Competition Policy Symposium co-organized by the Competition Policy Research Center and Tokyo American Center

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***Keynote speeches are based on the papers submitted in advance by the speakers. The statements are not a transcription of the actual speeches given on the day of the symposium.**

Opening Remarks: Joanne Gilles
Deputy Director, Tokyo American Center|
Kazuhiko TAKESHIMA
Chairman, Fair Trade Commission of Japan

Part I: Keynote Speeches
"Securing benefits of international competition"

R. Hewitt Pate
Assistant Attorney General, Antitrust Division
United States Department of Justice

"Competition Policy and International Competitiveness from a U.S. Federal Trade Commission Perspective: The Case of Merger Enforcement"

Alden F. Abbott
Associate Director for Policy and Coordination
United States Federal Trade Commission

Part II: Panel Discussions: "Globalization of Competition and New Design of Competition Policy"

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Discussants:
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Chairman:
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(Opening remarks)

Chairman [translated]: Ladies and gentlemen, we would now like to begin the symposium. This symposium is jointly organized by the Tokyo American Center and the CPRC, the Competition Policy Research Center. My name is Kojima. I'm the deputy director of the CPRC. I will be the MC overall and for the first portion of today's program. Good afternoon.

We are planning to compile a report of today's symposium, including the contents of the keynote speeches and the discussions that should take place later. We are also going to publish it on our website. I would like to first ask the organizers to deliver their opening remarks. First, I'd like to ask Madam Joanne Gilles, the deputy director of the Tokyo American Center, to speak please.

Mrs. Guiles [translated]: Ladies and gentlemen, good afternoon. I thank you very much for finding time out of your busy schedules to join us today. As has been introduced, my name is Joanne Guiles. I am the deputy director of the Tokyo American Center. It is a pleasure to welcome you all today for this program.

This program is a joint competition policy symposium jointly organized by the Tokyo American Center and the Competition Policy Research Center, CPRC. In the first part of the program we will look at promoting economic prosperity through competition policy, a view from the United States. We have a presentation by Mr. R. Hewitt Pate, who is assistant attorney general for the Antitrust Division of the Department of Justice, and Mr. Alden F. Abbott, who is the associate director for policy and coordination, Bureau of Competition of the Federal Trade Commission.

In the second part of the program we will be joined by a senior member of the Japanese Fair Trade Commission, Mr. Akinori Uesugi, who is the secretary general. And we will also be honored with the presence of Prof. Tatsuo Tanaka, associate professor of the Faculty of Economics at Keio University. He is also a visiting researcher at the CPRC, and they will form a panel.

Competition policy is about insuring fair competition and protecting the consumer. And more and more focus is on how such policy should be in recent years, and against that backdrop I think it is indeed timely for us to organize this symposium on that particularly important and interesting matter. I would like to close by wishing every

success to this program, and thank you very much once again for your kind attention.

Chairman [translated]: Thank you, Madam. And now I would like to ask the Chairman of the Fair Trade Commission, Mr. Kazuhiko Takeshima, for his opening remarks, please.

Mr. Takeshima [translated]: Good afternoon, ladies and gentlemen. It is indeed a great pleasure for us to welcome such a big audience like this. Thank you indeed for taking time from your busy schedule to attend this program today. The assistant attorney general for the Antitrust Division, Department of Justice and also the Federal Trade Commission, these two groups are represented here, and we at the Fair Trade Commission of Japan have been conducting periodical consultations. We have had two day sessions, which were just concluded. And on this opportunity Mr. Pate and Mr. Abbott have come to Japan. And I really appreciate that they have kindly accepted our request to be keynote speakers in today's program. And the Tokyo American Center, I believe that they deserve great appreciation for taking a lot of effort in organizing today's program.

We are now working very hard for strengthening and amending the Antimonopoly Act at our commission. And in the coming October an extraordinary session of the Diet might be convened, and we aim at submitting a draft amendment of the Act to be deliberated on and enacted at the coming session of the Diet. So in that regard, today's program is extremely timely. And we have positive figures showing that we are finally coming out of the prolonged stagnation of the economy, but still structural reform of the economy remains of utmost importance for this country. This means that fair and free markets are allowed to be fully functioning as the principle force of the economy. And to that end the competition laws, which means the Antimonopoly Act in Japan, should be fully operational and enforced and complied with. And with that objective in mind we are working for the amendment. Of course, there are differences between Japan and the United States, but the United States has 100 years of history of anti-trust enforcement and they are leaders in this regard. So we really appreciate this opportunity.

The Competition Policy Research Center began in June last year. Academia and the policy makers and practitioners of competition in Japan should work together in theory and practice. And the results of such activities will continue to be publicized in and around this country for stronger exchange and support in our policy. Professor

Suzumura of Hitotsubashi University is with us here today, and we have just begun the second year of our center. And I appreciate your ongoing support and understanding in our activities at that center. Thank you very much, indeed. Thank you very much, Mr. Chairman. And now we would like to go into the operative part of the program. Allow me to take my seat, please.

Chairman [translated]: As has just been explained, we have two parts in this program today. In the first part we would like to hear the keynote presentations from the two gentlemen from the United States. And then in the second part we would like to have a panel discussion based on the presentations that we will receive, and we will also welcome questions from the floor in both parts of the program.

First I would like to introduce Mr. Hewitt Pate, the assistant attorney general for Antitrust from the Department of Justice, and Mr. Alden Abbott, the associate director for policy and coordination, Bureau of Competition, Fair Trade Commission. Mr. Pate graduated from the University of North Carolina in 1984. He earned his degree in law (Juris Doctor) at the University of Virginia in 1987. He has been active as a lawyer before joining the Department of Justice as a deputy assistant attorney general of the Antitrust Division before assuming his current position in June 2003. Mr. Abbott graduated from the University of Virginia in 1974. He earned his J.D., doctorate of law, from Harvard University in 1977 and in 1984 he also earned an M.A. in economics from Georgetown University. He has worked with the Department of Commerce and the Department of Justice before joining the FTC in June 2001. And from February this year he has been serving in this current position.

So first, could Mr. Pate give us his presentation please?

[Keynote Speeches]

Mr. Pate's speech

Good afternoon, ladies and gentlemen. I am very pleased to be here today to talk with you about the globalization of competition law. This is my first visit to Japan, on the occasion of the 26th annual U.S. - Japan antitrust consultations. Chairman Takeshima has been a gracious host, and we have had very fruitful discussions over the past two days.

Just two weeks ago, the 28th Olympic Games came to a conclusion in Athens, Greece. It was a tremendous event, with more than 10,000 athletes from a record 202 jurisdictions competing. As you know, this year=s Olympics were the first to be held in Greece since the modern Olympics Games began in Athens at the end of the 19th Century. The modern Olympics started in 1896, only six years after the American Sherman Antitrust Act was enacted. Believe it or not, there are some important parallels between the modern Olympics and global competition law.

As for the most basic parallel, the Olympics are a microcosm of globalization and of competition. They are based on the principle that competition creates excellence by providing the incentive to bring out the best capabilities in the athletes. Through the constant challenge of new competitors and new training techniques, world records are made and shattered, and goals once thought impossible are reached and then exceeded. The Olympic Committee and other sports authorities, like antitrust enforcers, attempt to impose certain basic rules to ensure that the competitions are fair, and that cheating B such as fixing the outcome of events or taking banned substances B is not allowed to undermine competitive outcomes. (Like antitrust enforcers, the governing bodies face challenges, and can make no claim to be perfect.)

Participation in the Olympics started slowly. At the first Modern Olympic Games in 1896, 241 athletes from 14 nations took part. All of the participants were from Western Europe and North America. One might even say that the early Olympic Games were a regional, rather than a global, market. In 1920, when Ichiya Kumagae won Japan=s first Olympic medals B silver medals in singles and doubles men's tennis -- the number of participating nations had doubled to 29. Just eight years later, at the 1928 Olympics in Amsterdam, 46 countries competed and Japan won its first gold medals, in the triple jump and in the men's 200 meter breast stroke. At the 1932 Olympics in Los Angeles, a Japanese 14-year-old "new-entrant" Kusuo Kitamura B won the 1500 meter

freestyle swimming competition, to become the youngest male ever to win a gold medal at the Olympics. By 1964, at the Tokyo Olympics, the number of participating nations had doubled again to 93, and Japan B foreshadowing its emergence as a major economic power B was third among all participating nations in the number of gold medals won by its athletes. By the time of the 26th Olympiad in Atlanta in 1996, a truly competitive global athletic market had been established: 10,318 athletes from 197 countries competed in 271 different events, and men and women from 79 different nations won medals.

The Globalization of Competition Law

The history of antitrust laws also started slowly. In the 1890s, only the United States and Canada had comprehensive antitrust laws. It took some time, even in the United States, before enforcement became active or vigorous. By 1950, you still could count on the fingers of both hands the number of countries that were enforcing antitrust laws. Even in the 1970s, by which time many developed countries had adopted comprehensive antitrust laws, efforts by the United States to use our antitrust laws against harmful international cartels were met by strong resistence from our trading partners. U.S. approaches to antitrust law, including the criminalization of cartel behavior and the prosecution of corporate executives, were viewed with puzzlement and suspicion by other governments and their business communities. A number of countries even adopted blocking statutes aimed at thwarting the application of U.S. antitrust laws in the international context. Most countries did not view a law aimed at protecting the competitive process as something that was compatible with their economic or social cultures. And countries that did enact antitrust laws were more concerned with using them to maintain stability in the marketplace than in promoting real competition. In Japan, as we all know, the Antimonopoly Act (AMA) was adopted by the Japanese Diet in 1947. But it was not well accepted by Japanese society, and it was soon subject to amendments that substantially weakened the impact of the AMA on the economy. It was not until the oil shocks of the 1970s that the AMA and the Japan Fair Trade Commission (JFTC) began to be invigorated.

Looking at the global situation today, we see a remarkable change in the global acceptance of antitrust law as a promoter of economic growth and prosperity. More than 100 countries have adopted antitrust laws and there is unprecedented cooperation among countries in acting against international cartels. We now have the International Competition Network, an organization composed of antitrust enforcement agencies

from, at current count, nearly 80 nations, working to improve our understanding of how best to apply competition laws in an era of globalization.

What happened to cause this remarkable change in the global recognition of the importance of competition law? Probably the most important single event was the triumph of capitalism over the failed command and control model of the Soviet Union. With the dismantling of the Berlin Wall came the realization by many countries that the path to successful economic growth lay in fostering market-based competition, and that one of the building blocks of successful market economies was the protection of the competitive process through strong and well-focused antitrust laws. This was accompanied by a more sophisticated understanding of how markets operate and a greater appreciation of the harm caused to consumers, to the business community and to our economies as a whole by anticompetitive practices.

In addition, the tensions over U.S. application of its antitrust laws in international matters gradually gave way to increased dialogue and cooperation. This was demonstrated by the antitrust cooperation agreements entered into between the United States and a number of major antitrust enforcing countries in the 1980s and 1990s. Increased cooperation was bolstered by the recommendations of the OECD Council on Cooperation on Restrictive Business Practices affecting International Trade in 1986 and on Hard-Core Cartels in 1998. Around the same time, some highly visible and economically damaging international cartels were uncovered B notably the feed additives, graphite electrodes and vitamins cartels B that gave concrete evidence of the need for governments to work together and protect their consumers from these harmful global conspiracies.

Antitrust Enforcement Priorities in the United States

For the United States, our reevaluation of the proper role of antitrust law occurred somewhat earlier, in response to advances in economic learning that established the foundation for the landmark Supreme Court decision in the GTE Sylvania case. This reevaluation was based upon the recognition of the importance of promoting business efficiency through market mechanisms. It led to a clarification of the appropriate analytical framework and antitrust enforcement hierarchy for different categories of business conduct, a hierarchy that remains valid today.

At the top of this hierarchy is enforcement against cartels, conduct that is devoid of any efficiency justification and inflicts tremendous harm on our economy. Our Supreme Court, in its recent Trinko decision, described collusive behavior as "the

supreme evil of antitrust." Obviously, this is our core priority at the Antitrust Division. Second, we review mergers using the best analytical tools available, and make judgments on whether the effects of the merger may be "substantially to lessen competition or to tend to create a monopoly." If so, we must back up that judgment with a suit in court to block the merger. Third, we analyze unilateral conduct, as well as agreements subject to rule of reason analysis, in a cautious and objective manner. We do this mindful that it is often difficult to tell the difference between good, hard competition and anticompetitive conduct, but ready to challenge conduct that is harmful to competition. Let me discuss each of these priorities in turn.

A. Cartel Enforcement

Criminal enforcement against cartel behavior has long been a core priority of the Antitrust Division. Secret agreements among competitors to fix prices, allocate customers, or reduce output are a direct assault on the principles of competition that drive our market economy. Companies that participate in cartels are committing a fraud against their customers that deserves severe penalties. There is now widespread agreement among countries around the globe on the serious harm caused by cartels, and the need for antitrust enforcement agencies to give their highest priority to rooting out and punishing this behavior. Imagine if Olympic athletes agreed among themselves who would be the winner in a particular competition, or agreed not to run too fast so that none of them would have to exert themselves too much. The result would be immediate world scandal and outrage. In my view the same reaction is appropriate toward companies who fix the outcome of business competition at the expense of consumers.

We have found from our experience in prosecuting cartels that this behavior is extremely profitable and often very difficult to detect. To be successful in uncovering and challenging cartels, we must have the most modern and effective investigative tools. We use a "carrot and stick" approach in dealing with cartel participants. The "stick" or penalty for antitrust violations needs to be very severe if it is going to have any chance of counteracting the allure of the large profits that await successful cartel participants B ill-gotten gains that come out of the pocket of consumers and businesses that are downstream purchasers of the cartelized products.

