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RESTRICTED

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RESTRICTIVE BUSINESS PRACTICES

Proposal by the Norwegian Delegation

General Notes

The Norwegian delegation herewith submits in an annex to this document a new proposal for the appointment of a Working Party on Restrictive Business Practices for the consideration of contracting parties. Before commenting on this proposal it might be of interest to contracting parties to recapitulate previous considerations and other preparatory work done in this field.

I.

Previous Considerations and Proposals on International Control of Restrictive Business Practices

1. In Chapter V of the Havana Charter provisions are laid down with a view to counteracting restrictive business practices in international trade. As the Havana Charter was not ratified, the Economic and Social Council in 1951 took a new initiative in this field. In a resolution, based on a proposal submitted by the United States delegate and adopted on 13 September 1951, the Council appointed an ad hoc Committee to prepare a new proposal on international control of restrictive business practices. In paragraph 6 the resolution instructed the Secretary-General to seek from appropriate inter-governmental bodies or agencies their views as to the organization which could most appropriately implement the control and, in the light of these views, to make a report and recommendation at a later session of the Council (see ECOSOC document E/SR 546 - 549, and Resolution 375 (XIII)).

2. The ad hoc Committee submitted its report in February 1953. The Committee also submitted a report on national legislation and other governmental measures relating to restrictive business practices and an analysis of these measures (see ECOSOC documents E/2380, E/AC.37/3, E/2379/Add.2, E/AC.37/2/Add.2, E/2379 and E/2379/Add.1, E/AC.37/2 and E/AC.37/2/Add.1). The provisions proposed by the Committee were mainly based on Chapter V of the Havana Charter. Owing to its restricted mandate the Committee did not make recommendations with respect to the organization to be charged with the control. In its report the Committee stressed, however, the close inter-relationship between restrictive

business practices and other barriers to trade. The majority of the members were of the opinion that the proposed control agency should be part of a wider body with comprehensive responsibilities in the field of international trade as a whole.

3. The report from the ad hoc Committee was discussed in the Economic and Social Council at the meetings on 30 and 31 July 1953. The Council adopted a resolution requesting the Secretary-General to transmit the report to the States Members and to international agencies and organizations concerned for examination and comments. The resolution also requested the Secretary-General to proceed to implement paragraph 6 of the Resolution 375 (XIII) (see ECOSOC documents E/SR 742-744 and Resolution 487 (XVI)).

4. At the session of the Economic and Social Council in May 1955 the Secretary-General submitted a report on current legal developments in the field of restrictive business practices and a report on restrictive business practices in international trade (see ECOSOC documents E/2671 and E/2675). In a resolution adopted on 26 May 1955 the Council stressed once more the importance of the matter, recognizing that national action and international co-operation are needed in order to deal effectively with restrictive business practices affecting international trade, but taking into account the fact that international action would not be effective without sufficient support by States Members (see ECOSOC documents E/SR.855-857 and Resolution 568 (XIX)). This resolution concluded in fact ECOSOC's dealing with this matter. At the Session in September 1951 the United Kingdom delegate said that his delegation strongly felt that restrictive business practices could be satisfactorily dealt with only in a body which was equally concerned with tariffs, quantitative restrictions and similar measures affecting trade. His Government believed that the only appropriate body to deal with restrictive practices was that represented by the CONTRACTING PARTIES. Similar views were expressed by other delegates at the Session in May 1955.

5. At the Ninth Session of the CONTRACTING PARTIES the delegations of Denmark, Norway and Sweden stated that in their opinion the CONTRACTING PARTIES should consider the inclusion in the revised agreement of provisions with regard to control of restrictive business practices in international trade. As a basis for the discussion on this question the said delegations referred to the report submitted in February 1953 by the ad hoc Committee appointed by the Economic and Social Council (L/283). The CONTRACTING PARTIES decided to postpone further consideration on this matter pending receipt at the next Session of the report by the Executive Secretary on discussions in this field by the Economic and Social Council at its Session in 1955.

6. As the ECOSOC's dealing with the question of international control on restrictive business practices de facto was concluded in May 1955, the Norwegian delegation at the Eleventh Session of the CONTRACTING PARTIES proposed the establishment of a working party with the mandate to make recommendations with regard to whether and to what extent the CONTRACTING PARTIES should undertake to carry out control of restrictive business practices in international trade (L/568). At the same Session the delegation of the Federal Republic of Germany set forth a proposal on consultations as a first step towards solving the problem of control of restrictive business practices (L/551).

