>>MARKUS LANGE

Good morning ladies and gentlemen. Okay, next try. Good morning ladies and gentlemen. Welcome to the second day of our unilateral conduct workshop. My name is Markus Lange. I am head of the Bundeskartellamt international section in Germany. I am very honored to have the opportunity to moderate this morning's panel. Yesterday we worked on some fundamental concepts of unilateral conduct that we can build on today to move into specific forms of conduct. We started out yesterday by looking at governance or substantial market power and the criteria for assessing it and making it operational. Today we want to go a step further and look at two specific forms of exclusionary conduct, namely exclusive dealing and predatory pricing. This morning's panel starts out with exclusionary conduct from a broader perspective and then turns specifically to exclusive dealing. We should give ourselves until about 10:30 for a panel discussion here, which will be followed by a presentation on the very interesting Canada Pipe case that will be given by our Canadian colleagues. Now let me turn to our morning's panel and I would like to welcome a very distinguished panel that will be discussing the issues of exclusionary conduct and exclusive dealing. I would like to shortly introduce the panelists up here. To my left is Per Hellstrom. Per Hellstrom is the head of the Antitrust Unit on Information Industries Internet and Consumer Electronics at the European Commission. Further to the left is Randall Hoffley. Randall is a partner at the law firm of Stiteman (ph) Elliott. I would like to welcome Ken Heyer who is Economics Director at the Antitrust Division of the DOJ. And to the very left of the table,

I am happy to welcome Osamu Tanabe, Director of the division within the investigation Bureau of the Japanese Fair Trade Commission. Okay. I would like to get started with this morning's discussion by taking first a broader look at exclusionary conduct. I would like to start by asking Randall about the field of exclusionary conduct. Randall there is generally agreement that exclusionary conduct such as exclusive dealing and predatory pricing can harm competition. What effects have to be shown in order to justify antitrust intervention with respect to potentially exclusionary conduct? How do you distinguish harm to competitors from harm to the competitive process?

>>RANDALL HOFFLEY

Thank you Markus. For most jurisdictions, it is clear that exclusionary conduct, which enhances or preserves market power of the target has anticompetitive effects, which warrant remedies. In some jurisdictions, conduct that creates market power can also have the requisite anticompetitive effects. Indeed that is not only the case in the United States which covers monopolization but jurisdictions such as Canada whose competition authorities have in their recent abuse of dominance bulletin stated that conduct which creates the market power underlying the target's dominance produces affect warranting a remedy. For exclusionary conduct generally to coin a phrase you are here from the Canada Pipe case, the question is whether but for the exclusionary conduct, would the relevant market be materially more competitive because the existing competitors would be better able to compete, would be more effective or new effective competitors would

have entered within a reasonable period? The trick for antitrust enforcers, and I used to be one, is determining what the market would be like without the conduct as compared to with it. The principle effects examined are the barriers to entry by new competitors or expansion by existing competitors. In simple terms, the effects must be that absent the conduct, prices would be lower, choice of product would be wider, quality of service would be better, innovation would be greater, consumer switching of suppliers may be more frequent. On the last question that you asked Markus, in terms of harm to competitors versus harm to competition, in my view harm to competitors is distinguished from harm to competition by requiring that the exclusion or the impairment of the competitor has these effects. These price effects. Innovation effects on the market generally. So in other words, exclusion or impairment of a competitor who is not capable even absent the conduct of providing price competition, greater choice, better service, would not have the requisite effects on competition warranting antitrust enforcement action. I think Ken will speak more precisely on what is market foreclosure and those effects and we will consider that later.

>>MARKUS LANGE

Thank you very much Randall. As he said we will get into the issue of market foreclosure in just a minute. But I would like to give the other panelists the opportunity to follow up on the topic of exclusionary conduct as Randall has, explain it from their perspective if they so wish. Yes, please.

>>OSAMU TANABE

Just a comment on harm to competitors or harm to competitive processes. Japanese competition law like other jurisdictions puts our focus on that effects on competitors is forbidden. But it does not mean that the purpose of the Act is to protect competitors. It rather means that by prohibiting exclusionary conducts, fair and free competition would be maintained. In other words, the competition is low it aims at protecting the competitive order in the market. It pays attention to other specifics on alternate consumers as well. The alternate consumers can endure a high quality or low priced products or services as it benefits from the protection of a competitive order in the market.

>>MARKUS LANGE

Thank you very much. Ken do you want to --.

>>KEN HEYER

First I wanted to thank the ICN for inviting me to this event. I think these events can be very valuable. I get to see a lot of familiar faces. I apologize for not being very good with names but maybe I will remember next go around. I wanted to make a comment on the effects issue. Effects are difficult to determine in many circumstances. How does one know how much innovation would have occurred otherwise? In many

circumstances, the practice that is being challenged or investigated might be something that has been going on for a very long time. And so it may be difficult to determine what things would have been like without the practice. In other circumstances, the defendant or the possible defendant, may engage in conduct before its competitor has managed to become effective. In those circumstances, again you have difficulty trying to determine what the affects would have been because you did not have a real-world experiment to compare with. I would just put a short plea for occasionally perhaps out of necessity, having to require a bit more on structural factors combined with theory because it's not always easy to find the hard evidence of effects that would be ideal.

>>MARKUS LANGE

Thank you very much Ken. This takes us to the next question and I would like to ask Ken to take the lead right away. The question of what exactly is market foreclosure which, of course, is the central element in this. What factors are considered when looking at market foreclosure and how do you distinguish legitimate competition on the merits from anti-competitive foreclosure? Please Ken.

>>KEN HEYER

As with most of these questions, there is no single, simple answer. Because if there was, we just would have e-mailed it to everyone and would have saved all the airfare. I want to suggest a way of thinking about foreclosure that I think helps point toward how to

investigate and perhaps prove these types of things. And I think it is most relevant to cases such as exclusive dealing in particular. Let me talk just a bit about that. When we investigate conduct by dominant firms or exclusive dealing arrangements by dominant firms, we tend naturally to focus on the conditions in the market that the dominant firm operates in. I will call it the primary market. The product they produce if it's a manufacturer. Then we look at the practices they are engaging in such as exclusive dealing. But we keep coming back to questions about the market power of the dominant firm and entry into the market for the dominant firm's primary product, those kinds of things. What I wanted to suggest and here I am borrowing, plagiarizing from a former colleague of mine, Tim Brennan, who has argued I think with some considerable value that a good way of thinking about when and whether and why exclusive dealing might foreclose and be anti-competitive is to focus almost entirely on the primary -- on the market that is being locked up, if you will. Let's talk about this simple example people tend to focus on a manufacturer with exclusive dealing arrangements with a lot of distributors. Okay. Tim would suggest and the proposal that I would make for examining foreclosure is to do most of your analysis on the distribution market. Think to yourself, would we object to a merger of all of these distributors who are subject to exclusive dealing contracts? We ask questions then about how easy it is to enter distribution, whether there are good substitutes for these distributors? How many distributors have not been locked up? Whether there are efficiencies into locking up or merging distributors. These kinds of questions which are more familiar to us because

we look at them and we do merger analysis perhaps more than we do exclusive dealing analysis, many of us. They help to answer the question of whether there is anti-competitive foreclosure and whether there is likely to be harm from the practice. In fact, just to be provocative maybe, I would suggest that it may not even be necessary for the manufacturer or the upstream firm in this case to have dominance in its products if I, Ken Heyer, were to enter into exclusive dealing contracts with every possible distributor of a product. Even if I did not make that product, I could very well have market power. I could sell the rights to access those distributors to all the manufacturers. So the focus perhaps is on monopolizing an input, distribution. As opposed to focusing as much on the manufacturing level in doing these kinds of analysis. So anyway let me just mention that as a starting point for discussion perhaps.

