Oral History of Robert Pitofsky
Fifth Interview
March 10,2004

Ms. Born: This is the fifth interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being taken on March 10,2004, in a conference room at Arnold & Porter, 555 12th Street NW, Washington DC 20004. I inadvertently recorded over the first part of the interview, and therefore Bob has dictated a description of his activities during the period immediately following his deanship at Georgetown Law Center. That description follows:

After completing my service as dean at Georgetown—a six-year tour of duty—I was rewarded with a year-long sabbatical. During the first half of that year, I was a scholar at the Rockefeller Institutes villa in Bellagio, Italy. It was a five-week stay and I managed to complete most of an article on measurement of market power—later published in the *Columbia Law Review*. We then spent several months traveling in Italy, then Egypt, and finally France. Upon my return, I had arranged for a brief stay as a scholar at the Brookings Institute.

Mr. Pitofsky: I found Brookings to be one of the more interesting discussion groups in Washington, and luncheon with colleagues, especially colleagues who are not in my field, never failed to be interesting. I was very thankful for them for providing me on very short notice a place to work. The following year I went back to teaching and then I must admit I took another sabbatical. The first sabbatical was compensation for having been dean. The second sabbatical was compensation for the fact that I had been an academic for 25 years and I had never taken a sabbatical. I visited different places but I had never taken a year off.

Ms. Born: What did you do then?

Mr. Pitofsky: That coincided with the publication of a completely new edition of the casebook. The timing was right. Much had changed in the '80s, especially with the influence of formal economic analysis on antitrust, and so that was a major revision. I was not just updating the cases, and we really transformed the book considerably. I've always had the responsibility of writing the teachers' manual which is in some ways more time consuming than writing the book and I once again took on that role.

Ms. Born: So you just stayed here in Washington working on that?

Mr. Pitofsky: I think I worked out of the Arnold & Porter office for the most part. I'm sure we did some modest traveling. I remember during that stretch I wrote a paper on American antitrust laws for a Japanese audience and I spent a week or two traveling around Japan. The main project was the case book, but I had other modest pieces of scholarly work that I attended to during that year.

Ms. Born: When you stepped down from the deanship, did you return as of counsel for Arnold & Porter? Had you been of counsel during the deanship?

Mr. Pitofsky: Actually, as a formal matter, I had continued of counsel at Arnold & Porter even when I was dean. Now the fact is I wasn't in the law office very often and didn't put in nearly the hours that I committed before and after, but I was successful during that period—probably the most successful period of my entire career in attracting new clients. So that was my major role in my years as dean. People around the firm didn't see me very much.

Ms. Born: What about in your sabbatical years?

Mr. Pitofsky: No, I completely cut myself off from practice. Certainly in the first year, I completely cut myself off when I was in Italy and Egypt and France. I don't think I even phoned in. When I was at Brookings I probably had some very modest projects to do but the

firm was extremely generous, both while I was dean and after I was dean, in trimming their expectations of what I would do to my availability.

Ms. Born: Was there anything else of interest or note that you did during this period? We will get to your role in the transition team.

Mr. Pitofsky: That was the main additional activity aside from teaching. I had met then candidate Clinton at one of these Renaissance sessions in Hilton Head, South Carolina. We had talked briefly about antitrust. I think I said earlier he was very unusual as the President of the United States because he had taught antitrust at the University of Arkansas and used our casebook. After it became clear that he was going to be nominated, I became very active in writing papers addressing various issues in the campaign. And, of course, after he was elected I became very active in the transition process.

Ms. Born: What role did you play in the transition process?

Mr. Pitofsky: Oddly, I was given the job, not of examining the Federal Trade Commission and offering a blueprint for progress, but rather examining the Department of Justice and specifically the Antitrust Division of the Department of Justice and offering a blueprint for the future. It's supposed to be very confidential what you say and who works on it, but I think I can say my deputy in that process was Merrick Garland who was quite an extraordinary young lawyer and a great deputy to have.

