In a communication dated 27 July 1957 the Government of Norway has transmitted an explanatory memorandum and draft supplementary agreement on the control of restrictive business practices, appended hereto, with the request that they be circulated to contracting parties.

The communication states:

"At the Eleventh Session of the CONTRACTING PARTIES a Norwegian and a German memorandum on restrictive business practices were referred to the Intersessional Committee with instructions to submit a report and recommendations to the Twelfth Session. The Committee was authorized, if necessary, to appoint a Working Party.

"This matter was discussed at the last meeting of the Intersessional Committee and the Committee agreed to recommend that governments include experts in their delegations to the next meeting in September, and to invite contracting parties to submit proposals for consideration at that meeting.

"In complying with this decision I have the honour to submit an explanatory memorandum together with a draft supplementary agreement to the General Agreement and the Agreement on the Organization for Trade Co-operation on the control of restrictive business practices.

"The purpose of the memorandum and the draft agreement, which should be regarded as working documents, is to convey to the other contracting parties the Norwegian Government's views on the further procedure to be followed in dealing with this problem, and to provide other contracting parties with some background material in order to prepare a basis for the discussions.

"In the report on policy discussions at the Head of Delegations' meetings at the Eleventh Session, the Chairman of the CONTRACTING PARTIES draws attention to the extremely wide degree of support which was given to the view that the contracting parties should undertake work of real value in solving important disregarded problems of international trade, especially in the field of restrictive business practices."
"In the opinion of the Norwegian Government the question of the control of restrictive business practices is of a world-wide character, the solution of which is of fundamental importance for the attainment of the objectives of the General Agreement.

"Furthermore, the question of bringing the activities of restrictive business arrangements under control is accentuated by the existence of advanced plans for regional integration schemes.

The Norwegian Government hopes, therefore, that the CONTRACTING PARTIES will contribute to a progressive development in this field within the framework of GATT by making their own proposals and especially by the inclusion of experts in their delegations to the next meeting of the Intersessional Committee.

"An Export Group could then be established in order to carry out a comprehensive study of the problem, and subsequently make recommendations to the CONTRACTING PARTIES which could form a basis for the further deliberation of this matter."
ANNEX I
MEMORANDUM

The purpose of this memorandum is to sketch the background for the attached draft agreement and to clarify the suggested articles.

I.

PREVIOUS PROPOSALS CONCERNING INTERNATIONAL CONTROL OF RESTRICTIVE BUSINESS ARRANGEMENTS

It is generally recognized that restrictive business arrangements in international trade may hamper the expansion of production and trade and thereby the attainment of higher standards of living, full employment and economic and social development in different countries.

In accordance with this view the Havana Charter in Chapter V laid down provisions concerning counteracting of restrictive business practices, having such harmful effects. The general policy in this field was drawn up in Article 46. Paragraph 1 of this Article reads as follows:

"Each Member shall take appropriate measures and shall cooperate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade 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 objectives set forth in Article 1."

Specified rules with regard to the control were set forth in the other paragraphs of Article 46 and in Articles 47 - 54.

As the Havana Charter was not ratified, the Economic and Social Council in 1951 took a new initiative in this field. In a resolution, adopted on 13 September 1951, the Council stressed the importance of this question and appointed an ad hoc committee to prepare a new proposal for international control of restrictive business practices. The Committee submitted its report in February 1953. The proposed provisions were mainly based on Chapter V of the Havana Charter. Owing to its restricted mandate the Committee did not make recommendations with respect to the organization to be charged with this control. In its report the Committee stressed, however, the close inter-relation between restrictive business practices and other barriers to trade. The majority of the members were of the opinion that the proposed Control Agency - as intended in the original proposal for an International Trade Organization in the Havana Charter - should be part of a wider body with comprehensive responsibilities in the field of international trade as a whole.
In a resolution, adopted on 31 July 1953, the Economic and Social Council requested the Secretary-General of the United Nations to transmit the Committee's report to the State Members of the United Nations and to interested international organizations for examination and comments. The request included also transmission of the report to GATT, but the CONTRACTING PARTIES have not been formally asked for comments.

At the Ninth Session of the CONTRACTING PARTIES the delegations of Denmark, Norway and Sweden in doc. L/273 stated as their opinion that the CONTRACTING PARTIES should consider the inclusion in the revised General Agreement of provisions with regard to control of restrictive business practices in international trade, cf. also doc. W. 9/83. The Working Party recommended that the CONTRACTING PARTIES postpone further consideration of this matter pending receipt at the next regular session of a report by the Executive Secretary on discussions in this field by the Economic and Social Council at its Nineteenth Session, cf. doc. L/327/Rev.1/1955.

In a resolution, adopted on 1 June 1955, the Economic and Social Council stressed once more the importance of national action and international cooperation in order to deal effectively with restrictive business practices affecting international trade. The Council emphasized at the same time that international action would not be effective without sufficient support by member governments. Urging the governments to continue the examination of restrictive business practices with a view to the adoption of laws, measures and policies which would counteract the harmful effects, the Council decided to postpone further consideration of the matter.

At the Eleventh Session of the CONTRACTING PARTIES the Norwegian delegation proposed the appointment of an intersessional working party to make recommendations to the CONTRACTING PARTIES with regard to the question whether, and if so to what extent, the CONTRACTING PARTIES should undertake to carry out control of restrictive business practices in international trade, doc. L/568 and doc. L/568/ Corr. 1 and Corr. 2. The delegation of the Federal Republic of Germany proposed provisions concerning consultations between contracting parties with a view to eliminating harmful effects of restrictive business practices, doc. L/551. The two proposals were discussed in a plenary meeting on 1 November 1956. It was generally recognized that GATT would be the most appropriate body to deal with control of restrictive business practices in international trade. There were, however, differences in opinion as to whether the time was ripe for GATT to undertake such a task. The Chairman suggested that both the German and the Norwegian proposals should be referred to the Inter-sessional Committee, with instructions to submit a report and recommendations to the Twelfth Session. The Committee could, if necessary, appoint a working party. The CONTRACTING PARTIES agreed to this procedure, cf. SR. 11/11 and Corr. 1.

