The UNCTAD Restrictive Business Practice Code

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Introduction

Beginning with an abortive League of Nations proposal in 1927, international organizations have periodically attempted to formulate rules relating to the control of restrictive business practices (RBPs). Such rules were part of the rejected 1948 Havana Charter for an international trade organization. A United Nations committee under the Economic and Social Council (ECOSOC) in 1952 formulated another code, combined with an investigation and consultation procedure. It too was rejected. The General Agreement on Tariffs and Trade (GATT) explored this issue in the middle 1950s in an effort to formulate agreed rules on the topic, but it was not deemed feasible to apply the GATT system, which was designed to regulate the trade policies of governments, to the practices of private enterprises. The effort culminated in 1960 in a simple consultation resolution which has never been used.

Even national RBP laws, or antitrust laws as the United States calls them, have occasioned strenuous business objection and academic criticism. Business has argued that the anti-bigness tendency of such laws is inconsistent with the achievement of national growth and expansion, and with the formation

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3 Contracting Parties to GATT, in Basic Instruments and Selected Documents (BISD) 28, 171 (9th Supp. 1961), discussed in Furnish, supra note 1, at 328, and in Kintner, Joelson & Vaghi, supra note 1, at 89-90.
of combinations large enough to compete in world markets. Some economists have argued that such laws, though justified when aimed against monopolistic cartels, have no strong economic basis when they interfere with distribution methods of nondominant firms, with mergers, or with patent licensing. Nevertheless, the antitrust doctrine has spread. It has appealed not only to lawmakers favoring free competition and free trade, but also to those trying to fight inflation and to those trying to reduce what they perceive to be the abusive power of the dominant transnational enterprises. Now, 90 percent of all developed countries, and about half of the larger developing nations, have antitrust laws of some sort, or use antitrust rules as part of investment or technology screening. But, perhaps as many as a hundred small countries in the world have no such laws at all.

The application of any one nation's antitrust laws to international trade or investment has almost always engendered controversy. The application of the United States antitrust laws to foreign cartels has led to diplomatic protests, blocking legislation, and claims that such assertions of jurisdiction violate international law. Switzerland has imprisoned one of its citizens for giving information of antitrust violations to the Common Market Competition Directorate, while South Africa threatens similar sanctions against its citizens who aid the enforcement of a foreign antitrust law. Also, the basic premise of most antitrust or restrictive business practice laws, namely, that free competition is the optimum means for encouraging innovation, efficiency and growth, is fundamentally questioned by a very large number of nations who prefer Marxist solutions or at least very heavy doses of state capitalism, subsidization, and protectionism.

On the other hand, an international antitrust code has been urged, for instance, by a UN Group of "Eminent Persons," as a means of defining when the extraterritorial application of one nation's antitrust law is or is not

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*The Competition Directorate case referred to was the Hoffman La Roche Vitamins case. Hoffman objected that the Commission was using information obtained through a breach of the Swiss Criminal Code but this contention was rejected in a decision of the Commission. 76/642/EEC of 9 June 1976. The informant was prosecuted in absentia by the Swiss government. The case is discussed in J. Lever, Aspects of Jurisdictional Conflict in the Field of Discovery (Nov. 15, 1978) (address before the Fordham Corporate Law Institute, New York). For the South African provision see Republic of South Africa, Foreign Courts Evidence Act No.80 of 1962 (June 22, 1962), as amended by Second General Law Amendment Act No. 94 of 1974 (Nov. 11, 1974), and Protection of Businesses Act of 1978 (June 30, 1978).
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justified, and obviating the need for unilateralism. Also, Marxist nations have viewed negotiations on international restrictive business practice rules as a fairly safe way to join with developing countries in complaining about "exploitation" by capitalist enterprises and demanding elimination of restraints on sales to socialist states or on their ability to export products manufactured with the aid of developed country enterprises.

I. UNCTAD Preparatory Work

It was in this ambivalent context that the United Nations General Assembly decided in the winter of 1978, with surprising unanimity, to convene a UN conference to complete work on agreed principles and rules concerning the control of restrictive business practices. In the fall of 1979, a diplomatic conference was held under the auspices of the United Nations Conference on Trade and Development (UNCTAD). This conference represents the UN effort in the RBP field with the greatest chance of success to date. The conference will be the culmination of five years of work by three committees of experts. In 1974, an ad hoc committee of experts acting in personal capacities formulated an initial report on restrictive business practices with a tentative code of conduct for enterprises. This report was rejected by the Trade and Development Board of the UN Conference on Trade and Development as not sufficiently thorough and not representing important interests of governments. Accordingly, UNCTAD authorized a second, and then a third, ad hoc group of governmental experts, the latter working under a mandate agreed to at the fourth UNCTAD conference in Nairobi. This mandate included:

1. the identification of restrictive business practices likely to injure international trade, particularly the trade and development of developing countries;
2. the formulation of principles and rules to deal with such practices;
3. the development of systems for information exchange and collection; and
4. the formulation of a model antitrust law for developing countries.