Ms. Born: And is now on the D.C. Circuit Court of Appeals. During the transition, who else was working on the Justice Department transition team?

Mr. Pitofsky: I am not comfortable with this, because I think the idea when you take this job is to treat who you work with and what you say as utterly confidential. But certainly there were many people who I knew well, who were in that building working day and

night on the transition.

Ms. Born: Was it very intense?

Mr. Pitofsky: It was intense; it was good-natured. People were extremely enthusiastic about the prospect of a Democratic President and a person like Clinton having the job. People felt, and it turned out to be true, that major appointees to the Clinton administration took the transition reports rather seriously. I had been on transitions earlier, but I don't think anybody ever read the reports that we wrote.

Ms. Born: What earlier transitions are you referring to?

Mr. Pitofsky: Well, I had been on the transition group for President Carter when he was elected. That one was on the Federal Trade Commission. We wrote a report. I don't think it was as good as the report that we wrote in the '90s. I never saw any evidence that it was taken seriously, whereas the report that we wrote for the Department of Justice and the report that I know others wrote for the Federal Trade Commission were taken as absolute blueprints of what they ought to do and what order they ought to do it in and what weight they should give to different projects and so forth. It was what a transition process really should be.

Ms. Born: Did you get to know the President or the First Lady at all? Did you have much interaction?

Mr. Pitofsky: Not then. I had met them at the Renaissance sessions but I didn't know them well and they were not present at all during the workings of the transition process.

Ms. Born: Did you have hopes for a political appointment?

Mr. Pitofsky: I did. I was set on the Assistant Attorney General for Antitrust, and I think I had much support, but in the end, I finished second to a wonderful selection, and she is one of the people who I know took that transition report very seriously.

Ms. Born: Anne Bingaman. So, you returned to teaching at that point?

Mr. Pitofsky: I returned to teaching. The President reportedly said very kindly, look, I'm saving this fellow for the Federal Trade Commission. So that was encouraging. The problem was that there were five commissioners and no imminent departure so there was no chance that I could begin to serve in that administration for the first year or two.

Ms. Born: And when did the opportunity present itself?

Mr. Pitofsky: In **1994,** the former Chairman and then Commissioner of the FTC Cal Collier resigned in order to take a position in the private sector and that opened up a spot. I had serious competition from an outstanding person, but after a while it became clear that the President was going to go in my direction.

Ms. Born: Before we go into this I should have asked you about the Defense Science Board Task Force on Antitrust Aspects of the Defense Industry.

Mr. Pitofsky: That was one of the most interesting sideline projects that I've ever been involved in. It came up while I was in Japan. To my surprise I received a call from Jamie Gorelick who was then general counsel in the Department of Defense, saying that DOD is confused about what its responsibilities are under the antitrust laws. There was a great deal of pressure to consolidate the defense industry and improve its efficiency. DOD had been in court several times on proposed mergers. The decisions by the judges were not paragons of clarity. She said DOD is thinking of appointing a blue ribbon group that in formal terms would report to the Defense Science Board but would really report to the Secretary and the Under Secretary of Defense to explain whether or not antitrust enforcement against transactions in the defense industry is different than antitrust enforcement if you are talking about underarm deodorant and hair spray. And we'd like you to be chair. I said I had thought about this a great deal and I

believe there is much to be analyzed and said on the subject and I would be glad to engage in this project. Little did I know that it would be almost full-time for about six months.

Ms. Born: Was this during your sabbatical?

Mr. Pitofsky: No, it must have been after the transition because Jamie was already at the Department of Defense. It would have been '93 perhaps even early **'94** and it was an extraordinary group of people. I remember Bernard Schwartz who was the president of Loral was on the commission. Bob Litan who was in the Department of Justice. Jan McDavid who is a prominent lawyer in Washington. Again I was very fortunate—my deputy was a young woman who worked for Jamie Gorelick by the name of Amy Jeffress, who was in the same category as Merrick Garland. And the shock to me was after six months of debating, at times when I just couldn't see how this group could ever come out with a single position, we did it and voted our report out unanimously.

