

RECENT DEVELOPMENT

UNITED NATIONS SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES, GENERAL ASSEMBLY RESOLUTION 35/63 (1980).

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (hereinafter Principles and Rules), encompassed in a resolution adopted by the United Nations General Assembly, establishes general principles and rules for the control of restrictive business practices (hereinafter RBPs). The principles and rules also establish institutional mechanisms for a consultation procedure and for the exchange of expertise and information regarding RBPs. The resolution is based upon the recognition that RBPs can have an adverse effect on international trade and development, particularly for developing nations.

The records of the bodies that formulated the Principles and Rules illustrate the classic economic battle of the haves versus the have-nots. Effective control of RBPs, especially those of transnational corporations, traditionally has been viewed by the developing nations¹ as an important step in the establishment of a New International Economic Order,² *i.e.*, in the equalization of the international economic positions of the less industrialized nations *vis a vis* the advanced market economies of developed nations. The developed nations,³ on the other hand, have approached the Principles and Rules as part of a process the objective of which is to increase information exchange, consultation, and cooperation among nations.⁴ Finally, the socialist nations⁵ have viewed the formulation of the Principles and Rules as a forum for criticism of

¹ In 1964 UNCTAD established regional groupings of States. The appellation chosen by the developing nations was the "Group of 77", and the name is still used today though the developing nations now number approximately 120.

² Joelson, *The Proposed International Codes of Conduct as Related to Restrictive Business Practices*, 8 L. & POLY INTL BUS. 837, 848-50 (1976).

³ Under the UNCTAD regional groupings of States, the industrialized market economy nations are designated as Group B. Their number coincides with the members of the Organization for Economic Cooperation and Development (OECD).

⁴ Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INTL LAW. 587, 603 (1979).

⁵ The socialist countries, commonly referred to as Group D, consist of the members of Comecon, with the exception of Romania, Cuba, and Mongolia.

transnational enterprises and "private monopolistic organizations," and as a mechanism for restructuring the world economy to eliminate "discrimination, inequality . . . and exploitation."⁶ The challenge that confronted the drafters of the various proposals and of the final Principles and Rules was to resolve these basic differences in approach and to formulate a workable international solution to the problem of RBPs.

RBPs have long been a subject of both national and international concern.⁷ The development of international rules related to RBPs originated with the studies of possible controls for cartels and industrial agreements.⁸ United Nations efforts in this area began with the 1948 proposal and subsequent rejection of the Havana Charter, which called for an international trade organization.⁹ A United Nations committee under the Economic and Social Council (ECOSOC) drafted a convention in 1953, which paralleled the Havana Charter's list of RBPs and substantive law and provided for implementation procedures. These guidelines failed.¹⁰ However, the issue of RBPs was also explored by the contracting parties to the General Agreement on Tariffs and Trade (GATT) in the late 1950s, but it was concluded that RBP controls could not be incorporated effectively into the structure of GATT.¹¹ Nonetheless, one result of the study was the establishment of a governmental consultation procedure for contracting parties to GATT. It was foreseen that the harmful effects of RBPs involving enterprises of contracting parties would be resolved using this procedure.¹²

In 1972, the United Nations Conference on Trade and Development (UNCTAD) established an ad hoc Group of Experts on Restrictive Business Practices,¹³ which was charged with identify-

⁶ Report of the Third *ad hoc* Group of Experts on Restrictive Business Practices on its Sixth Session, U.N. Doc. TD/250, TD/B/C.2/201, TD/B/C.6/20 (1979) at 40 [hereinafter cited as Report of the Third *ad Hoc* Advisory Group].

⁷ Joelson & Griffin, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT'L LAW. 5 (1977). "Since 1945 more than 20 nations have enacted restrictive business practices legislation." *Id.* at 9. See Greenhill, *UNCTAD: Control of Restrictive Business Practices*, 12 J. WORLD TRADE L. 67, 68-70 (1978). See generally Furnish, *A Transnational Approach to Restrictive Business Practices*, 4 INT'L LAW. 317 (1969).

⁸ Furnish, *supra* note 7, at 318-20; Joelson & Griffin, *supra* note 7, at 10.

