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THIRD WORLD TRADE PARTNERSHIP: SUPRANATIONAL AUTHORITY VS. NATIONAL EXTRATERRITORIAL ANTITRUST — A PLEA FOR “HARMONIZED” REGIONALISM

*Wolfgang Fikentscher**

I. THE ISSUE

That “Third World countries” should receive the assistance of the “industrialized nations” in increasing the level of their economic development is a matter beyond dispute. Yet the years following the “economic decade” of the 1970’s have made apparent a crisis in the concepts underlying this philosophy of Third World assistance. The nature of this crisis has not yet been fully ascertained, and the following text does not undertake that task. Rather, it starts from the general feeling among experts involved in one way or another with “development aid” that the paths so far followed and the methods so far applied should be more or less radically reassessed.¹

One aspect of this reassessment relates to the problem of what body should, in the last resort, be the “primary agent” for determining the legal rules of development. The following discussion tries to make a contribution to this part of the general problem. Until recently it was commonly accepted that the United Nations should be the principal initiator, the clearing house, the “primary agent” as it has been called, for international development programs, and that UN member states should, as part of their membership duties, follow and elaborate these programs, drafted under UN supervision, by adopting appropriate policies at the national level. Various UN agencies and bodies have drafted codes of conduct designed to furnish guidelines (if not true rules of law) for the development activities of both states and private enterprise.² The most spectacular initiative in the framework of UN-centered Third World trade partnership is the idea of supranational authorities equipped with binding administrative powers, such as the Seabed Authority provided for by the Third United Nations Conference on the Law of the Sea (UNCLOS III).³ Part II of this paper

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1. See sources cited in note 35 *infra*.

2. For surveys of this UN material, see K. GREWLICH, *TRANSNATIONAL ENTERPRISES IN A NEW INTERNATIONAL SYSTEM* 117-22 (1980); Fikentscher, *United Nations Codes of Conduct: New Paths in International Law*, 30 AM. J. COMP. L. 577 (1982); see also sources cited in notes 11, 20 & 34 *infra*.

3. See United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, reprinted in 21 INTL. LEGAL MATERIALS 1261-354 (1982). Recent developments concerning

attempts to raise some criticisms of this approach.⁴

Although reliance on UN bodies and agencies for determining the legal rules of development has its drawbacks, who, if not the UN, should be the "primary agent"? Can legislative and administrative activities of the "sovereign and equal" nation-states be of any help, providing the necessary remedies to overcome the crisis in Third World development? The often narrow self-interest of nation-states seems to point to a negative answer. Yet the industrialized western-style democracies govern themselves by way of a traditional constitutional system of checks and balances. The public control of private and state enterprises in general, and antitrust laws in particular, are merely a part of this system of separated powers. So it may be asked whether *extraterritorial* antitrust law (as a prominent example of public control of enterprises that act extraterritorially) can be used as an instrument of Third World assistance. This question may seem novel, even surprising, and will be discussed in Part III.⁵

Given the international impact of national extraterritorial public control of economic activity and expansion, however, national approaches cannot stand alone. This leads to a call for international harmonization of national extraterritorial public control, as mentioned and encouraged in some recent UN codes of conduct. These patterns of international cooperation, including adjustment of those national economic laws having extraterritorial impact, need not be conceived of as worldwide, and indeed, should not be so conceived. Instead of pressing for supranational authorities acting worldwide under UN auspices (and thus hampered ideologically by the three-groups system⁶), regional entities for the coordination of extraterritorial legal and administrative activities, like those in the antitrust area, could produce a more meaningful and effective attempt to realize third-world trade partnership. Some remarks on this recently emerged "mini-treaty approach" will be made in Part IV.⁷

this ambitious project are commented on in Jaenicke, *Die Dritte Seerechtskonferenz der Vereinten Nationen*, 36 NJW 1936 (1983); Platzöder, *Die Seerechtsentwicklung aus deutscher Sicht*, SPEKTRUM DER WISSENSCHAFT, May 1983, at 36.

4. Part II is an unpublished comment, slightly revised here, which was contributed by the author at a conference organized by the Institute of International Studies, University of California, Berkeley, on the topic *What should American Policy be on the Law of the Sea?*, June 5-6, 1981.

5. Part III is a condensed version of a paper published in German: *Entwicklungshilfe oder Expansionskontrolle? Rechtspolitische Überlegungen zu Antitrust und Technologietransfer*, 1983 GRUR INT. 497 (this issue, edited by F.-K. Beier, G. Schrickler, W. Fikentscher & R. Krasser, was entitled BEITRÄGE ZUM GEWERBLICHEN RECHTSSCHUTZ, URHEBERRECHT UND WIRTSCHAFTSRECHT: FESTSCHRIFT FÜR EUGEN ULMER ZUM 80. GEBURTSTAG). I am indebted to Mr. Grayson McCouch, Fellow (1982-83), Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich, for providing the English translation.

6. The three-groups system, adopted throughout UN organizations, divides the member-states into the "B-Group" of western industrialized nations, the "D-Group" of socialist countries, and the "Group of 77," comprising the developing nations. See notes 14-18 *infra* and accompanying text.

7. Part IV summarizes discussions following a lecture entitled *Las tres funciones del control de la economía (derecho anti-monopolios)*, given by the author on April 6, 1983, at the Facultad del Derecho de la Universidad Autónoma de Barcelona. The lecture will be published in REVISTA DEL DERECHO MERCANTIL. The general contents of the discussions are reported here, and the author expresses his indebtedness to those who participated.

II. THE SEABED REGIME OF UNCLOS III AND THE THIRD WORLD SOVEREIGNTY PARADOX

The following paragraphs contain some critical remarks concerning the Seabed Authority of UNCLOS III in particular, and the underlying policy issues in general. The overall picture shows that the three principal interested parties, the "Western" industrialized world (including Japan, New Zealand, South Africa, and Israel, as well as Europe and North America), the developing countries, and the USSR-controlled socialist countries have different attitudes in viewing the law of the sea and what that law is about — the use of the sea. It would indeed be an "ethnocentric" mistake to assume that the two "other" groups look at the sea in the same way and with the same economic, navigation, communication, research-related, and other interests as does the West when dealing with the law of the sea.

For the West the sea is still a realm of freedom, a marketplace, a link between nations and continents, and therefore a platform on which one can trade, have dialogues, and meet someone. The sea has for democratic, industrialized nations the same function as a corridor in a condominium, where people move from one self-contained unit to another; the corridor consequently belongs to all and is, according to the rules of the house, free. This freedom is *not chaos* as is sometimes imputed in public discussion (the corridor has to be taken care of by common consent, it has to be kept clean, and so forth); it is *ordered* freedom.

For developing countries, this kind of freedom is, if one may generalize, a foreign idea. The prevailing ways of thinking in developing countries (their "cultural personality" or "modes of thought," to borrow terms from anthropology) are not akin to the Western concepts of personal identity, of rights at the disposition of the individual. Therefore, the conception of the linkages between these individuals in terms of ordered freedom, ordered under a system of law and good faith, is also alien to them. Their general pattern of ordering is primarily vertical or horizontal rather than structured.⁸

Hugo Grotius (1583-1646) defined this "Western" interplay between individuality and liberty under the legal rule of good faith, and then transposed his discovery to the community of nations: Nations are sovereign (analogous to the individuality of the human being), and *between* the sovereign nations there is the free space of liberty ordered by law and good faith.⁹ From this he deduced that the sea is free, providing thereby the basis for the general attitude of the West: All that does not belong to an individual or a sovereign state belongs to all, under a system of freedom

8. See, e.g., C. NAKANE, JAPANESE SOCIETY 12, 40-63 and *passim* (1970); see also W. FIKENTSCHER, assisted by H. KUNZ-HALLSTEIN, C. KLEINER, F. PENTZLIN & W. STRAUB, THE DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY: A STUDY IN THIRD WORLD DEVELOPMENT 27-39 (IIC Studies, Vol. 4, 1980), and references therein. Of course, these and the following (seemingly) sweeping and simplistic statements require a more detailed discussion than can be taken up here.