>>MARKUS LANGE

Thank you very much Ken. I will turn to the other panelists. Does anyone want to follow that up from their point of view? No?

>>MALE SPEAKER

I will just mention one or two or maybe five words. One way of assessing the affects on market foreclosure is to look at whether these barriers to expansion or barriers to entry artificially raise competitors' costs or reduce competitors' revenues so that the target's dominance cannot be challenged. Raising a rivals cost may have an effect of

foreclosing a competitors access to customers so that per unit cost increase and there are higher prices or higher prices would then otherwise be charged but for the conduct. While reducing rivals revenues may have an effect of requiring a competitor to incur substantial costs, earn lower margins. To convince a customer to switch such that switching is less frequent. That is one way of assessing market foreclosure whether strategies to raise a rivals costs or reduce a rival's revenues have foreclosure affects.

>>MARKUS LANGE

Thank you very much Randall.

>>OSAMU TANABE

I guess that market foreclosure means circumstances that new entrants cannot enter into the market or incumbent companies into the market are forced to exit. Either company could provide high-quality or low-priced products or services by improving its own business efficiency with the cost. Inefficient companies do exit from the market and create a circumstance of market foreclosure. That would be a result of the power of proper competition and the competition low is exact aimed for. We can call that kind of market foreclosure legitimate foreclosure. However exclusionary conduct restriction on businesses of both trading partners and competitors so if market foreclosure would because by such exclusionary conducts, then competitive agencies should pay attention to such competition and market foreclosure thereby. We can call such sort of market

foreclosure anti-competitive foreclosure. Accordingly I would like to point out that we should be careful for using the word market foreclosure because the word may include most legitimate anti-competitive foreclosure. And we should also note that anti-competitive foreclosure is normally caused by a company with dominant market power. Thank you.

>>MARKUS LANGE

Ken.

>>KEN HEYER

Let me pick up again on the comments that were just made and expand a little something that I think it's worth focusing on as well. On the question of when and whether conduct like exclusive dealing has efficiency properties or is anti-competitive, one issue could be the extent to which the firms engaging in it is engaging in more of it then it is necessary to achieve potential efficiencies. So, for example, sometimes even a dominant firm, it might be efficient to use exclusive dealing with its distributors for some of the usual reasons. What would be a bit more objectionable would be if it was locking up more distributors then it needed to achieve its efficiencies. I actually have a real world example that we used when we had a case that we brought several years ago that was against this company that made false teeth. There were all of these distributors who provided these teeth to people who made -- who shaped them and put them in

people's mouths. The interesting fact, one interesting fact that we founded the investigation was that there was a chain of distributors and the dominant firm, Dentsply (ph) the defendant in the case, was asked by this distributor -- the distributor wanted to carry their teeth and Dentsply (ph) had enough distributors in that region of the country already. So Dentsply (ph) said no thanks, we really don't need you. We don't want to use you because we have some other distributors there. Not long after that, one of Dentsply's (ph) competitors contacted the distributor and wanted to use them to help get around the Dentsply (ph) to distribute its teeth. And then Dentsply (ph) contacted the distributors and said, okay, now we are happy to use you and you have to sign an exclusive agreement. That was an example, we thought, illustrated a firm using more exclusives then it really needed for its own business purposes. The only reason it wanted to have that distributor exclusive to it was to keep it away from its competitor.

>>MARKUS LANGE

Thank you very much Ken. I think that was a very, very helpful and colorful illustration sorting out the details of foreclosure. I would like to come back to the point that Osamu Tanabe mentioned about distinguishing between legitimate and non-legitimate behavior that may result in foreclosure. This brings me to the next question that what be, what role does the intent play in the analysis in particular concerning effects and what types of intent may be relevant. For instance intent to exclude competitors in response to a market entry, competitive behavior such as low pricing and how do you prove intent?

Osamu Tanabe, please.

>>OSAMU TANABE

Basically the subjective element such as intent is not legitimate of exclusionary conduct. However if there exists intent of exclusion in the company, this can be an important finding to presume that conduct is exclusionary. As an example, I would like to introduce the Nitro case in Japan. In the case, [inaudible] of business activities were performed with the intent of exclusion by the individual company. The Japanese Fair Trade Commission found out that such conduct -- exclusionary conduct considering the existence of intent of exclusion is an important finding we are discussing here. The original company in the Nitro Corporation is a distributor of medical [inaudible] and sole supplier of Japanese made [inaudible] in western Japan. Nitro had dealt with its trading partner who dealt in both Japanese made and the imported ones. In order to make the company give up important rights they put pressures on them to increase the price of the graph pipes (ph) the company put pressure of the company by increasing the price of the graph pipes without changing the price for others. Unduly refuting the order and decreasing the credit limit applied to the company with out notice, etc. These activities are performed separately therefore it might be difficult to regard the activities as one activity as a whole. Also if we regard these activities as independent activities, each activity will not be enough to be considered exclusionary conduct. However in the case, the FTC found that these activities were sanctions against the company by the

presumption that Nitro tried to make them give up important rights on the exclude the imported products from the market. The FTC found that presumption by the existence of the statement of the company's President mentioning that the least increasing price to the company was to restrain them from importing graph pipes. I can say that although intent is not requisite element for proving exclusionary conducts, the existence of intents that can be an important finding to presume that conduct is exclusionary. When competing agencies try to prove that intent of exclusion, it is important and necessary to examine the process of the original conduct and especially find evidence that shows business strategies to exclude competitors from the market such as records of meetings within the company. Thank you.

>>MARKUS LANGE

Thank you. I think these are a number of very interesting aspects that are coming up with looking at intent especially one of the possible questions was whether looking at intent should be an additional screen that makes it more -- that sets the bar higher for the agency to prove its case or whether intent -- showing intent should be just kind of a shortcut to coming to a conclusion solving the case. Any further comments on that? Please per.