In the United States we use three different, complementary "sticks" to create a climate that will provide a sufficient deterrent to prospective participants of cartels. First, we subject companies that join cartels to high monetary fines. This summer, our

Congress enacted legislation to increase the maximum criminal fine for companies violating the antitrust laws from $10 million to $100 million, making antitrust fines one of the most severe under our criminal laws. Our Sentencing Guidelines set a baseline fine for antitrust violations of 20% of the sales involved in the cartel; and in extraordinary cases could be increased to as high as 80% of sales where aggravating factors exist. "Sales involved in the cartel" means all of the company=s sales of the cartelized product in the United States for the full duration of the conspiracy. Ordinarily, fines actually imposed by judges in the majority of cartel cases range from about 25% to 35% of the company=s total cartelized U.S. sales, although in some cases the percentage is significantly higher. Based on the Sentencing Guidelines, it has been commonplace for judges to impose fines of $10 million or more, with more than 40 such fines imposed in the last seven years. For example, Crompton Corporation recently pled guilty to participating in an international rubber chemicals cartel and agreed to pay a $50 million fine. Just last month Bayer AG agreed to plead guilty and pay a $66 million fine for its involvement in the same conspiracy.

The United States is not alone in imposing stringent fines against cartel participants. The EU and Canada also regularly impose very significant fines against companies that conspire to increase prices in their markets. In Europe, the Treaty of Rome=s maximum penalty of 10% of worldwide turnover has resulted in the European Commission imposing penalties on cartel members totaling more than 3 billion euros over the past three years alone. By contrast, the AMA's maximum six percent surcharge rate -- applicable to only the last three years of sales in the cartel -- is significantly lower than the fine levels in the United States and in other countries. The JFTC=s proposals to double or triple the surcharge rate would help cure this deficiency in Japanese law.

The second "stick" we use to deter cartels is severe penalties, not just on the corporations that engage in cartels, but also on the responsible executives of those corporations. It is our standard policy to pursue criminal prosecution against culpable corporate officials. Our courts understand the importance of this policy. They have regularly imposed prison sentences - last year averaging 21 months - as well as requiring them to pay substantial individual fines. In our experience, companies may weigh the potential profits to be gained by cartel behavior against the possibility of paying large antitrust fines. But few corporate executives view spending a year and a half or more of their life in jail as a convicted felon part of their job responsibilities. Our experience is that the prospect of prison sentences is a uniquely effective deterrent. This year, our Congress enacted legislation increasing the maximum term of

imprisonment to 10 years, from the current three year maximum, and we are hopeful that deterrence will be greatly increased.

Part of this individual penalty "stick" is the fact that foreign nationals who violate our antitrust laws will not be able freely to travel to the United States or elsewhere to conduct their business. Since 2001, we have adopted a policy of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. A red notice watch is essentially an international "wanted" notice that subjects the fugitive to arrest and possible extradition to the United States if he or she travels to a number of INTERPOL member nations. A number of fugitive antitrust defendants have already been detected through this approach. Our immigration policy prohibits foreign executives convicted of antitrust crimes from obtaining a visa to enter the United States, even after they have served their time in jail and paid their fines, unless they obtain immigration relief as part of a cooperation agreement with the Antitrust Division. The effect of these policies is to raise the stakes for foreign executives who hope to avoid prosecution, and to limit the ability of these corporate officials to travel to many parts of the world. Perhaps this factor played a part in the decision last month by Hitoshi Hayashi, an executive of Daicel Chemical Industries, Ltd., to plead guilty and agree to come to the United States to serve a 3-month jail sentence for his role in the 17-year international price-fixing and market allocation cartel for sorbates, a food preservative.

The third "stick" in our anti-cartel arsenal is private treble damages liability. Companies found to have participated in cartels are subject to lawsuits by the victims to recover three-times the economic harm they suffered in the United States as a result of the cartel. When those companies have been convicted of a criminal violation, victims that directly purchased the products from the cartel participants need not prove that the antitrust laws were violated, but only the amount of the damages that they incurred as a result of the illegal behavior. This private damage liability will often greatly exceed the criminal fines imposed on the corporation, and plays a significant role in the system of "sticks" adopted in my country to deter hard-core antitrust violations.

For each of these "sticks," we have developed an enticing "carrot" B in the form of our amnesty program B to induce companies to cooperate in our investigations. Under this program, the corporation that is first to bring to our attention a cartel that we were not aware of, or the first to come forward to cooperate in an investigation already underway, will (subject to certain conditions) receive three significant benefits unavailable to any of its co-conspirators that arrive at our door too late. First, the company itself receives complete immunity from prosecution. This means that it will not be subject to the heavy fines imposed on the other members of the cartel. Second,

subject to certain exceptions, the executives of the amnesty applicant that agree to cooperate in our investigation will also receive immunity from prosecution, meaning that they will not have to serve time in jail or pay any monetary fines. Likewise, the executives of the company qualifying for amnesty need not worry about the Red List notice, or about our visa denial policy, since these executives will never have been indicted or convicted of an antitrust felony.

The third carrot to companies participating in our amnesty program is a benefit just recently made available as a result of our Congress' enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. Under the new legislation, companies that qualify for amnesty will be liable to pay only actual damages attributable to their own conduct - rather than treble damages based upon joint and several liability - to the victims of the cartel, provided that the amnesty company cooperates fully in the private plaintiff's efforts to seek compensation from the other members of the conspiracy. This legislation ameliorates one of the major disincentives for companies considering seeking amnesty - that they would be subjecting themselves to hefty treble damage liability - consistent with the requirement that amnesty applicants agree to make full restitution to the victims of the cartel.

Our amnesty program has proven to be our most effective tool for uncovering and successfully prosecuting cartels. Under this program we are currently receiving approximately 2 amnesty applications every month, each of which discloses the existence of another illegal conspiracy that is harming our consumers and our economy. Our amnesty program has another, equally important benefit. It serves to prevent or destabilize cartels, by causing members to worry that one of their co-conspirators will - to return to my Olympic theme - win the "race" to our door to gain amnesty by being the first to reveal illegal cartel activity.

Our amnesty program has been so effective in rooting out cartels that many antitrust enforcement agencies around the world are adopting similar programs of their own. Most significant was the European Union's adoption of a revised program in February 2002. Countries such as Brazil, Canada, the Czech Republic, Germany, Ireland, Korea, Sweden and the United Kingdom have also announced new or revised enforcement programs, and a number of other countries are currently in the process of adopting amnesty programs as well. Japan's absence from this list is unfortunate. I have heard that there are traditional and cultural objectives to a system of this type, both on grounds that wrongdoers should not receive a lenient "plea bargain" and on grounds that it is objectionable to give evidence against a fellow competitor. I hope that my explanation of our program will demonstrate that this is a necessary tool of detection,

not a part of a "plea bargaining" system. I also hope that growing recognition of the dishonesty and harmfulness of cartel conduct will allow greater openness to the need to involve honest business executives in eliminating this conduct if it is discovered in their companies.

A cooperating network of international antitrust enforcement agencies can produce substantial synergies in the fight against international cartels. In many ways, Japan is a key partner in this effort. This is reflected in the JFTC's participation - along with EC, Canadian and U.S. antitrust authorities - in simultaneous, coordinated dawn raids and service of subpoenas last year in the four country investigation of price-fixing in the impact modifier industry. Continued moves by a larger number of countries to an effective enforcement program is critical to our progress. That is why we believe it is important for Japan to take the steps recommended by the JFTC to strengthen its effectiveness in enforcing the AMA against cartels and bid-rigging conspiracies. Japan's adoption of a corporate leniency policy along the lines proposed by the JFTC - and accompanied by a significant increase in surcharge levels - would be a substantial step that would bring Japan's approach closer to that of others in the international antitrust enforcement community. It would greatly increase the JFTC's capability to uncover and prevent domestic and international cartels that harm Japanese consumers and the Japanese economy.

B. Merger enforcement

Our second priority area in our enforcement hierarchy is mergers. This is a topic that Mr. Abbott will address more fully in his remarks, so I will only make a couple of points on this topic. Merger enforcement is second, rather than first, on our enforcement hierarchy for the simple reason that the anticompetitive effects of mergers are not as clear as they are for cartels. A merger can increase market power but also result in greater efficiency that may reduce prices to consumers. For that reason, we have found that determining the competitive effects of mergers requires careful analysis. Over the years we have developed a sound framework for reviewing mergers in the careful way required. That framework is reflected in our merger guidelines, which set out a clear methodology for defining the parameters of the relevant market B based on the hypothetical monopolist paradigm B and provide for analysis of the potential anticompetitive effects of a merger based on both the likely unilateral effects of the combination and the possibility that the merger will result in anticompetitive coordinated effects.

One of the most important elements of merger review is to focus the analysis exclusively on preserving competition in the relevant markets and not to be distracted by other considerations. There may be temptations, for example, to intervene (or not intervene) in a merger in order to protect individual competitors. If a competitor complains because a merger will create efficiencies that will make it more difficult for the competitor to offer a similar value to consumers, we do not view such complaints as a reason to stop a merger. Indeed, this analysis is a large part of why we decided not to block the GE/Honeywell transaction. Similarly, we will not seek to protect a company from competition because the company is headquartered in the United States. Our recent challenge to Oracle's attempt to take over PeopleSoft provides a good illustration. SAP, a German company, is the largest provider of enterprise software in the world. We would give no weight to an argument by Oracle that it should be permitted to acquire PeopleSoft to create a U.S. "national champion" that could ensure a U.S. counterpart to SAP. Rather, we look to preserve competition that will benefit consumers regardless of the source of that competition.

With respect to evaluating the effect on competition of a particular merger or acquisition, economists have made tremendous improvement over the last couple of decades in our analytical and empirical tools. We have moved beyond simple market shares and HHI calculations, although these factors are still important. In determining the scope of the relevant market, for example, economists frequently perform cross-price elasticity studies. The data necessary to conduct fairly robust elasticity studies often exists, for example, in the retail industries where scanner data provides access to enormous numbers of transactions. The development of a critical loss analysis (though this type of analysis can be subject to abuse) has helped to focus our assessment of how much competition is necessary to protect consumers in a given market. We have also developed merger simulation techniques to estimate the likely price effects from a given merger. As with any evidentiary source, we exercise caution in how we apply these tools and interpret the results.

Where we determine that a proposed transaction will harm competition, the question of remedy arises. Because most mergers will create at least some efficiencies, we seek to find a remedy to the competition concern that will permit the transaction still to proceed. In general, we prefer what we call structural relief B such as a divestiture of a discrete set of assets B to behavioral relief. A structural remedy permits us to step back afterward and let the markets work on their own. Behavioral injunctions, in contrast, require us to expend resources monitoring and enforcing the behavioral

restrictions and increase the possibility of inefficient regulation. In crafting a divestiture, we consider a range of factors to ensure that the divested assets will adequately replace the competition lost from the transaction. For example, we prefer that the divestiture include a complete business unit that credibly can operate under different ownership. We prefer to avoid supply contracts or other connections between the merged entity and the buyer of the divestiture package to help ensure that they will be truly independent competitors. In this regard, we find it useful periodically to look back at what has happened after a merger has been completed. Have the divested businesses thrived and adequately replaced the lost competition or have they failed for some reason? After-the-fact studies help guide us to more effective remedies in future transactions, and our work would benefit from more studies of this type.

Merger analysis is another area where the globalization of antitrust law is in full blossom. At last count the competition laws of nearly 70 countries provide for premerger notification. It is not uncommon for merging parties to file merger notifications in a dozen or more jurisdictions. This global expansion of antitrust merger review brings new challenges. From a procedural standpoint, the type of information requested and the timing of the review process can impose significant burdens on the parties to a transaction. From a substantive standpoint, the multitude of reviewing jurisdictions creates the risk of inconsistent results. We believe that all antitrust enforcement authorities should strive to reduce the procedural burdens and to apply consistent antitrust principles in their substantive analysis. In this regard, the International Competition Network's work in the merger area, including Guiding Principles and Recommended Practices for member countries, is a good example of the benefits that can come from antitrust agencies around the world working together.

C. Unilateral Conduct

The third leg of our enforcement hierarchy is dealing with monopolization and other single firm conduct. This is the area where it is the most difficult to distinguish between harmful exclusionary conduct and beneficial hard-nosed competition. It is also an area where the significant differences of approach and understanding by antitrust enforcement agencies around the world continue to exist.

Since the enactment of the Sherman Act over a hundred years ago, U.S. courts and antitrust enforcers have been struggling with the bounds of unilateral conduct cases. A core principle of these cases was perhaps best stated by Judge Learned Hand in his famous warning in the Alcoa case: "The successful competitor, having been urged to

compete, must not be turned upon when he wins."[1] This principle underscores the fact that even dominant firms B many of which achieve their success due to superior skill and industry B must be allowed to compete aggressively. That being said, and as the Antitrust Division's recent efforts in the Microsoft case and elsewhere attest, we are vigilant in taking action against anticompetitive single firm conduct when it is warranted.

Determining whether a competitor is competing aggressively or acting anticompetitively is a significant challenge that is best met by the application of objective, economically based, transparent standards. Under U.S. antitrust doctrine, these standards have evolved over time, and were most recently discussed by our Supreme Court in the Trinko case. In that case, the DOJ and FTC advocated a standard under which a refusal to assist rivals cannot be exclusionary unless it makes no economic sense for the defendant but for its tendency to reduce or eliminate competition. Although the Court did not explicitly adopt this standard, we believe the Court's analysis was consistent with the approach, and provided important guidance on the fundamental principles of U.S. monopolization law. The Supreme Court in Trinko also clarified that there is no basis in U.S. antitrust law for a stand-alone essential facilities doctrine. The Court expressed profound skepticism that the antitrust laws were intended to create a duty by one competitor to assist its competitors by assuring them access to its tangible or intellectual property. Some antitrust authorities around the world continue to cling to this increasingly discredited approach, placing themselves on a collision course with sound economic thinking and U.S. approaches in this area. But there are hopeful signs of progress. The most recent developments in the EC's long-running abuse of dominance case against IMS Health, for example, indicate that the European Court of Justice recognizes that mere denial to competitors of access to certain intellectual property rights, standing alone, is not sufficient to constitute an abuse of dominance.

