REPORT OF THE DRAFTING COMMITTEE OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT

CHAPTER VI

RESTRICTIVE BUSINESS PRACTICES

1. The text of Chapter VI as redrafted by the Drafting Committee appears in documents E/PC/T/C.6/W.66 and E/PC/T/C.6/W.79, and as redrafted by the Legal Drafting Sub-Committee, in this document.
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 which restrain competition, limit access to markets or foster monopolistic control whenever such practices have harmful effects on the expansion of production and trade and the maintenance in all countries of high levels of real income or impair any of the purposes of the Organization as set forth in Article 1.
COMMENTS

CHAPTER VI

RESTRICTIVE BUSINESS PRACTICES

GENERAL COMMENTS

1. The delegates of Brazil, Chile, Cuba and India sustained their reservation from the First Session of the Preparatory Committee against the exclusion of services from the purview of Chapter VI. The delegate of Cuba went on record with the opinion that services fell under the terms of reference of the Preparatory Committee and that in this respect there was no necessity to request a ruling of the Economic and Social Council of the United Nations.

2. The delegates for Brazil and Chile maintained the reservations which their delegations had made at the First Session regarding the compulsory registration of restrictive business practices with the Organization. The delegate for Czechoslovakia made a similar reservation. The delegate for Brazil also maintained the reservation which his delegation had made at the First Session, that the register of restrictive business practices, kept by the Organization, should be given some degree of publicity.

SPECIFIC COMMENTS

Article 39

Policy Towards Restrictive Business Practices

Brazil's original motion to include the mention of economic development in paragraph 1 was met by the wording of paragraph 1, which, through its reference to all the purposes of the Organization as set forth in Article 1 implicitly includes economic development.
2. Without limiting the generality of paragraph 1 of this Article, the practices listed in paragraph 3 below shall be subject to investigation in accordance with the procedure with respect to complaints provided by the relevant Articles of this Chapter, if the Organization considers them to have or to be about to have any of the harmful effects enumerated in paragraph 1 of this Article, whenever

(a) they are engaged in or 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, (i.e., trading agencies of governments or enterprises in which there is effective public control), or between private and public commercial enterprises; and
1. In the first sentence of paragraph 2 the words "in accordance with the procedure with respect to complaints provided by the relevant articles of this Chapter" have been inserted on the motion of the French Delegate in order to make it clear that the investigation procedure provided for in Article 40 should only follow upon a specific complaint in accordance with Article 40, and not as a consequence of studies undertaken by the Organization in accordance with Article 41. The Drafting Committee was not certain whether this addition did not constitute a substantive change of the original text, by limiting the authority of the Organization to investigate restrictive business practices on the Organization's own initiative. The Committee decided to include the sentence but to refer the question of the substantive change to the Second Session of the Preparatory Committee.

2. The term "public control" has been substituted for the term "government control" to clarify that enterprises under the control of subordinate public bodies, such as municipalities and others, also fall under this sub-paragraph.

3. The words "public or" were inserted before "private commercial enterprises" to avoid any discrimination in the substance of the obligations placed on the two types of enterprise. It was not found practicable to draft Article 32 and 33 in such a way as to include the obligations undertaken, by state monopolies regarding Restrictive Business Practices. The United Kingdom's Delegation reserved its position on this insertion.

4. The Delegates of China and Brazil reserved their position with regard to the inclusion of public commercial enterprises
(b) such commercial enterprises, individually or collectively, possess effective control of trade among a number of countries in one or more products.

3. The practices referred to in paragraph 2 of this Article 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 whether by boycott or otherwise;

(d) limiting production or fixing production quotas;

(e) suppressing the application or development of technology or invention, whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights to matters not properly within the scope of the authorized grant, or to products or conditions of production, use or sale which are not the immediate subjects of the authorized grant.
In this sub-paragraph,

5. The Delegate for Chile considered that the changes in paragraph 2 constitute a substantive amendment and preferred to express his final position in this matter at the Second Session.

39:3(c) 1. The rewording of this sub-paragraph was approved to meet a reservation on the part of Belgium which had pointed out at the First Session that boycotts constituted not a specific practice but only a special case of discrimination.

39:3(e) 2. The words "or development" were added to the text.

39:3(f) 3. The words "of the authorized grant" were added so as to clarify the wording.