>>PER HELLSTROM

Thank you Markus. I think under EC Competition Law it is neither raising a bar nor a

shortcut. Abuse under the EC Competition law is an objective concept. We would not make a finding based on intent only. But, of course, we may look at internal documents, business plans, etc. of the dominant company that suggests that there is a strategy at excluding. This may be one factor that is relevant in assessing the likely effects of the behavior or perhaps even more importantly sometimes in assessing the alleged efficiencies. I am thinking of the Microsoft case and the recent judgment. If you read that the court of first incident did put quite a lot of emphasis on certain internal e-mails to high executives within Microsoft and used them to refute some of the alleged and unsubstantiated efficiencies from Microsoft.

>>MARKUS LANGE

Thank you.

>>MALE SPEAKER

You will hear I think about the Canada Pipe case. It has in Canada at least brought a consideration of a dominant party's intent to the forefront of the analysis. Intent can be established through subjective evidence such as the smoking PowerPoint or it can be established objectively, but as you will hear in Canada Pipe, it is in the forefront of the analysis because in Canada in order for an act or conduct to be found anti-competitive, then you must proceed to establish that act has a lessening or prevention of competition effect. Before that can be found to be anti-competitive it has to have been found to have

as its objective the exclusion, predation or discipline. It sounds to me like the Nitro case was a discipline case of a competitor. It has acknowledged however in most cases, the anti-competitive purpose is going to have to be determined by inference. It is rare that enforcers get the smoking PowerPoint. That is the great circumstance where you have some document -- credible document that suggest that the entire strategy was exclusionary. And so business justification as Per has said will become a central part of your assessment and we will be talking about that a little later.

>>MARKUS LANGE

Thank you Randall. We have already talked about exclusive dealing so I guess it is time now to actually find out what we have been talking about. So Per I would like to put the question to you. How you do you define exclusive dealing?

>>PER HELLSTROM

I'm not sure I have the universal answer, but I can give you our view. I think the view of the European Commission. We believe that exclusive dealing is a behavior by a dominant company that aims to foreclose its competitors by hindering them from selling to customers. This can be done either through exclusive purchasing obligations. Requiring a customer on a particular market to purchase exclusively or to a large extent only from the dominant company. Or through conditional rebates. These are rebates granted to customers to reward them for a particular form of loyal purchasing behavior.

Perhaps the second category that might be subject to debate whether that should fall within exclusive dealing. We think the usual nature of these conditional rebates is that the customer is given the rebates if the purchases are over a predefined period exceed a certain threshold. So either you grant the rebate on all purchases, or only those made in excess of those required to achieve the threshold, the incremental rebates and through such conditionality the rebates may lock in customers and does foreclose competitors by hindering them from selling to those customers. That is why we consider them to be a form of exclusive dealing. In general I think it is important to understand in order to categorize different forms of abusive conduct or potentially abusive conduct to understand what effect is sought by the dominant undertaking in order to formulate a theory of harm. I think it is still useful to distinguish different types of exclusive -- exclusionary practices such as exclusive dealing, tying, refusal to supply, etc.

>>MARKUS LANGE

Thank you Per. Turning to the other panelists, is that a universally acceptable definition that Per offered or would you set some different emphasis? Ken.

>>KEN HEYER

I am not sure I personally have a working definition of exclusive dealing. Perhaps the division or the FTC does and I am not aware of it. I apologize for that. Mostly what I think Per was getting at was practices that have the effect of driving people to use a

particular supplier almost exclusively and be called exclusive dealing. I don't have a problem with the definition. I think in fact most practices that we would perhaps object to whether we call them exclusive dealing, whether we call them loyalty rebates, sometimes even whether we call them predatory pricing have this effect of driving so much business to one person that other people might not be able to effectively compete and they may have higher costs, they may exit, they may enable greater exercise of market power. So I think the definition is fine, but I think it probably covers a great deal of conduct that is called exclusionary whether we call it exclusive dealing or not.

>>MARKUS LANGE

Thank you.

>>OSAMU TANABE

Yes, thank you. I guess that the time of a single branding used in the EU is corresponded to that exclusive dealing used in the United States. And the time of the royalty rebates seem to be in the category of exclusive dealing in the EU. For Japan, exclusive dealing is defined as unjustly trading with another party on the condition that the third party shall not trade with the competitor thereby tending to reduce trading opportunities to the third competitor. In Japan, the term of exclusive dealings might include various types of conduct including loyalty rebates and loyalty discounts. Because this conducts can function in the exclusive dealings, therefore the coverage of

the definitions may be larger than in the United States and it is similar to the EU. Having said that, I tried to point out that definition of exclusive dealing is different among the competitive agencies. When we talked about harm, we should recognize the difference and should be careful in order to avoid confusion. Thank you.

>>MARKUS LANGE

Thank you. Randall.

>>RANDALL HOFFLEY

I think in the Canadian context, competition authorities would take a broader dealing of exclusive dealing then what Per has expressed. He talked about what I will call down stream exclusionary conduct. The Canadian authorities have taken the position that exclusive dealing can also take the form of a firm requiring that its own suppliers deal only with the firm itself and not with that firm's competitors. The other thing I would note is that exclusive dealing at least in the Canadian context is not simply the requirement, for example, of a supplier or is achieved by a requirement of a customer not to buy from others or a supplier not to supply others, but it can be enforced or induced by other contractual terms. So it can be need to release clauses, most-favored-nation clauses, or other contractual practices can constitute under Canadian law exclusive dealing. It does not have to be a simple contractual term requiring that you buy only from one supplier or requiring that the supplier only supply you.

>>MARKUS LANGE

Thank you Randall. The next question that one might look at in the context of exclusive dealing is what are the negative effects that have to be shown in an exclusive dealing case in order to justify intervention by an antitrust authority? Per.

>>PER HELLSTROM

Thank you Markus. As you all know, the commission recently issued its guidance paper on article 82 and abuse of exclusionary conduct. And the purpose of this paper is to promote some clarity and predictability and to bring Article 82 policy in line with an effects-based approach similar to the one we have adopted to Article 81 and the mergers. Of coarse I should issue a disclaimer because when you ask what effects have to be shown, this document is not supposed to be a statement of law. This outlined our enforcement priorities and, of course, with regard to interpretation of what the law is an Article 82 means in Europe that is for the courts to ultimately decide, but anyway to stick to this paper. This guidance paper draws the distinction that was mentioned earlier by Osamu Tanabe between foreclosure and anti-competitive foreclosure. The dominant company may of course, foreclose competitors by competing on the merits. That is as it should be. That is the purpose of competition. That will ultimately benefit consumers. Clearly not all foreclosure is a concern under Article 82. What we should target our enforcement powers on is conduct that is likely to result in

