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SUB-COMMITTEE ON ARTICLE 93 (RELATIONS WITH NON-MEMBERS)

Working Paper Prepared by the Secretariat

1. The Sub-Committee has six alternative drafts of Article 93 upon which to work - Alternatives A, B and C contained on pages 55 and 56 of the Report of the Preparatory Committee, the drafts prepared by the delegations of Australia and Belgium to be found upon pages 21 and 22 respectively of the Annotated Draft Agenda (document E/CONF.2/C.6/12) and the draft of the delegation of the United Kingdom (document E/CONF.2/C.6/35).
2. The substance of the six drafts may be summarized as follows:
  - (a) Alternative A of the Report of the Preparatory Committee is the draft which gives the greatest measure of freedom to Members in respect of the relations with non-Members. Under this draft such relations would be completely unrestricted except that Members would be obliged not to attempt to obtain advantages confined exclusively to themselves or preferential advantages from non-Members. Moreover, any Member a substantial part of whose trade is with a non-Member would have the right to suspend its application of the provisions of the Charter should such application entail serious injury to its legitimate interests, subject only to an obligation to consult with the Organization and other Members directly affected.
  - (b) Alternative C represents the opposite extreme to Alternative A in that it places the greatest measure of restriction upon the relations of Members with non-Members. Similarly to Alternative A, Alternative C would prevent Members attempting to obtain from non-Members preferential advantages but in this Alternative only such preferential advantages as would result in the application by the non-Member to any other Member of such measures as would, between Members, be inconsistent with the contents of the Charter. However, Alternative C goes on to depart substantially from Alternative A by denying to non-Members the benefits of Chapter IV (subject to one exception) and, except with the approval of the Organization, reductions in tariffs or preferential tariff rates  
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negotiated under Article 17.

(c) Alternative B steers a middle course between Alternatives A and C. Like both of these alternatives, it would prevent Members attempting to obtain exclusive or preferential benefits from non-Members, but in respect of this principle it follows the wording of Alternative A rather than C. It would, however, permit a Member to extend to a non-Member the benefits of Chapter IV of the Charter subject always to the approval of the Organization to be accorded or refused after consideration of certain factors.

(d) The draft prepared by the delegation of Belgium represents a relaxation of Alternative B in favour of the greater freedom allowed under Alternative A. That draft incorporates the principle from Alternatives A, B and C that benefits obtained from non-Members should not be exclusive or preferential following the references to that principle contained in Alternatives A and B rather than C. It also incorporates from Alternative A the principle of freedom of relations with non-Members by permitting Members to extend benefits under Chapter IV to them. Nevertheless it modifies this principle of freedom of relations by incorporating from Alternative B the idea of approval by the Organization. In that Alternative, however, approval by the Organization is prior approval; in the draft of the delegation of Belgium it is subsequent approval or appeal should any Member consider its interests are being unduly injured or that the purposes of the Organization are being impeded by another Member's extension of benefits under the Charter to a non-Member.

(e) The draft prepared by the delegation of the United Kingdom is very similar in substance to that prepared by the delegation of Belgium. It differs from that draft in that

- (i) although it would not permit a Member to obtain exclusive or preferential advantages from a non-Member, it employs the language of Alternative C to express this principle; and
- (ii) it would permit appeal to the Organization by a Member which considered its interests were being injured, not necessarily "unduly".

The draft prepared by the delegation of Australia in its first part is also close in substance to that prepared by the delegation of Belgium. It provides for freedom of relations between Members and non-Members which is the basis of Alternative A subject to

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consistency with the aims of the Organization and avoidance of substantial injury to the interests of Members. This, speaking broadly, is the substance of the drafts of the delegations of Belgium and the United Kingdom except that these latter drafts provide for a method of securing observance of the limitations upon the general principle. However, the draft prepared by the delegation of Australia, in its second part, shows that its first part is proposed merely as a stop-gap measure until the second annual session of the Conference of the Organization which will prescribe articles governing the relations of Members with non-Members.

3. An examination of the six alternative drafts before the sub-committee leads to the question of how the sub-committee should go about its work. It would seem that the essence of the proposal of the delegation of Australia must be considered first, it being in the nature of a motion of order. If that proposal, which amounts to preparing an article of a temporary character, is adopted, it will probably be necessary to establish a statement of general principles such as those contained in paragraph 1 of the Australian draft. However, it seems that this would also have to be done even if the essence of the Australian proposal is rejected. In that event the sub-committee would have before it five alternative drafts differing to a very considerable extent. In the circumstances, it would then probably be better not to take any one of those drafts as a basis of discussion but to establish and agree upon the principles to be covered in the text to be produced. After these principles had been considered, a small working party might put them into appropriate language.

4. It is suggested, accordingly, that after the Australian proposal, in essence, is considered the sub-committee might turn to a consideration of general principles, whether or not that proposal proves acceptable. If this procedure is acceptable to the sub-committee, it should be helpful for delegates to have before them some guidance as to the questions they might consider in order to establish the basis of the text to be produced. An examination of the six alternative drafts suggests that the principal points to be discussed, in the order in which they might be considered are as set out hereunder.\* The plan followed is that of commencing with one extreme -

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\* Even if the proposal of the delegation of Australia is not accepted, there would seem to be no reason why paragraph 1 of it, despite that it is part of a draft of a temporary nature, should not be taken into account equally with other drafts when attempts are being made to establish the principles of the text to be produced.