On the other hand, where an appropriate standard is met, and anticompetitive conduct by a monopolist is found, we will move aggressively to end the conduct and devise an appropriate remedy. The Antitrust Division took such a course in the Microsoft case, where it was clear to the Division, and ultimately to the courts as well, that Microsoft had acted to illegally maintain its monopoly. It did so by engaging in a series of anticompetitive acts that made no economic sense but for their tendency to

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[1] *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

eliminate or lessen threats to Microsoft's monopoly.

Devising a remedy for unilateral antitrust violations requires at least as much care as the initial rooting out of the violations. The potential for causing more harm than good through counterproductive remedies is great in the single firm context, particularly when combined with the practical problems of enforcing conduct remedies. Remedying single firm conduct is also one of the areas of greatest difference among antitrust enforcement bodies around the world. Here again our Microsoft case is illustrative, particularly in the area of product design-based remedies. We believe, and our courts have held, that antitrust enforcers should generally be skeptical about claims that competition has been harmed by the product design choices of a dominant firm. While anticompetitive single firm conduct is both a challenge to identify and a challenge to remedy, combating it is an important part of sound antitrust enforcement.

Conclusions

We need only look at the Olympic gold-medal performances of Mizuki Noguchi (who won the women=s marathon) and Kosuke Kitajima (who was victorious in the men=s 100-meter and 200-meter breaststroke), to understand how competition produces excellence. To make sure that competition continues to produce excellence in our economies, antitrust enforcers need the most modern investigatory tools and sanctions. The proposals by the JFTC to increase surcharge levels, introduce a corporate amnesty program, and strengthen its investigatory powers are important steps that reflect sound global trends in the antitrust area. They deserve strong support. At the same time, our challenge as antitrust enforcers is to ensure that our antitrust laws are applied in a manner that does not hinder the competitive process. I look forward to working hand-in-hand with the JFTC and our other antitrust colleagues around the world in continuing to promote convergence in the antitrust area and in stoking the flame of competition for the benefit of all our citizens.

Mr. Abbott's speech

I. Introduction

Konnichiwa. Good afternoon. I am delighted to be here today. I have been asked to provide a United States Federal Trade Commission ("FTC") perspective on competition policy and international competitiveness. This is an extremely broad topic. Thus, to make it manageable, I will focus primarily on American merger enforcement, which has evolved substantially in recent decades and which involves increasingly frequent interactions between American and foreign antitrust officials. Before turning to mergers, however, I will first briefly address criminal enforcement and regulatory reform – both of which are also vital to a competition policy that promotes international competitiveness. The views I express are my own, and do not necessarily reflect those of the Federal Trade Commission ("FTC") or any Commissioner.

II. Criminal Antitrust Enforcement

Criminal enforcement directed at hard core cartel activity (typically price fixing or bid rigging carried out in secret) is the responsibility of the U.S. Department of Justice's Antitrust Division. Such enforcement has loomed ever more significant in recent years, with greater fines and jail sentences obtained, and prosecutions of international price fixing cartels rising in prominence.

This is all to the good, because hard core cartel activity not only raises prices to consumers and reduces allocative efficiency, it also undermines the competitive vigor of cartel-afflicted industries. Cartel members focus on cooperating to divide up a limited market, rather than competing to obtain market share by introducing new and improved products and processes – the keys to competitiveness. In short, tough laws directed at cartel conduct promote international competitiveness while benefiting consumers. Thus I for one believe that the JFTC is to be applauded for proposing to raise antitrust surcharges.

III. Regulatory Reform

Now let me turn briefly to regulatory policy. Excessive, heavy-handed regulation, which encourages firms to follow detailed rules and reject competitive

innovations, diminishes the competitive vigor and "creative destruction" that are keys to international competitiveness. Regulatory reform complements antitrust enforcement and promotes international competitiveness by eliminating unnecessary constraints on the ability of firms to compete vigorously on the merits. Traditional justifications for strict government regulation of industry sectors, such as vague notions of "the public interest" and concerns about constraining natural monopoly, have been exposed as wrongheaded or dated. From the 1970s to the present, regulatory reform and deregulation have reshaped a wide range of American industries, such as commercial aviation, trucking, busing, "public utilities" (telecommunications, electricity, gas), and financial services. These reforms have substantially enhanced American economic performance, as documented by scholarly research. Studies also demonstrate that nations in general, not just the United States, benefit greatly from appropriate regulatory reform.

Despite these benefits, proposals for regulatory improvements often engender the staunch opposition of beneficiaries of the inefficient status quo. Mindful of this, the FTC has employed competition advocacy, bolstered by economic research reports, to press for sound regulatory reform, both at the federal and state levels. Not surprisingly, therefore, we applaud the efforts of other nations' competition agencies, such as the JFTC, to promote regulatory reforms through appropriate measures. We also look forward to continuing to exchange ideas on competition and regulatory reform under the aegis of the U.S.-Japan Regulatory Reform and Competition Policy Initiative. In short, regulatory reform is a "win-win" policy that will enhance any nation's economic welfare and competitiveness without detracting from – indeed, enhancing – the welfare of its neighbors.

IV. Merger Policy

Mergers are a significant dynamic force in the American economy. Mergers can lower costs and otherwise benefit consumers. Among other things, mergers provide a means for inefficient firms to exit the marketplace and for productive resources to come under the control of better management. In addition, mergers can enable firms rapidly to achieve scale economies, diversify product lines and geographic reach, acquire complementary resources, and respond to tax incentives. Each of these of motives can be quite legitimate from a business standpoint – they advance such goals as enhancing shareholder value, reducing risk, and increasing competitiveness.

Mergers, however, can also be adverse to consumers' interests. Consumer interests can be adversely affected if a merger creates or enhances market power. This can occur if the merger results in a single firm with enhanced market power or results in a group of firms with increased incentives and ability to exercise market power and raise prices to consumers. The FTC and the Department of Justice enforce statutes that prohibit mergers that may substantially lessen competition. The agencies also challenge consummated mergers that turn out to be anticompetitive.

Sound merger enforcement policy is a complex and evolving endeavor. Because mergers are often motivated by legitimate and socially desirable business interests – including efficiency gains – antitrust enforcement officials must take great care in performing their competitive analysis of mergers and, in so doing, use the best analytical tools available to identify as accurately as possible those mergers that are likely to be harmful to consumers. Ideally, enforcement policy should consistently prevent anticompetitive acquisitions, while allowing those mergers to proceed that do not pose a risk to consumer welfare.

This is not an easy charge to satisfy, and I must concede that, historically, our own merger enforcement record in the U.S. has not always been up to this standard. I will return to that point in a moment. First, however, since this is an international audience, let me briefly point out one additional significant, yet often overlooked, benefit of an enlightened domestic merger enforcement policy.

Specifically, an enlightened merger policy also enhances the international competitiveness of firms. I certainly need not tell a Japanese audience just how important competitive effectiveness is in international trade. Such effectiveness, in turn, is inextricably linked to the vigor of competition in home markets. In free competitive markets, a firm's long run success is driven solely by its ability to serve consumers better than its rivals. This is true irrespective of the division of the firm's revenues between domestic and export sales. Thus, when firms are subject to vigorous price competition in their home markets (regardless of the competition they confront in international markets), they face constant pressure to lower costs, innovate, and improve the quality of their goods and services. Such firms are going to be better positioned to compete effectively against foreign rivals in international commerce.

Now let me turn to a little history. Specifically, I think that an honest

commentary must admit that American merger enforcement policy was badly flawed until recent decades. During the 1960s and up to the early 1970s, U.S. merger enforcers relied on weak empirical work that found a positive correlation between industrial concentration and profits. That research, which has now been largely discredited, was amplified and relied upon by the government as justification for opposing horizontal mergers even in highly fragmented markets. The courts, lacking economic sophistication or guidance, found themselves powerless to come up with a theory to oppose these government actions. Indeed, the late U.S. Supreme Court Justice, Potter Stewart, was moved to say that the only thing consistent about the merger enforcement cases of that day was that the government always won.

This pattern of "automatic" government victories was broken, however, by the government=s 1974 defeat in *United States v. General Dynamics Corp.*2 In *General Dynamics* and several subsequent cases the Court emphasized that high market share numbers merely establish a rebuttable presumption of illegality – and that the government may lose if those numbers misrepresent the actual state of the market. Those decisions demonstrated the broader need to look at the specific facts in each merger case before drawing conclusions about its likely competitive effects. Around this time, new economic research was indicating that mere "structure/performance" paradigms based on nothing more than historical market shares as proxies for competitive performance are fatally inadequate as a basis for sound merger policy. Instead, good merger analysis requires a far more sophisticated understanding of the affected markets – including, among other factors, the dynamics of those markets, the competitive positioning of each incumbent firm, the ability of firms to alter their positioning or make short term output responses to price changes, and the likelihood that new firms can and would enter markets in which mergers might have temporarily produced an adverse price effect. Sound analysis must also be informed by the proposed merger's expected effects on productive efficiency, which in some cases may fully offset otherwise anticompetive price effects.

Importantly, although federal merger enforcement officials did not immediately change their public statements of enforcement policy in light of these developments, they were forced to reassess their thinking. A major analytical break with the past was due.

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2 415 U.S. 486 (1974).

That analytical breakthrough finally came in 1982, with the Justice Department's issuance of new Horizontal Merger Guidelines (originally released by the Justice Department, subsequently joined in by the FTC). For the first time, the Guidelines laid out a multi-step approach to evaluating mergers grounded in detailed economic analysis. Significantly, the substantial economic content of that approach gave economists Aa seat at the table@ along with the lawyers in the evaluation of proposed enforcement actions. Today no enforcement decision is made in the United States without a careful economic analysis of the proposed merger, typically performed by highly skilled economists within the agencies themselves.

Although the 1982 Guidelines were revised slightly in 1984, 1992, and 1997, in light of experience and new learning, their essential approach has been retained. Today, although I make no claim that U.S. federal merger enforcement has reached perfection, it is at least anchored in modern economic analysis and employs the best tools that professional economists have to offer.

To be sure, progress in applied microeconomics has not stopped; economics, like all science, always advances. Consequently, merger analysis and policy, in particular, must always be prepared to incorporate new thinking, and U.S. enforcers have attempted to do just that. Nonetheless, the refinements since 1982 in the U.S.'s approach to mergers have been largely at the margin. The core of American merger enforcement since the 1982 Guidelines has remained intact. That core, moreover, is now deeply rooted in an economically sophisticated antitrust bar and in the U.S. federal courts, with policy remaining generally consistent even as political leadership changes. Thus American merger policy is unlikely to return to its hopelessly flawed, economically unsophisticated past.

Let me say a few additional words about Horizontal Merger Guidelines. The Guidelines are broken into five key sections – dealing with: (1) market definition, measurement, and concentration; (2) the potential adverse competitive effects of mergers; (3) entry analysis; (4) efficiencies; and (5) failing entities. Each section sets out the specific steps that the enforcement agencies undertake in their merger reviews, employing tools of economic analysis. Let me stress that the Guidelines' five sections are not treated as independent of one another. Indeed, the analytical framework set out by the Guidelines is intended to be an integrated framework designed to generate a

confident conclusion about the likely net competitive effects of a merger, taking into account all parameters relevant to the particular merger. That process requires an analysis that ties together and gives appropriate weight to each relevant parameter based on a detailed factual evaluation. At the end of the day, the only analysis that can lead to confident conclusions is an integrated analysis.

The framework of the Guidelines is now rooted in the mainstream of American antitrust policy. The American antitrust bar knows that, in representing clients to the agencies, it must be able to make its case within the Guidelines' framework. Furthermore, although the Guidelines are not themselves statutory "law," American courts also find direction in the Guidelines in deciding litigated merger cases. This is important, because general acceptance of the Guidelines' framework has helped to provide overall clarity to the business community, as well as consistency, with regard to antitrust merger enforcement.

Even with this widespread acceptance of the Guidelines, however, the federal antitrust agencies rightfully recognize that periodic reassessment of the Guidelines' efficacy is essential. For that reason, just this year – in February of 2004 – the FTC and the Justice Department jointly sponsored a Merger Guidelines Workshop for the specific purpose of soliciting the views of legal and economic scholars and active members of the U.S. antitrust bar on current merger policy. Questions of particular importance were whether the current version of the Guidelines continues to serve its function well, and whether modifications to the Guidelines are in order in the light of several years of real world experience working under them. The workshop permitted the FTC and the Justice Department to receive important input from many of the leading antitrust authorities in the United States. An economist from the European Commission's Directorate General of Competition also participated in the conference.

One key theme emerged from the workshop – the overwhelming consensus of the participants was that the analytical framework set out in the Guidelines, overall, does a fine job in yielding the right policy results in individual cases. Moreover, because the Guidelines are now so familiar, they serve their principal purpose – providing guidance to the business community and the antitrust bar – with great effect. This assessment, in my view, is a strong endorsement of the current thrust of enforcement policy under the Guidelines.

Before closing, let me briefly address the importance of policy research and international cooperation in promoting effective antitrust policy, with particular regard to antitrust merger enforcement.