anticompetitive foreclosure. There is a definition of this in the paper. It is a situation where effective access of competitors of supplies to markets is hampered or eliminated as a result of the conduct of the dominant company. Whereby the dominant company is likely to be in a position to profitably increase prices to the detriment of consumers. This notion of increased prices is shorthand for the various ways in which a dominant company can influence the parameters of competition such as prices, output, innovation, quality of goods and services. All to the detriment of consumers. In a nutshell, anti-competitive foreclosure is foreclosure that is likely to have harmful effects on to consumers. Now of course it is all up to each individual case and based on the factual evidence in that case, and the identification of such consumer harm can rely both on qualitative evidence and where possible and appropriate on quantitative evidence. The focus should really be to have a credible story of anti-competitive harm. As to regards to pricing conduct, stated in this guidance paper, the commission will analyze whether the dominant company is capable of foreclosing a hypothetical competitor that is considered to be as efficient as the dominant firm. The so-called as efficient competitor test. We would also look at a series of other factors relevant for the assessment of whether the test could lead to anti-competitive foreclosure in a given case. These are factors such as the condition on the market, relevance of entry, barriers, position of and counter strategies available to competitors, possible evidence of actual foreclosure, implementation of an exclusionary strategy. So this as efficient competitor test establishes a soft safe harbor where the prices of the dominant company covers its long

run average incremental cost. That is the first step of looking at effects. After having it assessed whether the conduct is likely to cause anti-competitive foreclosure, the second step would be to analyze any defenses that the dominant company may put forward in terms of arguing that its conduct is absolutely necessary or justified by efficiencies. There all I can say now because I think we will discuss that more later is the necessary evidence for such a defense must be provided by the dominant company. Thank you.

>>MARKUS LANGE

Thank you very much Per. Would any of the other panelists like to come in on that topic? If not --

>>MALE SPEAKER

I would just briefly repeat one of the points that was mentioned earlier that is the difficulty in many cases of proving effects and many times we may have to resort to our best guess based on the conduct and the amount of foreclosure and the efficiency justifications even if we can't point to actual effects in the record. We could be talking about likely effects as opposed to ones we can measure and point to.

>>MARKUS LANGE

Thank you Ken.

>>MALE SPEAKER

The other thing I would stress is for competition authorities to think about what other reasons exclusionary conduct may be engaged in unrelated to the exclusion of competitors. The Canadian Competition Bureau in their draft abuse guidelines which they just released for consultation gives considerable discussion to this issue. For example, exclusive dealing may solve what are called free rider problems. Where a firm supplying a product to a downstream retailer also provide some service component, technological information or after market support that improves the product for consumers. If the retailer can use this information to improve the products of rival suppliers as well, the firm without contractual protection will have little incentive to provide this support in the future. Exclusive dealing may also preserve an incentive to offer these services which is generally to the benefit of consumers. Helping to ensure it that downstream retailers exercising -- exercise marketing efforts as well on behalf of market supplier's products. I guess all I would suggest is that when you are considering the question, one needs to look at the pro-competitive reasons for conduct that may explain the conduct and frankly address the issues of anti-competitive effects.

>>MARKUS LANGE

Thank you very much Randall. Ken.

>>KEN HEYER

Picking up on what Randall was saying about possible efficiency explanations, I think it's important especially in the context of exclusive dealing perhaps to observe that our antitrust standards and principles really, really can't be simplified to making sure people have as much choice as possible. Virtually any kind of marketing practice means that somebody, somewhere, somehow is not permitted to do what they want at the price they want to do it. You can say that setting a price of $10 is removing the person's choice to buy it for $9. Exclusive dealing or other practices to the extent they ought to be condemned by antitrust really ought to be shown to have some welfare harm to the economy or consumers apart from the obvious point that somebody's choice is not available anymore.

>>MARKUS LANGE

Thank you Ken. I would like to turn in more detail now to the analysis of exclusive dealing and I would like to ask you Ken what factors, in your view, are most relevant in this analysis.

>>KEN HEYER

Thank you. I tried to mention earlier the notion of thinking about exclusive dealing a little bit like a merger of distributors. Monopolization of an input if you will. But, of course, exclusive dealing is not a merger of input suppliers. In particular, the exclusive dealing contracts may be temporary. So one issue, it is not something that would necessarily tilt

the authorities to taking a hands off approach or to intervening is the issue of duration of these exclusive dealing contracts. Obviously if you have locked up every possible current and future distributor of these manufactures products for all time, you are very close to a merger of those folks and the kinds of questions and analysis I was outlining earlier might be appropriate. In other cases, the contracts or agreements with distributors might be very short term. In fact the Dentsply (ph) case I mentioned earlier, the famous false teeth monopolization case involved agreement between Dentsply (ph) and its distributors that could be canceled on extremely short notice. I think it was 30 days. Greg does that sound right? [off mic comment] well, agreement, understanding, arrangement, at will it was. That may have been terminable at will. That would be very extreme. We brought the case and we won it on appeal. The thinking was that although long-term contracts or agreements could be even more troubling potentially, even short term ones could have that effect. You want to ask why is it that distributors are agreeing to enter into these contracts with a dominant firm. If they are willing to do it for one day they might be willing to do it the next day also. And every day after that. Even if they are permitted to terminate the agreements. What would have to happen is for a competitor to be in a position to offer better terms tomorrow than it can offer today in order to get access to them. That may or may not happen. Duration may matter. Another thing that may matter relating to duration perhaps is whether the agreements are staggered. You may have a contract or an agreement with distributors, some distributors for two years, other distributors for three years, other distributors for four

years. If the manufacturer trying to compete with this firm, that has these agreements, needs to get some significant scale economies realized quickly, it may not be feasible for them to get enough distribution in a short period of time because only so many of these distributors come up for a new contract in a year. That could also be an issue to look at. Other than those qualifications, I guess I would go back again to mentioning what seems like a sensible approach of thinking about these exclusives as a kin to a combination of distributors and asking whether and why that might present problems from an antitrust perspective.

>>MARKUS LANGE

Thank you Ken. Would any of the other panelists want to follow that up? Then let's turn to the next aspect and I would like to ask Osamu Tanabe about presumptions and Safe Harbors in this field. Yesterday we had a rather detailed discussion about presumptions and Safe Harbors concerning the finding of dominance so Osamu I would like to ask you whether specifically in the field of exclusive dealing should there be presumptions and Safe Harbors that are tailored towards exclusive dealing.

