompts me to wonder what does it mean to be a leader in this environment. Is it important for the FTC to be perceived as and to be a thought and policy leader? If so, how can the FTC exercise effective leadership internationally, including on emerging issues and with agencies that operate in very different environments?

So let me just run down the table for anybody who would like to offer thoughts on this study with Bojana.

MS. BELLAMY: Yeah, sure. So I’ve got a very long wish list, which I will submit in writing probably to my friends at FTC. But, Andy, to continue
where you kind of stopped, I would really love the FTC -- I think there is some leadership vacuum first, let me say, in the privacy regulatory community at the moment, and I think FTC would be very well placed to fill that vacuum, together with some other across the world are kind of wanting to seek that new leadership role.

So one area where I would like to see some work would be in the area of fairness, fair processing, fairness and unfairness, you know. In the majority of data privacy laws we have requirements with fair processing, yet nobody knows what it means. Yet here, FTC statute and work is based on unfair trade practices. There is unfairness methodology that FTC can teach us a lot in this world of AI and machine learning as to what creates harms to consumers, what and how do we measure that and how we, as organizations, think what is fair and what is not fair.

I think this will be a great opportunity not just for bilateral, multilateral regulatory corporation, but together with the organizations who are implementing this in the practice as well. FTC anonymization test, again for those of you in the privacy geek community is still standing the test of
time where frankly everybody else says there’s no such
things as anonymous data because everything about me
doesn’t matter. If you know who I am, but you know
everything about me, that’s good enough to identify
me. Well, I think FTC has done some really great
thinking in the past and we need to revive that
leadership and kind of, again, convergence with some
others.

Risk-based approach to regulation and
enforcement and investigation is something that I
think FTC again is best placed to teach the rest of
the world. We live in a world where data is
everywhere. Every company, to your point, is today a
data company, Rod. I mean, I keep hearing this from
manufacturing companies to financial companies who say
we are data and tech companies today. So in that
world, we really need different ways of approaching
that.

And then a final point, I would like to say
that this whole topic of incentivizing what good looks
like and rewarding good behaviors, I think there is
something about that that we need to exploit more.
I’ve been head of privacy for a huge multinational
company for 12 years, and trust me, when we got good
praises from a regulator, that gave me a bigger
budget, that gave me more standing internally, that
got me to speak to the CEO and the board much quicker
than any penalty and any fine did.

I think realizing what motivates companies
and motivates people to behave well and be good
corporate citizens in this new interconnected world, I
think there is work to be done there. And I do
remember FTC consent decrees that I have read as I was
a practitioner, every single consent decree said to
me, here is how they reward companies who actually do
something while in privacy. That’s what DOJ said.
Data -- I think somebody mentioned before, that’s
what the SEC does, that’s what US sentencing
guidelines do.

So I kind of feel there is this US body of
work and it’s not even -- it’s legal background and
framework that actually exists and can teach the rest
of the world how to use those incentives and rewards
for compliance in this new world where I think this
will be particularly useful.

MR. TRITELL: Thank you.

So as we go down the table and as I see the
hourglass time running low, thoughts on FTC leadership
and any other closing thoughts you’d like to include
in about a minute and a half each.
MR. CALVANI: A minute and a half. Okay.

On the perception issue, you can go to Google and you can find a gazillion people, not a gazillion, but a large number of people that say that the US agencies have failed to export the US view of competition law and policy around the world. And I think, in some sense, that’s a red herring.

If you had asked yourself, have they been successful in selling the treaty, absolutely. One would expect them to be. I mean, the treaty you just -- in Ireland, we just go Xerox Articles 101 and 102. It’s really easy to do. If you wanted to Xerox the US, what in God’s name would you do to do that? The Section 1 of the Sherman Act is not very helpful. It’s a common law -- judge-made common law that we have for competition law in the United States. It’s not a user-friendly exportable commodity.

The same thing is true on the process side. Our legal process side is firmly grounded in the adversarial process that we took from England where the agencies, generally speaking, stand in the position of the crown as a party plaintiff before the courts. And it’s obviously a hell of a lot easier to sell the administrative process to jurisdictions who
owe their history to the continental system.

So I don’t find the fact that Article 101 and 102 have been adopted around the world, I’d be surprised if it hadn’t been. I don’t find it bothersome that an adjudicative administrative program has been adopted and the adversarial process hasn’t. I would be surprised if it were otherwise. I think the agency has been very successful in focusing on discrete and important topics.

We may have duplicated Article 101 and 102 in Ireland, but when it came time to look at our merger guidelines, we basically -- I guess we’re being filmed here -- we basically Xeroxed the US guidelines and tinkered with it a bit to make sure it fit our system. So I think the perception, sometimes this is a bit of a red herring. We’ve got to ask really what are we talking about.

MR. TRITELL: Eduardo, what are we really talking about?