4. The Delegate for the Netherlands maintained his reservation from the First Session in view of regarding the highly technical character of this sub-paragraph.
CHAPTER 40: Article 40
Procedure with Respect to Complaints and Conferences

1. The Organization shall

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

(b) consider each written complaint submitted by any Member or submitted with the authorization of a Member by any affected person, organization or business entity within that Member's jurisdiction, claiming that particular practices exist which have or are about to have the effect described in paragraph 1 of Article 39, and prescribe the minimum information to be included in such complaints;

(c) consider and request each Member concerned to furnish such information as the Organization may deem necessary including, information or data from commercial enterprises within its jurisdiction, and then determine whether further investigation is justified;
COMMENTARY

Article 40

Procedure with Respect to Complaints and Conferences

GENERAL COMMENTS

1. The Delegate for the Netherlands maintained the reservation his Delegation had made at the First Session regarding the reference of complaints to the International Court of Justice.

2. An Australian rearrangement and partial redraft of Article 40 was referred to the Second Session.

SPECIFIC COMMENTS

1. The United Kingdom Delegation, seconded by the French Delegation, suggested the following formulation: "consider each written complaint submitted by a Member on its own behalf or on behalf of any affected person, organization or business entity, within that Member's jurisdiction". The Drafting Committee decided to retain the London text, merely substituting the word "authorization" for "permission", and decided to refer this issue to the Second Session.

2. The Drafting Committee wished to state that in its opinion it would be one of the first tasks of the Organization, once a complaint had been received, to approach those Members for information within whose jurisdiction the person or business entity alleged to be engaged in the restrictive business practice was operating.
(d) if it considers that further investigation is justified, notify all Members of each such complaint, request the complainant or any Member to provide such information relevant to the complaint as the Organization may deem necessary and conduct or arrange for hearings provided that any Member and the parties alleged to have engaged in the practice shall have the opportunity to be heard at such hearings.

(e) review all information available and determine whether the practices in question have or are about to have the effect described in paragraph 1 of Article 39.

2. The Organization shall

(a) report fully to all Members its determination and the reasons therefor; if it finds that the practices have had or are about to have the effect described in paragraph 1 of Article 39, it shall request each Member concerned to take every possible action to prevent the continuance or recurrence of the practices, and may recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures;

(b) request all Members concerned to report fully the action they have taken to achieve these results;

(c) prepare and publish, as soon as possible after enquiries have been provisionally or finally closed, reports on all complaints dealt with under paragraph 1 (d) of this Article, showing fully its decisions, findings or other conclusions, the reasons therefore and any action which the Organization has recommended to the Members concerned;

Provided, that
3. The Drafting Committee inserted the words "or are about to have" into the text of this sub-paragraph in order to make the text consistent with the wording of Article 39, paragraph 2.

1. Three delegations objected to the insertion of the clause "or are about to have" in this paragraph because they considered such an insertion to contain a substantive change by increasing the authority of the Organization under this paragraph. The Committee consequently put the phrase in this context into square brackets and referred the decision on the issue to the Second Session.

2. The words "provisionally or finally closed" were substituted for the word "completed" to clarify that the Organization, according to the circumstances of the case, would not always be obliged to complete its enquiries, but if its findings warranted such procedure could temporarily discontinue investigations.
(1) publication of such reports or any portion thereof may be withheld if it deems this course justified; and

(ii) 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.

(d) report to all Members, and make public if it deems desirable, the action which has been taken by the Members concerned to realize the purposes described in paragraph 2 (a) of this Article.

**Article 41**

**Studies Relating to Restrictive Business Practices**

1. The Organization may

(a) conduct studies, either on its own initiative or at the request of any Member, or of the United Nations, or any specialized agency brought into relationship with the United Nations, relating to

(i) types of restrictive business practices in international trade;

(ii) conventions, laws and procedures concerning, for example, incorporation, company registration, investments, securities, prices, markets, fair trade practices, trademarks, copyrights, patents and the exchange and development of technology, insofar as they are relevant to restrictive business practices;

(b) request information from Members in connection with such studies.
CHARTER

2. The Organization may

(a) make recommendations to Members concerning such
conventions, laws and procedures as are relevant to their
obligations under this Chapter;
(b) arrange conferences for purposes of general consultation
on any matters relating to restrictive business practices.

