International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis

I. Introduction

There is current and virtually unanimous agreement that an international convention would be the most effective means of curtailing restrictive business practices engaged in by transnational enterprises (TNEs). However, there is considerable disagreement as to what types of enterprises should be deemed "transnational," what types of business practices should be classified as "restrictive" and what type of international convention would be appropriate. The purpose of this article is to analyze these areas of disagreement, to explore the effect on TNEs of the absence of an international convention and to develop a prognosis for an international convention regulating restrictive business practices.

At the outset it is important to remember that many of the disagreements we will be discussing can be traced to the symbolism attached to the TNE by various participants in the relevant international debates.

To the developing nations the TNE is the prime symbol of foreign interference in their domestic economic, political and social life. These nations blame their lack of development on past and continuing exploitation and interference by the TNE and, in many cases, its government of origin. The following list of the
complaints made by developing countries against the TNEs was recently published by The Economist:

It fiddles its accounts. It avoids or evades its taxes. It rigs its intra-company transfer prices. It is run by foreigners, from decision centres thousands of miles away. It imports foreign labour practices. It doesn’t import foreign labour practices. It overpays. It underpays. It competes unfairly with local firms. It is in cahoots with local firms. It exports jobs from rich countries. It is an instrument of rich countries’ imperialism. The technologies it brings to the third world are old-fashioned. No, they are too modern. It meddles. It bribes. Nobody can control it. It wrecks balances of payments. It upturns economic policies. It plays off governments against each other to get the biggest investment incentives. Won’t it please come and invest? Let it bloody well go home.'

As a result of these perceptions of the TNEs one of the principal goals of the developing countries’ program to establish a “New International Economic Order” is the control of abuses perpetrated by them. Such control would be accomplished by general “codes of conduct” for TNEs and specific regulations governing restrictive business practices and the transfer of technology. Such new regulatory devices are deemed to be necessary because the developing nations believe that the existing restrictive business practices legislation in developed nations is designed to deal only with the domestic effects of TNE conduct. This “neutrality” of developed country legislation toward the effects of restrictive business practices engaged in by TNEs beyond national borders allegedly encourages an increase of restrictive business practices in developing countries. Thus, for example, one developing country member of the Second Ad-Hoc Group of Experts on Restrictive Business Practices convened by the United Nations Conference on Trade and Development (UNCTAD) recently noted that:

[R]estrictive business practices legislation in developed countries was normally based on the concept of maintaining or introducing competition. Competition, however, presupposed some sort of essential equality amongst the parties concerned but this was

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3See, e.g., U.N. GAOR, 7th Special Sess., A/RES/3362 (S-VII), adopted 16 Sept. 1975 which provides in part: Restrictive business practices adversely affecting international trade, particularly that of developing countries, should be eliminated and efforts should be made at the national and international levels with the objective of negotiating a set of equitable principles and rules.

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not the case in regard to relationships between developed and developing countries. It was a handicapped race between unequals.3

In contrast, the developed nations tend to see the TNE as a symbol of the advantages of capitalism and of the increasing economic interdependence of nations. They generally believe that, except for occasional exceptions of abuse, the TNE plays an important and useful role in international economic relations and in domestic, economic and social progress. Nearly all of the developed countries recently adopted the following statement concerning TNEs which is contained in the first paragraph of the “Guidelines for Multinational Enterprises” promulgated in June 1976 by the Organization for Economic Cooperation and Development (OECD).

Through international direct investment, such enterprises can bring substantial benefits to home and host countries by contributing to the efficient utilization of capital, technology and human resources between countries and can thus fulfill an important role in the promotion of economic and social welfare.7

Moreover, one of the United States governmental delegates to UNCTAD's Second Ad-Hoc Group of Experts on Restrictive Business Practices recently noted that “[i]t is little or no hard evidence that multinational corporations commit a great number of antitrust violations, or more than they used to, or more than purely national firms of the same size.”8

This is not to say that the developed nations view TNEs as above reproach. On the contrary, the OECD is comprised of developed nations whose “Guidelines for Multinational Enterprises” above referenced include provisions relating to restrictive business practices. In addition, Secretary Kissinger stated in his address to the Seventh Special Session of the United Nations General Assembly:

The United States therefore believes that the time has come for the international community to articulate standards of conduct for both enterprises and governments.

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4The 23 members of OECD that participated are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States.


He then added that in addition to a statement of general principles:
Laws against restrictive business practices must be developed, better coordinated among countries, and enforced. The United States has long been vigilant against such abuses in domestic trade, mergers, or licensing of technology. We stand by the same principles internationally. We condemn restrictive practices in setting prices or restraining supplies, whether by private or state-owned transnational enterprises or by the collusion of national governments.9

Nevertheless, the dispute between developed and developing nations over the content, coverage and type of international convention needed to correct restrictive business practices is inextricably tied to differing perceptions of the TNEs, their activities and the aspirations of the respective nation. Consequently, the symbolic importance of the TNEs must be kept in mind when evaluating specific proposals or conventions.

