

22 June 1959

ACTION BY THE CONTRACTING PARTIES IN DEALING WITH
RESTRICTIVE BUSINESS PRACTICES IN INTERNATIONAL TRADE

Preliminary Draft Report

1. The Group of experts appointed by the Executive Secretary under the Resolution of the CONTRACTING PARTIES of 5 November 1958, reproduced in Annex A, met in Geneva from 15 to 24 June 1959 to consider, in accordance with its terms of reference as set out in the Resolution referred to, "whether, to what extent if at all, and how the CONTRACTING PARTIES should undertake to deal with restrictive business practices in international trade". The Group was composed of experts from twelve countries; their names are listed in Annex B and also the names of those who attended the meetings as observers.

2. The members of the Group were well familiar with the documentation submitted to them 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 Cooperation and by the Council of Europe. Both the theoretical and practical aspects of the problem of restrictive business practices have been so thoroughly explored that there was no need for the Group to go over the ground again. Its work being thus facilitated, the Group devoted its attention directly to the question posed in its terms of reference and was able during one brief session to agree upon recommendations to be made to the CONTRACTING PARTIES.

3. It was noted that, in the preamble to their Resolution of 5 November 1958, the CONTRACTING PARTIES recognized, firstly, 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" and, secondly, that "international co-operation is needed to deal effectively with harmful restrictive business practices in international trade". With these postulates, the members of the Group were in full accord. In view of the failure of all efforts to set up machinery for dealing with these issues on more than a regional basis, the Group were also in agreement with the implication of the Resolution that the CONTRACTING PARTIES should now be regarded as the appropriate and competent body to initiate action in this field. But what action would it be practicable for the CONTRACTING PARTIES to undertake in present circumstances?

4. The principal reason for the failure of past efforts is probably that they were too ambitious. A great many, perhaps most, governments have not been given power under domestic legislation to deal with restrictive business practices in their national territories and would therefore be unable to subscribe to an arrangement establishing an international control. Some members of the Group stressed that the institution of a world-wide control in matters relating to the activities of private enterprises, as distinct from governmental measures, would not be practicable without some harmonization of national legislation or the creation of a supra-national authority. And yet to do nothing would obviously leave a neglected field and a serious gap in the institutional arrangements for dealing with the problems which impinge upon commercial policy and upon the objectives of the GATT. Thus, clearly, this is a matter to which the CONTRACTING PARTIES should continue to give attention and for which solutions should be sought in the light of experience, future developments and changing circumstances. Further, these problems should be commended to governments for their continuing attention with a view to the adoption of measures or legislation to mitigate any harmful effects of such practices on world trade.

5. As for particular cases that may arise, where the policies of a cartel or trust or the practices of a group of enterprises appear to be harmful to the trade interests of a contracting party, it was felt that the CONTRACTING PARTIES should establish formal procedures to bring together in consultation the governments concerned. The existence of a proper forum for the examination of these difficulties should lead to a better understanding of the problems which such practices create and of the extent of their effects on trade. Bilateral discussions should be encouraged and their results should be studied so that, in this new and untried field, experience can be gained before anything more extensive is contemplated.

6. Whether restrictive business practices are a matter that would be deemed to fall under any specific provisions of the GATT - for example, whether the provisions of Article XXIII would be applicable - the Group felt it was not competent to judge. If the question should arise, the CONTRACTING PARTIES would decide. The Group noted, however, that under paragraph 1 of Article XXV the CONTRACTING PARTIES may take joint action to further the objectives of the General Agreement and assumed that a decision to lay down procedures for consultations on these important issues could be taken under these general powers.

7. Accordingly, the Group agreed to recommend that when a contracting party makes written representations to another contracting party, alleging that benefits accruing to it, directly or indirectly, under the General Agreement are being nullified or impaired by the action of a cartel or trust or by restrictive practices of business enterprises located in its territory, that other contracting party should give sympathetic consideration to these representations and should afford adequate opportunity for consultation. 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 one contracting party. A report on the outcome of the consultation should be transmitted by the participating governments to the GATT secretariat, but this should not be made available to other contracting parties except with the consent of these governments.

8. Realizing that the CONTRACTING PARTIES would wish to do all they can to bring about mutually acceptable solutions when consultations take place on these issues, the Group further recommends that, if the parties to a consultation report that no settlement was achieved and if the contracting party or parties which made the representations so request, the Chairman of the CONTRACTING PARTIES should appoint three independent experts - persons with special knowledge of, and experience in dealing with, restrictive business practices - to join with the participants in a further consultation with a view to arriving, through their assistance and advice, at some settlement of the matter. In the event of a settlement being achieved the participants should transmit a supplementary report to the secretariat; if no settlement is achieved the experts should report to the secretariat the reasons for failure and their comments thereon.7

9. The Group believe that, in establishing procedures for consultations in this field, the contracting parties would wish to follow developments and to know how the procedures are working out in practice. Therefore, the Group recommends that the Chairman of the CONTRACTING PARTIES should appoint a panel of three independent experts 7 - persons with special knowledge of, and experience in dealing with, restrictive business practices 7 7 some or all of whom might have served as experts in "further consultations" envisaged in paragraph 8 to review at appropriate intervals the reports received by the secretariat and to submit a report to the CONTRACTING PARTIES on the nature of the problems discussed, on the extent of the damage caused to international trade, alleged or acknowledged, and on the solutions reached or the reason why settlements could not be achieved. Through receiving such occasional reports the CONTRACTING PARTIES would be able to see the effects of these practices on world trade and their impact on the objectives of the GATT.

10. The Group considered whether to recommend that the CONTRACTING PARTIES should make arrangements for studies of cartel problems and of restrictive business practices generally, but concluded that this would not serve any very useful purpose at the present time. Many such studies have been made in recent years and, in fact, the recommendations of the Group are made with their findings in mind. Consideration was given also to the desirability of providing for investigations of particular practices which contracting parties might consider to be harmful to their external trade. Here one encounters the difficulty of obtaining the information that would be required for an investigation to be carried out fruitfully. Any body the CONTRACTING PARTIES might set up to conduct an investigation would have to rely upon information supplied by governments, but many governments, themselves, lack the authority to demand such information from private enterprises or, if they can obtain it, to pass it on to an international organization. Similarly, the Group agreed that it would not be wise or practicable, in present circumstances, to envisage procedures which would require the CONTRACTING PARTIES to make recommendations to individual contracting parties or to give rulings on issues in this field.

11. Though some members thought it regrettable that a bigger step could not be taken in the direction of establishing some form of supervision or control of business practices which may be harmful to the development of international trade, the Group feel that the procedures here recommended are the most that should be undertaken at the present time. The Group believe that the adoption of the CONTRACTING PARTIES of these formal procedures for bringing together in consultation the contracting parties concerned when problems arise and for reports to the CONTRACTING PARTIES on the questions discussed and the results of the consultations would prove a positive contribution to the amicable settlement of grievances and to a better understanding of the issues involved, of the extent of the restrictive effects on trade and of any threat there may be to the attainment by the CONTRACTING PARTIES of the ultimate objectives of the General Agreement.