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FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

SUMMARY RECORD OF NINTH MEETING

Held at the Capitol, Havana, Cuba
15 January 1948 at 10.30 a.m.

Chairman: Mr. A. J. van VELDEN (Union of South Africa).

CONTINUATION OF THE DISCUSSION ON ARTICLE 51 (document E/CONF.2/C.4/5)

Consideration of the Wording

Paragraph 1

In answer to the question raised by Mr. FAWCETT (New Zealand) concerning the use of the word "specifically" in the fourth sentence of paragraph 1, Mr. TERRILL (United States of America) said that he thought it important for this word to be retained, although "expressly" might be substituted. It was a general rule, stated Mr. Terrell, that a statute could not grant exceptions that were wider than its own provisions. The Charter specifically provided that certain measures were specifically prohibited. By implication there were still other measures that a member might take, but the rest of the Charter was silent as to what those measures were and how they should be dealt with. If the word "specifically" were removed, Chapter V would be superseded or blanketed by this unspecified area, and would consequently lose its meaning. Furthermore it was a well-known rule that in interpreting any document of this character, its specific provisions took precedence over its general provisions. Therefore, what had been specifically provided for elsewhere in the Charter was removed to that extent from the scope of Chapter V, but it did not follow that the same immunity should attach to measures which the rest of the Charter permitted only by implication.

The representative of NEW ZEALAND was satisfied with the explanation, and did not suggest that the word "specifically" should be removed or altered.

Mr. McINTOSH (United Kingdom) said he would prefer the substitution of the word "expressly".

Mr. BANERJI (India) said he preferred the word "specifically". In legal practice it was more commonly used than "expressly".

It was agreed that the word "specifically" should stand.

/Mr. GELDERMAN (Netherlands)

Mr. GELDERMAN (Netherlands) stressed the point that in the Geneva text of Article 51 an exception had been provided for inter-governmental commodity agreements. The second sentence of the present draft was inconsistent with Chapter VI, as it might be interpreted that even commodity counsels would fall under the purview of paragraph 1. The relationship of Chapter V with inter-governmental commodity agreements, as laid down in the "Specific Comments" should be clearly defined in the Article itself.

Mr. BANERJI (India) said the second sentence attempted to cover in a different way the content of Article 51, sub-paragraph 2 of the Geneva text. The words "specifically permitted" seemed to meet in substance the point raised by the representative of the Netherlands. Inter-governmental commodity agreements pursuant to Chapter VI, as they were permitted under that Chapter, could be governed by the first sentence of the Article, but not by the second, except where doubt arose as to whether a substantive part of that Chapter had been met. Unless something along the lines of the second sentence of Article 51 were included, there might be doubt as to how far the specific provisions of Article 67 (1) (c) would be counteracted by the substantive provisions of the first paragraph of the Article under reference.

Mr. GELDERMAN (Netherlands) suggested that the last part of the second sentence in paragraph 1 should be changed to read "...measures which have or are about to have the effect described in paragraph 1 of Article 44".

Mr. BANERJI (India) said he preferred the present wording which was the same as in the Geneva draft and in Article 50.

The CHAIRMAN pointed out that although it was true in a general sense that Article 51 governed both Article 50 and the other Articles of Chapter V, it also referred to the rights and obligations set out in other parts of the Chapter.

Mr. BANERJI (India) said he could not agree that Article 51 completely rules out Article 50. He would not oppose the phrasing suggested by the representative of the Netherlands if the rest of the Committee were prepared to accept it.

Mr. McINTOSH (United Kingdom), in supporting the deletion of the word "may", said that it would be preferable to leave the rest of paragraph 1 as at present drafted rather than to insert the words suggested by the representative of the Netherlands.

After a brief discussion in which the representatives of INDIA, BELGIUM, the NETHERLANDS, PAKISTAN and the UNITED STATES OF AMERICA took part, it was decided that the present drafting of paragraph 1 of Article 51 should stand.

