RESTRICTIVE BUSINESS PRACTICES: ARRANGEMENTS FOR CONSULTATIONS

Report of Experts, Adopted 2 June 1960, L/1015, BISD 9S/170

I. Introduction

1. The Group of experts, appointed by the Executive Secretary, met in Geneva from 15 to 24 June 1959. The Group was composed of experts from the following twelve countries: Austria, Canada, Denmark, Federal Republic of Germany, France, Japan, Kingdom of the Netherlands, Norway, Sweden, Switzerland, United Kingdom, and United States. These are the countries which responded to the enquiry which the Executive Secretary addressed to twenty-one countries inviting them to make experts available. The names of the experts are listed in Annex A 2 and also the names of those who attended the meetings as observers.

2. The terms of reference of the Group were contained in the Resolution of the CONTRACTING PARTIES of 5 November 1958.

3. The members of the Group were familiar with the documentation submitted to them (see Annex B) and with the lengthy discussions on this subject that have taken place through the past fifteen years: the work of the Preparatory Committee of the United Nations Conference on Trade and Employment, the Havana Charter, the discussions in the Economic and Social Council of the United Nations and the reports of its Ad Hoc Committee, the proposals put forward to the CONTRACTING PARTIES including those examined at their review session, the discussions of these matters at sessions of the CONTRACTING PARTIES, and the analysis of these various endeavours published by the CONTRACTING PARTIES in May 1959. All these were taken into account in their deliberations, and also the provisions of the Treaty establishing the European Coal and Steel Community and of the Rome Treaty relating to rules governing competition and the work done in this field by the Organisation for European Economic Co-operation and by the Council of Europe.

4. The Group noted the views of the CONTRACTING PARTIES, as set out in the preamble to their Resolution of 5 November 1958, that the activities of international cartels and trusts may hamper the expansion of world trade and interfere with the objectives of GATT. With these postulates the members of the Group were in full accord although they felt that sufficient evidence was not available to judge the extent of the actual damage to world trade which results from these practices. Something more than has been attempted in the past should now be undertaken and, therefore, the Group give an affirmative answer to the first question in their terms of reference, i.e., whether the CONTRACTING PARTIES should undertake to deal with these matters. Members agreed that the CONTRACTING PARTIES should now be regarded as an appropriate and competent body to initiate action in this field.

5. In discussion of the other two questions in their terms of reference, i.e., to what extent and how the CONTRACTING PARTIES should undertake to deal with these matters, the Group agreed to recommend 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.

6. The Group also agreed that further measures should be recommended to the CONTRACTING PARTIES, but despite efforts to reach a common view some differences of opinion remained on the nature of further measures to be recommended. There were also differences of view on certain other points. The view of the majority and the minority, including their views on points on which they agreed, are separately stated in Parts II and III of this report.

II. The views of the majority

7. The majority, consisting of the experts from Austria, Canada, the Federal Republic of Germany, Japan, the Kingdom of the Netherlands, Switzerland, the United Kingdom and the United States, considered that it would be unrealistic to recommend at present a multilateral agreement for the control of international restrictive business practices. The necessary consensus among countries upon which such an agreement could be based did not yet exist, and countries did not yet have sufficient experience of action in this field to devise an effective control procedure. Such agreements could not operate effectively, unless a sufficient number of countries had powers to act against international restrictive business practices in accordance with such an agreement or were able and willing to adopt

such powers, or unless the agreement incorporated a supra-national body with broad powers of investigation and control. In this connexion countries could not be expected to adopt legislation relating to international restrictive business practices before they had dealt with the problem on a domestic plane. The complexities of the subject, and the impossibility of obtaining accurate and complete information on private commercial activities in international trade and of enforcing decisions without adequate powers of investigation and control, precluded the possibility of an effective control agreement which was not based upon one of those two alternatives. Therefore, it was at this stage impracticable to set up any procedures for investigating or passing judgment on individual cases within the framework of GATT. In fact, a premature attempt to do so could well prejudice future progress in this field.

8. The majority felt that, as experts on restrictive business practices rather than on the legal aspects of GATT, the Group were not competent to judge whether restrictive business practices were a matter that would be deemed to fall under any specific provisions of GATT- for example, whether the provisions of Article XXIII would be applicable. However, the majority were convinced that, regardless of the question whether Article XXIII could legally be applied, they should recommend to the CONTRACTING PARTIES that they take no action under this Article. Such action would involve the grave risk of retaliatory measures under the provisions of paragraph 2 of that Article, which would be taken on the basis of judgments which would have to be made without adequate factual information about the restrictive practice in question, with consequent counter-productive effects on trade.

