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C O N T E N T S

P R O C E E D I N G S

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MR. KOVACIC: My name is Bill Kovacic, and I'm the General Counsel of the Federal Trade Commission, and with me today is Bill Kolasky, who is the Deputy Attorney General for Antitrust, and as you know, Bill's specialty is international affairs.

Also with us today is Mary Critharis, who is an Attorney Adviser in the International Section of the Patent and Trademark Office.

Today, we are going to continue the wonderful session that we started yesterday by turning our attention to the Pacific and to intellectual property developments and perspectives from a number of countries in that region.

I'd like to start by just briefly introducing the members of the panel to you, and happily, I can do this briefly, because for all of you internationalists, you know who these folks are.

In alphabetical order and seated to my left is Henry Ergas, who's the Managing Director of the Network Economics Consulting Group. As you heard yesterday if you were over at the session at the Great Hall, Henry recently chaired the Australian Intellectual Property and Competition Review Committee, which was charged

with reviewing Australia's intellectual property laws as they relate to competition policy, and we are delighted to have him back for a second round today.

To my right and second at the table is Steve Harris, who's a partner with the Alston & Bird law firm in Atlanta. He is the co-chair of the ABA Antitrust Section's International Task Force and the Section's International Antitrust and Foreign Competition Law Committee. You may know him best and I think increasingly scholars and practitioners in this area will know him better as the editor-in-chief of the ABA's wonderful two-volume treatise, Competition Laws Outside the United States.

To my left is Karl Jorda, who teaches intellectual property and industrial innovation at the Franklin Pierce Law Center in Concord, New Hampshire, known to this audience as one of the nation's preeminent centers of learning and research in the field of intellectual property. Among other responsibilities, Karl has headed several delegations of U.S. patent counsel at the Japanese Patent Office office meetings.

To my left, next to Karl, is Mr. Byungbae Kim, who is the Competition Policy Counselor and Director General of the Korean Fair Trade Commission. He

presently serves as the KFTC's spokesman and Director General for their Office of Public Relations, and he has headed the KFTC's Investigation Bureau, Deregulation Task Force and its General Policy Division.

To my right, at the end of this segment of the table, is Mr. Masayuki Koyanagi. He is the Director of the Institute for Intellectual Property. Previously he was an Appeal Examiner on the Board of Appeals in Japan's Patent Office, and he's also served in the Ministry of Foreign Affairs of Japan where he handled multilateral international property issues.

To my left at the end of the table at the corner is Tad Lipsky, who's currently a partner at the Latham & Watkins firm in Washington, D.C. For ten years, Tad served as the Chief Antitrust Counsel for the Coca-Cola Company and literally circled the globe working on competition policy issues for the company.

And as a foreshadowing of an event that will take place at the Antitrust Division next month in June, you also know Tad from his time at the Antitrust Division two decades ago where he played a formative role as a Deputy Assistant Attorney General at the Antitrust Division during Bill Baxter's tenure in that Division and had a role in the development of the

enormously influential DOJ 1982 Merger Guidelines.

To my right at the end of the table, we are especially delighted to welcome Dr. Len-Yu Liu, who is a Commissioner of the Taiwan Fair Trade Commission, and as one commission to another, we are most delighted to have you with us today. Dr. Liu also teaches at the National Taipei University Law School, and I can't say enough about the importance of having academics in government service -- as you know, that just gives a wonderful cast to what competition agencies can do. And in some ways he is at home as well with his graduate degrees in law from both Stanford and Harvard.

To my right, as part of another homecoming, third on the table next to Steve is Josh Newberg, who teaches law at the Robert H. Smith School of Business at the University of Maryland. This is, we're proud to say at the Commission, a homecoming for Josh as well. He served as an attorney in the Bureau of Competition at the Commission and as an attorney-adviser to Commissioner Ross Starek, and as you know, Josh only recently has published one of the most useful articles on intellectual property antitrust issues in Japan. Welcome home.

And my final introduction for the moment is for Mr. Toshiaki Tada, who's a senior associate in the

Hibiya Sogo Law Offices and is presently an international legal trainee at the Weil, Gotshal & Manges law firm. His practice in Japan has focused on antitrust, and he's often handled matters at the intersection of antitrust and intellectual property law.

And the gentleman to my right, known to all of you quite well, is Jim Rill, currently the co-chair of the Antitrust Practice Group at Howrey, Simon, Arnold & White, former Attorney General for the Antitrust Division, and as I will say later, Jim will be offering some perspectives on this half day segment, and I will give a further introduction to Jim when we turn to that part of the program.

Let me simply give you a brief description of the format today. In two and one-half hours, we are going to show you the Pacific, and we will do it in three parts. We will begin with an examination of policy issues in Japan. We will then turn to Australia, Korea and Taiwan, and again, Jim will provide us his observations about the session we have had for the past day and a half as a whole.

A couple of logistical notes, simply to encourage our panelists to be sure to speak into the microphones. One of the most useful features of what

the Department and the Commission have been doing with these hearings is that we do put transcripts on the web, we put papers on the web, and I'm struck at how our audience at home and abroad find these materials extremely useful. So, to give us the collective benefit of your thoughts for not simply the short term but much longer and for a larger audience, please speak into the microphones.

What we'll feature by way of format is principal presentations and then discussions by our colleagues here, and as you're ready to intervene with a comment, simply turn these handsome name tents up so Bill and I can spot you and invite your intervention.

I would like to ask Bill, Bill or Mary, if you have any opening comments you would like to make.

MR. KOLASKY: Just very briefly, I very much want to thank all of our visitors, especially those who have come here from Asia to share their experiences with us. We feel that we have a great deal to learn from other jurisdictions and from the way they are handling the same problems that we are struggling with.

When you look back at the development and evolution of American antitrust law, you see in the early decisions of the Supreme Court, back in the early 1900s, the Court frequently looked to the experience of

other jurisdictions, particularly the United Kingdom, for guidance on how to apply our antitrust laws.

In the last several decades, unfortunately, we in the United States have I think been far too inward-looking and too insular and have not looked often enough to the experience of other countries to see what we can learn from that experience. So, I very much welcome you here and look forward to hearing what you have to say.

Thank you.

MR. KOVACIC: Mary?

MS. CRITHARIS: (No response.)

MR. KOVACIC: Let's turn to our first segment. We are going to have two principal presentations, one by Steve Harris and one by Masayuki Koyanagi, to give us perspectives on IP and antitrust views in Japan.

Steve, could you start us off?

MR. HARRIS: Thank you very much for that kind introduction. I'm very happy to be here. I am also very happy to work with a net. Professor Newberg has written the quintessential and definitive article in this area, so he is here and will tell me if when I go wrong, which I do often, and Director Koyanagi, with whom I've discussed briefly how we're going to divide up the topic, certainly is also more than welcome to

jump in if I go astray.

The topic of IP and competition law in Japan starts hundreds of years ago, and I did draft a paper that will be posted on the website that discusses a lot of sort of historical context which I think is extremely valuable in order to understand what the Japanese mean when they talk about intellectual property and what they mean when they talk about property generally, because we too often assume that the experiential and cultural baggage that we all bring from our own lives to a word or to a subject applies globally, and that is not true about anything, and it's certainly not true about intellectual property or notions of property.

The 1968 guidelines were the first formal guidelines dealing with international licensing agreements. It was the first time that the JFTC put into writing its views of the application of the Antimonopoly Act to technology licensing. The AMA or Antimonopoly Act is the antitrust statute that was passed during the American occupation of Japan in 1947.

The '68 guidelines take pains to note the historical movements by 1968 away from overtly favoring licensees, which had been a point of concern, away from favoring Japanese firms as opposed to foreign firms,

and away from summary condemnation of licensing restraints and toward more of a rule of reason approach. While the 1968 guidelines said that, from at least an American perspective, many did not think they did that.

The black list of prohibited provisions still was quite long in 1968 and included things that today both the Japanese and others see as much less problematic, including exclusive distribution obligations, charging royalties on goods that don't use the licensed technology, quality obligations regarding the goods, prohibiting the licensee from manufacturing, using or selling competing goods, certain grantbacks, and all of those on the black list were condemned categorically -- we would say per se unlawful -- and were not subjected to an analysis of the effect, if any, on competition.

Now, the exception to that is the geographic restraints and restraints on export prices and output had a sort of a footnote that said they were prohibited only if they were of reasonable scope and if the licensor had registered the patent in the foreign market. This was an attempt at comity and at avoiding a fight over whether Japanese law was consistent with or, in fact, interfered with foreign intellectual

property rights.

Under the '68 guidelines, there was also a white list, it was black and white in those days, and the white list of exempted provisions included limiting the license period, limiting the scope of the license, granting the license for less than the full term of the patent, restricting output of sales or goods, limiting the frequency with which the licensed process may be used, and granting separate licenses to make, use or sell a patented invention.

Frequent criticisms often from U.S. companies and less so but to an extent in those days U.S. Government officials were that the guidelines applied only to international licenses, that they did disfavor non-Japanese licensors, despite the notes to the contrary, and that they had a lack of transparency of analysis, which I guess could be said about our own per se categories as well, and a lack of predictability, and still, again, despite the statements to the contrary in the guidelines, had an apparent favoritism toward the licensee, some call it paternalism.

Still, I would invite you to think of how not so out of step these guidelines were in the long view, if one looks at hundreds of years of history. First of all, the Japanese in just a few short decades, in a

post-war economy that had been devastated and saw the need to rebuild and approve of some depression cartels but not to use the depression cartel mechanism extensively, had adopted a fairly liberal and pro-business, pro-foreign business set of guidelines compared to what one has seen in some other countries that are closed and that are in a developing situation.

Recall that this was roughly contemporaneous with our infamous nine no-no's, and so at least in comparing where Japan was in 1968 with the United States thinking about what is or is not nefarious in technology licensing agreements, they may have been a step or two behind but only.

The JFTC enforcement of the guidelines, contrary to many memories, was rather vigorous in the 1970s, less so during the 1980s, however, and we'll talk about that. The grantbacks were the most common type of clause that was found to violate the AMA.

One note on grantbacks, that started a theme of intellectual property theft or intellectual property acquisition, unfair acquisition as seen by some U.S. companies, in the sense that Japanese companies which had increasingly the ability to improve technologies that they had licensed, if they were not obligated to grant back that technology, U.S. companies often saw

that as problematic and as part of the hollowing out process of the U.S. electronics and auto industries, for example.

The next step, from 1968 to 1989, we lived with the '68 guidelines, and in the interim, the U.S. abandoned the nine no-no's, moving closer to the 21st Century, and in 1989, after a great deal of pressure from Mr. Rill and others, they adopted the 1989 guidelines which reflected important policy shifts, including some real, tangible, textural liberalization of their approach to the problem.

It sought to address the criticisms of nontransparency and uncertainty through a new optional clearance procedure for the submission of proposed transactions. It kept the structure of the black and white list but added a new gray list, which is essentially a rule of reason analysis of the pro-competitive versus the anti-competitive effects on competition of a particular provision.

