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The UNCTAD Restrictive Business Practices Code: A Code for Competition?

The third Ad Hoc Group of Experts on Restrictive Business Practices, convened by the Secretary-General of the United Nations Conference on Trade and Development (UNCTAD), held its sixth Session from April 17 to April 27, 1979. The experts completed their work on the "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." Although the "principles and rules" are described as "multilaterally agreed," in fact there remain wide areas of disagreement between the Group of 77, the Group B countries and the Group D countries. Since the experts have now passed the task to a diplomatic negotiating conference scheduled to be held from November 18 to December 7, 1979, it is now necessary to confront these areas of disagreement and determine which are capable of resolution and which must remain unsettled for possible later action.[1]

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[1]Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on Its Sixth Session, U.N. Doc. TD/250, TD/B/C.2/201, TD/B/C.2/AC.6/20 (1979) [hereinafter cited as UN 1979]; First Draft of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Devising Appropriate Legislation, U.N. Doc. TD/B/C.2/AC.6/16 (1978) [hereinafter cited as Model Law]. The reports of the three previous Ad Hoc Committees are cited in Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW 587 n. 10 (1979). For brevity's sake, I will not repeat the explanation contained in Mr. Davidow's article dealing with the background and structure of the proposed code but instead will refer the reader of this note to that article. Similarly, I have not attempted any discussion of the 1976 OECD Guidelines for Multinational Enterprises or the proposed UNCTAD code on the transfer of technology. Useful reviews of the background of various international code proposals are contained in Plaine, *International Regulation of Restrictive Business Practices* (paper presented at the 1979 Symposium on Problems of Private Investment Abroad, Southwestern Legal Foundation); Joelson, *The Proposed International Codes of Conduct As Related to Restrictive Business Practices*, 8 L. & POL. INT'L BUS. 837 (1976). An authoritative critique of the present UNCTAD proposals is contained in *Comments to the U.S. Department of State and Justice Department on the Draft of the UNCTAD Code on Restrictive Business Practices* (June 21,

The article by Joel Davidow,[2] a leading participant in the session, admirably summarizes the current state of the discussions on the draft text between the three groups, placing the negotiations in the context of a long process toward an international antitrust code beginning with the rejected 1948 Havana Charter. His account of the present gaps in agreement coincides with that offered by the Group of 77 spokesman who stated at the closing meeting that the outstanding issues

> involved essentially political decisions and hence could only be resolved at the negotiating Conference. These were:
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> (a) Exceptions to the application of the principles and rules;
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> (b) Differential treatment for enterprises of developing countries;
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> (c) The inclusion of restrictive business practices occurring in the relations between the various entities constituting a transnational corporation;
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> (d) The role of UNCTAD in implementing and monitoring the principles and rules and in further work generally on the question of restrictive business practices; and
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> (e) The legally binding nature of the principles and rules.[3]

The "political decisions" involve the same questions that have been debated since the beginning of the negotiations, questions which concern the fundamental objectives and likely consequences of any code which finally emerges. In addition, the present text poses problems of interpretation and drafting that compound the many legal issues arising in any consideration of these questions. This article will attempt to review briefly the following:

1. The differential treatment sought by the Group of 77 for transnational enterprises in comparison with domestic enterprises and state-owned enterprises;
2. Uncertainties created by the code's use of vague, imprecise or largely untested concepts and definitions;
3. Treatment of intraenterprise transactions and relations; and
4. The legal status of the code: voluntary or mandatory.

1. Differential Treatment of Transnational Enterprises

The "differential treatment" issue relates to the basic nature of the code: whether it is a code for competition or development. The code's emphasis upon the central objective of the economic development of the less developed

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1979) (a report by the Committee on Trade Relations of the Association of the Bar of the City of New York, [hereinafter cited as Committee of the Association of the Bar Report]. As of the date of writing, the International Trade Committee of the Section of Antitrust Law of the American Bar Association had forwarded a report on the proposed UNCTAD code to the Section's Council for adoption by the Council. This report, like the Committee of the Association of the Bar Report, is highly critical of the present UNCTAD proposals.

