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The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture

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THE DRAFT INTERNATIONAL ANTITRUST CODE ("DIAC") IN THE CONTEXT OF INTERNATIONAL TECHNOLOGICAL INTEGRATION

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INTRODUCTION: THE LEGAL POLICY BACKGROUND OF DIAC

I am grateful that I am permitted to tell a bit about this Draft, and on the international law of competition in general, against the background of international technological integration.

Time is ripe for an internationally working system of the laws of competition on which all agents active in the worldwide marketplace can rely. It is of no use having national economies and national laws about national economies, and besides this an international economy and no international law. So something has to be done to this effect, and, having the World Trade Organization ("WTO") in place, it would be strange if this trade organization would not look into the question of competition.

Like any national law of competition, this coming internationally working system of law of competition will be composed of two parts. First, it takes rules against unfair trade practices, such as dumping or passing off. Then, there have to be rules against restraints of competition, such as cartels and monopolizing practices.

Therefore, one of the first general issues presented to the WTO will be this international law of competition, consisting of unfair trade and restraint of competition inhibitions. Anticipating this still under the old GATT regime, in 1991, together with eleven friends in the antitrust field, I formed an "International Antitrust Working Group," as we called ourselves, and two years later we presented our draft to Mr. Sutherland, Director General of GATT.

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We decided to formulate a draft law with explanatory comments and—by majority vote (see section VIII of our Introduction)—not just limit our activities to the elaboration of some principles. Another thing we agreed upon right from the beginning in 1991 was that we would not look to political constraints or feasibility arguments. We just wanted to work as we are used to working as theorists and practitioners of antitrust. It was teamwork, and everybody contributed to this result. We promised in the end not to tell anybody who drafted what. I may say that all the texts went through all the hands, so we are responsible for the whole draft.

Since my time appears to be more limited than I anticipated when I prepared this lecture I will confine myself to four topics: (i) some basic ideas underlying the Draft International Antitrust Code; (ii) five principles we followed in drafting the DIAC; (iii) a comment on Article 6 of the DIAC dealing with the interface of intellectual property and competition law, since this the subject of our conference; and (iv) some objections raised during the last two years against the DIAC, and answers to these objections.

I. Underlying Ideas

There are two possible approaches to an international antitrust law. The first approach makes the point that international trade needs protection not only from restraints through state intervention by tariffs and quotas (and other non-tariff barriers)—this is the classical field of GATT—but also from private restraints. This "trade approach," if I may say so, asks for an international antitrust law under the viewpoint of fostering and protecting international trade and commerce. The second approach may be called the "intellectual property and unfair trade practices approach." It dates back to the history of the Paris Convention of 1883 and the Berne Convention (now Revised Berne Convention) of 1886. The Paris Convention for the protection of patents and other industrial property contains an Article 10*bis*, which was added in 1900 in the Brussels Revision, a provision outlawing unfair trade practices and obligating all member states, among them the United States, to provide for the necessary procompetitive rules for the international business community. However, the language of Article 10*bis* of the Paris Convention does not cover the law of trade restraints, or antitrust law, the second subfield of the law of competition. This gap of the Paris Convention has now been open for ninety-six years.

There is no dispute today that the law of unfair trade practices, covered in 10*bis* of the Paris Convention, and the law of trade restraints closely interlink. For example, they cannot neatly be separated into the fields of predatory pricing, discriminations, boycotts, dumping, and subsidies.

This linkage is also present among the legal policies behind competition law. The illegitimate profits in terms of the law of unfair trade practices are drawn from dishonest behavior, such as passing off or boycotts; the illegitimate profits in antitrust law are gained from cartels, tyings, or monopoly rents; an agreement in restraint of trade, let us say by a conference telephone call from business office to business office, is nothing which should be honored by higher prices or assigned quotas. So, the legal policies of unfair trade practices law and antitrust law are very similar, and this is the reason why both fields are moving towards each other. Since the legal policies of unfair trade practices and antitrust law are so closely related, it is surprising that Article 10*bis* of the Paris Convention was never used as the basis for an international antitrust law.