Many provisions that were on the 1968 black list moved to the gray list. Those include exclusive dealing requirements, in-term prohibitions against dealing in competitive goods or technologies. The black list, however, was still not short. It included resale price maintenance, as it still does. A

post-term prohibition against handling of competing goods or technology, though, was still on the black list under the '89 guidelines. Post-term restraints on the use of technology or the requirement of a royalty after the expiration of a patent was verboten, and the restraints on R&D and exclusive grantbacks were still per se unlawful.

The new gray list, though, showed some daylight and included many provisions that came from the old 1968 black list and some that had not been addressed by the '68 guidelines. The gray list included exclusive dealing, requiring the licensee to distribute through the licensor or its designee, which had been prohibited in the '68 guidelines. The nonexclusive grantbacks, if balanced in substance -- and I certainly never understood what that meant, but I'm sure Mr. Koyanagi will explain it -- but it gave an opportunity to argue that a nonexclusive grantback might not harm competition.

The gray list also included requiring the licensee to use the licensor's trademark, restrictions on the quality of inputs or goods embodying the technology, input tying, royalties based on something other than the patented goods, package licensing and so on.

The white list expanded, so more activities were exempted, per se lawful, if you will, including separate licenses to make, use or sell, time limitations on the license, limitations to part of the technology covered by the patent, field of use restrictions, et cetera, and a long laundry list that I won't read but are in the paper.

The JFTC's enforcement of the 1989 guidelines is hard to determine. As Professor Newberg's paper teaches us, there is likely a lot of administrative guidance or "gosai shido" (phonetic) that took place in connection with a lot of these licensing agreements, and there is no public record ever of such administrative guidance decisions.

There are a few notable public examples, again, from Professor Newberg's paper. The 1990 cease and desist order for bundling of video game software for sale; the 1995 recommended decision against the restraint in license that continued post-term; a 1997 cease and desist order against a trade association that refused to license primary patents to firms seeking to enter the market, which are principally foreign firms; and a 1998 cease and desist order against bundling of two software programs.

The enforcement, as I said earlier, appears to

have decreased in the 1980s in part due to rule changes, but also because of a stronger pro-technology policy, and because Japan was rapidly becoming a net exporter of technology, something many Americans still don't know, but for well over a decade, Japan has been a net exporter of technology, and thus its own economic interest is very much in favor of protecting intellectual property.

In 1999, a new set of guidelines was promulgated by JFTC that replaced the 1989 guidelines. It made small changes, not as dramatic as from the 1968 to the 1989 guidelines, but the same direction was maintained. Mr. Koyanagi is going to address the specific provisions of the 1999 guidelines, so there, I've set him up, have hoisted that on him, and the new 1999 guidelines maintained the white, gray and black list but added what our friend Professor Newberg aptly named the dark gray category, which is a very useful appellation, which is not quite per se unlawful, but you clearly have an extremely high burden of proof to demonstrate that you can get away with one of these.

They include restrictions on licensee R&D, post-term royalties, completely exclusive grantbacks, post-expiration restraints on the use of competing technology or goods. And the 1999 guidelines' most

notable change is a great reduction in the black list. The per se category now is resale price maintenance, direct or indirect, basically controlling the sale prices of the licensee or controlling the resale prices of the licensee's buyer.

Mr. Koyanagi, again, will address those other specific provisions, except for ones I'm going to discuss briefly dealing with Section 21.

The starting point for the discussion of how the antitrust laws in Japan intersect with the IP laws of Japan is what is now Section 21, what was originally Section 23 as AMA was enacted, and that provision reads, "The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act," and some of those in this room will think that sounds somewhat like 35 U.S.C. s.271(d). Again, it is not read as being that comparable.

The evolving view of the limited exemption has focused, as good lawyers would, on the word that is the operative word, and that is when an exercise is legitimate and exempt or when it's illegitimate and thus nonexempt. What is called by some commentators the confirmation theory boils down to the notion that

patent rights are guaranteed rights like all other property rights but are subject to the Antimonopoly Act like all of the property rights, and to some in this room that will sound like some guidelines promulgated by another agency, the U.S. FTC and the DOJ.

The evolving view of the limited exemption also brings into play Section 100 of the AMA that makes it clear that the drafters envisioned the application of the Antimonopoly Act to IP rights at least in some circumstances. It declares and gives power to a court hearing an AMA case to delay that a patent or patent license be revoked and obligates, upon such a direction, the JPO to revoke that patent or the license of that patent.

AMA violations that may be the basis for revocation of a patent or license include violations of 89, which are private or unreasonable restraints of trade, substantial restraints of competition by a trade association, prohibited international agreements under Section 90, and prohibited acts by trade associations.

Conceptually at least, the enforcement of AMA violations against IP rights is also consistent with the Japanese Patent Act's express grant of authority to the JPO to impose compulsory licenses of patents if it's required by the public interest. That's actually

Article 93 of the Patent Act.

And the grant of authority to impose compulsory licenses under the Patent Act appears consistent with Japan's obligations under TRIPS Article 31. These have been seen as a collection of tools but not as a policy direction as to when they should be implemented.

The 1999 guidelines recognize liability for monopolization based on the unilateral refusal to license by a patent owner that is a monopolist in a relevant market, which is one of the first pieces of guidances from JFTC as to when these various tools might be used.

Mr. Koyanagi is going to speak to the specific application of that provision to patent pools, cross-licensing, et cetera.

It remains unclear how these 1999 guidelines about unilateral refusals to license may affect JFTC's enforcement actions, but it would appear to define certain exclusionary conduct using IP rights as illegitimate exercises under Section 21 and thus not exempt from the AMA.

Thank you very much for your kind attention.

MR. KOVACIC: Thank you, Steve.

If we could turn to Mr. Koyanagi to give us a further perspective, as Steve mentioned, on the JFTC's

guidelines for patent and know-how licensing agreements.

MR. KOYANAGI: Thank you very much for your very kind introduction. So, Mr. Harris imposed on me a very big obligation, but I would like to just say a brief explanation.

Today, I would like to introduce Japanese perspective on relationship between IP and antitrust. This slide shows Section 23, now Section 21, of the Antimonopoly Act of Japan. As Mr. Harris mentioned, please keep in mind, in Japan, provisions of the Antimonopoly Act will not apply to an action deemed as an exercise of rights under the patent law or other IP laws, and such action would not constitute conduct in violation of the Antimonopoly Act.

On February 15th, 1989, Japan Federal Trade Commission announced a guideline on the regulation of unfair trade practice concerning patent and know-how licensing agreements. That guideline not only served as a basis for determining if a patent licensing agreement falls under the category of an unfair trade practice, but also as a basis for the examination of the international agreements submitted to the JFTC.

On July 30th, 1999, the JFTC revised the above guidelines. One of the reasons is the fact that since

a number of the cases of the Antimonopoly Act relating to intellectual property rights with respect to conduct other than unfair trade practices has been increasing in recent years, there has been increasing demand for the JFTC to clarify its policy with regard to such acts, and the fact that the relationship between patents and competition law has been clarified by the revision of guidelines and rules in the United States and the EU.

The new guidelines consist of four parts, and the new guidelines mainly describe these four points. Those are a policy on patent licensing agreements under Section 23 of the Antimonopoly Act; the policy on patent and know-how licensing agreements from the standpoint of the Antimonopoly Act, Section 3; the policy on patent and the know-how licensing agreements from the standpoint of unfair trade practice; and the scope of application and the consultation system.

I would like to focus on these two points. This slide shows Section 3 of the Antimonopoly Act. In general, patent licensing agreements include the licensing of patents and the payment of consideration for such licensing. As one of the parties is subject to certain restrictive conditions, such as a restriction of the geographic region, assignment of

improved inventions, based on such agreements, unreasonable restraints of trade do not necessarily become a problem.

However, if, for example, competition in a specified product market or technology market is substantially restricted by the mutual imposition of restrictions, such as restrictions on the sales price of the patented product, on fields of R&D in patent licensing agreements, such restrictions may constitute a violation of the law as unreasonable restraints of trade.

Specifically, in cross-licensing, multiple licensing and patent pools, if by the mutual imposition of restrictions on matters such as the sales price of patent products and on the fields of R&D, there is a substantial restriction of competition in the specified product market or technology market, this constitutes a violation of law as unreasonable restraints of trade.

So, as I mentioned, it is generally believed that in Japan, there are no problems in terms of the Antimonopoly Act with respect to actions that are considered as the exercise of rights under the patent law, such as restriction of geographic region or of technology fields in the patent license agreement. But if, for some example, competition in the specific

product market or technology market is substantially restricted by the exclusion or control of business activity of other business in connection with patent licensing agreements, such restriction will constitute a violation of the law as a private monopoly.

Specifically, for example, if competition is substantially restricted in a specific product market or technology market by the exclusion or control of business activities of other business by action such as patent pools, accumulation of patents, or restrictions under license agreement, such restriction will constitute a violation of law as a private monopoly.

This slide shows newly designated restrictive provisions as white ones with respect to the approach from the standpoint of unfair trade practices.

This slide shows newly designated restrictive provisions as gray ones with respect to the approach from the standpoint of unfair trade practices.

The next two slides show restrictive provisions re-evaluated with respect to interference with fair competition. Black provisions under former guidelines included those having a certain degree of breadth with respect to the degree of interference with fair competition, but in transactions with restrictive conditions in which nonprice restrictions are the

problem under the guidelines, generally interference with fair competition is determined on an individual basis.

Therefore, while such provisions have been designated as gray provisions, since no rational grounds for imposing such restrictions are normally recognized and since their effect on competition may be considerable, the following nonprice restrictions are reclassified as restrictive provisions that are highly likely to be illegal dark gray provisions.

This slide shows the latest activities of the JFTC relating to IP and competition policy. So, technology standard is infrastructure in competition, and its importance is increasing in the stream of information technologies development, globalization of economies and pro-patent. Technology standard itself is not problematic; however, some acts relating to technology standard would conflict with competition policy.

The software transaction importance is increasing in business in the stream of development of information technology. There are strong needs to secure fair trade in software markets.

When for hardware manufacturers and application software manufacturers, being provided by an operating

system software manufacturer with technical information relating to the platform functions is necessary for continuing business activities, if the operating system software manufacturer in providing such technical information to hardware manufacturers or application software manufacturers imposes anti-competitive terms or is discriminatory, such restrictions can prevent hardware manufacturers and the software manufacturer from developing product for operating systems software that competes with its operating systems software, in such cases, where there is a risk that fair competition in the product market or technical markets of hardware and applications software will be impeded, such acts correspond to unfair trade practice and may be in violation of the law.

In addition, in cases where the manufacturer of operating system software that has become a de facto standard by imposing the above-described restrictions on hardware manufacturers or application software manufacturers excludes or controls business activities of other operating systems software manufacturers, application software manufacturers and the hardware manufacturers, thereby causing substantial restrictions on competition in the product markets or technical markets of operating system software, hardware and

applications software, this corresponds to a private monopoly and may be in violation of the law.

