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INTERNATIONAL ANTITRUST

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

ISSUES RELATING TO INTERNATIONAL ANTITRUST COOPERATION AND ENFORCEMENT, INCLUDING POSITIVE COMITY AGREEMENTS, THE FLAT GLASS INDUSTRY, AND PROBLEMS WITH THE JAPANESE MARKET

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INTERNATIONAL ANTITRUST

TUESDAY, MAY 4, 1999

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS,
AND COMPETITION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine (chairman of the subcommittee) presiding.

Also present: Senators Kohl and Specter.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Good morning. I apologize for starting half an hour late. As you know, the Senate has been voting on the Kosovo resolution.

Let me welcome all of you again to the Antitrust, Business Rights, and Competition Subcommittee. Today's hearing is the third in a series of our subcommittee's antitrust oversight hearings. At each of our oversight hearings, we have spent some time on international antitrust enforcement, and today, we are actually going to focus on that particular issue, which we think is a vitally important issue.

Senator Kohl and I have worked closely on this issue with both of the antitrust enforcement agencies, and we are happy to have with us back again Joel Klein. Joel, thank you very much for joining us. Joel Klein, of course, is of the Antitrust Division, and Robert Pitofsky of the Federal Trade Commission. We welcome both of you here today.

As noted at last October's hearing on this subject, international antitrust enforcement is becoming increasingly important. Expansion of global trade, the increasing impact of the Internet, and the more rapid cross-border flows of capital and resources are fundamentally reshaping the way American companies operate today. More and more business is conducted in the international marketplace, which means that more and more often, American companies find themselves involved in legal controversies in foreign jurisdictions.

Unfortunately, many foreign companies do not have the same commitment to free and open markets that we in the United States do. Some of these nations do not have strong antitrust laws to protect competition, and even among those countries that do, enforcement is often less vigorous than we would like. As a result, Amer-

ican businesses are often faced with unfair anticompetitive actions by foreign competitors in these overseas markets.

In order to address these concerns, U.S. agencies have entered into a number of agreements designed to increase cooperation among international antitrust authorities. As many of you know from our previous hearings on this issue, this subcommittee has been troubled by the implementation of these positive comity agreements. Enforcement by foreign antitrust authorities has sometimes not met the high standards set by our own agencies, leaving American businesses to suffer the consequences of unfair and anticompetitive business practices.

Despite these difficulties, I am happy to report that we have been seeing improvement in a number of instances. Two of the witnesses at our last hearing, representatives of Marathon Oil and representatives of the SABRE Group, have seen significant progress in the investigation of their respective complaints. Senator Kohl and I have been working closely with Mr. Klein, Mr. Pitofsky, and with their colleagues in the European Commission and both matters are proceeding at a much better pace. We will continue to monitor and work on these issues and we anticipate further progress in the months ahead.

While we seem to be making good progress with our colleagues in Europe, serious problems still remain in Japan. On our second panel today, we will hear from representatives of three companies that have been having tremendous difficulty in the Japanese market. Despite a great deal of work by this subcommittee and by the American enforcement agencies, we have seen virtually no progress on this issue. Accordingly, at today's hearing, we will focus on antitrust problems in the Japanese market.

Before I turn to Senator Kohl, let me address one additional point. The Justice Department has been in discussions with its counterparts in Japan regarding a positive comity agreement. This agreement, as I understand it, is similar in substance to some of the earlier antitrust cooperative agreements we have signed with our colleagues in the European Community.

On balance, I believe positive comity agreements are generally a good thing. Based on our experience, it seems that they help to diffuse some of the tensions that sometimes arise in the course of antitrust investigations involving companies from different countries. I think the jury is still out on how much they help, but they usually seem to provide some benefits.

However, in the case of Japan, I think we must proceed very cautiously. We have signed a number of agreements in the past with Japan and have seen these agreements ignored repeatedly and the interests of American companies violated. Senator Kohl and I, along with 24 other U.S. Senators, sent a letter last week to the President making our position clear. In the current environment, given the continual failure of the Japanese government to honor past agreements, we do not think it appropriate to sign a positive comity agreement.

I understand, however, that Mr. Klein will endorse a different position today, which we certainly respect, and that the administration is planning to enter into this positive comity agreement. I believe there were discussions about it yesterday. I think Mr. Klein

and Mr. Pitofsky will have a long, difficult road to travel in their efforts to gain some cooperation from the Japanese, and we certainly wish them luck.

Therefore, I do not believe that this is the best way to proceed. Instead, I think the Justice Department should strongly consider the extraterritorial enforcement of our antitrust laws in order to prevent Japanese companies from violating the rights of American companies.

Let me emphasize again, however, this subcommittee has a great deal of faith in both of our witnesses today and we will support their efforts to implement any agreement that is reached. In the meantime, we will continue with our own efforts to protect the legitimate business interests of American companies in Japan.

Let me at this point turn to the ranking minority member of this subcommittee and someone who I have enjoyed working with for the last few years, and that is Senator Kohl. Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman, not only for holding this hearing on international antitrust enforcement but for doing so today, as Prime Minister Obuchi of Japan, a country whose markets are most decidedly closed, visits the President. It is a good time to assess competition in the international marketplace and determine whether our trading partners have a commitment to free markets. The truth is that we are doing fine, but our foreign counterparts are not. Let me explain.

First, the good news. Our laws promote competition, our judicial process is open, and our enforcement authorities, led by Mr. Pitofsky and Mr. Klein, make sure that the system works well.

Indeed, after a slow start, it is becoming clear that our most important positive comity agreement, with the European Union, is beginning to pay off. Although it has taken some time, the EU has now acted on the first ever positive comity request from the SABRE group, and we have also seen some progress in the European investigation of the Marathon Oil matter. Just last week, the United States signed a positive comity agreement with Australia, which will help our two countries work together on antitrust violations.

But there is also bad news, especially from countries that have failed to open their markets. For example, after decades of trying to open the Japanese markets to paper, flat glass, and rice, and after we have signed several bilateral treaties to do just this, American companies are still frozen out of the Japanese market. Although the Japanese say all the right things and sign all the right agreements, their keiretsu of manufacturers and distributors has made it impossible for hard-working companies to bring competitive products to Japan.

Indeed, as Buck Evans of Consolidated Papers will tell us today, the Japanese work hard at appearing to open their markets, only in the end to deny foreign companies realistic chances to sell. After jumping through hoops for 6 months so his company's product would meet Japan's so-called market standards, his paper simply languished on the Japanese delivery docks, and languished, and

languished some more, until finally he decided that breaking open the Japanese markets was not worth the headache. Keep in mind that American paper products, like flat glass, are unquestionably the best in the world.

So the lessons of Buck Evans and his colleagues come down to this: The Japanese markets are about as open and competitive as ours were 100 years ago, when John D. Rockefeller controlled the oil and Jay Gould controlled the railroads. Perhaps that is why the Japanese declined our invitation to testify here today. But one thing is clear. We need to take more forceful action, not only with our trade laws, but also with our antitrust statutes, to go after this protectionist behavior.

In that regard, this may not be the most opportune time to sign a positive comity agreement with Japan, but if we do, it needs to be monitored very closely to ensure that the Japanese adhere to the letter and the spirit of their promises, and we should not hold our breath.

To be sure, we are not asking for favoritism for American firms to compete in Japan. All we want is for the Japanese to follow through with their commitments and open their markets the way we opened ours and for the President to more aggressively pursue compliance. Otherwise, I worry that if we do not see progress on the issue, it will continue to fester in Congress until it simply explodes, and that would not be good for either country.

With that, I look forward to hearing what our witnesses have to say today. I thank you.

Senator DEWINE. Senator Kohl, thank you very much.

At this point, I would like to enter the prepared statement of Senator Leahy into the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Chairman DeWine and Senator Kohl, I greatly appreciate you holding this hearing. I applaud your continued efforts to protect American consumers and businesses from unfair foreign business practices.

American consumers are often the victims of foreign collusion and cartels, and American businesses are often unable to play on a level playing field in foreign markets. Those who export to the United States and foreign interests that operate here gain the benefit of our antitrust laws—yet the favor often is not returned.

As the world becomes more interdependent, it becomes more important for the United States to work to establish an antitrust enforcement scheme to assure fair and equal treatment of our companies in foreign countries. The problem of transnational cartels is very real, and it grossly distorts free trade.

I was pleased to work closely with the Justice Department and the FTC on the International Antitrust Enforcement Assistance Act of 1994. I worked with then-Assistant Attorney General Anne Bingaman on that effort. As an original sponsor and supporter of that act, I am anxious to hear from the Justice Department and the FTC on how they feel it is working. International antitrust enforcement assistance agreements can give U.S. consumers greater protection against foreign monopoly power and can help promote U.S. commerce overseas.

Vigorous international antitrust enforcement will be helpful to American businesses wishing to compete in foreign countries. The comments of the Director of Government Affairs for PPG Industries highlights the failure of the Japanese to enforce their own antitrust laws while, at the same time, Japanese glass firms take advantage of the fair treatment accorded to their companies in the United States.

The costs of international cartels, in terms of business lost for U.S. firms, is certainly in the billions of dollars. Cartels affecting lysine, graphite electrodes, citric acid, pharmaceuticals, transportation, oil, gas and other products or businesses distort world trade and give non-U.S. companies an unfair advantage. In addition, anti-

competitive policies of other governments unfairly hurt American producers and manufacturers. For example, Canada subsidizes its sales of dairy products into the United States yet imposes 300 percent tariffs on our sales of milk into Canada.

I will be asking Assistant Attorney General Joel Klein and Chairman Pitofsky for their views on a number of matters to determine how we together can help alleviate these problems for our consumers, producers, inventors, investors and manufacturers. We must be determined and aggressive so that other countries are as fair to our companies and we are to theirs. This protects American jobs, helps our balance of trade and provides our consumers with lower prices.

Senator DEWINE. Let me turn to our first panel. Again, these are two veterans of this subcommittee. Robert Pitofsky was sworn in as Chairman of the Federal Trade Commission in April 1995. He has testified before this subcommittee on numerous occasions and we welcome him back.

Joel Klein is the Assistant Attorney General for the Antitrust Division at the Department of Justice, a post that he has held since July 1997. He is also a very familiar face at these hearings. We welcome you back.

Mr. Klein, we will start with you. Any written statement that you have submitted, any of the witnesses today, will be made a part of the record and you can proceed as you wish.

PANEL CONSISTING OF JOEL I. KLEIN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND ROBERT PITOFSKY, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, DC

STATEMENT OF JOEL I. KLEIN

Mr. KLEIN. Thank you, Mr. Chairman, Senator Kohl. I appreciate that. I will be very brief in my comments. It is delightful to be back here again.

I want to commend the subcommittee for its prescience in this area. I think not a lot of people have fully appreciated the significance, and the growing significance, of international antitrust enforcement. But I think as we move into the 21st century and the globalized economy, I think what we are talking about now, what we have been talking about for the last 2 years, will be absolutely critical and I continue to welcome the engagement.

As you mentioned, the President and Prime Minister Obuchi yesterday announced that we will enter a cooperation agreement with the Japanese, which I think is significant, although I certainly take the subcommittee's concerns and the other concerns expressed by the 24 Senators to heart, but I will say more about why I think this is important.

Beyond that, last week, the Attorney General of the United States and Chairman Pitofsky executed the first international antitrust enforcement agreement act treaty, whereby we have now a very formal, much along the lines of a mutual legal assistance treaty, with the Australians, again reflecting, I think, the important significance of antitrust enforcement, putting it up there in the top echelon of international law enforcement.

And most exciting, as we have talked about and I am proud to announce here this morning, the U.S. Department of Justice an hour ago filed in Philadelphia two criminal cases against the company, a major German carbon and graphite company called SGL, the largest company of its sort in the world. The company plead

guilty and is paying a $135 million fine in our graphite electrodes investigation. That is the single largest fine in the history of antitrust enforcement.

Second, its chairman and chief executive officer is going to pay a $10 million fine, and that is the largest individual fine by several orders of magnitude. Our highest fine up until now was $350,000, and now we took it to $10 million.

I want to let you know, in that one investigation alone, we have brought in now close to $300 million in fines, reflecting money that has been taken out of the U.S. economy, out of hard-working companies and ultimately consumers, been taken out of their pockets to go to a group of producers who were unwilling to live up to the law, and these are all the product of large international conspiracies. We currently have some 35 grand juries looking at this area and it is my view that in the next several years, we are going to crack open some of the most trenchant and longstanding conspiracies, and I look forward to working with the committee in making sure that the U.S. economy is free of this kind of theft from our people.

Beyond that, the chairman mentioned and the ranking member mentioned the issue of positive comity. I am pleased to say, while there were some bumps in the road, the SABRE, and maybe I am mixing my airline and surface transportation metaphors, but the SABRE matter now seems to be moving toward a, I think, promising conclusion. The European Commission has issued a statement of objections with respect to Air France, one of the people that we were concerned about. In the meantime, SABRE itself has reached agreements with SAS and with Lufthansa, which will increase SABRE's access to key information in the European markets.

I think when the final chapter is written on this, while we will have all learned some vital lessons, I think the subcommittee and its initiatives in this area, along with the work of the Federal Trade Commission, the Department of Justice, and the DG–IV in Europe, will show that this is a process that can work. It can work better, it can work more expeditiously, but I think we will show that it can work.

As I say that, I want to caution all of us that positive comity is not going to be a panacea for all trade problems. What we focus on is antitrust access issues, and there are a lot of other issues out there, but we and our colleagues, I am sure, at the Federal Trade Commission are willing to do the hard work to separate out the wheat from the chaff, and when we find antitrust issues that raise significant barriers to entry for American countries in foreign markets, you can be assured we will pursue them vigorously with enthusiasm and with commitment. But when we do not find the antitrust issues are the paramount issues, then, of course, there will have to be other remedies and other agencies involved.

I am sure there will be a great deal of discussion about this as we go forward, Mr. Chairman, so I thank you.

Senator DEWINE. Mr. Klein, thank you very much.

[The prepared statement of Mr. Klein follows:]

PREPARED STATEMENT OF JOEL I. KLEIN

Good morning, Mr. Chairman and members of the Subcommittee. I am pleased to be back before you to continue our discussion of antitrust enforcement in the global economy, and what we are doing to meet the challenges it presents.

As trade and commerce become increasingly global in scale, vigorous international antitrust enforcement is key to helping ensure that American businesses have the opportunity and the incentives to compete successfully and that American consumers and business purchasers are protected from anticompetitive conduct. Effective international antitrust enforcement requires not only that our own enforcers remain vigilant and active, but also that we are able to obtain assistance, where needed, from foreign antitrust enforcement authorities.

In the last few years, we have worked to strengthen the international enforcement tools at our disposal. With the help of this Subcommittee, we were able to obtain passage of the International Antitrust Enforcement Assistance Act of 1994, which enables us to enter into agreements with our foreign counterparts to share information and provide assistance on a reciprocal basis. Last week, we signed the first agreement under the 1994 Act, with Australia, which we hope to be a model for other such agreements. In March, we signed a more traditional antitrust cooperation agreement with Israel, along the lines of our 1991 agreement with the EU and our 1995 agreement with Canada. These agreements, the 1994 Act itself, and the growing number of more general mutual legal assistance treaties to which the United States is a party, combined with the favorable ruling we obtained two years ago in *United States* v. *Nippon Paper Industries Co. Ltd.,* reaffirming that Congress indeed has given us jurisdiction to prosecute anticompetitive activities that take place off U.S. soil but that have significant effects here, give us important building blocks for our continuing efforts to build an effective international antitrust enforcement regime and make effective use of it.

We have achieved some remarkable successes recently, including unprecedented levels of criminal fines.

From a practical standpoint, the increasing globalization of markets leads to increased complexity in our investigations, making it more difficult, time-consuming, and costly to pursue an investigation to its ultimate conclusion. Often, we must have the assistance of authorities in other countries in order to obtain crucial evidence. It is therefore particularly important, as Congress recognized in passing the 1994 Act, and as the Senate affirms on a broader law enforcement front when it ratifies additions to our growing network of mutual legal assistance treaties, that we be able to cultivate and maintain constructive working relationships with our foreign counterparts.

Although the United States can rightly claim a large share of the credit for the adoption around the world of competition as a foundation for commercial relationships, each country's antitrust law is necessarily tailored in part to its own legal system and culture. That variation in approaches to antitrust enforcement, in a world where countries zealously protect their sovereignty, creates number of difficult challenges in building an international antitrust enforcement regime that works effectively, challenges which have been brought to the forefront with the increasing globalization of markets.

As you know, in the fall of 1997 the Attorney General and I established an International Competition Policy Advisory Committee to look at these challenges with a fresh perspective, giving particular attention to three key issues. First, how can we build and strengthen a consensus among competition enforcement authorities around the world for prosecuting international cartels? Second, at a time when increasing numbers of mergers involve international transactions that directly affect competition in more than one country, how can the various competition enforcement authorities best coordinate their merger review efforts, while preserving their sovereignty, to achieve results that are sound and efficient, both for the parties to these mergers and for consumers in the countries affected by them? And third, how can we ensure that, as our international trade agreements remove governmental impediments to free trade, those impediments are not replaced by anticompetitive schemes on the part of private firms to impede market access? Getting the right answers to these questions is essential to the maintenance of free and fair international commerce, and its attendant benefits for the U.S. economy.

The Advisory Committee continues its work under the leadership of co-chairs Jim Rill and Paula Stern, former Assistant Attorney General for Antitrust and former International Trade Commission Chairwoman, respectively. It has held a number of meetings and hearings, and has heard from numerous witnesses representing a wide range of viewpoints. It plans to submit its final report this fall, and I expect it to be of tremendous value to the Department of Justice and to this Subcommittee

as we continue our efforts to internationalize basic antitrust principles and make them the foundation for the burgeoning commercial relationships among nations.

Meanwhile, we are continuing to pursue our enforcement responsibilities vigorously in the international arena. Let me now say a few words about the three major facets of our international enforcement agenda: international cartel enforcement, international merger enforcement, and positive comity.

INTERNATIONAL CARTEL ENFORCEMENT

Vigorous enforcement against international cartels is a top priority for us. As a result of our aggressive overall criminal enforcement efforts against hard-core antitrust violations such as price-fixing and market allocation, we have set records in the last two fiscal years in the level of fines collected. In fiscal year 1997, criminal fines totaling $205 million dollars were secured in cases brought by the Antitrust Division. This total is five times higher than during any previous year in the Division's history. We broke that record in fiscal year 1998, with more than $267 million in fines secured. Of the roughly $472 million in fines secured in the last two fiscal years, nearly $440—million—well over 90 percent—were in connection with the prosecution of international cartel activity, a graphic illustration of the increasingly international focus of our criminal enforcement work, and our success in cracking international cartels.

This focus is well justified. International cartels typically pose an even greater threat to American businesses and consumers than do domestic conspiracies, because they tend to be highly sophisticated and extremely broad in their impact—both in terms of geographic scope and in the amount of commerce affected by the conspiracy. The massive international cartels uncovered in citric acid, lysine (an important livestock and poultry feed additive), sodium gluconate (an industrial cleaner), and graphite electrodes (used in steel making) are prime examples. The criminal purpose behind these and other conspiracies investigated and prosecuted by the Division has been to carve up the world market by allocating sales volumes among the conspirators and agreeing on what prices would be charged to customers around the world, including customers in the United States.

International cartels victimize a broad spectrum of U.S. commerce, costing American businesses and consumers hundreds of millions of dollars a year. For example, citric acid, which is used in products ranging from soft drinks and processed food to detergents, pharmaceuticals, and cosmetics, is found in virtually every home in the United States. Sales in the United States during the course of the citric acid conspiracy were over $1 billion. In each of these cases, American consumers—and, in cases where the U.S. government is the victim, American taxpayers—ultimately foot the bill.