9. See W. FIKENTSCHER, BLÖCKE UND MONOPOLE IN DER WELTPOLITIK: DIE HERAUSFORDERUNG DER FREIEN NATIONEN ch.2 (1979); W. FIKENTSCHER, DE FIDE ET PERFDIA: DER TREUEGEDANKE IN DEN STAATSPARALLELEN DES HUGO GROTIUS AUS HEUTIGER SICHT (Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Philosophisch-Historische Klasse, No. 1, 1979).

and equal participation governed by good faith and international law. "Western" or "capitalist" international law applied this to other realms such as the air and outer space.

During the decolonization period, the developing nations argued on the basis of this theory of freedom — they used it and became sovereign in the Western sense, that of Grotius. However, they did not accept the legal philosophy of the West, the free linkages, the market, individual rights. Their own cultural traditions led them to look for another theory of what to do with items that belong neither to single beings nor to sovereign states. The result, which for them is quite logical and consistent, was a philosophy of the common heritage of mankind as an item of proprietary nature, and a fundamental rejection of the liberty of the sea (and of news communication). Without this liberty, the organizational result had to be the Seabed Authority as presented by UNCLOS III; a corresponding result is the *dirigiste* application of the rules of distribution.

Having become sovereign, the Third World challenges the foundations of sovereignty. This is the Third World sovereignty paradox that must be faced. If the West does not want to forgo the notions of personal and national sovereignty and the system of free linkages which is a corollary to both of them, it cannot accept the Seabed Authority envisioned by UNCLOS III.

Finally, the viewpoint of the USSR, the leading country among the socialist nations, is quite different from both the Third World and the Western views. The Soviet navy has a purpose different from those of the U.S. and NATO navies. Its purpose follows from article 31 of the Soviet Constitution of 1977, which requires the Red Army to fight for "socialist gains, the peaceful labour of the Soviet people, and the sovereignty and territorial integrity of the State."¹⁰ When read together with articles 28 through 30, covering foreign policy, article 31 suggests that for the USSR the sea is a military-strategic object more than anything else.

Given the disparity of views among Western, Third World, and socialist countries on how the sea should be used, what consequences follow from acknowledging these differences and taking a "nonethnocentric approach" to UNCLOS III?

First, it must be recognized that the Seabed Authority would mean a breakthrough to a nonfreedom, nonmarket, nondialogue philosophy and should in its present form be rejected. Therefore, the aim of renegotiations — if there are any — ought to be to remove from the text all supranational constitutional elements, as long as the principal UN voting system remains in accord with the Grotius system of "one country/one vote" (which causes the procedural practice within the UN General Assembly to tend toward the so-called "consensus resolution"). An alternative organizational pattern could possibly be modeled on the machinery of the UN's Restrictive Business Practices (RBP) Code.¹¹ There can be no doubt that the establishment

10. KONSTITUTSIYA (Constitution of 1977) art. 31 (USSR), reprinted in A. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 239 (1981).

11. See *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RPB/CONF/10, reprinted in 19 INTL. LEGAL MATERIALS 813 (1980); Atkeson & Gill, *The UNCTAD Restrictive Business Practices Code: A*

of the Seabed Authority regime goes beyond the framework of a regular treaty in international law, raising issues of a supranational and, therefore, constitutional (as opposed to contractual) character. That is why, with respect to the Seabed Authority, UNCLOS III is not a draft *treaty* but a draft *constitution* of international law, raising questions of representation and democratic legitimation of formidable dimensions.

Second, experience with other UN codes shows that the classical "Hugo Grotius approach" to international law, still the guiding principle within the group of Western industrialized countries, remains the backbone of international relations in general. It is little wonder, because historically the "Hugo Grotius approach" of individual personality and liberty *caused* the West to become "industrialized." From this, a rule of thumb in UN affairs may be suggested: Never do anything important within the UN for which no parallel device exists within the framework of those twenty to thirty western states that created the concepts of liberty and sovereignty, whether that parallel device be found in Group B, the OECD,¹² NATO, Free Nations — whatever term or organizational context may seem appropriate. The RBP Code was adopted because the EEC and OECD provided "samples nearest in shade." International law today has, in this sense, an "inside" and an "outside." If the inside fails, the outside will not work because, in spite of the UN, there is no agreement on what this "outside international law" is good for: free linkages or nonstructured ordering. The reason for this development is the multiplicity of "cultural personalities" or "modes of thought in law" — a multiplicity that has received general acceptance within the UN *while* the Grotius system of sovereignty is still in general use. UNCLOS III is just one example. If, as many think, seabed mining in the area covered by UNCLOS III will remain a marginal industry for the foreseeable future, the trade-off of giving up the legal philosophy which underlies sovereignty and international exchange on the basis of free trade and good faith simply seems too disadvantageous.

Finally, because renegotiations with the target of reducing the Seabed Authority at least to the size of the usual "machinery" of a UN code of conduct — namely, an *intergovernmental* group of *experts* outside of the voting system of the UN (as in the RBP Code) — have failed, it is better not to adopt the UNCLOS treaty but rather to rely on the "inside" approach outlined above, or on any similar regional concept of "mini-treaties" or "Reciprocating States Agreements" (so-called "RSA's").¹³ Extraterritorial antitrust may serve as an already existing example.

Step in the North-South Dialogue, 15 INTL. LAWYER 1 (1981); Oesterle, *United Nations Conference on Restrictive Business Practices*, 14 CORNELL INTL. L.J. 1 (1981).

12. Including the EEC and, therefore, Lomé.

13. See Seeberg-Elverfeldt, *Ist ein zweispuriges System des Meeresbergbaus praktisch möglich?*, in *Symposium der Deutsch-Amerikanischen Juristenvereinigung im Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg am 11.8.83: Ein Bericht*, DAJV-NEWSLETTER, Nov. 1983, at 3, 45.

III. DEVELOPMENT AID OR EXPANSION CONTROL — SOME POLICY CONSIDERATIONS ON EXTRATERRITORIAL ANTITRUST AND TECHNOLOGY TRANSFER

A. *Antitrust Law or Law of Technology Transfer?*

The western industrialized nations, a group that includes Japan, Australia, and New Zealand because of their market-economy orientation, are classified as "Group B" or "B-Group" countries in the UN and its subsidiary organizations. All of the larger countries in the B-Group have a national antitrust law of some sort (such as cartel laws, laws governing restraints on competition, or anti-monopoly laws).¹⁴ Among the socialist countries, grouped together in the "D-Group and Mongolia," Yugoslavia has introduced a cartel law in combination with the decentralization of enterprise management.¹⁵ Initiatives are also being taken in Hungary¹⁶ and Poland in planning laws against cartels. Otherwise, antitrust-type provisions in the eighteen socialist countries, to the extent they exist at all, are confined to the constitutional ones directed exclusively against "monopoly capitalism" of a Western stamp.¹⁷ Of the developing countries that comprise the "Group of 77" (which today includes 125 countries),¹⁸ a few have

14. This holds true for Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States of America (total number: 24). At the regional level, some of these countries are united by the cartel law of the EEC and the ECSC, and virtually all of them, including the smaller B-Group countries (such as Andorra, Monaco, Liechtenstein, and so on), are united by the OECD rules of mutual assistance in antitrust affairs. See Davidow, *Some Reflections on the OECD Competition Guidelines*, 22 ANTITRUST BULL. 441 (1977); von Portatius, *Wettbewerbspolitik in internationalen Organisationen*, 29 WuW 229, 231 (1979); Report by the Committee of Experts on Restrictive Business Practices on Information Agreements, 13 ANTITRUST BULL. 225 (1968).

