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THE NEW ANTITRUST PARADOX:

POLICY PROLIFERATION IN THE GLOBAL ECONOMY

Cooperation and Convergence

in International Antitrust:

Why the Light is Still Yellow

Keynote Speaker

Hon. Diane Wood

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INTRODUCTION
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My job at this point is to welcome Judge Diane Wood, of the 7th Circuit, who for many years was my colleague at the University of Chicago.

I don't want to go through the entire resume, since I've managed to misplace it, but I will try to point out what I do remember. Judge Wood went to the University of Texas both for college and for law school, and then clerked for Judge Goldberg and Justice Blackmun before going on to do some work on international trade at Covington & Burling.

After teaching at Georgetown for a year, Judge Wood came to the University of Chicago in 1981. She stayed for twelve years, before leaving to become the Deputy Assistant Attorney General for International, Appellate, and Legal Policy Matters with the Department of Justice. By 1995, it turned out that she had so impressed Orin Hatch, a Republican, that she could be appointed, although a Democrat, to the 7th Circuit. Hatch said, "If she's sane on trade, we're willing to excuse whatever else may be wrong with her."

So Judge Wood was a Democrat confirmed by a Republican Congress to a position that she has now held for eight years. I am happy to say that Judge Wood has not decided that the judicial oath requires her to foreswear all other activities. She has continued to teach at the University of Chicago, has continued to write, and has continued to come to various kinds of conferences, both on matters of general import and on her specialty of international trade.

Judge Wood is going to speak today about international cooperation and convergence, and she's going to talk about why the light is still yellow. I assume that means caution, not cowardice.

With that introduction, it is my great pleasure to give you Judge Diane Wood.

COOPERATION AND CONVERGENCE IN INTERNATIONAL ANTITRUST: WHY THE LIGHT IS STILL YELLOW
DIANE WOOD

It is a great pleasure to be here. I've been extremely interested in the discussions, particularly about the global antitrust movement this morning, some of which I agree with, as you might imagine, and some of which less so.

I was particularly interested by the reference to a paradox in the title of this conference. We know what kind of paradox Robert Bork was talking about in his book; it had to do with internal contradictions in antitrust. But there's a different kind of paradox that many people perceive in the position of the United States so far on the question of whether we should have international antitrust rules of some kind, and that is the question that I am here to address.

From the time before I was at the Department of Justice up to the present, the attitude of the United States has not been one of wild enthusiasm for international antitrust rules. It has instead been a far more cautious approach. There was a movement just after the WTO entered into effect to add three new issues to the WTO's agenda (everyone assuming that the problems of the world had been solved up until that time, with the end of the Uruguay round). Those three new issues were: one, environmental regulations; two, workers' rights; and three, antitrust or competition policy. That was then; this is now. We have seen a lot of regrouping on the part of the WTO in terms of how far it could push its new agenda. But in the meantime, many working groups and other kinds of organizations have begun to look much more seriously at the international antitrust agenda.

How did antitrust laws become so popular? The short answer is that everyone loves a winner. The United States has a very successful economic system, and we've had antitrust laws for a long time. We have certainly been vocal about the benefits of having them. But we did not set out to originate a great movement. Canada actually passed its first antitrust law in 1889, a year before the United States came along with the Sherman Act in 1890. And that was that for quite a while. This was not something that the rest of the world looked at, and said, “Aha, we see what we should be doing.” Instead, almost nobody else had antitrust or competition laws, and many countries frankly doubted whether this was such a great idea. Look at Nazi Germany with the various cartels. Or the zaibatsu in Japan. All around the world, cartels were not demonized, but sanctioned—and in fact, one might even say that during the period of the Depression, there were those in the United States who thought cartels might be a fine idea. There were some modest efforts at competition regulation on the international level, even with the League of Nations, believe it or not. They went nowhere. After World War II, the Havana Charter was proposed for what would have been an international trade organization. It had a chapter on restrictive business practices, which is what antitrust was called. The United States actually withdrew its support for the charter, not in small part because of its concern about these competition laws.