/The CHAIRMAN,

The CHAIRMAN, replying to a request by the representative of the NETHERLANDS, said that the minutes and the Report of the Committee would record the fact that in the opinion of the Fourth Committee the use of the words "may have" did not entail any extension of the provisions of Chapter V.

Paragraph 1 was taken as read and approved by the Committee.

Paragraph 2 (a)

Mr. TERRILL (United States of America) believed there was incongruity in the use of the expression "buyer and seller", when the previous sentence spoke of "contract of purchase and sale or lease or agency". Lessors and lessees were not buyers or sellers. The following sentence might be substituted for sub-paragraph (a):

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

It seemed redundant to include the word "commercial". The purpose of the Committee in introducing sub-paragraph (a) was to assure those engaged in international trade that ordinary commercial contracts between parties mentioned in the paragraph would not be considered prima facie within Chapter V. The sub-paragraph was merely a declaratory statement.

Mr. THILGES (Belgium) saw no objection to the United States proposal. It was corroborated by paragraph 1 of Article 44. One of the fundamental conditions was that the contract should not restrain competition, limit access to markets or foster monopolistic control.

Paragraph 2 (a) was taken as read and approved as amended by the United States of America.

Paragraph 2 (b) (i).

Mr. GELDERMAN (Netherlands) proposed that the word "and" should be amended to "or".

After some discussion in which the representative of the UNITED KINGDOM pointed out that "and" had been used in the Geneva draft, it was agreed that the present text should stand.

Sub-paragraph (b) (i) was taken as read and approved.

Paragraph 2 (b) (ii)

Mr. McINTOSH (United Kingdom) said there had been considerable discussion both at Geneva and in the Sub-Committee concerning the definition of "public enterprises", and as to whether or not all the sub-paragraphs of Article 44 (3) applied to such enterprises. The Sub-Committee had considered

/the Geneva text

the Geneva text too elastic. There might be great difficulty under the old definition if a member had effective control of engagement in one of two practices in relation to which a complaint had been raised against a particular enterprise, but not any engagement in the other. It had therefore been recommended in the Sub-Committee draft that in the case of publicly owned enterprises it should be left to the member as to whether, in a particular practice, it should assume full responsibility for the action on the part of the enterprise.

The representative of the UNITED KINGDOM proposed, and the Committee agreed, that the word "declares" should be substituted for "asserts".

Sub-Paragraph (b) (ii) was taken as read and approved.

Paragraph 2 (c)

Mr. BIRCE (Turkey) pointed out that in the new draft of Article 51 (2) (b) public and private commercial enterprises were defined without taking into account legal considerations. He wondered if such definitions were necessary.

Mr. McINTOSH (United Kingdom) said that only in that part of the Chapter where distinctions were made between the treatment of public and private enterprises were definitions necessary. He referred to Article 45 (a) (i) in which it was provided that, in the case of a public enterprise a member might present a complaint only on his own behalf and only after consultation with the other member concerned. This was considered a valuable safeguard in most cases against irresponsible complaints, or complaints which might lead to political disagreements. Only here was there a difference in treatment between public and private enterprises. Nothing could prevent the procedure from being carried out if the complaining member so desired. The paragraph was prefaced by the words "For the purpose of this Chapter" because the Sub-Committee recognized that the definition in paragraph (2) of Article 51 was ad hoc rather than legal.

Mr. BARROS (Brazil) said that in paragraph 4 (a) of Article 44, "public commercial enterprises" was construed to mean trading agencies of Governments, and might be interpreted in a very broad sense. To avoid confusion, the sentence in Article 51, paragraph 2 (b) (i) has been substituted for sub-paragraph (a) in Article 44, 4.

Mr. LEQUERICA (Colombia) supported the representative of Brazil. The definitions would clarify the text of Chapter V.

Paragraph 2 (c) was taken as read and approved.

Sub-Paragraph (d)

The CHAIRMAN referred members to paragraph 12 of the Sub-Committee's Report where a fuller explanation was given of the reason for inserting sub-paragraph (d) in the text.