15. See K. KNAP, PRÁVO HOSPODÁŘSKÉ SOUTĚŽE (1973); J. STRAUS, DAS WETTBEWERBSRECHT IN JUGOSLAWIEN (Schriftenreihe zum Gewerblichen Rechtsschutz, Bd. 19, 1970); TRIFKOVIĆ, PRAVO KONKURENCIJE (1981) (concerning competition law, and including a German summary); Pretnar, *Das Wettbewerbsrecht in der neuen Marktordnung Jugoslawiens*, 1963 GRUR INT. 536; Pretnar, *Das Recht der wirtschaftlichen Zusammenschlüsse in Jugoslawien*, 1959 GRUR INT. 590.

16. See Vörös, DAS RECHT DES SOZIALISTISCHEN MARKTVERHALTENS (1981); Vida, *Neue wettbewerbsrechtliche Bestimmungen in Ungarn*, 1974 GRUR INT. 314.

17. These countries include Albania, Bulgaria, Czechoslovakia, Cuba, the German Democratic Republic, the USSR, and Yugoslavia.

18. Afghanistan, Algeria, Angola, Antigua & Barbuda, Argentina, the Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Burma, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Chile, Colombia, the Comoro Islands, the Congo, Costa Rica, Cuba, Cyprus, Djibouti, Dominica, the Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran, Iraq, Ivory Coast, Jamaica, Jordan, Kampuchea, Kenya, Korea (People's Republic), Korea (Republic), Kuwait, Laos, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, the Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, the Palestinian Liberation Organization, Panama, Papua New Guinea, Paraguay, Peru, the Philippines, Qatar, Rumania, Rwanda, the Solomon Islands, Samoa, Sao Tomé & Príncipe, Saudi Arabia, Senegal, Seychelles Islands, Sierra Leone, Singapore, Somalia, Sri Lanka, St. Lucia, St. Vincent & the Grenadine Islands, Sudan, Surinam, Swaziland, Syria, Tanzania, Thailand, Togo, Tonga, Trinidad & Tobago, Tunisia, Uganda, United Arab Emirates, Upper Volta, Uruguay, Venezuela, Vanuatu, Viet-

cartel laws,¹⁹ though the practical effectiveness of these laws may be questioned.²⁰ Of increasing importance for developing countries are the national and regional legal provisions that regulate the transfer of technology from industrialized to developing countries.²¹ These controls are not concerned merely with classical problems of competition law, such as restrictive clauses in licensing agreements, discrimination, and patent pools; they also relate to the promotion of general economic and social policy, and infrastructural goals such as the encouragement of investment, budget balancing, and use of local technology, raw materials, and labor. If such provisions are not complied within a particular technology-transfer agreement, the national authority may refuse to authorize the agreement. The question has been raised whether this law of technology transfer involves something *other* than the conventional antitrust approach of industrialized countries, namely, cartel law. A second critical school asks whether the law of technology transfer is a *counterdevelopment* in response to western antitrust. A third school, contrasting with the first two, perceives in the technology-transfer laws of developing countries normative attempts to take up the familiar themes of anti-monopoly law from the perspective of developing countries in order to meet these countries' own specific legal policy needs, yet also in *acknowledgment of classical antitrust goals*.²² It may be said in support of the first two viewpoints that the modern law of technology transfer produces legal effects that previously were not to be found in cartel law, for example, the obligation to guarantee the suitability of the technology being transferred, preferential use of local personnel and materials, and regulation of corporate participation. The third theory is supported by the

nam (1964: Republic of Vietnam), Yemen (Arab Republic), Yemen (Democratic), Yugoslavia (which also figures in the D-Group), Zaire, Zambia, and Zimbabwe. List complete as of Dec. 1, 1981. See Sauvart, *Die "Gruppe der 77" — Gewerkschaft der Dritten Welt*, 29 VEREINTE NATIONEN 189 (1981). The People's Republic of China does not classify itself among any of the three Groups, B, D, or "77." The Republic of China (Taiwan), as a nonmember of the UN, belongs to none of the groups, but pursues a market-economy course similar to the Japanese model, and is preparing a "market law" which will contain cartel law provisions. See SU YEONG-CHIN, *MÖGLICHKEITEN UND GRENZEN GESETZGEBERISCHER MASSNAHMEN ZU PROBLEMEN DER MARKTWIRTSCHAFT IN NATIONALCHINA (TAIWAN)* (dissertation, University of Munich, 1981).

19. Specifically, Argentina, Brazil, Colombia, India, Mexico, Pakistan, Peru, the Philippines, and Venezuela.

20. See G. CABANELLAS, *ANTITRUST AND DIRECT REGULATION OF INTERNATIONAL TRANSFER OF TECHNOLOGY TRANSACTIONS* n.3 (IIC Studies, Vol. 7) 47-50 (1984); Cabanellas & Etzoldt, *Das neue argentinische Kartellrecht vom 1.8.1980*, 27 RIW/AWD 155 (1981); Cira, *Observations on Current Developments in Restrictive Business Practice Control Legislation in Latin America*, R. SUISSE DR. INT. CONC., Oct. 1982, at 29, 41 (perceives Argentina as the only country with a cartel law "free from interventionist baggage"); Correa, *La Regulación de las cláusulas Restrictiva en los Contratos de Transferencia de Tecnología en el Derecho Latinoamericano*, 14 REVISTA DEL DERECHO COMERCIAL Y DE LAS OBLIGACIONES 183 (1981).

21. The countries in which technology-transfer statutes have been enacted include Argentina, Brazil, Colombia, Honduras, India, Korea (Republic), Mexico, Nigeria, the Philippines, Venezuela, and Zambia, as well as the Andean Pact at the regional level; see the synoptic evaluation of these provisions in United Nations Conference on Trade and Development, *Control of Restrictive Practices in Transfer of Technology Transactions*, U.N. Doc. TD/B/C.6/72 (1982).

22. For details of this position, as distinguished from the others, see G. CABANELLAS, *supra* note 20, at 50.

fact that most technology-transfer laws — even those pursuing the particular economic policy of developing countries — greatly resemble their counterparts in Western antitrust law in provisions that concern contract clauses restricting competition through licensing or similar agreements. Some of the Western models reflected in such technology-transfer laws are the “Nine No-No’s” of U.S. antitrust law,²³ sections 20 and 21 of the German Law Against Restraints on Competition,²⁴ and the proposed block exemption regulation for patent licensing agreements under articles 85 and 87 of the EEC Treaty.²⁵ The degree of similarity varies as to the type, content, scope, and goal of the particular clauses.²⁶

If the rapidly evolving technology-transfer law of developing countries is essentially different from the law of restraints on competition, then caution must be exercised in applying basic concepts and principles from cartel law in the context of technology-transfer law. This would be true, for example, with respect to the two principles of prohibition and abuse control; or the “rule of reason” doctrine;²⁷ the basically anti-interventionist stance of the law of restraints on competition; the cooperation of cartel authorities from industrialized countries with technological authorities from Third World countries; the understanding of the relationship between the law of industrial property and copyright, and that of cartels or technology transfer; the planning of appropriate international conventions and executive agreements; the development of model laws by international expert groups (“machineries”), as provided for in the guidelines of the RBP Code; and, not least of all, the furnishing of technical assistance to antitrust and technological authorities in developing countries from cartel authorities in industrialized countries.²⁸ The problems concerning the nature of technology-transfer law thus have great practical, as well as methodological, significance.