At a meeting in April 1957 the Inter-sessional Committee decided that the question of control of restrictive business practices should be considered at a meeting in September 1957. The Committee agreed to recommend that governments should, if possible, include experts in their delegations to the September meeting and further agreed to invite contracting parties to submit proposals for consideration at that meeting, cf. doc. IC/SR.31.
II.

REGIONAL SCHEMES OF CONTROL

1. The Draft European Convention for Control of International Cartels

Chapter V, Article 51, of the Havana Charter states: "Members may cooperate with each other for the purpose of making more effective within their respective jurisdictions any remedial measures taken in furtherance of the objectives of this Chapter and consistent with their obligations under other provisions of this Charter."

Referring to these provisions the Secretariat-General of the Council of Europe on 2 March 1951 submitted to the High Contracting Parties a Draft Convention for more intensive control of restrictive business practices affecting trade between the respective European countries. The Convention, which was more detailed than Chapter V of the Havana Charter, provided for a compulsory registration of restrictive agreements between enterprises within the jurisdiction of two or more of the High Contracting Parties, laid down more specified rules with regard to harmful practices and established institutions to be charged with registration and control.

As the Convention was designed as a regional supplement to the Havana Charter, the negotiations were postponed pending the ratification of the Charter and later on pending the outcome of the activities of ECOSOC with regard to establishing control on a world-wide basis. In a study, submitted in June 1956, the Secretariat-General of the Council of Europe raised the question of whether the Council of Europe should decide to resume consideration of a European agreement on restrictive business practices. This question is no longer of interest. If a common European market is established in accordance with the Treaty of Rome, and if the planned European Free Trade Area is realized, there will be no need for the Council of Europe to establish control of restrictive business practices.

2. The European Coal and Steel Community

The Treaty on the European Coal and Steel Community has far-reaching provisions relating to restrictive business practices and monopolies.

In Article 65, paragraph 1, are set forth the following prohibitions against restrictive business practices:

"There are hereby forbidden all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, which would tend, directly or indirectly, to prevent, restrict or impede the normal operation of competition within the common market, and in particular:

(a) to fix or influence prices;
(b) to restrict or control production, technical development or investments;
(c) to allocate markets, products, customers or sources of supply."
In accordance with paragraph 2 of the said Article the High Authority may on certain conditions authorize enterprises to agree among themselves to specialize in the production of, or to engage in joint buying or selling of, specified products. Paragraphs 3 - 5 of the Article provide for control and enforcement of the provisions laid down in paragraphs 1 and 2.

Article 66 contains complicated provisions relating to concentrations of enterprises and abusive practices by dominant enterprises.

To counteract monopolizing it is stated in paragraph 1 that any transaction which would have the direct or indirect effect of bringing about a concentration shall be submitted to prior authorization of the High Authority. This provision shall be effective whether the operation in question is carried out by a person or an enterprise, or a group of persons or enterprises, whether it concerns a single product or different products, whether it is effected by merger, acquisition of shares or assets, loan, contract, or any other means of control. The High Authority shall define what constitutes control of an enterprise.

In accordance with the provisions of paragraphs 2 and 3 the High Authority may grant exemptions if the transactions in question will not give to the interested persons or enterprises the power to influence prices, to control or restrain production or marketing, or to impair the maintenance of effective competition in a substantial part of the common market or to evade the rules of competition resulting from the application of the Treaty.

Paragraphs 4 - 6 contain provisions regarding the application and enforcement of the rules in paragraphs 1 - 3.

The provisions in paragraph 7 concern public or private enterprises, which in law or in fact, have or acquire a dominant position which protects them from effective competition in a substantial part of the common market. The High Authority may take necessary action to prevent the use of such a position for purposes contrary to the Treaty.

In connexion with the special provisions of Article 65 and 66 concerning restrictive business practices, concentrations of enterprises and dominant enterprises, the High Authority may, according to other Articles in the Treaty, regulate production and investment, prices and conditions of competition etc.

The High Authority and the other supranational institutions, created by the Treaty, shall take necessary measures to ensure observance of the provisions of the Treaty and of regulations issued in accordance with these provisions.

The provisions of the Treaty concerning restrictive business practices, concentrations of enterprises and dominant enterprises have reference only to trade within the common market, not to export trade. However, the institutions of the community shall in accordance with Article 3(f) further the development of international trade and see that equitable limits are observed in prices charged on external markets.
3. The Treaty on the Common European Market

The Treaty of Rome contains in Articles 85 - 90 provisions with regard to restrictive business practices and practices by dominant enterprises.

Article 85, paragraph 1, sets forth a general prohibition against restrictive business practices. The first part of the paragraph reads in the English translation as follows:

"The following shall be considered as incompatible with the common market and shall be prohibited: all agreements between enterprises, all decisions by associations of enterprises and all concerted practices, likely to affect trade between Member States, and having as their object or result the prevention, restriction or distortion of the free play of competition within the common market, in particular those entailing:

(Here follows a list of examples).

Paragraph 3 makes exemptions with regard to agreements, decisions and practices which contribute to improve the production or distribution of the products, or to promote technical or economic progress whilst, at the same time, ensuring that consumers have a fair share in the benefits resulting therefrom. As further conditions it is stated that the agreements, decisions or practices must not impose on the enterprises concerned any restrictions that are not essential to the attainment of the above objectives or enable such enterprises to eliminate competition in respect of a substantial proportion of the products in question.