The international cartels uncovered by the Division have often been governed by elaborate agreements among the conspirators to ensure that each conspirator understood its role in suppressing competition and increasing prices in the varied markets of the world where the goods and services were sold. The cartel agreements, which were formed by high-level executives and carried out through conspiratorial meetings around the globe, included the following features: agreed-upon prices; agreed-upon volumes of sales worldwide; agreed-upon prices and volumes (market share allocation) on a country-by-country basis; exchanges among the conspirators of all types of otherwise competitively sensitive information, such as monthly sales figures by geographic area, prices charged (or bid) to customers in particular geographic areas, and prices to be charged (or bid) to specific customers; and sophisticated mechanisms to monitor and police the agreements.

Thus far, while much remains to be done, we have had great success in prosecuting these international cartels. In the food and feed additives industry alone, our efforts have resulted in criminal convictions or plea agreements against 9 companies and 10 individuals from 6 countries, and nearly $200 million in fines imposed or agreed to in the past 2 fiscal years—including a $100 million fine imposed on Archer Daniels Midland Company and a $50 million fine imposed on Haarmann & Reimer Corporation, the U.S. subsidiary of the German-based pharmaceutical giant Bayer AG.

In our investigation in the graphite electrodes industry, in February of 1998 we charged Showa Denko Carbon, a U.S. subsidiary of a Japanese firm, with participating in an international cartel to fix the price and allocate market shares worldwide for graphite electrodes used in electric arc furnaces to melt scrap steel. The company agreed to plead guilty, cooperate in the Division's ongoing investigation, and ultimately paid a fine of $32.5 million. In April of 1998, another participant in that cartel, UCAR International, agreed to plead guilty and pay a fine of $110 million, the largest fine imposed in antitrust history. Last Thursday, another participant, the

Japanese firm Tokai Carbon Co., agreed to plead guilty and pay a fine of $6 million. Sales of graphite electrodes in the United States during the term of the conspiracy were well over a billion dollars. This investigation is continuing.

Last fall, we achieved a tremendously important victory in our battle against international cartels, when the jury returned a verdict of guilty against three top executives of Archer Daniels Midland for masterminding their company's participation in the lysine cartel. These convictions send a strong deterrent message around the world that our commitment to vigorous enforcement against hard-core cartels includes prosecuting the top corporate brass in appropriate cases.

Notwithstanding our recent success, I am convinced that these prosecutions represent just the tip of the iceberg. At present, more than 30 U.S. antitrust grand juries—approximately one-third of the Division's criminal investigations—are looking into suspected international cartel activity. The subjects and targets of these investigations are located on five continents and in over 20 different countries. In more than half of the investigations, the volume of commerce affected over the course of the suspected conspiracy is well above $100 million; in some of them, the volume of commerce affected is over $1 billion per year.

The investigation and prosecution of international cartels creates a number of imposing challenges for the Division. In many cases, key documents and witnesses are located abroad—out of the reach of U.S. subpoena power and search and seizure authority. In such cases, national boundaries may present the biggest hurdle to a successful prosecution of the cartel. For that reason, we are aggressively pursuing cooperation agreements with foreign competition authorities to step up cooperation aimed at hardcore cartels.

To that end, we have been working in the Organization for Economic Cooperation and Development (OECD) to encourage OECD members toward more systematic and effective anti-cartel enforcement and international cooperation. Last spring, the OECD endorsed at the ministerial level our proposal encouraging member countries to enter into mutual assistance agreements to permit sharing evidence with foreign antitrust authorities, to the extent permitted by national laws, and to take another look at provisions in their laws that stand in the way of these cooperative efforts.

INTERNATIONAL MERGER ENFORCEMENT

As trade and commerce have become increasingly globalized, inevitably there have been increasing numbers of mergers that cross international boundaries and thus are subject to review by more than one country's antitrust authority. To minimize the burden placed on merging parties by multi-jurisdictional antitrust review, and to minimize the conflicts that can result from differing conclusions regarding a merger, it is important that we establish and cultivate good relations with foreign enforcers and understand each other's merger enforcement policies and practices, and coordinate where we can. Given each jurisdiction's understandable interest in reviewing mergers that impact its markets, and in applying the substantive and procedural rules it deems appropriate, navigating these waters is not easy. After our experience with the Boeing/McDonnell-Douglas merger—where U.S. and European Commission authorities reached sharply differing conclusions regarding the merger—we redoubled our efforts to minimize that kind of conflict, if not eliminate it altogether. I believe that our more recent experiences with the MCI/WorldCom merger and the Dresser/Halliburton merger, in which we and the EC shared our independent analyses of the transaction's as they, evolved, and ultimately reached essentially the same conclusions, are a good model for how close consultation in international merger enforcement can and should work.

POSITIVE COMITY

Let me now turn to positive comity. It grows out of a recognition that, because of legal and practical constraints that may come into play, effective enforcement in the global economy may require action by more than one country's antitrust authority.

Under a positive comity agreement, the antitrust authority of one country makes a preliminary determination that there are reasonable grounds for an antitrust investigation, typically in a case in which a corporation based in that country appears to have been denied access to the markets of another country. It then refers the matter, along with the preliminary analysis, to the antitrust authority whose home markets are most directly affected by the matter under investigation. After consultation with the foreign antitrust authority, and depending on what conclusions the foreign authority reaches and what action it takes, the referring antitrust authority can accept the foreign authority's conclusions, seek to modify them, or pursue its own action.

Such an approach has many helpful aspects. First, competition authorities have a great stake in taking each other's referrals seriously, not only in the interest of promoting cooperative relations, but because their own consumers are affected. Second, such a process maximizes, the likelihood that the kind of evidence necessary to properly decide such cases can be obtained, as the antitrust authority in whose country the conduct takes place generally has greater leverage to obtain it. Finally, this process can defuse trade tensions by providing a sensible, systematic approach to fact-gathering, reporting, and bilateral consultation among competition authorities.

We currently have cooperation agreements in place with the European Union, with Canada, and most recently with Israel, that have positive comity provisions, and we expect soon to have one in place with Japan. And as you know, last June we signed an enhanced agreement with the EU that provides additional details and outlines a formal protocol for referrals. We hope to reach agreements with other competition authorities as well.

As was discussed in the Subcommittee's hearing last fall, we now have a positive comity request pending with the European Commission regarding possible anticompetitive conduct by several European airlines that may be preventing SABRE and other U.S.-based computer reservation systems from competing effectively in certain European countries. In January 1997, we requested that the EC investigate the matter, and we have been in regular contact with the EC to monitor progress. The EC issued a statement of 11 objections against one of the European airlines, Air France, in March, which is a preliminary determination that the airline has anticompetitively discriminated against SABRE. Under EC procedures, Air France now has an opportunity to respond to the statement of objections, after which the EC will make a final decision. Subsequently, SABRE has reached agreements with two other European airlines, Lufthansa German Airlines and Scandinavian Airlines System (SAS), that provide for those airlines' enhanced participation in the SABRE system. We will be continuing to follow the EC's progress in this matter, and will take a close look at their supporting analysis for whatever decisions they reach regarding whether to take further action.

The computer reservation systems referral, our first such referral, has, I believe, thus far been a successful one, demonstrating that positive comity can be an important tool in the international antitrust enforcement arsenal. We have also gained valuable experience that we can apply in future referrals. This Subcommittee has played an important and constructive role in this process. Let me now turn to four steps we plan to take in future referrals, in light of our experience and the input we have received from this Subcommittee and elsewhere, to help improve the positive comity process.

First, we agree that it is a useful idea to establish an intended time frame for completing an investigation that has been referred under a positive comity agreement. Our 1998 agreement with the EC provides for a presumptive time frame of six months. Based on our experience, we can now see that such a time frame will be unrealistic in some if not most cases. Indeed, many of our own investigations have taken considerably longer. We believe a better approach is to engage the foreign antitrust authority to whom we make the referral, after they have had a chance to familiarize themselves with the matter, but as soon as practicable, and arrive at an educated estimate. We would do so in full realization that the course of an antitrust investigation may take unpredictable turns and encounter unanticipated obstacles; but we would use the estimate to gauge the progress of the investigation as it goes forward.

Second, we agree that it is a useful idea to maintain regular contact with the foreign antitrust authority to which a matter has been referred under a positive comity agreement. Suggestions have been made that an update every six weeks, or more frequently in the event of a major development, and we believe that is a helpful and workable schedule to adopt.

Third, we agree that it is a useful idea that the complainant be kept generally apprised of progress in the matter. There are limitations on what we can reveal to the complainant without compromising the investigation. We have a obligation not to reveal information provided to us in confidence by our foreign counterpart. But I think at a minimum we can convey to the complainant that we have been in recent contact with the foreign antitrust authority to whom we referred the matter, and, as appropriate, at times we may be able to provide more information. The complainant may also want to take advantage of whatever rights and opportunities it has in the foreign forum to directly obtain information; in some instances, it may thereby be able to obtain information directly that we would not be in a position to furnish, as well as obtain other important procedural rights.

Fourth, we agree that, having established a time frame for the investigation under a particular positive comity referral, when that time frame has run its course it is appropriate to take stock of where things stand and how we and our foreign counterparts can most effectively proceed. Of course, we would normally and will continue at all stages of a positive comity referral to consider these questions internally and to discuss them with our counterparts abroad. It should be kept in mind that, while we always reserve the right to initiate or resume our own investigation, there may well have been limitations on our own authority or practical ability to pursue the matter that led us to make the referral in the first place. If it was not feasible for us to pursue the matter ourselves initially, it may not become any more feasible later. And there may be very good reasons why an investigation is taking longer than anticipated. But we would expect to reassess any referral we make at appropriate junctures, and the running of the agreed-upon time frame would certainly be one such juncture.

Positive comity is but one tool in our antitrust enforcement arsenal, a relatively new tool, and one that may not be practical to employ very frequently. But we believe it can be a useful tool in appropriate circumstances, and that its successful use is an important part of our effort to further strengthen international antitrust enforcement cooperation in general. We are committed to making it work as effectively as possible, and we appreciate the Subcommittee's interest and assistance.

CONCLUSION

Opening markets around the world to competition will require a sustained effort on the part of antitrust enforcement authorities in many countries. We are committed to that effort, and appreciate the continued support of this Subcommittee. We look forward to meeting the ongoing challenge to ensure that businesses can compete without being subject to anticompetitive behavior and that consumers can benefit from competition that produces low prices, high quality, and innovative goods and services.

Senator DEWINE. Mr. Pitofsky, thank you for joining us.

STATEMENT OF ROBERT PITOFSKY

Mr. PITOFSKY. Thank you, Mr. Chairman, Senator Kohl, Senator Specter. I am pleased to be here to present testimony on behalf of the Federal Trade Commission. Let me say how much I agree with the opening remarks of both of you that given the increase in international trade, the increase in the number of transactions that affect consumers and citizens in different countries, there is no more important area for oversight by this committee, and I commend the committee for zeroing in on these questions over the last several years.

You have asked us to focus on positive comity and that is what I will try to do. It is a fairly new technique in which occasionally we will refer matters to one of our trading partners and inquire whether or not an American company injured by behavior in that foreign company is injured by behavior that violates the law of the foreign country. And, of course, we stand ready to do the same.

I do want to emphasize that if we refer something to a foreign country, that does not mean we wash our hands of responsibility in this area. On the contrary, we stay in touch, we follow the matter, and if we are not satisfied with the investigation by the foreign country, we can go back and enforce our own law in the area.

I know there is some discomfort about the way positive comity has worked and I also agree with the earlier comments that it got off to a shaky start, but I think we are doing a bit better, certainly in the last 6 months.

Also, perhaps in some quarters, the whole concept was oversold. International coordination and cooperation is critical and we have made great progress with respect to working with our trading part-

ners, exchanging information, although we recognize the concerns about confidentiality, discussing theories, applying consistent approaches to remedy.

Positive comity is really a very small element. It is a useful one, but a small and modest element that you use in unusual cases to try to protect American firms doing business abroad or foreign firms doing business in the United States. It is hardly a common resort.

We have referred two matters informally. One is to the Italian government. We got a very good result. One is to the European Community in the Marathon matter, and it looks like there is some encouraging movement there. There have been no matters referred to us and we have not invoked formal positive comity as yet.

Although it is a modest device, it is still important that we get it right. The SABRE witnesses who were here last time made some suggestions about ways in which we could modify our approaches. I think they put forward useful ideas and I think we can probably adopt some of those ideas and make things better.

First, there is a suggestion that we set a time deadline when we refer a matter to a country with which we have a positive comity arrangement. I think that is right. I would not do it at the opening of the referral because neither side knows very much about the matter. But perhaps 3 months after a referral, it would be a good idea for us to work out with the country we refer the matter to some sense of how long it is going to take to investigate the matter and come to a conclusion.

The SABRE representatives suggested that the antitrust enforcement agencies maintain regular contact with the country to which the matter is referred and also advise the complainant about the status of the matter. That is what we have done, actually, in the Marathon matter. I have spoken with senior representatives in DG–IV and we have kept Marathon advised and I think it has worked well.

Finally, there is the suggestion that after the positive comity matter is dealt with entirely, we come back and review the bidding and see if, at that point, based on additional facts that we have, we think it is worthwhile to try extraterritorial enforcement. Now, let me be candid about that. We would not have referred the matter to another country if we could have conveniently brought the case ourselves. But, certainly, we may have learned more and it may be that we are so dissatisfied that we want to bring an enforcement action and we would consider doing that after the—in fact, we would do it after the positive comity period has closed.

Let me just conclude by saying that the committee's oversight in this matter and the testimony of affected U.S. corporate officials has offered some very constructive suggestions, and I believe several of those suggestions can be implemented. Thank you very much.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY [1]

The Federal Trade Commission appreciates the opportunity to provide this follow-up report to the Subcommittee on the Commission's experience with the positive comity process.

The Subcommittee's hearing last October focused attention on the role that positive comity can play as an antitrust enforcement tool. The testimony offered at that hearing also, however, illustrated that positive comity, like other enforcement tools, is not a panacea. For positive comity to be an effective means of redressing harm from foreign anticompetitive practices, antitrust enforcement authorities must agree to help each other by taking on, and giving due priority to, cases that involve anticompetitive conduct in their own territory that inflicts harm in other countries. Even where such agreement and commitment exist—as manifested in the bilateral agreements into which the United States has entered with the European Community,[2] Canada,[3] and Israel [4]—we can never be certain that the antitrust authority that investigates and prosecutes the case will be successful.

Although positive comity may be a valuable tool, it is important to recognize that it is a small piece in a developing mosaic that reflects broad cooperation in antitrust enforcement among the United States and its major trading partners.[5] Much of the Commission's testimony for this Subcommittee's hearing last October was devoted to describing our enforcement efforts that have involved cooperation with foreign antitrust enforcement authorities. That work has continued in the intervening months, as was demonstrated by the settlements we reached in cooperation with the European Commission (EC) in the *4BB/Elsag Bailey* and *Zeneca/Astra* merger cases. Thus, evaluating positive comity in isolation may miss important developments in the forest by concentrating on this individual tree. For example, only a small fraction of the cases that come before us lend themselves to referral under positive comity. In the seven months since this Subcommittee's last hearing, the FTC has not referred or received a referral of a "formal" positive comity case, nor have we been involved in any new matters that could be classified as informal positive comity.

While there are few instances where formal or even informal positive comity comes into play, positive comity could be a device for assuring availability of relief and recognizing legitimate business concerns—without unduly contributing to international friction. In other words, positive comity could be a constructive, albeit rarely used, device.

The Subcommittee's hearings in October 1998 focused on possible ways of improving the positive comity arrangements. We believe there is room for improvement and, in this regard, we believe the testimony presented by SABRE [6] at the October 1998 hearings was particularly helpful. The FTC, along with the Antitrust Division, has been evaluating in recent months how to make the positive comity process work as efficiently and effectively as possible. We believe we can implement some of the suggestions offered at the October hearing.

A few additional comments about positive comity, particularly as to case selection and procedure, maybe useful. First, positive comity is still a relatively new experience for the U.S. agencies. There has been only one formal referral to the EC, and none to the U.S., in the eight years since the 1991 Agreement was signed. Thus,

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] Agreement between the Government of the United States of America and the European Communities regarding the application of their competition laws, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995) (hereafter "1991 Agreement"); Agreement between the Government of the United States of America and the European Communities regarding the application of positive comity principles in the enforcement of their competition laws, June 4, 1998, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶13,504A; OJ L 173/26 (18 June 1998) (hereafter " 1998 Agreement").

[3] Agreement between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶13,503.

[4] Agreement between the Government of the United States of America and the Government of the State Of Israel Regarding the Application of Their Competition Laws, Mar. 15, 1999, *reprinted in* 76 ATRR 279 (N4ar. 18, 1999).

[5] *See, e.g.,* Approaches to Promoting Cooperation and Communication among Members, Including in the Field of Technical Cooperation, Submission of the U.S. Government to the World Trade Organization, April 1999, WT/WGTCP/W/116.

[6] The SABRE Group, Inc., of Fort Worth, Texas, markets computerized reservation system (CRS) services and offered testimony before the Subcommittee's October hearing concerning its complaint against operators of CRS systems in Europe, which the Department of Justice formally referred to the EC under the positive comity article of the 1991 Agreement.

with respect to formal referrals, the Commission would be hesitant to burden the process with rules and obligations that might make it less likely that the process would be used in the future. On an informal basis, we have discussed a small number of matters with our foreign counterparts, including the Parma ham matter that was mentioned in our testimony last October.[7]

Second, and speaking for the moment just about our Agreements with the EC, while we might ask the EC to agree to certain conditions in its review in response to a positive comity request, whether the EC's Competition Directorate, DG–IV, agrees to those conditions is within its discretion. Only in cases within the scope of the deferral provisions of Article IV of the 1998 Agreement[8] would DG–IV be obligated to fulfill certain conditions, and even these can be waived by agreement of the parties as appropriate. In other positive comity cases—*i.e.,* in those outside the scope of the deferral presumption and in so-called informal positive comity cases-DG–IV (like the FTC or DOJ if the U.S. were the Requested Party) would not have any obligation to agree to conditions on accepting the referral, and might well be reluctant to handle such a case in away that significantly differed from its procedures in comparable cases outside the positive comity ambit. Moreover, many—perhaps most—cases to which the deferral presumption applies will be cases that the U.S. agencies could not or would not bring themselves. In some cases, we may lack the necessary subject matter or personal jurisdiction to prosecute the case and impose a remedy. For example, anticompetitive conduct affecting a U.S. firm located in and doing business in a foreign country—exporting from Norway to Turkey, for example—would not be reachable under U.S. law. Even if we could arguably assert jurisdiction, it maybe so difficult to collect evidence and/or impose an effective remedy that we would not as a matter of prosecutorial discretion, choose to allocate scarce resources to the matter. In such cases, there is no credible probability that we would bring our own case. This is the situation we would face not only in relation to the EC, but also in relation to other jurisdictions to which the U.S. agencies might seek to refer a matter under the positive comity provisions of either a bilateral agreement (Canada and Israel) or the OECD Recommendation.[9] Nonetheless, the U.S. agencies would still, in appropriate cases, ask DG–IV and other authorities to whom we might refer a matter under positive comity to agree to apply the procedures described below.

With the above caveats, the Commission believes we can improve the positive comity process in certain cases under our Agreements with the EC. First SABRE has suggested that once the EC accepts a positive comity referral, the U.S. antitrust agencies should agree with the EC upon a time frame within which we anticipate that the investigation, including issuing any relief, would be concluded. The Commission agrees that this is a useful idea. In fact Article IV.2.(c)(v) of our 1998 Agreement with the EC provides for such an understanding in cases falling under the deferral provisions of that Agreement. In retrospect, the six-month time frame in the agreement was probably too ambitious—the Commission does not complete most of its domestic investigations within that period, and positive comity cases maybe more complex than our typical domestic investigation. However, the Commission is pre-

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[7] As mentioned in the Commission's testimony of last October, the FTC informally encouraged the Italian Competition Authority (AGCM) to end a production quota agreement by a consortium of ham producers that exported to the United States, harming U.S. consumers with supracompetitive prices. The FTC held up its investigation while the AGCM conducted its investigation, which resulted in a finding that the consortium's production quota violated Italian law and an order under which the consortium agreed to end the quota.