Both approaches, the "trade" and the "competition law" approach, demonstrate an identical necessity: that an international antitrust, not just of conflicts law (with or without extraterritorial effects), but of a substantive nature is overdue.

In drafting our international antitrust code, we looked to GATT and to the possibility of a plurilateral agreement. Thus our Draft could be a candidate for Annex 4 of the WTO.

In Section I of the Introduction of the DIAC we stress the necessity of an international antitrust law in today's economic world. One of the arguments, which we raised there, concerns the law of merchants. The law of merchants was developed in history when merchants came together trading. It could be claimed that it is enough to have this self-made law of merchants. Then why do we have to regulate something? Should not the rules of how to compete be left to the competitors themselves? However, it is well known that if two are going to make a deal to regulate a conflict among themselves, more often than not the outcome of the settlement turns out to be at the expense of others, of some outsiders who did not participate in this negotiating under the law of merchants. Within the legal system of a nation-state it is the government which, in such circumstances, is able and in charge to protect the public or third party interests—for example those of the consumers. In the international

arena such government is missing. This was the result of John Jackson's fascinating survey. Internationally, the protection of third party interests, of outsiders, of the underprivileged, is therefore to be guaranteed by international cooperation in antitrust policy and law.

As Judge Wood has said at this Conference: This should be done in such a way that at least one national government lends its arm to put into effect the protection of the so far unprotected third party in the international arena. This party could be the consumer who falls victim to an international cartel. It could also be a producer who falls victim to the activities of some powerful chain of stores or suppliers. We have to look both ways in antitrust law.

The next section discusses the prospects and the usefulness of an international antitrust law from various points of view: United Nations, American, Japanese, and European Community. We tried there to anticipate what these nations and regions would think about an international antitrust system.

The third section deals with areas of law which we do not cover in our Draft, for example, dumping, subsidies, illicit payments, corruption, other unfair trading practices, and consumer protection; to include them would have surpassed our abilities to finish the Draft Code within two years.

The fourth section is devoted to the history of international antitrust law. This history begins during the war years 1940-1941 with the Atlantic Charter. It is certainly not yet finished to this very day.

The reasons why we thought that the WTO would be the proper place for our Draft Code are briefly set forth in section five.

Let me now turn to the five principles of law governing the Draft Code; they are contained and explained in section six.

II. Five Principles Followed in Drafting the DIAC

Our first principle was not to opt for a uniform law; not to opt for a "world law;" not to try to repeat the Havana Charter, or the soft law of the United Nations Restricted Business Code of 1980; but let national antitrust laws do the job, and let national antitrust laws stay in their place and take care of the problems which are posed in the international arena. In this, our view conforms to what Judge Wood proposed. We did not want to create a world law or a uniform law, comparable, for example, to the Uniform Bills of Exchange and Check Laws of 1930. We did not aim at an "Esperanto antitrust law." We wanted to confine ourselves to the application of national law.

However, it should be equiped—this national law—to deal with international problems.

And, with this aim in mind we had some easy models to follow: the Paris Convention of 1883, the Berne Convention of 1886, and other intellectual property protection treaties. These are international instruments utilizing national laws for international purposes in a legal field closely related to the law of competition. Therefore, our idea was to orient ourselves toward the two "great conventions" of 1883 and 1886 and to follow their techniques.

In this manner, the second principle of the DIAC is taken from the Paris and Berne conventions. It is the principle of national treatment, which means there should be no discrimination in the treatment of home firms and enterprises from abroad when it comes to the application of national antitrust laws. GATT, as you know, is also based on this principle. In the present context this means that national and international competition has to be treated without differentiation. This amounts to the abolishment of export cartel privileges.

The third principle is also derived from those "great conventions" of 1883 and 1886. It is the principle of minimum standards. Without this minimum standards principle there would be merely national law and national treatment. This would imply that foreigners are subjected to national law in the same way as nationals. However, differences between the national laws would remain, and this would permit international discrimination and prevent the establishment of some equal international standards. So, following the "great conventions," we tried to draw up a level of minimum standards, and the DIAC is basically nothing more then a collection of these minimum standards.

