RESTRICTIVE BUSINESS PRACTICES

Memorandum by the Government of Norway

The Norwegian Government has submitted the following memorandum and draft resolution for consideration by the Working Party on Restrictive Business Practices (L/1244) which will meet during the first part of the seventeenth session of the CONTRACTING PARTIES.

The CONTRACTING PARTIES on 2 June 1960 decided to establish a working party with the following terms of reference:

"To examine the report (L/1015) by the Group of Experts on action by the CONTRACTING PARTIES in dealing with restrictive business practices in international trade, taking into account any comments and proposals received from the contracting parties concerning the recommendations contained therein, and to report to the CONTRACTING PARTIES at the seventeenth session".

To prepare for the examination of this question by the Working Party and to give it a greater possibility of achieving fruitful results, the CONTRACTING PARTIES decided at the same time to invite contracting parties to submit to the Executive Secretary, not later than 15 September, their comments or proposals concerning the recommendations contained in the report by the Group of Experts.

The following memorandum is prepared pursuant to this invitation.

I.

Points agreed on by the Group of Experts

The Group of Experts has agreed on five very important points.

Firstly, the group endorses the opinion expressed by the CONTRACTING PARTIES in the resolution of 5 November 1958 that the activities of international cartels and trusts may hamper the expansion of world trade or otherwise interfere with
the objectives of the GATT. The group adds, however, that sufficient evidence is not available to judge the extent of the actual damage to world trade which results from these practices.

Secondly, the members agree that the CONTRACTING PARTIES should be regarded as an appropriate and competent body to initiate action in this field.

Thirdly, the group gives an affirmative answer to the question in its terms of reference whether the CONTRACTING PARTIES should undertake to deal with these matters.

Fourthly, the majority and the minority of the members in divergent formulations, agree in substance that in the present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of restrictive practices which would require an amendment of the General Agreement or a supplementary agreement to the General Agreement. The steps to be taken should, therefore, be within the framework of the present General Agreement.

Finally, the members agree that at the end of an initial period of three years the CONTRACTING PARTIES should reconsider the procedures which are laid down at the start.

It is a great step forward that all the members of the Expert Group have agreed upon these basic points. However, with regard to the procedures to be laid down for the initial period there are fundamental differences of opinion between the two sections of the group.

II.

Comments on the proposal made by the majority section of the Expert Group

With regard to the steps to be taken with the aim of contributing to the elimination of harmful restrictive business practices the majority merely proposes provisions on bilateral and multilateral consultations between the contracting parties directly concerned. In particular cases. Such a limited system of consultation does not correspond to any consultation system provided for in the General Agreement.

The general provisions on consultations are laid down in Article XXII. In addition to the provisions in paragraph 1 on direct consultations between the contracting parties concerned, paragraph 2 provides for consultations with the CONTRACTING PARTIES at the request of a contracting party if it has not been possible to find a satisfactory solution through consultations under paragraph 1. With regard to consultations otherwise provided for in the General Agreement the rule is that the CONTRACTING PARTIES consult with the respective contracting parties, partly without prior direct consultations between the contracting parties concerned, partly after such direct consultations have taken place without a satisfactory solution being reached. See for instance the provisions of Article XII, paragraph 4, and the provisions of Article XVIII, paragraph 12.
As stated by the minority, a contracting party considering itself damaged by restrictive business practices will, as a general rule, be in a weak position in direct consultations with a contracting party or parties within whose territories the cartels or trusts have their seats. This applies especially in cases where the respective cartel or trust embraces enterprises in a great number of countries. It is, therefore, essential that the CONTRACTING PARTIES may enter into consultations with the contracting parties concerned, if a satisfactory solution has not been reached through direct consultations. Such provisions may make the consultation system more effective, both because of the great authority involved in consultations carried out according to decisions made by the CONTRACTING PARTIES and because the possibility for a contracting party to request the CONTRACTING PARTIES to enter into consultations may contribute to voluntary settlements being reached under direct consultations. Many trusts and cartels may prefer such settlements instead of having their cases dealt with by the CONTRACTING PARTIES.

III.