This article refers to the present UNCTAD proposals variously as the "text" or "code." The proposed legal status of the "code" is discussed below.

[2]Davidow, *supra* note 1.

[3]UN 1979, *supra* note 1, at 35.

countries is unmistakable. The current draft moves the standard of adversely affecting the international trade and economic development of developing countries into the very definition of "restrictive business practices."[4] In addition, the Group of 77 has proposed text which would accord developing countries the right to exempt "industries, enterprises, acts, agreements, or undertakings" which are essential for their economic development or protection of their resources.[5]

Transnational enterprises are singled out for special attention in many of the provisions of both the agreed text and the text proposed by the Group of 77. At the same time there seems to be no agreement as to whether actions by state-owned enterprises will come within the coverage of the rules and principles.[6] It is clear that transnational corporations are not the only concerns that can engage in restrictive business practices; local domestic companies, state-owned enterprises and international state cartels are equally capable of such practices. A purported code for competition that neglects such enterprises is wholly inadequate.

In the code's singling out of transnational enterprises, the impression is reinforced that such companies are to be discriminated against. The Group of 77's proposed text goes on to advocate that

> account should be taken of the economic conditions in developing countries and the frequent absence of countervailing market power of enterprises of those countries to that of enterprises of developed countries, specially transnational corporations, and accordingly preferential or differential treatment should be afforded to their national enterprises in order to ensure the equitable application of the principles and rules.[7]

The spokesman for the Group of 77 stated in the report of the closing meeting: "The position of the Group of 77 on differential treatment was that the question needed to be viewed in the context of the new international economic order and the special disadvantages faced by developing countries in international economic relations."[8] In rejecting most of these proposals for "differential" or "discriminatory" treatment, Group B has offered a

[4] *See* text at note 11 *infra*.

[5] UN 1979, *supra* note 1, at (V), p. 12.

[6] In the 1978 discussions of the Ad Hoc Group of Experts, a representative of Group D stated his group's position that state-owned enterprises were not included within the meaning of "enterprises." This reservation is repeated in footnote (c) to the present agreed text. In the 1979 round of discussions, Group D also proposed the following as a further objective for section A of the draft code:

> 6. To ensure that the specific forms of restrictive business practices applied by transnational corporations do not impede the implementation of national sovereignty over natural resources, the fulfilment of national programmes of economic and social development, or expansion of the production and export of finished products and semi-manufactures by the national enterprises of recipient countries, especially developing countries.

[7] UN 1979, *supra* note 1.

[8] UN 1979, *supra* note 1, at 35.

reasonable counterproposal which would recognize "the need for small and medium sized enterprises . . . to cooperate or combine sufficiently to enable them to function efficiently and competitively in international markets."

2. Definition of *Restrictive Business Practices*

A criticism frequently leveled at the draft code is that its provisions are too undefined and vague to permit their use in any binding fashion. It is in the definition of restrictive practices that the code is most imprecise. Thus, "restrictive business practices" can arise from "an abuse or acquisition and abuse of dominant position of market power."[9] The reference to "competition" is whether such actions (or possible inaction) "limit access to markets or otherwise unduly restrain competition." In addition, the definitional section contains the following final clause referring to "acts or behavior of enterprises . . . which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same effects."[10] It is possible, but not unambiguously clear, that the "abuse" standard also applies to these latter agreements or arrangements "which . . . have the same effects." Sections D(3), D(4), and D(5) are the sections of the code which proscribe "specific" practices. The Committee of the Association of the Bar Report states that Mr. Davidow has interpreted D(4) as limited to the acts enumerated and applying only when all the other conditions cited in the section are fulfilled. I agree with the Committee's recommendation that any ambiguity should be eliminated.[11]

It may be argued that the "abuse . . . of a dominant position of market power" test simply imports the European Economic Community (EEC) rule under section 86 of the Rome Treaty,[12] and that outlawing undue restraints upon competition only mirrors Section 85 of the Rome Treaty and the Sherman Act.[13] The problem is that one simply does not know what content the terms will be given in the UNCTAD code. These terms necessarily have a much clearer meaning within the context of a unified system such as that of the EEC, where rules of competition form part of the law of each member state and are enforced by the Commission throughout the Community than in the widely differing contexts and economic and political systems of the

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[9]Section B 9 (1).