Ms. Born: What did the report say?

Mr. Pitofsky: Boiled down to essentials it is that national security is not strictly a matter of economics. And therefore, there are likely to be transactions — for example, a merger of two submarine companies or a patent license involving a high-tech weapon—which could be questionable under conventional antitrust laws but should be and would be allowed if the Department of Defense could make the case that this contributed significantly to national defense. We also urged the Department of Defense to speak with one voice because some of the problems they had in earlier cases arose because someone from the Air Force would say one thing and someone from the Navy would say the other, and the judge would throw up his hands and say, how am I supposed to decide whether this really contributes to national defense. They agreed , and to my knowledge, they have carried out on that pledge ever since.

Ms. Born: Was the report made public?

Mr. Pitofsky: It was made public, yes. I remember I was on television explaining it as was Jamie Gorelick and John Deutsch. Maybe I'm kidding myself because I'm not objective, but I think it was well received because what it said was antitrust still counts. Don't think what we are saying is that the antitrust laws don't apply to you—the defense industry. What we are saying is that you must adjust the way they apply. It's not going to do any good to say to a soldier with a defective weapon in combat, well, but we saved ten percent on the production of that weapon. It's just that price and output don't apply in the same way when you are talking about national security.

Ms. Born: Back to the issue of your selection as Chair of the Federal Trade Commission, how do you think you were chosen? Obviously, the earlier comment that the President was saving you for the FTC may have indicated an early decision—at least an early pre-disposition.

Mr. Pitofsky: I was an obvious candidate. It might not have taken so long but Charles Burson who had been Attorney General for the State of Tennessee and was assistant to Vice President Gore just happened to be my opponent. Charles Burson—in any other circumstances, I would have been for him because he would have been absolutely outstanding. He had support and I had support. Who knows how these things are finally decided. The President did have me meet with Bob Rubin and Laura Tyson and others in the White House, and eventually it was decided that Burson would continue as the Vice President's Chief of Staff and I would go to the Federal Trade Commission. I don't think there was another candidate.

Ms. Born: And so you were nominated. How did the confirmation process go?

Mr. Pitofsky: The process took quite a bit of time. In recent years, all

appointments to the regulatory agencies have been slow going. Mine, from nomination to confirmation, took about six months. That's not as bad as FTC Commissioner Tom Leary who took 18 months but it's not as quick as some other people who were confirmed. I had my hearing before the committee; it went very well. In fact I believe the committee voted unanimously that I was qualified but then the nomination just sat.

Ms. Born: Which Senate committee is in charge of the FTC?

Mr. Pitofsky: Commerce Committee has oversight. Judiciary has oversight of the Department of Justice. And for some reason it just sat, and I couldn't get a vote from the full Senate, and I didn't know why. I tried all sorts of different ways to find out what the stumbling block was, and I never could find out. Eventually I came to understand that two, perhaps three Senators recalled the fact that I had testified in the nomination of Robert Bork to the Supreme Court. I always thought my testimony was extremely mild and there was much praise in my testimony as well as criticism, but I did say in the end that he had a history of not giving the fullest weight to congressional will in a matter if he thought Congress had made a mistake. And I think several Senators remembered that, and I am not sure the goal was ever to block my nomination but it certainly was to delay it.

Ms. Born: But eventually it happened?

Mr. Pitofsky: Eventually it happened with the great help of some Democratic Senators on the Commerce Committee. I think I must have been nominated in the fall of '94 and I didn't take office until April of '95.

Ms. Born: What factors went in to your decision to accept the nomination?

Mr. Pitofsky: The idea of doing public service was for me a no-brainer. I was very enthusiastic about the Clinton administration and what their goals were and the people that they

had brought into government. It was just a question of which job I might be lucky enough to be offered. There were several feelers between my losing out to Anne Bingaman and my receiving a Federal Trade Commission offer. I was interested in several of them but not as interested as being Chairman of the Federal Trade Commission.