⁹ Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587 (1979); Furnish, *supra* note 7, at 322-26; Joelson & Griffin, *supra* note 7, at 10.

¹⁰ Furnish, *supra* note 7, at 326-27; Joelson & Griffin, *supra* note 7, at 11.

¹¹ Furnish, *supra* note 7, at 327-29; Joelson & Griffin, *supra* note 7, at 11-12.

¹² This consultation procedure has never been used. See Davidow, *supra* note 4, at 587.

¹³ UNCTAD Res. 73 (III), U.N. Doc TD/180 (May 9, 1972).

ing restrictive business practices, submitting recommendations for their alleviation or possible elimination, studying further those RBPs adversely affecting developing countries, and examining the possibility of promulgating guidelines for governments regarding RBPs. This group of experts reported to the Committee on Manufactures.¹⁴ A second ad hoc Group of Experts met in 1975 and 1976.¹⁵ The General Assembly's resolution supporting the efforts of the ad hoc Group was considered "an endorsement and a step forward regarding the type of desirable remedial action."¹⁶ However, as reflected in the Report of the Second ad hoc Group of Experts, there was a sharp division of opinion between the developed and developing nations on a number of important issues, including the ultimate result to be achieved by the control of RBPs,¹⁷ the scope of the principles to be adopted,¹⁸ and the iden-

¹⁴ Report by the *ad hoc* Group of Experts, Restrictive Business Practices in Relation to Trade and Development, U.N. Doc. TD/B/C.2/119, at 1 (1973).

¹⁵ See Report of the Second *ad Hoc* Group of Experts on Restrictive Business Practices, U.N. Doc. TD/B/600, TD/B/C.2/166, TD/B/C.2/AC.5/6 (1976) [hereinafter cited as Report of the Second *ad hoc* Group].

¹⁶ *Id.* Ch. I ¶5, introductory statement of the representative of the Secretary-General of UNCTAD, which "referred to resolution 3362 (S-VII) of the General Assembly, which stated that 'restrictive business practices adversely affecting international trade, particularly that of developing countries, should be eliminated and efforts should be made at the national and international levels with the objective of negotiating a set of equitable principles and rules.'" *Id.*

¹⁷ Experts from developed countries viewed the control of RBPs as "aimed essentially at maintaining and promoting competition," while experts from developing nations stressed that the goal should be that of "controlling all restrictive business practices likely to affect adversely the economies of developing countries." *Id.* at II-9-10, II-13. The experts from developing countries also emphasized the necessity for careful consideration of exemptions, and "the concept of more favourable and differentiated treatment." *Id.* at 15. In the words of one expert, "[c]ompetition . . . presuppose[s] some sort of essential equality amongst the parties concerned. . . ." *Id.* at 7.

Joelson and Griffin review successful international agreements concerning RBPs, including the Treaty of Rome creating the European Economic Community and the Investment Code of the Andean Common Market. The authors conclude that the history shows that successful international attempts to control RBPs have been among countries at the same level of development. Joelson & Griffin, *supra* note 7, at 12-14. See also Report of the Second *ad hoc* Group, *supra* note 9, at ¶15. Therefore, some "equalization" between the developed and developing nations would seem to be essential to the success of a U.N. effort to control RBPs.

¹⁸ Experts from developed countries preferred the development of "co-operation and improvement in the exchange of information." Report of the Second *ad hoc* Group, *supra* note 15, at II-10. Also favored was a "general rather than a detailed approach." *Id.* at II-11. Not surprisingly, obligatory principles were not favored. *Id.* at II-10. See Gill, *The UNCTAD-Restrictive Business Practices Code: A Code for Competition?*, 13 INT'L LAW. 607-15 (1979).

Experts from developing countries, while agreeing that exchange of resources and information regarding RBPs was important, regarded as essential the establishment of a "mandatory Code of Conduct." Report of the Second *ad hoc* Group, *supra* note 15, at II-8. See

tification of what practices should be categorized as restrictive business practices.¹⁹

At its fourth session in May 1976, UNCTAD formally called for action, on an international level, to formulate, within the framework of UNCTAD, "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."²⁰ The conference also urged that the exchange, collection, and dissemination of information on RBPs by the UNCTAD Secretariat be continued. It stressed the special need for the exchange of information supplied by the developed countries,²¹ for the provision of technical assistance regarding RBPs,²² and for the development of a model law or laws on RBPs.²³ Most importantly, the conference called for the convening of further meetings of the ad hoc Group of Experts.

