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**RAPPORT SUR LES TRAVAUX DE LA COMMISSION SPÉCIALE DE MAI 1985 SUR LE
FONCTIONNEMENT DE LA CONVENTION**

établi par le Bureau Permanent

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**REPORT ON THE WORK OF THE SPECIAL COMMISSION OF MAY 1985 ON THE OPERATION
OF THE CONVENTION**

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The Special Commission on the operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters met for the second time at The Hague from 28 to 31 May 1985, with Mr T.B. Smith, the Canadian Expert, serving as Chairman, and Mr P. Volken, of Switzerland, acting' as Vice-Chairman.

The first meeting of the Special Commission on this Convention took place from 12 to 15 June 1978, with Mr T.B. Smith also acting as Chairman.

Although a few difficult subjects were included in the Commission's agenda, the Special Commissions like the previous one, managed to deal with its agenda in a successful way. Nearly forty experts were present, representing, respectively, thirteen of the seventeen States which are now Parties to the Convention (Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Italy, Luxemburg, the Netherlands, Norway, Portugal, Sweden, the United Kingdom and the United States), seven States which were Members of the Conference but not Parties to the Convention (Argentina, Australia, Canada, Ireland, Japan, Switzerland and Uruguay), three States which were not Parties to the Convention nor Members of the Conference (Chile – elected as a Member of the Conference –, the People's Republic of China and Swaziland) and one international organization (the Commonwealth Secretariat). Once again, the experts were mostly drawn from the governmental offices which had responsibility for applying the Convention; in addition the meeting was attended by experts in two fields which were the subject of a special exchange of views; arbitration and competition law.

Following the mandate given to the Commission by the Fifteenth Session (1984) of the Hague Conference, the Special Commission's agenda was divided into three parts: I Operation of the Convention, II Exchange of views on the possibility of using the Convention for the taking of evidence abroad in the context of arbitral proceedings and III Exchange of views on the possibility of international co-operation relating to the taking of evidence in fields connected to competition law.

I. OPERATION OF THE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The meeting opened with a round-table discussion from which it appeared that, on the whole, the Convention had not given rise to major problems and that its application was satisfactory. It was generally recognized, though, that the Convention was probably not sufficiently used. This was to be deplored, because its use would help to reduce court costs substantially.

§ 1 Scope of the Convention

A Meaning of the term "civil or commercial matters"

1 Bankruptcy proceedings

The question was raised as to whether a request for the taking of evidence emanating from a foreign bankruptcy court was within the scope of "civil or commercial matters". In some States, for instance in the United States, special bankruptcy courts exist dealing with various aspects of bankruptcy. The experts agreed that a distinction must be made between, on the one hand, penal proceedings arising from fraud on the part of the bankrupt – or the officers of a bankrupt company –, which fall outside the scope of the Convention, and, on the other hand, regular bankruptcy proceedings which are everywhere considered to be civil in nature, falling within the Convention's coverage.

2 Distinction between "civil or commercial" matters and "administrative" matters

This question had already been raised at the first Special Commission meeting on the operation of the Convention (see *supra*, p. 36). The experts agreed that a precise distinction could not be drawn between these types of proceedings. A complicating factor is that, on the one hand, a request for evidence may emanate from an administrative tribunal acting on questions of a civil nature or, on the other hand, the request may emanate from a civil court at the instance of an administrative body which is a party to a civil lawsuit.

Attention was drawn to the judgment of the English High Court of Justice Queen's Bench Division of 23 February 1984 in the matter of *Securities and Exchange Commission v. certain unknown purchasers of the common stock and call options for the common stock of Santa Fé International Corporation et al.* (commonly referred to as the Santa Fé case), where the court implicitly considered a request for the taking of evidence emanating from a United States court in proceedings initiated by the American Securities and Exchange Commission to be of a civil or commercial nature. This decision reveals a liberal attitude towards the utilization of the Convention in matters falling in the borderland between civil or commercial and administrative matters.

As in 1978, some experts indicated that in practice their courts accept the characterization as "civil or commercial" given by the requesting authorities under their own law, but other experts indicated, to the contrary, that this determination should be made according to the views of the State addressed.

3 Utilization of evidence obtained under the Convention in criminal proceedings

The question as to whether evidence obtained under the Convention could be used in criminal proceedings (which in some countries, e.g. the People's Republic of China, may in the first instance take place not before a criminal court but before an administrative tribunal) in the requesting State had also already been raised at the first Special Commission meeting (see *supra*, p. 36).