First, as you may know, Timothy Muris resigned the FTC Chairmanship just last month to return to academia. Among the important accomplishments of Chairman Muris was his active support for a "Competition Policy R&D" program within the FTC. Competition policy R&D takes seriously Socrates' admonition that only the "examined life" is worth living. It uses workshops, hearings, studies, and reports to increase knowledge about competition policy and disseminate this knowledge to the wider community. Research flowing from this R&D may help enforcers focus on the potential enforcement targets that merit the greatest (or least) attention, thereby improving the quality of antitrust enforcement. The recent Merger Guidelines Workshop is an example of merger-related competition policy R&D. Another example is a series of Hearings on Health Care and Competition Policy in 2003, which considered, among other topics, the antitrust treatment of hospital mergers. More generally, to assess the efficacy of merger enforcement, the FTC is analyzing the effectiveness of past enforcement actions, including non-enforcement decisions, and industry and firm-specific conditions relating to the potential for both procompetitive and anticompetitive effects. Part of this effort is a review of consummated hospital mergers. A byproduct of that review has been the Commission's recent issuance of an antitrust complaint regarding the merger in 2000 of two Illinois hospitals. That challenge is presently being litigated. I anticipate that, with the support of our new Chairman, Deborah Majoras, we will continue to maintain a vigorous in-house "R&D" program.

Cooperation among antitrust enforcers grows increasingly important as the number of transactions – and, in particularly, mergers – that have effects in multiple jurisdictions expands. One important vehicle for multilateral international cooperation on antitrust enforcement policy is the International Competition Network, or "ICN," which brings together antitrust enforcers and practitioners from many nations to discuss antitrust issues. In my view, this effort is extremely important, because it allows for enforcers of competition policy from around the world to share their individual insights and experience in a cooperative, non-confrontational setting. Ultimately, ICN-inspired adoption of "best practices" on procedural matters and improvements in substantive analysis can have nothing but a beneficial impact on the quality of competition policy

throughout the world. The ICN's Merger Working Group has done particularly good work, through its subgroups on Merger Notification and Procedures (chaired by Randolph Tritell of the FTC), on the Analytical Framework for Merger Review, and on Investigative Techniques for Conducting Effective Merger Review.

Finally, let me turn to fruitful bilateral cooperation between American and Japanese antitrust enforcers. I applaud the JFTC's recent efforts to improve the transparency, efficiency, and effectiveness of merger review. Related to that initiative, the JFTC is also to be praised for its issuance of revised merger guidelines on May 31, 2004. I had an opportunity to review an early draft of those guidelines, and I can say without reservation that they represent a highly impressive step along the path of improved merger analysis. Notable helpful features of the guidelines are the inclusion of unilateral and coordinated effects analysis and the use of the HHI measure of concentration. We will continue to coordinate with the JFTC in future reviews of proposed mergers notified in both our jurisdictions. Such coordination may afford us the opportunity to discuss the applicability of our respective nations' merger guidelines to the transactions at hand. We will welcome these opportunities to cooperate with our Japanese colleagues as we strive jointly to enhance the quality and effectiveness of merger review and enforcement.

V. Conclusion

In sum, I submit it is no coincidence that the American adoption of regulatory reform, a strong anti-cartel program, and an economically-attuned efficiency-based merger policy have coincided with a period of rapid economic growth, dynamic innovation, and increased prosperity for American consumers over the past two decades. In other words, enlightened antitrust policy enhances competitiveness while bestowing substantial benefits on consumers. Research demonstrates this principle holds in other nations as well. Accordingly, we applaud the efforts of JFTC and the Japanese Government to further strengthen their competition policy regime and we look forward to continued fruitful interchanges between the competition policy officials of our two nations.

Domo arigato gozaimashita. Thank you very much. It has been an honor to speak to you today.

Chairman [translated]: Mr. Abbott, thank you very much. Now that we have had the two keynote speeches we would like to open the floor for questions and answers. Please identify yourself with your name and affiliation, as well as to whom your question is directed.

Questioner [translated]: Iyori is my name, and I'm an attorney at law. I have two questions. First, in order to eliminate the anti-monopoly practices I think compliance programs within businesses are very important. I'd like to know about what kind of efforts are being taken in the United States in that respect. And also, I think the availability of such compliance programs has been considered when the enforcers give sanctions. In January this year in the American Supreme Court the essential facilities doctrine was discussed. And in Trinko the decision was rendered. I think that the decision was rather passive or negative toward the essential facilities doctrine. And also amongst American lawyers, I think their general view is rather negative toward that doctrine. I would appreciate your comments on this. I think either of you could provide your comments, please.

Mr. Pate: These are important and good questions. Concerning compliance programs, I think in the United States all responsible companies provide for their employees comprehensive training on how to avoid violations of the anti-trust laws. This has been something that is going on in the legal departments of companies in my country for many years. It's something that I participated in when I was a practicing lawyer, and it's something that these firms have a great deal of experience with. I think that there was a great increase in the use of compliance programs.

Mr. Pate: …and it does so to encourage companies to have strong compliance programs. As for the Trinko case, that's a case in which the DOJ took an active part, together with the US FTC, in seeking review of that case by our Supreme Court. As you put it quite correctly, the Trinko case in my view very correctly sets forth a very skeptical and a very negative view about the so-called "essential facilities doctrine." In the United States in the lower court decision there, and in some other fairly isolated cases, the idea had arisen that simply by claiming that valuable property of another company, be it a physical plant or perhaps intellectual property, would be extremely helpful to a competitor who wanted to compete in the same market that therefore the firm owning this property should be required to share it and to give it away to its rival.

I think the Trinko case correctly cast great doubt on that doctrine and it made clear that it is not wrongful under the United States anti-trust laws simply to have a very successful or dominant position in the market. If a firm has achieved that position through its own efforts, without any unlawful conduct, that in fact is the type of goal of business success that our entire free market system depends upon. So anti-trust liability needs to be limited to situations where the firm actually engages in anti-competitive conduct, not to a situation where the firm simply is saying, "We will use our own property, be it physical or intellectual property, for our own business uses." So I think this Trinko case is very important to understanding American anti-trust law, and I appreciate you raising it.

Chairman [translated]: Mr. Abbott, would you like to add to the answer to the second question?

Mr. Abbott: About Trinko? Certainly I agree with Mr. Pate, and I think we need to be very careful to distinguish between acts by a firm which has a very large market share that are anti-competitive and those that are efficient. And I think in the past, long past, there was some very old case law that suggested that a monopolist would be sanctioned for engaging in efficient conduct. And, you know, we don't want to do that. We only want to sanction a monopolist, generally speaking, for acting in a way that would only be explained by an anti-competitive motive. A firm that invests a lot to develop its own property may have strong incentives to exploit that property, whether it's intellectual property or other property, in the best manner possible and you should be very, very careful before imposing an anti-trust sanction.

Particularly in Trinko there were other things going on. There were regulatory sanctions. The allegation was that this firm, which was one of the regional Bell operating companies, was not supposedly honoring contracts to allow interconnections to its facilities by other firms that wanted to compete and provide local phone service. But in that case there was a regulatory structure. First of all, there was some question as to whether the rules of interconnection created a disincentive to invest, but second of all there was a regulatory structure to deal with those problems. And it was an example, some critics thought, of an attempt to create disincentives by adding an anti-trust theory on top of regulatory enforcement. I talked about regulatory reform. Where regulation continues to exist I think you should be very, very careful before attempting to impose some additional burdens on a regulated firm when the regulatory law itself creates

remedies for firms who claim they've been harmed by that dominant firm. And again, the reason for that is the goals of anti-trust often are different than the goals of the regulatory statute. Goals of anti-trust allow a firm to basically conduct itself in an efficient manner and to try to maximize its profits subject to not acting in a purely anti-competitive way. The goals of regulatory statutes often are different.

Chairman [translated]: Thank you very much. Next question, please.

Questioner [translated]: I'm Ohara, a professor at Kobe University. I have a question for Mr. Pate. I understand that you have a bilateral agreement for cooperation between competition authorities not just between developed countries but developing countries as well. So when the United States has such bilateral cooperation agreements with a developed country, and I'm sure there will be more in the pipeline, simultaneous investigation could increase. And I would like to hear your view on that particular point. And then I understand that the United States is also discussing things with Brazil, Mexico, such developing countries, and you also have some cooperation agreements already in place. So as such numbers rise do you think that will lead to a common set of global rules, perhaps to be enforced at the WTO or such a global framework? Please?

Mr. Pate: Thank you very much for that question. We do have a number of bilateral agreements with a number of countries, and yes one of the goals of having such agreements is to be able to do better coordination of investigations when potential anti-competitive conduct involves more than one jurisdiction. I will tell you very frankly that sharing of information, particularly in criminal cases, in cartel cases, is something that is a difficult subject because of the laws each country may have on safeguarding confidential business information that is disclosed during those investigations. And this is true even in the case of countries and jurisdictions with which we have the closest working relationship, for example with the EC. There are still very great limits on disclosure, and I think that this is going to be a problem that takes some time to work through.

We're going to continue to pursue multilateral competition law discussion in bodies such as the OECD and the ICN, and as you say we will continue to take a bilateral approach. I think we are many years, a significant time, away from anything that would approach a common set of global anti-trust principles that would be enforced by some supranational body such as the WTO. I think the more realistic and more fruitful way

forward for any term within which those working here today should be concerned is the type of soft convergence that can occur through transparency of activities and discussion among the different enforcement authorities around the world so that we can compare, we can have benchmarks for which type of enforcement leads to better success in terms of economic growth and successful outcomes. But I think a global set of rules for enforcement in the way you described is something for which the anti-trust community is not nearly ready.

Chairman [translated]: Thank you very much. Perhaps the next question, please?

Questioner: One of the interesting differences between competition policy in the United States and in Japan, and this is an obvious point, but in Japan it's pretty much within the province of the Fair Trade Commission of Japan, one agency. In the United States there are at least two major agencies involved, but also depending on the political leadership, the administration, sometimes—not always, but sometimes—the competition policy/anti-trust approaches can differ. And I wondered if you could explain briefly, for the benefit of the Japanese audience, what are the major continuities and the major differences in the anti-trust enforcement area or philosophy for that matter, both from a DOJ perspective and from the FTC perspective between the last administration and this administration.

Mr. Abbott: Our former chairman, Timothy Muris and one of our commissioners, Commissioner Leary, have indeed published articles on the specific issue about the essential continuity of anti-trust enforcement. And they've done a lot of studying, and if you look at recent decades you find that—look at merger enforcement for example. Some argued, "Well, merger enforcement would be stricter under a democratic administration than a republican administration." The data just don't bear that up. Indeed, if you look at merger enforcement under the Clinton administration and the Bush administration you'd find very similar figures for the likelihood that a merger having certain characteristics, falling into a certain concentration level, certain customer complaints, would yield an enforcement action.

And our former chairman Muris, indeed, when he became chairman spoke about the essential continuity and said that enforcement changes at the margins. Vertical contractual relations used to be a big area of enforcement, before the 1980's. There were really only one, arguably two, vertical cases under the Clinton administration coming

out of the FTC. And there's been one, arguably two, depending on how you define it, vertical merger cases, not contractual but merger cases, in this administration, but again dealing with issues that involved horizontal competition. So I think by most measures, ever since the anti-trust revolution, and that's what I'd call it, of the early 1980's there has been a great deal of continuity. There is a broad anti-trust mainstream, not to say that certain enforcers may not have particular interests, but that's really a matter of individual preference and individual goals. I don't think there is, and I think most sophisticated observers would not foresee, a major effect on federal anti-trust enforcement based upon who wins the election.

Mr. Pate: I agree with that completely. I think one of the nice things about the jobs we have is that anti-trust enforcement is basically a bipartisan enterprise in the United States. You know, the bill, for example, that I mention which President Bush signed to greatly increase penalties and then enhance our amnesty program was jointly sponsored by the democratic and republican leaders of the Judiciary Committee and the Anti-Trust Sub-Committee. It was not an issue on which there was great partisan disagreement. I think that much more than a question of changes of administration in the United States you do see some differences in terms of the American approach on certain dominance or monopolization issues and a European approach, and I guess on that front I would suggest that there is somewhat more of a tendency in Europe to be open to the idea that we discussed with reference to the Trinko case that firms should be more frequently required to assist their competitors by giving them access to facilities or otherwise cooperating with their smaller rivals.

The reason we take a somewhat different approach is that this type of duty makes it quite difficult for anti-trust to give a coherent message. If on the one hand I am out saying that too much cooperation in the form of price fixing or market allocation agreements is such a serious offense that it should be a crime for which people go to jail, it's very difficult for me then to turn around on the other hand and say courts should be imposing obligations for firms to work together to share and to reach agreements on how they will jointly use assets. That is not to say that anti-trust will never impose such an obligation, but to have the government interfering too often to require shared resources as opposed to requiring tough competition, it makes it very difficult to provide a coherent message to the companies who are trying to hear what it is we're saying competition will bring. So I hope that's a helpful comment, but I agree entirely with Mr. Abbott about his characterization of the bipartisan issue and the continuity that

characterizes American anti-trust enforcement.

Chairman [translated]: Thank you very much.

Questioner [translated]: My name is Gohara. I'm from the Research and Training Institute of Ministry of Justice. I have a question for Mr. Pate. You cited the Olympic Games you gave us a parallel between anti-trust enforcement and the Olympic Games. I'm also interested in the criteria which you consider for competition. For example, I think in the Olympic Games you need a swimming pool and a clock or a watch. But in gymnastics sometimes the criteria on judgment are put to question. And of course you need a bar, and if the floor is uneven for some athletes then that would be very unfair for them. And in the public procurement some say that an even playing field is not provided, according to some. And the JTFC issued a report on that last year. And in the 1980's in the United States the non-price factors were increasingly considered in public procurement for providing equal conditions. And at the same time we need to consider stringent sanctions and punishments. So what do you think of the relationship between these two, how to gauge rates between these two?