(End of tape, side **A.)**

Mr, Pitofsky: I believed, just as I had written 25 years earlier, that the Federal Trade Commission was an agency of immense potential that had not realized on that potential at times because of a failure of leadership.

Ms. Born: What was the state of the FTC when you assumed the Chair as opposed to 25 years earlier?

Mr. Pitofsky: The state was relatively good because my immediate predecessor was an outstanding chair, Janet Steiger. She was a Republican. She'd been nominated by the first President Bush. She had attracted good people and had stabilized the agency. Prior to that during the Reagan years there were times when the chair and maybe one or two of the commissioners really didn't believe fully in the mission of the Federal Trade Commission. That was, I think, especially true of Dan Oliver and to a lesser extent of Jim Miller. The result was a brain drain, a disinclination of young people to go to the Federal Trade Commission where, after all, the leadership wasn't enthusiastic about its mission. Janet Steiger must have taken over in '89and she turned that around. She made it clear that she thought the Federal Trade Commission had a great deal to accomplish, that she was not cowed or intimidated by powerful interests in the private sector. She was willing to listen to original and innovative proposals. And in general she was one of the fine chairs of that agency. So when I took over things were in reasonably good shape.

Ms. Born: Was she still on the commission?

Mr. Pitofsky: She stayed. That's an interesting point because I needed her vote. When I came on there were two Democrats, two Republicans and one independent. It was very difficult for me to obtain the vote of one of the Republicans and the independent. And of course, everything at the commission depends on being able to count to three. So Christine Varney and I came to the commission virtually at the same time, and our ally in all the controversial cases was Janet Steiger. Now, as you would appreciate, most cases are unanimous or near unanimous. They are not controversial. But Janet was an immense asset in terms of substance. Also politically we adopted a technique of the two of us visiting Congress jointly for anything we had to say, so that we defended our budget together, we defended initiatives together, we spoke to individual Senators who were concerned about what we were doing together. It was a team project in my first years there and it worked extremely well.

Ms. Born: Was that because it demonstrated the bipartisan nature of the position?

Mr. Pitofsky: It was also true that Janet Steiger enjoyed enormous respect on the Hill. So we were a very successful pair. In fact, I think we were able to obtain modest budget increases in years when everyone else's budget was being cut. Or if we were cut, it was not as much as others.

Ms. Born: Tell me about who the other commissioners were at that point.

Mr. Pitofsky: Christine Varney was a young lawyer from Washington who had been extremely active in the Clinton campaign. In fact, she had lived in Little Rock for a year and I think she was secretary of the campaign—I am not sure I have the right title. She was extremely energetic and capable and very much committed to that part of our work that affected

the high-tech part of the economy. She knew computers, she knew telemarketing, she knew software, and she wanted to take a leadership position in that area, and I encouraged her to do so. The independent was Mary Askanaga who had been at the commission for perhaps 20 years and had been a commissioner for perhaps 12 years or more.

Ms. Born: She was an employee before then?

Mr. Pitofsky: Yes. She had been in the general counsel's office—first the San Francisco regional office and then the general counsel's office. And she was not just independent in name only. She was independent-independent. It was very difficult to predict her vote because she wouldn't tell you until the last minute which way she was going. And while I enjoyed her support on many important projects, I also lost her support on many important projects. The other Republican was Ross Steiger who had been at the commission as a commissioner for almost a full term. He had come from the White House Personnel Office. He had many connections in the Republican establishment. He was a very reasonable person, but his instincts were more conservative than Commissioner Varney, Commissioner Steiger and myself. The result was that when you were talking about cigarette regulation or major mergers or challenging a company like Intel, it was very rare that we were unanimous. And anything that was innovative in terms of antitrust laws, and I hasten to say, and I have written to this effect, we didn't do all that much innovative in terms of the rules of the road. Most of our innovation was on remedies, but whenever we tried to do anything innovative on remedies, it was a fight to get the third vote.

