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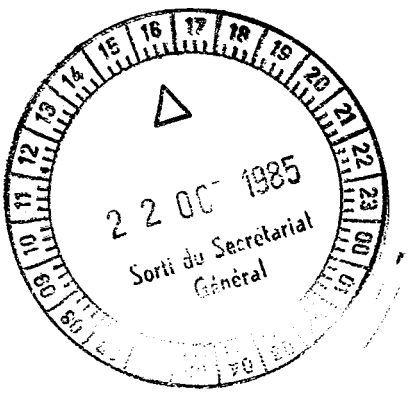
COMMUNICATION FROM THE COMMISSION TO THE COUNCIL

Participation of the Community in the Review Conference on the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.



COM- 567

Memorandum from the Commission to the Council

Re.: Participation of the Community in the Review Conference on the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

Introduction

When the United Nations General Assembly adopted the set of Multilaterally Agreed Principles and Rules on Restrictive Business Practices (the "Restrictive Practices Code") on 5 December 1980 (Resolution 35/63), it decided to hold a conference under UNCTAD auspices in 1985 to review all aspects of the Code.

The Review Conference is scheduled for 4 - 14 November 1985.

The proposals for improving the Code that will be considered at the Review Conference and the proposed rules of procedure for the Conference were discussed at the 4th session of the Intergovernmental Group of Experts (IGE), which has so far provided the institutional machinery of the Code, in April 1985.

Problems are raised by both aspects :

- the status under which the Community participates in the Conference under rules 1 and 33 of the proposed rules of procedure;

- the proposed amendments or clarifications of the Code.

1. The Community's status at the Review Conference

Under rules 1 and 33 of the draft rules of procedure for the Conference (TD/RBP/CONF 2/2 - see Annex 1) the Community would be able to participate, and not just attend as an observer as it has previously been restricted to doing at sessions of the IGE, but would not have the right to vote.

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This proposal was discussed at the 4th session of the IGE. Group D voiced reservations against the proposal, the Group of 77 considered it a basis for negotiation and Group B supported it. A reservation was entered on behalf of the Community and its Member States (Annex 2). On the fringes of the session, some members of Group B (USA, Austria, Sweden, Switzerland) expressed reservations against a clause expressly conferring a right to vote on the Community.

The matter has already been discussed in the RELEX group on the basis of the memorandum from the Commission to the Council dated 8 March 1985 (COM (85) 91 final). It is necessary to decide the position the Community and its Member States will take up at the opening of the forthcoming Conference.

Since the Conference is a review conference, the Community maintains that the rules of procedure of the main committees of UNCTAD are inapplicable and therefore do not prevent the Community's participating in such a conference on the same basis as its own Member States.

A more fundamental point is that the Community cannot be expected to acquiesce in the substantive amendments which the Conference might decide to make to the Code, unless it has been able to express, if necessary through the veto, any objections it might have to them. Section B (ii)(8) of the Code, which recognizes regional groupings of States as equivalent to States or Governments as far as the application of the Code is concerned, means that regional groupings like the Community are expected to honour the morally binding commitments assumed in accepting the Code. Consequently, unless the Conference concedes this point, it will be necessary to enter a reservation as to our acceptance of commitments that would be contrary to Community law.

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The Commission therefore requests the Council's to authorise it negotiate for the Community a status allowing it to play a full part in the Review Conference. For this purpose, as suggested in COM (85) 166 final, it is proposed that the Conference be asked to :

1) delete the footnote to rule 1(c) of the draft rules of procedure, and

2) add a paragraph 2 to rule 33 reading as follows :

"Regional Groupings of States, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their Member States which have accepted the Set of Principles and Rules. Such organizations shall not exercise their right to vote if their Member States exercise theirs, and vice versa."

2. Substantive proposals

The substantive proposals for improvements in the Code are set out in note TD/RBP/Conf. 2/4,the conclusions of which are attached as Annex 3.

The only proposals for amendments to the text of the Code relate to the institutional machinery. The majority of the proposals call for agreement on the interpretation of provisions already in the Code and on the resulting implications for the application of those provisions.