Mr. Pate: Well, I don't pretend to know anything about the issue of public procurement systems in Japan. I will tell you that we in the United States have a vast array of public procurement systems that are operated by our 50 states and our local governments in the United States. Some of them are good, some of them are bad in terms of producing competitive results. They have different features in terms of the extent to which price is the only criterion for consideration or where non-price concerns may be at issue. For all of them, equally, I think they benefit from having anti-trust law applied to them. So even if there is room for debate about the status of public procurement, I think the application of strong anti-trust principles in the form of serious surcharges and in the form of an amnesty program will benefit the system regardless of where it may find itself in terms of its effectiveness in public procurement. So I hope that's responsive to the question you're asking about this relationship.

Questioner [translated]: Thank you very much.

Chairman [translated]: We can entertain one more question. Who would like to ask the last question?

Questioner [translated]: My name is Yamada from MIPRO. I'm interested in the relationship between competition, policy and trade, particularly anti-dumping. In the United States, Europe, and Japan they are trying to concert their efforts, and there will be fair ground on which people would be competing and therefore anti-dumping cases should go down. I understand that the United States, Mexico, and Canada are negotiating a free trade agreement, and there is also another one going between the Americas. Would such activities arrest the number of anti-dumping cases being filed, and how are you cooperating with the Department of Commerce in such cases?

Mr. Abbott: Well, I'll be very careful about what I say because obviously I'm really speaking for myself. Dumping law is a matter that has been subject to criticism by many anti-trust scholars and at the same time there have been people who've said that dumping law was sort of a necessary aspect of any major international trade agreement. I'm not going to get into that issue. Certainly to the extent that dumping rules are not based on the anti-trust enforcer's idea of cost or relevant markets or of efficiency many scholars have said there's a tension between those doctrines. And I don't know too many anti-trust lawyers who are big fans of the dumping law. Nevertheless, it's part of our US federal statutory law and the Commerce Department and the International Trade Commission enforces those laws.

And the reference to trade agreements, there are bi-national panels set up to deal with those laws as part of the North American Free Trade Agreement, and of course the World Trade Organization also looks at dumping. It has a code that deals with subsidies and a code that deals with dumping. And there are cases that go before it regarding whether particular application of some country's statute is consistent with those codes. So I think I'd better leave it at that because different people in the US government are involved in negotiating in the framework of the WTO issues, such as dumping, and those involved with trade issues, and as I say people who believe in competition think that in general firms should be able to compete freely and the most efficient firm should be allowed access to markets. But beyond that I will say nothing more specific.

Chairman [translated]: Thank you very much, and I think it is time to break now. Thank you very much for all the questions, and thank you very much Mr. Pate. You referred to the Athens Olympics and you talked about how competition could enhance the performance of businesses and competency. And Mr. Abbott talked about the importance of international competition as well as domestic competition. And we

received a number of interesting questions from the floor, too. So in part two we would like to build on the discussions that we have so far had and we will introduce two new panelists from the Japanese side. But at this point in time I'd like to request a big round of applause to thank the two keynote speakers. Thank you very much. And we'd like to take a break.

[II. Panel Discussions]

Chairman [translated]: Welcome back. Why don't we begin part two, "Globalization of Competition and the New Design of Competition Policy?" We have a panel discussion session, and Mr. Pate and Mr. Abbott, and also from Japan Mr. Uesugi and Mr. Tanaka also are panelists. Mr. Uesugi is the secretary general of the Fair Trade Commission of Japan and Professor Tanaka is also a visiting researcher at the Competition Policy Research Center as well as being a professor at Keio University. And the moderator will be Professor Kotaro Suzumura of Hitotsubashi University. He has been the director of the Institute of Economic Research at Hitotsubashi University and also he's the first director of the CPRC, which began in June last year. So Professor Suzumura, you have the floor.

Prof. Suzumura [translated]: Thank you very much. I'm going to be the timekeeper as well as the moderator for this session. Mr. Uesugi and Mr. Tanaka have now joined the panel, so I'd like to shortly introduce them.

Mr. Akinori Uesugi was born in 1947. That should ring a bell with you, because in that year the Antimonopoly Act was enacted. He was born with the beginning of the AMA. He graduated from a university of law and also he joined the Fair Trade Commission and he's spent his career in the commission. And he served as the director general of the Investigation Bureau since 2000 and that of the Economic Affairs Bureau since 2002 .Since two years ago he has been the Secretary general of the Fair Trade Commission of Japan.

And Professor Tanaka of Keio University was born in 1957, 10 years after Mr. Uesugi was born. He graduated from the University of Tokyo and he finished a master's degree. He joined Keio University as an associate professor of the Faculty of Economics. And when the CPRC began last year he joined as a visiting researcher. He's been very active as a researcher there. Econometrics and network economics are a particular area of interest for Professor Tanaka.

So we first ask these two gentlemen to give their comments and remarks concerning part one, and then we open the floor for a panel discussion. And we first ask Mr. Uesugi for your comments, please.

Mr. Uesugi [translated]: Good afternoon, ladies and gentlemen. Listening to the two keynote presentations, I was happy to understand that they express their support to the proposed reform in our competition policy and legal framework. And I'd like to discuss the viewpoint of the Fair Trade Commission of Japan and try to link it with the two presentations. At the Japanese FTC one important pillar of activity is to try to enhance the level of understanding within the business community. It may not be the real sense or the real form of advocacy, as in Western countries, but it is indeed a very important type of activity in Japan because obviously to enforce the law is important, but that alone would not do any good. It is very important that the people in the business circles themselves understand why such anti-trust laws or anti-monopoly laws are important so that they will voluntarily work toward containing such activity.

Now it is often said that the Japanese economy is a two-tier system. We have 10% of the working population in a very competitive export industry and the remainder works in the inefficient domestic industries. And the same can be said as to the level of understanding associated with competition policies. As Mr. Abbott said, cartels do not just work against the interest of the consumers it also undermines the competitiveness and the technological innovation within businesses. And I try to communicate that message to the businesses.

And at the same time, for any company to be internationally competitive it is very important that there is competition within the domestic market. As Michael Porter says, "competition at home to win abroad", that's the concept. So that's what I try to communicate to the Japanese business community and I try to win hearts and minds about the competition policies. However, it is still a long way off in Japan, unfortunately.

And I think Japanese companies traditionally looked at the domestic market and the international market as two very different and separate entities. Even Japanese companies who are really facing fierce competition in the international market choose to work in a coordinated manner within the Japanese market, and I don't think I'm alone in taking this view. But globalization of the economy should lead to closer integration between domestic and international markets, although we have to admit that there are still barriers to entry associated with our domestic market. However, as more fusion goes on between domestic and international markets I hope the businesses will adopt a new mindset.

There's also a geographical factor within Japan. My impression is that in Japan the culture is more toward harmonization than competition among the businesses in the same country. Therefore, for the Japanese economy to see a true recovery we need to resolve this dual, two-tier system within the economy so that the economy as a whole will have a higher labor productivity. But the fact that we have this dual structure or the two-tier system, the thing is that the industries that truly need reform don't understand that they need to reform. And that, indeed, is a big challenge. And the same can be said about the understanding or awareness of competition polices. Those who need to know about competition policies don't know that they need to know. People who are here are OK.

So it's really to those who are not here that we need to communicate the message. In Japan there's this bestseller book called "The Wall of Foolishness," published by a famous professor, Takeshi Yoro. And he argues that the human brain shuts out information on the issues that that person is not interested in. So the challenge for us is how to overcome that wall of foolishness and communicate the message to those who don't know they need to know and who don't want to know that they need to know about competition policy. It's very important.

Listening to the two keynote speeches, I thought what they were talking about was so true, so reasonable, so natural, so obvious, but my understanding of that message doesn't do anything in Japan. We really need to sell this message to the Japanese business managers and need to take it as part of our business culture, the Japanese business culture.

Since the two speakers spent a considerable time talking about mergers I would also like to comment on that. I think traditionally Japanese companies were cautious about levering the economies of scale by mergers. And perhaps for that reason mergers that substantially reduce or lessen competition in the market were rare in Japan. Most of the mergers happened because companies needed to do so to cope with sudden changes in the market environment. Therefore, at the JFTC there were so few cases where we needed to block mergers through legal actions, although finally we are seeing some large-scale mergers that we might need to address and therefore the reason of the existence of the Japanese FTC may be questioned in how we handle such cases.

And in terms of using economic analysis, there are some challenges that Japan faces because Japanese organizations traditionally just trained people that they were hiring themselves. So they didn't use outside experts. And that's why within Japan or within the JFTC we do not have an expert group that would be referred to as "lawyers" or "economists." Obviously we need to do that. We have been able to manage that so far under the traditional system, but we need to leverage more resources from the outside. So we think that we need experience, expertise and economic analysis skills of outside experts. So that's the right thing to do, but it's difficult to do because we do not have this market of economists that we can tap into. If there were such a market we could hire economists from that market, but the thing is we need to start developing such a market or pool of economists that we can tap into.

And there's another challenge. When you review mergers and you employ analytical tools, as the two gentlemen said it's only so right. However, in the Japanese market sometimes people are not so open to foreign ideas. In March 2002 the Fair Trade Commission for the first time tried to introduce the Herfindahl-Hirschman Index, the HHI, and we asked for public comment. And then this prominent business organization came to us and said, "Why are you suddenly going to introduce this foreign concept?" And that has happened, like SSNIP (small but significant and non-transitory price increase). There are so many useful concepts out there that are used by other countries and as international economists sometimes it's difficult for us to introduce them outright. There is some reluctance in Japan.

Anyway, I hope opportunities like today are very important, and the fact that we set up the CPRC was indeed to leverage outside resources in the name of economists. And the fact that the CPRC was able to be involved in and organize such a conference is indeed significant in itself. Thank you.

Prof. Suzumura [translated]: Thank you very much, Mr. Uesugi. Professor Tanaka, you have the floor.

Prof. Tanaka [translated]: Thank you very much. Good afternoon. I'll try to be very brief in making my comments. Largely speaking, I think there have been four major points to be mentioned. One is globalization. I hope you can see this screen.

Our competition policy now needs to be coordinated globally, as everyone can agree.

Mr. Pate gave us a very interesting parallel with the Olympic Games. I like that. I hope that everybody also did have a very good understanding of it. And I hope that all of you and also the panelists all understand that globalization requires more cooperation amongst the various countries.

And the second keyword was "carrot and stick". Both are necessary. But in Japan we have only very weak carrots and very weak sticks, and such things have to be increased. And also amnesty programs have to be introduced. Yes, I agree with that contention of Mr. Pate as well. The Fair Trade Commission this time apparently has failed, but I hope that they will be successful next time. So all they have to do is work harder.

And now the third concept, merger. As Mr. Uesugi said, in principle I think the American approaches have to be introduced in Japan and I agree with him. As an economist, multi-step approaches have to be introduced. At the entrance level we have to introduce more steps, but in principle I think we should learn more from what the Americans have practiced. And also, about the multilateral conduct, there were questions related to this from the floor. Unlike cartels and mergers unilateral contact can be subject to anti-trust enforcement because it has the prospect of power of abuse, tie-in sales and also the unfair trade practices I think are a part of this.

It's not very controversial, but what's controversial is the essential facilities doctrine. The Supreme Court decision was just introduced in the first part, and the perspective was rather negative. But in the District Court level this doctrine was rather accepted, as well in other jurisdictions. So I think there is still controversy on this. And I have a little bit different comment on this from the panelists, but I will come back to this later. But basically I think I agree with what has been presented so far from the previous two keynote speakers.

And now I'll talk about the essential facility doctrine. Even if you are successful with a dominant market position if you are required to open your essential facility to others that would be unfair. Well, I think that's right. But I think this is rather exceptional because a high market share is not maintained by a high quality product but owning essential facility. So even though it's right to say that you shouldn't be punished by being successful, I think such a concept cannot be applied to this particular concept, essential facility doctrine. Unfortunately, this doctrine has been abused. I don't have this facility, but my competitor has it. I need this in order to compete fairly. Of course, such

a contention is not enough because if this contention goes on as accepted then everything has to be reviewed. Of course an essential facility is one that cannot be obtained by other competitors, including potential market entrants. So this is very essential. That is way the facility is called "essential." And the lack of this facility can mean a barrier to entrance. So I have this patent, so you cannot reproduce this. But the lack of this patent or the facility might mean an obstacle to entry into the market. So we need, therefore, very careful consideration.

I think, for example, the electric wires and the access rights or right of way in the power industry and communications where some huge costs are involved. And also the Microsoft operating system is a facility. The OS program has already been accepted as an essential facility. So in such cases a ban on such anti-competitive conduct is not enough to alleviate a monopoly because sometimes the anti-competitive situation is locked in. So very strong measures are required. I think ADSL is a successful example of how to solve this problem. Of course, you might disagree, but as far as Japanese cases are concerned this has been very successful. In the beginning ADSL was very low in terms of market penetration, but then unbundling was enforced by the authority and then entrance increased very rapidly as well as the number of users or subscribers. This is the user. The blue is the price. And Yahoo, a very aggressive player, joined. And then the price came down very rapidly.

So the essential facilities doctrine was not wrong, but as I said there is a risk of abuse. Sometimes the problem can be overcome because the problem is not essential for our business conduct, and also investment. And of course in the case of optic fiber facilities, if that is regarded as an essential facility then that might work as a disincentive to investment in innovation and other R&D efforts. And of course we need a better tool to have a better case-by-case judgment. We have improvements in the tools available to us. For example, we were too heavy on theory but these days they are able to use the econometric measures and quantitative measures in simulating the expected losses with specific figures and numbers. We have various tools and I think that with multi-step approaches we will be able to better solve this problem. For example, hypothetical simulations are being conducted in the reviewing mergers. There are various good measures. I think this will be true in the case of the essential facility doctrine.

At the CPRC two years ago our research team produced this. This is a kind of template. We follow these steps to consider solutions. The costs and benefits are calculated. So

with very deliberate measures I hope that we can overcome this problem.