The ad hoc expert groups each met about six times over a two-year period, until the mandate had largely been accomplished. An agreed list of restrictive practices likely to be injurious to trade and development was identified. A system for providing information to UNCTAD and for its dissemination in

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7UNCTAD Res. 93 (IV), May 30, 1976.
an annual report on developments in antitrust legislation and enforcement was created and a first draft of a model antitrust law was completed. In April 1979, a substantial set of principles and rules was completed at the expert level, though with a dozen or so bracketed texts representing unresolved differences between group positions, some of which were believed to be sufficiently serious that they could only be resolved at a diplomatic level conference.  

II. The Text as Negotiated by the Experts

The final document produced by the experts has the impressive title, "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 These Countries." The document is in a textual sense much more detailed and comprehensive than anything previously attempted internationally in this field. It contains almost fifty provisions, directed both at enterprises and governments.

A. Objectives

The first section sets forth five agreed objectives of the restrictive business practice rules. In summary, these objectives include ensuring that RBP's do not interfere with trade liberalization, encouraging efficiency through the creation and protection of competition, promoting consumer interests, eliminating disadvantages which may result from RBPs by transnational corporations and other enterprises, and providing rules which can be emulated at national and regional levels.

B. Definitions and Scope of Application

Three terms are defined. Restrictive business practices is defined as acts or agreements which through an abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly of developing countries and on the economic development of those countries. Dominant position of market power is defined as a situation where an enterprise, alone or with a few others, is in a position to control the relevant market. Enterprises is defined to include all forms of partnerships or corporations, whether created or controlled by states or not, which are engaged

in commercial activities, and including their branches, subsidiaries or affiliates.

Each of the three definitions reflects an element of compromise achieved by an ambiguity which is potentially controversial. The definition of restrictive business practices stresses effect on trade and development, especially of developing countries. This suggests that adverse effect on developing countries is a test in determining whether conduct is a restrictive business practice. However, the better reading appears to be that the definition does not define any offense, since those are defined in a later section which does not contain an agreed "catchall" offense. Even within the definition, it should be noted that there is no word or preceding the reference to having an adverse effect on trade and development. Thus, the definition must be read to state that an offense exists when a practice abuses a dominant position by limiting access to markets or unduly restraining competition and such practice has an adverse effect on trade or development.

The definition of dominant position of market power is controversial because of its reference to enterprises which not only alone, but also "with a few others," are in a position to control a relevant market. This reference to "shared" or "joint" monopolization is entirely consistent with existing Common Market and German law regarding dominant position, but is not a well-settled point under laws such as the American or Canadian antitrust statutes. Nevertheless, the effect of the provision is actually rather conservative, since nothing in the principles and rules defines being a member of a shared monopoly as an offense in itself. In the rules for enterprise, a number of practices, such as price discrimination and tying arrangements, are listed as being objectionable when abusive of a dominant position of market power in a relevant market. Thus, the effect of the substantive provision combined with the definitions is to create a rule that offenses like price discrimination and tying arrangements are objectionable only when engaged in by one of the leading firms dominating an industry. In a number of national jurisdictions, such as the United States, these practices could be illegal even when engaged in by a nondominant firm. On the other hand, if the definition of dominant position were limited to situations of single-firm dominance or multifirm conspiracy, practices like price discrimination or tying would become objec-

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tional only when engaged in by a monopolist or when there was a conspiracy among leading firms to each engage in the practice. This would be a rule substantially more conservative than the law in any major country. The definition of enterprise ends with the reference to inclusion of branches, subsidiaries, and affiliates. The ambiguity concerns whether the intended meaning was, on the one hand, that all branches, subsidiaries, and affiliates are separate "enterprises" for purposes of the principles and rules, or whether, on the other hand, each enterprise is addressed by the principles and rules so as to include its branches, subsidiaries, and affiliates. The developing countries favor the former interpretation, while certain developed countries, particularly the United States, favor the latter. A technical aspect of this dispute turns on whether an unincorporated branch should be treated as an enterprise for purposes of the principles and rules, given that in most legal systems it could not be treated as a separate entity. The broader issue concerns the implication which the definition could have on the question whether an agreement between a parent and subsidiary, or between two closely affiliated firms, could or should be viewed as a cartel arrangement violative of the rules for enterprises. It seems doubtful that an issue of this significance will be fully resolved simply by means of ambiguities or nuances in a general definition. The sections dealing with exceptions, scope of application, and rules for enterprises will undoubtedly have to address the intraenterprise issue in more specific and practical terms.

