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RESTRICTIVE BUSINESS PRACTICES

Statements submitted by the Governments of New Zealand, Sweden, the United States and the Federal Republic of Germany

(Comments on the Expert Group's Report L/1015 - for consideration by the Working Party at the seventeenth session)

I. STATEMENT BY THE GOVERNMENT OF NEW ZEALAND

The New Zealand Government supports the views of the majority of the experts, as set out in L/1015 and is willing to participate in bilateral or multilateral consultations if called upon to do so. New Zealand does not support the minority proposal and in particular does not support the setting up of a group of experts that would examine cases and enter into consultation with parties concerned.

II. STATEMENT BY THE GOVERNMENT OF SWEDEN

The question of the measures to be adopted to combat restrictive business practices with harmful international effects has been topical since 1947, in which year the work in connexion with the Havana Charter was undertaken. The draft projects for international control in this matter on a worldwide basis submitted hitherto - namely, the provisions of Chapter V of the Havana Charter and the draft articles of agreement prepared by the Ad Hoc Committee of ECOSOC in 1953 - have been adopted by Sweden in principle. The Swedish authorities still consider that it is desirable that the question of restrictive business practices should be dealt with by international control. Experience has however shown that it is extremely difficult to obtain unanimous agreement on the subject of such control, primarily because of the considerable differences which exist as between the domestic legal requirements prescribed by the various countries to combat restrictive business practices. Bearing that in mind, the work done by the Group of Experts in GATT dealing with the question of restrictive business practices should, it would seem, be aimed first at establishing a relatively simple provisional system which could be tried out over a transitional period in order to gain experience, and which would not entail either the standardization of national legal provisions of Member States on the subject, or the establishment of a supra-national body empowered to take decisions binding upon those States.

In view of the foregoing, it would appear natural to recommend that the countries concerned be obliged, as a primary measure against restrictive business practices with harmful international effects, to hold mutual consultations in order to arrive at a freely consented settlement. However, the chances of an injured party obtaining satisfaction in this way appear to be rather slight if no pressure in any form is to be brought to bear on the other party. The mere publication of the facts relating to the case would doubtless not have sufficient effect, even if such publication - in conformity with the majority recommendation in document L/1015 - were to be made by a special committee of experts established by GATT. For such a committee could only base the report it would send to the CONTRACTING PARTIES on documentation supplied by the parties concerned. A more effective result would be obtained if it were possible for the committee of experts or any other GATT body appointed - as proposed by the minority in document L/1015 - to establish direct contact with the parties concerned, when that appeared advisable, in order to reconcile the various viewpoints. That body would then appear to have better opportunities for going thoroughly into the case and forming an opinion on it, which could then be submitted in a report to the CONTRACTING PARTIES. The mere fact that such a system could be applied would tend to encourage the conclusion of freely consented arrangements.

The Swedish recommendation therefore is that settlement of the question be based on the method of consultations and in conformity with the minority recommendation put forward in document L/1015. An objection made in connexion with that method has been that in many countries it is impossible to obtain from the business concerns involved the necessary information about business conditions of some relevance in the cases envisaged. Too much importance should not, however, be given to that objection. It is in point of fact very often in the interests of a firm to supply the necessary information about the conditions of its business in order to obtain its country's support when consultations are held between the States concerned.

III. STATEMENT BY THE GOVERNMENT OF THE UNITED STATES

The United States has detailed substantive comments on either the majority or minority proposals at this time. The United States continues to support the majority proposal as the most practical initial step to deal with this complex problem.

IV. STATEMENT BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

THE HISTORY

The present effort to deal with restrictive business practices within the GATT must be seen as one step in a long chain of endeavours. Repeated attempts have been made since the end of the war to protect the growing international trade fostered through international treaties by controlling international restrictive business practices. To be considered here are not the regional arrangements we know of, but the attemps at a more or less worldwide control. To this day none of these attempts have reached the stage of effectiveness.

The Havana Charter covering the whole range of international economic relations contained a whole chapter on restrictive business practices defining practices which restrain competition, limit access to markets or foster monopolistic control. This chapter also refers to the supra-national authority which was also to be established with certain powers and rules of procedure under the Charter. Economically it provided that a decision on a restrictive business practice could be called for if such practice affected international trade by harmful effects on the expansion of production or trade, and by interfering with the achievement of other objectives of the Charter. The Havana Charter has not been ratified. The provisions contained in its Chapter V have been reconsidered by the Economic and Social Council (ECOSOC) of the United Nations but their recommendations - containing roughly the provisions of the Havana Charter with certain amendments - were not ratified either.

The GATT provides for the lowering of tariff walls and the abolition of quantitative restrictions. However, the subject of restrictive business practices is not dealt with; it had been "but part of a broader field covered by the Havana Charter which was now more or less dead".[1]

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[1] Mr. Krishnamachari (India), ECOSOC, thirteenth session, 547th meeting, 12 September 1951, page 627 of the official record.