[8] Under these provisions, the Requesting Party (that is, the competition authority making a positive comity request) will normally defer or suspend its own enforcement activities in favor of enforcement action by the Requested Party (that is, the competition authority receiving and acting on the request) where the anticompetitive activities at issue occur principally in the Requested Party's territory and the Requested Party agrees to certain conditions. In summary, these conditions include: (A) The adverse effects on the Requesting Party's interests can be and are likely to be fully and adequately investigated and remedied pursuant to the Requested Party's laws, procedures, and available remedies; and (B) the competition authorities of the Requested Party agree to (1) devote adequate resources to the case, (2) use their best efforts to pursue all reasonably available sources of information, (3) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and (4) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months of the Requesting Party's deferral or suspension of enforcement, or such other time as agreed to by the competition authorities of the Parties.

[9] The 1995 Recommendation of the OECD Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (1995), *available at* <http://www.oecd.fr/daf/clp/rec8com.htm>.

pared to discuss with DG–IV an appropriate time frame in which DG–IV expects to complete its process.

Of course, predicting how long an investigation will take is inherently uncertain. For example, critical evidence maybe more difficult to obtain than anticipated—or may not exist at all—and the target of the investigation may raise plausible defenses which must be investigated. The Commission, therefore, believes that it would be more productive to choose a target date once DG–IV has had a chance to start its procedure. Accordingly, we would expect to agree on a target date approximately three months after a positive comity referral takes place.

The Commission also has considered possible options if the anticipated completion date for the investigation arrives without final resolution. As a practical matter, there maybe little or nothing the FTC could do because of the jurisdictional and evidentiary obstacles mentioned earlier. However the FTC regularly re-evaluates its investigations to determine whether we are proceeding on the right course. Such re-evaluations typically occur at certain investigational points, such as completion of depositions, when we assess the strength of the evidence supporting our theory of violation. The same would be true in a positive comity referral. Thus, during the course of an investigation pursuant to a positive comity referral, we may ask whether the referral is proceeding as expected, and even whether we should consider terminating the referral and initiating our own case, as provided for by the 1998 Agreement. The passing of the anticipated action date is the type of event that would normally cause us to focus on the referral and to consider what response, if any, would be warranted at that point. The action the FTC decides to take would depend on many factors, such as the reason the investigation has taken longer than expected, the time frame in which DG–IV expects to act, and our satisfaction with how the investigation is being conducted. Our range of options at that point would include, among other things: taking no action; having an in-depth discussion with DG–IV staff, setting a new deadline; and initiating our own case.

Another productive suggestion made by SABRE at the October hearing was that the U.S. antitrust enforcement agencies maintain regular contact with DG–IV once DG–IV begins its investigation of a matter referred under the positive comity agreement. This is contemplated in Article IV.2.(c) (iii) and (iv) of the 1998 Agreement, which pertains to cases meeting the deferral presumption criteria. The Commission believes it would be useful to have someone from the FTC's staff in contact with an appropriate member of the DG–IV staff whenever there is a significant development in the investigation, but in any event at least once every six weeks. Sometimes, as a result of our meetings with U.S. complainants, those complainants continue their own efforts through their counsel, without asking our help. Sometimes the U.S. agencies make an informal inquiry of the reviewing authority about the status of the matter on behalf of a complainant, much as the FTC has done with respect to Marathon Oil Company's complaint that remains under EC investigation.[10] The Commission believes that regular communications will affirm our commitment to these provisions of the agreement and make it easier for both sides to fulfill their respective commitments.

SABRE also suggested that the referring U.S. agency maintain regular contact with the U.S. complainant on developments in the DG–IV investigation. While this is a good suggestion, some caution is appropriate. Some of the information we learn from DG–IV is confidential, and the U.S. agency would be prohibited from disclosing it to the U.S. complainant. For example, it may involve nonpublic (but not confidential commercial) information concerning a third party, or it may concern DG–IV's internal nonpublic processes. The Commission does not routinely provide status reports on its investigations to domestic complainants concerning investigations of U.S. firms, and there does not appear to be any reason to provide complainants in positive comity matters with any greater rights. Nonetheless, the Commission is willing to inform the complainant that we intend to be in regular contact with DG–IV about the matter, and that the complainant is free to contact us for whatever information we are able to provide.[11] Again,we have generally followed that procedure in the Marathon matter.

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[10] Since last October's hearing, Commission staff has been in regular contact with DG–IV on the Marathon matter, and has kept the Subcommittee staff apprised of developments in this matter as appropriate.

[11] As indicated in our follow-up responses to the questions posed by Chairman DeWine and Senator Kohl, some of SABRE's suggestions, while well intentioned, cannot be implemented in the current legal environment—specifically, SABRE's recommendations that the U.S. antitrust agencies develop and share confidential evidence with other antitrust agencies, and that each party to a cooperation agreement enlist and use the active assistance of professional staff supplied by the other party to overcome resource limitations.

In conclusion, the Commission appreciates the Subcommittee's continuing interest which we share, in making the positive comity process work as effectively as possible. The Commission believes that the practices described in this statement can help improve the positive comity process. We understand and appreciate the concerns that the Subcommittee and witnesses before the Subcommittee have raised, and we will continue to work with you to make the process as effective as possible.

Senator DEWINE. Thank you both very much.

Senator Specter, any opening comments?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

The issue of antitrust enforcement becomes more important each day as we see more mergers of major companies which limit consumers' alternatives as to where they are going to be able to look for competition.

The bank mergers have had a very profound effect on the country as a whole. Last year, the acquisition by First Union of a major Philadelphia bank has resulted in precisely the dire consequences which many of us predicted, but that went ahead.

We are now looking at a very complex acquisition issue involving Media One where there is a weighing of the size of the prospective acquiror, and this is something which is a matter of enormous importance.

I have been deeply involved in the issue of the antitrust exemption enjoyed by football on revenue sharing and the antitrust exemption that baseball has in a blanket manner. And it has been a profound issue for Pennsylvania, which is now looking at four new stadiums. It is a little hard for me to understand why the taxpayers of Pennsylvania ought to be called upon to put up public money when the NFL has a $17 billion multiyear television contract which they enjoy by virtue of the antitrust exemption which they have.

The school systems in Pennsylvania are in dire shape. Housing in Pennsylvania is in dire shape. And we are putting up a lot of public money.

There is a war in New England at the moment, maybe recently ended, between Boston and Hartford on the Patriots, Hartford being called upon to pay $375 million for a stadium. And one of the questions which I am going to ask both of you gentlemen to take a look at would be: What would be the ramifications if we legislated away the judicial doctrine of an exemption for baseball from the antitrust laws? Where would we go? How far would the impact be?

I am going to introduce legislation which would condition the continuation of the baseball antitrust law and the limited antitrust exemption which football has on their paying, in effect, half of the stadium construction costs. But the more I deal with baseball and the more I deal with football, with the executives, the less inclined I am to see them have any exemptions at all. They move teams around at will. They steal the Browns from Cleveland to Baltimore with extortion, a tremendous cost to Baltimore and Maryland, and baseball players move from one team to another for $91 million on a 10-year contract. Just a total blatant disregard of the public interest.

And when it comes to a request to have them make some contribution to stadium construction, which they ought to be bearing all of, they throw up their hands in horror and fight in a way which is really unbecoming.

So I like what you two men are doing. I have had occasion to sit down with both of you and talk to you about the work of your departments. This subcommittee wants to help you. We want to help you on funding. We want to help you do the very, very important job which you have.

Thank you, Mr. Chairman.

Senator DEWINE. Well, Senator Specter, thank you for your comments. We are kind of flexible around here, and in the interest of continuity, why don't you take your time right now and just follow up with the questions? That way we can continue on, if you want to do that.

Senator SPECTER. Thank you.

Senator DEWINE. We can stay on football and baseball. We will get to flat glass later.

Senator SPECTER. Thank you very much, Mr. Chairman. Well, there are quite a few issues.

I am fascinated by the antitrust case which Mr. Klein mentioned in Philadelphia about carbon and graphite. I want to know a lot more about that. I have a lot of questions about Media One, a lot of questions about banking. But in the limited time each of us has because of the time constraints, let me follow what the chairman has suggested.

This may be something which will have to be studied, Mr. Klein, but baseball has the antitrust exemption because Justice Oliver Wendell Holmes, I think it was 1922, said it was a sport. And Justice Blackmun had a long opinion in the 1970's saying it was not a sport but we are not going to change the matter, it is up to the Congress.

Well, the buck starts right here. This is where we start the change in the Antitrust Subcommittee.

Is there any doubt, Mr. Klein, that baseball is a business, a big business, and not a sport?

Mr. KLEIN. I do not want to say it is one or the other. It is certainly a very big business. It is a sport. It is many things. But there is no question that baseball is a big business, Senator.

Senator SPECTER. Well, is there any reason why baseball should not be subject to the U.S. antitrust laws except for the historical Supreme Court decisions?

Mr. KLEIN. I think in your opening comments, Senator Specter, you put your finger right on the issue, which is this is a matter that should be studied, and you are entitled to very, I think, thoughtful, careful engagement from us on this.

In part, I think there are several issues. One, you need to think about where you are in the course of the particular development of baseball as a business in terms of its reliance on the antitrust exemption, what implications it would have if you were to consider changing that in any way.

But I can assure you, Senator Specter, that we would welcome the opportunity to work with you and your staff on the issues that you have raised in your opening comments.

Senator SPECTER. Would the issue naturally come to the Department of Justice as opposed to the FTC, Chairman Pitofsky?

Mr. PITOFSKY. I think it probably would. We have not really had much experience in recent years with the application of the antitrust laws to professional sports, but I think it probably would go to the Department of Justice.

Let me say, to break it down a bit, the original decision which said that baseball was not interstate commerce is indefensible today, absolutely indefensible. Much of the—and I share your premise. I am very skeptical of antitrust exemptions generally, and I am very skeptical of this one.

On the other hand, it has now become a very complicated question because much of what was accomplished under the umbrella of the antitrust exemption has now moved over to collective bargaining. And, therefore, one has to see fairly carefully exactly what it is that these teams, these enterprises are doing, that they could not do if the antitrust laws applied.

But I have to say, to give them an across-the-board exemption with no limitations at all seems to me something that certainly deserves additional study, and I am skeptical about it.

Senator SPECTER. Well, I would like to see the experts apply that study, and I am well aware of the collective bargaining issue and the labor issues which overlap. And the matter goes much beyond stadium construction. The matter involves the issues of revenue sharing for baseball and salary caps. But I think there is no doubt that as far as Major League Baseball and the NFL are concerned, it is the public be damned.

Let the record show an affirmative nod by Mr. Klein. He can always negate my representation of his adoptive admission here. [Laughter.]

Adoptive admissions are gone in criminal law now, but they are not in Senate hearings, Mr. Klein.

Senator DEWINE. Be very careful, Mr. Klein, what you do with Senator Specter. [Laughter.]

Mr. KLEIN. This crick in my neck is going to cost me dearly.

Senator DEWINE. That is right. [Laughter.]

It is like at an auction. Never raise your hand.

Senator SPECTER. If you have a doctor's note, I will expunge the record.

But we have seen the Dodgers move in 1958 from Brooklyn. Los Angeles should have had a team, but they did not have to have Brooklyn's team. Indianapolis should have had a team, but they did not have to have Baltimore's team. That just sets up three-ring larceny if it goes to Cleveland. And you have small-market teams like Pittsburgh and Seattle in very terrible shape, and you have Mr. Murdoch buying the Dodgers for an astronomical price. At least we thought it was an astronomical price until the Redskins were sold recently. And Mr. Murdoch has his satellite and seeks to have the satellite operate in a way which is at variance with the FCC laws. And you have the super stations, and you have a tremendous amount of paraphernalia sold.

I have had conversations with Commissioner Selig over the years and many of the Major League Baseball owners about trying to bring some rationality. They have a gigantic goose that lays a gi-

gantic golden egg. But they are pressing the outer limits, refusing to have revenue sharing in baseball, refusing to have salary caps, and it puts tremendous pressure on a team like Pittsburgh.

So what happens? The legislature recently authorized a lot of public money for the Pittsburgh stadium, and I support that. With a gun at my head, a person will do most anything or a city will and a State will with a gun at their head.

And then you have football with the antitrust exemption which gives them an extraordinarily lucrative position, $17.6 billion. In discussions with Commissioner Tagliabue, help build these stadiums. No, we cannot afford it.

Well, if they cannot afford it, who can afford it? And if it is all heading for chaos, let the chaos be on the terms that every other business functions in America.

Commissioner Pitofsky puts his finger on it. Ludicrous to say they are not in interstate commerce, shorthand for big business in interstate commerce.

Do I have to do anything in a formal way to ask you to study this, Mr. Klein and Chairman Pitofsky, to give us an answer?

Mr. KLEIN. I view these proceedings as sufficiently formal.

Senator SPECTER. OK; I would like to know just what would happen if we just took it all away, no antitrust exemptions at all, not conditioned on building stadiums. If they do not want to build stadiums, we have to have a blood war, let us forget that one. Let us just take it all away. If we are going to go to war, let us make it unconditional surrender.

Thank you, Mr. Chairman.

Senator DEWINE. Senator, thank you very much.

Mr. Klein, I was a little surprised in reading your prepared remarks to see that the issue of flat glass was not dealt with. While the flat glass market is certainly not the only issue that we have with Japan and trade competition, it, I believe, is symbolic of what is wrong in that relationship. We examined this issue last fall at our last hearing, at which Mr. Walters from Guardian testified.

Let me ask you your views on the state of competition in the Japanese flat glass market. Let me just say that I hope you share my view that signing an agreement with the Japanese on positive comity is not meant to signify that we are not going to aggressively address this problem in regard to flat glass.

Mr. KLEIN. Sure. Mr. Chairman, let me make two points in response. As you may know, several months ago, several people from the flat glass industry came to the Department for the first time and requested that we look at this issue in terms of the possibility of pursuing some form of referral to the Japan Fair Trade Commission. Up until then, I think the issues had largely been dealt with on a trade basis.

We have fully engaged that process. We are in the course of studying the information that has been submitted. We have notified the Japanese, who are now doing a survey, that we expect to fully review the survey results and what action they take in response and that we will certainly continue to do our work and our analysis.

One of the benefits, I believe, of this agreement is if, and I underscore "if", Mr. Chairman, we come to the conclusion that there

is a basis for a positive comity referral with respect to glass or any other product, we will then have a vehicle in which to make the referral. So I see that as a key benefit of the process and we will continue to do our work in that regard.

I would also note, as I think you did in the beginning during your comments, that having an agreement and making a referral are only the beginnings of the process. You need to see the analysis that the Japan Fair Trade Commission would undertake. You need to see the decision they would make, the support for that decision. I think you know that from our part, we engage this with seriousness and purpose, and when we think there is a basis for referral, we will follow up.

Senator DEWINE. I appreciate your comments very much. As you know, and you and I have discussed this before, flat glass is a great concern of mine. It affects our State, affects our country, and I think we just have a long, long way to go and it is a real sore point with this Senator. I am not going to let go of it.

Let me ask you another question. In your testimony, you discussed a number of specific changes that you think may be worth making in order to improve the positive comity process. Do you envision implementing these changes as part of the actual positive comity agreements or merely as internal procedural changes at the Justice Department? Let me also ask you whether you have discussed these changes with your counterparts in the European Commission.

Mr. KLEIN. At this point, I would prefer, and I think the sensible way to go, since we have only had one experience, essentially, SABRE, and I remember the old line, one swallow does not a summer make, I think to try to really redo the agreement or amend the agreement would be premature. So I think the proposals, which, again, Chairman Pitofsky commented on in his remarks and I have some comments on them in my written remarks, I think we will seek to internalize those as working procedures under the agreement with the Europeans.

In a general sense, not the specifics, but in a general sense about timeframes and about contact with the parties, we have, indeed, discussed that with our counterparts in the European Commission and DG–IV.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Later today, we will hear from Buck Evans, president and CEO of Consolidated Papers, of how the American paper industry has had more than its fair share of problems with the Japanese. According to Mr. Evans, the Japanese market is not open for paper products, just as it is not open for flat glass.

As I understand it, Mr. Klein, your policy permits you to go after antitrust violations abroad that harm American exports. So, Mr. Klein, will you tell us what you can do to help Consolidated Papers and other American companies and what should they do with the Justice Department to help move the process along and break open this very closed market?

Mr. KLEIN. I think, first of all, what they should do, and I have actually talked to various representatives of the paper industry and made clear in my remarks that if they believe that the basis for

their market access issue is an antitrust violation, or as they call it in Japan, an antimonopoly violation, we would be happy to meet with them and to consider whether we would make a referral, previously, before the agreement, in some informal manner, or now, once the agreement is executed, pursuant to it.

What we have told them, Senator Kohl, is that just as in the United States we have companies come to us in the United States and say, I am having problems in this market because there is some collusive arrangement or there is a monopolistic practice and so forth, we need the support, the back-up, the evidence, the economic theories, and the hard work, because otherwise, obviously, we would lose our moorings. We have said this to various people with respect to access to foreign markets and we are prepared to engage, when the evidence is there in a prima facie way and make the appropriate referral.

The second issue which both you and the chairman have raised is an important issue and I want to be very candid with the subcommittee. We have the power under U.S. law to be able to bring on our own a market access case where we think it is a violation of U.S. law.

The real problem with that approach, and I know this from firsthand experience, is we do not have access to evidence in the foreign markets. So in order to bring a case in U.S. court, you need to both have the evidence and have a remedial plan that could exercise control within the foreign market, and the way sovereign power is now constructed in the United States, I think we would be unrealistic to think that we would frequently—I would not say never, and we have looked at several of these matters—frequently bring this kind of action in the United States.

One of the reasons why I have been a big proponent of positive comity, even though it is flawed and it is limited in its implementation sometimes, is because the alternative may be nothing because we do not have subpoena power, we do not have access to the documents, and foreign countries will not voluntarily produce that to us because they view that as within their own domain.

So I think we ought to continue to work to develop the positive comity option, reserve, and there may be cases in the future where we get the evidence, but we have had offshore meetings with people in affected industries who would not come to the United States but would talk to us outside their country of origin about these matters in efforts to tease out the relevant evidence to be able to launch an appropriate case. To date, we have not been able to put together that sort of evidence, and that is why we continue to hold out the hope that positive comity will be a meaningful avenue.

I view it as a positive step, but by no means the last step, simply the first step in Japan's evolution and maturity in terms of commitment to antitrust enforcement that they are willing to do something that up until now they were never willing to do. While antitrust agreements were quite common throughout the rest of the world over the past decade, Japan had never entered any one of them. The fact that they chose to do so with us, I want to look at the glass now being half full. Whether it gets full or not will certainly matter.

Senator KOHL. Mr. Pitofsky, what would you say to Mr. Evans from Consolidated Papers?

Mr. PITOFSKY. A very similar answer, Senator. I believe there are circumstances involving Japan and other countries in which they do not have the same commitment that we do to open markets and American firms are being injured unfairly. The question is what to do about it.

My own experience is the same as Joel Klein's. Getting the witnesses, getting the evidence is extremely difficult, if not impossible, and, therefore, relying in the first instance on positive comity, asking the foreign country to help us out, is the right way to go.