(a) Proposals not requiring amendment of the Code :

1) establishment of "focal points" in the various countries for matters connected with application of the Code. This is acceptable, but the Community's acceptance should be conditional upon a satisfactory solution to the problem of its status at the Conference ;

2) improvement of notification procedures provided for by national law. This proposal was rejected by Group B at the IGE's preparatory meeting in April 1985 and the arguments the Secretariat document advances do not give us reason to change our mind ;

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3) wider use of the consultation procedure provided for by the Code (section 4(F)). This proposal was rejected by Group B at the IGE's preparatory meeting. The Commission was not so opposed to it as the rest of Group B. The Commission finds it hard to justify a restriction of the consultation procedure to the cases covered by the 1979 OECD Recommendation, which would amount to applying the procedure only in relations between Group B countries and refusing it in relations with UNCTAD countries generally. Group B seems unlikely to change its mind. The proposal is supported by the Group of 77 and Group D ;

4) call for voluntary financial contributions by States towards technical assistance on a multilateral basis. This proposal was not well-received by Group B at the preparatory meeting. As far as the Community as concerned, such financial contributions must be conditional on its being given a satisfactory status both at the Revision Conference and at meetings of the IGE;

5) the holding of consultations on a formal or informal basis at or on the fringes of the regular meetings of the IGE. This proposal was made in April 1985 by Group B and should be accepted insofar as the consultations are at the level of the experts attending the IGE meetings.

b) amendments to the Code (institutional machinery) : It is proposed to replace the IGE by a Special Committee on Restrictive Practices, in order to better reflect the importance of restrictive business practices for the United Nations. In UNCTAD Special Committees rank higher than IGEs. Group B rejected this proposal at the April meeting, both because of the budgetary implications -

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contested by the UNCTAD Secretariat - and because some Group B delegations, notably the US, wish to keep the work of the IGE at the level of meetings of experts and avoid a politicization of its activities. The experience in the IGE has been that the Group of 77 do not have antitrust experts available to take part in technical discussions and send members of their permanent delegations in Geneva who tend to politicize the discussions.

The Secretariat argues that under UNCTAD rules Special Committees can decide not to use the rules of procedure of main committees. A Special Committee could therefore decide to admit the Community as a full member. This would be a reason for the Community to support within Group B the establishment of a Special Committee. If Group B agreed to an amendment of section G(i) of the Code to this effect, it would have to be specified that the Special Committee to act as the institutional machinery would be composed not only of States that had accepted the Code but also regional groupings of States that had done so.

If Group B stood firm in its opposition, the Community could fall in behind it in return for a commitment to support the Community in seeking full status under the present machinery.

In conclusion, the Commission considers that the Community could accept in principle the proposals referred to at para. 61(2)(a), (f), (h) and (i) and could negotiate on (d), (e) and (g).

DRAFT PROVISIONAL RULES OF PROCEDURE OF THE CONFERENCE

Chapter I

REPRESENTATION AND CREDENTIALS

Participation

Rule 1

Participation in the Conference shall be open to:

(a) All States,

(b) Namibia, represented by the United Nations Council for Namibia,

[(c) Regional groupings of States which have competence in the area of restrictive business practices and have accepted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, */ and]

(d) Other participants referred to in operative paragraph 4 of General Assembly resolution 33/153 of 20 December 1978.

Composition of delegations

Rule 2

Each delegation participating in the Conference shall consist of a head of delegation, and not more than two other accredited representatives, and such alternate representatives and advisers as may be required.

Alternates and advisers

Rule 3

The head of the delegation may designate an alternate representative or an adviser to act as a representative.

Submission of credentials

Rule 4

The credentials of representatives of States and the names of alternate representatives and advisers shall be submitted to the Secretary-General of UNCTAD, if possible not later than one week before the date fixed for the opening

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*/ Reference to regional groupings of States in this rule is based on the definition contained in section B, paragraph 8, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The draft rule does not confer on such regional groupings the right to vote.

day preceding the meeting. The President may, however, permit the discussion and consideration of amendments, even though these amendments have not been circulated, or have only been circulated the same day.

Decisions on competence

Rule 28

Subject to rule 19, any motion calling for a decision on the competence of the Conference to consider any matter, or to adopt a proposal, or an amendment submitted to it, shall be put to the vote before the matter is considered or a vote is taken on the proposal or amendment in question.