The JFTC considered the Antimonopoly Act from the viewpoint primarily of unfair trade practices, focusing on those restrictive conditions in software licensing agreements that relate to the exercise of rights under the copyright law and on restrictive acts that can easily become problematic in software trades. It should be noted that in cases where the product or technical markets for operating systems software, hardware or applications software are substantially restricted through the imposition of such restrictions, this may be a problem from the viewpoint of private monopoly.

The JFTC holds research meetings to consider a system relating to a patent in new fields, as well as the operation of such a system and the exercise of rights under it. Main points to be considered are analysis and study of competition policy relating to the granting of business method patents and biotechnology patents and the exercise of such rights.

This slide shows some concrete points at issue. Those are obstruction of competition through wrongful applications; restriction of competition through dependency relationship of gene patents; reach-through

license; refusal of license, accumulation of patents for the purpose of stifling R&D; financial patents; and use of patent pools.

The research committee will make a report by the end of this June. We will have the report in the near future.

Thank you for your attention.

MR. KOVACIC: Thank you very much, again, to both of our presenters for an excellent survey of recent developments in Japan.

As one way to begin, I was wondering if any of our panelists might have a general comment or observation that they would like to offer about the presentation or specific points that they might want to address to begin, if there was something that you might want to add. And if not, one particular focal point, one thing that stands out I think from the recent Japanese experience is the exceptional amount of effort devoted to rethinking the framework of competition policy controls, both research and guideline revisions, and one key item of interest for the policy-making community in the United States are are there particular approaches given this fresh re-assessment of Japanese policy that we might usefully think about considering as models for analysis or concern in the U.S. as we go

through our own re-assessment of the IP antitrust regime in the United States?

In short, and maybe I offer this most for our American discussants and panelists, have you seen developments that stand out that you might say, these are things that the U.S. policy-making community might well consider and focus on in their own evaluation of policy?

MR. NEWBERG: I want to congratulate both presenters. One thing that struck me in reading the interim report of the Study Group on Software and Competition Policy was the extent to which it seemed to be influenced by Microsoft's conduct and a lot of the violations or alleged violations that came up in the U.S. conduct case against Microsoft, and first of all, I wanted to ask Mr. Koyanagi if that was, in fact, the case, if that was one of the things that they were thinking about.

The other thing along the lines of the question that you asked, Bill, I think it's interesting the extent to which the report tries to come up with criteria and sort of the outlines of violations in the area of software licensing. Here are the kinds of things that we're concerned with, specific types of software licensing restraints, and to come up with an

analysis of it. So, I think they are useful.

MR. KOVACIC: Mr. Koyanagi, would you like to respond to Josh's question about the stimulus for evaluating the policy direction?

MR. KOYANAGI: JFTC's report in the (inaudible) is guideline for (inaudible), so I think JFTC's thinking over -- thinking or observation of the report to conduct their business, but the Japanese situation is to more aggressive application of this kind of policy. JFTC would therefore (inaudible) to such issues.

MR. KOVACIC: One thing that I think runs throughout a number of the papers and is addressed some in both Josh's work and in Steve's work focuses on the mechanism for implementing policy and the way in which matters interpreting the relevant regulatory guidance would be applied in Japan.

Do you have predictions about the way in which the specific policy guidance is likely to be applied and elaborated on in an environment in which private rights of action which feature so prominently in U.S. practice, in many ways are driving influences, have less of a role to play in Japan? Do you have thoughts about the extent to which the different mechanisms for enforcement and policy implementation are likely to

affect the way the framework that we've just seen is elaborated over time?

MR. HARRIS: Well, as I mentioned in my paper, the -- there is a recent amendment that allows injunctive -- an injunctive private right of action. There is so far no decisional -- no case law resulting from that, but there are two cases pending at least of which I'm aware.

There is still no private right of action for damages unless the JFTC has already concluded and provided an adverse and final finding of a violation, which is a very large impediment and usually insurmountable impediment to private enforcement.

In my own view, private enforcement is a very important tool, probably not surprising coming from a private practitioner, but from my own view, private enforcement is an important adjunct to government enforcement of the antitrust laws, and especially in light of the, you know, limited resources of JFTC or limited resources of any government authority.

Again, we get into some discussion of cultural differences, however, and the tendency toward consensus and harmonization and conciliation, which anyone who's litigated in Japan, and I have, has had to account for and deal with and drink a lot of green tea and try to

do what is possible, and, of course, attempt to compromise, but it becomes frustrating from the standpoint of those in the West who are used to trying to hash these issues out in an adversarial system and having the decision-maker who at the end of the day is going to make a call of whether it's a strike or a ball.

MR. NEWBERG: Yeah, I think that's broadly consistent with what I would say. The obstacles to private litigation in Japan do seem to be coming down very, very gradually. There are some cracks in the law, but I guess I'll mix metaphors and say the pace is glacial, and the obstacles to litigation are systemic. They are not functions of antitrust law or doctrine. They're functions of the civil litigation system, the supply of lawyers, the supply of judges, the fee structures, et cetera. So, I wouldn't expect an enormous amount of change in the role that private litigation plays in the development of policy in this area.

It does seem to me that there is more activism and more interest and more of an inclination to provide guidance from the JFTC. I think that one can identify that as a trend, and it looks like there's a commitment to that going forward.

MR. KOVACIC: I was wondering if I could ask our colleagues today who have been involved in the formulation of Japanese policies perhaps to comment a bit upon the relationship between the JFTC and government institutions, policy-makers, who have been involved in what we would call the intellectual property community. That is, one of our aims in the hearings we're holding is, in fact, to teach both communities a bit more about what they do in the sense that at least within our own experience, each community perhaps might benefit from a greater understanding of how they work together, and at least an issue posed is whether or not each regime is sufficiently attentive to distinctive policy concerns that arise within its own province.

I was wondering if our specialists from overseas might comment a bit upon the nature of the relationship between the IP and competition policy communities and policy-makers and to what extent, for example, competition policy issues do or do not figure in the thinking or decision-making of the intellectual property policy-making community.

MR. KOYANAGI: I think in Japan, there are no strong relationships between the IP policy-making and competition.

In Japan, my observation is there are no strong relationships between competition policy-making officials and IP policy-making officials. And so I would say one situation in Japan right now, there are intellectual property strategy, the task force under the Prime Minister in Japan, so, right now, so in Japan, through a strong patent policy to proceed. I think also competition policy-making officials don't have a strong position in the Japanese Government right now, so there are -- I don't think strong competition policy -- strong competition policy is not being taken in Japan for two or three years from now, two or three years.

MR. RILL: Just some historic perspective on the last question, I was I'll use the word privileged to serve as one of the core negotiators for the Structural Impediment Initiative talks between the United States and Japan back in what we'll call the first Bush Administration, and I was intrigued that it was one of the rare occasions where the Japanese Government appeared on the other side of the panel representing the multiple agencies of the Japanese Government, including the JFTC, but also the Finance Ministry, the Foreign Ministry and the Ministry for Trade and Industry.

One of our main issues on structural impediments was improvement in patent review, staffing, facilitation, enhancement of quality of review to improve what we perceived to be not full protection of intellectual property rights. Interestingly, the JFTC did not get particularly involved in those aspects of the discussion, and the discussion was mostly handled for the Government of Japan under the rubric of meeting.

Without being particularly pejorative about it, while I think there was some lip service paid to our suggestions, there was not a high priority of the actual involvement of people who were directly involved in intellectual property, nor was there I think any significant result, contrasted I think with some of the results we were able to obtain in strengthening the JFTC as a general matter.

Could I ask a question?

MR. KOVACIC: Absolutely. I should emphasize for all of our panelists, one of the rules of engagement is that you are free to pose interrogatories to your colleagues, so if you --

MR. RILL: I better be careful then for the future.

MR. KOVACIC: There is a mutual deterrence

element to it, as Jim says, but questions you have, you are most free to pose to colleagues.

Please, Jim.

MR. RILL: I was particularly interested in the comments both of Mr. Harris and Mr. Koyanagi, particularly in the latter part of the issues that are being raised with respect to licensing restraints in software, they seem somewhat more aggressive areas of inquiry than perhaps would be reflected in the conclusions and suggestions made in our 1995 guidelines.

I am reminded of the distribution guidelines in Japan, general distribution guidelines in Japan, which are really significantly more aggressive than our enforcement program, quite apart from our defunct guidelines, our enforcement program of vertical restraints, but unfortunately not matched by enforcement policies and enforcement activities in Japan.

I come back to something more basic, though, as I see a great convergence between U.S., European and Japanese intellectual property and antitrust interface. Let me ask either Steve or Mr. Koyanagi, is there any case you know of in Japan, since there are cases you both put on the table, in which the JFTC has condemned,

attacked, a unilateral refusal to license by a patentee, unilateral, not a trade association case, but a unilateral refusal to license by a patentee? I'm not aware of one, and I was just curious whether you might be able to comment on that.

MR. KOYANAGI: I think that there are no cases on that refusal policy.

MR. RILL: Thank you.

MR. HARRIS: Part of the problem, Jim, as you know -- well, not a problem, but part of the problem of you and I understanding this and knowing of it is the administrative guidance system, and many of these issues are handled through that process that is not public, that has served Japan for centuries and resolves most of these issues. So, whether or not JFTC has raised it, I would not be surprised at all if it may have been raised in administrative guidance, especially given the outlook set forth in the guidelines.

MR. RILL: But as I understand it, I think it's phrased even at the level of a warning, that there would be some --

MR. HARRIS: No. Of course, warnings are very rare, too. Any public expression is very rare through the administrative guidance system, so I don't know the

percentage, maybe Professor Newberg does, but a huge percentage of issues raised by JFTC are resolved through either informal consultation, which is even one step below the administrative guidance, or through the administrative guidance, both of which are nonpublic.

MR. RILL: My point is simply that there is a convergence here I think between the U.S. and EU and Japanese, basic principles, that one of the basic principles, of course, is that the unilateral holder of a patent has a right to exploit that patent and to refuse to deal, and I don't see Japan deviating from that basic principle.

MR. HARRIS: Well, I see them deviating in terms of where they start and what their initial outlook is, and actually EU, from the standpoint of certainly a duty to deal rather than a right to refuse. The analysis progresses both in the EU and the Japan from a somewhat -- well, from a very different starting point. I think they tend to wind up in the same place.

They are very strongly protective of IP, and whether you start with a duty to deal that's very narrow and has to have a very high burden of proof as an exception to the -- and can force you to deal, it's almost swallowed up by the exception, or vice versa, as we start out with the right to refuse and have a very

narrow category of very unusual circumstances that would present an exception to the right to refuse, I think you get to the same point.

MR. RILL: And a very --

MR. HARRIS: And very strong protection of IP protection, with an exception for the truly extraordinary case.