But, between 1945 and the present time, you begin to see a snowball of the enactment of antitrust laws. It begins, really, in 1952 or 1958, with the decision of the drafters of the key

European treaties, the Coal and Steel Treaty in 1952, and the Treaty of Rome in 1958, to include competition laws as a fundamental quasi-constitutional principle. That was in Articles 85 and 86 of the original Treaty of Rome; they renumbered it a while back, and it's now Articles 81 and 82. The member states of the European Union, as part of keeping an internally harmonious system, enacted their own competition laws. The developing world started moving from a fairly dirigiste [ph] approach toward their own economies, to saying, "Let's do the open economy thing that the United States and other countries do." Now they are out there enacting competition laws. Then the fall of the Berlin wall and the defeat of communism lead all of the socialist countries to enact competition laws. So more and more came along.

Ten years ago when I was at the Department of Justice I used to say that there were 40 or 50 competition laws that are recognizable as such out there. Today if you look at speeches from the DOJ and FTC people, they will tell you that there are more than 100. That's a lot of laws to be enacted over the last decade. So, having succeeded, we have to say, "What have we done? What have we wrought? And what should we do? What kind of new problems exist because this huge proliferation of laws exists?" There are a number of solutions on the table. Some people have argued, Andrew Guzman being one of them, for a regime of multilateral rules under the umbrella of the WTO, modeled on something like the Trade Related Intellectual Property (TRIPS) Agreement, which obviously is backed up by quite a few other international conventions on international property rights or patent copy rights, etc. Some have argued for a stand-alone international competition regime, along the lines of a single convention on narcotic drugs, or the postal convention. And others have said, "No, this is all premature." That is the group that I find myself in. We need to exercise greater caution and take this one step at a time.

First of all, we need to look at what these things are that people are calling competition laws, or antitrust laws. They are not all replicas of the best we have been able to come up with in the United States, after more than 100 years of experience. There are superficial similarities. Sometimes there are even real similarities. But below the surface there are quite a few fault lines.

Let's begin with the goals of the competition laws. This, obviously, has been a theme that we've debated amongst ourselves in our own country. Do we have one goal, consumer welfare? What do we mean by consumer welfare? Do we have multiple goals? I'm going to take as a given that we have settled on consumer welfare as the single goal of competition laws. Certainly when we were in the antitrust division in the Clinton administration, that was our thinking. But elsewhere, it is hard to generalize. One of the things that I did at the Department of Justice was represent the United States on the OECD Committee on Competition Law and Policy. It was an opportunity to talk to the competition enforcement officials from the other major economic countries in the world. At the time, there were about 25; now there are about 30. I found very little argument about the proposition that consumer welfare is one purpose of competition laws; but I found great divergence over the proposition that it is the only purpose. The European Union, for example, put competition principles into treaties originally because they saw it as a complement to the dismantling of trade barriers among member states. If you can't have tariffs among member states, why should you have distribution systems that permit companies to carve up the French market, the German market, the Italian market? And so on and so forth.

One can debate whether that makes any sense; but it certainly is there in the literature as one of the reasons why this particular set of rules was seen as necessary. Indeed, I had debates with people from the U.S. Trade Representative's Office and the Commerce Department when I was at Justice about whether that rationale should support competition rules in the WTO. People would say—and I don't mean to pick on Japan— "Look at the glass industry in Japan. Look at the film industry in Japan. They use exclusive distributors. Because they use exclusive distributors, we ["we" being the U.S. companies] can't break into the market. It must be illegal." And I would say to them, "What do you want to do? Do you want to change the rule about exclusive distribution in the United States, and reinvigorate the antitrust prohibition against that rule? Or do you want to have a discriminatory rule? It's only when other countries have exclusive distribution systems that it violates the law? Maybe that's not the reason that you're not getting in. Maybe that's not the essence of the problem. Or if it is, antitrust is the wrong tool. There was a real lack of understanding in the trade community about exactly what antitrust law really prohibited, and what it did not. They would also cite the Robinson-Patman Act to me constantly, saying, "Price discrimination is forbidden by the antitrust laws; therefore everything we're going with anti-dumping is okay." Obviously, I disagreed.