Of course, it's not easy. Formulating merger guidelines took time, so we again might take a lot of time. But doing this is worthwhile. We are in the infant stage. The negative judgment of the Supreme Court was in a way sad for me, for the developments and improvements in this approach that we are now working on. But the American and Japanese experiences should be further exchanged for the betterment of both. And of course when it comes to cartels and mergers I think we are working very well based on good coordinated and cooperative efforts. Thank you very much.

Prof. Suzumura [translated]: Thank you very much, Mr. Tanaka. Now we would like to ask the two keynote speakers to respond to the follow-up comments just given by the two Japanese speakers. If they want to respond they can do so, or if they just want to add on to their previous presentations you can do so too. Mr. Pate, would you like to start?

Mr. Pate: I'd be happy to. Thank you very much. I guess I'll take it in order. As to Mr. Uesugi, he and I have had a working relationship that predates this program. I would simply say I think JFTC and Japan is very fortunate to have an official such as Mr. Uesugi who is able to put these issues of competition so keenly into a broader international framework and with reference to the actual business realties that companies face. I certainly find nothing to take issue with in his remarks but enjoy sharing the podium with him. So the problem is Mr. Uesugi and I would not do a very good job of making for an interesting panel for you to listen to because we agree on too much, perhaps.

I very much enjoyed listening to Professor Tanaka's presentation. Obviously there is a great deal of agreement there too, but I really appreciate the opportunity to discuss some comments on essential facilities so that we can deepen our discussion there. To go back to the framework in which the Professor puts it, the question is does the firm succeed by having excellent product on the one hand or essential facilities on the other hand? And I think the problem with this is that we don't have agreement on what does this mean, the label essential facility. And simply to label something an essential facility does not tell us much.

The difficult question is when the excellent product and the essential facility are one and

the same thing. What do you do in that case? I'll make some remarks about that in the context of the Microsoft case you mentioned, but I will say it's hard to say anything too negative about a presentation that contains my favorite anti-trust quote by Judge Leonard Hand, which again goes to my point about a coherent message. Anti-trust law cannot at the same time urge the competitor to go out and compete, and then if the competitor does so in an excellent way and then wins the competition turn around and attack the competitor. And that's the point that Judge Han makes. I think it's an important point.

Now, is it the case that there is never a situation where society should make the judgment that a facility or a structure is so valuable that it cannot tolerate private monopoly control of that asset? Obviously the answer to that is "no." But I would suggest to you that almost all of the situations that we discuss in this regard have the characteristics of traditional regulated natural monopoly industries. These may be cases where an extremely expensive infrastructure that cannot be duplicated has been put in place, perhaps with extensive state assistance. It may be the case, actually, of a natural monopoly in the sense of a physical part of nature, such as a port. In certain situations like this society will make the judgment that we need put in place an expert regulator and to manage access to this facility.

My point in criticizing the essential facilities doctrine, and I'm sorry that the Supreme Court decision makes you sad but it is the Supreme Court decision that makes me the most happy since I have had my job. The point is that the very thing we want to encourage is for firms to take on the activity to create things that are extremely valuable and difficult to duplicate. And I think Professor Tanaka rightly realizes that there can be abuse of anything that diminishes the incentives for creation by having the legal authorities step in after the effort has been put into the creation of the facility and then take it away. So the place where I think this sort of thing will be seen again is going to be in the case of the traditional natural regulated monopoly. The way that can be approached is through in appropriate cases expert regulation. Is this a concept that can be introduced successfully as part of the general law of anti-trust that must apply to the day-to-day activities of each and every business, under general anti-trust or competition principles? I would suggest no, it will not be successful.

Patents and intellectual property rights I would suggest are a special case where this essential facility concept does not work well. The very premise of a patent system is that

in order to give an incentive to invent something extremely valuable we will tell the inventor that they may have the exclusive monopoly right to this invention for a limited time and they may make the profits for a limited time of having that position. After this, the invention becomes available to the public. So to my mind it does not seem to make very much sense to have a patent system that says the number one thing that we will value most is an invention that is so good that it will be essential to an entire line of commerce, and therefore very valuable, and then grant a patent of limited term on that invention, but then on the other hand to have an entire other body of law in the form of competition enforcement come around and say, "Oh no, now that we find how valuable this invention is we take your patent away and require you to license it on government-mandated terms to your competitors." This seems to me to make very little sense from an incentive point of view.

Now as to the question of software, which is a current one and always a difficult one, I think we need to be extremely careful about anti-trust enforcement approaches that put government officials in charge of product design. And again, this goes back to making the judgment, which can be controversial, about whether the essential facility and the excellent product are one and the same thing. And in the context of the operating system, Professor Tanaka along with my good friend Mario Monti of the European Commission suggest that what we need to do is identify the operating system and say we will divide it from other things. We will divide it from the media player. We will divide it from the browser, and make sure we will keep the operating system separate.

A problem with this is approach is that in the very quickly changing area of software a characteristic of the operating system has been that it includes over time more and more features. And how exactly are anti-trust lawyers and economists to be best situated to make the judgment of which inclusion of a feature is wrongful and which one is beneficial? Our DC circuit court of appeals used an example in an earlier Microsoft opinion that I think is helpful, and that relates to the hard drive that we now find in our PCs. At the time I started using a PC, you may remember, we had to take a floppy disk and put in the operating system, and then we would take the data disk and put it in and let it cook through the word processing function and take the operating system disk out. Well, as we all know at one point the invention was made of an internal, high-capacity hard disk drive. Well, at that time the makers of the independent floppy drives said, "No, no. This would be inappropriate, to allow the computer makers to incorporate the disk drive into the computer. This will destroy our market for having the separate drives."

Now that seems foolish to us today, but if you can cast your mind back did that seem foolish at that time or was this perhaps a plausible claim to anti-trust lawyers and anti-trust economists?

My point is that when we look into the future it's hard to know where the line between appropriate product design and abuse of a monopoly position lies. That's why we think the better way is to focus on conduct. And we took strong measures against Microsoft because of things like tie-out agreements, on which Professor Tanaka and I fully agree strong action is needed. So I think going forward the danger of an essential facilities approach to an innovative product design is really going to be that we end up with a rule that says OK, once your product reaches a certain level of success we are going to prevent any improvements to that product until such time that it becomes sufficiently inferior that you loose that dominant position. And I don't think that would be a good direction for the law to go it.

Even in the case of things that look like traditional public utility type monopolies I would suggest that we need to be cautious too. Obviously the local copper loop to homes in the context of telecommunications is one that has been highly regulated in the United States and around which debates continue about what the correct level of access is. On the other hand, if all of our attention is focused on allowing shared access to the existing pathway to provide service into the home, I wonder whether that in any way can sap the potential incentive to create other pathways, such as broadband over power lines, or satellite, or fixed wireless. Maybe sometimes if we spend too much time trying to require firms to share we can blunt the incentives that other firms might have to totally displace the incumbent that appears to be dominant.

So our disagreement, obviously, is not complete. It's one of degree. I would be much more concerned about keeping in place the strong incentive for the initial innovation that led to the creation of a valuable product, such as a computer operating system, in the first place. I acknowledge we need to leave room for follow-on innovation and for innovation in adjacent markets, but we need to be extremely careful about whether government intervention in the form of regulation may actually leave consumers worse off rather than better off. So with that I will conclude, and again thank both panelists for what I think was an excellent presentation.

Prof. Suzumura [translated]: Thank you very much. Professor Tanaka might have a

response, but Mr. Abbott, do you have any comments to what was said by Mr. Uesugi and Professor Tanaka, or you may additional comments?

Mr. Abbott: I'll be very brief. I echo Mr. Pate's comments. Mr. Uesugi's comments I agree with fully. And Professor Tanaka's comments, I think I share Mr. Pate's view on those comments. I would say very briefly that I think if you read the Trinko decision carefully, first of all one thing it highlights is the danger of false positives. One concern anti-trust enforcers have to be afraid of is in shaping a doctrine such as essential facilities. Some of these lower court cases use some loose language about a facility that needed to compete and could not readily be duplicated, some very loose language. And the concern is if you give broad recognition to a doctrine of that sort there's a risk that bad anti-trust cases are going to be brought, if not by the government certainly by private parties and that chill pro-competitive behavior.

That does not mean that in those special circumstances in which have some natural monopoly elements left, although that nothing can be done, indeed I think the point in Trinko was that the court recognized that whether the rules that the Federal Communications Commission to regulate access that were at issue in the case were correct or not at least it was a regulatory framework that required the opening up of this facility. You didn't need this vague anti-trust theory of essential facilities, which could be subject to misuse, to reach a conclusion. In short, why invent a new doctrine which can be handled by traditional anti-trust theory of monopolization instead of a multi-step, complicated but vague formula which can be misapplied in many cases?

False positives create a chilling effect. And that doesn't mean in the rare situations where you have a natural monopoly element that you can't do anything, because indeed something was being done. Congress had passed a very detailed law that dealt with those issues of access. And one way of seeing the case was an attempt by competitors to go beyond that law and to impose additional costs by coming up with a new anti-trust theory which wasn't rooted in the fundamentals of monopolization theory, as we understand it currently. So I hope that that's of some use. Again, I think the thrust of what Professor Tanaka had to say was quite right, and I think we just perhaps disagree in emphasis and on the margins, and we certainly don't support inefficient outcomes. What we're concerned about is a doctrine which can be easily misapplied and abused and that can chill innovation.

Prof. Suzumura: Thank you. Let me say that we have some time for discussion among the panelists. And this is a problem of resource allocation. But I'll go to Mr. Tanaka first. Would you like to respond to the comments given by these two panelists? Please.

Prof. Tanaka: I have three. Mr. Pate had three points. The first one was about patents, architecture and broadband. And regarding patents, yes a patent is an incentive for innovation and we need an incentive in the case of so-called essential facilities. But patents have a limit, as you say. Isn't that sufficient time and sufficient incentive, for Microsoft to have a huge amount of revenue, for inventing the operating system? So we can evaluate, is it sufficient or not? So that's the first point. And the second point is—OK. Regarding business, you mentioned that architecture should be determined by the market, right? You said the PC's architecture…Hard drive? Yes, architecture. Production design should be determined in the market. I agree with you. But in the case of the PC industry no one has a monopoly. So no one monopolized the personal computer market. So the market determined the product design. But in the case of the operating system Microsoft controls the operating system. So in that case Microsoft determines the product architecture. Am I right? So the situation is different.

And thirdly, in the case of ADSL, broadband access, I agree with you. That is in the United States unbundling is not necessary because you have a lot of other access right of way. For example, cable access especially is a very good competitor for ADSL. So I don't think that unbundling is necessary in the case of the United States. So it depends on the situation. So a case by case approach is good. That's the third point.

Prof. Suzumura*:* Would you like to respond?

Mr. Pate: Sure. On the telecom access point, I think there is broad agreement there. Yes, we have had unbundling requirements in the United States. Even though you say they are unnecessary we have had these in place. Other avenues were available. In terms of availability as a technical matter certainly you cannot say that the Microsoft operating system controls the entire world. Apple has a competing system, holding, a small percentage but one that is available.

Prof. Tanaka: A very small percentage.

Mr. Pate: I think perhaps some of the recent changes in the tone of Microsoft's behavior

have come from the fact that it has great concern about the increasing popularity of Linux and the potential particularly for it to grow in Asia. I think it's obvious that these are going to be controversial issues when you have a system that is of great importance to consumers in which one company holds such a large position. My point simply is to ask whether we really can have anti-trust law come up with an essential facilities-type doctrine or a product design review-type doctrine without putting in great danger the incentives that caused these types of innovations to be introduced in the first place.

Prof. Tanaka: But it is an empirical question. I think that you think that Linux or Macintosh is a good competitor to the Microsoft operating system. Do you think so?

Mr. Pate: Do I think that at the present time—you finish.

Prof. Tanaka: I think that it is an empirical question. So it should be tested empirically using economical techniques. You said if innovation can overcome the network externality then we don't need regulation. So if Linux or Macintosh can overcome the Windows monopoly by using new, good features or new, good performance, then we don't need regulation. But it's an empirical question. We can test it empirically.

Mr. Pate: I don't know that I necessarily do agree that having economists perform tests will tell us anything about what the future potential for technical innovation is likely to be.

Prof. Tanaka: For the future?

Mr. Pate: For the future. I want to be very clear. I'm not suggesting that at the present time Linux or Apple or some other competitor has displaced Microsoft from having monopoly power in the PC operating system market. That's not my point. Rather my point is that the types of remedy that would be used to say that now under anti-trust law rather than punish anti-competitive conduct we will now use general anti-trust law to try to displace a monopoly that was achieved without any wrongful conduct, has very grave dangers for the incentive structure on which our whole system is based. That's my point.

Prof. Tanaka: But we can also test whether it is really a disincentive or not by asking the business people or venture capitalists, et cetera. Don't you think so?

Mr. Pate: No, I think not.

Prof. Tanaka: No? Why?

Mr. Pate: The idea that government officials have the ability to go out and take surveys and then make correct predictions about what types of innovations will flow from the activities of business people, who actually have to put capital at risk in the marketplace and hire technical experts to create new products—I must say I have great skepticism that the academic and economic approach can really do that as an empirical matter.

Prof. Tanaka: OK. But in the case of the patent system we really do such research on how much time we permit the patent holder or how much scope we should allow the patent holder. So in reality, as a potential case, I am already doing it now.

Mr. Pate: I agree with that. I think that is a very legitimate question, and my point on that is that this is a question that the patent system needs to answer. The entire question of how long the term should be, what types of invention should we have a patent for, how rigorous should the standards be for the granting of a patent? Well, many people in the United States think our patent system gives away too many patents. Others might say that maybe they're on the wrong subject because we give away patents on business methods. These are very good questions for the patent system to make a judgment in a systemic way. What will create innovation? My point, though, is that for anti-trust law to come in post-hoc on a case by case basis and then try to second guess each decision with hindsight undermines the very system that the patent law sets up. So yes, there may be problems with the way the patent system works. Maybe it can be improved. I just don't think anti-trust law is the most effective tool to do so.

