

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Consultative Group of Eighteen

Thirteenth Meeting

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## RESTRICTIVE BUSINESS PRACTICES

### Note by the Secretariat

#### I. Introduction

1. This note has been prepared in response to a request made in the Consultative Group of Eighteen at its meeting of 15 July 1980 that the secretariat "prepare a study of the agreement recently negotiated on restrictive business practices in UNCTAD, drawing the attention of the Group to any implications it might have for the General Agreement" (CG.18/12, paragraph 31(ii)).

#### II. The UNCTAD Text

2. At its second session in April 1980, the United Nations Conference on Restrictive Business Practices approved by consensus a set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (referred to in this note as the Text), which it transmitted to the General Assembly for adoption at its thirty-fifth session. The Conference also recommended that the General Assembly convene, five years after the adoption of the Text, a United Nations Conference under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Text.

3. The Text applies to restrictive business practices adversely affecting international trade. It contains a preamble and seven sections. The following paragraphs indicate the contents of each of these sections and draw attention to some of the most relevant provisions in the Text.

Section A lays out the objectives of the Text, the first of which is "to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries".

Section B deals with definitions and the scope of application of the Text. Restrictive business practices are defined as "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 international trade, particularly that of developing countries, and on the economic development of these countries, or which

through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact". Enterprises are defined as "firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them". The section specifies that the Text "shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements", (section B, paragraph 9).

Section C sets out multilaterally agreed equitable principles for the control of restrictive business practices, providing e.g. that "appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices" (section C, paragraph 4).

Section D sets out principles and rules for enterprises, including transnational corporations. Specific acts from which enterprises should refrain are listed in paragraphs 3 and 4 of the section. These paragraphs are quoted in full below:

"3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) agreements fixing prices including as to exports and imports;
- (b) collusive tendering;
- (c) market or customer allocation arrangements;
- (d) allocation by quota as to sales and production;
- (e) collective action to enforce arrangements - e.g., by concerted refusals to deal;
- (f) concerted refusal of supplies to potential importers;
- (g) collective denial of access to an arrangement, or association, which is crucial to competition."

"4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse <sup>\*</sup>/ or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) predatory behaviour towards competitors, such as using below cost pricing to eliminate competitors;
- (b) discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods or services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;
- (c) mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;
- (d) fixing the prices at which goods exported can be resold in importing countries;
- (e) restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e., belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
- (f) when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
  - (i) partial or complete refusals to deal on the enterprise's customary commercial terms;
  - (ii) making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
  - (iii) imposing restrictions concerning where, or to whom, or in what form or quantities goods supplied or other goods may be resold or exported;
  - (iv) making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee."

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\*Footnote not reproduced

Section E, entitled "principles and rules for States at national, regional and sub-regional levels", calls on States, inter alia, to adopt legislation on restrictive business practices and to obtain and disseminate information on such practices.

Section F deals with international measures, which should include "work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules", (paragraph 1) consultations "in regard to an issue concerning control of restrictive business practices" (paragraph 4) and technical assistance (paragraph 6).

Section G on international institutional machinery, provides for the establishment of an Intergovernmental Group of Experts on Restrictive Business Practices (paragraphs 1 and 3 to 5) and for a review of the Text five years after its adoption.

### III. GATT and restrictive business practices

4. The Havana Charter, from which most of the provisions in the General Agreement were drawn, has a separate Chapter (Chapter 5) containing nine articles on restrictive business practices. These were not, however, carried over into the General Agreement, which contains no specific reference to the subject. Paragraph 1 of Article XXIX, however, provides that "the contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive ... of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures".

5. In 1954, when it became clear that the Havana Charter would not enter into force the CONTRACTING PARTIES reviewed the text of the General Agreement (at what is known as the Review Session). It was then suggested that the fact that the GATT contained no provisions on restrictive business practices caused a problem since such practices could frustrate the realization of the objectives of the General Agreement, including the raising of standards of living through an improved allocation of resources.

6. The discussions in the period 1954-1959 are well summarized in the study on Restrictive Business Practices written by Professor L'Huillier of the University of Geneva for the GATT and considered by the CONTRACTING PARTIES at the fourteenth session in 1958 (see Annex 1). It was first suggested that additional provisions be added to the General Agreement. One of the main difficulties with this approach was the need for legislation by national governments. It was then also suggested that action be confined to collecting information on restrictive business practices and holding mutual consultations between the contracting parties.

7. At their thirteenth session in 1958 the CONTRACTING PARTIES adopted a Resolution which recognized that restrictive business practices may interfere with the attainment of the objectives of the General Agreement and appointed a group of governmental experts to study the question and make recommendations (BISD, 7th supplement, page 29).