The solutions to these problems are made easier if the local policy underlying the cartel laws of the market-economy industrialized countries is taken into account. When it was enacted, this policy was based on considerations of economic fairness, competitive efficiency, and democratic values generally, and consisted of controlling and dispersing private economic power which had arisen and which posed a threat exclusively, or at least

23. See Griffin, *The Demise of the “Nine No-No’s” and Other Significant Changes in U.S. Antitrust Policy Concerning Transnational Technology Licensing*, R. SUISSE DR. INT. CONC., June 1982, at 39.

24. Gesetz gegen Wettbewerbsbeschränkungen (of 1957) §§ 20, 21, 1980 BGBl I 1761, 1766 (W. Ger.).

25. See Proposal for a Commission Regulation on the application of article 85(3) of the Treaty to certain categories of patent licensing agreements, 22 O.J. EUR. COMM. (No. C 58) 12 (Mar. 3, 1979); 22 O.J. EUR. COMM. (No. C 110) 10 (May 3, 1979). Both of these are reprinted in 1979 GRUR INT. 208.

26. See G. CABANELLAS, *supra* note 20; Correa, *supra* note 20.

27. See, e.g., Wiszniewska, Book Review, PAŃSTWO I PRAWO, Dec. 1982, at 135, 137 (reviewing W. FIKENTSCHER, *supra* note 8).

28. Technical assistance within the framework of the RBP Code is urged in Greenhill, *Principles and Rules on Restrictive Business Practices*, CTC REPORTER, Summer 1982, at 30. The similarity between the two legal fields is there set out from the perspective of an experienced practitioner.

predominantly, within each individual country.²⁹ Developing countries, by contrast, are not typically confronted with the problem of internal private economic power. The economic power that is perceived as a basis for development aid, yet also as a potential threat in the developing countries, stems primarily from foreign sources. Thus, in many cases developing countries must resort to importing technology from precisely the foreign corporations whose economic behavior should be subject to a national legal control. This basic outward orientation of legal policy with respect to economic power gives the law of technology transfer its own special character.

Aside from this outward orientation, however, the essential basis for the concern of legal policy with economic power is the same in developing countries as in Western industrialized countries. The policy of the lawmaker is determined by a combination of goals: economic fairness, balanced competition and social-welfare considerations, efficiency within the context of the particular policy goals set by the state, and, not least of all, security in the face of political pressure from private enterprises, including foreign suppliers of technology.

If the purely national significance of the typical technology-transfer law in developing countries is compared with that of the typical antitrust law in market-economy industrialized countries, an impression of two distinct fields of law emerges, barely bordering on one another yet having a few peripheral points in common; the question whether the law of antitrust and that of technology transfer actually constitute *one integral* legal field would have to be answered in the negative. However, if the political and historical situation in which antitrust and technology-transfer law came into existence is taken into account, then the legal policy goals largely coincide, and the idea of an *essentially integral legal field*, along with that of the transferability of basic concepts and legal principles from one context to the other, becomes fully plausible.

It should be noted here that mere national antitrust can hardly serve as a counterpart for comparison with technology-transfer law. A purely national view of antitrust law has long since ceased to correspond to the reality of world economics, and hardly continues to correspond to legal reality. Today, many Western industrialized countries rely on exports for more than fifty percent of their national income. The interweaving of international economics has progressed far beyond national antitrust, which has attempted to keep up by developing "extraterritorial" coverage.³⁰ If the cartel laws of the West are viewed in their entirety, complete with the doctrine of "extraterritoriality" already at hand, as elements and building blocks of a law for controlling economic behavior — partly in existence

29. For particulars concerning these goals of antitrust, see Fikentscher, *Methodos — axiologia — oikonomia (Method — Values — Economy)*, 1977 TO SYNTAGMA 495 (with summary in French); Fikentscher, *Iktisadi kontrolün üç fonksiyona tekelleri önleme hukuku (The Three Functions of Economic Control Law)*, 10 BANKA VE TİCARET HUKUKU DERGISI 711 (1980).

30. Rather than a complete list of the many discussions of this topic, a few representative sources will do. See, e.g., R. BÄR, *KARTELLRECHT UND INTERNATIONALES PRIVATRECHT* 366 (Abhandlung zum schweizerischen Recht, Bd. 369, 1965); Ongman, "Be No Longer a Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U. L. REV. 733 (1977); Rehbindler, in U. IMMENGA & E. MESTMÄCKER, *GWB KOMMENTAR ZUM KARTELLGESETZ* § 98, ¶ 2, nn. 7 et seq. (1981).

already and partly in the making — then the developing countries' laws of technology transfer also fit into this economic control law as an essential component. The legislative goals, as well as the factual situation to be regulated, are in harmony. International economic development leads not only to the internationalization of classical antitrust law, but also to the creation of a regional and transnational law of economic control. This law of economic control includes elements of technology-transfer law, as well as the doctrine of impermissible "monopolizing" in the sense of U.S. antitrust law, the French tradition of prohibiting "refus de vente," the Swiss derivation of antitrust from the prohibition of boycotting and the right of freedom of personality, and the German experience with the paradox of freedom that breaks apart if allowed to develop completely without restrictions.

The pursuit of this integrative model of antitrust goals may cause some proponents of conventional national antitrust to reconsider the legal policy they endorse. For example, the currently influential "Chicago School" of economics postulates efficiency as the only antitrust value worth pursuing.³¹ Yet a glance at the law of technology transfer in the context of global economic control is sufficient to indicate a multiplicity of values extending far beyond economic efficiency and embracing considerations of state financing, social policy, infrastructure, environmental protection, and cultural policy. "Chicago-style" single-value antitrust can still be pursued at the national level, of course, but, if one does not shut one's eyes to reality, the heyday of national antitrust is clearly over.

B. *Consequences for the Application of Cartel Law and for a New Orientation in Development Aid*

1. *Content, Interpretation, and Application of National and Regional Cartel Laws and of the RBP Code*

A transnational perspective on anti-monopoly law that takes the goals of technology-transfer law into account clearly must exercise a decided influence on the interpretation of cartel law and rules at the national, regional (such as the EEC, ECSC, and Andean Pact), and international (such as the RBP Code) levels.

This is true first of all at the international level, where, for example, it could be concluded that the treatment of *international* transactions in a manner essentially favorable to cartels should be discontinued, and provisions that allow this should not be adopted in the future. The frequently encountered preferential treatment of import and export cartels would thus have to be abandoned.³² In the context of cooperation between national

31. See, e.g., R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Reder, *Chicago Economics: Permanence and Change*, 20 J. ECON. LIT. 1 (1982). For the opposing view ("multi-value antitrust"), see Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980), and sources cited therein.