Comments on the proposals made by the minority section of the Expert Group

In addition to provisions on direct consultations between the contracting parties concerned, the minority proposes further steps when direct consultations have failed. The minority proposes that in such cases a group of experts, appointed by the CONTRACTING PARTIES, at the request of one of the contracting parties concerned, shall examine the case. If the group deems it appropriate the group shall enter into consultations with the parties concerned.

If the group does not succeed in settling the case, the damaged contracting party may refer the matter to the CONTRACTING PARTIES. The minority holds the view that in such cases the provisions of paragraph 2 of Article XXIII are applicable. According to the first part of this paragraph the CONTRACTING PARTIES shall, when a matter is referred to them, make appropriate recommendations to the contracting parties concerned or give a ruling on the matter, as appropriate. The minority advises against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2 with regard to further actions.

In the opinion of the minority, the CONTRACTING PARTIES may also lay down rules for dealing with restrictive business practices similar to those in paragraph 1 and the first part of paragraph 2 of Article XXIII by virtue of the provisions of Article XXV. The minority stresses that it is for the CONTRACTING PARTIES to take decisions with regard to these legal questions.

In the Norwegian opinion, such procedures as are proposed by the minority might, to a considerable extent, prevent and counteract harmful restrictive business practices in international trade. Considering, however, the objections raised to these proposals it might be advisable to suggest modifications with a view to securing a broader support by the contracting parties for the procedures to be laid down for the initial period. In accordance with this view, the Norwegian delegation has prepared a draft proposal, which is attached as an annex to this memorandum.
IV.

Comments on the Norwegian draft proposal

In the drafting of the proposal, the Norwegian delegation has aimed at reaching a compromise between the recommendations made by the majority section and the minority section of the Expert Group.

In the draft proposal no reference is made to Article XXIII of the General Agreement. In the Norwegian opinion this Article might be applicable, but it is better to avoid making use of it, at any rate during the initial period. Nor should it be necessary for the CONTRACTING PARTIES, during this period, to give any rulings with regard to restrictive business practices. The Norwegian draft proposal does not go further than to provide for consultation procedures of the same type as the consultation system of Article XXII.

The proposal is based on Article XXV. This has been done for two reasons. In the first place it might be doubtful whether Article XXII is applicable with regard to consultations on restrictive business practices. Article XXII relates only to matters affecting the operation of the General Agreement. As the General Agreement has no specific provisions on restrictive business practices, it may be maintained that consultations on such practices do not fall within the scope of Article XXII. Such objections do not arise with regard to the application of Article XXV as this Article provides for actions with a view to facilitating the operation and furthering the objectives of the General Agreement. It is recognized that the counteraction of restrictive business practices which cause damage to contracting parties lies within the objectives of the Agreement. This is expressed in the preamble of the resolution unanimously adopted by the CONTRACTING PARTIES on 5 November 1958 and unanimously endorsed by the Expert Group.

In the second place, it would be necessary to apply Article XXV even if Article XXII should be considered applicable on restrictive business practices, as a system for effective consultations on such practices would require more specific procedures than the provisions laid down in Article XXII.

In addition to these introductory remarks, some comments on the various parts of the draft proposal are given below.

Comments on the preamble

The first four paragraphs of the preamble should be in accordance with the points agreed upon by the Group of Experts.

Comments on paragraph 1

This paragraph corresponds, in the main, to the proposals set forth in slightly different words by the majority and by the minority of the Expert Group.
Comments on paragraph 2

This paragraph corresponds in the main to paragraph 2 of the majority proposal and to paragraph (ii) of the minority proposal.

The majority and the minority have both recommended the appointment of an expert group, although partly with different functions. In the Norwegian view, it may be more appropriate to appoint a committee on restrictive business practices instead of an expert group, cf. the comments on paragraph 4.

Comments on paragraph 3

Paragraph 3 contains the procedures to be followed in cases where it has not been possible to reach satisfactory solutions by direct consultations between the contracting parties concerned.

According to the rules recommended in this paragraph, a contracting party may request the CONTRACTING PARTIES to consult with the respective contracting party or parties. The request shall be conveyed by the secretariat to the Committee on Restrictive Business Practices, which shall make recommendations to the CONTRACTING PARTIES. It is for the CONTRACTING PARTIES to decide whether or not they should comply with the request. If the CONTRACTING PARTIES decide to comply with the request, the Committee shall carry out consultations with the parties concerned. If the Committee does not succeed in reaching a satisfactory solution, the CONTRACTING PARTIES may, if they find it appropriate, make specific recommendations to the contracting parties concerned with a view to reaching a settlement of the case. That is as far as the CONTRACTING PARTIES should go in the initial period. As mentioned above, they should, during this period, give no rulings or otherwise take further steps.