The Third ad hoc Group met each year from 1976 to 1979. During these sessions, it completed a "multilaterally agreed" set of "equitable principles and rules" which, unfortunately, embodied several significant areas of disagreement. The areas of agreement included objectives of the Principles and Rules,²⁴ definitions of important terms,²⁵ a substantially complete list of restrictive practices likely to be injurious to trade and development, the need for a system of information gathering and dissemination of expert assistance to facilitate the development of legislation, and the desire for concerted action on national and regional levels,²⁶ as

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. See also Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 L. & POLY INT'L BUS. 895, 910 (1976).

¹⁹ A major point of difference between developed and developing countries regarding the identification of RBPs was the characterization of parent-subsidiary practices, including exclusive dealing, refusals to deal, and territorial market and product allocation, as RBPs. See text at pp. 717-19 *infra*. Report of the Second *ad hoc* Group, *supra* note 15 at III-19. See Davidow, *The United States, Developing Countries, and the Issue of Intra-Enterprise Agreements*, 7 GA. J. INT'L & COMP. L. 507, 511-12 (1977); Gill, *supra* note 18, at 612-15.

²⁰ UNCTAD Res. 96, U.N. Doc. TD/218, at § III, ¶3(a) (May 31, 1976).

²¹ *Id.* at (b)-(d).

²² *Id.* at (e).

²³ *Id.* at (f).

²⁴ Report of the Third *ad hoc* Group, *supra* note 6, at 4-6.

²⁵ *Id.* at 7-8. The Group D countries continued to object to the inclusion of enterprises controlled by the State in the definition of enterprises and to the absence of a definition of cartels. *Id.* at 5.

²⁶ *Id.* at 11-13.

well as a set of general principles.²⁷ Unresolved issues were listed in a closing statement by experts representing the Group of 77. These issues were characterized as involving "essentially political decisions and hence [ones which] could only be resolved at the negotiating conference."²⁸

On the recommendation of the Trade and Development Board, the General Assembly convened the United Nations Conference on Restrictive Business Practices in November 1979 to negotiate and adopt a set of principles and rules consistent with the work of the Group of Experts.²⁹ After a second session in April 1980, the Conference adopted a resolution for transmittal to the General Assembly entitled The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which was adopted unanimously by the General Assembly on December 5, 1980.³⁰

The first section of the Principles and Rules presents a statement of objectives, directed principally at developing countries. Included among the objectives are the following: ensuring that RBPs do not impede or negate the realization of benefits to be gained from the liberalization of tariff and non-tariff barriers affecting world trade;³¹ attaining greater efficiency in international trade and development (through, for example, the control of concentration of economic power and through the fostering of competition and innovation);³² protecting social welfare in general and the interests of consumers in particular;³³ eliminating the disad-

²⁷ *Id.* at 17.

²⁸ Report of the Third *ad hoc* Group, *supra* note 6, at 35. Examples listed include: (a) exceptions to the application of the principles and rules; (b) differential treatment for enterprises of developing countries; (c) the inclusion of restrictive business practices occurring in the relations between the various entities constituting a transnational corporation; (d) the role of UNCTAD in implementing and monitoring the principles and rules and in further work generally on the question of restrictive business practices; (e) the legally binding nature of the principles and rules.

For a detailed study of the text and outstanding issues as negotiated by the *ad hoc* Committee of Experts and transmitted to the Conference, see Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587 (1979).

²⁹ Documents relating to the draft set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, circulated at the first session, 19 November to 8 December 1979, U.N. Doc. TD/RBP/CONF/8 at 2 [hereinafter cited as Documents relating to the draft].

³⁰ G.A. Res. 35/63.

³¹ *Id.* at §A(1).

³² *Id.* at (2).