>>OSAMU TANABE

Thank you Markus. I believe that the [inaudible] between the concept of dominance and exclusive dealing is that if a dominant company in the relevant market restraints its trading partner from dealing with its competitors and it results in reducing business

opportunities to the competitors to make it difficult for them to find alternative trading partners it usually falls under the concept of exclusive dealing. It seems obvious that if a company is not a dominant company in a relevant market, then restraint does not fall under the concept of exclusive dealing. Therefore the presumptions under the Safe Harbor of dominance is a decisive factor of determining whether restraints to deal with its competitors fall under exclusive dealing or not. According to the report on exclusive dealing presented at the ICN conference last year, 19 jurisdictions have neither presumptions nor Safe Harbors. Five jurisdictions provide for presumptions or indicate Safe Harbors. Presumptions under Safe Harbor defined by these five countries all related to dominance. Namely, such jurisdictions consider that criteria of dominance in determining whether conduct falls under exclusive dealing. Therefore I imagine that criteria of whether either company is dominant or not. It might be possible for the presumption of Safe Harbors when we examine whether suspected conduct falls under exclusive dealing. Per pointed out efficient competition -- efficient competitor test that if conduct cannot exclude efficiency [inaudible] such conduct should not be regarded as exclusive dealing. It might be possible Safe Harbor, but I think that [inaudible] whether the competitor is efficient or not is difficult to evaluate because we don't have [inaudible] market share or something like that. We should analyze on a case-by-case basis. So maybe consent competitor [inaudible] softer Safe Harbor I think. On the other hand, the extent of market foreclosure is also a great criteria in determining the exclusive dealing. However as all jurisdictions do not adopt the extent of market foreclosure as

the presumptions or Safe Harbors, it seems to be difficult to resolve. In my viewpoint, whether competitors' business opportunities have reduced or not should be examined on a case-by-case basis because I believe that market strain competition including [inaudible] competition is different in each case and we should examine cause and effect of changes on competitive situation in the market very carefully.

>>MARKUS LANGE

Thank you. Would any of the other panelists want to comment on that subject?

>>MALE SPEAKER

Just very briefly on the point about the equally efficient competitor. I don't recall in reading through the EC's very useful statement on single firm conduct that it went so far as to say that if the competitor is not equally efficient, then the dominant firm can do anything it wants. That would obviously be a troubling policy because sometimes a less efficient competitor still provides a competitive constraint. I think the more subtle interpretation, one that should probably be made clear to all, is that the concern is whether or not the conduct would be able to exclude an equally efficient competitor whether or not it at the moment is aimed at an equally efficient competitor. That narrows to some extent the Safe Harbor like interpretation.

>>MALE SPEAKER

That is indeed the correct interpretation. I mentioned the term soft Safe Harbor which may not feel very safe for many. [laughing]

>>MALE SPEAKER

Frankly in thinking about this question I had some difficulty in conceiving what Safe Harbors might be in respect to exclusive dealing. I understand Safe Harbors on the market power side and I also understand Osamu Tanabe's reference to perhaps a Safe Harbor around the amount of the market downstream that is tied up by exclusive dealing. You might have a Safe Harbor there. I did want to raise one other area that authorities could think about the Safe Harbor concept and that is in respect of intellectual property rights. The interface between competition and intellectual property is a complicated issue. One might argue that the right to exclude a person from the use of one's IP rights is an inherent to intellectual property. It seems to foster innovation and dynamic competition. In Canada, the unilateral exercise of an IP right such as a refusal to license is clearly not covered by the abuse of dominance provisions. The question is whether or not a decision, for example, to license only one customer to the exclusion of others, requiring exclusivity in that way could constitute an anti-competitive actor and an abuse of dominance. In light of the increasing importance that intellectual property plays in the economy, I would suggest this is an issue for some thought around -- it is not quite a Safe Harbor, but a similar concept.

>>MARKUS LANGE

Thank you very much Randall. I think this aspect of intellectual property rights is a very interesting one, but also a sensitive one where really the realms of IPR and antitrust meet and overlap. It brings us to the question of whether the one takes precedence over the other. Thank you very much for pointing that out. I would like to put another question to Randall. Namely the field of justifications. What justifications should be allowed and do positive effects -- is it necessary that positive effects outweigh negative effects so that there needs to be a net benefit for competition when looking at justifications.

>>RANDALL HOFFLEY

Thank you. Clearly competition authorities do not consider business justifications for exclusionary conduct in the same way. Most at least consider business justifications in the context of considering whether the conduct has an anti-competitive effect. For example, if the objective of the conduct was procompetitive, for example, to enhance the targets efficiency and it had that affect, it would be considered in assessing whether the conduct lessens competition. In that context I would have thought one would presume that pro-competitive effects would need to negate the anti-competitive affects or at least render them immaterial. In some jurisdictions such as in Canada, business justification may also be considered in determining whether the objective of the conduct is anti-competitive. Canada's federal court of appeal you will hear a little later in the

Canada Pipe case has defined a valid business justification in the following terms. A credible efficiency or pro-competitive rational for the conduct in question attributable to the respondent which relates to and counter balances the anticompetitive effects and/or subjective intent of the acts. It is important to recognize that this statement was only made in the context of assessing whether the conduct was or can be presumed to be intended to exclude discipline or predated competitor. I would have thought that most would have agreed that relevant business justification will be the one that has the effect of or the intent of enhancing efficiencies such as by minimizing costs of production or operation, improving the products targets or services or some other aspect of the target's businesses. Such as by improvements in technology or production processes so that the target's core assets or demand is changed. Clearly business justifications raise a number of complicated issues for competition authorities. Most notably going behind the rationale pro-offered by a dominant parties business people to determine if the measure has pro-competitive effects is a difficult task without the expertise in the industry in question. Competition authorities are required to deal in industries where they don't have experience. They have experienced business people telling them there is a business justification that will have efficiency effects. It is often very difficult for authorities to counter that. What that means to me is that not that it should be tested but that caution should be exercised in rejecting out of hand any kind of business justification or efficiency claims.

>>MARKUS LANGE

Thank you Randall. Would any of the other panelists like to follow that up? Ken, please.

>>KEN HEYER

A couple of things that were involved in Randall's remarks to comment on. One is that it is I think particularly difficult to try and interpret internal business statements and justifications in the following sense. Businessmen I think are focused on that one thing and one thing only and that is making as much money as they can. When they are doing their analysis they are typically not talking about the welfare effects of their practices. They may not even be distinguishing between how and why they will make more money. They are just talking about what they can do to make more money. Sometimes making money and up being a good thing for the economy and consumers. Sometimes it ends up being a bad thing and it may be anti-competitive. But focusing on statement about how their choice was based on making more money is a little bit tricky. We will use exclusive dealing and what if they add statements about how this will kill our competitors that does not prove that exclusive dealing is not also providing benefits to consumers. That is how it is maximizing its profits. It can be doing a lot of things it's wants. That is one point. Another point is that the difficulty of knowing, of our knowing with confidence what the net effect of practice is going to be I think a very important, very challenging and I don't really have an answer for it. If I knew with certainty that a particular policy of exclusive dealing was going to have a net negative effect, I knew that

with certainty, I would object to it. But I don't know with certainty. The businessmen engaging in these practices don't know with certainty either. So you have to make rules and decisions based on your best guess about what is going to happen. In particular, the cost of perhaps getting it wrong once in a while. So I guess I would add in thinking about the issue of justifications and Safe Harbors and having to demonstrate effects, I guess I would try to think more about the unavoidable fact that we will sometimes get it wrong. What would be the costs if we condemned it when it actually was efficient, versus what would be the cost if we permitted it and it was anti-competitive. That is a very difficult question, but I think it is important in this context because we are not omniscient.