Senator KOHL. Mr. Klein, Mr. Pitofsky, you have worked hard on creating a positive comity agreement with Japan and I commend your efforts, although I am not entirely optimistic, as none of us are, that the agreement will be a success. Why do you think that the Japanese will honor this agreement any more than they have the two flat glass agreements or the 1992 paper agreement, for that matter? We would like to be optimistic, but past Japanese behavior leaves people doubtful. So would you be willing to talk to the folks at the paper industry and at Consolidated, in particular, to see whether you can help?

Mr. KLEIN. Certainly, we would welcome them, if they would like to come in and talk to us and present their concerns. Again, I want to make it a fruitful engagement, so I would certainly urge them to engage antitrust counsel so that they understand the parameters in which we operate, because I think this is a new avenue for a lot of companies to explore relief. So consistent with, I think, the limited portfolio we carry, which is antitrust enforcement, I certainly would welcome meeting with those representatives, Senator Kohl.

As for the Japanese, let me say this. I do not know what history will show. I think they made a classic mistake for which they are paying by not committing themselves to deregulation, competition policy, and open access to their markets. I think America's greatest strength in the 21st century is we got there early, we got there with enthusiasm. It has cost us in terms of certain domestic industry, but our market is strong, our companies are strong because they competed domestically and we are ready for the world stage. I think it has been a great benefit for us and a mistake for other countries.

I think if you look at what Tom Friedman says in his recent book on globalization and you look at what Michael Porter says on the competitive advantage of nations, you understand that antitrust enforcement has been one of the geniuses of the American economy, and other countries are going to come to agree with that. I think we ought to at least suspend judgment. Perhaps optimism is more than history justifies, but we ought to suspend judgment because this is the first agreement that the Japan Fair Trade Commission has ever entered into. This is not an MITI agreement. This has been a Fair Trade Commission agreement and I would like to at least give them the opportunity when we find an appropriate case to refer to see what their response is.

Senator KOHL. OK; Mr. Pitofsky, would you like to make a comment?

Mr. PITOFSKY. I would like to assure the committee that we are not going to be naive about this. We recognize that the agreement is meaningless unless there is some enthusiasm and there is some commitment to enforce these provisions. Each of you have suggested that we keep an eye on what happens and that we study the results of this agreement.

I would like to be optimistic, as well. I think there is an important change going on in Japan in their attitudes toward foreign investment and international trade. But we will keep an eye on whether these agreements are, in fact, supported by the Japanese government.

Senator KOHL. Thank you. Thank you, Mr. Chairman.

Senator DEWINE. Senator Kohl, thank you very much.

Let me take a moment to welcome our students who are in the back and in the audience from the Close Up Program, a program that all the Senators are familiar with. We have the opportunity to see students, I think I do, about once a week from Close Up, so we welcome you here. This is a subcommittee hearing of the Judiciary Committee, the Antitrust Subcommittee. We are looking at antitrust issues and competition issues.

Chairman Pitofsky, Marathon Oil has a major stake in the Norwegian offshore gas fields and is shipping gas to Europe. Marathon alleges that anticompetitive behavior by Ruhrgas and other European gas concerns has cost the company over $500 million in losses. Marathon testified last fall with regard to its current complaint before the European Commission concerning Ruhrgas. Will you please provide the status of that investigation. When can we expect to see a conclusion of this case and the decision on whether a statement of objection will be filed? Are there any specific lessons that you think can be learned from the Marathon case?

Mr. PITOFSKY. Yes. Since our last hearing, we have been in touch with people in Europe on a regular basis. I have myself spoken to the Director General of DG–IV about the Marathon matter. They have done several things. They staffed up the group that was working on this matter. It was rather understaffed, I believe, the last time we met. There has been some progress. I believe that Marathon agrees that the matter is now moving. I think it has been slow. I think it has been——

Senator DEWINE. You think it has been slow? Did you say slow? I am sorry.

Mr. PITOFSKY. Yes, I think so. It is a complicated antitrust case, but I would have hoped it would move along more quickly. But I think it has now achieved some momentum. I think Marathon would agree with that. I cannot predict. I do believe that there will be action and movement in this matter in the near future. I cannot predict how long it will take.

Let me just remind you, this is a matter in which we are talking about sales from Norway into Europe. We could not reach that transaction under any interpretation of American antitrust law. Therefore, we must depend on the Europeans. I am encouraged that there is movement in recent months.

Senator DEWINE. Both of you have indicated in testimony today and testimony in the past your belief that positive comity is a useful tool but will not be the only means to resolve international anti-

trust disputes. As the U.S. economy becomes more intertwined with the economies of other countries, we are sure to see more and more cases that require international cooperation.

I agree that positive comity is not likely to provide a complete solution to these problems, but if not positive comity, how are we going to solve these problems? What else can we do?

Mr. KLEIN. I would say, first of all, the fact that these economies are becoming intertwined makes the need for cooperation greater. And paradoxically, Mr. Chairman, in our cartel work, for example, the one I announced today, two of those companies involved in that were Japanese companies that we prosecuted with this cartel, and in numerous other cases, we have included Japanese companies. It is interesting. In those cases, we get terrific cooperation from the Japanese. We get good cooperation in Europe because these are worldwide conspiracies.

As the economy becomes more global, I think you will find more effective cooperation. Indeed, the need to penetrate domestic markets is going to change somewhat because they are going to be globalized markets and that is going to increasingly happen as we move toward e-commerce and people able to hit a button here in the United States and buy a product anywhere in the world, and that is going to be equally true in other parts of the world.

So I think that what we are doing now is setting the groundwork for effective interconnected antitrust cooperation, and I am actually modestly optimistic about where we are going in that respect.

Mr. PITOFSKY. Let me support the first point you made, Mr. Chairman. The Federal Trade Commission 20 years ago, maybe once a year, twice a year, would encounter a merger that had cross-border implications. Today, 50 percent of the mergers that we take a careful look at, I mean, that we go beyond the initial investigation, involve more than one jurisdiction and some of them involve eight or ten.

The real story, it is partly the bilateral agreements that we have worked out with some of our trading partners with the Department of Justice taking a lead in an excellent way, and I think they are important because they point the way. The real story is day in, day out, people on the phone, working together as we have very successfully with trading partners in many parts of the world, particularly with DG–IV, particularly with Europe. We have had tremendous success in coordinating our theories, coordinating our remedies, exchanging information, and so forth. That is the way the future is going to have to work out.

Senator DEWINE. Senator Kohl.

Senator KOHL. I have no further questions. Thank you, Mr. Chairman.

Senator DEWINE. We thank you both very much. Again, you have been generous, as always, with your time. We look forward to continuing to work with both of you. Thank you.

Mr. KLEIN. Thank you, Mr. Chairman.

Mr. PITOFSKY. Thank you.

Senator DEWINE. Let me invite our second panel now to come up and I will begin to introduce you as you head up. Peter S. Walters assumed his current duties as Group Vice President for Guardian Industries in June 1989. Mr. Walters testified before this sub-

committee in October on the question of international antitrust enforcement and we welcome him back.

Gorton "Buck" Evans joined Consolidated Papers in 1973, became President and Chief Executive Officer in 1997. We welcome him before the subcommittee today.

John S. Reichenbach joined PPG Industries in 1958 and was named Director of Industry Business Analysis and Trade Policy for PPG's Glass Group in 1989. He currently serves as Director of Government Affairs for PPG.

We thank all of you very much, again, for your patience. We apologize for the late start. We will turn first to Mr. Walters. We do have written statements that will become part of the record. We would ask you to proceed as you wish. We have allotted basically 5 minutes for your opening statement, and if you could try to keep it within that, we would appreciate it and we will have plenty of time for questions.

Mr. Walters.

PANEL CONSISTING OF PETER S. WALTERS, GROUP VICE PRESIDENT, GUARDIAN INDUSTRIES CORPORATION, AUBURN HILLS, MI; GORTON M. EVANS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONSOLIDATED PAPERS, INCORPORATED, WISCONSIN RAPIDS, WI; AND JOHN C. REICHENBACH, DIRECTOR OF GOVERNMENT AFFAIRS, PITTSBURGH PLATE AND GLASS INDUSTRIES, WASHINGTON, DC

STATEMENT OF PETER S. WALTERS

Mr. WALTERS. Thank you very much, Mr. Chairman. As you mentioned, my name is Peter Walters. I am Group Vice President of Guardian Industries Corporation, of Auburn Hills, MI, and my responsibilities include overseeing the company's international business efforts.

Last October, I described my company's efforts to establish a meaningful foothold in Japan's flat glass market. Our lack of success and the similar failures of PPG and other non–Japanese-affiliated companies are due to a closed distribution system. A cartel of three Japanese flat glass producers has blocked competition from other non–Japanese firms for decades. Members of the cartel have acquired direct equity interest in important distributors or used highly effective coercive tactics to prevent otherwise independent distributors from switching to flat glass produced by foreign firms. The situation is described in detail in a paper prepared by PPG and Guardian that is being submitted along with PPG's testimony today.

I can report little progress over the last 7 months. Sales volumes at Guardian Japan have been flat, despite new sales initiatives in our part. To deal with the temporary economic downturn in Japan, the three companies have tightened their grip over distributors and resorted to, among other things, selective predatory price cuts to fend off competition from non–Japanese firms. The Japanese companies are betting that they can drive foreign suppliers from the market and recoup lost profits after we leave.

We have recently learned that the Japanese cartel assigns aggressive sales quotas to distributors. They must meet these quotas before they are free to purchase foreign glass. A distributor who fails to meet his quota faces financial retaliation that can ruin his business if, for example, he needs a credit reference from his main supplier or if he depends on rebates for returning the steel racks used to ship his glass.

I mentioned last October that the Japan Fair Trade Commission had agreed to do a survey of the flat glass industry. Such a survey, if it were rigorous, transparent, or reliable, would identify and confirm the anticompetitive practices described to this subcommittee. While the survey results have not yet been released, we expect them any day now. We are skeptical that they will be valid or even fair.

Discussions between the United States and Japanese governments since last October have not narrowed the perception gap much, if at all. My biggest concern is the Japanese government, and specifically MITI, simply is not taking this issue seriously. From the outset, MITI's approach to implementing the flat glass agreement has been to emphasize form over substance. They created a series of arguments intended to show that the market is open and they repeat the arguments despite these fallacies.

Senators DeWine and Kohl, you received a letter from the Japanese embassy containing many of these arguments in late March. The complete, unabridged version is contained in a paper presented by MITI during a government-to-government meeting in Washington in early April. Let me give you just a sample of MITI's specious arguments.

They argue that the share of the foreign glass in the Japanese market has doubled since 1994 to more than 14 percent. The fact is that nearly the entire increase is accounted for by imports from Japanese affiliates located abroad, and much is automotive glass that does not move through the distribution system.

MITI argues that the market is open because the share of foreign-made flat glass is more than twice that in the United States. Our previous point applies here, that the pattern of Japanese imports is dominated by shipments between Japanese-owned affiliates, nor has direct investment been an option in Japan, as is here in the States.

Another MITI argument is that the market is open because, steadily, more distributors handle imported flat glass, up from about 14 percent in 1994 to more than 37 percent in 1997. The problem here is tokenism. Virtually all distributors who handle foreign glass let it account for no more than 5 percent of their turnover.

A final example, and to me the most objectionable one, is MITI's assertion that U.S. firms do not work hard enough or understand the Japanese market. They cite figures that Japanese manufacturers have 30 times more sales people and 10 times more processing facilities. We have put more effort into penetrating the Japanese market than any other market in the world, with meager results. But we will keep at it. We will maintain and expand our efforts because the Japanese market is too important to ignore.

Mr. Chairman, this leads to the question of whether there is any prospect for success through the use of competition authorities. Last fall, I testified in support of proposed legislation to strengthen U.S. antitrust authorities to deal with foreign anticompetitive conduct. In particular, we supported a bill introduced by Senator Abraham to codify footnote 62 of the current antitrust guidelines for international operations. We urge that similar legislation be introduced in this Congress and enacted now.

We understand that substantive agreement has now been reached by the Department of Justice on a joint antitrust cooperation agreement with the Japan Fair Trade Commission. The positive comity provisions of that agreement could provide the basis for identifying and addressing anticompetitive business practices in the flat glass sector. In our view, if the agreement is signed, it is important for the Department of Justice to use the joint antitrust cooperation agreement to make early progress on flat glass.

Japan's willingness and ability to undertake a credible investigation into the conduct of its own flat glass industry, in cooperation with DOJ officials, will be the test of whether Japan is up to the challenge of being an equal partner with the United States under the joint agreement. If not, we should pursue the matter through unilateral action on the part of our own U.S. antitrust authorities.

Thank you very much, Mr. Chairman. I would be delighted to answer any questions.

Senator DEWINE. Mr. Walters, thank you very much.

Mr. Evans.

STATEMENT OF GORTON M. EVANS

Mr. EVANS. Thank you, Mr. Chairman, Senator Kohl, for the opportunity to appear before you this morning. I am Gorton M. Evans, President and CEO of Consolidated Papers, and with a name like Gorton, you can see why Senator Kohl refers to me by my nickname, Buck.

Consolidated, headquartered in Wisconsin Rapids, WI, is North America's largest producer of coated printing papers. We are a $2 billion company in a $160 billion industry. I have samples, thinking that perhaps you were not familiar with coated printing paper as much as you are flat glass. These are samples of the products we produce. Sports Illustrated, Newsweek, Time, and catalogs are produced on our paper.

Consolidated employs 7,200 people in the State of Wisconsin, and within the State of Wisconsin, there are 52,000 people employed in paper and related industry. The United States employs about 700,000 people in the paper industry.

The United States is the world's largest producer of paper and paperboard products. Paper obviously is a big part of our economy. That is because we are a Nation blessed with trees, a renewable resource, water, clay, minerals, chemicals, all the raw materials that are used to make paper, and this is important to our case because Japan is a very important market for our industry.

After the United States, Japan is both the world's second largest producer and consumer of paper products. Yet, the import penetration into Japan is the smallest of any developed nation. Why? Because Japan is protecting an industry that without that protection

would be so uncompetitive it would literally disappear. Japan's papermakers purchase the bulk of their wood and pulp and raw materials from North American suppliers. Their energy, chemicals, and raw materials are much higher cost than those of North American and Scandinavian competitors.

American paper manufacturers cannot penetrate the Japanese market because the Japanese have set up a complex, largely closed distribution system. Interlocking relationships exist between members of the same keiretsu—manufacturers, agents, wholesalers, trading companies, printers, publishers, and users, and even the banks. These relationships result in exclusionary business practices that block the entry of paper imports and promote the growth of their industry at our expense.

I would like to share with you a brief story. It is an example, first person, of what I am talking about, not too much unlike what we just heard from the flat glass.

In April 1992, after a year of intense negotiations, the United States and Japanese Governments signed a 5-year agreement to increase market access for paper products. The Japanese government promised to encourage Japanese keiretsus to increase their use of imported paper products and adopt nondiscriminatory purchasing practices. Our industry association, the American Forest and Paper Association, encouraged its membership to make every effort to begin doing business again with Japan.

So Consolidated Papers dedicated a number of people. We contacted Japan Pulp and Paper, an import agent located in Los Angeles. Our attitude was, we are going to do business, and we will do it their way. They were happy to represent us. Now I will shorten this otherwise long story.

After about 6 months of intensive sampling, shared technical information, redesign, resubmission of packaging, labeling, and everything you can imagine to meet their market standards, we got our first order, one roll of paper—that would be the equivalent of one sheet of glass—to be tested upon arrival in Japan for market suitability. Senators, paper is paper and printing is printing. This is not rocket science. As far as we could tell, the paper arrived in Japan, but we think it never got off the dock.

Overall, that 1992 agreement has not led to increased market access for American papermakers. How can I say that? In 1998, imports from all sources worldwide accounted for just 3.9 percent of Japanese consumption. One-point-seven percent came from the U.S. mills and 1.7 percent, more or less, has been our share for the past 20 years. In contrast, the U.S. imports 16.3 percent of its total consumption of paper and paperboard products.

Specifically, in our segment, coated papers, Japan exported 27,000 tons to the United States in 1997, or 300 percent more than we shipped to them. The Bureau of Census data show that Japanese producers increased their exports of coated paper to the United States in 1998 by 74 percent, while our exports to them actually went down.

How could an uncompetitive industry like Japan's paper industry grow their manufacturing capacity by over 10 percent in just 4 years, 4 years of negative GDP, and why is the U.S. paper industry shrinking within the same timeframe, a time of robust economic

growth? It is simple—protectionism. Monopolistic practices by countries like Japan allows for domestic expansion of capacity at home while increasing exports abroad, especially to the United States.

Senators if you happen to travel to Japan, perhaps you will come across that roll of paper that we shipped 6 years ago. We think it is still on the dock.

On behalf of the U.S. paper industry, I would like to thank the committee for providing the opportunity to highlight our industry's market access issues in Japan. We believe that closer United States Government-industry cooperation is needed to keep pressure on the government of Japan to eliminate collusive business practices which limit United States access to the Japanese paper market. I have submitted a more comprehensive statement which I request be included in the record. Thank you.

Senator DEWINE. It will be made part of the record. Thank you very much, Mr. Evans.

[The prepared statement of Mr. Evans follows:]

PREPARED STATEMENT OF GORTON M. EVANS

The U.S. is the world's largest producer of pulp, paper and paperboard with annual sales of more than $160 billion. Until the onset of the Asian financial crisis in mid-1997, the industry's exports served as the major engine of growth. In the 1990–1997 period, U.S. paper and paperboard exports worldwide doubled to 11.9 million metric tons with a value of $10.2 billion.

Access to the Japanese market is of crucial importance to the U.S. paper industry. After the U.S., Japan is the world's second largest producer and consumer of paper and paperboard. Yet, import penetration in Japan is the smallest in the world. In 1998, imports from all sources accounted for just 3.9 percent of Japanese paper and paperboard consumption and imports from the U.S. represented 1.7 percent of consumption. To put it in perspective, even a 1 percentage point increase in U.S. market share is worth more than $400 million in additional U.S. export sales to Japan.

Low import penetration is especially difficult to reconcile with Japan's lack of comparative advantage in paper manufacturing. Quite to the contrary, Japan suffers considerable competitive disadvantage in the form of high wood, energy, chemicals and labor costs which translate into one of the world's highest production cost structures.

Competition in the Japanese paper market has been suppressed historically by both governmental and private actions which have made access to the market for imported products extremely difficult (except for products that the Japanese paper industry does not produce such as liquid packaging board.)

The U.S. paper industry believes that an array of anticompetitive business practices deter paper imports. Some of these barriers are:

- A complex and largely closed distribution system,
- Interlocking relationships between members of the same *keiretsu,* which include manufacturers, agents, wholesalers, trading companies, printers, publishers or other end users, and financial institutions. (These relationships result in exclusionary business practices restricting the entry of new suppliers, including imports),
- Financial ties between manufacturers and distributors,
- Preferential bank financing even of uncompetitive companies,
- A lack of transparency in corporate purchasing practices, and
- Inadequate enforcement of anti-monopoly laws.

In April 1992, culminating a year of intense negotiations, the U.S. and Japanese governments signed a five-year agreement on measures to substantially increase market access for foreign firms exporting paper products to Japan (Paper Agreement). Without explicitly acknowledging that obstacles to market access exist, the government of Japan made a commitment to undertake a major effort to eliminate them.

Under the Paper Agreement, the Japanese government committed to encourage Japanese distributors, converters, printers and major corporate users of paper products to: (1) increase their use of imported paper products; and (2) adopt and implement open and non-discriminatory purchasing practices. Also, paper and paperboard producers, distributors, converters and printers were to establish and implement internal Anti-Monopoly Law (AML) compliance programs.