II. Defining "Transnational" Enterprises

Despite the innumerable studies, reports, books, articles and papers devoted to the topic, there is still no international consensus as to the definition of the oft used term "transnational enterprise." In fact, one of the five items on the “programme of work” of the United Nations Commission on Transnational Corporations is the establishment of a definition of “transnational corporation.”10 There is thus far not even agreement on the words to be defined. Various U.N. Reports refer to “multinational corporations,” “transnational corporations,” and “transnational enterprises.” Other frequently used words include “multinational enterprises” and “international corporations.” For the sake of consistency we have opted to use the term “transnational enterprise” which was recommended in the Report of the U.N.’s Group of Eminent Persons11 as being the most appropriate.

That Report also contained the following definition of “multinational corporations”:

[Enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be co-operatives or state-owned entities.]12


12Id. at 25. For other definitions see U.N. Dep’t of Economic & Social Affairs, Multi-
The participants at the First and Second Sessions of the United Nations Commission on Transnational Corporations were unable to agree on the use of this, or any other definition. Some delegations contended that state-owned enterprises should not be included within the definition because such enterprises are "not mainly geared to profit-making." Others thought such a distinction was inappropriate. Another contended point concerned the necessity of formulating a definition based on the structural characteristics of an enterprise. It has been cogently argued that agreements between two independent entities, such as classic cartel arrangements, have the same effects as intra-enterprise agreements. Nevertheless, many developing countries want to impose structural definitions in order to keep activities of state-owned or state-controlled cartels beyond the reach of any new regulation of restrictive business practices.

This lack of an agreed definition of "transnational enterprise" is a significant, but not formidable problem. Many developing nations simply take the view that any international convention should cover only those enterprises whose activities give rise to the concerns expressed by the developing nations. In any event, it seems clear that the lack of an agreed definition will not hinder rapid development of proposed conventions.

III. "Restrictive" Business Practices

Attaining broad international agreement as to those business practices which should be classified as "restrictive" has proven to be even more difficult than resolution of the threshold definitional problems. Since 1945 more than 20 nations have enacted restrictive business practices legislation, and several international conventions pertaining to restrictive business practices have been
drafted. Given these facts, it may appear incongruous that there should still be considerable dispute as to which business practices are "restrictive." This incongruity has several explanations which will be discussed following a brief historical review of past efforts to achieve international agreement.

A. Historical Review

After World War I the League of Nations studied the possibility of international controls for cartels and industrial agreements. However, no action was taken because: (1) national policies were too diverse to harmonize, (2) many nations objected to the loss of sovereignty inherent in effective international control, and (3) many nations believed that cartels were very efficient and therefore, beneficial.

Before the end of World War II the United States began to formulate plans for an International Trade Organization (ITO) which would have regulated many facets of international trade including restrictive business practices. After several years of work a proposed charter was adopted in Havana in 1948. Chapter 5 of the Havana Charter would have prohibited "business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control." The following list of restrictive business practices was included in the Charter:

(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
(c) discriminating against particular enterprises;
(d) limiting production or fixing production quotas;
(e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
(f) extending the use of rights under patents, trademarks or copyrights granted by any member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions or production, use or sale which are likewise not the subjects of such grants.

The term "restrictive business practices" is more widely accepted than is the American term "antitrust" which has a peculiar historical derivation. See 1 E. Kintner, Legislative History of the Federal Antitrust Laws Ch. 1 (1977) for a discussion of the origins of the Sherman Act. See text at note 46, infra.

See, e.g., Cassel, Recent Monopolistic Trends in Industry and Trade (1927.II.36); MacGregor, International Cartels (1927.II.16); Ouailid, The Social Effects of International Industrial Agreements (C.E.C.P. 94. 1926).


Id. Art. 46(3).
Although this Charter was signed by more than 50 countries it was abandoned after the United States withdrew its support. This reversal in United States policy was apparently caused by objections to provisions relating to international commodity agreements, foreign investment and full employment. The restrictive business practices provisions were not the subject of significant United States criticism.\textsuperscript{25}

The Havana Charter’s list of restrictive business practices, reprinted above, was repeated almost exactly\textsuperscript{26} in the 1953 United Nations Draft Convention on the prevention and control of restrictive business practices in international trade.\textsuperscript{27} This Draft Convention was drafted by an Ad Hoc Committee on Restrictive Business Practices and was endorsed by seven countries.\textsuperscript{28} Nevertheless, it died when the United States Department of State withdrew its support because “sufficient degree of agreement on fundamentals does not now exist” to make the Convention practicable or effective in accomplishing the elimination of restrictive business practices in international trade.\textsuperscript{29}