The next section, dealing with scope of application, stresses that the principles and rules apply to all enterprises and all types of transactions, and are universally applicable to all countries and enterprises regardless of the parties involved. The principles and rules apply to all acts and practices having the requisite bad effects, regardless of whether such practices involve enterprises in one or more countries. Scope of application is an area in which some of the most fundamental disagreements in the code are also evident. The developed countries' (Group B) text would exempt from the principles and rules all enterprise conduct which, under applicable national legislation or regulations, is exempted from restrictive business practice law. The developing countries (Group of 77) would exempt only activities which developing countries, under their legislation, determine are essential for their economic development or in defense of their primary commodities and economic resources. In dissimilar positions which are somewhat closer in wording, Group B would also exempt RBP's directly caused by sovereign acts of state or autho-

3In the definition section of the UNCTAD Transfer of Technology Code, it is agreed that, in addition to subsidiaries, affiliates, and joint ventures, an incorporated branch is also a party subject to the rules. U.N. Doc. TD/CODE TOT/14 ¶ 1(a) at 3 (1979).
rized by intergovernmental agreements among concerned countries. The Group of 77 text would exempt only those restrictive business practices caused by intergovernmental agreements negotiated within the auspices of the United Nations.

Lastly, a text in the scope of applications chapter, supported only by the Group B countries, would state that principles and rules for enterprises shall not apply to restrictions between a parent and subsidiary company unless those restrictions constitute an abuse of a dominant position of market power within a relevant market, for instance, restrictions adversely affecting competition outside the affiliated enterprises.

C. General Principles

A third section of the principles and rules sets forth general principles which are agreed upon. These call for: action at regional, national, and international levels to eliminate restrictive business practices; collaboration between governments at bilateral and multilateral levels for this purpose; creation of international mechanisms to facilitate exchange and dissemination of information among governments in regard to RBPs; and the creation of means to facilitate the holding of multinational consultations relating to RBPs and their control. The principle is also agreed that the provisions of the rules should not be construed to justify conduct by enterprises which is unlawful under applicable national legislation. In the only disputed provisions of this chapter, the Group of 77 favors the principle of according preferential treatment to their national enterprises in order to ensure "equitable" application of the principle rules. Group B's counteroffer is a provision stating that account should be taken of special conditions or economic circumstances, particularly in developing countries, including the need for small- and medium-sized enterprises to cooperate and combine sufficiently to enable them to compete in international markets.

D. Principles and Rules for Enterprises

Section D of the principles and rules sets forth principles and rules for enterprises, including transnational corporations. It is undoubtedly the most important section of the document. It provides, first, that enterprises should conform to the RBP laws of the countries in which they operate. Second, it is stated that enterprises should cooperate with competent authorities in such countries, and in particular should provide information such as details of restrictive arrangements required for RBP control. Information is to be provided even if it is located in foreign countries, unless such production is prevented by the applicable law or established public policy of the country where it is located.

Provision three deals with restrictive business practices of a cartel nature, and states that enterprises should refrain from participating in:

(a) price-fixing;
(b) collusive tendering;
(c) market or customer allocation;
(d) sales and production allocation;
(e) concerted refusals to deal;
(f) concerted refusal of supply to potential importers; and
(g) collective denial of access to an arrangement crucial to competition.

In addition, enterprises are enjoined not to fix the price at which goods exported can be resold in importing countries, though Group B would prohibit this "vertical" price-fixing only when unjustifiable, since resale price maintenance is legally permitted in a number of developed countries.

The fourth provision of Section D sets forth seven practices which are condemned when employed as an abuse of a dominant position of market power in a relevant market. The Group of 77, however, notes in a bracket that they would like the section extended to cover also acts or behavior "of similar effects." The first three practices listed are:

1. predatory behavior toward competitors;
2. discriminatory pricing or terms or conditions in the supply or purchase of products (the Group of 77 would extend this provision to cover excessive pricing of products and services); and
3. mergers, takeovers, or joint ventures.

Four additional practices are listed, but are further qualified by a subheading indicating that they are objectionable only when they are not engaged in for ensuring the achievement of legitimate business purposes such as quality, safety, adequate distribution or service. The four practices are:

(a) refusals to deal on customary commercial terms;
(b) exclusive dealing;
(c) customer or export restrictions; and
(d) tying arrangements.