³³ *Id.* at (3).

vantages of the RBPs of transnational corporations and other enterprises;³⁴ providing guidelines and principles for adoption at the international level; and facilitating the adoption of effective laws and policies at the regional and national levels.³⁵

The second section of the Principles and Rules provides a definition of terms³⁶ and delineates the scope of the document.³⁷ The scope of application section includes part of a compromised solution to important issues left unresolved at the Expert level, where it was agreed that the Principles and Rules would apply to all transactions in goods and services to all enterprises, and to all countries regardless of whether the RBPs involve enterprises in one or more countries.³⁸ The issue of exemptions from application of the principles was to be resolved at the Conference. The Group B countries proposed that the Principles and Rules should be applicable neither to acts acceptable under national legislation or regulations nor to RBPs directly caused by sovereign acts of state or authorized by intergovernmental agreements among concerned countries.

Most importantly, Group B proposed that the Principles and Rules should not be applicable to agreements between parent and subsidiary companies unless amounting to an abuse of dominant power in a relevant market.³⁹ The Group of 77 developing countries proposed that exemptions from the application of the Principles and Rules should be granted only under legislation and regulation of the developing countries to activities or enterprises "essential for their economic development or in defense of their primary commodities and economic resources."⁴⁰ According to the Group of 77 proposal, only RBPs directly caused by intergovernmental agreements negotiated within the auspices of the United Nations would be exempt from the application of the Principles and Rules.⁴¹ As negotiated at the Conference, these conflicting positions on scope of application are not included in this section but are resolved in Section C on equitable principles.⁴² In the final

³⁴ *Id.* at (4).

³⁵ *Id.* at (5).

³⁶ *Id.* §B(i). The terms defined are: (1) "restrictive business practices"; (2) "dominant position of market power"; and (3) "enterprises."

³⁷ *Id.* at (iii).

³⁸ Report of the Third *ad hoc* Group, *supra* note 6, at 11.

³⁹ *Id.* at 12-13.

⁴⁰ *Id.* at 12.

⁴¹ Report of the Third *ad hoc* Group, *supra* note 6, at 13.

⁴² See text accompanying notes 47-51 *infra*.

document, the only complete exemption from application of the Principles and Rules is for intergovernmental agreements.⁴³

The third section of the Principles and Rules, section C, contains the equitable principles. In the final text, the principles are divided into three subsections. This division represents the result of negotiation of a major issue at the Conference, namely, whether differential treatment should be afforded the enterprises of developing countries.⁴⁴ The position of the Group of 77 at the Expert level was that preferential treatment should be given to their national enterprises to ensure equitable application of the Principles and Rules.⁴⁵ However, the Group B position was that account should be taken of special economic conditions or circumstances, particularly in developing countries, to ensure equitable interpretation.⁴⁶

At the Conference, the Group of 77 stressed that inequality of market power necessitates preferential treatment for developing countries. This is true, they urged, because developing countries' enterprises "are . . . the recipients of the effects of [RBPs] . . . [not] the instigators of them." Furthermore, because they are new entrants, it was asserted such enterprises have a difficult time making gains in markets against enterprises of developed countries, which "have an entrenched position . . . buttressed by the use of restrictive business practices."⁴⁷ Rather than to provide excep-

⁴³ Principles and Rules, *supra* note 30, §(B)(ii)(9). The Principles and Rules also provide that references to "states" or "governments" include regional groupings having competence in the area of RBPs. *Id.* §B(ii)(8). An example is the European Economic Community.

⁴⁴ See note 40 *supra*.

⁴⁵ The text proposed by the Group of 77 stated that "account should be taken of the economic conditions . . . and the frequent absence of countervailing market power of enterprises of those countries to that of enterprises of developed countries, especially transnational corporations, and accordingly preferential or differential treatment should be afforded to their national enterprises in order to ensure the equitable application of the principles and rules." Report of the Third *ad hoc* Group, *supra* note 6, at 15. See also the exemption proposed under Section (B) of the Principles and Rules, *supra* note 30.

⁴⁶ Special conditions or economic circumstances under the Group B proposal included "the need for small and medium-sized enterprises to co-operate and combine sufficiently to enable them to function efficiently and competitively in international markets." Report of the Third *ad hoc* Group, *supra* note 6, at 15.