The rules suggested in paragraph 3 correspond, as will be seen, to the procedures which are laid down for consultations in other fields between the CONTRACTING PARTIES and particular contracting parties. Reference is specially made to the procedures for consultations on balance-of-payments restrictions. As it is done with respect to such consultations, it is also necessary to establish a special body to assist the CONTRACTING PARTIES in carrying out consultations concerning restrictive business practices. This body should have no authority to enter into consultations without being instructed to do so by the CONTRACTING PARTIES. In this respect the Norwegian draft proposal deviates from the proposal set forth by the minority section of the Expert Group, cf. paragraph (iv) of its proposal.

Comments on paragraph 4

The CONTRACTING PARTIES would have to face many difficult problems when they undertake to deal with restrictive business practices. It is, therefore, of the greatest importance that the body which shall assist the CONTRACTING PARTIES in this field is adequately composed. In this connexion attention is drawn to the recommendations made on 22 November 1958 by the Working Party
on Balance-of-Payments Restrictions with regard to the proposed Committee on Balance-of-Payments Restrictions, cf. BISD, seventh supplement, page 94. The following extracts are quoted:

"The Working Party considers that, as on previous occasions, the consultations should be entrusted to a Committee comprising governmental representatives. The composition of the Committee should reflect, as far as possible, the characteristics of the contracting parties generally in terms of their geographical location, external financial position and stage of economic development, and its size should be suited to the nature of its work. The Working Party recommends that the CONTRACTING PARTIES appoint a Committee on Balance-of-Payments Restrictions to conduct consultations in 1959, whose membership may be as follows:

- Australia
- Brazil
- Canada
- Dominican Republic
- Denmark
- Federal Republic of Germany
- France
- India
- Japan
- Norway
- United Kingdom
- United States

Chairman: To be appointed by the Chairman of the CONTRACTING PARTIES

In the light of experience, the Working Party strongly recommends that members of the Committee designate as their representatives persons of adequate qualifications and acquaintance with the problems to be dealt with by the Committee and that efforts should be made to ensure continuity in the representation on the Committee."

In the Norwegian view, it might be appropriate to establish a Committee on Restrictive Business Practices along similar lines as those recommended with respect to the Committee on Balance-of-Payments Restrictions. With regard to the committee which shall assist the CONTRACTING PARTIES in dealing with restrictive business practices, it is of the greatest importance:

(a) That the composition of the committee should reflect, as far as possible, the characteristics of the contracting parties generally in terms of their geographical location and stage of economic development.

(b) That the governments which shall be represented in the committee designate as their representatives competent persons.

(c) That continuity in the representation should be ensured as far as possible.

With regard to point (b), it should suffice that the representatives have adequate acquaintance with the problems to be dealt with by the committee. They do not have to be experts on restrictive business practices.
The rules in paragraph 4 have been drafted in accordance with the views stated above. The question as to which contracting parties are to be represented in the committee is left open for later consideration.

Comments on paragraph 5

The rules in this paragraph correspond to the provisions under (v) of the minority proposal with the amendment that the Committee on Restrictive Business Practices should report to the CONTRACTING PARTIES.

Comments on paragraphs 6 and 7

The proposal set forth by the majority of the Expert Group lacks a definition of the term "restrictive business practices". The minority proposal has only stated that the term "restrictive business practices in international trade" shall include practices applied by an enterprise or a combination of enterprises which has a dominant influence on trade in one or more commodities or services between two or more contracting parties, in so far as the practices affect other parties than the contracting party or parties having jurisdiction over the enterprises concerned.

In the opinion of the Norwegian delegation, it might be useful to lay down a more comprehensive definition of the term "restrictive business practices" and also to state to what extent restrictive business practices fall under the scope of the resolution. The suggestions contained in paragraphs 6 and 7, first sentence, are, in the main, formed on the basis of the provisions laid down in the Articles 85 and 86 of the Rome Treaty establishing the European Economic Community. The principle stated in the last sentence of paragraph 7, with regard to the circumstances in which restrictive practices should be considered harmful, corresponds mainly to the definition contained in Article 46, paragraph 1, of the Havana Charter.