In addition to the largely agreed upon Sections D(3) and D(4) dealing with cartels and abuses of dominant position, there was some agreement at the April 1979 negotiation on a parallel text for a new provision, Section D(5). It was originally the view of the Group of 77 that separate provisions were needed to deal with offenses thought to be peculiar to transnational corporations. Group B did not agree, however, that there were any such offenses that would constitute RBPs in themselves. The compromise reached was the creation of a new Section D(5) to deal with additional offenses, but under a heading applicable, like the others, to all enterprises, not just transnational corporations. The Group of 77 text in this section would prohibit restrictive business practices of the types mentioned in paragraphs three and four which are achieved through the licensing of trademarks or trade names, the use of marketing strategies to prevent or hinder imports or exports by related enterprises, or the use of transfer pricing to overcharge or undercharge for products or services purchased or supplied. Group B's text in this regard would apply to trademark restrictions only where they abuse a dominant position by preventing the importation of genuine trademarked articles in order to maintain an artificially high price in a particular market, and would
apply to transfer pricing only in regard to use of discriminatory pricing transactions between affiliated enterprises as a means of abusing a dominant position of market power which adversely affects competition outside the related enterprises. Group B took the position that the subject of export restrictions was adequately dealt with in section D(4)(c), and thus offered no additional text in Section D(5).

E. Principles for States

Sections E and F set out in substantial detail principles and rules which States should follow at the national, regional, and subregional level. Provision E(1) of this section simply urges states to adopt and improve legislation for the control of restrictive business practices. Provision E(2) states that nations should base their legislation on the principle of eliminating acts or behavior which abuse dominant positions, limit access to markets or otherwise unduly restrain competition, and which have adverse effects on trade or development. Provision E(3) instructs that when states do control restrictive business practices, they should ensure treatment of enterprises which is fair, equitable, and in accordance with established procedures of the law, and that laws and regulations should be publicly and readily available. Group B has so far insisted on additional language in the provision that national RBP laws should be not only fair and equitable, but also "non-discriminatory." The Group of 77 has refused to accept this.

Paragraph E(4) commits states to seek appropriate measures to prevent the use of restrictive practices within their competence when it comes to their attention that such practices adversely affect international trade and development. Paragraph E(5) obligates states obtaining information from enterprises which contains legitimate business secrets to accord such information reasonable safeguards normally applicable in this field.

There is a proposed paragraph E(6), supported only by Group B, which, like the Organization for Economic Cooperation and Development (OECD) recommendation of 1967, would commit States contemplating enforcement action that would affect important interests of other States to notify those States of such action, preferably sufficiently in advance to facilitate consultation.

Paragraph E(7) is a particularly important and controversial text. It dictates that States should take measures to prevent their legislation or administrative procedures from "fostering" the participation of enterprises in cartels when such participation will cause a dominant position of market power likely to have adverse effects on international trade or development. There are two disagreements as to the wording of this provision. The Group of 77 would prefer that the provision be directed particularly at developed countries. Group B, on the other hand, would limit this provision to condemning participation of enterprises in "international" cartels, thus arguably making the provision inapplicable to export arrangements involving companies selling out of a single nation. Both the Group of 77 and the socialist countries of
Group D have insisted that the provision should condemn both international and national cartels. There is an interesting interpretative question concerning the meaning of the phrase "foster the participation." Group B nations might well argue that a simple decision on their part to make their domestic restrictive business practice legislation inapplicable to pure export cartels does not "foster" the participation of their enterprises in such cartels, but simply means that the state is neutral in that regard.

The next provision, paragraph E(8), suggests that States should institute notification procedures for obtaining such information from enterprises as is necessary for the control of restrictive business practices. Provision E(9) urges States which are members of regional economic integration arrangements to eliminate all restrictive business practices impeding the free flow of goods in their common market. However, there is disagreement over the second sentence in this provision. In it, the Group of 77 stress that economic integration arrangements among developed countries should not include policies which impede improved access for exports of developing countries. Group B, and in particular the representatives of the European Communities, have denied that such policies exist, and have been unwilling to agree to such a principle. Provision E(10) suggests the creation of mechanisms at regional levels to promote exchange of information on restrictive business practices and to assist in their control.

The Group of 77 would add an eleventh provision urging that States in economic integration groups should ensure that such arrangements do not facilitate the use of restrictive business practices by enterprises in the region or abroad which would adversely affect the trade and development of developing countries. This provision is not accepted by Group B.

Provision E(12) commits States with greater expertise in the control of restrictive business practices to, on request, share their experience with, or otherwise provide technical assistance to, other States wishing to develop such systems. Last, in this section a thirteenth provision urges States, on request or at their own initiative, to supply publicly available information, and possibly other information, necessary to a requesting, interested State for its control of restrictive business practices.

F. International Measures

Section G of the principles and rules deals with international measures. This section urges collaboration at the international level. Provision G(1) suggests that a first priority should be achieving common approaches in national policies relating to restrictive business practices. Section G(2) deals with the subject of exceptions concerning restrictive business practices, but the approaches of the two major groups are at variance. The Group of 77 would require that the Secretary General of UNCTAD be notified of all exceptions stemming from national law and permitted under the principles and rules. Group B suggests merely that laws and exceptions regarding restrictive business practices be available for exchange among nations. This
difference reflects Group B reluctance at the expert level to commit so much authority to UNCTAD, as well as Group B's position that exceptions to the principles should be generally coincident with exceptions in national law rather than dependent on special approval in the principles and rules or by UNCTAD. Provision G(3) states that the United Nations should publish an annual report on restrictive business practice developments based upon official reports from member countries and other reliable material. This provision, based on an early recommendation of the experts, has actually been in effect for two years, with one annual report already having been published and another expected to be issued soon.

