

SECOND SESSION OF THE PREPARATORY COMMITTEE OF THE
UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENTDRAFT CHARTER

The Delegation of the United States of America submits the following proposals for amendment of Chapter VI of the Draft Charter:

CHAPTER VI

Restrictive Business Practices

Article 39: Policy Toward Restrictive Business Practices.

2. Without limiting the generality of paragraph 1 of this Article, the practices listed in paragraph 3 below shall be subject to investigation in accordance with the procedure ⁽¹⁾ with respect to regarding complaints provided by the relevant Articles in this Chapter if the Organization considers them to have or to be in order that the Organization may determine, in any particular instance, whether such practices have or are ⁽²⁾ about to have any of the ⁽³⁾ harmful effects enumerated ⁽⁴⁾ described in paragraph 1 of this Article, whenever

COMMENT:

- (1) These changes are suggested as a drafting improvement to eliminate unnecessary words.
- (2) The original clause requires the prior determination of harmful effects as a condition precedent to investigation by the Organization. This is evidently a drafting error since the purpose of investigation is to determine whether or not in a particular instance harmful effects are resulting from certain practices.
- (3) It is unnecessary to repeat the word "harmful" in this paragraph; otherwise, it would also have to be repeated in all the following Articles of the Chapter.
- (4) Substitution of the word "described" is suggested in order to conform with usage elsewhere in Chapter VI.

3(e) ~~/Suppressing/~~ Agreeing with others to prevent ⁽¹⁾ the application or development of technology whether patented or unpatented; and

COMMENT:

(1) This change is suggested in the interest of accuracy and effectiveness. The original clause is ambiguous and defective for the following reasons: In the first place, there is no simple and definable act of "suppressing" technology; whether or not a particular bit of information is or can be put to use at any given time depends upon a large number of circumstances, some of which are of a commercial nature. In the case of patented information, it is probably correct to say the majority of patents issued throughout the world do not cover inventions that are commercially feasible. In the case of patented technology, the information in question must be kept secret if it is to be "suppressed", in which case it will not be known.

Consequently, it has seemed desirable to specify a genuinely restrictive practice; namely, agreement with others to prevent the use or development of technology. The term "prevent" has a clear and definite meaning in this context and moreover a test of commercial feasibility is provided: i.e. the agreement is at least prima facie evidence that either or both of the parties would otherwise have used or developed the technology in question.

3(f) Extending the use of rights under patents, trade marks or copyrights, granted by Members to matters which they determine not to be properly within the scope of ~~/authorized grants/~~ such grants or to products or conditions of production, use, or sale which they determine ~~/are/~~ not to be the immediate subjects of ~~/the authorized grant/~~ such grants.

COMMENT:

These changes are suggested in order to avoid any implication that ITO will intrude upon the jurisdiction of the courts of Member countries concerning the validity and scope of patents, etc., granted by the governments of these countries.

Article 40: Procedure with Respect to Complaints and
Conferences

1. The Organization shall [(a)] arrange, if it considers such action to be justified, for particular Members to take part in a [conference] consultation requested by any Member which considers that any practices exist which have or are about to have the effect described in paragraph 1 of Article 39.

COMMENT:

These changes are suggested in order to avoid confusion as to the action contemplated under this paragraph. The term "conference" has been eliminated because it gives the impression to some that a series of formal international gatherings, similar to the present Geneva meeting, will be required. Actually, the procedure is an informal one involving all Members directly interested, and can better be described as a "consultation". This change is accordingly provided and this step is set forth in a separate paragraph.

- [(b)]2. The Organization shall prescribe [the] minimum information to be included in complaints claiming that particular practices exist and have or are about to have the effect described in paragraph 1 of Article 39.

COMMENT:

This sentence is taken without significant changes from original sub-paragraph (b) and set forth as a separate paragraph, in order to conform to the chronological sequence of steps in the complaints procedure.

- [(b)][(c)] 3. In order to decide whether an investigation of
a complaint is justified, the Organization shall ⁽¹⁾ consider each written complaint submitted by any Member or submitted with the authorization of a Member by any affected person, organization or business entity within that Member's jurisdiction claiming that particular practices exist and have or about to have the effect described in paragraph 1 of Article 39 ⁽²⁾; if the Organization deems that further information is necessary before such decision can be reached,
it shall ⁽³⁾ request each Member concerned to furnish such

information as the Organization may deem necessary⁽⁴⁾
supplementary information,⁽⁵⁾ including for example
information [or data]⁽⁶⁾ from commercial enterprises
within [its] the jurisdiction of the Members concerned⁽⁷⁾ ;
review all relevant information⁽⁸⁾ ; and [then determine]
decide⁽⁹⁾ whether an investigation is justified.