(Laughter.)

MR. MOTTA: Well, I coincide with Terry. I mean, the legal system makes a major difference. But let me tell you in the case of Mexico. We frankly used the -- I mean, when we started the negotiations of NAFTA, we didn’t have competition law at all. That
was a little bit more than 25 years ago. There was not a competition law in Mexico. And we basically used, with the help of the OECD, we basically used the model of the FTC. So that’s what we did.

So an element of leadership could be in very specific elements, like -- I mean, we have an administrative legal system, a completely different legal system than the US, but we basically use the same design of the FTC and that has been useful. We basically use the knowledge -- the human capital from the FTC. I remember the FTC helping the Mexican authority to communicate with our judges. We created a very important human capital in Mexico in the judiciary to judge the decisions of the competition authority. That was basically, even though the legal system was completely different, that was an example of how you could apply the knowledge of the markets, the knowledge of the competition enforcement in general itself. And it goes beyond the legal system.

MR. TRITELL: Rod?

MR. SIMS: In the interest of time, I’m actually going to junk what I was going to say and just I want to reinforce some of the things that Bojana said. I think it’s an extremely good idea for the FTC to exercise leadership in the data field,
given it is the competition, the consumer and the privacy regulator. That is a fantastic combination. I had never met our privacy regulator in Australia. I didn’t know where they were. I didn’t know who they were until we did our digital platform inquiry, and then I finally located them. They’re in the same building I work in in Sydney. (Laughter.)

MR. SIMS: But I didn’t know.

MS. BELLAMY: Oh, no. You met them in the lift.

MR. SIMS: Sort of, yes. (Laughter.)

MR. SIMS: So the fact that you’re already at one I think is something that can be worked on. And I also want to support the consent of unfairness in our digital platform inquiry. We are completely looking to the US on that, not just the way the law is done, but the way it’s administered. If we were to press for such a law, we would try and completely copy the way the US is doing it.

MR. TRITELL: Andy, last word?

MR. WYCKOFF: I’ll pull a trick from Rod and actually build on a comment he made earlier. I think after basically 40 years of regulatory reform and then
our economy’s becoming more digitally based on the internet, which it really empowers the end user in a way we hadn’t seen before, that the importance of consumer policy needs to be underscored. I completely agree, but I don’t see it in many countries or at the OECD for that matter. And so giving greater weight to that and what that means, because we rely on them to make markets in a way that we didn’t 50 years ago.

MR. TRITELL: One second left. Bingo. Thank you. I will go over our time to thank you for an extraordinarily informative and interesting and fun discussion. Thank you all so much.

Please join me in recognizing our wonderful panel in this discussion.

(Applause.)

MR. TRITELL: And if you would stay where you are, we’re just going to have a few concluding remarks to wrap up our hearings. Time has flown. Our panel time has flown, our two days have flown. They’ve been an extraordinary couple days. We had high expectations. From my point of view they have been roundly exceeded throughout the program. We’ve had an extremely rich dialogue on the key issues that the FTC faces today and those that will confront the agency in the international aspect of our work, which
will continue to play an increasingly important role as we seek to fulfill our consumer protection privacy and competition missions.

None of this would, of course, have been possible without a truly extraordinary amount and quantity of work by a huge number of people. So allow me a moment to offer a few words of thank.

First of all to Chairman Simons, joined by our Commissioners, for conceiving these hearings and supporting this hearing on international issues; to the FTC staff far too numerous to name, especially from all my colleagues in the Office of International Affairs; to Bilal Sayyed and his team from the Office of Policy Planning, who have run this and all the other hearings; from the amazing group from my Office of the Executive Director working mainly behind the scenes whom you may have seen, though, at the back of this room and outside this room, who not only made this happen, but ensured that our program transpired extremely seamlessly and professionally, thank you, thank you.

To our panel moderators from the Office of International Affairs, plus Ellen Connelly from OPP, and to our faculty who came from around the world in some cases just for this hearing. Thank you for
making the time and for all the preparation and
tought that went into making these panels so
productive and insightful.

We’ve learned so much from these sessions
and that learning will greatly inform our thinking and
the FTC’s priorities and policies as we prepare for
the challenges of the coming years and decades.

Thanks as well to our audience and our
stakeholders whose views we welcome at all times and
especially in comments that we encourage you to submit
by the end of May as part of our hearings record.

That concludes our 11th session of the FTC
Hearings on Competition and Consumer Protection in the
21st Century. Please join us for our future hearings,
including our 12th hearing, which will focus on the
FTC’s approach to consumer privacy, which will take
place at our Constitution Center in Washington on
April 9th and 10th.

We look forward to working with you in
furtherance of the FTC’s critical missions of
maintaining competition and protecting consumers.

Thank you very much.

(Applause.)

(At 4:40 p.m., the hearing was adjourned.)
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
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