⁴⁷ Documents relating to the draft, *supra* note 29, at 4 (statement on the Position of the Group of 77 made by Brazil on behalf of the Group of 77 at the second plenary meeting, on 21 November 1975). Further support of the Group of 77 position for preferential treatment as part of the transformation of the "old international economic relationship" was expressed by China in its statement, which noted that according to United Nations statistics, the industrial output of the developing countries, which account for over 70 per cent of the world's population, amounted to only 8 per cent of total world industrial production in 1975, and increased to only 9 per cent in 1977. The develop-

tions to the rules for the enterprises of developing countries, Group B countries urged that the Principles and Rules be applied universally, although they conceded that consideration should be given to the adverse effects of RBPs upon developing countries.⁴⁸

The first subsection of the agreed text contains the general principles as negotiated by the Experts.⁴⁹ The second and third subsections incorporate a compromise between the positions of the Group of 77 and Group B. There are no provisions for any absolute exceptions from application of the Principles and Rules. Instead, the second subsection stresses that although nations should "bear in mind the need to ensure comprehensive application" of the Principles and Rules to enterprises, they should take into account the conduct of enterprises accepted or required by national law.⁵⁰ The third subsection regarding preferential or differential treatment for developing countries stresses that states, particularly developed countries, should take into account the development, financial, and trade needs of developing countries for the purpose of encouraging economic development through the promotion of domestic industries.⁵¹

Section D embodies the Principles and Rules for enterprises. With minor exceptions, the text to which the Experts agreed remained unchanged at the Conference level. Section D contains the following principles: (1) enterprises should conform to the restrictive business practices laws of the countries in which they operate; (2) enterprises should consult and cooperate with competent authorities in the countries in which they operate, and should provide information, particularly details of restrictive

ing countries' share of trade in manufactured goods is only 8 per cent of the world total. These figures are an eloquent illustration of the present disadvantaged position of the developing countries in international economic capital.

Id. at 8-9.

⁴⁸ *Id.* at 6. (Statement on the position of Group B made by Canada on behalf of the members of Group B at the second plenary meeting, on 21 November 1975).

⁴⁹ Principles and Rules *supra* note 30 §C(i). These general principles include: (1) taking appropriate action in a mutually reinforcing manner at national, regional, and international levels to eliminate or effectively deal with RBPs; (2) establishing collaboration between governments at bilateral and multilateral levels to facilitate the control of RBPs; (3) devising appropriate mechanisms to facilitate exchange and dissemination of information among governments with respect to RBPs; (4) facilitating multilateral consultations on policy issues relating to the control of RBPs; (4) not construing the Principles and Rules as justifying conduct by enterprises that is unlawful under applicable national or regional legislation.

Id.

⁵⁰ *Id.* §C(ii).

⁵¹ *Id.* §C(iii).

agreements, even if that information is located in foreign countries, unless its disclosure is prevented by law or established public policy; and (3) enterprises, except those under common control, should refrain from practices that limit access to markets or otherwise unduly restrain competition. Such practices include: (a) fixing prices, including those of exports and imports; (b) collusive tendering; (c) market or customer allocation; (d) allocation by quota of sales and production; (e) concerted refusals to deal; (f) concerted refusal of supplies to potential importers; and (g) collective denial of access to an arrangement or association crucial to competition. A fourth principle is that enterprises should refrain from the abuse of a dominant position of market power. Such activities include (a) predatory behavior toward competitors; (b) discriminatory pricing or terms or conditions in the supply or purchase of goods or services, including, for example, differential pricing between affiliated enterprises; (c) mergers, takeovers, joint ventures, or other acquisitions of control; (d) fixing the prices for resale of exported goods in importing countries; and (e) restricting the importation of legitimately trademarked goods identical or similar to trademarked goods in the importing country when the trademarks are of the same origin and where the purpose of restricting importation is to maintain artificially high prices. Whether the activities listed above are considered to be abusive is determined by examination of the purpose and effects of the activities in a particular situation. Subsection (4)(f) lists four practices from which enterprises should refrain when they are not used for legitimate business purposes such as ensuring quality, safety, adequate distribution, or service. These practices are (i) refusals to deal on customary commercial terms, (ii) exclusive dealing, (iii) restricting resale, customers, or export of goods, and (iv) tying arrangements.⁵²

During the development of the Principles and Rules relating to transactions between affiliated enterprises, disagreement arose as to what actions by enterprises should be considered restrictive.⁵³ It should be noted that the terms "restrictive business practices" and "antitrust" are not equivalent, and that what may constitute a restrictive business practice in, for example, the European Economic Community may not be an antitrust violation in the

⁵² *Id.* §D 1-4.