So, trade liberalization has been one of the driving forces behind competition and antitrust laws in other countries. There are also development objectives, the elimination of the vestiges of apartheid, or the opening of industries to members of aboriginal groups, etc. You see all kinds of things. And perhaps most importantly you see a very strong dose of unfair practices regulation. I listened to a presentation by a man from Indonesia one time, who was very happily telling us all about the new law they had passed, which now is some years old. The overwhelming majority of what he was talking about was the list of things that companies could not do. They couldn't have trade promotions. They couldn't advertise in certain ways. They couldn't do all sorts of things. These forbidden business practices were the kinds of things that, if we regulated them at all, would fall under the jurisdiction of either the Unfair Trade Practices branch of the FTC, or a state Attorney General. It is not something that we would consider to be under antitrust law. But there is a vagueness about what, exactly, you are covering in antitrust laws. We have our definitions, and other countries have theirs, to which they are equally entitled. But if our definitions differ, I worry about convergence toward the middle. And it is a bit obnoxious to say to other countries, "We'll converge with you as long as you do all the changing." We can say that, but the response would not be overwhelmingly positive.

The attitude toward regulation itself varies considerably among countries. It is a procedural difference. In general, I hardly even need say in this group, Americans distrust regulation. Maybe not as much as the people in this room, but in general our sense of individualism characterizes both our regulation of business and our personal rights. Many other countries have long traditions of trusting their bureaucrats. Think of the continental Europeans. Think of the Japanese. Think of so many others. If you trust your bureaucrats, maybe you don't mind the idea of a regulatory decree that specifies, business practice by business practice, what a firm with 30 percent or 40 percent of the market can do. That's just what people do. They are as baffled by our skepticism as we are by their trust. But there is another difference as well. Because it is seen as a government function, antitrust regulation, or competition regulation, is very comfortably situated in the broader context of industrial policy in most of these countries. That is one of the consequences of putting all of the responsibility in the hands of governments

to enforce antitrust law, and not having private actions, or a totally independent group, which the courts have been, for better and for worse, in the United States. Within our structure, antitrust policy cannot really be industrial policy, because it has to pass muster before a completely separate group of people.

Another point is that the size of the economy and the openness of the market may make a difference in antitrust policy. Certainly many smaller countries believe that it does make a difference. I've had many discussions with people, both from small countries with extremely open economies, like New Zealand, and small countries that aren't that far along the way—some African countries—and they will say, "An antitrust trust law that's a purely consumer-welfare-oriented law, with no national original discrimination, makes perfect sense for you Americans, because you have an enormous integrated market. But we're just little Kenya; we're just little fill-in-the-blank. And we can't afford to do that. Our law has to be different." They make the argument that antitrust is not a one size fits all proposition. Previous efforts to develop global rules have always run up against this problem. If you look at a particularly terrifying example, the set of equitable rules and principles on restrictive business practices that the U.N. passed in 1980, there are basic propositions with which anybody familiar with antitrust would agree. Cartels are bad. Monopolistic abuses are bad. But each statement is followed by huge sets of exceptions. I think it was mandatory in every sentence of that document to say "except for developing countries." That phrase appears everywhere. "Special treatment for developing countries. Special exceptions." This the risk of global rules. Even if we do assume we're all on the same page, economic theories can differ. I think that's largely what lay behind the problems with G.E.–Honeywell.

Now, we have to ask the question: Do these differences signal a problem that needs a solution? We certainly all know that there are many differences in the laws of the 50 states of the United States, and yet Congress has not chosen to federalize every area of law. It has not passed fully preemptive legislation in the insurance area, in the tort area, in franchise protection areas. Maybe some of you think there should be federal law in these areas. But the truth is that we live with a certain amount of diversity. So we have to ask whether or not some level of disagreement is acceptable within international competition law. There are some real problems, particularly as the system has ballooned. The sheer number of autonomous procedural systems has imposed ever-increasing transaction costs on the companies that have to abide by these rules. Firms that want to enter into joint ventures may have to register them in some places. They may have to notify to authorities and get substantive clearance in other places. And they might not need to do anything but get decent antitrust advice in still other places.