MR. KOVACIC: Maybe before going to Mr. Kim's question, if I could frame the point of this interchange slightly differently. We spent a lot of time yesterday in talking about the European regime focusing on the obligation to deal and the extent to which, as we put it yesterday, a mere refusal to extend a license might be actionable under the European Union competition regime.

If I could pose the question this way, that is, suppose you are advising a business manager in the United States, Europe and Japan, and the question on the table from the manager is, what risk do I face and what complications do I confront if I decide with a position of dominance, let's assume it's somehow defined a dominant enterprise, simply refusing to extend the license to someone who arguably can claim that without the license, they cannot compete with me in a market?

Taking those three jurisdictions, where do you feel the most nervous about a refusal to license, where do you feel the greatest comfort, and how would you, as we say in the academic world, how would you explain your answer?

MR. NEWBERG: Well, I think in the United States, it's still the law, and it's recently re-affirmed, that a unilateral refusal to license intellectual property is not an antitrust violation.

I guess in terms of nervousness, in advising a client, I would say there's not an enormous amount of basis for nervousness on the issue of unilateral refusal to license, even if you have a dominant position in the United States; some basis for nervousness, albeit not enormous because of the lack of private enforcement and the lack of case examples that Jim Rill pointed out; and perhaps slightly more of a basis for nervousness in the EU, because you have both doctrinal basis for going after a unilateral refusal to license as a violation, and you also have the other policy concerns that are built into the EU competition enforcement structure.

MR. HARRIS: I would agree with where the Professor comes out. I think the market integration aspect or policy directive undergirding the agency

treatment and certainly Article 82, you know, informs decisions like the Ostrabrauner (phonetic) decision, the McGill decision, and you have, therefore, in the EU a long and growing case law. In fact, there's a new case out at the end of May and another one, the Telegraph case, that is similar and follows those decisions that, again, starts from the position of a duty to deal and whether there's an exception.

I personally would dust off my old essential facilities cases if the hypothetical client that you described walked into my office and had those three jurisdictions in mind, because despite the distaste of many for that doctrine, including Mr. Lipsky, who's written an article on it, written an article on his distaste and why we should all have a distaste for the policy, it exists in law, and that analysis is still good law in the United States in my view and generally reflects the analysis and the elements of that analysis in the EU.

And again, I'm not in the room in JFTC in which the administrative guidance is given, but I have talked to a number of the enforcers in JFTC and Japanese academics, and I think that's generally the analysis, that look, it's an attempt to balance two very important public goods, which are intellectual

property, which is in essence to incentivise innovation, and competition, and as I call them in my paper, those are the twin engines of progress. When one is way out of balance with the other and when there's an intellectual property right that is blocking a high degree of social good that can be driven by competition in a market, you're going to have, in essence, a decision for the good of public welfare that is in exceptional cases only, as they said in McGill, to require a license.

Those cases are very rare and I think will remain very rare, but I think they exist, and the proper policy is to undertake that analysis, not to shy away from it simply because those cases are exceptions.

MR. KOVACIC: Jim?

MR. RILL: I don't disagree with much of what Steve said. I think that a rigid application of whatever he perceives as the essential facilities doctrine in making a conclusion even as to Europe would be quite conservative, possibly overly conservative. I don't disagree with Josh or Steve -- with Josh in their ranking. I think the question presupposes a level of anxiety, however, on the part of the counselor that may be somewhat unduly given to trepidation.

I think that first of all, even Europe wouldn't

go so far as to say that the application of the essential facilities doctrine, even the Commission wouldn't go that far, and I was taken yesterday by the debate, the rather extended debate among those who have actually been involved in the cases, particularly Ian Forrester, who represented the Commission in the McGill case, as I recall, emphasizing how narrow the approach at the Commission was in McGill and how little intellectual there was to the intellectual property being claimed in McGill.

I'm not suggesting that's a good standard, but what Ian was saying was by looking at those cases, one will over-emphasize differences between Europe and the United States, those cases -- and IMS, of course, is in the courts now. So, I think I'd probably take a tranquilizer and be a little bit less nervous than you are.

MR. HARRIS: I agree. I think you should tell the clients to take a tranquilizer. These are exceptionally rare cases. I had the great pleasure of working with Ian Forrester for NDC, and actually he represented NDC on the appeal in the Commission versus Legal Services, and but I did the argument for NDC at the EC level in that case, and they are such exceptionally rare cases.

One of the points is you have to work very hard to convince the Commission, and you should, that you have a very exceptional case and that this fits that. I mean, they spoke to everyone in the industry. They spoke to everyone in the industries in other countries. They basically had to be persuaded.

I also think one point that Ian makes is right. It cannot be discussed in EC decisions, and this is an interesting distinction that drives some of these decisions, and that is the extent to which the intellectual property is valid or valuable. In our court system, of course, the same judge can determine the validity -- and often in a Walker Process or a Handgards circumstance does -- determine the validity or invalidity of a patent at the same time or in the same case that he or she is determining whether or not there's been a violation of antitrust laws.

Because the validity of IP rights in the EC is strictly a national concern, both the EC and the EC courts in Luxembourg have to defer to the courts. So, when that case started, the German courts were saying this is a valid right. The German Court of Appeals has now said it is an invalid right in the IMS case. So, the point of departure for both the Commission and the courts in Luxembourg is very different depending on how

the national courts view the IP right.

MR. KOLASKY: If I can follow up on that, after the discussion yesterday morning, I had occasion to have lunch with Dr. Mehta from the EC, and he had an impressive observation, which is that one needs to look at what happened after the decision in McGill, and what he pointed out is that within a matter of a couple of years, McGill was not in business.

MR. HARRIS: It was less than a couple of years.

MR. KOLASKY: Yeah, and the point he was making, of course, is that the problem with compulsory licensing under even an essential facilities doctrine approach is that that turns it into a public good, and it's then very hard for anyone to make any money. So, I'm sort of curious, though, we focused on the EU in this discussion, but turning back to Japan, I would be very interested in getting Mr. Koyanagi's comments following up on what Steve Harris was saying about the administrative guidance system in Japan, and that is, if someone were to come to the JFTC and make an argument along these lines that a copyright or a patent was essential, access to that was essential for a company to keep in the market, under what circumstances, if any, would you give administrative

guidance requiring the patent or copyright holder to license it?

MR. KOYANAGI: Generally speaking, in the case of intellectual property, I think essential facilities is not applicable, because in some -- in some technology, it is a circumvent technology situation. So, however, in the -- operation system software have a function, and it's -- have a very strong network effect. So, in that case, it is -- might be -- it might be applicable to that essential facility, but generally speaking, in the intellectual property case, there are no applications of the essential facilities in Japan.

MR. KOVACIC: Mr. Kim, you have patiently waited throughout this sidebar discussion. Please.

MR. KIM: Thank you. I'd like to make one comment regarding the categorization between JFTC's 1999 guidelines. I think there are very sophisticated categorizations which are white, black, gray or other colors. So, recalling my experiences in KFTC, I found sometimes that some provisions were too sophisticated to be applicable in actual cases.

Since the antitrust agencies are facing very different circumstances according to cases, I wonder whether these sophisticated categorizations did

actually work when JFTC reviewed the actual cases.

Thank you.

MR. KOVACIC: Would anyone like to comment on that interesting question? I think an issue for all of us in having guidelines, when you have classification schemes with different criteria, nominal criteria is, of course, how well do they apply in practice and do the nominal classification schemes provide useful guidance in predicting what the institution will do in practice, and, you know, perhaps experience with the guidelines is not rich enough to permit an observation, but do any of our colleagues have thoughts about how the set of presumptions that are built into that scheme -- and, of course, in the academic world, thank God for gray, if not different shades, but always gray, but how do -- do any of the panelists have observations about how the classification scheme and the level of scrutiny associated with each, in fact, is operating in Japan?

MR. HARRIS: Just personally, I would hate to go back to the time even before 1968 when there were no guidelines, and I understand Mr. Kim's question, there are often clauses which are hard to pigeonhole, hard to decide whether they are gray or dark gray. It's hard to know whether a gray clause, whether your, you know,

back of the envelope -- the effects on competition analysis is the same the JFTC would come down with, but in the usual case of a license that you're looking at, at least in my practice, one is not going to contact JFTC, one is not going to initiate informal consultation except in a major transaction, and so I find them very useful guidelines in terms of sort of the third rail, the truly dangerous clauses that one wants to avoid.

Then again, one has to use one's own sense, and it's probably culturally flawed, but one's own sense of how the effect on competition analysis will go forward in terms of the gray categories, and I think also counseling with Japanese practitioners on current outlook of the JFTC, and again, the large transaction informal guidance itself is the proper approach, but I would have a hard time advising my clients without the guidelines.

MR. NEWBERG: Yeah, I think that, coming back to points that were made earlier, the '99 guidelines are still very new, so there just hasn't been an enormous amount of experience with them, and also you have this structure where the overwhelming majority of contacts with the agency are informal and undocumented. So, you know, we don't know to what extent these

categories are meaningful in those informal interactions, because they're not recorded.

I do think, though, that the 1999 guidelines, you know, announced very decisively, continuing and expanding on the 1989 guidelines, that there's a broader and broader area of restraints for which the JFTC is open to argument, to argument about competitive effects, and I do think that that's profoundly important.

In the case of the dark gray category, that is a way of saying, well, if you want to come in and make an argument, you have to have -- you have to have a lot more to say, you know, to justify this restraint, but the basic principle is a larger and larger area of licensing conduct falls into this category where the agency is open to a searching debate, when anti-competitive and pro-competitive effects.

MR. KOVACIC: I just conclude this segment by saying that in fairness to our Japanese colleagues that if someone were to force us under oath to explain when a quick look is quick, I would not relish that opportunity, but it is interesting to contemplate how the different institutions have attempted to signal, at least in a rough way, enforcement intentions and the methodologies that they've used to do that and the role

that -- transparent administrative guidance plays a crucial role in transmitting the norms that surround the operation of those standards.

We would like to turn now to a Australia, Korea and Taiwan, and for this segment, to give us an overview of Australian experience and licensing arrangements, we're going to turn to a reprise performance by Henry Ergas, who again made a wonderful contribution to yesterday's session and is going to give us an overview of the Australian experience.

MR. ERGAS: Thank you very much, and again, it's a pleasure to participate in these hearings.

What I want to do is talk briefly about the relationship between competition laws and the intellectual property laws, and in particular focus on some proposed changes to the treatment of intellectual property in our competition law, the main competition law in Australia being the Trade Practices Act of 1974, and I then want to say a few words about the implications of the reforms that are currently proposed to the Trade Practices Act.

I should say by way of preface that a written paper, rather lengthy written paper, is available I believe on the website of the FTC, and I won't even attempt to summarize it at this point but merely

highlight a few issues that seem of greatest relevance to the subjects being dealt with this morning.