The rules set forth in Article 85 of the Treaty of Rome have much in common with the corresponding provisions in Article 65 of the Treaty on the European Coal and Steel Community. On the other hand the two Treaties differ greatly with regard to the provisions concerning dominant enterprises. The Treaty of Rome has no general prohibition against transactions which have the effect of bringing about concentrations of enterprises. Article 86 of the Treaty limits itself to a general prohibition against unfair practices applied by dominant enterprises. The first part of Article 86 reads in the English translation as follows:

"To the extent to which trade between Member States may be affected thereby, it shall be incompatible with the common market and be prohibited for one or more enterprises to take unfair advantage of a dominant position within the common market, or within a substantial part of it."

In addition to this general rule the paragraph lists some examples of such unfair actions.

The super-national institutions, which are to be established in accordance with the provisions of the Treaty, are also charged with various responsibilities in connexion with the provisions concerning restrictive business practices and unfair practices of dominant enterprises.
Article 87, paragraph 1, states that the Council shall issue appropriate regulations or directives for the application of the principles set out in Articles 85 and 86.

According to paragraph 2 the regulations and directives shall be designed in particular:

(a) to ensure observance of the prohibitions in Article 85, paragraph 1, and Article 86 by the institution of fines or means of compulsion;

(b) to determine ways and means of applying paragraph 3 of Article 85;

(c) where necessary, to define the scope of application of the provisions contained in Articles 85 and 86 in respect of the various economic sectors;

(d) to specify the respective responsibilities of the Commission and the Court of Justice in the application of the arrangements provided for in the present paragraph;

(e) to specify the relationship of the national laws to the provisions of Article 87 and of the regulations and directives issued in accordance with the Article.

In Article 89 it is stated that the Commission shall supervise the application of the principles laid down in Articles 85 and 86. At the request of a Member State or on its own responsibility the Commission shall investigate any presumed infringement of the principles. If it finds that such infringement has taken place, it shall propose appropriate means for terminating it.

Article 90 contains special provisions regarding public enterprises.

The provisions of the Treaty on restrictive business practices relate only to practices which are likely to affect trade between Member States. They do not have reference to restrictive practices which relate to trade between Member States and outside states, nor do they apply to practices which have significance only for the domestic market of the Member State.

4. The European Free-Trade Area

The discussions on the European Free-Trade Area have not yet got beyond the initial stage. For the time being it is, therefore, not possible to make any definite statement as to provisions with respect to restrictive business practices. However, if the negotiations lead to agreement on establishment of a free-trade area, it is to be assumed that the Treaty will provide for control of restrictive business practices which have harmful effects on trade between the Member States or otherwise hamper the objectives of the free-trade area.
5. The Nordic Common Market

The question of the establishment by Denmark, Finland, Norway and Sweden of a common market has been considered for some time. A joint commission has submitted a report and the proposals will be studied by interested institutions and organizations within the end of this year. The respective governments and parliaments are expected to decide on the matter next year. The proposals include provisions concerning control of restrictive business practices affecting trade between the Member States.

III.
REGIONAL AND INTERNATIONAL SYSTEMS OF CONTROL

The establishment of common markets or of free-trade areas might further the creation of cartels and trusts by facilitating concentrations of capital and by abolishing protection through tariffs and quantitative restrictions. This applies particularly to common markets or free-trade areas of such size as the European Common Market and the planned European Free-Trade Area. Reference is made to the statement by the Norwegian delegate at the meetings of the Intersessional Committee in April 1957, cf. doc. IC/SR.31, page 6.

To safeguard the interests of the Member States the Treaty of Rome, as mentioned above, sets forth general prohibitions against restrictive business practices which are likely to affect trade between Member States. However, as the prohibitions have no reference to trade with other countries, they do not involve any protection for them. Cartels and trusts within the European Common Market may, therefore, be wholly free in their operations with regard to outside countries. A similar situation will arise in respect to cartels and trusts within the European Free-Trade Area as regards their operations affecting other countries.

The establishment of common markets and of free-trade areas of greater size and the tendencies in such markets and areas to foster new or stronger cartels and trusts affecting outside contracting parties, may cause difficulties as to trade between contracting parties inside and contracting parties outside the respective common markets or free-trade areas. This makes a strong case for control of restrictive business arrangements on a wider international basis. It would not be justified, however, to request the Member States of common markets or of free-trade areas to charge themselves with obligations to take action against harmful restrictive business practices applied by enterprises within their territories against outside contracting parties, as long as these outside contracting parties do not undertake corresponding obligations. Regard should be had for the fact that the individual countries within a common market or a free-trade area, particularly the small countries, may be affected by the operations of cartels or trusts having their seats outside the common market or the free-trade area. The only solution satisfactory to all contracting parties would be the establishment of an international control, implemented by GATT.
During the discussions at the meeting of the CONTRACTING PARTIES on 1 November 1956 some delegates expressed as their view that the time was not ripe for the establishment of control in international trade, as many countries had not enacted sufficient domestic legislation concerning control of trusts and cartels, cf. SR 11/11 1956 pages 88-95. As stated by the Norwegian delegate in his reply it is in this respect necessary to differentiate between two different kinds of national legislation.

In the first place there is the question of legislation providing for control of cartels and trusts, which operate on the domestic market. This control has as its purpose the protection of the country itself against harmful restrictive business practices. The Norwegian Government shares the view that it would be advisable for countries whose economy is based mainly on private enterprise to establish such control. It should be recognized, however, that this is a question of internal policy and that it should be up to the different states themselves to decide whether and in which form they should introduce control. The need for control of internal restrictive practices may depend on the degree of economic development in each country and especially on the significance of cartels and trusts on the domestic market.