Comments on paragraph 8

Paragraph 8 corresponds in the main to the proposals of the majority and minority sections of the Group of Experts.

V.

Additional Remarks

In the report submitted by the Group of Experts, the majority and the minority expressed different views with regard to the relation between national legislation on restrictive business practices and international counteraction of such practices in international trade, cf. especially the text under the paragraphs 7, 13 and 20-22 of the Report. The Norwegian delegation has previously expressed similar views as the minority with regard to this question, cf. document 1/893 and the documents there mentioned.
The problems discussed would, however, be significant only if it were a question of introducing control on restrictive business practices imposing such obligations on contracting parties as would require an amendment of the General Agreement or a supplementary agreement to the General Agreement. In the present situation there is no question of such a far-reaching project. The Norwegian proposal of a consultation system rests within the framework of the present General Agreement. The proposal does not involve any legal obligation on the contracting parties, neither in respect of action to be taken against trusts and cartels nor with regard to the furnishing of information. Under these circumstances there should be no need for further discussions on this matter.

The majority of the Expert Group referred to the difficulties which may arise as a consequence of the fact that there are no internationally-agreed standards or guidelines upon which judgment could be based with respect to the circumstances in which specific business practices in international trade should be deemed harmful, cf. the statement contained in paragraph 10 of the Report by the Expert Group.

In the Norwegian opinion, it would be quite impossible for the Contracting Parties to lay down specified guidelines in this field at the start of their dealings with restrictive business practices. The only workable course of action will be to consider each particular case on the basis of general principles, as is suggested in the Norwegian proposal, cf. the first paragraph of the preamble and the last sentence of paragraph 7. There is scarcely any danger that such consultations as proposed will lead to inequitable results. The parties engaged in consultations must be assumed to refer to solutions previously reached which concern similar restrictive methods applied under similar circumstances. A party will hardly accept a settlement which is found to be unjust and contrary to previous settlements in corresponding cases. On the basis of experience gained through consultations, it may perhaps be possible in the future for the Contracting Parties to lay down supplementary rules on which judgment could be based.

In this connexion, attention should be drawn to the fact that this matter was thoroughly discussed under the considerations preceding the Havana Charter. After lengthy discussions, it was unanimously accepted that it would not be possible to lay down in the Charter specified guidelines as a basis for the judgment of restrictive business practices. It was agreed that one could not go further than to state that the provisions on restrictive business practices should only apply when the practices were considered harmful and that this expression should be interpreted in the light of the objectives of the Charter, cf. the provisions in Article 46, paragraph 1, of the Havana Charter.

The majority of the Expert Group also pointed to the difficulties which may confront governments with regard to the furnishing of information on restrictive business practices applied by cartels and trusts operating from their territory. The minority maintained that these difficulties must not be over-estimated. In many cases, the damaged contracting party may be able to provide sufficient evidence. It is also to be assumed that the cartels and trusts, in their own interests, would prefer to state their case since they
will otherwise run the risk of being considered as applying harmful practices on the sole evidence brought forward by the complaining contracting party. In the Norwegian opinion, this point deserves to be stressed. To illustrate this by examples, attention is drawn to two types of restrictive business practices which are comparatively frequent in international trade, i.e. discrimination in prices or terms of business between various countries and dumping practised towards one or more countries with a view to destroying domestic competitors. In such cases, the damaged country or countries will often be able to put forward considerable evidence. The prices charged and terms stated for sales to the various countries are, to a great extent, made known in newspapers or periodicals. In addition, the buyers in the import countries will be able to furnish information to their governments.