The most substantial provision of section G is the fourth, which is a partially agreed procedure for consultation in situations where a State, particularly a developing country, believes that bilateral diplomacy is appropriate in regard to an issue concerning control of restrictive business practices, and requests consultation. States agree to give full consideration to such requests, and, upon agreement as to subject matter and procedures, to consult in good faith. It is then stated that where a satisfactory conclusion is reached, and if the States involved so agree, a report on the matter should be made available to interested States or international organizations. The Group of 77, in bracketed language, would stress that the Secretary General of UNCTAD, upon request of a member, should be empowered to convene such consultations and to prepare and distribute reports concerning them. The Group of 77 would also provide that upon agreement of such States, any unresolved matter arising out of a consultation on restrictive business practices should be brought to the Trade and Development Board of UNCTAD in order that it consider what further action might be taken to resolve the issue. Group B opposed any such additional procedure and took the position that any decision to create additional responsibilities for UNCTAD should be made at the diplomatic rather than expert level.

Provision G(5) of the international measures sets forth an eight point technical assistance program. The recommendations are:

a) a model RBP law should be elaborated within UNCTAD;
b) experts should be provided upon request to developing countries to help them formulate or improve RBP legislation and procedures;
c) the training programs should be held, primarily, in developing countries, to train officials in the control of restrictive business practices;
d) a handbook on restrictive business practice laws and regulations should be compiled;
e) books and documents relevant to restrictive business practices should be collected and made available, particularly to developing countries;
f) exchanges of personnel in the field of restrictive business practice control should be arranged;

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18 UNCTAD Annual Report, supra note 12.
g) international conferences on the subject should be held; and
h) seminars for an exchange of views on restrictive business practices
among persons in the public and private sectors should be arranged.

G. Implementation and/or Further International Work

Section H, as proposed by the Group of 77, deals with implementation of
the principles and rules. The section provides, first, that States should imple-
ment the agreed provisions by means of appropriate national legislation and
regulation: The second provision would commit States to the creation of a
permanent mechanism within UNCTAD to monitor implementation and to
make proposals for possible revisions or improvements of the principles and
rules. It is interesting to note that these provisions do not presume a legally
binding code. The suggestion that States “should” implement it through
national legislation is obviously not mandatory. The creation of a monitoring
committee falls far short of any kind of adjudicatory or enforcement author-
ity. Nevertheless, Group B at this time has not been willing to agree at the
expert level to even this degree of implementation. The developed countries
adhered strictly to their voluntary guidelines approach, supporting in Section
H only a modest proposal that there be further international work in the form
of periodic meetings among RBP enforcement officials to confer on matters
of policy and share experience.

III. Unresolved Issues

In its closing statement at the last experts’ meeting prior to the UN con-
ference, the Group of 77 expressed satisfaction that nearly all drafting issues
capable of agreement at the expert level had been resolved. They then listed
five policy questions which they believed were not solvable at the expert level
and which would thus be crucial issues at the diplomatic negotiation. These
were:

1. exceptions from the rules for enterprises;
2. special treatment for national enterprises of developing countries;
3. applicability of the rules for enterprises to intra-enterprise transactions;
4. the role of UNCTAD in future work or implementation; and
5. the legal nature and effect of the principles and rules.

The Group B countries largely agreed that this was an accurate listing of
the remaining issues, but did not fully agree that exceptions, special treat-
ment or intraenterprise transactions were political issues as opposed to legal
or practical issues. The United States delegation argued that it would be
unfeasible as well as undesirable to limit exceptions to RBP rules only to
enterprises of developing countries. Exemptions for labor unions, farmer
cooperatives, sport leagues, and the like are extremely widespread and well

14See Report of the Third Ad Hoc Group, supra note 12, at 35.
accepted. Moreover, the very purpose of an exemption could be lost by denying it to some enterprises.

Similarly, Group B delegates have insisted that special and preferential treatment based on nationality is not feasible in the RBP field, since the members of a cartel, or its victims, may be from both developed and developing countries, depending on where products are mined, manufactured, or consumed. Group B countries have been prepared to accept the concept that a less developed country should have fewer obligations in regard to those principles and rules which involve financial or technical burdens, but assert that any special treatment for enterprises should turn on their lack of size and market power, not their nationality. It seems likely, though not yet certain, that a compromise along these lines can be achieved at the diplomatic conference.