Concurrent with the Paper Agreement, the Japan Fair Trade Commission (JFTC) undertook a study of the paper distribution system from the competition perspective. While the JFTC report, released in June, 1993, did not identify specific, actionable violations of the Anti-Monopoly Act, it cited certain aspects of the paper distribution system which it found to be problematic. These include,

- Capital relationships between manufacturers, distributors and wholesalers that reinforce business ties,
- The use of oral agreements to determine the terms of a transaction,
- Traditional after-sales price adjustment.

What has been the effect of the Paper Agreement? We should acknowledge that the agreement produced a number of positive changes in business practices. One example is the use of written contracts rather than unwritten "understandings" between manufacturers and their distributors. Critically, the Agreement provided some legitimacy for Japanese customers who were inclined to use imported paper but were concerned about negative repercussions from their primary suppliers, the Japanese paper manufacturers. (This points to the need for a government-to-government venue for discussing market access issues and for ongoing review of progress in opening the Japanese paper market.)

Overall, though, the agreement did not appear to have lead to increased market access for imported paper. The U.S. government and the U.S. paper industry concurred in the judgement that the agreement was not producing the results anticipated.

As reported in the March 1997 *National Trade Estimate Report on Foreign Trade Barriers,* "there has been no meaningful increase in Japanese imports of paper products." This assessment was based on the lack of any meaningful change in the level of imports in both absolute terms and as a share of Japanese paper consumption. Moreover, there was no evidence that the GOJ took steps to implement commitment to work with other ministries to encourage end users to purchase imported paper products and to require Japanese companies to develop Anti Monopoly Act compliance policies. The 1998, and the just issued 1999, National Trade Estimate Report arrived at the same conclusion.

The full impact of the combined failure to implement the agreement and refusal to even discuss remedies can best be understood in the context of concurrent developments in the Japanese paper industry:

- Even though Japan is a high-cost producer and notwithstanding a relatively slow 2 percent rate of domestic demand growth—Japanese companies initiated projects which added some 1.7 million metric tons of new paper and paperboard capacity in the 1997–98 period;
- The major players in the industry underwent a "consolidation" which substantially strengthened the position of the leading producers and minimizes direct competition;
- Several paper companies obtained special treatment under Japan's Business Reform Law, which provides, inter alia for special tax credits and JFTC approval for cooperation with other companies in the industry in the course of restructuring.

Finally, in April 1997, with this new capacity substantially in place and Japanese domestic industry control over the market reinforced, the GOJ refused to renew the government-to-government paper agreement on the grounds that the paper market was "open" (sic) and that government interference in the marketplace—presumably encouraging imports and requiring policies for compliance with the Anti-Monopoly Act—were not consistent with Japanese government policy.

In refusing to extend the 1992 paper market access agreement, the Japanese government pointed to the almost 50 percent increase in Japan's imports of printing and writing papers in 1996, primarily from Finland, as an indication of the openness of the Japanese paper market. However, results in 1997 confirmed the U.S. judgment that the previous year's situation reflected short term market conditions. Total paper and paperboard imports dropped from 1.56 million metric tons in 1996 to 1.32 million metric tons a year later. In the important printing and writing paper sector, Japanese imports dropped by 38 percent, from 625,933 metric tons to

387,139 metric tons. In 1998, Japanese paper and paperboard imports fell an additional 11.7 percent.

The issues of compliance with the AML and GOJ toleration of anti-competitive practices in the paper market closely parallel in structure and in market effects the pattern in the photographic film, flat glass and other industry sectors. Specifically:

- The JFTC's 1993 paper market survey documented the existence of "traditional" business practices which impede access to new market entrants,
- The JFTC has failed to act on indications of problematic behavior by Japanese paper companies. Japanese press reports during the period of the Agreement and since then documented meetings and discussions among Japanese paper producers regarding prices and other conditions of the Japanese paper markets, but there have been no subsequent enforcement action by the JFTC.

The 1996 merger between New Oji Paper and Honshu Paper companies, creating the largest paper company in Japan, indicates that the JFTC will sanction the increased consolidation in the Japanese paper industry. While the JFTC expressed some concerns about the merged company's stake in the top two paper distributors, and about the practice of loaning executives to distributors, no effective action was taken to initiate the thorough reform of the distribution system promised in the several announced distribution reform programs.

At the same time, Japanese paper manufacturers, in spite of their industry's generally high production costs, are expanding exports to Asia-Pacific markets. Japan's total paper and paperboard exports were up 35 percent in 1997, with printing and writing papers exports rising by an extraordinary 52 percent. Paper and paperboard exports advanced 14.8 percent in 1998. It is evident that Japan's long term strategy of protecting the local paper industry from import competition, has allowed Japanese paper producers to significantly expand production capacity of high-value added paper products for both the domestic and export markets.

The genesis of this strategy can be traced back directly to the 1994 report issued by the "Study Committee on Basic Issues of the Japanese Paper and Pulp Industry" organized by MITI. Among other things, the report urged the Japanese paper industry to become more international in outlook and expand into foreign markets for further growth. It is evident that Japan's long term strategy of protecting the local paper industry from import competition, has allowed Japanese paper producers to significantly expand production capacity of high-value added paper products for both the domestic and export markets.

The Japan model represents an extremely well developed system of protectionism. Some would say that this is a failed system that has contributed to Japan's economic malaise. So why does it matter? There is evidence that other countries have proceeded down the same path. South Korea, for one, has also built up a large paper industry without any apparent comparative advantages. China is also a concern. Right now, our main concern with China are high tariffs and traditional nontariff barriers. However, as it lowers tariffs and traditional nontariff barriers once it joins the WTO, we are concerned that China's non-transparent trade and economic structure would allow it to protect the domestic paper industry through a combination of administrative guidance, government-industry ties, toleration of cartels and other anticompetitive business practices.

RECOMMENDATIONS

Our experience with the 1992 U.S.-Japan Paper Market Access Agreement and the Japanese Government's unwillingness even to discuss its renewal, illustrates the limitations of trade negotiations as a tool to open Japanese markets to competition. It seems apparent that the primary cause of the U.S. industry's inability to obtain reasonable access to the Japanese market is collusive and exclusionary practices among the Japanese paper manufacturers and between those manufacturers and distributors. The Japanese Government has been unwilling to bring an end to those practices by vigorous enforcement of the Japanese Anti-Monopoly Law.

Our industry's situation should provide the Committee with support for Recommendations it could make to antitrust enforcers along the following lines:

(1) U.S. enforcers should request the JFTC conduct a follow-up to its 1993 Survey of the Paper Industry and Market, in order to assess compliance by Japanese paper companies with the Anti-Monopoly Law.

(2) U.S. enforcers should request the Japanese Government's cooperation with a U.S. investigation of conduct in Japan that is hindering exports from the United States.

(3) U.S. enforcers should help educate Japanese enforcement authorities and Japanese companies on the value of comprehensive anti-monopoly law compliance programs and encourage their adoption by Japanese companies. If adopted, such programs could help deter employees from violating Japanese and/or U.S. law.
(4) U.S. enforcers should work with the U.S. agencies responsible for compliance with existing trade agreements, to determine whether conduct that constitutes non-compliance with such agreements amounts to an antitrust violation.
(5) U.S. antitrust enforcers should consider supporting amendments to the antitrust laws clarifying their application to conduct outside the United States which hinders access to foreign markets.

Thank you.

Senator DEWINE. Mr. Reichenbach.

STATEMENT OF JOHN C. REICHENBACH

Mr. REICHENBACH. Thank you, Mr. Chairman and Senator Kohl. My name is John Reichenbach. I am the Director of Government Affairs for PPG Industries, Incorporated. It is the hope of PPG that today's hearing will shed light on the manner in which the antimonopoly law is, or perhaps more accurately, is not, enforced in Japan.

PPG entered the Japanese flat glass market in 1967 and has had continuous presence there ever since. Japan has the second largest glass market in the world. It is, therefore, an important one from both economic and strategic points of view.

Despite the company's world class technologies and global success in manufacturing and selling a wide range of glass and other products, they have encountered severe market entry barriers in the Japanese flat glass market which for many years have frustrated the attempts of PPG and other non–Japanese producers to enter the Japanese market due to fundamental distortions in Japan's flat glass market.

The Japanese producers of flat glass and downstream products of flat glass have engaged in a wide range of patently anticompetitive activities. The evidence available to us strongly suggests that the Japanese producers originally established a collusive market allocation arrangement with the knowledge and acceptance of their government.

For as long as I can remember, the market shares in Japan of the three Japanese glass producers have remained essentially the same, as shown in Graph No. 1. These practices have been and are pervasive and are of a nature that, if undertaken in the U.S. market, would be subject to intense antitrust enforcement activities by authorities at the Federal and State level. By contrast, the Japanese government has not pursued even the most egregious instances of anticompetitive behavior.

Attached to my testimony, you will find a longer listing of anticompetitive trade practices in Japan and I would like to highlight several areas for you.

Japanese flat glass manufacturers have imposed informal sales quotas on their customers. These quotas operate by prohibiting Japanese distributors from buying any non–Japanese-affiliated foreign manufactured glass until a minimum quota amount of Japanese-produced glass is first purchased. If a Japanese distributor does not meet the quota for purchases of glass from his Japanese suppliers before buying glass from independent foreign producers,

the distributor faces any of a number of pressures, ranging from unfavorable credit reports to forfeiture of cash deposits made in advance of purchases to social ostracism.

Japanese glass producers exercise control over the distributors in many ways. Some are direct, such as the acquisition of partial ownership or forced consolidation of distributors. In some cases, Japanese producers require distributors to open their accounting and purchasing records to the producers so that the source of purchases is known to the Japanese producers. In other cases, Japanese producers have been known to place their personnel on the management staff of their distributors. In effect, this means that Japanese producers can monitor and then later pressure distributors to limit the amount of glass that is purchased from other suppliers, such as PPG.

One of the strongest proofs of the collusive nature of the Japanese market came from a Japanese employer of a U.S. glass producer who stated that in his previous employment, he personally collected and aggregated the production numbers of the Japanese producers so that each could regulate their production according to the agreed upon market shares.

Additional strong evidence of collusion is contained in recent comments reported in the Japanese press which suggest that Japanese producers and distributors are engaged in price signaling, if not outright price fixing. In the April 15, 1999, issue of the Nippon Keizai Shinbun, an executive of one of the large exclusive glass distributors signaled that he was going to accept a manufacturer's proposal for a new pricing structure for the entire industry and encouraged the rest of the industry to do so, as well, stating, "It is a good time for the glass industry to reconsider the current glass pricing structure when the whole industry is suffering from excessive competition among themselves." This clear call for price coordination was designed to allow an increase in prices.

Japanese glass manufacturers also employ a less-than-arm's-length relationship in their business dealings. These relationships extend to credit suppliers and advertisers as well as to their distributors. In one instance, PPG called a Japanese trade publication to arrange to buy advertising space for the sale of PPG glass products. Despite having been told that space was available initially, in a subsequent meeting with the newspaper to finalize arrangements for the advertisements, PPG representatives were told that the newspaper could not offer space to a foreign flat glass producer. The reason given was that the newspaper would suffer the loss of all advertising revenues from Japanese producers if it sold space to a U.S. glass producer.

Distributors have in the past explained to our sales personnel that if they made large flat glass purchases from PPG, they could expect higher prices or even a total cutoff from supply on special glass products which are not made by independent foreign suppliers and, thus, must be bought from Japanese makers. These threatened reprisals intimidate distributors from buying large quantities of foreign glass.

These producer practices are designed to monitor, discipline, and ultimately control the distribution channels in the Japanese flat

glass market. These practices run counter to both U.S. antitrust law and the letter of the Japanese antimonopoly laws.

A 1993 JFTC study confirmed the firsthand experiences of PPG by finding that essentially all primary wholesalers are in actuality the exclusive agents of one of the manufacturers. The surveys also found that the Japan's flat glass market is virtually monopolized by the three glass makers and that the system of sales through exclusive distributors had barred access by other suppliers.

During its 30-plus years in Japan, PPG has tried every plausible way to increase its market presence. PPG has hired Japanese nationals for its sales staff, both as inside and outside staff. PPG has participated in trade shows and even formed a Japanese glass marketing joint venture with the Japanese trading company Itochu. Over the years, we have established sales offices, fabrication facilities, and cutting centers in Japan. A 1997 survey by Japan's Ministry of International Trade and Industry found that Japanese buyers viewed PPG's products as equal or superior to the quality of Japanese products.

Initially, because of producer pressure, Japanese distributors demanded that PPG repackage its glass into Japanese style containers so that distributors' purchases of non–Japanese-affiliated glass could be more easily disguised. For the same reason, PPG also was told to deliver its products only on Sunday. Additionally, deposits collected by the Japanese producers from distributors to reserve future glass purchases have been threatened with confiscation if distributors continued buying U.S. glass products.

The Japanese government has claimed that the flat glass agreement has resulted in a larger market presence for foreign manufacturers. This claim, however, runs contrary to the facts. As Graph No. 2 shows, the 1998 USTR national trade estimates report listed the import share of the Japanese market at only six percent, with only three furnished by independent foreign producers.

This highlights the stark imbalances in the flat glass market of Japan versus the United States. Graph 3 will show that Japanese glass producers and their affiliates in the U.S. enjoy unfettered access to the U.S. market, holding approximately a 22 percent U.S. market share through wholly owned subsidiaries and another 15 percent of the U.S. market through joint ventures with other foreign producers. By contrast, U.S. producers are virtually blocked from the intensely anticompetitive Japanese market.

In addition, the Japanese affiliates based in the United States and other countries also enjoy unrestricted access to the Japanese market. For example, 91 percent of the automotive glass parts shipped to Japan from the United States in 1998 came from wholly owned subsidiaries of Japanese flat glass producers, as shown in chart 4. Thus, the independent foreign producer share of 2 to 3 percent has remained relatively unchanged in the flat glass market of Japan.

With these facts in mind, we hope that the U.S. Congress and the administration will act to ensure that the Japanese enforce antitrust laws which they currently have on their books. We have asked the JFTC to investigate these practices and take action. We believe that a thorough, unbiased investigation of the Japanese flat glass market will reveal a number of anticompetitive practices.

We also recommend that the measure of success in this undertaking be the accomplishment of defined objectives within the near term. In order to pursue this type of success, we also urge that the U.S.–Japan Flat Glass Agreement be strengthened and renewed before the end of this year.

This concludes my prepared testimony. I will be pleased to attempt to answer any questions you may have.

Senator DEWINE. Thank you very much.

[The prepared statement of Mr. Reichenbach follows:]

PREPARED STATEMENT OF JOHN C. REICHENBACH

INTRODUCTION

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: My name is John C. Reichenbach. I am the Director of Government Affairs for PPG Industries, Inc. ("PPG"). This Subcommittee asked PPG to provide testimony regarding the Company's experiences with anticompetitive practices in the Japanese market and the Government of Japan's responses to such practices. It is the hope of PPG that today's hearing will shed light on the manner in which the antimonopoly law is—or perhaps, more accurately, is not—enforced in Japan.

Because my career at PPG has caused me to deal with this problem extensively, I have been asked to appear here today in order to share my Company's views. I joined PPG in 1958 and have served in a variety of positions in the glass business of the Company, including Director of Industry and Business Analysis, Director of Market Planning, and Director of Marketing. I became the corporate Director of Government Affairs for PPG Industries, Inc. in 1994. In these capacities, I have dealt often with the long-standing problems PPG has encountered in Japan's flat glass market.

ABOUT PPG

PPG was the first commercially successful plate glass manufacturer in the United States and has been a glass technology leader since 1883. PPG's glass operations had global sales exceeding $2.5 billion last year. PPG Industries has 18 glass manufacturing facilities in 14 states employing nearly 10,000 highly skilled American workers. The Company is the largest manufacturer of glass for commercial and residential construction in North America. PPG's glass business units supply automotive, aircraft and other transportation original equipment and replacement glass parts, glass for commercial and residential construction and remodeling, and products for industrial, mirror and furniture applications. PPG is also a global producer of fiber glass, coatings and chemicals.

Most glass today is produced by the float process. Molten glass is poured continuously from the melting furnace into a second furnace containing a bed of molten tin. The molten glass floats on the tin and gradually cools until it forms a continuous ribbon. The solid state form is conveyed into another furnace known as an annealing lehr, where the controlled cooling process is completed. The continuous glass ribbon is then cut into the customers' sizes and packaged for shipment.

PPG IN JAPAN

PPG's interest in the Japanese market is long standing. Indeed, PPG entered the Japanese flat glass market in 1967 and has had a continuous presence ever since. Japan has the second largest glass market in the world. It is, therefore, an important one from both economic and strategic points of view.

Despite the Company's world class technologies and global success in manufacturing and selling a wide range of glass and other products, we have encountered severe market entry barriers in the Japanese flat-glass market which for many years have frustrated the attempts of PPG and other non-Japanese producers to enter the Japanese market. During the more than thirty years PPG has operated in Japan we have attempted every plausible method to gain greater access to the flat glass market. Our efforts, however, have yielded very little success due to fundamental distortions in Japan's flat glass market.

Broadly speaking, the Japanese producers of flat glass and down-stream products of flat glass have engaged in a wide range of patently anticompetitive activities. Moreover, the evidence available to us strongly suggests that the Japanese producers originally established a collusive market allocation arrangement with the knowl-

edge and acceptance of their government. For as long as I can remember, the market shares in Japan of the three Japanese glass producers have remained essentially the same.

These practices have been and are pervasive and of a nature that, if undertaken in the U.S. market, would be subject to intense antitrust enforcement activity by authorities at the federal and state level. By contrast, the Japanese Government has not pursued even the most egregious instances of anticompetitive behavior, thereby attracting widespread criticism for inadequate enforcement of its antimonopoly laws.

ANTICOMPETITIVE TRADE PRACTICES

During its more than three decades of operation in Japan, PPG has observed a litany of anticompetitive practices occurring in the Japanese flat glass market. Attached to my testimony you will find a longer listing of some of these practices, but I would like to highlight several areas for you. (See Attachment 1 for description of barriers to entry in the Japanese market.)

(1) Restrictive distribution practices

Japanese flat glass manufacturers have imposed informal sales quotas on their customers. These quotas operate by prohibiting Japanese distributors from buying any non-Japanese affiliated foreign manufactured glass until a minimum quota amount of Japanese produced glass is first purchased. If a Japanese distributor does not meet the quota for purchases of glass from his Japanese suppliers before buying glass from independent foreign producers, the distributor faces any of a number of pressures ranging from unfavorable credit reports, to forfeiture of cash deposits made in advance of purchases, to social ostracism.

(2) Oversight of distributors by producers

Japanese glass producers exercise control over the distributors in many ways. Some are direct, such as the acquisition of partial ownership or forced consolidation of distributors. In some cases, Japanese producers require distributors to open their accounting and purchasing records to the producers, so that the source of purchases is known to the Japanese producers. In other cases, Japanese producers have been known to place their personnel on the management staff of their distributors. In effect, this means that Japanese producers can monitor and then later pressure distributors to limit the amount of glass that is purchased from other suppliers, such as PPG.

(3) Evidence of collusion

- One of the strongest proofs of the collusive nature of the Japanese market came from a Japanese employee of a U.S. glass producer who has stated that he personally collected and aggregated the production numbers of the Japanese producers so that each could regulate their production according to the agreed market share.
- Additional strong evidence of collusion is contained in recent comments reported in the Japanese press which suggest that Japanese producers and distributors are engaged in price signaling, if not outright price fixing. In the April 15, 1999 issue of the Nippon Keizai Shimbun, an executive of one of the large exclusive glass distributors signaled that he was going to accept a manufacturer's proposal for a new pricing structure for the entire industry and encouraged the rest of the industry to do so as well stating, "It is a good time (for the glass industry) to reconsider the current glass pricing structure when the whole industry is suffering from excessive competition among themselves." This clear call for price coordination was designed to allow an increase in prices. (See a copy of the article and translation at Attachment 2.)
- Japanese glass manufacturers also employ a less than arms-length relationship in their business dealings. These relationships extend to credit suppliers and advertisers as well as their distributors. In one instance, PPG called a Japanese trade publication to arrange to buy advertising space for the sale of PPG glass products. Despite having been told that space was available, in a subsequent meeting with the newspaper to finalize arrangements for the advertisements, PPG representatives were told that the newspaper could not offer space to a foreign flat glass producer. The reason given was that the newspaper would stiffer the loss of all advertising revenues from Japanese producers if it sold space to a U.S. glass producer.