>>MARKUS LANGE

Thank you Ken.

>>OSAMU TANABE

I just wanted to introduce the distribution guidelines introduced by the Japanese Fair Trade Commission which states that exclusive dealing may not be illegal if there is a reasonable justification. The guidelines show two examples of justifications for exclusive dealing. The first example is that in a case where a finished product manufacturer commissions part manufacturers to make a parts by using material which totally supplied from the finished product manufacturer. In this case we can find it reasonable that the

finished product manufacturer requires the part manufacturers to sell the parts exclusively to itself. The second example is that in a case where a finished product manufacturer commissions parts manufacturers to make parts with secret know how which are provided by the finished product manufacturer. In that case we can also find it reasonable that the finished product manufacturer requires part manufacturers to sell the parts exclusively to itself. As long as such restriction is deemed necessary to keep the know-how come confidential or preventing unauthorized divergence of it. Thank you.

>>MARKUS LANGE

Thank you. Thank you very much to the panelists for their very interesting and enlightening explanations and responses to the questions that I have put to them from the panel. I would like to open it up to the floor now. Are there any questions from the audience to the panelists? Please.

>>AUDIENCE

My question probably mainly relates to the notion made by Ken Heyer. Regarding the number of exclusive contracts that are necessary for the company to maintain its business in the regular -- in a normal way, in a competitive way. What kind of tests do you use when establishing the number or the amount of contracts that are in fact pro-competitive and that really are needed for maintaining the normal business of the company? As I can see it it is a kind of [inaudible] approach to the exclusive dealing

case. What tests would you use for these purposes? Thank you.

>>KEN HEYER

That is a very good question which is another way of saying I don't have a very good answer. However, I wanted to indicate that that seems to me to be the right question and if you did have evidence, as we did in the Dentsply (ph) case, that perhaps they were using too many of these things, all that I can say about the right number question is that I guess advice for looking in a real world case would be obviously you would want, at a minimum, to confirm that there can be some real benefits from using exclusive dealings at all. And then you would have to consider issues like scale economies and the value of having a broad network, things of that sort. Exactly where and when that and is not easy to determine I would concede.

>>MARKUS LANGE

Thank you very much. Yes, please.

>>PER HELLSTROM

Hi, I have a question of how you interpret the concept of likely effects. Likely effects. Suppose you have a case where you have obtained documents of contracts that clearly indicate that exclusive dealing is there. But the dominant company has not been enforcing this contract clause possibly because perhaps there have not been serious

competitors in the market. There is some chicken and egg. Perhaps serious competitors are deterred and there is no need to actually enforce the contractual clause. In that situation, would you still consider that there is a likely affect of foreclosure even though you don't have hard evidence that competition has been foreclosed?

>>MARKUS LANGE

Would any of the panelists want to get in on that?

>>MALE SPEAKER

Do we have a choice? [laughing]

>>MALE SPEAKER

Leave it to the enforcers.

>>MALE SPEAKER

I can take a try. It seems to me that you had two issues there. One was the fact that you don't have actual real world effects that you can measure. I think that we talked about that earlier when we said sometimes maybe a practice is engaged in before an entrant has become very big and successful. It is keeping him from becoming big and successful. What do you look at? There I think you have to rely on a combination of theory and whether or not these contracts really provide structural barriers to or maybe

even contractual responses that are committed to barriers to someone becoming more effective and competitive. The second issue I think you mentioned was what is the internal documents of the firm indicate that this is why they are doing it, what they think they will accomplish. I don't remember. I thought you were starting with that.

>>AUDIENCE

I'm just saying the contract is already there. There is an exclusive contract, but the dominant company has not been enforcing it.

>>MALE SPEAKER

Oh, they have not been enforcing it.

>>AUDIENCE

Enforcing it. Perhaps there is no serious competition around, just some lackluster competition so there has not been a serious need to actually enforce it.

>>MALE SPEAKER

It sounds like there is no need to have exclusive dealing if there is no other person competing against you, right?

>>AUDIENCE

You never know. Perhaps a serious competitor may have been deterred [overlapping speakers]

>>MALE SPEAKER

Because they knew this was going to be the policy.

>>MALE SPEAKER

On the two questions. On the meaning of the word likely even there there is not complete clarity if you read the case law of the European Court of Justice. In the first instance, they seem to use the terms likely, capable, liable to just interchangeably. They don't really make a distinction. It is just some sort of vague causality, like a sliding scale of what likely means. I think in our guidance paper we try to make the difference a bit clearer between capable and likely, but whether we succeeded to, I will let you be the judge of that. But clearly likely effects, yes, you don't have to wait to prove actual effects or a dead body. You can act before and you can investigate the market to see what the likely outcome of the behavior is. On the particular question of whether a contract is enforced but perhaps still have some deterrent effect, that would be a matter of having to investigate that. That would be part of the market investigation to ask customers or potential competitors why indeed they are not going into the market. Is it because of the contracts? If it is, then you establish the causal link because of that. I think you would have to look at that in more detail.

>>MARKUS LANGE

Thank you.

>>AUDIENCE

Thank you. I like these assimilation with the mergers and the situation as an example. Can that also work in case of the contracts in case the contract cannot be assimilated with the affects of the merger. In other words when they are that lose and they can so easily be terminated, is it then really necessary to check what you would think of the merger?

>>MALE SPEAKER

Thank you. I was trying to get to that when we talked about the short duration of contracts. If you -- when distributors are offered a -- and I will say it offered an exclusive dealing contract or agreement or understanding, they have a choice whether to accept it or not. It may be a one-day termination. They can terminate at will. They have a choice whether to enter into it. Okay. The terms need to be good enough, from their perspective relative, to the alternative of not entering into this arrangement. Let's say they find it attractive enough that they will agree to be exclusive. And maybe all of the distributors make the same decision. So I guess what I am saying is even though this is obviously not a merger of all of the distributors, it still could keep those distributors from

being available to someone else. And technically the distributor can go to someone else, but the terms and the alternatives are such that it is more profitable for them to say with the dominant guy. They are worse off if they choose to not be exclusive because then by the way they have to be exclusive with the other people. They will not be able to carry this guy's product. If you were to think that the terms are such that these distributors, maybe each and every one of them is not going to find it more attractive to work with another firm, then it may be sensible to think about it as a kin to a merger albeit a soft one where the consent has to remain there overtime.

>>MARKUS LANGE

Yes please.

>>AUDIENCE

[off mic comment]

>>MALE SPEAKER

I think it is obviously most likely -- far and away most likely to be of concern if the firm entering into these contracts with distributors is a dominant firm. However, just from a technical standpoint if nothing else, as I was try to indicate earlier, if somehow, some way, a firm that was not dominant in the primary market were able to reach agreements with all the distributors saying you have to get my permission before you work with

anybody else, that could be a kin to monopolizing an input and creating market power that ought not be permitted.