8. The Group's report was adopted in June 1960 (BISD, 9th supplement, page 170). The Group agreed on a number of general conclusions, in particular that "the CONTRACTING PARTIES should encourage direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices" (paragraph 5). There were, however, differences of view between a majority of the Group and a minority of its members on the formulation of a recommendation to the CONTRACTING PARTIES and their views were presented separately in the report. The majority recommended that no action be taken under Article XXIII (paragraph 8), while the minority held the view that when consultations fail to lead to voluntary settlements the provisions of paragraph 2 of Article XXIII are applicable although they also advised against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2 (paragraph 18).

9. A Working Party, appointed in June 1960 to examine the report by the group, could agree only on confirming the view of the experts that the GATT should initiate action in the field of restrictive business practices and should encourage consultations as to the effects on international trade of particular restrictive practices (W.17/23, 15 November 1960). On 18 November 1960, the CONTRACTING PARTIES adopted a Decision<sup>1</sup> reproduced in Annex 2 establishing arrangements for consultations, without reference to any particular Article of the General Agreement. The Decision provides that, if consultations between contracting parties do not result in a mutually satisfactory conclusion, this fact and the nature of the complaint should be brought to the attention of the CONTRACTING PARTIES.

10. No such cases have been brought to the attention of the CONTRACTING PARTIES.

11. The paragraphs above summarize the discussions that have taken place in the past in the GATT on restrictive business practices, discussions which began because the General Agreement did not contain provisions on the subject as such. There are, however, a few provisions in the General Agreement and other GATT agreements which are of some relevance to the matter because they relate to actions by enterprises and are covered by the UNCTAD Text. Examples are given below:

- (a) Article XVII dealing with State trading enterprises is a case in point, the aim of the Article being, in effect, to ensure that such enterprises do not indulge in certain restrictive business practices.

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<sup>1</sup>BISD, Ninth Supplement, pages 28-29.

- (b) Article VI and the Anti-Dumping Code are relevant since predatory pricing to eliminate competitors is regarded as a restrictive business practice.

12. Questions relating to restrictive business practices were also raised during the Multilateral Trade Negotiations, a notification on corporate policies of multinational corporations being included in the Inventory of Non-Tariff Measures (MTN/3B/1, notification 84).

### Conclusion

13. It seems clear from the above paragraphs that there is no conflict between the UNCTAD Text and the General Agreement, in particular because the UNCTAD Text provides specifically that "The Set of Principles and Rules shall not apply to intergovernmental agreements nor to restrictive business practices directly caused by such agreements". Indeed the UNCTAD Text and the 1960 Decision by the CONTRACTING PARTIES reflect a broadly similar appreciation of the harmful effects that restrictive business practices could have for international trade and for development.

14. It is also clear that restrictive business practices have been a matter for concern by the CONTRACTING PARTIES in the past but that previous discussions in the GATT revealed the difficulties which exist in dealing with problems in this area. However matters relating to restrictive business practices have not been examined in any systematic way in the GATT since 1960.

15. The question that the agreement on the UNCTAD Text raises is, therefore, whether this agreement reflects a change in the situation which warrants another look at the question in the context of the General Agreement.

16. Discussions in the past seem to show that the main questions would be:

- (a) should the possibility be examined of drawing up additional obligations aimed at controlling international restrictive business practices?
- (b) should the possibility be examined of permitting Article XXIII to be invoked when advantages which contracting parties could reasonably expect under the General Agreement are being nullified or impaired by restrictive business practices?

In this connexion, attention would again need to be given to the possibilities open to governments to enforce obligations in this area and the implications of the constraints of existing national legislation for the nature of the commitments that governments could be expected to assume.

ANNEX 1

**EXAMINATION OF THE PROBLEM OF RESTRICTIVE BUSINESS  
PRACTICES  
BY THE CONTRACTING PARTIES TO GATT**

1954-1959<sup>1/</sup>

- " 342. In 1954 the Governments of Denmark, Norway and Sweden expressed to the CONTRACTING PARTIES their opinion that the forthcoming review of the General Agreement would afford the opportunity of examining the possibility of inserting provisions relating to restrictive business practices. They proposed taking as a basis for discussion the draft of the *Ad Hoc* Committee of ECOSOC.
- " 343. In the same year the Government of the Federal Republic of Germany embodied suggestions along the same lines in a draft which was largely inspired by that of the *Ad Hoc* Committee, but which differed from it on one important point. Whereas the ECOSOC draft (like the Havana Charter) left to Member States an option between the consultation and the investigation procedures, the German draft provided that a Member presenting a complaint should first be required to resort to the consultation procedure, and only if that failed could the investigation procedure take place. In short, the German proposal was exactly the reverse of the amendment of the text of Chapter V of the Havana Charter by the *Ad Hoc* Committee's draft.
- " 344. At the review session the CONTRACTING PARTIES examined the question whether they should have direct responsibility for the implementation of the draft articles of agreement on restrictive practices submitted to ECOSOC by the *Ad Hoc* Committee. They decided to postpone further consideration of the question pending the outcome of the ECOSOC discussions.
- " 345. In 1955 at the tenth session, seeing that ECOSOC had not reached agreement on the subject, they decided to postpone the question until the following session.
- " 346. Then, in 1956, the Governments of the Federal Republic of Germany and of Norway submitted new proposals to the eleventh session of the CONTRACTING PARTIES. The German suggestion, this time, was to confine

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<sup>1/</sup>From Restrictive Business Practices, published by the GATT in May 1959.

action in the matter to collecting information on restrictive business practices and holding mutual consultations between the contracting parties. As for the Government of Norway, it believed that consultations alone would not suffice, and expressed the hope that the CONTRACTING PARTIES would decide to establish an intersessional working party to submit recommendations on the question whether and to what extent the CONTRACTING PARTIES should assume responsibility for control of restrictive business practices affecting international trade and concerning provisions to be included in the General Agreement or embodied in a supplementary agreement.