Both proposals were discussed at the plenary meeting on 1 November 1956. In his summing up the Chairman said that the discussion had brought out the complexities and difficulties of the problem, and he had noted that no exception had been taken to the view that the GATT was competent to deal with the matter. He suggested that both proposals be referred to the Intersessional Committee with instructions to submit a report and recommendations to the Twelfth Session. He said that the Committee was fully representative and that the Committee could appoint a working party if it found it necessary. The Chairman's proposal was unanimously adopted (see SR.11/11).

7. At its meeting in April 1957 the Intersessional Committee invited contracting parties to submit proposals on control of restrictive business practices for consideration at a meeting of the Committee in September 1957. Following this invitation the Norwegian Government on 27 July 1957 transmitted a Memorandum and Draft Agreement on such control (L/653). In the Memorandum the Norwegian Government stressed that the Draft Agreement was not to be considered as a formal proposal. It contained only preliminary suggestions as a contribution to the preparatory work to be done. At its meeting in September the Intersessional Committee discussed the question of establishing a working party, but it was decided to refer this matter to the forthcoming Twelfth Session.

8. At the Twelfth Session the Norwegian delegation proposed that the CONTRACTING PARTIES establish a working party to study the complicated problems in connexion with the control of restrictive business practices through the GATT and to make recommendations whether and how such control should be carried out (Spec/161/57). The proposal was discussed at the plenary meeting on 13 November 1957. A majority of the speakers were in favour of the Norwegian proposal. A number of others, however, were of the opinion that the decision should be postponed until the Thirteenth Session. Some speakers indicated that it would be appropriate to instruct the secretariat to collect additional information on the matter. In the light of the views expressed in the debate the Chairman proposed that the secretariat be instructed to collect and analyse documentation on the subject and to submit it to the next meeting of the Intersessional Committee. The Intersessional Committee should then decide whether to establish a working party or a group of experts or to refer the matter to the CONTRACTING PARTIES at the Thirteenth Session. This proposal was unanimously adopted (see SR.12/14).

At the request of the secretariat, Professor J. L'Huillier with the assistance of Mr. C. A. Junod, has prepared a memorandum containing an analysis of restrictive business practices with reference to methods applied in national legislation and a summary of international and regional arrangements and proposals aiming at counteracting harmful restrictive practices in international trade. The memorandum, written in French, was

finished in August 1958, but the English version was not ready for circulation before 25 September 1958. Under these circumstances it was not possible for the Intersessional Committee to study the document before the end of the meeting on 27 September. It was, therefore, not possible for the Committee to take a decision with regard to the establishment of a working party or an expert group. This matter was referred to the Thirteenth Session.

II.

The Need for International Control of Restrictive Business Practices

9. At the ECOSOC meeting on 11 September 1951 the delegate for the United States, in introducing his draft resolution, admirably stated the need for international control of restrictive business practices as will be seen from the following extracts from the Summary Report, ECOSOC document E/SR 546:

"

There would be general agreement that the most urgent problem facing the world was the necessity of bringing about a universal increase in standards of living. Yet international cartels, which were in the process of increasing their range and influence, had the power to frustrate the solution of that problem. There would similarly be general agreement that measures must be taken to increase international trade by reducing trade barriers. Yet cartels could undo much of the positive work which governments were collectively performing in that field. The action of cartels was fully capable of re-introducing the very restrictions which the reduction or abolition of tariffs, quotas and other trade restrictions under the General Agreement on Tariffs and Trade, the European Payments Union, the Benelux Customs Union Treaty, the Schuman Plan and other similar agreements had been aimed at removing. In fact, in certain circumstances, cartels could have an even greater limiting effect on trade.

....."

After having further pointed out in detail that the cartels by restricting production or by other means might hamper the progressive economic development, especially in countries which they regarded as export markets, the delegate summed up as follows:

"

Cartel restrictions could impose trade barriers while governments were attempting to reduce them. They could reduce production and employment while governments were attempting to increase them. They might thwart industrial development while governments were trying to

promote it. They could have the effect of reducing productive efficiency while governments were attempting to stimulate it; and, by raising prices, cartels could reduce the purchasing power of consumers while governments were attempting to raise the consumers' standard of living. It was clear, therefore, that collective action was required, and it was also clear that the time was ripe for such action to be taken."

Referring to national legislation in different countries, the delegate continued:

"But although national action to cope with international restrictive business practices was partly effective, it was not sufficient in itself. The experience of the United States clearly showed the limited effect of national legislation not reinforced by international action. Such legislation did not enable consuming countries, dependent upon imports from a cartel situated abroad, to protect themselves from arbitrary decisions by the cartel concerning the price or quality of the commodities it supplied. National legislation was powerless to prevent a country's national market from being allocated to any particular member of a foreign cartel, which member could forthwith exploit his monopolistic position with impunity. Neither could consuming countries use their national legislation to overcome barriers to industrial development that might be imposed from abroad by a cartel.