Let me start by setting out the relationship between the intellectual property rights established by our intellectual property statutes and the competition laws in Australia. A distinctive feature of our competition act, i.e., the Trade Practices Act, is that it contains a section which has the effect of exempting from certain provisions of the Act conditions imposed in licenses and assignments insofar as those conditions relate to the subject matter of an intellectual property right.

The provision at issue, which is Section 51(3) of the Act, exempts conditions of licenses and assignments from the operation of important sections of the Act, and the sections that are exempted are Section 45, which is our horizontal agreements section and which includes section 45A, which is the per se prohibition on horizontal agreements that affect price.

Also exempted is Section 47, which is the section that deals with vertical relationships generally and in particular with exclusive arrangements. There is finally an exemption provided in respect of the provisions of Section 50, and Section 50 is the section of the Act which deals broadly with

the acquisition or transfer of assets, so it's the merger provision of the Act.

The sections that are not exempted under Section 51(3) are, importantly, Section 46 of the Act and Section 48 of the Act. The most significant of those in practice is Section 46 of the Act, which is our unilateral exercise of market power provision, roughly equivalent to a monopolization provision.

Under Section 46 of the Act, i.e., the unilateral exercise of market power provision, there have been a number of cases which involve material that was covered by intellectual property. In essence, one can say that the mere fact that the conduct at issue in a Section 46 case refers to or arises in relation to material that is the subject of an intellectual property right in no way exempts that conduct from the effect of the section, and in particular, if I go to the question which was raised slightly earlier in this panel, if use is made of intellectual property in one market through, for example, unilateral refusal to license that property, so as to restrict competition in another market, then there is at least a risk that the firm would face that it would be exposed to provisions under Section 46 of the Act.

Putting aside Section 46 and the per se retail

price maintenance provision, though, the main other provisions of the Act insofar as the Act deals with anti-competitive conduct, the other major areas of the Act are exempted by the effect of Section 51(3).

Looked at that way, Section 51(3) would appear to be a very broad exemption, indeed, but it is safe to say that there is considerable ambiguity as to the precise scope of Section 51(3) because of the rather poor drafting of the section. Nonetheless, it does at least contain the potential to have the effect of exempting many possibly anti-competitive forms of conduct from the reach of the Act.

Reflecting this, there have been two reviews of Section 51(3) in recent years. The first of those was a review by the National Competition Council, which is a statutory body that is mainly responsible for the administration of the Competition Principles Agreement between the Commonwealth Government, our Federal Government, and the states. There was a review by the National Competition Council which recommended that Section 51(3) be retained but substantially narrowed.

There was considerable controversy about the recommendations of the National Competition Council review, and so a second review was charged with responsibility for re-assessing the desirability of

Section 51(3). This is the Intellectual Property and Competition Review Committee, which was an independent committee established by the Attorney General and by the Minister for Industry, Science and Resources, with the responsibility of reviewing the intellectual property statutes and the Trade Practices Act insofar as those affected the or touched on the interaction between intellectual property and the overall Commonwealth goal of promotion of competition.

That was a committee that I chaired, and the Intellectual Property and Competition Review Committee recommended broadly as follows with regards to Section 51(3). The committee emphasized that in its view, it was essential that firms be able to enter into efficient contracts regarding intellectual property rights, and as a result, the exercise of intellectual property rights ought not to be subject to unnecessary or onerous obligations except where those obligations had a clear justification in terms of the public interest.

At the same time, the committee recognized that intellectual property rights shall not be capable of being used to exceed the market power that they directly conferred. As a result, the committee recommended a substantial reframing of the current

provision, i.e., of Section 51(3). In essence, that reframing involves the following, which is that conditions in license and assignments under intellectual property statutes should be fully exposed to the provisions of the Act insofar as those conditions would give rise to a substantial lessening of competition. The Government has since announced that it has accepted that recommendation, and legislation is to be tabled in Parliament amending the Trade Practices Act in the light of that recommendation.

What is the effect of that recommendation and of the proposed reform? As I said, the reframing of Section 51(3) will make conditions in licenses and assignments subject to the provisions of the Act insofar as those conditions have the effect or likely effect of substantially lessening competition. What that means in practice is that conditions in licenses and assignments will become subject to the provisions of the Act, except where the breach that they would otherwise cause is merely a per se breach.

So, a condition in a license or assignment would not fall foul of the Act if it merely breached a per se prohibition but where that breach did not entail or would not give rise to or be likely to give rise to

a substantial lessening of competition.

The associated recommendation to that was that the ACCC, the main enforcement agency, which is the Australian Competition and Consumer Commission, be required to issue guidelines as to how it would assess the substantial lessening of competition test in respect of conditions in licenses and assignments, and the effect of issuing those guidelines will be to create a reasonable expectation amongst parties that those guidelines will be adhered to, and hence, to create a basis in administrative law should the ACCC in practice depart from those guidelines in its consideration of conditions in licenses or assignments.

The impact of this change will be to -- and here there is contrast to what we were told moments ago about Japan -- to bring a very substantial range of conditions that are ordinarily imposed in licenses and assignments in Australia out of a white box and into a gray box, and so the effect will be that, whereas previously we have had a rather narrow black box and a very large white box, we will converge with Japan and possibly, I would expect, other jurisdictions in having an extremely large gray area.

It's worth saying that whilst having gray areas may connote uncertainty among parties, and hence, act

as an impediment to efficient commercial operation, our Act is distinctive -- well, New Zealand mirrors this provision -- but our Act has the feature that parties who believe that they are entering into an agreement for interconduct that may be in breach of the Act because of its competition effects can nonetheless seek authorization of that conduct where the authorization then requires the parties to establish that there is a public interest in the conduct that outweighs any competitive detriment that the conduct may give rise to.

Put simply, our Act operates through a shifting onus of proof where in assessing whether conduct is in breach of the competition provisions, i.e., gives rise to or is likely to give rise to a substantial lessening of competition, the enforcement agency bears the onus of demonstrating that the conduct will indeed reduce competition.

However, our Act recognizes that there may be a trade-off between competition and efficiency, and hence, then allows authorization of that conduct insofar as that conduct would be more generally desirable, so desirable, indeed, as to outweigh the competitive detriment.

However, to secure that authorization, it is

then the party at issue that bears the onus of demonstrating that the efficiencies that would be obtained, i.e., the gains or benefits to the community, outweigh the detriment.

It's worth saying in conclusion that by this change, we are moving towards a situation where the mere fact that conduct involves the intellectual property statutes will not exempt it from any of the Act's provisions insofar as that conduct would have the effect or likely effect of substantially lessening competition.

It's worth noting that the committee I chaired made a wide range of other recommendations that are intended to give greater effect to this broad reform, and those other recommendations go importantly to changes in the intellectual property statutes themselves, and the bulk of those recommendations have been accepted by the Commonwealth Government. Some have already given rise to amending legislation; others are expected to do so reasonably soon.

The ACCC, for its part, is currently developing or at least beginning the preparatory work for the guidelines that I mentioned a moment ago. Importantly, those guidelines will cover the types of questions which I was very pleased to learn our colleagues in

Japan as well as elsewhere are now grappling with about software licenses, in particular.

We recognize at the same time that anti-competitive conduct may increase efficiency, and hence, every provision will be made to ensure that where conduct, though anti-competitive, has public benefits that outweigh the anti-competitive detriments, that that conduct will be authorized in a timely and cost-effective way.

Thank you.

MR. KOVACIC: Thank you, Henry.

We would like now to turn to Korea, and Mr. Kim will give us a tour of the recent Korean experience.

MR. KIM: Thank you. I was asked to explain about the Korean competition policy and intellectual property rights. I'd like to use this handout that is here instead of seeing the slides in front from the screen.

In order to introduce the Korea Fair Trade Commission laws and regulations, I will briefly explain about fair trade laws and regulations of Korea with regard to IPR, KFTC's 2000 guidelines on intellectual property rights and competition policy and KFTC's 1997 notifications on the types of and criteria for determining unfair business practices in international

contracts.

Then finally I will go briefly through some cases that KFTC deals with in the past, the Korea Coca-Cola case and Proctor & Gamble case.

Since Korea has several law systems that codify the laws or regulations which are made based on the laws of (inaudible) law, therefore, the fair trade laws and regulations which are made based on the law is a very important source of law with regard to relationship between the competition policy and IPR.

There are two types of regulations and laws that can be applied to the case with regard to IPR. The general provisions that can be applied not only to the IPR-related cases but also to non-IPR-related cases. These are Article 3-2 of the Monopoly Regulation in the Fair Trade Act, and Article 7, which is about M&A, Article 19, restrictions on cartel, Article 23, which is about unfair business practices, and finally Article 29, which is about price fixing. These general articles are some very general provisions that we can find in most laws and regulations in most countries.

The second type of provisions are directly related to the IPR. The paragraph 1 of Article 32 of the Act forbids companies to enter into international

contracts which provides for cartels, price fixing or unfair business practices, and paragraph 2 of Article 32 says KFTC can allow the types of and criteria for determining unfair business practices, cartel or price fixing.

And Article 33 says that an enterprise may request the KFTC to review the international contract. And Article 59 defines directly the relationship between competition policy and IPR. I think this article is very similar to a section of Japanese AMA: The Article 59 says this Act shall not apply to any acts which are deemed an exercise of rights under the Copyright Act, Patent Act, Utility Model Act, the Design Act and the Trademark Act, and the KFTC's interpretation about this article is that only regulatory use of the right is exempt from the application of the Act, and the courts of Korea also support KFTC's interpretation.

But there are strong arguments within the KFTC or in economic arena that this provision should be deleted or revised to make sure that only the proper (inaudible) use is exempt from the application of the Fair Trade Act.

And Article 29-(2) is about the resale price fixing. It says that no enterprises shall engage in

resale price maintenance, and the remaining part, starting from "provided" to the end, should be struck now. It was included by mistake. And paragraph 2 says that the paragraph 1 shall not be applied to publications and some commodities.

And Article 43 of the enforcement decree of the act says that some publications defined in the Copyright Act would be exempted, would be exempt from the application of the Act.

And the other important regulations regarding the relationship between IPR and competition policy to IPR, KFTC 1997 guidelines and KFTC 1997 notifications. I will briefly go through these two guidelines or notifications.

The scope of application of KFTC's 2000 guidelines is licensing, cross-licensing, pooling agreement -- arrangement and acquisition of IPR. With regard to the general principle of the regulation, the guideline says that the rule of reason will be applied in not only the contractual arrangements but also in competition in a related market, the duration of the arrangement, market structure and other relevant factors will be considered.

I think this general principle is relatively different from the 1995 Antitrust Guidelines for the

licensing of IPR issued by DOJ and the FTC, because it's my understanding there are some clauses in the 1995 antitrust guidelines that in some cases a per se rule will be applied, but this guideline of KFTC says that the rule of reason analysis will be applied in most cases.