One delegation asked what the effect would be of transmitting the evidence under the express condition that it be used only in specific proceedings, excluding all others. The unanimous response was that such a condition would have no effect, particularly because of the fact that in all legal systems evidence has to be made available to the parties as well as to the court.

B The concept of "judicial authority"

The question was posed as to whether, e.g. an Attorney General is a "judicial authority" within the meaning of article 1 of the Convention. The discussion showed that it was not necessarily the name of the authority which was determinative, but rather the function exercised in the particular case which must be of an adjudicatory nature. Many experts indicated that their Central Authorities interpret the term in a liberal way.

C Production of documentary evidence; measures of compulsion

While legal systems of common law countries and of the Nordic countries generally provide for compulsion to be applied against a party to a lawsuit or a third person to produce a document in his possession, most civil law systems do not provide such a possibility. A difference of opinion appeared as to the question of whether under article 10 of the Convention the courts of a requested State of the latter category of legal systems may decline to apply any compulsion in order to cause the production of documents, or whether the spirit of the Convention should rather inspire them to find ways within their own system to assist the foreign court. The question may become acute, more particularly, where the requested State concerned has not made an absolute reservation under article 23 of the Convention.

The decision of the *Oberlandesgericht* (Higher regional court) Munich of 27 November 1980 (see *infra*, Part Four, No 12, pp. 114 and 115) illustrates that even where the requested State, as in the case of the Federal Republic of Germany, has made an absolute reservation under article 23, it may be possible to obtain information on documents which themselves could not be surrendered or produced, by way of the compulsory examination of third persons as witnesses concerning the contents of those documents.

D Extension of the Convention

The French delegation proposed that the system of the Convention be used for the exchange of information on foreign law between Central Authorities. The Special Commission did not approve of this proposal, to the extent that it implied an obligation on the part of the Central Authorities. Some experts referred to the European Convention on Information on Foreign Law (London, 7 June 1968) which is in force among a great number of Members of the Conference and which already deals with some aspects of the

proposal. It was agreed, however, that Central Authorities remain free of course to exchange such information, in particular information on their respective laws and on the status of proceedings in their countries, on an informal basis.

§ 2 Forwarding of Letters of Request

A Forwarding authorities: centralization versus decentralisation

As in 1978, it appeared that practices varied on this point. In some States the courts seized of the lawsuits send the requests for evidence directly to the foreign Central Authorities, in most other States they send their requests abroad through the channel of their own Central Authorities. Arguments in favour of and against both systems were advanced, but no single solution was achieved.

B Language problems

The problem of bad translations of letters of request was raised. Such translations cause problems in giving instructions to the executing authorities and may result in lengthy delays. However, it was pointed out that the quality of a translation depends on the competence of the translators who are available to the court in the requesting State.

C The model form

The first Special Commission had recommended the use of a model form of letter of request (see *supra*, pp. 41-42). Some experts had pointed out that the model form is rarely used and that greater use of it could contribute to a more efficacious processing of letters of request. Moreover, it was suggested that the model could be improved. Attention was drawn to the additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad, adopted in La Paz on 24 May 1984, which provides for more detailed forms. Contrary to these forms which constitute an inherent part of the OAS Protocol, however, the model form recommended by the 1978 Special Commission is not included in the treaty itself, but entirely optional. The Special Commission, therefore, was free to recommend any amendments to the model. A small drafting committee, chaired by Mr G. Möller (Finland), and composed of Messrs Volken (Switzerland), Epstein (United States), Böhmer (Federal Republic of Germany), Gerard (Luxemburg) and Meijknecht (Netherlands), suggested a number of amendments to the 1978 model form. The modified form appears as an annex to this Report.