32. See Allison, *Antitrust and Foreign Trade: Exemption for Export Associations*, 11 HOUS. L. REV. 1124 (1974) (discussing the United States' Webb-Pomerene Export Trade Act); Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INTL. L. & POL. 19 (1975) (discussing potential use of § 307 ban on imports to coerce "immoral" governments); Chapman, *Exports and Antitrust:*

cartel authorities (in some cases pursuant to international treaty),³³ it must then be noted that while the cartel ministries of the Western industrialized countries are concerned primarily with economic concentration within their own countries, the technological authorities of the developing countries by contrast are concerned primarily with economic concentration on the part of others. At the regional level as well, above all in the context of the European Communities and the Andean Pact, there must be a corresponding readiness to acknowledge the to-some-extent-contrasting legal policy values of the other side.

Not least of all, under a multi-value antitrust perspective, the RBP Code must not be interpreted and applied exclusively according to classical Western antitrust principles; it must likewise take into account the specific and aggregate policy goals of those countries whose control regulations are directed primarily against foreign rather than domestic economic power. Conversely, the integrative approach of the RBP Code makes it possible to introduce traditional principles of Western antitrust — for example, the rule of reason, the principle of comparable markets, the legal operation of anti-discrimination provisions, intra-enterprise competition concepts, the recognition of ancillary restraints on competition, and the experience in applying cartel provisions as protective laws.³⁴ These considerations are just as important for the activities of the International Expert Group (“machinery”) under the RBP Code as for the related work on revision of the Code.

2. Modern Criticisms of Development Aid

The conception of transnational economic control as a multi-value regulatory instrument also opens up new prospects for national and international measures that have been summarized under the rubric of “development aid.” The criticisms of development aid, both in conven-

Must Competition Stop at the Water's Edge?, 6 VAND. J. TRANSNATL. L. 399 (1973) (alternatives to Webb-Pomerene Act's exemption of export trade from U.S. antitrust laws); de Keyser, *Territorial Restrictions and Export Prohibitions under the United States and the Common Market Antitrust Laws*, 2 COMMON MKT. L. REV. 271 (1964); Markert, *Zur gegenwärtigen Situation der Exportkartelle*, 16 AWD 99, 105 (1970) (discussing the Webb-Pomerene Act); Rehinder, *supra* note 30, at § 6, nn. 9-29 (with a report on the sharpening of German controls on export cartels); *id.* at § 7, nn. 4-6 (same as to import cartels). In Germany, the fourth cartel law amendment in 1980 introduced broadened control over abuse of basically favored export cartels, by changing § 12, ¶ 2, cl. 1, and § 44, ¶ 1, cl. 2, of the Law Against Restraints on Competition. See Gesetz gegen Wettbewerbsbeschränkungen, 1980 BGBl I 1761, 1765, 1777 (W. Ger.). The grant of power to the Federal Minister of the Economy rather than the Federal Cartel Office reflects the special consideration of extra-economic interests.

33. See, e.g., Agreement on Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States — Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, 1976 BGBl II 1711 (W. Ger.). The German Federal Cartel Office is authorized to initiate direct contacts in matters of mutual administrative assistance. See *Richtlinien für den Amtlichen Verkehr in das Ausland und mit ausländischen Dienststellen im Inland*, Special Regulation No. 21, between the Office of External Affairs and the Federal Minister of the Economy, *Mitteilungsblatt des Auswärtigen Amtes*, No. 3, Apr. 30, 1965.

34. For details of the RBP Code, see Fikentscher & Straub, *Der RBP-Kodex der Vereinten Nationen: Weltkartellrichtlinien* (pts. I & II), 1982 GRUR INT. 637, 727 (and sources cited therein); Fikentscher, *supra* note 2; see also United Nations Conference on Trade and Development, Consideration of the Revised Draft of a Model Law or Laws on Restrictive Business Practices, U.N. Doc. TD/B/RBP/15 (1983).

tional forms and in general, are many and weighty. Why the sometimes extraordinary efforts to help developing countries have by and large had so little success — indeed, according to some commentators have caused more harm than good — is a much discussed theme that can only be touched upon here.³⁵ Among the possible explanations is the exclusively horizontal or vertical (and therefore nonstructured) social ordering of most developing countries,³⁶ manifested among other things in the lack of an economically substantial middle class, the strong trend toward centralized planning, and relatively “fragmented” social relationships; but perhaps these are only the symptoms of causes which as yet remain unknown. It is widely conceded that the so-called “trickle down” effect has not taken place — thus, the hope that aid directed at the head of state or leading groups in developing countries would more or less necessarily “seep through” to benefit the needy sections of the population has not been fulfilled.³⁷ New approaches, for instance “decentralization” programs, are being tried, but their success is still the subject of investigation.³⁸

The international interest in indigenous economic structures and socio-political factors has increased. But this knowledge may come too late for many areas that have been “opened up” through development aid. The currently prevalent opinion is that in many cases it may be preferable to refrain from giving aid altogether rather than to give it in the wrong way.

3. *Antitrust and Development Aid*

Multi-value extraterritorial control of economic power could offer a new point of departure toward a solution. Technology-transfer law is one of the

35. For detailed argument on this point, see, e.g., P. BAUER, EQUALITY, THE THIRD WORLD AND ECONOMIC DELUSION (1981); W. FIKENTSCHER, *supra* note 8, at 141-49; Bendokat, *Entwicklungshilfe — verschleudertes Kapital?*, DER BÜRGER IM STAAT, Mar. 1970; Dahrendorf, *Interview*, EUROPA NEWSPAPER, No. 4, 1981, at 4; Fischer, *Stillstand im Nord-Süd-Dialog: Chancen einer Neubestimmung*, 35 EA 369 (1980); Hamburger, *Es ist alles ganz anders*, Frankfurter Allgemeine Zeitung, Jan. 6, 1962, Wirtschaftsteil, at 5 (one of the earliest warnings); Holthus, *Ernüchterung in der Entwicklungspolitik*, WIRTSCHAFTSDIENST No. V, 1981, at 212; Löwenthal, *Von der Strukturkrise der Weltwirtschaft zur internationalen Strukturpolitik*, 33 GEWERKSCHAFTLICHE MONATSHEFTE 235 (1982).

36. See note 8 *supra* and accompanying text.

37. This illusion is emphasized in Dahrendorf, *supra* note 35 (citing Raul Prebisch, the General Director of UNCTAD for many years, as the source of the concept of “trickle down”).

38. See, e.g., DEPT. OF POLITICAL AND ADMINISTRATIVE STUDIES, UNIV. OF PAPUA NEW GUINEA, DECENTRALIZATION: THE PAPUA NEW GUINEAN EXPERIMENT (1978); E. KOSWARA, THE DECENTRALIZATION SYSTEM IN INDONESIA (1969); J. NYERERE, DECENTRALIZATION: UNITED REPUBLIC OF TANZANIA (1972); USAID, OFFICE OF RURAL DEVELOPMENT, MANAGING DECENTRALIZATION: PROJECT PAPER (1979); R. YIN & D. YATES, STREET-LEVEL GOVERNMENTS: ASSESSING DECENTRALIZATION AND URBAN SERVICES (1975); Andors, *Hobbes & Weber vs. Marx & Mao: The Political Economy of Decentralization in China*, 6 BULL. CONCERNED ASIAN SCHOL. Sept.-Oct. 1974, at 19; Appleby, *Some Thoughts on Decentralised Democracy*, 8 INDIAN J. PUB. AD. 443 (1962); Chauhan, *Democratic Decentralization and Local Administration in India, Nepal and Pakistan*, 1977 ASIA Q. 279; Furniss, *The Practical Significance of Decentralization*, 36 J. POL. 958 (1974); Rondinelli, *National Investment Planning and Equity Policy in Developing Countries: The Challenge of Decentralized Administration*, 10 POLICY SCIENCES 45 (1978); Note, *Conflict Resolution in a Politically Decentralized Local Government System*, 11 COLUM. J. L. & SOC. PROBS. 629 (1975); P. Reis Vieira, *Towards a Theory of Decentralization, A Comparative View of Forty-Five Countries* (dissertation, Univ. of Southern California, Los Angeles, 1967).

most important instruments of legal policy and doctrine in the developing countries. Of course, "extraterritorial antitrust law" means more and functions more broadly than "development aid," and conversely not all problems of development aid can be resolved through use of extraterritorial antitrust law. However, it may well be that a multi-value antitrust approach that incorporates the themes of technology transfer can give new impetus to development aid by replacing economic aid *to developing countries* with a control on economic expansion *into those countries*.