COMMENT:

(1) These changes are suggested in order to put into one paragraph the second step in the complaint procedure; namely, that of "screening" a particular complaint in order to decide whether an investigation is warranted. The underscored words state this intent of the paragraph.

(2) This clause has been transferred to the preceding revised paragraph.

(3) This clause indicates why further information may be necessary in the course of the "screening" process.

(4) The information submitted with the complaint may be conclusive to establish a prima facie case; if it is not, the Organization may wish to call for supplementary information.

(5) Since it is presumable that other information may also be useful, that which is obtainable from business firms should be cited as illustrative.

(6) The term "or data" is superfluous; "information" includes "data".

(7) The word "Members" must be substituted for "it", which now refers to the Organization.

(8) This step is added to complete the preliminary "screening" process.

(9) A decision by the Organization is required at this stage, and the word "decide" seems to be more appropriate than "determine", which is used in a different context, below, in paragraphs 5 and 6 of this Article.

~~4(d)~~ 4. If ~~it~~ it considers that ~~the Organization decides~~ that an ~~further~~ further investigation is justified, it shall notify all Members of ~~each such~~ the complaint, request the complainant or any Member to provide such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. ~~Provided~~ that any Member and the ~~Any Member as well as the~~ Any Member as well as the parties alleged to have engaged in or to have been affected by ⁽²⁾ the practice complained of shall ~~have the~~ be afforded reasonable ⁽³⁾ opportunity to be heard at such hearings.

COMMENT:

(1) These words are added in order to distinguish clearly between the screening process and the formal investigation, which is treated in the present, revised paragraph.

(2) This addition to the original text is made on grounds of equal justice. The interest of ITO in parties affected by restrictive practices can surely not be less than in parties allegedly engaging in such practices.

(3) This suggested addition is in accordance with the general practice of safeguarding the legitimate rights of all parties as to time and place of performance.

5. The Organization shall review all information available and determine whether the practices in question have or are about to have the effect described in paragraph 1 of Article 39.

COMMENT:

This paragraph is taken from paragraph 1 (e) of the New York draft and transposed to its proper place in the sequence of steps.

6. The Organization shall report fully to all Members its determination and the reasons therefor.

COMMENT:

This paragraph is taken from paragraph 2 (a) of the New York text and transposed in order to precede this stage of an investigation, which is both distinct and important.

2. (a) 7. If it the Organization finds determines that the practices in question have had or are about to have ⁽¹⁾ the effect described in paragraph 1 of Article 39, it shall request each Member concerned to take every possible action to prevent the continuance or recurrence of the such ⁽²⁾ practices, and may recommend to the Members concerned specific ⁽³⁾ remedial measures to be carried out in accordance with their respective laws and procedures.

COMMENT:

(1) The Organization and the Members should not be precluded from preventive action, although such cases would probably be much less frequent than those of an ex post nature.

(2) The word "such" is suggested in order to cover practices similar to those which have been the specific object of the investigation and determination by ITO. For example, if the practices in question have involved, inter alia, agreeing with others to prevent the application of certain technology, the Members should enjoin the parties to refrain from similar practices in the future.

(3) This word is added to indicate that ITO can recommend particular steps or techniques. In complex cases involving a number of countries, it would be helpful if detailed suggestions could be offered in order that the actions of the several Members might be harmonized insofar as possible.

2. (b) 8. The Organization shall request all Members concerned to report fully on the action they have taken to achieve these results to prevent the continuance or recurrence of the practices in question.

COMMENT:

The suggested changes are not substantive and are advanced in the interest of greater clarity. The term "these results" has no definite reference as used in the New York draft.

2. (c) 9. prepare and publish As soon as possible after its enquiries concerning any complaint dealt with under paragraph 1 (d). paragraphs 3 to 6 ⁽²⁾ have been provisionally

or finally closed, the Organization shall prepare and publish Reports on all complaints... a report ⁽²⁾ showing fully its the decisions, findings determinations or other conclusions reached, the reasons therefor and any action which the Organization has recommended to the Members concerned ; Provided. However, (i) publication of such reports or any portion thereof may be withheld if it deems this course justified; and (ii) ⁽³⁾ the Organization shall not, if a Member so requests, disclose confidential information furnished by that Member which would materially damage the legitimate business interests of a commercial enterprise.

COMMENT:

(1) These words have been added to indicate more clearly the scope of the complaints concerning which reports are to be published.

(2) The revised language is to indicate that a report should be made on each complaint, rather than a generalized report.