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principle of complete freedom of relations between Members and non-Members - and working down through the various degrees of restriction proposed to almost the opposite extreme represented by Alternative C.

(a) Should there be any restriction upon the economic relations of Members with non-Members or should there be complete freedom for Members to carry on such economic relations with non-Members as they see fit? At least one delegation is of the opinion that such relations should be absolutely unrestrained.

(b) If it is decided that Members should not be completely free to carry on economic relations with non-Members, the question then arises as to what should be the degree of restriction to be imposed. All the alternative drafts with the exception of that prepared by the delegation of Australia agree on one point in this connection. They all contain express wording purporting to prevent Members receiving from non-Members preferential or exclusive advantages. (Similar wording is used in Alternatives A and B and in the draft prepared by the delegation of Belgium, while the wording used in Alternative C coincides with that used in the draft presented by the delegation of the United Kingdom). In Alternative A this measure of restriction is a maximum, in the other drafts it is a minimum, in that these latter drafts go on to provide for more or less larger degrees of restriction. The draft of the delegation of Australia would, it seems, also probably prevent Members receiving from non-Members preferential or exclusive advantages. It does not, however, say so in express words but an arrangement where a Member received exclusive advantages from a non-Member would appear to be inconsistent "with achievement of the purpose and objectives of the Organization" as specified in paragraph 1 of the Australian draft.

(c) After extracting this one measure of restriction apparently common to all of the alternative drafts, the next point to consider is probably that raised in paragraphs 2 and 3 of Alternative A. That Alternative, after providing for the common measure of restriction mentioned above, heads in the opposite direction to other drafts by enabling, in paragraphs 2 and 3, a Member a substantial part of whose trade is with a non-Member to suspend the application of any of the provisions of the Charter should its legitimate economic interests be seriously injured by their execution, subject only to an obligation of consultation with the Organization and directly affected Members.

(d) To continue further it is necessary to return to the question of the degree to which the economic relations of Members with non-Members are to be restricted. There is no further measure of restriction common to the alternative drafts. Following the general plan of this paper to

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work from the principle of complete freedom of relations towards the opposite extreme, it would be proper now to examine the drafts prepared by the delegations of Australia, Belgium and the United Kingdom which, next to Alternative A, permit the greatest degree of liberty to Members.\*

(i) It is rather difficult to distinguish between these three drafts in respect of the degree of restriction greater than the common degree mentioned above for in substance they are almost identical. The Australian draft would not permit relations between Members and non-Members to be inconsistent with the "achievement of the purpose and objectives of the Organization" while the Belgian and United Kingdom drafts would permit appeal by any Member to the Organization should such relations impede the purposes of the Organization. The Australian draft would not permit such relations in any case to "cause substantial injury to the interests of Members"\*\*\*; the Belgian draft would permit appeal to the Organization should such relations "unduly" injure the interests of any Member, while the United Kingdom draft would permit such an appeal should any Member consider its interests were injured.\*\*\*

(ii) Finally both the Belgian and the United Kingdom drafts lay down the matters to be taken into account when the Organization considers an appeal under Article 93 as those drafts envisage it. The Belgian draft requires the Organization to "have regard to the general purposes and objectives" of the Charter and to "the legitimate interests of the various interested Members" while the United Kingdom draft requires the Organization to have "due regard to the purpose and objectives set forth in Article 1 and to the legitimate interests of all interested Members."

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\* An alternative method of proceeding at this stage might be to take Alternative C which contains the greatest degree of restriction and work back towards the measure of restriction common to all drafts.

\*\* It is not clear whether this means "the interests of Members" collectively or severally.

\*\*\* It may be in the nature of the Australia draft, as a stop-gap measure, that it does not mention the means of implementing the principles it states, whether or not this should be by way of appeal, or this may be because the delegation of Australia considers that, even without specific mention the procedures of Chapter VIII would be available.

(e) If it

(e) If it is considered necessary to proceed to a greater degree of restriction than is provided for by the Australian, Belgian and United Kingdom drafts, Alternative B might next be discussed. This Alternative goes one step further away from the principle of complete freedom of relations between Members and non-Members subject to the common degree of restriction mentioned above. Instead of permitting a certain amount of liberty of action subject to appeal to the Organization in certain circumstances, that Alternative would require a Member proposing to or continuing to grant to a non-Member benefits under the Charter to obtain the prior approval of the Organization. The Organization would grant or deny approval after considering whether or not substantial injury would be caused to the interests of other Members and whether or not the expansion of trade and promotion of the purposes of the Organization would be adversely affected. In the case of an existing arrangement the Organization would also take into account the possibility of substantial injury to the interests of the Member concerned. It will be noted that the first two of these considerations are very similar to those upon which the Organization would be required to take its decision in judging an appeal under the Belgian and United Kingdom drafts.

(f) Alternative C stands at the opposite extreme to Alternative A. Apart from the degree of restriction common to all the drafts before the sub-committee, Alternative C would deny to non-Members the benefits of Chapter IV of the Charter except that where a Member was already extending such benefits, when the Organization might permit it to continue doing so should termination of the relevant arrangement be more detrimental to the interests of Members generally than continuation. This Alternative would also prohibit Members extending to non-Members any of the tariff reductions effected under Article 17 except with the consent of the Organization. The idea of approval by the Organization thus appears in this draft as in Alternative B and the drafts proposed by the delegations of Belgium and the United Kingdom but in a more limited context. A breathing-space of one year after acceptance of the Charter is allowed to each Member before provisions aimed at confining the benefits of the Charter to Members take effect.

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