If it is true that the "trickle down" effect takes place either not at all or on too small a scale, then the fault, with reference to the goals of technology-transfer policy, must lie not only with Western donor firms that engage in particular practices but also with the elites, managers, and heads of state in the developing countries who cooperate with those firms. Conceptually, under this view, the conflict between North and South becomes one between rich and poor — a conflict, basically unrelated to national affiliations, between the powerful and the powerless. In place of development aid in the traditional sense, that is, as support above all for heads of state and other high-ranking entities in the developing countries, the policy emphasis comes to include control directed against the abuses of "Western" corporations and countries in their expansion into the Third World, which is itself frequently motivated by development-aid considerations. The issue is that the local elites in developing countries often take part in expansion from outside, yet the aid either fails to reach the places where it is most needed or does so under conditions that do not best suit the local economic and social order.

The slogan "expansion control instead of development aid" would be too simplistic and easily misunderstood. If development aid is conceived of as an adjustment of economic imbalances between stronger and weaker countries that corrects the market and thereby creates markets — to express it in neo-liberal terms — then there is no alternative to development aid. On the other hand, it is precisely in this process that development aid becomes a field of endeavor for international economic control, which is the focus of attention here.

4. *Consequences for the Extraterritorial Application of National Cartel Law*

Due to legislative intent, the technology-transfer laws of the developing countries have had an extraterritorial orientation, at least in the past. By contrast, extraterritoriality presents a stumbling block for the application of the cartel laws of the industrialized West. The latter problem is constantly discussed, and the proposed solution generally consists of national caution and international comity.³⁹ However, if the approach proposed here is fol-

39. The discussion on this subject is voluminous. See, e.g., F. HERMANN, *VÖLKERRECHTLICHE GRENZEN FÜR DIE ANWENDUNG KARTELLRECHTLICHER VERBOTS-NORMEN* (Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb — Schriftenreihe, Heft 48, 1969); K. MEESSEN, *VÖLKERRECHTLICHE GRUNDSÄTZE DES INTERNATIONALEN KARTELLRECHTS* (Völkerrecht und Internationales Wirtschaftsrecht, Bd. 5, 1975); Rehinder, *supra* note 30, at § 98, ¶ 2, nn. 17-54 (citing further sources); Mann, *Limitations on the Exercise of Extraterritorial Jurisdiction with Particular Reference to Anti-Trust Legislation*, 1958 REPORT OF THE INTERNATIONAL LAW CONFERENCE 87. From the case law see, Judgment of May 29,

lowed — that is, multi-value, transnational control on economic power incorporating the goals of the developing countries' technology-transfer laws — then the extraterritorial effect of national antitrust must be affirmed outright, particularly in the area of development aid. This, of course, requires that countries with cartel laws reach sufficient agreement among themselves so that they do not encroach on each other's rights in the extraterritorial application of their national cartel laws. The same holds true with respect to the technology-transfer laws of the developing countries. Thus, a need exists for harmonizing the extraterritorial claims of national cartel laws, as well as for official cooperation among national cartel authorities, technology-transfer authorities, and the International Expert Group under the RBP Code. This harmonization need not be universal; it may work better on a regional (or even bilateral) scale, notwithstanding due regard for RBP standards and terms. If this were successful, the "trickle down" effect — a clumsy term for what might better be called the "attainment of development goals" — would no longer present a fundamental problem. With this normative harmonization and official cooperation, the issue would be one of economic and social molding in the developing countries through an extraterritorial cartel policy of the "B-Group" and "Group of 77" countries that was as unified as possible, with the goal of economic equity within the poorer economic *areas* as well as between the poorer and richer economic *areas*.

C. *Toward a Model for a Transnational Law of Economic Control*

1. *Competition and Legitimate Competitive Advantages*

The word "Ordnungspolitik" (signifying legal-economic policy of a neo-(Ordo-) liberal style, as developed by the Freiburg School of economists) is specifically German, but the problem that it describes is a general one, which has been raised most recently with the completion of the RBP Code.⁴⁰ In formulating transnational economic controls, it must be decided whether to proceed according to the precepts of unrestrained liberalism, the neo-liberal rules of law for a market economy, a purely or primarily interventionist system, the administration of a *justum pretium* (such as use value in Marxist value theory), a course of pragmatism in the sense of a mixed economy, "planification" in the French sense, or some other control model. This, in turn, determines the choice of an appropriate distribution, which is to serve as a guiding principle. To some extent, the international discussion of "Ordnungspolitik" has only just begun. Considering the predominantly market-economy character of the world economy at present, it would be natural to follow a liberal concept and continue to pursue the UN's policy up to now. It should be emphasized, however, that given the German experience, the model cannot be that of perfect, or even "voll-

1979, Bundesgerichtshof, Kartellsenat, W. Ger., 74 BGHZ 322, WuW/E BGH 1613 (29 WuW 765) ("Organische Pigmente"); Judgment of July 12, 1973, Bundesgerichtshof, Kartellsenat, W. Ger., 25 BGHSt 208, WuW/E BGH 1276 (23 WuW 702) ("Ölfeldrohre"); Judgment of Nov. 26, 1980, Kammergericht Berlin, 27 RIW/AWD 403, 407 (1981) ("Bayer-Firestone"); Judgment of July 1, 1983, Kammergericht Berlin, WuW/E OLG 3051 (34 WuW 233) ("Morris-Rothmans").

40. See note 34 *supra*.

ständig" competition, which might conceivably describe the continuing international cooperative efforts in the field of substantive cartel and technology-transfer law and the corresponding authorities.⁴¹ Rather, the model of competition must correspond to practical observation; and insofar as it is pragmatically conceived, it must include the concept of competitive advantages. Competition must occur with something and for something. It cannot be conducted without competitive advantages giving rise to mini-monopolies. Perfect (atomistic) competition is no competition at all; "vollständig" (strategy-free) competition (where information is taken from the market; competitive pressure; *Euckenian* competition) is a special form that rarely occurs and cannot serve as a model. The function of law is to prevent the legitimate competitive advantages that are necessary for practical competition from burgeoning into restraints which are harmful to competition.