(3) Suppression of reports would be undesirable and probably ineffective. This provision, moreover, invites the public to suspect the procedures and motives of the Organization. A discretionary element will, of course, enter into the preparation of any report and will provide the necessary safeguard.

2.(d) 10. The Organization shall report to all Members and make public if it deems desirable, the action actions ⁽¹⁾ which has have been taken by the Members concerned to realize the purposes described in paragraph 2 (c) to prevent the continuance or recurrence of the practices in question. ⁽²⁾

COMMENT:

(1) There appears to be no valid reason to attempt to keep from the public the acts of governmental authorities in this instance. Such a stipulation in the Charter would not, moreover, add to public confidence in the Organization.

(2) See comment 8 (a) above.

NOTE: The following is a clear draft of Article 40, revised as suggested:

Article 40: Procedure with respect to Complaints.

1. The Organization shall arrange, if it considers such action to be justified, for particular Members to take part in a consultation requested by any Member which considers that any practices exist which have or are about to have the effect described in paragraph 1 of Article 39.
2. The Organization shall prescribe minimum information to be included in complaints claiming that particular practices exist and have or are about to have the effect described in paragraph 1 of Article 39.
3. In order to decide whether an investigation of a complaint is justified, the Organization shall consider each written complaint submitted by any Member or submitted with the authorization of a Member by any affected person, organization or business entity within that Member's jurisdiction; if the Organization deems that further information is necessary before such decision can be reached, it shall request each Member concerned to furnish supplementary information, including for example information from commercial enterprises within the jurisdiction of the Members concerned; review all relevant information; and decide whether an investigation is justified.
4. If the Organization decides that an investigation is justified, it shall notify all Members of the complaint, request the complainant or any Member to provide such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member as well as the parties alleged to have engaged in or to have been affected by the practice complained of shall be

- afforded reasonable opportunity to be heard at such hearings.
5. The Organization shall review all information available and determine whether the practices in question have or are about to have the effect described in paragraph 1 of Article 39.
 6. The Organization shall report fully to all Members its determinations and the reasons therefor.
 7. If the Organization determines that the practices in question have had or are about to have the effect described in paragraph 1 of Article 39, it shall request each Member concerned to take every possible action to prevent the continuance or recurrence of such practices, and may recommend to the Members concerned specific remedial measures to be carried out in accordance with their respective laws and procedures.
 8. The Organization shall request all Members concerned to report fully on the action they have taken to prevent the continuance or recurrence of the practices in question.
 9. As soon as possible after its enquiries concerning any complaint dealt with under paragraphs 3 to 6 have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions, determinations or other conclusions reached, the reasons therefor and any action recommended to the Members concerned. However, the Organization shall not, if a Member so requests, disclose confidential information furnished by that Member which would materially damage the legitimate business interests of a commercial enterprise.
 10. The Organization shall report to all Members and make public actions which have been taken by the Members concerned to prevent the continuance or recurrence of the practices in question.

Article 41: Studies Relating to Restrictive Business Practices.

1. The Organization may is authorized
 - (a) to conduct studies, either on its own initiative or at the request of any member, or of any organ of the United Nations or of any specialized agency brought into relationship with the United Nations inter-governmental organization,⁽¹⁾ relating to
 - (i) types of restrictive business practices in international trade; and
 - (ii) conventions, laws and procedures concerning, for example, incorporation, company registration, investments, securities, prices, markets, fair trade practices, trade marks, copyrights, patents and the exchange and development of technology, insofar as they are relevant to restrictive business practices;
 - (b) to request information from Members in connection with such studies.

COMMENT:

- (1) This change introduces language in conformity with that of other Chapters.
2. The Organization may
 - (a) make recommendations to Members concerning such conventions, laws and procedures as are relevant to their obligations under this Chapter; and
 - (b) arrange for conferences of Members for purposes of general consultation on discussion of⁽¹⁾ any matters relating to restrictive business practices.

COMMENT:

- (1) This substitution is made in order to avoid use of the word "consultation", which is used in paragraph 1 of Article 40 to describe a different and distinct procedure.

Article 42: Obligations of Members.

1. In order to implement the proceeding Articles of this Chapter Each Member shall take all possible steps by legislation or otherwise to forbid and prevent ensure, within its jurisdiction, that private and public commercial enterprises within its jurisdiction do not engage in practices by private or public commercial enterprises which have the effect described in paragraph 1 of Article 39, and generally shall assist other Members and the Organization in preventing practices which have the effect described in paragraph 1 of article 39 such practices, these measures to be taken in accordance with the particular the Member's system of law and economic organization of the country concerned

COMMENT:

This re-draft combines paragraphs 1(a) and 2(a), lines 4-9 of the New York draft, both of which deal with the general obligations of Members. It substitutes the term "forbid and prevent" for "ensure" because the latter is too vague to be meaningful in this context. The redraft indicates to whom "assistance" is to be given. It also makes the term "in accordance with its system of law and economic organization" modify both obligations set forth in the paragraph.