⁵³ See text accompanying notes 13-19 *supra*.

United States.⁵⁴ Nevertheless, the Western market economy countries generally agree that parent-subsidiary agreements are not in themselves restrictive business practices.⁵⁵ The developing nations, on the other hand, consider intra-enterprise agreements to be a major source of harmful RBPs, and thus favor the elimination of such arrangements.⁵⁶ At the first Conference session, a spokesman, in emphasizing the importance of making intra-enterprise transactions using RBPs subject to the Principles and Rules, noted that "roughly fifty percent of world trade is between related enterprises. Hence, to exclude such transactions from the scope of the principles and rules would seriously impair its [sic] value and effectiveness."⁵⁷ In final form, section D(3) of the Principles and Rules excludes enterprises "when dealing with each other in the context of an economic entity wherein they are under common control" from the application of the section, which lists prohibited horizontal offenses. However, all enterprises,⁵⁸ including parents and subsidiaries, are subject to §D(4), which lists abuses of dominant position. Whether the conduct listed is considered an abuse is determined "in the light of the organizational, managerial, and legal relationship among the enterprises concerned. . . ."⁵⁹ This compromise reflects the previously "misunderstood" Group B position as presented by Davidow, who states that

all rules for enterprises—rules against price-fixing, tying arrangements, and the like—are fully and expressly applicable to transnational corporations when such firms fix prices with competing firms or place tied products or services on independent buyers . . . [and] when a transnational corporation acts abusively through a subsidiary or affiliate to produce adverse competitive

⁵⁴ See Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 L. & POLY INT'L BUS. 895, 901 (1976).

⁵⁵ *Id.* See also Davidow, *The United States, Developing Countries and the Issue of Intra-Enterprise Agreements*, 7 GA. J. INT'L & COMP. L. 507 (1977), where the author analyzes the state of United States and EEC law on parent-subsidiary relationships, pointing out that there are "complex and debatable" issues "even under (such) well settled and relatively conservative bodies of antitrust law. . . ." *Id.* at 508.

⁵⁶ *Id.* at 512.

⁵⁷ Documents relating to the draft, *supra* note 29, at 4. (Statement on the position of the Group of 77 made by Brazil on behalf of the Group of 77 at the second plenary meeting on 21 November 1979). See also *id.* at 3 (statement by China on its position, made at the second plenary meeting, on 21 November 1979); Report of the Third *ad hoc* Group, *supra* note 6, at 40. (Statement of the spokesman for the experts from Group D).

⁵⁸ The definition of enterprises includes "corporations . . . and . . . their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them." Principles and Rules, *supra* note 30, §B(3).

⁵⁹ *Id.* at § D(4).

effects outside the group or entrench a dominant market position.⁶⁰

The fifth section of the Principles and Rules, section E, sets out the actions that nations should take and the principles they should follow at the national, regional, and subregional levels. These are: (1) adopting and enforcing appropriate legislation and administrative procedures for the control of RBPs; (2) basing such legislation on the principle of regulating behavior which, through abuse of dominant position, limits market access or unduly restrains competition, has adverse effects on trade or economic development, or which through agreements among enterprises has the same effect; (3) ensuring fair and equitable treatment of enterprises on the same basis and in accordance with established legal procedures; (4) seeking remedial or protective measures to prevent the use of RBPs that adversely affect international trade and development, particularly of developing countries; (5) safeguarding information obtained from enterprises containing legitimate business secrets; (6) instituting or improving procedures for obtaining information from enterprises; (7) establishing regional and sub-regional mechanisms for exchange of information on RBPs; (8) sharing expertise in control of RBPs with other States; and (9) supplying information to other States, particularly to developing countries.⁶¹

