

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

REPORT TO COMMISSION B

by

SUB-COMMITTEE II ON CHAPTER VI

PART I

1. Commission B of the Preparatory Committee at its meeting on the 29th May appointed a second Sub-Committee on Chapter VI, on which were to be represented the Delegations of BELGIUM, BRAZIL, CANADA, FRANCE, the UNITED KINGDOM and the UNITED STATES. This Sub-Committee was instructed to consider the draft of Chapter VI, and especially Articles 39, 40, 41, 42 and 45, in the light of all the various amendments which had been proposed for this Chapter and of the observations which had been or were to be expressed in the course of meeting of Commission B except as regards the application of the Chapter to services, which was referred to the first Sub-Committee of the Commission.

The Chairman of Commission B, in appointing the Sub-Committee, indicated that the meetings of the Sub-Committee might be attended by observers from other interested Delegations who were not represented in the Sub-Committee and that such observers might ask leave of the Sub-Committee to present their views on specific points of interest and importance to them and to the Sub-Committee.

2. The Sub-Committee, upon the motion of the Delegate of BELGIUM, elected unanimously Mr. S. L. HOLMES (U.K.) as its Chairman, on the understanding that in view of the very complex nature of the work of the Sub-Committee Mr. Holmes would confine his activities to the functions of Chairman, while Mr. Andrew would represent the UNITED KINGDOM on the Sub-Committee.

The Sub-Committee held 15 meetings, in which it considered in great detail all the amendments and observations which had been referred to it by Commission B. In its discussions, the Sub-Committee gave consideration to the proposed amendments collated in Document E/PC/T/W/132 covering suggestions on behalf of Canada, the United States, the United Kingdom, Belgium, France, Czechoslovakia, Brazil, and to the following additional amendments and observations:

- (a) SOUTH AFRICAN observation on the application of Art. 39 (verbatim record of the 4th meeting of Commission B, page 36),
- (b) NORWEGIAN amendment to Article 39 (Doc.E/PC/T/W/160),
- (c) NETHERLANDS amendment to Article 39, paragraph 3 (Doc. E/PC/T/W/138),
- (d) CZECHOSLOVAKIAN amendment to Article 40, (Doc. E/PC/T/W/119),
- (e) NORWEGIAN amendment to Article 41 (verbatim record of the 4th meeting of Commission B, page 18 and Doc. E/PC/T/W/155),
- (f) CHILEAN observation on the term "discussion" in Article 41 (verbatim record of 4th meeting of Commission B, page 26),
- (g) NEW ZEALAND proposal regarding an international census of international agreements (verbatim record of the 4th meeting of Commission B, page 21),
- (h) BRAZILIAN amendment to Article 41, submitted directly to the Sub-Committee,
- (i) NETHERLANDS amendment to Article 42, paragraphs 1 and 2, (Doc. E/PC/T/W/139).

The Sub-Committee also took note of the comments on the text of Chapter VI as reproduced in footnotes to the Drafting Committee's Report (E/PC/T/34).

3. In the course of its work, the Sub-Committee had the benefit of consultation with representatives of the Delegations of CZECHOSLOVAKIA, CHILE, the NETHERLANDS, NEW ZEALAND and the UNION OF SOUTH AFRICA.
4. The Sub-Committee reached agreement on English and French texts of Chapter VI, which are appended to this report, and recommends to Commission B their consideration and adoption.

## PART II

### CHAPTER VI. RESTRICTIVE BUSINESS PRACTICES

#### Article 39

##### Policy towards restrictive business practices

1. Members shall take appropriate measures, individually or through the Organization or in both ways, to prevent business practices affecting international trade (whether engaged in by private or public commercial enterprises), which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other purposes of the Organization as set forth in Article 1.