2. Each Member shall establish procedures to deal with for authorizing complaints, conducting investigations and preparing information and reports requested by the Organization.

COMMENT:

This re-draft includes paragraph 2(a), lines 1-3, which indicate what Members should do to help the Organization "consider", "investigate", "study" and "report". The redrafted paragraph conforms with Article 40, paragraph 1(b) of the New York draft.

3. Each Member shall furnish to the Organization, as promptly as possible and to the fullest extent practicable, such information as is requested by the Organization under paragraphs 1 (c), (d) and 2(b) of Article 40 and under paragraph 1(a) of Article 41 for its consideration and its investigation of complaints and for its conduct of studies, provided that the any Member
- (a) may withhold confidential information relating to its national security;
 - (b) on proper notification to the Organization, may withhold information which is not essential to the Organization in undertaking an adequate investigation and which, if disclosed, would materially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld.

COMMENT:

This re-draft includes paragraph 2(c) of the New York draft. It refers specifically to "consideration", "investigation" and "studies" rather than to cross-references.

4. Each Member shall take fullest account of the Organization's determinations, requests and recommendations made under paragraph 2(a) of Article 40 on the basis of its investigations and determine and initiate appropriate action in accordance with Its the Member's system of law and economic organization to prevent within its jurisdiction the continuance or recurrence of any practices which the Organization finds to have had the effect described in paragraph 1 of Article 39.

COMMENT:

This re-draft includes paragraph 1(b) of the New York draft. However, it refers specifically to "investigations", thus eliminating the cross-reference. Also, it specifies that after "determination", appropriate action will be initiated. (In the event that no action is believed appropriate, provision is made in the following paragraph for report of this fact to the Organization.)

5. Each Member shall report, as requested by the Organization, under paragraph 2(b) of Article 40, the any action taken, independently or in concert with other Members, to implement recommendations made by the Organization under paragraph 2(a) of Article 40, and in cases in which when no action is has been taken, to explain to the Organization the reasons therefor and discuss the matter further with the Organization if requested to do so.

COMMENT:

The language of paragraph 2(d) of the New York draft is followed in this re-draft, which provides for the elimination of cross-references. It also substitutes the word "any" for "the" in order to provide for the possibility that a Member may determine that no action is appropriate or necessary.

6. Take part in consultations and conferences upon the request of the Organization. In accordance with paragraph 1(a) of Article 40 and paragraph 2(b) of Article 41.

COMMENT:

This re-draft incorporates paragraph 2(e) of the New York draft. It eliminates cross-references and refers specifically to "consultations" (which term has now been introduced, exclusively, into paragraph 1 of Article 40 of the suggested U.S. re-draft) and to "conferences" (which term relates exclusively to 2(b) of Article 41 of the suggested U.S. re-draft.)

NOTE: The following is a clear draft of Article 42, revised as suggested:

Article 42: Obligations of Members.

1. Each Member shall take all possible steps by legislation or otherwise to forbid and prevent, within its jurisdiction, practices by private or public commercial enterprises which

- have the effect described in paragraph 1 of Article 39, and shall assist other Members and the Organization in preventing such practices, these measures to be taken in accordance with the Member's system of law and economic organization.
2. Each Member shall establish procedures for authorizing complaints, conducting investigations and preparing information and reports requested by the Organization.
 3. Each Member shall furnish to the Organization, as promptly as possible and to the fullest extent practicable, such information as is requested by the Organization for its consideration and its investigation of complaints and for its conduct of studies, provided that any Member
 - (a) may withhold confidential information relating to its national security;
 - (b) on proper notification to the Organization, may withhold information which is not essential to the Organization in undertaking an adequate investigation and which, if disclosed, would materially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld.
 4. Each Member shall take fullest account of the Organization's determinations, requests and recommendations made on the basis of its investigations and determine and initiate appropriate action in accordance with the Member's system of law and economic organization to prevent within its jurisdiction the continuance or recurrence of any practices which the Organization finds to have had the effect described in paragraph 1 of Article 39.

5. Each Member shall report, as requested by the Organization, any action taken, independently or in concert with other Members, to implement recommendations made by the Organization, and when no action has been taken, explain to the Organization the reasons therefor and discuss the matter further with the Organization if requested to do so.
6. Take part in consultations and conferences upon the request of the Organization.