/Mr. BANERJI

Mr. BANERJI (India) pointed out that the delegation of India had had to refer to its Government regarding the text of sub-paragraph (d), and, as no reply had yet been received, his delegation accepted sub-paragraph (d) provisionally. It reserved the right to refer to the question again in plenary session should such action be necessary.

Mr. LLOSA (Peru) said that the question of what were considered as restrictive business practices should be studied very carefully, and an international commercial code drawn up by the ITO which could be reviewed periodically. That code should indicate the practices considered as restrictive and as preventing Members from carrying out the provisions of the Charter, and should lay down measures for the punishment of offenders. History had shown that restrictive business practices were carried out by firms belonging to the highly industrialized countries to the detriment of underdeveloped countries, and he felt that the reduction of international barriers envisaged by the Charter would intensify such practices unless some action was taken to prohibit them.

Mr. COPPOLO d'ANNA (Italy), referring to the procedure to be followed by members of ITO in the settlement of disputes, considered that a joint sub-committee of the Fourth Committee and of the Sixth Committee should be set up to consider the matter and to lay down clear-cut regulations as to the procedure to be followed. The delegation of Italy considered that countries should not resort to the general procedure of Chapter VIII once there had been resort to any specific procedure laid down in the other Articles of the Charter. If there was to be resort to the sanctions mentioned in Article 90 then that fact should be stated frankly in Chapter V.

The CHAIRMAN said doubt had been expressed as to whether, once the consultative procedure laid down in Article 50 or Article 45 had been followed, it was necessary to have further recourse to the consultative procedure provided in Article 89. Doubt had also been expressed as to whether the word "only" in the first paragraph of Article 50 was intended to exclude the other Articles of Chapter V or whether it was intended to exclude recourse to Article 90. He had learned from the Chairman of the Sub-Committee dealing with Articles 89 and 90 that it was considered desirable for each Committee to come to some decision as to what the inter-relation between its subject matter and Chapter VI was to be.

Mr. COUILLARD (Canada), speaking as the Chairman of the Sub-Committee dealing with Articles 89, 90, 91 and 92, said the discussions of that Sub-Committee had not progressed very far. His statement would therefore be limited and subject to subsequent general discussion of Chapter VIII.

/The Sub-Committee had

The Sub Committee had decided that a decision concerning the applicability of Chapter VIII to any other provisions of the Charter, including Chapter V, should be taken by the Committee or Sub-Committees concerned. Chapter V should therefore contain the provisions necessary to make clear the decisions of the Fourth Committee.

The Sub-Committee assumed that Chapter VIII stood behind the whole Charter unless an exception to that rule was specifically written into the Articles of the Charter. Referring to the matters of consultation, he said that under Article 89 and other Articles the Sub-Committee had set up a working party to deal with the relation between consultation provisions throughout the entire Charter. The opinion seemed to be in sub-committee that consultation provisions in Article 89 were satisfied when consultation was provided for and was carried out under other Articles of the Charter. The opinion of the working party, however, was not yet known.

Mr. LECUYER (France) felt there was no doubt that in the present draft the two procedures laid down in Article 45 and in Articles 89 and 90 were at the disposal of Member States, and that one or the other of those procedures could be chosen alternatively. It might be well to divide the two procedures, and to study carefully whether the procedure outlined in Article 45 should not be considered as a preliminary procedure before resort was had to the provisions of Article 89.

He felt that the matter should be the subject of a general discussion in the Fourth Committee. It was only when that Committee had taken a definite decision that the Sixth Committee would be able to decide in what way it was legally possible to apply and implement the conclusions reached by the Fourth Committee.

Mr. BIRCE (Turkey) felt that, in view of the divergent opinions which had been expressed in the Committee, the question of substance should be discussed by the Committee and the question of procedure referred to a sub-committee. He agreed with the remarks made by the representative of Canada.

The CHAIRMAN said the question of substance was being discussed by the Committee. The Committee had to decide in the case of the various Articles in which consultation or investigation procedure was laid down whether that was intended to dispose of the matter, or whether subsequent recourse to either consultation procedure under Article 89 or the further procedures laid down in Article 90 was to be allowed or not.