This still doesn't solve our Microsoft question because of course the intellectual property there does not solely consist of patents that have a natural term of expiration. Not only does the operating system continue to be issued in new versions as it is improved there are also trade secret aspects of the invention which have no natural term of expiration. Again, there are situations in which society may declare something the property of the public and put it under regulation. I would suggest to you to say that something in the nature of a computer operating system that was invented in the first place through competitive business effort without, in this case, government monopoly intervention, which makes it different than the telephone or the electric power system

for example, is a very dangerous thing for the government to do without running the risk of chilling the innovation and economic progress that we depend on. Some agreement, some disagreement.

Prof. Suzumura: Well, thank you very much for a heated discussion. The discussion so far has concentrated on a particular issue because most of the comments given are in agreement with the initial speeches that were so beautifully put forward. But given the limitations of time, maybe we can come back to this issue after we open up the discussion to the floor, but for now I would like to ask Mr. Uesugi if you want to elaborate on some of your points if you want to say something, in addition to what you have already said.

Mr. Uesugi: Rather, I'd like to raise a question for Mr. Pate. You seem to emphasize inappropriate conduct by the monopolists. We should be very careful to select inappropriate conduct. Otherwise, it's over-regulating monopolies. Are you saying this in terms of upstream markets or downstream markets where the monopoly position in one market is used upstream market or downstream market? We are rather concerned about this problem, but do you have concern or you don't have concern?

Mr. Pate: It depends on what is meant by the term "used." To go back to our favorite case, Microsoft for example undoubtedly had strong market power over original equipment manufacturers who needed to install the Microsoft operating system on their PCs. And it used that power to require in some cases from those manufacturers agreement that they refuse to deal with Microsoft's competitors in middleware. That is an example of a use of a dominant position that is clearly wrongful and it is a type of behavior that is now prohibited by the final judgment that we obtained in the Microsoft case. If the question is simply one of the fact that there may be attractiveness in an adjacent market to customers by virtue of the fact that they know and use a dominant product in a different market, then under American law I think the answer is quite clear that our courts reject the idea of monopoly leveraging, that the fact that you have a dominant position in one market does not then mean that any time a competitor is able to allege that this position gave you an advantage of some sort in an adjacent market, even if there is no danger of the actual monopolization of that second market, then this will not in and of itself be an unfair advantage.

We proposed in the Trinko case a test, again a test has been used by the Department of

Justice for several years during Joel Klein's tenure at the Department of Justice when the Microsoft case was and the American Airlines case where we were challenging the conduct of a monopolist, which asked does the conduct make any business sense but for the exclusion of a competitor? If it were not for the effort to exclude a competitor, would this conduct make business sense? Well, if you're improving your product and making it better even though this takes away your competitor's customer, well that makes business sense. In the context of say our American Airlines case if what you see is the company losing money, taking activity that actually costs it money rather than making more money, or in the case of Microsoft we said the imposition of these tie-out agreements on Microsoft's customers, which very clearly under the evidence made the customers unhappy, well this is not doing something to appeal to the customer. It's doing something that doesn't make any sense but for trying to exclude your competitor from the market.

So this can be a difficult line to draw. This is our current effort to make a more objective and transparent statement of how we will draw that line, but again the place where we have had friendly disagreement on the panel, I think it is important for sound monopolization enforcement to be looking for anti-competitive conduct rather than saying we will have the general law of anti-trust displacing any dominant position once it is achieved. Maybe sometimes you need regulation to do that, but it should be in a very special case, probably not something anti-trust will do very well.

Mr. Abbott: I would just add one minor comment. I certainly agree fully with Mr. Pate's approach. I do think that this was one real concern, and this was something our former chairman Muris was concerned about, was that potential monopolists may sometimes manipulate government processes to maintain their monopoly power. For instance, if there's a regulation that says you can't compete as a generic pharmaceutical if a firm claims its patent would block entry of that firm the mere regulatory filing, whether it's false or true, blocks entry. Well, that's a use of a patent and that creates market power not because of the patent itself but because there are peculiarities to the regulation that allow a firm to manipulate our governmental processes.

Sometimes attempts to mislead a regulatory body—this was an argument in a case currently before the commission, Unocal. The allegation is that if a state regulator body is misled into adopting a certain standard and then it turns out that after the fact the standard really requires the use of a patent and the firm misled the regulatory body so

that it could then insist on enforcing its patents and get higher royalties, that's misuse of regulation. Again, it's not a legitimate use of a property right, and so that's one thing that I think we have to be very careful about. In looking at the development of regulations and laws, one thing in recent years the Federal Trade Commission has been concerned about is how those laws can be abused to allow firms to obtain or retain monopolies. And as Judge Bork, a famous anti-trust professor for many years in America, said "The longest-lasting monopoly is typically the one that's created by government power itself." So there is no one magic way to monopolize. There are a number of different schemes that can be used, and often the most successful ones involve abuse of government, at least in the view of many people at the FTC.

Prof. Suzumura: Would you like to—no? Yeah. Well, I'm in a rather awkward position. I have several questions but I have to wait.

Mr. Pate: You have control of the essential facility, too.

Prof. Suzumura: I don't want monopolize time. If there is additional time I will come back to my own questions. So why don't I make the best use of this time and open questions to the floor. There are several requests.

Prof. Suzumura [translated]: There are several requests to make. Please raise your hand to get my attention if you would like to take the floor, and please always speak through the microphone. And also don't forget to identify yourself, and please be brief in asking your questions. So we have had panel discussions. Of course I'd like to come back to part one in asking your questions, so now the floor is open.

Questioner: I am a Japanese lawyer from Nishimura and Partners, and I am also a research fellow of the Competition Policy Research Center. I have a question regarding Trinko. In spite of the Trinko case, in the Metronet case I understand that a local telephone carrier changed their pricing plan and excluded Metronet from the market. In that case, in spite of the negative Trinko decision against competitors the Metronet complaint against the local carrier is accepted by the circuit court. My feeling is that regarding pricing policy matters the US court is very negative about finding abuse of a dominant position, as in the American Airline case. Is this Metronet case an exceptional case or is it some new trend towards the abuse of the dominant position using pricing tactics? So I think this decision is the first case for price squeezing.

Mr. Pate: That is a type of claim for which there is judicial precedent in the United States. I think in terms of telecom pricing, again this is a subject of very current and heated debate in front of our Federal Communications Commission. And I think following the Trinko case, that in that particular area one of the clear messages of the case is that the anti-trust laws are not going to exist as a re-do or a second bite of the apple for participants in the regulatory process who are unhappy with the results they get in going through the procedures that our regulators put forward. That's an aspect of Trinko that Mr. Abbott emphasized, and I think it is an important one.

Beyond that I'm aware of the Metronet case. I haven't looked at it recently to prepare for this so I don't mean to say specific things about it. On pricing generally of course, as you know, in the United States our courts are extremely skeptical of challenges to low prices. Predatory pricing claims are exceptionally difficult to make in the United States, and I think that represents a very wise judgment. Where anti-trust law attacks low prices the one thing we know that we are doing in the short run is removing low prices that are benefiting consumers. We have to be quite sure about the longer-term judgment that a predatory pricing type case is attempting to make that competition will be so clearly displaced without an opportunity for entry that there really could be successful recoupment later on of the losses from the low prices by the later charging of high prices. Under our Supreme Court's law that is a very difficult showing to make and I think the reason is fear of false positives of the type that Mr. Abbott mentioned. So I hope that's a helpful response, maybe not specific enough to Metronet but on some general principles.

Prof. Suzumura: Would other panelists like to say something? OK, I'll go to the next question.

Questioner [translated]: Okada from Hitotsubashi University. I have a question for Mr. Abbott on corporate mergers. When you think about competition policy a merger is a special case because you have to do it before the fact and you have to try to predict what would happen after that merger, and predicting is always difficult. In the United States, I think there is this wave of mergers happening in the United States. And in the 1980's there was one. There was another in the 1990's, and before that there was a wave of mergers in the 1960's. And those waves came from different factors and there were

different logics that drove such waves, I understand. But against that backdrop I think it must have been difficult to maintain a consistency in your competition policy or the merger review policy, especially over the '80s and '90s. Would you like to share with us what you tried to do, what you focused on, in trying to ensure consistency over those different waves or different natures of mergers?

Mr. Abbott: It's a good question. Certainly it is true that one of the biggest effects of the merger wave is it creates major stress on limited enforcement resources. I know that the Federal Trade Commission in the late 1990's when there were many mergers had to shift a lot of their attorneys and economists from non-merger work to mergers just to deal with the volume of work coming in. That having been said, I think that the existence of the merger guidelines framework, which was well understood and had been applied over a fair number of years, helped the agency to apply a fairly consistent approach.

Now I also think that the FTC and the Anti-Trust Division tend to have specialized industries. For example, the Federal Trade Commission has a whole section of lawyers who spend all their carrier studying the petroleum industry and refineries and different aspects of the petroleum industry have enormo us about of practical business knowledge of the marketers, the forms of distribution, problems that have arisen in the past and complaints so that you're not start anew. When you're looking at a merger in that industry, just as the justice department in telecom or steel, you're dealing with people who've spent many years studying the industry, both lawyers and economists. And they know very quickly who to contact, what studies have been done, and what sorts of problems have arisen. Obviously there are some unusual circumstance in industries that have been studied less, but there has been a huge accumulation of industry-specific expertise, and that helps a lot in analyzing specific mergers and avoiding a lot of broad questions and getting down to the specific questions, maybe asking customers who are mostly to be harmed if they're concerned about a merger.

And as I said, I think that the fact that there has been consistency is really reflected by the numbers. Just one more measure, in terms of the percentage of the total number of merger filings, the percentage of mergers that led to enforcement actions, with just one or two blips on the screen, has been fairly consistent over the past 20 years or so, which seems to suggest we may not be acting perfectly but at least we're following a fairly consistent pattern. But again, I would just emphasize the industry-specific expertise, and

that's something we also commend. As anti-trust departments develop they really should learn this isn't just a matter of theory. You really have to understand the specific industry you're dealing with. And once you have that base of knowledge it makes it much easier even when you're stressed by dealing with a large number of transactions.

And I'll just add a footnote. For instance in the petroleum industry we had a recent empirical study at the Federal Trade Commission that suggests that the wave of mergers by refineries really hasn't had a big effect on petroleum pricing in the US. It's more often regulatory factors, OPEC and a number of other factors. And what's interesting also is that there's been consistency in the analysis, as I said, both under the Clinton administration and the Bush administration in that area. And people who study it closely see that many mergers just aren't given a wave and allowed to go forward. Often there's some very specific, target divestiture relief aimed at solving particular problems. So when you look at many mergers which critics have said, "Why was this merger approved?" Well, if people look closely at the merger often they find that if there were problems in particular market segments the agency, based on its expertise, has been able to target those problems and arrange for necessary divestitures.

Prof. Suzumura [translated]: Thank you very much. Any other questions?

Questioner: Our country also would like to expand the use of economic evidence. But as Mr. Uesugi said, we'd like to have sufficient resources regarding economists as well as know-how on how to collect economic data. So I would like to hear how far US litigation uses economic data and economic evidence. We know the Bell Resort case, the Philadelphia Bakery case, or the Tenet Health Care case. In such cases some econometrical evidence was used. But some Japanese people are skeptical. The use of economic evidence is only related to some cases, like Tenet Health Care. How far is such economic evidence used in the first stage of the case? In most notification cases the economic evidence is produced by the complaining side and reviewed by the government through the economists. This is my question.

Prof. Suzumura: Abbott-san.

Mr. Abbott: I'll just speak to that quickly. Certainly the use of economic evidence is very important, and indeed I think the economists at both the Federal Trade Commission and the Justice Department have spoken publicly about this. First of all,

most mergers because we have a safe harbor the vast majority of mergers—I don't have a number, but it's certainly probably over 95%—that are proposed don't go to our second request stage where we require more information if they pass the safe harbor. Now those mergers that do require a closer look, early on we have a team, usually at least one economist working with a team of lawyers at the Federal Trade Commission—and there is certainly a similar if not identical approach at the anti-trust division—trying to decide what questions to ask, what data to ask for in the second request. And often the merging parties have their own economists, and I think some Justice Department officials, I know FTC officials, have advised that early on the economists for the merging parties should talk to the economists for the government, and I won't go into it.

Sometimes in big matters outside experts are hired as well on all sides, but early on communication is established. The government economists will tell the people at Justice or the FTC what particular evidence, working with the lawyers, is most valuable. And we'll try to work with the economists of the merging parties. Obviously this is something that has developed over the years. You mentioned—and I'm not going to spend time here, it's sort of a technical matter—critical loss analysis. This is one of just many techniques of a former bureau director at the FTC Joseph Simon's, and a number of economists helped develop that. But that's just one of several techniques that are used. There are also some fairly quantitative techniques, the merger simulations that a number of economists have used.

So it's sort of a general question, but I think what happens is there's a lot of sophistication, certainly for major mergers that go to second requests. And the merging parties' economists and the government economists, if the merging parties want the transaction to go forward, tend to work together closely. And there's sort of a common understanding. This common understanding about what to ask for, again, requires a lot of work and I think that the Europeans now, just having the European Commission, is moving towards greater use of evidence. Partly it's because of US rules, compulsory process, and confidentiality of filings actually often had more access to data than was available to European enforcers and perhaps the Japanese enforcers.