On the other hand, it should not be ignored that both in this and in other fields problems will arise when the CONTRACTING PARTIES start dealing with restrictive business practices. The difficulties should, however, not be exaggerated. According to the Norwegian proposal, there will be no question of making legally-binding decisions; the aim of the proposal is only to contribute to voluntary solutions through consultations. Experience has proved that it has been possible to a great extent to reach agreements by this means. The CONTRACTING PARTIES have thereby been able to avoid many complicated problems which would have arisen if legally-binding decisions should have been made. It is to be hoped that the consultation system will work satisfactorily also in the field of restrictive business practices.
DRAFT RESOLUTION

THE CONTRACTING PARTIES

Recognizing that business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and removal of quantitative restrictions or may otherwise interfere with the objectives of the General Agreement on Tariffs and Trade;

Recognizing, further, that international co-operation is needed to deal effectively with harmful restrictive practices in international trade;

Considering that in the present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of such practices which would require an amendment of the General Agreement or a supplementary agreement to the General Agreement;

Desiring to take steps within the framework of the present General Agreement with a view to counteracting harmful restrictive practices;

Having considered the report submitted 30 June 1959 by the Group of Experts, document L/1015, and the report submitted November 1960 by the Working Party, document ......

Decide in the terms of Article XXV to lay down the following procedures for dealing with restrictive business practices:

1. A contracting party which considers itself damaged by restrictive business practices may request the contracting party or parties having jurisdiction over the association or enterprises applying the practices to enter into consultations on the practices on a bilateral or multilateral basis as appropriate. A party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party with a view to reaching a satisfactory solution. If the party addressed agrees that harmful effects are present it should take such measures as it deems appropriate to eliminate these effects.

2. (a) If the requesting party and the party or parties addressed reach a satisfactory solution, they should jointly inform the secretariat of the nature of the complaint and of the solution reached.

(b) If the requesting party and the party or parties addressed are unable to reach a satisfactory solution, they should inform the secretariat of the nature of the complaint and the reason why it has not been possible to reach a solution.
(c) The secretariat shall convey such information as mentioned under (a) and (b) to the Committee on Restrictive Business Practices appointed by the CONTRACTING PARTIES in accordance with paragraph 4 below.

3. (a) The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of such matters as are mentioned in paragraph 1, if it has not been possible to reach a satisfactory solution through consultations under the said paragraph. The request shall be conveyed by the secretariat to the Committee on Restrictive Business Practices which shall make recommendations to the CONTRACTING PARTIES.

(b) If the CONTRACTING PARTIES decide to comply with the request, the Committee on Restrictive Business Practices shall carry out consultations with the parties concerned in accordance with such instructions as are laid down by the CONTRACTING PARTIES. The Committee shall inform the CONTRACTING PARTIES of the outcome of the consultations. If the Committee does not succeed in reaching a satisfactory solution, the CONTRACTING PARTIES may, if they find it appropriate, make specific recommendations to the contracting parties concerned with a view to reaching a settlement of the case. The parties concerned should within a time limit fixed by the CONTRACTING PARTIES inform the secretariat if and how the case is settled and if not, why this has not been possible. The secretariat shall convey the information to the Committee, which shall report to the CONTRACTING PARTIES.

4. The Committee on Restrictive Business Practices shall consist of a chairman and a vice-chairman, both appointed by the Chairman of the CONTRACTING PARTIES for a term of three years, and of governmental representatives for .... contracting parties, selected by the CONTRACTING PARTIES for a period of three years. By the selection due regard shall be had for the desirability of including in the Committee members from contracting parties in different geographical areas and with different types of economies. The contracting parties selected shall as far as possible try to ensure continuity in the representation on the Committee.

5. The Committee on Restrictive Business Practices shall report annually to the CONTRACTING PARTIES on consultations made pursuant to paragraph 1.

6. The term "restrictive business practices" shall in this resolution mean:

(a) practices applied by associations or according to decisions of associations, by agreements or concerted practices or by other arrangements between enterprises, having as their object or result the prevention, restriction or distortion of competition.

(b) practices by which an enterprise or a combination of enterprises having dominant influence on trade in one or more commodities or services between two or more contracting parties takes unfair advantage of its position.
7. Restrictive business practices as defined under 6 fall under the scope of this resolution only if they affect other contracting parties than the contracting party or parties within whose territories the associations or enterprises have their seat. The practices should be considered harmful if they have such effects as mentioned in the first paragraph of the preamble to this resolution.

8. At the end of a period of three years, during which the Committee on Restrictive Business Practices will have had the possibility of assessing the real importance of restrictive business practices in international trade and of appreciating the nature of their effects and of the difficulties encountered in reaching solutions, the Committee will submit to the CONTRACTING PARTIES proposals for possibly improving the procedures.