Mr. RAUF (Afghanistan) said his delegation supported the interpretation of Article 51 giving members the right to have recourse to Article 89 in case of need. If the Committee came to any other decision then the wording

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of the first sentence of Article 51 would have to be changed.

Mr. BARROS (Brazil) said that, looking at the matter from the legal point of view, the Charter would be a code of international commercial law, and a number of problems might arise which, apart from their purely economic and legal aspects, might also have political overtones. If parties failed to reached agreement in accordance with the procedure laid down in Article 45A, then it would be essential in the interests of trade for another path to be followed in an endeavour to settle disputes. At that juncture the matter would no longer be a purely technical one - it would assume a political aspect, and it would seem appropriate in that case to leave the door open to another procedure, that of Article 89.

The Charter should clearly state that in all cases covered by Chapter V the procedure of Article 45A should be carried out before resort was had to Article 89.

In the specific case of Chapter V he felt that in certain cases where no satisfactory solution could be reached under the procedure of Article 45A, it would not be necessary to repeat the consultation procedure of Article 89, but resort might be had to the provisions of Article 90.

The Fourth Committee should reach a decision on the matter before it submitted it to the Sixth Committee.

The CHAIRMAN suggested that the Committee should first discuss whether the consultation procedure provided for in the two Articles of Chapter VI (Articles 45 and 50) should be subject to possible subsequent consultation under Article 89.

Mr. BIRCE (Turkey) felt that the matter should be left to a working party to study.

Mr. THILTGES (Belgium) said that before the matter was referred to a working party there was a point of substance which should be discussed. The question of application of Articles 89 and 90 which set up a sort of appeal procedure might have various aspects, many of which had already been enumerated by certain members.

The point at issue was to know whether in the case of special procedure resort should be had to that procedure before referring to Article 89, and when resort had been had to that specific procedure whether the procedure laid down in Article 89 could also be invoked.

Referring to the specialized committee to be set up by the ITO, he said that the provisions of Chapter V depended in the final analysis upon the composition, qualifications and impartiality of that committee. He would like the Charter to mention all those qualifications.

/When Article 89

When Article 89 was implemented, the organization should consult the various inter-governmental agencies and committees, and where services were concerned those mentioned in Article 50 should be consulted. In both cases consultation was necessary, but should not preclude resort to Article 90.

Mr. BIRGE (Turkey) said that, from the legal point of view, when resort had been had to specific procedure then general procedure could not be resorted to.

Mr. TERRILL (United States of America) pointed out that the provisions of Articles 45 and 45A were quite different from those of Articles 89 and 90. He felt that the remarks of the representative of Afghanistan should be seriously considered by the Committee.

The CHAIRMAN said that three points arose out of the discussion:

(1) Whether the resort must in the first place be had to consultation procedure, and whether it was possible to by-pass that procedure and go direct to Article 89;

(2) having had recourse to procedures in Articles 45 and 50, whether that would exclude recourse to Article 89;

(3) having had recourse to other specific procedure regarding investigation provided for in Article 45A, whether that would in turn exclude recourse to consultation under Article 89.

He asked for the nomination of another representative to take his place as he was leaving Havana on the following day.

The representatives of the UNITED STATES OF AMERICA, the UNITED KINGDOM, INDIA, and BELGIUM expressed their appreciation of the services of the Chairman.

Mr. TERRILL (United States of America), supported by Mr. RAUF (Afghanistan), suggested that the representative of Belgium should be nominated.

Mr. THILTGES (Belgium) said he was unable to accept nomination as he also would shortly be leaving Havana.

Mr. McINTOSH (United Kingdom) suggested that the representative of India should be nominated.

Mr. BANERJI (India) said he did not feel competent to accept the nomination.

Mr. TERRILL (United States of America), supported Mr. MUNOZ (Chile), having suggested the nomination of the representative of Norway, the CHAIRMAN announced that the representative of Norway had been unanimously elected second Vice-Chairman of the Fourth Committee.

The meeting rose at 1.30 p.m.