>>MARKUS LANGE

Thank you Ken. Yes, please.

>>AUDIENCE

Just a quick question as to how you would treat a situation in which it is the customer who wants the exclusive. In other words the customer thinks it will do better if it does a winner take all contest for its supplies and for a significant time period. Is that a self-validating situation? Is that treated differently? How is that analyzed?

>>MALE SPEAKER

I think the answer is fairly clear under EC Competition Law and jurisprudence. It's does not matter. You can still condemn conditional rebate schemes even if the customer themselves asked for it.

>>OSAMU TANABE

The same situation in EU.

>>MALE SPEAKER

I think there are some circumstances under which it would not be a problem and others in which it might be. Situation in which it would not be a problem is if there is one final consumer and it prefers to give all of its business to one supplier. In a circumstance like that I can imagine not challenging the arrangement. However, especially in cases where the customer is a distributor, and especially in cases where locking up multiple distributors could keep out a competitor, you can certainly imagine terms being such that perhaps even some of the rents could be shared with the customer who is asking for exclusives. The harmed party in that case would not be your customer, it would be your customer's customers.

>>MALE SPEAKER

That would be the same in Canada as well.

>>MARKUS LANGE

Thank you. Any further questions? Yes, please.

>>AUDIENCE

Not to pick on Randall but one of the points you raised about weighing efficiencies against the anti-competitive harm, I'm wondering whether other jurisdictions, I think I know or I should say Randall if you want to answer this as well I'm wondering how other jurisdictions have thought about this and how that will play itself out in terms of how you

weigh the anti-competitive effects against any sort of efficiency arguments raised?

>>MALE SPEAKER

In our guidance paper we do mention a bit on that. We try to mirror the situation we have under Article 81-3 for those of you who are familiar with that. We would look at a four-step test. The efficiency must have been or be likely to be realized and must result from the conduct in question, that is the first part. Then that conduct must be indispensable to realized efficiencies. There must not be a less anticompetitive way of achieving the efficiencies. That was mentioned so it is sort of proportionality. Number three, the conduct must not eliminate effective competition by removing all or most sources of actual potential competition. And last, but not least, the likely efficiencies must outweigh any likely negative effects identified by the Commission for Competition consumers. That is the four-step test we use. A bit abstract but still.

>>MALE SPEAKER

One quick point and I suspect, and I am treading on thin ice here because we are in the middle of a transition game here at the Antitrust Division at the Department of Justice and if I say anything that bothers my new bosses I will deny having said it. I hope this is not being recorded. [laughing] On the issue of indispensability.

>>MARKUS LANGE

This is being webcast.

>>MALE SPEAKER

This is being webcast? Oh, okay. I have no further comments. [laughing] Actually I will say something. I am protected by the civil service regulations so I am probably okay. On the issue of indispensability that was mentioned as one of the conditions. I am not certain how this was crafted as I tried to recall the statement that was put out nor how it would be interpreted in practice. I would say that in determining whether a practice is valuable or not, I don't know that U. S. authorities, certainly I would not go so far as to say it has to be indispensable to achieving the purpose. If it is something that achieves the purpose at much less cost than some other alternative, then I would consider it to be not indispensable but to be justifiable perhaps.

>>MARKUS LANGE

Thank you Ken. I would like to bring this panel to a close now. Thank you very much to the audience for their attention and for the questions. Thank you very much to the panelists for their very interesting and enlightening explanations on the issues we discussed. And thank you and now I would like to give the opportunity to look into a practical case. Our colleagues from the Canadian Competition Bureau Martíne Dagenais and Richard Bilodeau will present the Canada Pipe case. [applause]

>>RICHARD BILODEAU

This is much better. You don't hear yourself talk when you are talking to the microphone. As I was trying to explain, Martine and I worked on this case and it is close to our hearts and we will do our best to avoid any bias in favor of one side or the other. But we do have someone will be in one of the breakout rooms who was counsel for Canada Pipe so I'm sure she will keep us in check if we go off track. [off mic comment] [laughing] Just a bit of history or background in terms of where this case originated from and ended. The Commissioner of Competition brought this application before the Competition Tribunal. The tribunal dismissed the case for a variety of reasons, but we can get into that a bit later. The Commissioner appealed the case to the Federal Court of Appeal and the Federal Court of Appeal returned the case to the Competition Tribunal for redetermination. We will talk about some of the issues. Randall brought some of those up earlier. Canada Pipe did seek leave from the Supreme Court to appeal the Federal Court of Appeals decision, however leave was denied and the matter was eventually sent back to the Competition Tribunal for redetermination. At the end of the day, about a month before the hearing was to begin, the parties -- Commissioner and Canada Pipe agreed to reach a consent agreement to settle the issue and avoid the redetermination hearing. We will not talk about the agreement, but if any of you are interested, it is available on the Competition Tribunal's website in Canada. Briefly, the allegations that the commissioner brought against Canada Pipe can be summarized pretty easily. Canada Pipe, we alleged, did have market power in the supply of cast

iron, drain waste, and vent pipefittings and MJ coupling markets in Canada. A bit of a description. Everybody knows what pipe is. It is a straight piece of tubing that bring liquids in this case. Fittings or cast iron fittings are a product that allows the pipe to change direction from one -- from going from a parallel to a downward slope, for example, and a coupling is what is used to join two pipes or join a pipe and a fitting together. When we refer to drain waste in that we are referring to bringing wastewater from a toilet or water from a bathtub or a washer, for example, and also for venting the system outside of the building. Also Canada Pipe had engaged in a practice of anti-competitive acts in a program called the Stocking Distributor Program which we alleged was exclusive dealing and was also full on forcing. At the end of the day we argued that the practice had a substantial lessening of competition and also substantial prevention of competition. We will focus this presentation however on the anticompetitive effects. We won't talk too much about the SLC/SPC aspect of it. The program itself, Stocking Distributor Program. The program had two classes of distributor. It created one category called a stocking distributor and the other called the non-stocking distributor. To be a stocking distributor you had to give Canada Pipe the first opportunity to supply the three products; the pipe, the fittings, and the couplings. In turn the distributor had the opportunity to buy the three products at a heavily discounted rate. Sometimes in the order of 40-60 percent. Although those discounts varied across the three products and across the six geographic regions that the Tribunal had identified. Distributors who purchased all of their products from Canada Pipe during any given