(4) Tie-in sales

Distributors have in the past explained to our sales personnel that if they made large flat glass purchases from PPG they could expect higher prices, or even—total

cut-off from supply, on special glass products which are not made by independent foreign suppliers, and thus must be bought from Japanese makers. These threatened reprisals intimidate distributors from buying large quantities of foreign glass.

These producer practices are designed to monitor, discipline, and ultimately control the distribution channels in the Japanese flat glass market. These practices run counter to both US antitrust law and the letter of the Japanese antimonopoly law. Yet, in each of these cases no effective remedial action has been taken.

In a 1993 JFTC study, the government of Japan noted a number of anticompetitive practices in the flat glass industry, confirming the first-hand experiences of PPG. This remarkably frank examination of the Japanese flat glass market provided many insights into the state of the industry. The survey found that "each [domestic] manufacturer does not engage in trying to sell to the distributors of another manufacturer, nor does it try to induce the distributor of another manufacturer to become its distributor." The survey acknowledged that there is a vertically integrated structure to the flat glass market, in which "essentially all primary wholesalers are in actuality the exclusive agents of one of the manufacturers."

Further, the JFTC found that there were instances in which makers or exclusive distributors, had "either lodged complaints to or harassed agencies who had sold imports" and it confirmed that "there were instances of [retailers] being pressured by manufacturers or contract agencies * * * if they expanded purchases of imported products or initiated new purchases." The surveys finally found that "Japan's flat glass market [is] virtually monopolized by the three glass makers, [and that] the system of sales through exclusive distributors ha[d] barred access by other suppliers."

The JFTC market survey confirmed the anticompetitive experiences that PPG had witnessed. During its time in Japan PPG has tried every plausible way to increase its market presence. PPG has hired Japanese nationals for its sales staff, both as inside and outside staff. PPG has participated in trade shows, and even formed a Japanese glass marketing joint venture with the Japanese trading company, Itochu. Over the years we have established sales offices, fabrication facilities and cutting centers in Japan. A 1997 survey by Japan's Ministry of International Trade and Industry ("MITI") and Ministry of Construction ("MOC") found that Japanese buyers viewed PPG's products as equal or superior to the quality of Japanese products. Moreover, PPG cost advantages consistently enabled it to price its glass at 20 percent–30 percent below comparable Japanese products until last year, but now we are encountering selective predatory pricing by Japanese producers.

Thus, all of these efforts have been thwarted by a coordinated scheme to protect market share and preserve a closed market structure in Japan.

EFFECT OF THE 1995 US–JAPANESE FLAT GLASS AGREEMENT

The U.S.-Japan Flat Glass Agreement held out the hope for change, but after nearly five years of its operation, it has not lived up to its initial promise. Today, the Japanese flat glass market remains largely unchanged. The practices which I have cited have not gone away. Indeed, PPG continues to experience overt and covert anticompetitive behavior.

Initially, because of producer pressure, Japanese distributors demanded that PPG repackage it's glass into Japanese style containers so that distributors' purchases of non-Japanese affiliated glass could be more easily disguised. For the same reason, PPG also was told to deliver its products only on Sundays. Additionally, deposits collected by the Japanese producers from distributors to reserve future glass purchases have been threatened with confiscation if distributors continued buying U.S. glass products. These practices, and a laundry list of others, continue unabated despite the U.S.-Japanese agreement.

In addition, we now see aggressive new predatory pressures in Japan. Perhaps in desperation over the economic recession in Japan, during 1998 and 1999 to date the Japanese producers have resorted to unprecedented, deep, selective price cuts. This practice by the Japanese producers is a narrowly focused attempt to retain distributors who had begun to purchase quantities of PPG glass by offsetting PPG's cost/price advantages.

The Government of Japan has claimed that the flat glass agreement has resulted in a larger market presence for foreign manufacturers. This claim, however, runs counter to the facts. Even if one accepts the market statistics presented by the Government of Japan, they do not reflect greater foreign producer participation in the Japan market nor do they support claims that the Japanese glass market is becoming more open or that anticompetitive practices are abating.

For example, the Government of Japan's simple assertion that 14.7 percent of the Japanese flat glass market in 1997 was supplied by imports does not tell the whole

story. Of that 14.7 percent, approximately 4 share points were accounted for by PPG sales of automotive privacy glass to the Japanese flat glass producers. Clearly, this glass did not go through the traditional distribution channels. Another 8 share points were attributable to imports from affiliates of the Japanese flat glass producers in the U.S. and elsewhere. In addition, much of this glass consisted of fabricated automotive glass parts which, once again, did not travel through normal flat glass distribution channels. Thus, the remaining 2 or 3 share points were the only flat glass imports relevant to a discussion of the anticompetitive structure of the flat glass market.

This highlights the stark imbalances in the flat glass markets of Japan versus the United States. Japanese glass producers and their affiliates in the U.S. enjoy unfettered access to the U.S. market, holding approximately a 22 percent U.S. market share through wholly owned subsidiaries and another 15 percent of the U.S. market through joint ventures with other foreign producers ventures. By contrast, U.S. producers are virtually blocked from the intensely anticompetitive Japanese market. In addition, the Japanese affiliates based in the U.S. and other countries also enjoy unrestricted access to the Japanese market. For example, 91 percent of the automotive glass shipped to Japan from the U.S. in 1998 came from wholly owned subsidiaries of Japanese flat glass producers. It is particularly frustrating that these imbalances are founded on business practices which would be vigorously prosecuted by the competition authorities in the U.S., Europe, Canada, and elsewhere.

Thus, the independent foreign producer share of 2–3 percent has remained relatively unchanged in the Japanese flat glass market. Of equal concern to PPG is the continuing lack of enforcement of Japan's antimonopoly laws. It is these laws and the practices they are designed to prevent that hold out the hope of significant change in the Japanese flat glass market.

conclusion

With these facts in mind we hope that the United States Congress and the Administration will act to ensure that the Japanese enforce the antitrust laws which they currently have on the books. We have asked the JFTC to investigate these practices and take action. We believe that a thorough, unbiased investigation of the Japanese flat glass market will reveal a number of anticompetitive practices. Elimination of these market distortions would substantially open the Japanese flat glass market to independent foreign manufacturers.

We also recommend that the measure of success in this undertaking be the accomplishment of defined objectives within the near term. In order to pursue this type of success we also urge that the U.S.-Japan Flat Glass Agreement be strengthened and renewed before the end of this year.

This concludes my prepared testimony. I will be pleased to attempt to answer any questions you may have.

ATTACHMENT 1

BARRIERS TO ENTRY IN THE JAPANESE FLAT GLASS MARKET: OPPORTUNITIES FOR BILATERAL COOPERATION

STATEMENT OF THE PROBLEM

Access to the Japanese flat glass market is controlled by an entrenched oligopoly of manufacturers that have effectively organized themselves as a cartel. They have entered into tacit agreements among themselves to allocate the flat glass market through their control of the distribution system. The oligopoly was originally organized with the active support of the Government of Japan. There has been no successful new entry into the market since the 1960s and market shares for the incumbent manufacturers have remained essentially constant over most of that period.

U.S. and European flat glass manufacturers have unsuccessfully attempted to enter the Japanese flat glass market. For U.S. manufacturers, efforts to penetrate this market began over 30 years ago. Since then, U.S. manufacturers have steadily built efficient sales and service capabilities in Japan in an attempt to reach customers. At the same time, these U.S. manufacturers have urged the Government of Japan, including the Ministry of Trade and Industry (MITI) and the Japan Fair Trade Commission (JFTC), to exercise their authority to deter market foreclosing, anticompetitive conduct by the Japanese manufacturers.

Despite their initial promise, successive trade agreements between the United States and Japanese Governments to open the Japanese flat glass market have not been successful. Japanese undertakings in the 1992 Bush-Miyazawa Action Plan did not succeed in the goal to "substantially increase market access for competitive foreign firms." Indeed, the Japanese Government failed to implement key elements of

the agreement. Likewise, a 5-year bilateral agreement on flat glass signed in 1995, which was intended to "deal with structural and sectoral issues in order substantially to increase access and sales of competitive foreign goods and services * * *," has not been effective to open the market to competition.

In retrospect, it is not surprising that trade agreements alone have failed to open the market to competition. The root cause of the market access problem is collusive and exclusionary conduct among the Japanese manufacturers and between the manufacturers and distributors that is most effectively remedied by vigorous enforcement of the U.S. antitrust laws or the Japanese Antimonopoly Act. To date, neither the U.S. antitrust authorities nor the JFTC has taken an enforcement action against Japanese manufacturers and/or distributors. Consequently, the Japanese flat glass market remains effectively closed to new competitors.

U.S. and Japanese antitrust authorities have recently announced negotiations on a bilateral antitrust cooperation agreement in line with similar agreements that the U.S. maintains with Canada and the European Commission. While potentially useful, such an agreement would not likely be accepted by the U.S. business community unless the JFTC is able to demonstrate that it is a reliable and credible antitrust enforcement agency on par with the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission. Nothing in the JFTC's actions to date with respect to its own flat glass industry suggests that it would meet such high standards. Indeed, the JFTC's lack of enforcement resolve has enabled an oligopoly of Japanese glass manufacturers to engage in cartel behavior by controlling the purchasing decisions of its customers and by blocking new entrants, including U.S. manufacturers, from gaining a foothold in their market.

BARRIERS TO ENTRY IMPEDE SALES AND INNOVATION

The $3 billion per year Japanese flat glass market is the second largest single market in the world. Nearly the entire market is supplied by three Japanese producers—Asahi Glass Company, Ltd. (Asahi), Nippon Sheet Glass (NSG), and Central Glass Company (Central). Each Japanese glass producer is a member of one of the powerful keiretsu groups, with Asahi part of the Mitsubishi Group, NSG part of the Sumitomo Group, and Central part of the Mitsui Group. Since the late 1960s the three producers have maintained steady market shares in a 5-3-2 ratio. Asahi has consistently been the largest, with a market share of around 50 percent. These constant market shares are in stark contrast to the patterns in the U.S. and Europe, where flat glass market shares have shifted dramatically since the 1960s and new entrants have thrived.

The exclusive distribution system for flat glass in the residential construction market represents the single greatest barrier to market access. That distribution system consists of three rigid channels, each controlled by one of the domestic flat glass manufacturers. Secondary distributors and dealers are, in turn, controlled by the distributors. As a result, the domestic manufacturers are able to control the market down to the smallest customer at the retail level.

One consequence of the tightly controlled flat glass market in Japan is that the use of innovative, high-value-added products such as insulating glass, tempered and laminated safety glass, and energy-efficient low emissivity (low-E) glass has lagged behind that of Western Europe and the United States. The relatively low level of these value-added fabricated glass products in Japan can be traced directly to the lack of competition, both among the Japanese flat glass producers and from foreign suppliers. Even as Japanese manufacturers have increased production of value-added products in recent years, they have done so in a highly vertical fashion. In the U.S. and Europe, the value-added coating and fabrication is primarily done downstream by independent companies. In Japan, the domestic makers preserved the value-added processes for themselves to prevent the distributors from gaining any measure of control over the production process and thereby asserting even a modicum of independence from the manufacturer with which they have an exclusive arrangement.

The Japanese flat glass cartel controls the market through a variety of collusive and exclusionary practices, including refusals to deal, exclusive distribution arrangements, and economic coercion over distributors and potential purchasers of foreign glass. While Japanese glass manufacturers do not always hold controlling ownership interests in distributors, their control has been achieved by similarly effective means, including tacit supply contracts, partial ownership, quotas and targets, financial leverage (such as delayed settlement of accounts), exchange of personnel, and ultimately by threats of retaliation should the distributor purchase products from outside the exclusive channel. A recent example of the leverage that the manufacturers exert over their distributors comes from salesmen for foreign suppliers

who have reported that Japanese manufacturers have informally assigned quotas to their distributors. The distributors are permitted to buy imported glass only after they have satisfied their domestic quota requirements.

FOREIGN FLAT GLASS FIRMS HAVE NOT BEEN ABLE TO PENETRATE THE MARKET

No major foreign flat glass company has succeeded in penetrating the Japanese market. The market's sheer size and the relatively higher prices historically enjoyed by the domestic manufacturers have made it a prime target for foreign firms, including the major international companies (e.g., Pilkington, St. Gobain, PPG, and Guardian) as well as regional manufacturers from Taiwan and Korea. A 1998 survey by MITI found that prices for imported flat glass products were 20 percent more or less expensive than domestic products.

Pilkington (U.K.) has attempted to export high-value-added architectural glass from its European operations, as well as raw float glass from its Chinese manufacturing facility in Shanghai. St. Gobain (France) recently became affiliated with a Korean supplier and for many years has attempted to sell products from its European operations.

PPG Industries, Inc. (United States) has been one of the most patient and persistent of the major international firms. They have maintained sales operations in Japan since 1967, and have a joint venture with the trading firm Itochu Corporation that was established primarily to market and distribute its imported flat glass products.

Guardian Industries Corp. (United States) began its Japan efforts more than a decade ago. It has built up a significant sales and distribution network in Japan, with sales offices and warehouse/distribution centers in Tokyo and the Tokai region. It also plans to add additional warehouse/distribution centers. Guardian also cuts glass to size at these centers to ensure that it can sell to smaller, more demanding customers.

The major international glass manufacturing companies have uniformly experienced failure in entering the Japanese flat glass market. This failure can be attributed directly to the systematic efforts of the Japanese flat glass manufacturers to deny entry to new entrants. All of the potential foreign entrants to the Japanese market are technologically advanced, have proven marketing skills, aggressive pricing, and compete effectively with each other and with Japanese firms (especially the largest, Asahi) in all other world markets.

LACK OF SALES OPPORTUNITIES IN JAPAN CONTRASTS WITH THE U.S. AND EUROPE

Japan's distribution system for flat glass contrasts sharply with systems in North America and Europe, where a glass distributor is free to choose from the products of competing manufacturers and where most distributors handle products of multiple manufacturers. In these markets, manufacturers tend to cater to the requirements of the customer/user, giving rise to manufacturing technologies that allow for efficiencies unavailable to the Japanese market. In North America and Europe, product innovation is encouraged and distributors are free to secure capital and buy supplies from the most competitive sources available to them.

The United States flat glass market is open for both investments and imports. Japanese firms participate in the U.S. flat glass industry and account for about one-fifth of total sales.

* Asahi, Japan's leading producer, purchased a 20-percent share of AFG Industries, Inc., the third-largest glass maker in the United States, through its Brussels-based subsidiary Glaverbel during a management buyout in 1988, and acquired the remainder of the firm in December 1992. The acquisition expanded Asahi's North American distribution network and product capabilities, giving Asahi float lines and fabrication equipment in both the United States and Canada. The operations of Asahi and AFG are especially complementary in the United States, linking Asahi's two automotive-glass plants with a supply of raw flat glass from AFG's float glass plants. The AFG acquisition gave Asahi control of approximately 20 percent of the U.S. market.
* NSG, Japan's second-largest producer, bought a 20 percent share of Libby-Owens-Ford (LOF) in 1989. The balance of LOF is owned by Pilkington of the United Kingdom. The acquisition gives NSG a presence in all three North American markets through LOF's U.S. and Canadian facilities and the NSG–LOF joint venture to produce automotive glass in Mexico, L–N Safety Glass. Another NSG–LOF joint venture to produce automotive glass, United L–N Safety Glass, Inc., began its first full year of operation in Versailles, Kentucky, in 1988.

* Central Glass, Japan's third-largest producer, initially entered into a joint venture with Ford to produce automotive glass at a plant in Tennessee called Carlex. Central has now purchased Ford's shares and owns 100 percent of the company.

Depending upon economic circumstances, imported flat glass products tend to account for 10 percent to 50 percent of most of the world's major markets. The high end of these percentages tends to be in European economies, where logistics are relatively efficient. Countries such as England and Italy, with their own domestic glass producers, still show import shares between 30 percent and 50 percent of the total market. In Japan, imports come primarily from overseas suppliers that have affiliations with Japanese manufacturers. According to official Japanese statistics, aggregate flat glass imports account for approximately 14 percent of total consumption. However, imports from non-affiliated foreign suppliers account for only 5 percent to 6 percent of the total market.

Despite its own economic difficulties, Japan seems impervious to the free market forces that have boosted sales of imported flat glass products from Asia in both the U.S. and Europe. Preliminary statistics for late 1997 and 1998 demonstrate that both the United States and European markets saw significant increases in imports from Southeast Asian countries due to the economic slow-down in the region and the devaluation of currencies. Even though the Southeast Asian countries are much closer to the Japanese market, statistics demonstrate that there was virtually no increase in imports for these countries into Japan. This pattern provides additional evidence that domestic manufacturers exert significant anticompetitive restraints on the Japanese flat glass market.

A LITANY OF PRIVATE ANTICOMPETITIVE ACTIVITIES IN JAPAN

The current structure of Japan's flat glass market was created in the 1967–1973 period, as the Japanese Government was encouraging the domestic industry to adapt to the float glass technology. The system of three vertically integrated supply networks, one for each manufacturer and based on *keiretsu* relationships, was created with the active support of MITI, according to longtime participants in the flat glass industry. Japan's flat glass market is held together by a wide range of coercive forces and unwritten anticompetitive agreements and understandings, some of which are tacit, but all of which are effective in deterring successful new entry.

* *Restrictive Distribution Practices.* Unwritten supply contracts, sales quotas imposed by the producers, partial ownership of distributorships by producers, the placement of producers' personnel in management positions of distributorships, the practice of producers accompanying distributors on calls to the latter's customers, and financial levers such as delayed settlement of accounts, leave wholesalers controlled by and dependent on producers and make it possible to discipline distributors who step out of line. The domestic makers' leverage has been sufficient to give them open access to the financial records of their affiliated distributors. They have been able to orchestrate amalgamations when to their advantage. As a result, over the past two years, Japanese manufacturers have steadily increased their equity holdings in the larger distributors, making it even less likely that such distributors would respond to favorable economic incentives to handle products sold by new entrants.
* *Opportunities for Collusion.* An extensive network of industry trade associations ties distributors and retailers to manufacturers to allow for collusive marketing efforts. There are informal associations consisting exclusively of the distributors of a given manufacturer on a regional and national basis. In the past, meetings of these associations were attended by manufacturers' representatives who also attended parties and social occasions. There also are retailer associations attended by distributors and manufacturers.

In the current "soft" market, the domestic makers are attempting to retain market share at all costs. Asahi, for example, closely monitors the sales calls of foreign suppliers and their bids through a sophisticated e-mail system linking its affiliated distributors. Then, to prevent any possibility of its distributors deviating from their exclusive arrangement, Ashai lowers its prices selectively as much as necessary to prevent foreign suppliers from winning the bids. While this strategy clearly has been costly for Asahi—it realized a loss for the second half of 1998, its debt has been downgraded by Standard and Poors, and it has begun a major cost-cutting effort—it persists in using its market power to drive out any threat from upstart new competitors and will continue to do so until sales improve and it can reap the financial benefits of its exclusionary tactics.