"All those and other considerations made it clear that international action was needed to supplement national legislation in discovering the existence of harmful cartel arrangements and in making it possible for individual governments to protect their citizens against them. More important still, however, was the fact that international action was required to safeguard the strength, the stability, and the prosperity of the international trade system, upon which the well-being of all participating nations largely depended. When the flow of world trade was restricted, the trade of every individual country suffered, and it was common knowledge that it was impossible for one country to be prosperous in a world that was poor, or for it to have a large volume of trade in a world where trade was restricted or shrinking. Any action by cartels that lowered European standards of living by curtailing production in Europe did direct harm to the Western Hemisphere and to Asia. By the same token, any action by cartels that interfered with the standard of living in the United States and Latin America automatically exercised a detrimental effect on both Asia and Europe.

"The principle included in the Havana Charter had been subjected to study by every country participating in the drafting of that document. Two preliminary conferences had been held before the long conference held at Havana itself, as well as many informal discussions

at high level amongst officials of interested governments. The difference of opinion between those who believed that cartels were always bad and those who thought that they were sometimes good and sometimes bad had been reconciled by the provision that action should be taken against restrictive business practices, not on an arbitrary basis, but upon the submission of proof that they had harmful effect upon trade.

..... "

10. The Norwegian views concerning these problems have been expressed in statements by the Norwegian delegate in the debates on this matter at plenary meetings of the CONTRACTING PARTIES. Reference is made to the following extract of the statement at the plenary meeting on 13 November 1957:

"

It is generally recognized that cartels and trusts exert a constantly increasing influence in international trade, and that this influence in many cases interferes with the achievement of the objectives of the General Agreement. Cartels and trusts may for instance break down competition by the use of dumping, by exclusive agreements or by other unfair practices. They may charge excessive prices in markets where they have dominating influence, they may discriminate between different countries with regard to prices or terms of sale or of purchase, or they may divide markets and limit production. In these and in many other ways they may hamper both economic development in individual countries and expansion of world trade.

"It is also generally accepted that harmful restrictive business practices in international trade can be effectively counteracted only on the basis of international co-operation. Countries which are suffering damage from the operation of foreign cartels and trusts are not able to take action against enterprises outside their own jurisdiction. They are as a rule, therefore, in a weak position. This applies especially to small and to less developed countries. The countries where the cartels and trusts in question have their seats cannot be expected to take action against harmful practices only affecting outside countries as long as the other countries do not undertake corresponding obligations with regard to practices applied by their cartels and trusts operating in foreign trade. Even if a country would take action to protect another country it may in many cases be unable to do so alone, as most of the cartels and trusts which operate in international trade, are built up by enterprises in different countries. The only solution is a comprehensive international co-operation based on the principle of reciprocity.

..... "

After having referred to the establishment of the European Common Market and to the planned European Free-Trade Area the delegate continued as follows:

"Such extensive system of integration may break down or weaken some national cartels and trusts, but they may on the other hand further more powerful restrictive arrangements between enterprises in the different countries within the integrated market.

"The States, parties to the Treaty of Rome, have been aware of this danger. They have laid down in the Treaty provisions against restrictive business practices which are likely to affect trade between Member States. However, these provisions do not apply to trade with other countries. Cartels and trusts within the European Common Market may therefore be free in their operations with regard to outside countries. It is likely that this will lead to the creation of new and the strengthening of existing cartels and trusts having their seats inside the Common Market and operating in the trade with other countries.

"The negotiations on the planned European Free-Trade Area have not yet got beyond the preparatory stage. If they lead to a satisfactory result, as Norway hopes, it is to be assumed that there will be provisions for control of restrictive business practices which have harmful effects on trade between Member States. On the other hand, the provisions would likely not be applied to trade with other countries. One must, therefore, foresee that also the Free-Trade Area may lead to the formation of stronger cartels and trusts operating in trade with outside countries.

"Such tendencies as mentioned make it more necessary for the CONTRACTING PARTIES to provide for remedial action against restrictive business practices which interfere with the attainment of the objectives of the General Agreement."

Similar views have been expressed or supported by other delegates in the debates at plenary meetings of the CONTRACTING PARTIES. Reference is made to SR.11/11 and SR.12/14.