The issue of whether and to what extent to apply rules for enterprises to intraenterprise restrictions has political overtones, since many nations are suspicious that any "exemption" in this regard would involve favoritism for transnational corporations (TNCs) and would prevent the principles and rules from serving as a check on abuses of the economic power of such firms. This view, however, is largely based on a misunderstanding of the position of the Group B experts, and of their reasons for that position. Developed country RBP experts have agreed that all rules for enterprises—rules against price-fixing, tying arrangements, and the like—are fully and expressly applicable to TNC's when such firms fix prices with competing firms or force tied products or services on independent buyers. It is also clear that the Group B experts would have the rules apply when a TNC acts abusively through a subsidiary or affiliate to produce adverse competitive effects outside the group or entrench a dominant market position.

Group B's reluctance to agree to prohibitory rules which appear to condemn restrictive arrangements purely between parent and subsidiary or among affiliates is based on four important considerations: First, the Group B position supports international rules based on laws and enforcement policies in major jurisdictions. In that regard, the European Court of Justice, in Centrafarm BV v. Sterling Drug, Inc. and the United States Antitrust Division, in its Antitrust Guide for International Operations, have concluded that a parent company's control of its subsidiaries' purchases or sales, or allocation of functions with or among them, should not be treated as an objectionable conspiracy in restraint of trade. Second, there is the practical consideration, noted in the OECD experts' report concerning RBP's of multinational enterprises, that the opposite rule would "force upon competition authorities the impracticable task of seeking to create and maintain com-

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petition within a single enterprise on an ongoing basis." Third, the full applicability approach is objectionable on logical grounds because it would produce absurd results. If the president of an American firm which sells tractors is also president of its Yugoslav subsidiary, is he guilty of "price-fixing" if he sets the same price in both countries? Is he guilty of exclusive dealing if he agrees with himself to buy parts only from the parent company? Fourth, a rule requiring parent companies to refrain from controlling the sales and purchasing policies of foreign subsidiaries they create would amount to a de facto expropriation of control, and would have the likely effect of discouraging useful forms of direct foreign investment.

The developing countries, although generally unwilling to support binding international rules so strong as to interfere with their own sovereignty and economic policies, have nevertheless pressed for a scope of application and method of implementation more ambitious than would be preferred by the developed nations. Some developing countries have favored "legally binding" international rules. This appears to mean that the final document would be in the form of a convention, and that nations would be obligated to conform their national law to achieve the rules of the convention. However, there have been many problems with this approach. It is not entirely clear how a developed country, particularly one that is the home country of many multinational enterprises, could enact and enforce legislation to govern the conduct of its enterprises around the world in transactions which may have no direct connection to its own commerce. It also seems clear that most countries are quite unwilling to agree to such a system. Another problem with the legal convention approach is that developing countries have not been prepared to have similar binding rules apply to their national enterprises or their agreements regarding primary commodities. In the most recent political statements offered by developing countries on this issue, references to the legal nature of the document have been so vague as to suggest a retreat from an earlier position of supporting a binding code of conduct in this field.

Although neither the legal nature nor the implementation scheme for the principles and rules has been agreed to, most of the outcomes in this area now seem predictable. It is highly unlikely that the rules will be adopted in binding treaty form. The opposition to that is very strong and exists not only throughout Group B but also among the Group D countries and, as noted, among some of the more advanced nations of the Group of 77. On the other hand, it seems likely that modest forms of implementation, followup, and consultation procedures will be adopted. Such a system was adopted by the OECD countries in regard to their multinational guidelines of 1976, and has operated satisfactorily, though at very minimum levels of activity. A similar system of having an UNCTAD committee follow up on the guidelines has emerged in the negotiation of the Transfer of Technology Code of Conduct. A bilateral consultation procedure, which could form part of the implementation process, has, as noted, already been largely accepted as part of the restrictive business practice principles and rules.

IV. The Exercise in Perspective

In evaluating the significance of the antitrust principles and rules being negotiated, it is well to keep in mind how modest they are in conception. The Treaty of Rome, which extends to the nine member-nations of the European Communities, is perhaps the most comprehensive system for enforcing free trade and free competition on an international scale. That treaty creates a common market, that is, a customs union and a free trade zone; forbids actions of States which would restrict free trade or competition in the zone; limits subsidization of industries or exports by States; applies strong antitrust rules to agreements or single firm abuses likely to injure trade and competition within the zone; and entrusts the enforcement of the competition rules to an autonomous, multinational commission with powers to seize documents from the premises of corporations, to demand accurate answers to interrogatories, and to levy fines on those who violate the rules. The treaty provides for an international court in Luxembourg to which all significant issues of interpretation of the competition rules are to be referred.23

There is no international system capable of achieving global free trade to the extent that the EEC has achieved it on a regional basis. Although the principles of GATT embody free trade concepts, the GATT and MTN permit exceptions in the form of tariffs and other trade barriers,24 and developing countries have complained that the GATT actually favors developed countries, particularly in regard to rules relating to subsidization and other safeguard measures.25 Yet, except for the existence of the GATT, the untried antitrust rules would not be complemented by any guarantees of free trade. The UNCTAD rules are not intended to regulate the domestic industrial policies of States, their subsidization of industries or hindering of foreign competition, or the creation of state monopolies. Further, although there is some consideration of creating a committee within UNCTAD with limited monitoring duties, no regional group participating in the RBP negotiation has recommended, or seems likely to support, the creation of an enforcement agency at the international level with powers at all comparable to those of the European Communities Commission at Brussels. Nor does there seem any likelihood that the member states of UNCTAD are prepared to create a new international court for RBP’s, or to refer antitrust decisions to the International Court of Justice at the Hague.