quarter received quarterly rebates that varied between seven and 15 percent again depending on which of the three products we are talking about. Those rebates were paid out at the end of the quarter. At the end of the year, based on your annual purchases, you were eligible to receive a 4 percent rebate on the entire purchase for that year. The quid pro quo is that you had to buy everything through Canada Pipe. During the course, for example, of one quarter you decided that you wanted to buy one unit or more from another supplier, you risked losing the accumulated -- you risked losing that quarters rebate and also the accumulated annual rebate for that year. I say risk losing. In some situations some distributors did lose a rebates and in others they were warned that they could lose rebates. For a non-stocking distributors, quickly, you did not get any rebates quarterly or annual rebates and you were allowed to purchase the three products depending on which year we are talking about between 4-6 percent off. That discount was applied at the point of purchase. I talked quickly about the three products. The pipefittings and couplings using drain waste and vent applications. The product market was limited to cast iron. Cast iron is as you can surmise is a metal product and cast iron was the main product used in buildings over a certain height and that was because of building codes in Canada and also preferences by the users of the product whether you are talking mechanical engineers or architects or contractors or builders. Some of the other materials that we looked at or the tribunal considered were plastic piping which you would find in more residential applications but also some commercial. Copper, copper being much more expensive than cast iron and plastic. You can find

also steel pipe, much more expensive and also asbestos cement pipe and as you can surmise by the word asbestos even though the pipe was mostly cement and very little asbestos there was a negative connotation to the word. And just a quick side note, funny little story. Canada Pipe counsel brought examples of different pipe before the tribunal. It had a cast iron pipe, plastic pipe, also had an asbestos cement pipe or portions of it that were laid out before the panel members and also some of the staff of the tribunal. So returning from the break one morning, the sitting judge asked that we move the asbestos pipe from the front of the room to the back of the room. Where we were sitting. [laughing] Obviously it had a negative connotation. In terms of geographic markets, just to conclude on this, because of the variety of the technical characteristics of the product and also the preferences of the users, the tribunal determined that other materials were not close substitutes and that cast iron products consisted of the product -- the three product markets. In terms of geographic markets, we did not go into a very detailed analysis at the tribunal stage or the tribunal didn't in it's analysis. And based on Candida pipes six pricing regions in Canada, they determined that those were the six geographic markets. One slide too much. So in terms of market share, in the six geographic markets Canada Pipe had between 80-90 percent depending on which of the markets we looked at. In terms of barriers to entry the Bureau argued that the program itself was the primary barrier to entry. Canada Pipe on the other hand argued that the program was not a barrier to entry and there were other routes available to new entrants to distribute their products either by selling directly to

the end user or by using distributors who weren't already sourcing cast-iron pipe and getting them to source their product. The other thing the tribunal considered very briefly is that building a new foundry which is necessary to produce a cast iron products is not likely to happen in Canada. There were already a number of foundries that were not being used at full capacity and because of environmental regulation it's not an easy thing to do. However Canada Pipe did argue that it would be possible and had been demonstrated in the past by one of the new entrants in this market that an existing foundry for other types of cast iron products could be converted to produce cast-iron pipe and fittings. That was one of the arguments that Canada Pipe had put forward. At the end of the day the tribunal relied on Canada Pipe's large market share and range of products they produced, as well as the national presence in Canada that limited the penetration of competitors.

>>MARTINE DAGENAIS

So in terms of the anti-competitive acts the Bureau argued that Canada Pipe had locked in all of the distributors into the SDP since all of the major distributors dealt exclusively with it. At least 80 percent of cast-iron sales were made through the stocking distributors. Therefore we mentioned that the SDP foreclosed the distribution network to new entrants and current competitors. Also our economic expert testified that the SDP induced distributors to deal exclusively with BB or Canada Pipe as the loyalty requirement makes the price of the last unit of purchase very low or even negative in

some cases and the price of switching the last purchase to a rival very high. As the distributor would have to surrender, like Richard mentioned, significant rebates on all of its previous purchases. In other words, the affect of the SDP makes it extremely costly for distributors to source a portion of its cast-iron needs from Canada Pipe and source its remaining needs from a competitor. So we also argued that the SDP precluded total entry by new entrants and in order to get a distributors business a new entrants had to be able to satisfy all of the distributor needs of cast iron. And also the last thing that we argued is that a distributor may be reluctant to entrust all of it needs to an untested and unknown supplier. On the other side, Canada Pipe argued that the SDP was not a contract. That participants could choose to deal with other suppliers and every year on January 1st, a distributor could choose to deal with who they wanted to. Their expert testified that the SDP was not a barrier to entry like Richard mentioned and not an anti-competitive act because new entrants did not need to distribute through stocking distributors. We mentioned that new entrants could establish a new distribution network, sell directly to competitor contractors, and could distribute to a distributor that did not carry cast-iron products. So the tribunal looked at four aspects. The contractual nature and binding effect of the SDP. The business justification, the impact of the SDP on suppliers, other suppliers and the switching costs. So briefly the contractual nature and binding effect of the program. The tribunal found that even though the terms of the SDP could be seen as binding, the terms were clear and it was only for a year. Also it concluded that even the rebate structure in the SDP was an inducement to exclusive

dealing, it did not find that the program had an exclusionary effect. In terms of the impact of the SDP, the tribunal concluded that the practice has had an impact on competition, but did not prevent other suppliers from some markets. In terms of the switching cost which from the economists and from my own opinion would say that it was the main determining factor for deciding if the program was anti-competitive or not. The tribunal mentioned that they were equal to zero at the beginning of each calendar year and it was only a cost benefit analysis that a disputer would have to do. Lastly the business justification, Canada Pipe presented and I know we said two, but I added -- Anita asked us to add another one. Three business justifications and the first one was the SDP encouraged competition by creating a level playing field between large and small distributors and that the SDP allowed it to maintain a full line of products that consumers might not have access to otherwise. Lastly, to maintain the disability it had to generate high-volume sales and that the SDP promoted such volumes. The tribunal accepted the third and the second one, but not the creation of a level playing field between distributors. Accepted the fact that Canada Pipe's rationale as a business justification to sell a certain volumes of sales of all three products to be able to maintain a full line of products. At the end of the day, the tribunal found that for practice to be anti-competitive it must have a negative effect on competition. And found that this link had not been established in this case. We appeal to the Federal Court of Appeals. The business justification, Randall give you the business justification, what they said. They rejected it and at the end of the day it is just self-interest. It has to be a credible

justification. On the anti-competitive acts, the Federal Court of Appeals stated the following. "An anti-competitive acts is one whose purpose is an intent or negative effect on a competitor which is different than what the tribunal concluded on competition. That it's predatory, exclusionary or disciplinary and that the focus of the analysis is on the act itself to discern its purpose". Anita, I know you are in the room. So would you like to add anything? I assume she will say no because she was consulted so --. [laughing]

>>AUDIENCE

[off mic comment] sorry. It was not just the intent to sell more volume. There were production efficiencies that were realized as a result of selling this additional volume. This volume was necessary to lower production costs and that thusly led to the ability to have a full set of products. That was a distinction. The other -- I think it is fine Martíne. Thank you very much for the opportunity.

>>MARTINE DAGENAIS

Thank you. [applause]

>>MARKUS LANGE

Thank you very much Martine and Richard for this very interesting presentation which will then lead us into the breakout session. After the coffee break, we will have a 15-minute coffee break now. Just after 11:00 o'clock please go to the breakout session

rooms. Thank you.