And the guideline illustrates eight types of unfair business practices which are tying arrangements of raw materials, parts, manufacturing equipment, forcing licensee to use the trademarks or designs that are identified by the licensor, restrictions on exporting territories or restrictions on sales territories, restrictions on customers, restrictions on transaction quantities, restrictions on transaction methods and designation of sales and resale prices, and finally restrictions on the use of competing products, restrictions on the use of IPR after its expiration, charging royalties on non-licensed products, tying technology, restrictions on R&D, requiring excessive sales promotion expenses and unfair refusal to license.

This final type of unfair business practices is kind of a gathering of various other restraints rather than a single type of restraint.

With regard to cross-licensing and pooling arrangement, business competitors, the guideline says

that Article 19, restrictions about cartel, will be applied, and if you go to the acquisition of IPR, a merger analysis will be applied when the IPR consists of major parts of businesses or when the license of IPR practically is equivalent to acquisition.

And if we talk about other characteristics of the guideline, for each type of unfair business practice, one or two examples of business practices which KFTC does not consider unfair are provided for comparison. Types of unfair business practices are largely similar between the 2000 guidelines and the 1997 notifications that I am going to explain later.

The general principle (inaudible) is the same as (inaudible) rule of reason analysis. One difference between the two guidelines or notification is that the scope of application for the 1997 notification is far more extensive than the notification is for IPR franchise contract, joint R&D agreement, import distribution contract and joint venture agreements.

I will briefly speak about the 1997 notification. Before 1997, a request for the review of international contracts was mandatory. From 1981 to 1996, there were 2,338 requests were made for the review of international contracts. At the end of 1996, the requests for the review was changed into a

voluntary one to lessen the burden on the companies and to promote technology transfer.

Now, before closing the explanation about this notification, there are still criticisms about this Article 32 and Article 33 of the Act and this 1997 notifications, because many people think that these articles and notifications are discriminatory against international contracts, and some people say that the general provisions in the Act can be applied, so there's no need to maintain these articles or notifications.

Considering those criticisms or arguments, KFTC is now reviewing the way to delete the Articles 32 and 33 from the Act and revoke the 1997 notification.

And then I go talk about the cases that KFTC did in the past. I'm afraid that no specifications will deal after the issuance of the 2000 guidelines, so I talk about the Korea Coca-Cola case of 1997. I think Tad is in better position to explain about this case, but with his permission, I'll go explain about this.

The Coca-Cola Corporation signed a merger agreement with Bumyang in 1974. Coca-Cola and Bumyang revised the contract twice and extended the expiration date to June 1st, 1996. In order to reshape the corporation in Korea, Coca-Cola decided to set up the

Serabul Company, which would be in charge of manufacturing in Korea, and Coca-Cola also decided to change the existing bottlers to distributing companies. For that purpose, Coca-Cola proposed that Bumyang accept the changes or else Coca-Cola would terminate the contract on June 1st, 1996.

During the negotiation process, Coca-Cola extended Bumyang's right to manufacture and sell Coca-Cola in Korea until April 1st, 1997. Over dispute as to the price of manufacturing assets that Coca-Cola wanted to buy from Bumyang, Coca-Cola stopped supplying raw materials for Coca-Cola to Bumyang as of April 1st, 1997.

Bumyang filed a complaint with KFTC contesting that Coca-Cola practically promised to extend their contract until the end of 1997. I'll skip the detailed reasons that Bumyang cited.

On August 27th, 1997, KFTC made the decision that Coca-Cola unfairly refused to deal with Bumyang. The KFTC decision was mainly based on the assumption that there was a tacit agreement between Coca-Cola and Bumyang to extend the contract until the end of 1997 and that it was unfair for Coca-Cola to unilaterally refuse to deal considering the 23 years of transactions between Coca-Cola and Bumyang and Bumyang's huge

investment for the transaction and the difficulty to find substitute suppliers for Bumyang.

The Appeals Court affirmed the KFTC's decision, but the Supreme Court revoked the Appeals Court decision and affirmed Coca-Cola's argument based on the reasons that there's no circumstantial evidence of the plan to extend the contract beyond the April 1st, 1997, and there were other ways for Bumyang to utilize its assets, and Coca-Cola was not in an urgent need to buy Bumyang's assets.

I finally talk about the Proctor & Gamble case in 1998. The Proctor & Gamble Korea acquired a portion of Ssangyong Paper Manufacturing Company and filed an M&A report to KFTC.

KFTC defined the relevant market of that merger to be the women's sanitary pad market in Korea. The market was shared by P&G, Yoohan Kimberly and Ssangyong and other minor companies.

KFTC decided that the M&A of X and Y harmed competition based on the reasons that the market share of both amounted to 64 percent, and the market share gap is too big compared to that of Yoohan Kimberly, and the entry barrier was too high in terms of initial investment and technology.

KFTC paid special attention to the volume and

speed of innovation in the pad market. The life cycle of these products tended to be too short for newcomers to constantly keep up with the leader. The numbers of patents that P&G had was over 300, and that of Kimberly Clark, the parent company of Yoohan Kimberly, was over 400.

On May 25, 1998, KFTC approved the M&A with a condition that X should sell Y's equipment and intellectual property, which were 24 trademarks, 12 patents, six utility models, which were directly related to the production of the sanitary pad to third party within one year of finishing the transaction.

These are the presentations that I would make. Before closing my presentation, I'd like to make one additional comment. It is my understanding that DOJ and the FTC have a lot of expertise regarding the relationship between competition policy and IPR, but as you might find out during my presentation, the KFTC does not have so much expertise, while KFTC has not had so much cases regarding these issues, so I hope my presentation won't be seen as kind of trying to teach fish about the sea.

Thank you.

MR. KOVACIC: Thank you very much.

For our final perspective for the experience at

Taiwan, Commissioner Liu, please.

MR. LIU: Ladies and gentlemen, it's a great honor for Taiwan Federal Trade Commission to be invited to attend the Asian Perspective Antitrust and Intellectual Property Issues.

Article 45 of the Taiwan Fair Trade Law provides that no provision of this law should apply to any proper conduct in connection with the exercise of rights pursuant to the provisions of a copyright law, trademark law or patent law. Therefore, the viewpoint regarding intersection of antitrust and intellectual property law of the Taiwan Federal Trade Commission is that any proper -- any proper exercise of the above-mentioned laws will not be considered as a violation of Taiwan's antitrust law.

Now I'm going to focus on an important CT product, joint patent licensing practices case which was in violation of the Taiwan Fair Trade Law. I am looking forward to your comments.

Contents: Respondents, including respondents, industry and the relevant laws of this case, and summary, and the issues, our investigations of this case, and our grounds for disposition.

This case, the respondents are Philips Electronics, a Netherlands corporation, and then two

Japanese corporations, including Sony and Taiyo-Yuden Corporation. And this case is about an information storage media production industry. And the relevant laws of this case is Article 10 and Article 14 of the Taiwan Fair Trade Law.

And the effects, a summary. To facilitate a patent licensing to CD-R producers around the world, the respondents adopted a joint licensing arrangement. Sony and Taiyo Yuden first licensed their patent rights to Philips, and Philips bundled the rights together for licensing to other companies.

The issues of this case are as follows: Whether the joint licensing practices were in violation of provisions of the Fair Trade Law regarding concerted actions, and secondly, price-setting by monopolistic enterprises, and another issue is about joint licensing caused such important trading information as patent terms and contents to be unclear and was in violation of provisions of the Federal Trade Law regarding abuse of market position by a monopolistic enterprise.

During the investigation, we found that there are competition relations among the respondents in terms of patents they owned, and the respondents adopted a joint licensing or so-called patent pool arrangement in which a consensus was reached on

royalties and others.

Regarding royalty, they divided the royalty into three portions. Philips got 60 percent of the royalties; Sony, 25 percent; Taiyo Yuden, 15 percent. And by this joint agreement, Sony and Taiyo Yuden give up their individual licensing right, which forced potential licensees having no opportunity to choose trading partner, but turning to Philips to obtain the Bongo (phonetic) patents.

Furthermore, regarding setting of royalties, we found that respondents possessed overwhelming advantage due to the patent technologies owned by them and the joint licensing practices among them.

The licensing agreement also stipulated royalties to be paid as 3 percent of the net selling price with a minimum of 10 Japanese yen per licensed product, but unfortunately, later on, CD-R prices had fallen substantially at the time, and 10 yen was obviously the larger figure. Hence, royalties was up to at least 20 or 30 percent of the selling prices.

And as to refusal of providing important information, we found that such licensing agreements and others during the process of negotiating patent licensing with its CD-R producers, and during the process of negotiating, Philips, who represented the

three above-mentioned companies, granted nearly 200 patents to an individual firm, and Philips did not provide individual patent licensing offer. Instead, it merely listed the numbers and the names of the patents at issue in the United States and Japan.

And our grounds for disposition: The respondents' agreement apparently affected the market function of supplying and demanding for CD-R patents because of concerted acts restricting market competition, impeding the functioning of the price mechanisms and damaging consumer rights and interests. The Fair Trade Law imposes a relatively strict prohibition on concerted action.

And we also find that the respondents failed to apply to the Federal Trade Commission for an exemption. And the joint licensing agreement among the respondents enabled them to obtain an overwhelming position in the CD-R patent licensing market. Hence, they constitute a monopolistic enterprise under Article 5 of Taiwan Federal Trade Law, Article 5.

And supply and demand in the market had changed. The respondents, who maintained their method of calculating royalties, and failed to effectively respond to changes in supply and demand in the market.

Article 10 of the Taiwan Federal Trade Law

provides that monopolistic enterprises should not abuse their market position by other acts, and while refusing to provide the licensees with important trading information, Philips demanded that the licensees sign the contested licensing agreement and sought payment of royalties.

The agreement also demanded that the licensees withdraw any invalidation actions against the patents at issue. And we found out, relying on its dominant position, Philips obviously compelled the licensees to accept the licensing agreement.

After considering the unlawful acts' impact as well as the respondents' motives for the violation, benefits obtained thereby, and considerable business scales and prominent market standing, the Taiwan Federal Trade Commission imposed administrative fines of NT $8 million on Philips and NT $4 million on Sony and NT $2 million on Taiyo Yuden, and ordered the companies to immediately cease the illegal practices.

In conclusion, I would like to point out that in this case, we did not pay much attention to the question of whether the royalty is too high or not. Instead, we focused on the respondents' abuse of market power.

Thank you.

MR. KOVACIC: Thank you, Commissioner, and we have just heard some very interesting case studies from both Korea and the case study from Taiwan.

We have some time for discussion before we turn to Jim's summary remarks, and again, I'd like to invite the panelists if they would like to pose questions to our principal presenters.

MR. LIPSKY: Okay, I've got a question, Bill. First, I want to introduce the question by making a comment on the subject of large gray areas. I assume everybody here is aware, but some of the comments reminded me that not everybody might be aware, that in the very lengthy development of the U.S. doctrines about the antitrust rules that apply to intellectual property practices and particularly intellectual property licensing restrictions, we had a long period when the Government, with the support of the courts, was successfully enforcing a very rigid approach in the form of numerous per se rules, and these rules were encouraged not only by government prosecution but also by the unique subsidies that the American civil justice system has for the bringing of private antitrust suits.