In analyzing what international antitrust rules ought to accomplish, or can accomplish, one should remember that different types of restrictive business practices will create lesser or greater conflicts of national interest. Presumably, nations will favor or implement strict rules only when their interests in

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eliminating certain practices actually coincide. However, nations will tend to disagree when their export or import interests are at stake. They also tend to differ concerning the objectionability of the fact that a restrictive arrangement was made without government approval or participation. Some States, particularly the United States, would generally take the position that an agreement restraining trade and competition made without government approval is an evil regardless of whether the restraint was in fact harmless, or even arguably in the national interest. Other States would have very little bias against private trade restraints per se, evaluating them after the fact in terms of their effects. The United States approach presents some difficulties in a few situations, but it has the very significant advantage in the context of an international code that it tends to be neutral in application, and relatively easy to interpret and administer. Examination of a few examples may clarify these points.

At one extreme, if an enterprise in one State agrees with its leading potential competitor in another State that each will stay out of the other's national market, international trade between those two states is restrained. Assuming that neither State had approved the contract and that both would prefer free trade to private restraint, either State would have an interest in assisting prosecution of the conspiracy by the other, or in agreeing to some form of international condemnation of the arrangement. The situation becomes a bit more complex if, for instance, an enterprise of State A licenses or contracts with an enterprise of State B to produce or distribute there, but not to export to State C. State A might favor the restriction as protecting exports of its enterprise to State C, while States B and C might be opposed to it. Sometimes, however, State B might have accepted the restriction in exchange for other favorable aspects of the licensing or distribution arrangement. In that instance, State B would not be expected to favor an international system under which State C could cast doubt on the legitimacy of the transaction.

Commonality of interest is more difficult to find when enterprises in country A or, perhaps, in countries A and B, agree to raise prices to a uniform level in sales to consumers of country C. The facts can be further complicated by laws in countries A or B exempting or approving such joint selling in export markets. Given these facts, there seems to be far more conflict of interest than coincidence of interest. Countries A and B become richer and more successful as the restrictive business practice continues; they lose revenues and balance of trade if it is prevented. The primary argument for reaching agreement to prevent such export cartels would be that the alternative is export warfare under which nations producing the same commodities or manufactures have an interest in joining together, directly or through their enterprises, to raise the price of such products to all buyers who are not members of the cartel. This is a powerful argument, with some basis in current experience, but it has been difficult to devise a fair and equitable princi-

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ple concerning what should be condemned and what allowed. An all-
inclusive condemnation of export cartels ignores the fact that many export
associations lack market power and exist merely to achieve minor economies
of scale in selling abroad. Moreover, such a condemnation would not affect
other practices, such as merger of exporting firms or government-controlled
export, which eliminate export competition even more effectively than does
an export association.

Thus, the strong probability that nations will find themselves in major
conflicts of economic interest in regard to certain RBPs they have allowed or
facilitated makes it unrealistic to expect international rules to provide any
decisive solutions. Such rules can at most increase the tendencies toward
uniformity of approaches, and provide a framework for consultation of a
flexible nature.

For developed countries, the basic conception of the UNCTAD restrictive
business practice exercise as a whole has been essentially that "the process is
the product." Experts of western and other developed nations have believed,
based on their own OECD experience, that one-time, international agree-
ments with hard and fast rules are not at present a feasible method of dealing
with restrictive business practices in all their contexts. Rather, it is believed
that a gradual exchange of information and experience, comparison of legis-
lation and enforcement, and development of common norms based on ma-
ajority approaches will, over time, serve an educational role, develop personal
contacts between antitrust experts in different countries, facilitate bilateral
cooperation and consultation, and create bases for further work, particularly
at the regional level.

Developing countries have been unsatisfied with this gradual approach for
a number of reasons. Most important, they believe that their general situa-
tion is one of crisis, with change being urgent, so that immediate and substan-
tial action is called for. Also, as a practical matter, they doubt that they have
the experts or the funds to keep up a working committee on a technical
subject like antitrust over a long series of international meetings held at a
distant point like Geneva. Thus, for them, both politics and practicality mili-
tate in favor of a "quick fix" approach rather than the building block ap-
proach with which OECD countries are more comfortable.

