RESTRICTIVE BUSINESS PRACTICES

MEMORANDUM

Submitted on 15 June 1959 by the Norwegian Expert

General Notes

The resolution to appoint an expert group on restrictive business practices, adopted by the CONTRACTING PARTIES on 5 November 1958 was based on a proposal set forth by the Norwegian delegation. See documents L/893, L/893 Add. 1, L/893 Add. 2, SR 13/12, SR 13/13 and L/907.

Document L/893 contains a short summary of previous considerations and proposals on international control of restrictive business practices. In addition to the statements and documents mentioned or referred to in document L/893 attention is drawn to the publication, "Restrictive Business Practices", issued by the secretariat in May 1959.

In the Norwegian opinion it would be appropriate to introduce the control by a supplementary agreement to the General Agreement on Tariffs and Trade. The Government of Norway has previously suggested such a solution. Pursuant to a request from the Intersessional Committee the Government in 1957 transmitted a Draft Supplementary Agreement to the General Agreement on Tariffs and Trade and to the Agreement on the Organization for Trade Cooperation to this effect. See document L/653. The Agreement on the Organization for Trade Cooperation and the corresponding amendments to the General Agreement on Tariffs and Trade have, however, not been ratified. Under these circumstances it might be advisable to consider whether the control of restrictive business practices could be initiated on the basis of provisions contained in the present General Agreement on Tariffs and Trade. In this connexion attention is drawn to Article XXIII.

The Article refers to cases where a contracting party considers that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of:

(a) the failure of another contracting party to carry out its obligations under the Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation

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According to paragraph 1 of the Article the contracting party may in such cases, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c), the matter may be referred to the CONTRACTING PARTIES under paragraph 2 of the Article. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter as appropriate. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.

It must be assumed that the provisions of this Article are applicable to restrictive arrangements and practices interfering with the objectives of the General Agreement. Reference is made to the fact that the CONTRACTING PARTIES in the preamble to the Resolution of 5 November 1958 have recognized that the activities of international cartels and trusts may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement on Tariffs and Trade.

If control of restrictive business arrangements and practices, founded on Article XXIII should be effective, it is imperative to lay down special rules of procedure. As a basis for discussion of this matter Draft Rules of Procedure are attached as an Annex to this memorandum.

Comments on the Draft Rules

Chapter I contains definitions of the terms "restrictive business practices" and "dominant enterprise". It is further stated that restrictive business arrangements and business practices, applied by dominant enterprises, shall be dealt with according to the rules only when they relate to trade between contracting parties.

Chapter II establishes a standing committee, the Cartel Committee, to carry out the functions assigned to it under Chapters III and V. The Committee shall consist of one chairman and six other members, elected by the CONTRACTING PARTIES.
The members of the Committee shall perform their duties in the general interest of all contracting parties and shall neither solicit nor accept instructions from any government.

The paramount considerations in the selection of candidates shall be their competence, integrity and impartiality as individuals. Due regard shall also be had for the desirability of including in the Committee members from countries in different geographical areas and with different types of economies.

The Committee shall perform its duties with the assistance of the secretariat.

The appointment of a Cartel Committee along such lines as indicated, is essential. The investigations and studies with regard to restrictive business arrangements or practices applied by dominant enterprises can only be carried out successfully under the guidance of a body consisting of competent and independent members.

The most important duty of the Cartel Committee is to carry out investigations to ascertain whether or not a particular restrictive business arrangement or a particular practice, applied by a dominant enterprise, has harmful effects on trade between contracting parties or otherwise interferes with the objectives of the General Agreement. According to the rules in Chapter III the Cartel Committee shall carry out such investigations only when the matter is referred to the CONTRACTING PARTIES under Article XXIII, paragraph 2, of the General Agreement.

The Committee may request the necessary information from the contracting parties concerned and shall submit a report to the CONTRACTING PARTIES on the results of the investigations. The CONTRACTING PARTIES shall decide whether the report should be made public.

In Chapter IV it is stated that the CONTRACTING PARTIES, in accordance with paragraph 2, Article XXIII, of the General Agreement, shall make recommendations with regard to elimination of a harmful arrangement or practice or, if they consider the circumstances serious enough to justify such action, authorize a contracting party or contracting parties to suspend the application by any other contracting party or parties of such concessions or other obligations under the General Agreement as they determine to be appropriate in the circumstances.

Under Chapter V the Cartel Committee is authorized to conduct studies relating to restrictive business arrangements and practices, applied by dominant enterprises, affecting trade between contracting parties. The Committee shall submit reports on the results of such studies to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall decide whether the reports should be made public.

Such studies may be of importance both to the Cartel Committee and to the CONTRACTING PARTIES in furnishing general information concerning restrictive business arrangements and practices as a background for particular
investigations, recommendations and other decisions. The publication of the studies may also contribute to the prevention of harmful arrangements and practices.

According to Chapter VI each contracting party shall furnish to the Cartel Committee as promptly and as fully as possible such information as it requests for its work. Each contracting party shall inform the CONTRACTING PARTIES of national legislation on restrictive business arrangements which it has enacted and of general lines of the application thereof.