Apart from a number of purely formal amendments, the following items were added to the model: a new *Item 4* was included asking for specification of the date by which the requesting authority requires receipt of the response to the letter of request and to state the reason for any special urgency. This was done, in order to draw attention to any special situation where expedited treatment is required and to obtain prompt action where the need for such action is justified. *Item 5 c* was added which needs no explanation. In the heading of *Item 6*, it is now suggested that details be given on any representative in the requested State. Indeed, it may be very useful for the receiving Central Authority and the executing court to be able to contact local counsel if available in the requested State. This will help to avoid any unnecessary delay. Under *a, b* and *c* of the same *Item 6* it is now suggested that details be given on the representatives of the parties to the lawsuit in the requesting State. In order to attract the statement of more details on the proceedings, in *Item 7* examples have been added of categories of litigation which may lead to the issuance of letters of request, and it is suggested that a summary be given of the complaint and the defence and any counterclaim, as well as other necessary information or documents. It may be useful, *e.g.* to attach copies of any relevant judicial decisions specifying the nature and details of the evidence sought, to the extent that they may be of assistance to the receiving Central Authority or the executing court. Under *8 b*, an item is added concerning the purpose of the evidence or judicial act sought. This was done with a view, in particular, to requests for the pre-trial discovery of documents where it may be useful to specify how the information sought relates to the lawsuit pending in the requesting State,

The Special Commission emphasized that the model form is simply an aid, and that in the last resort it is the text of the Convention, in particular article 3, which remains decisive.

§ 3 *Receipt and execution of Letters of Request*

A Problems of delay

The discussions showed that the average delay in executing letters of request varied between one and six months depending on such factors as the possible presence of counsel, the courts' workload and the possibility of appeal against the decision on the execution of the request – which is offered by some systems but not by others. A number of experts indicated that their Central Authorities are able to give special expedited processing to urgent requests (*cf.* also new Item 4 in the revised model form).

B Special methods or procedures (article 9, second paragraph)

Article 9, second paragraph, which provides that if the requesting authority specifies a particular procedure for the taking of evidence, that procedure must be followed unless incompatible with the domestic laws of the State of execution or impossible of performance due to practical difficulties, serves a very useful function in bridging the differences between the various systems of civil procedure. The discussion revealed a great openness of the States Parties to the Convention towards admitting application of each other's procedures on their territory. For example, the Experts of the Federal Republic of Germany indicated that, although the laws of civil procedure of their country do not provide for the taking of evidence "common law style", the requested court will, if so requested, allow the testimony to be taken down in shorthand or by another means, such as tape recorders. Also it will, if so requested: put the witness on oath; order that a transcription of the testimony be made and that the transcription be read to the witness and signed by him; certify that the recorded testimony is accurate and reliable; and give an assurance that all objections of a party or witness against the manner in which the deposition is taken will be put down in the minutes. The parties may be accompanied by their attorneys and their interpreters, otherwise the court will arrange for the interpretation by sworn interpreters. Furthermore, cross-examination of the witness is allowed under the control of the requested judge. The French Expert referred to the amendments to the French Code of Civil Procedure (articles 739 and 740) which were made expressly to include new provisions in accordance with article 9, paragraph 2, of the Convention. Article 739, second paragraph, now expressly provides; "If so requested in the letter of request, questions and answers shall be transcribed or recorded in full." And article 740 reads: "The parties and their counsel, even if they are foreigners, upon authorization by the judge, may ask questions. Such questions must be formulated in or translated into French, as must the replies which are made thereto."

In fact it appeared that the courts in civil law countries generally will allow for depositions to be taken "common law style" if so requested, even though they may sometimes have difficulties in conducting a cross-examination or encounter problems due to the time-consuming procedure of verbatim recording of testimony. On the other hand, the United States Expert mentioned an example where the United States acceded to a request from a panel of judges from the Federal Republic of Germany to preside at an evidentiary hearing in New York. The witness was examined by the German judges pursuant to judicial procedure in the Federal Republic of Germany. Also the United States follows special procedures requested by the Central Authorities of other States in obtaining blood samples from witnesses in the United States in connection with paternity cases.

C Privilege or duty to refuse to give evidence (article 11 of the Convention)

Discussions showed that no problems seem to arise where the claimed privilege is based on the laws of the State of execution. On the other hand, where the privilege is founded on the laws of the State of origin, problems may arise, in particular because of the difficulty of proving the privilege under the law of that State. This may cause considerable delays in the execution of the request and consequently in the proceedings.