11. At the session of the Economic and Social Council in May 1955 the United States delegate maintained that the ad hoc Committee's proposal for the establishment of international machinery would lead to success only if all countries were guided by a common economic philosophy, put into effect by a comparable legislation and enforcement. Similar views were expressed by some delegates at the plenary meeting of the CONTRACTING PARTIES on 1 November 1956 (SR.11/11).

In the Norwegian opinion a distinction must be made between the control of restrictive business practices in international trade and the control of trusts and cartels which operate only on their home markets. It is for the countries themselves to decide on the national control. Variations between the measures taken by the different countries in this respect may always be expected as a consequence of different economic conditions and of differences with regard to the significance of restrictive practices in domestic trade. The international control refers only to restrictive practices affecting international trade. To establish such a control the partaking countries would have to undertake certain obligations which are necessary to carry out the control, but it should be no question of imposing on them obligations with regard to the internal control of trusts and cartels only operating in domestic trade. To stipulate as a condition for an agreement on control of restrictive practices in international trade that the countries also should have similar legislation with regard to the internal control, would in fact make it impossible to reach such an agreement. In accordance with this view a statement was given by the Norwegian delegate at the session of the Economic and Social Council in May 1955 and also by the Norwegian delegate at the plenary meeting of the CONTRACTING PARTIES on 1 November 1956 (SR.11/11). Reference is also made to the following statement in the Memorandum submitted by the Norwegian Government (L/653):

"....."

In the first place there is the question of legislation providing for control of cartels and trusts, which operate on the domestic market. This control has as its purpose the protection of the country itself against harmful restrictive business practices. The Norwegian Government shares the view that it would be advisable for countries whose economy is based mainly on private enterprise to establish such control. It should be recognized, however, that this is a question of internal policy and that it should be up to the different States themselves to decide whether and in which form they should introduce control. The need for control of internal restrictive practices may depend on the degree of economic development in each country and especially on the significance of cartels and trusts on the domestic market.

"Even if a country has established an effective control of the operations of cartels and trusts on its domestic market, it has not thereby made any approach to solving the problem of control of restrictive business practices in international trade. The national legislation, which is required to this end, is different in aspect. It shall provide for steps to be taken to protect other countries against harmful restrictive business practices, applied by cartels or trusts within the jurisdiction of the legislating country. It is obvious that such legislation would be enacted and applied only

in accordance with an international agreement, imposing corresponding obligations on all participating countries, in order to establish international co-operation in this field. The obligations would depend on the kind and the extent of the international control, which the countries may agree upon. Without clearly defined obligations laid down in an international agreement a country cannot be expected to take steps to enact national legislation to protect the interests of other countries.

..... "

III.

Proposal for the appointment of a Working Party

12. From the statements and the documents referred to above two conclusions may be drawn: First, that it is necessary to establish international control of restrictive business practices. Second, that the GATT is the appropriate body to implement such control.

Before the CONTRACTING PARTIES take this matter up for consideration and decision, it is, however, necessary to provide for a study of the problems involved. The Norwegian delegation, therefore, proposes the appointment of a Working Party to study these problems and to make recommendations to the CONTRACTING PARTIES with regard to whether, and in case to what extent and how, they should undertake to deal with restrictive business practices in international trade. The Working Party should also make recommendations with regard to provisions considered necessary for implementation of the control, if the CONTRACTING PARTIES should decide to undertake such functions.

It will be up to the Working Party itself to formulate its recommendations. In the view of the Norwegian delegation, however, the Working Party should try to harmonize differences of opinion for the purpose of reaching conclusions acceptable for all contracting parties.

The Norwegian delegation would like to stress that adoption of the proposal would not imply any obligation for any contracting party with regard to the question whether and in which way the CONTRACTING PARTIES should deal with restrictive business practices in international trade. The proposal only aims at creating a sufficient basis for the consideration of this important matter by the CONTRACTING PARTIES.

ANNEX

DRAFT RESOLUTION

Submitted by the Norwegian Delegation

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

Referring to the discussions on this matter at the Twelfth and Thirteenth Sessions and to the documentation submitted

THE CONTRACTING PARTIES

Decide:

- (i) to appoint a Working Party to make recommendations to the CONTRACTING PARTIES
 - (a) with regard to whether, and in case to what extent and how, the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade; and,
 - (b) with regard to provisions considered necessary for the implementation of control of restrictive business practices in international trade, should the CONTRACTING PARTIES decide to undertake such functions;
- (ii) to request the Working Party to submit its report and recommendations not later than 15 June 1958; and
- (iii) to deal with the matter at the Fourteenth Session of the CONTRACTING PARTIES.