With the death of the Ad Hoc Committee’s Draft Convention, several nations attempted to have restrictive business practices included within the purview of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{30} After several years of study a group of experts appointed by the members of GATT concluded only that:

it would be unrealistic to recommend at present a multilateral agreement for the control of international restrictive business practices. The necessary consensus among countries

\textsuperscript{25}For detailed background see Hearings on H.J. Res. 236 “Membership and Participation by the United States in the International Trade Organization” before the House Comm. on Foreign Affairs, 81st Cong., 2d Sess. (1950); Edwards, Regulation on Monopolistic Cartelization, 14 OHIO ST. L.J. 252 (1953); Diebold, The End of the ITO, ESSAYS IN INTERNATIONAL FINANCE No. 16, Princeton Univ., Oct. 1952.

\textsuperscript{26}The provision on suppression of technology, Art. 46(3)(e) was broadened to include situations where the suppression was the result of coercion by a single firm or would have the result “of monopolizing an industrial or commercial field.” Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council, 16 U.N. ECOSOC, Supp. 11, at 6 (1953); E/2380 and E/AC.37/3.

\textsuperscript{27}Report of the Ad Hoc Committee, supra note 26, at Annex II, Art. 1, para. 3.


upon which such an agreement could be based did not yet exist, and countries did not yet have sufficient experience of action in this field to devise an effective control procedure.\footnote{1GATT, Basic Instruments & Documents 171 (9th Supp. 1961).}

In 1959 this group recommended and the GATT adopted a Decision providing for the establishment of direct governmental consultations whenever a Contracting Party believes that it is being harmed by restrictive business practices engaged in by enterprises of another Contracting Party.\footnote{2Id. at 28. For background see J. JACKSON, WORLD TRADE AND THE LAW OF GATT § 20.3 (1969); C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 238 (1976); GATT, Restrictive Business Practices GATT/1959-2 (1959).}

The most successful international agreements concerning restrictive business practices have been those of the European Common Market. In 1951 the six original members of the European Coal and Steel Community (ECSC) signed a treaty regulating restrictive agreements and concentrations in the coal and steel industry.\footnote{3261 U.N.T.S. 140 (1957). See Arts. 65-67.} Six years later the Treaty of Rome creating the European Economic Community (EEC) prohibited a broader range of restrictive business practices in all industry.\footnote{4298 U.N.T.S. 3 (1958).} Article 85 of the EEC Treaty prohibits agreements, decisions and concerted practices:

which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 86 prohibits an abuse by one or more enterprises of a dominant position within all or a substantial part of the European Common Market. The Article contains the following examples of such abuse:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers,
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial use, have no connection with the subject of such contracts.

These provisions have proved to be the most successful effort at international regulation of restrictive business practices because the treaty provisions super-
sede inconsistent national laws and are administered by a "supranational" Commission and Court.\textsuperscript{35}

Another example of regional international agreement on restrictive business practices is the Investment Code of the Andean Common Market (Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela).\textsuperscript{36} Decision 24 of the Andean Commission,\textsuperscript{37} adopted in December 1970, contains Articles which enumerate restrictive business practices which may not be included in patent\textsuperscript{38} or trademark licenses.\textsuperscript{39} To date only a few Andean Group countries have adopted the


\textsuperscript{38}Id. Art. 20.

Article 20. Member Countries shall not authorize the conclusion of contracts for the transfer of foreign technology or patents which contain:

(a) Clauses by virtue of which the furnishing of technology imposes the obligation for the recipient country or enterprise to acquire from a specific source capital goods, intermediate products, raw materials, and other technologies or of permanently employing personnel indicated by the enterprise which supplies the technology. In exceptional cases, the recipient country may accept clauses of this nature for the acquisition of capital goods, intermediate products or raw materials, provided that their price corresponds to current levels in the international market;

(b) Clauses pursuant to which the enterprise selling the technology reserves the right to fix the sale or resale prices of the products manufactured on the basis of the technology;

(c) Clauses that contain restrictions regarding the volume and structure of production;

(d) Clauses that prohibit the use of competitive technologies;

(e) Clauses that establish a full or partial purchase option in favor of the supplier of the technology;

(f) Clauses that obligate the purchaser of technology to transfer to the supplier the inventions or improvements that may be obtained through the use of the technology;

(g) Clauses that require payment of royalties to the owners of patents for patents which are not used; and

(h) Other clauses with equivalent effects.

Save in exceptional cases, duly appraised by the competent authority of the recipient country, no clauses shall be accepted in which exportation of the products manufactured on the basis of the technology is prohibited or limited in any way.

In no way shall clauses of this nature be accepted in connection with subregional trade or the exportation of similar products to third countries.