That may change, and that can be overcome sometimes by some agreement by merging parties to waive confidentiality for the limited purposes of making data available to foreign anti-trust enforcers. But because of the structure of our law we have access to

huge amounts of confidential data and that facilitates that examination. Obviously it's a costly and complicated process and there are critics who say that we should handle it in a better way, but on the whole I think it's developed well. And I think there's probably no substitute for people who have industry expertise who you get data but also to write data, not just any data. And I don't know if that's responsive to your request or not.

Prof. Suzumura [translated]: Would JFTC like to comment on the latest interaction there? Mr. Uesugi?

Mr. Uesugi [translated]: Well, I think it's where you start. I mean, when you define the market you think about the hypothetical monopolist. You can use that concept and you will look at how the existing markets are classified and you ask the users whether there is a substitution. And as a result the final decisions we make aren't that off the mark, we believe. And on top of that the question would be whether all the cases merit additional collection of economic data for the analysis. As of now the cases that we have looked at, we have actually compared other decisions that we've made and we have reviewed it against additional economic data that we did not have at the time of the decision. And the result is that we were not so much off the mark in the decisions we made. So the question is whether we can confirm and whether after the mergers there will be an adverse situation. Up to now we have been able to manage the cases pretty much, sometimes by introducing remedial action, but perhaps the times are changing and obviously I do accept that more economic analysis is due.

Prof. Suzumura [translated]: OK, let's move on to the next question from the floor, unless the panelists need to definitely add something on that point. I think there's another question.

Questioner: …and I should admit before I ask this question that if I take a position different from that of Mr. Pate he has the power to fire me. But my question is about the essential facilities doctrine and the…

Mr. Pate: Actually what he doesn't know is that I don't really have the power to fire him under our civil service system. But he should be careful anyway.

Questioner: He may have already decided to. Under the Trinko case, first of all before I ask the question I want to set the stage for it by pointing out that in the Trinko case the

Supreme Court did mention the Aspen Skiing case from several years ago, which was an earlier case that did require one competitor to cooperate with another based on the fact that each one of them owned a different mountain for skiing. And the theory was in that case it's very difficult to go out and invent yourself another mountain. That case, interestingly, well first of all I should say we've been calling that the Aspen Skiing Clause or the Aspen Skiing Exception, and I guess since the Trinko case made you unhappy we should now call it the Tanaka-san Happiness Exception. The interesting thing about the Trinko case is that they did not say that Aspen Skiing was overruled. So it still seems to be good law. But in neither case, in Aspen Skiing itself or in the new Trinko case, did they describe the result in Aspen Skiing as an essential facilities doctrine. That term was not actually used.

So my question is, understanding that you're not a lawyer in the United States and are maybe hearing this for the first time but if you can, with that information, knowing that it is possible to get the result that I believe you want in the United States in an Aspen Skiing Case-type situation under the anti-trust law that we apply in the United States, without the essential facilities doctrine—and you've just heard Mr. Pate's formulation that the United States took in its brief in the Trinko case, which was, I will say it again, does the conduct make any business sense but for the tendency to exclude or harm a competitor? Do you believe that there is any situation where Mr. Pate's formulation of that test, that "but for" test is what we call it, would not be enough and that the essential facilities doctrine would provide something additional? That's my question.

Prof. Tanaka [translated]: Let me respond in Japanese this time regarding the Aspen Skiing Case and the Trinko decision. In Aspen Skiing yes, there wasn't any necessity for essential facility and that's how the court ruled, and I agree with that decision. My message is that I think that "essential facility" needs to be defined clearly and therefore the application should be limited. And if you look at whether eliminating conduct that would limit competition is enough, I think that was the question. I don't think that is enough. That would be my answer, because a typical case would be Microsoft. Suppose Microsoft did not do any competition limiting conduct. They were clean. But still they would be very monopolistic. So even if they do not do any conduct that is competition limiting their monopoly would still be there, and that's why essential facility should be introduced and I think that's why they were subject to unbundling, despite the fact that they may have not been doing any bad things. That is an aberration from the traditional anti-trust doctrine, I think, and I understand why the anti-trust pool is hesitant to move

into that type of thinking. However, without a particular behavior that reduces competition the fact is that the monopoly is there and it does have a negative impact on the economy and therefore something must be done. That's my position.

Mr. Suzumura [translated]: If you don't want to continue further on that, I will turn to other questions. Are there any other questions? I can probably take only one more question. This is the last question I can take, so if you have a question please raise your hand. Yes, please?

Questioner: Thank you. My name is Andrei Hagio from the Research Institute of Economy, Trade and Industry. And since there's been so much discussion about the Microsoft case here, my understanding is that recently the Japanese FTC started to investigate Microsoft and Intel on an issue which is related to the essential facility doctrine. Namely, if my understanding is correct, they're probing into the contracts that Microsoft has been signing with original equipment manufactures. And in particular there are some clauses in those contracts stating the intellectual property relationships between Microsoft and the OEMs, saying for example that the OEMs by licensing Microsoft's operating system give up the right to sue Microsoft if by licensing the essential facility they found out that that operating system infringes on their intellectual property rights. It seems to me that it's very closely related to the essential facility doctrine but it appears to raise a very different type of issue. So I'd be very curious to have your comments on this, Mr. Pate, and perhaps Professor Tanaka.

Mr. Pate: Sure. The NAP clauses, non-assertion clauses, I'm not sure I agree that this is necessarily part of…I'm sorry.

Prof. Tanaka [translated]: As far as this matter is concerned, this has nothing to do with the essential facility doctrine, so you have the floor, please.

Mr. Pate: I don't think it's an essential facilities issue. Non-assertion clauses are an interesting issue. I might agree particularly in the case of a firm that has a dominant or large market share. They can create problems in terms of future incentive to innovate. If a firm is required to give up the ability to assert its own IP this can be a problem, particular for someone who's spent so much time on the panel today talking about the need to protect IP incentives. In our own enforcement of our Microsoft decree the result of our investigation into this was that Microsoft has removed those clauses going

forward. My understanding of the JFTC case is about the question of whether the clauses should be removed retrospectively. So there is a shared concern that the clauses may create problems for innovation. There are different questions that arise when even if you have a type of clause that has the potential for harm to innovation incentives, if it's been in place and conduct has taken place based on it what may be the results of retrospective removal of the clause? That's something that's not involved in our dealings with Microsoft. As I understand it it's now a question on which my colleagues at JFTC will have the pleasure of fighting with Microsoft for a while going forward. But I think it's not really so much an essential facilities question.

Prof. Tanaka: I agree.

Questioner: Actually, from what I understand it's a very new issue that they're investigating, which was not brought up in the Microsoft…My point was that in the Microsoft case in the United States the OEM relationship which was being investigated was the exclusivity of the contracts. For example, Microsoft was found to be forcing OEMs to place only their software. The JFTC case is a bit different. They're looking at something else, which is the problems of the cross-intellectual property rights agreements and the inherent risk of violating property rights when you license someone else's software with your own.

Mr. Pate: I understand. So your question doesn't go to the non-assertion clauses at all?

Questioner: No, I think it's related to the essential facilities doctrine but I don't really know much about this JFTC case because it's very recent. But I would like to know how it relates to the Microsoft cases which have been brought up in the United States and in Europe.

Prof. Tanaka: I don't think so. I'm not sure. I don't know.

Mr. Pate: Well, I'm not sure. I gave my best answer on the JFTC case about which I'm aware, so maybe I'll let someone else take a stab. I'm not sure I understand your question fully.

Questioner: I'm just trying to find out more about how the Japanese FTC case relates to the Microsoft case in the United States and in Europe.

Questioner [translated]: Again, Ohara from Kobe University. We were talking about this non-assertion clause of Microsoft, whether that's an abuse of a monopolistic and dominant position. I think that was the issue. Be it in the United States or in the EU the non-challenge clause is believed to inhibit technological innovation and therefore the Supreme Court has this Lear v. Atkins case ruling. And in the EC the technological transfer contract license clause is decided to have added something that should not be included because it will impede technological innovation. So such a non-challenge clause is ruled illegal in the EC and USA. And if that's the case, the non-assertion clause in Japan should also be deemed illegitimate or ruled as an abuse of the monopolistic market position. That's my position.

Prof. Suzumura [translated]: I don't want to force too much on Mr. Uesugi on this case.

Mr. Uesugi [translated]: Well, let me set the facts clear. What was at issue in the United States and what is at issue are totally unrelated. I think I can say that. It's really about the impact on future innovations that the clause may have, whether it is an unfair form of trade that would have a negative impact on future technological innovation. And it's not really about the essential facilities doctrine or it is not about setting up barriers to entry into OS or PC. It's really about whether that non-assertion clause is impeding or inhibits competition within the Japanese market. So I think the last question wasn't really relevant to the discussion we were having.

Prof. Suzumura [translated]: That was the last question, I said, so I think I should stick to that. This will bring us to the end of the panel discussion. But having said that, I think the last comment was about an example that came up in the keynote speech but there were so many other important points we could have taken up. I looked at the program and I am not just the time keeper but I have five minutes to wrap up the discussion. So I would like to take liberty of that and perhaps try to wrap up the issue and perhaps ask my questions in the course of that, although I only have very limited time.

There are three points I'd like to make. The first point is, Mr. Pate used this analogy of the Olympic Games. I'd like to build on that. When you talk about competition policy, what you are supposed to do—for example if it's in the Olympic Games there's a forum for competition and there are some rules that should be designed for any competition.

And therefore setting those rules and setting the arena would be one primary objective. At the same time, you need to look at the performance of the participants and the allocation of penalties and prizes to the participants is also an important aspect. So the prize is to win a market share and to get the profit. And if anyone deviates from the rules of the competition a penalty should be applied, obviously. Before that, detection of the deviation is also another important rule. And that is also common sense.

And I actually recall that Mr. Pate made a very interesting remark. He said that in regulation of cartels they are using carrots and sticks and that there are various carrots. And on the stick side, he said that in the case of the United States the penalties they have are monetary fines and some executives could actually serve jail terms. And there is this private triple damages. In the United States the systems are all compatible with each other. And in the case of Japan it's slightly different. On one hand, we have the surcharge system. We also have some criminal penalties. And then one question is whether we can apply both at the same time for the same act. This is a constitutional issue. Competition regulations don't stand alone. It's part of the overall legal system that exists within a society. It is embedded within that system. The competition law that we have in Japan originated from a foreign country and it was kind of transplanted into Japan. So it needs time to perhaps naturalize and because it was transplanted it came with this essential problem of compatibility with other legal frameworks that already exist in Japan. We didn't have time today to discuss this compatibility within the overall system, but I think that was one point that actually surfaced, although implicitly, in the discussion. I wanted to mention that.

The second point I'd like to make is this: well, perhaps you may have a given law but even against that framework competition policy is something that evolves. I think that was made clear in Mr. Abbott's presentation, that for example to discern what mergers should be stopped and what mergers should go ahead there's a history. In the United States they started from a classic approach, a more ridged and more perhaps empirical but not so theoretical framework. And then they came up with the guidelines, which gave a framework for a more consistent type of decision making, and at least the competition policies as they relate to mergers became clearer.

So there's this evolution that took place in the competition policy, and I think that evolution itself is very important. And I really like the fact that you said that when you review the history of American merger policies, Mr. Abbott came out very candidly in

admitting that there were flaws. And you also spoke with pride about the new system that you have introduced, and that candidness was really striking and impressive to me. Any policy needs to evolve, and sometimes you need to get out of what you did in the past, which means you need to be very candid and honest about past mistakes that might have been made. And I think that's a very important attitude to take, so that's what I wanted to highlight. And obviously that should apply to Japan. We really need to learn from lessons learned.

And that brings me to the third point. In the first part of the program there was a question about the Trinko case. Mr. Pate responded, and I want to build on what he said there. I think this was particularly important. Oh, let me go back, backtrack. There was a question about bilateral agreements. I'd like to talk about that first. And maybe I didn't get the question right, but I understood it to be a question about global law enforcement. If that happens against those agreed bilateral agreements that could lead to a solution of all those inconsistency issues that currently exist. Then Mr. Pate I think said that actually that's not the story. And the way that I interpreted it is that competition policies started and were lost from different situations and therefore there are intrinsic differences in each and every country.

However, while that is accepted when you try to insure transparency in those policies and when you have discussions that would enhance understanding between different authorities that is important. I think that was the message given and if I'm wrong I need people to correct me. But anyway, what I'm trying to say is that law enforcement in various countries is now different and harmonization could be one important challenge. But even looking at such challenges I like the fact that you mentioned the transparency and discussion and information exchange could be the way out from that complicated global system we currently have. And I think those are the three most important things that came out, for me at least, and I would like to leverage those findings on the future activities in CPRC.

By the way, the CPRC is affiliated with the Japanese Fair Trade Commission, but when you think about economic analysis that it was suggested that the Fair Trade Committee introduce we are not actually an organization to undertake such economic analysis. We rather have the mission to think about competition policy within the Japanese framework, and we are there to help the Fair Trade Committee review their own activities from a somewhat objective viewpoint. We believe that is our mission. We

hope we can contribute the activities of the Fair Trade Commission. I know it sounded like an advertisement for the CPRC, but you know we don't have many opportunities to do so, so I hope you will excuse me for doing so. And on this note I would like to close this session. Once again I would like to thank everyone for all the impressive discussions and the impressive presentations, particularly by the keynote speakers. And I request a big round of applause for all of them. Thank you very much.

Chairman [translated]: Professor Suzumura, thank you very much. And I appreciate once again the great contributions by the panelists and also from the audience as well. We will continue their efforts through organizing symposia like this or in other forms at the CPRC and learn from the lessons and from your input. I also appreciate your ongoing support and participation in our program as well as programs organized by the Tokyo American Center. Thank you very much indeed. On behalf of the organizers, the Tokyo American Center, and the CPRC, thank you indeed for your contributions and cooperation. This concludes this program, part two.

(End)