Section F of the Principles and Rules relates to international measures and advocates collaboration aimed at eliminating or effectively dealing with RBPs through specific actions. These include working to achieve common approaches in national policies, communicating annually to the Secretary-General of UNCTAD, publishing an annual UNCTAD report, continuing work on a model law or laws, and implementing technical assistance, advisory and training programs on RBPs.⁶²

The most important provision establishes a procedure for consultation among States,⁶³ which are directed to "accord full consideration to requests for consultations."⁶⁴ If developing countries use the consultation procedure, application of the Principles and Rules to the actions of enterprises from the developed countries

⁶⁰ Davidow, *The UNCTAD Restrictive Business Practices Code*, 13 INT'L LAW. 587, 599 (1979).

⁶¹ Principles and Rules, *supra* note 30, §E(1-9).

⁶² *Id.* at §F(1-3, 5-7).

⁶³ *Id.* §F(4).

⁶⁴ *Id.* §F(4)(b).

may be enhanced, especially when national legislation and regional agreements are based upon the Principles and Rules.

The final section of the Principles and Rules deals with the international institutional machinery for giving effect to the Principles and Rules. The section establishes an Intergovernmental Group of Experts on RBPs, which operates within the framework of UNCTAD. The purposes of the Group are to provide a forum for consultations, to undertake and encourage studies and research, to collect and disseminate information, and to make reports and recommendations. It is not empowered to act as a tribunal or to pass judgment in regard to specific business transactions. The Group is specifically directed to "avoid becoming involved when enterprises in a specific business transaction are in dispute."⁶⁵

The adoption of the Principles and Rules by the General Assembly and the establishment of institutional machinery in the form of a consultative and information-gathering, non-judicial body resolves an issue long debated; *i.e.*, the legal nature of the Principles and Rules. Throughout the negotiations and meetings of the Group of Experts, the developing countries maintained that the proposed Principles and Rules should be binding.⁶⁶ The developed world, conversely, insisted that principles for enterprises and for States should be voluntary.⁶⁷ As adopted, the Principles and Rules follow the proposal of the developed countries. They were adopted as a United Nations resolution rather than as a convention to be ratified by each signatory State, and the institutional framework expressly excludes international enforcement and adjudication mechanisms.

In practice, the distinction between "binding" and "voluntary"

⁶⁵ *Id.* §G(i-ii). The third subsection provides for a review procedure five years after the adoption of the Principles and Rules.

⁶⁶ Report of the Second *ad hoc* Group, *supra* note 15, at ¶76: "those principles applying to the activities of enterprises should not be voluntary since it . . . (is) the responsibility of governments to enforce restrictive business practice laws as regards the operations of enterprises beyond their national frontiers." *Id.*

⁶⁷ *Id.* At paragraph 73 it is stated that principles for governments should be voluntary because of the greatly varying states of development among members of the United Nations and the divergencies in approaches to restrictive business practices, a field in which many member countries . . . (have) no legislation or little experience. . . .

Principles for enterprises should also be voluntary. The experts from the developed market economy countries also noted the lack of international enforcement mechanisms and the unlikelihood, given the divergence in national objectives, that countries would create and accept any binding international enforcement and adjudication. *Id.*

probably will not weaken the effect of the Principles and Rules, since the consensus reached affords the resolution "considerable moral force,"⁶⁸ regardless of whether it is considered to have the force of international law.⁶⁹ In particular, the mechanisms established for increased exchange of information and expertise⁷⁰ should have a positive effect. Furthermore, the anticipated incorporation of the Principles and Rules into national legislation and regional agreements of developing nations should eventually give the Principles and Rules legal effect.⁷¹

Schaun Griffin

⁶⁸ *Id.* at ¶77.

⁶⁹ Davidow & Chiles, *supra* note 18, at 256 n.51.

⁷⁰ See text accompanying note 66 *supra*.

⁷¹ See Davidow & Chiles, *supra* note 18, at 256; and Joelson, *supra* 2, at 870-71.