The new term for minimum standards is "consensus wrongs." I will come back to that when I talk about some objections raised against the DIAC. In essence, we wanted to regulate the consensus wrongs, which are antitrust offenses to which everybody can be reasonably expected to be opposed. Hence, the international antitrust code as we propose it is cast in the form of minimum standards. This means nations can and will go beyond—widely, if they want to—the standards of our draft.

You can take from this combination of principles that we were mainly following the Paris-Berne approach in drafting this concept of internationalizing national restraint of competition laws. However, we tried to avail ourselves of the sanction mechanism of GATT; these

GATT remedies are easy-to-use sanctions in the modern economic world, and are already well-tested.

I come now to principle number four. This principle is new and requires some words of explanation. The three principles mentioned so far—national law, national treatment, and minimum standards—are well known instruments of international treaty law. The fourth principle brings, as far as we can see, something radically new. If we think of the Paris Convention, or the Revised Berne Convention, the next principle in line after the three named before would be the principle of self-execution. These Conventions are self-executing. However, we could not rely on a self-executing character of GATT law, nor of WTO. I will leave aside these difficult problems we talked about yesterday—whether via the European Union law WTO law might become binding for the citizens of the European Union. At any rate this self-executing character of the great conventions has not been attributed to GATT or, until now, to WTO. Therefore, we were confronted with the fact that most GATT/WTO contracting parties do not view these rules as the law of the land.

By consequence, for our Draft Code, we had to look for another principle, another idea, of similar implementary effect as self-executing bindingness. We invented a new principle and gave it the name Principle of International Procedural Initiative ("IPI"). We started from the idea that there is already an international agency, GATT, now WTO. This international agency can be entrusted to safeguard the application of the national laws of antitrust under the mentioned international conditions. In cases when a member state does not live up to its own international promises and commitments, hence does not take its own initiative, distorts its own law, does not want to apply its own law, or stays behind what the other members of the international community are properly expecting from this nation, some international WTO official from Geneva may knock at the door of the inactive member state and say: "Would you please reconsider this case. Let me plead in your agency; let me plead in your courts." Thus, the WTO antitrust official deserves national standing. But the official will be bound by national prodecural law. That WTO official will stay under that national, legally and culturally accepted, antitrust law. IPI is a merely procedural device—the granting of standing—to the international authority in national agencies and courts. Therefore, we called it "the principal of international procedural initiative." It is embodied in Article 19 alinea 2 of the Draft, and it comes down to a very simple wisdom: in case somebody from outside complains, WTO sees

to it that the national laws, on the basis of national treatment and minimum standards, are applied.

Which brings me to the fifth and last principle. This one is very simple: the DIAC only refers to transborder cases. Antitrust cases occur that have elements crossing national borders. We drafted our text in a way that it only refers to transnational cases. Merely national cases belong exclusively to national authorities and courts, and no international authority would have the right of standing. But transborder situations—international antitrust cases—are something for WTO to take care of.

This is the collection of the DIAC principles—national law, national treatment, minimum standards, standing of WTO, and only transborder cases.

I am perusing the remaining sections of the Introduction very briefly. Some words about section V, which deals with the ideas of competition and market which we used: we did not follow any theoretical concepts. We just took competition as it is understood in the marketplace. We rejected the competition and market concepts which I have called the "objective" market idea—that is, a market in square miles, possibly blown up to the dimensions of a world market, without paying attention to competitive rivalry. For a concept, we were looking to a market in which there is competitive strategy, for example, in which advertising is worthwhile. It is the market which is defined by competitive rivalry, and this means, by two criteria: The agent in the marketplace, the "owner of the firm," asks himself: "Who is my competitor, whose rival am I?" This is the first criterion. The second criterion is the answer to his question, while considering the other side of the market: "Whose competition can I use for my own strategies, from whose competition do I benefit?" So the "subjective market" looks at the two stages of the market. If you add up these two standards, you come to a market idea which focuses on the viewpoint of a single enterprise, and thus may be called the subjective market concept. It is quite apart from world market ideas (or "European" or national market ideas) as mere geographical notions in which there are no competitive relationships and no alternatives that lead to a rivalry between the agents in the market place. The rest of the sections of the Introduction report on the working patterns of the International Antitrust Working Group.