Attention is drawn to the fact that the suggested Rules do not impose any obligation on the contracting parties to enact and maintain legislation on restrictive business arrangements or practices, applied by dominant enterprises, which have harmful effects on trade between contracting parties or otherwise interfere with the objectives of the General Agreement. It is for each contracting party itself to decide by which means it will comply with recommendations made by the CONTRACTING PARTIES in accordance with the rules of Chapter IV, cf. Article XXIII, paragraph 2, of the General Agreement. It is to be hoped that the contracting parties will provide the necessary legal basis for actions to comply with the recommendations made by the CONTRACTING PARTIES.
ANNEX

DRAFT RULES OF PROCEDURE WITH REGARD TO RESTRICTIVE BUSINESS PRACTICES

REFERRING to the resolution adopted by the CONTRACTING PARTIES on 5 November 1958 in which it was stated that the activities of international cartels and trusts may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement on Tariffs and Trade,

RECOGNIZING that the activities of international trusts and cartels may be of such nature as to call for consultations and actions by the CONTRACTING PARTIES under Article XXIII of the General Agreement,

HAVING CONSIDERED the report prepared by the Group of Experts, appointed under the said resolution,

The CONTRACTING PARTIES

DECIDE to adopt the following procedure with regard to restrictive business practices, referred to the CONTRACTING PARTIES under paragraph 2 of Article XXIII of the General Agreement:

Chapter I
Definitions

1. The term "restrictive business arrangements" shall refer to associations, decisions of associations, agreements, concerted practices and other arrangements between enterprises having as their object or result the prevention, restriction or distortion of the free play of competition, as for instance:

(a) direct or indirect fixing of prices, rates of profit or terms of business;

(b) limitation or control of production or of technical development or investment;

(c) limitation or control of import or export or allocation of markets, customers or sources of supply;

(d) discrimination, specifically as concerns prices or terms of business.

2. The term "dominant enterprise" shall mean an enterprise or a combination of enterprises which have dominant influence on trade in one or more commodities or services between two or more contracting parties. The term "combination of enterprises" shall mean enterprises which are under joint control of the same group of interests regardless of whether the control is carried out in the form of a trust, a holding company, or otherwise.
3. Restrictive business arrangements and business practices, applied by dominant enterprises, shall be dealt with according to these Rules only when they relate to trade between contracting parties.

Chapter II

The Cartel Committee

1. A standing committee, the Cartel Committee, is hereby established to carry out the functions assigned to it under Chapters III and V of these Rules.

2. The Cartel Committee shall consist of a Chairman and six other members elected by the CONTRACTING PARTIES. The members shall be elected for a term of four years provided that at the first election three of the members shall be elected for two years only. The members shall be eligible for re-election. The CONTRACTING PARTIES shall also elect alternates. If a member or an alternate retires before his term is expired, the CONTRACTING PARTIES shall elect another member or another alternate for the rest of the term.

3. The members of the Committee shall perform their duties in the general interest of all contracting parties and shall neither solicit nor accept instructions from any government.

The paramount considerations in the selection of candidates shall be their competence, integrity and impartiality as individuals. Due regard shall also be had for the desirability of including in the Committee members from countries in different geographical areas and with different types of economies.

4. The Cartel Committee shall perform its duties with the assistance of the secretariat.

Chapter III

Investigations

1. If a matter concerning a particular restrictive business arrangement or a particular practice applied by a dominant enterprise is referred to the CONTRACTING PARTIES under paragraph 2 of Article XXIII of the General Agreement, the Cartel Committee shall carry out investigations to ascertain whether or not the arrangement or practice has harmful effects on trade between contracting parties or otherwise interferes with the objectives of the General Agreement.

2. The Committee may request the contracting party or contracting parties having jurisdiction over the enterprise or enterprises in question to furnish necessary information. It may also request other contracting parties to furnish additional information. The Committee may conduct or arrange for hearings.
3. The Committee shall submit a report to the CONTRACTING PARTIES stating whether the restrictive business arrangement or the practice which has been subject to investigation is of such nature as described in paragraph 1 of this chapter.

4. The CONTRACTING PARTIES shall decide whether the report should be made public.

Chapter IV

Recommendations and Rulings

1. The CONTRACTING PARTIES having received from the Cartel Committee such a report as mentioned in paragraph 3 of Chapter III, shall, if they deem the arrangement or practice to be of such nature as described in paragraph 1 of Chapter III in accordance with paragraph 2 of Article XXIII of the General Agreement, make appropriate recommendations to the contracting party or the contracting parties in question with regard to elimination of the harmful arrangement or practice.

The contracting party or parties shall inform the CONTRACTING PARTIES of the measures taken to comply with the recommendations. If no action has been taken, the reasons for this should be reported.

2. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may in accordance with paragraph 2 of Article XXIII of the General Agreement, authorize a contracting party or contracting parties to suspend the application to any other contracting party or parties of such concessions or other obligations under the General Agreement as they determine to be appropriate in the circumstances.

Chapter V

Studies

The Cartel Committee is authorized to conduct studies relating to restrictive business arrangements and practices, applied by dominant enterprises, affecting trade between contracting parties. The Committee may request information from the contracting parties for this purpose and may also make use of information from other sources. The Committee shall submit reports on the results of such studies to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall decide whether a report should be made public. The studies shall be kept apart from the investigations carried out under Chapter III.
Chapter VI

Information

1. Each contracting party shall furnish to the Cartel Committee as promptly and as fully as possible such information as it requests for its work in accordance with these Rules. On notification to the Committee a contracting party may, however, withhold information which it considers not essential for carrying out the studies or investigations, and which, if disclosed, would substantially damage the legitimate business interests of an enterprise. In notifying the Committee that the contracting party is withholding information pursuant to this clause, the contracting party shall indicate the general character of the information withheld and the reason why it is considered not essential.

2. Each contracting party shall inform the CONTRACTING PARTIES of national legislation on restrictive business arrangements which it has enacted and of general lines of the application thereof.