D Blocking statutes

A number of countries, in a reaction against what they conceive of as abuses inherent in some forms of pre-trial discovery combined with exorbitant assertions of judicial jurisdiction, have adopted, since the 1978 meeting, many statutes which prohibit the production of certain evidence abroad or provide for the possibility that an order may be

made prohibiting such production. It was pointed out that such blocking statutes, if they are to be compatible with the Convention, must remain within the limits set in article 12 of this Convention. In this connection several experts, basing their interpretation on the French text of article 12, pointed out that the expression "exclusive jurisdiction over the subject-matter of the action" in the second paragraph of that article should be construed as referring to the adjudicatory rather than the legislative jurisdiction of the requested State.

§ 4 *Pre-trial discovery of documents*

The subject of pre-trial discovery of documents, the reservation of article 23 of the Convention relating thereto, and the interrelationship with blocking statutes constituted the core issues of this meeting.

The experts from the common law countries represented at the meeting explained once again what is to be understood by pre-trial discovery of documents and reported on new developments since 1978.

The United States Experts emphasized as they had done in 1978 that the expression "pre-trial" does not literally mean: "before the commencement of the proceedings". The fact-finding process can only be engaged after institution of civil proceedings, *i.e.* after a complaint has been filed with the court and summons been served on the defendant (c/. U.S. Federal Rules of Civil Procedure, Rule 3 and following). It is true that the search for facts, witnesses, *etc.*, is conducted by the parties themselves and not by the courts as is generally the case in civil law countries, and that the courts will only intervene when the parties cannot agree among themselves. The process is controlled, however, by the Federal Rules of Civil Procedure and state rules patterned after these rules. In particular they provide for safety guards against discovery abuse; and there is no automatic duty to render documents or to produce witnesses; objections may be made, privileges invoked. Also a party may request a protective order from the court which has power to order *e.g.* that trade secrets not be disclosed. In addition, the rules provide for discovery conferences through which the court may establish a plan for discovery. Many federal courts have adopted limitations on discovery and in 1983 amendments to the Federal Rules (in particular Rules 26(b)(1), (c) and (g)) were adopted. Under Rule 26(b)(1), as it now reads, the court shall, acting upon its own initiative or pursuant to a motion by a party, limit the frequency or extent of the discovery method, if it determines, among other things, that the discovery is unreasonable or unduly burdensome or expensive; under Rule 26(g), as amended, every request for discovery or response thereto must now be signed by the attorney to certify that the request is consistent with the civil procedure rules and not made for improper purposes or is unreasonable or unduly burdensome or expensive. The American Experts stressed that these amendments were not sufficiently known, even by American attorneys themselves, and were underutilized, but might provide effective means to curb abuses leading to "fishing expeditions".

The Experts from the United Kingdom pointed out that, although the general objects of discovery in the United States courts are similar to those of discovery in the United Kingdom, they are in certain respects more far-reaching in extent, particularly in their application to non-parties. English courts do not, except in a limited class of cases, allow discovery against non-parties (the purpose of the exception being chiefly to enable a person injured in an accident to obtain access to his own hospital records if he wishes to sue). As far as the parties to the litigation are concerned, generally speaking they must disclose *a)* documents which are admissible in evidence or disprove any of the disputed facts (the facts in issue); *b)* documents which, though not themselves evidence, "contain information which may enable the [other] party either to advance his own case or to damage that of his adversary if it is a document that may fairly lead him to a chain of inquiry which may have either of these consequences".

These problems concerned the United Kingdom when making its statement under article 23. What it effectively precludes is a party seeking discovery conducting a "fishing expedition" by a request for the production of unspecified documents which may or may not be in a person's possession and may not necessarily turn out to be relevant to the

proceedings but might for example be such as would lead to a train of enquiry which might itself lead to relevant material. The United Kingdom's position was illustrated by the Westinghouse Uranium case (*infra*, pp. 118-119) as well as by the recent *Re Asbestos Insurance Coverage* cases [1985] 1 *All E.R.* 716, [1985] W.L.R. 331.

Experts from civil law countries pointed out that in the absence of similar procedures in their systems their courts and lawyers, generally, will tend to consider pre-trial discovery of documents procedures much sooner as being unreasonable or overly burdensome than lawyers in the United States, particularly if they go hand in hand with excessive adjudicatory jurisdiction pretensions. This was why in their view some form of reservation under article 23 was needed. Most of these experts, however, favoured a limited reservation either along the lines of the statement made by the United Kingdom under article 23 or the reservation contained in article 16 of the additional Protocol of the Inter-American Convention on the Taking of Evidence Abroad adopted at La Paz on 24 May 1984.