III. INTERNATIONAL TECHNOLOGICAL INTEGRATION

Third, I was prepared to report on the substantive rules of the Draft Code. However, as space is short, let me restrict myself to Article 6 of the DIAC which deals with the intellectual property issue; that is, restraints of trade based upon intellectual property rights. Again, here I have to be brief. When I learned American antitrust, at the University of Michigan in 1952, my teacher was Professor S. Chesterfield Oppenheim—an unforgettable teacher, to whom I owe a lot. The link between intellectual property protection and competition law was one of his favorite areas in teaching and research. He dwelt quite a bit on this topic, and his guiding idea was, I remember this quite vividly, that there is a dividing line: On the one side of the line you have intellectual property claims as exclusive rights. As far as these go, there cannot be an antitrust violation. However, if you cross this line you are in the sphere of possible antitrust violations. This was the dominant opinion at that time. Let us call this the classical contents theory, or "two-area theory."

Later this developed into a "three-area theory," namely, when the doctrine of patent misuse arose. According to this doctrine, transgressing the exclusive claim is not necessarily an antitrust violation. There are cases in which patents are abused irrespective of any antitrust offense.

This was the material with which we were confronted in drafting Article 6. Convinced by a happy thought of one of the members of our Group, we tried a four-area theory, something new. We started by saying that there are two different fields of law with two not identical policies of law—intellectual property protection and antitrust law. From the outset, these fields are separated, so that there are areas in which antitrust law applies or does not apply, and there are areas in which something is protected under the laws of intellectual property protection or not. If you start from this premise, you will combine the two areas of the law to create a cross of four fields, and so we called our theory a "four-area theory."

Let me start with the upper left corner of the cross. Here we are concerned with situations where intellectual property rights are granted under the law, and there is no antitrust offense. That is the first possibility—you stay within the exclusive claim without committing an antitrust offense. We covered this case in Article 6, section 1(a), and we commented about this in our Comment number 3. For example, here we listed licensing contracts. There are licensing

clauses which are legal, such as the tying of supply, minimum royalties, field restrictions, trademark requirements, confidentiality requirements, information requirements, quality restrictions, clauses regarding improvement patents, and most favored licensee requirements. These are all cases in which the restriction stays within the exclusive claim, and there is no antitrust offense. You can add to this list Article 6, section 2 with its possibility of granting exclusive licenses, which is a very important addition.

Let me move one square field down. Here we are within the intellectual property rights, but outside of the legality standards of antitrust. In other words, there is an antitrust offense although the contractual clause stays within the claim. We have listed two such cases in Article 6, section 1(b). For example, here belong the abuses of monopolies which may be connected with the use of intellectual property rights. This section 1(b) would be applicable to the *Magill* case. Patent pools are also mentioned here, by reference to Article 4 of the DIAC.

Let us move up to the right upper field. Here we are concerned with situations that are not covered by intellectual property rights, and besides this fact there is no antitrust offense. This covers the doctrine of patent misuse under U.S. law—for example, the extension of duration of the patent term in a competitive market, or the trademark abuse against an older right. In our Draft this third situation is covered by Article 6, section 1(c).

Next, there remains a fourth area in which we are concerned with cases in which the restrictive clause under the exclusive intellectual property claim is not covered by that intellectual property right, however there is an antitrust offense. Again, this is mentioned in our Article 6 section 1(c) indicated by the conditional conjunction "when." We commented upon this in Comment Number 4, alinea 2, and in Comment Number 5 to Article 6 where we say that we list two examples which are not meant to be exhaustive. Example one is an obligation not to challenge the validity of the licensed rights ("no-challenge clause"), and example two is an obligation with respect to the licensed right even though it may have expired. Here we find the extension of duration with an anticompetitive effect.