Article 42

Obligation of Members

1. In order to implement the preceding Articles, this
Chapter, each Member shall

(a) take all possible steps by legislation or otherwise
to ensure that private and public commercial enterprises
within its jurisdiction do not engage in practices which
have the effect described in paragraph 1 of Article 39;
(b) take fullest account of the Organization's
determinations, requests and recommendations made under
paragraph 2 (a) of Article 40 and determine appropriate
action in accordance with its system of law and economic
organization to prevent within its jurisdiction the
continuance or recurrence of any practices which the
Organization find to have had or to be about to have the
effect described in paragraph 1 of Article 39.

2. Each Member shall

(a) establish procedures to deal with complaints, conduct
investigations, prepare information and reports requested
by the Organization and generally assist in preventing
practices which have the effect described in paragraph 1
of Article 39, these measures to be taken in accordance
with the particular system of law and economic organization
of the country concerned;
Specific Comments

1. The Drafting Committee decided to insert the phrase "or to be about to have" in square brackets in the text because the same doubts with regard to substance prevailed as regarding the insertion of this phrase in Article 40, paragraph 2 (a).

2. Certain Delegations reserved their position with regard to the use of the word "determine" in the third line and suggested to replace it by the words: "in deciding as to".
(b) conduct such investigations as may be necessary and practicable to secure information requested by the Organization or to prevent practices which have the effect described in paragraph 1 of Article 39;
(c) furnish to the Organization, as promptly as possible and to the fullest extent practicable, such information as is requested by the Organization under paragraphs 1 (c), (d) and 2 (b) of Article 40 and under paragraph 1 (a) of Article 41 provided that the Member
(i) may withhold confidential information relating to its national security; or
(ii) on proper notification to the Organization, may withhold information which is not essential to the Organization in undertaking an adequate investigation and which, if disclosed, would materially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld;
(d) report, as requested by the Organization under paragraph 2 (b) of Article 40, the action taken, independently or in concert with other Members, to implement recommendations made by the Organization under paragraph 2 (a) of Article 40, and, in cases in which no action is taken, to explain to the Organization the reasons therefor and discuss the matter further with
1. This new clause was inserted to provide for the adequate protection of legitimate business interests of commercial enterprises against damaging disclosures. Upon the motion of the United Kingdom, Committee III of the First Session, in its last meeting, had agreed to incorporate such a proviso into the text of Chapter VI and the clause newly inserted under (ii) implements this decision.

2. The Belgian, French and Luxembourg delegations recorded a reservation against the phrase "which is not essential to the Organization in undertaking an adequate investigation", as a substantive departure from the agreement reached at the First Session.
the Organization if requested to do so;
(e) take part in conferences upon the request of the
Organization in accordance with paragraph 1 (a) of
Article 40 and paragraph 2 (b) of Article 41.

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
Any act or omission to act on the part of the Organization
shall not preclude any Member from enforcing any national
statute or decree directed towards preventing monopoly or
restraint of trade.

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;
(b) the international arrangements excepted in Article 59.
COMMENTARY

42:2 (e) 1. The Drafting Committee inserted a reference to paragraph 1 (a) of Article 40 because it believed that the intention of the First Session had been to include in this paragraph conferences under Article 40 as well as conferences under Article 41.

2. The United Kingdom reserved its position on the insertion of the reference to paragraph 1 (a) of Article 40.

Article 45

Exceptions to the Provisions of this Chapter

45:1 1. The Drafting Committee examined the desirability of re-inserting paragraph 1 (c) of Article 40 of the United States Draft Charter reading: "agreements or understandings concerning railway transportation, aviation, shipping and telecommunications services", into the text of Article 45,
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.
but in the absence of general agreement decided against re-insertion. Certain delegations desired to see services included; others desired to see them partly or wholly excluded. The Committee felt that the matter was one of substance going beyond its competence and decided to leave it for consideration at the Second Session. The United Kingdom delegation expressed itself in favour of the complete exclusion of services.

2. The delegate for Chile proposed that if Article 45, paragraph 1, sub-paragraph (c) were re-inserted, it should read:

"Inter-governmental agreements under the sponsorship of the Economic and Social Council of the United Nations, the International Trade Organization and other specialized agencies concerning railway transportation, aviation, shipping and telecommunications services".

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