2. Without limiting the generality of paragraph 1 of this Article, and in order that the Organization may decide in a particular instance whether certain practices have or are about to have any of the effects referred to in paragraph 1, the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided in Articles 40 and 42, whenever
- (a) a complaint is presented to the Organization; and
  - (b) the practices are engaged in or are made effective by one or more public or private commercial enterprises or by a combination, agreement or other arrangement between commercial enterprises, whether between private commercial enterprises, between public commercial enterprises, or between private and public commercial enterprises; and
  - (c) such commercial enterprises, individually or collectively, possess effective control of trade among two or more countries in one or more products.
3. The practices referred to in paragraph 2 above are as follows:
- (a) fixing prices or terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
  - (b) excluding enterprises from any territorial market or field of business activity, allocating or dividing any territorial market or field of business activity, allocating customers, or fixing sales or purchase quotas;
  - (c) discriminating against particular enterprises;
  - (d) limiting production or fixing production quotas;
  - (e) preventing by agreement the application or development of technology or invention whether patented or unpatented;
  - (f) extending the use of rights under patents, trade marks or copyrights, granted by any Member, to matters which are determined by its system of law not to be properly within the scope of such grants, or to products or conditions of production, use or sale which are similarly determined not to be the immediate subjects of such grants;
  - (g) any similar practices which the Organization may from time to time decide to be restrictive business practices.
4. In this Article "public commercial enterprises" means
- (a) trading agencies of governments, and
  - (b) enterprises wholly or mainly owned by public authority over which there is effective control by public authority, including control of engagement in the practices listed in paragraph 3.
- "Private commercial enterprises" means all other commercial enterprises.

Article 40

Procedure with respect to  
Investigations and consultations

1. The Organization shall arrange, if it considers such action to be justified on the basis of information submitted by the Members concerned, for particular Members to take part in a consultation requested by any affected Member which considers that in any particular instance practices exist (whether engaged in by private or public commercial enterprises) which have or are about to have the effect described in paragraph 1 of Article 39.
2. A complaint may be presented to the Organization by any affected Member on its own behalf, or by any Member on behalf of any affected person, organization or business entity within that Member's jurisdiction, provided that, in the case of a complaint against a single public commercial enterprise (as defined in Article 39) acting independently, such complaint may be presented only by a Member on its own behalf and only after the Member has resorted to the procedure under paragraph 1 of this Article.
3. 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. The information shall give substantial indication of the nature and harmful effects of the practices.
4. In order to decide whether an investigation of a complaint is justified, the Organization shall consider each written complaint submitted in accordance with paragraph 2 of this Article, review all relevant information, and decide whether an investigation is justified. 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.
5. If the Organization decides that an investigation is justified, it shall notify all Members of the complaint, request 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, and any affected person, organization or business entity on whose behalf a complaint is made, as well as the parties alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard at such hearings.
6. The Organization shall review all information available and decide whether the practices in question have had or are about to have the effect described in paragraph 1 of Article 39.

7. The Organization shall report fully to all Members its decision and the reasons therefor.
8. If the Organization decides that in any particular case the practices complained of 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 remedial action, and may recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.
9. The Organization shall request all Members concerned to report fully on the remedial action they have taken in any particular case.
10. As soon as possible after its enquiries concerning any complaint dealt with under paragraphs 3 to 7 of this Article have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions 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.
11. The Organization shall report to all Members and make public the remedial actions which have been taken by the Members concerned in any particular case.

#### Article 41

##### Studies relating to restrictive business practices

1. The Organization 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 other inter-governmental organization, relating to
    - (i) general aspects of restrictive business practices affecting 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 affecting international trade; and
    - (iii) registration of restrictive business agreements and other arrangements affecting international trade; and
  - (b) to request information from Members in connection with such studies.

2. The Organization is authorized
  - (a) to make recommendations to Members concerning such conventions, laws and procedures as are relevant to their obligations under this Chapter; and
  - (b) to arrange for conferences of Members to discuss any matters relating to restrictive business practices affecting international trade.

#### Article 42

##### Obligations of Members

1. Each Member shall take all possible steps by legislation or otherwise to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which have the effect described in paragraph 1 of Article 39, and shall assist other Members and the Organization in preventing these practices, such measures to be taken in accordance with the Member's system of law and economic organization.
2. Each Member shall make adequate arrangements for presenting complaints, conducting investigations and preparing information and reports requested by the Organization.
3. Each Member shall furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and its investigation of complaints and for its conduct of studies under this Chapter, provided that any Member
  - (a) may withhold confidential information relating to its national security; and
  - (b) on proper notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting 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, and the reasons why it considers it not essential.
4. Each Member shall take full account of each decision, request and recommendation of the Organization under paragraphs 6 and 8 of Article 40 and, in accordance with its system of law and economic organization, take in the particular case the action it considers appropriate in the light of its obligations under this Chapter.
5. Each Member shall report, as requested by the Organization, any action taken, independently or in concert with other Members, to implement decisions made by the Organization, and, when no action has been taken, inform the Organization of the reasons therefor and discuss the matter further with the Organization if requested to do so.