The discussion also showed that serious problems had arisen as a result of the co-existence of blocking statutes and the article 23 reservation. Indeed, the combined effect of a blocking statute and a general, unrestricted reservation under article 23, may paralyse the Convention and has caused the courts in the United States not to use the Convention.

See also § 7 below.

§ 5 *Intervention by diplomatic officers^ consuls and commissioners (Chapter II of the Convention)*

The discussion on this subject showed that there were few, if any, problems in practice. In view of this fact, several experts indicated that their countries might reconsider the need for the declarations excluding the application of article 17 and, more generally, their practice under Chapter II.

Certain countries, in particular of the civil law group, consider the taking of evidence on their territory to be a judicial act which, in the absence of special authorization, must be done by their magistrates, while other countries, in particular of the common law group, allow evidence to be taken voluntarily before any person without prior permission. In those countries where prior permission is required, practice varies widely, certain countries applying criminal penalties if evidence is taken officially without permission (*e.g.* Switzerland) or possibly expelling a person who is taking such evidence, while some other countries do not apply sanctions at all.

§ 6 *Does the Convention provide an exclusive means of obtaining evidence abroad?*

This was a new issue, which had not yet arisen during the 1978 meeting. The United States Experts explained that, as illustrated by the cases summarized in Part Four (*infra*, p. 102 *et seq.*), there has been a legal issue in United States courts concerning whether the Convention is the exclusive method for taking evidence located in other States Parties to the Hague Evidence Convention. Many United States courts have ruled that the treaty, even though non-exclusive, should be applied on the basis of international comity. Other courts have ruled that the treaty has not supplanted the United States Federal Rules of Civil Procedure where the court has personal jurisdiction over the party who had been requested to provide the evidence. On the other hand, the Experts of the Federal Republic of Germany pointed out that in the view of their country the Convention is exclusive, where the courts of a Contracting State order witnesses or documents to be produced in another Contracting State, because at that point that country's sovereignty may be at stake. Where the court of a Contracting State orders witnesses or documents to be produced in its own country, the Convention, though not exclusive, should be first applied, before recourse may be had to that court's own, non-treaty rules for the taking of evidence abroad. Opinions differed among the delegates and no consensus could be reached at this juncture. See also the next paragraph.

§ 7 Conclusions on the most controversial points raised by the operation of the Convention

The experts reached agreement on the following conclusions from the meeting:

1 The discussions have clearly shown the necessity for a substantial number of States of a reservation in order to avoid abuses which can arise in connection with pre-trial discovery of documents. However, the adoption of an unqualified reservation as permitted by article 23 would seem to be excessive and detrimental to the proper operation of the Convention.

2 The tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame – or, to the extent that they have not yet done so, to limit – their reservations along the lines of the reservation formulated by the United Kingdom or the reservation contained in the Protocol drawn up under the auspices of the Organization of American States.

3 The question of exclusivity of the Convention remains in issue. Under the interpretation of certain States, the Convention is not by its terms an exclusive channel for obtaining evidence located abroad. However certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention on their territory will take on an exclusive character.

4 Statutes which prohibit the production of evidence abroad, commonly known as “blocking statutes”, many of which have been adopted since the 1978 meeting of the Special Commissions are in part a response to what are perceived in some countries as exorbitant assertions of jurisdiction by the courts of other countries. Such statutes however constitute a complicating factor and emphasize the need for long-term solutions through international understanding.

The combined effect of a blocking statute and an unqualified reservation under article 23, when both are adopted by a State, may be to discourage use by other States of the Hague Convention.

The Special Commission was unanimously of the opinion that the use of the Convention should be encouraged, since its use can help to avoid conflicts.

II. EXCHANGE OF VIEWS ON THE POSSIBILITY OF USING THE CONVENTION FOR THE TAKING OF EVIDENCE ABROAD IN THE CONTEXT OF ARBITRAL PROCEEDINGS

The desirability of taking up work on this subject is being considered in liaison with UNCITRAL; the main purpose of the Special Commission’s discussions on this point was to determine whether it was technically possible to use the Convention’s mechanisms in the context of arbitral proceedings. Concerning the desirability of using the Convention for this purpose, a number of experts expressed the view that there was little need for such a facility in practice. Certain experts thought that arbitrators or litigants in arbitral proceedings might use the Convention as it stood by making their request through the courts in the countries where the arbitral tribunal sat. In particular, the experts from the Nordic countries and the United States pointed out that under domestic law courts may render assistance for the production of evidence abroad in the context of arbitral proceedings.

