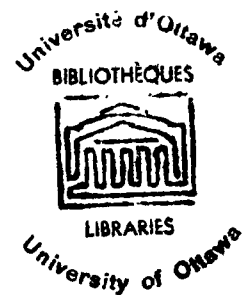


**The Control of Transnational Restrictive Business Practices
and the New International Economic Order**

by

Edmund Gregory Hinkson

A thesis submitted to the School of Graduate Studies
of the University of Ottawa in partial fulfilment of
the requirements for the Masters in Law degree



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CHAPTER I
INTRODUCTION

The rise of the Transnational Enterprise¹ in international trade, finance and investment is one of the most significant developments in international economic relations in the last forty years. Up to the end of the Second World War, transnational enterprises played a relatively minimal role in world trade. In 1929, for example, the total assets of transnational enterprises were calculated at \$1,400 million United States currency. However, by 1970 the worth of assets controlled by these enterprises had multiplied by fifteen. The value added by all transnational enterprises - including production in the country in which the particular transnational enterprise had its central management - had reached one-fifth of the world's gross national product by that period, the nations with centrally-planned economies excluded.² Transnational enterprises may now control over 60 per cent of the world's industrial assets.³

Although 70 per cent of all investment by transnational enterprises is in the western industrialized countries, the presence of the transnational enterprise in the developing countries of the world has had a tremendous impact in the post-war II period. The substantial majority of the manufactured exports and commodities of the developing nations go to the developed world rather than to other developing countries. Nearly two-thirds of the developing world's manufactured exports are sold in the developed countries. The total

-
1. Generally speaking, "Transnational Enterprises", "Transnational Corporations", "Multinational Enterprises" and "Multinational Corporations" are used interchangeably. However, Seymour J. Rubin, the Executive Vice President and Executive Director of the American Society of International Law, in an article entitled "the Regulation of Transnational Corporations" reported in The CTC Reporter (No. 18, Autumn 1984, p. 57), draws a distinction between a transnational corporation and a multinational corporation, stating that the former implies an entity which controls several businesses in other countries from a centralized headquarters whereas the latter implies a transnational corporation with ownership spread among several countries. The writer will use the term "transnational enterprise" in this thesis.
 2. U.N., Dep't of Economic and Social Affairs, Multinational Corporations in World Development (1973), UN ST/ECA/190, p. 13.
 3. Trisciuzzi, George, "Multinational Regulation of Foreign Direct Investment", at p. 148, National and International Challenges (1983), ed. by Fisher, B., and Turner, J.

sales of the majority of transnational enterprises exceeds the gross national product of most of the third and fourth world countries⁴ in which these enterprises operate. The rate of growth in the sales of the majority of transnational enterprises also exceeds that in the gross national product of most of the developing countries in which they operate.

Although there is no international consensus as to the definition of the term "transnational enterprise"⁵, the concept brings to mind a business organization comprising a parent company situated in one country exercising a significant influence over the activities of at least one affiliate or subsidiary situated in another country organized:

-
4. The Third World is generally recognized as comprising those countries in the developing world which need time and the transfer of modern advanced technology, rather than access to huge foreign financial aid, in order to develop an industrial economy. The oil-rich members of the Organization of Oil Export Countries (OPEC), plus Zambia, Taiwan, Singapore, Morocco and South Korea are examples of countries falling within this category.

The Fourth World contains countries which possess raw materials but which, unlike Third World countries, need significant financial help and favourable treatment from outside industrial nations to buy their products and to acquire modern technology. Countries such as India, Egypt, Jamaica and Thailand would fall within this category.

In our thesis we shall use the words The Third World to signify both The Third World and Fourth World.

5. The Intergovernmental Working Group on a Code of Conduct (IGWGCC) established by the Centre on Transnational Corporations concluded an agreement on a definition of the term "transnational corporations" in the United Nations Draft Code of Conduct on Transnational Corporations at its seventeenth session in May, 1982. The Group, comprising experts from each ideological bloc, agreed to specify the main characteristics of a transnational corporation by defining it as an enterprise:
- a) comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities;
 - b) which operates under a system of decision-making which permits coherent policies and a common strategy through one or more decision-making centres;
 - c) in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.

- 1) for the production of international profit for the shareholders of, and investors in, the organization; and
- 2) for the provision of marketable goods and services.

The decision-making process involved in the organization of a transnational enterprise permits coherent policies and a unified strategy. The chief characteristics of such enterprises are:

- 1) a central management in one sovereign state;⁶
- 2) significant business activities within other national economies;⁷
- 3) the capacity to shift capital and resources between its various enterprises; and
- 4) influence, power and control over the markets in which the enterprise conducts business.

The omnipresence of the problem which host countries encounter in transacting business with and controlling transnational enterprises is in many cases in proportion to the vast financial, commercial and management resources available to these enterprises, since they extend across national boundaries into the arena of international trade and economic relations. The production, distribution, and service sectors of the economies of these countries are all affected by their presence. Their centre of management is by definition located outside of the national territory of the host country. Decisions made by the directorate of that central management frequently have a direct effect on the socio-economic structure of a host country and are generally beyond the control and regulation of the host country authorities, especially where that host country is in the developing world. Many of these decisions, strategies and policies may very well conflict with host country government plans.

There is abundant evidence to prove that transnational enterprises operating within third world countries conduct practices which are adverse to the economic development and international trade of these nations. These

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6. The country in which the central management of a company is located will be referred to as the "home country" in our thesis.
 7. These countries in which entities which are not the central directorate of a company are located will be referred to as the "host country" in our thesis.

enterprises often indulge in what are known as "restrictive business practices"^{7a} in their quest for the maximum possible amount of royalties and dividends for repatriation to their home-based shareholders.

In this thesis, we shall seek to demonstrate means whereby harmful transnational restrictive business practices which are engaged in by enterprises can be effectively detected and controlled. We shall show the difficulty involved in national regulation of the conduct and policies of these enterprises which hamper the trade and development potential of countries affected by that conduct and those policies. We shall also examine the various regional and international attempts by organizations, regional entities and other international bodies, especially those attempts by the Organization of Economic Co-operation and Development and by the United Nations, to minimize, if not to solve, the problems arising from transnational restrictive business practices of enterprises and other firms. We shall seek to relate these international attempts at control and regulation of harmful restrictive business practices of these firms to the call by the world's developing nations for modification of the global economic structure which was established just after the Second World War, in order that the significant interests, circumstances and needs of these countries could assume primary importance in the international economic system. Finally, we shall outline our projections for subsequent developments in international affairs on the issue of control of transnational restrictive business practices and shall recommend policies to third world nations with respect to expansion of their international trade and increase in national foreign exchange earnings accruing from such trade.

7a. The basic concept of "restrictive business practices" is restraint of competition. The precise definition of the term often varies with different philosophies and purposes. In some cases, the "rule of reason" is applied to determine whether certain behaviour constitutes a restrictive business practice, while in other cases, emphasis is laid on the prohibition per se of the activity (see infra text ch. 7, p. 172 at note 440). For the list of restrictive business practices identified by the United Nations Third Ad Hoc Group of Experts on Restrictive Business Practices, the representatives of which were drawn from developed market economy nations, socialist states as well as developing countries, see the separate lists comprised in The UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The UNCTAD Principles and Rules), secs. D(3) & (4) (see infra text Appendix II, p. 258-60).

CHAPTER II

National and Immediate Post-1945 International Efforts to Detect and Control Restrictive Business Practices

I. Host Country Problems: Introduction

The problems encountered by national states, or by regional or international bodies, in the detection and control of restrictive business practices and their adverse effects on international trade and economics are all primarily based on the transnational structural base of these enterprises, combined with their accessibility to vast financial resources and other powerful means of support. As an illustration of the financial power of which we are speaking, figures such as those which show transnational enterprises to have accounted for approximately 92 per cent of the foreign trade of the United States, the world's largest single trading bloc, in 1977 can be produced.⁸ In the United Kingdom, which is another major trading bloc in itself notwithstanding entry into the European Economic Community (EEC) in 1973, transnational enterprises accounted for approximately 82% of its total exports in 1981.⁹ Although complete and precise up-to-date statistical information on the extent of transnational enterprise activity in international trade is not at present available, it can be safely noted that transnational enterprises account for a significant proportion of international trade flows.

The transnational nature of these enterprises makes it very demanding for a host country, especially a developing nation, to be cognizant of operations and policies of a transnational enterprise which has a subsidiary with it. It is not easy for host country government authorities to gain access to accurate

8. U.N. Centre on Transnational Corporations, Transnational Corporations and International Trade: Selected Issues (1985), UN2 St/CTC/54, p. 3. This report states that at this time it is not possible to assess the evolution of the role of transnational corporations since 1977, since the requisite statistics are not yet available for more recent years.

9. Ibid., p. 4

information, whether it concerns the amount of gross profits accruing to the parent company of a subsidiary based in that country or whether it concerns information on transfer pricing methods adopted by that enterprise.

In this section, we will address the issue of national control of restrictive business practices which have originated or have been arranged extraterritorially. We will seek to demonstrate how this problem has been approached by the United States, the world's leading commercial nation.

II. National Jurisdiction Over Transnational Enterprises: Analysis of United States' Practice

The jurisdictional tenet on which national control over an enterprise is based is the territorial principle. Under this principle, a state would be able to claim jurisdiction over an enterprise which has been incorporated within its borders. Logically, under this principle, a state is not capable of claiming jurisdiction over an enterprise which is incorporated outside of its borders. It would therefore follow that the authorities of state A have no right of access to information which lies within the knowledge of the foreign management of an enterprise incorporated in state B, which is affiliated to one incorporated within state A.¹⁰ A strict application of the territorial principle also implies an absence of national jurisdiction over restrictive business activities conducted by an enterprise incorporated in that state, where those activities occur outside of its territorial borders.

In an application of this traditional principle, the U.S. Supreme Court early this century categorically denied extension of U.S. antitrust laws to foreign restrictive conduct which had taken place beyond the territorial limits of that country, even though those acts had been carried out by a

10. Company law of western developed nations and other common law jurisdictions generally recognizes each affiliated enterprise as a separate and distinct legal entity from its other affiliated enterprises and also from its parent company. However, for legal position within the Andean Pact countries, see text ch. 3, p. 52. See also infra text ch. 4, p. 63 for probable alternative position under the OECD Guidelines.

U.S.-based corporation.¹¹ Justice Holmes opined that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done".¹²

The case of United States v Sisal Sales Corp'n¹³ was the first to expressly distinguish the American Banana Case. In this case, the defendants, including American nationals, had obtained a monopoly on all sisal trade between Mexico and the United States. The Supreme Court distinguished its previous reasoning by stating that in the first case, the claim was based upon "acts done outside the United States (and which were not unlawful by the law of the place)"¹⁴ whereas in the present case, the conspiracy had been entered into, and had been made effective by acts, in the United States with the objective of controlling the sisal trade both internally and externally. However, although the substantial part of the activity in the latter case had taken place externally, some acts had still occurred domestically.

The U.S. judiciary first sought to extend the extraterritorial application of domestic antitrust legislation in United States v Aluminum Co. of America¹⁵ through a broad interpretation of the territoriality principle by using the "effects doctrine". The Second Circuit, sitting as a court of last resort due to a lack of quorum in the Supreme Court, effectively overruled the ratio decidendi of the American Banana Case in holding that jurisdiction under the Sherman Act¹⁶ extends to foreign restrictive arrangements occurring beyond U.S. territorial boundaries once they were intended to affect, and actually did affect, U.S. import, export or interstate trade or commerce. In an oft-cited opinion, Justice Hand asserted that:

11. American Banana Co. v United Fruit Co., 213 U.S. 347 (1909)

12. Ibid. at p. 357

13. 274 U.S. 268

14. Ibid. at p. 276

15. 148 F. 2d. 416 (2d. Cir. 1945)

16. 15 U.S.C.S. secs. 1-7 (1985)

"any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which the State reprehends ..."¹⁷

Hence, a cartel scheme entirely among foreign firms occurring entirely in Europe was held to be subject to U.S. antitrust law.

Within recent times, a new trend has begun to emerge from U.S. judicial decisions as the Courts began to consider, in accordance with the recommendation in 1972 of the International Law Association, the question of "comity"¹⁸ in its exercise of national jurisdiction over those extra-territorial restrictive business practices which are also subject to foreign law. The application of antitrust law in these circumstances by U.S. judges, in addition to their authority to order discovery and production of documents on persons resident in a foreign country or incorporated under foreign law,¹⁹ has brought severe reaction from some fellow Organization for Economic Co-operation and Development (OECD) member nations, including the United Kingdom, Canada and Australia which have all enacted what is known as "blocking statutes" seeking to prevent what they regard as an invasion by the United States of their legislative jurisdiction and national sovereignty.²⁰ These statutes aim to prevent compliance with discovery proceedings and the enforcement of foreign judgments, laws or regulations within their territorial jurisdiction.

17. Supra note 15 at p. 443

18. Mr. Justice Wilkey in Laker Airways Ltd. v Sabena, Belgian World Airlines et al., 731 F. 2d 909 at p. 937 described "comity" as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum".

19. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [The Hague Convention]; Federal Rules of Civil Procedure 28(b); 28 U.S.C. 1983 (1982)

20. United Kingdom, Protection of Trading Interests Act, 1980, c.11; Canada Foreign Extraterritorial Measures Act, S.C. 1984, c. 49; Australia, Foreign Proceedings (Excess of Jurisdiction) Act, Acts 1984, No. 2

In Timberlane Lumber Co. v Bank of America,²¹ a private antitrust action, Judge Choy criticized the "effects" test as inadequate since it did not take into consideration the interests of other nations. He therefore judicially recognized the "jurisdictional rule of reason"²² and stated that a court could decline extraterritorial authority over foreign acts which were intended to have, and did have, an effect on U.S. trade if international comity and fairness merited that jurisdiction not be enforced in the circumstances.²³⁻²⁴

Mr. John Shenefield, a former U.S. Associate Attorney General, maintains that the Timberlane Case marks the reconciliation of a strong extraterritorial antitrust enforcement with greater consideration for the legitimate political

21. 549 F. 2d 597 (9th Cir. 1976)

22. Ibid. at p. 613. Kingman Brewster originally described the "jurisdictional rule of reason" in 1958 in foreign antitrust cases as requiring judicial decision as to whether or not a cause of action exists based upon a balancing of certain international considerations. Brewster, K., Antitrust and American Business Abroad (1958)

23. The new balancing test to be used was tripartitely enumerated:

- 1) the presence of some effect on U.S. commerce;
- 2) the characterization of the restraint as an antitrust violation under U.S. law;
- 3) if there has been a violation, whether the interests of, and links to, the U.S. are sufficiently strong, when compared with those of other nations, to justify an extraterritorial application in the circumstances. (Timberlane's case, ibid.)

24. The following factors are to be balanced in determining the applicability of the third test:

- a) degree of conflict with foreign laws or policy;
- b) nationality of the parties;
- c) locations or principal places of business of corporation;
- d) the existence of an explicit purpose to harm or affect U.S. commerce;
- e) the extent to which enforcement by either state will achieve compliance;
- f) the foreseeability of such events;
- g) the extent to which conduct within the U.S. is a significant component of the alleged violation;
- h) the relative significance of effects on the U.S. as compared with effects elsewhere. (Ibid. at p. 614-15)

and economic concerns of other states with respect to their national sovereignty.²⁵

The Third Circuit in Mannington Mills Inc. v Congoleum Corp.²⁶ endorsed the interest balancing approach formulated in the Timberlane case but expanded it to include four additional factors.²⁷

However, it is submitted that the dissenting view of Mr. Justice Adams, who opined that a court should not abstain from exercising authority in deference to considerations of international comity once it concludes that it has subject-matter jurisdiction, is to be preferred.²⁸ Considerations should be weighed at the outset when the court determines whether jurisdiction exists. Justice Adams in effect asserted that the question of international comity should only be taken into account when foreign law requires conduct inconsistent with that mandated by U.S. antitrust legislation.²⁹

The inchoate, uncertain nature of judicial implementation of the interest balancing approach was revealed in Laker Airways Ltd. v Sabena, Belgian World Airlines et al. where Mr. Justice Wilkey, delivering the majority judgment, asserted that the diplomatic and executive branches of government, rather than the judicial, were the appropriate fora in which to weigh the degree of

25. Shenefield, John, Extraterritoriality in Antitrust (1983), 15 L. & Pol'y Int'l Bus. 1109, at p. 1114

26. 595 F. 2d 1287 (3d Cir. 1979)

27. These additional factors were:

- 1) availability of a remedy abroad and the pendency of litigation there;
- 2) possible effect upon U.S. foreign relations if the court exercises jurisdiction and grants relief;
- 3) whether an order for relief would be acceptable in the U.S. if made by the foreign nation under similar circumstances;
- 4) whether a treaty with the affected nations had addressed the issue. (Ibid. at p. 1297-8 per Weis, J.)

28. Ibid. at p. 1299; see also Binkowski, Edwards, 'Timberlane': Three Steps Forward, One Step Backwards (1981), 15 Int'l Lawy. 419, at p. 430-1

29. Mannington Mills' case, ibid. at p. 1302

conflict with foreign laws or policy, although the learned judge impliedly endorsed the interest balancing approach with respect to all of the other criteria.³⁰

The Restatement of the Foreign Relations Law of the United States (Revised)³¹ has attempted a doctrinal formulation by providing the United States with jurisdiction over "conduct a substantial part of which takes place within its territory [or] ... conduct outside its territory which has, or is intended to have, substantial effect within its territory".³² Jurisdiction may not be exercised if to do so would be unreasonable having regard to all relevant factors including the eight factors listed in the section.³³

Additionally, the U.S. Congress has reinforced the Timberlane/Mannington Mills Test by enacting the Foreign Trade Antitrust Improvement Act in 1982,³⁴ which amended the Sherman Act to exclude from the jurisdiction of U.S. antitrust law international business activity unless there is a "direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce or on the export opportunities of a U.S. national. However, the Clayton Act and Webb-Pomerene Act are unaffected by this new legislation. Heavy weight must be given to the "effects" element of the balancing test.³⁵ This Act is a "clarifying" statute and does not alter the recent judicial principles discussed in this section.

30. Supra note 18 at p. 948-50, 955. In this case, the British Government invoked the provisions of the Protection of Trading Interests Act, Supra note 20, to prohibit the two British defendant airlines from producing any documents located in the United Kingdom which might be requested for discovery purposes in the U.S. litigation.

31. Tent. Draft No. 2, 1981

32. Ibid. at sec. 402 (1)(a), (c)

33. Ibid. at sec. 403

34. Pub. L. 97-290 sec. 403, 96 Stat., enacted as Title IV of the Export Trading Company Act, 1982 (15 U.S.C.S. sec. 6(a) 1982)

35. Supra note 25, at p. 1119

III. Home Country View of Restrictive Business Practices
Not Affecting Their Interests

Countries which are the home countries of the substantial majority of transnational enterprises, and which have established national competition and antitrust legislation, have not traditionally designed their laws prohibiting anti-competitive practices to take into account restrictive business practices which have some adverse effects on international trade but none on the trade of that particular nation. Local competition regulations only apply where the restrictive business practices in question are adversely affecting the trade of the nation which has enacted the particular legislation. This is so regardless of whether those harmful restrictive business practices emanate from within, or outside of, the affected state which seeks to enforce its laws against the act. Developing nations, especially those without national antitrust legislation, are therefore in a particularly vulnerable position with regard to restrictive business practices which affect their interests but not those of the industrialized world, home of the transnational enterprise.

By way of illustration, Mr. Robert S. Ingersoll, a former Deputy Secretary of State, speaking of the policy of the United States, the home country of between 40-50 per cent of the world's transnational enterprises, stated in 1976 that:

"The United States, by itself does not aim to regulate all its multinational corporation in the interests of other nations. The position of the United States' Government is that control of multinational corporation abuse beyond that which directly affects American interests is a subject for international control and agreement."³⁶

The ambit of national competition legislation enacted by the developed countries does not even extend to encompass anti-competitive practices conducted by their nationals - whether they be natural or legal persons - within their national jurisdictions on the ground that their acts are adversely affecting the trade and economic development of a second country or are restricting international trade per se. Generally, the trade of the particular country must be affected for it to take any legislative action

36. 74 Dep't State Bull: 412 (1976) (Statement made before the Subcommittee on "Priorities and Economy in Government" of the Joint Economic Committee on March 5th, 1976).

against the restrictive conduct. The task of controlling restrictive business practices affecting the international trade of the developing and under-developed world is therefore made much more difficult.

The severity of this issue is compounded by the realization that over one hundred nations still do not have any national antitrust or competition legislation and, consequently, no legal protection against restrictive business practices of transnational enterprises, which affect their interests nationally or internationally. The majority of developing countries do not yet possess the technical or legal know-how to protect themselves from restrictive business practices which affect them. Alternatively, these countries just do not consider the enactment of national competition legislation to deal with the issue to be a priority. This policy is partly a consequence of a substantially valid belief within individual third world countries that any unilateral attempt to regulate the activities of transnational enterprises and to lessen the detrimental effect which anti-competitive activities have on their national interests may effect a retaliatory response from the international commercial sector. For example, transnationals may reduce their business operations within the enacting state, or potential foreign entrepreneurs may rather invest in a more accommodating nation.^{36a} These are the main reasons why these countries have been calling for mandatory international codes on the subject of restrictive business practices. An international campaign to address the issue had to be launched, in the absence of political will in western industrialized countries to enact legislation which would be effectively capable of dealing with the problem of restrictive business practices engaged in outside of their individual territories in circumstances where their own trade and economic development is not being compromised, and also since the prevalent view among third world nations was that the adoption of national competition legislation was not primarily important.

Existing national legislation in the market economy countries, despite its general evolution in recent years in terms of the widening of its scope to provide greater control over aspects such as mergers, monopolies and practices directly affecting consumer interests, has not really mastered the evolving phenomenon of the expanding transnational enterprise. Indeed, this is connected to the fact that administrations in industrialized countries generally take a different position where the adverse effects of transnational enterprise conduct are external, as opposed to internal, to that country's economy.

36a. Infra text ch. 2, p. 18-9

IV. Perception of Market-Economy Countries towards Export Cartels

Another area of contention is the encouragement given by some developed countries to the operation of export cartels. These are arrangements between competing firms relating to export activity. A national export cartel comprises firms from a single country, whereas an international export cartel consists of businesses from several countries. Their operations may consist of "an internalized, bureaucratic-type, decision-making process ... in the regulation of the allocation and co-ordination processes of economic activity",³⁷ excluding any competition between the member firms on export markets. Their main objective is to increase profits from the sale of the product concerned by enhancing or stabilizing export prices through anti-competitive devices such as production or export quotas and allocation of export markets.³⁸

Inter-enterprise cartel arrangements can create private barriers to imports into particular developed countries and can consequently, even if not intentionally, reduce exports from developing nations. The Interim Report produced by the United Nations Conference of Trade and Development (UNCTAD) Secretariat in 1971 with respect to restrictive business practices enumerates three methods by which export cartels in developed market-economy countries may affect the export interests of developing nations:

- 1) by discriminating against developing nations, in terms of price or otherwise, in the sale of such products or by refusing to sell to developing countries production equipment, vital raw materials or intermediate goods which they need for their export industries;
- 2) by the application in export markets of monopolistic practices such as predatory pricing by these export cartels to exclude exporters from developing countries; and
- 3) by allocating export markets which take into account subsidiaries of the parties located in developing countries.³⁹

37. Smith, Robert, Role of Cartels in the World Economy (1979), p. 1

38. U.N. Doc. TD/B/C.2/104/Rev. 1, p. 45

39. Ibid.

The contemporary attitude among developed market-economy nations towards cartels must be analyzed from a historical perspective commencing just over a half of a century ago. The U.S. administration in the early 1930's gave legislative authority to industrial cartels in an effort to help counter over-production and the depression. In addition to the Supreme Court declaring this policy to be unconstitutional,⁴⁰ it was also recognized as an economic failure.

In spite of this, export cartels increased in numbers, strength and power. In 1931, Japan had legally authorized cartelization of the substantial majority of its industries and, by the late 1930's, had made cartel associations compulsory under governmental control. When the Second World War broke out, restrictive business programs existed under the auspices of the German and Italian governments and were also in effect in major British and French industries.⁴¹ At that time, it is estimated that between 30 and 40 per cent of world trade in manufactures was controlled by cartels.⁴²

After the war ended, laws designed to curb cartels were enacted in the United States, Western Europe and Japan. Legislation in the first two regions was supported by civil and criminal prosecutions resulting in heavy fines against the offenders. However, although the war had resulted in the destruction of international cartels, many domestic cartels survived in minor industries in these countries.⁴³ Japan's national economy became highly cartelized again during the 1950's, in a reaction against the rigid antitrust

40. See Schechter Poultry v United States, 295 U.S. 495 at 534-7 (1935) where Chief Justice Hughes stated that Congress could not constitutionally delegate its legislative authority to trade or industrial associations or to groups and authorize them to enact laws which they might deem appropriate for the rehabilitation of their industries, since this would entail an abdication of its political sovereignty.

41. Edwards, Corwin, Control of Cartels and Monopolies (1967), p. 6

42. Machlup, "The Nature of the International Cartel Problem", at p. 11-2, A Cartel Policy for the United Nations (1945), ed. by Edwards, Corwin

43. Supra note 41, p. 8

standards imposed during the U.S. occupation⁴⁴ and as a result of the prevalent belief in Japan that a rigid national competition policy would weaken it economically.⁴⁵

Nevertheless, import cartels and purely domestic cartels are per se prohibited in the United States and are prohibited in principle in Canada, France, the Federal Republic of Germany, Japan and the EEC.⁴⁶ The legislation prohibiting import cartel activity is based on the premise that such cartels restrict competition on the domestic market by excluding competitive alternative foreign products and that they therefore increase domestic prices of the product. Import cartels must be differentiated from export cartels in that they involve agreements among competitors in one or several countries relating primarily to the prevention of imports or to their restriction to certain quantities. Alternatively, import cartels may be part of an exclusive dealing arrangement between exporters and importers of a particular product with the aim of excluding other businesses from the importing activity.⁴⁷ The effects of these policies could also be quite detrimental to the international trade of developing nations.

Whereas import cartels are generally prohibited in developed countries, export cartels are usually exempted from the national antitrust legislation of these nations. These associations are specially exempted in Germany,⁴⁸

44. Edwards, Corwin, Trade Regulations Overseas (1966), p. 673

45. Kintner, Earl, et al., Groping for a Truly International Antitrust Law (1973-4), 14 Va. J. Int'l L. 75, at p. 99

46. In Germany, import cartels may be authorized if there is no or only insignificant competition among foreign suppliers. (Act Against Restraints of Competition, 1957, sec. 7 as am.) In Japan, import cartels may be authorized by the Export and Import Trading Act, 1952, sec. 7-2 if an imported product is subject to substantial restraint of competition at the place of export or to "excessive" competition among importers and if, as a result, price or other conditions of trade are "extremely disadvantageous" relative to those prevailing among importers in other countries or to the conditions of domestic trade in the exporting country. However, in 1970 there were only two import cartels in the former country and three in the latter. (Supra note 38, p. 9)

47. Supra note 38, p. 5

48. Act Against Restraints of Competition, 1957, sec. 6

Japan⁴⁹ and the United States.⁵⁰ In these countries, as well as in the United Kingdom, the operation of export cartels is required to be notified to competent national authorities. However, these notifications need only be published in the United States and in Japan.

Export cartel activities in developed countries are the least publicized of all cartel activities. In those developed countries where no notification is required, export associations are not controlled and may not even be specifically known to the competent authorities.⁵¹

The sponsorship given to national export cartels by western industrialized nations is a direct result of the earnings which can accrue to these countries from such associations. When enterprises in country A, or in the case of an international export cartel, enterprises in countries A and B, agree to raise prices to a standard level in sales to consumers of country C, countries A and B gain greater wealth, whereas they lose revenue and balance of trade if such practices are prohibited. However, the consumers in country C are adversely affected.

The acceptance of, and even encouragement given to, some export cartels in the industrialized world is borne out by figures published in 1971⁵² showing that there were eighty-one exempted export cartels in the Federal Republic of Germany at the end of 1970 and two hundred and fourteen in Japan alone at the end of March, 1970. There were thirty-five exempted national export associations in the United States at the end of October, 1970. The numbers in the first two nations may well be substantially higher at the

49. Export and Import Trading Act, 1952, sec. 5 and 11

50. Webb-Pomerene (Export Trade) Act, 1918 15 U.S.C.S. secs. 61-66 (1982). Here, the exemption only applies to national export cartels where these do not interfere with domestic competition. Agreements between a U.S. export cartel and a foreign export cartel are not permitted under the Act.

51. Supra note 38, p. 36

52. Ibid.

present date. Export cartels also exist in other developed market-economy states. However sufficient data regarding their presence is not available due to inadequacy of publication and it is therefore not possible to estimate the total number in these countries. Complete numerical information on domestic cartels with export activities is also unknown due to lack of available information.

Refusals to supply cartelized products, or the employment of other similar discriminatory treatment by export cartels, are likely to have an adverse impact on the export interests of developing countries. Major areas of concern to the Third World would include the negative effect on their balance of payments, especially where high import prices are fixed.

It must be mentioned, however, that transnational enterprises have apparently substantially abandoned many traditional cartel practices, except those allowed or encouraged by home governments, such as export associations. Professor Vernon explains the substantial decline in participation by transnational enterprises in cartels to be partially attributable to the "development of integrated parent-subsidary structures of multinational corporations".⁵³ The conclusion could be drawn from this analysis that a transnational enterprise does not need to participate in an inter-enterprise cartel arrangement, since it can place its own restrictions on international trade by creating a restrictive intra-enterprise arrangement.⁵⁴

V. The Fragility of Developing Countries' Position

An attempt by an economically weak country to unilaterally seek to control restrictive business practices of transnational enterprises, where these practices have an adverse effect on their trade and development, may encounter opposition from the international commercial sector which deals with that country. A transnational enterprise has the option of phrasing out, and

53. Vernon, R., Antitrust and International Business (1968), 46:5 Harv. Bus. Rev. 78, at p. 83

54. See Infra text ch. 6, p. 158-162

ultimately discontinuing, its operations in a developing country which imposes legal or administrative restrictions on the ability of that enterprise to make profitable investments. The enterprise can easily transfer its operations to a country which offers it a more favourable and accommodating investment climate.^{54a} This is all the more reason why the developing countries, through their majority representation in various international fora, have united in a common front to tackle the issue of restrictive business practices. In the absence of such unity, these countries can be easily pitted against each other by international conglomerates.

We will later examine the background to attempts by sovereign countries, especially the less developed nations of the world, to shift the balance of economic power away from the transnational enterprise to create a more equitable international trading environment. However, we will now scrutinize the world financial structure as it was established after World War II.

VI. The Establishment of the Bretton Woods System

The United States assumed unchallenged leadership of the Western World after the termination of the Second World War. With Europe divided ideologically along East-West lines after the creation of the "Iron Curtain", the United States set about its task of establishing, or rather re-establishing, then physically and economically devastated Western Europe and Japan as viable, industrialized nations. The economic planners of the United States convened a conference at Bretton Woods, New Hampshire in 1944 and, together with the leaders of Western Europe, created new international economic and financial institutions.

Firstly, the International Monetary Fund (the IMF) was brought into existence with the purpose of monitoring the gold-based, fixed exchange rate system and to provide credit to countries in financial difficulty. Secondly, the International Bank for Reconstruction and Development (the World Bank) was designed so as to arrange international capital transfers for development

^{54a.} Supra text ch. 2, p. 13

projects. The United States, through the Marshall Plan,⁵⁵ granted 13 billion U.S. dollars to war-torn Western Europe between 1947 and 1961 to aid in the reconstruction of those nations. Additionally, a suggested charter for an "International Trade Organization" (ITO) was published by the United States.⁵⁶ This was a consequence of discussions between that country and the United Kingdom and marked the first attempt to deal with international trade on a multilateral basis. A proposed "Havana Charter" was also drafted. The General Agreement of Tariffs and Trade (the GATT) was also established in the aftermath of the Second World War. Its creators had only intended this organization to be a subdivision of the ITO. However, the GATT developed into a major international trade institution after the collapse of the ITO.

These institutions were conceived primarily as a result of the development of ideas during the Second World War that recognized the need for international economic institutions to prevent the type of "beggar-my-neighbour" policies which had been so disastrous to world trade during the inter-war period and which some observers of international events held to be largely responsible for the outbreak of the Second World War itself.⁵⁷ Private international investment increased tremendously after the creation of these Bretton Woods institutions. The majority of this investment was direct rather than the portfolio capital of fixed-interest loans and securities which was predominant in the latter part of the previous century. Direct private investment by U.S. interests in Western Europe increased tremendously, with that country entrenching its position as the world's most important creditor nation, a position which it had taken over from the United Kingdom after the end of the First World War. U.S.-based enterprises established themselves in Western Europe so as to retain the markets they had created in the immediate post-1945 period.⁵⁸

55. Named after General Marshall, U.S. Secretary of State between 1947-49, the aid amounted to 3 per cent of G.N.P. of the United States during the period in which it was given.

56. U.S. Suggested Charter, Dep't of State Pub. No. 2598 (1946)

57. Jackson, John, World Trade and the Law of GATT (1969), p. 37

58. See OECD, International Investment and Multinational Enterprises; Recent International Direct Investment Trends (Paris, 1981), p. 5

The Bretton Woods system was conceived by the old Western World in order to facilitate:

- 1) the international transfer of capital and technology;
- 2) non-discrimination in international trade; and
- 3) the general lowering of trade barriers between nations for the particular advantage of the United States and her major economic allies.

The rules and policies of the IMF and of the World Bank operate in a manner to unfairly inhibit growth in less developed countries.⁵⁹ Additionally, although the GATT rules did not on its face initially appear to discriminate against less developed countries, its procedures and its structure as a "negotiating" institution from its inception implied that those countries with the least amount of bargaining power would be placed in a disadvantageous position.⁶⁰

The Bretton Woods economic order provided steady economic growth in the United States, Canada, Western Europe and Japan. Severe recession and inflation was avoided in these countries for a generation after these institutions were first established. U.S. military and foreign aid expenditures, U.S. foreign investments and U.S. purchase of foreign commodities marked the era of the late 1940's, the 1950's and the 1960's. This situation was beneficial to the United States and to the other countries in the industrialized Western World, since international investment by their transnational enterprises was substantially reimbursed through foreign purchases of their products and through the return of dividends, royalties and interests from those investments. The success of this economic structure for these nations before 1970 is borne out by the fact that once the system got on the way at the close of the 1940's, real GNP in most of these nations increased by 3 to 4 per cent per annum, with Japan's increasing at a remarkable rate of 9 to 10 per cent.

59. Johnson, H., Economic Policies Toward Less Developed Countries (1967), p. 17; Pincus, J. Trade, Aid and Development: The Rich and Poor Nations (1967), p. 368-73; see Infra text ch. 5, p. 107-8

60. Supra note 57, p. 669-70; Infra text ch. 5, p. 98-107

During the latter years of the 1960's, however, the balance of payments⁶¹ of the United States started to be in a deficit portion. This signaled a loss of confidence in the Bretton Woods economic structure during the 1970's and marked the beginning of the call for modification of the world economic structure to more adequately take into account the circumstances of third world nations, a process which we shall examine in detail subsequently in this thesis.

Firstly, however, we shall examine structures established by the Bretton Woods system to deal, inter alia, with the growing problem of restrictive business practices of transnational enterprises. We shall detail the attempts made by these structures to confront the issue and we shall show why these attempts failed.

VII. The International Trade Organization and the Havana Charter

A proposed Charter of the International Trade Organization was adopted in Havana in 1948 (the Havana Charter). This Charter, the precursor of all subsequent codes of conduct for transnational enterprises with respect to the issue of restrictive business practices, contained a chapter addressing the subject at hand. Chapter 5 would have prohibited "business practices affecting international trade which restrains competition, limits access to markets, or fosters monopolistic control".⁶² The Charter had gained over fifty signatures from member states but it was aborted when the United States withdrew its support. However, it was not objections towards those provisions of the Charter dealing with restrictive business practices which catalysed the United States' withdrawal of support; it appears to have been U.S. grievances over provisions relating to worldwide full employment, foreign investment and international commodity agreements which were the immediate and primary reasons. The demise of the Charter after the United States made it known that

61. "Balance of payments" is basically the difference between what a country spends, loans or invests abroad and what it receives from abroad.

62. Havana Charter For an International Trade Organization, Art. 46(1), State Dep't Pub. 3206, Commercial Policy Series 114 (1948)

it would not be signing the document is a clear illustration of the unchallengeable position of U.S. economic dominance and authority during that period of post-war international relations.

Although the Havana Charter never came into force,⁶³ some of its proposals with respect to restrictive business practices control appear in subsequent codes for transnational enterprises. We shall therefore, in view of the significance of this Charter, examine some of its provisions.

The Charter intended to prohibit restrictive business practices only whenever such practices had harmful effects on the expansion of national products or of international trade or interfered with the achievement of any of the objectives set out in the first Article of the document.⁶⁴ Consultation procedures would have been open to an affected member state which considered that a harmful restrictive business practices existed.⁶⁵ After that, a member state would have been free to set an investigation procedure in motion.⁶⁶ This would have been a far-reaching and significant provision at the time. The Charter would have sought to control harmful restrictive business practices by relying on the national legislation of the member states,⁶⁷ on international co-operation and combined action and interaction,⁶⁸ on studies conducted by the ITO⁶⁹ and on co-operation with other international organizations.⁷⁰

63. Only one country, Liberia, ratified the Charter without qualification.

64. Supra note 21

65. Ibid. at Art. 28(1)

66. Ibid. at Art. 48

67. Ibid. at Art. 50(1)

68. Ibid. at Art. 51(1)

69. Ibid. at Art. 49(1)

70. Ibid. at Art. 53(4)

Additionally, the Charter outlined a list of restrictive business practices,⁷¹ implicitly stating at the end of the subparagraph that the list was not necessarily closed.⁷² Lists of restrictive business practices outlined in subsequent codes such as the UNCTAD Principles and Rules and the OECD Guidelines bear close resemblance to the list appearing in the Havana Charter.

The Charter would have been only addressed to member states and would have conferred no rights or obligations on individual enterprises. Act 50(1) appeared to place an affirmative obligation on member states to prevent anti-competitive practices from occurring, rather than to merely adopt the policy of taking action after the act has occurred and a complaint been recorded by a member state. However, the policy of developed countries of not seeking to prevent transnational restrictive business practices which do not harm their individual country would have been endorsed.⁷³

Mr. Renouf, who was legal advisor to the Havana Trade Conference and to the Contracting Parties to the General Agreement, suggests that it may have been a mistake to attempt such a complete code initially.⁷⁴ Secondly, he opines that discussion over the issue of restrictive business practices should have been simultaneous with those of arrangements for the reduction of tariffs and quotas. In such a case, concessions may have been forthcoming from those opposed to antitrust regulation in any form in exchange for other advantages.

VIII. The Efforts by the United Nations Economic and Social Council

The United Nations (U.N.) came into being on October 24th, 1945 in the aftermath of the Second World War. Seated in New York, the United Nations was brought to life in San Francisco where its Charter was drafted. The United

71. Ibid. at Art. 46(3)(a)-(f)

72. Ibid. at Art. 46(3)(g)

73. Ibid. at Art. 54(1)

74. Renouf, The Abortive Charter for an International Trade Organization (1951), 29 Can. B.R. 53, at p. 55

Nations began with 51 states as members. The world body now consists of 169 member states. Among the purposes of the United Nations as outlined in Article 1 of its Charter is:

- 1) to maintain international peace and security;
- 2) to develop friendly relations among nations;
- 3) to achieve international co-operation in solving international problems; and
- 4) to be a centre of international harmonization for the attainment of these goals.

One of the organs created by the United Nations Charter is the Economic and Social Council (ECOSOC). Its functions include the initiation and formulation of studies, reports and recommendations with respect to international economic matters.⁷⁵

ECOSOC, realizing that the effort made at Havana was doomed to fail, approved a resolution on September 13th, 1951 which urged Member States to take:

"appropriate measures and co-operate with one another to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade, on the economic development of underdeveloped areas, or on standards of living."⁷⁶

75. United Nations Charter, Art. 62(1)

76. Report of the Ad Hoc Committee on Restrictive Business Practices, Annex 1, U.N. Economic and Social Council Res. 375 (XIII), Item 1, (1953), Official Records: 16 U.N. ECOSOC Supp. 11, ab 12, U.N. Doc. E/2380, E/AC 37/3

A report was submitted on March 30th, 1953 by an Ad Hoc Committee made up of ten countries and established by the Council. The report proposed draft articles of agreement on the prevention and control of restrictive business practices in international trade based on Chapter V of the Havana Charter.⁷⁷

Although the draft convention contained innovative provisions such as the establishment of an international agency to monitor the economic and political effects of any given restrictive business practice, the document was generally a weak attempt to bring certain measures into operation which would have sought to deter restrictive business practices from arising. There was to be no obligation, moral or legal, for a member state to accept any recommendation which called for tougher action on their part than that called for under the individual country's legal or administrative system. Additionally, action would only have been taken by unanimous consensus and recommendations would have been the only action which could have been adopted.

However, the United States opposed the draft vigorously and finally withdrew its support for the document.

Professor Rahl puts forward the thesis that the lack of widespread enthusiasm for an international antitrust agreement at that period in the history of international effort to deal with the problem was the primary reason why the ECOSOC attempt failed.⁷⁸ The learned author is supported in his theory by the comment submitted pursuant to the ECOSOC Resolution 487 (XVI) of July 31st, 1953.⁷⁹ While this is generally correct, the view of the United States that it was more advisable for countries to expend their energies on the development of their own national competition regulations, or on the enactment of legislation on the subject, if there was none previously, was one of the most significant reasons for the absence of enthusiasm. It was

77. Ibid., Annex II

78. Rahl, James A., "International Organizations and Treaties in Antitrust", at p. 427, Common Market and American Antitrust: Overlap and Conflict, Vol. IV, (1970), ed. by Rahl, James.

79. E/26/2/Add. 2 (April 4th, 1955)

therefore hoped that standard national antitrust laws would have been the result. However, at that time, the diversity of national approaches to the problem precluded the probability of worthwhile international regulation of harmful restrictive business practices. This, together with a lack of global expertise understanding the problem at hand and capable of creating mechanisms which would have made an impact, was the major reason for the failure of the ECOSOC efforts.

IX. Contribution of the Council of Europe to the Regulation of Restrictive Business Practices

The Council of Europe was one of the plethora of organizations on a regional level which was established after the termination of the Second World War, during the period of changing world international relations. The council was given its birth by statute signed in London on May 5th, 1949.⁸⁰ This Group is basically the political and cultural counterpart of the OECD, minus the non-European members of the latter.

The Council's Consultative Assembly, at its first session in 1949, requested the Committee of Ministers to draw up a convention for the control of international cartels.⁸¹ Consequently, a Draft European Convention for the Control of International Cartels was submitted for comment to member states and the Consultative Assembly in March, 1951 after being prepared by the Secretariat.⁸²

One of the major provisions in this Draft Convention was the stipulation that "all restrictive practices concluded between commercial enterprises within the jurisdiction of two or more High Contracting Parties shall be registered, that is, 'any combination, agreement or other arrangement between

80. The original ratifying member states of the Council of Europe were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Subsequent accessions have raised membership of the Council to eighteen.

81. See Robertson, The Council of Europe: Its Structure, Functions and Achievements (2nd. ed. 1961), p. 41-4

82. Ibid., p. 118; the provisions of this Draft Convention are stated in L'Huillier, Restrictive Business Practices, GATT, p. 81-6

private or public commercial enterprises which involves or is likely to involve restrictive practices'".⁸³ Restrictive business practices were to be registered with the European cartel board which would have been created. Control, and not prevention, of restrictive business practices was the aim of the registration requirements of the Draft Convention. Seven developed countries in Western Europe⁸⁴ have enacted provisions in their national law requiring that restrictive agreements between commercial enterprises concerning restrictive business practices be reported to the Government of the country, following the path set in the Council of Europe.

This draft, like its predecessors the Havana Charter and the ECOSOC Charter, did not seek to prohibit restrictive business practices per se. Prohibited restrictive business practices were defined as those:

- 1) which affect trade between member states, and
- 2) which "restrain competition, limit access to markets or foster monopolistic control".

In addition to its similarity with these two Charters in the definition of prohibited restrictive business practices, the Council's draft drew on the Havana Charter for its enumeration of the various types of practices.

In view of the novelty of its registration requirements at the international level, it would be beneficial to examine some of the proposals of the Council of Europe's Draft Convention in the area of restrictive corporate practices control.

The registration requirement sought to simplify investigation of the effect of a particular agreement. The cartel board would have had the power to investigate either on its own initiative or in response to a complaint.⁸⁵ Failure to register an agreement which should have been registrable would have

83. L'Huillier, ibid., p.84

84. Austria, Denmark, Finland, Netherlands, Norway, Sweden and the United Kingdom

85. L'Huillier, supra note 82, p. 84-5 at para. 299

raised the presumption of the presence of a "harmful" agreement or practice. Consequently, the burden of proving that the agreement or practice was not harmful would have then been on the accused enterprise or other party.⁸⁶

Complaints would have been brought to the cartel board either by member states or by any other affected party, whether a person, enterprise or an organization.

On the issue of consultation, the Council's Draft differed from that authored in the Havana and ECOSOC fora. Consultation would only have taken place after there had been an investigation into the facts of the alleged circumstances. Professor Jacques L'Huillier interprets this as an illustration of the intention by the Council to penalize harmful practices more severely than would have been the case under earlier draft conventions.⁸⁷

The Commission would have been bound to attempt to settle the dispute after the investigation if consultation procedures failed to arrive at a compromise. In the absence of a settlement, complainants would have had the innovative recourse to the European Court provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁸ Professor L'Huillier has however questioned the competence and impartiality of a court established and manned for purposes of human rights in this area of antitrust litigation.⁸⁹

The Council of Europe's Draft was as severely criticized as its Havana and ECOSOC predecessors. Some authorities argued that the investigation, consultation and other settlement procedures, as proposed, were too complex. Others felt that national sovereignty would have been too seriously compromised. Several member governments correctly opined that a global agreement would have been preferable to a European Convention which would have

86. Ibid.

87. Ibid., p. 84 at para. 297

88. Ibid., p. 86 at para. 304

89. Ibid.

perforce been inapplicable to United States-based cartels. They however committed an error of judgment in suggesting that it was more advisable to await the results of ECOSOC's effort at an agreement. That effort collapsed, as previously discussed.⁹⁰ The Council of Europe's attempt to gather agreement among Western European countries for the regulation of restrictive business agreements and practices fell through, this time not largely due to the withdrawal of United States' support but, in the absence of participation by the United States, due to the lack of political will on the part of the Western European states to conclude a regional agreement which would have been restricted without North American involvement.

X. GATT's Failure to Address the Issue of Restrictive Business Practices

As stated previously,⁹¹ the GATT was intended to be a subdivision of the ITO. Conceived in October, 1947, the GATT has developed to play a major role in the free trade system which the United States professed to champion in the aftermath of the Second World War. International trade barriers and tariffs were lowered to facilitate the increase in trade and exchange of goods between nations. The unconditional most-favoured-nation clause, which sought to ensure the same treatment for each contracting party to the agreement by a second party as that to which the most favourably treated third country was entitled, was the central doctrine of its convention. In essence, this doctrine was a pledge against discrimination and preference.⁹² Although it was an intergovernmental agreement, the GATT did not imply the creation of an organization in the full sense of the term, nor was it the intention of its twenty-three original member states to establish a complete international trade and economic treaty. The GATT was only to be an agreement of provisional application lasting until the Havana Charter was ratified and the ITO established.

90. See supra text, p. 26

91. See supra text, p. 20

92. See Memorandum on the Most-Favoured-Nation Clause as an Instrument of International Policy, (1933), p. 4, pub. by the Royal Institute of International Affairs

Although the GATT took up the issue of the international control of restrictive business practices after the failure of the Havana and ECOSOC efforts, at its 1954 Conference which was summoned to consider revising the General Agreement, the forum has never been successful in devising an agreement dealing with the problem of restrictive business practices. This is to a large extent due to the fact that the GATT was never intended to address the issue of restrictive business practices. It had been contemplated that the ITO Charter would sufficiently cover this area of competition policy when it came into effect. The GATT membership finally requested the Secretariat in 1957 to collect and analyze information on prevalent restrictive business practices, including any proposals for intergovernmental control of their harmful effects in international trade. The L'Huilier Report, entitled Restrictive Business Practices, GATT, was submitted to the GATT members in November, 1958 and was published by them in May, 1959.

A Group of Experts from the United States, Japan and Western Europe was appointed by the GATT's Executive Secretary in November, 1958 to study the restrictive business practices problem as it related to the activities of international cartels and trusts. The Group recommended, though disagreeing on the procedure that should be adopted, GATT involvement in the regulation of restrictive business practices in international trade. Direct international consultations were suggested with a view to the elimination of the harmful effects of particular restrictive practices.

In the majority report issued by the experts from Austria, Canada, Germany, Japan, the Netherlands, Switzerland, the United Kingdom and the United States, the conclusion was reached that it was presently unrealistic to establish a multilateral agreement for the control of international restrictive business practices. The absence of a consensus among nations and the lack of political feasibility at that time for national or supranational regulation of transnational enterprises were the reasons behind their conclusion.^{92a}

92a. The minority report submitted by France and the Scandinavian countries would have granted the experts discretionary power to partake in the consultation procedures between the member states, as well as the power to actively judge the effect of particular restrictive business practices in question.

Finally, a statement was issued by the GATT on November 18th, 1960 in the form of a Decision. The Preamble, although acknowledging that restrictive practices may have a negative effect on the expansion of world trade and on the economic development of individual countries, concluded that "in present circumstances it would not be practicable for the Contracting Parties to undertake any form of control of such practices or to provide for investigation".⁹³

All the GATT did was to recommend that bilateral or multilateral consultations should take place between member states in order to discover means through which the harmful effects of restrictive business practices could be eliminated. No particular machinery or institutions were established by that body to monitor or control restrictive business practices.

XI. Reasons for Failure to Establish Convention on Restrictive Business Practices in Late 1940's and 1950's

The underlying cause for the futility of all efforts in the late 1940's and the 1950's to draw up a multilateral treaty governing the harmful effects of restrictive business practices in international trade stemmed from the general feeling among the more developed countries, particularly the United States, that the time had not yet arrived for such a project to be attempted. These countries felt that their national antitrust regulations should first be standardized and that general expertise on the issue should be augmented before such an ambitious step could be taken. There was no political will on the part of the developed nations to bring about an international agreement at this time. Indeed, as we have seen, firms such as export cartels were tolerated even though they generally adopted restrictive agreements in their dealings which hurt international trade, especially the trade of less developed countries. Indeed, in light of subsequent events and developments which we shall examine later, it is arguable whether the United States and her major economic allies and trade partners genuinely wished to implement an international agreement on restrictive business practices at all during the

93. Preamble, 9th Supp. B.I.S.D. 28

period before the mid-1970's. It was only on the impetus and initiation of the developing nations, recently politically sovereign, in the period of the 1970's, that the developed countries commenced serious efforts to adopt concrete procedures which would result in the conclusion of an international agreement. However, there was no co-ordinated external pressure on the developed countries in the post-war era until the 1970's to monitor those restrictive business practices emanating from their business enterprises which affected the economic development of less developed countries. The international economic structure as devised by the West in the late 1940's, with its disadvantages to third world countries which we shall later outline, went basically unchallenged for almost a quarter century.

XII. Conclusion

In this chapter, we have examined the problems involved in the control of restrictive business arrangements which affect a nation state where those arrangements are formulated outside its borders. We have sought to detail how the United States has approached this complex issue. We have also shown the reluctance of the political directorate in the western developed countries to control, far less to eliminate, those activities of their export cartels which do not adversely affect their individual national interests, although they are detrimental to other nations, particularly those in the developing world. We have also mentioned the particular difficulties encountered by home countries, especially those in the Third World, vis-à-vis the transnational nature of foreign-controlled enterprises. Finally, we have mentioned the unsuccessful early post-1945 international and European efforts to address the issues of corporate restrictive conduct.

In our third chapter, we shall begin to examine recent efforts undertaken at the regional level to deal with restrictive business practices. We shall also examine bilateral and multilateral co-operation and consultation procedures involving the United States with respect to corporate activities of a restrictive nature.

CHAPTER III

Consultation Agreements and Pre-1976 Regional and Organizational Trade and Investment Codes

I. Introduction

In our first section of this chapter, we shall examine bilateral consultation, notification and co-operation arrangements involving the United States as these arrangements relate to the detection and control of restrictive business practices. We shall also analyze whether this procedure, which was in effect the alternative to an international antitrust agreement during the 1950's, 1960's and early 1970's, has been to any extent successful in its resolution of international disputes concerning restrictive business practices. In our fourth section, we shall detail and analyze the co-operation procedures within the OECD context.

II. Bilateral Consultation and Cooperation Procedures

A. Canada-United States

The efforts during the 1950's to address the issue of international control of restrictive business practices revealed the need to promote consultation between nations, to increase relevant expertise and knowledge on the part of administrative authorities and to create greater international co-operation. It was within this context that the United States in 1959 concluded an informal Antitrust Notification and Consultation Procedure with its northern neighbour and principal trading partner, Canada. Arranged between Canada's Minister of Justice and Attorney General, Davie Fulton, and the U.S. Attorney General, William Rogers, the agreement called on the two administrations to consult each other when enforcing their own antitrust or anticombines legislation where there was the possibility that the interests of the other country would be affected by such an enforcement. However, there was no right of reversal by one country of the actions or decisions of the other.

As a follow-up to this understanding, a Joint Statement was issued in November, 1969 by the Canadian Minister of Consumer and Corporate Affairs, Ron Basford, and John Mitchell, Attorney-General of the United States.⁹⁴ The statement announced a new era in antitrust enforcement relations between the two countries with respect to restrictive business practices in international trade. It read in part:

"Each country will insofar as its national laws and legitimate interests permit, provide the other with information in its possession of activities or situations, affecting international trade, that the other requires in order to consider whether there has been a breach of its restrictive business practices laws."⁹⁵

Mention is also made of the primary concern of issues relating to cartels and other restrictive agreements as well as to those restrictive practices of transnational enterprises which affect international trade.

On March 9th, 1984 a further Memorandum of Understanding was reached between the two countries.^{95a} Signed by Judy Erola, the then Minister of Consumer and Corporate Affairs in Canada, and the United States' Attorney-General, William French Smith, this Memorandum is expressly stated to have superseded the 1959 and 1969 Understandings between the two countries. The agreement reiterates the recommendation that one country notify the other when their antitrust investigations or proceedings involve the national interests or sovereignty of the other country.

The new agreement contains an apparent concession by Canada to United States' interests by providing that:

"If One Party seeks to obtain information located within the territory of the other in furtherance of an antitrust investigation or inquiry, the other Party will not normally discourage a response."

94. U.S. Dep't of Justice Press Release, November 3rd, 1969 (mimeo)

95. Ibid., p. 4-5

95a. Memorandum of Understanding between Canada and the United States as to Notification, Consultation and Co-operation with respect to the Application of National Antitrust Laws, Canadian Competition Policy Record (1984), Appendix I.

The paragraph continues to request that a country which believes that the other country is encroaching on its national interest or sovereignty should notify and consult the offending country before taking action in response to the perceived infringement of its sovereignty. This provision has clearly been influenced by the Uranium Antitrust Litigation in the later years of the 1970's and the early 1980's, during which Canadian political and antitrust authorities frustrated attempts by U.S. authorities to have documents located in Canada produced before U.S. courts. At stake here is the practical effectiveness of U.S. extraterritorial antitrust application of its laws on to Canadian territory where U.S. corporations and other business enterprises have substantial interests and investments.

Finally, the Memorandum does recognize that the contracting countries should carefully consider "the significant national interests" of the other during an investigation, inquiry or prosecution.

These arrangements have produced greater harmony and co-operation between U.S. and Canadian antitrust officials and is a reflection of the general "close relationship" existing between the two countries on the level of governmental administration. Indeed, the task force report on foreign ownership of Canadian industry prepared for the Privy Council Office in 1968 concluded that the 1959 agreement had served to reduce tension and had created an atmosphere of increased understanding between the two countries on antitrust matters of mutual concern.⁹⁶ However, the arrangement is a weak one and primarily depends on the good intentions of both parties. It will be ineffective if either party refuses to co-operate with the other, since there is no obligation to consult or to notify. Neither is there any procedure by which the judicial or administrative body of the affected country can reverse or modify the actions or decisions involved. Additionally, the presence of Canadian "blocking legislation", preventing certain information and documents from being disclosed to U.S. antitrust officials and preventing the enforcement of judgments in Canada which have been given by U.S. courts on antitrust matters which Canada perceives as an infringement of its sovereignty, is enough illustration that outstanding problems still remain unresolved by these arrangements.

96. Report of the Task Force on the Structure of Canadian Industry, Foreign Ownership and the Structure of Canadian Industry (1968), p. 333-35 [the Watkins Report]

B. Federal Republic of Germany - United States

The United States and the Federal Republic of Germany also entered into a mutual co-operation agreement regarding restrictive business practices on June 23rd, 1976.^{96a} This agreement is designed to complement their earlier Friendship, Commerce and Navigation Treaty regarding co-operation in the control of restrictive arrangements affecting their interests. Mr. Joel Davidow, a former Director of the Policy Planning Division of the U.S. Justice Department's Antitrust Division, has stated that the accord is primarily a codification of existing practice, with its chief practical significance being the encouragement of co-operation by other United States' agencies with Germany requests for information.⁹⁷

C. Australia-United States

The United States and Australia entered into a co-operation agreement on antitrust matters on June 29th, 1982 after lengthy negotiations.^{97a} Under this agreement, the two countries will seek to avoid conflict with respect to the investigation of antitrust matters and "to give due regard to each other's sovereignty and to considerations of comity."⁹⁸ A system of notification of, and consultation over, antitrust actions was established.⁹⁹ The creative and novel aspect of this agreement was the U.S. administration's concession that it will appear in private antitrust proceedings when requested by the Australian government and "shall ... report to the court on the substance and outcome of the [prior intergovernmental] consultations."¹⁰⁰

96a. Agreement between the United States and the Federal Republic of Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices (reported in 15 Int'l Leg. Mats (1976), p. 1282-87)

97. Interview with Mr. Joel Davidow, 754 Ant. & Tr. Reg. Rep. (BNA), at A-18 (March 9th, 1976)

97a. Agreement Relating to Co-operation on Antitrust Matters, United States - Australia, June 29th, 1982, T.I.A.S. No. 10, 365, 5 Tr. Reg. Rep. (CCH) sec. 50, 440

98. Ibid., Art. 2(5)

99. Ibid., Arts. 1-2

100. Ibid., Art. 6

Subsequent bilateral agreements with the United States as one of the contracting parties would most likely contain a provision similar to Art. 6.

D. Restrictive Business Practices Clauses in Treaties of Friendship, Commerce and Navigation

Inserted in the various Treaties of Friendship, Commerce and Navigation (F, C & N), negotiated by the U.S. State Department pursuant to their foreign economic policy, is a clause whereby the United States and the other country agree to mutually consult with respect to anti-competitive activities in international trade and to take appropriate measures to eliminate their harmful effects.

The clause only refers to restrictive business conduct which adversely affects trade "between the two contracting parties". It therefore follows that the clause does not apply if an enterprise incorporated in one contracting state arranges with an enterprise in a third state to adversely affect the trade between one of the contracting states and the third state.

As in the bilateral arrangements previously discussed, there is no obligation to consult with each other¹⁰¹ or to take effective steps to curb harm emanating from one state which adversely affects the other as a consequence of restrictive corporate practices. Therefore, although these clauses provide an opportunity for discussion and notification between the two contracting states, their effectiveness again depends on the good intentions of the two states involved since the arrangements are purely voluntary in nature. Although the United States had concluded twelve F, C & N Treaties containing a restrictive business practices clause by 1983,¹⁰² the provision

101. See eg United States v R.P. Oldham Co., 152 F. Supp. 818 (N.D. Calif. 1957)

102. The countries with which the United States has concluded Treaties of Friendship, Commerce and Navigation containing such clauses are Columbia (1935), Italy (1948), Ireland (1950), Denmark (1951), Israel (1951), Greece (1951), Japan (1953), the Federal Republic of Germany (1956), Korea (1956), Nicaragua (1956), Pakistan (1959) and France (1959).

had not been invoked by that country up to 1981 and had only been used on two occasions by the other contracting countries, once by Italy and once by Japan.¹⁰³ Indeed, Professor Rahl asserts that in practice the consultation procedure provided for has not resulted in effective resolution of disputes concerning transnational restrictive business activities or in relief of tensions connected with attempted U.S. extraterritorial antitrust enforcement. Additionally, on the few occasions when such consultations have taken place they have occurred after the antitrust investigation or lawsuit at a time when such consultation would be practically worthless.¹⁰⁴ Previous consultation may very well have had a greater effect on a reasonable resolution of the incidents.

III. International Direct Investment Between 1960-73¹⁰⁵

The period ranging from the early 1960's to the mid-1970's witnessed a rapid growth in international direct investment both in absolute terms and relative to the growth of various economic aggregates such as visible trade, domestic investment and gross national product (G.N.P.) Continental countries, particularly France and the Federal Republic of Germany, had risen to be leading nations in terms of export of direct investment, although the United States remained the primary source. International direct investment was heavily channelled towards developing sources of primary products and oil in the early 1960's and mid-1960's. As the period progressed, however, a substantial increase in direct investment in manufacturing in the United States, Western Europe and Japan occurred. This was especially due to the necessity for large firms to protect their markets, developed through the post-war increase in international trade, which were threatened by the rise in trade barriers in the industrialized world and by the growth of enterprises in the domestic markets of these countries.

103. This was in the Matter of Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C. 1960). The matter was however disregarded both by the U.S. State Department and by a U.S. Court.

104. Supra note 78, p. 449

105. The information for this section was primarily obtained from the OECD Publication on International Investment and Multinational Enterprises: Recent International Direct Investment Trends (Paris, 1981), p. 5-6

The average annual growth rate of total outward international direct investment flows in current dollars in the thirteen leading industrialized nations among the free market economies¹⁰⁶ was close to 12 per cent during the 1960-73 period. This growth rate was approximately a 150 per cent increase over that of the G.N.P. of these countries in current dollars and practically the same as the 14 per cent growth rate in international trade. This period also saw the rapid growth of the largest transnational enterprises, both in terms of size and in terms of the international scope of their operations. Additionally, an increasing number of previously national enterprises joined the ranks of the transnational enterprise.

The establishment of the OECD was a major consequence of the significant increase in direct investment between the industrialized western states beginning in the early 1960's. We shall now comment on the formation of this important organization and critically examine its co-operation procedures with respect to restrictive commercial activities.

IV. The Organization for Economic Co-operation and Development

A. Formation of the Organization

The OECD was founded on the assumption, correct as future trends proved it to be, that the world was entering a new era of international economic relations with the global economic development, the rise in international direct investment and the growth of transnational trade which we were to witness in the period of the 1960's and early 1970's. Headquartered in Paris, the Organization came into being by Convention on Sept. 30th, 1961 after eighteen major industrial nations of Western Europe,¹⁰⁷ the United States,

106. These nations are Australia, Belgium, Canada, Federal Republic of Germany, France, Italy, Japan, Netherlands, Norway, Spain, Sweden, United Kingdom and United States.

107. The eighteen Western European member nations of the OECD are Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. The Socialist Federal Republic of Yugoslavia participates in certain work of the OECD, especially in the Economic and Development Review Committee. (Agreement of October 28th, 1961).

Representatives of the European Economic Community and of the European Free Trade Association, founded in 1959, also take part in certain aspects of the Organization's affairs.

Canada, New Zealand, Japan, Australia and one major developing country, Turkey, signed the document in Paris on Dec. 14th, 1960. The organization is basically the successor to the Organization for European Economic Co-operation, which had by 1960 fulfilled the primary purpose of its existence with the completion of the distribution of "Marshall Plan" aid to Western Europe.

The first article of the OECD Convention is illustrative of the three principles on which its signatories felt that mutual national interests could be best promoted, viz:

- 1) the achievement of economic growth, employment and a high standard of living in member countries;
- 2) the financial stability and expansion of world trade on a non-discriminatory basis in accordance with international obligations; and
- 3) the basic responsibility of the wealthiest nations to assist less developed countries with the consequence being the development of the world economic status.

The OECD has to be viewed in the perspective of its vast significance as an international organization in terms of politico-economic size, power and influence. Although member nations together contain only 20 per cent of the world's population, they were responsible for approximately 60 per cent of the world's industrial production, 70 per cent of its trade and 90 per cent of the aid dispersed to developing countries during the mid-1970's.¹⁰⁸ The OECD also contains the home countries for the vast majority of the world's transnational enterprises as well as the host countries for the majority of foreign investment by these enterprises. Indeed, transnational enterprises exercise approximately 75 per cent of their activity in the OECD geographical area.¹⁰⁹

108. The U.S.A.-B.I.A.C. Committee on International Investment and Multinational Enterprises, A Review of the Declaration on International Investment and Multinational Enterprises (Nov., 1976), p. 13

109. Supra note 3 at p. 149

B. Co-operation Procedures

In 1967, the OECD adopted recommendations to member countries for prior notification to be given to other member states when the former seek to apply extraterritorial antitrust legislation in a manner conflicting with the concept of permanent sovereignty.¹¹⁰ Recommendations were drawn up for increased co-operation between member nations in the area of restrictive business practices in international trade when an issue arose with regard to enforcement proceedings and exchange of information. Increased international co-operation was also urged with respect to the development and application of restrictive business practices regulations.

The perception held by the western developed world of restrictive business conduct carried on in international trade is clearly revealed in the third preamble, where it is stated that the diminution of free competition through restrictive business practices may have an adverse effect on achievement of the trade expansion and the economic growth aims of member countries as outlined in Art. 1 of the OECD Convention. We shall examine this perception from a closer viewpoint later on in this thesis and compare it to the view held by the developing world concerning restrictive business practices.

In 1973, the OECD recommended and implemented a voluntary consultation and conciliation procedure on restrictive business practices affecting international trade. Provision was made for a member country which considers its interests to be substantially and adversely affected through the restrictive conduct of a foreign-owned or foreign-controlled enterprise to discuss the problem with the officials of the home country. If the home country agrees with the requesting country's opinion, it is urged to use its "good offices" in an attempt to persuade the enterprise in question to take remedial action or, alternatively, should itself try to eliminate the harmful conduct through appropriate action. This is, of course, with regard to the legislative powers and legitimate interests of the home country.

110. Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade of October 5th, 1967 [derestricted OECD doc. C [67] 53 (Final) October 10th, 1967].

The member countries involved are advised to take the issue to the OECD Committee of Experts on Restrictive Business Practices, which will endeavour to reach a satisfactory settlement in the event of a failure to find a solution through the bilateral discussions.¹¹¹

The Organization also adopted a recommendation on restrictive business practices relating to the use of patents and licences in the following year.¹¹²

Finally, a recommendation was accepted which called for closer co-operation within the OECD on the issues of voluntary notification, exchange of information, co-ordination of action, consultation and conciliation.¹¹³ Declared to have repealed and superseded the 1967 and 1973 Council Recommendations discussed above, the 1979 Recommendation is basically a consolidation of the two previous agreements. There is the additional stipulation that a member state which considers that a particular investigation or proceeding involving restrictive business conduct encroaches on its own sphere or sovereignty can draw its opinion on the matter to the attention of the investigating country.¹¹⁴ It is recommended that the latter country give "full and sympathetic consideration" to those views without compromising its own sovereignty.¹¹⁵

111. Recommendation of the Council Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade of July 3rd, 1973 [derestricted OECD doc. C [73] 99 (Final) December 20th, 1973].

112. The Recommendation was adopted on January 22nd, 1974

113. Recommendation of the Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted by the Council on September 25th, 1979.

114. Ibid. at para. 3(a)

115. Ibid. at para 3(b)

We can gain insight into the practical effectiveness of these recommendations through an analysis of the OECD Report on the operation during the period 1967-75 of the 1967 recommendation.¹¹⁶

During the nine-year period, there were 137 cases giving rise to notification, exchanges of information or consultations between member states. The report notes that the number of cases of contacts increased over the period. The United States initiated over one-third of all contacts during the period and was again the member nation contacted on more occasions than any other country, although the percentage in this case was only about 13 per cent of the total.

The vast majority of cases of contacts involved notifications. This was normally conducted by letter or by cable to whatever agency the foreign government had listed with the Organization, which was usually its foreign office.

There were also twenty cases of exchange of information and fifteen involving consultations. International price and market-sharing agreements - two traditional types of restrictive business conduct - were the major types of restrictions involved in the contacts, although mergers and acquisitions were also the subject of many contacts.

The Report attempts to reach conclusions on certain issues, even though a sound evaluation of the notifications, exchanges of information and consultations is difficult due to the minimal provision of information detailed by countries involved in the procedure.

Almost 50 per cent of the consultations in the period was between Canada and the United States, a reflection of the substantial investment by U.S.-controlled enterprises and by U.S. citizens in the Canadian economy and

116. OECD: Report on the Operation of the 1967 Council Recommendation Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade During the Period 1967-75 (reproduced in 22 Ant. Bull. (1977), p. 459).

industries and of the close nexus between Canadian trade and U.S.-based parent companies.¹¹⁷

The Report notes that in the majority of cases of notification, no response was required or sought from the notified country since the notifying country was usually exercising its national jurisdiction over domestic subsidiaries of foreign-based parents. The notification procedure may therefore have very well been taken as a matter of diplomacy and international courtesy rather than as a process through which to obtain more information for an antitrust inquiry.¹¹⁸

In some of the notification cases, parallel proceedings were subsequently initiated in the country notified, while in other cases, a satisfactory solution was reached without legal proceedings being initiated in the notifying country.¹¹⁹

On the issue of exchange of information, the Report concludes that the requesting country "has often produced a reaction in the notified country leading to re-consideration of a case or investigation or the opening of investigations or proceedings in the notified country".¹²⁰

Additionally, the responding countries have always co-operated as far as they legally can by supplying information requested to a requesting member country. This has sometimes led to the initiation of an enquiry or proceeding.

117. Ibid. para. 9

118. Ibid. para. 11

119. Ibid. para. 13

120. Ibid. para. 14

The Report concludes by noting that:

"[T]he Recommendation has been a particularly useful instrument for exchanging information on the activities of multinational enterprises suspected of restricting competition in one or more national markets."¹²¹

Although the OECD Report exemplifies the quantity of information on transnational enterprises which is exchanged among the leading OECD nations, it is apparent that these co-operation procedures are "more likely to be used to complain about antitrust investigations or prosecutions which affect the complaint's national sovereignty than to seek relief against a restrictive business practice".¹²² One only has to compare the quantity of instances in which notification of enforcement proceedings, and consultations consequent on them, have been utilized during the period under examination in the Report with the amount of times the provision for co-ordination of efforts against harmful restrictive business practices has been used in order to perceive the accuracy of Mr. Davidow's statement. Indeed, the 1973 recommendation of a voluntary consultation and conciliation procedure dealing directly with the curtailment of harmful transnational anti-competitive conduct was never used.¹²³

Mr. Davidow concludes that national law, not international co-operation or conciliation, remains the major method for the elimination of those restrictive business practices which nations are willing to prevent or punish.¹²⁴

121. Ibid. para. 17

122. Davidow, Joel, Quixotic Quest: The Seeking of a World Competition Code, p. 57. (Paper presented at a Conference on International Regulation of Restrictive Business Practices in Airlie, Virginia on Nov. 10th, 1979.)

123. Ibid. Additionally, the 1960 GATT recommendation for bilateral or multilateral consultations was never applied in practice.

124. Ibid.

Although the 1979 co-operation procedures have not resulted in, and indeed were not intended to result in, the elimination of restrictive business practices in international trade, they have propelled increased co-operation between the members of the OECD on matters relating to antitrust and competition policy. They have probably eased tensions through the allowances for diplomatic courtesies which are illustrated by the prior notification provisions. Additionally, an opportunity for dialogue and discussion means an opportunity for the interests of the notified country to be taken into account in proceedings within the notifying country. These procedures will not, however, resolve the conflict created through the insistence of the United States to enforce its antitrust legislation extraterritorially and the determination of other industrialized OECD nations to resist those actions in order to protect their sovereignty.

In the following section, we shall briefly discuss the voluntary International Chamber of Commerce guidelines for international trade and investment. We shall then conclude this chapter by commenting on two legally binding agreements which relate to competition policy and to restrictive arrangements and practices affecting their respective regions, viz. the Treaty of Rome and the Investment Code of the Andean Common Market.

V. The International Chamber of Commerce's Regulation of Trade and Investment

The United States' Council of International Chamber of Commerce undertook the challenge of devising voluntary standards of behaviour for foreign investors in 1952. The Council's draft was submitted to the International Chamber of Commerce (I.C.C.). However, this effort was abandoned after two years of concerted endeavour to develop a set of guidelines for business conduct. The failure of this attempt was partly due to the great diversity among various industries and businesses and partly due to the belief, held particularly by the business community in the United States, that guidelines for international business might easily be interpreted by host country authorities as principles of rules to be applied even in circumstances where it's originators did not intend them.

The I.C.C. itself issued a set of Guidelines for International Investment in 1972. These Guidelines embody recommendations for appropriate action to be taken by governments and by private investors in order to create a more favourable environment for foreign private investment. The first multilateral voluntary investment code, this document is based on the view that mutual trust and understanding between international investors and national governments, as well as co-operation between them on basic issues affecting their relationship, is a vital prerequisite for the maximization of the beneficial effect of foreign direct investment.¹²⁵

The I.C.C. Code is purely voluntary, bestowing no obligations on any of its addressees - whether home or host countries or investors - to observe its recommendations. Its conservative guidelines have had a negligible impact on the conduct of transnational enterprises as far as their indulgence in restrictive corporate behaviour is concerned.

Additionally, over two hundred transnational enterprises, mostly in the United States, have devised their own codes of conduct. Some of these codes, including that of the Caterpillar Tractor Co.,¹²⁶ are quite lengthy and cover many phrases of conglomerate operations. General themes embodied in the codes include exhortations to corporate executives to perform their management functions and business affairs in an ethical manner, to abide by all home and host country laws and to be proper corporate citizens.

VI. The Treaty of Rome

The Treaty of Rome,^{126a} which established the European Economic Community on March 5th, 1957, represents the most successful international agreement addressing the issue of restrictive business practices control. The overriding purposes of the Treaty are:

125. Weisglas, Max, International Business and the United Nations Code (1982), 12 C.T.C. Reporter 16, at p. 17

126. Caterpillar Tractor Co., A Code of Worldwide Business Conduct (Oct. 1st, 1974)

126a. Treaty Establishing the European Economic Community, 298 U.N.T.S. 3

- 1) to encourage free trade within the Community, partly through the elimination of private restraints of trade within the Common Market as well as governmental restraints such as tariffs and quotas and partly through the removal of abuses by transnational enterprises which arise out of their attainment of a dominant position within markets in member states, and
- 2) to facilitate the economic integration of the Community.

Art. 85 of the Treaty seeks to prohibit agreements, decisions and concerted practices which affect trade between member nations and which prevent, restrict or distort competition within the Common Market. Any prohibited agreement or decision shall be void ab initio. Art. 86, meanwhile, prohibits an abuse by one or more enterprises of a dominant position, within all or a substantial part of the European Common Market, which may affect trade between member states.

An innovative feature of the Treaty of Rome - at least at the time of its adoption - is its establishment of machinery to enforce its regulations concerning anti-competitive activities of private enterprises through regional administrative and judicial institutions. The Treaty provides for the enforcement of rights and duties of both persons and member states. The Commission of the twelve-member European Economic Community is responsible, inter alia, for implementing treaty prohibitions against restrictive business practices affecting trade between member states, while the European Court of Justice interprets the Treaty's regulations and rules on issues arising out of the document. The prohibitions addressed to transnational enterprises, individual investors and member states are binding on the relevant addressees and, along with the legally enforceable judicial decisions and the Community's rules and decisions, take precedence over existing domestic law where there is a conflict.¹²⁷

National courts, in an act indicative of the loss of individual national sovereignty to a supra-national organization, must apply community law where appropriate in a case before them. Additionally, Art. 177 of the Treaty

127. Wilham v Bundeskartellamt, [1969] Comm. Mkt. L.R. 100, Amsterdam Bulb B.V. v Productshap Voor Siergewassen, [1977] Comm. Mkt. L.R. 218

stipulates that each of the highest national courts must request a preliminary ruling from the European Court of Justice interpreting the Treaty and the rules or regulations of the Commission in order to ensure the uniformity of the various national judicial interpretations of community competition regulations.

The broad language present in the Treaty's regulations relating to the control and prohibition of harmful restrictive conduct of transnational enterprises is balanced by the developing body of precedents available for guidance. The Treaty seeks the harmonious application of its principles by administrative and judicial agencies equipped with implementation and enforcement authority. The legally binding regulations relating to harmful restrictive conduct have had an influential impact on the activities of business enterprises within the Community.

Additionally, the Community recognizes the "effects doctrine" and subjects foreign trade which has anti-competitive effects within the Common Market to its competition rules, regardless of where that trade takes place.

It is submitted that the ability of the Commission to legally enforce the Treaty's competition regulations and to implement its prohibitions creates a more effective Code than if it had been merely a voluntary document.

Once there exists genuine political will on the part of member states and courage on the part of the judiciary to broadly interpret the competition principles, there is a stronger chance that the Commission would succeed in removing obstacles to competition within the Community than if no enforcement mechanism had been created.

VII. The Investment Code of the Andean Common Market

A second example of a mandatory regional international agreement on restrictive business practices is the Investment Code of the Andean Common Market.¹²⁸ Brought into being on May 26th, 1969 by six South American

128. Agreement on Andean Subregional Integration (May 26, 1970), [1970] 2 Registro Oficial No. 345 (translated in 8 Int'l Leg. Mats 910 (1969)).

countries,¹²⁹ the letter and spirit of the Code has been domestically enacted into the laws of the member nations.

The Code's three principal purposes are:

- 1) the exclusion of foreign investments from key sectors of the Market's economy;
- 2) the reduction of foreign participation in local companies to a minority position;
- 3) the diminution in the reliance on foreign technology, while stimulating the development of local technology.

The agreement is based on the right of each member state to exercise full permanent sovereignty over its resources and economic activities in its own territory,¹³⁰ a concept which, as we will see in our following chapter,¹³¹ has not been promoted by the OECD Guidelines.

The integration process is conducted by a Commission, a political body whose Decisions are binding on member nations, and by a Junta, a technical secretariat which supervises the implementation of the Code and the Decisions of the Commission.

Decision No. 24 of the Andean Commission,¹³² promulgated pursuant to Art. 24 of the Agreement on Andean Subregional Integration, contains Articles prohibiting member countries from entering agreements for the transfer of foreign technology, patents or trademarks which contain certain restrictive clauses. The Code contains regulations limiting the remittance of profits by transnationals which operate within the Common Market. The Treaty also

129. Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela. Chile withdrew from the Pact in October, 1976, indicating as one of its chief reasons for so doing, the discouragement resulting from the Code with respect to foreign capital.

130. Decision No. 24 of the Andean Commission, 4th Consideration

131. Infra text ch. 4, p. 91-3

132. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, (Dec. 31st, 1970), [1971] Registro Oficial No. 264 (translated in 11 Int'l Leg. Mats 126 (1972); translated and reprinted in 10 Int'l Leg. Mats 152 (1971)).

differentiates between the treatment to be accorded to enterprises depending on their economic status and nationality. Two illustrations of this policy are the presence of an investment screening mechanism establishing high standards of entry for foreign investors and, secondly, a reservation of certain economic sectors, such as commercial banking, public utilities, media and insurance industries, for domestic enterprises.

Additionally, the Andean Investment Code redefines two major market-economy corporate and investment principles for its own purposes. Firstly, the Code deems subsidiary and parent companies to be a single unit, thus prohibiting them from entering contracts having legal effects with each other. Secondly, the principle of "arms-length" pricing has been extended to apply to intra-corporate transactions by transnational enterprises. Transfer pricing practices, which are prevalent among these enterprises in their international operations, are therefore illegal within the Andean Common Market.¹³³

This attempted regulation of the harmful effects resulting to national and regional trade from activities of foreign-owned or foreign-controlled enterprises by the Andean countries met with an initial negative reaction from transnational enterprises with interests in the region. Foreign investment to the signatory countries was reduced in the initial period after Decision No. 24 was promulgated, whereas the level of capital flows to non-signatory Brazil increased. Professor Robert Grosse concludes that several statistical tests on aggregate foreign investment data show a significant initial decline in the growth rate of foreign investment in the Andean Pact countries relative to the rate before the Code's creation and relative to the trend of foreign investment in other areas of Latin America and the Caribbean.¹³⁴ The Code's regulations regarding ownership of enterprises and property, profit remittance and capital reinvestment were selected as being the main reasons for the initial negative reaction to the agreement from sources of foreign capital.

133. See generally, White, Eduardo, Control of Restrictive Business Practices in Latin America (1975), U.N. Doc. UNCTAD St/MD 4

134. Grosse, Robert, Foreign Investment Codes and Location of Direct Investment (Praeger, New York: 1980), ch. 8

However, this decline in the growth rate of foreign investment within the Pact countries during the early period has apparently halted since the latter years of the 1970's and there is now no significant difference in the rate of foreign investment before and during the Andean Code. The Code has therefore not reduced the level of foreign investment into the signatory countries, in the final analysis, whereas corporate conduct within those nations has altered in the manner in which the host countries desired it to be altered when they created the treaty. The Code must for this reason be regarded as successful. It has achieved the aim of member states to reduce significantly, through legally enforceable regulations, the adverse effects of restrictive practices carried on by transnational enterprises, while it has ultimately not deterred the presence of foreign investment to a perceptible degree. It must therefore be regarded as an eligible model for any subsequent legally binding code formulated within the developing world. However, it would be virtually impossible to eliminate all restrictive business practices conducted by transnationals operating within the region. There is evidence, for example, to show that transfer pricing policies still prevail.

VIII. Conclusion

In the final two sections of this Chapter, we outlined the significance of two treaties, one regulating antitrust matters in an industrialized western region and the other pertaining to investment policy and restrictive business practices in a third world region. Although these Codes seek to control competition and restrictive corporate activities in two economically diverse regions, they are both legally binding on transnational enterprises operating within their respective geographical area.

In our following Chapter, we shall outline the background to the adoption of the OECD Guidelines. We shall also detail and critically analyze the competition principles of this voluntary Code as they relate to restrictive agreements and arrangements between enterprises and comment on provisions in the document with respect to treatment of transnational enterprises while operating in host countries. Additionally, we shall examine the Code's legal significance and practical efficacy.

CHAPTER IV

The OECD Guidelines

I. Reasons Behind Negotiation of the Guidelines

The OECD Guidelines on International Investment and Multinational Enterprises grew out of strong reactions by both developed and developing nations to the growth of United States-based enterprises in Europe in the 1960's and 1970's. 75 per cent of the world's investment takes place among OECD countries.¹³⁵ United States' originating investment accounts for about 50 per cent of global investment and 70 per cent of all United States' investments overseas are situated in OECD countries.¹³⁶

There were many reasons behind the negotiation, and ultimate adoption, of the OECD Guidelines. Firstly, the steady economic growth present in the global economic structure, especially in the western industrialized economies, during the 1950's and 1960's began to unravel by 1973 as the Bretton Woods system began to falter. At the 1944 Conference, the participating governments had agreed to a fixed exchange rate system in which the value of their currencies was pegged to the United States' dollar, which in turn was pegged to gold valued at \$35 per ounce. This system had been devised to prevent a repetition of the monetary chaos of the 1930's which resulted when countries competitively devalued their currencies in order to protect their domestic economies from worldwide depression. This new policy meant that the U.S. dollar and each of the currencies that could be converted into it were backed by a relatively stable measure of value. Transactions in international trade could be carried on with the confidence of a secure currency. This policy also assisted international trade expansion and economic growth, particularly in the United States and in other developed countries.

By 1970, however, the huge reservoir of U.S. dollars held by non-U.S. citizens meant that the United States' storage of gold could be speedily

135. Supra note 3 at p. 149

136. Ibid.

drained if the non-American holders of the dollar decided, for one reason or another, to redeem their holdings. Additionally, the United States was at that time coming under increasing pressure from abroad to act on its persistent dollar deficits. General Charles de Gaulle, the then French President, correctly claimed that the fixed exchange rate system gave the United States "exorbitant privilege" by enabling it to finance its deficits through domestic monetary expansion and through allowing American citizens to buy up foreign assets at bargain rates.

The other European leaders became sufficiently concerned about the impending crisis in international economic matters to lobby for internationally controlled mechanisms for liquidity creation. The I.M.F. Special Drawing Rights system emerged in 1968 as a consequence of this concern.

The United States finally took some action in the early 1970's. The Nixon Administration unilaterally abandoned a major tenet of the Bretton Woods system in August, 1971 when it severed the convertibility of the dollar into gold. This change in U.S. economic policy was adopted without prior notification to, or consultation with, that country's allies. Its new policy continued with the devaluation of the dollar in 1973, leading to a system in which the currencies of the major western trading partners were permitted to float against each other in more or less free markets. This act resulted in goods manufactured in the United States now being less expensive abroad than they previously were. This was the U.S. solution to its massive trade deficit problem. This trade deficit, which was primarily in relation to other OECD member nations, had augmented the long-standing balance of payment deficit problem which the United States had with these countries.

An additional factor heralding the adoption of the Guidelines was that third world nations perceived these international economic events as signifying a faltering of the post-war international economic order. Consequently, these states increased pressure for reform in the system. The United States and its fellow OECD member nations began to recognize the necessity of formulating guidelines within their organization with respect to the modus operandi of enterprises and to private international investment.

The need for guidelines concerning transnational enterprises and investment and international consortia became more apparent with the virtual quadrupling of world oil prices between October, 1973 and January, 1974.¹³⁷ The first three years in the decade of the 1970's had witnessed the simultaneous peak of the business cycle for the world's major economies, the 1960's notwithstanding. The massive increase in the price of crude oil in such a short period of time therefore left shell-shocked western industrialized economies, since those countries were heavily dependent on the importation of oil from outside the OECD bloc. The OECD countries therefore embarked on a period of severe economic recession after the oil price hike in 1973.

International investment within the OECD bloc, as well as from OECD nations to the developing world, declined significantly in the immediate aftermath of the "oil crisis". Unemployment percentages rapidly increased in all the OECD countries, Japan excepted, as the mid-1970's approached. The overriding concern of the majority of countries now became one of how to prevent the foreign investor from divesting, not one of how to prevent him from dominating domestic economies.

The fact that the growth of the transnational enterprise was no longer an American phenomenon by the year 1973 was another reason for the realization that guidelines regulating international business activities had become a necessity. Western European and Japanese firms had broken United States' dominance, particularly in the automobile, computer and technology industries. In 1959, for example, an American firm was the largest in the world in eleven out of thirteen major industries, whereas by 1976 the number had declined to seven out of thirteen. Between 1959 and 1976, the number of United States' enterprises in the world's top twelve industries, the aerospace industry excluded, declined from 71 per cent to 44 per cent of the 156 largest companies in these industry groups.¹³⁸

137. Between October, 1973 and January, 1974, the world price of crude oil increased from \$2.75 U.S. a barrel to \$10.00 U.S. a barrel.

138. Franko, Lawrence, Multinationals: The End of United States Dominance (1978), 56:6 Harv. Bus. Rev. 93, at p. 95

The changing nature of the transnational enterprise, with the increasing presence of state-owned enterprises in Western Europe, was another impetus for the adoption of OECD Guidelines. As an illustration, under the regime of Harold (now Sir Harold) Wilson's British Labour Party in the latter part of the 1960's, the government of the United Kingdom "deprivatized" industries such as British Leyland. The previously held belief that business enterprises were purely profit-earning organizations began to change with the increasing realization among political and economic leaders in the West that they bore significant social responsibility to the countries in which they operated.

Additionally, other forms of direct international investment such as joint ventures, management contracts and licensing arrangements became more popular and began to erode the monopoly which the standard parent-subsidiary concept of transnational activity had previously held.

Another factor which motivated the OECD member states to adopt the Guidelines was pressure from trade unions, particularly on European Community governments, to create a code of conduct which would regulate the activities of transnational enterprises.¹³⁹

However, there could be no OECD Guidelines on conduct of business Enterprises without the support of the United States' administration. Reluctant at first to establish such a code, U.S. disinclination was overcome through the realization by its political and commercial leadership that the possible benefits which would result from the presence of a non-binding code of conduct which expresses standards of good practice for business enterprises to follow far outweighed any potential disadvantages. The United States' administration began to perceive the imminent OECD exercise as a means through which a decline in what it regarded as unwarranted criticism of transnational enterprises could be achieved and the positive contributions which they make could be emphasized. Additionally, the concept of international investment policies conducive to free market flows and the principle of equitable treatment of foreign-based enterprises could be reiterated. The United States

139. Kanzlarich, R., The Review of the 1976 OECD Declaration on International Investment and Multinational Enterprises (1980-1), 30 Am. U.L.R. 1009, at p. 1012-3

ultimately came to perceive the Guidelines as an opportunity to enunciate in writing its expectations of "good corporate citizenship" from transnational enterprises operating within in the OECD area.¹⁴⁰

Finally, the United States and other OECD member nations saw a speedy negotiation of their own guidelines as a type of "pre-emptive strike" before the creation of codes of conduct drawn up by the United Nations or by its agencies, fora in which the developing countries and socialist states commanded an overwhelming numerical majority. The industrialized countries therefore hoped that an OECD code would set the standard for other international codes, which they correctly predicted would inevitably come into existence in the foreseeable future.

In our following section, we shall outline the composition of the OECD Guidelines.

II. Composition of the Guidelines

On June 21st, 1976, after eighteen months of difficult negotiations with active participation from the business communities of the twenty-three developed member countries, the OECD's Council of Ministers approved its Declaration and Decisions on International Investment and Multinational Enterprises¹⁴¹ together with four other instruments relating to the Declaration. All the members of the organization were signatories to the various documents, with the exception of Turkey, which abstained.¹⁴² The five-chapter Declaration contains statements as to guidelines for business

140. The OECD Guidelines for Multinational Enterprises: A Business Appraisal (1977), at p. 12-3, ed. by Coolidge, P., Spina, G., and Wallace, D. (Statement by Paul H. Boeker, then Deputy Assistant Secretary of State for Economic and Business Affairs and Chief U.S. negotiator at the OECD Conferences on Restrictive Business Practices).

141. Organization for Economic Co-operation and Development, Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on International Investment and Multinational Enterprises, [Paris, 1976].

142. Turkey subsequently adhered to the 1976 Declaration and Decisions as revised and reviewed in 1979.

enterprises and decisions on national treatment for foreign-controlled enterprises, on international investment incentives and disincentives and on consultations and review procedures pertaining to the issues at hand.

The first instrument, formally an Annex to the Declaration¹⁴³, is the Guidelines for Multinational Enterprises. This consists of an introductory eleven point policy statement of Considerations and Understandings which, pursuant to the Declaration, is an "integral part" of the Guidelines¹⁴⁴ and, secondly, the text of the Guidelines themselves. This is divided into seven chapters referring separately to general policies, disclosure of information, competition, financing, taxation, employment and industrial relations and science and technology.

The remaining three instruments are Decisions on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises, on National Treatment and on International Investment Incentives and Disincentives.¹⁴⁵

We shall now proceed to examine the legal status of these documents.

III. Legal Status of the Guidelines

Sweden and the Netherlands had tended to favour the formation of a binding document on the subject of transnational enterprises. Delegations from these two countries felt that an undertaking freely entered into, based simply on the moral instincts of the corporate community, would be open to numerous contradictory interpretations, ultimately vitiating whatever efficacy

143. OECD, Guidelines for Multinational Enterprises, Annex, OECD Declaration, supra note 141.

144. Declaration, para. 1

145. OECD, Decision of the Council on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises; Decision of the Council on National Treatment and Decision of the Council on International Investment Incentives and Disincentives, supra note 141, respectively.

the resulting documents could have had. However, the preference of the United States for a non-binding agreement prevailed, since its opinion was supported or accepted by the majority of delegations at the negotiations. This preference for a strictly voluntary code was based on the belief that international commercial transactions do not lend themselves to the formulation of binding international agreements to regulate them. Therefore, the view prevailed that the guidelines and principles could only be established in a general flexible framework on account of the differing perceptions which existed on the nature and objectives of a code. Para. 6 of the Introduction to the Guidelines therefore provides that:

"The Guidelines ... are recommendations jointly addressed by member countries to multinational enterprises operating in their territories. These guidelines ... lay down standards for the activities of these enterprises in the different member countries. Observance of the Guidelines is voluntary and not legally enforceable ..."

An examination of the relevant provisions of the OECD Convention reveals that Art. 5 allows the Organization to:

- a) **take decisions which except as otherwise provided, shall be binding on all the members; and**
- b) **make recommendations to members.**

Art. 6(2) meanwhile states that:

"If a member abstains from voting on a decision or recommendation, such abstention shall not validate the decision or recommendation, which shall be applicable to the other members but not to the abstaining member."

Finally we note that Art. 6(3) proceeds to provide that:

"No decision shall be binding on any member until it has complied with the requirements of its own constitutional procedures."

It is therefore submitted that the three Decisions on Intergovernmental Consultation Procedures, on National Treatment and on International Investment Incentives and Disincentives are legally binding on an OECD member state insofar as that state has incorporated the letter of these documents into its national legislation. The Declaration, together with the Considerations and Understandings prefacing the Guidelines, is not per se legally binding, by virtue of the Convention itself. However, these documents could be considered legally binding insofar as they incorporate existing rules of general international law. Finally, the seven chapters of the Guidelines are expressly stated not to be legally enforceable.¹⁴⁶

Complex legal issues can arise, however, following from the integration of the five instruments. The three Decisions, for example, explicitly refer to the Declaration, while the Decision on Intergovernmental Consultation Procedures also refers to the Guidelines. Nevertheless, no practical problems have arisen so far due to these ambiguities.¹⁴⁷

The following section serves as an introduction to our discussion of the competition guidelines of the Code.

IV. The Guidelines as They Relate to Restrictive Business Practices of Transnational Enterprises

The OECD Guidelines for Multinational Enterprises initially consisted of thirty-nine points including four competition principles agreed to by the signatory countries. Because of their intended generality, the Guidelines are not designed to operate as a final accord on the activity of transnational enterprises but are rather intended as a foundation on which future conventions and consultations concerning international business conduct can be built. Neither is the harmonization of the individual competition laws of the OECD member countries necessarily one of the purposes of the effort even

146. OECD Guidelines, Introductory Considerations and Understandings, para. 6

147. Baade, H., "An Introductory Survey", 407 at p. 443, Legal Problems of Codes of Conduct for Multinational Enterprises (1980), ed. by Horn, N.

though one of the primary objectives may be to ensure that the operations of transnational enterprises are in harmony with the national policies of the countries in which they operate.¹⁴⁸

The OECD is generally concerned with the question of restrictive business practices as those practices curtail the maintenance and promotion of competition among firms and enterprises, with the consequence that sustained development of their free market economies is impeded. This organization, as a result, perceives the removal of harmful restrictive business practices as a means whereby productivity will be increased through a consequential rise in competition among business enterprises, whether locally-based or transnational in nature.¹⁴⁹

Although no attempt has been made in the Guidelines to define the term "restrictive business practices", the agreement generally seeks to curb actions by business enterprises which would adversely affect competition in the relevant market through abuse of a dominant position of market power.

The preliminary issue of to whom should or could the Guidelines be addressed was resolved by deciding to use the neutral term "enterprises". These would include both privately-managed and state-owned operations as well as a hybrid of the two.¹⁵⁰ That term would also embrace both transnational enterprises and domestic firms, whether the latter were an individual trading concern, a partnership or a corporation.¹⁵¹ There was no necessity to circumvent the potential problem of international law being formally applicable only when addressed to states or to international organizations. The decision not to create a binding code which would be enforceable under international law meant that this issue did not arise.

148. Guidelines, Introduction, para. 6

149. Wex, S., A Code of Conduct on Restrictive Business Practices: A Third Option (1977), 15 Can. Year Book Int'l L. 198 at p. 207

150. Supra note 148, para. 8

151. Ibid., para. 9

Finally Introductory para. 8 states that the Guidelines:

"are addressed to the various entities within the multinational enterprise ... according to the actual distribution of responsibilities among them ... the word "enterprise" as used in these guidelines refers to these various entities in accordance with their responsibilities."

It would therefore seem that a parent company situated in one country and its wholly-owned subsidiary situated in another may be treated as a "single" enterprise under the Guidelines, with each held accountable for the other's actions with respect to the observance of the Guidelines' provisions.¹⁵²

We shall now seek to examine and analyze the Competition Section of the Guidelines.

V. Outline and Analysis of Provisions of the Competition Guidelines

A. Paragraph One

The first principle calls on enterprises to refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power. This is the only quasi-substantive OECD guideline directly relevant to corporate concentration. This provision addresses the issue of unilateral conduct in a monopolistic setting. The general concept incorporated in the paragraph, viz. the abuse of a dominant position by a single firm, reflects well-settled antitrust law in many OECD member countries, especially those within the European community.¹⁵³

152. See remarks by Professor Barry Hawk before the Proceedings of the Workshop on the OECD Investment Declaration and Guidelines, held on March 16th, 1977 at the National Chamber Building, Washington, D.C., supra note 140, at p. 155.

153. See, eg. Art. 86 of the Treaty of Rome and the West German Anti Cartel Law, sec. 22, [1973] Bundesgesetzblatt I 918-19 (reprinted and translated in OECD Guide to Legislation on Restrictive Business Practices (Vol. 2, 1973), p. 12).

This guideline is rather conservative, since it is only applicable to restrictive conduct when that conduct is performed by a firm which has a dominant position in a relevant market.¹⁵⁴ The specific prohibitions outlined in the guidelines, such as discriminatory practices, mergers and restrictive patent licensing, are therefore only applicable to enterprises which already possess, or are about to acquire through their conduct, a dominant position in a relevant market. It is general policy in many of the OECD countries, including the United States, that single firm conduct which is unethical and which injures another competitor, but which does no general harm to the consuming public and does not threaten any changes in market structure, should be dealt with under the law of tort or of unfair competition, rather than under antitrust laws.¹⁵⁵

154. The term "market dominating position" is defined in the OECD Glossary of Terms Relating to Restrictive Business Practices (1965) as "the position occupied either:

- a) by a single enterprise; or
- b) by a group of enterprises between which no effective competition exists and which does not encounter effective competition in a market" (at p. 12-3, A-2).

Market domination within the meaning of this definition therefore depends on two factors:

- 1) the identification of the relevant market; and
- 2) the determination of whether an enterprise or a group of enterprises is exposed to effective competition in this market.

An OECD study states that the identification of the relevant market essentially embraces two elements:

- a) the identification of what may be termed the product market, i.e. the goods or services which are in such a close competitive relation with one another that they may be considered as essentially satisfying the same need; and
- b) the identification of the geographical market, i.e. the territory in which the relationship described under (a) is effective.

(OECD, Market Power and the Law: A Study of the Restrictive Business Practice Laws of OECD Member Countries and of the EEC and ECSC dealing with Market Power (1970), p. 21).

155. See, eg., Bernard Food Industries, Inc. v Dietene Co., 415 F. 2d 1979 (7th Cir. 1969)

There are, however, some basic differences in the scope of regulation between the Sherman Act and OECD competition guideline 1(a). In one respect, sec. 2 of the Sherman Act¹⁵⁶ is broader than guideline 1(a) since the former covers monopolization, conspiracies to monopolize, attempts to monopolize and conspiracies or attempts to attain a monopoly or dominant position, while the latter applies only if a dominant position of market power has already been achieved and has subsequently been abused. The paragraph is therefore limited to condemning what would constitute "actual monopolization" under United States' antitrust law. On the other hand, guideline 1(a) is at least theoretically broader overall than sec. 2 in that its applicability does not necessarily turn upon market share criteria.

The determination of presence or absence of effective competition, meanwhile, normally entails an evaluation of the particular competitive situation in the market concerned. This involves a detailed examination and appraisal of all aspects of structure, conduct and performance in the particular market. Austrian, Norwegian and United Kingdom legislation, however, lays down formal criteria such as a certain market share. Once an enterprise or a group of affiliated enterprises attains this share, a dominant position is automatically deemed to have been achieved in the market, regardless of the degree of competition still existing there.¹⁵⁷

However, a dominant position of market power may be established according to the guideline's standards if the enterprise in question holds only a small market share but commands superior financial or marketing resources, particularly if the relevant market is held predominantly by small-sized or medium-sized firms. This makes the paragraph in the OECD document similar in this respect to Art. 86 of the Treaty of Rome, where access to supplies and technological predominance, particularly patents and know-how, is relevant.

156. 15 U.S.C.S. sec. 2 (1985)

157. Ibid., p. 22

The OECD member nations will probably interpret the phrase "in the relevant market" to mean that the effect has to be felt in the same relevant market in which the dominating position of market power is held. This would be a reasonable interpretation of the concept, since the phrase could have been omitted if merely the existence of anti-competitive effects were to be sufficient irrespective of the market in which those effects were to occur.¹⁵⁸

The concept of "abuse" as used in the Treaty of Rome appears to parallel the United States' monopolization concept of "predatory", "exclusionary" or otherwise anti-competitive or unfair business conduct. Some United States' examples would include horizontal mergers, price or supply squeezes, price fixing, discriminatory treatment of customers and market division. Excluding a few exceptions, most of which would concern either high or excessive pricing or different pricing to purchasers in different countries, a U.S. enterprise which is not engaged in conduct which would constitute actual monopolization under U.S. antitrust law would not be committing an "abuse" under para. 1.¹⁵⁹

The paragraph, on its face, does not cover a "shared monopoly", i.e. a finding of a dominant position held by independent enterprises without any showing of a conspiracy or concerted action among them.

Before we examine the illustrations of abuses listed in paragraph 1, it must be kept in mind that the list is not exclusive, in the same manner in which the list given in Art. 86 of the Treaty of Rome is not exhaustive. The European Court of Justice has held certain practices which do not come under the paragraph to be included within Art. 86, despite their not having been listed within the Article.

158. Stockman, Kurt, "Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure", 224 at p. 227, Corporate Concentration: National and International Regulation (Vol. 2, 1981), pub. by Michigan University Press

159. Supra note 140, at p. 159

The first concrete example of practices from which enterprises should refrain is "anti-competitive acquisitions". This example is derived primarily from the European Court of Justice's decision in the Continental Can Case,¹⁶⁰ where the acquisition of an actual or potential competitor by the holder of a dominant position was held to constitute an abuse.

This provision is much narrower than the anti-merger provision of sec. 7 of the Clayton Act¹⁶¹ which prohibits mergers which "may" lessen competition in the future and not just in the present period. The paragraph, instead, appears to apply only where the acquiring firm already has a dominant position before the merger takes place, which is more consistent with the approach taken by the European Community. Guideline 1(a) therefore requires that the acquisition "would" adversely effect competition and requires a far higher degree of certainty of effect, with a concomitant higher burden of proof and sufficiency of evidence.¹⁶²

Although Professor Kurt Stockman claims that it is still debatable whether the criteria to be used to judge whether the acquisition has adversely affected competition is the "reasonable doubt" or the "high degree of likelihood" criteria,¹⁶³ it is submitted that since this abuse falls under the ambit of the civil law in the European Community, the requisite standard there would be one of a "high degree of likelihood". An argument could, however, be made out for the application of the "reasonable doubt" standard in the United States, since sec. 7 of the Clayton Act is partly penal in nature.

This example of an abuse of a dominant position in the market applies to any form of acquisition, whether it is:

160. Europemballage Corp'n & Continental Can Co. v Commission, [1973-2] C.J. Comm. [Rec. 215]

161. 15 U.S.C.S. sec. 18 (1985)

162. Hawk, Barry, The OECD Guidelines for Multinational Enterprises: Competition (1977), 46 Ford. L.R. 241, at p. 260; Supra note 158 at p. 228

163. Stockman, ibid.

- 1) horizontal, i.e. the acquisition of a competitor;
- 2) vertical, i.e. the acquisition of a supplier or customer; or
- 3) conglomerate.¹⁶⁴

It is the opinion of noted commentator Professor Barry Hawk that the efficacy of this example as a guideline for the benefit of the transnational enterprise is suspect.¹⁶⁵ Even within the OECD, there prevails differing attitudes towards merger control and concentration. Where an OECD member enacts anti-merger legislation on competition grounds, the question whether an acquisition is "anti-competitive" still has to be decided and different answers may very well arise from different member states. Therefore, little guidance is given to a transnational enterprise contemplating an acquisition in an OECD country, although the reference to "anti-competitive" indicates strongly that economic and competition policies should be emphasized over political and national ones.

Secondly, para. 1(b) of the competition guidelines seeks to prohibit "predatory behaviour towards competitors". This is a standard feature of almost all antitrust laws and condemns what is generally accepted as a serious form of anti-competitive conduct.

The problem encountered in this paragraph revolves around the substantial controversy surrounding the "predatory" nature of some practices. For example, in many situations it is not clear whether pricing is "competitive" or "predatory". Paragraph 1(b) could, therefore, be given anti-competitive interpretations.¹⁶⁶ Additionally, the general language used permits wide divergencies of interpretation. Problems as to the assertion of what business conduct would fall within the ambit of the paragraph would arise as well. In the United States, such behaviour could include:

164. The regular defenses, such as the fact that the acquired firm was "a failing company", should still be allowable under the Guidelines.

165. Hawk, supra 162, at p. 260; Hawk, supra note 140, at p. 159-60

166. Areeda, Phillip and Turner, Donald, Predatory Pricing and Related Practices Under Sec. 2 of the Sherman Act (1975), 88 Harv. L.R. 697, at p. 699

- 1) temporary below - cost pricing to harm or eliminate a competitor; and
- 2) tying and discriminatory arrangements and practices such as sabotage, trade espionage and intentional misrepresentations about a competitor's product.¹⁶⁷

"Predatory pricing" is the major example of "predatory behaviour" in competition law. Professor Donald Turner defines this practice as "selling at a lower price than customary profit-maximizing considerations would dictate, for the purpose of driving an equally or more efficient competitor out of all or the greater part of the market".¹⁶⁸ This practice is exemplified when a firm sells a particular item at a price below out-of-pocket costs over a long period of time for the purpose of driving rivals out of the market and then recouping these losses through higher profits derived in the absence of competition.

Finally, example (b) raises the question whether business activity harmful to a particular competitor should be proscribed when there is no apparent or short-run harm to competition and consumers. The requirement that the action must "adversely affect competition in the relevant market" would seem to limit example (b) to predatory behaviour where an adverse effect on competition can be shown and not only the presence of harm to a competitor. This is also related to the issue of whether all below-cost pricing should be assumed to be predatory.

The third conduct from which enterprises are requested to refrain, the "unreasonable refusal to deal" with other firms,¹⁶⁹ is a common prohibition in most systems of antitrust law. For example, it is specifically mentioned under Art. 86 of the Treaty of Rome.¹⁷⁰

167. Hawk, supra note 162, at p. 261-2

168. Turner, D.F., Conglomerate Mergers and Sec. 7 of the Clayton Act (1965), 78 Harv. L.R. 1313, at p. 1340

169. Competition Guidelines, para. 1(c)

170. See Institute Chemioterapico Italiano Sp A & Commercial Solvento Corp'n v Commission, [1974] C.J. Comm. [Rec. 223]

The fourth practice which should be avoided is "anti-competitive abuse of industrial property rights."¹⁷¹ However, this illustration suffers from the criticism of being too general a guideline and is lacking as a useful directive to the transnational enterprise, which should rather continue to look for guidance from the regulations on this issue of the individual OECD nations, since these regulations conflict and vary to a large degree.¹⁷²

Professor Hawk opines that the fifth example is most comprehensible by dividing it into two separate clauses, each of which covers different types of pricing practices by a transnational enterprise:

- 1) discriminatory or unreasonably differentiated pricing; and
- 2) anti-competitive transfer pricing¹⁷³ i.e. prices set on intra-company transfers to maximize the global profits of the parent company.¹⁷⁴

171. Supra note 169 at para. 1(d)

172. See Ulmer, The Law of Unfair Competition and the Common Market, [1963] Ind. Property 33

173. "Transfer pricing" is officially called prices of "internal assignment". It is the result of sale transactions between affiliated enterprises at prices deviating substantially from what would be the market price of the goods. The practice is generally considered to be a supreme tool in the acquisition and abuse of transnational power and may be employed by enterprises for a variety of reasons. Some of these purposes include:

- 1) minimizing tax and custom levies;
- 2) maximizing repatriation profits;
- 3) taking advantage of particular interest rates in a particular jurisdiction;
- 4) minimizing apparent profits in a given subsidiary in order to strengthen the company's hand in wage negotiations in the host country;
- 5) taking advantage of the possible changes in the value of currencies; and
- 6) the possibility, in certain third world countries especially, that a transnational enterprise's property will be nationalized and expropriated.

It should be noted that controversy still exists over whether transfer pricing ordinarily implicates antitrust policies rather than taxation, customs and foreign exchange control matters.

174. Hawk, supra note 162, at p. 264

With respect to the first clause in this example, price discrimination involves charging different prices on different sales of the same product despite identical costs. The monopolist may discriminate in price between different markets or between different customers in the same market. The provision makes it clear that only the kind of systematic or abusive discrimination in a particular market which has an adverse effect on competition is intended to fall within its ambit, not all price differentiation in a particular product of a company which is competing in various countries.

Three different categories of pricing transactions could come within the prohibition against discriminatory or unreasonably differentiated pricing:

- 1) price discrimination among purchasers within a single country;
- 2) price differences between or among different countries; and
- 3) an anti-dumping prohibition which involves a forbiddance of the sale of commodities in country A, by an enterprise with its central management in country B, at a price below their fair market value in country B, where the intention is to eliminate competition and to subsequently increase the price of the commodities in country A when a monopoly has been obtained.¹⁷⁵

However, the term "unreasonably differentiated" has no accepted meaning under antitrust legislation. Since there is no apparent certainty in the meaning of the first part of the clause outlined in para. 1(e), its utility is limited to that of a reflection of OECD concern over high price disparities within the organization's member countries.¹⁷⁶

The second clause of the subparagraph appears to call on transnational enterprises to refrain from applying transfer pricing techniques both between their branches or divisions, and their parent and subsidiary companies. It is a complex task to attempt to exercise control over intra-enterprise pricing

175. Ibid.

176. Ibid., at p. 266

and profit allocation. The lack of access to relevant accounting data on a parent company or on a subsidiary located outside of the jurisdiction makes it difficult to monitor transfer pricing. In part, however, the practice is difficult to control simply because of the paucity of reasonable guidelines on the issue of setting prices in the absence of a market for the goods.

The concern underlying this second clause, just as in the first, is more European than American. Also similar to the first clause, the second serves as an illustration to transnational enterprises of an increased concern on the part of member states and third world countries with regard to the anti-competitive abuses of transfer pricing. It is, however, admitted that it is an extremely complicated task to devise a detailed international regulation of so flexible a concept as transfer pricing. It is difficult to draw the line between what constitutes "equitable transfer pricing" and what constitutes "transfer pricing which reflects an abuse of the power which is associated with many transnational enterprises".

In conclusion, we can sum up our analysis of para. 1 by commenting that this guideline reflects firmly rooted antitrust law in many OECD member countries through its condemnation of the abuse of a dominant position in the market by a single enterprise. However, the vagueness associated with its condemnation diminishes the efficacy of the paragraph.

B. Paragraph Two

This paragraph covers vertical restraints, i.e. restraints involved in the distribution or resale of goods or services. It requires an enterprise to give maximum freedom to its purchasers, distributors and licensees with regard to the resale, export, purchase and general development of their operations consistent with law, trade conditions, the need for specialization and sound commercial practice. Unlike the first paragraph, a dominant position of market power is not necessary for a practice to come within the ambit of this paragraph, which is similar in this instance to sec. 1 of the Sherman Act¹⁷⁷ and Art. 85 of the Treaty of Rome. The OECD provision differs from that of the EEC and the United States, however, in that no conspiracy or concerted action need be present in the former.

177. 15 U.S.C.S. sec. 1 (1985)

The underlying theme of the paragraph addresses itself to restrictions on exports and on re-exports imposed by transnational enterprises on local licensees, distributors and other sellers and the consequent effect on the balance of payments of countries and on development of local industries.^{177a} European and third world countries are especially sensitive about such restrictions.¹⁷⁸

The reference regarding "freedom ... to purchase" deals with the problem of direct or indirect tie-ins,¹⁷⁹ condemned practices under sec. 14 of the Clayton Act¹⁸⁰ and Art. 86 of the Treaty of Rome. Tied selling, put simply, is the supply of goods or services by the manufacturers tied to the condition that the buyer only purchase from him. It is therefore a form of "exclusive dealing".

Given its broad language, para. 2 cannot be expected to provide much practical guidance with respect to tie-in arrangements, since many different exceptions from the general prohibition on tie-ins exist in the various OECD states. The paragraph is therefore more of an expression of OECD concern about the imposition of tie-ins upon unwilling purchasers and licensees.

One must admit, nevertheless, that this paragraph could be interpreted as going further than U.S. antitrust law or even as being contrary to such legislation as the U.S. Trading With the Enemy Act¹⁸¹ which stipulates restrictions on exports to certain countries by foreign resellers or licensees of United States' controlled firms. As such, paragraph 2 could contribute to a heightening in the international commercial conflict between the United

177a. The paragraph should not, however, be interpreted to impose an obligation on a transnational enterprise to sell to whomever demands. Additionally, joint ventures and restrictions placed on them by parent companies, as well as restrictions instituted on subsidiaries, are not intended to come within the scope of this paragraph.

178. Hawk, supra note 162, at p. 269; supra note 140, at p. 159; Davidow, Joel, Some Reflections on the OECD Competition Guidelines (1977), 22 Ant. Bull. 441, at p. 451

179. Davidow, ibid.

180. 15 U.S.C.S. sec. 24 (1985)

181. 50 U.S.C.S. app. secs. 1-44 (1981)

States and other OECD member nations, such as in "the Pipeline Sanctions affair"¹⁸² between the United States and some Western European countries in the early 1980's.

Mr. Joel Davidow accurately notes that "[the second competition guideline] is not worded as a traditional antitrust prohibition, but rather in the form of affirmative encouragement".¹⁸³ The learned antitrust official, who was one of the chief U.S. negotiators at the conferences leading up to the adoption of the Guidelines, interprets this as an indication that "[w]estern negotiators were prepared to go somewhat beyond well settled law when they were confident that what they were writing was a voluntary guideline ... rather than a rule of prohibition which might well become binding".¹⁸⁴

The paragraph also calls on transnational enterprises not to coerce their resellers to follow their policies with respect to restrictions on resale but does not prohibit particular vertical restrictions per se. Hence, agreements involving vertical restraints which are voluntarily entered into by the purchasers, distributors or licensees are not prohibited.¹⁸⁵

In conclusion, the ambiguity arising in this competition provision despite reasonable attempts at interpretation vitiates the amount of practical guidance this type of provision could have offered to transnational enterprises. The presence of such vague terminology as "freedom to resell, export, purchase", "trade conditions" and "sound commercial practice" is to be regretted. The usefulness of this provision is therefore limited to that of

182. Dresser Ind., Inc. v Baldrige, No. 82-2385 (D.D.C. filed August 23rd, 1982), dismissed per stipulation, December 23rd, 1982. This litigation arose out of the Reagan Administration's imposition of controls in 1982 on exports by Western European subsidiaries of U.S. parent companies which were to be used in the construction of the Soviet Siberian gas pipeline. The Western European governments involved, particularly the United Kingdom and France, strongly resisted the U.S. imposed sanctions. After extensive negotiations with these governments, the United States rescinded the pipeline embargo on November 13th, 1982.

183. Davidow, Joel, The U.S., Developing Countries and the Issue of Intra-Enterprise Agreements (1977), 7 Ga. J. Int'l & Comp. L. 507, at p. 511

184. Ibid.

185. Supra note 140, at p. 163; Hawk, supra note 162, at p. 269-71

drawing attention to certain concerns of some European countries as well as of the developing world.

C. Paragraph Three

The third paragraph of the competition guidelines seeks to prevent transnational enterprises from participating in, or otherwise purposely strengthening, the restrictive effects of private 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. The paragraph, however, does not clarify the position where government agencies or state-owned or state-controlled enterprises form a cartel-like arrangement and compel a transnational enterprise to participate or aid in the objectives of that cartel.¹⁸⁶

As a general rule, cartels reserve the right to employ operational techniques such as cutbacks in the production of their commodities, boycotts of particular countries, corporations or organizations and the right to avoid price competition through bid-rigging, price fixing, a division of markets, allocation of customers and price discrimination. The egocentric foci of the cartel organization, whether it is a domestic or an international structure, serves to obstruct the free flow of trade and open market areas. This policy conflicts with western competition principles. Paragraph 3 is hence a significant declaration by the OECD of their antipathy to anti-competitive cartel arrangements. Either concerted action or a conspiracy is a necessary element before a particular conduct can fall within the ambit of this paragraph. This is the same position taken by sec. 1 of the Sherman Act¹⁸⁷ and Art. 85 of the Treaty of Rome with respect to this issue.¹⁸⁸

186. Under the "sovereign compulsion" doctrine, when anti-competitive conduct employed by U.S. parties is required by foreign law and is undertaken as a result of foreign government compulsion, such conduct has a defence to any antitrust action under U.S. law (See Inter-American Refining Corp. v Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)).

187. 15 U.S.C.S. sec. 1 (1985)

188. See, for example, Finkin Roller Bearing Co. v United States, 341 U.S. 593 (1951); Suiker Unie UA v E.C. Comm'n (Re the European Sugar Cartel), [1975 Court Decisions] Comm. Mkt. Rep. (CCH) para. 8334

Unlike the first guideline, para. 3 does not require the presence of market domination before specific conduct may come within its prohibition.

The words "or otherwise purposely strengthening the restrictive effects of", as opposed to "participating in", show that the guideline's intention is to apply the third parties, unlike para. 1(a), which applies only to those participating in an anti-competitive acquisition while occupying a market-dominating position.

It is submitted that there is no materially significant difference between the words "which would adversely affect competition" in para. 1(a) and para. 3's "which adversely affect or eliminate competition". Both guidelines require anti-competitive effects either to be present or to be expected.

The final qualifying clause, viz. "and which are not or specifically accepted under applicable national or international legislation," is subject to difficult questions of interpretation. It would, however, seem to confirm exemptions given to certain cartels found in particular national antitrust laws, such as nation-state cartels, export cartels, import cartels and crisis cartels. The Organization of Oil Exporting Countries ("OPEC") consortium, for example, is recognized as being a legitimate organization under this clause. This qualification would also appear to re-emphasize that a member country remains free to establish as many exemptions from the ban placed on restrictive agreements as it wishes and may therefore permit corporate concentration, both national and transnational, in order to foster other economic and social policies which it deems to be necessary.¹⁸⁹

It is, however, true that the presence of serious conflicts among national laws and regulations and the absence of a consensus on applicable international law principles means that this clause provides little practical guidance to transnational enterprises. It does not resolve the question whether enterprises should participate in export cartels or should carry on

189. Supra note 158 at p. 231

business with nation-state cartels which are encouraged in the exporting country but are per se unlawful under the importing country's legislation.¹⁹⁰

The guideline is a recommendation by western industrialized countries to their transnationals and other enterprises not to participate in any cartel which has not been exempted or approved under relevant national or regional law. However, as we have previously discussed,¹⁹¹ all of the major OECD member nations allow national export cartels and all, with the exception of the United States, allow international export cartels.

Finally, the paragraph also acts as an expression of national concern with regard to unapproved cartel activity and participation conducted by or on behalf of these enterprises.

D. Paragraph Four

The final paragraph of the Competition Section of the Guidelines¹⁹² is a procedural and not a substantive one, in contrast with the first three guidelines. It pronounces that transnationals should be ready to consult and co-operate, including on the sensitive issue of provision of information, with the competent authorities of countries whose interests are directly affected by competition issues or investigations.

Guideline four adopts similar language to that previously used in the OECD recommendations of 1967, 1973 and 1979 concerning co-operation, consultation and conciliation in the restrictive business practices field where international trade is affected.¹⁹³ However, the provision differs from

190. It is possible, for example, that a U.S. export cartel which is excluded from U.S. antitrust legislation under the Webb-Pomerene Act could constitute a violation of Community and West German antitrust laws. See, Timberg, Export Agreements and Export Cartels, 1974 Fordham Corp. L. Institute, Int'l Ant. 25, at p. 32-3, ed. Hawk, B.

191. Supra text ch. 2, p. 17-18

192. Supra note 169, para. 1(e)

193. Supra text ch. 3, p. 42-5

those recommendations, since the latter are addressed to the individual OECD member governments, whereas the former is addressed to enterprises.

One of the basic differences posed by the transnational nature of these enterprises is the inaccessibility of host country governments to complete information on their activities, which is primarily the result of parent company refusal to release information transcending the whole ambit of operations of the conglomerate, including those of its subsidiaries. The enforcement of antitrust law, the levying of appropriate taxes and the proper monitoring of transfer pricing are just three areas of concern to the authorities, who can be hampered by the particular enterprises involved.

Therefore, this paragraph directs its foci on the issue of co-operation by these enterprises with host countries regarding legitimate attempts to obtain pertinent information on their activities and to serve process.

The scope of the paragraph is quite extensive, since it speaks of co-operation and provision of information to all nations "whose interests are directly affected", notwithstanding the absence of a subsidiary or branch of the enterprise within those countries.¹⁹⁴ Despite its theoretically wide scope, the efficacy of this allowance in practice is suspect if an enterprise has no subsidiary or branch office in the country concerned. In such a case, there would not be any sanction available to elicit a reply to a request for information which is based solely on guideline four of the competition section.

Additionally, parents and subsidiaries are deemed to be a single entity for the purposes of this paragraph with the parent being advised to co-operate with the appropriate competition law authorities in relation to foreign subsidiary investigation or on other antitrust issues.¹⁹⁵ This circumvention of the legal doctrine which defines subsidiaries as being separate legal

194. Supra note 140, at p. 164; Hawk, supra note 162, at p. 274; Davidow, supra note 178, at p. 455

195. Hawk, ibid.; Hawk, ibid.; supra note 150

entities from their parent companies¹⁹⁶ marks a change in policy by the majority of OECD member governments. It also gives credence to the efforts by successive U.S. administrations to obtain information from foreign-based subsidiaries of parent companies located in the United States. The contention of a foreign-based subsidiary in such a situation that it is a separate legal entity from its parent company would be dismissed on an application of the fourth guideline. This again, on its face, increases the possibility of international conflict between the United States and other OECD member administrations, particularly those of Australia, United Kingdom, the Netherlands and Canada, in their role as host governments with respect to the issue of disclosure of information by enterprises to the U.S. administration in connection with foreign antitrust investigations.¹⁹⁷

However, nothing in para. 4 should be construed as a demand that these enterprises reveal the information requested under foreign antitrust legislation under circumstances where such revelation would be a prohibition of the laws of its home country.

It is not clear exactly what "consultation and co-operation" is called for in this provision. It is however submitted that the consultation and co-operation sought for would be consistent with that required by the previous 1967 and 1973 and current 1979 OECD co-operation recommendations.

The final sentence qualifies the first by asserting that provision of information should be in accordance with safeguards normally applicable in this field. This is yet again another vague, imprecise standard which will be subject to numerous and conflicting interpretations even within the OECD bloc. A reasonable interpretation of "normally applicable", it is submitted, would be that safeguards normally applicable under the laws of the host country involved and the requesting country should be available without question.¹⁹⁸ Hence, privileges such as the attorney-client right of confidentiality should

196. Supra note 10

197. Supra text ch. 2, p. 8

198. Supra note 158 at p. 232

come within this context and be protected under this clause. Additionally, the confidentiality of trade secrets and competitively sensitive information should be respected.¹⁹⁹

In summary, the competition guidelines' final paragraph calls for greater co-operation between enterprises and OECD antitrust authorities than that which presently exists in the legislative provisions of national laws in individual member states. However, the vagueness of the qualifying sentence to a large extent presents enterprises with an area of personal choice over what information, if any, they should disclose, and to whom they should disclose it. In reality, this provision is rather conservative. It does not provide for extensive disclosure of sensitive information on the part of transnational enterprises to competent antitrust authorities which one would suspect on a first reading of the paragraph.²⁰⁰

VI. Conclusion on Analysis of the Competition Section of the Guidelines

The Competition Guidelines serve a wide educational value through the extensive labour which went into their formulation and the increasing exchange of information and views among officials in the antitrust environs of the various countries. Additionally, a movement towards stronger antitrust enforcement can occur even without a formal or technical "harmonization" of national laws. Para. 4, together with the co-operation procedures previously discussed²⁰¹ and the consultation procedures outlined in the Code,²⁰² will generally encourage greater co-operation among national enforcement officials.

199. Hawk, supra note 162, at p. 276; Davidow, supra note 194

200. Guideline 4 is, in reality, an expansion of para. 3 of the "General Policies" section of the Guidelines, which reads:
"While observing their legal obligations concerning information, enterprises should supply their entities with supplementary information the latter may need in order to meet requests by the authorities of the countries in which those entities are located for information relevant to the activities of those entities, taking into account legitimate requirements of business confidentiality."
Additionally, there is a separate "Disclosure of Information" section within the Guidelines.

201. Supra note 193

202. Infra text ch. 4, p. 87-90

The guidelines are not, however, a replacement for national rules and compliance would still be with national antitrust rules and policies where these may be narrower than the guidelines. Indeed, interpretation of the provisions by individual OECD members can be expected to follow their interpretation of individual national regulations. However, there would be exceptional instances where the guidelines would affect the interpretation of existing national business law and international business contracts, such as in the Badger Case.²⁰³

The wide dictum utilized, and the differences in competition legislation and policies between the OECD countries, ensures that the competition guidelines will be most useful only as an articulation of areas of antitrust concern shared by OECD countries about transnational enterprises. Significant ambiguity pervades the competition guidelines, a result of the intentional lack of specification throughout the section. Vaguely phrased terms and clauses translate into differences in interpretation by various OECD states to suit individual self-interests. Economic and political policies will still play a major role in the guideline's application by individual member nations to alleged restrictive business practices.

We shall now examine the practical effect of the OECD Guidelines.

VII. Effect of Voluntary Nature of the Guidelines

No mandatory obligation is placed on the transnational enterprise to observe the letter, far less the spirit, of the Guidelines. There is no evidence that these enterprises have been constrained in any of their normal activities by the existence of these principles.²⁰⁴

Nevertheless, the voluntary nature of the Code does not mean that companies may ignore them. Additionally, the Code's inherently non-enforceable nature does not preclude it from being a description of

203. Ibid., p. 83-4

204. Hamilton, Geoffrey, International Codes of Conduct for Multinationals, Mul. Bus., No. 3 of 1983, p. 1 at 6.

standards of business ethics and of general principles of policy. Corporate directorate should realize that the Guidelines in fact represent a consensus among twenty-three western industrialized states, a consensus which emerged only after significant consultation with their business and industrial communities with respect to the issue of what behaviour and conduct is expected from transnationals which operate within their respective territories.²⁰⁵

Indeed, we may quote from a report of the OECD Committee on International Investment and Multinational Enterprises which comments that "while observance of the Guidelines is voluntary and not legally enforceable, they carry the weight of a joint recommendation by OECD Governments addressed to multinational enterprises which represent their firm expectation of multinational enterprise behaviour".²⁰⁶ The public approval and the support for the Guidelines given in June, 1976 by the Business and Industry Committee ("the B.I.A.C.") and by the Trade Union Association Committee ("the T.U.A.C."), both representative bodies attached to the OECD, was a most welcome gesture, manifesting as it did that the parties directly concerned found the declarations and recommendations to be equitable and reasonable. Their actions also illustrate their willingness to make the guidelines operational.

A code which is voluntary may very well be more likely endorsed than one which is legally binding on transnational enterprises and may consequently be better able to fashion their policies in a manner more consistent with "proper corporate citizenship".²⁰⁷ The majority of enterprises probably conform in a large measure to the standards enunciated in the Code, even if only as a matter of practical business sense and good public relations. Enterprises apparently recognize that observance of these regulations would ultimately

205. Plaine, D., The OECD Guidelines for Multinational Enterprises (1977), 11 Int'l Lawy. 339, at p. 343-4

206. OECD, International Investment and Multinational Enterprises: Review of the 1976 Declaration and Decisions, OECD Doc. 47580, para. 37 (1979)

207. Davidow, Joel, International Antitrust Codes: The Post-acceptance Phrase (1981), 26 Ant. Bull. 567, at p. 573

lead to an improved foreign investment climate beneficial to all concerned, especially the corporate community.²⁰⁸

The prime illustration of the significance of the OECD Code is the Badger Case.²⁰⁹ Here, the Badger Co. Inc., a U.S.-based transnational enterprise, decided to close its unprofitable Belgian subsidiary in 1976. This action was legal. However, the subsidiary then failed to offer sufficient funds to its 237 employees to cover termination payments required under Belgian law, claiming that it owned too few assets to cover that expenditure. The parent refused to intervene to settle its subsidiary's liabilities. Certain Belgian trade unions then brought the case to their government, arguing specifically that the transnational enterprise had failed to live up to the OECD Guidelines. The Belgian government subsequently presented the issue to the OECD's Committee on International Investment and Multinational Enterprises (the "C.I.M.E."), contending that Badger Inc. should bear financial responsibility for the termination of its affiliate's labour contracts under the "Employment and Industrial Relations" section of the Guidelines.²¹⁰

The issue raised two points as viewed in the context of the Guidelines:

- 1) Did an enterprise have a responsibility to inform employees before a decision to close down was taken, beyond that imposed by national law or by a collective bargaining agreement?

208. Lévy, P., "The OECD Declaration on International Investment and Multinational Enterprises", 47 at p. 56, Emerging Standards of International Trade and Investment (1983), ed. by Rubin, S.J. and Houfbauer, G.

209. The Badger Case, Written Question No. 323/71 of June 29th, 1977 (Mr. Van der Hek), and the Answer of the Commission, dated September 14th, 1977, Official Journal 1977 C. 246/17 and 246/18

210. Para. 6 of the Guidelines concerning "Employment and Industrial Relations" recommends that an enterprise provide reasonable notice to its employees when considering changes in its operations which would have a major effect on its employees' livelihood, particularly in the case of closure of the enterprise with consequent lay-offs or dismissals.

Para. 9 recommends that an enterprise enable authorized employee representatives to conduct negotiations with authorized management representatives on collective bargaining or labour management relations issues.

- 2) What was the responsibility of a parent for the financial obligations of a subsidiary?

Ultimately, the parent company decided to settle directly with the Belgian government after discussions were held at the C.I.M.E. meeting in March, 1977. Full compensation for termination of the subsidiary's labour contracts was paid, even though this compensation was beyond the contribution of available assets of the bankrupt subsidiary.

This event represented an historical precedent regarding respect for the OECD Guidelines although it cannot be directly demonstrated that they were interpreted as being binding in this instance. Notwithstanding its voluntary nature, the Guidelines may be used to build a legal case against transnationals which fail to comply with their tenets in an OECD member country. It is submitted that the Badger Case is no less significant as regards the Competition section of the Code by virtue of the fact that it fell within the domain of the Employment and Industrial Relations section.

Additionally, the Guidelines constitute a source of law on issues not yet covered by positive rules of law, despite the document's legal unenforceability.²¹¹ The support for its principles by the world's leading western economies in itself lends some legal authority to the instrument. Indeed, Ambassador Phillippe Lévy, who was the Chairperson of the Working Group on the Guidelines, contends that the overwhelming majority of enterprises with important international activities in the OECD area act in general accordance with the Guidelines, except where the question relates to disclosure of sensitive information, particularly where the company is incorporated outside of the United States.²¹² However, it is possible that this merely reflects the conservative nature of the Code in that it does not go far beyond what was the general conduct of transnational enterprises at the time of its adoption.

211. Vogelaar, Theo, "The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedures and Review", 127 at p. 135, Legal Problems of Codes or Conduct for Multinational Enterprises (1980), ed. by Horn, N. Dr. Vogelaar is a former Special Consultant to the OECD Director-General on International Investment and Multinational Enterprises.

212. Supra note 208 at p. 53

Next, we shall analyze the possibility of the Code becoming binding in the future.

VIII. Future Possibility of the Guidelines Becoming Binding

The Guidelines are not "instant international law" in the sense that they are transformed into customary international law through the mere act of being adopted. The OECD's limited and specialized membership, in addition to the explicitly declared "voluntariness" of the Code, ensures that result. A U.S. representative at a meeting of the OECD Council in July, 1977 went so far as to state that:

"Voluntary guidelines followed by companies could not lead to the creation of customary international law as the Guidelines do not purport to be - and are not accepted as - law by companies or by states. Customary international law contains few, if any, examples of obligations on entities other than states. Companies or individuals might have rights which international law calls upon other states to observe, but not obligations vis-à-vis states."²¹³

However, it is submitted that noted commentator Professor Hans Baade is correct when he maintains that this comment has to be viewed within the context in which it was made, coming as it did just after the Badger Case had been resolved.²¹⁴ It must therefore be seen as a post-mortem attempt to restrict what was then perceived to be possible precedential effects which that issue may have had in relation to competition policy or industrial-labour relations within the OECD or outside of that region. We can only endorse the learned commentator's feeling on the matter, which is that the Guidelines

213. There is no accessible reference for this statement since the minutes of the OECD Council meetings are "restricted".

214. Baade, Hans, "Legal Effects of Codes of Conduct for Multinational Enterprises", 1 at p. 9, Legal Problems of Codes of Conduct for Multinational Enterprises (1980), ed. by Horn, N.

customary international law by state practice, particularly through the action of host and home states in intergovernmental follow-up proceedings.²¹⁵ This would also occur if the norm-creating provisions of the Code were regarded as binding by a large number of states.²¹⁶ If this were to occur, the Code may possibly even bind those states which were not party to its creation.²¹⁷ Transnational enterprises would then become subjects of international law, at least for these purposes.²¹⁸

Indeed, the authorized OECD summary of the Badger Case states that parts of the Guidelines, "though voluntary in origin, may ... in the course of time - when they have been frequently applied ... - pass into the general corpus of customary international law even for those multinational enterprises which have never accepted them".²¹⁹ This view is presently supported by other legal scholars as well.²²⁰

The Code could also be incorporated by reference in investment agreements and labour contracts or used as evidence of industrial practice in arbitration matters.

Finally, the Guidelines may also become binding to some extent through the domestic legislation of some of its principles by individual countries. A prominent example of such follow-up legislation is the Foreign Corrupt

215. Ibid. at p. 12

216. Davidow, Joel, and Chiles, Lisa, The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices (1978), 72 Am. J. Int'l L. 247, at p. 255

217. North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3

218. Supra note 208 at p. 50

219. Vogelaar, Theo, Multinational Enterprises: The Guidelines in Practice, 86 OECD Observer (May, 1977), at p. 78, also reprinted in Blanpain, R., The Badger Case and the OECD Guidelines for Multinational Enterprises (1977), p. 151-53

220. See, for example, Schwamm, Henri, The OECD Guidelines for Multinational Enterprises (1978), 12 J.W. Tr. L. 342, at p. 350

Practices Act²²¹ enacted by the United States Congress on Dec. 19th, 1977. This legislation, in substance, supplies the penal sanction for para. 7 of the General Policies section of the Guidelines, which provides that enterprises should not render "any bribe or other improper benefit ... to any public servant or holder of public office".

However, there is at present no policy by the OECD member states to intentionally transform these principles into a part of international law.

We shall now examine the follow-up procedures as outlined in the OECD document.

IX. The Intergovernmental Consultation Procedures of the C.I.M.E.

The OECD is strictly an intergovernmental organization which achieves its aims through the exchange of information, consultation and co-operation as well as through co-ordinated action among governments and their administrations. The C.I.M.E. is entrusted with the task of preparing and implementing the OECD council's acts. Established on January 21st, 1975, the C.I.M.E. has two main subsidiary bodies:

- 1) a Working Group on the Guidelines; and
- 2) a Working Group on International Investment Policies.

The C.I.M.E. may also act as a co-ordinator for meetings on exchange of views on issues related to the guidelines and report to the Council on the results of those meetings.²²² Provision is made for member countries of the organization to request consultations within the C.I.M.E. "on any problem arising from the fact that multinational enterprises are made subject to conflicting requirements."²²³ Member countries are bound to co-operate in

221. 15 U.S.C.S. sec. 7 8d(d) 2 (1983)

222. Second Revised Decision of the Council on the Guidelines for Multinational Enterprises (1984), para. 3

223. Ibid., para. 7

good faith in order that they might arrive at a reasonable solution. Furthermore, enterprises are given the opportunity to express their views on matters with respect to the application or interpretation of the Code where their individual interests are at stake.²²⁴ They may do so either orally or in writing. In practice, though, only a few enterprises have expressed themselves in writing and in these cases their letters have assisted in clarifying issues.²²⁵ However, enterprises are not permitted to initiate consultations before the C.I.M.E.

Additionally, representatives of the B.I.A.C. and the T.U.A.C. are also invited to express their respective opinions on matters of concern to them emanating from the Guidelines.²²⁶ Indeed, the B.I.A.C. took the step to submit a study on international investment incentives and disincentives in 1981.

The C.I.M.E. shall also act as a forum for consultations on questions concerning the application of the "national treatment" standard and exceptions to that concept, in relation to transnational enterprises, at a member country's request.²²⁷ This provision was utilized in 1981 when a number of OECD governments, including the United States, requested consultations on the new National Energy Plan of Canada. This case involved allegations of discrimination by the Canadian government against foreign oil firms. Swiss Ambassador, Mr. Phillippe Lévy, contends that these consultations had very little practical impact, since the then Trudeau government successfully resisted external attempts to alter the scheme.²²⁸ The C.I.M.E. also has the responsibility of reviewing the "national treatment" concept with a view to extending its application.²²⁹ Member countries must also provide information

224. Ibid., para. 5

225. Supra note 211 at p. 138

226. Supra note 222, para. 4

227. Second Revised Decision of the Council on National Treatment (1984), para. 6

228. Supra note 208 at p. 56

229. Supra note 227, para. 4

to the group of experts concerning their application of the principle.²³⁰ Consultations may also proceed within this forum when a member state considers its interests to be "adversely affected by the impact on its flow of international direct investments of measures taken by another member".²³¹ Although little use has been made of this provision, the C.I.M.E. believes that its existence provides an important safeguard.

There is no provision for the settlement of disputes or any prescribed enforcement mechanism for the Guidelines beyond the understanding that the OECD member governments would recommend them to their enterprises. The C.I.M.E. is not permitted to reach conclusions on the conduct of individual enterprises.²³² Its role is merely to provide a conduit through which the different views of the member countries and of transnational enterprises could be aired and compromises could be reached. All that the group of experts can do is study, analyze and report the issue to the Council. They may not take sides in any controversial issue or resolve facts in a given incident.

What this procedure achieves is a "clarification" of the Guidelines,²³³ since the C.I.M.E. uses the details of specific cases as illustrations of issues arising under the Code.²³⁴

Although the Committee is not a judicial or an arbitral body, it does have some practical effect. The Badger, Hertz and Batco Cases all had the genesis of their ultimate resolution in this body. There is also comfort in the realization that both the B.I.A.C. and T.U.A.C. can initiate consultation procedures before the C.I.M.E. Indeed, the T.U.A.C. has frequently taken advantage of this opportunity to bring issues before the body.

230. Ibid., para. 7

231. Second Revised Decision of the Council on International Investment Incentives and Disincentives (1984), para. 1

232. Supra note 222, para. 6

233. Ibid., para. 3

234. Committee on International Investment and Multinational Enterprises Report (Rev. 1979), para. 84

This Committee has the potential to be a significant player in the process of effective implementation of the OECD Code. Historically, however, the majority of western industrialized nations, particularly the United States, have preferred to use non-public, bilateral, diplomatic approaches rather than formalized international consultation and conciliation procedures, especially where restrictive business practices are concerned.²³⁵ Sacrifice of national sovereignty to an authoritative institution with the power to resolve international antitrust controversies has not been the policy of successive U.S. administrations. There had been no formal recourse to para. 7 of the Decision on the Guidelines²³⁶ or its equivalent in the 1976 and 1979 Decisions up to the end of 1983. The competition guidelines had not been consulted or interpreted in any OECD fora up to the same period. All this in spite of controversial matters such as "the Pipeline Sanctions affair".²³⁷ Mr. Joel Davidow remains optimistic yet, maintaining that "it seems conceivable that the competition guidelines will ultimately have some practical effect, though they appear to offer less fertile pastures for potential complainants than the norms on labour relations".²³⁸

The final issue which we will scrutinize in this section is that of the relationship between the 1976 Decision of the Council on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises, as revised, with the specific OECD Co-operation Procedures in the field of restrictive business practices affecting international trade. Although there is no indication in either document with respect to which procedure should prevail, it appears that there is no general priority for one or the other. The intergovernmental consultation procedure is more narrowly focused with regard to competition principles than the 1979 procedure. However, it is open to argument which procedure would be more practical to utilize in a specific case. Both procedures may be simultaneously used in the same case.

235. Supra note 216, at p. 268

236. Supra text ch. 4, p. 87 at note 223

237. Supra note 182

238. Davidow, Joel, "The Implementation of International Antitrust Principles", 119 at p. 129, Emerging Standards of International Trade and Investment (1983), ed. by Rubin, Seymour, and Houfbauer, Gary

We shall now outline the reasons for establishing "National Contract Points" within the OECD region.

X. National Contact Points

The 1984 Revised Decision of the Council on the Guidelines for Multinational Enterprises for the first time provided for "National Contact Points" to be established in each of the member countries.²³⁹ This manoeuvre was welcomed by both the B.I.A.C. and the T.U.A.C. The business community and the trade unions especially have made active use of them in some countries. The tasks of these contact points are:

- 1) to disseminate, promote and, to the extent necessary, explain the Guidelines in the light of the clarifications and conclusions reached during the Review or at a later date by the Committee,
- 2) to gather information on experience with the application of the Guidelines at the national level; and
- 3) to provide a means for discussion with interested parties - in particular from the business and trade union community - on problems which may arise under the Guidelines. They may organize regular meetings and/or ad hoc consultations for this purpose to deal with specific matters.

The contact points provided the input for the C.I.M.E. in its preparation for the 1982 OECD Mid-Term Report.

Next, we shall scrutinize the provisions relating to treatment of foreign-based enterprises.

XI. Obligations Towards Transnational Enterprises Arising Under the Guidelines

The original Declaration on International Investment and Multinational Enterprises recommends to OECD member countries to accord "national treatment" to foreign-owned or controlled enterprises operating in their territories,

239. Supra note 222, para. 1

i.e. treatment under their laws, regulations and administrative practices which is consistent with international law and no less favourable than that accorded in like situations to domestic enterprises.²⁴⁰

The "national treatment" standard reflects the consensus among OECD nations that foreign-controlled enterprises which are subject to the laws of the countries in which they have activities and which are expected to act consistently with declared government policies as well as with the Guidelines' standards should generally be treated as national enterprises are in similar situations. The West, particularly the United States, believes that this would contribute to a favourable foreign investment climate throughout the OECD, consequently improving economies in that region and, ultimately, throughout the world as a whole.

This paragraph provides a distinct benefit to transnationals with subsidiaries within the OECD, even though the declaration is not binding on member countries and even though, as we shall now outline, there are limitations and exceptions to the principle.

In the arena of limitations, the section deals only with established investment rather than with the entry of new foreign investment into the host country. Even new foreign investment from already established enterprises in the host country falls outside of the ambit of these principles.²⁴¹

Additionally, the provision that member countries consider applying "national treatment" standards to enterprises which are owned or controlled by nationals of other than OECD countries,²⁴² although laudable in theory, is again of limited practical effect. Besides investment in certain OECD countries from Middle-East sources, there is not much investment in the OECD where the capital has emanated from outside of the area.

240. Declaration, II.1

241. Ibid., para. 4

242. Ibid., para. 2

In the arena of exceptions, provision is made for countries which have domestically enacted legislation constituting exceptions to the principle of "national treatment" to notify the Organization of these exceptions.²⁴³ These would include government aids or subsidies such as credits on preferential terms, tax rebates and the granting of public contracts. A distinction is made between exceptions already in effect at the time of the Guidelines' adoption and those which came into effect after that date. Members of the European Community, by virtue of their belonging to an economic union, are allowed to accord to fellow members a more favourable treatment than that accorded to other countries within the OECD, provided that the latter organization is notified of the categories of rights and activities affected. Additionally, Australian and Canadian laws have at times tended to foster the development of national enterprises. These countries have therefore arranged for an appropriate "general exception" to the rule. In practice, there is nothing to prevent a member nation from adopting measures which it deems to be within its economic self-interests with respect to foreign investment within the particular country in the light of specific circumstances peculiar to it.

In the overall analysis, however, endorsement of the concept of "national treatment" by the OECD should influence transnationals to support the Guidelines as a whole rather than to criticize its implementation. These enterprises would realize that the Code is for the benefit of all concerned and includes favourable provisions for them, even though some restrictions and impositions may have been placed on their conduct.

In our penultimate section, we shall outline governmental efforts to promote the Guidelines within the OECD area.

XII. Action Within the OECD Region to Promote the Guidelines²⁴⁴

Member governments took steps after 1976 to promote better knowledge and comprehension of the Guidelines. The document has been widely distributed to all ministries and public organizations concerned in the majority of member

243. Supra note 227 at paras. 1, 2 and 3

244. The information comprising this section was obtained from supra note 206, p. 61-3, Annex 1, para. 2-5

nations. There have also been attempts to draw the Code to the public's attention through official press releases, publications and press briefings in some of the countries. Speeches by government officials, letters to corporate and labour representatives and organizations as well as surveys of adherence by transnational enterprises to the principles are other methods through which there have been concrete efforts to make the Guidelines nationally known.

In many member countries, mechanisms and procedures have been established including inter-ministerial groups and advisory committees which periodically hold discussions with interested parties such as individual companies, business and labour organizations. The Guidelines have also been extensively distributed to these interest groups. Additionally, some member nations have gone so far as to draw the Guidelines' attention to their foreign-controlled enterprises through diplomatic channels. The United States' Ambassador to the OECD, Mr. William Turner, presented explanatory speeches on the Guidelines in major host countries of U.S. transnational corporate affiliates.

In the United States itself, Secretary of State, Dr. Henry Kissinger, Secretary of the Treasury, William Simon and Secretary of Commerce, Elliot Richardson, recommended the observance of the Guidelines in a joint letter on August 19th, 1976 which was addressed to each individual transnational enterprise with headquarters in that country.

A few governments, such as the Dutch, have indicated that they occasionally take the relevant principles into account when determining their competition policies.²⁴⁵

245. It is indeed apparent that the OECD member countries have made a greater effort to publicize the OECD Guidelines than they have made with respect to the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. (Infra text ch. 6-7). At the end of 1983, the only implementing activities concerning the latter Code reported in many developed countries were letters to national business organizations bringing the document to their attention. For example, in the United States, the only major publication by the administration was the co-authorship of a letter by the State and Justice Departments to 800 business leaders, combining the letter with a question and answer sheet explaining the Code and emphasizing its voluntary nature. (Supra note 238 at p. 133)

Action on implementation of the Guidelines is a fundamental aspect within the process of making its principles effective. It can only be hoped that promotion of the principles at the national and international level would continue unabated and efforts to promote the principles would even be increased over subsequent years.

Finally, we shall now comment on the review of the various OECD documents.

XIII. Review Periods

The Declaration, together with the "considerations and understandings" prefacing the Guidelines, as well as the Guidelines themselves, was to be reviewed within every third year "with a view to improving the effectiveness of international economic co-operation among member countries on issues relating to international investment and multinational enterprises".²⁴⁶ The first review was undertaken in June, 1979, the second in May, 1984 when it was decided to review the Declaration again at the latest in six years. These reviews were prepared by the C.I.M.E. and its working groups on the basis of the experience of all parties concerned in implementing the 1976 documents.

The three Decisions of the Council were initially to be reviewed within every third year²⁴⁷ but, at the last Council meeting at ministerial level in May, 1984, a decision was taken to review them again at the latest in six years.²⁴⁸

There were no changes to the 1976 OECD Package in the amendments in 1979 and 1984 as they pertained to the "Disclosure of Information" and "Competition" sections as well as to the Declaration on International

246. Declaration, V

247. Decision of the Council on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises, para. 5; Decision of the Council on National Treatment, para. 7; Decision of the Council on International Investment Incentives and Disincentives, para. 3, supra note 141, respectively

248. Supra note 222, para. 4; supra note 227, para. 8; supra note 231, para. 4

Investment and Multinational Enterprises. However, para. 2 of the "General Policy" section was changed to include a specific reference to consumer interests.²⁴⁹

Finally, the Decisions of the Council on National Treatment, on International Investment Incentives and Disincentives and on Intergovernmental Consultation Procedures on the Guidelines have all been revised. Furthermore, a Section on Conflicting Requirements imposed by Member States on Multinational Enterprises was added to the Package as a consequence of the May, 1984 review.

XIV. Conclusion

In this Chapter, we have attempted to place the formulation of the OECD Guidelines within the context of the international economic order of the early 1970's and to show how this economic order influenced the decision of the OECD governments to negotiate a code. We have examined the competition principles of the Guidelines and have attempted to analyze the legal consequences of an inherently voluntary document. We have also scrutinized the effect which that non-binding nature has had, and will continue to have, on its efficacy. We also discussed the possibility of the OECD Guidelines achieving binding effect in future years.

In our fifth Chapter, we shall examine the Bretton Woods financial and commercial structure from the foci of the developing countries, with emphasis on the economic development of these nations in the 1950's, 1960's and early 1970's as compared with that of the developed western nations. Secondly, we shall examine the fashioning of third world orchestration in the 1970's for modification of the post-war global economic structure through the process of international events in that period. We shall then discuss the significance and consequences of the New International Economic Order resolutions which have been adopted by the United Nations insofar as those resolutions pertain to our thesis. Finally, we shall examine the effect which the clamour for a new order has had on international economic affairs within the last decade.

249. The paragraph now reads:

"Enterprises should in particular, give due consideration to [host] countries' aims and priorities with regard to economic and social progress, including ... consumer interests."

CHAPTER V

The Third World, the Regulation of Transnational Enterprises and the Post-1945 International Economic Order

I. Bretton Woods and the Economic Development of the Third World

A. The Commercial Aspect

There were still over one hundred countries in Africa, Asia, the Caribbean, Latin America and the Pacific under the tentacles of colonialism when the major economic powers of the Western countries convened the Bretton Woods Conference near the close of the Second World War. Political independence for the vast majority of countries in the underdeveloped world (as the "Third World countries" were then described) was a process which would transcend the subsequent generation and beyond, after the September, 1945 cease-fire. As a consequence of this lack of political independence, the interests of the then colonies were considerably disregarded by the creators of the Bretton Woods institutions at the time when the post-war international economic, financial and commercial structure was being formulated. The underdeveloped countries played only a minor role in devising or organizing the new international economic institutions in the latter part of the 1940's, since a number of the less developed countries in Africa and Asia pressed without success for recognition of the special relationship between economic development and world trade.

Firstly, the aborted Havana Charter had emerged as a document which would have primarily promoted developed country interests alone, through the establishment of an organization committed to non-discrimination in international trade and through a general lowering of trade barriers in the developed market economies vis-à-vis other I.T.O. member countries. These two tenets would have resulted, even if unintentionally, in the denial of the special protection which less developed countries so desperately needed for their domestic industries and fragile economies.

The GATT was promoted as the leading international commercial institution and convention among the western nations after the failure of the Havana Charter. In several ways, the General Agreement did not attempt to represent the interests of underdeveloped countries in the first decade and a half after its inauguration. The United States and Western Europe largely moulded the rules of this organization, and the exceptions to those rules, to serve their own commercial concerns. Before the mid-1960's, the only step ventured in the GATT to come to terms with the special economic problem of the underdeveloped world was the solitary revision of Art. XVIII of the Treaty, granting member countries with weaker economies a wider discretion to restrict trade into their countries in order to protect domestic industries and to limit national balance of payments' deficits.²⁵⁰ This was a mere drop of water in the ocean as far as the creation of an equitable international trading environment in which less developed countries could operate on favourable terms was concerned.²⁵¹

The grant of "unconditional most-favoured-nation treatment multilaterally without discrimination" was the most significant feature of the General Agreement, if only because the United States envisioned it as the sine qua non for both the expansion of its own trade and as a deterrence to the possible creation of hostile economic blocs. Mr. Eric Wyndham-White, a GATT former Director-General, has described the principle as the "cornerstone of the organization and its agreement".²⁵² This clause calls on all signatory members to extend tariff concessions granted to one contracting party to all other member states as well. On the same token, tariff duties and other barriers to trade were also to be applied in a non-discriminatory fashion.

250. Dam, K., The GATT Law and International Economic Organization (Chicago: University of Chicago Press, 1970), p. 230

251. Finlayson, Jock, and Zacher, Mark, The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions (1981), 35 Int'l Org. 561, at p. 582

252. Wyndham-White, Eric, "Negotiations in Prospect", at p. 321, Toward a New World Trade Policy: The Maidenhead Papers (1975), ed. by Bergsten, Fred (Lexington, Mass: D.C. Heath)

The principle of non-discrimination can, however, only be justified where countries of similar economic structure and levels of commercial development, and hence, of a generally equivalent bargaining position, are being considered. It was therefore inevitable that bargaining power in the institution's negotiations was heavily tilted in the favour of western nations, since their markets were much more important to the less developed countries than vice-versa. Consequently, the failure to stipulate that there was an obligation to negotiate on all products was used by the U.S. and her major economic allies to exclude from negotiations, during the first fifteen years of the GATT, a variety of goods of vital interests to the development of the Third World as a whole. To add to their concerns, less developed countries were rarely the recipients of concessions negotiated in the GATT, since they were seldom the principal suppliers of products on which those concessions were granted. Additionally, we witnessed the decimation of any probable advantages accruing to less developed countries on any tariff concessions which may have been otherwise applicable, since these countries were unable to obtain significant concessions with respect to non-tariff barriers on products of major interest to them.²⁵³

At the first World Conference on Trade and Development, Professor Raul Prebisch, the brilliant first Secretary-General of UNCTAD, noted that "however valid the 'most-favoured-nation' principle may be in regulating trade relations among equals, it is not a suitable concept for trade involving countries of vastly unequal economic strength".²⁵⁴ Even strong supporters of the GATT concede that the principle of non-discrimination in fact meant discrimination against the less developed countries.²⁵⁵

253. Dell, Sidney, "The Origins of UNCTAD", 10 at p. 22, UNCTAD and the North-South Dialogue (1985), ed. by Zammit Cutajar, M.

254. Annual Report by the Secretary-General of the United Nations Conference on Trade and Development (1969), p. 66

255. Rubin, Seymour, Most-Favoured-Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution (1981), 6 Int'l Tr. L.J. 221, at p. 225

The second central doctrine embodied in the GATT treaty is the norm of trade liberalization or "free trade". Theoretically, the developed western nations are strong proponents of a free market system. However, in practice, free trade has only been allowed to the extent that it is compatible with the economic objectives of the individual nation concerned. The developing nations, especially the newly industrializing countries,²⁵⁶ have been affected tremendously by the protectionist policies of industrialized western nations. National protectionist policies harbour domestic industries.²⁵⁷

The third principle which is central to the GATT is based on the view that there should be reciprocation of trade "concessions" to each member of the agreement, preferably to an equivalent extent. This principle again serves to entrench the advantageous position of the prime trading nations within the Organization. The states with populous domestic markets and a high volume of trade with countries whose barriers they wish to see reduced would be more easily able to achieve their objective, through simply lowering their own trade barriers.²⁵⁸

256. The newly industrializing countries today are generally recognized to be Argentina, Brazil, Hong Kong, Mexico, Singapore, South Korea and Taiwan

257. An illustration of this is the fact that the practices and policies in developed nations have seriously undermined trade liberalization with regard to textiles and clothing, which is a key export sector for developing countries and is the only sector which is subject to special GATT supervision. Additionally, trade liberalization with respect to tropical product exports, crucial to a substantial number of developing countries, has been a long-standing item, not yet finalized, on the GATT agenda.

A major concern of third world countries has been the imposition by developed nations of excise duties on products such as coffee, cocoa, tea and bananas. These levies are effectively trade barriers, since they affect products which are not grown in the states adopting the levies. (Annex to the statement by Mr. Alister McIntyre, Deputy Secretary-General of UNCTAD, to the ECOSOC, Notes on Developments in the International Trading System Relevant to the Position of Developing Countries (July 10th, 1985), UNCTAD/OSG/314, p. 18 at para. 77).

258. Supra note 251, at p. 576

Fourthly, the concept of "national treatment", provided in Art. III, is another western industrialized principle operating to the disadvantage of those member countries with weaker economies. Analogous to the "national treatment" standard for foreign-controlled enterprises enunciated in the OECD Guidelines,²⁵⁹ this provision calls on member states not to discriminate between domestically produced and imported goods.²⁶⁰ The same article also prohibits a well-meaning GATT member from legislating internal taxes and other forms of regulations associated with the sale of imported goods within that country in order to discriminate against those goods relative to domestic supplies.²⁶¹ Of course, less developed countries imported, and still import on average, costlier manufactured products from the wealthier countries than they export raw materials or commodities to the industrialized world. Furthermore, Art. III means, in the majority of instances, that goods imported from the wealthier North would be cheaper in price to the consumer in the Third World than the comparable domestic supplies. This circumstance yet again places tough, in many cases unbearable, competition on local industries, to the detriment of the economic progress of the developing countries.

The present Executive Director of the U.N. Centre on Transnational Corporations, Mr. Sidney Dell, also specifies the absence of a solid institutional basis for the GATT as being a serious disadvantage for the less developed countries, especially when one considers the efforts of those countries to attain recognition for new principles of international trade which would take into account their peculiar circumstances and weak bargaining power.²⁶² As an illustration, industrialized nations were able to continue to apply national commercial measures, such as those protecting their domestic industries, even though such policies were contrary to the letter and spirit of the Treaty, since the GATT assumed the supremacy of national legislation over provisions of the agreement. Additionally, since honouring the

259. Supra text ch. 4, p. 91-93

260. GATT, Art. III:2

261. Ibid., Art. III:1

262. Supra note 253, p. 23

convention's provisions was purely a voluntary decision, there were no sanctions attached for failure to comply, except the "self-help" policy of retaliation by an injured member state. Of course, those countries with retarded commercial and industrial development could take little comfort in their knowledge that such an avenue was available for them to take.

The inadequacy of GATT's legal basis also gave the major industrialized countries an avenue whereby they could place the exceptions to the Treaty above its rules and legitimize the granting of permanent waivers where it was within their self-interests to do so, despite the obvious incompatibility of such actions with the spirit of the agreement. Mr. Dell provides the example of pressure being placed on the weaker member nations to forfeit protection ensuring their exports against quantitative trade restrictions in order to forestall the unilateral imposition of further restrictive measures being placed on their goods by the leading economic member states, despite the fact that such protection was theoretically afforded to them.²⁶³ This situation occurred in the case of cotton textile importation to the developed countries.

Another area of concern to the less developed countries was the failure of the organization to deal effectively with the issue of agriculture when the majority of the industrialized nations cut off their agricultural industries from external competition in order to again protect their national interests. This inevitably resulted in a weakening in the international division of labour in the agricultural sector to the disadvantage of third world countries.²⁶⁴

Therefore, through a resort to waivers of the provisions in the agreement, through special multilateral arrangements, through bilaterally negotiated restraints and through absolute unilateral action, major developed nations have been able to avoid or to ignore the full obligations of GATT in major third world sectors, such as textiles, clothing and a wide variety of

263. Ibid.

264. Supra note 251, at p. 581

agricultural and tropical products. In fact, the export trade of many developing countries is not covered by the principles of trade liberalization but, rather, by restrictive arrangements and policies, such as those mentioned in this paragraph.²⁶⁵

Even in contemporary times, many high tariffs remain in respect of third world exports into developed market-economy countries, despite the lowering of average tariff levels that has occurred over the last twenty years.²⁶⁶ These tariffs severely affect the commercial and economic development of developing countries and contribute to the high unemployment levels throughout these countries.

Finally, the General Agreement was not designed to address the controversial I.T.O. issue of international commodity agreements, an area of contention which was partly the reason for U.S. withdrawal of support for the Havana Charter. The breakdown of the I.T.O. negotiations affected the interests of the less developed countries with respect to international commodity agreements. Third world raw materials and their terms of entry into the industrialized world were, therefore, substantially disregarded by the Bretton Woods commercial institutions.

The extensive disadvantages to third world interests embodied in the Treaty and confirmed through the application of the General Agreement by the industrialized nations was reflected in the economic figures of the third world countries when compared to those of GATT's chief beneficiaries. The share of world exports held by the less developed countries steadily declined in the first fifteen years after 1945, especially where primary commodities were concerned. Additionally, the underdeveloped world received a shrinking percentage of the final price paid by consumers in the northern societies for their exported primary products. The processing, transport and marketing of those products has continued to be largely controlled by entrepreneurs based in developed countries, especially in the United States, in the United Kingdom

265. Supra note 257, p. 15-16 at para. 64

266. Ibid., p. 18 at para. 74

and in France. It was these entrepreneurs, substantially in the form of transnational enterprises, who reaped the major financial benefits from exported third world primary commodities and raw materials.

Consequently, the less developed countries, already lagging behind the industrialized North in terms of G.N.P. and per capita income, only experienced an average annual G.N.P. growth rate of 2 per cent in the 1950's. In comparison, the advanced western nations experienced an average annual G.N.P. growth rate of 3-4 per cent during the same period. Japan's growth rate average was a phenomenal 9-10 per cent per annum.

The failure of the GATT and other Bretton Woods institutions to perceive the economic development of third world countries as a priority for the progress of all mankind resulted in further retardation in the infrastructural development and economic progress of these countries. Terms of trade, which were inequitable from the viewpoint of third world countries between 1945 and the early 1960's, produced declines in the share of the global world market for those countries. Those same terms of trade, to a substantial degree, also resulted in slower rates of growth in the economies of the less developed countries.

With the transition from colonial rule to political independence under way for the majority of African, Asian, Pacific and Caribbean countries by the mid-1960's, there was a steady rise numerically in Third World GATT membership from the late 1950's. Consequently, the special circumstances in which the Third World found itself as a result of the colonial legacy began to be more earnestly asserted in the GATT during the 1960's. Demands were made to industrialized members to make the economic and commercial development of countries with weaker economies a major international concern. Additionally, UNCTAD's creation in 1964 catalysed efforts for the implementation of much overdue reform to the GATT Treaty in order to redress imbalances and inequalities within the document.²⁶⁷

267. Supra note 251

In February, 1965, Part IV was added to the GATT regulations²⁶⁸ in order to give greater latitude to weaker members to employ trade barriers for developmental purposes. It also granted these members special treatment through "commitments" from developed countries to reduce trade barriers of interest to the developing countries²⁶⁹ and through the waivering of the right of the industrialized membership to reciprocal treatment in trade matters.²⁷⁰

Messrs. Finlayson and Zacher describe this new chapter as "a victory of at least a symbolic nature for the developing countries".²⁷¹ This apparent concession to the developing member nations of the GATT can in no sense, however, be described as revolutionary. No mandatory obligations were imposed on developed member states. Noted GATT author, Professor Kenneth Dam, refers to the new chapter as "a great deal of verbiage and very few precise commitments".²⁷²

Indeed, the non-reciprocity provisions have not been sufficiently applied in practice. Few multilateral contractual concessions in favour of developing countries have been made without reciprocity. Additionally, products of particular export concern to developing nations have usually been exempted from the full application of the tariff reduction principles or have been covered by other trade policy measures, as previously mentioned,²⁷³ which have nullified the positive effect of the trade concessions.²⁷⁴

The trend of reform in the GATT to make the institution more sympathetic to third world needs continued in 1971 with the creation, in that year, of the Generalized System of Preferences. By this system, each industrialized

268. GATT Press Release 962 (1966)

269. Supra note 260, Art. XXXVII:1

270. Ibid., Art. XXXVI:8

271. Supra note 251

272. Supra note 250, p. 237

273. Supra text ch. 5, p. 102

274. Supra note 257, p. 22 at para. 90

country established preferential tariffs for particular imports from developing countries. The consequent effect on the economies of those developing countries affected has, however, been limited.

The strongest campaign for fundamental changes to previous GATT norms and practices was mounted during the economic recession in the industrialized countries, which coincided with the rise in bargaining strength available to the Third World led by the oil-rich nations among them and also with the emergence of newly industrializing states as major competitors in international manufacturing markets. This pressure for change was made within the context of the call by the developing states for a new order which would govern international economic relations. This call was also audible in fora of the United Nations and its agencies as well as at the conferences of the political Non-aligned Movement, where the concept had its birth.

Non-tariff barrier codes containing specific provisions exempting developing countries from various obligations and granting them "differential and more favourable treatment" in certain respects were adopted by the GATT after the conclusion of the Tokyo Round in 1979.²⁷⁵ This revision gave developing member states greater scope to employ trade barriers as a tool of national economic development. Special treatment for less developed members has also been granted through the permanent waivering of the "most-favoured-nation" principle in order to permit the operation of tariff preferences to these members.

Finally, therefore, the principle of "preferential treatment" became implanted in GATT tenets with the advent of the 1980's. Messrs. Finlayson and Zacher could say in 1981, however, that the effect on trade bargaining of these changes remains unclear.²⁷⁶ These authors argue that it remains to be seen whether the organization can be used as a medium through which new practices can be developed which would mould North-South economic relations.

275. BISD, 29th Supp., 1980, p. 203, Balassa, The Tokyo Round and the Developing Countries (1980), p. 28-30

276. Supra note 251, at p. 584

It is however submitted that prospects for this eventuality are dim, since the GATT focuses on trade barrier reduction, free trade among all nations and the realization of mutual commercial advantages, principles which would hardly, by themselves, foster a new international economic system which is more pertinent to the interests of the developing world.

B. The Financial Aspect

The position and influence which developing countries hold in the international financial and monetary arena is similar to that held by them in international trade and commerce. The World Bank and the I.M.F., its sister agency, although nominally specialized organs of the United Nations, have weighted voting which ensures the predominance of the capital-exporting nations. Voting rights in these institutions are based on monetary contribution to the budget of these organizations and on the G.N.P. of the individual member countries. Originally, the United States possessed 37 per cent of the voting power in the World Bank.²⁷⁷ That country now holds approximately 20 per cent of the voting shares in an organization which does not include the Soviet Union, or her closest allies, among its membership. The top five shareholders, the United States, the United Kingdom, the Federal Republic of Germany, France and Japan, together control approximately 40 per cent of the voting rights in the Bank. Additionally, the United States continues to possess an effective veto power over possible amendments to the Bank's Charter.²⁷⁸

The president of the World Bank has always been a citizen of the United States, while the managing director of the I.M.F. has, by tradition and precedent, always been a national of a Western European country.

All this means that the decision-making process in the World Bank and in the I.M.F. are effectively in the hands of the western industrialized countries. Although we have witnessed the emergence of an influential

277. Payer, Cheryl, The World Bank (1982), p. 22

278. Van de Laar, Aart, The Bank and the Poor (1979), p. 59

Middle-Eastern bloc within these two financial organizations in recent years with the attaining of larger voting shares by the oil-rich nations, the developing countries, as a group, have been hindered by obstacles placed in their path by the World Bank and the I.M.F. when these nations have attempted to pursue developmental policies which do not conform to the conventional views or interests of the developed donor states. Despite the numerical superiority of third world countries within these organizations, they are denied an effective voice in the formulation of economic decisions even in instances where their own interests would be affected.

II. Events Between 1969-74 Facilitating Call for a
New International Economic Order

The origin of third world demands for a change in the Bretton Woods economic structure is generally considered to be the final communique of the first unofficial gathering of the Non-aligned Movement in Ban Dung, Indonesia, held between April 18th-24th, 1955.²⁷⁹ This organization was formed by the heads of twenty-nine developing African and Asian countries. The main objective of the group was the maintenance of a bloc of third world countries which would be politically neutral in the "cold war" affair and the subsequent power struggles between the United States and the Soviet Union. These non-aligned countries have all historically experienced the exploitation of European colonialism, a system which as recently as in the immediate pre-World War I period had prevailed over 80 per cent of the earth's land area and had encompassed 75 per cent of the world's population. With the advent, or in the majority of cases, the imminent advent, of political independence for these countries, they were attempting to minimize the dominant control over all aspects of their societies which was concomitant with colonial rule and government.

One of the major conduits through which colonial rule brought tremendous economic benefits to the respective "Mother Countries" had been the "transnational enterprise", which had exploited the colonies for their raw

279. Ban Dung 1955 (Colombo: Ceylon, The Gov't Press, n.d.), p. 22-31

materials and agricultural products. Fundamental change to this system of exploitation was of prime concern to the Non-aligned Movement when the organization held its first official convention in Belgrade during September, 1961.

The faltering of Bretton Woods at the end of the 1960's gave the developing countries justification to increase their criticism of the present economic order. Previous to this period, only occasional voices had been heard calling for a restructuring of the world economy. These speeches had come from the more vociferous developing countries, such as Egypt, Ghana and India. However, these voices became louder after the 1964 formation of UNCTAD as a rival to the GATT. UNCTAD consisted of a majority third world membership from its inception. However, the major impetus for support from the Third World, as a whole, for a modified global economic order which would seek to redress the economic imbalances against developing countries emerged in the early 1970's. Then, the United States' economy was on the decline under the strain of the increasing financial burden of the Vietnam War and that country was consequently forced to move off the gold-exchange standard and to devalue its dollar.²⁸⁰ With the growing perception that the economy of the chief proponent of the Bretton Woods system was no longer invulnerable, third world countries began to arm themselves as allies for battle in an attempt to bring about a reorganization of the 1944 system into a New Order.

The 1973 Arab-Israeli War contributed in a large measure to the momentum leading up to the international debate on the question of a New International Economic Order ("N.I.E.O."). The Arab oil-exporting countries placed an embargo on those countries, such as the United States, which continued to support Israel. Even though the embargo was only partly effective, since non-Arab OPEC member countries increased their oil production and some pro-Arab receiving countries re-exported the oil, the threat of an imminent economic disruption in the industrialized nations resulted in pro-Arab moves by France and Japan. This additional demonstration of division within the

280. Supra text ch. 4, p. 55

ranks of the industrialized market-economy countries brought about a belief in the developing world that global balance of power had shifted in their direction.²⁸¹

In 1971, the Libyan government of Colonel Gaddafi moved to put into practice a course of action which it had been recommending to fellow third world countries. It nationalized all stages of its oil production from transnational enterprises which operated within its borders. The subsequent oil price hike in 1973-74 by OPEC is generally accepted as the single most important factor in convincing developing countries that they could use their natural resources and national commodities in an attempt to bring about the reorganization of the international economic system. The achilles' heel had been revealed in the economic structure of the West, since the substantial increase in price of the world's most important traded commodity heralded economic recession in the United States and her main commercial allies. This was a significant event within the context of the N.I.E.O. debate. The Third World, as a whole, united in the international fora in their call for greater control over their own resources and economies as well as for restrictions to be placed on the power and influence of the transnational enterprise over host country economies in the developing world. Despite the higher oil bill borne by the majority of developing countries as well, they unanimously endorsed the OPEC action at the Sixth Special Session of the General Assembly in April-May, 1974.

Previous to the oil price hike, UNCTAD III was convened in Santiago, Chile in April, 1972 under the auspices of the democratically elected Marxist Allende government, amidst rumours, proven valid by the course of subsequent events, that the U.S. Central Intelligence Agency and the powerful American-based transnational enterprise, I.T.T., had unsuccessfully conspired to prevent Allende's ascent to the presidency of his country in 1970 and were in fact continuing to destabilize his regime with the help of the World Bank and

281. Denoon, David, "Facing the New International Economic Order", at p. 13, The New International Economic Order: A United States Response (1979), ed. by Denoon, D.

the U.S. administration.²⁸² The use of restrictive business practices and the abuse of power by transnational enterprises, with the cognizance and overt support of their home governments, was of prime concern to third world representatives at this conference. President Luis Echeverría of Mexico, addressing delegates, voiced his country's support for a new legal norm recognizing the right of third world countries to control their own raw materials. He proposed that the international economy be placed on a firmer legal footing through the formulation of a Charter of Economic Rights and Duties of States.²⁸³

Within the fora of the Non-aligned Movement, a recommendation was adopted at the Fourth Conference, held in Algiers between September 5th-10th, 1973, to the effect that the United Nations' General Assembly should give priority to drafting a Charter of Economic Rights and Duties of States. The Charter should recognize "the economic aspirations of States engaged in the struggle for promoting their own development, as well as the aspirations of the international community as a whole".²⁸⁴ By this juxtaposition, the non-aligned countries made it clear that they perceived the economic development of third world nations and their sovereignty over their own resources to be interrelated with the advancement of mankind as a whole.

The impetus towards debate in the United Nations on the question of the viability of a new international economic system which would regulate global commercial and financial matters was maintained through a rapid progression of

282. On his ascent to the presidency, Allende nationalized private banks, copper mines and other key industries, the majority of which were previously owned by United States' interests. These U.S.-based interests objected to the compensation offered. In October, 1972, the World Bank suspended negotiations with respect to new loans for Chile, claiming that the government's economic policies would prevent the effective utilization of Bank lending. Allende was deposed from the presidency in a bloody right-wing military coup on September 11th, 1973.

283. See UNCTAD Proceedings, 3rd Sess. (1972), U.N. Doc. TD/180, Vol. 1A, pt. 1, p. 184-86

284. Fourth Conference of Heads of State or Gov'ts of Non-aligned Countries, Algiers (Sept. 5th-10th, 1973), Fundamental Texts (Algiers: Algeria, Min. of Foreign Affairs, n.d.), p. 72

international economic conferences.²⁸⁵ All these conferences saw the unity of the Third World maintained in the face of attempts by the United States to capitalize on the differences in economic and industrial strength within the Third World itself.

III. United Nations' Efforts Before 1970 to Establish a New International Economic Order

The first call for a N.I.E.O. made within a United Nations' assembly was in 1952 when the Chilean representative raised the issue of permanent sovereignty over natural resources during the debate on the draft International Covenant on Human Rights at the Eighth Session of the Human Rights Commission. The issue was raised in the context of the economic, social and political aspects of the right of self-determination.

The United Nations, with its growing third world membership by the early 1960's, acknowledged the full sovereignty of developing countries over their natural resources as early as 1962. The World Body stipulated that the development of such resources, as well as the import of foreign capital therein, should be governed by contractual rights, national legislation and international law.²⁸⁶ Surprisingly, this resolution was adopted by a very large majority representing both developed capitalist states as well as the developing member countries.²⁸⁷ It is submitted that the support at that time of the industrialized market-economy countries for political independence, in principle, for third world countries contributed to their approval of a document recognizing sovereignty of developing countries over natural resources. Additionally, western acceptance of Resolution 1803 (XVII) could

285. Among these international conferences were the African Ministerial Meeting Preparatory to UNCTAD III in October, 1971, held in Addis Ababa; the Latin American Ministerial Meeting of November, 1971, held in Lima and the Ministerial Meeting of the Asian Group of 77, held in October, 1971 in Bangkok.

286. U.N. Gen. Ass. Res. 1803 (XVIII), December 19th, 1962

287. The Resolution was adopted by 87 votes to 2, with 12 abstentions. France and Sough Africa registered negative votes. The Soviet-bloc countries abstained.

be attributed to the inclusion within the text of the recommendation that "national development of natural resources" must be "in conformity with international law".²⁸⁸ This resolution was a significant one within the context of the debate on the question of restriction of the power of transnational enterprises and of abuse of that power, since approximately two-thirds of the operations of transnational enterprises in developing countries involve the extraction of natural resources.

IV. The Declaration and the Programme of Action on the New International Economic Order

In January, 1974, Algerian President Honari Boumedienne, then unofficial leader of the non-aligned states, called on the Secretary-General of the United Nations to organize a special session of the General Assembly to discuss matters of raw material production, trade and development. President Boumedienne was in a commanding position, since he was the President of a radical Arab oil state at a time when the United States and other industrialized nations were lobbying for the oil issue to be internationally discussed.

The Sixth Special Session, which the Non-aligned Movement had requested, was duly summoned three months afterwards in April, 1974. President Boumedienne, in his address,²⁸⁹ called on third world countries to "take control from the international monopolies and transnational enterprises of the mechanisms whereby the wealth of poor countries is transferred away from them and ... the system of price-fixing for raw materials continues to flourish". The Non-aligned Movement's President also urged developing countries to follow the path taken by the oil-producing nations and to unify in the formation of national consortia to deal with all the other raw materials and commodities within their national boundaries. He accurately perceived third world developmental problems as being inherent in the profound imbalance present in

288. See Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v The Government of the Libyan Republic (Award on the Merits, January 19th, 1977), 53 Int. Law Rep., p. 448 at para. 84, per Arbitrator Dupuy (translated from the original French version).

289. Official Records of the General Assembly Sixth Special Session, 2208th Plenary Meeting, U.N. Doc. A/PV.220, p. VII

international economic relations as formulated at Bretton Woods. Finally, for our purposes, the Algerian leader noted that under the sole heading of profits declared by transnational enterprises, the capital that flowed out of developing countries during the second half of the 1960-70 development decade was about one and a half times the foreign aid in grants that home governments of these enterprises made available to the developing countries. Indeed, the true multiplication factor is probably much more than one and a half when one considers the fact that transnational enterprises frequently understate their amount of profits earned in developing countries.

Although President Boumedienne's was the key address from a representative of the Third World, many other delegates from that bloc enunciated economic programmes which they saw as leading to greater equality and justice in the international economic arena, to the economic decolonization of third world countries, to the elimination of their relationship of dependence on developed countries as well as to the realization of their rightful role in the international financial decision-making process through the policy of "one nation - one vote" within the corridors of the World Bank and the I.M.F.

On May 1st, 1974, the General Assembly of the United Nations adopted, without a vote being carried out, two resolutions entitled:

- 1) The Declaration on the Establishment of a New International Economic Order ("The Declaration");²⁹⁰ and
- 2) The Programme of Action on the Establishment of a New International Economic Order ("The Programme").²⁹¹

The former document outlines the basic principles on which a new viable system of international economic relations might be built in the near future. The latter document, more concrete and precise in its proposals, seeks to make the principles of the N.I.E.O. operational through a range of measures relating to various aspects of concern to developing nations. These two

290. Res. 3201 (S-VI)

291. Res. 3202 (S-VI)

resolutions were both based on principles and measures - formulated in the decade previous to their adoption - drawn from organizations with an influential developing country membership, such as UNCTAD and the Non-aligned Movement.

The principles proposed in the Declaration which are of interest to us, insofar as they relate to codes of conduct for activities of transnational enterprises, include:

- 1) "[T]he regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries;"²⁹² and
- 2) "Preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible."²⁹³

Among those resolutions in the Programme which are of a similar nature is the provision that:

- 1) "All efforts should be made to reform the international monetary system with 'full and effective participation of developing countries in all phases of decision-making for the formulation of an equitable and durable monetary system and adequate participation of developing countries in all bodies entrusted with this reform and, particularly, in ... the I.M.F.';"²⁹⁴

292. Supra note 290, para. 4(g)

293. Ibid., para. 4(n)

294. Supra note 291, para. II, 1(d)

A second principle intended to herald a N.I.E.O. provides that:

- 2) "All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations:
 - a) to regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries;²⁹⁵
 - b) to regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned;²⁹⁶ and
 - c) to promote reinvestment of their profits in developing countries."²⁹⁷

Finally, there is para. VIII (a), which proposes that:

- 3) "All efforts should be made to defeat attempts to prevent the free and effective exercise of the rights of every state to full and permanent sovereignty over its natural resources.

These are just a few of the measures which developing countries perceive as vital for their economic progress in the post-colonial era. However, although these two documents stand as resolutions of the General Assembly, their significance as the embodiment of practical propositions which will be implemented in the near future was immediately called into doubt by the accompanying supplementary statements and reservations of thirty-eight

295. Ibid., para. V, (b)

296. Ibid., para. V, (d)

297. Ibid., para. V, (e)

countries. These countries mainly included the more industrialized nations in the western world. Indeed, Finland and New Zealand were the only two members of the OECD which did not register reservations on either of the two documents.

United States' Ambassador Scali "strongly disapproved" of some of the provisions in both documents and did not "endorse" the resolutions.²⁹⁸ On the issue of the regulation and supervision of activities of transnational enterprises, the Ambassador maintained the repeatedly broadcasted view of his administration, which is that although transnational enterprises must act as good corporate citizens of host countries and are subject to regulation and supervision by the authorities in those countries, such regulation and supervision must be non-discriminatory and in conformity to the norms of international law.²⁹⁹

It is readily apparent that if a vote had been taken on these resolutions, the United States, along with the majority of its chief economic allies, would have registered negative votes or at least have abstained. The U.S. Ambassador, and those who held a similar view to his on this issue, clearly understood that the developing nations were challenging the theory that regulation and supervision of transnational enterprises must be "in conformity to the norms of international law" as these norms have been formulated by the industrialized western world. It is only when these norms have been redefined that a new international economic structure can be progressively created. However, the developed western states are committed to resisting any challenge to these "old order" norms.

We shall now discuss the Charter of Economic Rights and Duties of States. Then we shall examine the legal significance of these N.I.E.O. documents and the practical impact which these three resolutions have had on international economic relations in the years following their adoption by the United Nations.

298. U.N. Doc. A/PV 2229, para. 81

299. Ibid., para. 94

V. The Charter of Economic Rights and Duties of States

The Charter of Economic Rights and Duties of States³⁰⁰ ("The Charter") was adopted by the United Nations' General Assembly during its Twenty-Ninth Session on December 12th, 1974 by a vote of 120 to 6, with 10 abstentions.³⁰¹ The Charter was the natural postcursor to the earlier N.I.E.O. resolutions which had been adopted without a vote in the General Assembly. It completed, and at the same time complemented, the earlier statements. By itself, the 1974 Charter ranks as the most explicit and comprehensive statement of the N.I.E.O. programme on paper. It was intended by its proponents to be a pragmatic instrument, clearly outlining the rights and obligations governing international economic relations which would be observed in the future by all states. It was also the intention of its creators to use the Charter as the basis from which would result the subsequent codification of specific provisions relating to those particular aspects of the document which required a more detailed treatment. The Charter was not, therefore, envisaged as being an end in itself but was rather regarded as being a significant step in the restructure of global economic relations.

Although six industrialized nations registered negative votes and ten abstained, Australia, New Zealand and Sweden were three member nations of the OECD which voted in favour of the adoption of the Charter. We shall now outline the principles in the document which are of relevance to our thesis, since the Charter represents the apex in the attack by third world countries, as a group, on transnational enterprises.

The Charter again expresses the concept of permanent sovereignty to which every state is entitled.³⁰² Nine developed nations, including Canada, France, the Federal Republic of Germany, Japan, the United Kingdom and the United

300. U.N. Gen. Ass. Res. (A/Res/3281 (XXIX)), January 15th, 1975

301. The dissenting nations were Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States.

302. Supra note 300, Art. 2(1)

States, disapproved of the language used in this paragraph.³⁰³ Circumstances had changed since 1962 when these countries, by and large, agreed in principle to the concept of full sovereignty of developing countries over their natural resources.³⁰⁴ Now, in the midst of the oil crisis and third world pressure and unification, these countries decided to adopt a different policy.

Art. 2(2)(a) authorizes the right of every state to regulate and exercise authority over foreign investment within its jurisdiction, in accordance with its laws and regulations and in conformity with its national objectives and priorities. The paragraph also gave a nation the option of refusing to grant preferential treatment to foreign investment.

Ten developed nations voted against this proposition.³⁰⁵ These states asserted that the regulations applicable within a national jurisdiction to foreign investment should be in accordance with its international obligations.³⁰⁶

Art. 2(2)(b), meanwhile, provides for host country regulation and supervision over the activities of transnational enterprises which operate within the jurisdiction of that country. Measures could be adopted to ensure the compliance of such activities with national legislation and their conformity with the economic and social policies of the host country's government. Additionally, a second state has the duty to do all it legally can do in order to assist a host state in its regulation of the activities of a transnational enterprise within its own territory.

303. U.N. Doc. A/C.2/SR.1648, p. 38-9

304. Supra text ch. 5, p. 112-13; supra note 286

305. Supra note 303, p. 39-40

306. See, eg., the statement by the United States' representative contained in U.N. Doc. A/C.2/SR.1649, p. 21. Even Canada, which, with the substantial investment of U.S.-based interests within its national boundaries, was to subsequently differ significantly with its southern neighbour at the end of the 1970's over the question of governmental scrutiny of foreign investment, voted against this provision (see U.N. Doc. A/PU.2315, p. 56)

Although there was a consensus that host countries are entitled to control the activities within its territory of foreign-based enterprises, the general view of the western industrialized nations was that transnational enterprises "[should] enjoy ... the same rights and fulfil the same obligations as any other foreign person".³⁰⁷ These states,³⁰⁸ led by the United States, hold the view that transnational enterprises should be protected by the same international standards which are applicable to foreigners, even if they are, as they should be, subject to national jurisdiction.

As Art. 2(2)(b) stands, it is a prime example of how the Third World has used its numerical superiority in the United Nations to attempt to alter the international economic structure in order that it could be more amenable to their own purposes. Since transnationals are the major conduits through which capital is transferred internationally to the developing world, this principle proposes that host country third world administrations should use foreign-based enterprises which operate within their respective territories to promote economic and social progress concomitant with their avowed policy of securing greater economic independence, power and influence in global economic matters. A third world host country must have a moral right to define the limits of acceptable activity on the part of a transnational enterprise while that enterprise is conducting business within its national boundaries, in order to suit the social and economic interests of that host country. It is, however, quite optimistic to believe that enormously powerful enterprises can be submitted to the will of third world countries, the majority of whose G.N.P. is exceeded by the total sales of most of those enterprises. It is even more optimistic to believe that home countries of these enterprises can be coerced into assisting developing countries in this type of endeavour. It is within the interests and benefit of these home countries of transnational enterprises which operate in the developing countries that the socio-economic

307. Report of the Second Comm. (1974), 29 U.N. GAOR, Supp. _____, at _____, U.N. Doc. A/9946, para. 2(c)

308. Besides the United States, the Federal Republic of Germany, Japan and the United Kingdom also voted against Art. 2(2)(b). See supra note 303, p. 40-1.

structure of the the latter states remain dependent on, and linked to, the industrialized nations of the West and that the present period of "neo-colonialism"³⁰⁹ continues.

Art. 14 deals with the issue of barriers placed in the way of exports from developing countries. As such, it addresses the problem of GATT, since that organization has traditionally been insensitive to the concept of the economic and commercial development of developing countries.³¹⁰ The Article therefore calls on member nations to join together in realizing "a steady and increasing expansion and liberalization of world trade and improvement in the welfare and living standards of all peoples, in particular those of developing countries". States should dismantle trade barriers and endeavour to solve global trade problems, especially where those trade problems of developing countries are concerned. Consequently, developed nations are urged to create more accessible markets for products of interest to developing countries and to adequately remunerate those countries for their exported primary products.

The liberalization of markets in the industrialized countries of the world in order that products from the Third World can enter those countries on more amenable terms is a major branch in the quest for a N.I.E.O. Third World nations perceive such a policy to be vital to an increased growth rate in their international trade, to an expansion in their share of world trade and, ultimately, to improved standards of living at home.

However, it is submitted that this particular policy, when critically examined, cannot be seen as a challenge to a basic assumption, even if it is not a practice, which underlies the Bretton Woods economic structure. The concept of free trade, as distinct from a planned economic structure, is still emphasized. The continued policy of dependence on markets in the

309. The term "neo-colonialism" has been attributed to the late Kwame Nkrumah, Ghanaian Prime Minister between 1952-60 and President between 1960-66. President Nkrumah used the term to describe a nation that is now politically sovereign, in theory, after having a history of colonial rule but whose economic and political systems are in reality externally directed, influenced and controlled. (See generally, Nkrumah, Kwane, Neocolonialism: The Last Stage of Imperialism (1965)).

310. Supra text ch. 5, p. 98-104

industrialized world, more so than international trade between developing countries, is also reiterated. It is therefore readily apparent that the Third World does not wish to see the old economic system completely eradicated but is only calling for modification of the administration of that system to better serve the needs of the developing countries.

Art. 18 again addresses itself to issues covered by the GATT. This Charter provision, however, concentrates on the redefinition of some major GATT principles. Developed countries are asked to extend, improve and enlarge non-reciprocal and non-discriminatory tariff preferences in favour of developing countries. Indeed, industrialized nations are urged to consider the possibility of creating "other differential measures" which would provide special and more favourable treatment for the trade and developmental needs of third world countries.

This proposition breaches the concept of reciprocity of trade concessions in an attempt, from the point of view of the United States and her economic allies, to injudiciously undermine the theory of the GATT. Predictably, this provision, so vital to the realization of a more equitable international trading environment in favour of developing countries, was opposed by the major western industrialized nations.

Additionally, Art. 18 asks developed countries to refrain from implementing measures which would have adverse effects on the economic development of third world countries. Unfortunately, this provision will again have little effect on the commercial and economic policies of the major industrialized powers. The prime concern of these nations is the advancement of their own interests and not those of the world as a whole, even if such a policy entails economic retardation in the developing countries.

The final principle in the Charter which we will examine is Art. 26 which reads in part:

"International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of ... the exchange of most-favoured-nation treatment."

Fourteen developed countries disapproved of this provision³¹¹. The major reason for their disapproval was ostensibly their belief that such an article implies the automatic grant of "most-favoured-nation treatment".³¹²

Some commentators may find it difficult to imagine that third world nations should now be clamouring for the automatic application of "most-favoured-nation treatment". These states have historically encountered numerous problems and disadvantages through the application of this concept by western industrialized nations.³¹³ However, there has recently been a change in policy within the third world caucus towards this issue.³¹⁴

VI. Legal Significance of the New International Economic Order
Resolutions and of the Charter

Clarification of the legal nature of the N.I.E.O. resolutions adopted by the United Nations is a prerequisite to any evaluation of what role such resolutions will play in future developments within the international economic system. Traditionally, resolutions of international organizations, such as the United Nations, cannot have binding force.³¹⁵ They are not, by themselves, capable of bringing into existence a new rule of international law. Many writers, such as Mr. Haight, strongly contend that resolutions of the General Assembly do not in any way have the force of law.³¹⁶ This view would therefore only give the N.I.E.O. resolutions of the United Nations legal efficacy insofar as those documents have declared or restated previously existing principles or rules of international law.

311. Supra note 303, p. 57 et seq.

312. See, for example, the statement by the French representative on behalf of the EEC member nations, U.N. Doc. A/C.2/SR.1650, p. 4

313. Supra text ch. 5, p. 98-99

314. For example, Mr. Alister McIntyre, UNCTAD's Deputy Secretary-General, has now called for the "unequivocal adherence to the 'unconditional most-favoured-nation' principle" (supra note 257, p. 17 at para. 70)

315. Art. 38 of the Statute, International Court of Justice

316. Haight, G., The New International Economic Order and the Charter of Economic Rights and Duties of States (1975), 9 Int'l Lawy. 591, at p. 597

Messrs. Brower and Tepe, however, modify this view. In their opinion, although these resolutions are legally non-binding, they can be construed by those states which reject traditional international economic law as a new standard of international law or as a device through which to pressure future international law-making.³¹⁷ As such, these resolutions are regarded by a large majority of states as a development of legal norms for the establishment of international economic regulations, on the basis of equity, sovereign equality, interdependence, common interest and co-operation among all states irrespective of their economic and political systems.³¹⁸ Those proponent states argue that even a technically non-binding instrument can eventually create legal obligations and responsibilities for states. The developing countries' contention that these resolutions will subsequently alter the rights and duties of nations is buttressed by the fact that the documents, the Charter in particular, are replete with language of legal obligation and responsibility. Additionally, use of the indefinite article in the documents strengthens this contention.

The absence, at least for the present, of any legal obligations or responsibilities placed by the N.I.E.O. resolutions on the developed western countries is indisputable, in view of the importance of those dissentient or abstaining states with respect to international economic and commercial matters and in view of the numerous significant amendments proposed, but not adopted in the resolutions, by those states.³¹⁹ Professor Gillian White, in her discourse, outlines two basic reasons for the rejection by the industrialized western nations of the Charter and its precursor resolutions:

- 1) the document[s] were an attempt to assert principles of international law, or at least opinio juris, without specific reference to established international legal doctrine; and

317. Brower, C.N., and Tepe, J.B., The Charter of Economic Rights and Duties of States; A Reflection or Rejection of International Law? (1975), 9 Int'l Lawy. 295, at p. 302

318. Supra note 300, Preamble

319. White, Gillian, A New International Economic Order? (1975-6), 16 Va. J. Int'l L. 323, at p. 330

- 2) the [documents] failed to formulate and articulate propositions which would be of predictive value in economic intercourse. The developed states, therefore, had no assurance that their economic relations with developing states would be subject to a predictable or stable regime.³²⁰

As an illustration, the United States felt that the resolutions did not purport to completely take into account the respect for agreements and international obligations where treatment of foreign investment was concerned. The representative of that country, therefore, went on record maintaining that the Charter did not achieve the aim of encouraging harmonious economic relations in that "it discouraged, rather than encouraged, the flow of capital needed for development and endorsed the principle of extensive government intervention in economic matters through the concept of producer cartels and the indexation of prices".³²¹

It is clear that the most significant countries in terms of international trade, investment and finance do not regard the Charter or any other N.I.E.O. resolution as international agreements of binding nature. These proposals seek to introduce norms and rules which are at variance with the traditional regulations of international economic relations established by those same countries which reject the N.I.E.O. resolutions on the grounds, basically, that their implementation is not within the interest of their numerically restricted economic bloc.

There is not much prospect in the near future that N.I.E.O. principles would en masse become legally binding. The future will witness tighter controls, both at the national and at the international level, over certain abusive activities of transnational enterprises, as administrative expertise in antitrust regulation increases throughout the World. There will also be some piecemeal non-reciprocal concessions given to developing countries by the industrialized West, more as result of political strategy to prevent the spread of the communist doctrine than for any other reason, particularly where United States' concessions are concerned. However, in the absence of general support from the developed western countries, the prospects for which look dim

320. Ibid., at p. 335

321. Supra note 306

at the present time and in the near future, it is difficult to foresee the new concept becoming legally binding on any state opposing it. Although the North Sea Continental Shelf Cases³²² do recognize that an international agreement may in time become part of customary international law theoretically binding even on those countries which are not parties to the agreement, those cases also concede that a pre-condition of this occurrence is widespread, representative participation in the conventional rule by the world community, including those states whose interests are specially affected by the rule. The Charter and other N.I.E.O. resolutions may therefore continue to have mere political effects instead of the binding force for which the developing countries had hoped. The N.I.E.O. will be only of limited practical effect if it does not succeed in penetrating the national and international economic reality of the industrialized world.

Despite the drawback of lack of legal enforceability, and although, as we will see in the following section, the initial exuberance of its chief proponents has now clearly subsided, the concept of a N.I.E.O. continues to have a significant impact on the international economic community. The writer can only agree with Professor Robin White in his sentiments that the documents will continue to provide primary evidence and guidance for all nations of legal norms which will govern international economic relations in the future.³²³

We shall now look at the major events which occurred in the aftermath of the U.N. documents of 1974, as these events pertain to our thesis. We shall also discuss the main reasons for the retardation of the N.I.E.O. concept in the latter years of the 1970's and in the early 1980's.

VII. The Aftermath of the Charter and of the New International Economic Order Resolutions

Although the Twenty-Ninth Session of the General Assembly marked the apex of the solidarity within the third world bloc for support for N.I.E.O. propositions, there were follow-up meetings during the mid-1970's and the late

322. Supra note 217

323. White, Robin C.A., A New International Economic Order (1975), 24 Int'l & Comp. L. Q. 542, at p. 552

1970's within international organizations which are sympathetic to third world developmental objectives.

More than one hundred developing countries met in Dakar, Senegal in February, 1975 to reaffirm the principle that recovery and control of natural resources held the key to third world economic freedom and to urge developing nations to formulate a joint plan to protect the prices of their exported commodities.³²⁴ The conference emphasized, however, that in the final analysis, "responsibility for speedy development is first incumbent on the developing countries themselves". This is clear evidence that the developing nations realize that they cannot depend totally on aid, assistance and concessions from more economically advanced states for their deliverance, but must also foster an attitude of "self-reliance" or of inter-dependence within the third world bloc itself.

The Second General Conference of the United Nations Industrial Development Commission ("UNIDO") at Lima, Peru, held during the month following the Dakar Conference, adopted a Declaration and Plan of Action on Industrial Development and Co-operation³²⁵ by 82 votes to the solitary dissenting vote of the United States. There were seven abstaining states.³²⁶ This document, which is of course not binding on any nation, in part expressed the "need for the international community to comply in full with the precepts contained in the Charter".^{326a} The representative of the United States rationalized his country's disassociation from such a document as being based on reluctance on the part of his administration to accept the Charter as an effective system of legal rules governing international economic relations.

324. Conference of Developing Countries on Raw Materials (reprinted in 14 Int'l Leg. Mats (1975), p. 534).

325. U.N. Doc. ID/B/155/Add.1, p. 22 (reprinted in 14 Int'l Leg. Mats (1975), p. 826).

326. Those states abstaining were Belgium, Canada, the Federal Republic of Germany, Israel, Italy, Japan and the United Kingdom.

326a. 14 Int'l Leg. Mats (1975), p. 826 at 844

These and similar issues were discussed and debated at the UNCTAD IV meetings in Nairobi, Kenya in 1976 and in Manila, Philippines in 1979 without notable practical progress at either conference. Subsequent Non-aligned Movement meetings, such as that under the chairmanship of President Castro in Havana, Cuba in 1979, also attempted to maintain the issue of the N.I.E.O. in the forefront of international economic debate. However, by then, a combination of factors had reacted to remove the lustre from debates and discussions on the issue in major international commercial and financial fora.

At the Seventh Special Session of the U.N. General Assembly in September, 1975, then U.S. Secretary of State, Dr. Henry Kissinger, sought to respond to, and to counter, the economic demands proposed in the Charter. Although the Kissinger speech, which was delivered by U.S. Ambassador to the U.N., Daniel Moynihan, signified a shift, at least rhetorically, in the policy of the United States towards some accommodation to third world needs, the overall message of the speech was, in effect, the buttressing of the Bretton Woods economic order. The United States proposed the strengthening of those institutions, such as the I.M.F. and the International Finance Corporation, which are associated with the commercial and economic interests of the developed western nations. The speech, although offering approximately two dozen often complex suggestions for adjustment to the international economic structure which would presumably be to the advantage of the developing world, did not at any stage seek to undermine the viability of the "free market approach", with its distinct advantages to the industrialized western countries.

The speech is significant, however, with respect to the subsequent formulation of the UNCTAD Restrictive Business Practices Code. It marked the first occasion before a major international body that the United States unequivocally recorded its support for a global agreement which would outline general principles concerning abuse of commercial power by transnational enterprises, including principles with respect to restrictive business practices. Without agreeing to the basic goals of the N.I.E.O., the United States had expressed its willingness to discuss, within an international context, specific economic issues which affect developing countries in particular.

Dr. Kissinger maintained that:

"[Transnational enterprises] must act in full accordance with the sovereignty of host governments and take full account of their public policy. Countries are entitled to regulate the operations of transnational corporations within their borders ... "

"The United States ... believes that the time has come for the international community to articulate standards of conduct for both enterprises and governments. [In addition to a statement of general principles], laws against restrictive business practices must be developed, better co-ordinated 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 business practices in setting prices or restraining supplies, whether by private or state-owned transnational enterprises or by the collision of national governments."³²⁷

Additionally, the Kissinger speech epitomized the defeat of the attempt by the Secretary of State to define the contemporary international economic conflict as essentially one of "energy supply". The consequence of this in the diplomatic arena was the summoning of the French-proposed talks on the "North-South" dialogue, the Paris Conference on International Co-operation ("the CIEC"). A wide agenda, dealing with the problem of raw materials as a whole and taking into account the interests of all the developing countries, was on the order paper. There were twenty-seven participating nations, nineteen representing the developing world and eight the industrialized nations. Commissions were established among these nations relating to energy.

327. Kissinger, Dr. Henry, Global Consensus and Economic Development, at p. 7-8 (U.N., New York, September 1st, 1975), (Address by the Secretary of State, delivered by Ambassador Moynihan; reprinted in 73 Dep't State Bull. (1975) 425, at p. 432-33).

raw material, development and financial matters. The first meeting was convened in December, 1975.

The developing countries optimistically perceived the CIEC as the first pragmatic attempt to convert theoretical concepts on a N.I.E.O. into concrete programmes of action. As it eventually turned out, the optimism of the developing countries proved to be unrealistic. According to Mr. Richard Steade, the CIEC lost its chance of becoming the most important new international institution since the formation of the United Nations.³²⁸ The developed countries recovered from the impact which the oil crisis had on their economies as the decade progressed and were no longer genuinely interested in a new deal which was more compatible with third world needs. The United States succeeded in retarding progress in dialogue, effective discussion and policies at the conferences, as arguments resurfaced over the agenda.

The final top-level session of the CIEC ended in June, 1977, eighteen months after the meetings commenced. As far as the developing countries were concerned, those discussions only produced two tangible results:

- 1) an agreement in principle on the establishment of a Common Fund to stabilize primary commodities by means of bufferstocks and general development; and
- 2) a pledge from the northern states to provide an additional \$1 billion in aid to the poorest southern countries.

The CIEC was a resounding victory for the United States and her closest economic allies. These countries had achieved success in their ultimate objective, which has been to ensure the minimization of concessions to be granted to the developing world. The Paris Conference was unproductive and politically embarrassing for the third world nations.³²⁹ Those countries failed to come away with any agreement on relief of their rising debt which

328. Steade, Richard, Multinational Corporations and the Changing World Economic Order (1978-79), 21(2) Cal. Man. Rev. 5, at p. 9

329. Browning, Jim, Breaking the North-South Economic Impasse (May 31st, 1977), Christian Sc. Monitor 1, at p. 3

was owed to the northern countries and to banks based in those countries. A major reason for the failure of the developing nations to achieve greater concessions may well have been inherent in the composition of their representation at the Conference. Most of the nations from the third world bloc present at the CIEC were technically advanced states which possessed substantial supplies of significant raw material products. Additionally, these countries were primarily regular recipients of capital grants from the private foreign-based markets and did not have nearly as great a stake in any probable debt rescheduling formula as had the economically weakest members of the third world bloc.

Finally, for the purposes of our discussion, the Brandt Commission, named after its chairman, a former West German Chancellor, and comprising other international notables, produced its report in 1979.³³⁰ The Commission proposed, inter alia, a massive expansion of developmental aid to developing countries in order to help alleviate their economic problems and to narrow the widening gap between the rich and poor nations. This aid was to reach two and a half times the 1978 level of \$21 billion by the mid-1980's. The finance, to be raised from contributions from western industrialized countries, was to total 0.7 per cent of their annual G.N.P. In return, OPEC would promise to stabilize oil supplies and prices.

Although world oil prices have reached their lowest level in over a decade at the time of writing,³³¹ the actual flow of direct financial aid from developed western states to the Third World is only approximately one-half of the 0.7 per cent target which was established by the Brandt Commission as an objective which should have been realized by the mid-1980's. Yet again, the economic fragility of the majority of third world nations has undermined the effectiveness of any bargaining power which they may have in the international economic power structure. The United States and other western powers have again succeeded in achieving their major objective. Although the price of

330. The Report of the Independent Commission on International Development Issues under the Chairmanship of Willy Brandt, North-South: A Program for Survival (1980)

331. The price of crude oil on the world market was lowered to approximately \$10.00 U.S. a barrel during the first week of April, 1986.

crude oil on the world market has now been drastically reduced, there has been no indication as yet that these countries will increase their financial commitment to the developing world.

VIII. Other Factors Restricting the Impetus for a New
International Economic Order

Political manoeuvres by the developed nations which amounted to a continuation of their historical "divide-and-rule" policy, vast disparities in size, influence, interests, economic resources and growth rates within the third world bloc as well as the different effects which the world economic crisis had on individual developing nations all combined to destroy the solidarity present among the southern nations in the first half of the 1970's as conflicts, frustration and dissension surfaced within the coalition.³³² It is said that people are wise in hindsight but it should not have come as any surprise to the perceptive viewer of the international economic scene during the 1970's that friction arose, after the initial third world victory in 1973-4.³³³

Firstly, it must be remembered that the vast majority of developing countries are not oil-producing nations and would have been even more seriously affected by the oil price hike than were the industrialized countries. Although some OPEC members did establish aid programmes and concessionary oil-pricing schemes for needy third world countries, the policy of the Arab OPEC members on this issue was to primarily favour fellow Arab nations that bordered Israel, then secondly, to favour Muslim countries, with whatever aid remained going to other third world nations.

Secondly, tight monetary and fiscal policies of developed country administrations in the face of the recession resulted in a decline in their demand for raw materials from developing nations, since their production of finished manufactures was reduced. This, in turn, entailed higher prices for fertilizers and capital goods exported from industrialized countries to the

332. Wionczek, Miguel, The New International Economic Order: Past Failures and Future Prospects (1979), 10 Dev. and Change 647, at p. 652

333. Supra note 281, at p. 14-19 generally

Third World. The net effect was a reduction in the quantity of exports from, and consequently in the national income of, the majority of developing countries.

Thirdly, the political and technical clout available to negotiators from the Third World in international organizations declined with respect to the issue of the N.I.E.O., since major states within that bloc became less interested in the long-term objectives of the new order. Consequently, the capacity of these countries to negotiate with advanced industrialized nations naturally deteriorated.

Finally, moderate Arab OPEC members, decided as the decade of the 1970's drew to a close, that high oil prices and additional revenue in their coffers were less important to them than political stability throughout the world, particularly in the Middle East, and than a solid, growing global economic base. Tension between moderate Arab states, such as Egypt, and the western industrialized nations, particularly the United States, declined substantially after the oil crisis. With increasing pressure from the United States and with some Western European nations as well as Japan beginning to actively support the Arabs, if only for economic reasons, Israel concluded a peace agreement with Egypt in 1979. As Professor David Denoon bluntly puts it:

"Although the N.I.E.O. was a convenient tool for achieving solidarity among the developing countries when the Arabs wanted concessions from the West, it was largely irrelevant to their purposes by the late 1970's."³³⁴

In the final analysis, circumstances and factors, both within the third world bloc and external to it, contributed to the breakdown in unity and cohesion within the group on the issue of the N.I.E.O. It was therefore inevitable that the implementation of those principles which were significant to the formulation of any N.I.E.O. would not be comprehensively realized within a few years as the developing countries had originally hoped.

334. Ibid., at p. 16-17

A tangible consequence of the failure by third world nations to achieve greater concessions in order to make the N.I.E.O. a practical reality, instead of mere pieces of paper recorded in the annals of international organizations, was a general decline in the foreign trade of developing countries from the second half of the 1970's and slow economic growth rates for the substantial majority in the 1980's. Exports for oil-importing developing countries deteriorated by 21 per cent (calculated cumulatively) between 1978 and 1982. In the case of the least developed, the figure fell by 31 per cent between 1977 and 1982. The Third World's G.N.P. growth rate was only 0.3 per cent in 1981 and 0.5 per cent in 1982. After experiencing an average annual growth rate of 6.3 per cent during the period 1975-80, the G.N.P. of the newly industrializing developing countries fell in 1981 to 1.7 per cent and rose only 0.6 per cent above that in 1982. Since the least developed countries had not experienced the rapid growth rates in the latter half of the 1970's which the newly industrializing countries had experienced, the decline in their G.N.P. growth rates was less marked. On average, the figure declined from an annual 3.5 per cent during 1975-80 to 2.3 per cent in 1981 and to 2.9 per cent in 1982. Even so, the per capita income of these countries declined, largely a consequence of higher population growth rates.³³⁵

IX. Conclusion

Only foolhardy optimism would cause any international economic observer to predict the complete implementation of a new and more equitable world order before the end of this century. Even the holding of numerous conferences and meetings, which characterized the issue during the decade of the 1970's, has been decimated in the 1980's. Notwithstanding the breakdown in the common front presented by the Third World on the issue in the late 1970's, the opposition of the developed western nations, particularly the United States, to the new order was the main reason for the destruction of third world aspirations. Many, therefore, believe that the ideal of a N.I.E.O. had no realistic basis, since it was foreseeable that agreement and co-operation with

335. Szentcs, Tomas, The Concept of the New International Economic Order: A Decade After (1985), 6 Dev. and Peace 35, at 37

those states would not be achieved on the majority of N.I.E.O. propositions. Even at the height of the oil crisis, the United States and her representatives, such as Dr. Kissinger, Ambassador Moynihan and Treasury Secretary Simon, all stood firmly behind the concept that market forces must be allowed to operate freely. They apparently never thought, or rather it didn't matter to them, that the United States had allowed the free market system to be abused through protectionist and neo-mercantilist measures which were operating to the disadvantage of the trade of other countries, both within the OECD bloc and in the developing world. Additionally, transnational enterprises were allowed by home countries, even if only through their tacit acquiescence, to abuse the free market concept by price fixing, collusive tendering and production allocation, to name just a few forms of anti-competitive practices, when these were not detrimental to their national interests.

It could very well be, as Mr. Miguel Wionczek submits,³³⁶ that the absence from the N.I.E.O. negotiations of the socialist states, accounting as they do for about 30 per cent of the world's economy, and of direct transnational enterprise representation, instead of by mere proxy or through their home country intermediaries, diminished the chances of success on this issue for the Third World.³³⁷ Some justification for this opinion is achieved when one notes the successful compromise reached to conclude the UNCTAD Principles and Rules, which we will examine and discuss in our following two chapters. On that occasion, all ideological and economic blocs were represented at the negotiating table and there was considerably greater input from transnational enterprises.

Finally, we will venture to offer a few suggestions on viable approaches by developing countries to improve their position in the international economic environment.

336. Supra note 332, at p. 653-4

337. As an illustration, the socialist bloc was not among participating countries at the C.I.E.C., held in Paris between 1975-77. These countries contend that responsibility for re-shaping the international economic order does not lie with them, since they had no part in previous economic exploitation of Africa, Asia, the Caribbean and Latin America during the colonial era.

- 1) Developing countries need to again unify on matters of international economic significance. They must seek the co-ordination of their individual interests and attempt to achieve cohesion in their international economic policies in order that their bargaining power in international fora will be enhanced. To this end, earnest efforts should be made to form international commodity consortia along the lines of OPEC with regard to other commodities in abundance in the third world countries.³³⁸ These commodity consortia should aim at providing a countervailing force against transnational enterprises;
- 2) Developing countries must adopt a firmer policy of "self-reliance" in order to attempt to alleviate external dependence. This "self-reliance" must be individually oriented as well as collective among other developing nations; and
- 3) Developing countries must diversify their economic and commercial links and not only limit themselves to traditional avenues of international trade. Commercial and economic links must be fostered with other developing countries, with socialist-bloc states and with other western countries than the United States and the respective former mother country.

338. It must, however, be noted that there are other international commodity consortia besides OPEC. There is the International Bauxite Association, the Association of Iron Ore Exporting Countries as well as the African, Caribbean and Pacific Countries' Association with respect to sugar cane production and export. However, these associations have never attained the significance of the OPEC consortia. This factor may not lie as much with the inherent weakness of these associations as with the primary importance of oil as a global commodity during contemporary times and the lack so far of any viable alternative.

CHAPTER VI

The UNCTAD Principles and Rules: Part One

I. The Formation of the United Nations Conference of Trade and Development

In 1962, a United Nations Conference on Trade and Development (UNCTAD) was convened³³⁹ to address such major issues as the development and financing of international trade, particularly that of the developing countries, and the establishment of stable prices for essential goods.³⁴⁰ UNCTAD was ultimately formalized as a subsidiary body of the United Nations' General Assembly by a resolution on December 30th, 1964.³⁴¹ With its headquarters situated in Geneva, the organization was mandated with the responsibility to foster and effectuate principles and policies on international trade and development, with special emphasis on the interests of the Third World. The body also co-ordinates trade and development matters among other U.N. agencies and advises on governmental trade and development policies.³⁴² UNCTAD ministerial sessions are held at three or four year intervals. Its Trade and Development Board is responsible for implementing its decisions between these sessions.

There were no delusions over whether or not UNCTAD had been given any legal authority by its creators. In April, 1972, the then Secretary-General of the organization, Mr. Perez Guerrero, stated in his opening address at UNCTAD's Third Session that:

"UNCTAD has no power whatsoever to enforce its recommendations and decisions. The executive power is elsewhere. It rests with governments."³⁴³

339. ECOSOC Res. 917, 8/3/62

340. U.N. Gen. Ass. Res. 1785 (XVII), 12/8/62

341. U.N. Gen. Ass. Res. 1995 (XIX)

342. Schwartz, Richard, Are the OECD and UNCTAD Codes Legally Binding? (1977), II Int'l Lawy. 529, at p. 530-1

343. U.N. TD/151

II. The Composition of the United Nations
Conference on Trade and Development

UNCTAD's membership is as large as that of the U.N. and would be similarly composed of three major political blocs of countries representing divergent economic ideologies.

The most powerful group numerically is the "Group of 77" ("G-77"). This group consisted of seventy-seven third world countries on the inception of UNCTAD in 1964, all of which had historically experienced colonial domination and exploitation. The number of countries within this group has increased to approximately one hundred and twenty-five, with the independence since 1964 of more former colonies throughout the World and the consequent accession of these newly independent countries to the UNCTAD Charter. This group is synonymous with "developing countries"; with "the less developed countries"; or with "the third world". We shall use these terms interchangeably throughout the following Chapters.

"Group B" is basically representative of the OECD member nations minus Turkey. As such, it is synonymous with "the western industrialized countries"; with "the industrialized (or developed) market-economy countries"; or with "the western developed countries".

"Group D" consists of the Union of Socialist Soviet Republic and its Eastern European allies. This group would therefore include the planned or state-controlled economies of Eastern Europe.

China is a "group alone" in UNCTAD. Consistent with its history of restrained participation in UNCTAD's affairs, it did not play an active role in the Code's negotiations. However, it expresses support for the objectives and philosophies of the Group of 77.

III. Basis of Different Perspectives of Each UNCTAD Bloc

It is easy to imagine the differences in views emanating from within the corridors of UNCTAD with respect to issues of regulation and supervision of transnational enterprises, of control of harmful restrictive business practices of these enterprises and of the duties of host countries to transnationals.

The western industrialized nations view restrictive business practices as an interference with the efficient use of economic resources. As such, they perceive the restriction of these activities to be generally consistent with increased production.³⁴⁴ These countries are therefore generally concerned with controlling restrictive arrangements between enterprises insofar as such a measure would lead to the maintenance and promotion of competition both within their individual domestic economies and on the world trade market. Group B, led by the United States, envisaged the drafting of an international restrictive business practices code as a means whereby they could transpose principles embodied in their national antitrust legislation to the rest of the world generally and to international commercial transactions in particular.

The developing countries, on the other hand, saw the UNCTAD Code as a means through which their programme for a "New International Economic Order" could be furthered. Any probable code was therefore perceived by the Group of 77 as a channel through which they could acquire an increased share of international trade, a more favourable distribution of global wealth, greater internal economic progress and more substantial control over their own "means of production".³⁴⁵ The G-77 do not view the promotion of the greatest possible economic competition as a prime objective of any code of conduct for enterprises. Rather, they view international codes as mechanisms to protect

344. Supra text ch. 4, p. 62 at note 149

345. Oesterle, Dale, United Nations Conference on Restrictive Business Practices (1981), 14 Corn. Int'l L.J. 1, at p. 14-15

protect weaker economies from restrictive business conduct of foreign-controlled enterprises operating within their respective territories.³⁴⁶ This bloc seeks to limit the economic power of transnational enterprises vis-à-vis host governments within their territorial boundaries.

The western developed countries were concerned with concepts such as "non-discrimination" and "national treatment" towards enterprises controlled by their nationals with respect to such issues as the expropriation of real property or corporate plant through a host country's policy of nationalization. Meanwhile, the G-77 concentrated on issues such as "preferential treatment" for their enterprises, the control of prices and inflation, transfer pricing, increase of employment opportunities for their nationals, the counter of foreign law and policy within their economies as well as the implementation of their own national commercial regulations and increased participation by their nationals in domestic markets. All these matters are viewed by industrialized western nations as inappropriate to a code on restrictive business practices.³⁴⁷

Group D sympathized with the aims of the G-77 countries. Moreover, the Soviet bloc has a direct interest in the control of restrictive arrangements since they believe that these abuses, conducted by western-controlled transnationals, operate to the disadvantage of their industries.³⁴⁸ The socialist-bloc countries, therefore, perceived the code "as an opportunity for the world community to reconstruct international economic relations on an equitable and democratic basis, free from all forms of discrimination, inequality, diktat and exploitation, through the elimination of artificial impediments and barriers whereby restrictive business practices development

346. Supra note 149

347. Joelson, Mark, and Griffin, Joseph, International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis (1977), II Int'l Lawy. 5, at p. 16

348. Supra note 345, at p. 27

development of mutually advantageous relations between East and West."³⁴⁹ During the negotiations, Group D proposed the limitation of the scope of the code's application to exclude state-controlled enterprises, through which the substantial part of their commercial activities takes place. They insisted that restrictive business practices are only indulged in by privately-owned and privately-controlled enterprises. Group B refused to allow this attempted restriction of the code's application.³⁵⁰

There was even disagreement within Group B itself, over the definition of "restrictive business practices".³⁵¹

We will analyze the provisions of the UNCTAD Principles and Rules from the perspective of all these differences to see how it was ultimately possible to reach a compromise in the face of such divergent views and opinions between the various blocs.

IV. Introduction to the Principles and Rules

A. Negotiations Preceding Adoption of the Principles and Rules

UNCTAD's work on the study of restrictive business practices of transnational enterprises, with specific emphasis on the effect of such practices on the trade of developing countries, was initiated on March 27th, 1968 through a decision taken at the Second UNCTAD Session.³⁵² The western industrialized members of the body voted against the project on this occasion.

349. Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Sixth Session, U.N. TD/250, p. 40 at para. 30 (1979) per spokesman for Group D

350. Supra note 122, p. 20

351. The Community members are much more pre-occupied with the abuse of market power than with restrictions of competition through the process of mergers, which has traditionally been a priority with the U.S. antitrust officialdom. (Supra note 347, at p. 16-17. However, see infra text ch. 7, p. 180 at note 467 for the current U.S. administration's policy towards mergers.)

352. UNCTAD Res. 25 (II), 78th plenary meeting

At the Third UNCTAD Session in 1972, the conference undertook to examine means whereby "restrictive business practices adversely affecting the trade and development of developing countries" could be controlled.³⁵³ The delegates unanimously decided that the possibility should be examined of devising guidelines on the subject.

In 1974, a Group of Experts on the subject of restrictive business practices was appointed by UNCTAD to formulate an initial report on the issue, including tentative rules for enterprises.³⁵⁴ However, their report was not endorsed by the Trade and Development Board of UNCTAD, except with respect to their suggestion for further meetings, this time to be held among government experts. UNCTAD therefore invited a Second Ad Hoc Group of Experts which was drawn from nominees proposed by respective governments. Their mandate included:

- 1) the identification of restrictive business practices likely to injure international trade, particularly that of developing countries;
- 2) the formulation of principles and rules to deal with the same;
- 3) the development of systems for information exchange and collection; and
- 4) the formulation of a model antitrust law for developing countries.³⁵⁵

Subsequently, the UNCTAD Committee on Manufactures in 1975 suggested that multilaterally acceptable principles should be formulated.³⁵⁶ Discussions within UNCTAD accelerated after the Kissinger speech before the U.N. General Assembly calling for international negotiations with the objective of formulating a code of conduct for transnational enterprises, with emphasis on the issue of control of their restrictive business activities.³⁵⁷

353. UNCTAD Res. 73 (III), (May 19th, 1972)

354. U.N. TD/B/C.2/119/Rev. 1 (1974)

355. Supra note 122, p. 14. The Second Ad Hoc Group produced its report in 1976. (Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices, U.N. TD/B/C.2/AC.5/6 (March 8th, 1976)). The report contained a list of nineteen "Restrictive Business Practices Which Are Likely to Adversely Affect the Trade and Development of Developing Countries" (Ibid., p. 18-9). These nineteen abuses were broader than those presently condemned under any individual national legislation.

356. Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices, U.N. TD/B/600 at para. 1 (1976)

357. Supra text ch. 5, p. 128-29

At its fourth planning conference held in Nairobi, Kenya in 1976, the Third Ad Hoc Group of Experts was established to formulate a model law on restrictive business practices which would assist developing nations when they were ready to devise domestic competition legislation.³⁵⁸ As mentioned earlier in our thesis, the majority of the world community is not governed by national antitrust or competition legislation such as that which has been enacted in North America and Western Europe.³⁵⁹ The 1976 conference also resolved to formulate a set of principles and rules on the subject.³⁶⁰

Therefore, within a four year period, UNCTAD's view on the form of document to deal with the control of restrictive business practices evolved from mere guidelines such as those produced by the OECD, to principles and, finally, to the more precise and positive set of principles and rules. The scope of the document was also enlarged to encompass not only practices which affected developing countries but also those policies which generally affected international trade.³⁶¹

The developing countries enunciated their position on the importance of a code during the Arusha Conference. The Programme asserts that:

"Restrictive business practices notably those of the transnational corporations have adverse effects on the economic development of the developing countries ... not only do they restrict trade but they also prevent appropriate transfer of technology needed by developing

358. The Third Ad Hoc Group produced a Draft Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as a part of its report. (Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Sixth Session, U.N. TD/B/C.2/AC.6/20 (May 7th, 1979)).

359. Supra text ch. 2, p. 13

360. Conf. Res. 96 (IV)

361. Paramjape, H.K., India: Review of the Monopolies and Restrictive Trade Practices Act (1980), 14 J.W. Tr. L. 68, at p. 73

countries³⁶² to accelerate their industrialization so as to expand their production of manufactures and to realize an increased share of manufactures in export markets ... therefore it [is] necessary that specific measures be taken to control the restrictive business practices including those of the transnational corporations ..."³⁶³

On December 20th, 1978, the U.N. General Assembly decided to convene a U.N. Conference on Restrictive Business Practices to negotiate the principles and rules. This Conference was to be held under the auspices of UNCTAD between the end of 1979 and April, 1980.³⁶⁴ Two sessions of a diplomatic conference followed from November 19th to December 8th, 1979 and again from April 8th to 22nd, 1980. Even at the commencement of the second session, major issues such as whether state enterprises should come within the ambit of the code, whether intra-enterprise transactions should be generally exempted as well as whether the code should state explicitly that it was merely "voluntary" remained outstanding.

Therefore, it was a major achievement for the willingness to reach a compromise that final agreement between the various ideological blocs could have been reached on a Set of Principles and Rules on the last day of the second session, April 22nd, 1980. Subsequently, on December 5th of that year, the U.N. General Assembly unanimously adopted The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices³⁶⁵ ("the Principles and Rules") as a resolution of its body.³⁶⁶

362. Negotiations under the auspices of UNCTAD commenced in 1975 for a U.N. Code on Transfer of Technology. These negotiations reached near total impasse in 1980 and 1981, with about 40 per cent of the draft code's provisions still in dispute. The final meeting in 1981 ended without an agreement even as to when, or whether, to hold another negotiating conference. Efforts have been made within UNCTAD in the last year to revitalize these negotiations.

363. Arusha Programme, UNCTAD V, U.N. TD/236, p. 45-6 at paras. 1-3. The Arusha Programme is the communique of the Fourth Ministerial Meeting of the Group of 77, which was held in Tanzania in February, 1979.

364. U.N. Gen. Ass. Res. 33/153, (December 20th, 1978)

365. U.N. Doc. TD/RBP/CONF. 10, Annex (1980)

366. U.N. Gen. Ass. Res. No. 35/63

B. Composition of the Principles and Rules

The Principles and Rules deal in considerable detail with the substantive definition of "restrictive business practices" as well as with principles and rules for states, in contrast with the OECD Guidelines which relate to competition policy. The document is, however, similar to the OECD effort in its deliberate policy of leaving numerous terms undefined and in its use of generally expressed terminology with elusive meaning. This was the only technique through which unanimous agreement on all provisions outlined in the document could have been achieved. In addition to its Preamble, the Code consists of forty-four provisions and addresses both enterprises and nation states.

The document is organized into eight sections. These sections respectively contain:

- 1) the Preamble;
- 2) definitions and scope of application of the Set;
- 3) objectives of the Set,
- 4) principles for control of restrictive business practices;
- 5) principles and rules for enterprises;
- 6) principles and rules for states;
- 7) international measures with respect to the control of restrictive business practices; and
- 8) international institutional machinery for the same purpose.

The Set is more detailed and comprehensive than any previous international agreement on restrictive business practices or on related antitrust matters.

We shall now examine the legal status of the Principles and Rules.

C. Legal Status of the Principles and Rules

The first major issue to resolve was whether the Principles and Rules should be in the form of a binding international treaty or should be just simply voluntary, non-binding recommendations addressed to states and to

enterprises.³⁶⁷ Consensus on the issue was finally reached at the first session of the diplomatic conference which was held in November and December, 1979 when it was agreed that the document should be embodied as a General Assembly resolution.

Group B, consisting of nations which were recently the sponsors of the voluntary OECD Guidelines, predictably were steadfast in their demand that any code attempting to regulate international antitrust conduct should not be legally binding on either states or enterprises. Even before the substantive details of the code had been finalized, Group B was strongly campaigning for a code which would be merely recommendatory to enterprises. The representatives of this bloc felt that this was the only possible and practical course on which to embark, given the vast differences in economic and industrial development of the U.N. member states and given their varied approaches toward competition policy and restrictive business practices.³⁶⁸ They argued that

367. There were many different forms which the code could have taken, some of which include the following:

- 1) The entire code could have been in the form of a declaration contained in a General Assembly resolution, with no provision for its implementation either at the national or at the international level. This is the format which was ultimately agreed upon;
- 2) There could have been a variation to (1), by which the adopting states could have undertaken to give effect to it in their national law and administrative practices;
- 3) The provisions addressed to transnationals could have been included in an international treaty which would have been legally binding on the states adopting it, whereas the provisions on intergovernmental co-operation, on treatment of transnationals and on the implementation of the code could have been contained in a General Assembly resolution;
- 4) The provisions on intergovernmental co-operation and implementation could have been included in a treaty, whereas those addressed to, and dealing with the treatment of, enterprises could have been in a U.N. resolution; and
- 5) The entire code could have been in the form of a legally binding international convention, with the provisions addressed to enterprises in an annex to the convention. A supra-national organization could have been created to interpret and enforce its provisions or, alternatively, home governments could have committed themselves to ensuring that those transnationals which were based in their respective territories did not violate the convention's principles while doing business, whether at home or abroad.

368. Supra note 356, p. 33

voluntary principles could help to harmonize international opinion on restrictive business practices, to shape the general behaviour of the majority of enterprises and to facilitate international co-operation. A more amenable atmosphere could be created by a voluntary document. This would lead to greater co-operation between states and transnational enterprises operating within their individual territories. The principles and rules should not be regarded as a code applicable to specific arrangements but rather as an expression of areas of antitrust concern, with particular reference to restrictive agreements. Group B contended that any attempt to confine private business interests into international economic rigidity would ultimately have an adverse effect on the economy of host countries, including the developing nations.

Of course, Group B representatives did not mention the fact that a binding code would be detrimental to their interests, considering that the vast majority of the world's transnational enterprises are controlled from within their territories.

This approach to the legal status of the agreement by the United States and her major economic allies was a reversal of their 1946 position when the United States was urging the establishment of an international organization, the ITO, which would have heard complaints from states or from private persons and whose treaty would have bound states to take action against duly declared harmful restraints.³⁶⁹ The policy of successive U.S. administrations with respect to the creation of an international organization with enforceable powers in antitrust matters changed substantially within a generation. The phenomenal increase in U.S. foreign investment, which meant that strict, enforceable regulation of such investment would operate against U.S. interests, as well as the realization that there was little likelihood that the majority of countries would be prepared to formulate and accept binding international enforcement and adjudication provisions, are two major reasons for this shift in U.S. policy.

369. See Suggested Charter for an International Organization of the United Nations, Art. 37(5), State Dep't Publ. 2927, Comm. Pol'y Serv. 106 (1947).

The developing countries were eventually persuaded by the more powerful western nations to accept a non-binding document, although they had initially lobbied for a binding code. The G-77 were partly swayed by the Group B argument that the creation of a legal document would necessitate prolonged delay in its implementation, since international machinery would have to be established and concurrence would have to be acquired of all the governments involved. Additionally, OPEC member states and newly industrializing countries recognized that a legally binding code would operate against their own national enterprises as well.³⁷⁰ In the final analysis, the developing countries had no choice but to accept a non-binding agreement, since the western industrialized countries would not have been party to any other kind of agreement. The socialist-bloc countries also declined to support a legally binding code.

The Group of 77, however, sought a compromise by insisting that the words "Enterprises shall refrain" or "States agree" should be used in the operative provisions of the code, rather than "Enterprises should refrain" or "States should agree".³⁷¹ The developed nations again disagreed with this proposal, maintaining that there would be room for the implication that the principles and rules were binding. The recommendatory words "should refrain" or "should adopt" have therefore been used instead. The G-77 had to be content with assurances from home country representatives that their nations were "committed" to the Set. The developing countries were more successful, however, in their insistence that the word "voluntary" be exempted from the document. Nevertheless, they conceded that the text should expressly state that it consisted of "recommendations" to states,³⁷² which it does in the opening operative paragraph of the document.³⁷³

370. Davidow, Joel, "UNCTAD Restrictive Business Practices Code", 193 at p. 206, Legal Problems of Codes of Conduct for Multinational Enterprises (1980), ed. by Horn, N.

371. Supra note 122, p. 51

372. Supra note 238

373. Supra note 365

As a mere General Assembly resolution, the Code does not, at present, have any legally binding force.³⁷⁴ However, we will examine the possibility of the resolution subsequently acquiring a binding legal status in international law.³⁷⁵

It must be emphasized that the agreement contains no international investigative or enforcement mechanism, nor does it institute any international judicial forum to adjudicate or to settle disputes arising out of the document's provisions. The only body which is capable of interpreting the Set, the Intergovernmental Group of Experts created by Section G, is expressly precluded from serving as an adjudicating tribunal.³⁷⁶

We will now detail and analyze the provisions of the Set.

V. Outline and Analysis of the Principles and Rules
(Preamble - Section C)

A. Preamble

In addition to characterizing the code as "recommendations", the Preamble refers to "the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations". It also mentions the "need to eliminate the disadvantages to trade and development particularly that of the developing countries which may result from the restrictive business practices of transnational corporations or other enterprises" and the need to "attain the objective in the establishment of a New International Economic Order" that will develop and improve international economic relations on a just and equitable basis.³⁷⁷ The final paragraph recommends "[that] measures adopted

374. Supra text ch. 5, p. 123 at note 315; Art. 10 of the U.N. Charter

375. Infra text ch. 7, p. 213-14

376. Principles and Rules Section G, para. 4; Ibid., ch. 7, p. 199-200

377. Preamble, second para.

by states for the control of restrictive business practices should be applied fairly, equitably, on the same basis to all enterprises and in accordance with established procedures of law ..."

It is clearly discernible that the G-77 were able to significantly influence the text of the Principles and Rules. The references to the N.I.E.O., to the fact that increased activity by transnational enterprises could enhance possible harmful effects of restrictive arrangements and to the need to remove, in particular, those practices which adversely effect third world economies all stand as a testament to recognition of the special circumstances in the existing global economic order in which developing countries find themselves. Indeed, the emphasis on third world development is present throughout the document.

The spirit of compromise which pervades the Code is reflected through the Preamble's special notification of the positive role which competition and free trade can play in international development as well as of the significant contribution which transnationals make to that progress.³⁷⁸ Additionally, the final paragraph is a concession to Group B's insistence over the inclusion of the principles that third world countries should not discriminate against transnationals which operate within their boundaries, should accord them similar treatment to that accorded domestic enterprises and that accepted norms of international law should govern the treatment of transnationals with respect to their overseas operations.

B. Section A: Objectives

This section sets out five agreed objectives of the Code. The first is to ensure that restrictive business practices do not interfere with trade liberalization ensuing from reduction of tariff and non-tariff barriers. This reflects the letter and spirit of the Treaty of Rome, Arts. 85 and 86, which creates a common market within the Community.³⁷⁹

378. Atkeson, Timothy and Gill, David, The UNCTAD Restrictive Business Practices Code: A Step in the North-South Dialogue (1981), 15 Int'l Law. 1, at p. 5

379. Supra note 207, at p. 578

The second objective seeks to promote efficiency in international trade and development through:

- a) the creation and encouragement of competition;
- b) the control of the concentration of capital and/or economic power; and
- c) the encouragement of innovation.

The aim of the third goal is to protect and promote social welfare and consumer interests, while that of the fourth is to eliminate disadvantages to trade and development which may result from restrictive business practices of enterprises, particularly those of transnationals. This should be done in order to maximize benefits to international trade, particularly that of third world countries. The final objective is to provide an international agreement for the control of restrictive arrangements which can be emulated at the national and regional levels.

These objectives illustrate major areas of concern which are addressed in the Code. The pro-competition and free market concepts of the western industrialized states are endorsed, while the protection and promotion of third world commercial development is also recognized as being a priority of global interest.

In the Draft Code negotiated by the experts, the socialist-bloc countries had proposed the inclusion of a sixth objective which sought to ensure the effective control of certain specific forms of restrictive business practices of transnationals, with special emphasis on those practices which are a consequence of corporate affiliations. With infra-firm trade variously estimated as accounting for between one-third and one-half of total world trade, Group D felt, with all good reason it is submitted, that special mention of intra-corporate abuses was justified. However, Group B strenuously objected to this proposal and it was excluded from the final document. We will examine the issue of intra-firm transactions as they relate to restrictive agreements further on in this chapter.³⁸⁰

380. Infra text ch. 6, p. 158-62

C. Section B: Definitions and Scope of Application

1) Definitions

The developing countries had sought a definition of "restrictive business practices" which would include any conduct which adversely affects the trade and development of the developing world. Group B opposed this proposal on the grounds that it would carry the definition beyond traditional antitrust principles.³⁸¹

The Group of Experts used the ITO's definition of "restrictive business practices",³⁸² with the additional reference to adverse effects on international trade and economic development, particularly that of developing countries. Their categorization was ultimately accepted by the conference. The term is therefore defined as:

"Acts or behaviour of enterprises which, through an abuse or acquisition and 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 that of developing countries and on the economic development of those countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact."

381. Benson, Stuart, The U.N. Code on Restrictive Business Practices: An International Antitrust Code is Born (1980-81), 30 Am. U. L. R. 1031, at p. 1040. For example, the developing states were concerned with such issues as:

- 1) management strategies of transnational enterprises which are inconsistent with their national development objectives;
- 2) transfer pricing; and
- 3) the exclusive use, or non-use or non-transferral, of patents. The G-77 therefore sought to accommodate these issues in the definition of "restrictive business practices". However, these are not regarded as antitrust problems by Group B administrators and economists.

382. Supra note 62

Restrictive business practices are therefore viewed as being capable of occurring through:

- 1) an abuse of acquisition of, and an abuse of, a dominant position of market power; or
- 2) restrictive agreements or arrangements among enterprises.

The language used in this definition gives rise to a number of possible interpretations and controversies.

Firstly, argument exists over whether the agreements or arrangements mentioned at the end of the definition require an abuse, or an acquisition and abuse, of a dominant position before they can be considered restrictive business practices. Although it is possible that the "abuse of a dominant market position" standard applies to the second type of restrictive business practice as well as to the first, it is submitted that the presence of the pronoun "or" before the second part of the definition precludes such an application. An agreement or arrangement need only limit access to markets or otherwise unduly restrain competition to the extent that there is, or there may be, an adverse effect on international trade, particularly that of developing countries, to come within the Set's definition.³⁸³

Secondly, the addition of the words "acquisition and abuse" is a source of confusion. These words seem to be mere surplusage since an abuse of a dominant position of market power necessitates a previous acquisition of that dominant position. Even in a case where the acquisition is in itself considered to be an abuse, it is unnecessary to add the words "acquisition and abuse" since the "abuse" concept would be broad enough to cover the situation. Alternatively, the words "through an acquisition or abuse" could have been used instead of "through an abuse or acquisition and abuse."

383. Messrs. Atkeson and Gill agree with this interpretation, but concede that the substitution of the word "impact" for "effect" may permit an economic argument to the contrary. (Supra note 378, at p. 7)

Thirdly, the definition gives rise to ambiguity over whether "adverse effects on developing countries" is a test in determining whether or not particular conduct is a restrictive business practice. Although the stress laid on "adverse effect on the international trade and economic development of third world countries" suggests that it is a test,³⁸⁴ other criteria have to be satisfied as well before the conduct can be considered a restrictive business practice under the Code. The "adverse effects" test is a mere limiting provision on the definition. There must be a restriction on the accessibility to markets or other undue restraints of competition, as well as an abuse of a "dominant market power position," before a practice can be said to fall within the ambit of the definition. It would have been otherwise if the definition had included the word "or" before its reference to the "adverse effects" test. In such a case, mere demonstration that particular conduct had such adverse effects would have been sufficient to show the existence of a restrictive business practice. It is, however, likely that a third world country, in view of the definition's imprecision, could contend that any activity by a transnational enterprise which adversely affects its trade and economic development constitutes an abuse of a dominant position and is therefore a restrictive business practice.³⁸⁵

The inclusion of the "adverse effects" test has also been criticized by western antitrust experts on the ground that such a test undermines the competitive objective of the Code.³⁸⁶ It is, however, submitted that the basic idea of explicitly mentioning the adverse effect which restrictive business practices generally do have on international trade and economic development, particularly that of the Third World's, is a welcome innovation. The writer's criticism lies only with the grammatical defects present in the definition.

384. Supra note 122, p. 21; Supra note 370 at p. 197

385. Gill, David, The UNCTAD Restrictive Business Practices Code (1979), 13 Int'l Lawy. 607, at p. 611

386. Supra note 378, at p. 7

Finally, the definition implies that a business practice which merely restrains competition or limits access to markets will not suffice to bring such conduct within its ambit. An undue restraint of competition must be present for the practice to be considered restrictive.

In the final analysis, this definition sacrifices precision and certainty for the sake of compromise. Group B could be said to have been successful in its desire to limit the definition, whereas the developing countries were able to achieve the explicit mention within the definition of the fact that restrictive business practices can be especially detrimental to their development, a result of the peculiar circumstances in which these countries have been economically placed.

Secondly, "dominant position of market power" is defined as:

"A situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular product or service or groups of products or services."

The controversial nature of this definition stems from its reference to an enterprise which is in a position to control a relevant market, not only by itself but also in concert with a few other enterprises. Although the latter situation is condemned under certain circumstances by the Treaty of Rome and in West German competition legislation where a dominant position has been achieved, the concept is still novel and untested in North American antitrust policy.³⁸⁷ However, interdependent conduct in oligopolistic sectors of industry is not an offence under the Code, provided that it is non-collusive.³⁸⁸ It is, however, likely that some developing countries will seek

387. Supra note 370, at p. 197

388. Ibid., at p. 198. Advocates of the "shared monopoly" doctrine favour penalizing conduct which is designed to enable members of an oligopolistic industry to act in unison despite the absence of an express agreement. The doctrine would therefore condemn oligopolies per se as an antitrust violation (Plaine, Daniel, "International Regulation of Restrictive Business Practices", 1 at p. 16, Private Investors Abroad (1979), ed. by Landwehr, M. This paper was presented at a 1979 Symposium on Problems of Private Investment Abroad, under the auspices of the Southwestern Legal Foundation).

to interpret the Code as a condemnation of the abusive control of a particular market by a "shared" or "joint" monopoly.³⁸⁹

Mr. Joel Davidow, who was the Vice-Chairman of the U.S. delegation at the final U.N. Conference on Restrictive Business Practices and who was also a delegate at the OECD negotiations, comments that the effect of the definition is rather conservative, since there is the additional criteria that the existence of a conspiracy is a prerequisite for a finding of an abuse of a dominant market power position where the acts have been carried out by a combination of enterprises.³⁹⁰ The mere structural potential of monopoly power is not sufficient to involve an abuse.

Finally within the definition section, "Enterprises" are defined as:

"Firms, partnerships, corporations, companies, other associations, natural or juridicial persons, or any combination of them, whether created, controlled or owned by States or by private interests or a mixture of the two, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them."

The socialist-bloc countries had strenuously sought the exemption of state-owned enterprises from the definition of enterprises throughout the negotiations. Such an exemption would have brought the vast majority of enterprises operating within the socialist bloc outside the ambit of the Code. Group D's argument was that these enterprises do not fit the definition of "transnational enterprises" and, even if they do, they do not engage in restrictive business practices.³⁹¹

389. A "shared" or a "joint" monopoly exists when two or more firms act together, without an explicit agreement, to exert sufficient power to constitute a monopoly.

390. Supra note 370, at p. 198

391. Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Fifth Session, U.N. TD/B/C.2/AC.6/18 (1978)

Although the Group of 77 maintained an indifferent attitude over this issue, the western industrialized nations insisted that state-owned enterprises be included within the scope of the Code and refused to sign any agreement which excluded them.

Despite the fact that the socialist-bloc countries ultimately conceded their inclusion in the final document, the Code's non-binding nature gives them the right to exclude their state-owned enterprise from the principles and rules when it is within their interest to do so. Group D's Soviet representative at the closing meeting sought to undermine the inclusion of state-owned enterprises by repeatedly stating that the Set was directed at transnational enterprises only.³⁹² Additionally, Group D consistently refers to the fact that UNCTAD Resolution 25 (ii), which still forms the basis of UNCTAD's work in this area, relates to "restrictive business practices adopted by private enterprises of developed countries".

Even though the definition expressly includes "state-owned enterprises ... which are engaged in commercial activities", the Soviet-bloc countries might very well seek to plead the doctrine of sovereign immunity to preclude the Set's application of these enterprises.³⁹³

Despite the capability of socialist exclusion of their state-owned enterprises, the explicit inclusion within the definition of these enterprises

392. U.N. TD/RBP/CONF/II, p. 8 (1980)

393. The doctrine of sovereign immunity is still recognized and pleaded by Group D states in cases where a state-owned enterprise is conducting commercial activity, although some western countries have sought to severely restrict its application in these circumstances. (See, eg., The United States' Foreign Sovereign Immunities Act (1976), 28 U.S.C.S. secs. 1330, 1332, 1391, 1441, 1602-11 (1982). The restrictive theory of sovereign immunity provides that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are commercial in nature or those which private individuals normally perform. (See generally von Mehren, The Foreign Sovereign Immunities Act of 1976 (1978), 17 Colum. J. Transnat'l L. 33)) The socialist-bloc countries would also be able to take advantage of Section C(6) to exclude the commercial activities of their state-owned enterprises. (Infra text ch. 6, p. 165)

prevents any possible assertion of discrimination in the Code against privately-owned enterprises. It also negates the socialists' insistence that the Set is directed solely against transnationals. The inclusion of state-owned enterprises was paramount as far as the creation of a balanced agreement was concerned. Its exclusion would have made the Principles and Rules unacceptable to a wide variety of business groups, since state-owned or state-controlled enterprises are becoming increasingly important in world trade, not only within the socialist bloc but also in developed market-economy countries of Western Europe and in the developing nations. It is estimated that these enterprises, on the whole, account for almost 30 per cent of world trade at the present time.³⁹⁴

However, the main area of contention in this final definition of Section B centres around the question whether all branches, subsidiaries and affiliates are separate "enterprises" for the purpose of the Code or whether an enterprise is deemed to include its branches, subsidiaries and affiliates.

The developing countries consider the former interpretation to be correct, while the United States and other OECD member nations prefer the latter view.³⁹⁵ The practical problem here involves whether an agreement between a parent and its subsidiary, or between two closely affiliated firms, should be considered an infringement of the rules for enterprises in view of its cartel-promoting nature.³⁹⁶

A representative of G-77 outlined his group's view on this issue by stating that:

394. U.N. TD/B/RBP/8 at para. 9

395. See generally Supra note 183; Joelson, Mark, The Proposed International Codes of Conduct as Related to Restrictive Business Practices (1976), 8 L. & Pol'y Int'l Bus. 837, at p. 848-52, 861-69

396. Supra note 370, at p. 198

"The position of the Group was that the inclusion of restrictive business practices occurring in the relations between the various entities constituting a transnational corporation, particularly those engaged in developing countries, was crucial ... [A]s much as 50 per cent of world trade could be between related entities of transnational corporations, and to exclude full coverage of such transactions from the scope of the principles and rules would seriously impair the value of the instrument they were working on."³⁹⁷

The Group D countries support the G-77 on this issue. They themselves proposed that an enumeration of specific forms of restrictive business practices which are employed by transnationals in order to gain a dominant position of market power should be included as part of Section B. These would have included:

- 1) schemes for dividing up markets between parent companies and their subsidiaries in other countries, and
- 2) schemes of global strategy under which the headquarters of transnational enterprises give those enterprises which are under their control in other countries directives concerning volume or production levels, investment or procurement policies, outlet channels for finished products, volume and geographical direction of exports and external transfer of profits and capital.³⁹⁸

However, Group B was vehemently opposed to the idea of categorizing any intra-enterprise transaction as a restrictive business practice.³⁹⁹

397. Supra note 349, p. 36 at para. 14

398. Ibid., p. 40 at para. 32; U.N. TD/RBP/CONF.1

399. Supra note 385, at p. 612. Group B countries argue that affiliated enterprises normally co-ordinate their operations to some degree. They are able to utilize the benefits of common ownership to simplify, facilitate and broaden the scope of co-operation between their affiliated companies. Therefore, these nations contend that the end result is ordinarily synergistic rather than restrictive, since transnationals gain in efficiency and productivity as a consequence of their ability to act through one or more members of an enterprise in order to allocate resources.

The United States,⁴⁰⁰ Canada⁴⁰¹ and the European Community⁴⁰² each acknowledge the special circumstances of affiliated relationships and transactions in their restrictive business practices laws. Their competition legislation is only applicable to intra-firm restrictions when these take the form of abuse of a dominant position, or of monopolistic behaviour, in the national market, i.e. in situations where the restrictions adversely affect competition outside the affiliated enterprises. Group B countries further contended that the issue of intra-firm arrangements, restrictive or otherwise, was not a concern of an antitrust code but was more pertinent to a foreign investment code.⁴⁰³ They therefore proposed, in an attempt to limit the Code's scope of application, that the Set should not apply to agreements, arrangements or restrictions between parents and subsidiaries or among enterprises belonging to the same concern unless the practice amounts to an abuse of a dominant position of market power within the relevant market. This proposal was not accepted by the other groups.

Third World countries are very concerned about restrictions, placed on subsidiaries which operate within their territory, with respect to transfer of technology contracts between the parent and its subsidiary, such as those prohibiting exports designed to protect home or third markets.⁴⁰⁴ Indeed, legislation in some of these countries relating to transfer of technology

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400. United States v Everest and Jennings Int'l, Cir. No. 77-1648 R (C.D. Cal. 1977); 1979-1 C.C.H. Trade Cases, para. 62, 508, p. 76, 961 (Feb. 5th, 1979). The U.S. Dep't of Justice recognizes that a parent enterprise may legally allocate territories or set prices for its controlled subsidiaries. (U.S. Dep't of Justice, Antitrust Guide for International Operations (1977), p. 12)
401. Canada, Combines Investigation Act R.S.C. 1970, c. 23, secs. 31.5, 31.6 and 32.1(1)
402. Centrafarm BV v Sterling Drug, Inc. [1974] J. Comm. E. Rec. 114
403. Seth, Sanjiv, The UNCTAD Restrictive Business Practices Code (1980), ch. 2, p. 13 (University of Toronto: Thesis)
404. See Major Issues Arising from the Transfer of Technology to Developing Countries, U.N. TD/B/AC.11/10 Rev. 1 (1974)

severely penalizes such contractual restrictions.⁴⁰⁵ On the other hand, developed western states criticize legislation which equates a parent's control of its subsidiaries' purchases or sales as an objectionable conspiracy in restraint of trade. These countries, together with their transnational enterprises, consider such legislation to be "quasi-expropriatory" and "inequitable".⁴⁰⁶

However, it is submitted that any nation, whether it is a developed or developing state, has the right to regulate the activities and practices of any enterprise which operates within its territory. The political authorities of a nation have the right to make decisions which are in the national interest of that nation, as those authorities perceive those interests to be. This is one of the major tenets of the N.I.E.O. The enterprise has the option of removing its operations from the country if it is not satisfied with the legal conditions under which it is bound.

However, affiliated enterprises are regarded as one enterprise within the Code's definition of "enterprises". The United States and her major economic allies were steadfast in their refusal to compromise on this issue. Therefore, intra-corporate transactions and relationships are effectively exempted from the Code's scope of application, except where they amount to an

405. For example, Mexico prohibits contracts which contain clauses restricting transfer of technology into that country. (Law on Registration of Contracts and Agreements Regarding the Transfer of Technology and the Use and Exploitation of Patents and Trademarks, (1972)). All contracts containing such clauses are required by law to be registered with a regulatory agency which examines the contract and declares void those clauses which it considers to be unreasonable and restrictive. Unregistered contracts which contain such clauses have no legal effect. The Cartagena Agreement of the Andean Countries also invalidates restrictive clauses in transfer of technology, patent or trademark contracts. (Supra text ch. 3, p. 51 at note 132).

406. Supra note 403, ch. 1, p. 54. These differences between developed western nations and third world countries have led to bitter debate within the aborted UNCTAD negotiations for a transfer of technology code on the subject of the elimination of these contracts.

abuse of a dominant market power position which adversely affects international trade and the economic development of third world countries.⁴⁰⁷

In the final analysis, the western industrialized states' contention is sounder in terms of practical business reality. Although the G-77 nations and Group B states are legally correct in that a U.S. parent is a separate legal entity from its subsidiary in Barbados, which must be subject to the Laws of Barbados by virtue of its incorporation in that territory, these two enterprises in fact operate as one integrated entity, particularly where matters of technological, production and marketing interests are concerned. Indeed, the developing countries would not be wise to fervently advance this issue, since such a stand could mean a weakening of their campaign to increase the co-operation, with developing host countries, of parent enterprises which are based in industrialized countries, where the activities of their subsidiaries which operate within the Third World are involved. At stake are issues such as the disclosure by a transnational enterprise of information based in the home country to developing countries.

2) Scope of Application

The Set applies to all restrictive business practices which adversely affect international trade and which particularly affect the commercial and economic development of member nations of the G-77, irrespective of whether such practices involve enterprises in more than one country.⁴⁰⁸

407. Additionally. Section D(3) exempts business conducted "[within] the context of an economic entity of common control, including ownership, or where the enterprises involved are not able to act independently of each other". (Infra text ch. 7, p. 171).

The question of what exactly is the extent of the control test is, however, another source of potential controversy, since different meanings can be asserted for different contexts. It is submitted that assistance can be gained from the phrase "otherwise not able to act independently of each other" to outline the peripheries of the exemption, since this phrase appears to be broader than the control test. (See Lockwood, Charles, "Some Views on the UNCTAD Restrictive Business Practices Code", 35 at p. 39, Codes of Conduct for Transnational Corporations: Signals of Public Expectation? (August, 1980). Paper presented at a discussion arranged by the International Bar Association's Section on Business Law, held in Berlin, West Germany.)

408. It is also emphasized that the document applies to all enterprises, all commercial transactions and all countries "regardless of the parties involved". (Principles and Rules sec. B(4)-(7))

However, the Code's definition of restrictive business practices does not cover agreements between governments acting in their governmental capacity or restrictive business practices directly caused by such agreements.⁴⁰⁹

The developing countries' experts had also proposed that third world countries be allowed to exempt those activities from the Code's application which they, under their national laws, may determine are essential for their economic development or for the protection of their primary commodities and economic resources. They contended that such differential treatment was vital within the context of the N.I.E.O. and within the context of the special advantage enjoyed by the developed countries in the international economic arena.⁴¹⁰

Group B, meanwhile, countered by proposing the exclusion of all conduct which is exempted from the restrictive business practices laws of their respective countries.⁴¹¹ The western industrialized states were not willing to allow any explicit special immunity for developing countries alone.

Although the Set does not specifically exempt restrictive activities which are excluded under relevant national law from its scope of application, we will examine the compromise which was reached on this issue in the following Section.⁴¹²

D. Section C: Principles for the Control of Restrictive Business Practices

This Section outlines some agreed general principles including national, regional and international efforts to deal with restrictive business practices, including those of transnational enterprises, which adversely

409. Ibid. sec. B(9). This is a concession to Group B. G-77 nations would have preferred an exemption for only those restrictive business activities which result from intergovernmental agreements drawn up under the patronage of the United Nations.

410. Supra note 349, p. 35 at para. 12

411. Ibid., p. 45 at para. 53

412. Infra text ch. 6, p. 166-67

affect international trade and particularly affect the development of third world countries.⁴¹³ This reference to transnationals in Section C(1) is a result of the greater emphasis placed by the G-77 on problems caused by these enterprises.⁴¹⁴

The Set also expressly states, in a provision analogous to OECD competition guideline para. 3, that it does not justify conduct by an enterprise which is otherwise unlawful under applicable national or regional law.⁴¹⁵ This is a clear indication that the Code does not have any effect on the occasionally stringent foreign investment regulations of many developing countries.⁴¹⁶ National law is therefore not precluded from dealing more severely with restrictive business practices than is suggested by those guidelines which are recommended in the Principles and Rules. In his thesis, Sanjiv Seth comments that "this provision provides a massive escape clause to all nations adopting the Code, for even while they adhere to its rules and principles, nothing in it prevents them from following an antitrust policy of their own."⁴¹⁷ States may adopt their own definitions of restrictive business

413. Section C also mentions bilateral and multilateral government consultations to deal with restrictive business practices, the creation and improvement of international avenues to facilitate intergovernmental exchange and dissemination of information on the subject and the establishment of means to facilitate these multilateral consultations. (Supra note 408, sec. C(1)-(4)).

414. See also reference to "transnational corporations" in Principles and Rules, secs. A(4); B(4); E(1), F(1), (2) & (3). However, western antitrust officials argue that transnational enterprises do not necessarily account for more offenses related to restrictive business conduct than do mere export firms or than do domestic businesses with which they compete abroad. (Supra note 122, p. 9). Nevertheless, transnational enterprises do generally possess gigantic operations and do often compete in major oligopolistic markets. Their restrictive practices will therefore be of greater significance than those of a mere export or of a domestic enterprise. The adverse effect which a restrictive activity carried on by a transnational enterprise would have on the development of an affected third world nation would, therefore, generally be more detrimental than a restrictive activity conducted by another type of enterprise under the same circumstances.

415. Supra note 408, sec. C(5)

416. Czako, J., The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1981), 13 L. and Pol'y Int'l Bus. 313, at p. 329

417. Supra note 403, ch. 2, p. 17

practices and deal with such conduct in any manner which they see fit. As a corollary of its voluntary nature, the Set does not compel national or regional legislation to conform to its principles and rules.⁴¹⁸

Paragraph 6, at Group B's suggestion, effectively exempts restrictive conduct which "is accepted under applicable legislation or regulations" or which "is required by States". The exemption for "accepted conduct" means that the Code goes beyond the U.S. antitrust defense of sovereign compulsion. "Accepted conduct" would be conduct specifically exempted under applicable national or regional law and would include exemptions from competition regulation given to certain types of industry or sectors of the economy as well as exemptions for labour unions, farmer co-operatives and sport organizations. This exemption would also cover those practices of national export cartels or associations which are generally authorized by western industrialized nations, or, at least, which are not prohibited by relevant national competition legislation. The paragraph also seems to endorse the establishment of commodity consortia by developing nations, such as OPEC.

Meanwhile, the "required conduct" exemption maintains the "sovereign compulsion" and "Act of State" defences.

The writer can only agree with the opinion of Professor Dale Oesterle when he writes that:

"The failure [of the Code] to address the propriety of state-sanctioned conduct invites widespread abrogation of the agreement's standards. [It] suggests that the participants on all sides, in the end, accepted very limited goals for the Conference. The participants were unwilling to tackle the paramount international restrictive business practice problem - the legitimacy of international cartels, such as OPEC, and of national cartels, such as those permitted by the Webb-Pomerene Export Trade Act in the U.S."⁴¹⁹

418. Supra note 378, at p. 11

419 Supra note 345, at p. 53-4. Additionally, paragraph 6 provides another means whereby Group D countries can exclude conduct of their state-owned enterprises from the Code's ambit. (Supra text ch. 6, p. 157)

The final paragraph was the only disputed provision in this Section. The western developed states had contended 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 co-operate and combine sufficiently to enable them to compete in international markets. The G-77 had originally favoured the idea of according preferential treatment to their national enterprises in order to ensure "equitable" application of the principles and rules.⁴²⁰ Group B insisted that special and preferential treatment based on nationality is neither feasible nor desirable in the area of restrictive business practices, since the members of a cartel may very well be from developing countries. Any "special" treatment for enterprises should therefore be centred on their lack of size and market power and not on their nationality.⁴²¹

A compromise was reached by reiterating that the developed countries should take into account, in their control of restrictive business practices, the development, financial and trade needs of developing countries in order to:

- a) promote their economic development and development of domestic industries; and
- b) encourage their economic development through arrangements among developing countries.⁴²²

Developing nations have therefore been allowed "preferential" or "differential" treatment in the control of restrictive business activities by the more economically advanced countries "in order to ensure the equitable application of the Set." However, this paragraph is expressed as a matter of comity just as is the preceding provision. States "should take into account" developing country necessities.

420. Draft Code (April, 1979), Proposed Para. V to sec. C

421. Supra note 122, p. 24

422. Supra note 408, sec. C(7)

Some western proponents will argue that recognition of the "preferential or differential" principle for particular countries or bloc of countries is contrary to the theory that the Set is predominantly a competition code. However, it is submitted that paragraph 7 is consistent with the ideals of "fairness" and "equity" advanced by N.I.E.O. concepts in order to enhance the economic and commercial status of the developing world. Group D publicly expressed its support of the granting of "specific privileges" to developing countries under the Code.⁴²³

In his comment on the final two principles in Section C, Professor Stuart Benson emphasizes that:

"[These] two paragraphs do not provide any automatic and fixed exemptions from the Code or recommend such exemptions from national regulation. They [merely] suggest that enforcement should vary depending on the nature and degree of state involvement, with special deference to be accorded to economic development needs. This deference, however, is to be based on the needs of the countries involved or affected, not on the ownership or nationality of the enterprises concerned."⁴²⁴

VI. Conclusion

In this Chapter, we illustrated the various compromises reached during the negotiations of the UNCTAD Agreed Principles and Rules between the various ideological blocs within the organization. We then sought to detail and to analyze the Preamble and the first three Sections of the document, after outlining the different perceptions of the purpose of the Set which were held by the three Groups. We also examined the legal status of the Set.

In our following Chapter, we shall continue our detail and analysis of the Code. We shall also examine its inherent defects and estimate its probable impact and utilization in antitrust matters at the national, regional and international levels. Finally, we shall attempt to ascertain the possibility of its principles and rules becoming binding in the future.

423. Supra note 392, p. 9; Closing statement made by the representative of the USSR on behalf of Group D

424. Supra note 381, at p. 1039

CHAPTER VII

The UNCTAD Principles and Rules: Part Two

I. Outline and Analysis of the Principles and Rules (Section D - Section G)

A. Section D: Principles and Rules for Enterprises

This Section, which contains principles and rules for enterprises, including for transnationals, is the most important section of the Code. Firstly, it recommends that enterprises should comply with the legislation of host countries concerning restrictive business practices and be subject to the competence of the judicial and administrative system there.

No mention is made that any exercise of national jurisdiction over restrictive business practices should be "subject to standards of international law". This is unlike para. 7 of the Introductory Considerations and Understandings of the OECD Guidelines which specifically refers to such a proviso.⁴²⁵

Secondly, para. 1 provides no guidance for determining what amount of "operations" in a jurisdiction, whether directly or through a subsidiary or a mere branch office, should be sufficient to expose an enterprise to the law and administration of that country. It is submitted that jurisdiction under para. 1 should depend on whether or not the enterprise "carries on business" in the particular country. An enterprise should be deemed to carry on business in a country if it has a "permanent establishment" in the country, i.e. a fixed place through which its business is wholly or partly carried on. This would include:

425. Recognition of the concept that the enforcement of regulations which deal with restrictive business practices should be subject to international law is of significant concern to major Group B countries. Although Messrs. Atkeson and Gill assert that international law considerations are to be implied in the paragraph, it is submitted that this must not be taken for granted. (Supra note 378, at p. 13). Developing nations have sought to vary traditional international law on issues such as the duty to provide adequate and prompt compensation to transnationals after expropriation of their property and it is probable that some third world nations would argue that domestic legislation alone should fashion the course of judicial or administrative action against a transnational enterprise.

- 1) a place of management;
- 2) a branch;
- 3) an office;
- 4) a factory;
- 5) a workshop; and
- 6) a mine, oil or gas well, a quarry or any other place of extraction of natural resources.

An enterprise may also carry on business through an agent who does not have an independent status and who has authority to conclude contracts on behalf of the enterprise.⁴²⁶

The second paragraph urges enterprises to co-operate with the competent authorities of countries directly affected in controlling restrictive business practices which are adversely affecting the interests of those countries. Information should be provided for this purpose, even if it is located in a foreign country, unless such an action is prevented by the applicable law or established public policy of the country in which it is located. The final sentence prescribes that the provision of information should be in accordance with safeguards normally applicable in this field.

The effect of this paragraph is similar to that of the final provision of the OECD Competition Guidelines. Similar to those Guidelines, this provision encourages a transnational enterprise to convey information to a nation even though that enterprise has no business operations in that nation.⁴²⁷ The interest of that nation need only be "adversely affected" by the restrictive conduct with which the particular enterprise is associated.

Secondly, the paragraph approves of national legislation or public policy prohibiting the production or disclosure of such information to a foreign jurisdiction.⁴²⁸ It therefore effectively recognizes the sovereign

426. This definition of a "permanent establishment" is taken from the OECD Model Double Taxation Convention on Income and Capital (Paris, 1977), Art. 5

427. Supra text ch. 4, p. 78

428. Supra note 207, at p. 581

right of nations to implement "blocking statutes".⁴²⁹ This explicit recognition, although consistent with reality in contemporary antitrust policy, is unfortunate. "Blocking statutes" protect and encourage restrictive business activities if they are successful in their objective of preventing discovery or production of documents or of preventing prosecutions in competition affairs. They may, additionally, have the effect of preventing foreign-controlled enterprises from co-operating with host countries in antitrust investigations.

Recent U.S. antitrust policy has, indeed, only accepted true impossibility of performance as an excuse for not providing information referred to in para. 2.⁴³⁰ There is hence apparent conflict between the Set and U.S. law on this issue.

The criticism made earlier concerning the vague and uncertain character of the final sentence of the OECD Competition Guidelines, para. 4 is also pertinent to the final sentence of para. 2.⁴³¹

The third provision of this Section outlines seven practices which enterprises are recommended to refrain from participating in. The paragraph applies to agreements or arrangements among enterprises, whether formal or informal, written or unwritten, which limit access to markets or otherwise unduly restrain competition and have or are likely to have adverse effects on international trade, particularly the trade and economic development of developing countries.⁴³²

429. Supra text ch. 2, p. 8

430. In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. III, 1979); United Nuclear Corp. v General Atomic Co., 1980-81 Trade Cases para. 63, 639 (S.Ct. M.N., 1980)

431. Supra text ch. 4, p. 79-80

432. The negotiators therefore utilized the language of the Section B definition of "restrictive business practices", minus the "abuse of a dominant market power position" concept, to describe the requisite effects of the restrictive agreements or arrangements. (Compare a similar use of the Section B definition of "restrictive business practices" in the operative language of Sec. D(4), in this case to describe the requisite effects of the "abuse of a dominant market power position" concept.)

As previously mentioned,⁴³³ the subsection exempts restrictive business conduct carried on within the scope of a common economic union, including ownership,⁴³⁴ or carried on where the enterprises between which such conduct is engaged are not able to act independently of each other. Although a consensus was reached between the three groups with respect to this exemption, neither the Sherman Act nor the Treaty of Rome excludes agreements from their respective prohibitions on the ground of common ownership per se. Professor Benson, however, does not perceive this difference between the Set and U.S. legislation as well as Community antitrust policy to be a significant one, since he submits that such agreements are generally not anti-competitive or violative of antitrust legislation.⁴³⁵

The Section's prohibition applies when the relevant practice is agreed or arranged between enterprises engaged "in rival or potentially rival activities". This is comparable to sec. 1 of the Sherman Act and Art. 85 of the Treaty of Rome. The reference to "rival or potentially rival activities" confirms the paragraph's exclusion of normal affiliated behaviour and relations. It also is a condemnation of harmful horizontal agreements or arrangements, i.e. those between two or more separate enterprises at the same level of commerce.⁴³⁶ Although the majority of vertical arrangements are excluded from Section D(3), agreements or arrangements between "potential" rivals or competitors which may act vertically, for example those between a licensor and a licensee, would also fall within the scope of this provision.⁴³⁷

433. Ibid., ch. 6, p. 161-2

434. The addition of the phrase "including through ownership" serves as an indication that more than stock ownership relationships are excluded. It also suggests that minority, as well as majority, stock ownerships could fall within the exemption. Common control may also arise through management contracts. (Supra note 378, at p. 14)

435. Supra note 381, at p. 1043

436. Ibid.

437. Fikentscher, Wolfgang, U.N. Codes of Conduct: New Paths in International Law (1982), 30 Am. J. Comp. L. 577, at p. 580; supra note 345, at p. 39

The practices from which enterprises are requested to refrain from participating, in the circumstances outlined in the paragraph are:⁴³⁸

- a) agreements fixing prices including as to exports and imports;
- b) collusive tendering;⁴³⁹
- c) market or customer allocation arrangements;
- d) allocation by quota as to sales and production;
- e) collective action to enforce arrangements - eg., by concerted refusals to deal;
- f) concerted refusal of supplies to potential importers; and
- g) collective denial of access to an arrangement or association which is crucial to competition.

This provision implies an antitrust "prohibition" principle as opposed to an "abuse control" principle. It includes a "rule of reason" test⁴⁴⁰ in the prohibition,⁴⁴¹ condemning only those agreements which actually restrain competition. This is suggested by the textual statement that the relevant

438. This list is non-exhaustive (Compare Sec. D(4); Infra text ch. 7, p. 175 at note 448). A proposal by Group B had provided for an exhaustive enumeration of the kinds of restrictive business practices which would be prohibited under the Code, while the G-77 preferred that the list be merely illustrative.

439. "Collusive tendering" is the practice whereby suppliers, among themselves, fix prices and/or other conditions for sale of goods or services. It is one of the common forms of restrictive business practices distorting patterns of trade and hindering the trade and economic development of third world countries. This practice can result in higher prices for products and poorer quality goods and services. "Collusion" may be aimed at eliminating domestic competition within the purchasing country as well as potential new participants in international trade. (See U.N. TD/B/RBP/12/Rev. 2 (1985), p. 1-2).

440. The "rule of reason" means that a distinction will be made between lawful and unlawful concerted action restraining competition, after a consideration of all the facts and circumstances of the case, in a decision with respect to whether to prohibit a restrictive practice as an imposition of an unreasonable restraint on competition. This is to be contrasted with the "per se" doctrine, which summarily invalidates certain acts that directly stifle competition.

441. Supra note 437, at p. 583

practices should be avoided only when they will "unduly restrain competition" and produce "adverse effects" on international trade.⁴⁴² The Code therefore differs from U.S. antitrust jurisprudence under the Sherman Act, which condemns all agreements of selected types due to the belief of its creators that the substantial majority of such agreements restrain competition and that the disadvantages of prohibiting a few beneficial arrangements are outweighed by the advantages gained in minimizing enforcement costs. The writer can only agree with Professor Oesterle when he states that the refusal to use "per se" rules in the Principles and Rules is unfortunate, since the Code does not establish any binding judicial or administrative enforcement machinery.⁴⁴³ The learned author proceeds to state, on the same page, that:

"Definite standards would enable one state to ascertain more confidently the failure of enterprise or other states to abide by the standards' prescriptions. The lack of definite standards invites irreconcilable factual disputes, since there is no formal resolution mechanism."

The practices outlined in paragraphs (a), (c), (d), (e) and (f) are all prime examples of the intended consequences of a cartel-like agreement or arrangement. This condemnation of restrictive cartels is similar to the prohibition outlined in the third paragraph of the OECD Competition Guidelines.

Finally, although this paragraph forbids certain harmful restrictive conduct, domestic rulings, tribunal decisions and guidelines issued by antitrust enforcement authorities would be needed to clarify and interpret relevant cases arising within a particular jurisdiction.

442. Supra note 207, at p. 582

443. Supra note 345, at p. 33

The fourth provision of Section D outlines certain activities from which enterprises are advised to refrain when they amount to an abuse,⁴⁴⁴ or an acquisition and abuse, of a dominant position of market power, with the consequence that access to markets is limited or competition is otherwise unduly restrained and they are, or are likely to be, adverse effects on international trade, particularly that of developing countries and on the economic development of these countries. The activities have to relate to a "relevant market" and it would not therefore be inconsistent with the provision if the particular activities were practised outside the market in question.⁴⁴⁵

It is enough that the dominant market power position has been "acquired" by the act or behaviour in question. The market power need not be acquired or be already existing in the relevant market where the act or behaviour is committed. It may involve a different market, hence including the transfer of market power from one market to another.⁴⁴⁶

444. The paragraph also provides that whether a particular practice is abusive or not should be examined in terms of its purpose and effects in the actual situation, particularly with reference to whether it limits access to markets or otherwise unduly restrains competition which has, or is likely to have, adverse effects on international trade, particularly on the trade and economic development of third world countries. A particular act would not fall within the ambit of the prohibition, even if it is undertaken by separately incorporated enterprises, in a case where the act is:

- a) totally within an organizationally, managerially and legally dependent corporate context, such as within a common economic entity and has no adverse effect on competition among other firms in the relevant market;
- b) appropriate in the light of special conditions or economic circumstances in the relevant markets, such as exceptional conditions of supply and demand or market capacity;
- c) of a kind which is usually treated as acceptable under the appropriate national or regional legislation; and
- d) consistent with the purposes and objectives of the Set.

445. Fikentscher, supra note 437, at p. 586

446. Ibid.

Similar to the policy of the Sherman Act and the Treaty of Rome, the Code does not establish a fixed percentage of control of the market at which a dominant position of market power is achieved, since many other factors, such as barriers to entry, affect a firm's power in a given market.⁴⁴⁷

The prohibited activities are:⁴⁴⁸

- 1) predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;
- 2) discriminatory (i.e. unjustifiably differentiated) pricing, terms or conditions in the supply or purchase of products or services, including pricing schemes applied to intra-enterprise transactions;
- 3) mergers, takeovers, joint ventures or other acquisitions of control, whether they are horizontal, vertical or conglomerate;
- 4) price fixing of exported goods which are being resold in importing countries; and
- 5) restrictions on the importation of trademarked goods where the importing country produces goods bearing the same or a similar trademark and the trademarks belong to the same owner or are used by interdependent enterprises with the aim of maintaining artificially high prices.⁴⁴⁹

The remaining practices, outlined in subparagraph 6, are only objectionable when their objective is not for ensuring the achievement of legitimate business purposes such as quality, safety, adequate distribution or service. These acts are:

447. See eg., "United States v Columbia Steel Co.", 334 U.S. 495, 527-28 (1948)

448. Unlike the previous paragraph, the abuses in the fourth are exhaustively listed, although the Group of 77 would have preferred the provision to be extended to also cover acts or behaviour "of similar effects".

449. The language used in this subparagraph indicates that in principle Sec. D(4) subjects intra-enterprise relations to an "abuse control" test. The test here, for affiliated enterprises, is the equivalent of their treatment under U.S. antitrust practice (see U.S. Dep't of Justice. Supra note 400 case A, p. 10, 12).

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

Section D(4) therefore covers vertical restraints of enterprises in a dominant position of market power.

The applicable doctrine to use to ascertain whether an act is prohibited under para. 4 is clearly the "rule of reason" and not the "per se" doctrine.

This fourth provision is more similar to the Treaty of Rome's Art. 86 in its approach of abuse⁴⁵⁰ than to the Sherman Act's sec. 2 notion of monopolization. As Stuart Benson maintains,⁴⁵¹ however, the result is essentially the same. Additionally, abuses of market dominating power are prohibited, as in Art. 86. Similar to the Community legislation again, but unlike the Sherman Act, the paragraph refers to existing or acquired monopolies which, as such, are not per se subject to legal sanctions, although their abuse is forbidden.

Section D(4) closely parallels the first two paragraphs in the OECD Competition Guidelines, although the UNCTAD principle is more expansive in outlining its prohibitions.

The practices outlined are a combination of those present in the Sherman Act and the Clayton Act. However, the principle is more conservative than the relevant provisions in U.S. legislation as well in those of many European jurisdictions. For example, para. 4 excludes all single firm or vertical

450. Under the "abuse approach", an act is only offensive if, considering its purpose and effects, it restrains competition and adversely affects international trade and development. This analysis of abusive behaviour is analogous to the application of the "rule of reason" with respect to monopolization in order to determine unlawful behaviour. (Supra note 381, at p. 1042)

451. Ibid., at p. 1042

conduct of nondominant enterprises,⁴⁵² whereas in the United States it is possible for a merger to be prohibited by the Courts even though the enterprise involved only controlled a small percentage of the relevant market.⁴⁵³ However, the U.S. judiciary has been recently shifting in a similar direction as that suggested by the Code and has held, as an illustration, that "predatory" pricing by a small firm is legal since no dangerous probability of monopolization exists.⁴⁵⁴

In negotiations over para. 4(ii), the developing countries sought to include a principle which would deal with the issue of the internal transactions of transnationals. The proposal would have prohibited the "use of pricing policies for transactions with related enterprises to fix prices and in particular to overcharge or undercharge for products or services purchased or supplied".⁴⁵⁵

Current international trade conditions encourage transnational enterprises to overvalue imports and undervalue exports when transacting business with a subsidiary situated in a developing country.⁴⁵⁶ The Third World is therefore placed at a disadvantage with respect to foreign exchange issues and with regard to the collection of tax and custom duties. In this manner, these countries lose wealth to major western industrialized countries, which are the home countries of the substantial majority of transnationals.

452. Supra note 207, at p. 583

453. See eg., United States v Von's Grocery Co., 86 Sup. ch. 1478 (1966) [Majority Judgment]. In this case, the third largest grocery chain in Los Angeles bought out the sixth largest. Merged chain became the second largest, controlling 7.5 per cent of city's retail grocery business. The largest had 8 per cent of the market. Merger was prohibited as a violation of sec. 7 of the Clayton Act. The majority's decision was based primarily on the policy of arresting the trend toward concentration in industry and of preserving a large number of competitors.

454. See United States v Empire Gas Co., 537 F. 2d 296 (8th Cir. 1976); Mullis v ARCO Petroleum Corp. 502 F. 2d 290 (7th Cir. 1974)

455. Supra note 345, p. 21

456. See text ch. 4, p. 70-2; see Barnett, Richard and Müller, Donald, Global Reach: The Power of the Multinational Corporations (1974), p. 173-76

Transnational enterprises can also gain by underpricing imports, in the appropriate circumstances, to their third world-based subsidiaries. This would also decrease their custom duty payments and enable the subsidiary to engage in predatory pricing within the domestic market.⁴⁵⁷ As noted by a socialist-bloc spokesman, the control of intra-corporate transactions is a fundamental tenet of the N.I.E.O.⁴⁵⁸

Although the OECD Guidelines refer to the harmful effects of transfer pricing on overall global economic development,⁴⁵⁹ the United States campaigned against a condemnation of transfer pricing in the Principles and Rules, arguing that such an issue was not relevant to an antitrust code since it involved financial, taxation and investment questions and contending that its inclusion as a prohibitive practice would be impracticable due to the inevitable vagueness of the principle. Additionally, the United States argued that such a provision could operate against developing countries by discouraging foreign investment.⁴⁶⁰

A compromise was negotiated which was, in the final analysis, similar to the Group of 77's proposal. The following clause was added in para. (4)(ii)'s condemnation of "discriminatory pricing":

"including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises."

457. See generally Greenhill and Herbolzheimer, International Transfer Pricing: The Restrictive Business Practices Approach (1980), 14 J.W. Tr. L. 232

458. Supra note 349, p. 40-1

459. Supra text ch. 4, p. 71-2

460. Supra note 370, at p. 205-206

Professor Oesterle comments that the difference between the final provision and the proposal of the G-77 lies in the subordination of the transfer pricing restriction to language that condemns only behaviour limiting access to markets or otherwise unduly restraining competition.⁴⁶¹ The text is therefore similar to the OECD Competition Guidelines' para. 1(e).

Although the learned author opines that para. 4(ii) is redundant in view of the earlier condemnation of "predatory pricing" and that the "limited access" and "restraint of competition" requirements in effect nullify the transfer pricing restriction⁴⁶² and although Messrs. Atkeson and Gill write that an interpretation of this clause as a requirement of "arms-length pricing" between affiliated enterprises would be strained,⁴⁶³ it is submitted that third world countries would nevertheless perceive the paragraph as a condemnation of transfer pricing practices.

Group D and the G-77 had campaigned for the inclusion of "excessive pricing of products and services" in this subparagraph. Although the competition laws of certain Group B members, such as the Federal Republic of Germany, the United Kingdom and the European Economic Community, apply to excessive pricing,⁴⁶⁴ other member countries, such as the United States, Canada and Australia, have always reasoned that an enterprise illegally monopolizes a market only when it engages in exclusionary conduct. Opposition to the inclusion of excessive pricing is based on the concept that high prices invite entry and are therefore the opposite of exclusionary.⁴⁶⁵ It is, however, submitted that the arguments for the inclusion of "excessive pricing"

461. Supra note 345, at p. 36

462. Ibid.

463. Supra note 378, at p. 16

464. See eg. United Brands Co., 2 C.C.H. Com. Mkt. Rep. para. 9800 (1975); Edwards, Corwin, American and German Policy Toward Conduct by Powerful Enterprises: A Comparison (1978), 23 Ant. Bull. 83 at p. 100. Rhineland, The Roche Case; One Giant Step for British Antitrust (1974-5), 15 Va. J. Int'l L. 1, at p. 34-5

465. Supra note 122, p. 37; see United States v Aluminium Co., supra note 15 at p. 426

were meritorious, since it is possible that a seller could charge an excessive price to a disfavoured consumer, whereas he could charge a reasonable price to a favoured one. The Code should have explicitly stated that this type of pricing conduct could come within the discriminatory pricing prohibition.

However, in the final analysis, it was improbable that such a course could have been taken, considering that prominent U.S. business and legal associations were even criticizing the inclusion within the paragraph of "discriminatory pricing" although such a practice can be illegal in the United States even if the actor is not a monopolist.⁴⁶⁶ Under the Set, "discriminatory pricing" is only restricted if engaged in by a monopolist.

Certain U.S. business and legal groups also opposed the inclusion of "mergers" within the scope of paragraph 4(iii), although the Clayton Act may prohibit mergers even if they only threaten to undermine the competitive structure of a market.⁴⁶⁷ The Code, on the other hand, only condemns mergers where the resulting entity has actual control of the relevant market.

The fear of these U.S. business and legal interests was predicated on their belief that the act of merger, which they claim frequently reflects or enhances rather than restrains competition, might be subjected to improper attacks in non-market economies for social reasons or for other reasons unrelated to competition. However, Messrs. Atkeson and Gill provide a solid answer to this pessimism when they assert that "the abuse control" test, "the dominant market power position" test, "the restraint of competition" test and "the adverse effects" test all combine to act as security provided by the Principles and Rules against improper attacks on mergers.⁴⁶⁸

466. Robinson-Patman Act, 15 U.S.C. secs. 13, 13(a)-(c), 21(a) (1982)

467. 15 U.S.C.S. sec. 18 (1985); see generally, Brown Shoe Co. v United States, 370 U.S. 294 (1962). It must be mentioned, however, that the Reagan Administration has been much more favourable than its predecessors to mergers. There is even the impression in some quarters of both business and Government in the United States that "any merger today will win Washington's approval". (See Greenwald, John, Let's Make a Deal, Time Magazine, December 23rd, 1985, 44 at p. 46, col. 1)

468. Supra note 378, at p. 17

The controversy over the use of transnational marketing strategies,⁴⁶⁹ particularly over those involving affiliate co-operation, which hinder imports or exports of related enterprises is illustrated by the negotiations over para. 4(v). Messrs. Oesterle⁴⁷⁰ and Davidow⁴⁷¹ both perceive the attack on marketing strategies by the socialist bloc and by the developing countries as the high water mark of their efforts to inject general investment and development issues into the Code. On the other hand, Group B opposed the inclusion of transnational marketing strategies, both on the grounds that it was not pertinent to an antitrust code and on the grounds that a rule regulating such an issue would of necessity lack clarity and precision and would therefore undermine the legitimacy of countless managerial decisions within the transnational corporate structure. Additionally, the Group B countries contended that these practices were adequately covered under subsections (vi)(a) and (c), which deal respectively with unreasonable refusals to deal and with restrictions on sale or resale.⁴⁷²

The position maintained by the western industrialized nations generally prevailed, since the Set does not denounce parent-subsidiary transactions involving marketing strategies although it does condemn the use by transnational enterprises of licensed or assigned trademarks to prevent the parallel importation of products legitimately bearing the same mark if the objective of the practice is to avoid competition from such imports, even where such a practice is a result of an intra-enterprise arrangement.

A few points must be reiterated in concluding our analysis of Section D. Firstly, the illustrations listed in the final two paragraphs of the Section are by no means exhaustive of possible harmful restrictive business practices. Secondly, the paragraphs only define the listed practices in general terms, leaving a broad range of possible interpretations by various interest groups and ideological blocs in their application of the principles to specific activities.

469. Supra text ch. 6, p. 159

470. Supra note 345, at p. 36-7

471. Supra note 122, p. 40

472. Ibid.

Finally, it must be remembered that these rules have no binding effect on enterprises. Firms, including transnationals, are free to contravene these recommendations if they so desire, since they know that any probable contravention would not have any legal ramifications at the international level. Although all the practices listed in the final two paragraphs are condemned under U.S. antitrust legislation as well as in most Western European jurisdictions, including under E.E.C. law, their infringement of "the abuse control" test and of "the adverse effects" test would only trigger legal proceedings if the consequences of these acts have a direct or intended effect on national commerce. No western antitrust law authorizes competition officials to institute legal action against an overseas-based anti-competitive practice, the consequences of which only harm a third state or harm international trade in general without adversely affecting the domestic commerce or economy of the state in question.⁴⁷³

B. Section E: Principles and Rules for States

A major innovation as far as competition codes sponsored by U.N. organizations is concerned has been the inclusion in the UNCTAD document of principles and recommendations for nation states. Section E therefore provides an apparently balanced approach to the Code.

The Section suggests a commitment from states at three basic stages:

- 1) the adoption, improvement and enforcement of appropriate legislation to control restrictive business practices and the implementation of judicial and administrative procedures for the same purpose;⁴⁷⁴
- 2) the achievement of that purpose without infringing the concept of fair, equitable treatment of enterprises, which is on the same basis to all businesses, in accordance with established procedures of law, as well as

473. Supra text ch. 2, p. 12-13. See also Art. 85(1) of the Treaty of Rome, which only applies to cartels which have the objective or effect of "preventing, restraining or distorting competition within the Common Market."

474. Supra note 408, sec. E(1)

by making public, and readily available, any relevant legislation and regulations⁴⁷⁵ and without breaching the confidentiality surrounding legitimate business secrets of enterprises operating within their individual jurisdiction;⁴⁷⁶ and

- 3) the institution or amelioration of channels whereby information necessary for the effective control of restrictive business practices can be obtained⁴⁷⁷ and exchange of information on the subject and on the application of relevant national legislation and policies, as well as international co-operation with respect to their control, can be promoted.⁴⁷⁸

The Section outlines details of principles and rules which states should follow at the national, regional and subregional levels. The second provision calls on nations to base their legislation primarily against restrictive business practices as that term is defined in the Code, except that the criteria of "adverse effects on international trade, particularly on the trade and economic development of developing countries" has been omitted.

States are therefore only urged to deal primarily with acts which adversely affect their own trade and economic development. It is submitted that this is an endorsement of the "effects doctrine". Additionally, a

475. Ibid., sec. E(3)

476. Ibid., sec. E(5)

477. Ibid., sec. E(6). Professor Osterle states that it is unclear whether para. 6 contemplates the institution of legislation which requires enterprises to provide periodic reports to governments on details of restrictive agreements, understandings and other arrangements or whether the grant of subpoena power to national investigative bodies is sufficient. (Supra note 345, at p. 50). It is submitted that both of these illustrations should come within the ambit of this paragraph, which should be interpreted broadly to include any legitimate action to obtain information from an enterprise, once such action does not infringe the legitimate business interests of that enterprise.

478. Ibid., sec. E(7). However, the Group B proposal that states should notify other nations when the former are contemplating antitrust enforcement action which would affect important interests of the notified nation was not included in the Set. This recommendation, in effect, would have called for the establishment of notification procedures similar to that available to OECD member nations.

logical implication from the sound argument that the presence in the paragraph of the word "primarily" - used in relation to the question of what should be the basis of restrictive business practices legislation - suggests that states are free to deviate somewhat from the standards of the Code in their domestic legislation⁴⁷⁹ would be that the word also creates an opening for an argument in favour of extraterritorial antitrust legislation where there is no direct or intended effect on national commercial or economic interests.⁴⁸⁰

A well-meaning state, however, finds no guidance on the type of remedies that are appropriate for a violation of national legislation enacted in conformity to subsections (1) and (2). As Oesterle comments, a general provision on appropriate remedies "is critical to the effectiveness of international or national codes" and "would greatly facilitate international co-operation for national investigations undertaken consistent with the norms of the Agreed Principles and Rules".⁴⁸¹

The major provision in the Section is the third, the first sentence of which recommends that:

"States in their control of restrictive business practices should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law."⁴⁸²

Group B had argued for the word "non-discriminatory" to be included in the paragraph along with the words "fair" and "equitable" but the G-77 refused to accept this suggestion. The paragraph, as it stands, still represents a

479. Supra note 345, at p. 45

480. Infra text ch. 7, p. 186-89

481. Supra note 345, at p. 49-51

482. This principle is in sharp contrast with Sec. C(iii) 7 which deals with preferential treatment for developing countries in order to promote their industrial and economic development so as to ensure the equitable application of the Set. (Supra text ch. 6, p. 166-67)

significant achievement on the part of the western developed countries. American business organizations supporting the Code conspicuously applauded its inclusion in the document.⁴⁸³

Group B countries would argue that fair, equitable treatment of enterprises, "on the same basis to all", is predicated on a neutral economic standard applicable to all global businesses, whether they are transnational enterprises based in the major western developed nations or are domestic industries situated in third world countries. They would also contend that such a provision should be applied broadly in accordance with an international law.

The socialist-bloc states and developing nations predictably would contend that, under the N.I.E.O. notion, preferential treatment of national industries in the developing world is "fair" and "equitable".

Controversy also arises as to whether the clause will be satisfied by treatment of a particular transnational "on the same basis" as all other foreign-based enterprises once that treatment is fair and equitable or whether foreign-based enterprises are entitled to the same or similar treatment as domestic enterprises. The correct interpretation is uncertain, since on the one hand, the provision speaks of equal treatment of all enterprises but yet, on the other hand, the word "nondiscriminatory" has been intentionally excluded from the paragraph. Additionally, "fair" and "equitable" remain undefined within this context. Group B will maintain that the principle of nondiscrimination is still embraced in the language of the clause "treatment ... on the same basis to all enterprises". However, it is submitted that Group D and G-77 countries will assert otherwise.

483. See, eg., Policy Statement of National Foreign Trade Council, The Restrictive Business Practices Code (July 21st, 1980); Letter from L. Fox, Vice-President and Manager, National Association of Manufacturers, to R. Cooper of the International Economic Affairs Dep't (July 1st, 1980); U.S. Council of the International Chamber of Commerce, Report of the Committee on Restrictive Business Practices, p. 2 (May 24th, 1980)

Whatever is the result of all this in the final analysis, it is certain, as Messrs. Atkeson and Gill recognize, that this third paragraph offers transnational enterprises an unprecedented opportunity to secure important procedural "due process" protections.⁴⁸⁴

The fourth paragraph recommends that states should undertake appropriate measures to prevent, or at least to control, the use of restrictive business practices where such an action would be within their competence, after they have been notified that these practices are adversely affecting international trade and the commercial development of the Third World.

The phrase "within their competence" suggests that states should control all restrictive business practices over which they have jurisdiction. Sanjiv Seth asserts that states are competent to deal with these practices when they possess:

- 1) legislative jurisdiction over the offence; and
- 2) personal jurisdiction over the offenders.⁴⁸⁵

As previously stated,⁴⁸⁶ legislative jurisdiction in prevailing antitrust law only arises in a case where the relevant conduct has adverse effects on the trade or commerce of that particular nation. At the present stage of antitrust enforcement policy, no home country would claim jurisdiction in the absence of an adverse effect on its individual national interest, even in the case where the offenders are its nationals or are present within its territorial borders, i.e. are within its jurisdictional competence.

This principle can therefore be interpreted as a request to states to broaden their legislative jurisdiction to control even those restrictive activities which do not have adverse effects on their own national interest, although they do adversely affect international trade generally and the economic interests of third world nations in particular.⁴⁸⁷

484. Supra note 378, at p. 17

485. Supra note 403, ch. 2, p. 28

486. Supra text ch. 2, p. 12-13; supra text ch. 7, p. 182

487. Supra note 403, ch. 2, p. 29

Developing countries have been urging western industrialized states, even before the adoption of the Set, to control the restrictive conduct of their transnationals abroad, even in circumstances where such conduct has no direct or intended domestic effect.⁴⁸⁸ They have gained support on this issue from some respected U.S. academics, notably Professor Rahl.⁴⁸⁹

Although it is theoretically possible for a home government to intervene in foreign practices conducted by its nationals, even if such practices have no domestic commercial effect, on the basis of the principle that a state has jurisdiction over its nationals wherever they may be or wherever they do business,⁴⁹⁰ developed countries have argued that numerous difficulties attend any possible exercise of such jurisdiction. The writer must concede this point on the basis of the history of U.S. extraterritorial exercise of jurisdiction in antitrust matters. Frequently, diplomatic friction has been created when OECD host countries protest over what they perceive to be an unjustifiable intrusion into their own territorial sovereignty and into their authority to administer commercial operations within their own borders.⁴⁹¹ It is therefore easy to conclude, as have Davidow and Chiles, that such friction would only proliferate if the exercise of home state jurisdiction is attempted for violations of the Code which take place outside the borders of that home country and which have no national economic or commercial effect.⁴⁹²

The conflict generated by extraterritorial antitrust jurisdiction, investigation and enforcement lies substantially between developed western countries. It is therefore submitted that there may be instances, for

488. Supra note 356 at para. 7

489. See, eg., Rahl, James, American Antitrust and Foreign Operations: What is Covered? (1974), 8 Corn. Int'l L.J. 1, at p. 7

490. O'Connell, D.P., International Law (2nd ed; 1970), p. 602

491. See, eg., complaints raised by the United Kingdom in United States v Imperial Chemical Industries Ltd., 100 F. Suppl. 504 (S.D.N.Y. 1952), by Switzerland in United States v Watchmakers of Switzerland Information Centre Inc., 1963 Trade Cas. para. 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. para. 71,352 (1965), by Canada in the Westinghouse Uranium Case 473 F. Supp. 393 (1979)

492. Supra note 216, at p. 260-63

example, where a United States' exercise of extraterritorial jurisdiction over the Barbados-located subsidiary of a U.S. parent company would not encounter opposition from the Barbados government where that subsidiary is conducting activities of substantial detriment to the commercial and economic development of Barbados. Indeed, from a purely commercial and economic viewpoint, it would be in the interest of Barbados for its competent officials to co-operate with such a policy by the government of the United States, since the former nation has not yet enacted any national antitrust legislation nor is it part of any regional community which has an applicable antitrust treaty.

It must be admitted, however, that there would be instances where the relevant Barbadian authorities may justifiably object to such an exercise for political reasons in order to protect the sovereignty of the country. In such a case, a U.S. attempt at extraterritorial investigation and jurisdiction would probably be frustrated by the failure of these authorities to co-operate with U.S. officials, since a substantial amount of the evidence needed to pursue the matter and possibly prosecute the enterprise would be situated within Barbadian territory. Any U.S. attempt under these circumstances would most likely fail, even in the absence of relevant "blocking legislation" within the statute books of Barbados. If this were to occur, the controversy could not be resolved in the absence of an international antitrust tribunal.

It is submitted that in this era of gigantic international corporate activity, there exists a very strong argument for increased co-operation between nation states, especially between the particular home country and host country involved, in order to ensure that restrictive arrangements and agreements which are carried out by transnational enterprises are investigated and prosecuted. The transnational enterprise has permeated national boundaries and has made the world very interdependent on a commercial, industrial and economic level. The quest by transnationals for vast profits has no territorial boundaries or territorial restrictions. Ivanov documents that transnationals based in the OECD area keep 60 per cent of their third world-based subsidiaries under their full control and another 20 per cent under at least 50 per cent control.⁴⁹³ Additionally, the adoption of a

493. Ivanov, International Corporations and the Third World (1975), 4 Phil. Y. Int'l L. 75, at p. 79

unanimous international code calling for increased international co-operation to prevent, or at least to control, harmful restrictive practices must inculcate at least a moral commitment from home administrations to pursue anti-competitive conduct practiced by their nationals wherever they are and wherever they may be operating their business, provided that:

- 1) the host country is reluctant to institute, or is legally incapable of instituting, whether for political, economic or other reasons, proceedings against such conduct; and
- 2) the conduct in question would have been illegal under the laws of the home country if it had had any direct or intended effect on the economy of the home country.

On the same token, host countries in the developed western world should either assume responsibility and prosecute restrictive practices conducted within their respective territories which have adverse international effects or allow the home government to do the same. An environment in which restrictive business practices can flourish must not be fostered through an abdication of responsibility on the part of those most capable, whether legally or institutionally, of responding. The presence of political will on the part of industrialized nations to act against these harmful activities is of vital importance to the development of international trade on the whole and to the economic and commercial development of the Third World in particular.

At the same time, developing countries have to assume a greater role in protecting their own development from practices which hinder it. More third world countries must enact restrictive business practices legislation with a view to controlling these activities of enterprises, particularly of transnationals.

The writer realizes that an OECD host country would be very reluctant to prosecute a practice which does not have any domestic effect although it does affect the interests of a third state. Indeed, the host country may feel that the practice furthers its own national interest to the detriment of that of the third state. However, it is submitted that international trade and competition suffers when immunity is granted to such a practice. This aspect must be seriously addressed if the commitment of nation states under the Code is to be regarded as being sincere.

Paragraph five⁴⁹⁴ is of practical importance to both home governments and to transnationals, since it seeks to ensure the protection of legitimate business interests in order not to unjustifiably and unnecessarily interfere with international commerce. The imprecision of the language "information [should be accorded] reasonable safeguards normally applicable in this field", however, subjects this provision to the same grammatical criticism as the final OECD Guidelines' competition principle, which uses the same phrase on the issue of provision of relevant information by enterprises to the competent authorities.⁴⁹⁵

Another proposal which sought to urge members of a regional economic community to eliminate all restrictive business practices which hinder the free flow of goods in their common market was excluded in the face of objections by Group B countries, especially those within the European Community. These nations disagreed with the politically sensitive G-77 suggestion that economic arrangements between developed countries should not include policies impeding improved access for exports from the developing world. The industrialized countries denied that such policies exist.⁴⁹⁶

The G-77 has recently recommended that states should publicly make available details of all restrictive business practices affecting international commercial transactions and should consequently establish or strengthen notification procedures concerning the use of such practices by enterprises. A registry with such information open to all member nations should also be established within UNCTAD.⁴⁹⁷

494. Supra text ch. 7, p. 183 at note 476

495. Ibid. ch. 4, p. 79-80

496. Supra note 349 at p. 46, para. 56. Group B also disagreed with the addition of a separate provision urging nations in economic common markets to ensure that such arrangements do not facilitate the use of restrictive business practices, whether conducted by enterprises operating in the region or abroad, which would adversely affect the trade and development of developing countries.

497. UNCTAD, Report of the United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (November, 1985), U.N. TD/RBP/CONF.2/8, Annex II, p. 2 at para. 8(b) (Draft Declaration submitted by Egypt on behalf of the Group of 77).

However, enterprises would hardly reveal practices which were really harmful, since they know that authorization for such practices would rarely be granted. This indeed has been the experience of the E.E.C. Their representative at the first review of the Code, which was held in November, 1985, asserted that the best means of discovering illicit practices was through a complaint mechanism or through direct investigations by the Commission.⁴⁹⁸ It is submitted that the UNCTAD Secretariat should be authorized to investigate restrictive business practices which fall within the Section B definition of the term, on complaints being filed and substantiated by those member nations who claim to be affected by the relevant practice. It is, however, very unlikely that major western developed countries would agree to this proposal.

The most significant omission from Sec. E, out of those proposals which had been discussed during the negotiations, is the recommendation that states should take measures to prevent their legislation or administrative procedures from "fostering the participation of enterprises in international agreements" of a cartel-like nature where such participation would cause a dominant position of market power which would likely have a detrimental effect on international trade and development.

The United States had supported this proposal, but had insisted that the condemnation be limited to international cartels only, in deference to its Webb-Pomerene Act,⁴⁹⁹ thus arguably making the provision inapplicable to export arrangements involving enterprises operating out of a single nation.⁵⁰⁰ On the other hand, the G-77 and Group D would have wished the provision to be directed primarily at developed western countries and to condemn both national and international export cartels.

The omission of this provision from the final document means that the Code simply ignores the issue of control of international and national export cartels where their practices are detrimental to international trade and to third world development. Since many developed countries encourage national

498. Ibid., p. 24 at para. 70

499. Webb-Pomerene Act, 15 U.S.C.S. secs. 61-6 (1982), 40 Stat.516 (1918)

500. Supra note 122, p. 28

export cartels,⁵⁰¹ the Principles and Rules do not deal with the problem of when may a state foster restrictive business practices by enterprises operating within its jurisdiction.

We shall now examine the international measures which have been recommended by the Set.

C. Section F: International Measures

This Section of the Code addresses itself to bilateral and multilateral measures to achieve collaboration and co-operation among states. The first three provisions outline specific actions which should be taken with respect to international collaboration relating to the problem of restrictive business practices through strengthening and improving mechanisms for their control.⁵⁰²

The fourth provision is the most substantial provision in the Section and one of the most important in the Set.⁵⁰³ It suggests that a state, particularly a member of the developing world, should request bilateral or multilateral consultations with another state or states where it believes that such consultation could resolve an issue relating to restrictive business practices. The consultation could be held under the auspices of UNCTAD, which would provide "mutually agreed conference facilities" for the occasion. States are advised to be responsive to such requests and to subsequently consult in good faith. A joint report on the consultations and their results

501. Supra text ch. 2, p. 17-8

502. Paragraph one proposes that the collaboration between states should aim at achieving common approaches, compatible with the Code, in national policies concerning restrictive practices.

Paragraph two calls on states and regional groupings to annually inform UNCTAD of procedures taken by them in pursuance of their commitment to the Code as well as of other procedures taken which were not specially addressed in the document.

Paragraph three commits UNCTAD to publishing annual reports on restrictive business practices legislation and developments based on official reports from member countries and on other reliable material. (See also Supra note 408, sec. F(6)(c), Infra text ch. 7, p. 194 at note 506.)

503. This paragraph is a corollary to Section E(9) which recommends that states, either on request or at their own initiative, supply publicly available information to other states, particularly to those in the Third World, as well as other information which does not contravene national legislation and established public policy and which is necessary for the recipient state to effectively control restrictive business practices.

could be prepared by the states involved on their mutual agreement, with UNCTAD's assistance, and be made available to the Secretariat for inclusion in its annual report on the subject.

The Group of 77 also recommended that UNCTAD should be empowered to convene such consultations on any member's request, and to prepare and distribute reports on the outcome of these consultations. This Group also suggested that the Secretary-General of the organization should be able to bring any unresolved matter before its Trade and Development Board in a case where the relevant permission has been granted by the states involved. Under this proposal, the Board would then have considered what further action might be taken to resolve the issue. Predictably, the western developed nations, ever suspicious of any proposal to grant greater authority to UNCTAD, opposed these recommendations, maintaining that any decision to grant UNCTAD additional authority should be made at the diplomatic level, rather than at that of the experts.

The fifth provision commits UNCTAD to continue its work on the elaboration of a model law on the subject of restrictive business practices. The model would provide a guide for developing countries when they draft legislation on the topic. States are asked to provide information and experience to UNCTAD for the fulfilment of this objective.⁵⁰⁴

504. A draft model antitrust law for third world countries had been formulated in 1978 and revised in 1979 by the UNCTAD Secretariat with the help of a few select experts from developing countries. (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) and 1979 update, U.N. Doc. TD/B/C.2/AC.6/16 Rev. 1 (1979)). The draft condemned a wide variety of business agreements, contained stringent prohibitions on price discrimination, transfer and excessive pricing and sought to limit the internal growth of dominant enterprises. Since it was formulated before the UNCTAD Code, it did not take into account changes made in that document during the final negotiations, such as its exceptions to intra-corporate transactions and its rejection of the shared monopoly concept. Group B experts severely criticized the draft as draconian and insisted that it should be modified to conform to the Principles and Rules.

Although the developing countries maintained that Group B had no locus standi over the validity of a model law specifically intended for third world nations, a newly-created permanent Committee of Experts on restrictive business practices convened in Geneva in October, 1981 to work on a model law which would be acceptable to the various blocs within UNCTAD. In 1984, the Group B nations presented their draft model law for review by the Secretariat. However, up to the present time, no model acceptable to all states within UNCTAD has been devised. Business groups in the OECD, particularly in the United States, have adopted a common policy of discouragement of any model law. The U.S. Council of the International Chamber of Commerce has gone so far as to opine that "the detail of the Set of Principles and Rules makes it unnecessarily to draft a Model Law". (Statement by the U.S. Council of the I.C.C., (May 28th, 1980))

The provisions outlined in the sixth paragraph are among the most significant in the document, since their main objective is to improve the ability of countries without much experience in dealing with anti-competitive conduct to control those practices.⁵⁰⁵ It was hoped that these principles would assist developing nations by providing them with the knowledge and wherewithal to formulate and implement antitrust policies so that, in the final analysis, their commercial and economic development could be advanced.

UNCTAD and other U.N. organizations are therefore authorized to implement technical assistance, advisory and training programmes for developing countries with respect to restrictive practices. To this end:

- 1) competition experts should be provided on the request of a developing nation to assist in drafting or improving regulations and procedures with respect to restrictive business practices;
- 2) seminars and training programmes should also be convened, principally in the Third World, for the benefit of the appropriate authorities, with experts in the field from developed countries providing their experience and knowledge with respect to the detection of these practices;
- 3) UNCTAD should compile a legislative handbook on the subject. Included in this record would be judicial and administrative decisions handed down within the jurisdiction of member nations;⁵⁰⁶
- 4) UNCTAD should also collect and make available, in particular to developing states, books, documents and other relevant material on the subject;
- 5) exchange visits between the appropriate authorities should be arranged and facilitated, together with international conferences dealing with legislation on, and policy towards, corporate restrictive practices; and
- 6) seminars should be convened to facilitate exchange of views on the subject among those in the public and private sectors.

505. This paragraph is also an elaboration of sec. E(8), which urges states with established antitrust regulations to share this experience with, and to provide technical assistance to, other states on the latter's request.

506. See also supra note 408, sec. F(3) (Supra text ch. 7, p. 192 at note 502).

The Section's final provision is a request to international organizations and finance programmes, especially to the United Nations Development Programme (U.N.D.P.), to assist in financing the UNCTAD projects outlined in the sixth paragraph. All countries, especially those with greater resources, are asked to contribute voluntarily in order to make the proposed technical and training programmes a reality.⁵⁰⁷

The consultation procedure outlined in para. 4 is in every possible sense "voluntary". The procedure is even weaker than its counterpart in the OECD, a consequence of the mutual suspicion between developed and developing nations and of Group B's distrust of the Secretariat. To provide two illustrations, the OECD document makes provision for U.S. authorities, acting on a complaint relating to a restrictive business practice which has been made by French officials and which the United States perceives to be valid, to use their influence to persuade its offending enterprise to desist those activities which are the subject of the complaint or, failing any positive action on the part of the enterprise, to take appropriate action within their legislative authority to curtail the activities. On the other hand, there is no suggestion in the UNCTAD Code that the United States should act to eliminate, or at least to control, the conduct which is the subject of French concern.

507. An additional section, proposed by the Group of 77, would have provided that states implement the agreed provisions by means of appropriate national legislation and regulations (supra note 358 at p. 34, para. 1). This was perceived by the developed countries as an attempt by the G-77 to circumvent the Set's nonbinding nature. Consequently, this proposal was not accepted. Another suggestion from the G-77 would have committed states to create a permanent mechanism within the organization to monitor implementation of the Principles and Rules and to propose possible alterations to the document (supra note 358 at p. 34, para. ii). The western industrialized bloc again rejected this proposal as being inconsistent to the Code's voluntary nature and to their position that no U.N. sponsored investigative or enforcement machinery should be implemented with respect to the control of restrictive business practices.

Group B, meanwhile, would have preferred the inclusion of a rule requiring notification of all antitrust proceedings against their enterprises in developing countries. However, the G-77 disagreed, perceiving this proposition as a means through which powerful home countries could pressure third world countries to drop investigations.

Secondly, provision has been made within the OECD for member nations to bring an unresolved issue before its Committee of Experts on Restrictive Business Practices, which is empowered to reach a solution. The equivalent proposed authority for the UNCTAD Trade and Development Board was struck down during the negotiations by the OECD bloc within UNCTAD. Although the OECD procedures have apparently never been used with respect to co-operation between members in their efforts against harmful restrictive practices, the fact remains that such procedures do exist, and can be used, within that caucus.

It is unfortunate that the developed countries have not seen it fit to offer a stronger monitoring and enforcing role for UNCTAD and a mediating role for its Secretary-General or for its Trade and Development Board.

In spite of this, Mr. Joel Davidow maintains that the UNCTAD consultation provisions still serve some practical use beyond the situation which previously existed, since a small, economically weak country would now be more willing to raise an antitrust issue with a powerful home government than it would have been before the adoption of the Code. The latter government may now consider that the matter should be treated with greater gravity, one reason being the possibility of a publication of the consultation and of its outcome. Additionally, the option of holding a contemplated consultation under UNCTAD's auspices could create a healthier atmosphere for compromise and co-operation than if the discussion had the character of an ordinary bilateral meeting.⁵⁰⁸

On the whole, though, Mr. Davidow is quite pessimistic over what the UNCTAD consultation and collaboration provisions will achieve. He asserts that:

"It is still very rare when antitrust agencies of two or more nations co-operate in their examination of handling restrictive business practices ... [N]o tradition of co-operation has been developed that is comparable to the very fine co-operation now going on in such areas as drug enforcement, anti-hijacking and smuggling."⁵⁰⁹

508. Supra note 238 at p. 132

509. Davidow, Joel, Extraterritorial Antitrust: An American View (1981), 15 J.W. Tr. L. 500, at p. 515. (Paper delivered at the International Chamber of Commerce Conference on Extraterritorial Application of Competition Laws at the I.C.C. Headquarters (Paris, May 12th, 1981))

In another text, the same author opines that:

"Past experience indicates that if consultation procedures are created, they will more likely be used to complain about antitrust investigations or prosecutions than to seek relief against a restrictive business practice."⁵¹⁰

Mr. Davidow's comment is based on the experience of the OECD bloc, where the majority of member countries possess their own antitrust legislation as well as judicial precedents. Any consultation procedure within an UNCTAD forum which is similar to that available to OECD members would most likely be utilized on a wider basis than its OECD analogue, since the UNCTAD membership largely consists of developing nations, possessing limited or no antitrust legislation, which are gravely concerned with the capability of anti-competitive practices of foreign-controlled firms to diminish their foreign exchange earnings. In making this prediction, the writer is aware that the notification and consultation provisions of the Set have never been applied although the document has been adopted almost six years ago.⁵¹¹ It is, however, submitted that with only weak and powerless consultation procedures available, the developing states perceive a lack of political will on the part of the western developed nations to make these provisions viable and meaningful. The G-77 therefore believes that efforts to reach a satisfactory solution to an antitrust matter through the present UNCTAD procedures would be futile. At the present time, home countries show no willingness to consult about the conduct of their enterprises with third world countries or to promise to seek to alter that conduct, whether by legislation, use of their "good offices" or otherwise.

510. Supra note 122, p. 57

511. Supra note 497, p. 7 at para. 18 per the Director of the Manufactures Division of UNCTAD

The Draft Declaration submitted by the Group of 77 at the November, 1985 Review Conference called for effective use to be made of the consultation procedure outlined in the Set.⁵¹² Group D echoed this suggestion⁵¹³ and also called on the Secretary-General of the organization to take effective measures for the more vigorous implementation, on a multilateral basis, of the provisions outlined in the sixth paragraph of the Section.⁵¹⁴

Additionally, progress with respect to the provision of technical assistance and the preparation of a handbook on restrictive business practices legislation has been slow.⁵¹⁵ Only Norway and Sweden have so far funded any technical assistance or training programmes for any third world officials. The contemplated financial sources for these projects have not been realized. The UNDP has frozen its budget for four years since 1984 and the developed countries, with the exception of Norway and Sweden, have generally not perceived it to be in their interest to finance these projects in the past five years. However, Japan and Australia plan to host an advisory and training programme among South-East Asian and Pacific countries, representing the newly industrializing nations, in the near future.

One positive implementation so far has been the publication of annual reports, based on material provided by nations possessing the relevant information, on developments relating to the control of restrictive business practices.

We shall now examine the international institutional machinery established within UNCTAD by the Set.

512. Ibid., Annex II, p. 2 at para. 8(e)

513. Ibid., Annex IV, p. 2 at para. 5(b) (Draft Proposals submitted by the Soviet Union on behalf of Group D).

514. Ibid., at para. 6

515. Ibid., text p. 11 at para. 27 per Representative of China

D. Section G: International Institutional Machinery

1) Intergovernmental Group of Experts

Section G establishes an Intergovernmental Group of Experts on Restrictive Business Practices, which operates as an adjunct to an UNCTAD Committee. The third paragraph enumerates the functions of this body. These are:

- 1) to be a forum and channel for multilateral consultations, discussion and exchange of views between states on matters related to the Set, particularly on its operation and on experience gained from its application;
- 2) to periodically undertake and disseminate studies and research related to provisions of the Set, with the objective of increasing knowledge among the member nations of the various antitrust experiences of states and of creating a more effective Set;
- 3) to invite and consider relevant U.N. studies, documents and reports;
- 4) to study issues related to the Set, issues arising out of information related to business transactions as well as to study other relevant information, obtained by request from states,
- 5) to collect and to disseminate information on matters arising out of the Set which relate to its implementation as well as to measures taken at the national and regional levels by states to further the objectives of the Set;
- 6) to make appropriate reports and recommendations to members on matters within its competence, including those with respect to the application and implementation of the Set;
- 7) to submit annual reports on its work; and
- 8) to establish procedures which can deal with issues related to confidentiality of business information.

Paragraph four limits any probable authoritative power which might have been associated with the Intergovernmental Group. The paragraph provides that in the performance of its functions, the Group shall not act like a tribunal or otherwise pass judgment on the activities or conduct of Governments or

enterprises in connection with their business transactions. Additionally, it should avoid becoming concerned when enterprises to a special business transaction are involved in a conflict.

This provision reiterates the voluntary nature of the document and its incapacity to bind any state or enterprise on any aspect. No adjudicatory or enforcement machinery is intended to be created by the Set in order to ensure any kind of commitment to its objectives and principles. The Group B countries had insisted on a powerless organ, a direct result of apprehension on their part over granting any authority to an UNCTAD body. Therefore, the Intergovernmental Group is primarily a discussion forum on issues of national legislative and enforcement experience, rather than a competition enforcement agency.

The Group is the only body which is capable of implementing or interpreting the UNCTAD Code.⁵¹⁶ Although there is no rigid specification for the ideological composition of the body, its membership habitually consists of representatives drawn from each of the three distinct blocs within the organization. The critical test of the Group's ability to influence member

516. The Director of the UNCTAD Manufactures Division has recently suggested that the application and implementation of the Set could be monitored by national and regional focal points. These would in fact be government officials who would also be responsible for explaining its significance to enterprises. The focal point could serve as a centre to analyze the marketing and distribution channels in those countries or regions which do not have any applicable competition legislation. As such, the centre could evaluate needs for restrictive business practices control and report to the government on its assessment (Supra note 497, p. 9 at para. 18). The OECD member nations have reportedly given a list of their potential focal points to the UNCTAD Secretariat. Group B would however prefer to restrict the terms of reference of any UNCTAD appointed focal point to that given to the OECD's national contact points (Supra text ch. 4 at p. 91). On the other hand, although G-77 has not specifically outlined what it perceives to be the role of these focal points, it appears as if the Group would wish a home government to appoint someone within its territory to receive complaints against transnational enterprises based there and to investigate the subject of those complaints. Hence, focal points would contribute to "ensuring full adherence to the provision of the Set" (Supra note 497, Annex II, p. 2 at para. 8(c)). This suggestion would not receive any support from Group B, which would contend that such a situation would contravene the mere recommendatory nature of the Set.

nations would be its success in using its reports and recommendations to provide interpretations of controversial principles. Although the Experts have been denied any adjudicatory power, the line may be thin between offering recommendations to states on the application of the Code and passing judgment on the activities of states in relation to issues arising out of the Set. The need for a consensus within the body would, however, deter the probability of a negative judgment being made on a home country with respect to an issue arising out of the Code. Indeed, the first five years after the establishment of the Group have witnessed little consensus within the body on any major matter.

If a consensus can be reached within the Group, the common position is placed before a plenary session to become official policy. If no consensus among the group emerges, the issue can either be left for future resolution or the differing representatives can each make a public statement outlining their own position.⁵¹⁷

It is hoped by those who would like to see the Code serve a useful purpose that case situations would provide some clarification for contentious provisions in the document. They point out that distinct blocs, with often widely differing economic and developmental objectives and ideologies, were still able to successfully conclude negotiations on the Principles and Rules. Encouraged by that precedent, they hope that a Group of Experts, drawn from host, home and socialist-bloc countries, would also be able to eventually reach common ground on the Set's interpretation. We can only hope that any future clarification will ultimately exert some influence over the conduct of transnationals and over the competition policy of nation states, so that, in the final analysis, a more conducive environment for genuine economic and commercial development of third world countries would emerge, without compromising the willingness of foreign private concerns to invest in the manufacturing, industrial and high technology sectors of these countries.

517. Rothstein, R., Global Bargaining: UNCTAD and the Quest for a New International Economic Order (1979), p. 195

A comparison between the functions of the Intergovernmental Group and those of the C.I.M.E.⁵¹⁸ reveals the substantial similarity between these two bodies. Both act as fora for multilateral consultations and discussions, collect information on disputed issues arising out of the respective instruments and study and report these issues to the relevant authorities. Neither body has the authority to settle any antitrust dispute, to reach any conclusion on the culpability of a state or an enterprise or to enforce any recommendation which it may propose. They are both merely channels through which views can be exchanged and, it is hoped, compromises and a better mutual understanding can be achieved. Their respective success will largely depend on their diplomatic handling of contentious competition matters and on the ability of their experts to persuade, without being judgmental. This could be a complex task. However, if these two bodies are successful, they could contribute significantly to a more effective implementation of the respective instruments.

It is, however, unfortunate that the UNCTAD Code negotiators missed the opportunity of including representatives of trade unions, business chambers and enterprises within the framework of the implementation of the Principles and Rules in a similar manner as they are included within the OECD Guidelines. There is no provision for an enterprise to express its views before the Group on a matter of concern to it. Neither is provision made for any labour or business representation before the Committee. Contrarily, the B.I.A.C. or the T.U.A.C. may initiate consultations within the C.I.M.E. In a few instances, these consultations have resulted in the resolution or clarification of the contentious matter.⁵¹⁹

At the 1985 Review Conference, the Egyptian spokesman for the Group of 77 stated that his Group favours the establishment of a special committee on restrictive business practices to be assigned the functions designated in Section G, on the grounds that these functions are not appropriate for an Intergovernmental Group.⁵²⁰ One reason for this assertion is that the Group

518. Supra text ch. 4, p. 87-90

519. See, eg., the Badger Case; ibid., p. 83-4

520. Supra note 497, p. 13 at para. 36

has been specifically required to make recommendations to states and experts are not diplomatically in a position where they could make such recommendations, since they are only competent to deal with technical matters.⁵²¹ This was echoed by the Indian representative when he opined that such a special committee "would be in a position to reflect the political will of the participating countries, which was a vital prerequisite for the fulfilment of the commitments entered into by governments."⁵²²

It is apparent that the developing nations are not satisfied with the progress which the Intergovernmental Group has made so are in implementing the Principles and Rules. The Group of 77 has not been articulate enough, however, in outlining the differences in composition and function between their proposed committee and the present Intergovernmental Group. In view of this lack of clarification, the writer can only accept the argument of Group B that the "expert" nature of the Group should not be altered at this time.⁵²³ Indeed, their Australian spokesman maintained that the Experts have been able to encourage "useful" and "valuable" contacts on the subject, especially between the developed and developing nations.⁵²⁴ This Group B representative also claimed that the Experts have focused on the need for additional technical assistance to developing countries in the area of control of restrictive business practices. He mentioned that new technical assistance will be provided in the future.⁵²⁵

Although the socialist-bloc countries feel that the Intergovernmental Group has not been successful in making recommendations to Governments with respect to the Set's application or in co-ordinating its work with other competent U.N. organizations, it is noteworthy that they did not suggest any alteration to the composition of the Group of Experts or recommend its

521. Ibid., p. 19 at para. 56

522. Ibid., p. 21 at para. 59

523. Ibid., p. 33 at para. 111

524. Ibid., Annex III, p. 2 at para. 5(e)(ii) (Draft Conclusions of the Review Conference submitted by Australia on behalf of Group B.)

525. Ibid., at para. 5(e)(v)

replacement by another Committee. Indeed, Group D expressed the view that the Group of Experts had carried out some useful work, particularly in the area of its conduct and dissemination of reviews and investigations on restrictive business practices and also through its provision as a forum for the holding of multilateral consultations, discussions and international exchange of views on questions concerning the Code's application.⁵²⁶

The differing opinions between the G-77 and, to a lesser extent, Group D on the one hand and Group B on the other with respect to the success, or lack thereof, of the Intergovernmental Group, illustrates the differences between the highly industrialized market economies and the rest of the world on the enforceability and applicability of the Code. Whereas the developing and socialist states envisage any institutional machinery established by the Set as being capable of influencing home countries to effectively apply and implement the provisions of the document within their respective territories, the developed western nations perceive the role of the Experts to be that of simply compiling information with respect to existing national and regional legislation and investigations on the subject, of providing a forum for multilateral consultations and of providing technical assistance to third world countries in order that these states would espouse the "free" and "open" trading systems of the western industrialized nations.

In the final analysis, it would have been unrealistic to have expected that all aspects of the Set could possibly have been fully implemented within five years after having been adopted as a U.N. General Assembly resolution. The substantial control of restrictive corporate activities will have to be a systematic and gradual process.

2) States to Implement "Voluntary" Commitment

The second paragraph in the Section emphasizes that states should take appropriate steps, nationally or regionally, to meet their commitment to the Principles and Rules. This is a conservatively phrased principle which

526. Ibid., Annex IV, p. 1 at para. 2

clearly avoids any notion of a legally binding commitment. States have been merely advised to take appropriate action in furtherance of the Code's objectives.

3) Review Procedure

The final provision of the Agreed Principles and Rules deals with the issue of review of the document. It states that an UNCTAD review conference shall be held five years after the adoption of the Set. The first Review Conference was held at the UNCTAD headquarters in Geneva between Nov. 4th-15th, 1985. It is expected that the second Review Conference will be held in 1990.

II. Conclusion on Analysis of the Principles and Rules

A. Defects

There are undoubtedly defects and inadequacies in the Code. First and foremost, it is not legally binding on either U.N. member nations or on any enterprises. The latter are therefore at liberty to conduct operations in contravention of the spirit and letter of the document with impunity, unless their actions infringe particular national or regional legislation. No penalties are established for any transgressions of the principles of the Set on the part of enterprises, nor are any remedies provided for states or for enterprises which are adversely affected by any breach of these principles. To illustrate an important consequence of this situation, in the absence of restrictive business practices legislation, it can be confidently stated that a company incorporated under the Companies Legislation of Barbados can with impunity enter into a restrictive agreement with a locally-based subsidiary of a U.S. parent company which effectively limits the international trade of Barbados in order to protect the domestic market of the subsidiary, since such an agreement will not be penalized under any national, regional or international law. It is this type of practice, far too prevalent in contemporary times, conducted by enterprises operating in third world countries, which can restrict the transfer of technology needed for the economic development of these countries and, indeed, can restrict their commercial and infrastructural development as a whole.

It is ironic that the Principles and Rules have not been successful in addressing this major issue, considering the numerous references in the document to the commercial and economic development of the Third World. The G-77 has even asserted that there has been continued and intensified use of restrictive business practices in international commercial transactions, especially by transnationals, despite the adoption of the Set. Moreover, the developing nations contend that restrictive agreements have been increasingly used by some developed countries, including the United States, as an instrument of protectionism as well as a circumvention of their obligations to liberalize trade.⁵²⁷ The Intergovernmental Group also echoed similar sentiments at each of their three sessions in November, 1981, 1982 and 1984.

Secondly, no specific headway has been made on the question of procedures to be adopted to facilitate co-operation, consultation and exchange of information among states or to make recommendations to states with respect to the Code's application. These issues are significant if third world authorities are to become more competent in dealing with restrictive business conduct. This lack of progress has its genesis in the procedural limitations of the document itself which have allowed the absence of political will on the part of certain western industrialized nations to retard the effective implementation of the Set.

A major consequence of this has been the failure, so far, to reverse the trend of limited co-operation and co-ordination among nation states in their enforcement of national antitrust legislation against transnational enterprises. The recurring problems of foreign discovery, the production of documents, the issuance of subpoenas to non-nationals outside of one's territorial jurisdiction, the extraterritorial enforcement of judicial and administrative orders and the consequent application of "blocking statutes" in relation to anti-competitive activities have not diminished between OECD member nations. This is unfortunate, especially when one considers that a 1974 report of the "Group of Eminent Persons" identified this area of contention as one of the top priorities which should be addressed by any

527. Ibid., p. 19 at para. 55

restrictive business practices code.⁵²⁸ Additionally, it is highly unlikely that the Set will prompt any home country to exercise control through its own domestic legislation over a practice which has no detrimental effect on its own trade and development.

Thirdly, the Code does not provide any guidance as to the circumstances, if any, in which an enterprise should be allowed to engage in restrictive business activities. Neither is there any guidance on the related question of when may a state allow or require an enterprise to enter into a restrictive arrangement. The only provision concerning this issue is the Sec. B exemption for intergovernmental agreements and for restrictive business practices covered by those agreements.

Fourthly, the Principles and Rules do not deal effectively with the question of control of the adverse effects of intra-corporate arrangements. A substantial volume of international trade is governed by these transactions. The majority of large firms manufacturing or selling in third world countries are subsidiaries of transnational enterprises controlled by nationals of major western industrialized countries. This issue is one of grave concern to developing nations, since intra-enterprise agreements which impose production and marketing restrictions limit the foreign exchange earnings and hinder the economic development of these nations.

Fifthly, the Code does not solve the problem of export cartels and their operations, which are frequently detrimental to national interests other than those of the country which has sponsored them. There is no definition of "cartels" in the Code, an omission which, in the view of a Group D spokesman, might be an obstacle to their effective elimination.⁵²⁹ Indeed, the protectionist sentiment has increased in the last few years within major trading nations and with it has increased the encouragement given to national export cartels. It is unfortunate that the United States successfully traded

528. The Impact of Multinationals Corporations on the Development Process and on International Relations, U.N. Doc. E 5500/Rev.1-ST/ESA/16 (1974)

529. Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Fifth Session, TD/B/C.2/AC.6/18, p. 5

off the Code's failure to address the issue of third world commodity consortia, such as OPEC, against a similar stand with respect to western-sponsored national export cartels. Third World commodity consortia are a necessary countervailing force to transnational enterprises and are vital to the commercial and economic development of developing countries, an objective which the Code strongly stresses as one of its leading goals.

Sixthly, the important question of the accessibility to sensitive information concerning restrictive arrangements which is in the custody of transnationals, by the appropriate third world authorities, remains unresolved. A transnational enterprise will rarely voluntarily reveal information which is needed by a developing nation to control restrictive practices undertaken by that enterprise in the absence of a legal obligation to do so, even if the disclosure of that information is not prevented by any applicable foreign legislation.

Finally, there are numerous instances where vague terminology is used in the Set. Phrases such as "limit access to markets"; "unduly restrain competition"; "fair and equitable"; "safeguards normally applicable in this field"; "control the relevant market"; "legitimate business purposes"; "adverse effects" and "unjustifiable" encourage the probability of a variety of interpretations and philosophical differences by various groups, enterprises or blocs of states to suit their individual interests. This could make practical application of the Code very difficult to achieve and could facilitate evasion of its principles and rules.

There is no international body which may adjudicate contentious factual situations or render binding rulings interpreting issues arising out of the Code. Neither is there provision for any controversial terminology to be possibly interpreted in an analogous manner to a previous interpretation under any relevant national or regional legislation. Additionally, the value of the Intergovernmental Group as a source of any authoritative interpretation of the Set is highly suspect.

Conflict is bound to arise in relation to the applicability of the Set, in the absence of substantial harmonization among states and interest groups

with respect to its interpretation. This is the sacrifice which had to be made for the sake of a unanimous adoption of the Agreed Principles and Rules. The major western developed states, particularly the United States, succeeded in their strategy to effectively limit any potential authority which the Set may have had.

B. Positive Impact and Usefulness of the Principles and Rules

The legally non-binding nature of the UNCTAD Principles and Rules does not mean that states or enterprises may ignore its provisions completely. The Code was unanimously adopted as a resolution of the General Assembly and, as such, must exert considerable moral and political force and influence on the conduct of those whom it addresses. For example, in 1981, sixteen countries were able to report to UNCTAD's Secretary-General that they had fulfilled their "commitment to the Code".⁵³⁰

The Set may have considerable practical effect on the conduct of enterprises even though they are neither signatories nor formal parties to it.⁵³¹ Home country administrations requested and were given suggestions by influential business organizations within their countries during the negotiations. In the United States, the home country of more transnational enterprises than any other nation, the National Foreign Trade Council, the National Association of Manufacturers and the National Council of the International Chamber of Commerce all supported the Set.⁵³²

Secondly, individual nation states may enforce the principles and rules embodied in the Code through domestic legislation to that effect. The Code would then be legally binding on any enterprise which is operating within its

530. Supra note 238 at p. 133

531. Supra note 216, at p. 255-6; supra note 345, at p. 7

532. Oesterle, Ibid., at p. 48-9. For example, the Vice-President of the National Council of the International Chamber of Commerce, John Caldwell, wrote to Richard Cooper, the Under-Secretary of State for Economic Affairs, in a letter dated on July 10th, 1980, stating that.

"Generally, the final text adequately addresses our reservations which I highlighted in prior correspondence to you on this subject."

jurisdiction as a result of national legislative enactment in compliance with an international resolution. Korea and Argentina reported to the UNCTAD Secretariat that they have each adopted national competition legislation based on the letter and spirit of the Set.⁵³³ A few other countries, including Hungary, India, Poland and Sri Lanka, have reportedly strengthened their domestic competition regulations.⁵³⁴

Additionally, the Code could form the basis of some contractual provisions in investment agreements between states themselves or between states and transnational enterprises.

Thirdly, good public and governmental relations require that enterprises act in a manner consistent with the apparent consensus as to proper corporate behaviour. Enterprises must at least respect, even if they fail to comprehensively honour, those principles outlined in both the OECD Guidelines and in the UNCTAD Code which are clear and unambiguous. Enterprises may find that states and their citizens will expect them to do so, even in the absence of national legislation enacting the Code's provisions. Certainly, transnational enterprises will occasionally receive criticism from both home and host governments as well as from employee associations where the interests of these administrations are adversely affected by corporate conduct which conflicts with the principles and rules.

Fourthly, the Code is of significant educative value, since it exposes third world officials to well-developed concepts of competition regulation and policy, whereas before, these officials had possessed little knowledge of the legal or administrative means through which restrictive business activities could be controlled or eliminated. Developing countries are now more capable of implementing more effective control mechanisms or even of enacting antitrust legislation.

533. Supra note 238 at p. 133

534. Supra note 497, p. 26 at para. 77; p. 21 at para. 61; p. 25 at para. 74 and p. 31 at para. 100 respectively.

Fifthly, the possibility of increasing interstate consultation as a result of the Code means that there exists the potential for less conflict than presently exists. Respective antitrust officials would be given opportunities to be more appreciative of each other's point of view. The international exchange of information provisions are other mechanisms through which co-operation at the regional or international level can be fostered. Similarly, the principle that developed countries supply developing nations with appropriate information to better assist the latter to effectively deal with the question of control of anti-competitive practices is favourable to third world interests, at least in theory. In an interview with the U.N. Centre on Transnational Corporations, the immediate past Secretary-General of UNCTAD, Mr. Gamani Corea, asserted that co-operation procedures have been established among certain nations regarding the exchange of information on restrictive business conduct. He stated that consultation mechanisms have been established between the Nordic countries, between the Asian and Pacific countries and between the United States and Australia.⁵³⁵ Therefore, it does appear that some use has been made of the provisions in the Code to facilitate and encourage international co-operation and exchange of information.

Sixthly, the publication of reports, studies and research materials by UNCTAD and by the OECD on the subject and on relevant legislation will be invaluable in providing experience and knowledge, especially to the competent authorities in developing countries. The contemplated technical assistance seminars and advisory and training programmes will also have this effect.

The seventh beneficial aspect is that the Set represents an expression of areas of antitrust concern to states with respect to the operations of enterprises, particularly those of transnationals. Although its adoption as a U.N. resolution could never, by itself, signify the eventual elimination of restrictive business practices which have an adverse impact on nation states, each consenting country to the Code is hoping that enterprises would voluntarily readjust certain harmful activities now that they have seen the global concern with respect to those practices.

535. Interview with Mr. Gamani Corea, C.T.C. Reporter (No. 18, Autumn, 1984), p. 42

Finally, the Set will undoubtedly be referred to in certain diplomatic negotiations, legal briefs and corporate enquiries. Mr. Corea has mentioned that some countries have indicated that reference has been made to the Code in settling issues involving international trading transactions.⁵³⁶

In the final analysis, the writer can only agree with the comments of the U.S. National Foreign Trade Council that "the impact of the Code will depend largely on how it is interpreted and implemented."⁵³⁷ However, while this organization perceives the Set's ability to promote genuine competition in international business as the determinant of its success, the main criteria by which developing countries will assess the agreement is the extent to which it will effectively be able to reduce the adverse impact which restrictive activities, particularly those engaged in by transnational enterprises, have had on their commercial development and foreign exchange earnings. The Third World therefore perceives the Principles and Rules as an instrument which would accelerate their acquisition of a more authoritative role in the international trading system and in matters of global economic interests.

The efficacy of the Code will depend primarily on the extent to which transnationals and other enterprises are willing to abide by the principles embodied in it and the degree of political will possessed by the major home countries to adhere to the letter, and indeed the spirit, of the Set. We can only hope that the fundamental difference between the western developed countries and their business communities on the one hand and the developing and socialist nations on the other, with respect to the primary role of the Agreed Principles and Rules, would not be the genesis of any eventual frustration on the part of the economically weaker countries over the impact of the Set.

536. Ibid. The former Secretary-General of UNCTAD cited, as an example, Norway's invocation of the agreement in a case where a foreign exporter refused to supply a Norwegian fruit importer in contravention with national law and with the principles of the Set.

537. Statement by the United States' National Foreign Trade Council, (July 21st, 1980).

III. Future Possibility of the Principles and Rules Becoming Binding

General Assembly resolutions are only recommendations to member states and are, as such, non-binding under Art. 10 of the U.N. Charter. However, under the criteria outlined by Professor Ognaz Seidl-Hohenveldern the UNCTAD Code, as well as the OECD Guidelines, can be said to fall into the bracket of "soft law" which, by its continued application over a period of time, could produce an accretion of "firm law."⁵³⁸ He argues that even though "soft law" is vague in the obligations which it imposes on states and weak in its commands, once states take their content seriously, the moral force attached to it could subsequently transform "soft law" into international law. There is no definite time span for such a transition period.

Mr. Davidow, though, maintains that the principles and rules embodied in the Code are "too weak or too vague to deserve or ultimately attain the status of international law."⁵³⁹ Although Mr. Davidow was not writing as a member of the U.S. administration at the time, it is submitted that his expressed views against the probability of the Principles and Rules ever creating legal norms of customary international law are typical of a U.S. representative, since it is not within the interests of that country for such a transition to ever occur.

Authors such as Messrs. Brower and Tepe contend that General Assembly resolutions do have some legal effect, for example, as evidence of customary international law.⁵⁴⁰ It is submitted that the Agreed Principles and Rules, or rather provisions thereof, can be ultimately transformed into customary international law through state practice, particularly through the action of home and host countries in intergovernmental follow-up proceedings with

538. Gold, Joseph, Strengthening the Soft International Law of Exchange Arrangement (1983), 77 Am. J. Int'l L. 443, at p. 443-4

539. Supra note 207, at p. 586

540. Supra note 317; see also supra note 216, at p. 255-6; see also supra text ch. 4, p. 85-6

respect to its implementation. The legal norms so developed would then be applicable to enterprises.⁵⁴¹ This is the only manner in which these provisions are ever likely to attain legal status, short of their domestic enactment by individual states.

It is clear that transformation of the Code into a legally binding instrument, backed up by effective enforcement machinery, is not at present a realistic probability, despite calls by China⁵⁴² and by the G-77⁵⁴³ to alter the legal character of the document. The major western countries will probably never commit themselves to the elimination of restrictive activities conducted by their transnational or other enterprises where their own national interests remain unaffected and, in some instances, are even enhanced. Neither would they be party to any agreement which binds their enterprises to place the concept of third world commercial and economic development foremost among their objectives. The United States and her major trading partners would oppose developing nations restricting what they regard, in many cases, as normal and legitimate business activities conducted in the interest of healthy competition. Furthermore, those countries would rarely legislate antitrust principles which advance third world development as their main aim.

The call by developing nations for a legally binding Set has decreased significantly since its adoption in the General Assembly. The Code's adherents still hope that the world's major trading nations will resolve to implement the Set and to make it effective. In the final analysis, any resolution to that effect depends on how these countries perceive such an action to affect their individual national interests.

541. Supra note 214 at p. 28

542. Supra note 497, p. 11 at para. 28

543. Ibid., Annex II, p. 3 at para. 8(h)

IV. Conclusion

In this Chapter, we have attempted to detail and to analyze the final four sections of the UNCTAD Agreed Principles and Rules, including those principles and rules for enterprises as well as for states, in addition to international measures and institutional machinery which have been established to deal with restrictive business practices. We have also examined the inherent defects in the Set and have attempted to estimate its probable impact and utilization in antitrust matters at the national, regional and international levels. We have also attempted to ascertain the possibility of the Code becoming binding in the future.

In our final Chapter, we shall firstly summarize and analyze the primary issues which arise out of our thesis. We shall include in this summary an analysis of the significance of the UNCTAD Set and of the N.I.E.O resolutions on the developmental objectives of third world nations. We shall also examine the possibilities of, and weigh the benefits which will accrue to the Third World from, an UNCTAD Code in the future which is legally binding on both nation states and enterprises, including on transnationals. We shall then give our projections for other future trends in the international economic system with regard to the regulation and the control of restrictive business practices of transnational enterprises and to the co-ordination of foreign investment policy. Finally, we shall outline our recommendations to developing states with respect to the control of international restrictive arrangements which adversely affect their interests and also with respect to the implementation of New International Economic Order concepts and to the ultimate advancement of third world commercial and economic development.

CHAPTER VIII

Conclusion

I. Introduction

The phenomenal development of the transnational enterprise in the post-war era has been one of the major features of the second half of twentieth century development. These corporate organizations now control over 60 per cent of global industrial assets and conduct nearly 50 per cent of international trade. Their dominance of international trading, financial, investment and commercial markets means that major transnational enterprises exert tremendous influence and power over the economic and political destiny of many countries in which they operate. Western industrialized nations view transnationals as "the most effective engines" of global development as well as efficient allocators of global resources.⁵⁴⁴

The majority of contemporary third world leadership realizes that their countries are dependent on foreign-controlled enterprises for capital investment, for the transfer of technology which has been developed in the industrialized world, for employment of their nationals and residents as well as for market channels for their products and natural resources. However, the general considered view of this leadership is that the existence of foreign-controlled firms within their territories is a regrettable fact which their countries, unfortunately, must at present accept. Many third world scholars consider that these enterprises economically, sociologically, and culturally exploit developing host countries. Many of these enterprises engage in restrictive business practices which are generally detrimental to the commerce and economy of host countries, especially developing host nations, over one hundred of which have no applicable national or regional legislation to control these arrangements.

544. See, for example, the statement by the then U.S. Secretary of State, Dr. Kissinger, supra note 327 at p. 432

Generally, the developed western nations only claim jurisdiction over those restrictive practices of a foreign-controlled enterprise which have substantial and/or direct anti-competitive effects on domestic trade or commerce. It is virtually impossible for such jurisdiction to be enforced, however, unless the offending enterprise has a place of business, a subsidiary or an agent within the territory of the prosecuting state. Additionally, even where the extraterritorial jurisdictional requirements are met, it may be difficult to enforce administrative and judicial orders which pertain to a domestic antitrust action because of statutory prohibitions in the nation where pertinent information and the directorate and senior management of the offending enterprise are situated. This legislative policy, which is present in many OECD nations, can effectively frustrate any attempted extraterritorial antitrust jurisdiction of a foreign state and has aggravated the problem of restrictive business practices control.

The problems associated with the transnational structure of these enterprises which host countries, especially in the developing world, have to address in any attempt to control restrictive corporate activities are based on the difficulty of access to information situated in home countries which relates to policies and practices of these enterprises.

Additionally, an economically weak developing country which unilaterally attempts to penalize restrictive business practices which are carried on by a foreign-controlled enterprise operating within its territory, where those anti-competitive arrangements are affecting its foreign exchange earnings or commercial growth, may be threatened by retaliatory action. The firm may remove its operations into a more accommodating country. Potential foreign entrepreneurs may rather invest in another country which does not place any stringent restrictions on the capacity to maximize financial returns from one's foreign investment. The valid fear of probable jeopardization of the continued ability to attract foreign investments has been one reason why many developing countries have refrained from unilaterally enacting legislation which would control restrictive business practices. Many third world states do not even regard the adoption of national restrictive business practices laws to be a legislative priority.

Home countries of the vast majority of transnational enterprises, which indeed are the jurisdictions with established national antitrust or competition legislation, have generally refrained from prohibiting restrictive arrangements conducted by enterprises which are based in their individual nations once those arrangements do not have any negative effect on their national economy or commerce. Therefore, a substantial number of restrictive agreements among export cartels, transnational enterprises and other international commercial combinations which only have a detrimental effect on third world commercial and economic progress may continue virtually unobstructed, since they are not illegal under any applicable legislation.

The major developed market-economy countries in fact give licence to national export cartel arrangements which benefit those countries but affect the export interests of third countries. Their essentially "inward-looking" antitrust legislation generally prohibits import and purely domestic cartels alone. The change in attitude in some western developed states, including the United States, in the 1980's towards restrictive business practices is related to this legislative policy. These nations are increasingly tolerating the use of such practices, ostensibly in order to protect domestic markets and to protect employment at home. The recent policy of "voluntary export restraints" which the United States and Canada have adopted towards Japanese automobiles is just one illustration of this new philosophy.

II. Post-1945 Proliferation in the Use of Restrictive Business Practices by Transnational Enterprises

The formation of the Bretton Woods economic, commercial and financial institutions facilitated a tremendous increase in private international investment during the following quarter of a century, particularly in the United States and in her main commercial partners. The general decrease in international trade barriers resulted in an impressive increase in global trade, especially between the United States, Western Europe and Japan, which all experienced unprecedented economic growth until the mid-1970's.

With the proliferation, increasing dominance and expansion in operations of the transnational enterprise came a multiplication in the occurrence and anti-competitive effect of restrictive business practices which affect international trade. These practices include intra-affiliate import and export price-fixing agreements as well as the allocation of markets, customers and territories, and sales and production quotas arranged between cartels. Other arrangements such as predatory pricing, mergers and takeovers, as well as collusive tendering and tied purchasing, may also have anti-competitive effects at both the domestic and international level. Although all of these arrangements, except the first-mentioned, are also carried out by other commercial entities, their detrimental effect is generally intensified when conducted by transnational enterprises due to their size and their available financial and technological resources. Additionally, policies relating to transfer pricing also restrict foreign exchange earnings of host countries, particularly those in the Third World.

III. Bilateral and OECD Consultation Agreements

There was no genuine political will on the part of the United States in particular and her primary commercial allies in general to formulate an international agreement to deal with restrictive business practices in the late 1940's and 1950's. These states felt that competition legislation needed to be developed and experience needed to be gained at the national level before international efforts could be made to control these activities.

Rather than establishing multilateral mechanisms to address international antitrust issues, the United States initiated bilateral consultation and co-operation agreements with some of its principal trading partners during the 1950's. These agreements particularly represent an attempt to mitigate any potential conflict between the United States and the other contracting state which may arise out of U.S. extraterritorial application of its antitrust legislation, through consultation between responsible authorities of the two countries. These understandings also seek to increase bilateral co-operation

with respect to the control of international restrictive arrangements. Indeed, the trend has recently been to make provision even for the appearance of a competent foreign authority to appear in private antitrust proceedings abroad in order to give evidence relating to the results of prior inter-governmental consultations.

These bilateral agreements have created a more harmonious and co-operative atmosphere between antitrust officials in various countries. They have, however, not resolved the diplomatic friction which has been a consequence of U.S. assertion of extraterritorial antitrust jurisdiction, nor have they resolved the problem of international commercial practices conducted in restraint of competition. They are voluntary understandings which will be ineffective if there is no willingness to co-operate. Indeed, clauses in the United States' Friendship, Commerce and Navigation Treaties relating to restrictive business activities have been rarely utilized.

Co-operation procedures dealing with transnational arrangements which attempted to reconcile national extraterritorial jurisdictional claims over such arrangements with the simultaneous assertion of legislative jurisdiction over the same by another nation were also formulated within the OECD in the latter half of the 1960's and in the 1970's. However, these provisions have been applied by member nations mainly to complain about extraterritorial antitrust investigations or prosecutions which affect their individual national interests rather than to co-ordinate efforts to control transnational restrictive arrangements.

IV. Formulation, Analysis and Significance of the OECD Guidelines

The official reason for the adoption of the OECD Guidelines on International Investment and Multinational Enterprises was the need for the OECD to provide guidelines with respect to the growth of U.S. direct private investment in Europe and, to a lesser extent, the growth of Western European and Japanese investment in the United States. The more compelling reasons for

their formulation, however, were the demise of the Bretton Woods system in the late 1960's and early 1970's with respect to dollar-gold convertibility, the resulting devaluation of the U.S. dollar and the economic recession in the West, which was a direct consequence of the unprecedented oil price increases which came after the simultaneous peak in western market economies during the early 1970's.

These circumstances allowed vocal third world leaders to increase their campaign for reform of the post-war economic order. The OECD nations realized that it was in their interests to devise guidelines to deal with private international investment and transnational enterprises before a similar code could be formulated under the auspices of a U.N. agency which would be more sympathetic to third world concerns. They also recognized that foreign investors needed to be assured that their economic interests within the OECD were secure and entitled to minimum standards of legal protection. On the other hand, commercial concerns needed to be made more aware of their social responsibility as proper corporate citizens. The previous negative attitude of major OECD nations, particularly the United States, had changed such that by the mid-1970's, these same countries perceived the adoption of principles addressing these issues as an opportunity to buttress traditional western foreign investment protection concepts and to reduce the impact of the then significant call by developing countries for modification of those concepts to accommodate the recent extensive evolution of third world political power.

The OECD member states' concern over restrictive business practices exists insofar as such arrangements restrict competition and productivity within their domestic markets or hinder national trade or commerce. Their competition guidelines therefore aim to curtail abuses of dominant position having adverse anti-competitive effects in the same market in which the position is held and the abuses take place. Hence, for example, an "anti-competitive acquisition" is condemned only where the acquiring firm already occupies a dominant position before the acquisition takes place. Additionally, predatory conduct towards a competitor is only prohibited where

it can be shown that such conduct is adversely affecting competition rather than merely damaging the business of that particular competitor. A monopolistic business is also expressly requested to refrain from using systematic or abusive price discrimination in a particular market to the extent that competition is adversely affected. Transnational enterprises are recommended to desist from employing transfer pricing policies between their different branches or divisions as well as between affiliated corporations.

However, it is not a prerequisite that an enterprise possess a dominant market power position before its imposition of restrictions on local licensees, distributors and other sellers with respect to purchases, exports and re-exports and before the consequent economic and commercial detriment to another country are prohibited.

It is not necessary that a dominant market position be attained before participation in a national or international private cartel arrangement, which is not accepted under either national or regional legislation, is forbidden by the Guidelines. National export cartels are, however, specially exempted from the domestic legislation of major OECD member nations. Additionally, these same countries, with the exception of the United States, also generally accept the existence of international export cartels.

The final competition guideline is a fragile attempt to increase co-operation between transnational enterprises and host country officials, as well as authorities from third countries whose interests are directly affected, where the legitimate provision of relevant information with respect to a competition issue or an investigation is requested from the enterprise. Affiliate companies are recognized as a single commercial entity in order to facilitate co-operation between antitrust authorities and a parent company where the modus operandi of its subsidiary is involved. The provision is an acknowledgement of U.S. efforts to obtain information situated outside of U.S. territory in furtherance of an antitrust investigation or proceeding at home. The exemption where provision of the information would be inconsistent

with "normal applicable safeguards" is so ill-defined, however, that it could be used by an unco-operative country to prevent disclosure of pertinent information even where the jurisdictional requirements have been met. Therefore, the provision merely reasserts the present state of affairs with respect to the controversy resulting from claims of jurisdiction by a sovereign state through an application of extraterritorial antitrust legislation.

Although these competitive guidelines serve as an educational exercise for OECD antitrust officials, they are not intended to act as a substitute for national or regional competition regulations and laws. They only exhibit the general concern of national and regional government officials over restrictive practices engaged in by commercial entities, particularly by transnational enterprises, since domestic legislation within the OECD varies distinctively with regard to exceptions to general market-economy antitrust theory and since imprecise, vague terminology is used throughout the guidelines. Individual OECD member states will continue to interpret the guidelines to suit their own national interests as the circumstances dictate.

However, even though the guidelines are legally non-binding, enterprises must still respect them as a pronouncement of proper business ethics. The Badger Case illustrates the significant and influential effect which the "package" is having on commercial practices within the area. It can be expected that the majority of enterprises will substantially conform to these recommendations while operating within OECD states, since the competition principles are for the most part conservative in their prescription of what is "proper corporate conduct". National Contact Points have also been established to assist in explanation of the principles and to provide national information and discussion fora. Additionally, the principles on "national treatment" should also encourage enterprises with significant foreign investment within the region to support the guidelines as a whole, although these principles only protect established foreign investment and are potentially subject to important exceptions.

The ability to convey their opinions within the C.I.M.E. with respect to the application or interpretation of the Guidelines where their individual interests are in issue, as well as the possibility for consultation within that fora with labour representatives, should also encourage business organizations and transnational enterprises to generally comply with the thrust of the Guidelines.

Finally, although the Code does not represent "instant international law," some of its principles can eventually be transformed into customary international law through state practice. Some principles would also be incorporated into labour contracts or commercial agreements. In addition, individual member nations have domestically enacted tenets outlined in these instruments.

V. The GATT and Third World Development

The special interests of third world countries, the vast majority of which were still under colonial rule at the end of the Second World War, were considerably disregarded when the post-war trading order was created. The major GATT tenets, viz. the grant of "unconditional most-favoured-nation treatment multilaterally without discrimination," and the principle of reciprocal trade concessions, were founded on the premise that their main beneficiaries would be those countries with commensurate levels of advanced commercial development and, consequently, a high degree of bargaining power. Discussions regarding products of vital interest to developing countries and the conditions under which these products would be imported into the western industrialized nations were excluded from the negotiating table during the first decade and a half after the collapse of the ITO negotiations.

The GATT's early objective of fostering international trade with the aim of increasing the economic welfare of all its contracting parties has not materialized. Recently, an influential protectionist sentiment has re-emerged in North America and Western Europe, while it had revived in Japan since that

nation's post-1945 economic reconstruction. Although national protectionist policies have adversely affected the commercial trade of other industrialized nations, they have seriously hindered the export trade and the economic and social development of third world countries.

There has been a constant deterioration in the terms of trade for developing countries within the last forty years. The GATT principle of "national treatment", which sought to place the sale of imported goods on the same terms in the domestic market as local products, was disadvantageous to developing countries which generally import a larger quantity of manufactured goods and costlier products than they export primary commodities and raw materials to industrialized market-economy nations. This state of affairs has partly hindered the successful development of a local industrial sector in many third world states.

Additionally, major industrialized nations have unilaterally carved out many exceptions and, in some instances, have obtained permanent waivers when it is within their national interests to do so. Leading commercial nations, by disregarding their international commitments and moral obligations in this manner, have again adopted policies which have seriously affected major sectors in developing countries through restricting third world exports into western markets and therefore limiting their accessibility to comparatively thriving consumer populations.

Consequently, the share of global exports and trade held by less developed nations steadily declined and the growth rate of these countries generally progressed at a slower pace in the first fifteen years after the creation of the GATT. Additionally, these states received a shrinking percentage of the profits accruing from the sale of their products and raw materials in the industrialized world with the increase in control by transnational enterprises of major facets of third world economies. The transnationals involved in these sectors received the substantial percentage of the financial benefit from third world exports.

Minor voluntary commercial concessions were made to the economically-weaker members of the organization, after the numerical increase in GATT Third World membership from the mid-1960's, in an attempt to stimulate economic growth within these nations. Although the developing world as a whole experienced larger growth rates during the 1960's than previously, the potential of these GATT concessions for third world development has been limited in the absence of legal obligations on wealthier member states to grant these concessions. In addition, the growth rates of developing nations were still generally below that of the northern countries. Although the 1970's did witness recognition of the concept of preferential treatment in certain aspects for developing member states in order to advance their national economic progress, it is submitted that the GATT, as a result of the essential premises and tenets on which it is primarily based, will never be a convenient conduit through which fundamental N.I.E.O. principles can be ultimately realized.

VI. International Monetary Institutions and Third World Development

The international financial and monetary institutions created at Bretton Woods also substantially serve the economic interests of their more powerful members. Influence and decision-making authority within the World Bank and the IMF are based on the quantity of monetary contributions to their budget and on the gross national product of their member nations. Independent development policies of third world member nations have therefore been impeded by these organizations. Economically weak nations generally do not possess an effective role in the formulation of major decisions which affect their own economic development. Additionally, major international economic decision-making frequently takes place within summit meetings of the "Group of Five"⁵⁴⁶ or the "Group of Seven",⁵⁴⁷ without any participation by developing nations.

546. These nations are the Federal Republic of Germany, France, Japan, the United Kingdom and the United States.

547. Ibid., plus Canada and Italy.

In the final analysis, it is submitted that the depressed state of the majority of third world economies at the present time is partly a consequence of the inequitable post-war international economic order. That order has continued the unequal economic relationship between the colonial powers and their colonies which had existed before the emergence of extensive third world political sovereignty.

VII. Significance of United Nations' Resolutions Relating to the
New International Economic Order and Analysis
of Relevant Subsequent Events

The faltering of the Bretton Woods monetary structure in the late 1960's and early 1970's gave greater momentum to the call by third world countries for modification of the international economic order so that it would be more compliant towards their peculiar circumstances.

In 1973, the Arab-Israeli War, the consequent Arab oil embargo placed on those western industrialized nations which supported Israel, the Libyan nationalization of oil production, as well as the subsequent OPEC price hike which quadrupled the price of crude oil and spurred an economic recession in the West, all served to inculcate a belief within third world nations that they could use their natural resources to effectively pressure the highly industrialized states into re-organizing the global financial and commercial system. The increased demands for change in the international economic system, including calls for more effective host country regulation and supervision of transnational enterprises and for the exercise of more extensive control over their own resources, were primarily linked to the Arab-OPEC member nations' use of oil as a "political weapon".

As a result, three resolutions dealing with the issue of a N.I.E.O. were adopted by the U.N. General Assembly. The Declaration, the Programme of Action and the Charter variously recommended:

- 1) host country regulation and supervision of the activities engaged in by transnational enterprises within the territorial borders of that host country in order to ensure that its national interests are advanced. An international code of conduct should therefore be adopted and implemented

- in order to address the question of the control and eventual elimination of restrictive practices in commercial transactions;
- 2) removal of trade barriers which discriminate against third world exports in western industrialized markets and adequate compensation to developing countries for their exported primary products,
 - 3) extension of non-reciprocal, non-discriminatory tariff preferences in favour of third world countries;
 - 4) strict observance of the principle of "unconditional most-favoured-nation treatment";
 - 5) respect for the concept of permanent sovereignty over natural resources and over national economic policies; and
 - 6) reform of the decision-making process involved in the international monetary system.

On the whole, these three documents seek to give developing nations greater control over their own destiny, to stimulate increased economic growth in these countries and to expand their share of international trade. However, in the final analysis, the Third World was only seeking a modification of the Bretton Woods institutions rather than a fundamental alteration to the international economic structure.

The efficacy of these documents was however immediately questioned by the major western industrialized nations. These states sought to prop up traditional norms of international economic law, such as the concept of non-discrimination with respect to foreign investment. Major OECD member nations have not yet accepted the broader implications of a N.I.E.O. Neither have they yet publicly conceded that the existing system discriminates against economically weak countries, although they may have in principle accepted, even if irresolutely, that the contemporary global economic structure needs to be adjusted.⁵⁴⁸

With the advance of the 1970's, the western developed states overcame the negative domestic economic impact which increased oil prices had induced. The overriding necessity, from their point of view, for them to compromise with

548. Aziz, Santaj, "The New International Order: Search for Common Ground", at p. 51, The New International Economic Order: A Third World Perspective (1984), ed. by Ghosh, P.

the Third World therefore faded. By the end of the 1970's, the United States had effectively retarded progress in the discussions over a N.I.E.O. As of the date of this writing, although the price of crude oil has declined to its lowest level in over a decade, the actual flow of direct financial aid from western states to the developing world is only approximately one-half of that which had been established as a target for this period by the Brandt Commission.

Significant differences in size, influence, economic wealth, natural resources and growth rates between third world countries themselves have also contributed to the collapse of the relatively united front presented by these nations during the early 1970's and mid-1970's. However, ironically, the immediate cause was the fact that the unprecedented oil price rise also adversely affected the economic development of those third world countries which relied upon oil imports to satisfy domestic consumption. The substantial majority of developing states therefore encountered foreign exchange earning problems, balance of payments difficulties and a decline in growth rates.

Moreover, there was a decline in the demand for third world raw materials in the developed world. This signified a regression in the export trade of these nations. Also, moderate Arab OPEC member countries, which are among the more economically powerful third world countries and some of which had been effective voices in the early 1970's during the campaign for modification of the global economic system, no longer felt that it was within their best interests to continue to use oil as a "political weapon" against those industrialized states which supported Israel or to exercise their bargaining power to ensure the advent of any new legal norms with respect to the international economic order.

In the final analysis, however, the opposition of the developed western world, particularly that of the United States, to this concept is the primary reason why the implementation of fundamental N.I.E.O. ideals has not yet been realized and why these principles will not attain the status of international law in the near future. These concepts cannot create any legal obligation on national states to observe them in the absence of their approval. The notion of a N.I.E.O. will therefore continue to have mere political effects alone for

the present time rather than far-reaching practical value and legal significance. However, a stricter monitoring of political and economic abuses of transnationals will continue, from a developing country viewpoint, to be one beneficial result of this exercise. Additionally, N.I.E.O. concepts will provide primary evidence of legal norms which may govern international economic relations sometime in the future.

Developing countries have accounted for 70 per cent of the world's population within recent years. Their share of world trade earnings, however, is only 15 per cent. Their share of global industrial production at present is less than 7 per cent. Additionally, these countries only account for 30 per cent of global income.

The Second General Conference of UNIDO, which was convened in March, 1975, estimated that the only process through which this state of under-development can be eradicated would be for the share of world industrial production to rise to 25 per cent by the year 2000 and for a new international economic order, which would provide for a more equitable opportunity for commercial and technological development, to become a reality.⁵⁴⁹

However, there has not been any significant improvement in the past decade in the economic prospects for the developing world as a whole. Indeed, the economic and commercial development of the substantial majority of these countries, particularly the least developed, has further deteriorated. The last few years have diminished the possibility of rapid economic development or the re-alignment of world monetary and commercial decision-making to include third world nations which possess significant petroleum resources or which are embarking on expansive industrial projects. Additionally, the manufactured goods exporting developing states, countries which in the second half of the last decade were able to substantially boost their exports at a rate exceeding their growth of imports, have recorded a sharp decrease in exports within the last six years.⁵⁵⁰

549. Supra note 325, at p. 829, para. 28. See also the Brandt Commission's recognition of this estimation (Supra note 330, p. 172).

550. Supra note 335

VIII. Analysis of Major Issues Arising out of the
UNCTAD Principles and Rules

Negotiations for the adoption of an international restrictive business practices code progressed within UNCTAD during the latter half of the 1970's within the context of furthering the N.I.E.O. concept with respect to the supervision and regulation of the activities of transnational enterprises with a view to controlling, if not eliminating, their anti-competitive arrangements and agreements.

There were differences with respect to the perception of a restrictive business practices code between western developed nations and third world states. The former generally perceives control of these activities as a means through which competition could be promoted or maintained and consequent efficiency in production could be increased. Meanwhile, the G-77 viewed the adoption of the Set as a major measure within the context of the N.I.E.O. debate, since the document would enunciate principles which, if implemented, would lead to a more equitable international trading environment through control of restrictive arrangements in commercial transactions and through improvement of mechanisms which would more effectively regulate transnational enterprises and, therefore, enhance the sovereignty of developing host countries. The Group of 77 perceives restrictive agreements involving transnationals as a means through which vital technology which is needed to accelerate third world industrial development is prevented from being transferred into developing countries and through which the economic and commercial development of these countries is substantially retarded.

While Group B nations were primarily concerned with such traditional concepts as "non-discrimination" and "national treatment" of foreign investment and with issues relating to potential expropriation of foreign property, the G-77 lobbied for recognition of "preferential treatment" for their domestic enterprises and for the right to implement their own national regulations with respect to foreign investment, even if those regulations were at variance with traditional principles of international law. The Soviet-bloc nations generally supported the position of the developing nations. In

addition, the latter unsuccessfully lobbied for activities conducted by state-owned enterprises to be omitted from the ambit of the principles and rules.

One result of these fundamental differences between Group B and the G-77 with respect to the role of competition policy and of a restrictive business practices code was the decision not to formulate legally binding principles but, rather, to adopt mere non-binding recommendations to both states and to enterprises. This was at Group B's insistence. The nations within this Group were also able to persuade the developing states that the disparities in economic and industrial development between member nations precluded the practicability of a legally binding document. There is hence no international investigatory or enforcement mechanism attached to the Set, nor is there any adjudicatory tribunal.

However, the Code has become a focus for developing states in their search for solutions to their economic problems. Reference to the need to eliminate commercial and economic disadvantages accruing to the Third World through restrictive business arrangements, in order that a N.I.E.O. can be established, is specifically mentioned in the preamble and is implicit throughout the text. Nevertheless, the preamble also emphasizes pro-western concepts such as fair and equitable treatment of foreign-controlled business, observation of accepted norms of international law in the treatment of these enterprises and protection of legitimate business interests of enterprises. The preamble speaks of the positive role of competition in national and international economic development as well as of the pivotal function which transnational enterprises play in this process. It is this kind of equilibrium which influenced the Soviet representative at the 1985 Review Conference to maintain that:

"[T]he text of the Set constitutes a well-balanced document, which under present conditions imparts sufficiently clear guidance with regard to ways and means of overcoming the negative effects of restrictive business practices on the development of international trade."⁵⁵¹

551. Supra note 497, Annex IV at para. 3

However, it does not seem probable that the UNCTAD Code or the OECD Guidelines would by themselves substantially reduce the prevalence of transnational restrictive business practices, since it is clear that very limited goals were set by their negotiators.

Firstly, the document's exemption of anti-competitive conduct which is "accepted" or "required" by states is a clear illustration that no political will exists among the industrialized nations to enforce those aspects of the Code which are not in accordance with their individual national interests. Licence will therefore continue to be given to activities of export cartels that adversely affect the commercial potential of developing countries, once those activities benefit home country economy or once they do not affect domestic markets. Indeed, the present administration in the United States, the world's major commercial power, has undermined the objectives of the Set through its enactment of the Foreign Trade Antitrust Improvement Act in 1982,⁵⁵² legislation which positively encourages the existence of national export cartels. This is an illustration of the permissive attitude which major developed market-economy states have adopted towards restrictive practices which only affect foreign markets. Additionally, there is a direct correlation between this policy and the recent resurgence of protectionist policies by these countries.⁵⁵³

In the final analysis, it must be kept in mind that the Principles and Rules allow for adoption of a national or regional antitrust policy which is at variance with those provisions outlined in it.

Secondly, the Set's exclusion of all intra-enterprise transactions from its ambit entails the automatic exemption from its scope of agreements and arrangements which deal with between one-third and one-half of world trade unless they amount to an abuse of a dominant position of the market and adversely affect international trade and commerce, particularly that of the developing world.

552. Pub. L. 97-290 sec. 403, 96 Stat., enacted as Title IV of the Export Trading Company Act, 1982 (15 U.S.C.S. sec. 6(a) 1982)

553. Supra text ch. 8, p. 218, 225

However, there is one major beneficial aspect, from a host country viewpoint, pertaining to the recognition of parent companies, subsidiaries and affiliates as a single enterprise, since this acknowledgement involves a recommendation to parent companies to provide information to a host country where an agreement contracted with a third enterprise has an anti-competitive effect on that host country, unless such disclosure is legally forbidden.

The Set condemns restrictive corporate practices on a "rule of reason" analysis. All of the facts and circumstances must be weighed before one of these practices will be deemed to constitute an unreasonable restraint on competition and to adversely affect international trade or to be potentially able to do so. As such, the Principles and Rules do not employ the "per se" doctrine, which would have automatically invalidated these practices. The Code is in this respect even more conservative than the United States' Sherman Act.⁵⁵⁴ It is unfortunate that the Set does not recommend use of the "per se" doctrine for national or regional competition policy, since it does not establish any binding judicial or administrative enforcement machinery which would adjudicate the relevant facts and circumstances. The Code's failure to make such a recommendation means that there are no definite standards to guide either enterprises or states as to when a practice should be prohibited.

Both harmful horizontal arrangements or agreements, and certain vertical ones which amount to an abuse of a dominant position of market power, can amount to a condemned restrictive commercial practice under the Agreed Principles and Rules. In the latter case, the dominant market position can be "acquired" by the relevant conduct. There is no fixed percentage of control of market at which a dominant position can be acquired. Additionally, although excessive pricing is not prohibited, transfer pricing is forbidden to the extent that it unduly restricts competition and adversely affects international trade.

On the issue of recommendations to states concerning their competition policy, states are urged to deal primarily with those acts which adversely

554. 15 U.S.C.S. secs. 1-7 (1985)

affect their own national interests. Although the Set therefore endorses the application of the "effects doctrine", it is submitted that this section can also be interpreted as a request to states to consider extending their legislative jurisdiction to control those restrictive arrangements which do not adversely affect their own trade or economy but which generally affect international trade, particularly that of third world countries. Although numerous difficulties would attend any possible exercise of jurisdiction by State A over foreign restrictive business practices arranged in State B, in which nationals of State A who are not within its territory are involved, where those practices do not have any effect on State A's economy or commerce, it is submitted that from a purely commercial viewpoint, State B should generally co-operate with State A if its own interests are being adversely affected. A fortiori if State B does not have any applicable national or regional competition legislation. It is, however, conceded that there would be some circumstances where State B could justifiably object to such an exercise of extraterritorial jurisdiction in order to protect its political sovereignty.

Ultimately, there must be more effective international consultations, collaboration and co-operation, including with regard to the legitimate supply of relevant information, both between the OECD nations themselves, and between those nations and developing countries, if the question of control of transnational restrictive corporate practices is to be resolved. A home territory should be allowed to pursue foreign restrictive arrangements involving their nationals where such involvement would have been illegal under its existing legislation if it were to result in an adverse effect on national trade or commerce.

Countries which have established antitrust regulations must share this experience with, and otherwise assist, nations which are less experienced on this issue. Proposals for seminars on the control of restrictive corporate practices, for international conferences dealing with legislative and other policies as well as for advisory and training programmes for developing nations must become a reality. There should be an international effort to achieve common approaches, compatible with the Code, to the issue of control of restrictive business activities.

Additionally, nations should publicly make available details of all restrictive practices which affect international trading transactions. Notification procedures concerning the use of such practices by enterprises should therefore be established or strengthened. A registry containing this information should be established within UNCTAD so that states on the whole would be better able to deal with these practices. The efficacy of this recommendation would depend on the creation within the UNCTAD Secretariat of an authority entrusted with the responsibility to investigate restrictive business practices.

However, as the Code presently stands, no division of the UNCTAD Secretariat has any authority to examine any matter relating to the question of a restrictive business practice which remains unresolved after bilateral or multilateral consultation. The consultation procedure outlined in the Set is a very fragile one, even weaker than that provided within the OECD. It is in every sense a "voluntary" process. It is submitted that UNCTAD should be provided with a more forceful monitoring role and its Secretary-General or its Trade and Development Board should be granted a conciliatory role. More effective use must be made of these consultation procedures if there is to be a more significant international attempt to control anti-competitive commercial arrangements.

At present, the only body which can possibly implement or interpret the principles and rules, the Inter governmental Group of Experts, is expressly precluded from acting in an adjudicatory capacity with respect to activities or conduct of government or enterprises in connection with their business transactions. This explicit prevention of any adjudication reiterates the non-binding effect of the document. The Group of Experts primarily serves as a discussion forum rather than as an antitrust enforcement agency. However, it is still hoped that the Group's reports and recommendations would influence member nations in their interpretation of controversial principles.

It is submitted that there is no defect in the inherent composition of the Group, although the G-77 would prefer to see its replacement by a special committee on restrictive business practices which would be more capable of influencing states with its recommendations. The shortcoming with respect to

the Intergovernmental Group lies rather in the limitation placed by the Code on the power and authority of the Group of Experts. Representatives of labour and of business should be able to bring complaints and issues before the Group and enterprises should be able to express their views before the experts on matters which affect their individual interests.

However, it is clear that the basis of the differences between western developed nations and the remaining countries on the issue of the authority of any institutional organization established by the Set lies in their differing perception of the role of this system. Developing and socialist-bloc states believe that any such machinery should be able to influence home countries to effectively apply and implement the principles and rules, whereas those same home countries insist that the function of such an organization be restricted to that of an information centre and consultation fora.

It is unfortunate that the document does not attempt to address the issue of national and international export cartels. These associations adversely affect the economic and commercial interests of third states, especially those in the developing world, even though they may generally benefit the national interests of the sponsoring state.

The vague, ambiguous terminology characterizing the Agreed Principles and Rules militates against any perception of the document as a clear, precise statement on competition policy. This is especially the case where the control of restrictive practices is concerned. Many provisions in the Set will be given varied interpretations to suit the particular interest of the individual interpretator. This makes any comprehensive practical application of the Code difficult to achieve and facilitates evasion of its principles.

However, it can be hoped that the Code will have some influence on the approach of states to the problem of restrictive activities in commercial affairs, as well as on the conduct of enterprises, particularly of transnationals, in their international business transactions. Some countries have already enacted restrictive business practices legislation based on some of the principles and rules. The experience of the whole exercise will enlighten third world officials on the issue and will improve their competence to effectively deal with restrictive business practices. Developing nations will

therefore become more capable of implementing more effective control systems and of enacting appropriate legislation. Their authorities will benefit from reports and other research materials on the subject which will be available to them. These reports will help them to better comprehend the problem of anti-competitive arrangements in international commercial transactions. Additionally, any increase in co-operation or consultation between nations would be partly attributable to the adoption of the Agreed Principles and Rules.

It must also be hoped that the Set, through increased international publicity on the issue, will eventually lead to a reduction in the prevalence of restrictive practices which have a detrimental impact on the commercial expansion of third world countries and on their foreign exchange earnings. We also look forward to the eventual acquisition of a more influential role by the Third World in the international commercial and financial arena. This process would involve the implementation of some N.I.E.O. concepts.

IX. Prospective Developments in International Affairs on the Issues of Control of Transnational Restrictive Business Practices and of Co-ordination of Foreign Investment Policy

A. Legally Binding UNCTAD Principles and Rules?

There has been a weakening in the concept of control of transnational enterprises through international codes within the last five years in the industrialized western nations. Many of these nations did not participate in the formulation of the OECD Guidelines because they wished to control transnational enterprises. Rather, they wished to influence the code-making process in other international fora, particularly within U.N. organizations. At the present time, the philosophy of major market-economy political administrations, especially that of the United States, the United Kingdom and the Federal Republic of Germany, is to discourage government policies of intervention in commercial considerations. This is a reversal of the interventionist policy of the administrations in these countries during the mid-1970's when governments with more pro-regulation leanings were in political power.⁵⁵⁵

555. Supra note 204, at p. 9

Even the majority of developing countries no longer perceive a legally binding code as of overriding international importance. Although the G-77 still publicly tends to insist on the adoption of a binding document, it appears that only China, India and Chile are now earnestly calling within international fora for a reversal of the non-binding nature of the UNCTAD Set.⁵⁵⁶ The majority of developing countries now believe that a legally binding code would consequently infringe on their desire for absolute national sovereignty, since they would then be legally obligated to accord "fair" and "equal" treatment to transnational enterprises in conformity with traditional concepts of international law.⁵⁵⁷ Additionally, narrow self-interests have again emerged among many oil-rich and newly industrializing nations, which arguably comprise the two most influential blocs within the Group of 77. These countries are now reluctant to press for control of transnational enterprises at the global level, since they have themselves recently begun to acquire their own transnational enterprises. Mr. Joel Davidow maintains that developing nations now seem to prefer the idea of member nations binding themselves to amend national law in order to achieve compliance with the standards of the Code.⁵⁵⁸

Although many third world commentators must regard this moderation in policy with respect to the legal nature of the UNCTAD Principles and Rules as an unfortunate development for the Third World as a whole, the writer concedes that a legally binding document does not necessarily have a greater impact than a voluntary one. A treaty or convention may become internationally impotent if ratified by only a minority of developed nations. A mandatory restrictive business practices code would, at the present time, have tremendous difficulty obtaining approval from the U.S. Congress or from

556. See, for example, endorsement of a legally binding Set by Chinese representative and by Indian representative at the 1985 Review Conference (Supra note 497, p. 11 at para. 28, and p. 21 at para. 59 respectively). Also endorsement by Chilean representative at the Third Session of the Intergovernmental Group of Experts on Restrictive Business Practices (November, 1984), (U.N. TD/B/RB/24 at para. 76).

557. Supra note 122, p. 53

558. Ibid.

legislatures in other major western industrialized states.⁵⁵⁹ Additionally, such a code would not be likely to invoke penalties for breach of its provisions. Also, binding principles and rules can be waived. This has resulted in the case of major tenets of the GATT.

In addition, effective implementation of any treaty with respect to restrictive business practices control would entail the harmonization of laws affecting business in all U.N. member states and the conferral of power to a supra-national body or to the International Court of Justice in order to adjudicate contentious issues arising out of the treaty. The complications which this involves would be insurmountable at the present time.

On the other hand, a voluntary code which has been approved by all nations and agreed to by most transnational enterprises may very well significantly shape the future conduct of these firms and influence the development of appropriate norms. Indeed, the immediate past Secretary-General of UNCTAD, Mr. Corea, could assert that "states are attaching considerable significance to the Set and to the commitments entered into therein".⁵⁶⁰ Additionally, the non-binding nature of the present Set means that modification of substantive principles in response to changing circumstances would not be as complicated as if the document were legally binding.

The writer realizes that the only practical method through which disputes over such issues as claims regarding extraterritorial antitrust jurisdiction could be effectively resolved would be through the establishment of an international organization to adjudicate and enforce, or to supervise the enforcement by national or regional courts of, internationally accepted rules of competition policy. However, it is submitted that the implementation of any of these measures and the implementation of a legally binding instrument, a process which would be concomitant with the former implementation, would not be feasible in contemporary times when there is no political will on the part

559. Rubin, Seymour and Hufbauer, Gary, "Lessons from the Codes," at p. 182-83, Emerging Standards of International Trade and Investment (1983), ed. by Rubin, S., and Hufbauer, G.

560. Supra note 535

will on the part of the majority of nation states to make it a functional concept. Indeed, any general examination of the 1985 Review Conference Report⁵⁶¹ would reveal the obdurate unwillingness on the part of the developed market-economy nations to alter any aspect of the document as well as the largely conservative attitude of the Soviet-bloc states with respect to the legal nature of the Set. Consequently, there was no progress at this Conference with regard to the issue of the establishment of any additional bodies to deal with the observation and effective implementation of the principles and rules.

Some provisions of the Code, however, may very well acquire the status of customary international law through state practice, particularly through interaction between home and host countries in inter governmental follow-up proceedings with respect to implementation of the principles and rules. We can only hope that even in the absence of a legally binding document, nation states, particularly the United States and her main commercial allies, will resolve to implement the provisions and to make the Set effective.

B. Sauvant's Host Country Councils?

The multi-faceted significance of transnational enterprises to host country economies is the basis of Mr. Karl Sauvant's suggestion that host country councils be established in home countries to participate in the entire internal decision-making process of those transnationals which have significant operations within their territories. This would supplement policies aimed at creating external control mechanisms.⁵⁶²

The noted author, with sympathetic leanings toward third world issues, proposes that these councils comprise representatives from host country governments in which the respective transnational enterprise has considerable

561. Supra note 497 (U.N. TD/RBP/CONF.2/8).

562. Sauvant, Karl, "The Role of Transnational Enterprises in the Establishment of the New International Economic Order: A Critical View", at p. 137-41, International Trade, Industrialization and the New International Economic Order (1981), ed. by Lozoya, Jorge, and Green, Rosario.

influence over such factors as essential industries, investment expenditures, employment levels and share of the export market.⁵⁶³ Mr. Sauvant suggests that host country councils should only be created for those transnational enterprises whose activities significantly affect the economic aspect of host countries.⁵⁶⁴

This proposal could theoretically lead to a greater harmonization of foreign investment policy and a broader consistency in the designs for host country economic, social and industrial development between the political administration and the transnational corporate directorate. It would also involve more effective co-operation between these two parties. This would ultimately lead to a smoother transfer of vital capital and essential technology into host countries, especially into third world host nations. It would also entail a more equitable allocation of global wealth and a less problematic transfer of indispensable commodities and natural resources from developing countries to industrialized states.

However, even though these are noteworthy suggestions, their implementation would not be realistic at this present stage of international economic relations. The strength of contemporary "free enterprise" market forces in the western developed world militates against any acceptance of any recommendations along these lines at this time. The commercial and corporate sectors, along with their political lobbyists, would campaign vigorously against any attempt to adopt this recommendation. Additionally, although the major home countries are also leading host countries, their governments would

563. Ibid., at p. 138. Sauvant's proposal would authorize these councils to receive information, to hear explanations, to be consulted and to even have a co-determining voice in the decision-making process at the headquarters of the transnational enterprise.

564. Ibid., at p. 140. While there are numerous transnationals, only a limited number of them have operations in individual host countries which are of a sufficient size to have important consequences to economic life in these countries. This is largely a result of the high level of concentration in international business. Approximately 150-200 transnational enterprises account for over one-half of the entire book value of international direct investment (Ibid., at p. 169, note 68).

not at present support this idea. The undermining of entrepreneurial spirit needed to develop global economies would be just one reason cited in opposition to Sauvant's proposal.

C. Ball's International Incorporation?

Meanwhile, Mr. George Ball, a United States' international business lawyer, a transnational corporate chairman and a former diplomat, articulates a policy of the international incorporation of certain global enterprises, rather than their national incorporation.⁵⁶⁵ This international corporate regulation would be administered by a supra-national body which would be composed of representatives from signatory nations and which would exercise supervisory authority over the internationally chartered corporations.⁵⁶⁶ A parent company would then be no longer regarded as the sole instrument of a particular nation, nor would a transnational corporate structure be regarded as American, British, Japanese or that of any other nation. Ball's recommendation would bind any transnational incorporated under the international legislation to its provisions. On the other hand, a signatory state to the agreement would be bound not to impose additional restrictions on the particular firm.

This proposal would eliminate the contemporary problem of the identification of a particular transnational enterprise with the interest of its home country. It would also diminish the general feeling within the Third World that transnationals represent a form of neo-colonialism and of economic imperialism which has emerged since the demise of colonialism. Mr. Ball's proposition, like Sauvant's, would also result in greater unification of investment and social policy between all relevant parties.

However, this suggestion is not a feasible ideal at this present stage of history, for similar reasons why Sauvant's proposal must also be rejected. Mr. Seymour Rubin refers to the inability of states to impose additional restrictions on global firms, to the problem of different national tax

565. See generally Ball, George, Cosmocorp: The Importance of Being Stateless (1967), 2:6 Colum. J.W. Bus. 25-30

566. Ball's proposal would also internationalize the share ownership, board membership and top management of these corporations.

structures and to the difficulty involved in the equitable selection of representatives to the supra-national body as other reasons which would hinder the establishment of any legislative policy with respect to international incorporation.⁵⁶⁷

Additionally, states in both the developed and in the developing world are now very reluctant to surrender any national sovereignty to a supra-national organization. Even the countries in the European Community, an organization which was formed in the aftermath of an ideologically divided and devastated Europe, cannot yet attain a common Company Legislation although the Community has been reasonably successful in its implementation of the Treaty of Rome.

D. A United Nations' Code on Transnational Enterprises?

The United Nations Commission for Transnational Corporations (the CTNC) was formally established on December 5th, 1974.⁵⁶⁸ The CTNC set up the Inter-governmental Working Group which has been engaged in work on a proposed universal standard or code of conduct for transnational enterprises since 1976, by combining national policies with international interests.⁵⁶⁹ The majority of members of the CTNC are representatives from host developing countries rather than from home countries.⁵⁷⁰ Consequently, the Commission's attitude is likely to reflect a third world viewpoint.

567. Rubin, Seymour, Corporations and Society: The Remedy of Federal and International Incorporation (1973), 23 Am. U. L.R. 263, at p. 295-300

568. U.N. ECOSOC Res. 1913 (LVII)

569. Finalization of the United Nations' Code has been delayed. It is probable that the adoption of the UNCTAD Agreed Principles and Rules has prejudiced the fate of the United Nations' code (Bulajic, Milan, Legal Aspects of the New International Economic Order, p. 15). A more plausible reason is that the proposed code is too comprehensive and too extensive in scope, since it seeks to deal with too wide a variety of issues. It is, therefore, very difficult to reach a consensus and a common ground on all the substantive areas addressed by the draft code. Key outstanding differences remain although progress has been made towards a final document.

570. The CTNC is composed of forty-eight members elected by ECOSOC for three year terms. Selection is based on geographical distribution of member states. Therefore, twelve members are from Africa; eleven from Asia; ten from Latin America and the Caribbean; ten from Western Europe and North America; and five from Eastern Europe and the Soviet Union.

The main tasks assigned to the CTNC were to:

- 1) review comprehensively all aspects of transnational enterprises and their operations;
- 2) act as a forum for exchange of views between interested governmental or non-governmental groups;
- 3) act as an advisory service for ECOSOC and to the U.N. Centre on Transnational Corporations;⁵⁷¹
- 4) act as a research organization with respect to the political, economic and social effects of operations of transnational enterprises; and
- 5) act as a consultative group to ECOSOC.

The future U.N. Code for Transnational Enterprises will include host government obligations regarding treatment of transnational enterprises as well as standards of conduct for corporate behaviour. In addition to issues covered in the UNCTAD Agreed Principles and Rules and in the contemplated UNCTAD Transfer of Technology Code,⁵⁷² the U.N. Code will include provisions with respect to:

- 1) socio-cultural objectives and values;
- 2) non-interference in internal political affairs;
- 3) observance of economic development goals and policies of the countries in which they operate;
- 4) taxation of transnational enterprises;
- 5) respect for human rights and for fundamental freedoms,
- 6) consumer and environmental protection;
- 7) repatriation of capital and remittance of profits and royalties; and
- 8) cessation of operations conducted by transnational enterprises in racist South Africa.

571. The Centre on Transnational Corporations was also formed by ECOSOC (U.N. ECOSOC Res. 1913 (LVII)). It is an autonomous section of the United Nations Secretariat and began to function in November, 1975. It is a research and a support group to both the CTNC and to ECOSOC. Its task has been to collect and to analyze information needed to formulate the code of conduct on transnational enterprises and to provide technical advice to governments in a co-ordinated manner.

572. Supra note 362

The United Nations' Code will also attempt to prescribe rules for ownership and control, particularly with respect to the encouragement of host country equity participation and employment of host country citizens at international corporate decisions-making levels.

The U.N. Code, like its UNCTAD counterparts, will be non-legally binding and vaguely expressed in ambiguous terminology when it is eventually adopted. It may therefore pose only a minimal threat to the autonomy of transnational enterprises. It may be possible, however, that the U.N. Code will in due course have a considerable substantive effect.

X. Writer's Recommendations to Developing Countries

A. Co-operation, Co-ordination, Self-reliance and Commercial Expansion

Developing countries can themselves, as a group, attempt to achieve certain N.I.E.O. goals. These nations must firstly strengthen mechanisms which would lead to co-ordination of their national interests, a greater cohesion in their economic and commercial programmes as well as in their policies towards transnational enterprises and to foreign investment. These states will have to outline principles with respect to advancing co-operation between themselves in order to advance third world development.

Third World nations must also foster policies relating to individual and collective self-reliance, on the basis of the mobilization of their national resources. This would involve effective sovereignty over their own natural resources. Third World commodity consortia should be strengthened in pursuance of this objective. These should operate as a countervailing force to transnational enterprises.

Third World states must also seek more extensive economic and commercial links among themselves and with socialist-bloc countries. Reliance can no longer be primarily placed on traditional international trading links. A developing country should also look to other developed market-economy countries besides its former colonial ruler and the United States for new international commercial transactions.

B. Adoption and Implementation of Regional Competition and Investment Treaties

All developing countries should join together in regional movements and implement legally binding codes of conduct. This would achieve common approaches in the official policy of regional administrations towards foreign investment, transnational enterprises and the control of harmful restrictive business practices. These regional treaties will have to be basically similar in order to reduce substantially the bargaining power of transnationals and their home country governments so that they would not benefit from pitting regions comprising host countries, or host countries within these regions, against each other for foreign investment. The ability of foreign interests to match third world nations against each other has resulted in individual countries offering incentives, such as fifteen year tax-free holidays, allowances of contractual prohibitions against employees with respect to membership of trade unions (frequently in contravention of their constitutional rights) and assurances of a governmental policy of abstention with respect to the monitoring of restrictive commercial activities, in order to woo, and then to maintain, foreign investment by transnational enterprises within their nations. These national approaches have ultimately hindered the socio-economic development of third world countries as a whole.

The UNCTAD model restrictive business practices law⁵⁷³ should be finalized in order to guide developing nations when they are in the process of formulating these treaties, which should also be based on the UNCTAD Agreed Principles and Rules and on the 1974 N.I.E.O. resolutions. The Andean Investment Code would also be a suitable model on which to base subsequent regional competition and investment treaties within the Third World.

These treaties should contain provisions:

- 1) prohibiting and penalizing restrictive arrangements and agreements, including transfer pricing arrangements in intra-corporate transactions,

573. Supra text ch. 7, p. 193 at note 504

which adversely affect the commercial development of member nations and of the region as a whole and which otherwise limit their foreign exchange earnings;

- 2) endorsing the exercise of full permanent sovereignty over the natural resources of, and the economic activities conducted within, the region;
- 3) prohibiting member nations from entering agreements which seek to limit the transfer of foreign technology, patents or trademarks into their nations;
- 4) restricting the repatriation of invested capital and remittance of profits by transnational enterprises which operate in the region,
- 5) encouraging the regional reinvestment of profits;
- 6) effecting preferential treatment for smaller, national enterprises, for regionally-based firms and for joint ventures which have been principally established with domestic capital;⁵⁷⁴
- 7) establishing an investment screening mechanism to vet potential foreign investment; and
- 8) encouraging and facilitating the establishment of regional banking and insurance institutions.

Regional free trade and economic integration agreements and arrangements among third world countries within a particular region should also be established, and if already in existence, should be strengthened.

There should also be provisions which seek to guarantee consultation between developing host country administrations and the directorate of subsidiaries which operate within their territories. This would ensure that host country national interests are protected and would increase opportunity for dialogue on the issue of restrictive business practices control.

Regular international consultation and collaboration between the competent officials in member states on issues arising out of the treaty should also be stipulated.

574. The writer recognizes that this suggestion is contrary to the UNCTAD Principles and Rules, Sec. E(3).

Corresponding penalties will have to be established within each contracting state for the contravention of these provisions. A Commission should also be set up in order to regulate the implementation of the treaty. A regional Court of Justice, which would have exclusive authority to interpret the treaty, to adjudicate issues which arise out of the convention and to interpret the decisions of the Commission, could also be established. Member states, the Commission, enterprises, including those transnationals which operate within the region, other foreign concerns with regional investment interests and individual nationals or residents of any member nation would be competent to bring or to defend an action before the Court.

These provisions would have to be legislated into the statute books of each individual contracting member state in order to ensure compliance with the treaty. However, the complete implementation of the provisions of a particular treaty could be a gradual process in order that member states, transnational enterprises and other foreign interests would have an adequate period in which to adjust their policies to the transformation. The Andean Investment Code, for example, provided a fifteen year adjustment period.

It is submitted that effective implementation of these provisions will increase inter-regional trade and, hopefully, regional commercial, financial, economic and social development. These provisions would strengthen the concept of state sovereignty and would diminish the ability of foreign investment concerns to intervene in the politico-economic system of developing host countries. Any implementation of a treaty which contains these or similar provisions would ultimately result in a significant decrease in the quantity and in the adverse effect of restrictive business practices by transnational enterprises within third world regions.

It is also submitted that, in the final analysis, the successful implementation of a regional competition and investment convention would not result in a policy of substantial divestment on the part of transnational enterprises and other concerns controlled by interests in the industrialized nations if there is already a large foreign investment presence in the region.

The formulation and effective implementation of regional conventions which contain these or similar provisions will mean that third world countries would have accomplished all that they can achieve by themselves to establish a N.I.E.O. Although western industrialized states would resist any implementation of these regional conventions and would attempt to pressure potential member nations which have extensive foreign investment within their territories from participating in such a venture, it is submitted that this is the only approach through which developing countries can genuinely cultivate a habit of economic self-reliance which would ultimately reduce their dependence on the wealthier, industrialized nations.

XI. Epilogue

Attempts to regulate restrictive business practices at the international or supra-national level have generally taken three forms:

- 1) consultation and co-operation between or among antitrust enforcement officials, either through bilateral inter governmental mechanisms or through multilateral organizations;
- 2) binding legislation at the regional level; and
- 3) regional or international codes of conduct or "guidelines", whether mandatory or voluntary.

These attempts have been primarily initiated for two basic reasons:

- 1) the desire to mitigate actual or potential conflicts in the enforcement of national law, particularly where the extraterritorial application of national antitrust regulations is concerned; and
- 2) the imperative need to regulate subsidiaries of foreign-based transnational enterprises, which is an overriding concern for developing countries in particular.

Professor Detlev Vagts however asserts that while transnational enterprises do occasion antitrust problems in third world countries, primarily as a consequence of their dominance of small markets and the lack of significant domestic competition, their principal conflicts with developing

host countries will more likely arise from five major types of issues, all of which the learned professor classifies as falling outside the ambit of strict antitrust theory:

- 1) management strategies that are inconsistent with national development goals;
- 2) transfer pricing;
- 3) exclusive use, or non-use or non-transferral, of patents and know-how;
- 4) repatriation of earnings; and
- 5) termination of investments.⁵⁷⁵

We have therefore addressed all of these areas of contention between developing countries and those transnational enterprises which conduct business within these nations. Additionally, we have discussed and analyzed the issues arising out of traditional competition policy with respect to the control of transnational restrictive business practices. We can only hope that a resolution to all these controversial issues will be devised in the future in order that third world social, economic and commercial development would accelerate and the emergence of a New International Economic Order would materialize.

575. Vagts, Detlev, The Multinational Enterprise: A New Challenge for Transnational Law (1970), 83 Harv. L.R. 739, at p. 759-76.

Appendix One

Organization of Economic Co-operation and Development,
Declaration by the Governments of OECD Member Countries
and Decisions of the OECD Council on International
Investment and Multinational Enterprises,
OECD Doc. 21(76) 04/1, June 21st, 1986

Competition Guidelines

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 towards 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 purchasers, distributors and licensees freedom to resell, export, purchase and develop their operations 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;
- (4) 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.



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UNITED NATIONS CONFERENCE ON
RESTRICTIVE BUSINESS PRACTICES

THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND
RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

As approved by the Conference for transmittal
to the General Assembly for adoption as
a resolution

HD 3626
451

THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND
RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

At its closing meeting, on 22 April 1980, the United Nations Conference on Restrictive Business Practices adopted the following resolution:

The Set of Multilaterally Agreed Equitable Principles and
Rules for the Control of Restrictive Business Practices

The United Nations Conference on Restrictive Business Practices,

Recalling General Assembly resolution 33/153 which required the Conference to negotiate, on the basis of the work of the Third Ad hoc Group of Experts, and to take all decisions necessary for the adoption of, 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, including a decision on the legal character of the principles and rules,

Having held its first session from 19 November to 8 December 1979 and its second session from 8 to 22 April 1980,

1. Approves the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, annexed hereto;
2. Transmits to the General Assembly at its thirty-fifth session this Set of Principles and Rules, having taken all decisions necessary for its adoption as a resolution;
3. Recommends also that the General Assembly, five years after the adoption of the Set of Principles and Rules, convene a United Nations Conference under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules.

7th plenary meeting
22 April 1980

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Annex

THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

The United Nations Conference on Restrictive Business Practices,

Recognizing that restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries,

Affirming that a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices can contribute to attaining the objective in the establishment of a New International Economic Order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis,

Recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,

Considering the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,

Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations adversely affecting international trade, particularly that of developing countries, and the economic development of these countries.

Convinced also of the benefits to be derived from a universally applicable set of multilaterally agreed equitable principles and rules for the control of restrictive business practices and that all countries should encourage their enterprises to follow in all respects the provisions of such a set of multilaterally agreed equitable principles and rules,

Convinced further that the adoption of such a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices will thereby facilitate the adoption and strengthening of laws and policies in the area of restrictive business practices at the national and regional levels and thus lead to improved conditions and attain greater efficiency and participation in international trade and development, particularly that of developing countries and to protect and promote social welfare in general, and in particular the interests of consumers in both developed and developing countries:

Affirming also the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

Affirming further the need that measures adopted by States for the control of restrictive business practices should be applied fairly, equitably, on the same basis to all enterprises and in accordance with established procedures of law; and for States to take into account the principles and objectives of the Set of Multilaterally Agreed Equitable Principles and Rules,

Hereby agrees on the following Set of Principles and Rules for the control of restrictive business practices, which take the form of recommendations:

SECTION A - Objectives

Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
 - (a) The creation, encouragement and protection of competition;
 - (b) Control of the concentration of capital and/or economic power;
 - (c) Encouragement of innovation.
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries.
4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries.
5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

SECTION B - Definitions and scope of application

For the purpose of this Set of Multilaterally Agreed Equitable Principles and Rules

(i) Definitions:

1. "Restrictive business practices" means acts or behaviour of enterprises which, through an abuse or acquisition and 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 that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.

2. "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

3. "Enterprises" means firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

(ii) Scope of application:

4. The Set of Principles and Rules apply to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. They apply irrespective of whether such practices involve enterprises in one or more countries.

5. The "principles and rules for enterprises, including transnational corporations" apply to all transactions in goods and services.

6. The "principles and rules for enterprises, including transnational corporations" are addressed to all enterprises.

7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.

8. Any reference to "States" or "Governments" shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

9. The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements.

SECTION C - Multilaterally agreed equitable principles for
the control of restrictive business practices

In line with the objectives set forth, the following principles are to apply:

(i) General principles

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.

2. Collaboration between governments at bilateral and multilateral levels should be established, and where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices.

3. Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among governments with respect to restrictive business practices.

4. Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.

5. The provisions of the Set of Principles and Rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation.

(ii) Relevant factors in the application of the Set of Principles and Rules

6. In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.

(iii) Preferential or differential treatment for developing countries

7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly of developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular the least developed countries, for the purposes especially of developing countries in:

(a) promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and

(b) encouraging their economic development through regional or global arrangements among developing countries.

SECTION D - Principles and Rules for enterprises,
including transnational corporations

1. Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate, and in the event of proceedings under these laws should be subject to the competence of the courts and relevant administrative bodies therein.

2. Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information, in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provision should be in accordance with safeguards normally applicable in this field.

3. Enterprises, except when dealing with each other in the context of an economic activity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following

when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) agreements fixing prices including as to exports and imports;
- (b) collusive tendering;
- (c) market or customer allocation arrangements;
- (d) allocation by quota as to sales and production;
- (e) collective action to enforce arrangements - e.g., by concerted refusals to deal;
- (f) concerted refusal of supplies to potential importers;
- (g) collective denial of access to an arrangement, or association, which is crucial to competition.

4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse */ or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;
- (b) discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
- (c) mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;

*/ Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, and to whether they are:

- (a) appropriate in the light of the organizational, managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises.
- (b) appropriate in light of special conditions or economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market.
- (c) of types which are usually treated as acceptable under pertinent national or international law.

- (d) fixing the prices at which goods exported can be resold in importing countries;
- (e) restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e., belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
- (f) when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
 - (i) partial or complete refusals to deal on the enterprise's customary commercial terms;
 - (ii) making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
 - (iii) imposing restrictions concerning where, or to whom, or in what form or quantities goods supplied or other goods may be re-sold or exported;
 - (iv) making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee.

SECTION E - Principles and rules for States at national,
regional and subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.

2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and 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 their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.

3. States in their control of restrictive business practices should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.

4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade and particularly the trade and development of the developing countries.

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.
6. States should institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for their effective control of restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.
7. States should establish appropriate mechanisms at the regional and sub-regional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and sub-regional levels.
8. States with greater expertise in the operation of systems for the control of restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to, other States wishing to develop or improve such systems.
9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly of developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.

SECTION F - International measures

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of those countries. In this regard, action should include:

1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.
2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.
3. Continued publication annually by UNCTAD of a report on developments in restrictive business practices legislation and on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, based upon publicly available information and as far as possible other information, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the United Nations Centre on Transnational Corporations and other competent international organizations.

4. Consultations:

(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;

(b) States should accord full consideration to requests for consultations and upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;

(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.

5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connexion.

6. Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices particularly for developing countries:

(a) Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures;

(b) Seminars, training programmes or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connexion, advantage should be taken, inter alia, of the experience and knowledge of administrative authorities especially in developed countries in detecting the use of restrictive business practices;

(c) A handbook on restrictive business practices legislation should be compiled;

(d) Relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries;

(e) Exchange of personnel between restrictive business practices authorities should be arranged and facilitated;

(f) International conferences on restrictive business practices legislation and policy should be arranged;

(g) Seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.

7. International organizations and financing programmes, in particular the United Nations Development Programme, should be called upon to provide resources through appropriate channels and modalities for the financing of activities set out in paragraph 6 above. Furthermore, all countries are invited, in particular the developed countries, to make voluntary financial and other contributions for the above-mentioned activities.

SECTION G - International institutional machinery

(i) Institutional arrangements

1. An Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD will provide the institutional machinery.
2. States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.

(ii) Functions of the Intergovernmental Group

3. The Intergovernmental Group shall have the following functions:
 - (a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;
 - (b) To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;
 - (c) To invite and consider relevant studies, documentation and reports from relevant organizations of the United Nations system;
 - (d) To study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;
 - (e) To collect and disseminate information on matters relating to the Set of Principles and Rules to the over-all attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;
 - (f) To make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;
 - (g) To submit reports at least once a year on its work.

4. In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connexion with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.

5. The Intergovernmental Group shall establish such procedures as may be necessary to deal with issues related to confidentiality.

(iii) Review procedure

6. Subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules. Towards this end, the Intergovernmental Group shall make proposals to the Conference for the improvement and further development of the Set of Principles and Rules.

III. RESOLUTION 35/63 ADOPTED BY THE GENERAL ASSEMBLY
AT ITS THIRTY-FIFTH SESSION, ON 5 DECEMBER 1980

Restrictive business practices

The General Assembly.

Recalling its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States, and 3362 (S-VII) of 16 September 1975 on development and international economic co-operation,

Recalling that the United Nations Conference on Restrictive Business Practices, convened by the General Assembly in its resolution 33/153 of 20 December 1978, held its first session from 19 November to 8 December 1979 and, in accordance with Assembly decision 34/447 of 19 December 1979, held a second session from 8 to 22 April 1980,

Noting with satisfaction that the Conference approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices¹ and transmitted it to the General Assembly at its thirty-fifth session, having taken all the necessary decisions for its adoption as a resolution,

Noting that the United Nations Conference on Trade and Development, by its resolution 103 (V) of 30 May 1979,² requested the United Nations Conference on Restrictive Business Practices to make recommendations through the General Assembly to the Trade and Development Board with regard to the institutional aspects of future work on restrictive business practices within the framework of the United Nations Conference on Trade and Development, bearing in mind the work done in this field elsewhere in the United Nations,

1. *Adopts* the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the United Nations Conference on Restrictive Business Practices;

2. *Decides* to convene, in 1985, under the auspices of the United Nations Conference on Trade and Development, a United Nations conference to review

¹ See section IV below.

² See *Proceedings of the United Nations Conference on Trade and Development, Fifth Session*, vol. I, *Report and Annexes* (United Nations publication, Sales No. E.79.II.D.14), part one, sect. A.

all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;

3. *Takes note* of the recommendations of the United Nations Conference on Restrictive Business Practices regarding international institutional machinery, contained in section G of the Set of Principles and Rules, and requests the Trade and Development Board, at its twenty-second session, to establish an inter-governmental group of experts on restrictive business practices, operating within the framework of a committee of the United Nations Conference on Trade and Development, to perform the functions designated in that section:

4. *Decides also* that the necessary resources should be made available to the United Nations Conference on Trade and Development to carry out the tasks embodied in the Set of Principles and Rules.

*83rd plenary meeting
5 December 1980*

Appendix Four

The Charter of Economic Rights and Duties of States

United Nations' General Assembly Resolution 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (January 15th, 1975)

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:
 - (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
 - (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph.

Article 14

Every State has the duty to co-operate in promoting a steady and increasing expansion and liberalization of world trade and an improvement in the welfare and living standards of all peoples, in particular those of developing countries. Accordingly, all States should co-operate, inter alia, towards the progressive dismantling of obstacles to trade and the improvement of the international framework for the conduct of world trade and, to these ends, co-ordinated efforts shall be made to solve in an equitable way the trade problems of all countries, taking into account the specific trade problems of the developing countries. In this connection, States shall take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a balance more favourable to developing countries in the sharing of the advantages resulting from this expansion, through, in the largest possible measure, a substantial improvement in the conditions of access for the products of interest to the developing countries and, whenever appropriate, measures designed to attain stable, equitable, and remunerative prices for primary products.

Article 17

International co-operation for development is the shared goal and common duty of all States. Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

Article 18

Developed countries should extend, improve and enlarge the system of generalized non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organizations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalized tariff preferences and other generally agreed differential measures in their favour.

Article 19

With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential, non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic co-operation where it may be feasible.

Article 20

Developing countries should, in their efforts to increase their over-all trade, give due attention to the possibility of expanding their trade with social countries, by granting to these countries conditions for trade not inferior to those granted normally to the developed market economy countries.

Article 21

Developed countries should endeavour to promote the expansion of their mutual trade and to this end may, in accordance with the existing and evolving provisions and procedures of international agreements where applicable, grant trade preferences to other developing countries without being obliged to extend such preferences to developed countries, provided these arrangements do not constitute an impediment to general trade liberalization and expansion.

Article 22

1. All States should respond to the generally recognized or mutually agreed development needs and objectives of developing countries by promoting increased net flows of real resources to the developing countries from all sources, taking into account any obligations and commitments undertaken by the States concerned, in order to reinforce the efforts of developing countries to accelerate their economic and social development.
2. In this context, consistent with the aims and objectives mentioned above and taking into account any obligations and commitments undertaken in this regard, it should be their endeavour to increase the net amount of financial flows from official sources to developing countries and to improve the terms and conditions thereof.
3. The flow of development assistance resources should include economic and technical assistance.

Article 23

To enhance the effective mobilization of their own resources, the developing countries should strengthen their economic co-operation and expand their mutual trade so as to accelerate their economic and social development. All countries, especially developed countries, individually as well as through the competent international organizations of which they are members, should provide appropriate and effective support and co-operation.

Article 26

All States have the duty to coexist in tolerance and live together in peace, irrespective of differences in political, economic, social and cultural systems, and to facilitate trade between States having different economic and social systems. International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage, equitable benefits and the exchange of most-favoured-nation treatment.

Article 28

All States have the duty to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports so as to promote just and equitable terms of trade for them, in a manner which is remunerative for producers and equitable for producers and consumers.

Article 31

All States have the duty to contribute to the balanced expansion of the world economy, taking duly into account the close interrelationship between the well-being of the developed countries and the growth and development of the developing countries, and the fact that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts.

2315th plenary meeting
December 12th, 1974

Resolution adopted by the General Assembly
by a vote of 120 to 6, with 10 abstentions.

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ABSTRACT

In this thesis, we have sought to illustrate the difficulties involved in the detection and effective control of transnational restrictive business practices, particularly those which adversely affect the international trade and foreign exchange earnings of third world nations. We have examined the various regional and international attempts to minimize the problems which often arise from these anti-competitive activities, especially those of transnational enterprises. We have also related these international efforts to control and to regulate restrictive arrangements of these enterprises to the call by the developing nations since the early 1970's for a modification in the international economic order which would make it more compliant with the developmental objectives of the third world.

We introduced our topic in Chapter One, mentioning the phenomenal post-1945 development of the "transnational enterprise" in the process.

In Chapter Two, we referred to the problems which host countries, especially developing states, encounter in seeking to obtain information with respect to the anti-competitive practices of these enterprises due to their transnational nature. We also dealt with the issues arising out of the jurisdictional restriction of home country restrictive business practices legislation to those practices only which have or are likely to have a direct and substantial effect on domestic trade or commerce. Since over one hundred developing countries have not yet enacted antitrust legislation, this home country legislative policy means that those restrictive arrangements which affect international trade generally or which only affect third world trade are rarely investigated and prosecuted. We also noted the encouragement given by major western industrialized states to some export cartel arrangements for protectionist reasons even though those arrangements frequently affect third world interests. We concluded that any unilateral attempt by a developing state to control transnational anti-competitive activities which affect its domestic interests may be courting adverse economic repercussions.

In this Chapter, we also discussed the establishment of Bretton Woods financial and trading institutions and the unsuccessful regional and international efforts during the late 1940's and 1950's to formulate international restrictive business practices agreements.

In Chapter Three, we discussed bilateral consultation agreements which were formulated in the post-war era between the United States and some of its major trading partners as these arrangements related to the detection and control of transnational restrictive business practices. We also discussed the co-operation procedures which were adopted during the 1960's and 1970's by the Organization of Economic Co-operation and Development. We concluded that these voluntary procedures have not resolved the diplomatic friction which has been a consequence of the assertion by the United States of its extraterritorial antitrust jurisdiction, nor have they resulted in the co-ordination of national efforts in order to effectively control transnational anti-competitive activities.

In this Chapter, we also mentioned efforts by the European Economic Community and by the Andean Pact to minimize the problem of transnational restrictive arrangements through legally binding treaties. We concluded that these efforts have been successful compared to the previously mentioned bilateral consultation agreements and the OECD co-operation procedures.

We outlined and analyzed the voluntary OECD Guidelines in Chapter Four. Its competition principles generally aim to curtail abuses of a dominant position which have adverse anti-competitive effects in the same market in which the position is held and the abuses take place. We concluded that although enterprises must respect the guidelines even though they are legally non-binding since they are descriptive of proper business ethics, their efficacy is undermined through vague, ambiguous terminology which creates avenues for evasion of their objectives.

In our Fifth Chapter, we examined the post-war international economic order as it relates to third world development. We concluded that the international trading and financial institutions which were established in the post-1945 era have considerably disregarded the specific needs of developing countries and have primarily enhanced western developed world interests. We discussed the call by the Third World during the 1970's for changes in the international economic order, including calls for more effective host country regulation and supervision of transnational enterprises. We examined and analyzed the legal and practical effects of the adoption by the United

Nations' General Assembly in 1974 of the Declaration and the Programme of Action on the New International Economic Order as well as of the Charter of Economic Rights and Duties of States. These non-binding documents seek to give developing nations more effective control over their own destiny, to stimulate their increased economic growth and to expand their share of global trade. However, major western industrialized states disapprove of primary tenets outlined in these resolutions and have not yet accepted the broader implications of a New International Economic Order. Consequently, there has as yet been no practical implementation of fundamental new order concepts, although they continue to provide primary evidence of legal norms which may govern international economic relations sometime in the future.

In Chapters Six and Seven, we outlined and analyzed the non-binding Restrictive Business Practices Code of the United Nations Conference of Trade and Development, which was subsequently adopted as a resolution of the United Nations' General Assembly. The developing nations perceived this adoption as a major event within the context of the new order with respect to the regulation and supervision of transnational enterprises, since effective implementation of the Code would lead to a more equitable international trading environment through improved wherewithal to control transnational anti-competitive arrangements and would facilitate the transfer of vital technology needed for third world development. Although the Code has become a focus for developing states in their search for solutions to their economic problems, some pro-western international norms are also endorsed in the agreement. We concluded that it is unlikely that the adoption of the Code would by itself substantially reduce the prevalence of those restrictive business practices which adversely affect the international trade and development of third world countries. Indeed, these practices are now being increasingly used by some developed nations for protectionist purposes.

Additionally, very limited goals were established by the negotiators of the Code. Its non-binding nature, together with its allowance for exemptions from its ambit, has ultimately restricted the efficacy of the agreement. Imprecise, ill-defined terminology means vague guidelines for enterprises regarding their conduct of anti-competitive arrangements. Its fragile consultation procedure will not resolve the controversy over the application

of extraterritorial antitrust legislation, nor has the question of accessibility by antitrust authorities to pertinent information concerning restrictive arrangements which is in custody of transnational corporate management been ultimately answered.

However, we concluded that the Code will still exert considerable moral and political force and influence on the practices of states and of enterprises in competition policy. Some of its principles, together with those in the OECD Guidelines, may be eventually transformed into customary international law through state practice.

In our concluding Chapter, we recommended that third world countries should mutually co-operate to advance their development, should foster policies of self-reliance, strengthen third world commodity consortia and expand their international trading links. We also recommended that these nations adopt legally binding regional competition and investment treaties which would aim at attaining a common approach by individual member states towards foreign investment. We concluded that effective implementation of these treaties would advance various facets of third world development and would ultimately result in significantly diminutive adverse effects consequent on transnational restrictive business practices within the Third World and in an increase in third world national foreign exchange earnings accruing from international trade.