Ms. Born: What were your goals when you became chair?

Mr. Pitofsky: They were several and they grow out of my experience as a critic of the FTC in 1969. First of all, I put tremendous emphasis on attracting senior staff, and while in

one sense it was frustrating that I had to wait six months to be confirmed, in another sense, it gave me an opportunity to do a wide search for senior staff. Luckily the two bureau directors were Bill Baer of Arnold & Porter and Jodie Bernstein—and they probably were—myself included because I was once a bureau director—the best two bureau directors that agency has ever seen. Jodie is a bureaucratic genius. I have never seen anything like her ability to work through a complicated bureaucratic problem. And Bill has a combination of street smarts and substantive ability.

Ms. Born: Did you bring them in?

Mr. Pitofsky: Yes. They came with me on day one. There were people already at the commission who I came to realize were great assets: Susan DeSanti, who is chief of policy planning and a very thoughtful person, a person who thinks long term, and I managed to persuade her to stay. The general counsel was Steve Calkins who, of course, was very familiar with the Federal Trade Commission because he had been the reporter on the second Kirkpatrick report. And then I spent a long time trying to select the head of the bureau of economics. Traditionally the economists and the lawyers were at each others' throats at that agency, and they did not coordinate and cooperate. By and large the economists were constantly critical of what the lawyers were proposing. I eventually found someone who I knew only slightly, named Jonathan Baker, who was both a lawyer and an economist. We talked long hours about my principal concern that he bridge this gap between lawyers and economists, and I think he was as successful as anyone who has ever had that job. He was brilliant at it, and he changed the role of economists. They weren't just thinkers; they weren't just big picture analysts. They became hands-on supporters of the lawyers in the cases that we brought, whereas in the past the commission would tend to hire prominent lawyers to help on their cases as expert witnesses.

And we did that too, and we were very fortunate with the people who were willing to testify for us.

Ms. Born: Lawyers or economists?

Mr. Pitofsky: Economists. I never hired an outside lawyer to supplement our work the way Joel Klein hired David Boies to handle the *Microsoft* case. Maybe I was right. Maybe I was wrong. I wanted to educate a generation of competent lawyers, and I thought bringing in outsiders was the wrong way to do that. So that's senior staff. Junior staff—we were extremely active in reaching out to the law schools and to young people at law firms for exceptional people, and since there was the greatest merger wave in the history of the country going on, and much interest in what consumer protection could do about unwelcome phone calls, spam, deception and unfairness in the sale of computers, and so forth, it became quite an attractive place for young people. Beyond staff I had an idea, and in fact I announced it during my Senate Commerce Committee confirmation. I said that I knew, when the Federal Trade Commission was created in 1914, the idea was not to simply have a second enforcement agency. President Wilson and Brandeis, his advisor, had in mind an agency that would do reports, studies, hold seminars on cutting edge economic issues. That theme had been quite successful in the history of the FTC. It had led, for example, to investigations of the securities market that eventually produced the Securities and Exchange Commission. That theme had been lost over the years—or almost entirely lost. I announced even before I took office that we would have very extensive hearings on the impact of global competition and high-tech innovation on the American capital market. And we did under the leadership of Susan DeSanti.

Ms. Born: Tell me about those hearings and what the results of them were.