In the mergers area, it's a nightmare. Ten years ago I did a monograph with Professor Richard Wish of Kings College in London, in which we were told by the OECD to look at eight transactions in which more than one national authority had reviewed either the merger or the acquisition. And in one of them we discovered that the parties had considered notifying to 21 different countries; in the end, they whittled it down to nine. It was quite common for companies to have notified to at least four or five countries. Different timetables. Different forms. Different substantive tests. And at some point, people would say, "When do we know? Give us a time table, give us a form; we'll fill the thing out, however onerous it may be." But the situation has not improved—in fact, it has deteriorated. Instead of 40 or 50 countries with these

rules, now there are 100, and of that 100 more than 60 require premerger notification. Suppose you're Gillette-Wilkinson. You manufacture razor blades. You do business in pretty much every country of the world. A razor blade is a razor blade is a razor blade. It doesn't become a different product when you sell it in Australia or the United States. But the law that governs it may be very different, and that is a serious problem of multiplicity. The same thing is true for monopolistic practices.

The problem with regulating cartels is more substantive than procedural. I realized this when I attended a conference on the issue of hard-core cartels, and we asked the question, "Are hard-core cartels a bad thing?" The answer was a universal "Yes, but—." "Yes, but not if it's a price undertaking entered into by the full industry to resolve an anti-dumping case." "Yes, but not if it's a rationalization cartel," when the industry in our country, such as the steel industry is trying to restructure. "Yes, but if it's a major industry with problems like agriculture, we don't think that's a hard-core cartel." "Yes, but we don't really care about export cartels, because somebody else's consumers are paying the price." The number of exceptions put on the table was staggering. We started out with this nice clean proposition, "Cartels are bad," but everyone had their favorite exception that they wanted to put in, and by the time you make everyone happy, you don't have much of a principle left.

Remedial options also differ quite considerably among countries. Even if you solve the procedural problems, even if you solve the substantive convergence, there is tremendous variety. Obviously the most important decision, in my view, is to criminalize or not to criminalize. The United States has criminal sanctions. Japan does. Canada does. There are other countries that criminalize certain behaviors—but there aren't many. Most countries resort to a combination of injunctive relief and administrative fines, and those countries do not agree on the level of fines, on the level of deterrence, or on the targets, whether individual executives or entire companies. Maybe the trickiest problem with remedies is this: How do you preserve the right of countries to implement a non-regulatory approach if they so choose? Back in the 1950s and the 1960s, this was the big problem that the rest of the world had with the United States. The United States was constantly bringing international prosecutions of various kinds—I'll use the word loosely to include civil cases—in which they would say, "We don't think this mostly offshore watchmaking industry, or shipping industry, or insurance industry is complying with the antitrust laws of the United States, and because you do business in the United States, this is our business too." The Swiss actually took us to the World Court on this. They had a private organization of their watchmaking industry that involved appeals to industry panels, and they said, "We don't want an antitrust law; we want to leave the industry alone. It's none of your business." The United States eventually agreed that we would not actually put anyone in jail for contempt of court for doing something that was required by Swiss law, but that was as far as we were willing to bend.

The shoe is on the other foot now, because the U.S. regime, particularly with respect to verticals and with respect to monopolistic firms, is on the whole, more permissive than many of the other regimes around the world. We are now the ones saying, "Why should you punish a firm for having this particular kind of distribution system? Why should you punish a monopolist because it refused to do business with one of its competitors? We don't see don't see that that's an antitrust violation." How do you preserve that in a world with global reach? That's what leads many of us to the discussion of harmonization. So why not go all the way? Why not

create a sensible global antitrust regime? I did, in fact, try to do something about this at the Justice Department, and it became painfully clear to me that the differences between governments were huge; that nobody would actually agree on antitrust rules that I felt comfortable with; and that a slower approach, a different approach, was the better way towards our ultimate goal