[10]The definition is contained in section B(1) of the proposed code. The Group of 77 adopts this approach in their text for D(3) and D(4), which would extend the proscription of the various specified practices to cover also acts or behavior "of similar effects." (See also its use in the Model Law, discussed below.) The end result would be an open-ended definition of the most important term in the code.

[11]*See* discussion in Committee of the Association of the Bar Report, *supra* note 1, 5-7. The Report suggests that the definition, scope and proposed remedies of "restrictive business practices" be limited in sections B and C, UN 1979, by reference to the specific acts of section D(4).

[12]The Treaty Establishing the European Economic Community, March 25, 1957, 294-98 UNTS (1958).

[13]The Sherman Act 26 Stat. 209 (1890); 15 U.S.C. § 1-7.

member countries of UNCTAD.[14] It is all too possible that "abuse" may be read to include any action by a large international company that is claimed by a developing country to adversely affect its trade and development. Mr. Davidow argues that the test of "adverse effects" on the international trade and development of developing countries, embedded in the Section B(1) definition of "restrictive business practices," is a *limiting* phrase rather than an extending phrase.[15] Grammatically, Mr. Davidow may be correct, but it is not unreasonable to fear that, in a code containing a number of ambiguously defined terms, the limiting phrase will in fact operate as a means of extending the code's coverage. Again, the ambiguity should be eliminated.

The reference to "dominant position of market power" is ambiguous in itself. In addition, the definition here expressly includes "a situation where an enterprise . . . together with a few other enterprises is in a position to control the relevant market. . . ." It thus incorporates the novel and undeveloped concept of "shared monopoly" into this international primer of rules and principles for the control of restrictive business practices. The definition of "dominant position of market power" needlessly jeopardizes situations where no abusive acts are cited and where only the possession by one enterprise or a few enterprises of a power "to control the relevant market for a particular product or service" is involved. The text could be construed as condemning every structural situation involving a few sellers. At a minimum, the offense should be redefined to add as additional elements either (i) agreeing together with other enterprises to limit competition from third parties or (ii) specified acts recognized as constituting abusive behavior and similarly limiting competition from third parties.[16]

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[14]Article 86 provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between the Member States.

Such abuse may, in particular, consist in:

(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 usage, have no connection with the subject of such contracts.

Treaty of Rome, *supra* note 12, art. 86. See the discussion of dominant position under the antitrust laws of the European Economic Community in the United Brands Case, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8429.

[15]*See* Davidow, *supra* note 1.

[16]With respect to the "shared monopoly" theory, one would agree with Mr. Davidow that this is "not a well-settled point" under United States antitrust law. In fact, although the Antitrust Division announced two years ago its intention to bring shared monopoly cases, no such cases have yet been brought by the Division. A recent speech by Daniel J. Plaine points out that "The FTC has three cases on the shared monopoly theory—*In re Kellogg*, (Docket No. 8883) (1972); *In re Exxon*, (Docket No. 8934) (1976); and *In re Ethyl*, (Docket No. 9128) (1979); and these have yet to be concluded." Mr. Plaine concludes that the "theory of shared monopoly is equally

The Committee of the Association of the Bar Report points out, additionally, that

> [t]he concept of "dominant position" is based on a notion that concentration is inherently suspect. There presently exists a lively debate among economists and in the literature as to the nature and effects of industrial concentration. Accordingly, an international code based on nebulous notions of the "inherent evil" of concentration or oligopoly would be premature.[17]

The *Report* goes on to criticize the proposed code's sweeping inclusion of mergers and price discrimination among the practices condemned by the code. For these reasons, and in view of the "radically disparate" traditions involved, the *Report* notes:

> Thus, the Committee believes wisdom dictates that, at least in its initial phase, the code should be limited to regulating practices, the undesirability of which is not open to substantial controversy. The Committee further believes that productive experience with a limited code is necessary as a prerequisite to expansion of that code into areas where there is less likely to be agreement about the appropriate aims and goals to be achieved.[18]

3. Transactions between Affiliated Enterprises

With respect to transaction between affiliated enterprises, the definition of *enterprises* presently includes such transactions and relationships. In extending without qualification the various recommendations and principles of the code to such companies, the text departs both from business reality and existing antitrust practice:

(a) Corporations which are affiliated with each other by common ownership normally coordinate their operations in various respects. They are able to utilize the benefits of common ownership to simplify, facilitate and broaden the scope of cooperation between their affiliated companies. The end result is ordinarily synergistic rather than restrictive; transnational organizations in particular gain in efficiency and productivity through their ability to act through one or more members of an enterprise to allocate resources. The notion of "competition" between members of such an enterprise is a contradiction in terms.

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undeveloped in the jurisprudence of the European Economic Community." Plaine, *International Regulation of Restrictive Business Practices* (paper presented at 1979 Symposium on Problems of Private Investment Abroad, Southwestern Legal Foundation). In view of the controversy surrounding the "shared monopoly" concept, it seems clearly inappropriate to press for its adoption in a primer for antitrust regulators. The Report of the International Trade Committee of the Antitrust Section of the American Bar Association, mentioned in footnote 1, observes at page 23: "In the context of most small foreign developing economies where any relatively large enterprise or small number of relatively large enterprises is automatically, without any requirement of intent, in a 'dominant position,' the Code's definition of 'dominant position,' constitutes adoption of that untested theory with a vengeance."

[17]Committee of the Association of the Bar Report, *supra* note 1, at 2-3.

[18]*Id.* at 11-12.

(b) United States law and that of the EEC and most other countries recognize the special nature of affiliated relationships and transactions under their provisions for controlling restrictive business practices.[19]

The Group of 77 has additionally proposed in Section D(5) various provisions expressly prohibiting the use by related enterprises of trademark practice or "other marketing strategies" to "prevent or substantially hinder" exports or imports or the use by related enterprises of "pricing policies . . . to fix prices and in particular [*sic*] to overcharge or undercharge." Group B has proposed an additional clause in Section B limiting the scope of application of the rules as follows:

> (vii) The principles and rules for enterprise shall not apply to agreements, arrangements or restrictions between parent and subsidiary or among enterprises belonging to the same concern, unless amounting to an abuse of a dominant position of market power within the relevant market, for example, adversely affecting competition outside these enterprises.[20]

The Group B provision, while clearly preferable to the Group of 77 text, is inadequate for two reasons:

(i) As noted above, the "abuse of dominant position" is not sufficiently defined within the context of the code.

(ii) The use of the phrase "for example" creates ambiguity and should be eliminated. Such arrangements, to be proscribed, must have anticompetitive effects upon competition from third parties.

Group D has proposed the following text as part of Section B:

> (v) The specific forms of restrictive business practices employed by transnational corporations in order to gain a dominant position of market power include:
> (a) Manipulations with transfer prices;
> (b) Schemes for dividing up markets between parent companies and their subsidiaries in other countries;
> (c) Schemes of global strategy under which the headquarters of transnational corporations give the enterprises under their control in other countries directives concerning the volume and inventory or production, investment policy, sources of procurement of equipment and materials, the levels of purchase prices, outlet channels for the finished products, the volume and geographical direction of export and the transfer of profits and capital to other countries.

In the accompanying report, the spokesman for Group D, in traditional Marxist rhetoric, defended the proposal by stating that:

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[19] *See, e.g.*, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 26 (1977); Centrafarm BV v. Sterling Drug, Inc. [1974] (J. Comm. E. Rec. 114. Mr. Davidow's article points out the absurdity of the "full applicability" approach. The United States Department of Justice recognizes that a parent corporation may legally allocate territories or set prices for its controlled subsidiaries. U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

[20] Similarly, the Group B proposed text for D5(b) would provide: "Using discriminatory pricing transactions between affiliated enterprises as a means of abusing a dominant position of market power and affecting adversely competition outside these enterprises."

[t]he socialist countries regarded control of restrictive business practices as one of the most important tasks in the reconstruction of international economic relations on an equitable and democratic basis and the elimination from such relations of all forms of discrimination, inequality, *diktat* and exploitation. The socialist countries' concern with the elimination of restrictive business practices derived from their position of principle in matters of international cooperation and was based on solidarity with the peoples of the developing countries in their struggle for the construction of an independent national economy, against neocolonialism and against exploitation by foreign capital and on the desire to eliminate the artificial impediments and barriers whereby restrictive business practices hampered the development of mutually advantageous and equitable trade and economic relations between East and West . . . . Section V of the Programme of Action on the Establishment of a New International Economic Order, adopted by the General Assembly at its sixth special session (resolution 3202 (S—VI), drew attention to the need to regulate the activities of transnational corporations in the host countries so that these activities conformed "to the national development plans and objectives of the developing countries."[21]

The proposals by the Group of 77 and by the spokesman for the Group D countries underline the fundamental problem of this code. The proposed principles for regulating restrictive business practices are regarded by some representatives of the Group of 77 not as a code for competition but primarily as a tactical step in the South's struggle for the New International Economic Order. Equally, the principles reflect an effort by some representatives of the socialist world to impose its anticompetition, antiprivate business principles in the trappings of principles to regulate "restrictive business practices." We are not on the road from Havana but on the road to 1984.

The first draft of the model law proposed by the UNCTAD Secretariat to the Experts dramatically illustrates the turn which these discussions on "restrictive business practices" has taken. The model law is a collection of concepts and alternative routes designed to be of assistance to developing countries who wish to introduce laws for the control of restrictive business practices. As the spokesman for the Experts from Group B noted this past April, however:

[t]he whole of the proposal suggested a degree of regulation of ordinary business decisions which would be burdensome to all concerned and might be anticompetitive, rather than promoting competition, and could also seriously hamper trade and investment. Of course, one had to prevent abuses of the freedom to do business, but as a whole a careful balance had to be established between too much business freedom and not enough.

The definition of restrictive business practices in article 2 amounted to criteria *inter alia* for judging restrictive agreements, although they were qualified by the rather ambiguous phrase that practices meeting the criteria "shall be subject to control in accordance with the provisions of this law." Article 3 contained a set of nine criteria applicable to all restrictive business practices and which amounted to a very broad range of gateways whereby restrictive agreements or other restrictive acts might be approved.

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[21]UN 1979, *supra* note 1, at 40.

The net effect of the foregoing was that almost complete discretion was left to the adjudicating body. On the one hand, it could disallow an agreement which met any of the criteria in article 2; or it could allow almost any such agreement on the basis of other criteria available to it.[22]

The nine criteria of article 3 of the model law include such objectives as "creat[ing] or maintain[ing] employment opportunities," "control[ling] inflation," "encourag[ing] balanced economic development within the State," and "protect[ing] and promot[ing] social welfare in general."[23] Article 2 (D) would require large firms to obtain government approval for any new capital investments.[24] Article 2 (E) would outlaw "excessive or unfair prices" or "excessive profits."[25] These and other provisions of the model law may be properly described, to quote the Group B spokesman again, as "very difficult to administer, possibly counterproductive or anticompetitive and beyond the scope of competition regulation."[26]

4. A Binding or Voluntary Code?

Returning to the UNCTAD code, the present text reflects the many areas of dispute and disagreement between the various parties to the process necessarily following from the differing economic interests, legal systems and objectives guiding them. There is no common acceptance of the desirability of the role of competition by many of the *dirigiste* and socialist governments.

It would be dangerous therefore to accord to these general principles (which are frequently no more than polite statements of disagreement) any greater authority than that of voluntary guidelines or signposts for the continuing process of international education in and acceptance of competition as a rule for business conduct. Joel Davidow has observed that the Group B conception of the exercise "has been essentially that 'the process is the product.' "[27] Given the significant differences between the countries of the world toward competition policy, it is clear that an international law or code is impracticable. These guidelines should be regarded not as a code applicable to specific arrangements but rather, like the Organizations for Economic Cooperation and Development (OECD) Guidelines, as an expression of areas of concern directed toward restrictive business practices generally.[28]

Even if the provisions of the code are expressly recognized as voluntary and nonbinding, the problem remains that commentators and national authorities will persist in ascribing greater significance to them and seek to have them

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[22] UN 1979, *supra* note 1, at 49.

[23] Model Law, *supra* note 1, at art. 3.

[24] *Id.* art. 2(D)

[25] *Id.* art. 2(E)

[26] UN 1979, *supra* note 1.

[27] Davidow, *supra* note 1.

[28] *Cf.* HAWK, A REVIEW OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: COMPETITION 32, (1977).

mandated as national law and recognized as a source of international law.[29] It is therefore recommended that the United States and other Group B countries should avoid taking any actions in the forthcoming diplomatic negotiating conference that would encourage the Group of 77 and Group D countries to assume that the proposed principles will be accepted in their present form, without the amendments presently sought by Group B and certain additional clarifications. Specifically, the following amendments and clarifications should be obtained:

(1) The code should be expressed as a nonbinding, voluntary set of principles and recommendations.

(2) Transactions between affiliated entities should be expressly excluded from the coverage of the code.

(3) The attempt to extrapolate the principles to cover "shared monopoly" should be abandoned. A possible compromise might be reached by requiring as added elements, specified acts of abusive behavior or agreeing with other enterprises, in both instances, to limit competition from third parties.

(4) The definition of "restrictive business practices" in both Sections B and D must be appropriately clarified to limit the ambiguities, particularly the "open-ended" dangers, which have been criticized. In particular, every effort must be made to prevent the standard of "adverse effects" on development from becoming a source of additional "offenses."

(5) Efforts to tilt the code's provisions against transnational enterprises and in favor of national companies and state-owned enterprises should be firmly opposed, and Group B should make it clear that the provisions are equally applicable to all groups.[30]

If all of the above can be achieved, it may be possible to reach an intellectually respectable, if less than enthusiastic, judgment that adherence to the code, with all its acknowledged imperfections, is in the national interest. Any further compromise would be a step away from the presumed objective of encouraging, rather than preventing, competition.

The Group B representatives have thus far conducted an extremely difficult negotiation with great skill and devotion and, in the circumstances, considerable success. Mr. Davidow and the other Group B representatives have already accomplished in part the two long-run goals mentioned in his article — achieving agreement on standards that lessen tension and help to frame issues in a useful fashion, and utilizing international institutions constructively. But the fundamental disagreement on objectives remains. The Group

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[29]The Committee of the Association of the Bar Report, *supra* note 1, for similar reasons warns that little reliance should be placed on express reservations as to the nonbinding status of the code. *Cf.* Davidow and Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978); Schwartz, *Are the OECD and UNCTAD Codes Legally Binding?*, 11 INT'L LAW. 529 (1977).

[30]This note has not discussed the draft code's provisions for implementation. At the moment, Group B appears to be resisting the proposal of the Group of 77 that such implementation should be exclusively through UNCTAD.

B countries seek a code for competition, while it becomes ever more clear that some representatives of the Group of 77 and the Group D countries are pursuing the negotiations primarily to attain the New International Economic Order and to limit competition from private international business. No optimistic view of the educational values of the dialogue can justify this latter objective as one to which the Group B countries can or should agree. It must be hoped, therefore, that the natural human instinct to conclude a transaction will not result in last-minute compromises to obtain an "agreement" before a true accord is achieved.