I'm sure you're familiar with treble damages, mandatory payment of successful plaintiffs' attorneys fees, class action procedures, notice of pleading,

precomputing -- pretrial discovery, I mean the list is quite extensive is the reason why the American trial lawyers are such a powerful influence on our society. That's part of it. So, these doctrines of per se illegality were liberally applied in cases.

For example, a very common pattern is where an intellectual property owner would bring an infringement suit and be greeted with an antitrust counterclaim and also an allegation of misuse, and the successful establishment of an allegation of misuse would completely deprive the intellectual property owner of his opportunity to enforce the intellectual property against anybody, not just the particular licensee or alleged infringer who happened to be a litigant.

So, at precisely the moment where this policy of aggressive prosecution under per se rules reached its peak, I can't resist pointing out that the productivity growth curve for the United States economy took a distinct downward kink, which allowed many Ph.D. theses to be written by economics students about why that was. Anyway, it's been alleged that there might have been a connection. I can't resist that.

In any event, in the early 1980s, of course, the per se approach, which had been somewhat softening, I might add, during the seventies, but in the early

1980s, the per se approach was almost totally abandoned, and in fact, that coincided with a number of other intellectual property reforms; the strengthening of trademark infringement remedies and copyright infringement remedies; the creation of the Federal Circuit and the consolidation of all appellate jurisdictions for patent issues into one court; the Stevenson, Weidler and Bidole Acts (phonetic), which made it much easier for parties who had received government subsidies to exploit intellectual property.

There's just a whole list of things that were done in the 1980s, so that I think it's fair to say that the policy presumptions on which the per se approach had been based were totally reversed in the 1980s, and I think the, you know, the needle has not really moved back too much from then.

There's been a very keen appreciation of the relationship between intellectual property protection, the rate of innovation and the ability of the economy to grow on the one hand and the risk of either vague or overly restrictive antitrust rules, the risk that those rules pose to the process of innovation and indeed the fundamental economic goals of society.

Now, believe it or not, this is all coming down to a fairly simple question, which is as follows:

In the United States, we now recognize I guess what we would refer to as the chilling effect of either vague or excessively harsh antitrust rules, and in the presentations this morning, I was struck, Henry, by your reference to -- I don't think you called it the chilling effect, but I think you did refer to some sensitivity on the part of the Australian process of developing these guidelines and implementing these new policies, that the Government presents itself as willing to consider that and to give authorizations for conduct that may appear to run afoul of the new rules, but the Government will cooperate and the ACCC I assume will cooperate in trying to make sure that behavior that is pro-competitive is safe and is approved.

But my question is an institutional question, which I guess the first question would be to the representatives of the other countries that are represented here, Japan and Taiwan and Korea, is there also a recognition of this potential chilling effect of excessively harsh antitrust rules, the overuse of per se rules, for example, or the inability of private parties who are subject to the rules to determine whether their conduct would be lawful or not?

We often have a similar counseling dilemma as antitrust lawyers here in the United States. The

Federal Trade Commission issues staff advisory opinions, the Department of Justice issues business review letters where parties are uncertain about the legal consequences of their actions, but it's often good to counsel those who are considering getting advice that sometimes the Government has reasons to be conservative in its advice, maybe to worry about the fact that if things don't work out so well later, they might be assigned blame for failing to apply the standard correctly.

So, there is a kind of a conservative tendency, not to mention the fact that once you engage with the Government, there are all kinds of other questions. Perhaps the subject matter of the consultation will not as strictly confined as the private party hopes it will be.

So, question number one is, is there a recognition of the risk of chilling effect from uncertainty and from overuse of per se rules or excessively rigid rules, and finally, the question would be, again, do any of the representatives here of the other countries that are present, who speaks up about the chilling effect? Who is there in the process, in effect, to warn about this possibility?

Is it the competition agency that is

essentially responsible for gauging the risks of chilling pro-competitive or innovative behavior? Is it a representative of the agencies that concern themselves primarily with the intellectual property rights, like our PTO? Is it some other -- is it a private party? Is it the parties who are subject to the regulations?

So, I've talked long enough. Let me put those two questions on the table.

MR. KOVACIC: Do we have any takers for Tad's questions? If you would like to assess the chilling effect of high-powered air conditioning, you are also free to do that, too, but -- Mr. Kim and then Mr. Tada.

MR. KIM: I'd like to make some comment with regard to Tad's questions on some issues. As you might find in the KFTC's 2000 guidelines, that guideline obviously reflects a tendency against harsh treatment for IPRs, but when I talked with my colleagues in Korea during the process of preparing for these hearings, my colleagues in Korea are concerned that over-protecting the IPR might harm the competition, especially in the field of the patent business model. They are really worried about the effect.

And with regard to the second question, I guess that in Korea, the relationship between competition

agency and the patent office is not so close as is -- as it is in Japan, so the warning does not usually come in Korea. Thank you.

MR. KOVACIC: Mr. Tada?

MR. TADA: Yes, about the chilling effect, with respect to rule of reason model, I think the -- there had been those kind of effects in Japan, because we are also a civil law country, and the civil laws or statutory laws are relatively detailed, but the competition law is very vague. So, especially at the private sector, say that they can't understand what is the standard. So, that's why JFTC tries to establish guidelines and publish it and try to make the rules very clear.

And with respect to a per se rule, actually in Japan, I think the clear per se rule is only about the resale price maintenance. Other than that, even though price fixing and cartels we need to distinguish as well, because we don't adopt a per se rule with respect to cartels, and so I -- as I mentioned before, most of the time, the private business section requires the Government to make the rule clear.

MR. KOVACIC: Henry?

MR. ERGAS: In respect of the chilling effect, let me turn to something that was emphasized in the

report of the IP committee, and in particular, the IP committee's report put great emphasis on the special importance of the role of contracts and assignments of licenses and the efficient use of intellectual property, and the committee stressed that whilst contracts, assignments and licenses were of significance to efficiency in the economy generally, they were probably of greater significant to the efficient allocation of resources in respect to intellectual property rights, and the committee's report contains the fairly detailed discussion of why that might be the case.

Without rehearsing that discussion even in part, let me just emphasize one element in it, which is that particularly in Australia, a very significant part of our intellectual property is generated by public or semi-public specialized institutions that in particular are equivalent to your Government labs, which is what we call the CSIRO and its associated system, or the Commonwealth Scientific and Industrial Research Organization, and by their status, these entities which generate a great deal of intellectual property are not in a position to themselves exploit it directly.

They therefore have to rely entirely on contracts and licenses to secure efficient use of that

intellectual property, and imposing impediments that would be unduly onerous on that process of securing those licenses or assignments would significantly diminish the efficiency of the Commonwealth's quite substantial investment in research and development which it makes both through these specialized institutions and through university, and given the growing role of those institutions, as well as of other specialized, privately funded R&D-oriented institutions in the innovation system, we were especially mindful of the need to ensure that they could contract without undue regulatory constraints being imposed on them.

MR. KOVACIC: I wonder if I could pose a question to Professor Jorda. Hearing this constellation of experiences from the Pacific and from Asia most intensively, as someone who's spent a great deal of time participating in discussions about intellectual property regimes, from what you hear about trends in the development of legal standards on the competition policy side, as someone who comes at the issues as an intellectual property scholar, do you have general impressions about what you've heard about the path that the Pacific nations are taking in developing competition policy rules?

MR. JORDA: Indeed I do, yes. We are not --

excuse me, we are not talking about India today, but I was in India recently, and my experience there is perhaps of interest in this very context here and explains why there is such a liberalization with respect to antitrust enforcement, in concordance with the appreciation of the value and importance of intellectual property rights.

When I was in India about ten years ago and I made pro-patent statements, I was practically crucified, as you can imagine, you know. It was a small meeting at the -- WIPO meeting, and in India, very few in attendance, and those who were in attendance were just rapidly anti-patent.

I was there just recently, and I couldn't believe my ears about the about-face that has taken place in India. Under government sponsorship, intellectual property law is now being taught in all institutions, academic institutions. Intellectual property institutes are springing up everywhere. The Chamber of Commerce has a slogan to the effect that patent or perish, et cetera. It's on everybody's lips, a total about-face, and why?

They say now that we have intellectual property to protect, based on such a significant shift in attitudes, and, of course, that has been the history

especially in Taiwan, that's another recent example, and that was mentioned in connection with the developments in India, and there is a relationship between the value of intellectual property in the view of a country and perhaps a liberalization of enforcement and imposition of restrictions on the exercise and exploitation of intellectual property rights.

I was very happy to hear the presentations today, I commend the speakers, they confirm my views, and very positive developments indeed. In fact, so positive that perhaps there isn't much cause for concern or much cause on the part of the Federal Trade Commission, Justice Department, to take drastic steps.

MR. KOVACIC: With that made, I want to make sure we have time for Jim, but I have one question that I have as a result of this discussion which I found absolutely fascinating and following up on your remarks.

Do you think there would be interest on the parts of competition authorities in Asia to have a working group on these intellectual property antitrust issues in the new International Competition Network? Would that be valuable so that there would be a forum for competition authorities to get together to discuss

these issues on a regular basis?

Please.

MR. TADA: I think definitely, I --

MR. KOVACIC: Yes, Mr. Tada.

MR. TADA: -- I think that would be a very helpful thing to do, because as I think Mr. Koyanagi mentioned in his presentation that Japanese, the JFTC convened a study group for patenting in new areas, and one of the members is from JPO, just an observer, but that's a relatively new thing to do.

And also, now I think the intellectual property side also recognizes that competition law is important. For example, recently the Japanese patent bar -- patent attorney examination has changed, and they adopted as a selective subject, which includes antimonopoly law. So now, you know, both sides are getting together. So, it's a very good time to convene those kind of meetings.

MR. KOVACIC: Commissioner?

MR. LIU: I think it's very valuable to have this kind of discussion, and maybe, as you know, we have the Microsoft case in Taiwan, and this is a hot topic, and I think it's maybe appropriate for us to get together to discuss your suggestions and questions. Thank you.

MR. KOVACIC: Mr. Kim, please.

MR. KIM: Okay, I think Mr. Kovacic's suggestion is very good, and I think it would be better if the officials from the patent offices would also join in that international conference. Thank you.

MR. JORDA: And that India could be included.

MR. KOVACIC: They need a competition authority first.

I would like to turn to our final panelist to attempt -- and this is a terribly unfair thing to ask -- to offer a synthesis and views on what we've done in the past day and a half, and the only reason that we would make such an unfair request is that the person who's about to provide it is equal to the task. We wouldn't seek out just anyone to do this.

