United Nations Conference on Restrictive Business Practices

Dale A. Oesterle

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UNITED NATIONS CONFERENCE ON RESTRICTIVE BUSINESS PRACTICES

Dale A. Oesterle†

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The United Nations Conference on Restrictive Business Practices (UNCRBP) concluded on April 22, 1980 with the consentient adoption of a resolution approving a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (Agreed Principles and Rules). The endorsed document contains business practice guidelines for businesses engaged in activities that affect international trade and urges nation-states to

1. United Nations Conference on Restrictive Business Practices, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/Conf./10 (1980). The UNCRBP must be distinguished from the Commission on Transnational Corporations, an advisory body to the Economic and Social Council of the United Nations, which is also drafting a code of conduct for transnational corporations. See, e.g., Centre on Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct, U.N. Doc. E/C.10/17 (1976). At the time this Article was written, a United Nations official had announced that the commission was close to agreement on the code of conduct. 331 INT'L TRADE REP. (BNA) (U.S. Export Weekly) C-3 (Nov. 4, 1980) (Sauvant, before the Southeastern Dialogue on the Changing World Economy in Atlanta on October 24, 1980). The official noted that the proposed code recommends that transnational corporations maximize their contributions to the economic and social development of host countries and minimize their negative effects on such development. Id.

2. The term "restrictive business practices" corresponds generally to the American term "antitrust," which has a peculiar historical derivation. The Sherman Act, the primary American antitrust statute, was a reaction to industrial trust agreements that were formed in the 1880s. See generally W. Letvin, Law and Economic Policy in America (1965); H. Thorelli, The Federal Antitrust Policy (1955).
implement the guidelines. The UNCRBP forwarded the agreement to the United Nations General Assembly and recommended that the General Assembly adopt the agreement by resolution at its thirty-fifth session. Since every major international political bloc sent representatives to the UNCRBP and the representatives unanimously approved the Agreed Principles and Rules, the document should gain the endorsement of the General Assembly without modification.

The UNCRBP deserves particular attention because it is the first global negotiation to produce a compact on the control of restrictive business practices since formal international discussions on the issue began over fifty years ago. Moreover, the UNCRBP participants compounded their surprise by producing a lengthy and intricate text despite their strikingly diverse political philosophies. This Article investigates the nature, scope, and possible ramifications of this international compact. The Article begins with a brief description of the format and legal nature of the document, and then discusses the pressures that generated it and the directions to enter-


The first formal international discussion on restrictive business practices took place in 1927 when, under the auspices of the League of Nations, the Industrial Committee on the International Economic Conference considered a proposal directed at harmonizing national laws on restrictive business practices. See Oualid, The Social Effects of International Industrial Agreements, League of Nations Doc. C.E.C.P. 94, at 35 (1926). The proposal was rejected on grounds that have plagued subsequent attempts to reach international agreements on the subject: divergent national attitudes on the issue precluded a consensus on common norms, and an internationally imposed code was believed repugnant to national sovereignty. Furnish, supra, at 319-20.
prises and states that it contains. The Article concludes with thoughts on the value of the agreement.

I
AGREED PRINCIPLES AND RULES: FORMAT AND LEGAL NATURE

A. Format of Agreed Principles and Rules

The Agreed Principles and Rules is an unusually wordy restrictive business practices code. The document contains a preamble and seven major sections. Within the sections are forty-seven provisions, several of which have numerous subparts. The document is unlike most national and international restrictive business practices codes which are characteristically brief and general.\(^7\) As noted below, however, the extra language in the Agreed Principles and Rules does not often provide clarity. Rather, the length of the document is a result of delicate political compromises among the widely diverse views of the conference participants.

The preamble and section A set forth the drafters' objectives and intentions. Section B contains definitions of key terms—"restrictive business practices" and "enterprises," for example—and specifies the scope of the document's application. Section C includes a potpourri of general principles that either flavor or limit the document's operative standards. Section D, the most important section of the document, sets out standards for the behavior of commercial enterprises. The core of the section is subsection D(3), which condemns certain business "agreements or arrangements," and subsection D(4), which condemns certain acts of "abuse of a dominant position of market power." The document thus incorporates the general division between agreements in restraint of trade and monopolization contained in sections one and two respectively of the Sherman Act.\(^8\) As noted below, however, the Sherman Act division is not followed rigorously; several actions often dealt with under section one of the Sherman Act, such as vertical agreements, are dealt with under subsection D(4) of the Agreed Principles and Rules. Section E urges states\(^9\) to deter enterprises from engaging in condemned behavior. States are asked to pass and enforce appropriate legisla-

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\(^7\) See generally OECD, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1979).


\(^9\) The Agreed Principles and Rules does not define the term "state." International law is primarily concerned with states that are independent in their external relations.
tion and to exchange relevant information. Section F recommends international action aimed at eliminating the condemned business practices. Finally, section G establishes a permanent United Nations Conference on Trade and Development (UNCTAD) Group of Experts to study and discuss matters relating to the Agreed Principles and Rules.

B. LEGAL NATURE OF AGREED PRINCIPLES AND RULES

The Agreed Principles and Rules addresses language of obligation to both states and enterprises: states and enterprises “should” do or refrain from doing specified activities. The legal nature of these obligations depends on the legal authority of the enacting body, the United Nations General Assembly. Resolutions of the General Assembly do not legally bind member states, nor do they establish international law. Noncompliance is not grounds for a


10. See Agreed Principles and Rules §§ D & E.


12. Under some circumstances, General Assembly resolutions may constitute evidence of general principles of international law or of customary international law. I. BROWNLIE, supra note 11, at 14. Brownlie lists the following as examples of “lawmaking” resolutions: The resolution that affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal; the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes; the Declaration on the Granting of Independence to Colonial Countries and Peoples; the Declaration on Permanent Sovereignty over Natural Resources; and the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space. Id. The contours of the doctrine of international law by assimilation are unsettled, however. See generally A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971). Most theorists require evidence of repeated adherence and of opinio juris, the belief by states that such adherence is required by international law, before a norm is deemed to be customary international law. Id. at 47-72.

Moreover, in some cases, a General Assembly resolution may have the force of international law because it is an authoritative interpretation and application of the principles of the United Nations Charter, which itself has international law status. I. BROWNLIE, supra note 11, at 15. Examples of such resolutions are the Declaration of the Elimination of All Forms of Racial Discrimination and the Declaration of Principles of International Law Concerning Friendly Relations. Id. at 15 n.1.

It is highly unlikely that the Agreed Principles and Rules will acquire international law status. The document is not an authoritative interpretation of language in the United Nations Charter, nor is it probable that members of the General Assembly will vote for the document in the belief that it embodies customary international law. Perhaps, many years hence, if the document’s norms are followed consistently, the document may come to be considered an articulation of customary international law standards. Indeed, one noted international law practitioner believes that the Agreed Principles and Rules may rise quickly to the level of customary international law because of the accelerating pace of international economic relations. Interview with Mr. Daniel J. Plaine (November 20,
claim for reparations or for judicial remedies. Rather, General Assembly resolutions are recommendations.

Stating that a nonbinding resolution does not give rise to legal responsibility, however, is quite different from stating that states are free to act as if there were no such resolution. General Assembly resolutions do exert considerable moral or political force by voicing global beliefs on the propriety of individual and state conduct. Non-conformists risk disapprobation and, in extreme cases, ostracism from the world community. One commentator explained this social pressure as follows:

Various reasons have been advanced to explain why General Assembly recommendations should exert great influence. Emphasis has been placed on the fact that the recommendation represents the will of the majority of nations and is an expression of world opinion. Public opinion, which is thus put forth as a principal force supporting recommendations of the General Assembly, has also been suggested by some as the leading force supporting obligations established by international law. In the marshalling of world opinion recommendations of the Assembly enjoy an advantage because of the opportunity, which is not always available in the sphere of international law, for full publicity and for a recorded vote. The force of a recommendation is not derived from a judgment made in an internal court of conscience, but from a judgment made by an organ of the world community and supported by many of the same considerations which support positive international law. The judgment by the General Assembly as a collective world conscience is itself a force external to the individual conscience of any given state.13

Moreover, those states voting in favor of a resolution containing language of obligation directed at themselves seemingly recognize a commitment, backed by their reputation for integrity, to conform to the understandings of the agreement.14 Such states may view the resolutions as practically controlling even though they reject any international legal responsibility for conforming to them.

This political or moral commitment may stimulate a corroborative internal legislative or administrative response that transforms


the resolutions into a legal form. If states respect their obligations as enumerated in the Agreed Principles and Rules, states will enforce the code through their national legal machinery. Section E of the Agreed Principles and Rules urges states to adopt and enforce legislation to control conduct specifically condemned in sections B and D of the document. The code, therefore, may become legally binding on enterprises because of national legislation enacted and applied in furtherance of the international agreement. The degree of consensus behind a resolution reflects the number of states committed to its tenets and the potency of the pressure that the world community can exert on those states that are hesitant to comply. The particularity of the resolution's directives (also a measure of the consensus behind it) affects whether states can translate the resolution into concrete action (and whether states can monitor each other's actions pursuant to the resolution). Resolutions on commercial matters, such as restrictive business practices, provide the General Assembly with its best opportunities for optimal impact. Commercial resolutions often can gather a larger affirmative vote and be more focused than their political or moral counterparts. Rules for international business transactions often involve less international emotion and less national pride.

The effect of the language of obligation that the Agreed Principles and Rules addresses to commercial enterprises is also complex. Commercial enterprises were not formal parties to the UNCRBP, nor will they be formal parties to the General Assembly resolution. They will have, therefore, no special commitment to the language of the Agreed Principles and Rules. Of course, if states, influenced by their obligations under the agreement, act to regulate commercial enterprises accordingly, then enterprises may find themselves formally bound by the precepts of the document. The General Assembly resolution, even if not reflected in state domestic legislation, however, may still have considerable practical effect on their conduct. First, government negotiators in the UNCRBP indirectly represented enterprises by soliciting and accepting suggestions of

15. Examples of U.N. resolutions whose non-unanimous and partisan nature seriously impaired their potential moral and political force include, inter alia, resolutions condemning American involvement in Indochina and those condemning Israeli occupation of lands formerly held by Arab nations. Other examples are the resolutions espousing the New International Economic Order, discussed in note 43 infra and accompanying text.

businesses identified with national interests. A state could consider businesses that refuse to comply with the results of a negotiation consummated after careful consultation with representatives of domestic industry to be acting in bad faith. Second, good public and governmental relations require that companies act in a manner consistent with an apparent global consensus as to good corporate behavior. International firms are sensitive to public opinion and recognize the benefits of an affirmative public image. A company refusing to comply with the agreement may find it difficult, for example, to obtain diplomatic protection from its home country, insurance for its operations, and financing through international institutions. As these informal penalties cumulate, voluntary business codes may become impossible to ignore "as they are brought through the back door."

Two cases have arisen under the OECD Guidelines for Multinational Enterprises, a voluntary international code analogous to the Agreed Principles and Rules, that suggest that voluntary codes can have a substantial impact on the conduct of transnational firms. In one case, the Belgian government used the OECD Guidelines to demand that the Raytheon Company take steps not required by Belgian law. A Raytheon subsidiary located in Belgium went into bankruptcy, and the assets were insufficient to pay its employees. United States and Belgian law did not require Raytheon to make up the deficiency. The Belgian government, however, relying on the OECD Guidelines, demanded that Raytheon meet the shortfall. Raytheon, concerned with its relations with the Belgian government, agreed to a settlement on the matter that was favorable to the employees. The Belgian government apparently believed that the Guidelines gave its arguments political legitimacy.

I have written to you on several occasions to express certain concerns that the Chamber of Commerce of the United States has had with the proposed drafts of the UNCTAD Principles and Rules on Restrictive Business Practices... I want to commend the U.S. negotiators for their diligent effort to resolve these issues of greatest concern to the U.S. business community. Generally, the final text adequately addresses our reservations which I highlighted in prior correspondence to you on this subject.

Id. at 1.

18. But see INT’L TRADE REP. (BNA) (U.S. Export Weekly) C-4 (Dec. 5, 1980) (remarks of J. Shenk: “[M]any corporations have received adverse publicity on many issues and have not taken their critics seriously.”).


In another case, Danish labor unions used the OECD Guidelines to their advantage in a strike against a local subsidiary of Hertz. Hertz decided to transfer workers from other subsidiaries located elsewhere in Europe to replace the Danish workers. Danish law permits the practice but a paragraph in the OECD Guidelines condemns it. The Danish labor unions used the OECD to fuel their protests. Other European trade unionists joined the fray, and convinced Hertz that the practice should be discontinued and not repeated.22

The Agreed Principles and Rules, therefore, may not be yet another toothless General Assembly pronouncement. The consensus behind the agreement in the UNCRBP suggests that a substantial majority of the members of the General Assembly, from all political blocs, is willing to commit itself to carrying out the document's recommendations.23 The states' interpretations of their obligations are of immediate concern to transnational businesses that may find themselves dealing with national legislation or administrative action undertaken by states in furtherance of the agreement's norms. Moreover, transnational businesses may discover that states and their people will expect such businesses to respect the agreement's proscriptions independent of national legislation.24 International firms may receive criticism from governments, courts, or segments of the public (trade unions, for example) for failing to follow the code, even though it is voluntary.25 A wide range of non-legal but troublesome sanctions could await violators. For example, government pressure could consist of threats of harsh registration, licensing or taxing requirements, or of lax police protection for business personnel or property. At the extreme, violations could provide make-weight justifications for expropriation of property with minimal or no compensation. These potentialities have led one international business expert to fear that the code, although voluntary, will be "bootstrapped" into mandatory requirements for international firms.26 Transnational businesses, therefore, should not underestimate the possible potency of the UNCRBP compact.

22. See id. at 7; Interview with Mr. Daniel J. Plaine (November 29, 1980).
23. Indeed, the General Assembly passed the UNCRBP agreement by a voice vote. See addendum infra.
25. See id.
26. Id. at A-1.
II

PRESSURES FOR AN INTERNATIONAL AGREEMENT ON RESTRICTIVE BUSINESS PRACTICES

International negotiations on a restrictive business practices code have gone through two major stages, each characterized by the identity of the dominant moving parties. In the forties and fifties, the United States, supported by other developed countries, pushed for an international compact on restrictive business practices embodying the American postwar economic philosophy of free trade.\(^{27}\) Twice, international codes were drafted, and each time the United States scuttled the effort in its final stages.\(^{28}\) Thereafter, U.S. enthui-

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\(^{27}\) In 1945, the United States published, with Great Britain as co-sponsor, Proposals for Expansion of World Trade and Employment, Com. Pol'y Ser. 79 (1945). The Proposals contained, \textit{inter alia}, a chapter on restrictive business practices and recommended the formation of an international enforcement organization, the International Trade Organization (ITO). The ITO proposal led to the convening of an international diplomatic conference to discuss possible promulgation. Reduction 1/13 of 18 February 1946, ECOSOC Official Records (1st yr., 1st Sess.) 173 (1946). The conference produced the Havana Charter for an International Trade Organization, \textit{reprinted in} Com. Pol'y Ser. 114 (1948). Article 46 of the Charter included a general statement condemning anticompetitive business practices:

Each member shall take appropriate measures and shall cooperate with the organization 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 . . . .

\textit{Id.} at 86. The article also listed six specific practices that were suspect: fixing sale or lease terms of any product; market division or customer allocation; discrimination against particular enterprises; limiting or fixing production levels; preventing through agreement research and development activities; and unwarranted extension of the use of rights under patents, trademarks or copyrights. \textit{Id.} Although over fifty countries signed the Charter, it was shelved when the United States Department of State, in late 1950, publicly withdrew its request for congressional ratification. Furnish, \textit{supra} note 6, at 326.

In 1951 the State Department resurrected Chapter V of the Havana Charter as an independent issue before the United Nations Economic and Social Council. In response, the Council appointed an \textit{ad hoc} committee of experts to formulate an international system of controls based on the Chapter. The substantive provisions of the Havana Charter were carried over intact into the ECOSOC Draft. Again the United States withdrew its support at the final moment. Although several other nations had filed statements supporting the Draft, they did not push the matter in the ECOSOC when the United States filed adverse comments. Furnish, \textit{supra} note 6, at 327.

Norway, Sweden and Denmark later urged the GATT contracting parties to adopt the ECOSOC Draft. \textit{See generally} GATT Doc. L/283 (1954). The contracting parties, after five years of study, adopted only a noncommittal resolution, however. Members were encouraged to consult privately on the harmful effects of any restrictive business practices to which they or their nationals were parties. After the discussions, states were instructed to submit reports to the GATT Secretariat. \textit{See generally} \textit{General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents} 170-79 (9th Supp. 1961).

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\(^{28}\) It has been argued that Congress rejected the Havana Charter because of its controversial provisions on commodity stabilization agreements and world-wide full employment, rather than because of its restrictive business practice provisions. \textit{See, e.g.,}
siasm on the matter waned. The second stage took place in the seventies, when the developing countries renewed the negotiations. Their aims, however, were far different from those of the developed countries in the earlier negotiations. The developing countries viewed an international code on restrictive business practices as a weapon for accomplishing a redistribution of wealth from developed to developing countries. The developed countries participated conservatively in the second stage negotiations and continued to insist that an international code embody free trade principles. The second stage produced the UNCRBP agreement. The Agreed Principles and Rules cannot be understood without reference to the milieu of the negotiations.

A United Nations General Assembly resolution of December 20, 1978 'convened the UNCRBP. The resolution asked the UNCRBP to negotiate "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." By the time of the promulgation of the resolution, three successive Groups of Experts appointed by the UNCTAD Secretariat had undertaken preliminary work on a restrictive business practices code. The Groups of Experts published reports on each

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30. Id.


of their sessions containing the text of language proposed by various participants, agreements thereon, and extracts of opening and closing comments from the participants. These reports provide evidence of the ratio legis of the code.

The General Assembly resolution establishing the Conference was passed after the Third Ad Hoc Group of Experts had held its fifth session. The participants had negotiated the essential structure and most of the provisions of an Agreed Principles and Rules, although substantial disagreement over various provisions remained. The experts were at loggerheads over, inter alia, preferential treatment for the enterprises of developing countries, the applicability of the rules to intra-enterprise transactions, the legal nature of the rules, and specific exceptions to the rules. In preparation for the UNCRBP, the Group of Experts met again in a sixth session to clarify the areas of disagreement. The UNCRBP took place in Geneva in two sessions, November 19-December 8, 1979 and April 8-22, 1980. Its participants resolved successfully all dis-
putes over language in the Group of Experts’ final draft.

At the UNCRBP and in the UNCTAD Groups of Experts, a substantial majority of the world’s states were officially represented by three major political blocs of countries known in UNCTAD as Group B, Group D, and the Group of 77. Group B is composed of industrially developed countries of the West, all of which have market economies. Group D is composed of the countries of Eastern Europe (except Yugoslavia and Rumania, which have joined the Group of 77) and the Soviet Union. The Group of 77 actually consists of approximately one hundred and twenty developing countries, the bulk of which are in Africa, Latin America, and Southern Asia. For the most part, these blocs of countries negotiated as discrete units. The members of each bloc met first to formulate a common position and then designated representatives to meet with representatives of the other blocs.

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36. See, e.g., Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Sixth Session, supra note 34, at 35. See also Davidow, supra note 5, at 7.

Eighty-eight countries, six international agencies, nine intergovernmental organizations and ten non-governmental international organizations sent delegates to UNCRBP. U.N. Doc. TD/RBP/Conf./11, paras. (x)-(xiv) (1980); U.N. Doc. TD/RBP/Conf./Inf. 1 and 2 (1980).

37. Interviews with Mr. Joel Davidow, Director of Office of Policy Planning, Antitrust Division, Department of Justice; Member of United States Delegation to UNCRBP (Aug. 13 & 27, 1980).

38. Id.


40. The merits of the group decision-making system in UNCTAD have been questioned. R. Rothstein, supra note 39, at 194-202; Wex, A Code of Conduct on Restrictive Business Practices: A Third Option, 15 CAN. Y.B. INT’L L. 198, 204-05 (1977); Gossvic, UNCTAD: North-South Encounter, 568 INT’L CONCILIATION 21 (1968). The system is cumbersome and complex. Each group or subgroup (there are three regional blocks in the Group of 77, for example) negotiates a common position. Representatives of each group then negotiate a common intergroup position in “contact group” sessions. There is very little contact between members of different groups outside the “contact groups”; the structure is rigidly pyramidal. Since Group B and the Group of 77 contain a coalition of interests that often diverge on particulars, the intragroup settlements are fragile and typically permit little compromise in intergroup negotiations. Id. The flexibility displayed by the Group of 77 in the intergroup negotiation at UNCRBP is therefore unusual.

For an example of an occasional exception to the unit bargaining process in the UNCTAD discussions on restrictive business practices, however, see Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Fourth Session, U.N.
The Group of 77 (supported by Group D) and Group B began the UNCRBP negotiations with widely differing views of the appropriate function of an international compact on restrictive business practices. The Group of 77 was intent on promulgating a code to enable its constituents to garner a larger share of the fruits of international trade; its goals were intensely self-serving. Conversely, Group B sought to increase global allocative and distributive efficiency by perfecting the international competitive process (whether the Group B goal is, in essence, selfish or virtuous may be debatable, but the debate is beyond the scope of this Article). The efficacy of the UNCRBP depends on whether the participants successfully integrated these diverse goals and, if so, on whether the language of the agreement accurately embodies whatever common denominator exists.

A. The Developing Countries

At the UNCRBP, the Group of 77 pursued a restrictive business practices code that would further its program for a "New International Economic Order" (New Order). At its core, the New Order

Doc. TD/B/C.2/AD.6/13, at 24 n.10 (1978) (proposal from "an expert from a socialist country of Eastern Europe").


42. Those arguing that Group B goals are self-effacing claim the following: An international competitive market system is in everyone's interest because such a system allocates scarce resources so as to maximize the satisfaction of everyone's personal wants. Moreover, a free trade system provides freedom of opportunity to individuals, who are limited only by their own skill and resourcefulness. Opponents argue that Group B goals are self-serving because Group B recognizes that its enterprises will dominate and plunder in a competitive system.


In the United Nations Resolution on Development and International Economic Cooperation, supra, it is urged that "[r]estrictive business practices adversely affecting interna-
is a demand for a redistribution of the world's wealth in favor of the developing countries. The goals of the program include: the enhancement of control by developing countries over their own economies; the encouragement of indigenous economic development in developing countries; the development of an international system of assistance to developing countries; and preferential treatment for developing countries in matters concerning international trade. New Order documents are infused with declarations of rights of developing countries and corresponding duties owed such countries by the developed countries. The New Order even includes a demand for "reparations" to states that are or have been "foreign-dominated."

An important feature of the New Order is an effort by its adherents to wrestle economic power from transnational corporations. Such corporations are composed of a parent company, traditionally based in a developed country, and one or more subsidiaries in other countries. Transnational corporations tend to be large, able to shift capital and resources rapidly, and technologically sophisticated.

44. Sauvant, supra note 43, at 10.

A demand for "preferential and nonreciprocal treatment for developing countries, whenever feasible, in all fields of international cooperation whenever possible" is contained in the Declaration on Establishment of a New International Economic Order, supra note 43, para. 3(n), in Programme of Action on the Establishment of a New International Economic Order, supra note 43, para. 3(b), and in the Charter of Economic Rights and Duties of States, supra note 43, art. 19. Called the "principle of compensatory inequality," the demand is based on (i) the notion that undeveloped states are so far "behind" developed states that rules must discriminate in favor of undeveloped states if they are to catch up, and (ii) the notion that preferential treatment is compensation for the past exploitation of the third world by developed countries. Fatouros, The International Law of the New International Economic Order: Problems and Challenges for the United States, 17 Willamette L. Rev. 93, 100 (1980). The arguments are similar to those that advocates use to justify affirmative action programs in American law. Id.

46. See generally documents cited in note 43 supra.
47. Gwin, supra note 43, at 100.
49. R. Vernon, Sovereignty at Bay 4 (1971); Vagts, The Multinational Enterprise: A New Challenge for Transnational Law, 83 Harv. L. Rev. 739 (1970). The definition of transnational corporation is the subject of a continuing debate. Participants disagree over requirements of geographic spread, organizational ties between units, size, marginal structure, and ownership patterns. See Ahorsni, On the Definitions of the Multinational Corporation, 11 Q. Rev. Econ. & Bus. 27 (1972); Hadari, The Structure of the Private Multinational Enterprise, 71 Mich. L. Rev. 729 (1973). The United Nations has had difficulty settling on the proper terminology; it has referred successively to these entities...
Third world leaders publicly justify\(^5\) their offensive against transnationals by asserting that the corporations rapaciously extract wealth from developing nations by underpaying for commodities and labor and by overcharging for their products;\(^5\) that the corporations exert excessive economic control over the affairs of developing nations;\(^5\) that the corporations perpetuate the industrial underdevelopment of

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as multinational corporations, multinational enterprises and now transnational corporations. Davidow & Chiles, *supra* note 16, at 248 n.6. The terminology shift reflects the belief of the socialist and developing countries that the term “transnational corporations” emphasizes the transnational character of corporate activities and control as opposed to the international character of the capital structure of the corporations. There are only a few corporations with multinational capital structures. Hvoinek, *Critique: Transnational Corporations in World Development*, 1 CTC Rep. (United Nations Centre on Transnational Corporations) 36 (No. 8, 1980). Ironically, the developing countries are distastefully discovering that the broadened term arguably includes thousands of intermediate and small firms of their own operating abroad, and the socialist countries are discovering that the broadened term can include their foreign trade organizations which have representative offices abroad. *Id.* The Soviet Union argues that to include foreign trade organizations of the socialist countries is a “de-politization” of the term transnational corporation and “misleads the whole process of setting up effective international measures to control [transnational corporations]. This approach is an attempt to put on an equal footing the private exploitative monopolistic form of foreign operations and its socialist alternative, based on public ownership, equality and mutual benefit.” *Id.*

The existence of such entities is a relatively recent phenomenon. Most formed after World War II in response to the liberalized world trade facilitated by the Bretton Woods institutions and to the growth of rapid communications technology. D. Wallace, *International Regulation of Multinational Corporations* 35-72 (1976).

50. The true reasons for the political offensive against transnationals (some of which are not often publicly aired by those who are motivated by them) are more multifaceted. Professor Vernon states:

Multinational enterprises . . . have served as unwitting and unwilling lightning rods for a number of quite different forces in the developing countries. Their presence has drawn the hostility of those eager to develop a strong national identity free of outside influence, those repelled by the costs of industrialization, those at war with capitalism as a system, and those distrustful of the politics of the rich industrialized states, especially the United States.


51. Henari Boumediene of Algeria, President of the Non-Aligned Countries, opened the Sixth Special Session of the U.N. General Assembly with the following remarks:


52. Coonrod, *supra* note 50, at 278.
the third world through a global division of labor and technology;\textsuperscript{53} that the corporations pursue management strategies designed to maximize their profits at the expense of national goals of the developing countries;\textsuperscript{54} and that the corporations serve as conduits for the foreign and economic policies of the corporate parent's host country.\textsuperscript{55} Each of these claims is grounded on the ability of transnational corporations to exploit positions of market power in domestic markets, power typically generated through their control over advanced technology, their sophisticated managerial skills and financial resources, and their ability to take advantage of economies of scale.\textsuperscript{56}

Developing countries could simply prohibit transnational corporations from operating or otherwise investing within their boundaries (and this is done in many countries in certain industries),\textsuperscript{57} but developing countries generally recognize the need for foreign investment to foster economic development.\textsuperscript{58} Accordingly, developing countries continue to solicit, and even demand, foreign investment but, at the same time, seek to strengthen their control over business conduct affecting their domestic economies.\textsuperscript{59} According to the Group of 77, a code of restrictive business practices should apply only to restrict Western industry and should exempt industry of the Group of 77. In addition, New Order adherents seek to prohibit Western transnational corporations from engaging in business practices that lessen the export potential, purchasing freedom, or technological progress of industries of developing nations.\textsuperscript{60} Injury to the industry of developing nations, not injury to the competitive structure of an international or domestic market, is their criterion for relief. It was clear from the outset, therefore, that the Group of 77 did not consider the proper purpose of the code to be the preserva-

\textsuperscript{53} Id. at 278-85; R. VERNON, supra note 50, at ch. 7. The claim that transnational corporations have a negative economic impact has not been substantiated, however. Id.\textsuperscript{54} Vagts, supra note 49, at 756-77; R. VERNON, supra note 50, at ch. 7.\textsuperscript{55} Coonrod, supra note 50, at 282; R. VERNON, supra note 50, at ch. 7.\textsuperscript{56} H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1178 (2d ed. 1977). Allegiances may shift from home countries to host countries, however, due to overriding corporate interests. See, e.g., A. SAMPSON, SEVEN SISTERS 297-538 (1975).\textsuperscript{57} Many countries protect their financial institutions and communications industries from foreign investment. Transportation and defense-related industries are also often protected from foreign investment. Sauvant, supra note 48, at 361.\textsuperscript{58} R. VERNON, supra note 50, at 159-61, 210; Vagts, supra note 49, at 759-60.\textsuperscript{59} Report of the Second \textit{Ad Hoc} Group of Experts on Restrictive Business Practices, \textit{supra} note 31, at 35. \textit{See also} Report of Third \textit{Ad Hoc} Group of Experts on Restrictive Business Practices in its First Session, Proposal Submitted on Behalf of the Group of 77, U.N. Doc. No. TD/B/C.2/AC.6/4, Annex I (1979).\textsuperscript{60} Davidow, \textit{International Antitrust Codes and Multinational Enterprises}, 2 \textit{LOY. L.A. INT'L & COMP. L. ANN.} 17, 21 (1979).
tion and promotion of international competition.\textsuperscript{61}

The resort of developing countries to international negotiations on restrictive business practices reflects their perception that individual states are relatively powerless against transnational corporations.\textsuperscript{62} The territorial bounds of enforcement jurisdiction limit a state's ability to gather information about business practices that originate with decisions in headquarters or major offices of transnational corporations located elsewhere.\textsuperscript{63} Moreover, individual states fear that transnational corporations will relocate in states that take a more benign view toward business practices.\textsuperscript{64} Finally, most developing states do not have the expertise and resources to draft appropriate national legislation or to enforce such legislation if promulgated.\textsuperscript{65}

Third world leaders have adopted, therefore, international strategies. First, they seek to encourage, and even require, uniform legislation in developing states regulating restrictive business practices.\textsuperscript{66} It is believed that this would prevent transnational corporations from taking advantage of their international mobility by playing one state off against another.\textsuperscript{67} Second, third world leaders seek to require that developed countries aid in the control of transnational corporations for the benefit of developing countries.\textsuperscript{68} Developed countries, it is argued, should compel transnational corporations to provide developing countries with requested information. Furthermore,

\begin{itemize}
\item \textsuperscript{61} Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices, supra note 31, at 4.
\item \textsuperscript{62} See id. at 7.
\item \textsuperscript{63} Report of the Group of Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations, U.N. Doc. E/5500/Rev. 1, ST/ES4/6, at 53 (1974). The Group noted that making information available to host countries could "well be a most important first step in assisting developing countries in their dealings with multinational corporations." \textit{Id.}
\item \textsuperscript{64} Coonrod, supra note 50, at 280; Davidow & Chiles, supra note 16, at 257.
\item \textsuperscript{65} Report of Second Ad Hoc Group of Experts, supra note 31, at 7-8.
\item \textsuperscript{66} 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.6/6, at 8 (1977).
\item \textsuperscript{67} A third alternative, the creation of a supranational enforcement organization, has not been pursued. Davidow & Chiles, supra note 16, at 258. Davidow & Chiles attribute this to the developing countries' "glorification of nationalism and their fear and rejection of laws or law enforcement lying outside of national control." \textit{Id.}
\item \textsuperscript{68} See authorities cited in note 64 supra.
\end{itemize}
developed countries should themselves accept the burden of policing business practices of transnational corporations, even if the practices in issue have no adverse effect on developed country markets. At a minimum, third world leaders demand that the restrictive business practice laws applied by developed countries to conduct adversely affecting their own economies be applied with equal force to conduct affecting the economies of developing states.69

In accordance with these goals, the Group of 77's initial draft of the Agreed Principles and Rules included nonreciprocal proscriptions; it condemned only practices adjudged to affect adversely "the trade and development of developing countries."70 The draft incorporated a partial list of condemned practices, but the general definition was open-ended71 and to be read in accordance with, among others, the following objectives:

(a) To increase the share of developing countries in world trade, in particular through an expansion and diversification in their exports of manufactures;
   
   * * *

(c) To maximize the benefits and to minimize the disadvantages to trade and development deriving from the operations of transnational corporations so as to ensure that they may make a positive contribution to the trade and development of developing countries;
   
   * * *

(e) To strengthen the participation of national enterprises of developing countries in their imports and exports of manufactures and semi-manufactures with a view to the improvement of countervailing power in world trade and industrialization, and especially to that of the transnational corporation.72

The draft demanded that all governments "ensure that enterprises . . . refrain from the use of such practices," and asked UNCTAD to monitor national enforcement efforts and settle disputes.73 It also obligated governments to require enterprises to gather and submit business data on production, customs, prices and internal accounting practices, and to transmit such data to other interested governments.

70. Id. at 35.
71. Id. at 37. The "illustrative list" included practices commonly prohibited in Group B countries, such as price-fixing, boycotts, market or customer allocation by quota as to sales and production, exclusive dealing and so forth. The list also included, however, restraints on transactions between parent and subsidiary corporations that are not found in the antitrust codes of Group B countries. Id. paras. (g)-(j), at 37. See also U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 25-26 (1977).
72. Report of the Second Ad Hoc Group of Experts on Restrictive Business Practices, supra note 31, paras. 74(a)(i)-(v), at 37. Governments of developed market-economy countries were also admonished to refrain from encouraging business practices abroad that were considered domestically unacceptable. Id. para. 74(i), at 43.
73. Id. paras. 74(h) & (i), at 37-38.
B. THE DEVELOPED COUNTRIES

Developed countries view the control of restrictive business practices as a means of maintaining and promoting market competition. They therefore define restrictive business practices as those practices that interfere with the efficient use and allocation of economic resources by distorting the competitive process. Developed countries view a restrictive business practices code as a neutral set of rules for participants in the competitive process; such a code should not protect the interests of a few select combatants. Moreover,}


75. Secretary of State Henry Kissinger announced the current position of the United States on an international restrictive business practices code at the Seventh Special Session of the U.N. in 1975. The Secretary implied that the competition-oriented principles behind United States legislation should also define any international antitrust code when he noted that the United States “has long been vigilant” against business practices that set prices or restrain supplies and that the United States “stand[s] by the same principles internationally.” H. Kissinger, Global Consensus and Economic Development (address read by D.P. Moynihan, U.S. Representative to the United Nations, before U.N. General Assembly, Sept. 1, 1975), reprinted in 73 DEP’T STATE BULL. 425, 433 (1975) [hereinafter cited as Speech of Secretary Kissinger].

Secretary Kissinger’s statement represented a marked policy shift toward the New Order. In 1974, the United States refused to participate in preparations for the Sixth Special Session of the U.N., labelling the New Order a product of the “tyranny of the majority.” See Davidow, supra note 5, at 37. In his 1975 statement, however, the Secretary called on the world to “put aside the sterile debate over whether a new economic order is required or whether the old economic order is adequate.” Speech of Secretary Kissinger, supra, 73 DEP’T STATE BULL. at 426. See also Statement of Secretary of State Cyrus Vance of May 30, 1977, before the Conference on International Economic Cooperation and Development, reprinted in 76 DEP’T STATE BULL. 645 (1977) (United States policy is “to build a new international economic system”). Without agreeing to the basic goals of the New Order, therefore, the United States has indicated its willingness to discuss specific economic issues.

While explanations for this shift from confrontation to conciliation are diverse, most commentators agree that the position recognizes that a “divide and conquer” approach to third world solidarity will fail. See Gwin, supra note 43, at 106-14. Perhaps the United States believes that third world leaders, if invited to offer particularized and workable proposals on international economic problems, will find it difficult to continue to rely on general ideological rhetoric. The willingness of the United States to confer on these issues continues to date, and may serve to rebut the third world contention that the United States is insensitive to the problems of poorer nations.

76. Secretary Kissinger stated that the standards should be “balanced” and “fair”:

Host governments in turn must treat transnational enterprises equitably, without discrimination among them, and in accordance with international law.

Principles established for transnational enterprises should apply equally to domestic enterprises, where relevant. Standards should be addressed not only to privately owned corporations, but also to state-owned and mixed transnational enterprises, which are increasingly important in the world economy.

Speech of Secretary Kissinger, supra note 75, 73 DEP’T STATE BULL. at 433.

The Secretary implied a quid pro quo for any American agreement to an international code: respect by all states for the private ownership and contract rights of transnational
developed countries enthusiastically hail transnational corporations as "the most effective engines" of global development. They believe that the corporations, as participants in the international competitive struggle, act as efficient allocators of global resources, as a force for increased global economic integration, and even as an effective equalizer of international income, transferring capital and technology to developing countries.

The wealth readjustment approach of the New Order is antithetical to this efficiency-based theory. Accordingly, the initial response of the developed countries to New Order initiatives on an international code for controlling restrictive business practices was guarded. The original position of the Group B countries is contained in two documents, a Group B proposal submitted to the Second Ad Hoc Group of UNCTAD Experts and voluntary guidelines formulated under the auspices of the Organization for Economic Cooperation and Development (OECD). The UNCTAD Group B proposal recognized "that there might be a number of voluntary principles concerning remedies at the national and international level which might be of value and multilaterally acceptable."

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The Group B countries urged that the code be voluntary, because the

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77. Secretary Kissinger has stated that transnational corporations "may well be one of the most effective engines of development. . . . [They] have been powerful instruments of modernization . . . in the developing countries, where there is often no substitute for their ability to marshal capital, management skills, technology and initiative." Id., 73 DEP'T STATE BULL. at 432.

78. Coonrod, supra note 50, at 285-86. See also Ball, Cosmocorp: The Importance of Being Stateless, 2 COLUM. J. WORLD BUS. 25, 28 (1967). Those who place extreme confidence in transnational corporations view national sovereignty as an obstacle to their full efficiency and argue that the world should remove national incorporation restrictions. Id. at 28-29.

79. Only through an argument based on the questionable infant industry exception can one claim the two theories are consistent. Cf. III P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 912b-912c (1978 & Supp. 1980).


81. OECD, Guidelines for Multinational Enterprises, OECD Doc. 21 (76)04/1, Annex (1976), reprinted in 75 DEP'T STATE BULL. 84 (1976) [hereinafter cited as OECD Guidelines]. See Davidow, Some Reflections on the OECD Competition Guidelines, 22 ANTITRUST BULL. 441 (1977); Hawk, The OECD Guidelines for Multinational Enterprises: Competition, 46 FORDHAM L. REV. 241 (1977). The OECD has 24 member nations: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, and West Germany. Id. at 243 n.11.

alternatives—a treaty creating an international court to enforce the
code or a treaty binding states to enact the code into national legisla-
tion—were impractical. The Group B spokesmen justified the posi-
tion in the Group of Experts as follows:

In the foreseeable future, national or regional law, as perhaps guided by
model laws, would be the most appropriate instrument for the enforcement
of binding rules on enterprises. The experts also stressed that there existed
no worldwide international machinery for the enforcement and interpreta-
tion of any conceivable worldwide restrictive business practice rules, and lit-
tle likelihood, given the wide divergence in national objectives, attitudes and
experience in this field, that countries would be prepared to create and accept
binding international enforcement and adjudication. It was believed that
any attempt to enforce general principles for enterprises separately in each
nation would lead to wide variations in interpretation, procedures and san-
cctions, and that this would be unfair and inequitable, would create an unsta-
able and unpredictable atmosphere in which enterprises would be forced to
operate, and exacerbate conflicts among nations.\(^8\)

This is a far cry from the United States proposals of 1945.\(^8\)\(^4\) In 1945,
the United States urged the establishment of an international organi-
zation (the ITO) that could hear complaints from states or private
parties. An ITO decision would have bound states to “take action”
against duly declared harmful restraints.\(^8\)\(^5\)

The Group B UNCTAD proposal suggested only that an inter-
national agreement recommend that states “strengthen, adopt or
seriously consider adopting legislation” based “primarily on the
principles of avoiding monopoly or its abuse and preventing undue
restraints on competition.”\(^8\)\(^6\) States were encouraged to interpret
and implement such legislation “by means of legal procedures ensur-
ing fair and factual determination of the issues, treating enterprises
equitably and without differentiation based on foreign origin or con-
trol.”\(^8\)\(^7\) The proposal referred to the same list of condemned busi-
ness practices that the Group of 77 had incorporated in its
preliminary proposal, but impliedly condemned only those practices
that tended to interfere with the efficient use of economic
resources.\(^8\)\(^8\) The Group B proposal gave maximum leeway to
national prerogative, by excepting “practices that are generally or
specifically accepted under applicable national or international
law.”\(^8\)\(^9\) Finally, the proposal urged states to cooperate in making

\(^8\)\(^3\) \textit{Id.} at 33.
\(^8\)\(^4\) \textit{See} Suggested Charter for an International Organization of The United Nations,
art. 37(5), Dep't State Publ. 2927, \textit{Com. Pol'y Ser.} 106 (1947).
\(^8\)\(^5\) \textit{Id.}
\(^8\)\(^6\) \textit{See} Report of the Second \textit{Ad Hoc} Group of Experts on Restrictive Business
Practices, \textit{supra} note 31, paras. 73(d)(i) & (d)(ii).
\(^8\)\(^7\) \textit{Id.} at 33-34.
\(^8\)\(^8\) \textit{See id.} at 32-33.
\(^8\)\(^9\) \textit{Id.} at 34.
"general information" available to other states.\textsuperscript{90}  

The Group B countries negotiated the OECD Guidelines\textsuperscript{91} as a prelude to UNCRBP, and offered them as a model for any international compact.\textsuperscript{92} The OECD Guidelines focus on competitive effect: the Guidelines condemn monopolization,\textsuperscript{93} trade restrictions\textsuperscript{94} and, in certain cases, participation in cartels or restrictive agreements.\textsuperscript{95} The Guidelines ask enterprises to publish regularly financial statements providing countries with details on company structure, sales, capital investments, financing, research and development, accounting policies, and "policies followed in respect of intra-group pricing."\textsuperscript{96}  

The OECD Guidelines call for review and consultation procedures to help implement the code.\textsuperscript{97} A Committee on International Investment and Multinational Enterprises is established to "hold an exchange of views on matters relating to the guidelines" and report to the Council.\textsuperscript{98} Business and organized labor are represented in the discussions through the Business and Industry Advisory Committee and the Trade Union Advisory Committee, respectively.\textsuperscript{99} Individual businesses may be invited to participate in the discussions, but the Guidelines admonish the Committee to "not reach

\textsuperscript{90} Id.  
\textsuperscript{91} OECD Guidelines, note 81 supra.  
\textsuperscript{92} Davidow, supra note 5, at 15.  
\textsuperscript{93} OECD Guidelines, supra note 81, at 86.  
\textsuperscript{94} Id.  
\textsuperscript{95} Id.  
\textsuperscript{96} Id.  
\textsuperscript{97} Decision of the Council on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises, \textit{reprinted in} 75 \textsc{Dept State Bull.} 87 (1976). In 1978 and 1980, the OECD Council issued further recommendations to member states. See Davidow, Extraterritorial Antitrust: An American View 1-2 (\textsc{Dept Justice}, March 12, 1981) (copy of speech on file at \textit{Cornell International Law Journal}). The recommendations urge member states to enforce prohibitions on restrictive business practices and to consult and cooperate with each other on national prosecutions. \textit{Id.}  

The first major OECD resolution in the restrictive business practices area was promulgated in 1967. The members agreed to cooperate through joint notification of investigations and proceedings that affect each other’s interests. See Recommendation of the Council of OECD Concerning Co-Operation Between Member Countries on Restrictive Business Practices Affecting International Trade, \textit{reprinted in} 13 \textsc{Antitrust Bull.} 370 (1698). Since 1973, the OECD has provided a voluntary conciliation procedure, under which restrictive business practice experts from other countries attempt to find mutually agreeable solutions to problems occasioned by practices originating in one country and adversely affecting the interests of another. Recommendation of the Council (OECD) Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, \textit{reprinted in} 19 \textsc{Antitrust Bull.} 283 (1974). The procedure has never been used, probably because of the member states’ reluctance to permit an international tribunal to judge their antitrust policies. See Davidow, supra, at 28.  
\textsuperscript{98} Id. para. 1, 75 \textsc{Dept State Bull.} at 87.  
\textsuperscript{99} Id. para. 2, 75 \textsc{Dept State Bull.} at 87.
conclusions on the conduct of individual enterprises.”

In sum, the goals of Group B at UNCRBP were very limited. Group B “believed that voluntary principles could help to harmonize international opinion about restrictive business practices, shape the general behavior of most enterprises, and facilitate international co-operation.” According to Group B, harmonized international opinion could ease international tensions over the application of national antitrust law to foreign concerns or foreign acts. United States antitrust laws, for example, penalize actions abroad that affect adversely American domestic commerce. Americans are thus prevented from using foreign jurisdictions as a haven for agreements that flout domestic antitrust laws, and Americans and foreign nationals are prevented from acting to deprive United States consumers of the benefits of competition among importers or among domestic and foreign sources of supply. Foreign governments have reacted to suits against their nationals with diplomatic protests and legislation blocking the access of American courts to foreign documents. Moreover, in extreme cases, foreign courts have blocked the enforcement of American antitrust decrees. An international antitrust code could eliminate some of these tensions of unilateralism by harmonizing international antitrust standards. Foreign states will understand, respect and even aid the efforts of their compeers to regulate activity affecting domestic markets, and

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100. Id. para. 3, 75 Dep't State Bull. at 87.
102. See Davidow, supra note 34, at 587-88.
103. See, Address of J. Shenefield, Assistant Attorney, Antitrust Division (Aug. 9, 1978), reprinted in 1978 TRADE REG. REP. (CCH) ¶ 9150.
104. Id.
105. The United Kingdom, for example, enacted legislation in 1980 in response to U.S. antitrust prosecutions of U.K. nationals in the uranium and shipping industries. The U.K. law establishes machinery to prohibit citizens from complying with requests for documents situated in the U.K. if the legal proceeding in the United States is concerned with possible violations of antitrust law. Furthermore, the law establishes a cause of action in U.K. courts for nationals to recover two-thirds of any treble damage award suffered at the hands of specified antitrust plaintiffs in United States courts. See The Protection of Trading Interests Act, 1980, c. 11, reprinted in 959 ANTITRUST & TRADE REG. REP. (BNA) F-1 to F-2 (Apr. 10, 1980). See generally Flexner, Foreign Discovery and U.S. Antitrust Policy—The Conflict Resolving Mechanisms, 12 VAND. J. TRANSNAT'L L. 315 (1979); Note, Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation, 88 YALE L.J. 612 (1979). See also Stanford, The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad, 11 CORNELL INT'L L.J. 195 (1978). France was the most recent addition to the list of at least twenty countries that have promulgated statutes of this type. See notes 245-49 infra and accompanying text.
will expect the same treatment in return. Of course, even harmonized standards will not eliminate distrust of the fairness of foreign tribunals. Moreover, the reason that Group B countries reject a treaty binding states to enforce internationally agreed principles—the lack of a workable consensus on a restrictive business practices approach—also raises substantial doubt over whether a voluntary code will coalesce international views enough to lessen significantly the tensions created by unilateral enforcement.

Less frequently argued, but also plausible as a Group B goal, is the notion that a voluntary international code, if based on principles of competition, could shape enterprise behavior to maximize global allocative efficiency and, thereby, enhance global wealth. Increased global efficiency could have beneficial effects in American markets. For example, a price-fixing agreement between industries in countries $A$ and $B$, raising the price of goods to a country $C$ purchaser, which sells products incorporating the goods to the United States, is not within the cognizance of American courts, even though the agreement may affect American commerce. The code could, by influencing the behavior of the offending industries directly, or by influencing the governments in $A$, $B$, or $C$ to adopt and enforce legislation prohibiting price-fixing, aid indirectly United States consumers. Moreover, foreign countries with increased wealth (because of their increased efficiency in allocating their resources) could provide the United States with economic benefits through augmented international trade opportunities, and with political benefits, through the easing of tensions caused by large disparities in economic status among states. Again, however, those potential benefits depend on the fidelity of states to the competitive principles behind the code, a fidelity found only in Western states.

An international antitrust code could provide more tangible benefits to the Group B countries if it contained restrictions, even if voluntary, on state sponsored commodity cartels such as the Organization of Petroleum Exporting Countries (OPEC), the International Bauxite Association, and the Association of Iron Ore Exporting

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109. A more callous version of the goal would hold that the United States should push free trade principles because United States corporations can best exploit such a milieu; United States corporations will be the largest and most powerful forces in such an international market. The recent success of Japanese and West German industries appears to put the premise of the goal in jeopardy, however. Moreover, even if the United States representatives in UNCTAD and UNCRBP held such a view, it is unlikely that they would have publicly acknowledged it.
Countries.\textsuperscript{110} State sponsored cartels are generally beyond the reach of United States antitrust legislation.\textsuperscript{111} In 1945, the United States and over fifty other states were willing to speak directly on state sponsored restrictive business practices,\textsuperscript{112} but no similar willingness exists today. The developing countries claim, as a basic New Order principle, a "right to associate in organizations of primary commodity producers in order to develop their national economies."\textsuperscript{113} They consider commodity cartels as necessary countervailing forces to transnational corporations. Moreover, a restriction aimed at limiting sovereign prerogatives in this area is a two-edged sword.\textsuperscript{114} It would affect legislation in Group B countries, such as the Webb-Pomerene Export Trade Act in the United States, that permit export agreements among nationals.\textsuperscript{115} In addition, the belief commonly held in the United States that the New Order advocates are using the United States alternately as a punching-bag and a lunch-line instills a general reluctance in the United States to surrender any sovereign prerogatives in response to New Order program demands.\textsuperscript{116} Americans retain a deep suspicion that other states do not fully abide by neutral free trade principles and thus are tempted to favor their own enterprises facing foreign challenges.\textsuperscript{117} Consequently,

\textsuperscript{110} See Sauvant, supra note 48, at 368-82.


\textsuperscript{112} The Havana Charter allowed exceptions to its Chapter V restrictive business practice prohibitions only if essential national security interests were at stake. Havana Charter, supra note 27, art. 99.

\textsuperscript{113} Charter of Economic Rights and Duties, supra note 43, art. 5.

\textsuperscript{114} For example, an early draft of the Agreed Principles and Rules contained a provision directing nations to refrain from "fostering" the participation of enterprises in cartels. The Group of 77 wanted the provision to be directed solely at developed countries. Group B argued that the provision should condemn participation in international cartels as opposed to national cartels. Both the Group of 77 and Group D insisted that national as well as international cartels be included. See Davidow, supra note 34, at 595-96. The provision was dropped altogether from the final version.


\textsuperscript{116} Vernon, supra note 50, at 206-07.

\textsuperscript{117} Cf. Menzies, U.S. Companies in Unequal Combat, FORTUNE, April 9, 1979, at 102.
Group B was careful to except state sponsored practices from condemnation in all its UNCTAD and UNCRBP proposals.

C. The Socialist Countries of Eastern Europe and the Soviet Union

At the UNCRBP, the socialist countries of Group D, dominated by the Soviet Union, sympathized with the aims of the Group of 77. Moreover, Group D sought control of restrictive business practices because it believes that such practices are undertaken by Western transnational corporations to the direct disadvantage of its industry. Group D views national foreign trade cartels in Group B countries as particularly harmful. The remarks of a Group D spokesman to the Third Ad Hoc Group of Experts summarize the major tenets of the Group D position:

The spokesman for the experts from Group D said that the socialist countries regarded control of restrictive business practices as one of the most important tasks in the reconstruction of international economic relations on an equitable and democratic basis and the elimination from such relations of all forms of discrimination, inequality, diktat and exploitation. The socialist countries' concern with the elimination of restrictive business practices was derived from their position of principle in matters of international cooperation and was based both on solidarity with the peoples of the developing countries and in their struggle for the construction of an independent national economy, against neo-colonialism and against exploitation by foreign capital and on the desire to eliminate the artificial impediments and barriers whereby restrictive business practices hampered the development of mutually advantageous and equitable trade and economic relations between East and West.118

The Group D and the Group of 77 positions diverged, however, on the issue of whether the code should cover state-owned enterprises. Group D argued that state-owned enterprises should be exempt because none fit the definition of "transnational corporations," and because none in fact engage in restrictive business practices.119 The Group of 77 took a noncommittal stand on the issue. Group B vigorously opposed the exclusion, and refused to sign an agreement that contained it.

118. Report of the Third Ad Hoc Group on Restrictive Business Practices on its Sixth Session, supra note 34, at 40. See also Report of the Third Ad Hoc Group on Restrictive Business Practices on its Fifth Session, supra note 32, at 4 (remarks of Group D spokesman: "[E]nterprises in the socialist countries were themselves being subjected by transnational corporations and other capitalist monopolies to restrictive business practices which were often related to and interlinked with official political discrimination.").

III

ANALYSIS OF AGREED PRINCIPLES AND RULES

A. Standards for Corporate Behavior

1. The Proscriptions Defined

Assuming an enterprise agrees to follow the Agreed Principles and Rules, what acts must it refrain from undertaking? In assessing the specifics of the compact's prohibitions, the enterprise will note that the compact has three prominent characteristics. First, if Western usage is assumed, it is more lenient, in all respects but two, than United States antitrust law. Second, if Western usage is not assumed, the language of the compact admits of diverse interpretations on fundamental matters. Third, the compact does provide a weak but potentially operative mechanism for on-going interpretation.

Sections B and D outline the cardinal definitions of those practices that the Agreed Principles and Rules condemns. Section B defines “restrictive business practices” 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 these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.

The definition has four components, each requiring further elaboration: “enterprises”, “dominant position of market power”, acts in “abuse” of such a market position that “limit access to markets or otherwise unduly restrain competition”, and “agreements” that have the “same impact.”

The Agreed Principles and Rules specifies that “enterprises” includes all forms of legal associations, “irrespective of the mode of creation or control or ownership, private or state, which are engaged in commercial activities.” Later provisions make it clear that the proscriptions of the document are not limited to transnational corporations, but “apply irrespective of whether such practices involve

120. The two more stringent provisions are discussed in notes 134-42, 172-78 infra and accompanying text.
121. See notes 141-42, 166 infra and accompanying text.
122. See notes 198-219 infra and accompanying text.
123. Agreed Principles and Rules § B(i)(1).
124. See notes 128-133 infra and accompanying text.
125. See notes 135-42 infra and accompanying text.
126. See notes 143-52 infra and accompanying text.
127. See notes 153-55 infra and accompanying text.
128. Agreed Principles and Rules § B(i)(3).
enterprises in one or more countries." The term "commercial activities" is left undefined. A later provision, however, stipulates that the document's restrictions apply "to all transactions in goods and services." This provision suggests that the distinction between commercial and governmental activities may turn on whether the state acts as a regulator of commerce or as a participant in the production or sale of a commercial good or service. The distinction invites difficulty: are two states regulating legitimately when they agree with each other to extract uniform royalties from, or set production limits on their privately owned mineral industries, but regulating illegally when they agree to set production limits on state-owned industries? The test will be difficult to apply in practice.

The willingness of Group D to agree to the inclusion of state-owned corporations came late in the drafting process and was a surprise to Group B representatives. Perhaps Group D members believe that section C(6) will enable them to exempt state-owned corporations by appropriate legislation. Equally plausible is the belief among Group D representatives that, since state-owned enterprises never engage in the condemned practices, the inclusion is harmless.

Section B also explains that "[d]ominant 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 . . . [a] relevant market." The "acting together" language is ambiguous as to whether it includes shared monopoly, tacit collusion or conscious parallelism, all much-debated concepts in U.S. antitrust law. These theories attack non-collusive but interdependent conduct in oligopolistic sectors of industry. Members

129. Id. § B(ii)(4). See also id. §§ B(ii)(5), (6).
130. Id. § B(ii)(5) (emphasis added).
131. Cf. Comment, supra note 111, at 585-87 (application of commercial activities exception in Foreign Sovereign Immunities Act).
132. See notes 253-54 infra and accompanying text.
133. In statements made at the closing of UNCRBP, the Soviet Union, on behalf of Group D, reiterated its position "that the use of restrictive business practices is alien to their State enterprises because of the legal, social and economic conditions existing in those countries, in which those enterprises carry on independent commercial activities." UNCRBP Closing Statements, supra note 39, para. 14(b). Cf. Hvoinik, note 49 supra.
134. Agreed Principles and Rules § B(2).
135. See, e.g., III P. AREEDA & D. TURNER, supra note 79, § 840.
137. See L. SULLIVAN, ANTITRUST § 110 (1976).
139. Advocates of the "conscious parallelism" doctrine argue that collusion without formal agreement, through, inter alia, price signalling in oligopolistic industries, is a
of the U.S. negotiating team disagree on the agreement's treatment of these issues.\textsuperscript{140} The Group of 77 will undoubtedly favor a reading that condemns parallel conduct in oligopolistic industries.\textsuperscript{141} Moreover, several other members of Group B also appear to favor the inclusion of the shared monopoly concept.\textsuperscript{142}

The definition of "restrictive business practices" states that such a market position is "abused" if acts are undertaken that "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."\textsuperscript{143} The specific reference to the trade and development of developing countries in the definition admits of three interpretations: first, culpability may depend on a finding of adverse effects on the industries of a developing country; second, culpability may arise for causing a lower degree of harm to developing country
industry than to industry of a developed country; and third, the standard for culpability, whether competition is stifled, applies equally to all state industries harming any other state’s industries, with developing countries specifically mentioned in the standard only by way of illustration. Group B will argue for the third alternative; the Group of 77 will probably favor the second.

Section D specifies acts that constitute condemned behavior as abuses of a dominant position: “predatory behavior towards competitors, such as using below cost pricing to eliminate competitors;” “discriminatory” or “unjustifiably differentiated” pricing or terms of sale; mergers and other joint operations “whether of a horizontal, vertical or a conglomerate nature;” fixing resale prices; restrictions on the importation of genuine trademark articles where the “purpose of such restrictions is to maintain artificially high prices;” and various other non-price vertical restrictions if employed for purposes other than “the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service.”144 A footnote states that “[w]hether acts or behavior are abusive or not should be examined in terms of their purpose and effects in the actual situation,” with consideration given to, inter alia, “special conditions or economic circumstances in the relevant market.”145

The Agreed Principles and Rules is more lenient on vertical agreements, discriminatory pricing, and mergers than is U.S. law, if the UNCRBP terminology is read in light of common American usage. Under the Robinson-Patman Act, courts may declare discriminatory pricing illegal (unless justified by cost or the need to answer a rival), even if the actor is not a monopolist;146 the Agreed Principles and Rules restricts discriminatory pricing only if engaged in by a monopolist. The Clayton Act prohibits mergers if they threaten to undermine the competitive structure of a market;147 the Agreed Principles and Rules condemns mergers only if the resulting entity has actual control of a relevant market.148 Vertical restrictions in the United States may be illegal whether or not undertaken by a monopolist—resale price restrictions and tying arrangements are per se illegal, while other nonprice restrictions receive Rule of Reason treatment.149 The Agreed Principles and Rules condemns resale

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144. Id. § D(4).
145. Id. § D(4)n.
146. 15 U.S.C. §§ 13, 13a-c, 21a (1976). Arguably, however, a firm lacking market power has neither the incentive nor the ability to discriminate.
price restrictions only if undertaken by a monopolist, and other nonprice restrictions only if undertaken by a monopolist without a "legitimate business purpose." The predatory behavior prohibition in the Agreed Principles and Rules, however, is similar to the prohibition that has developed in United States law, where the "below cost pricing" definition is much debated.

Subsection D(3) lists business "agreements or arrangements" that are condemned when they "limit access to markets or otherwise unduly restrain competition." The list, which, unlike subsection D(4), is not exhaustive, includes price-fixing agreements; "collusive tendering"; market or customer allocations; concerted refusals to deal; "concerted refusal[s] to supply potential importers"; and "collective denial[s] of access to an arrangement crucial to competition." The section B definition of "restrictive business practices" incorporates these prohibitions by reference in the clause "or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact." The United States negotiators probably intended the term "same impact" to refer to the earlier clause in the definition "limit access to markets or otherwise unduly restrain competition." The language of subsection D(3) itself supports this conclusion. Arguably, however, the term "same impact" could refer to the entire previous restrictive clause beginning with "which, through an abuse or acquisition and abuse of a dominant position of market power." If the latter interpretation is correct, the "restrictive business practices" definition applies only to agreements in which one or more of the participating firms controls a relevant market. This would be a very permissive definition, and would create a disparity between the standard states are asked to implement under sections C and E and the standard enterprises are asked to obey under section D. The sensible interpretation would be to construe the reference to agreements in the "restrictive business practices" definition as synonymous with subsection D(3).

Subsection D(3) appears basically consistent with United States law on the practices it condemns. The subsection, however, does not

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arrangements); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (resale price fixing per se illegal).
150. Agreed Principles and Rules § D(4)(d).
151. Id. § D(4)(e).
152. For discussion of the debate, see symposia contained in 87-88 YALE L.J. (1977-78), and 88-89 HARV. L. REV. (1975-76).
153. Agreed Principles and Rules § D(3).
154. Id. § D(4)(e).
155. Id. § B(i)(7).
156. Interviews with Joel Davidow, note 37 supra.
appear to permit the establishment of conclusive presumptions or *per se* rules that are so important to American antitrust jurisprudence. The subsection condemns only agreements that actually restrain competition. U.S. law condemns all agreements of selected types, because of the belief that the substantial majority of such agreements restrain competition, and that the disadvantage of prohibiting a few beneficial arrangements is outweighed by the advantages gained in minimizing enforcement costs.\(^{157}\) The Agreed Principles and Rules gives all business agreements scrutiny under some type of Rule of Reason treatment; all the facts of each case must be gathered and balanced to judge whether the agreement is anti-competitive.\(^{158}\) The refusal to use *per se* rules in the agreement is perhaps unfortunate, because the Agreed Principles and Rules lacks a binding judicial enforcement mechanism.\(^{159}\) The Agreed Principles and Rules would seem to require, for optimal effectiveness, bright line prohibitions that *per se* rules provide. Definite standards would enable one state to ascertain more confidently the failure of enterprises 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. Of course, agreements that are *per se* illegal under American law should be highly suspect under the language of the Agreed Principles and Rules.

2. **Omissions**

An analysis of practices the UNCRBP participants agreed not to condemn is basically an analysis of the primary negotiating triumphs of Group B. The Group of 77 and Group D submitted a series of proposals in the UNCTAD Groups of Experts that were aimed not at promoting and preserving competition, but at restricting the operating freedom of transnational corporations. The Group of 77 proposed to restrict the use of consignments, trademark and tradename licensing and "other marketing strategies" that they perceived to limit imports or exports by industry indigenous to Group

\(^{157}\) *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The possibility that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expenses necessary to identify them. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1979).

\(^{158}\) Under a Rule of Reason approach, the "fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 49. See also Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

\(^{159}\) See notes 198-218 infra and accompanying text.
of 77 countries. Both the Group of 77 and Group D sought to circumscribe intra-enterprise agreements. Group D's text was the most elaborate:

(v) The specific forms of restrictive business practices employed by transnational corporations in order to gain a dominant position of market power include:

(a) Manipulations with transfer prices;
(b) Schemes for dividing up markets between parent companies and their subsidiaries in other countries;
(c) Schemes of global strategy under which the headquarters of transnational corporations give the enterprises under their control in other countries directives concerning the volume and inventory or production, investment policy, sources of procurement of equipment and materials, the levels of purchase prices, outlet channels for the finished products, the volume and geographical direction of export and the transfer of profits and capital to other countries.

Similarly, the Group of 77 sought to prohibit 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." Similarly, the Group of 77 sought to prohibit 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."

Group B refused to agree to such provisions, saying: first, that such matters were not germane to an antitrust code—transfer pricing, for example, is considered a financial or tax revenue problem rather than a restrictive business practice; second, that the provisions could not be practically followed because of their vagueness; and third, that the provisions could discourage foreign investment.

The apparent success of the Group B negotiators in blunting the Group of 77 demands for including general regulatory provisions in the Agreed Principles and Rules is remarkable in light of the fervor with which the Group of 77 pursues New Order principles. Perhaps this success is attributable to Group B's internally cohesive negotiating package; the rigor and definiteness of that package may have enabled it to dominate the discussion with principled and reasoned positions on difficult issues. The more elusive social and political goals of the Group of 77, although powerful concepts, may have fallen under the mechanistic ax of economic logic. It is folly to

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161. Id. at 9-10.
162. Id. at 21.
164. Daniel Plaine has stated that "[t]here is a hard economic realism which would very likely inject some pragmatism into the present debate about intracorporate restrictions and, it is hoped, result in a sensible compromise. Plaine, supra note 139, at 15.
An alternative explanation may be that the New Order itself exhibits a yet unclarified tension between the principles of economic planning and free trade. See Fatouros, supra note 45, at 101. Some New Order demands reflect an effort to allocate world resources
believe, however, that the Group of 77 and Group D, in consenting to a code without such provisions, have dropped their demands for regulations consistent with their early draft provisions. They may either have decided to press these demands in an alternate forum, such as the United Nations Commission on Transnational Corporations, or, more likely, to assert that the theory of their specific proposals has been incorporated in some of the more general provisions of the Agreed Principles and Rules.

The most sensitive issue in this area is the propriety of "transfer pricing." Transfer prices are prices set on intra-company transfers to maximize the global profits of the parent corporation. When transnational corporations buy from and sell to their own subsidiaries, they establish prices that often have little connection to the market price. The deviations from the market price depend on a variety of factors: minimizing tax burdens; taking advantage of foreign currency exchange rates; maximizing repatriation profits; and the need for public relations leverage in dealing with stockholders or public authorities. The literature on how to manage transnational corporations is filled with advice on how to set prices on intra-company transfers. Current international trade conditions encourage transnational corporations to overvalue imports and undervalue exports when dealing with a subsidiary in a developing country. Thus, the developing countries are disadvantaged in foreign exchange matters on the basis of political principles; other demands reflect an assumption of world-wide free trade. Id. The tension has created some confusion and oscillation in Group of 77 negotiating positions.

165. When a representative of the United Nations Centre on Transnational Corporations, the Secretariat to the Commission on Transnational Corporations, reported before the Third Ad Hoc Group of Experts, he was closely questioned by Group B representatives on whether the Centre was investigating the issue of transfer pricing. Report of the Third Ad Hoc Group of Experts on Restrictive Business Practice on its Fifth Session, supra note 32, at 6. Group B consistently attempted to refer transfer pricing issues to the Commission on Transnational Corporations. Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Fourth Session, supra note 31, at 15. Ironically, the negotiators at the Commission have apparently dropped the issue as too sensitive politically for an agreement.

166. See, e.g., text accompanying notes 192-97 infra.


170. R. Barnett & R. Miller, supra note 51, at 173-76. On the other hand, transnational enterprises also can gain, under appropriate circumstances, from underpricing imports to their subsidiaries. This lessens customs duty payments and enables the company's subsidiary to engage in predatory pricing behavior in order to obtain local market dominance. See generally Greenhill & Herbolzheimer, International Transfer Pricing: The Restrictive Business Practices Approach, 14 J. World Trade L. 232 (1980).
and tax collection,\textsuperscript{171} and perceive they are losing wealth to home countries due to the diversion of profits attributable to local resource exploitation. As noted by a Group D spokesman, control of intra-corporate transactions is therefore a fundamental New Order tenet.\textsuperscript{172}

Whether the issue of transfer pricing has been eliminated from the Agreed Principles and Rules may turn on the interpretation of subsection D(4)(b) on discriminatory pricing. The provision condemns "discriminatory" or "unjustifiably differentiated" prices "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." The clause is similar to the Group of 77 proposal noted earlier and, standing alone, appears to regulate transfer pricing if such pricing affects the market.\textsuperscript{173} The difference from the earlier Group of 77 proposal, however, lies in the subordination of the transfer pricing restriction to language that condemns only behavior limiting access to markets or otherwise unduly restraining competition.\textsuperscript{174} Since transfer prices theoretically never adversely affect competition unless they are vehicles for predatory pricing,\textsuperscript{175} this limitation effectively nullifies the transfer pricing restriction. Indeed, the provision is redundant in light of an earlier subsection condemning predatory behavior.\textsuperscript{176} The inclusion of the provision suggests that some or all of the negotiators have misunderstood the scope of its content. One wonders whether it is a prohibition against "price squeezes."\textsuperscript{177}

The dispute over the use of transnational marketing strategies, particularly those that include affiliate cooperation, to hinder imports or exports by related enterprises is reflected in subsection B(4)(e). The attack on marketing strategies by Group D and the

\textsuperscript{171} Id.
\textsuperscript{172} E.g., Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Sixth Session, supra note 34, at 40-41 (Group D spokesman).
\textsuperscript{173} Agreed Principles and Rules § D(4)(b). See Greenhill & Herbolzheimer, supra note 170, at 240-41.
\textsuperscript{175} The text is based, therefore, on the OECD Guidelines. See note 81 supra.
\textsuperscript{176} But cf. Trans World Airlines v. Hughes, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973) (tying arrangements by parent to affiliate may be actionable at behest of minority stockholders).
\textsuperscript{177} See notes 135-38 supra and accompanying text.
\textsuperscript{178} A price squeeze occurs when a partially integrated monopolist raises the price of a raw material to customers while maintaining the price of the final product it sells in competition with those same customers. See III P. AREEDA & D. TURNER, supra note 79, at ¶ 728C; R. BORK, THE ANTITRUST PARADOX 243-244 (1978). A provision prohibiting price squeezes is subject to serious question. Id.
Group of 77 constitutes the high water mark of their efforts to inject general investment and development issues into the Agreed Principles and Rules. Group B agreed to condemn, based on precedents in the OECD countries, the use by dominant firms of licensed or assigned trademarks to prevent the parallel importation of products legitimately bearing the same mark, if the purpose of the practice is to avoid competition from such imports rather than to protect buyers from confusion. The provision includes trademark arrangements between affiliated companies. Otherwise, Group B prevailed in its desire not to proscribe parent-subsidiary transactions involving marketing strategies.

The final noteworthy omission in the Agreed Principles and Rules is the absence of regulations on technology licensing. The First Ad Hoc Group of Experts recommended that certain restrictions in the area of technology licenses be declared illegitimate. But subsequent Groups of Experts on restrictive trade practices left the regulation of technology licensing to the UNCTAD Committee on Transfer of Technology. The Code on Transfer of Technology, designed to improve the economic position of developing countries, has origins independent from the Agreed Principles and Rules. Although four diplomatic level conferences on the transfer of technology had produced agreement on about seventy percent of a text

179. See Davidow, supra note 5, at 37.
183. The Group B countries were not even forced to carry through on their willingness to adopt the position argued by the United States government in United States v. Everest & Jenneys Int'l, C.A. No. 77-1648R (C.D. Cal. 1977), [1979]-1 CCH Trade Cas. ¶ 62508, at 76,961 (1979). See Davidow, supra note 5, at 36-37.
on restrictive licensing, the negotiations now appear indefinitely stalemated.\textsuperscript{187}

In the transfer of technology conferences, Group B has argued that industrial property rights in patents, trade-secrets and other confidential business information deserve protection and should be specially exempted from restrictive business practice laws.\textsuperscript{188} According to Group B, a licensor of confidential technology should be free to set price, quantity, field of use, territorial and other conditions in licenses, as long as the licensor does not abuse its rights to the technology.\textsuperscript{189} The Group of 77, however, is largely unwilling to allow owners of technology to use any form of restrictive license. Rather, the Group of 77 insists that licensors be required to license the technology without accompanying provisos on price, quantity, and other conditions.\textsuperscript{190}

The division of labor between the Agreed Principles and Rules and the Code on Transfer of Technology\textsuperscript{191} does not mean that licensing restrictions are necessarily outside the scope of the Agreed Principles and Rules. The United States antitrust laws have been held to justify prosecutions for various "abuses" of industrial property rights.\textsuperscript{192} The Group of 77 is on solid ground, therefore, in arguing that, at minimum, the language of the Agreed Principles and Rules also regulates those "abuses."\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{187} See id.
  \item \textsuperscript{189} Abuses of industrial property rights in Group B countries include versions of the following: licensing obligations that extend beyond the life of the rights; that prevent licensee challenges on the validity of the rights; that prevent licensee research into new products or processes; that require grant backs of select privileges from licensees; that tie technology to the purchase of additional technology, goods or services; that decide territories through cross-licensing; and that act to restrain competition by facilitating the pooling of such rights. See \textit{Preparation of a Draft Outline of an International Code of Conduct on Transfer of Technology, Submitted on Behalf of Experts from Group B, U.N. Doc. TD/B/C.6/AC.1/L.2} (1975), \textit{as revised by} U.N. Doc. TD/B/C.6/AC.1/L.5 (1975), \textit{reprinted in} 17 \textit{INT'L LEGAL MATERIALS} 473 (1978); Davidow, \textit{supra} note 5, at 40-44. See also Joelson, \textit{United States Law and the Proposed Code of Conduct on the Transfer of Technology}, 23 \textit{ANTITRUST BULL.} 835 (1978).
  \item \textsuperscript{191} See note 186 \textit{supra}.
  \item \textsuperscript{192} See note 189 \textit{supra}.
  \item \textsuperscript{193} An official of the United States Justice Department, Antitrust Division recently commented:

A recently adopted United Nations voluntary "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" contains no rules dealing expressly with know-how licensing. However, the rules
Moreover, because the balance struck by Group B countries between the scope of industrial property rights and antitrust laws is not incorporated specifically in the Agreed Principles and Rules, the Group of 77 could argue that the language supports a less lenient balance. There is an inherent tension between the recognition of industrial property rights and the tenets of competition. Industrial property rights are, in essence, governmental grants of legal monopolies over the fruits of select technologies. The grants encourage the development, use and disclosure of progressive innovations. The scope of the grants reflects a judgment on the best balance between the gains from incentives to innovators and the costs from permitting private monopolies over valuable information. Group B countries give broad protection to the grants. The Group of 77, basing their arguments, arguendo, on the Group B objective of encouraging competition (rather than New Order principles) could construct a strong argument, with support from United States scholars, that United States law is too lenient and, accordingly, that the language of the Agreed Principles and Rules requires restrictions on technology licensing beyond those recognized in U.S. law. For example, developing countries could argue credibly that restrictions (particularly price and export restrictions) in licensing agreements with actual or potential rivals restrain competition in violation of the various prohibitions of subsection D(3). The failure of the Agreed Principles and Rules to address specially the licensing problem may, therefore, result in the wholesale incorporation of the transfer of technology code debate, and stalemate, into the Agreed Principles and Rules.

3. Mechanisms for On-Going Interpretation

In sum, the Agreed Principles and Rules contains numerous terms with elusive meanings: “acting together,” “control the relevant market,” “limit access to markets,” “unduly restrain competition,” “unjustifiable,” “legitimate business purposes,” and so forth. Such terms leave much room for philosophic differences and for dif-

195. F. Scherer, supra note 194, at 440-41.
196. See, e.g., L. Sullivan, supra note 137, at 184.
ferences in factual interpretation, much as the term “competition” in American antitrust law shelters disparate American political philosophies. A comparison of the populist and darwinist positions illustrates the latitude of the term in American law. Populists define competition as the state of affairs that results from an industry composed of small, independently-owned businesses. Competition is viewed as a system of decentralized economic and governmental power that maximizes individual freedom. Social darwinists, however, define competition as the state of affairs that encourages superior businesses to survive and grow. Successful businesses are presumed to make better products at lower cost, and growth is a reward for their vigor. Populists attempt to prevent private concentrations of economic power; darwinists are apologists for such power. Both the populists and darwinists have enjoyed some success, although the darwinists are currently more influential. The federal judiciary and the Federal Trade Commission are trusted to reconcile these and other diverse positions on the aims of antitrust enforcement. A somewhat analogous political dichotomy existed at the UNCRBP. The Group of 77 and Group D countries seek to protect national enterprises from international corporations. Group B countries seek to promote efficient competition in international trade. These divergent goals will inevitably lead the Groups to interpret the critical terms of the Agreed Principles and Rules differently.

The use of general terminology in other antitrust codes, such as sections 85 and 86 of the Rome Treaty or sections one and two of the Sherman Act, apparently has lulled the UNCRBP participants


199. Id.


201. For a triumph of populism, see United States v. Aluminum Co. of America, 148 F.2d 416, 417 (2d Cir. 1945), where Judge Learned Hand found in the Sherman Act a preference for “a system of small producers, each dependent for his success upon his own skill and character,” over “one in which the great mass of those engaged must accept the direction of a few.” On the other hand, recent Supreme Court decisions stress that considerations of economic efficiency dominate American antitrust analysis. E.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-56 (1973). See also 1 P. AREEDA & D. TURNER, supra note 79, § 104.

202. See, e.g., R. BORK, supra note 178, at 118-19; F. SCHERER, supra note 194, at 38.

203. For a discussion of the United States and Common Market antitrust laws, see B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST (1979).
into the use of similarly vague language. These other codes, however, are implemented by enforcement mechanisms that provide a degree of cohesion to, and reconciliation of, diverse views on interpretation. The Sherman Act, for example, is more the enactment of a legal process than the enactment of a set of business practice rules. Congress deferred to the federal courts for the development of an American antitrust law, recognizing that these courts will use reasoning characteristic of common law courts in carrying out their mandate. The Commission of European Communities, the Court of Justice, and member state tribunals provide an analogous function in interpreting and enforcing the Rome Treaty. Group B insisted that the UNCRBP use general standards and rely on a "case-by-case" definition of such standards. But the UNCRBP, again at the seemingly incongruous insistence of Group B, did not establish or otherwise provide a case decision mechanism. Rather, the Agreed Principles and Rules establishes only the Intergovernmental Group as a source of official interpretation, and its value in this regard is highly speculative.

The Intergovernmental Group is designed to provide a forum for multilateral consultation on the operation of the Agreed Principles and Rules; to invite, undertake and circulate studies on restrictive business practices; to request, if needed, relevant data from states; to collect and circulate information on the efforts undertaken by states to comply with the Agreed Principles and Rules; to make reports and recommendations to states on the application and implementation of the Agreed Principles and Rules; and to submit yearly reports to the Committee of Ministers of Foreign Affairs of the Member States.

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205. The often-quoted statement of Senator Sherman is the most important evidence of the intentions of the Fifty-first Congress in enacting the Sherman Act:

I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.

21 CONG. REC. 2460 (1890). As one might expect, the courts tend to quote this statement whenever they need to justify uncomfortable extensions of relevant antitrust precedent. See, e.g., United States v. U.S. Gypsum Co., 483 U.S. 422, 438 n.14 (1978).

206. See B. HAWK, supra note 203, at 415-27. Hawk asserts that there is greater clarity in EEC competition policy than in its U.S. counterpart because of the simpler structure of the EEC enforcement mechanism.

207. See notes 210-14 infra and accompanying text. Perhaps the Group B position was designed to weaken appreciably the strength of any UNCRBP agreement. If so, the strategy appears to have been successful.
Section G, however, contains the following caveat:

In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgment 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.

The line between making recommendations to states on the application and implementation of the Agreed Principles and Rules and passing judgment on the activities of states is a fine one. Presumably, generally and affirmatively phrased recommendations will avoid the restriction.

The critical import of the section is the ability of the Intergovernmental Group to use its reports and recommendations to disseminate interpretations of contested provisions. Although the precise constitution of the Intergovernmental Group is unspecified, the Agreed Principles and Rules calls for the Group to operate as an adjunct to an UNCTAD committee. Because such bodies are historically open to all UNCTAD members, Group B, Group D and the Group of 77 should all have representatives in the Intergovernmental Group. Moreover, other UNCTAD committees historically have emphasized the quest for consensus and have de-emphasized voting. If a consensus emerges from "contact group" meetings, the common position is put before a plenary session to become official policy. If no consensus emerges, the issue is either left for future resolution or each side makes a public statement of its own position.

The Intergovernmental Group will undoubtedly operate similarly.

The Group will perform optimally if it does not take advantage of its option to let disputed issues pass without public comment. The public airing of conflicting positions exerts a subtle pressure towards reasonableness that may encourage unanimity. Moreover, an ongoing chronicle of conflicts, as well as agreements, on the meaning of the Agreed Principles and Rules' language would provide an evolving clarification of the real content of the underlying compact. Since the Group must issue a yearly report on its work, it might use the

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208. See Agreed Principles and Rules § G. The Intergovernmental Group is also to submit proposals to a second UNCRBP to be held five years after the adoption of the Agreed Principles and Rules. Id. § G(iii).

209. Id. § G(ii)(4).

210. See U.N. DEP'T PUB. INFO., EVERYONE'S UNITED NATIONS, supra note 31, at 140.


212. R. ROHSTHIEIN, supra note 39, at 195.
report as a vehicle for such a chronicle. If a chronicle of agreements is published periodically, Group negotiations could build on earlier successful negotiations, and affected parties could better assess the extent of their obligations under the document.

Those interpretations by the Group that do represent a consensus will have an official air and will represent a collective commitment that should lead UNCRBP members to accord them respect. Of course, disputes over the meaning of provisions in the Agreed Principles and Rules that require the attention of the Intergovernmental Group may be reflected in the deliberations of the Group itself, with the result that no consensus on and, therefore, no definitive interpretation of disputed language will ever emerge. The hope of the Agreed Principles and Rules negotiators, particularly those from Group B, is that general ideological conflicts will not prevent consensus when specific issues are addressed pragmatically. The rigorous demands of formulating arguments of reasoned particularity, coupled with the superior expertise of officials from Group B countries (where most of the antitrust legislation extant in the world exists) appear to support the optimism of the Group B negotiators. The success of the UNCRBP itself also provides some basis for such a prediction.

The Agreed Principles and Rules also provides for a limited bilateral consultation procedure that could provide additional, though limited, interpretation through negotiation:

[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 . . . 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.]

As is evident from the language of the subsection, the procedure is voluntary. The Group of 77 proposed that the UNCTAD Trade and Development Board have the authority to resolve issues that could not be resolved in bilateral conferences, but Group B countries successfully opposed the provision. The Agreed Principles and Rules provides only that the UNCTAD Secretariat, if the parties involved so permit, may issue a report on the results of a consultation. These

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213. Since 1972, the EEC Commission has issued annual reports on competition policy. These reports describe the Commission's approach to specific issues, thereby guiding industries and member states on the meaning of the Rome Treaty. See B. Hawk, supra note 203, at 424-26.

214. Interviews with Joel Davidow, note 37 supra.


Consultations may involve the appropriateness of state action or inaction in light of the standards of the Agreed Principles and Rules. If so, the reports, if circulated, could serve to clarify areas of agreement and disagreement in the interpretation of the compact. Only a few member states typically will be parties to the proceedings, however, and the reports will have limited persuasiveness for those states not directly involved.

The consultation procedure is similar to one contained in the 1976 OECD Guidelines and to the one contained in the GATT. The history of these provisions suggests that states are more likely to use consultation procedures to complain about ongoing foreign antitrust investigations or prosecutions than to demand relief from anticompetitive business conduct through the enforcement organs of a foreign state.

The impotence of the Intergovernmental Group and the consultation mechanism may lead some to argue that the Agreed Principles and Rules should be interpreted by analogy to similar provisos in the Rome Treaty or the Sherman Act. There is no solid evidence that either the UNCTAD Groups of Experts or the UNCRBP participants intended such an approach. Indeed, circumstantial evidence suggests the opposite. The language of the Agreed Principles and Rules is unique; its cardinal standards do not follow exactly the language of any other antitrust code. Moreover, the Agreed Principles and Rules repeatedly refers to a policy not incorporated into existing antitrust codes (most of which are promulgated by developed countries)—the social needs and political demands of developing countries vis-à-vis developed countries. This lack of similarity in text and purpose diminishes the force of analogical interpretation.

In sum, unless the Intergovernmental Group is successful in reconciling diverse interpretations, the Agreed Principles and Rules papers over too many disagreements for the document to qualify as an operable consensus on international restrictive business practice problems. Developing countries will argue for implied exemptions for their industries and for broad application of rules to transnational industries. Developed countries will argue for narrow appli-

217. Interviews with Joel Davidow, note 37 supra.
218. See Davidow, supra note 5, at 53. Interestingly, "restrictive business practices" consultation clauses have been included in treaties of friendship, commerce and navigation between the United States and foreign countries (usually developed countries) for over thirty years. Implementation of the clauses has been rare. See B. Hawk, supra note 203, at 813; Haight, The Restrictive Business Practices Clause in United States Treaties: An Antitrust Tranquilizer for International Trade, 70 Yale L.J. 240 (1960).
219. The abuse of dominant position language, for example, found in § D(4) of the Agreed Principles and Rules, is similar to language found in article 86 of the Treaty of Rome. See B. Hawk, supra note 203, at 680.
cation of the restrictions, based on economic principles of allocative efficiency. A transnational enterprise will have to stay abreast of each state's restrictive business practice standards in order to comply with these shadowy restrictions. Part of the task will be to ascertain how each state is using the UNCRBP agreement. In other words, the enterprises will have the burden of assessing a variety of state standards, a burden they had before the agreement, complicated by the burden of speculating on the effect of the agreement in each jurisdiction.

B. STATE OBLIGATIONS UNDER AGREED PRINCIPLES AND RULES

1. Domestic Legislation

Should states agree to follow the directions of the UNCRBP compact, what are their obligations? Sections E and F ask that states perform specified acts to implement the restrictive business practice standards identified in the earlier sections. Although the obligations are stated briefly and concisely, their generality will cause a state seeking in good faith to follow them to be, at best, perplexed on exactly what it should do. Moreover, the generality of the provisions will cause states to interpret the provisions in light of their individual predispositions on the subject. Indeed, UNCRBP participants already appear to have developed a variety of interpretations on their obligations under the agreement.

Subsection E(1) urges that states "adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices." This subsection raises two questions: first, should a state adopt legislation opening its courts to suits against its nationals based on injury having an impact outside its territory; second, should the legislation contain standards of enterprise behavior that mimic those in the compact? Subsection E(2) seemingly limits, without explanation, subsection E(1), by urging states to "base their legislation primarily on the principle" of dealing with acts that "limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development." The subsection thus recommends that states deal only with acts that have adverse effects within their own borders. Moreover, the word "primarily" in the subsection suggests that states are free to deviate somewhat from the standards of the Agreed Principles and Rules in their domestic legislation.

220. Agreed Principles and Rules § E(1).
221. Id. § E(2) (emphasis added).
Subsection E(4), however, reopens one of the issues that subsection E(2) would appear to have resolved. Subsection E(4) obliges states to "seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence . . . that . . . adversely affect international trade and particularly the trade and development of the developing countries."222 Under this subsection, are states to enforce the standards of the compact against their nationals on the basis of extra-territorial injury? No country has such legislation currently in force. The United States antitrust laws do not apply to foreign activities that have no direct or intended effect on domestic commerce.223 Neither does European Community law apply to restraints on exports not affecting the Community.224 Moreover, statements of Group B representatives make clear that their governments will not feel obligated under the Agreed Principles and Rules to enact such legislation. Representatives of American business have indicated that their support for the Agreed Principles and Rules depends on their understanding that the code does not require American courts to police American industry abroad.225 It seems apparent from the drafting history of the Agreed Principles and Rules, however, that the Group of 77 believes developed countries have such an obligation,226 and the Group of 77 may have the better argument under the language of the agreement.

Group B has two arguments to buttress its interpretation of subsection E(4). First, Group B will undoubtedly argue that extraterritorial regulation of corporations is not "within their competence," as that language appears in subsection E(4). International law, however, recognizes that a state can regulate the conduct of its nationals wherever they may be or wherever they do business.227 Theoretically, therefore, developed countries could regulate the practices of their corporations, whether or not such practices affect domestic commerce. Such legislation is within their legal competence. In essence, the Group B position is an argument that the phrase refers to practical as well as legal constraints, and that the practical difficulties that would attend such expansive jurisdiction (e.g., foreign and domestic sensitivity; access to information; conflicting decisions) are

222. Id. § E(4) (emphasis added).
224. B. Hawk, supra note 203, at 583.
226. See notes 68-69 supra and accompanying text.
prohibitive. Second, Group B can argue that the reference to “appropriate remedial or preventive measures” in subsection E(4) refers only to action undertaken pursuant to legislation enacted under subsection E(2), legislation dealing with domestic effects only. The Group of 77’s rebuttal is that “measures” is a broader, not narrower, term than the concept of legislative action; appropriate legislation is such a “measure,” along with administrative and other types of government actions. The debate promises to be lively.

Returning to subsection E(2), a state confronts the problem of how closely its legislation should follow standards in the compact. What does it mean to “primarily” base legislation on the principle of dealing with undue restraints on competition? U.S. statutes are broader than the standards in the code, but the statutes seemingly satisfy the criteria of subsection E(2). The agreement, therefore, does not appear to require the United States to adopt additional antitrust legislation. The restrictive business practice laws of most Western nations also appear sufficiently close to the code standards to satisfy the subsection.

Conversely, the Group of 77 apparently believes that the subsection does not limit the group’s right to encourage the enactment in all developing countries of a very broad model law. A separate UNCTAD document entitled “A Model Antitrust Law for Developing Countries,” written by the UNCTAD Secretariat with the help of a few select experts from constituent countries of the Group of 77, goes far beyond the restrictions contained in the Agreed Principles and Rules. The Model Law condemns a wide variety of business agreements, contains stringent prohibitions on price discrimination, transfer and excessive pricing, and limits the internal growth of dominant firms. Experts from Group B countries have vigorously

228. For a discussion of the difficulties, see Davidow & Chiles, supra note 16, at 259-61.
229. Subsection E(2) does not specifically incorporate the standards of sections B and D. Subsection E(2) asks states to enact legislation concerned with adverse effects on “their trade or economic development.” Agreed Principles and Rules § E(2) (emphasis added). Sections B and D define condemned practices by reference to practices that have “adverse effects on international trade.” Accordingly, subsection E(2), if it is to have any specific definition in the code, must take standards from sections B and D by analogy. Because practices specified in sections B and D will also have adverse effects on domestic trade, national legislation enacted pursuant to subsection E(2) should, in effect, strike the “international effects” language in sections B and D and, in lieu thereof, insert language of “domestic effect.”
criticized the Model Law.\textsuperscript{231} The Group of 77 argues that Group B has no claim for participation in the drafting of a model law intended specifically for the developing countries' constituency.\textsuperscript{232} The Group of 77 apparently views the Agreed Principles and Rules as outlining the minimum obligation of nations with respect to anti-trust proscriptions, and believes that nations should feel free to augment significantly its provisions.

Next, the well-meaning state seeking to implement the UNCRBP agreement must confront the ambiguity in the Agreed Principles and Rules as to whether to accord special status to the industries of developing countries. The Group of 77 countries will no doubt emphasize the language in the Agreed Principles and Rules that recognizes the special needs of industries of the developing nations. Subsection C(iii)(7) contains the most cogent declaration of the policy:

> 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.\textsuperscript{233}

This policy of preferential treatment for developing countries is a wildcard, reminiscent of Justice Brandeis's attempt to protect "small dealers and worthy men" under the Sherman Act.\textsuperscript{234} Integrating the social needs of developing countries into concepts of economic efficiency requires difficult judgments on matters of considerable uncertainty. Are all cartels of industries in developing countries to be exempt from the Agreed Principles and Rules standards? If not, which ones are exempt?

In sharp contrast to subsection C(iii)(7), subsection E(3) directs states to enact restrictive business practices legislation that ensures "treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law."\textsuperscript{235} Group B countries will argue forcefully for a broad and undeviating application of the provision. American business organizations that support the Agreed Principles and Rules carefully note

\textsuperscript{232} See Davidow, \textit{supra} note 34, at 604.
\textsuperscript{233} Agreed Principles and Rules § C(iii)(7).
\textsuperscript{234} Chicago Board of Trade v. United States, 246 U.S. 231, 238, 238-39, 241 (1918).
\textsuperscript{235} Agreed Principles and Rules § E(3).
and applaud the provision in their letters of approval.\textsuperscript{236} Yet, any protection for domestic industries in developing countries or for developing country cartels per subsection C(iii)(7) would seem to offend this subsection. Group B countries will argue that they are prepared to impose fewer antitrust burdens on the industries of developing counties, but that fewer burdens should be attributable to those industries' lack of size and market power, not to the economic condition of their home countries.\textsuperscript{237} A "fair" code, according to Group B, is based on a neutral economic standard applicable to all global businesses. In rebuttal, the Group of 77 and Group D will justify as "fair" and "equitable" under New Order principles the preferential treatment of developing country industries. The Soviet Union representative, for example, noted at the conclusion of the UNCRBP that his government supported the grant of "specific privileges" to developing countries under the Agreed Principles and Rules.\textsuperscript{238} Each view finds support in the language of the Agreed Principles and Rules, and it would be unwise for Group B countries to believe that the Group of 77 and Group D countries allow the Agreed Principles and Rules to rest solely on principles of economic efficiency.\textsuperscript{239}

Finally, a well-meaning state finds no guidance on the types of remedies that are appropriate for violations of national codes enacted pursuant to subsections E(1) and E(2). The fashioning of appropriate remedies is critical to the effectiveness of international or national codes. International unanimity on standards for conduct means little when there is disharmony concerning sanctions. A large


\textsuperscript{237} See UNCRBP Closing Statements, supra note 39, at 7 (closing statement made by Canada on behalf of Group B). In this regard, it is interesting to note what became of the Group of 77 support for diplomatic conferences on a code for the transfer of technology. Davidow, supra note 5, at 18.

A final irony of the transfer of technology negotiation has been that G-77 nations, particularly of Latin America, who issued the code to universalize their stringent national laws, came to realize that lengthy bargaining with developed country experts was resulting in an exception-ridden document which would more tend to undermine their harsh rules than endorse them.

\textsuperscript{238} See UNCRBP Closing Statements, supra note 39, at 9 (closing statement made by the representative of the USSR on behalf of Group D).

\textsuperscript{239} In the closing statements, only the Group B representative mentioned the concept of competition. Id. at 7. The Secretary-General of UNCTAD, Mr. Gamani Corea, and China specifically noted that the Agreed Principles and Rules was an important contribution in implementing New Order principles. Id. at 7, 9.
measure of current international tension over restrictive business practices stems from divergent national positions on appropriate remedies. For example, substantial international friction is created by the application of the American treble-damage remedy to foreign citizens. Moreover, the United States would undoubtedly object and refuse to cooperate with foreign prosecutions if foreign states use violations of the agreement to justify extreme penal sanctions. A general provision on appropriate remedies would greatly facilitate international cooperation for national investigations undertaken consistent with the norms of the Agreed Principles and Rules. The lack of such a provision suggests that functional international cooperation may not yet be feasible.

2. Little or No Progress in Interstate Information Exchange

In addition to recommending national promulgation of certain standards, the Agreed Principles and Rules asks states to undertake minimal efforts aimed at information gathering and exchange. These provisions, however, constitute one of the disappointments of the UNCRBP negotiations. Section E(6) calls on states to “institute or improve procedures for obtaining information from enterprises . . . necessary for their effective control of restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.” It is unclear whether the provision envisions legislation requiring periodic reports from enterprises, or whether the grant of subpoena power to national investigative bodies is sufficient. The agreement does admonish states to accord “legitimate business secret” protection “normally applicable in this field, particularly to protect . . . confidentiality.”

Section E(9) urges states to supply other states, “on request or at their own initiative when the need comes to their attention, . . . information necessary to the receiving interested State for its effective control of restrictive business practices.” The provision does not ask for special legislation, but rather applies “to the extent con-
sistent with . . . laws and established public policy." Thus, the Agreed Principles and Rules neither expands on nor otherwise affects existing methods of international information exchange. Rather, the document merely asks states to cooperate within the existing international information exchange procedures.

The information exchange provisions of the Agreed Principles and Rules, therefore, make no specific inroads on the recurring problem of foreign discovery in restrictive business practice actions. The omission is glaring. International information exchange is one of the central problems impeding the enforcement of existing restrictive business practice codes, and the current system is functioning poorly. For example, a U.S. court has the power to order the production of foreign documents when it has or can acquire *in personam* jurisdiction over the party controlling the documents. Several Western countries, upset over the scope of American antitrust investigations, have enacted or otherwise promulgated nondisclosure laws or limitations on discovery. "Blocking statutes" are now in force in at least twenty countries, including Australia, Canada, the Federal Republic of Germany, the Netherlands, South Africa, France, and the United Kingdom. Countries have relied on these statutes in refusing to comply with American grand jury subpoenas and court discovery orders in private litigation. Additional problems arise when domestic courts seek documents from recalcitrant foreign citizens over whom they exercise no *in personam* jurisdiction. States must labor under the vague obligations imposed by considerations of international comity in resorting and responding to letters rogatory. The cumulation of these chaotic procedures substantially

244. *Id.*
248. Most recently, investigators in the uranium cartel litigation confronted the effects of such a statute. The Canadian statute in question prevented U.S. authorities from obtaining information relevant to price-fixing. The Canadian authorities regarded such requests as infringing on their sovereign prerogatives. B. HAWK, *supra* note 203, at 319-20.
blocks efforts by states to obtain documents located in foreign jurisdictions. As one practitioner has stated: "[I]t is no exaggeration to say that the present record reflects only minimal cooperation or coordination."250

Experts from both developing and developed countries recognize that the success of international and national rules dealing with transnational corporations depends on successful procedures for interstate information exchange.251 Typical antitrust investigations require a detailed economic analysis of a relevant market, as well as a careful study of voluminous corporate records. When the actors are multinational firms, whose conduct affects the economies of several states and whose offices are located in several states, the various states must cooperate in order to gather the data material to an effective inquiry.

The UNCRBP negotiators were apparently unwilling to urge states to adopt mechanisms to formalize information exchange procedures. Presumably, the negotiators were wary of committing their states (even through voluntary provisions) to cooperate with other states' prosecutions of restrictive business practices. Perhaps the negotiators were concerned with the possibility that a foreign prosecution may be based on practices that are condoned in the state that is asked to provide information. For example, it would be extremely unpopular for the United States to commit itself to support prosecutions in Group of 77 countries based on an enacted version of the

Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary times.

The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941). See generally Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 YALE L.J. 515 (1953); Note, supra note 245, at 372-77. The United States participated in a recent effort to conclude a multilateral agreement on international judicial assistance—the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. See 28 U.S.C. § 1781 (1976). See also Amram, U.S. Ratification of the Hague Convention on the Taking of Evidence Abroad, 67 AM. J. INT'L L. 104 (1973); Note, supra note 245, at 379-86. Only six countries have ratified the Convention: Denmark, Norway, France, Portugal, Sweden and the United States. A receiving country may not refuse to honor a request for information except when the letter does not comply with Convention requirements, when the execution of the letter would require the performance of acts that do not fall within the functions of that state's judiciary, or when the execution of the letter is prejudicial to the state's security or sovereignty. See 28 U.S.C. § 1781, arts. 5, 12 (1976). The United States also has entered into formal cooperation agreements with Canada and the Federal Republic of Germany. Both agreements include information exchange provisions. The agreements have not prevented conflicts between the parties. See B. HAWK, supra note 203, at 812.

250. Plaine, supra note 139, at 25.
251. See notes 63 & 240 supra and accompanying text.
Model Antitrust Law for Developing Countries. A possible solution to such a concern could have been a provision in the Agreed Principles and Rules conditioning cooperation in a specified information exchange mechanism on the requirement that the foreign prosecution be based reasonably on violations of the agreement's norms. Such a provision would not only produce benefits associated with a formalized information exchange procedure, but would also encourage states to respect the norms of the agreement in their enforcement actions. Foreign states adopting an overly restrictive code would do so at the risk of disqualifying themselves from benefiting from the information exchange provisions.

3. Exemption for State-Sanctioned Conduct

A well-meaning state receives no guidance on the appropriateness of granting exemptions for conduct otherwise condemned under the standards of the UNCRBP code. Rather, the Agreed Principles and Rules merely recognizes that nations are free to exempt conduct with specific legislation, and asks other countries to respect the legislation.

In order to ensure that 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. Absent is even a general admonishment that countries refrain from indulging in protectionist tendencies. The agreement leaves the matter wholly to the discretion of each country, and asks countries to respect each others' legislation. Indeed, subsection C(iii)(7) seems to endorse the efforts of developing countries to establish commodity cartels. At minimum, the agreement might have taken the approach of the Havana Charter, by asking states to refrain from expressly sanctioning conduct that otherwise violates the norms of the agreement unless national security issues or problems of subsistence are at stake. Mere economic advantage for the acting state would thus be an insufficient justification for such conduct.

The Agreed Principles and Rules's failure to address the propriety of state-sanctioned conduct invites widespread abrogation of the

252. See note 60 supra and accompanying text.
254. Id. § C(iii)(7). See also Davidow, supra note 5, at 58 (suggesting optimistically, but unrealistically, that the exemption for state-sanctioned commodity cartels like OPEC may be read to require the approval of consumer states).
255. See note 27 supra and accompanying text.
agreement's standards. For example, Group D countries could effectively exclude their state-owned enterprises by enacting legislation or promulgating rules that specifically "accept" the conduct of such enterprises. The omission is unfortunate, because no effective solution to the state sanctioning problem can be forged solely through national action. International diplomacy demands that one sovereign respect the legislation of another. In the United States, for example, the state action and sovereign immunity doctrines protect OPEC. Accordingly, this problem requires international negotiation and compromise. The failure of the Conference to deal seriously with the issue suggests, perhaps better than any other single event, 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 Act in the United States.

CONCLUSION

The question remains whether the Agreed Principles and Rules represents a salutary negotiating achievement. United States negotiators argue that, though the code may be ambiguous, it increases the tendency of diverse states to adopt a uniform approach to antitrust problems, and provides a mechanism for continuing international discussion on restrictive business practice issues. One of the members of the U.S. delegation to UNCRBP summed up the position well:

Experts of western and other developed nations have believed, based on their own OECD experience, that one-time, international agreements with hard and fast rules are not at present a feasible method of dealing with restrictive business practices in all their contexts. Rather, it is believed that a gradual exchange of information and experience, comparison of legislation and enforcement, and development of common norms based on majority approaches will, over time, serve an educational role, develop personal contacts between antitrust experts in different countries, facilitate bilateral cooperation and consultation, and create bases for further work, particularly at the regional level.

The Agreed Principles and Rules may be valuable under this incremental approach, provided all signatory states understand and respect the limited nature of the compact. A signatory state according more than limited significance to the agreement, however, (a country that believes the Agreed Principles and Rules reflects a fun-

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256. See note 111 supra.
257. See note 115 supra and accompanying text.
258. Davidow, supra note 34, at 603.
damental accord) may be frustrated and disillusioned when other states do not conform to its theories of interpretation. Such a state may see its efforts and sacrifices not being reciprocated, and this perception may reinforce the state's belief that non-conforming states are untrustworthy. Moreover, the agreement may be misused by opportunistic states which find that a slanted construction can serve their political purposes. Both phenomena could exacerbate international tensions over the role of transnational corporations. A true assessment of the value of the Agreed Principles and Rules, therefore, requires balancing these incremental advantages claimed by the U.S. negotiators against the potential mischief created by a document purporting to embody a consensus that does not in fact exist.


Two aspects of the General Assembly resolution deserve special notice. First, the Agreed Principles and Rules was passed without recorded objections. The General Assembly, therefore, mirrored the unanimity of the UNCRBP. The size of the consensus will augment significantly the resolution's influence. See notes 10-15 supra and accompanying text. Second, the General Assembly resolution made specific reference in its Preamble to the basic documents of the New International Economic Order. See note 43 supra. The Preamble notes that the agreement is in furtherance of the New International Economic Order program. The language thus suggests that the arguments of Group of 77 countries for discriminatory treatment of their indigenous industries, in accord with New International Economic Order principles, will reappear in arguments on the meaning of language in the agreement. See notes 233-39 supra and accompanying text.