

FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

REPORT TO THE CONFERENCE

1. The Fourth Committee, established by a decision of the Third Plenary Meeting to examine Chapter V, of the Geneva Draft, (Restrictive Business Practices) has considered all the amendments proposed to that Chapter and, subject to the reservations mentioned in Part I of this Report, has agreed on the new text of Chapter V, as it appears in Part III of this document.
2. Dr. C. CHARLONE (Uruguay) was appointed Chairman, and Mr. A. J. van VELDEN (South Africa) Vice-Chairman; on Mr. van VELDEN's departure from Cuba on 16 January 1948, Mr. B. N. BANERJI (India) was appointed as his successor. In the absence of the Chairman and Vice-Chairman Mr. DEBARROS (Brazil) presided at one meeting of the Committee.
3. After the first reading of the text, the Committee set up a Sub-Committee to study all the amendments proposed in relation to Chapter V. Mr. J. H. LOPEZ ALCAR (Mexico) was appointed Chairman of the Sub-Committee, which was composed of representatives of the ten following delegations:
Argentine, Belgium, Canada, Ecuador, India, Iraq, Mexico, Norway, United Kingdom and United States.
The Sub-Committee held twenty-three meetings and submitted its final report to the Fourth Committee on 10 January 1948 (document E/CONF.2/C.4/5).
4. The Committee has held fourteen meetings.

PART I

GENERAL COMMENTS

5. The delegations of Ceylon, India, Pakistan and Venezuela reserved their positions on Chapter V, and especially on Article 50, pending the outcome of discussions on the new Article 18A.

The delegations of Denmark, France, Greece, Norway and Sweden reserved their positions on Article 50, pending the outcome of discussions on the new Article 18A. The delegation of Colombia reserved its position with respect to the scope of Article 50.

/6. The delegation

6. The delegation of Argentina has reserved its position in respect of the inclusion of "public commercial enterprises" within the scope of Chapter V and in respect to Article 50. In this connection the Committee made a clear distinction between the state acting in a legislative or executive capacity and the state pursuing the activities of a business enterprise. It was considered important to point out that the inclusion of business practices of public commercial enterprises in Chapter V does not infringe upon the sovereignty of the state itself, but is designed to bring within the framework of the Chapter the business practices of public commercial enterprises insofar as they may harmfully affect international trade.

7. As an aid to proper interpretation of the words 'decide' and 'decision' a new sub-paragraph was added to Article 51, and it was decided to incorporate the following explanatory note in the report of the Committee:

"The words 'decide' and 'decision' ('constate' and 'constatation' in the French text) as used in Articles 44, 45A (except in paragraphs 3 and 4) and 47 relate to conclusions by the Organization whether or not particular practices have had, have or are about to have the harmful effects described in paragraph 1 of Article 44, and do not prescribe the obligations of Members. Members' obligations regarding these 'decisions' are set out in the relevant paragraphs of Article 47. Therefore, such 'decisions' (or constatations) are not to be construed as binding the legislative, executive or judicial activities of Member States".

8. The Committee discussed at length the relation between the procedures of Chapter V under Articles 45 and 45A, and those of Chapter VIII. In the course of its discussions, the Committee had the benefit of a communication from Committee VI (E/CONF.2/C.6/63) setting forth the opinions of that Committee on the subject of Chapter VIII in its general relation to other parts of the Charter. Committee IV found that the question was full of complexities and that it was difficult to foresee at this stage all implications of cases that may in practice arise.

However, Committee IV calls attention to the fact that the procedures under Chapter V apply to complaints directed against harmful effects arising out of business practices of commercial enterprises, while the procedures under Chapter VIII apply to complaints against Members as such. Therefore, the procedures set forth in Chapter V cannot preclude resort by a Member to the procedures under Chapter VIII, whenever it considers that there is nullification or impairment of the benefits under the Charter by another Member.