\textsuperscript{39}Id. Art. 25

Article 25. Licensing contracts for the utilization of trademarks of foreign origin in the territory of the Member Countries may not contain certain restrictive clauses such as:

(a) Prohibition or limitation of the exportation or sale in certain countries of the products manufactured under the trademark concerned, or similar products;

(b) Obligation to use raw materials, intermediate goods, and equipment supplied by the owner of the trademark or his affiliates. In exceptional cases, the recipient country may accept clauses of this nature provided the prices correspond to current levels on the international market;

(c) Fixing of sale or resale prices of the products manufactured under the trademark;

(d) Obligation to pay royalties to the owner of the trademark for unused trademarks;
national mechanisms such as screening, evaluation and approval of licenses necessary to implement Decision 24.40

The most recent international effort to devise an agreement regulating TNE restrictive business practices was the OECD's June 1976 promulgation of non-binding "Guidelines for Multinational Enterprises" which contain the following provisions on "Competition."

Enterprises should while conforming to official competition rules and established policies of the countries in which they operate,

1. refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example,
   a. anti-competitive acquisitions,
   b. predatory behaviour toward competitors,
   c. unreasonable refusal to deal,
   d. anti-competitive abuse of industrial property rights,
   e. discriminatory (i.e. unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of affecting adversely competition outside these enterprises;

2. allow purchases, distributors and licensees freedom to resell, export, purchase and develop their operation, consistent with law, trade conditions, the need for specialization and sound commercial practice;

3. refrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition and which are not generally or specifically accepted under applicable national or international legislation.41

This brief historical review reveals that the successful attempts to reach international agreement on those business practices which should be classified as "restrictive"42 have been those among countries at the same developmental level. The developed countries have reached agreement in the OECD and in the European Communities. The developing countries have reached agreement in the Andean Common Market and in their "Group of 77" proposals to various U.N. agencies. Attempts to reach a consensus of both developed and developing countries have failed to achieve more than the GATT's relatively weak provisions relating to voluntary consultation.

(e) Obligation permanently to employ personnel supplied or indicated by the owner of the trademark; and

(f) Other obligations of equivalent effect.


42OECD, Declaration on International Investment and Multinational Enterprises, Annex, supra note 7.

B. Current Disputes

This lack of a broad international consensus continues to exist and is reflected in the March 1976 Report of UNCTAD's Second Ad Hoc Group of Experts on Restrictive Business Practices. These experts drew up a list of restrictive business practices "which are likely to adversely affect (sic) the trade and development of developing countries." The experts from the developed countries thought that guidance for interpreting this list should include the definition of "restrictive business practices" contained in the Havana Charter, (i.e., practices "which restrain competition, limit access to markets, or foster monopolistic control"). The experts from the developing countries and from a "socialist country of Eastern Europe" believed that the Havana Charter definition was inappropriate because it "would not enable the dynamic nature of such practices and the objectives of Governments in controlling them, to be taken fully into account, especially in regard to the adverse effects of such practices on developing countries."
This list of restrictive business practices contains several footnotes delineating disputes between the experts as to the meaning and scope of certain listed practices. The Report states that "[t]he list is neither exhaustive nor does the order of the list reflect any sequential importance in terms of the practices, nor does the list presuppose any conclusion as to how the practices should be controlled under national or international regulation."  

There are three principal reasons for this lack of agreement between developed and developing countries as to which business practices should be classified as "restrictive."

First, the majority of nations participating in the present efforts to reach international agreement on the control of restrictive business practices have no domestic restrictive business practices legislation and no experience in administering or enforcing such legislation.

Second, several of the objectives which the developing countries are seeking to attain via an agreement on restrictive business practices are deemed to be inappropriate by the developed countries. For example, the developing countries are seeking preferential treatment for their enterprises and would thus permit domestic and government controlled enterprises to engage in many of the practices that would be illegal if they were engaged in by TNEs. The developed countries favor the prohibition of enumerated restrictive business practices regardless of the type of enterprise that engages in such conduct.

In addition, other objectives sought to be attained by the developing countries via an international agreement on restrictive business practices include: a more equitable distribution of wealth, the control of prices and inflation, the protection and assistance of small-scale enterprises, an increase of employment opportunities, and increased participation by nationals in domestic markets. The developed nations believe that these objectives should be attained via tax, welfare, wage-price, and investment laws.

Third, despite the many years of international consultations and studies in the field of restrictive business practices there still exist significantly different viewpoints in this area which reflect variations in national policies. The competition policy of a nation necessarily reflects that nation's legal traditions and political and economic perceptions. Thus, there is still considerable disagreement among even developed nations as to which business practices should be classified as "restrictive." For example, the enforcement officials in the European Common Market are much more concerned with abuse of market power than with incipient limitations on competition through mergers.