Still, in spite of a great variety of different opinions, one point on which most free nations do agree is that the freedom of international trade generally deserves protection from private restrictions which might frustrate the benefits of such freedom.

SHOULD A WORLD AUTHORITY BE INSTITUTED?

There are two ways in which to achieve this protection. One way is by voluntary arrangements among nations without any coercion and without a central authority, and the other would be through an efficient powerful central authority. The question is whether a compromise between these two ways appears to be possible under present circumstances. The German Government believes that any middle course would defeat its purpose.

The following are the elements the absence of which would render any world authority on restrictive business practices ineffective and thus useless:

(1) (a) definitions as to what should be considered restrictive business practices,

(b) rules as to what harm to international trade shall justify an action of the authority,

(2) power (a) to investigate, and

(b) to enforce decisions.

(Ad 1) Definitions and rules

Their nature

An authority which cannot work upon legal definitions would be wide open to attacks that it acts discriminatorily whenever it does anything. It could not decide cases satisfactorily where the two parties concerned disagree on questions of a legal nature, for example on the admissibility of patent pools. Consequently, we find in most national laws and in the Havana Charter such definitions.

It is conceivable that some restrictive business practices in one country greatly benefit its national economy to the disadvantage of other nations. If there are no rules on the economic questions of harmful effects again the authority will be blamed for discriminating.

Can such definitions and rules be given?

The question whether an authority on an international level should be established thus depends entirely upon the question whether nations today are in a position to furnish an international body with the definitions and rules outlined above.

A comparison of the various national laws already in existence shows that there is almost no point yet where one could speak of a worldwide concensus of opinion on (a) which restrictive business practices should in principle be considered permissible and which not, and (b) which economic effects should be considered harmful and which not.

Furthermore, about half of the contracting parties have no laws forbidding restrictive business practices at all. Some countries so far rely solely on making public information on cartels. In a number of countries certain restrictive business practices are per se forbidden, regardless of their usefulness. In others, a more or less elaborate administrative procedure is laid down by which certain effects of the restriction under consideration are investigated, and only if negative effects are found is the agreement decreed unlawful. Still further, the economic effects upon which decisions are based very often stem from very different concepts of economic policy. National economic policy as a rule is an extremely important question for nations, and these policies cannot be subjected to international corrective measures except where they result in violations of the basic human freedoms. Lesser developed countries by necessity strive for industrialization and will, therefore, protect certain industries. It cannot be denied that countries beginning to develop depend on certain central planning. For other nations in which industry has become a powerful factor, it is more important to curt rather than to protect this power; but there also agriculture often enjoys certain privileges.

These are but a few examples of a set of problems regarding which an understanding must be reached before the drafting of rules.

The field of international law on restrictive business practices is unfortunately distinguished from the field of ordinary international public law in that there are no basic standards which could be considered accepted on a worldwide basis.

International law in general and international control on restrictive business practices in particular are nothing but a roof for what national laws and legal principles have in common. It can only be based on the legal systems and principles of the individual nations. A body of international law cannot be developed in the abstract, but must be the common denominator of the economic concepts of individual nations. A distinct concept of international economic relations cannot grow out of general theories of natural law, but must be the abstract of a great number of bilateral or multilateral

agreements which turn out all to be based on the same principle. Thus, for example, the concept of freedom of international trade cannot be defined on the basis of theories alone but must emanate from an evolutionary process.

Without doubt this evolutionary process has begun but has not produced tangible results yet.[1] A concept of substantive law, agreed upon by all or at least most nations, as to (a) definitions of specific business practices, and (b) when those should be deemed harmful to international trade, does not exist. There is no consensus of opinion upon which an agreement must be based of necessity. The Latin American Free Trade Area offers a good illustration of this difficulty. The draft of the agreement which was distributed to the CONTRACTING PARTIES contained certain provisions on restrictive business practices, whereas the final version by Article 49 postponed this crucial question. The situation has not basically changed since the Ad Hoc Committee of the ECOSOC stated[2]: "Special difficulties arose, however, in connexion with restrictive business practices which were sanctioned by government statutes and regulations. The main problem faced by the Committee in this connexion was the diversity of governmental attitudes with respect to the same restrictive business practices. Thus, for example, one or two governments might make mandatory a practice which other governments might variously prohibit, ignore, approve or subject to different degrees of regulation or sponsorship."

Conclusion

Member nations are not in a position yet to furnish a supra-national authority with definitions of restrictive business practices or with rules as to the harmful effects which would make them subject to condemnation. So the establishment of a supra-national authority would create a body burdened with the task of applying yardsticks which do not and cannot yet exist.