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The business community, by the way, is no fan of cooperation among antitrust agencies. I went to quite a few countries after the International Antitrust Enforcement Assistance Act, which allowed us to enter into bilateral agreements with counterpart authorities in other countries. If you have a vitamin cartel that's having an effect on the United States and it's having an effect on Canada, or Europe, or Australia, you're allowed to sit down and do a joint prosecution. Such cooperation is completely voluntary; no one is ever dragged in against their will. But it is allowed. The business community practically threw tomatoes at me when I tried to say that cooperation between antitrust agencies would be good for consumer welfare. That kind of collaboration simplifies, streamlines, and improves the situation for all involved. Of course, sometimes businesses would rather face a fragmented prosecution than a unified one.

But even with potential benefits in sight, I believe that harmonization is, at this time, premature. First, as I've been implying, I'm concerned that the end result will be the wrong rules. Maybe they'll be the wrong rules because they acknowledge multiple goals. Maybe they'll be the wrong rules because they'll be too regulatory. Maybe they'll be wrong because they legitimize too many exceptions, exceptions that we've been working hard to reduce. But if we sign up to the wrong rules just for the sake of international harmonization, we'll be worse off than we are now, when at least we have the right rules for our own country. That counts for something. And we're muddling along. The world has not actually ground to a halt because of these difficulties we've been talking about. Secondly, particularly with respect to the WTO, if we're talking about putting an international regime within the WTO, I am concerned about both institutional and political overload. We all remember the problems in Seattle when the WTO was meeting there. It was a mess. But the demonstrators were making one important point, which is that there is a democratic gap between the rules that the WTO is thinking of, with its insulated bureaucrats, and the democratic institutions in each of the member countries. I would almost suggest that's particularly true, given that we have Fast Track negotiating authority again. I actually like Fast Track authority, because I think it's a very effective way for any administration to negotiate credibly with counterparts.

I also am concerned about giving the WTO dispute resolution authority in antitrust cases. I'll stipulate that it has the technical expertise to do it. WTO panel people are constantly telling me, "We deal with cases this hard all the time. We have anti-dumping cases; we have IP cases; we have this kind of case, and that." Fine. They're experts. As a judge who occasionally sees antitrust cases, I would not feel comfortable reviewing what somebody else had done if nobody gave me the record. That's a really important part of review, and I would be surprised if the WTO had the full record—all of the confidential documents, all of the discovery products. I could be wrong, but I am skeptical.

Third, I'm concerned that global rules would be achieved at the price of so much dilution that they would just be bromides; they would be nothing. They would say: Cartels are bad,

unless they are accepted through legislation which is published in a document of general circulation. No problem is solved having that kind of rule. Back when everybody thought Japan was so powerful that they would be the dominant economy for the next millennium, we used to say, "So what if we pass some rule that says Japan has to have an antitrust law? They already have one. General MacArthur gave it to them." It is a perfectly good law. You could read the law and check off the things you agreed with. They had an agency that had 500 people in it. The law was fine. But what we need is something other than these standards that everyone already meets.

On national treatment, I actually agree that commitment to national treatment might be helpful—but it seems to me that it already exists under many bilateral agreements. The United States has a huge network of friendship, commerce, and navigation treaties, bilateral investment treaties, and other kinds of treaties that commit us to national treatment. Maybe Article 3 of the GATT, as modified by Article 20, doesn't apply. Maybe it does. But in general, I would be surprised if national treatment were the biggest problem out there. I remain skeptical that the kinds of global rules that I think are achievable would actually do much.

Let me end on a more positive note. I do think there's a better way forward. And I think it involves education. It involves consensus building in a voluntary environment. It involves targeted cooperation with like-minded countries. It involves fidelity to our own evolving vision of antitrust law. And it also involves, finally, serious international efforts to eliminate the barriers to competition that are still embedded in some of the international rules. We have the International Competition Network. I realize some people here are fans. Others are not. But I think it's serving some of these functions. It's working on targeted problems, like the merger review problem. If the ICN could make even minor progress in that area, everyone would be better off. My own idea is that there should be a rule that you get to file your merger on whatever form your home country uses, and then submit a copy of that form to an international clearinghouse, which would then send it along to the other jurisdictions when necessary. Those other jurisdictions could follow it up or not, as they wish, and if they need more information, they could get it. That would be straightforward, and maybe it would work. Education goes on at the ICN every day, and people begin to understand why it is we have the rules that we do. How did we get there? It didn't happen overnight.