The following conclusions were reached on the technical aspects of extending the Convention for use in the context or arbitral proceedings:

1 Opinion was divided as to whether any possible protocol to the Convention should provide that applications (letters of request) for the taking of evidence abroad should be made through a forwarding Central Authority in the State where the arbitral tribunal sat, or should provide that such applications could be made directly to the Central Authority in the State where the evidence was to be taken.

2 It was generally agreed that any such protocol should provide an option for the taking of evidence abroad by commissioners (*cf.* article 17 of the Convention).

3 There was a consensus that it would be difficult, if not impossible, to distinguish in establishing the scope of such a protocol among the differing types of arbitral tribunals which exist in practice, such as tribunals operating under the auspices of arbitration institutes or tribunals which apply or do not apply the UNCITRAL rules.

III. EXCHANGE OF VIEWS ON THE POSSIBILITY OF INTERNATIONAL CO-OPERATION RELATING TO THE TAKING OF EVIDENCE IN FIELDS CONNECTED TO COMPETITION LAW

The Canadian Experts introduced the subject which had been brought on the Special Commission's agenda following proposals made by their Government first to the 1984 Special Commission on general matters and policy and subsequently to the Fifteenth Session of the Hague Conference. Referring to the Westinghouse case and the decision of the *Oberlandesgericht* Munich of 27 November 1980 (*infra*, pp. 113-115), the Canadian delegation expressed the opinion that antitrust suits, in any case as long as the parties to the suit are private litigants (or state bodies acting on the same footing as private litigants), were for the purpose of civil or commercial matters within the meaning of the Convention. They suggested that it would be useful to supplement the Evidence Convention by notification and consultation procedures such as provided in article 6 of the U.S.-Australian Agreement relating to co-operation on antitrust matters, signed in Washington on 29 June 1982,¹ and especially in articles 4 and 11 of the U.S.-Canadian Memorandum of Understanding as to notification, consultation and co-operation with respect to the application of national antitrust laws, signed on 9 March 1984.²

The discussion brought out the following points:

a Certain States make a clear distinction between unfair competition law, which is characterized as a civil or commercial matter and therefore falls within the Convention, and antitrust law, characterized as administrative or penal and therefore falling outside the scope of the Convention. This distinction is not so clear in some other States.

b In certain States antitrust proceedings may be brought either by public authorities or by individuals or private companies.

c It followed that for those States which draw a clear distinction as referred to under *a*, a protocol covering administrative matters would seem to go too far; and for

¹ Article 6 of the U.S.-Australian Agreement provides:

"Private Antitrust Suits in United States Courts

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations."

² Article 4 of the U.S.-Canadian Understanding reads as follows:

"Consultation

Either Party may request consultations when it believes that an antitrust investigation, proceeding (including for the purposes of this paragraph a private suit pursuant to the antitrust laws of either Party), business review, advisory opinion or compliance procedure, or action relating to an antitrust investigation or proceeding, is likely to affect its significant national interests or require the seeking of information from its territory. Such requests will be made and honored promptly."

And article 11 of the Understanding provides:

"Private Antitrust Suits

1 When a private antitrust suit has been commenced in a court of one of the Parties relating to conduct which has been the subject of notification and consultations under this Understanding, the Party in whose court the suit is -pending will, if so requested by the other Party, inform the court of the substance and outcome of the consultations.

2 When the conduct dealt with in a private antitrust suit has not been the subject of notification and consultation under this Understanding, the Party in whose court the suit is pending may, at the request of the other Party or on its own initiative, inform the court of how the national interest of the other Party may be implicated by the suit or may offer to the court such other facts or views as it considers appropriate in the circumstances."

those States where the distinction is less clear, such a protocol would be very difficult to frame and might even complicate matters.

d Concerning the consultation procedures suggested by Canada, these seemed to the Commission to be of such a different nature from the subject-matter of the Convention that it would not be appropriate to deal with them in a protocol.

e The foregoing negative conclusions should not restrict the Permanent Bureau in carrying out its exploratory studies on competition matters (*cf.* Final Act of the Fifteenth Session of the Hague Conference, under B, 2).