Even if a country has established an effective control of the operations of cartels and trusts on its domestic market, it has not thereby made any approach to solving the problem of control of restrictive business practices in international trade. The national legislation, which is required to this end, is different in aspect. It shall provide for steps to be taken to protect other countries against harmful restrictive business practices, applied by cartels or trusts within the jurisdiction of the legislating country. It is obvious that such legislation would be enacted and applied only in accordance with an international agreement, imposing corresponding obligations on all participating countries, in order to establish international cooperation in this field. The obligations would depend on the kind and the extent of the international control, which the countries may agree upon. Without clearly defined obligations laid down in an international agreement a country cannot be expected to take steps to enact national legislation to protect the interests of other countries.

In order to establish international cooperation in this field through the CONTRACTING PARTIES the first thing to be done should be to draw up an agreement setting forth the scope of the control, laying down rules on the work to be done by the different institutions of the Organization for Trade Cooperation and specifying the obligations imposed on the individual contracting parties. Only on the basis of an agreement of this kind would the participating countries be in a position to take the necessary legislative steps.
IV.

MAIN LINES OF THE NORWEGIAN DRAFT AGREEMENT

1. Introductory remarks

The questions whether and to what extent the CONTRACTING PARTIES should undertake control of restrictive business practices in international trade and the drafting of an agreement for this purpose raise complicated problems. The Intersessional Committee was aware of that when at the April meeting it invited the contracting parties to submit proposals for consideration at the September meeting and recommended that governments should, if possible, include experts in their delegations to this meeting.

In the opinion of the Norwegian Government the most appropriate procedure would be for the Intersessional Committee at the meeting in September to appoint an Expert Group to undertake a comprehensive study of the problems involved and to make recommendations to the CONTRACTING PARTIES as a basis for their deliberations on this matter. The Expert Group or those members of the group, which are in favour of charging GATT with this control, should present a draft agreement in the report.

The Norwegian Government would like to stress that the attached Draft Agreement is not to be considered as a formal proposal. It contains only preliminary suggestions, submitted pursuant to the request of the Intersessional Committee, as a contribution to the preparatory work to be done.

As will be seen, the Draft Agreement is formulated as a supplementary agreement to the General Agreement on Tariffs and Trade and the Agreement on the Organization for Trade Cooperation. It might perhaps have been more logical to draft two different supplementary agreements, one pertaining to the General Agreement, and the other to the Agreement on the Organization for Trade Cooperation. As the provisions relating to the substance of the control and the provisions concerning the institutions, which shall perform the tasks imposed on the Organization, are closely intertwined, it has, however, been found more practical, at any rate at the initial stage, to present all the articles in one agreement.

2. The principles of the control

The Draft Agreement is mainly based on the principles expressed in Chapter V of the Havana Charter and in the proposal set forth by the Ad Hoc Committee, appointed by ECOSOC. The text, however, is completely revised with a view to giving the provisions a more precise formulation and making the control more effective.

The Draft Agreement provides for control relating to:

(a) restrictive business arrangements which are likely to affect trade between contracting parties;
(b) practices, applied by enterprises or combinations of enterprises which have dominant influence on trade between two or more contracting parties.

The terms "restrictive business arrangements", "dominant enterprise" and "combinations of enterprises" are defined in Article I.

The Draft Agreement does not set forth general prohibitions against such restrictive arrangements and such practices as mentioned. It provides for action only with regard to arrangements and practices which are likely to have harmful effects on trade between contracting parties or otherwise to hamper the objectives set forth in Article I of the General Agreement.

Action should be taken by the contracting party or the contracting parties having jurisdiction over the enterprises in question, cf. the provisions in Article 2 and Article 8, paragraphs 2 - 6.

It is to be assumed, however, that the authorities of a contracting party will not always be particularly interested in taking action against its own enterprises, especially if it has no guarantee that similar measures will be taken by the other contracting parties. There may also be differences of opinion as to whether a particular restrictive arrangement or a particular practice has harmful effects. Rules are, therefore, laid down to provide for investigations in order to ascertain whether or not a particular arrangement or practice is contrary to the provisions of the agreement and to secure that necessary remedial action will be taken. Before going into these questions it would be convenient first to mention the institutions which should be charged with the functions.

3. The Institutions

Article 3, paragraph 1, states that the Organization for Trade Cooperation shall give effect to those provisions of the Agreement which provide for joint action. It is assumed that the Agreement on the Organization, signed 10 March 1955, will be ratified. This agreement would establish the following institutions:

(a) The Assembly;
(b) The Executive Committee;
(c) The Secretariat.

In addition to these institutions it would be necessary to establish a new institution, competent to deal with restrictive business arrangements and practices applied by dominant enterprises. The provisions with regard to this new institution, which is named "The International Cartel Commission", are laid down in Article 3, paragraphs 2 - 4. It is proposed that the Commission shall consist of seven members, elected by the Assembly, ordinarily for a term of four years. The Commission is envisaged as an independent administrative body and its members shall perform their duties in the general interests of all contracting parties and shall neither solicit nor accept instructions from any government.
Paragraph 4 states that the secretariat shall assist the Commission in accordance with rules established by the Assembly. Most of the work with regard to collecting information, preparing surveys and reports will have to be done by the secretariat in accordance with instructions laid down by the Commission.

The functions of the International Cartel Commission are stated in Articles 4 - 6 and Article 8, paragraphs 3 - 5.

The functions of the Executive Committee and of the Assembly in the field of restrictive business arrangements and practices applied by dominant enterprises, are stated in Article 7, Article 8, paragraphs 5 and 6, and Article 10.