Certainly some of our bilaterals are stronger than others. With the Canadians, with the Australians, we have the strong version of bilateral cooperation, where we actually share information. With Europe and with Japan, and with Israel and with a number of other countries, we have the softer form, where we may call them up and say, "We're about to file a case," but we don't give them our case file, because we can't. The idea of positive comity, which emerged in the 1992 version of the Cooperation Agreement between the United States and the Commission, is extremely helpful. It essentially states that if there is a practice going on in a foreign country that violates their law and that's hurting our consumers, we can call on the other party to take steps. If they do, so much the better. If they don't, we still reserve the right to do whatever we can do. But the information problem that I mentioned earlier is a huge one; it's very nice to say that you can file a lawsuit, but if you have no information to back up your allegation that an unfair anti-competitive practice is going on, you will rightly lose that lawsuit. So again, information is an obstacle that we will have to surmount.

Finally, let me just list a few areas where I think competition problems are still embedded in the international structure. Agricultural policy. Take a look at the various agreements that restrict agricultural imports around the world. Government procurement. Sectoral agreements. The telecommunications agreement has this language about competition. There are many sectoral agreements that would benefit from a good competition audit. Anti-dumping and countervailing duty rules: I absolutely agree with everything Michael Trebilcock said. They are perverse, not helpful. The United States refuses to include them in the debate about developing an overall competition policy. And that's a shame, because you could do a lot of good if you were willing to open that up. But thus far, the political will to do that has not been there.

To conclude, there are those who are eager to put competition policy on the world stage. I say, let's start here. Let's start where you can really do something right away that will make a big difference. And in the meantime, we can move cautiously forward with this broader international agenda, and taking care not to wreck everything good that we've accomplished domestically along the way.

QUESTION AND ANSWER SESSION

QUESTION: I think that the idea of consumer welfare is problematic, because it is so frequently used only in the sense of low prices for the ultimate consumer. What if three Americans export oranges to China, and two of them decide to sink the ship with the third, because they don't want to compete with it any more. They bring an antitrust case which is a perfectly good antitrust case that gets won all the time—where is the American consumer interest in that case? I'm wondering whether the real standard isn't market distortion or merits competition.

JUDGE WOOD: Well, I agree with that. I always try to say when the economists are talking about consumer welfare, they're really actually talking about a bigger package of things. And the monopoly cases are the examples that you're giving.

But suppose a group of Americans get together and agree outside of the umbrella of the Webb-Pomerene Act, or the Export Trading Company Act, to cartelize trade of something we don't care about that much—take eels, for example. There are two schools of thought. One school of thought: "Don't worry about it. It's only the foreign consumers. Let their authorities do something if they want to."

The other school of thought, which you actually hear from the developing countries, in part, is: "Wait a minute. You have to get personal jurisdiction over firms. You have to make people accountable." It is like exporting Tris-treated sleepwear to their markets. They can say, "Why don't you stop this practice, which violates your own law, which is being created on your soil, which is being done by people subject to your jurisdiction, and not worry so much about whether it's our consumers who are going to pay the overcharge, or someone else?"

The laws are written, I think at the moment to cover that. But, it doesn't fit neatly in a consumer welfare model.

QUESTION: More of a comment that I have. First of all, I think it's wonderful that you continue to speak on these issues. You've got so many different forms of tenure—academic tenure, life tenure as a federal judge. And so, even though your employment is secure, it's great that on these issues you continue to contribute.

It's quite interesting how your position on this particular address corresponds surprisingly closely with the position that hopefully is about to come out from a joint group of the ABA antitrust section and international trade section.