Withdrawal of proposals and motions

Rule 29

A proposal or a motion may be withdrawn by its sponsor, at any time before voting on it has commenced, provided that it has not been amended by decision of the Conference. A proposal or a motion thus withdrawn may be reintroduced by any representative with its original priority, provided he does so promptly and it has not been substantially changed.

Consideration of programme budget implications

Rule 30

Before the Conference takes a decision or makes a recommendation, the implementation of which might have programme budget implications for the United Nations, it shall receive and consider a report from the secretariat on such implications.

Reconsideration of proposals

Rule 31

When a proposal has been adopted or rejected, it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be put to the vote immediately.

Consensus

Rule 32

1. The Conference shall endeavour to ensure that all its substantive decisions are taken by consensus.

2. Notwithstanding any measures that may be taken in compliance with paragraph 1, a proposal before the Conference shall be voted on if a representative so requests.

Voting rights

Rule 33

Each State participating in the Conference shall have one vote.

B. Provisional agenda for the Conference

(Agenda item 3 (b))

59. The Intergovernmental Group of Experts had before it a draft provisional agenda for the Conference submitted by the UNCTAD secretariat (TD/B/RBP/26).

60. At the closing meeting, on 30 April 1985, the Chairman introduced a slightly revised proposal, which he had submitted as a result of informal consultations (TD/B/RBP/30).

Action by the Intergovernmental Group of Experts

61. At the same meeting the Group adopted the provisional agenda for the Conference proposed by the Chairman (see annex III below).

C. Provisional rules of procedure for the Conference

(Agenda item 3 (c))

62. At the closing meeting, on 30 April 1985, the Chairman drew attention to the draft provisional rules of procedure for the Conference prepared by the UNCTAD secretariat (TD/B/RBP/28) and to the following changes to rules 1 and 4 which had been agreed upon in informal consultations:

(a) Rule 1: The text of paragraph (c) should be placed in square brackets;

(b) Rule 4: The text should be completed by adding "or by the Permanent Mission to the United Nations of the State at Geneva, upon the explicit authorization of the Head of State or Government or the Minister for Foreign Affairs".

63. The Chairman added, that with respect to rule 4, the suggested change would bring the rule into conformity with the corresponding rule of the rules of procedure of the United Nations Conference on Conditions for Registration of Ships. However, the Senior Legal Officer of UNCTAD had been advised by the Office of Legal Affairs that this practice in UNCTAD, whereby permanent missions could issue credentials in respect of representatives to United Nations conferences, was not in accordance with established United Nations practice.

64. The representative of Italy, speaking on behalf of the European Economic Community and its member States, reserved his position with respect to the footnote to rule 1 (c) and the related rule 33 of the draft provisional rules of procedure.

Action by the Intergovernmental Group of Experts

65. At the same meeting, the Group adopted as the provisional rules of procedure of the Conference the draft provisional rules submitted by the UNCTAD secretariat (TD/B/RBP/28), with the revisions to rules 1 and 4 proposed by the Chairman. 8/ It was understood that the outstanding issues would be resolved by the conference when adopting its rules of procedure.

8/ The revised text will be issued as document TD/RBP/CONF.2/2.

Annexe 3

Chapter II

CONCLUSIONS CONCERNING THE IMPROVEMENT AND FURTHER DEVELOPMENT OF THE SET OF PRINCIPLES AND RULES

56. As described throughout this note, the Set of Principles and Rules has not lived up to the expectations placed on it by Governments at the time of its adoption in December 1980. In the last five years, restrictive business practices have become an increasingly important component of international trade policy. This trend is the result of a serious dichotomy in government policy which, on the one hand, advocates free market forces in international trade while, on the other, submits to strong protectionist pressure resulting in an intricate network of marketing arrangements restraining trade, such as, for example, voluntary export restraints. All such restraints to trade inevitably involve restrictive business practice arrangements among enterprises in both the exporting as well as the importing countries.

57. Full implementation by all States of their commitment to the Set of Principles and Rules would undoubtedly have averted this negative trend. Hence the requests from a number of States, and in particular from the developing countries, for a mandatory or legally binding Set of Principles and Rules.