6. Each Member shall, at the request of the Organization, take part in consultations and conferences provided for in this Chapter with a view to reaching mutually satisfactory conclusions.

Article 43

Supplementary enforcement arrangements

1. Members may co-operate with each other in prohibitive, preventive or other measures for the purpose of making more effective any remedial order issued by a duly authorized agency of any Member in furtherance of the objectives of this Chapter.
2. Members participating in or intending to participate in such co-operative action shall notify the Organization.

Article 44

Continued effectiveness of domestic measures  
against restrictive business practices

No act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.

Article 44 - A

Procedure with respect to services

1. Members recognize that transportation, telecommunications, insurance, banking and certain other services are substantial elements of international trade, and that any restrictive business practices in relation to them may have harmful consequences similar to those described in Article 39. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member should consider that there exist restrictive business practices in relation to an international service in the meaning of Paragraph 1 which have or are about to have such harmful effects, and that its interests are seriously prejudiced by this situation, the Member may submit a written statement explaining the situation to the Member or Members the public or private enterprises of which are engaged in the services in question. The Member or Members concerned shall give sympathetic consideration to the statement and to such proposals as may be made with a view to affording adequate opportunities of consultation and effecting a satisfactory adjustment of the matter.
3. If no adjustment can be effected, and if the matter is referred to the Organization it shall be transferred to the appropriate specialized inter-governmental agency if one exists, with such observations as the Organization in its discretion may wish to make. If no such specialized agency exists, Members may, under Article 61 (c), ask the Organization to make recommendations for, and promote international agreement on, measures designed to improve the conditions of operation of the service in question so far as they affect the purposes of the Organization.
4. The Organization shall, subject to Article 61 (e), cooperate with specialized inter-governmental agencies in connection with restrictive business practices affecting the general field covered by the Charter and those agencies shall be entitled to consult the Organization, to seek advice, and to ask that a study of a particular problem be made.

#### Article 45

##### Exceptions to the provisions of this Chapter

1. The obligations in this Chapter shall not apply to
  - (a) inter-governmental commodity arrangements meeting the requirements of Chapter VII; and
  - [(b) the international arrangements excepted in Article 59.]
2. [Notwithstanding the foregoing paragraph, the Organization may make recommendations to Members and to appropriate inter-governmental organizations concerning any features of the arrangements referred to in paragraph 1 (b) of this Article which may have the effect described in paragraph 1 of Article 39.]

PART III

GENERAL NOTES ON CHAPTER VI

Article 39

1. Paragraph 1 - Purposes of the Organization.

The reference to the purposes of the Organization represents agreement reached as between suggestions that either all or none of the purposes in Article 1, as it will appear in its final form, should be named in this paragraph. Under this redraft the words "the expansion of production or trade" are followed by "and" and consequently harmful effects of practices must relate to this and at least one of the other purposes. They are not specifically named since they have already been included by reference to Article 1. The suggestion that specific reference be made to economic development is taken care of by using the phrase "expansion of production or trade", thus making clear the obligation of each Member to prevent interference with the economic expansion in countries whether under-developed or fully industrialized.

2. Paragraph 2 - "Public or"

It was decided, after considerable discussion, to recommend the retention of these words, subject, however, to a proviso (which appears in para. 2 of Article 40) and to an expansion of the definition of "public commercial enterprises" (which now appears as para. 4 of Article 39). The new proviso in Article 40 requires that, if a Member considers that its interests are detrimentally affected by a single public commercial enterprise which effectively controls international trade in a product, the Member must first seek to have the matter dealt with by consultation, as provided in para. 1 of Art. 40. It is recommended also in paragraph 2 that in such a case a complaint can be presented only by a Member on its own behalf, and not on behalf of any affected person, organization or business entity.

3. Paragraph 2 - "Or are about to have"

This phrase, which is designed to emphasize the desirability of preventive as well as remedial activities, appears in paragraph 2 but not in paragraph 1 of Article 39. It has been generally accepted that Members should have the right to complain about practices which they consider are on the point of having harmful effects, and that the Organization should be free to make investigations, reports and recommendations in such cases. A Member undertakes (under para. 1 of Art. 42) to take all possible steps to prevent harmful practices and (under para. 4 of Art. 42) to take full account of the Organization's recommendations and take the action it considers appropriate in the light of its obligations under Chapter VI.