"347. Finally, at their eleventh session, the CONTRACTING PARTIES referred the German and the Norwegian proposals to the Intersessional Committee with instructions to submit a report and recommendations to the twelfth session.

"348. In conformity with its terms of reference, the Intersessional Committee, in 1957, invited contracting parties to submit proposals for consideration at its September meeting. In complying with this request, the Norwegian Government submitted an explanatory memorandum together with a draft supplementary agreement to the General Agreement.

"349. At the twelfth session of the CONTRACTING PARTIES, the Norwegian Government again put forward its proposal to appoint a working party, and suggested that the CONTRACTING PARTIES should study the matter at their fourteenth session on the basis of the report of the working party.

"350. Finally, the CONTRACTING PARTIES instructed the secretariat to collect and analyse documentation on restrictive business practices and to submit it to the next meeting of the Intersessional Committee. The Committee is to decide whether it should establish a working party or a group of experts. If the Committee feels that it cannot give an affirmative reply, that is to say, if it considers that further immediate progress is not possible, it can refer the matter to the CONTRACTING PARTIES at the thirteenth session with suitable recommendations. "

The last paragraph of the Preface adds:

" In order to complete the historical narrative it should be added that at their thirteenth session the CONTRACTING PARTIES adopted a Resolution which recognizes that the activities of international cartels and trusts may hamper the expansion of world trade and the economic development of individual countries, thereby interfering with the attainment of the objectives of the General Agreement on Tariffs and Trade. The Resolution also recognizes that international co-operation is needed to deal effectively with such practices. Under the terms of the Resolution the CONTRACTING PARTIES decided to appoint a group of governmental experts to study and make recommendations as to any action the CONTRACTING PARTIES should take to deal with restrictive business practices in international trade. The CONTRACTING PARTIES will consider the experts' report in 1960. "

ANNEX 2

**RESTRICTIVE BUSINESS PRACTICES**  
**ARRANGEMENTS FOR CONSULTATIONS**

*Decision of 18 November 1960*

*Having considered* the report<sup>1</sup> submitted by the Group of Experts, which was appointed under the Resolution of 5 November 1958, and related documents<sup>2</sup>,

*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 reduction 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.

*Desiring* that consultations between governments on these matters should be encouraged,

*Considering*, however, that in present circumstances it would not be practicable for the CONTRACTING PARTIES to undertake any form of control of such practices nor to provide for investigations,

The CONTRACTING PARTIES,

*Recommend* that at the request of any contracting party a contracting party should enter into consultations on such practices on a bilateral or a multilateral basis as appropriate. The party addressed should accord sympathetic consideration to and should afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions, and if it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects, and

*Decide* that:

- (a) If the requesting party and the party addressed are able to reach a mutually satisfactory conclusion, they should jointly advise the secretariat of the nature of the complaint and the conclusions reached;
- (b) If the requesting party and the party addressed are unable to reach a mutually satisfactory conclusion, they should advise the secretariat of the nature of the complaint and the fact that a mutually satisfactory conclusion cannot be reached;
- (c) The secretariat shall convey the information referred to under (a) and (b) to the CONTRACTING PARTIES.

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<sup>1</sup>See BISD, Ninth Supplement, page 170 for the report adopted by the CONTRACTING PARTIES.

<sup>2</sup>The related documents are L/1287 and Add.1, L/1301, L/1333 and W.17/23.

ANNEX 3

EXTRACT FROM INVENTORY

OF NON-TARIFF MEASURES

MTN/3B/1

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Multinational corporations - corporate  
policies

Canada  
EEC

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Method

It was notified that multinational corporations could distort trade patterns, and thus limit the freedom of particular affiliates to make purchases and sales decisions on the basis of commercial considerations alone. Large firms operating internationally could, for instance, find it desirable to place further investments in the country where they have their headquarters or to allocate, when planning, production for export to a particular country. These firms could also, when differences are not too great in comparative advantage as between several countries in which they operate, find it more convenient to increase the scale of operations in the country of the parent firm, or find it desirable to respond to trade union pressures or other public pressures in one country or another.

The representative of Canada pointed out that the effects were becoming more significant with the reduction of governmental barriers and the growth of large multinational corporations.

It should be borne in mind that the sales of some of these corporations were as high as the gross national product of several countries.