2. *Industrial Property Rights and Copyright as Legitimate Competitive Advantages*

Among the legitimate competitive advantages that function to promote competition are contractual claims and intellectual property rights. The importance of intellectual property, in the form of patents, utility models, copyrights, designs, models, and the like, is particularly significant in the search for a model of world economic order. The prospects for the development of economic progress with the goal of economic and social equity in the poorer countries are not improved by the diffident attitude of some developing countries toward intellectual property, the often inadequate protection afforded it in these countries, and their delayed support for legal protection of intellectual property under international conventions. Without such legal protection, the advantages that would foster competition and, in turn, a market — as the instrument that presumptively serves as the most socially equitable distribution mechanism for scarce goods — are lacking. This is demonstrated by the Japanese example.⁴² Equally unconvincing, however, is the attitude of some antitrust representatives in Western industrialized countries, which underestimates the importance of industrial property and copyright at the same time that it adopts, or intends to adopt, a particularly favorable stance toward competition. The noteworthy reserve with respect to patents and their economic application in the EEC Commission's proposed block-exemption regulation on patent licensing agreements should be mentioned here, as well as some criticisms leveled against sections 20 and 21 of the German Law Against Restraints on Competition.⁴³

41. For a discussion of these concepts, see, e.g., 2 W. FIKENTSCHER, *WIRTSCHAFTSRECHT* § 22, at III, ¶¶ 3, 4 (1983) (containing an overview of the literature); W. MÖSCHEL, *RECHT DER WETTBEWERBSBESCHRÄNKUNGEN* 41-95 (1983); I. SCHMIDT, *WETTBEWERBSTHEORIE UND POLITIK* 7 (1981).

42. See Rahn, *Die Bedeutung des gewerblichen Rechtsschutzes für die wirtschaftliche Entwicklung: Die japanischen Erfahrungen*, 1982 GRUR INT. 577 (and sources cited therein).

43. Gesetz gegen Wettbewerbsbeschränkungen, 1980 BGBl I 1761 (W. Ger.); Proposal for a Commission Regulation on the application of article 85(3) of the Treaty to certain categories of patent licensing agreements, 22 O.J. EUR. COMM. (No. C 58) 12 (Mar. 3, 1979). For commentary, see V. EMMERICH, *KARTELLRECHT* 338 (3d ed. 1979); H. JOHANNES, *INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW* (European Aspects, Law Series

There is a real and indisputable danger that restraints on competition may be established and defended with the use of exclusive industrial property rights, such as through cross-licensing or pools. However, it should not be overlooked that aside from such restraints on competition, industrial property rights and copyrights are the most important factors next to tangible property and contract rights for making competition possible in the first place.⁴⁴ Along with the essentially critical attitude of extreme advocates of competition toward patents, the opposition of some developing and socialist countries to industrial property rights in the form of subjective rights has created obstacles to reform of the Paris Convention.⁴⁵ Fundamentally, an atomistic conception of competition is just as hostile to practical competition as the intended abolition of property in socialism and the deficient promotion of property in developing countries with "nonstructured" social orderings. It will be difficult for a transnational antitrust approach taking technology-transfer goals into consideration, supported by the extraterritorial application of national cartel laws, to prevail against the opposition of the developing countries, opponents of industrial property in the ranks of extreme competition theorists, and representatives of Marxist legal thought in the East and the West, especially since there are institutional opponents of large-scale "Western" industry and economy as well. These opponents of such a model form a motley front — yet, to the extent it holds together, a formidable one — against free competition and against the market as presumptively the most socially equitable distribution mechanism.

D. Results

Despite the opposition described above, undeniable progress toward a fairly constituted, functioning world market has been made, particularly through the UN's practice of setting down economic guidelines in the form of codes — a practice begun in 1974, when the "New International Eco-

No. 17, 1976); H. JOHANNES, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT IM EUROPÄISCHEN GEMEINSCHAFTSRECHT (Recht der Internationalen Wirtschaft — Schriftenreihe, Heft 9, 1973); MONOPOLKOMMISSION, FORTSCHREITENDE KONZENTRATION BEI GROSSUNTERNEHMEN 361-84 (Hauptgutachten der Monopolkommission II, 1978); Emmerich, *Die Auslegung von Art. 85 Abs. 1 EWG-Vertrag durch die bisherige Praxis der Kommission*, 6 EUR 295, 329-34 (1971); Emmerich, in *GWB KOMMENTAR ZUM KARTELLEGESETZ*, *supra* note 30, at § 20, nn. 48-59.

44. On the legal policies behind industrial property law, see Beier, *Die Bedeutung des Patentsystems für den technischen, wirtschaftlichen und sozialen Fortschritt*, 1979 GRUR INT. 227; Beier & Kunz, *Die Bedeutung des Patentrechts für den Transfer von Technologie in Entwicklungsländer*, 1972 GRUR INT. 385.

45. International Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as amended at *Stockholm*, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923. For an overview of the Paris Convention and a list of members of the Patent Union, see 2 J. BAXTER & J. SINNOTT, *WORLD PATENT LAW AND PRACTICE* 132.4(2)-150 (rev. ed. 1984). On the problems encountered in amending the Paris Convention, see Kunz-Hallstein, *Die Genfer Konferenz zur Revision der Pariser Verbandsübereinkunft zum Schutze des gewerblichen Eigentums*, 1981 GRUR INT. 137. With respect to copyright law, the attitudes are obviously different, and certain developing countries are according increasing importance to the protection of intellectual creations and artistic achievements. See A. DIETZ, *URHEBERRECHT UND ENTWICKLUNGSLÄNDER* (1981); Kunz-Hallstein, *Recent Trends in Copyright Legislation of Developing Countries*, 13 IIC 689 (1982); *Developing-Country Needs for Copyrighted Works*, 15 COPYRIGHT BULL. No. 2, 1981, at 10.

conomic Order" was drawn up as a program. The cartel guidelines of the RBP Code provide a worldwide formulation and normative anchoring for all UN member-states, with the goals of protecting consumers and avoiding discrimination and restraints on trade.⁴⁶ The same zeal should be brought to further work on drafting rules for technology transfer (TOT Code), to develop standards with respect to the activities of multinational corporations and the protection of foreign investments (TNE Code), and to reform the International (Paris) Convention. In this respect it is worthwhile to make use of the experience of the national cartel authorities in the Western industrialized countries, as well as that of the technology-transfer authorities of the Third World, not in the sense of a confrontation or juxtaposition, but rather as part of a system of world economic legal norms for the control of economic power and behavior.

IV. REGIONAL (AND INTER-REGIONAL) HARMONIZATION AND COOPERATION IN THE EXTRATERRITORIAL APPLICATION OF LEGAL NORMS FOR THE CONTROL OF ECONOMIC ACTIVITIES

A. Concepts

If one accepts that *national* extraterritorial legal and administrative control of "one's own" business and its expansion into world markets is the more practical and promising way to establish fair trade partnership with other countries, especially Third World nations, rather than reliance on *supranational* control by authorities of UN origins, one important problem remains: Conflicting national extraterritorial laws may result in what might be called a catch-as-catch-can approach to transnational economic transactions. The so-called "claw-back" statutes and mutual anti-dumping procedures may be cited as examples of this kind of disintegration of international relations.⁴⁷ Apart from these extreme cases of disorder — which do exist — international cooperation seems to be the general rule.⁴⁸ Regional units like the EEC provide rules for the harmonization of laws having effect outside the national territory.⁴⁹ Eric Stein, to whom this paper is dedicated with affection and respect for his many contributions to a better understanding of the European process of legal and economic integration, has devoted some of his studies to the phenomenon of regional harmonization.⁵⁰ To the same end, sections E and F of the RBP

46. See note 34 *supra*.

47. On the related problem of compulsory discovery of documents located in foreign countries, see, e.g., *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1306 (D.C. Cir. 1980); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); see also 2 W. FIKENTSCHER, *supra* note 41, § 27, at II; PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS (J. Griffen ed. 1979).