4. Studies relating to restrictive business arrangements and dominant enterprises affecting trade between contracting parties.

As mentioned above the Draft European Convention provided for compulsory registration of restrictive agreements concluded between enterprises within the jurisdiction of two or more of the High Contracting Parties. Under previous discussions in GATT delegates of the Federal Republic of Germany have indicated the idea of registration with the institutions of GATT of restrictive business practices in international trade.

Public registration of restrictive business arrangements has been carried out in Norway since 1920. The system has worked satisfactorily. Registration was later established in Denmark, Sweden and United Kingdom. In Finland registration will take place from 1958. The Netherlands also has a registration system, but the register is not public.

The Norwegian Government is in favour of applying the registration system to wider areas, as for instance with regard to restrictive business arrangements affecting the Member States in the planned European Free-Trade Area. It may, however, be doubted whether it would be appropriate to apply the system as foundation for a world-wide control of restrictive business arrangements in international trade. Such extension of the system would require the establishment of a large administration and would also for other reasons be difficult to carry out. The system should at any rate not be introduced at the initial stage of such control.

The proposed International Cartel Commission should, however, have as one of its functions the conduct of systematic studies relating to restrictive business arrangements and dominant enterprises affecting trade between contracting parties. Provisions concerning such studies are laid down in Article 4, paragraph 1. Paragraph 2 in the said Article has provisions regarding conferences of contracting parties on matters relating to restrictive business arrangements and practices applied by dominant enterprises.
5. Consultations, investigations, and measures against contracting parties which do not take action against harmful restrictive arrangements or practices.

Article 5 contains provisions concerning consultations between contracting parties, affected by harmful restrictive arrangements or unfair practices applied by dominant enterprises, and contracting parties having jurisdiction over the enterprises in question.

In the view of the Norwegian Government too much cannot be expected from such consultations. An affected contracting party will often be in a weak position because it lacks necessary information. Special difficulties may arise in cases where the cartel or the enterprises belonging to a dominant combination are under the jurisdiction of different contracting parties; likewise in cases where different contracting parties are affected by the arrangements or practices. The procedure provided for in Articles 6 and 7 should effectively secure that necessary remedial action will be taken against harmful restrictive arrangements or practices.

Article 6, paragraph 1, states that the International Cartel Commission shall carry out investigations to ascertain whether or not:

(a) a particular restrictive business arrangement has such harmful effects as described in Article 2, paragraph 1;

(b) a particular practice, applied by a dominant enterprise, is of such unfair nature as described in Article 2, paragraph 3.

The Commission may carry out the investigations at the request of a contracting party or on its own initiative. The latter provision is particularly important.

A system whereby investigations can be made only on the basis of a complaint from an affected contracting party would not be effective. As a rule the contracting party affected will not be in possession of adequate material for full elucidation of how the cartel or the dominant enterprise carries on its business. Nor can the affected contracting party rely on obtaining sufficient information from the authorities in the home country of the cartel or the dominant enterprise. This would in many cases mean that the contracting party affected would not be able to give sufficient grounds for a complaint. Furthermore, a contracting party might hesitate from trade policy considerations to make a complaint against a cartel or a dominant enterprise within the territory of another contracting party. From the same considerations it may also be reluctant to set forth a formal request for investigations. Special difficulties would arise in cases where the cartel enterprises, or enterprises belonging to a dominant combination, are under the jurisdiction of different contracting parties or where different contracting parties are affected by the restrictive arrangements or unfair practices in question. For such reasons the International Cartel Commission should be empowered to make investigations also on its own initiative.
Article 6, paragraphs 2 - 6, prescribe rules of procedure with regard to the investigations and contain provisions concerning the reports from the Commission.

If the Commission finds that the restrictive business arrangement or the practice which has been investigated is contrary to the provisions of Article 2, the contracting party having jurisdiction over the enterprise or enterprises in question, shall as soon as possible take action to comply with the provisions of Article 2.

It is to be expected that the contracting parties usually will take remedial actions according to the findings of the Commission. There may be cases, however, where a contracting party does not take action, or the action taken is ineffective, to comply with the findings of the Commission and the provisions of Article 2. It is, therefore, necessary to lay down rules of procedure to be followed in such cases. The problems which here arise are complicated. The Draft Agreement suggests the following rules for consideration:

(a) The International Cartel Commission shall in such cases submit a report to the Executive Committee, cf. Article 6, paragraph 6.

(b) The Executive Committee may, if it agrees with the Commission, request the contracting party or the contracting parties in question to take action in accordance with specific recommendations within the time limit determined by the Committee. If the contracting party or the contracting parties do not comply with these recommendations, the Committee shall submit a report to the Assembly, cf. Article 7, paragraph 1. The Committee shall also report to the Assembly in the event of disagreement with the Commission.

(c) In order to enable the contracting parties to counteract the harmful effects of the restrictive business arrangement or the unfair practice, the Assembly may grant to other contracting parties exemptions from the obligations set forth in Article 2 and from certain articles of the General Agreement. The Assembly may also instruct the International Cartel Commission not to carry out investigations according to Article 6, requested by contracting parties which have not complied with the recommendations made by the Executive Committee, cf. Article 7, paragraph 2.

When a contracting party does not take effective remedial action against restrictive arrangements or practices affecting in a harmful way other contracting parties, it seems appropriate that the other contracting parties should be enabled to permit their enterprises to carry out counteracting restrictive arrangements or practices. This method of counteraction may, however, be suitable for the purpose only in some cases. In other cases it may be necessary to apply other means. There may, for instance, be a question of granting exemptions to apply quantitative restrictions.
(d) The investigations of the International Cartel Commission and consideration of the matter by the Executive Committee and the Assembly may require considerable time. If the harmful restrictive arrangements or unfair practices cause severe damage to an affected contracting party, it may, therefore, be necessary to enable that party to take provisional protective measures. That is the aim of the provisions laid down in Article 7, paragraph 3.