4. Paragraph 3 (f) - Extension of the use of patent and other rights

The changes made in the New York draft avoid any implication that the Organization would 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. This meets the principal objection raised by the Netherlands Delegation in Document E/PC/T/W/138

Article 40

5. It is proposed to change the heading of this Article to "Procedure with respect to Investigations and Consultations". The re-arrangement of the paragraphs of this Article, as proposed in E/PC/T/W/122 was considered by the Sub-Committee to represent a distinct improvement over the New York draft.

6. Paragraph 1 - "Consultation"

The Sub-Committee concurs in the view that the word "conference", in the New York draft, suggests a more formal and elaborate procedure than is contemplated or is desirable. "Consultation" suggests the informality which is more appropriate when discussion is arranged among the several Members directly interested. The word "consultation" is used also in Article 42(6) in referring to a Member's corresponding obligation.

7. Paragraph 2 - Presentation of complaints.

The New York draft provided that any affected person, organization or business entity could submit a complaint direct to the Organization if authorized to do so by a Member. The present draft would provide for the "presentation" of a complaint only by a Member - on its own behalf or on behalf of any affected person, organization or business entity. This has been made a separate paragraph and the remaining paragraphs have been accordingly re-numbered. (The other change in paragraph 2 is referred to above in Note 2)

8. Paragraphs 6 and 8 - "have had"

Use of the words "have had" instead of the word "have" is intended to make it clear that the facts in any particular case would be judged by the Organization as of the time the complaint was presented rather than as of the moment of the decision, which might be reached at a much later time.

Article 41

9. Paragraph 1 - Studies of Restrictive Practices.

The NORWEGIAN delegation proposed, in Document E/PC/T/W/155, authorization of studies relating to "trusts and combinations which substantially control or influence international trade". It was considered that adequate provision was made for specific investigations under Article 40, and that studies under this Chapter should relate to general aspects of restrictive business practices affecting international trade.

10. Paragraph 1 - Publication of reports.

The NORWEGIAN proposal, in the same document, that the Organization should be authorized to publish the results of studies, was considered to be met adequately by the provisions of Article 61 (a).

11. Paragraph 1 (a) (111) - Registration of restrictive business agreements.

The Sub-Committee agreed to insert this new sub-paragraph (111) providing for studies relating to the registration of restrictive business practices. This action was taken in view of reservations by BRAZIL and CHILE in the first session of the Preparatory Committee (General Notes, No. 4, in E/PC/T/W/132), the BRAZILIAN amendment (document E/PC/T/W/54), as well as the observations by the Delegates of BRAZIL and NEW ZEALAND in the 4th meeting of Commission B.

Article 42

12. This Article has also been subject to a re-arrangement of paragraphs, following E/PC/T/W/122, which is considered to be an improvement over the New York draft.

13. Paragraph 3 (b) - Withholding of information.

To remove any possible ambiguity it was decided to recommend inclusion of the words "the Member considers" after the words "information which" in line 2. It was agreed that the following words should be added: "and the reasons why it considers it not essential."

14. Paragraph 14. Action on recommendations.

Referred to in note 3.

Article 44A

15. For convenience of the Members of Commission B, the text of this Article, as recommended by Sub-Committee I, is included with the other Articles which Sub-Committee II was directed to examine.

Article 45

16. Paragraph 1 (b) - Exception of "the international arrangements excepted in Article 59".

Under the New York draft of Article 59, the provisions of Chapter VII shall not apply to ... "(b) ... agreements relating to the purchase and sale of a commodity falling under Section E of Chapter V". The latter Section, however, refers not to any specific commodities but to "any product" the importation or

exportation of which is controlled by a state monopoly. Amendments have been proposed to both Article 59 and Section E of Chapter V, and are now under consideration. Until it is known what changes are to be made in these Articles the Sub-Committee feels it impossible to make any recommendation on the text of paragraph 1 (b) of Article 45. This sub-paragraph and paragraph 2 have accordingly been placed between square brackets in this draft.

17. U. K. Amendment to Article 45 - Document E/PC/T/W/131.

The Delegate of the U.K., in conformity with his statement at the 4th meeting of Commission B, was unable to withdraw his proposed amendment to Article 45 until a decision will have been reached in regard to the proposed new Article 44 - A.