* *Refusals to Deal.* The threat of sanctions for dealing with foreign manufacturers, although pervasive, is rarely explicit. In the past, potential customers have told U.S. glass companies that, despite favorable pricing, they could not purchase U.S. glass. They explained that purchases from a foreign supplier would affect their ability to purchase other products, such as polished wire glass, from Japanese manufacturers. Several end users of flat glass have told a U.S. producer that, although that producer could supply 90 percent of their glass needs, they were afraid that the domestic glass manufacturers would either cut off their supplies of other products or charge them unreasonably high prices. In 1995, under the terms of the bilateral flat glass agreement, Japanese flat glass producers notified distributors in writing that they are not bound to buy exclusively from them. As a result, domestic makers have altered their techniques for preventing distributors from buying meaningful amounts of imported products. According to salesmen for U.S. suppliers, domestic makers have imposed informal quotas on their distributors, allowing imported glass to be purchased only after the quota has been filled.
* *Exclusive Distribution Arrangements in Sash Kits.* Japanese flat glass manufacturers and their distributors control a large portion of the sash (i.e., window frame) market. They buy sash kits, cut the glass, assemble finished units, and sell them directly to buyers in the construction market. This is unlike the practice in the United States and Europe, where sash makers are major buyers of glass for assembly of windows sold directly to the construction industry. U.S. flat glass producers seeking to establish facilities in Japan to assemble cut glass into sashes from kits purchased from Japanese sash makers have been told that they could not purchase sash kits because the Japanese sash makers were too dependent on sales to the domestic glass manufacturers and therefore were vulnerable to retaliation.

Because of the restrictive business practices outlined above, U.S. flat glass producers and other foreign producers continue to hold an abnormally low market share. All non-affiliated foreign producers account for only an estimated 5 percent to 6 percent of Japanese consumption, and of that total U.S. companies account for barely 2 percent.

Unlike in the United States and Europe, it has not been possible to enter the Japanese market through foreign equity participation. U.S. companies have explored the possibility of joint-venturing in Japan with existing glass manufacturers, distributors, and fabricators. However, because all of the major distributors and fabricators are effectively controlled by one of the three Japanese flat glass companies, no such alternative has existed.

EVIDENCE OF ANTICOMPETITIVE PRACTICES REVEALED IN THE JFTC SURVEY

Under the January 1992 Bush-Miyazawa Action Plan Agreement on Flat Glass, the Government of Japan committed that the JFTC would conduct a survey of competitive conditions in the flat glass market. The JFTC completed that survey in June 1993. Although the survey did not purport to be an in-depth study of the Japanese flat glass industry, much less a credible investigation into actual industry practices, it nonetheless presented a remarkably detailed picture of the structural and competitive problems in the market as of 1993, many of which persist today. For example, the survey:

- Confirmed that "each [domestic] manufacturer does not engage in trying to sell to the distributors of another manufacturer, nor does it try to induce the distributor of another manufacturer to become its distributor;"
- Reported on a "state of monopoly by three makers, pricing by consensus, and creation of sales networks of distribution by each maker;"
- Acknowledged the vertical organization of the market, and the long-term market shares in a 5-3-2 ratio for the three producers;
- Reported that prices for imported raw float glass are some 20 to 30 percent lower than domestic glass;
- Confirmed that "almost all distributors are brand name dealers belonging to one manufacturer;"
- Acknowledged that imports are essentially shut out of the market by conceding the "meager penetration of imported goods in the area of construction float glass" and also by conceding the "fact that essentially all primary wholesalers are in actuality the exclusive agents of one of the manufacturers;"
- Reported that "with Japan's [float] glass market virtually monopolized by the three [float] glass makers, the system of sales through exclusive distributors

has barred access by other suppliers" [and] "has encouraged coordinated efforts among the three makers to preserve the monopoly situation;"

- Confirmed instances in which manufacturers and exclusive distributors "have either lodged complaints to or harassed agencies who had sold imports;"
- Found that "there were incidences of [retailers] being pressured by manufacturers or contract agencies" and reported that various retailers feared retaliation "if they expanded purchases of imported products or initiated new purchases;"
- Revealed in great detail the lack of competitive forces in the market; and
- Described how the *keiretsu* system results in the allocation of glass for construction jobs.

Notwithstanding the evidence of private anticompetitive restraints presented to it by importers and the survey findings, the JFTC concluded that "the survey revealed no evidence of violation of the law." Instead of using the evidence of collusion, attempts to monopolize the market, and/or exclusionary conduct as the basis for a credible investigation into industry practices, the JFTC simply suggested that the three manufacturers implement ineffective measurers such as voluntary antitrust compliance programs, curtailing certain rebates, and informing their distributors that they are "free" to buy imports to address the existing competitive problems. Not surprisingly, these suggestions were implemented in a cursory and ineffective manner.

RECENT EFFORTS TO REMOVE BARRIERS TO ENTRY HAVE FAILED

In January 1995, after long and complex negotiations, the U.S. and Japan concluded a bilateral flat glass agreement. The five-year agreement spelled out the responsibilities for all parties to, create an open flat glass market. Japanese flat glass manufacturers and distributors released public statements that the market was open on a non-discriminatory basis for competition by all suppliers, foreign and domestic alike. The government of Japan endorsed these statements and agreed to survey the industry annually to ensure that the goal was being met. The data required to be collected in the annual survey was spelled out in great detail in the agreement. The Japanese government also agreed to strengthen building standards to require greater use of energy-efficient glass products and safety glass.

Since the flat glass agreement was signed in 1995, there has been no significant enduring change in the Japanese glass market. There was a slight increase in imports in the first half of 1995, as distributors were encouraged to purchase glass from other suppliers and found this freedom of buying satisfactory. However, by the end of 1995 this diversification trend was reversed, and for the last three years little change has been noticed in purchasing patterns within the Japanese glass economy.

Representatives of the United States Trade Representative (USTR) have sought additional measures from their MITI counterparts in attempts to encourage MITI to take the flat glass agreement seriously, but these efforts have met with no success. President Clinton on two occasions has raised lack of compliance with the agreement with Prime Minister Obuchi. No change in the Japanese negotiating posture has been detected. MITI essentially insists that the market is open, that compliance with the Agreement has been achieved, and that there is no need for further discussion.

In 1998, the DOJ encouraged the JFTC to help the Japanese glass producers institute effective antitrust compliance plans, but MITI blocked the discussion and suggested that MITI has no authority to force Japanese firms to improve their compliance plans. The JFTC is in the process of conducting a second survey of competitive practices in the Japanese flat glass industry. But unless the survey and the information-gathering techniques used to compile it are improved substantially, it is unlikely that the JFTC will gather sufficient evidence of anticompetitive conduct to overcome its historic inertia and launch a credible investigation into the competitive conduct of the entrenched incumbent manufacturers.

BARRIERS TO ENTRY SUSCEPTIBLE TO ANTIMONOPOLY LAW ENFORCEMENT

Japan has an Antimonopoly Law prohibiting monopolies, unreasonable restraint of trade, unfair trade practices, and restraint of competition. The wording of the law closely parallels U.S. antitrust statutes, because U.S. antitrust experts provided extensive advice when the law was being drafted.

Despite the Antimonopoly Law, the JFTC has pursued very few enforcement actions. The JFTC has limited resources and has always been extremely short on personnel, but its ineffectiveness likely reflects deliberate government policy. As part of its industrial strategy, the Government of Japan has not only tolerated but actively encouraged the formation of cartels and other anticompetitive actions by the

Japanese industry. Thus Japanese companies have been permitted to engage in bid-rigging, restrictive distribution practices, restrictive industry standards, customer boycotts, and restrictive distribution arrangements that would violate the antitrust laws of virtually any other industrialized nation. These anticompetitive practices are pervasive in the glass sector.

JAPANESE LAW CONDEMNS COLLUSIVE AND EXCLUSIONARY CONDUCT

The Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade ("Antimonopoly Law") and related Regulations and Guidelines prohibit anti-competitive conduct of the type used by the Japanese manufacturers to restrict imported glass.

1. Section 3 of the Antimonopoly Law states: "No entrepreneur shall effect private monopolization or any unreasonable restraint of trade." Section 7 empowers the JFTC, in accordance with certain procedures, to "order the entrepreneur concerned * * * to cease and desist from such acts * * * or to take any other measures necessary to eliminate such acts in violation of the said provisions." Section 45 *et. seq.* sets forth a wide array of compulsory investigative and enforcement tools that the JFTC has available with respect to suspected or established violations.

2. Section 19 of the Antimonopoly Act states: "No entrepreneur shall employ unfair trade practices." Section 20 empowers the JFTC, in accordance with certain procedures, to "order the entrepreneur concerned to cease and desist from the said act, to delete the clauses concerned from the contract and to take any other measures necessary to eliminate the said act." Section 45 as above applies.

3. Section 8 of the Antimonopoly Law states: "No trade association shall engage in any acts which come under any one of the following paragraphs: (i) substantially restraining competition in any particular field"* * * "(v) causing entrepreneur to employ such acts as constitute unfair trade practices." In the event of a violation, the JFTC, in accordance with applicable procedures, may order the trade association "* * * to cease and desist from such act, to dissolve the said association, or to take any other measures necessary to eliminate the said act." Section 45 as above applies.

4. Section 2 of the Antimonopoly Act defines "unreasonable restraint of trade" as meaning:

> That any entrepreneur, by contract, agreement or any other concerted actions, irrespective of the names, with other entrepreneurs, mutually restrict or conduct their business activities in such manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers; thereby restraining, contrary to the public interest, substantially competition in any particular field of trade.

5. The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices (1991) ("Guidelines") set forth the JFTC's interpretation of what conduct constitutes an "unreasonable restraint of trade." Examples include:

> Where competitors concertedly refuse to deal with a new entrant *or cause their customers* or suppliers *not to deal with a new entrant* etc. and if such conduct causes substantial restraint of competition * * * by making it very difficult for the refused firm to enter the market. * * * [Guidelines, Part I-Boycott]
>
> Where firms concertedly engage in such conduct as described above with their customers. * * * [Guidelines Part I-Boycott]
>
> Where firms concertedly * * * allocate a market to each Firm. * * *" [Guidelines, Part I-Customer Allocation]

Special restrictions apply to firms deemed "influential in a market." Such firms are in the first instance judged by a market share of not less than 10 percent or by virtue of being within the top three in the market.

6. Section 2 of the Antimonopoly Act defines "unfair trade practices" as including "(iii) unjustly inducing or coercing customers of a competitor to deal with oneself * * * (v) dealing with another party by unjust use of one's bargaining position."

7. The Guidelines provide illustrations of what constitutes an unfair trade practice, including:

"Where an influential firm in a market engages in transactions with its trading partners on condition that they do not engage in transactions with its competitors, or causes them to refuse to deal with its competitors, and if such conduct may reduce business opportunities of its competitors and prevent them from easily finding alternative trading partners. * * *" [Guidelines, Part I-Dealing on Exclusive Terms]

"Concerted refusal to deal" [Guidelines, Part I-Boycott]

"Restriction of sales (or resale) price of distributors by a manufacturer" [Guidelines, Part II-Resale Price Maintenance]

"Where an influential firm in a market engages in transactions with its continuous trading partners on condition that the trading partners do not engage in transactions with its competitors so long as the influential firm lowers its price to meet the competitors' price quotations * * * and if such conduct may reduce business opportunities of the competitors and prevent them from easily finding alternative trading partners." [Guidelines, Part I-Other Unfair Trade Practices]

8. The Antimonopoly Act, Section 2, defines illegal "private monopolization" as meaning that "any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by in any other manner, excludes or controls the business activities of other entrepreneurs, thereby restraining, contrary to the public interest, substantially competition in any particular field of trade."

CONDUCT BY JAPANESE FIRMS WOULD VIOLATE US ANTITRUST LAWS

In the past, the Japanese flat glass cartel has divided up the Japanese market by customer and territory. Some of the anticompetitive conduct, such as customer and territorial allocation, would constitute a per se violation of U.S. antitrust law. For example, there is evidence that the three Japanese manufacturers have engaged in a combination or conspiracy in restraint of trade by dividing markets and fixing prices, all activities that would be in violation of Section I of the Sherman Act. *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946) and *Monsanto Co.* v. *Spray-Rite Service Con.,* 465 U.S. 752 (1984).

Other conduct involving non-price vertical restraints, such as exclusive distributorships, would be analyzed under the rule of reason to determine the effect on competition and, ultimately, consumers. However, considering the demonstrable anticompetitive effects, such as inflated market prices and the lack of product innovation, of what in other circumstances might be deemed benign or procompetitive conduct, even non-price vertical restraints would not likely survive scrutiny under the rule of reason.

The exclusive dealing arrangements that each manufacturer maintains with its own distribution network, especially in light of the enduring market power of Asahi and the substantial foreclosure created by the parallel conduct of the others, would constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 329 (1961) (in evaluating the competitive effects and determining the amount of market foreclosure, the Court should consider the relative strength of the parties, the proportion of commerce involved and the effects on effective competition).

In light of its market power, Asahi's (and likely Nippon's and Central's) practice of conditioning the sale of certain desirable or unique products on the purchase by its agents and customers of other products could constitute tying arrangements in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde,* 466 U.S. 2 (1984).

The tacit agreements among the Japanese manufacturers and between each manufacturer and its exclusive distributors to limit dealings with non-affiliated foreign suppliers could constitute both horizontal and vertical boycotts in violation of Section I of the Sherman Act. *Business Electronics Corp.* v. *Sharp Electronics Corp.,* 485 U.S. 717 (1988); *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207 (1959).

Anticompetitive conduct in foreign jurisdictions that affects U.S. exporters can be challenged under our own antitrust laws. 1995 Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (citing the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) and § 45(a)(3) (1988)). Anticompetitive conduct that violates both U.S. and foreign antitrust laws would appear to be a particularly good candidate for U.S. prosecution. A recent appellate court decision expressly rejected a Japanese defendant's claim that notions of international comity should prevent the application of U.S. antitrust laws to extraterritorial conduct that violates both U.S. and Japanese antitrust laws. *U.S.* v. *Nippon Paper,* 109 F.3d 1, 8 (lst Cir. 1997).

CONCLUSION

Based on years of experience, it is clear that the Japanese flat glass market cannot be opened without the active involvement of the Government of Japan. The JFTC has gathered significant evidence of conduct-exclusive dealing, threats and coercion, concerted and collusive behavior, suppliers' interference in the resale prices of their distributors, and improper trade association activities-to warrant the insti-

tution of formal proceedings as permitted by the Antimonopoly Act. Failure to do so constitutes toleration by the Government of Japan of anticompetitive activities by private Japanese firms that harm Japanese consumers.

No U.S.-Japan bilateral antitrust cooperation agreement will be credible or acceptable to the U.S. business and consumer community until the JFTC demonstrates that it is a credible enforcement authority. To do so would require decisive action on the JFTC's part. The Japanese flat glass industry is an excellent candidate for U.S.-Japanese cooperative enforcement action because the long-standing and widely recognized nature of the anticompetitive practices that block market access, inflate prices and stifle innovation adversely affect both foreign manufacturers and Japanese consumers.

ATTACHMENT 2

CENTRAL GLASS REQUESTING FOR SEPARATE DELIVERY CHARGES FOR TREATED GLASS PRODUCTS, STARTING NEXT MONTH

(SOURCE: THE NIPPON KEIZAI SHINBUN, 4/15/1999, PAGE 26.)

Central Glass Co., Ltd., ranked third among Japanese glass producers, decided to start charging delivery charges on top of the prices of special, treated glass products that include multi-layered glasses. The company has initiated negotiations with its exclusive distributors.

The company aims to begin the extra delivery charges this May. Through this arrangement, the company plans to establish a marketing system in which it can raise delivery costs when necessary.

Central's new pricing approach appears to reflect glass manufacturer interests in protecting their own profits by reviewing current business practices in which raw material (glass) costs are eating into delivery costs.

Traditionally, flat glass prices were set as "delivered prices to users, which include freight costs." This pricing practice was established approximately 25 years ago, and has been employed to the present. Glass products are typically delivered in a ten-ton truck. Popular treated glass products, in recent years, come in small lots with a larger variety than standard sheet glass products. Thus, it is now becoming increasingly difficult for glass manufacturers to recover full costs because deliveries of the popular glass products are made in a smaller four-ton truck.

Ikeda Glass (of Chiyoda, Tokyo), a large exclusive glass distributor, is going to accept Central's proposal for a new pricing structure. The company states

> It is a good time (for the Japan's glass industry) to reconsider the current glass pricing structure as the whole industry is suffering from excessive competitions among themselves (President, Ikeda Kazuo).

Ikeda Glass plans to develop similar pricing structure, keeping glass delivery costs and glass prices separate.

If Central's new pricing structure for special, treated glass products is accepted well by the distributors, then, this pricing structure may spread to other glass products as well.

Two other large glass manufacturers, Asahi Glass and Nippon Sheet Glass, are expected to follow Central's new pricing structure.

Multi-layered glass products provide high energy-efficiency and are expected to grow in use by providing an opportunity for energy conscience Japanese consumers to save energy. Central Glass appears to have concluded that the company needs to revise its pricing structure to recover delivery costs for special, treated glass products as their sales are expected to grow very rapidly.

The Nippon Keizai Shinbun, 4/15/1999, page 26.