It should also be noted that the agreed principles and rules for enterprises
may not even have the effect of serving as a model law. The reason for this is
the existence of a separate UNCTAD document entitled *A Model Antitrust
Law for Developing Countries*. It seems clear that the proposed UN transfer
of technology code of conduct, for instance, would, if promulgated, have
certain model law implications; that is, it is likely that countries with no law
on the subject might well enact legislation based on the code, or insist, ad-
ministratively, that technology transfers to their country be in accordance
with the structures of the code. Similar uses for the restrictive business prac-
tice principles seem somewhat less likely, both because of the existence of a
separate RBP model law and because cartel or anticartel principles are not
used to shape individual commercial transactions as often as technology transfer rules are.

It is significant that the model restrictive business practices law of UNCTAD was written by the secretariat and experts employed by them, rather than by the governmental experts who negotiated the principles and rules. In fact, experts from developed countries have been quite critical of the model restrictive business practice law. They found fault with its emphasis on notification of a great variety of agreements, its stringent provisions in regard to price discrimination, transfer pricing and excessive pricing, and its unusual provisions limiting internal growth of dominant firms.\(^2\) A technical dispute has arisen concerning the model law, with the developing countries arguing that a model intended specifically for them should be completed in UNCTAD meetings attended only by their experts, while developed country experts stood by the principle that all UNCTAD work should be open to every member.

Conclusion

There are two long-run goals which best justify the time, effort, and expense involved in negotiating the RBP principles and rules. The first is to achieve standards for the conduct of enterprises in their international trade and investment, particularly vis-à-vis developing countries, that will lessen tension on both sides and frame disputes into objectively resolvable issues. The second is to transform the UN and UNCTAD from political "wailing walls" into practical institutions for the development of acceptable norms and the facilitation of the resolution of disputes on a basis that is fair and equitable to all concerned.

Epilogue

Between November 19 and December 7, 1979, the First United Nations Conference on Restrictive Business Practices Principles and Rules was held in Geneva. The Conference made progress but did not result in a final agreement. The Conference will reconvene, with a good chance of success at that time. The most important progress of the recent session was in achieving agreement that the code would have very modest legal effects, at least in the initial stages. The developing countries and the Socialist bloc finally agreed to the Western position that the code should not be in treaty form, but rather should be embodied at most in a United Nations General Assembly resolution. It was also agreed that implementation and follow-up of the code would be accomplished by committee meetings in Geneva for the purpose of exchanging and discussing experience in this area and under the codes, but that the committee should not pass judgment on the behavior of any particular enterprise or government, nor become involved in any current dispute.

The problem of how to apply international restrictive business practices rules to parent-subsidiary relationships was a central element in the negotiation. Late in the negotiation, the Chairman of the Conference produced a text stating that the section dealing with horizontal offenses would apply only to arrangements between enterprises "not under common control," but that the section dealing with abuses of a dominant position would apply to parent-subsidiary conduct, subject to a footnote indicating that the listed restrictive practices might be non-abusive if "appropriate in light of the legal, organizational or managerial relationship of the enterprises involved." The Conference adjourned before it could be determined whether this compromise was acceptable to the developing countries, or to the Socialist bloc, who thought that the rules should either be tougher on parent-subsidiary relations, easier on state enterprises, or both.

The Chairman's proposed compromise text contained interesting and potentially acceptable approaches on the difficult issues of exceptions and special treatment for developing countries. It was proposed that there should be a complete exception only for intergovernmental agreements. Enterprise conduct allowed under national law would be subject to the voluntary principles and rules, with a caveat that due account should be taken of the extent to which conduct had been excepted or exempted, balanced against a statement that exemptions from national law should be as narrow and short-lived as possible. In regard to "special treatment," the Chairman proposed that states enforcing RBP laws should take due account of the trade, development and financial needs of developing countries, when these were reflected in policies allowing certain consolidation or cooperation of enterprises. Thus, the Chairman skirted these controversial issues by stressing that full exceptions were not necessary in a voluntary code and relying on the principle of comity, i.e., that states should take due account of the important interests of other states before exercising jurisdiction, which concept has gained favor in the United States in recent antitrust decisions and in policy statements by the Justice Department.

The first United Nations Conference on Restrictive Business Practices highlighted a brace or ironies. First, the text as negotiated moved closer and closer to United States and Common Market antitrust rules and approaches, while at the same time the developing countries were prepared to declare that control of international RBPs was an objective of the "New International Economic Order." The second irony was that as Western antitrust officials and developing country diplomats neared agreement on antitrust principles and rules, the major parties opposing the code were the United States business community and the Soviet Union, for completely opposite reasons. It thus remains questionable, just as Corwin Edwards predicted, that intense negotiation or careful drafting can fully overcome profound differences in political and economic perceptions.