(Ad 2) Power of the supra-national authority

(a) to investigate

No authority could possibly participate in giving an opinion and rendering a decision upon nothing but information voluntarily submitted by the parties to the case. Therefore, such an authority could not possible work without the necessary power to investigate. It ought to be in a

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[1] On international public law Edouardo Vitta (Studi sui trattati, Giapichelli, Turin, 1958) concludes that the development of the international community has not reached such a degree as to allow it to be assimilated to a superior authority with the functions of an international legislature.

[2] United Nations document E/2380, paragraph 22.

position to discover the facts of the case. The direct investigation power of a central authority would involve a surrender of sovereignty which can only be considered in connexion with agreements creating far-reaching political and economic integration. Up to this day most international systems contemplated interposed national administrations between the central authority and the private authors of the restriction. But national administrations may either not be willing or lack the constitutional powers necessary to investigate and to communicate the results of their investigation to such a supra-national authority.

Only sixteen of the contracting parties have national laws on restrictive business practices. This means that more than one half of the member nations cannot be expected even to have the machinery necessary for the investigation eventually required from them. Any such investigation would result in a discrimination against nationals of those countries where national legislation on restrictive business practices exists.

(b) to enforce decisions

Also decisions of a supra-national body must have the weight of enforceability. Even if there were definitions and powers to investigate, a decision which could not be enforced is only of very limited value.

It is not to be expected that a reasonable majority of nations would be prepared to vest the necessary enforcement power in an international body.

Both elements, those of substantive and procedural law, must come together before effective activity by a supra-national body can be visualized. It would be meaningless to give either legal definitions and guiding lines without the necessary powers or to give the necessary powers without definitions and economic guiding lines.

Conclusion

There is no half way of instituting a supra-national body within the GATT which, for its lack of either definitions and economic guiding lines or of the necessary powers, must remain inefficient and would only discredit the moral authority so far gained by the GATT in other fields. It is to be feared, that such an action would only block the way to progress in the field of restrictive business practices.

THE LIMITATIONS OF THE GENERAL AGREEMENT

The body by which these questions are to be considered are the CONTRACTING PARTIES within the meaning of Article XXV. This fact presents a legal problem. The GATT itself does not deal with the restrictive business practices of the citizens of its member nations. The CONTRACTING PARTIES

are in a sense only the executive body of this agreement. The assembly, therefore, cannot go beyond the scope of the agreement, except where they clearly propose an amendment within the meaning of Article XXX which would then have to be ratified. Only where the CONTRACTING PARTIES make a non-binding recommendation as proposed by the majority of the experts in document L/1015, would no ratification procedure be required. By non-binding recommendations, however, neither binding definitions or rules nor powers can be conferred upon an authority.

The minority proposal somehow falls between these two alternatives. It uses the wording and the frame of a non-binding recommendation, but it suggests an alteration of the GATT agreement by attempting to extend the applicability of Article XXIII and thereby the authority of the CONTRACTING PARTIES to restrictive business practices.

The applicability of any part of Article XXIII as suggested by the minority can, however, only be based on an interpretation of the GATT to cover restrictive business practices. Hence this cannot be decreed without opening the door for the applicability of the whole provision.

The results of this would be another grave danger. The sanctions of Article XXIII, paragraph 2, eventually to be applied by the CONTRACTING PARTIES could lead to a member nation leaving the GATT. The fact that minority proposal suggests that such sanctions should not be applied does not exclude the danger of their application. It must further be examined whether a body largely functioning in a parliamentary way is the right forum to act in judicial capacity. In other words - apart from all legal and fundamental problems there is one of practicability.

THE MAJORITY PROPOSAL

Everything said so far might suggest that in the field of restrictive business practices nothing should be done. The German Government does not, however, draw this conclusion. The need for international understanding on the protection of the freedom of competition is constantly growing; provisions to this effect will be found in bilateral agreements as well as in multilateral agreements of a limited territorial scope like EFTA and EEC. It is to be hoped that the time is not far off when the community of the free nations will be ready for an agreement of the scope of the Havana Charter. The German Government believes that all possible steps in line with this tendency should be undertaken.

Therefore, the German Government subscribes to the majority proposal, that the CONTRACTING PARTIES recommend to all member nations to subject themselves to a consultation procedure without arbiter. This point is of central importance. Whenever an authority is included in the scheme all the mentioned difficulties reappear, however small the power vested in this arbiter may be.

FUTURE DEVELOPMENTS

Governments may increasingly tend to pass national legislation on restrictive business practices, to create institutions for investigation which would put them in a position to find out the facts of cases which are the subject of a consultation. Regional groups like the Latin American Free Trade Area might embody in their agreements provisions on restrictive business practices.

In the recommendation made by the majority, therefore, provisions are included for a group of experts to follow closely these developments in the world. This group of experts will best be qualified to determine when an attempt for a broad international agreement on restrictive business practices could be based on more solid ground.

Conclusion

The German Government, therefore, recommends that the majority proposal be submitted without amendment for approval.