9. In these circumstances, the majority considered that the course of action holding out the best hope of progress at this stage was the encouragement of direct consultations between contracting parties with a view to the elimination of the harmful effects of particular restrictive practices. Such consultations might be bilateral, or they might be joint consultations in the sense that representations might be made by one contracting party to more than one government or that two or more contracting parties might submit joint representations to another. The majority also considered that the CONTRACTING PARTIES should appoint a group of experts to be convened when appropriate by the secretariat to study the experience gained from these consultations and to report to them on the nature and extent of the effects of international restrictive practices so far as these are revealed by the reports on individual cases. The majority believed that this procedure would not only facilitate the settlement of differences by direct consultation but, by providing the CONTRACTING PARTIES with fuller information about the problems, would provide the basis on which they might decide what further steps may be needed or desirable.

10. The minority proposal provides for the participation of a group of experts in the consultation procedure. The majority disagreed with this proposal for the following reasons:

In order to accomplish their task the experts would be bound to make judgment upon specific issues involved, in particular cases which were the subject of consultations, without the means of obtaining sufficient information upon which to base such judgments. In the light of what is stated in paragraph 7, the majority feels unable to share the confidence expressed by the minority that the necessary evidence will be supplied in the absence of adequate powers of investigation. Even if sufficient information is available in some cases there are no internationally agreed standards or guidelines upon which judgment could be based. No such standards or guidelines are contained either in the Resolution of the CONTRACTING PARTIES, which is a basis of the work of the present Group, or in the definition of restrictive practices which is proposed by the minority, since neither provides an answer to the question, in what circumstances specific business practices in international trade should be deemed harmful. In making their judgments, experts would therefore have to rely upon their personal views which may not be consistent with each other. Thus these judgments may tend to hinder rather than help the development of a common international approach.

The majority did not consider that any useful purpose would be served by the intervention of experts in the consultations and, moreover, could not agree that in present circumstances governments should be obliged to accept such intervention.

11. In the light of all these considerations the majority recommend for the approval of the CONTRACTING PARTIES the following 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 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,

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, but desiring that consultations between governments on these matters should be encouraged,

Recommend that:

1. 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.

2.

(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.

And Decide:

(i) To appoint a group of experts on restrictive business practices to be convened when appropriate by the secretariat. The group will study the information supplied under paragraph 2 above and will report to the CONTRACTING PARTIES on the general aspects of the problem, insofar as they are revealed by that information, including the nature and extent of the influence which is exerted by international restrictive business practices on the expansion of world trade and on the economic development of individual countries.

(ii) After three years, the group of experts will, in the light of the experience gathered, advise the CONTRACTING PARTIES on the course of action to be followed in the future.

III. The views of the minority

12. The minority, consisting of the Danish, French, Norwegian and Swedish experts, agree in many respects with the majority. On certain fundamental issues, however, the minority hold divergent views. Hence the minority put forward the following proposal as to the way the CONTRACTING PARTIES should deal with restrictive business practices affecting contracting parties:

(i) At the request of any contracting party which considers itself damaged by restrictive business practices, a contracting party or parties having jurisdiction over the association or enterprises concerned should enter into consultations on such practices on a bilateral or a 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 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.

(ii) (a) If the requesting party and the party addressed are able to reach a mutually satisfactory conclusion, they should jointly inform the secretariat of the nature of the complaint and of the conclusions reached.

(b) If the requesting party and the party addressed are unable to reach a mutually satisfactory conclusion, they should inform the secretariat of the nature of the complaint and the fact that a mutually satisfactory conclusion cannot be reached. The secretariat shall convey such information to a group of experts.

(iii) The group of experts should consist of a chairman and four other members with ten alternates appointed by the CONTRACTING PARTIES. The paramount consideration in the selection of candidates should be their competence, integrity and impartiality as individuals. Due regard should also be had for the desirability of including in the committee members from countries in different geographical areas and with different types of economies.

(iv) At the request of one of the contracting parties concerned the group of experts should examine cases reported under paragraph (ii) (b). If the group of experts deems it appropriate the group should enter into consultation with the parties concerned with a view to reaching a satisfactory settlement of the case. The group of experts should submit a report to the secretariat on the outcome of such consultations.

(v) The secretariat should report annually to the CONTRACTING PARTIES on consultations made pursuant to paragraph (i).

(vi) The term "restrictive business practices in international trade" should include practices applied by an enterprise or a combination of enterprises which have a dominant influence on trade in one or more commodities or services between two or more contracting parties, insofar as the practices affect other contracting parties than the contracting party having jurisdiction over the enterprises concerned.

(vii) At the end of a period of three years, during which the group of experts would 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 group should submit to the CONTRACTING PARTIES proposals for possibly improving the procedure.

13. As to the differences in views within the group the minority draw attention to the following paragraph in the preamble of the proposal made by the majority which reads as follows:

"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, but desiring that consultations between governments on these matters should be encouraged."

The minority admit that a complete control of restrictive business practices implying specific obligations on contracting parties would require an amendment of the General Agreement or a supplementary agreement to the General Agreement. In the present situation they have not found it advisable to propose such a far-reaching project. On the other hand, they are of the opinion that it is imperative that some initial measures be taken to counteract restrictive business practices having harmful effects on trade between contracting parties or otherwise interfering with the objectives of the General Agreement. They refer in this connexion to the fact that the Chairman of the CONTRACTING PARTIES, in his summing up at the twelfth session, stated inter alia that the debate appeared to have revealed fairly wide agreement that early action was called for.