Indeed, Jim Rill is precisely the right person to do this. You're aware of his career in private practice and his role as a public servant, as the head of the Department of Justice Antitrust Division, but I underscore one other experience of Jim's that you know of quite well, and that is his co-chairmanship of the ICPAC Initiative of the past decade. It's really a testament to the capacity of hearings, such as this one, intellectual discussion, research and analysis, to provide a catalyst for policy development.

Jim's role in that, both in the creation of the formulation of the ICPAC Initiative and the preparation and dissemination of its results has had an influence that greatly merits the tremendous effort that was devoted to that undertaking, and we'd like to turn to Jim to provide some concluding thoughts about our day and a half of international perspectives.

Jim?

MR. RILL: Thank you, Bill and Bill and all of you for the patience for the concluding remarks.

During the last couple of days, I think we've all been given clear evidence of the complexity of the interface between antitrust and intellectual property rights in the global scene, which if nothing else certainly justifies the wisdom and foresight of the Federal Trade Commission and the Department of Justice in conducting these hearings.

It's also evident to me that complexity exists not only among jurisdictions but within each jurisdiction, and as the debate goes forward -- debate in the European sense meaning polite discussion -- goes forward, those complexities and some uncertainties become more evident under a broad rubric of general convergence, and I don't want to lose sight of the fact that that broad rubric of general convergence has been

a theme that has persisted I think throughout all of these hearings and certainly in the past two days, and I think the general convergence comes under a principle that seems to be expressed by speaker after speaker, that antitrust competition policy and intellectual property policy are complementary, can co-exist on reasonably friendly terms and serve a mutual objective of progress and innovation.

I'd like to refer, I think because it sets forth and encapsulates a sound point, a recent statement by Assistant Attorney General Charles James, who said, and I quote, "More than ever before in the creation and dissemination of intellectual property is the engine of driving economic growth and consumer satisfaction. Consequently, as antitrust law addresses the competitive complications of conduct involving intellectual property and as intellectual property addresses the nature and scope of intellectual property rights, we must take care to maintain proper incentives for the innovation and creativity on which our economies depend. A healthy respect for intellectual property rights will promote, not diminish, competition." That's the end of the quote from Charles.

Certainly there is evidence in the last couple

of days of convergence among those jurisdictions which have presented here on that concept of respect for intellectual property rights consistent with respect for properly applied competition law. We've heard it from the United States, we've heard it from the European Union, we've heard it from Japan, we've heard it from Taiwan, we've heard it from Korea, we have heard it throughout. We've heard it from Australia, and just a few moments ago, we heard it from India.

But differences do exist -- otherwise, we wouldn't be having these hearings -- and complexities exist which to some extent produce some threat to the stimulus sought by intellectual property rights, some conflicts, some confusion, and some results which could be viewed as hostile to intellectual property rights in the name of antitrust, and in an international setting, these consequences have effects beyond the boundaries of the particular jurisdiction involved, because as we look across global commerce, we see the licensing, for example, of intellectual property rights not being vulcanized jurisdiction by jurisdiction, but efficiently proceeding on a global platform, which can be interrupted, interfered with, sometimes not without justification of course, on different intellectual property right and antitrust interfaces occurring with

different standards being applied by different countries, and of course, this particular issue, this particular challenge is exacerbated by the fact that we now have -- everybody has a different count -- but in round figures 100 jurisdictions now with some form of antitrust regulation.

Thus, there's I think a widespread call for clarity and convergence expressed yesterday and today of cutting across the lines of private and public sectors, and they evoke, it seems to me, a government response to which the speakers yesterday and today have actually been very sensitive to. For example, even while the U.S. and the EU are so very close, it's not entirely clear based on the debates of yesterday involving Messrs. Forrester, Bennett, John Temple Lange and Director Mehta that there aren't at least differences that are apparent and should be illuminated, discussed and clarified.

The equation of patent rights and market power or lack thereof; refusals to deal in compulsory licensing. We had a discussion of that not only yesterday but again this morning. The definitional murkiness between a U.S. standard of what is a vertical and horizontal licensing arrangement and the EU definition of competitive and noncompetitive or

competitor and noncompetitor licensing arrangements; the entire scope of vertical restraints, the subject of Dr. Ray's presentation yesterday; and possibly the limits to exploitation of IPR.

In other jurisdictions, while the convergence is there, we have at least some of the same dilemmas presented by complexity and lack of clarity. I thought the discussion today of, if you will, the unwritten law of Japan was particularly -- if an unwritten law can be illuminating -- particularly illuminating.

In Australia, we heard yesterday and today about some application of the essential facility doctrine and certain special rules applicable in Australia to special industries.

We heard excellent discussions today of actual cases from Korea, Coca-Cola and Proctor & Gamble, refusals to deal based on prior dealings in Coca-Cola, the Philips case in Taiwan dealing principally with concerted action. The nuances at the edges of and underlying perhaps even the thrust of these cases create enormous issues of interpretation, enormous issues for counseling, enormous issues for international cooperation as to illuminate the interface across these many jurisdictions.

We're talking here about jurisdictions that are

mature, that have developed competition policies and developed intellectual property policies, where there's still some lack of clarity and question as to convergence, even within the central thrust that tends to, I think, accept the values expressed in Charles James' comments that I read.

So, where do we go from here? There is a widespread call from the private sector and expressed with some sympathy in the public sector for more guidelines, and so far as it goes, that's good. The U.S. has the 1995 guidelines; Japan, 1999 guidelines; Korea 2000 guidelines; the EC is now considering a report that might lead to more guidelines under technology transfer block exemption. When Bill Kolasky asked Director Mehta yesterday, are you going to do guidelines, I think he said we are going to do business review, and I think Bill took that as a yes.

Guidelines have been recommended to the EU by the International Chamber of Commerce, by the American Bar Association in its massive report on these hearings, by the American Chamber yesterday in the remarks of the attorney who is active in developing the American Chamber in Brussels' position on antitrust and intellectual property. I think that guidelines then as a result of the testimony we've heard at these hearings

are a salutary development, not to be rigid, not to be locked in stone, but to be developed as progressive, clear work in progress, one.

Two, speeches and articles. I've heard, of course, Director Mehta talk about business review letters, which are a form of sub-guideline, if you will, clarification. With respect to speeches, we've heard numerous references to the nine no-no's, the nine no-no's of 1970. How many people realize that there was no guideline on the nine no-no's, no rule? It was a speech by Bruce Wilson, who was then, with all respect, Deputy Assistant Attorney General sitting in the chair where Bill Kolasky sits now. I'm not suggesting you do this again, Bill, but I recommend to you the learning that can come out of -- I recommend to you, the government representatives -- the learning that can come out of more forthcoming speeches and articles.

Just a couple of examples that I think are -- without denigrating any other examples. Tim Muris' American Bar Association speech in November of last year, and Hew Pates' George Mason article, which either has just been published or is just about to be published, which both constitute comprehensive reviews of the intersection between antitrust and intellectual

property.

I would strongly endorse a recent statement by Bill Kolasky, a speech in London, May 17, suggesting that the U.S./EU working group or a U.S./EU working group comparable to the one currently working on mergers be established to work on the intersection between antitrust and intellectual property. Beyond that, there seems to be considerable justification for other working groups, possibly on a regional basis, possibly on a dual national basis, to discuss and work out and clarify the intellectual property/antitrust intersection, multinational efforts.

Some of my thoughts were anticipated, and I'm delighted to say they were anticipated earlier in this session, when Bill Kolasky suggested and the representatives from Korea, Taiwan, Japan, and by proxy, India, urged that the next tranche of topics of the up and running International Competition Network put on the agenda the discussion of antitrust and intellectual property. The round tables that the ICN's been conducting in the merger area, the advocacy area, I think have stimulated discussion and progress and work that has been very, very helpful.

These round tables have included public sector and private sector in sessions very much like this

session where there's a free exchange of views and a learning process that can't be really equalized or patterned, blueprinted, in much of any other existing forum.

I'd suggest to those who are involved in steering the ICN that one might want to take it in smaller chunks rather than to walk across the entire landscape of intellectual property and antitrust, and I would suggest opening with rather basic topics, like the equation or not of patent or intellectual property rights and market power, and also the status of unilateral refusals to deal in compulsory licensing. I think getting into license restrictions might be more than ICN is ready for as a first cut.

But again, I would endorse the private sector participation as it does in the ICN and point out that the International Chamber of Commerce, the ABA, the U.S. Council for International Business have been very anxious to participate, participation by people who have actually been on these panels.

Other organizations should not be ignored. The OECD has produced very thoughtful reports, some you might say at 30,000 feet. I think of one in this particular area prepared by Carl Shapiro that was published by the OECD that gets into the economic

intellectual correlation between competition policy and intellectual property policy. That type of work is something that the OECD is I think well suited to perform, and its continued performance of that kind of work seems to be very desirable, less practical, less round table oriented than some of the ICN work.

WTO is a little more difficult. There is the TRIPS agreement. It's sort of general. Where WTO goes from there is hard to identify, but WTO does have a lot of members, with a few noticeable absences at the moment, but a lot of members, and I noticed in a recent UNTAD (phonetic) paper, there is a recommendation that WTO's working group on competition and trade undertake a work in this area.

My own personal view, and this really hasn't been discussed at these hearings, my own personal view is that's not so desirable as perhaps a broad ICN approach, together with the OECD higher level view.

I think the stimulus for further work and creativity generated by these hearings has been absolutely for my purposes illuminating and truly superb, and I want to also express only personal gratitude for the people who have traveled so far to participate in these discussions, because I do think they form the groundwork for truly useful international

cooperation and clarity in this area, which is obviously of enormously expanding importance to business and legal and governmental communities.

Now, that's what I got out of it today and yesterday. Thank you.

MR. KOVACIC: Thank you, Jim, and for all of our panelists, a well-deserved round of applause. Thank you all.

(Applause.)

MR. KOVACIC: Let me express one other set of things. I'm not only grateful to the senior managers at the Division and the Commission, folks like Bill Cohen, Susan DeSanti and Bob Potter, who have thrown themselves into this project so actively and thoughtfully, but also the professional staff of the agencies who do the extraordinary legwork that makes this possible, and most notably Gail Levine and Robin Moore from the FTC, but also Hillary Greene, Matthew Bye, Mike Barnett, Justin Brown and Angela Wilson, and from the Division, and forgive me if I haven't caught anyone, Frances Marshall, Carolyn Galbreath and Katie Leicht, all of whom, again, did extraordinary work putting this together.

The reason it's so productive and useful is that they did a wonderful job. So, I want to thank

them.

Bill, do you have anything?

MR. KOLASKY: I would both echo Bill's thanks to our panelists, who I thought were absolutely terrific and made a real contribution, and also to the staffs of both the FTC and the Division, who really have done a wonderful job putting these hearings together. So, thank you.

MR. KOVACIC: Thank you all again for coming.

(Whereupon, at 12:08 p.m., the hearing was concluded.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P022101

CASE TITLE: COMPETITION/IP WORKSHOP, PART II

DATE: MAY 23, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 5/28/02

SUSANNE BERGLING, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE