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Volume 2 | Number 1

Article 2

1-1-1979

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Recommended Citation

Joel Davidow, *International Antitrust Codes and Multinational Enterprises*, 2 Loy. L.A. Int'l & Comp. L. Rev. 17 (1979).

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International Antitrust Codes and Multinational Enterprises*

BY JOEL DAVIDOW**

In June 1979 the fifth United Nations Conference on Trade and Development agreed to schedule diplomatic conferences on restrictive business practices and transfer of technology rules to be held in November and December 1979 at Geneva. In light of the substantial role which the U.S. has taken, and will take in the upcoming negotiations, and their particular importance for U.S. corporations, it is appropriate to examine U.S. policy in regard to international codes of conduct, particularly those relating to antitrust and multinational corporations.

The United States has long been a leader in the development of giant industrial corporations and strict antitrust rules. With characteristic pride and zeal, we have exported both, and controversy has followed.

Nations anxious to protect local industries and markets have resented the "global reach" of our companies and of our competition laws.¹ Our companies are seen as dangerously powerful and answerable to no single sovereign. Our laws are viewed as a unilateral approach to multilateral problems, further flawed because we decline to enforce them when only foreigners are victimized, as by our Webb-Pomerene export cartels.²

In response to both these criticisms, the United States has agreed to participate in drafting and promulgating international antitrust principles to serve as guidelines for multinationals. In a statement prepared for the seventh special session of the United Nations, then Secretary of State Kissinger announced that the

* This article is adapted from a speech delivered to the American Bar Association and has been published in its original form in the April 1979 issue of the ABA Journal.

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1. See generally R. BARNET & R. MÜLLER, *GLOBAL REACH* (1974); R. VERNON, *STORM OVER THE MULTINATIONALS* (1977).

2. For a critical analysis of the United States exemption for export cartels and a suggestion that such associations be approved only upon a showing of need, see NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES* 295-307 (1979). See also Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 *VAND. J. TRANS-NAT'L L.* 399 (1973).

United States, as a leader in developing antitrust rules, would support equivalent rules in an international code of conduct if such a code were voluntary, nondiscriminatory, and applicable to states as well as enterprises.³

The idea of writing international antitrust rules is not new. The rejected Havana Charter of 1948 contained rules against such classic offenses as market division, price-fixing, tying, and abuse of industrial property rights.⁴ A draft prepared in 1952 by the Economic and Social Council of the UN contained similar rules, combined with an investigative and consultative procedure, but it too failed to receive adequate support, particularly from the United States.⁵ Opponents of these early codes argued that only a few countries would have the motivation and means to enforce such rules, and that it was preferable to develop antitrust laws at the national and regional level before attempting a worldwide code. Arguably, the desired development has taken place, as evidenced by the strengthened antitrust laws of nations ranging from Germany to India and the development of regional rules in the European Communities, the Andean Pact, and the Caribbean states.⁶ There are counterarguments, of course. More than a hundred countries still have no antitrust law. Many of these reject most free market concepts and strongly support special treatment for their enterprises and cartelization of primary commodity markets important to them. State trading has increased, and there is almost no acceptable way to draft competition rules which can apply equally to private enterprises and governmental agencies performing like functions.

Whatever the abstract merits of the arguments for and against codes of conduct, it is obvious that their time has come. The International Chamber of Commerce offered a general code in 1972.⁷ The

3. Global Consensus and Economic Development, address by Secretary of State Kissinger read before the seventh special session of the U.N. General Assembly on Sept. 1, 1975, by Ambassador Daniel P. Moynihan, *reprinted in* 73 DEP'T STATE BULL. 425, 432-33 (1975).

4. See U.S. DEP'T OF STATE, PUB. NO. 3206, COM. POL'Y SER. 114, CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS (1948). See also Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAW. 317, 322-27 (1970).

5. See Report of the Ad Hoc Comm. on Restrictive Business Practices, 16 U.N. ESCOR, Supp. (11), U.N. Doc. E/2380/AC. 37/3 (1953); Timberg, *Restrictive Business Practices as an Appropriate Subject for United Nations Action*, 1 ANTITRUST BULL. 409 (1955).

6. See generally C. EDWARDS, TRADE REGULATION OVERSEAS (1966); UNCTAD, Control of Restrictive Business Practices in Latin America, U.N. Doc. UNCTAD/ST/MD/4 (1975) (study prepared by Eduardo White at the request of the UNCTAD secretariat); UNCTAD, Laws and Regulations Relating to the Control of Restrictive Business Practices, U.N. Doc. TD/B/C.2 AC 5/Misc. 1 (1975).

7. INTERNATIONAL CHAMBER OF COMMERCE, GUIDELINES FOR INTERNATIONAL INVESTMENT (1972).

next year, a United Nations commission of eminent persons concluded, over a few Western dissents, that transnational enterprises engender numerous problems, including some related to restrictive business practices. The "*Eminent Persons Report*"⁸ led to the creation of a UN Center in New York to study the subject and a working group to draft a general code of conduct.

By 1976, the Western countries, plus Japan, partly because of a desire to stay ahead of UN developments, promulgated their own 39-point code of conduct for multinational enterprises under the auspices of the Organization for Economic Cooperation and Development (OECD).⁹ The code includes four antitrust principles¹⁰ which reflect a more sophisticated approach than that of the drafters of 1948. Monopolization is condemned only when a dominant position in a relevant market is abused by means of specific conduct such as acquisitions, refusals to deal, or price discrimination. Participating in a cartel is to be avoided only when the cartel is not permitted by applicable national law. Multinationals, it is stated, should permit their purchasers, distributors, and licensees to buy, sell, and export freely, but may restrict such freedom whenever doing so is justified by trade conditions, the need for specialization, or sound commercial practice. The 1976 guidelines reflect the current preoccupation with the procedural problems of regulating multinationals by having the final principle devoted to the duty of firms to consult and cooperate with authorities of directly affected countries in regard to competition investigations, and to furnish requested information if adequate safeguards for its confidentiality are provided by the requesting government.

As the developed countries anticipated, the negotiation of an OECD code of conduct was a mere prelude to the much more difficult and contentious process involved in attempting to draft agreed principles at the UN level. Within the OECD, there had been no controversy in accepting the principle that the code of conduct should take the form of voluntary guidelines. At the UN Center in New York and the UN Conference on Trade and Development

8. U.N. Dep't of Economic and Social Affairs, *The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5500/Rev. 1 ST/ESA/6 (1974). See generally Coonrod, *The United Nations Code of Conduct for Transnational Corporations*, 18 HARV. INT'L L.J. 273 (1977).

9. OECD, *Guidelines for Multinational Enterprises, Annex, Declaration on International Investment and Multinational Enterprises*, reprinted in 75 DEP'T STATE BULL. 84 (1976) [hereinafter cited as *OECD Declaration on International Investment*]. See generally Davidson, *Some Reflections on the OECD Competition Guidelines*, 22 ANTITRUST BULL. 441 (1977).

10. *OECD Declaration on International Investment*, supra note 9, at 86.

(UNCTAD) in Geneva, where work on a technology transfer code and an antitrust code has been taking place, the developing nations have demanded that the codes should be framed in obligatory language, should take the form of a treaty or convention, and should have the effect of invalidating or making unenforceable all contracts contrary to the agreed norms. The People's Republic of China has supported this demand, while the Soviet bloc has played a waiting game, trying somewhat to disguise its considerable conservatism in this area. The West has been left apparently alone in arguing for the guidelines approach.¹¹

It seems likely, nevertheless, that the voluntary approach will prevail. Competition rules are almost always a two-edged sword. As Western delegates have resisted or narrowed exceptions for state enterprises or developing countries and have insisted on guarantees of fair and equitable treatment of enterprises under established procedures and published regulations, a number of the other nations have lost their enthusiasm for being bound by such international rules. There was considerable agreement at the February 1979 Geneva Conference on a Transfer of Technology Code of Conduct as to a long-run compromise on an implementation and review procedure similar to that adopted by the OECD, but with perhaps a more active form of surveillance of results. It also seems agreeable that the rules and implementation procedures will be reexamined after a five-year period, with a view to their being supplemented or strengthened.¹²

In regard to the basic antitrust offenses—price-fixing, market and customer allocation, tying clauses, boycotts—it has not been notably more difficult to negotiate agreed rules at the UN level than within the OECD, though major problems remain in regard to what type of government approval will justify such conduct, particularly when it affects more than one country. The other major problems have concerned the applicability of such rules to parent-subsidiary transactions and the acceptability of provisions submitted by the developing countries which would create antitrust offenses not recognized in the United States.

At stake is more than the fairness or desirability of particular

11. See generally Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978).

12. UNCTAD, United Nations Conference on an International Code of Conduct on the Transfer of Technology, Selected Documents of the Conference, U.N. Doc. TD/CODE TOT/10 (1978).

rules. There is a tug-of-war between two opposing conceptions of what these codes of conduct should do. The United States and other home countries of multinationals seek codes of conduct which will create uniform, predictable worldwide rules, based on well settled free market principles common to American, Common Market and Japanese law, with no discrimination between multinational and local firms. The United States in particular has stressed that competition principles should not be bent or extended to achieve trade, investment, or development goals. Developing countries have stressed that codes of conduct should help to bring about a new international economic order, not merely to codify the old one. In the desired new order, multinational enterprises should completely refrain from any restriction likely to lessen the export potential, purchasing freedom, or research and development activity of the local firms they have created or with which they deal. The codes of conduct are seen as needed to endorse and provide models for innovative regulation by developing countries that will employ competition policy as an instrument to help achieve national development goals.

The result of these substantial differences has been a creative tension, but not yet a total stalemate. On the one hand, the developing countries, lacking an antitrust tradition of their own, have had to accept free market conceptions in order to write an intellectually coherent code at all. For instance, it is agreed by all nations that the objective of the UNCTAD international antitrust principles is to achieve efficiency in international trade and development by “(a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation.”¹³ These are sentiments as American as apple pie.

On the other hand, Western delegates have agreed in the UNCTAD context to language and to rules that have no direct counterparts in American or Common Market competition law. The agreed text states that restrictive business practices are particularly objectionable when they injure the trade and development of developing countries. “Transnational corporations” are specifically mentioned as among those to whom the principles and rules are addressed, but the principle has been maintained that the competition and tech-

13. UNCTAD, Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices of Multinational Enterprises on its Fourth Session, U.N. Doc. TD/B/C.2/AC.6/13 (1978).

nology transfer rules are equally applicable to all enterprises.

In the proposed transfer of technology code, two agreed provisions stipulate that no licensor should restrict the licensee from using local personnel or from adopting the technology to local conditions on its own responsibility. Neither rule is to be found in a U.S. antitrust case, but neither restriction has much to be said for it, so principle has been bent, as Holmes advised, to meet the felt needs of the time.¹⁴

The question of applying restrictive practice principles to parent-subsidiary relationships is more difficult, because the issue is one of substance and policy as well as theory. In terms of theory, the issue is debatable, since parent and subsidiary may claim to be or be treated as either a unity or two separate firms, depending on the tax, trade, antitrust, or international law context.¹⁵ The policy point is more obvious. It seems likely that if the international community accepted anything close to an unqualified rule stating that it is a restrictive business practice for foreign parent companies to restrict the exports, prices, or purchases of subsidiaries they have created, and if such a rule were implemented or emulated, direct foreign investment would be substantially discouraged. Even here, however, absolutes are elusive. For instance, even in developed countries like Canada, national law is more stringent against export restrictions imposed on subsidiaries than a multilaterally agreeable code of conduct would be.¹⁶ And it may be that if a subsidiary is really fully controlled, express restrictions on its activities are unnecessary and their removal would have little or no practical effect. Business comment and advice on these points have been far from uniform.

A compromise, consistent with the Antitrust Division's recent Sherman Act section 2 case and settlement involving the Everest & Jennings wheelchair company's restriction on sales by its English joint venture affiliate to U.S. customers, is to apply antitrust rules to parent-subsidiary restrictions only when the firms occupy a dominant market position and employ the restrictions to entrench that position or injure a rival firm.¹⁷

14. O.W. Holmes, Jr., *THE COMMON LAW* 1 (1881).

15. For a discussion of the competition issue presented, see Davidow, *The United States, Developing Countries and the Issue of Intra-Enterprise Agreements*, 7 GA. J. INT'L & COMP. L. 507 (1977).

16. See OECD, *REPORT OF THE COMM. OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES* 35-36 (1977).

17. See *United States v. Everest & Jennings Int'l*, No. 77-1648-R (C.D. Cal. Feb. 5, 1979) (consent decree).

The most significant of the new antitrust offenses developing countries wish to have recognized in international codes is the abuse of transfer pricing by overcharging or underpaying subsidiaries. Western opposition has been largely based on principle; U.S. delegates have contended that transfer pricing is more properly viewed as a tax or investment question than an antitrust issue. Transfer pricing is assigned a separate chapter in the general code of conduct for transnational enterprises.¹⁸

It is likely that in a taxation context, the United States and other developed countries will support the principle that parent-subsidiary transactions should be made on an arms-length basis at prices comparable to those for equivalent transactions among independent firms.¹⁹ But this does not conclusively settle whether or under what circumstances transfer pricing should be treated as an antitrust offense.

The OECD competition guidelines condemn discriminatory pricing, including pricing among affiliated firms, which is used as a means of adversely affecting competition outside those firms.²⁰ If a transfer price is to a wholly owned subsidiary and is not reflected in resale prices, there appears to be no competition issue at all. The colorful phrasing of this point is that the antitrust laws are indifferent to "corporate self-abuse." But what if there is a tie-in sale or an overcharge or both, to a partially owned firm? Should international antitrust principles be used to protect foreign minority shareholders? This would not be the traditional function of antitrust, and there are undoubtedly better ways to achieve such protection under national laws. This analysis suggests that there should be close coordination between international antitrust negotiations and the negotiation of general standards of corporate behavior in order to deal adequately with each significant issue in its appropriate context, without stretching legal doctrines beyond their accepted meanings or purposes.

It would be well to be quite careful in resolving this or most of the other questions raised in this field. Certainly, serious concerns exist which justify the utmost in good faith efforts to draft strong,

18. See generally UNCTAD, *Dominant Positions of Market Power of Transnational Corporations*, U.N. Doc. TD/B/C.2/167 (1978).

19. Surrey, *Reflections on the Allocation of Income and Expenses among National Tax Jurisdictions*, 10 *LAW & POL'Y INT'L BUS.* 409, 413-15 (1978).

20. For a discussion of competition guideline 1(e) (discriminatory pricing), see Davidow, *supra* note 9, at 450-51.

sensible rules promptly. But thought is needed every bit as much as action, and a scheme for unifying world commerce to ensure free and fair competition among all enterprises has not even appeared on the horizon. The United States and the United Nations will be asking multinational enterprises to conform their competitive conduct to an amalgam of antitrust, trade, and investment rules. The least we must offer in return is a balanced, predictable set of norms in which principles of due process and equal treatment are given fully as much weight as principles dealing with cartels, mergers, and licensing.