V.

COMMENTS ON CERTAIN ARTICLES

On Article 1

The Article distinguishes between restrictive business arrangements and practices, applied by dominant enterprises or dominant combinations of enterprises. The reason is that such practices may not always be of restrictive nature. A dominant enterprise may charge unreasonable prices or in other ways take unfair advantage of its position without imposing any restriction on competition. The dominant position itself cannot be characterized as a practice.

The term "restrictive business arrangements" has been considered more appropriate than the usual term "restrictive business practices". A cartel which is built up as a large organization is a restrictive business arrangement, but it might not properly be designated as a restrictive practice.

The definition of the term "restrictive business arrangements" in paragraphs 1 and 2 has been formulated on the pattern of the rules in the Treaty of Rome, Article 85, paragraph 1. Several alterations, however, have been made, more especially in order to adapt the rules to the system of control provided for by the Draft Agreement.

The general definition in paragraph 1 is meant - with one reservation, which will be mentioned below - to cover all kinds of restrictive arrangements between enterprises, whether they are horizontal or vertical, whether or not they impose obligations on the enterprise in question or only contain recommendations, and regardless of how the arrangements are carried out.

Paragraph 2 states that restrictive business arrangements fall within the scope of the agreement only when they are likely to affect trade between contracting parties. Some examples of such arrangements are mentioned without in any way limiting the general provisions in paragraph 1 and in the first part of paragraph 2.

As mentioned under Section II, 2, the Treaty on the European Coal and Steel Community has laid down special provisions relating to concentrations of enterprises in order to prevent monopolization. These provisions are very
Intricate. The Treaty of Rome has not in this respect followed the pattern of the Treaty on the European Coal and Steel Community. Article 86 of the Rome Treaty limits itself to a general prohibition of unfair practices applied by dominant enterprises.

Agreements or other transactions between enterprises having the effect of creating a dominating combination of enterprises may be characterized as arrangements in restraint of trade. The term "restrictive business arrangements" in paragraph 1 should not, however, be interpreted as covering such transactions. With due regard to the harmful effects which concentrations in certain cases might cause, it should be recognized that it would be quite impossible for GATT to deal effectively with such complicated matters. Following the pattern of Article 86 of the Treaty of Rome, the Draft Agreement, Article 2, paragraphs 3 and 4, only provides for action against practices by which dominant enterprises or dominant combinations of enterprises take unfair advantage of their position to the detriment of other contracting parties. The terms "dominant enterprises" and "combinations of enterprises" are defined in paragraph 3 of Article 1.

On Articles 2 - 7

Reference is made to the comments under Section IV.

On Article 8

Paragraph 1 imposes obligations on the contracting parties to furnish to the institutions of the Organization for Trade Cooperation necessary information for their work. The provisions are formulated on the pattern of the rules of Article 50, paragraph 3, of the Havana Charter, cf. the corresponding provisions in Article 5, paragraph 3, of the proposal, set forth by the Ad Hoc Committee, appointed by ECOSOC.

Paragraph 2 imposes on the contracting parties obligations to enact and maintain adequate legislation as the basis for the information to be furnished to the institutions of the Organization and to ensure within its jurisdiction the prevention or abolition of restrictive business arrangements and of unfair practices by dominant enterprises in accordance with the provisions of Article 2. Furthermore, it is stated that the contracting parties shall ensure that the legislation, enacted by them, is effectively enforced.

As mentioned under Section III the contracting parties cannot be expected to enact such legislation as here described before they have reached an agreement defining their obligations in this respect. It will consequently be necessary, after the Agreement is signed, to allow the contracting parties sufficient time to enact legislation.
If a contracting party has not enacted adequate legislation within the time limit fixed in the Agreement, or if it does not maintain such legislation or does not effectively enforce it, the question arises as to what measures should be taken by the Organization. The measures suggested in paragraphs 5 and 6 of Article 8 correspond to the provisions in Article 6, paragraph 6, and Article 8, paragraphs 1 and 2.

On Article 9

Article 9 is reserved for special provisions relating to public enterprises. Many problems arise here and they should be carefully studied before the provisions are drafted. Reference is made to the provisions in Article XVII of the General Agreement and to Article 90 of the Treaty of Rome.

On Article 10

The Article authorizes the Assembly to issue such regulations as it finds necessary for the implementation of the provisions of Articles 1 - 9 of the Agreement.

On Article 11

This Article is reserved for provisions with regard to the acceptance and the entry into force of the Agreement.

Additional Remarks

It may be necessary or appropriate to insert in the Agreement other provisions than those which are suggested in the Draft Agreement. This should be a matter for examination as part of the preparatory work to be undertaken by an Expert Group.
ANNEX II

DRAFT AGREEMENT

SUPPLEMENTARY AGREEMENT

TO

THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE
AGREEMENT ON THE ORGANIZATION FOR TRADE COOPERATION.

PREAMBLE

RECOGNIZING that national action and international cooperation in the
field of restrictive business arrangements can contribute substantially to
the attainment of the objectives set forth in Article I of the General Agree­
ment on Tariffs and Trade, the contracting parties agree to the following
Supplementary Agreement to the General Agreement on Tariffs and Trade and to
the Agreement on the Organization for Trade Cooperation:

Article 1

1. The term "restrictive business arrangements" shall in this agreement
mean associations, decisions of associations, agreements, concerted practices
and other arrangements between enterprises, having as their object or result
the prevention, restriction or distortion of the free play of competition.
The term applies regardless of how the arrangements are carried out and whether
or not they impose obligations on the enterprises in question or only contain
recommendations.