And particularly I wanted to make you aware that in February, the ABA approved under a blanket authority an endorsement of the idea that the economic objectives of antitrust law are the basic and common core of antitrust law. And that it did not object to the pursuit of other non-economic objectives per se, but it had some comments to make that they should be used not to make essentially specific case decisions in antitrust law, but should either be embodied in separate rules of institutions, or if included in antitrust law, at least subject to rule of

transparency and explicit analysis, so that derogations can be identified and dealt with, rather than just simply mushed around.

You know, there is the consumer welfare element. There's the small business element. There's the export promotion element. And here's the decision, that there should be some kind of accountability in the reasoning. And in fact, that report, which is already approved, will be one of the major bases for the sections position on competition discipline in the WTO, basically saying that the United States should continue to express strong reservations about any WTO competition discipline, until there is a broader consensus about what antitrust law is, and is not. Precisely along the lines you proposed. I guess great minds think alike.

QUESTION: You describe a litany of challenges facing any kind of effort to cooperate on antitrust. And I think they're all right. But I don't see why the ICN is a likely place to resolve that. We don't have much in the way of examples of that being done in the past, despite the fact that attempts have been made. We have a lot of the kind of reasons you give, suggesting that there are tradeoffs here that can't be made by competition policy types, sitting in Cancun without any other authority, or without any authority full-stop, really in a sense. And so I wonder if the ICN strategy is really a status quo strategy, which I don't particularly like, but I could see the defense for. And in contrast to the WTO strategy, it seems to me that nobody wants a full-blown international antitrust code. It seems like we get from the WTO either nothing, or what we've gotten in other new areas, with the possible exception of TRIPS: quite minor steps.

JUDGE WOOD: Well, let me start with the WTO, because over the years it has been my perception that the Europeans are far more enthusiastic about some home for competition policy in the WTO. And there was a time right around 1993, when were actual proposals on the table for a full-blown antitrust code; certainly Lord Britain was out there, urging adoption of an antitrust code. And he was saying, "The moment is now! We have to do this." But in terms of negotiating dynamics, I don't see the U.S. and the EU together versus the rest of the world. I think it's much more complicated that than, and there is a certain amount of disagreement.

Now, in terms of whether the ICN model is going to work, the only counter-example I would offer you that starts when I was a very young lawyer at the Department of State. I was in the Office of the Legal Advisor, and on one occasion went to Geneva for discussions on what was then the U.N. Conference on Trade and Development Code of Conduct for the Transfer of Technology. The developing countries who began these discussions started out with the propositions of the Charter of Economic Rights and Duties of States that went something like, "Technology is part of the universal human heritage, and natural resources are part of the inherent sovereignty of nations, and thus you can expropriate whenever you want for whatever you want."

Eighteen years later, when I went to the Department of Justice, the Transfer of Technology Code hadn't quite died, but it had changed. After a nearly twenty-year discussion, those same countries ended up saying, "'You're right. Intellectual property is something people have to invest in. Intellectual property doesn't just spring up from the ground. It needs to be protected." They had changed their restrictive foreign investment laws. They had changed their TOT laws. They had changed a lot of things. Tedious though it was, the discussion process had borne very

useful fruit, which I think was the sine qua non for something like TRIPS to pass. I think there is something real that happens in these discussions and these meetings. We'll see.

QUESTION: In the trade context, there are now a lot of fans, including AEI fans, of unilateral free trade. That is to say, we can unilaterally do things to free up trade. And if nothing else, the force of example will serve a useful purpose apart from all the other more direct economic benefits. Is that transferable to the antitrust context? Is that exactly parallel? And if so, are there steps that we, the United States, could take unilaterally that would contribute to a more sort of coherent and somewhat more sensible international system?

JUDGE WOOD: When you talk about unilateral measures in free trade, I take it you're talking about deciding to lower trade barriers, rather than the 301 context, where we decide we're going to retaliate against other people, without anything to legitimize our actions. And I would actually say we've already done that with antitrust.

The only area where there is serious difficulty still is this area of enforcing access to export markets, because other countries feel very strongly that we shouldn't be doing that. suppose could meet them halfway and say, "Fine, take care of your own markets."