Mr. Pitofsky: They went on for almost six months, I think. And the result was a

report filled with data, but also with recommendations, concluding that the nature of competition in the world was changing, that there had been a vast increase in exports and imports, that the parts of our economy that were growing most rapidly and that we cared about the most tended to be the high-tech sector of the economy, that as far as consumer protection was concerned, the old concerns of pyramid frauds and marketing fraud, false advertising were still there but those matters now were introduced through new techniques. For example, we discovered many frauds in which the telephone call would be placed to the United States target. And then the call would be routed from Canada to Maldova to some place in Africa and back to the U.S. The caller would then be charged international phone rates. And it was totally fraudulent. When we sought to enforce the law, we found that there were treaties between the United States and Maldova or Canada and Maldova that made it almost impossible for us to achieve enforcement. On the substantive side, pyramid frauds as you recall are frauds in which one person invites two people to contribute, and then two invite four, and on and on. Well, just imagine what you can do with a fraud like that with a computer. We found that pyramid frauds were rife throughout the economy. Of all the issues that we addressed in the global competition hearing, the one that had the most impact and that made the most difference had to do with whether there ought to be an efficiency defense to mergers that were marginally illegal. We had very extensive hearings on that. There were many points of view offered but in the end the commission, I think unanimously, voted to amend the Department of Justice-FTC merger guidelines to clarify and expand an efficiency defense for mergers. Easier said than done. We then spent six months or more negotiating the language of that defense. But it's interesting. I was on a program just last week at the Federal Trade Commission discussing that defense. No one at the session now takes the position that there shouldn't be an efficiency defense. The whole quarrel is how broad it

ought to be. All we were trying to do is wedge that issue into the guidelines so that we could get started asking people to tell us what they thought was the reason for the merger.

Ms. Born: Why did it take so long to draft the language relating to the defense?

Mr. Pitofsky: There were many people—some people at the FTC and many people at the Department of Justice—who thought it was a bad idea. They thought that once there was an efficiency defense good lawyers would dream up efficiency claims. They would take discovery that will go on for months and in the end it would be impossible to overcome. That was a legitimate concern, but it's turned out not to be true. Many companies in court have offered efficiency defenses, but the defense itself is rather narrowly described in the guidelines. The judges have followed the narrow description, and so far no court has concluded that this would be **an** illegal transaction but for the efficiencies. The efficiencies have been rejected as superficial, lacking substantial evidence, not necessary, and the same efficiencies could have been achieved without a merger, points like that. I have come to learn that there are many examples of prosecutorial discretion where the agency would have brought a case except it became persuaded that there were substantial efficiencies. I testified to that and Tim Muris has said the same.

Ms. Born: So that you think is the biggest impact so far of the defense?

Mr. Pitofsky: Oh yes, absolutely. The fact is if there is a really strong efficiency defense and the merger itself is not to monopoly or near monopoly, the agency is just not going to bring that case. And they haven't. The one case in which a very strong efficiency defense nevertheless did not prevent the FTC from suing was Beech-Nut/Heinz baby foods. I never denied there was a real efficiency there. But it was a merger from three to two, there were high entry barriers, neither company was failing, and number one had 60 percent or more of the

market. We just didn't think the efficiency defense is enough to overcome that kind of concentration.

Ms. Born: Were there other studies and reports that were done during your tenure on other issues?

Mr. Pitofsky: Many. I wish I could remember them all. Jodie and the consumer protection people were exceptionally active. There were a series of hearings and reports on privacy. That was probably one of the most extensive commitments of time and effort. There were hearings on sales of alcohol to teenagers. And on predatory lending. There were extensive hearings on what was called "B to B" transactions, business to business on computer.

Ms. Born: Bob, you said that the hearings involved globalization of competition, and what were the implications of that development?

Mr. Pitofsky: Let me take a step back. In one way the role of the Chairman and the Commissioners of the Federal Trade Commission and of the head of the Antitrust Division changed radically with respect to international coordination and cooperation. I remember when I was a Bureau Director at the FTC Miles Kirkpatrick once in a while would go over to the OECD meetings in Paris and when he returned we'd ask what happened. And he said little if anything. It was at most show-and-tell by different countries about what they were doing, and the show may have represented rather well drafted statutes on the books, but there was very little enforcement in Europe and much less in East Europe, Russia, China, Asia and Australia. By the 1990s something approaching 100 countries had antitrust codes. That would be the end of the 1990s. And many of them were very serious about enforcement efforts. And it wasn't just cartel behavior. That would be the obvious sort of target for a foreign antitrust or competition agency. There was occasional enforcement against exclusive dealing, price discrimination, dominant

firm behavior and so forth. One result of all this is if the Chairman of the Federal Trade Commission wanted to, he or she could be on the road to a foreign country twice a month. There were that many conferences. There were also treaty obligations. The United States had treaty obligations with the EU, Canada, Japan and Korea. The result was that you almost had to be in each of those countries once every two years and sometimes once every year.