2. Restrictive business arrangements fall within the scope of this agreement
only when they are likely to affect trade between contracting parties, such as
for instance the following arrangements, provided that they relate to trade
between contracting parties:

(a) direct or indirect fixing of prices, rates of profit or terms of
business;

(b) limitation or control of production or of technical development
or investment;

(c) limitation or control of import or export or allocation of markets,
customers or sources of supply;

(d) discrimination, specifically as concerns prices or terms of business.
A restrictive business arrangement shall at any rate be considered as affecting other contracting parties, when it is made by enterprises within the territories of two or more contracting parties.

Restrictive business arrangements which have significance only on the domestic market or only affect countries which are not contracting parties to the General Agreement on Tariffs and Trade, fall outside the scope of this agreement.

3. The term "dominant enterprise" shall in this agreement mean an enterprise or a combination of enterprises which have dominant influence on trade in one or more commodities or services between two or more contracting parties. The term "combination of enterprises" shall mean enterprises which are under joint control of the same group of interests regardless of how the control is carried out, whether in the form of a trust, a holding company, or otherwise.

Dominant enterprises fall under the scope of this agreement only with the limitations set forth in paragraph 2 of this Article.

Article 2

1. Each contracting party shall take appropriate action to prevent or abolish within its territory restrictive business arrangements which are likely to have harmful effects on trade between contracting parties or otherwise hamper the objectives set forth in Article 1 of the General Agreement.

2. When such restrictive business arrangements as described in paragraph 1 are made by enterprises falling under the jurisdiction of different contracting parties, these contracting parties shall cooperate with each other for the purpose of taking remedial action as far as possible along similar lines with a view to complying effectively with the provisions of paragraph 1.

3. Each contracting party shall take appropriate action to prevent dominant enterprises within its territory from taking unfair advantage of their position to the detriment of other contracting parties. If such unfair practices are applied, the contracting party shall take action to abolish them.

4. When the enterprises partaking in a dominant combination fall under the jurisdiction of different contracting parties, these contracting parties shall cooperate with each other for the purpose of taking remedial action as far as possible along similar lines with a view to complying effectively with the provisions of paragraph 3.

Article 3

1. The Organization for Trade Cooperation, established by the Agreement, bearing the date of 10 March 1955, shall give effect to those provisions of this agreement, which provide for joint action, cf. Articles 4 - 11.
2. In addition to the institutions established by the agreement on the Organization for Trade Cooperation is hereby established a special commission, the International Cartel Commission. The Commission shall, in accordance with the provisions of this agreement, deal with matters concerning restrictive business arrangements and unfair practices applied by dominant enterprises.

3. The International Cartel Commission shall consist of seven members elected by the Assembly. The members shall be elected for a term of four years, provided that at the first election three of the members shall be elected for two years only. The members shall be eligible for re-election. The Assembly shall also elect alternates. If a member or an alternate retires before his term is expired, the Assembly shall elect another member or another alternate for the rest of the term.

The members of the Commission shall perform their duties in the general interests of all contracting parties and shall neither solicit nor accept instructions from any government.

The paramount considerations in the selection of candidates shall be their competence, integrity and impartiality as individuals. Due regard shall also be had for the desirability of including in the Commission members from countries in different geographical areas and with different types of economies.

4. The International Cartel Commission shall perform its duties with the assistance of the secretariat in accordance with rules established by the Assembly.

**Article 4**

1. The International Cartel Commission is authorized to conduct studies relating to restrictive business arrangements and dominant enterprises, affecting trade between contracting parties. The Commission may request information from the contracting parties for this purpose and may also make use of information from other sources. The Commission may publish the results of such studies. The studies shall be kept apart from the investigations carried out under the provisions of Article 6.

2. The International Cartel Commission may arrange for conferences of contracting parties to discuss matters relating to restrictive business arrangements and practices applied by dominant enterprises, falling under the scope of this agreement.

**Article 5**

A contracting party being affected by a particular restrictive business arrangement, which it considers to have such harmful effects as described in Article 2, paragraph 1, or by a practice applied by dominant enterprises which it considers to be unfair, cf. Article 2, paragraph 3, may consult the contracting party or the contracting parties having jurisdiction over the enterprises in question with a view to reaching a mutually satisfactory solution. At the request of a contracting party affected, the International Cartel Commission shall arrange for such consultations. Action under this Article shall be without prejudice to the procedure provided for in Article 6.
Article 6

1. The International Cartel Commission shall, at the request of a contracting party or on its own initiative, carry out investigations to ascertain whether or not:

(a) a particular restrictive business arrangement has such harmful effects as described in Article 2, paragraph 1;

(b) a particular practice applied by a dominant enterprise is of such unfair nature as described in Article 2, paragraph 3.

If the Commission finds that a request from a contracting party is completely without justification, the Commission shall decline to undertake investigations.

2. When the International Cartel Commission has decided to undertake an investigation, it shall inform all the contracting parties thereof.

The Commission may request the contracting party or contracting parties having jurisdiction over the enterprise or enterprises in question to furnish necessary information, including particulars from the enterprises. It may also request other contracting parties to furnish additional information.

The Commission may conduct or arrange for hearings on the case. Interested contracting parties as well as representatives for the enterprises whose actions are under investigation, shall be afforded reasonable opportunity to be heard.

3. After reviewing all information available, the Commission shall report its findings to the interested contracting parties.

4. If the Commission finds that the restrictive business arrangement or the practice which has been investigated, is of such nature as described in Article 2, paragraph 1 or 3 respectively, the contracting party having jurisdiction over the enterprise or enterprises in question, shall as soon as possible take action to comply with the provisions of Article 2. It shall inform the Commission of the actions taken.