58. Since the Set was unanimously adopted by the General Assembly in the form of a resolution, it clearly involves a morally binding commitment and may be cited in national and international proceedings. Therefore, while there is no contractual obligation as such - as for example is the case with an international treaty - nevertheless the fulfilment of the commitments accepted (as in the case of an international treaty) largely depend upon the willingness of States, and in particular the principal trading countries, to respect them and not to search for ways and means to circumvent them.

59. It would therefore be necessary for the Conference to decide that while there is no need, at this time, to change the provisions of the Set, it is essential, in order to ensure the adequate implementation of the Set at both national and international levels, that States decide upon concrete measures to promote and enhance its application.

60. An important outcome of the Conference would therefore include an agreed declaration by the Conference that five years after the adoption of the Set restrictive business practices have become one of the main barriers to international trade transactions. Far from being controlled or eliminated from the international trading system, restrictive business practices have been increasingly used as an instrument of protectionism in the face of efforts to reduce more traditional types of governmental restrictions to trade such as tariffs and non-tariff barriers.

61. Conscious of this fact, the Conference should urge all States to take concrete action, in line with their commitments to the Set of Principles and Rules, to eliminate restrictive business practices from international trade transactions. Rather than changing the provisions of the Set, the Conference should endeavour to decide upon the following issues:

(1) To urge States to avoid entering into arrangements in restraint of trade resulting in the use of restrictive business practices as a palliative to governmental measures as covered under the General Agreement on Tariffs and Trade.

(2) To strengthen the control of restrictive business practices at both national, regional and international levels, by taking concrete steps towards the implementation of the Set of Principles and Rules. These steps may include, in particular :

(a) The establishment by States of focal points in their respective national or regional administrations for contacts with enterprises and other States in order to enhance and facilitate consultations, discussion and exchange of views between them on the application of the Set. These focal points should inform annually the Secretary-General of UNCTAD of their activities, within the existing procedure in provision 2 of section F of the Set. Developing countries should be assisted in establishing such focal points through multilateral and bilateral technical co-operation, in particular through exchange of personnel at national or regional levels;

(b) The establishment or improvement by States, at national and regional levels, of notification procedures for enterprises concerning the use of restrictive business practices in import and export transactions, and such information to be made publicly available;

(c) The strengthening of notification procedures among States by agreeing that when it comes to the attention of a State that a restrictive business practice has, or is likely to have, adverse effects on international trade, particularly that of the developing countries, and the economic development of those countries, it should promptly notify the State or States concerned in order to identify the necessary action in accordance with the provisions 4 - 9 of section E of the Set to facilitate appropriate action.

(d) Stimulation of the use of the consultation procedure by agreeing that, when a State decides to undertake an investigation of a practice which it believes has, or is likely to have, adverse effects on international trade, and which has implications for the laws, policies or national interests of another State or States, it should promptly notify such State or States of the investigation to the extent possible and may enter into consultations on the matter in accordance with provision 4 of section F of the Set before initiating judicial or administrative action.

(e) An invitation to States, in particular the developed countries, to make voluntary financial and other contributions for the technical assistance, advisory and training programmes on restrictive business practices as called for in provisions 6 and 7 of the Set. States may also be invited to pursue in the Governing Council of the United Nations Development Programme the allocation of resources for the implementation of the work in this area;

(f) A request for further studies to be prepared by the international institutional machinery under provision 3 of section G of the Set, in particular concerning the link between restrictive business practice policies and governmental trade policies;

(g) The establishment of a Special Committee on Restrictive Business Practices to perform the function of the international intergovernmental machinery called for in section G of the Set, in place of the Intergovernmental Group of Experts, which does not properly reflect the importance of the issue of restrictive business practices and its adverse effects on international trade, particularly that of developing countries, and the economic development of these countries;

(h) The holding of intergovernmental consultations on a formal or informal basis, at each annual session of the intergovernmental machinery, for the purpose of improving the implementation of provision 4 of section C and provision 3(a) of section G of the Set.

(i) A recommendation to the General Assembly that a Review Conference on Restrictive Business Practices should be convened in 1990.