Ms. Born: What kind of treaty obligations?

Mr. Pitofsky: Essentially agreements that the parties would meet, discuss cases of common interest, discuss possible procedural reforms, and assign to specific people in different agencies coordination on a particular project. The reason for that is that there are so many cases—mainly mergers and joint ventures, but it goes beyond that—where the consequences of the transaction don't exhaust themselves in the United States, don't exhaust themselves in Europe, but really have an impact in 10,12, 15 different countries. And unless you can coordinate your investigation, one, it's unfair to the parties to have 15 different people investigating, and two, you're going to get in each other's way. So part of it is coordination. There's also the matter of avoiding inconsistent remedies, and it's surprising how often that comes up. One country will say you must do X, and the other country will say you cannot do X. That's unacceptable. Finally, there was considerable enthusiasm outside the United States for a global code so that the law in all of the OECD countries, for example, would be the same. Joel Klein and I were never enthusiastic about that. We always felt that countries were at such different levels of development that an antitrust principle that might be appropriate for Uruguay or New Zealand wouldn't be appropriate for Canada, Europe, or the United States. However, we did come around to the view that there is one area where every self-respecting competition code should have a provision, and that is cartels: price fixing, market division, output control and so

forth. So we proposed—actually it was the Federal Trade Commission that took the lead—that the OECD and eventually the Inter-American Council would adopt the position which mandated that in cartel matters, different countries would cooperate with each other in exchanging evidence that was not privileged, exchanging theories of the case and cooperating on a remedy. There was a terrible struggle in the OECD. Many countries have a tradition of independence—such as Switzerland and Sweden—and the idea of their signing on to something like this was not congenial to them. But we had meeting after meeting and modified the language I'm sure many times over. And eventually I thought one of the great successes of that period in the OECD was the adoption of a principle of antagonism toward cartels and cooperation and coordination. We then carried that agreement to Panama City where we met with as I recall all but one of the Latin American countries, and they adopted it in about 24 hours. So you do have on the cartel front remarkable international cooperation. There continues to be agitation to expand the success on the cartel front to dominant firm behavior, joint ventures, exclusive dealing and so forth. I truly believe that there will come a time when we will be able to add to the cartel provisions, but we're just not there. And the idea of having the same merger rules in Israel, Brazil, the United States and Korea is just not in the cards.

Ms. Born: Is that because the legal structures are different and at different levels of development? Is it because the economic needs of the countries are different?

Mr. Pitofsky: It's mainly the latter. But the administrative differences are also significant. Suppose someone were to say a merger of two non-failing firms to one is absolutely a violation of international law. A very small economy would say, we don't have enough business in our country to support two companies and they certainly are not efficient enough to export, so it makes sense for us to allow a merger of two to one or three to one or something like

that. Our definition of a failing company is different than yours. Our definition of an efficiency defense—most countries don't have an efficiency defense—is different than yours. A common code proposal is now on the agenda of the WTO. I think there's been an agreement that nothing will be brought to a vote for at least a year or two. I think it's worthy of discussion, but I can't see a uniform code. I can see a uniform commitment to transparency so that private sector companies doing business in Ireland know exactly what the law is there. There are other things that I've called soft convergence that are doable. One is something called positive comity. And that is, if most of the transaction affects the commerce of a particular country and a small part of it affects the second country, the second country could say to the first, why don't you take the lead in this investigation? Just keep us informed. Those are steps that are possible, but a uniform merger code just doesn't make sense. Although there are people including my valued colleague Eleanor Fox and others who are more cosmopolitan in their attitude toward these issues and willing to entertain more ambitious proposals.