5. If the restrictive business arrangement or the practice which has been investigated, is carried out by enterprises falling under the jurisdiction of different contracting parties, and the arrangement or the practice has been found to be of such nature as described in Article 2, paragraph 1 or paragraph 3 respectively, the Commission may make recommendations to the contracting parties in question to cooperate with each other in accordance with the rules laid down in Article 2, paragraph 2 or paragraph 4 respectively. The contracting parties shall inform the Commission of the measures taken.

6. If the contracting party or the contracting parties in question do not take action on the reports from the Commission in accordance with the provisions of paragraphs 4 and 5, cf. Article 2, or if the Commission finds that the measures taken are inadequate or ineffective, a report on the matter shall be submitted to the Executive Committee.
1. The Executive Committee having received from the International Cartel Commission such a report as mentioned in Article 6, paragraph 6, may, if it agrees with the Commission, request the contracting party or the contracting parties in question to take action in accordance with specific recommendations within a time limit determined by the Committee. If the contracting party or the contracting parties do not comply with these recommendations, the Committee shall submit a report to the Assembly with recommendations as to the steps to be taken. If the Committee does not agree with the Commission, it shall report thereon to the Assembly.

2. In order to enable contracting parties to counteract the harmful effects of the restrictive business arrangement or the unfair practice described in the reports from the International Cartel Commission and the Executive Committee, the Assembly may:

(a) grant to contracting parties affected, exemptions from the obligations set forth in Article 2 with respect to restrictive business arrangements or practices applied by dominant enterprises in so far as the arrangements or practices are applied against contracting parties which have not complied with the findings of the International Cartel Commission, cf. Article 6, paragraphs 4 and 5, and where applicable, with the recommendations made by the Executive Committee, cf. paragraph 1 of this Article.

(b) grant to contracting parties affected, exemptions from Articles ...... of the General Agreement with respect to trade with contracting parties which have not complied with the findings of the International Cartel Commission, cf. Article 6, paragraphs 4 and 5, and where applicable, with the recommendations made by the Executive Committee, cf. paragraph 1 of this Article.

(c) instruct the International Cartel Commission not to carry out investigations according to Article 6 at the request of contracting parties which have not complied with the findings of the International Cartel Commission, cf. Article 6, paragraphs 4 and 5, and where applicable, with the recommendations made by the Executive Committee, cf. paragraph 1 of this Article.

Such exemptions as mentioned under (a) and (b) may also be granted to other contracting parties which are willing to cooperate in the matter of counteracting measures.

The Assembly may authorize the Executive Committee to repeal the exemptions mentioned under (a) and (b) and the instructions mentioned under (c) as soon as the contracting parties in question have complied with the findings of the International Cartel Commission, cf. Article 6, paragraphs 4 and 5, and where applicable, with the recommendations made by the Executive Committee, cf. paragraph 1 of this Article.

3. If the harmful restrictive business arrangements or unfair practices described in the reports mentioned in paragraph 2 cause severe damage to affected contracting parties, the Executive Committee may grant to them provisionally such exemptions as mentioned in paragraph 2(a) and (b).

In cases of emergency an affected contracting party may without prior approval of the Executive Committee apply the rule laid down in paragraph 2(a). The contracting party shall immediately report to the Executive Committee on the measures taken. The measures shall be repealed if such action is requested by the Executive Committee.
Article 8

1. Each contracting party shall furnish to the International Cartel Commission or to the other institutions of the Organization for Trade Cooperation as promptly and as fully as possible such information as they request for their work in accordance with the provisions of this agreement. On notification to the respective institution, a contracting party may, however, withhold information which it considers not essential for carrying out the studies or investigations which the respective institution of the Organization has undertaken, and which, if disclosed, would substantially damage the legitimate business interests of an enterprise. In notifying the institution in question that the contracting party is withholding information pursuant to this clause, the contracting party shall indicate the general character of the information withheld and the reason why it considers it not essential.

2. Each contracting party shall enact and maintain adequate legislation:

(a) to be able to furnish information to the institutions of the Organization for Trade Cooperation in accordance with the provisions of paragraph 1 of this Article;

(b) to ensure within its jurisdiction the prevention or abolition of restrictive business arrangements and of unfair practices by dominant enterprises in accordance with the provisions of Article 2.

Each contracting party shall, furthermore, ensure that the legislation enacted by it is effectively enforced.

3. At the request of a contracting party the International Cartel Commission shall give advice with regard to the enactment of such legislation as mentioned in paragraph 2 and with respect to the application of the legislation.

4. Each contracting party shall inform the International Cartel Commission of the legislation which it has enacted in accordance with paragraph 2 and of the general lines of the application thereof. The Commission shall transmit the information to the other contracting parties.

5. If the Commission finds that a contracting party has not enacted or maintained adequate legislation in accordance with paragraph 2 of this Article, or that the legislation is not effectively enforced, the Commission shall report thereon to the Executive Committee.

The Executive Committee shall forward the report to the Assembly with its recommendations with regard to the steps to be taken.

6. The Assembly, having received such report as mentioned in paragraph 5, may request the contracting party in question to enact adequate legislation or to take necessary steps to enforce such legislation in accordance with specific recommendations within a time limit determined by the Assembly.

If the contracting party does not comply with the recommendations, the Assembly may grant to the other contracting parties such exemptions as mentioned in Article 7, paragraph 2 (a) and (b), and may give instructions as mentioned in the said Article paragraph 2 (c).
Article 9
(Special provisions relating to public enterprises.)

Article 10
The Assembly may issue such regulations as it finds necessary for the implementation of the provisions set forth in Articles 1 - 9 of this agreement.

Article 11
(Provisions concerning the acceptance and the entry into force of the Agreement.)