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"Id. at 20.
"See note 15, supra.
"See text at note 9, supra.
"Report of the Second Ad Hoc Group of Experts, supra note 5, at 29.
Consequently, it is illegal in the Common Market for a firm with a dominant market position to charge excessive prices, to earn an excessive profit or to refuse to deal. United States antitrust law has no similar direct control over prices, profits or individual refusals to deal. Conversely, mergers which would be struck down under United States laws as anti-competitive might not even be questioned by European authorities because they favor the creation of "European size" companies to compete with large American and Japanese companies.

These significant variations among developed nations although significant, nonetheless appear trivial when compared to the disagreements among the developed and developing nations. The restrictive business practices legislation of developed nations focuses upon practices which limit or distort competition. The legislation in and proposals of developing countries tend to focus upon practices which restrict their exports or perpetuate their "exploitation" by the TNEs and/or the developed countries. Developing countries are very concerned with intra-enterprise relationships, particularly market allocations and transfer pricing. They have sought to include within the definition of "restrictive" business practices agreements between members of the same corporate family. A much more lenient view toward intra-enterprise agreements is usually taken by developed country jurisprudence.

These differences in national restrictive business practices legislation are so significant and deeply rooted that the Secretary of the U.N.'s Ad Hoc Committee on Restrictive Business Practices, which prepared the 1953 Draft Convention discussed earlier in this article, recently stated that "[t]he notion that national antitrust legislation and administration can be modified so as to achieve uniform national standards is quite unrealistic." This leads us to an analysis of the disputes concerning the type of international convention that should be adopted to control restrictive business practices engaged in by TNEs.

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53See text at note 26, supra.

IV. What Type of International Convention Is Appropriate?

There are three principal disagreements as to what type of international convention regulating restrictive business practices engaged in by TNEs would be appropriate.

The first disagreement is whether the convention should contain general principles and specific rules or just general principles. A comparison of the OECD Guidelines and the Group of 77s UNCTAD proposals reveals the magnitude of this disagreement.

The OECD Guidelines relating to Competition contain four short paragraphs written in general terms. For example, enterprises should refrain from "anti-competitive abuse of industrial property rights." On the other hand, within UNCTAD there is a separate group of experts which deals solely with transfers of technology, and the developing countries have proposed within that forum an international code of conduct on transfer of technology which contains a list of 40 restrictive business practices related to industrial property rights which should be prohibited.

The OECD's brief Guidelines may also be compared with the previously noted list of 19 "Restrictive Business Practices Which are Likely to Adversely Affect the Trade and Development of Developing Countries" prepared by UNCTAD's Second Ad Hoc Group of Experts on Restrictive Business Practices. These experts stated in their Report that "the practices listed were broader than those at present treated under any one system of legislation. . . ."

As of this writing, this dispute as to the appropriate degree of specificity for an international convention on restrictive business practices is unresolved. Pursuant to Resolutions adopted at the Ministerial Meeting of UNCTAD in May 1976 a third Ad Hoc Group of Experts on Restrictive Business Practices will meet with the goal of "formulating a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries." The Committee on

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55See note 7, supra.
56The issue of restrictive business practices is under the jurisdiction of UNCTAD's Committee on Manufacturers. A separate UNCTAD Committee on Transfer of Technology was created in 1974. Each Committee has its own Intergovernmental Group of Experts.
58See note 44, supra.
60UNCTAD Report on 4th Session, supra note 57, at 10-11; UNCTAD, Provisional Agenda for
Transfer of Technology will also continue its work in drafting an international code of conduct for the transfer of technology "corresponding, in particular, to the special needs of the developing countries.61

The second disagreement over the nature of an international convention governing restrictive business practices is whether the convention should deal with the actions of TNEs only, or with those of home and host governments as well. Here again a comparison of the OECD Guidelines and the developing country UNCTAD proposals is instructive.

The OECD Guidelines for TNEs were negotiated as one part of a three part package concerning foreign direct investment.62 The other two parts of this package, which were adopted by the OECD simultaneously with the Guidelines, involved Declarations by the OECD Member Countries that they will: (1) grant foreign owned enterprises operating in their territory "national treatment", i.e., treatment no less favorable than that accorded in similar situations to domestic enterprises, and (2) take each others' interests into account in their actions concerning international investment incentives and disincentives.63

To date no similar "package" has been proposed in UNCTAD.64 As previously noted,65 the developing nations take the position that they should be permitted to authorize or to undertake restrictive business practices that would be prohibited if engaged in by TNEs. According to one member of the United States delegation to UNCTAD's Second Ad Hoc Group of Experts on Restrictive Business Practices:

Experts from countries with strong antitrust traditions attempted to convince the delegates from developing countries that cartel practices are in the long run injurious and debilitating even to those who perpetrate them, and not only to the victims. This was a difficult point to sell in light of the enormous short run profits of OPEC. Perhaps the easier point to get across was that the developed nations are simply not prepared to sign a one-sided international agreement.66

The third disagreement concerning an international convention on restrictive business practices involves the legal nature of such a convention. The developing countries want the convention to be legally binding. Most developed countries insist that the convention, like the OECD Guidelines, be non-binding.67
This disagreement may well be one over a matter of form rather than one of substance. Although the developing nations have stated their preference for a "binding" convention, it is unclear how such a result would be attained. The mere adoption of a convention by UNCTAD would not bind other states unless they consented to be bound via an appropriate ratification procedure. UNCTAD has recognized this fact and has postponed a final decision on the legal character of such convention until consensus drafts are produced by the experts on restrictive business practices and transfer of technology.

The developed nations believe that given the wide divergence in national objectives, attitudes and experience concerning restrictive business practices there is little likelihood that a consensus could be reached creating binding international enforcement and adjudication machinery. They also believe that:

any attempt to enforce general principles for enterprises separately in each nation would lead to wide variations in interpretation, procedures and sanctions, and that this would be unfair and inequitable, would create an unstable and unpredictable atmosphere in which enterprises would be forced to operate, and could exacerbate conflicts among nations.

The adoption of voluntary guidelines favored by the developed nations would, in their view, help to harmonize international opinion and facilitate international cooperation concerning restrictive business practices.

Despite this disagreement as to the legal nature of a consensus convention, it is likely that the standards enunciated in any such draft would be incorporated into many national laws, especially in those countries that presently lack any restrictive business practice legislation.

V. The Effect on TNEs of the Absence of an International Scheme

Thus far this article has discussed the past and current attempts to attain a broad international agreement on the control of restrictive business practices engaged in by TNEs. From the perspective of the management of a TNE the most important point to be gleaned from this discussion is that there is currently no broad international consensus. Management must confront a patchwork of regulations, which may be national or regional, binding or voluntary, consistent or inconsistent. Each subsidiary, branch or affiliate of the TNEs may be subject to differing laws and policies. Simultaneously, the whole enterprise may be subject to attempts at extraterritorial regulation by one or more nations.

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See, e.g., Address by the Secretary-General of the UN to UNCTAD's Third Session TD/151 (1972); I. Brownlie, Principles of Public International Law 673-77 (2d ed. 1973); D. Bowett, The Law of International Institutions (2d ed. 1970).


Id. at 37.

See Report of the Second Ad Hoc Group of Experts, supra note 5, at 33.
examples of the resultant international clashes will suffice to illustrate the TNEs' regulatory dilemma.

A. Swiss Watch Case

In 1954 the U.S. government sued several American and Swiss watch manufacturers for conspiring to eliminate competition in the production, sale, and trade of watches, watch parts and watchmaking machinery. The defendants had allegedly entered into a series of agreements beginning in 1931, designed to protect the Swiss watch industry from the development and growth of competitive watch industries in the United States and elsewhere. The primary means of effectuating this conspiracy was an agreement entered into in Switzerland termed the "Collective Convention." The Swiss government had encouraged and approved these private agreements. It had also passed legislation in aid of the Convention signatories. For example, any signatory who breached any of the Convention's provisions was, under Swiss law, subject to private sanctions provided in the Convention, and nonsignatories were subjected to certain price and other regulations.

The defendants claimed that the United States court should not assume jurisdiction over their activities on the ground that the American antitrust laws cannot be applied to acts of sovereign governments. In making this contention, they apparently relied on the fact that the agreements were entered into and became effective in Switzerland, and were sanctioned by Swiss law. The court responded that if "the defendants' activities had been required by Swiss law, this court could indeed do nothing." However, the challenged agreements in this case had been formulated privately without compulsion on the part of the Swiss government. The fact that the private agreements were recognized or even approved of by the Swiss government was insufficient to "convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental action compelling the defendants' activities." The court held, "a United States court may exercise its jurisdiction as to acts and contracts abroad, if . . . such acts and contracts have a substantial and material effect upon our foreign and domestic commerce."

The Court's final judgment was modified after a compromise was reached between the United States and Swiss governments. The latter had threatened to institute a case against the former in the International Court of Justice if a satisfactory agreement was not achieved.

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91963 Trade Cas. ¶ 70,600 at 77,456.

9Id. at 77,456-57.

91965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965).