PART II - SPECIAL COMMENTS

ARTICLE 44

9. In paragraph 1 of Article 44 the words "and shall co-operate with the Organization" were substituted for the words "individually or through the Organization or in both ways" in order to express the general principle of co-operation between members and the Organization".
10. In considering paragraph 2, sub-paragraph (c) of Article 44, the Committee was of the opinion that the expression "effective control of trade between two or more countries" was open to possible misinterpretation. The amendment is designed to make it clear that the activities of an enterprise which has been granted sole rights of import or export of a particular product in a particular country, and which might, therefore, be said to have de jure control of trade between that country and any other, will not be liable to complaint unless it also has de facto control of trade and is in a position to exert monopolistic pressure on its suppliers or customers to accept certain terms or conditions. It is clear that if a Member's exports or imports of a product are a negligibly small proportion of international trade in that product, business practices of firms under that Member's jurisdiction in respect of this product could not be subject to complaint. Generally speaking an enterprise situated in one country will not be in a position to exert such de facto control of trade with any other single country unless it also controls trade among several countries, and it is for this reason that the Committee introduced the more general expression "effective control of trade among a number of countries". This phrase is also intended to cover the less frequent case of an enterprise which exerts de facto control of trade between two countries only.
11. In Article 44, paragraph 3 (a) the term "third parties" has been changed to read "others" in order to maintain uniformity with the French text of the Geneva Draft of the Charter and to reflect the understanding of the representatives of some delegations as to the meaning of this sub-paragraph. It was the Committee's view that the language should be broad enough to allow the procedures of Chapter V to be applied to (i) cases in which two or more parties agree upon the terms of their behaviour towards other parties, including prices or other conditions of doing business with such other parties; and (ii) cases in which "one" enterprise, including a complex of firms related by common ownership of some or all of their respective capital, engage in the practice of monopolistic extortion towards other buyers or sellers.

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The Committee emphasizes that this sub-paragraph is not to be construed as applying to simple price situations where, for example, an enterprise during the period of a "seller's" market may be charging prices higher than could normally be obtained. It was not the Committee's intention that the Organization should exercise functions similar to those of a national price control agency. The Committee points out that sub-paragraph 3 (a), like all other sections of paragraph 3, can be construed only together with paragraphs 1 and 2.

12. In the French text of sub-paragraph (c), paragraph 3 of this Article, the word "determinees" was substituted for the word "particulieres", as the latter word could be misinterpreted as meaning "private".

ARTICLE 45A

13. The Committee feels that paragraph 7 of Article 45A is of considerable importance. This paragraph provides that if the Organization decides that certain restrictive business practices have harmful effects, it shall call upon the Members concerned to take remedial action. The paragraph provides further that the Organization may make recommendations to the Members concerned regarding remedial measures to be taken in the particular case.

In view of its importance the Committee calls attention to this distinction between a decision of the Organization and a recommendation. The term decision relates to conclusions by the Organization as to whether the practices in question have harmful effects. The term recommendation relates to specific or general suggestions formulated and advanced by the Organization which set forth a course of action that might be followed to advantage by the Members concerned in remedying the situation under complaint. It is not contemplated in paragraph 7 that in every case such a recommendation would be proper or necessary. In simple situations involving one, or perhaps two countries, a recommendation by the Organization might not be appropriate; however, in complex cases involving a number of countries, it is frequently difficult, if not impossible, for one country to act effectively and properly in the absence of knowledge as to the lines of conduct which other countries propose to follow. In the view of the Committee it appears inadvisable to require the Organization to make recommendations in every case or to define the type of cases in which recommendations would be appropriate. This matter should be left to the discretion of the Organization.

ARTICLE 47

14. In Article 47, the transposition of the words "in accordance with the Member's system of law and economic organization" and the addition of the word "constitution" to paragraph 1, are intended to make it clear that in
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implementing the obligations undertaken by a Member in terms of this Article it has to proceed in accordance with its own system of political and economic organization. The nature of the exact legal or administrative implementations of these obligations would accordingly vary from country to country, and no impairment of fundamental legislation or basic economic policy would be involved in giving effect to a Member's obligations under this Article. In other words the phrase "system of law" is complementary to the words "constitution" or "basic legislation". The words "constitution" and "system of law" represent two different concepts - one the actual existence of basic fundamental legislation, and the other the general legal framework within which remedial action was carried out by a Member of the Organization.

15. A small amendment in Article 47 (1) makes it clear that the practices referred to in Article 47 and in respect of which Members undertake obligations are those which meet the conditions of paragraphs 1, 2 and 3 of Article 44.

ARTICLE 48

16. It was the intention of the Committee that the co-operative action permitted under Article 48, paragraph 1, should be entirely voluntary and that this Article should not be construed as implying any obligation upon members to participate in co-operative action. The Committee was also of the opinion that the parties to such co-operative action should be those members directly interested in any particular instance of restrictive business practices.

ARTICLE 50

17. The alteration of the word "banking" in the first sentence of Article 50 (1) to the phrase "the commercial services of banks", is designed to make it perfectly clear that the banking operations to which the paragraph refers are simple financial services directly and intimately connected with international commercial transactions such as the provision of short-term credit facilities to cover imports and exports of goods; and the alteration of the phrase "in relation to them" to the phrase "enterprises engaged in these activities in international trade" is intended to show that the paragraph refers only to banking institutions which are themselves directly engaged in international commercial transactions.

The Committee agreed that the provisions of Article 50 do not refer to such activities as the regulation of internal credit or of internal monetary circulation by a central bank or to longer term international lending by a governmental agency.