48. An example is the Agreement on Cooperation Regarding Restrictive Business Practices entered into by the United States and the Federal Republic of Germany. See note 33 *supra*.

49. See 1 W. FIKENTSCHER, *supra* note 41, § 13, at V, ¶ 2.3; Schwartz, *Wege zur EG-Rechtsvereinheitlichung*, in Festschrift für Ernst von Caemmerer 1067 (1978); Seidel, *Ziele und Ausmass der Rechtsangleichung in der EWG: Zur britischen Auffassung*, 14 EuR 171 (1979).

50. See, e.g., E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION (1971); Stein, *Harmonization of European Com-*

Code⁵¹ call for a harmonization of national antitrust activities and rules having international effect. Section E reads:

Principles and rules for States at national, regional and subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.
2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.
3. States in their control of restrictive business practices should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.
4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade and particularly the trade and development of the developing countries.
5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.
6. States should institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for their effective control of restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.
7. States should establish appropriate mechanisms at the regional and sub-regional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and sub-regional levels.
8. States with greater expertise in the operation of systems for the control of restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to, other States wishing to develop or improve such systems.
9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly of developing

pany Laws, 37 LAW & CONTEMP. PROBS. 318 (1972); Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM. J. INTL. L. 1 (1964); Stein, *Harmonization of Law in the European Economic Community*, in COMPARATIVE ASPECTS OF ANTI-TRUST LAW IN THE UNITED STATES, THE UNITED KINGDOM AND THE EUROPEAN ECONOMIC COMMUNITY 27 (Intl. & Comp. L.Q. Supp. Pub. No. 6, 1963).

51. U.N. Doc. TD/RPB/CONF/10, *reprinted in* 19 INTL. LEGAL MATERIALS 813, 819-20 (1980); *see also* note 34 *supra*.

countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested States for its effective control of restrictive business practices.

Section F reads in part:

International measures

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries.

Although in the front line of devices designed to work as instruments of worldwide (or UN-wide) harmonization and coordination, sections E and F do not exclude but rather encourage regional and interregional initiatives. In other fields as well, UN agencies have advised interregional planning of rules for national public control of business behavior having effects outside the national territory.⁵²

International cooperation and adjustment of national rules and administrative activities for exercising public control over economic behavior with extraterritorial repercussions thus need not be conceived of as worldwide or UN-wide. Such rules and administrative actions may be more effective the less they attempt to be so. In the vast majority of legal-economic issues, the "competent unit" is smaller than the world economy in general. Regional and interregional harmonization of laws, administrative cooperation, information, and exchange may therefore show better results than UN-sponsored programs, some of which have encountered growing criticism for their clumsiness and over-organization.⁵³ Problems caused by the existence of the division into Groups B, D, and "77" — useful for the decisionmaking process in UN bodies but cumbersome and ill-equipped to tackle issues that ask for quick and unideological solutions — could be avoided or at least diminished. To be sure, the framework of the UN should not be weakened by an overemphasis on regional agreements.⁵⁴ UN and regional approaches should be combined in a useful cooperation of regulatory systems of international law. Again, Eric Stein has shown in many of his articles how a region, Europe, can successfully develop its intraregional order in accordance with general international law and the UN organization.⁵⁵ The

52. See, e.g., Permanent Sovereignty over Natural Resources, U.N. Economic and Social Council, Comm. on Natural Resources (8th Session), U.N. Doc. E/C.7/1983/5 (Apr. 7, 1983) (paper discussing ways to overcome the accelerated decline in mineral investment in developing countries).

53. See sources cited in notes 3, 13, 35 *supra*.

54. See Pérez de Cuéllar, *Multilaterale Zusammenarbeit in Gefahr: Bericht des Generalsekretärs über die Arbeit der Organisation an die 38. Generalversammlung*, 31 VEREINTE NATIONEN 155 (1983).

55. See Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INTL. L. 1 (1981) (stressing the role of the judiciary in shaping regional law); Stein, *Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market*, 68 MICH. L. REV. 1327 (1970); Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat in the European Economic Community*, 48 RIV. DIR. INTERN. 1 (1965); Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965); see also

trend in the international law of the sea is the regional or multilaterally functioning "mini-treaty" within a UN-regional double system.⁵⁶

B. *Examples*

A "harmonized" regionalism would pursue harmonization on a bilateral, trilateral, or regional basis, paying due attention to (but not necessarily being bound by) UN programs and guidelines. It would work functionally rather than geographically and thus — in case of demand — interregionally.

A region where this approach — regional coordination and harmonization of national legal and administrative activities for the public control of economic behavior having extraterritorial effect — could be put to a test consists of the countries bordering the Mediterranean Sea. This part of the world has always been a distinct "economic region" ("Wirtschaftsraum"). In former centuries it was the most important one in the world. The "southern expansion" ("Süderweiterung") of the EEC cannot answer all the problems of this region. There are legal-economic contacts between Greece, the new EEC member, and Spain and Portugal, the EEC candidates, but it would be better to have more of them.

Another region of this kind is, of course, Latin America. Its legal-economic integrative process is a firmly established part of modern international law. Again, it seems that it would be better to have more of this integration, by way of coordination and harmonization. Unlike the Mediterranean countries, Latin America does not have to cope with a multitude of languages. The Spanish language links all Central and South American nations except Brazil to Spain; the Portuguese language links Brazil to Portugal. The importance of these two European countries as possible catalysts for a coordination of legal-economic concepts and policies cannot be overlooked. There are regular contacts between Spanish and Latin American lawyers and economists, and there will be more.⁵⁷

The Mediterranean and the Latin American regions have much in common: positively, with respect to their average economic structure, many of them are developing countries, and negatively, in their opposition role in relation to the "northern industrialized countries" in Europe and North America and in a resulting "Third World" feeling. The substantial identity of interests in these two regions is striking indeed. Even more striking, if it comes to details, is the role Spain plays within these two regions. *She* belongs to both regions: by geography to the Mediterranean; and by language, tradition, and influence to Latin America. Only slightly different is

REGIONALISMUS IN EUROPA (Reports of the Bayerische Landeszentrale für politische Bildungsarbeit, 3 vols., 1978, 1981, 1983).

56. See notes 3, 13 *supra* (on the possibility of a "zweispuriges System").

57. These contacts between Spanish, Portuguese and Latin American lawyers — for example in the Instituto hispano-luso-americano-filipino de Direito Internacional Privado in Lisbon — are reminiscent of the meetings between Scandinavian lawyers that have been taking place since the 1880s, influencing the harmonization of Scandinavian law. The peculiar place of the Latin American countries within the Third World, due to the old ties to Spain, Portugal, and Europe in general, is convincingly set forth in Wagner de Reyna, *Entwicklung und Kultur, ENTWICKLUNG UND ZUSAMMENARBEIT*, No. 4, 1983, at 4, 6.

the position of Portugal. In particular, the *interregional* importance of Spain can hardly be overestimated.

CONCLUSION

UN bodies like the proposed Seabed Authority do not offer a way out of the present crisis in Third World trade partnership relations. Rather, this problem should be addressed substantively through an extraterritorial anti-trust approach including transfer of technology control, and methodologically through a regional approach consisting of harmonized national rules paying due attention to UN programs and guidelines.