セントラル硝子

運送費を別建て要求

加工ガラス、来月分から

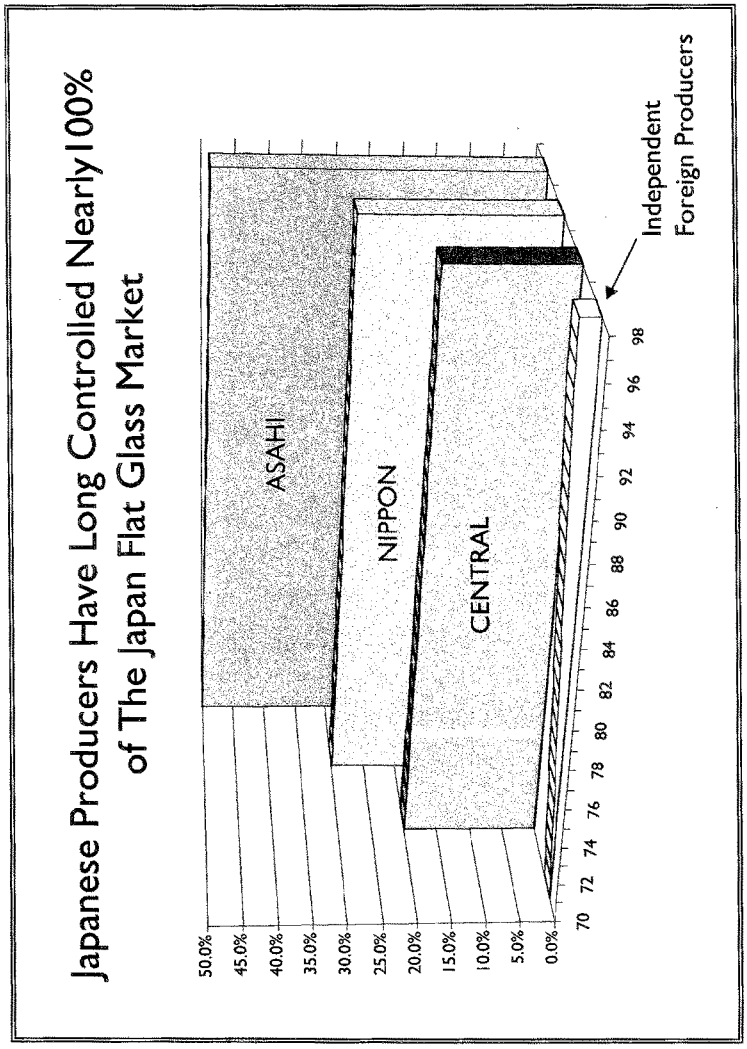
板ガラス生産量三位のセントラル硝子は複層ガラスなど特殊な加工ガラスについて、これまで販売価格に含めていた運送費を別建てとする方針を固め、特約店（卸）との交渉に入った。五月出荷分からの実施を目指す。今後、物流の事情に応じて運送費部分を引き上げられる素地をつくる。市況低迷の長期化で素材価格が物流費に食い込んで下落するなかで、メーカー側が従来の取引慣行を見直し、自衛策に出た格好だ。

板ガラスの価格は「運送費を含めた需要家への持ち込み」という取引条件が約二十五年前に固まり、現在まで続いている。おおむね十トン積みトラックでの配送を基準としていた。だが、最近需要を伸ばしている加工ガラスは四トン積みトラックなどでの多品種少量配送になるため、従来の価格体系の中ではコストの吸収が難しくなっていた。

特約店大手のイケダガラス（東京・千代田）は「業界全体が過当競争で疲弊し切っている今こそ、新しい価格体系を考える必要がある」（池田和夫社長）として基本的に受け入れる方向だ。同時に川下のガラス工務店などに対しても、運送費別建てを申し入れる。

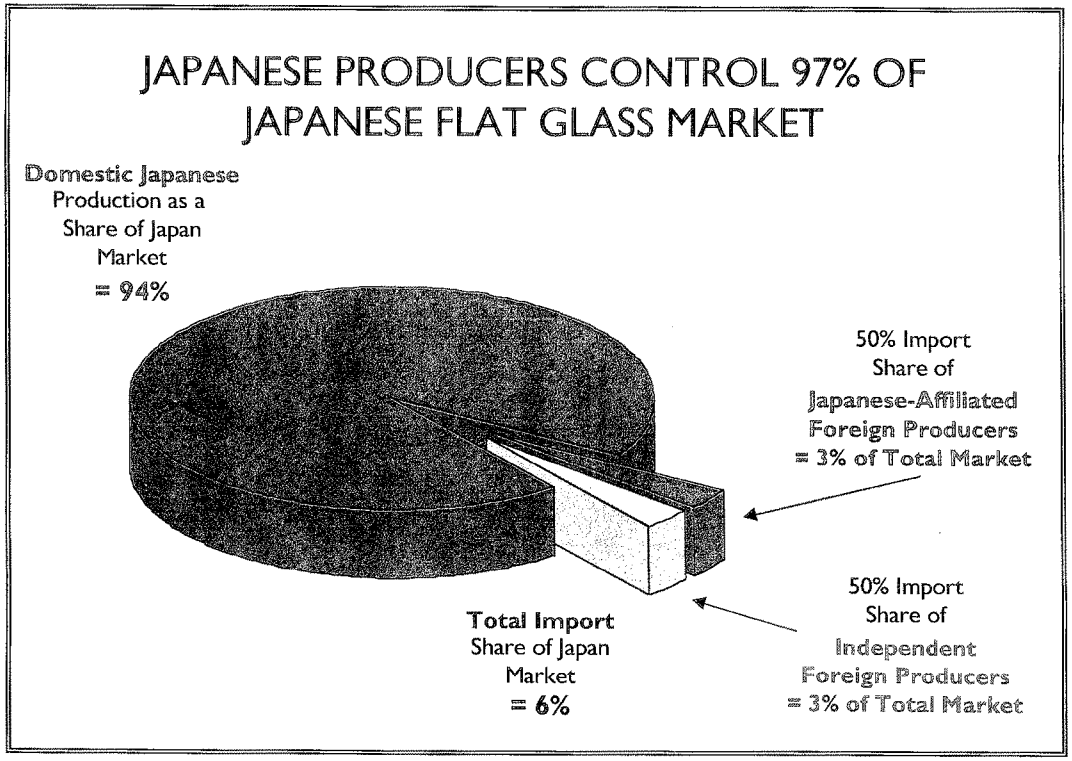
この試みが受け入れられれば、通常の板ガラスにも物流コストを別建てにする形が広がる可能性がある。旭硝子、日本板硝子のメーカー上位二社も追随する公算が大きい。

複層ガラスは冷暖房効率を高める機能を持ち、省エネルギーの観点から市場の成長が見込まれている。セントラル硝子は今後の需要急増をにらんで、コスト回収の体系を整えておく必要があると判断した。



Source: National Marketing Research from *Freedonia 1997 Study*

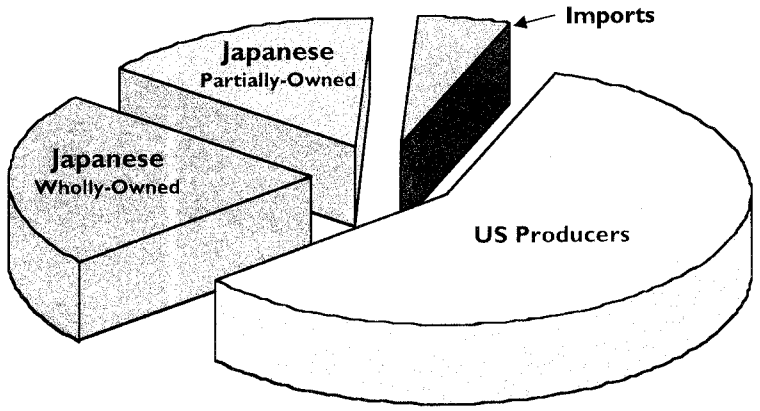
Prepared by the Law Offices of Stewart and Stewart.



Source: 1998 National Trade Estimate Report on Foreign Trade Barriers, USTR, at 237 (1998).

Prepared by the Law Offices of Stewart and Stewart.

Wholly- and Partially-Owned Affiliates of Japanese Flat Glass Producers Account for 37% of U.S. Flat Glass Market



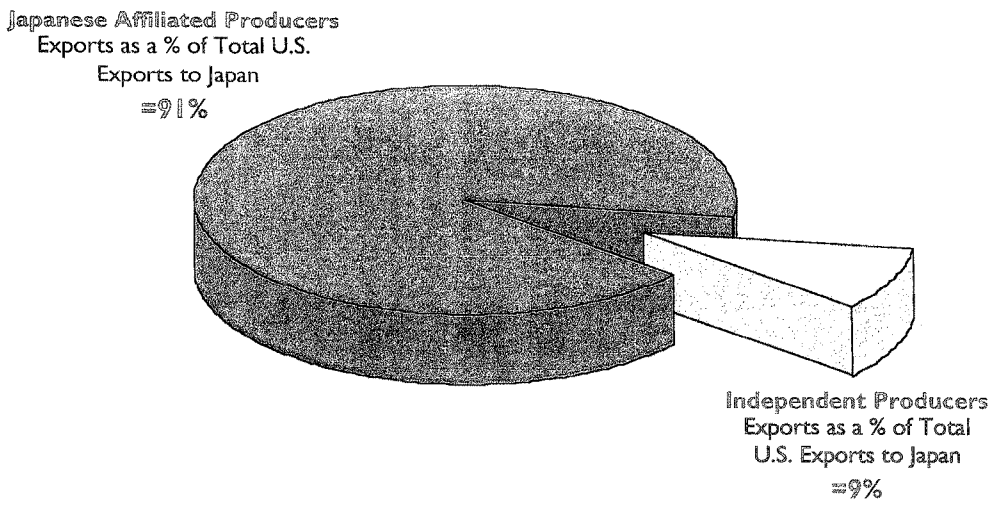
22% Wholly-Owned Affiliates of Japanese Flat Glass Manufacturers
15% Foreign Affiliated Producers (Partially-owned by Japanese Flat Glass Manufacturers)
5% Imports (Including from Japan)
58% U.S. Flat Glass Manufacturers

Source: PPG Market Research.

Prepared by the Law Offices of Stewart and Stewart.

JAPANESE AFFILIATES DOMINATE U.S. GLASS EXPORTS TO JAPAN

Share of U.S. Exports of Laminated Automotive Glass to Japan in 1998



Source: Compiled from Journal of Commerce, PIERS Export data. Data are the aggregate of HS Codes 7007.11, .19, .21, .29 and 8512.90.

Prepared by the Law Offices of Stewart and Stewart.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Gentlemen, your statements are very forceful, informative, and factual, and not very debatable. So I would like to ask you, if you were today at the meeting with the Prime Minister who is here meeting with the President, what would you say to Mr. Obuchi and what would you recommend to the President?

Mr. Evans.

Mr. EVANS. Ambassador Barshevsky, the U.S. Trade Representative, has identified a number of encumbrances, and I am not an attorney, so as a businessman, I do not use the same language, but there are a number of barriers that continually are thrown in this country's face, principally by Japan, the leader of the pack, if you will.

At the November 1998 APEC ministerial in Kuala Lumpur, the Japanese government singlehandedly tore it apart. U.S. Trade Representative Barshevsky and her staff had brought everyone along on trade issues, world trade issues, to complete the work in the coming sectorial, I think this November. At the conclusion, literally at the conclusion of the negotiations, Japan, in essence, backed out.

Japan is a stumbling block, Senator, to further progress by refusing to eliminate tariffs on forest products and threatened to derail agreements that other nations have welcomed and said, in some cases reluctantly, they could get on board with. But Japan keeps derailing the process.

Senator KOHL. What would you say to the Prime Minister if you were at that meeting today and what would you say to the President?

Mr. EVANS. The evidence is clear. Japan is a protectionist society, but I know it is a cultural thing, so I am frustrated. I know we cannot go in there and police their culture. We cannot impose what we would like to see on them. But on the other hand, if they are going to be part of the global community, I would say, you had better get on board, because if you do not, we already see the EU now having been a resister in the paper industry only a couple of years ago. They are on board. Consolidated Papers is now exporting paper to, of all places, Finland. You could not say that 2 years ago. But Japan is isolating themselves to a point where who would want to do business with them?

There is a phrase that goes around. It is called "Japan fatigue," where they wear you down with their Asian patience, and that is what we were talking about today. We have all made the effort, made the effort, and made the effort, but they wear you down, and at some point in time, the people of Japan will be missing out on better products.

Senator KOHL. Are they their own worst enemy?

Mr. EVANS. Pardon me, sir?

Senator KOHL. Are they their own worst enemy?

Mr. EVANS. Yes, absolutely.

Senator KOHL. OK; Mr. Walters, what would you say to the Prime Minister? What would you say to the President?

Mr. WALTERS. I think it would be the same, actually, and I will just make two brief points. One is that, unfortunately, it has been our experience that in a variety of industries, I think including

those of us on the panel today, the Japanese do not seem to take a U.S. point of view seriously if there is not some form or threat of retaliation or leverage on our side of the negotiating table.

So it is hard to imagine today that there is a will to change without some forceful action on our part, and I think we should search, actually, for what is in our arsenal, which is one of the reasons why I have testified twice in front of your subcommittee.

Second, aside from that, I think all you have to do is look at Mr. Reichenbach's chart and see that from 1970 to today, there is not any competition in the Japanese glass market, forgetting foreign competition. The three producers do not compete against each other.

I have every confidence that if that market was opened up for the benefit of their own consumers, Guardian and PPG will compete. We do not need anybody's help to compete. We do it everywhere else in the world. We batter each other's brains out elsewhere in the world. For the good of the Japanese consumer, they need to open their market and then the chips will fall where they may and those aggressive, pricey, high-quality, good delivery companies will do well, and those who are not will not do so well—for the benefit of their own economy.

Senator KOHL. You are also, of course, suggesting that they are their own worst enemy?

Mr. WALTERS. In a sense, that is correct.

Senator KOHL. If you were speaking to the Prime Minister today, you would, what, make a plea based on that to him to open up his market?

Mr. WALTERS. Right, for the good of his own processors, for the good of his window manufacturers, his mirror manufacturers, his commercial glass high-rise office building manufacturers. They all need access to other glass in order to compete globally.

Senator KOHL. OK; Mr. Reichenbach.

Mr. REICHENBACH. Senator Kohl, building on what Mr. Evans said, I would say to the Prime Minister of Japan that integrity is not cultural and I would urge him to force through the JFTC the various industries in his country to live up to the agreements that his government has signed with the Government of the United States.

And I would say to the President, please, Mr. President, force him to do that, if necessary, through the powers that are already conferred upon the United States Government through the means of the Department of Justice and their extraterritorial reach, because integrity, if it cannot be learned, can be forced, and that is what I would suggest to the President.

Senator KOHL. All right. I thank you. Senator DeWine?

Senator DEWINE. Thank you very much, Senator Kohl.

Let me ask all three of you to comment on this. The Japanese have charged that your companies and your industry in the United States are flabby and not capable of competing in Japan. I would like for each one of you to address that.

It has also been alleged that part of the problem is that your industry and your companies do not have a Japanese sales force, you do not have sales literature in Japanese, you basically do not know

how to deal with the culture. These are some of the allegations that are made.

Specifically in regard to flat glass, it has been alleged it is very costly to ship glass from the United States to Japan. Would you like to comment on that? Mr. Walters, do you want to start?

Mr. WALTERS. Well, firstly——

Senator DEWINE. True or not true?

Mr. WALTERS. Not true. Guardian Industries is a global manufacturing company and we are quite familiar with competing against our Japanese competitors elsewhere in the world. They are noble competitors. And depending upon which continent we are traveling, Guardian typically has anywhere from 10 to 20 percent market share, bigger here, smaller there, depending upon where we are, with one exception and that is Japan.

For the life of me, I cannot imagine that there is any reasonable justification for the fact that Guardian and PPG and others have anywhere from 10, 25, whatever it is, percent market share elsewhere in the world and we have less than 1 percent in Japan.

Second, there is a little chicken-and-egg thing in terms of questions like sales force, which is to say that if you are a large Japanese glass company in a $5 billion market and you have 50 percent market share, well, of course you are going to employ more sales people than a company that has 1 percent market share. So that is a disingenuous kind of an argument.

Whether or not Guardian has tried hard enough, I think it is not true. We have no ex pats in Japan. We employ only Japanese nationals, many people who were previously employed in the Japanese glass industry. We have set up warehousing, we have set up distribution, we have set up cutting facilities so that we can deliver glass to customers and you cannot tell the difference between the distribution of a Guardian product versus one of our Japanese competitors.

So as far as I am concerned, there is no effective difference and that is a lame excuse for why the market, in fact, is not open.

Senator DEWINE. Mr. Evans.

Mr. EVANS. Mr. Chairman, I really cannot speak to that because our company is not large enough and diverse enough except to say we have made the effort and we were thwarted. But I can use a different example. Some of the larger companies, like a Weyerhauser and Westvaco, are selling considerable paperboard product and/or lumber products in Japan because it suits the Japanese purpose. But those larger paper companies also manufacture this type of paper and they are thwarted. They would like penetration on the total product line.

So I would not be the best candidate to testify as to what is the problem, except, as we know, it is a protection issue, and while they need certain products, they welcome those in from the producer, but while they in their mind do not need these products, then they are thwarted.

Senator DEWINE. Mr. Reichenbach.

Mr. REICHENBACH. Mr. Chairman, I think the assertions that you mentioned on the part of the Japanese are completely untrue. Since 1967, we have hired all Japanese nationals. All of our literature, our technical literature, our price lists, our product lit-

erature is all printed in Japanese and always has been. We have maintained, as Mr. Walters said, cutting centers, distribution warehouses, and fabrication facilities in Japan. It is simply patently untrue. We have had typically in the last 4 to 5 years almost as many salespersons in Japan as we have in the United States, which is considerably larger geographically.

And in addition to that, I would like to point out that in 1967, the same year that we attempted to enter the Japanese glass market, we formed a chemicals manufacturing joint venture with one of the three Japanese glass producers and that, being in a different market and being welcome, has done extremely well and we have had no problems. But in the glass market, it has been a total case of frustration.

Senator DEWINE. What level of penetration would you expect to see before you would believe that Japan is truly open? You mentioned, Mr. Walters, that in other countries, you are at 20, 25 percent, is that right?

Mr. WALTERS. Correct.

Senator DEWINE. Is that the figure you would expect in Japan before you would consider it open, or what would that figure be?

Mr. WALTERS. I think our expectations would be less than that. The first measure of competition in the market, forgetting foreign producers for a second, would be changes in market share in Japan. One company attacks another company and there is a shift in market share. I have a chart that is attached to my full testimony that shows the difference between North America, Europe, and Japan over this same period and you see dynamism. You see companies entering, you see companies exiting, you see changing market shares in those regions. Only in Japan do you see this constant line without any competition. So that would be a measure even among the existing producers.

We would probably, and I say probably, need to obtain 4 to 5 percent market share in Japan through our exporting from the States and elsewhere, distributing in Japan, before we would then begin to make significant investments, more than these smaller $2, $3, $4, $5 million investments, and that is what it would take us to get to a 10 to 20 percent market share. But we need to walk before we can run. If we cannot sell anything, we cannot justify the significance of that investment.

Senator DEWINE. Mr. Evans.

Mr. EVANS. Our industry, a commodity industry, would be comfortable with 10 percent.

Senator DEWINE. Mr. Reichenbach.

Mr. REICHENBACH. I would tend to agree with the progression that Mr. Walters has indicated, but our ultimate objective and our ultimate level of satisfaction would probably not be reached on our part until we had somewhere in the neighborhood of 15 to 20 percent market share, because that is what we have done elsewhere in the world.

Senator DEWINE. Would each one of you like to recap as far as what you would expect the Japanese to do to open their markets?

Mr. WALTERS. I will briefly respond.

Senator DEWINE. Give me two or three top things.

Mr. WALTERS. In my view, after less time than PPG—Guardian has been in the Japanese market about 10 years—I have come to the conclusion that until the ties between the producers and the distributors are in some fashion broken, there will not be competition in the market. The ties are too strong. What we are forced to do is go so deep in the market that we sell glass 2 or 3 tons at a time instead of 2,000 or 3,000 tons at a time, which is the way a normal market would allow us to sell. So rather than two or three, Mr. Chairman, that really is what I view needs to happen in Japan.

Senator DEWINE. Mr. Evans.

Mr. EVANS. We are looking for honesty and integrity. Come to the table, be honest, do not be deceitful, have no hidden agendas. Let us know factually what we have to do to penetrate the market to better serve that population. We are open. We are forward. That is the way we deal with them as they come here. Our distributors, consolidated distributors on the West Coast, all carry Japanese products. They are welcomed.

Senator DEWINE. Mr. Reichenbach?

Mr. REICHENBACH. Mr. Chairman, I agree with Mr. Walters. The control of the distribution system, which three Japanese producers have, just absolutely has to be broken, and a simple letter sent once or twice saying, you are now free, Mr. Distributor, to buy foreign glass, is not going to do the trick. That has been tried and that is an exercise in futility. It is the control over the distribution market that has to be broken, Mr. Chairman.

Senator DEWINE. I appreciate the testimony of this panel. I think it has been very instructive. It has pointed out major problems that we have with Japan in two very important industries. Your testimony has been very, very helpful.

These are important issues. They are difficult issues. But I want to assure everyone concerned that this subcommittee is going to continue to work on these issues. We want to make sure that American companies are able to compete fairly in foreign markets and on the same terms and conditions as other companies.

We plan to have another hearing on international antitrust and competition issues. We plan on having that hearing this fall. We hope to see by that time some substantial progress in the Japanese market and we will take a look at it again at that point. This will leave plenty of time for the Japanese to address the underlying issue, and the underlying issue, let us make no mistake about it, is their closed markets. We will be working with Mr. Klein and Mr. Pitofsky to ensure that our industries are able to compete as effectively in Japan as Japanese companies are able to compete here. In the meantime, we will continue to assess whether or not legislative remedies are appropriate.

Again, we appreciate the panel's testimony very much. Thank you.

Mr. WALTERS. Thank you, Mr. Chairman.

Mr. EVANS. Thank you.

Mr. REICHENBACH. Thank you.
Senator DEWINE. The subcommittee is adjourned.
[Whereupon, at 12:02 p.m., the subcommittee was adjourned.]

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