9Haight, supra note 73, at 311.
B. The Bechtel Case

In January 1976 the United States Department of Justice filed suit against the Bechtel Corporation, one of the nation's largest heavy construction firms and four of its affiliates. The Complaint alleges that these firms conspired to boycott individuals and American subcontractors "blacklisted" by the Arab League countries as part of those countries' boycott of companies that do business with Israel and "Zionist" persons or entities. The relief requested is an injunction prohibiting the continuation of refusals to deal with blacklisted persons or entities as subcontractors and the continuation of requirements that subcontractors refuse to deal with blacklisted persons or firms. An element of the Justice Department's theory was that the "sovereign compulsion" defense, which immunizes anticompetitive conduct when that conduct is compelled by a foreign sovereign, does not apply to conduct outside the territory of the foreign sovereign, i.e., in the United States.

The Bechtel defendants initially raised twelve defenses to the Complaint including sovereign compulsion, the act of state doctrine and United States governmental approval of the complained of activities. To further complicate matters, the Commissioner-General of the Arab Boycott announced that the Arab countries would not sell oil or other raw materials to American firms that fail to abide by the rules of the boycott.

In January 1977 the Justice Department and Bechtel agreed to a proposed consent decree to settle the case. Under the proposed decree Bechtel would agree not to implement the Arab Boycott in the United States by screening possible bidders and not to require others to refuse to deal with United States companies blacklisted by the Arabs. Bechtel would be required to include United States blacklisted persons in recommendations, evaluations or lists of possible subcontractors or suppliers. However, if the Arab countries "specifically and unilaterally" refuse to deal with a blacklisted person, Bechtel would be permitted to refuse to deal with that person. In addition, Bechtel would be permitted to enter into contracts that specify that they are to be

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interpreted according to the laws of the country in which the construction project is located, including Arab countries. The decree could be modified upon Bechtel's application if new statutes or treaties become applicable to the Arab Boycott or if another defendant in a similar action brought by the Justice Department obtains a consent decree that places Bechtel at a competitive disadvantage.

C. The Beecham Case

In March 1970 the United States Department of Justice filed a civil antitrust suit against Bristol-Myers Co., Beecham, Inc., both of which are United States companies, and Beecham Group Ltd. [Beecham U.K.], a British company. Beecham, Inc., is a 90 percent owned subsidiary of Beecham U.K. The government alleged that the three defendants combined and conspired to restrain and monopolize trade in ampicillin and other semisynthetic penicillin drugs by fraudulently procuring and enforcing Beecham U.K.'s United States patent covering ampicillin and by restraining the sale of drugs in bulk form or under other than specified trade names.4

In November 1972 the court ordered Beecham U.K. to answer certain interrogatories relating to acquiring the United States patent and to its negotiation of agreements with Bristol-Myers. On December 5, 1972, an official of the United Kingdom Department of Trade and Industry (DTI), acting under Section 2 of that country's Shipping Contracts and Commercial Documents Act,5 issued an order to Beecham U.K. directing it not to comply with the American court's discovery order "so far as it relates to documents in the United Kingdom and to information to be compiled from such documents, [since the order] constitutes an infringement of the jurisdiction which, under international law, belongs to the United Kingdom."

In response the Department of Justice contended that Beecham U.K. should be compelled to furnish the requested information even if such compliance violated English law. The United States court agreed, and issued an order, pursuant to Federal Rule of Civil Procedure 37(b), that those factual issues involved in the court's discovery order with which Beecham U.K. had failed to comply would be resolved against Beecham U.K. and for the plaintiffs, precluding Beecham U.K. from introducing at trial evidence in opposition to those claims.

5Ch. 87, § 2. The Section provides

(1) If it appears to any Minister of the Crown authorized to act under this section—(a) that any person in the United Kingdom has been or may be required to produce or furnish to any court, tribunal, or authority of a foreign country any commercial document which is not within the territorial jurisdiction of that country, or any commercial information to be compiled from documents not within that jurisdiction; and (b) that the requirement constitutes

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Subsequently, Beecham U.K. requested the DTI to lift the order barring compliance with the United States court's ruling. A new order was issued in August 1973 that modified the earlier order by removing all restrictions on discovery, except as "documents or information relate to any dealings between Her Majesty's Government or any public authority in the United Kingdom and Beechams." A letter from the DTI to Beecham U.K. accompanying the new order stated that the Secretary decided to vary the original order after examination of the documents and added that "[h]e is concerned to give all possible help to the Court in this matter consistent with the maintenance of U.K. jurisdiction." Beecham U.K. filed as many interrogatory answers as it believed it could under the DTI order and the United States district court, noting that "Beecham [U.K.] has made a conscientious endeavor to complete discovery. . . ." rescinded its May 1973 order that would have resolved factual issues against Beecham U.K.66

Because of the patchwork pattern of national attitudes in the realm of restrictive business practices legislation illustrated by cases such as these, and recent well publicized incidents involving international practices of TNEs, some TNEs managers are actually encouraging the promulgation of an international agreement that would harmonize national policies concerning restrictive business practices.67 Several TNEs have adopted their own corporate codes of

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conduct and the International Chamber of Commerce has issued "Guidelines for International Investment." Many international businessmen who have not actively encouraged an international agreement on restrictive business practices have nonetheless come to admit the inevitability of increased governmental control of restrictive business practices via a "binding" international agreement or "voluntary" agreements which are subsequently incorporated into national law. It is clear that attention has shifted from the question of whether there should be such an international agreement to what type of agreement is feasible.