(End of tape, side B)

Ms. Born: How much of your time was involved in the international effort, and what kind of staffing did you have?

Mr. Pitofsky: I tried to keep control of my own time because if you stay away from the office for a week and come back, it takes three weeks to catch up, and there is no way to do that over the Internet or telephone. It's just not possible, so I probably averaged three or four international trips per year. I also had the good fortune of having a colleague, Joel Klein, who was equally involved in these treaty obligations—the treaties always cited both agencies—and we agreed at an early point that, as much as we enjoyed each other's company, it was not necessary that we both go to every meeting. That's pretty much the way that we

handled it. In six years, I was in Japan three or four times, Korea two or three times, Europe at least a dozen times, probably more—because I did think that the meetings between the law enforcement people in Brussels and the meetings with me and my staff were essential. There were major, real, discrete issues that needed to be resolved. This was far from show and tell. As far as staff was concerned, the commission already had what I would call a "skeleton" force doing international coordination, but it hadn't received financial or commission support to the extent that I thought it deserved. Eventually the two people who headed that staff were first Deborah Valentine, a mid-career lawyer from O'Melveny who was an extraordinarily talented person and then, when she was promoted to general counsel, Randy Triteel who had been a European partner in one of the major New York firms. If I attended four meetings and conferences abroad, they must have attended a dozen each year, maybe more. That's the tip of the iceberg. The real change lies in the fact that virtually every day someone in the Federal Trade Commission would be on the phone with someone either in Canada or Brussels or Tokyo or Seoul or Australia working out a coordinated response to a mutual problem. That is an entire departure. When I was a commissioner in the early '80s, we had one case that had major international implications. My guess is that of the 4,500 mergers per year that we saw at the height of the merger wave in the '90s, a quarter to a third were transactions that had international implications. So it was day-in-day-out coordination and cooperation, and that's just the antitrust side. Cross- border fraud was the fashionable approach to fraud during those periods. The lottery would be in Australia, the money would be in the Cayman Islands, the actual fraud would be mailed from South Africa—literally. Tracing down the responsible party and then imposing a remedy was impossible without the cooperation of the country where the fraud was initiated. And frankly some countries weren't enthusiastic about enforcing laws covering white-collar

crime against Americans emanating from their country. But we had some considerable success and that's an area where Jodie Bernstein had her international unit on the consumer protection side. I would have to be honest and say that we were often frustrated because these people were so clever in the way they set up their transactions on the consumer side. On the antitrust side, I would say we were successful virtually all the time because we had such extensive cooperation with foreign countries. One of the most famous international antitrust cases occurred before I got to the Federal Trade Commission and that had to do with an alleged international diamonds conspiracy. I am told that the reason the American government lost that case is they could not get access to the DeBeers witnesses and documents. Now, I don't know if that would happen today in light of the way in which we address international cartel behavior. I'm not sure about that, but I do know that people in the Justice Department feel that the lack of cooperation and coordination and DeBeers' very clever ways of staying within South Africa's borders cost them the ability to win that case. We were much more successful, especially in our merger enforcement program, because of cooperation.

Ms. Born: Were the treaties or other kinds of informal agreements between countries in part designed to exchange discovery-type information?

Mr. Pitofsky: Yes, very much so. Now some information is given under confidentiality restrictions, and we were extremely careful not to overstep so as not to undermine our whole effort, but assuming there was no privilege involved, no confidentiality involved, the exchange was total. The advantage that that gives an enforcement agency is enormous. It surprises me because Europe is so cautious procedurally in the way they enforce their competition codes. But they have something called the "dawn raid" in which law enforcement people show up at the company and start reviewing their files with no notice whatsoever.

Sometimes documents emerge in a situation like that which would be very difficult to obtain in conventional ways.