Because it is new, I wanted to present this four-area theory to you. I think the four-area theory takes care of many problems discussed in this field.

IV. OBJECTIONS AND REJOINDERS

Let me come to the last section. I have written an article on the list of objections raised against the DIAC, but it is in German, so I will just go through the main parts of the list.

There was an objection that the DIAC contains too much theory. Some said this is "Freiburg thinking," indicating an alleged similarity to the teaching of the so-called Freiburg School of neo-liberal thinking, influential in Germany. I may answer to this that we made a mix of all kinds of antitrust ideologies—of the good Old English common law of trade restraints dating back to Edward Coke, and to the old common law ancillary restraint doctrines. Of course, U.S. antitrust was observed in its political aspects. Also the Freiburg School teachings, and the United Nations' experiences based on the Restrictive Business Practices Code of 1980 were given due consideration. But not only those. We felt quite independent from any theory.

A second objection says there is much too little theory in the DIAC. We were reproached for having overlooked the teachings of the Chicago School, and other important theories that lie behind a sound antitrust philosophy. To my observation as an outsider, Chicago school teachings suffered a severe blow in the Kodak case of 1992 and are no longer so much observed as they used to be. Anyway, looking to the needs also of small countries we could not follow Chicago teachings. Small countries are especially sensitive against vertical restraints. They suffer much more from vertical restraints in economy than large countries with big economies. So, as you know, France, Canada, and Austria are hostile to and have rather strict laws against vertical restraints. The bigger the economy, the less dangerous are vertical restraints because one can better replace intrabrand by interbrand competition. But in a small economy this cannot work as market access is more difficult. Take, for example, the eastern *Länder* in reunited Germany, where vertical restraints in the beverage industry, supermarket chains, and by important brand owners have killed off large parts of the liberalized and fledgling domestic economy. The West German tax payer has to pay for this ill-conceived antitrust policy by huge transfer payments.

The third objection raised against the DIAC was that we should have regulated fewer details and limited ourselves to principles (this was also a minority view within the Group). This is the notion that we should have concentrated on "consensus wrongs." Now, imagine we were sitting here together and asked to put together the consensus

wrongs in the antitrust field throughout the world; what would they be? There would be a basic inhibition of cartels—horizontals—in restraint of trade. Second, there would certainly be a control of abusive distribution systems. Third, there would be some regulation dealing with the interface of intellectual property protection and restraints of trade. Fourth, there would be some concentration and merger control in order to prevent the circumvention of provisions against horizontals and verticals by merging. Fifth, surely there would be a provision against abusive monopoly power. Sixth, there would be some minimum procedural rules. This is what I would say are the consensus wrongs which have to be put together in order to have something in international antitrust at all. If you look at the DIAC, in essence it contains little more; the treatment of the consensus wrongs, that is exactly what we did.

The fourth objection raised against the DIAC again points to the contrary. It is being argued that we covered too few details, that the DIAC should have been drafted in more detail in order to give it a wider scope. Authors associated with the work of the Organisation for Economic Co-operation and Development miss an introductory part of the DIAC dealing with definitions. But we followed the Continental European usage of regulating only the legal relations (see Savigny: *Rechtsverhältnisse*), and let them *implicitely* define the legal terms used according to the mischiefs a law wants to cure, in order to avoid the definitory introduction developing a normative life of its own. Other examples of desired additional details to be included in the DIAC refer to rules concerning parallel and gray market imports. However—I cannot go into the details—we covered this (see Article 5, section 3, on contractual restrictions; and Article 6, section 1 (a), section 2 ("justified"), Comment Number 5, on trademark licenses). Again, as I have said before, it depends on whether you build up parallel import restrictions on a contract system, or on trademarks. Both sides of the problem are regulated in our Code. Another issue found missing in the DIAC by some authorities is dumping and subsidies. However, we expressly excluded this topic from our drafting business because of its affinity to unfair trade practices law (see Part III). I may end by saying that we quite deliberately made extensive use of the rule of reason, the English common law defense in restrictive business practices law, in order to cover many situations that cannot be regulated in detail.