14. They agree with the majority that, at the first stage, some consultation procedure either on a bilateral or on a multilateral basis should be employed. In this respect paragraphs (i) and (ii) of their proposal correspond largely to the same paragraphs in the proposal of the majority. In the view of the minority, however, the affected contracting party will as a general rule be in a weak position in such bilateral or multilateral consultations especially in cases where the enterprises belonging to a cartel or a dominant combination are under the jurisdiction of different contracting parties. Also for other reasons the initial consultations might be unsuccessful.

15. The minority consider it essential, in order to reach a mutually satisfactory solution, that a group of experts appointed by the CONTRACTING PARTIES should take part in renewed consultations. This group should be composed of competent and impartial experts appointed by the CONTRACTING PARTIES. Not only would the group of experts be of assistance and help to the consulting parties, but it may be assumed that the mere existence of, as well as the participation of, such a group may effectively contribute to a voluntary settlement being reached.

16. The majority likewise propose the establishment of a group of experts. This group, however, would only be convened by the secretariat and its functions would be limited to a study of the information supplied by the consulting parties and, subsequently, to a report to the CONTRACTING PARTIES on the general aspects of the problem only insofar as they are revealed by that information. In the view of the minority, a group of experts with such limited functions could not furnish the CONTRACTING PARTIES with a full and objective analysis of the outcome of the consultations. According to the proposal of the minority the group of experts would submit a report to the secretariat on the outcome of the consultations.

The secretariat would report annually to the CONTRACTING PARTIES not only on the general aspects of the problems but on all consultations made pursuant to paragraph (i) of the minority's proposal.

17. Paragraph (vi) of the proposal states that the term "restrictive business practices in international trade" should include practices applied by an enterprise or a combination of enterprises which have a dominant influence on trade in one or more commodities or services between two or more contracting parties, insofar as the practices affect other contracting parties than the contracting parties having jurisdiction over the enterprises concerned. With regard to the criterion "harmful" the minority draw attention to the first paragraph in the preamble of the Resolution of 5 November 1958 in which the CONTRACTING PARTIES recognize 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.

18. The minority have drafted their proposal in order that it should, to the greatest possible extent, contribute to the achievement of voluntary settlements. If, unfortunately, no such settlement can be reached the question arises whether the damaged contracting party may refer the matter to the CONTRACTING PARTIES. The minority hold 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 matters are referred to them, make appropriate recommendations to the contracting parties concerned. While referring to these provisions, the minority advise against the use by the CONTRACTING PARTIES of the authority conferred upon them under the second part of paragraph 2. 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 group stresses that it is for the CONTRACTING PARTIES to take decisions with regard to these legal questions.

19. The minority underline that their proposal is only aimed at providing for some initial steps to be taken to deal with restrictive business practices in international trade. The proposal does 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. The group are convinced that the proposed procedure nevertheless would have considerable preventive and counteracting effects and thus contribute to the attainment of more fair and sound methods in international trade.

20. The contention of the majority that the control of restrictive business practices through the General Agreement would not be practicable until a sufficient number of countries have adopted national legislation for dealing with such practices on the domestic plane could not be accepted by the minority. In the opinion of the minority it is necessary to distinguish between two different kinds of national legislation. 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 minority believe 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 what 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.

21. Secondly, 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 should 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. At present only very few countries have enacted legislation on restrictive business practices which enables them to take steps to protect the interests of other contracting parties. On the other hand, it may be presumed that even without such legislative powers international cartels and trusts operating in foreign trade would to a great extent avoid the application of practices which may be deemed to be harmful by a competent and impartial expert group appointed by the CONTRACTING PARTIES to such an important instrument of international trade policy as the General Agreement.

22. The majority have also pointed to the difficulties which may confront governments with regard to furnishing information on restrictive business practices applied by cartels and trusts operating from their territory. The minority consider that these difficulties should 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. If not, they would be taking the risk of being considered as applying harmful practices on the sole evidence brought forward by the complaining contracting party.

23. The main difference between the proposal set forward by the majority and that of the minority is that the former does not permit the participation of the expert group in the consultations between individual contracting parties if one of the consulting parties does not agree to such participation. If the group of experts is not permitted to intervene no report could be made to the CONTRACTING PARTIES which, therefore, if a matter were referred to them, would not have adequate material for considering the case. In the view of the minority it would be possible only in exceptional cases to obtain the agreement of the contracting party or parties addressed with regard to the participation of the group of experts in the consultations, and thus a damaged contracting party may be deprived of the benefit of having an impartial and competent examination of the case and the CONTRACTING PARTIES may be burdened with cases which might otherwise have been solved by voluntary agreement.