18. Electricity as a service or as a product is covered by Chapter V. On the question of whether electricity should be considered as a

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product and its transmissions as a service, the Committee felt that it should be left to the Organization itself to come to a conclusion.

ARTICLE 51

19. The first sentence of paragraph 1 of the new Article 51 is intended to make it clear that action by commercial enterprises necessary to implement for instance, an inter-governmental commodity control agreement which meets the requirements of Section C of Chapter VI cannot be subject to challenge under Chapter V, but that effects of such action which are restrictive beyond the scope and purposes of the said agreement may be subject to complaint.

20. The Committee agreed that the use of the words "may have" in paragraph 1 of this Article (51) did not entail any extension of the provisions of Chapter V.

21. Paragraph 2 (a) specifically lays down that single contracts of purchase, sale or lease concluded between two commercial enterprises whether public or private, shall not except in the special circumstances set out in the proviso be considered as falling within the meaning of the term "business practices" as used in this Chapter. It was believed that this provision would be a safeguard against certain types of complaints which did not properly fall within the scope of Chapter V.

22. An alteration in the definition of public enterprises was made in paragraph 2 (b) (1) in order to distinguish between the actions of a State when acting in its sovereign legislative or administrative capacity and when acting in a trading or commercial capacity. In the former case the actions of a State are not subject to investigation under Chapter V.

23. The delegation of India has accepted sub-paragraph (d) provisionally and has reserved its right to reconsider its position in the plenary session.

PART III

CHAPTER V - RESTRICTIVE BUSINESS PRACTICES

Article 44General Policy Towards Restrictive Business Practices

1. Each Member shall take appropriate measures and shall co-operate 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.

2. In order that the Organization may decide in a particular instance whether a practice has or is about to have the effect indicated in paragraph 1, the Members agree, without limiting paragraph 1, that complaints regarding any of the practices listed in paragraph 3 shall be subject to investigation in accordance with the procedure regarding complaints provided for in Articles 45A and 47, whenever

(a) such a complaint is presented to the Organization, and

(b) the practice is engaged in, or made effective, by one or more private or public commercial enterprises or by any combination, agreement or other arrangement between any such enterprises, and

(c) 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 are the following:

(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

(c) discriminating against particular enterprises;

(d) limiting production or fixing production quotas;

(e) preventing by agreement the development or application of technology

technology or invention whether patented or unpatented;

(f) extending the use of rights under patents, trade marks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subjects of such grants;

(g) any similar practices which the Organization may declare, by a majority of two-thirds of the Members present and voting, to be restrictive business practices.

Article 45

Consultation Procedure

Any affected Member which considers that in any particular instances a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 44 may consult other Members directly or request the Organization to arrange for consultation with particular Members with a view to reaching mutually satisfactory conclusions. If requested by the Member and if it considers such action to be justified, the Organization shall arrange for an assist in such consultation. Action under this Article shall be without prejudice to the procedure provided for in Article 45A.

Article 45A

Investigation Procedure

1. In accordance with paragraphs 2 and 3 of Article 44, any affected Member on its own behalf or any Member on behalf of any affected person, enterprise or organization within that Member's jurisdiction, may present a written complaint to the Organization that in any particular instance a practice exists (whether engaged in by private or public commercial enterprises) which has or is about to have the effect indicated in paragraph 1 of Article 44; Provided that, in the case of complaints against a public commercial enterprise acting independently or any other enterprise, such complaints may be presented only by a Member on its own behalf and only after the Member has resorted to the procedure of Article 45,

2. The Organization shall prescribe the minimum information to be included in complaints under this Article. This information shall give substantial

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indication of the nature and harmful effects of the practices.

3. The Organization shall consider each complaint presented in accordance with paragraph 1. If the Organization deems it appropriate, it shall request Members concerned to furnish supplementary information, for example, information from commercial enterprises within their jurisdiction. After reviewing the relevant information, the Organization shall decide whether an investigation is justified.

4. If the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard.

5. The Organization shall review all information available and decide whether the conditions specified in paragraphs 2 and 3 of Article 44 are present and the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article.

6. The Organization shall inform all Members of its decision and the reasons therefor.

7. If the Organization decides that in any particular case the conditions specified in paragraphs 2 and 3 of Article 44 are present and that the practice in question has had, has or is about to have the effect indicated in paragraph 1 of that Article, it shall request each Member concerned to take every possible remedial action, and may also recommend to the Members concerned remedial measures to be carried out in accordance with their respective laws and procedures.

8. The Organization may request any Member concerned to report fully on the remedial action it has taken in any particular case.

9. As soon as possible after its proceedings in respect of any complaint under this Article have been provisionally or finally closed, the Organization shall prepare and publish a report showing fully the decisions reached, the reasons therefor and any measures recommended to the Members concerned. The Organization shall not, if a Member so requests, disclose confidential information furnished by that Member, which if disclosed would substantially damage the legitimate business interests of a commercial enterprise.