VII. A Prognosis

We began this article by noting the widespread agreement that the most effective means of curtailing restrictive business practices engaged in by TNEs would be an international convention. We have also noted that it is very unlikely that a broad, inclusive and legally enforceable international convention with supranational adjudicatory and enforcement mechanisms will be adopted in the foreseeable future. Three more modest types of international convention are feasible.

A. International Consultation and Conciliation

The GATT already has adopted procedures for inter-governmental consultations on restrictive business practices. In addition, several other consultative vehicles presently exist.

In 1967 the Council of the OECD recommended that Member countries undertaking a restrictive business practice proceeding or investigation involving important interests of another Member country should notify the latter, in advance, if possible, and should consult so as to avoid conflict. The Council also recommended that: "where two or more Member countries proceed against a


9See text at note 32, supra.
restrictive business practice in international trade, they should endeavor to
coor-ordinate their action insofar as appropriate and practicable under national
laws."

According to the Chief of the Foreign Commerce Section of the Justice
Department's Antitrust Division this Recommendation:
particularly as it applies to prior notification of investigations and cases, has been
extensively followed and adhered to with great care. It appears to have been quite
successful in lessening the international friction which had previously accompanied
certain antitrust investigations and prosecutions.

In 1973 this 1967 OECD Recommendation was extended to provide a
voluntary procedure for inter-governmental consultation and conciliation. The
1973 Recommendation provides that a Member country adversely affected by
restrictive business practices engaged in by enterprises situated in another
Member country should consult with that country. If that country agrees that:
enterprises situated in its territory engage in restrictive business practices harmful to the
interests of the requesting country [it] should attempt to ensure that these enterprises
take remedial action, or should itself take whatever remedial action it considers
appropriate, in particular under its legislation on restrictive business practices, on a
voluntary basis and considering its legitimate interests;

If such consultations do not result in a satisfactory solution, the Member
countries may, if they so agree, submit the dispute to the OECD's Committee of
Experts on Restrictive Business Practices for conciliation.

The previously discussed 1976 OECD 'Guidelines for Multinational
Enterprises' relating to "Competition" provide that enterprises should:
be ready to consult and co-operate, including the provision of information, with
competent authorities of countries whose interests are directly affected in regard to
competition issues or investigations. Provision of information should be in accordance
with safeguards normally applicable in this field.

Several other consultative vehicles exist. These include provisions of United
States' treaties of Friendship, Commerce and Navigation with foreign
governments which obligate the signatories to consult with a view to eliminating
the harmful effects of restrictive business practices and bilateral consultation agreements between the United States and Canada and the United States and West Germany.

UNCTAD's Second Ad Hoc Group of Experts on Restrictive Business Practices has been considering proposals from the developed and developing countries for consultation procedures. However, to date no agreement has been reached.

Even if UNCTAD is eventually able to achieve a consensus on an international consultative procedure such an agreement would not solve the basic problem of inconsistent national restrictive business practices policies. One leading commentator has averred that such governmental consultations do not resolve the problem of the TNE's exposure under United States antitrust law to treble damage actions brought by private parties.

B. A Model Law for Developing Countries

Some progress has been made within UNCTAD in formulating a model law on restrictive business practices for developing countries. The May 1976 Ministerial Meeting of UNCTAD called for the elaboration of a model law or laws on restrictive business practices based on the previous work of the Second Ad Hoc Group of Experts on Restrictive Business Practices.

Such a model law presumably would be incorporated into the national laws of several developing countries. Thus, although it would not be an international agreement, it would help to harmonize national laws and thereby to reduce international conflicts.
C. Convention Limited to Practices that Affect International Trade

One highly desirable type of international convention would be one limited to restrictive business practices that affect international trade. Such an agreement would not attempt to provide uniform standards for the numerous restrictive business practices that affect only domestic commerce or for practices that traditionally have not been considered within the scope of restrictive business practices legislation. Such a convention would deal with effects on competition in international trade and include necessary investigative and enforcement procedures. It would not resolve all of the problems stemming from inconsistent national legislation, but it could significantly reduce international conflicts concerning extraterritoriality.

It is unfortunate to conclude that agreement on such a convention appears to be unlikely in the near future. In the meantime, it would be unrealistic to expect more than the development of further consultation agreements and a model law for developing countries. It is clear that the uncertainties affecting this area of the law will linger to perplex and challenge us for some time.

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