/10. The Organization

10. The Organization shall report to all Members and make public the remedial action which has been taken by the Members concerned in any particular case.

Article 46

Studies Relating to Restrictive Business Practices

1. The Organization is authorized:

(a) to conduct studies, either on its own initiative or at the request of any Member or of any organ of the United Nations or of any other inter-governmental organization, relating to

(i) general aspects of restrictive business practices affecting international trade;

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

(iii) the registration of restrictive business agreements and other arrangements affecting international trade; and

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

2. The Organization is authorized:

(a) to make recommendations to Members concerning such conventions, laws and procedures as are relevant to their obligations under this Charter;

(b) to arrange for conferences of Members to discuss any matters relating to restrictive business practices affecting international trade.

Article 47

Obligations of Members

1. Each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises

enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 44 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.

2. Each Member shall make adequate arrangements for presenting complaints, conducting investigations and preparing information and reports requested by the Organization.

3. Each Member shall furnish to the Organization, as promptly and as fully as possible, such information as is requested by the Organization for its consideration and investigation of complaints and for its conduct of studies under this Chapter;

Provided that any Member on notification to the Organization, may withhold information which the Member considers is not essential to the Organization in conducting an adequate investigation and which, if disclosed, would substantially damage the legitimate business interests of a commercial enterprise. In notifying the Organization that it is withholding information pursuant to this clause, the Member shall indicate the general character of the information withheld and the reasons why it considers it not essential.

4. Each Member shall take full account of each request, decision and recommendation of the Organization under Article 45A and, in accordance with its constitution or system of law and economic organization, take in the particular case the action it considers appropriate having regard to its obligations under this Chapter.

5. Each Member shall report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization and, when no action has been taken, inform the Organization of the reasons therefor and discuss the matter further with the Organization if it so requests.

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

Article 48

Co-operative Remedial Arrangements

1. Members may co-operate 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.

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2. Members shall keep the Organization informed of any decision to participate in any such co-operative action and of any measures taken.

Article 49

Domestic Measures Against Restrictive Business Practices

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

Article 50

Special Procedures with Respect to Services

1. The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks, are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 of Article 44. Such practices shall be dealt with in accordance with the following paragraphs of this Article.

2. If any Member considers that there exist restrictive business practices in relation to a service referred to in paragraph 1 which have or are about to have such harmful effects, and that its interests are thereby seriously prejudiced, the Member may submit a written statement explaining the situation to the Member or Members whose private or public enterprises are engaged in the services in question. The Member or Members concerned shall give sympathetic consideration to the statement and to such proposals as may be made and shall afford adequate opportunities for consultation, with a view to effecting a satisfactory adjustment.

3. If no adjustment can be effected in accordance with the provisions of paragraph 2, and if the matter is referred to the Organization, it shall be transferred to the appropriate inter-governmental organization, if one exists, with such observations as the Organization may wish to make. If no such inter-governmental organization exists, and if Members so request, the Organization may, in accordance with the provisions of Article 69 (c), make recommendations for, and promote international agreement on, measures designed to remedy the particular situation so far as it comes within the scope of this Charter.

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4. The Organization shall, in accordance with paragraph 2 of Article 84, co-operate with other inter-governmental organizations in connection with restrictive business practices affecting any field coming within the scope of this Charter and those organizations shall be entitled to consult the Organization, to seek advice, and to ask that a study of a particular problem be made.

Article 51

Interpretation and Definition

1. The provisions of this Chapter shall be construed with due regard for the rights and obligations of Members set forth elsewhere in this Charter and shall not therefore be so interpreted as to prevent the adoption and enforcement of any measures insofar as they are specifically permitted under other Chapters of this Charter. The Organization may, however, make recommendations to Members or to any appropriate inter-governmental organization concerning any features of these measures which may have the effect indicated in paragraph 1 of Article 44.

2. For the purposes of this Chapter

(a) the term "business practice" shall not be so construed as to include an individual contract between two parties as seller and buyer, lessor and lessee, or principal and agent, provided that such contract is not used to restrain competition, limit access to markets or foster monopolistic control;

(b) the term "public commercial enterprises" means

(i) agencies of governments insofar as they are engaged in trade, and

(ii) trading enterprises mainly or wholly owned by public authority provided the Member concerned declares that for the purposes of this Chapter it has effective control over or assumes responsibility for the enterprises;

(c) the term "private commercial enterprises" means all commercial enterprises other than public commercial enterprises;

(d) the terms "decide" and "decision" as used in Articles 44, 45A (except in paragraphs 3 and 4) and 47 do not determine the obligations of Members, but means only that the Organization reaches a conclusion.
