United Nations
CONFERENCE ON TRADE AND EMPLOYMENT

Nations Unies
CONFERENCE DU COMMERCE ET DE L'EMPLOI

UNRESTRICTED
E/CONF.2/C.4/SR.11
19 January 1948
ORIGINAL: ENGLISH

FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

SUMMARY RECORD OF THE ELEVENTH MEETING

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

The CHAIRMAN opened the meeting by saying that, according to a previous proposal by the representative of Switzerland an informal group consisting of himself and the representatives of Belgium, Brazil, Mexico the United Kingdom and the United States of America had been formed to devise a draft text of the proposed note to the Sixth Committee in relation to the procedures in Chapters V and VIII. The working group had agreed that in all ordinary circumstances the specific procedures contained in Chapter V should hold precedence over the provisions of Chapter VIII. The provisions of Article 51 (1) and Article 44 (2) supported this interpretation. However, owing to a lack of agreement as to the time at which recourse could be had to Chapter VIII, and whether resort could be made to that Chapter alternately or simultaneously with Chapter V, as well as to the fact that Chapter VIII was still under debate, and the composition and functions of the Restrictive Business Practices Commission under the ITO were still unknown, it had been stated in the note that "it would be impracticable at this juncture to attempt any precise definition of the relationship between the two chapters".

It was decided to discuss the Mexican amendment to Article 50 first to allow time for the text of the report to be considered by Members.

MEXICAN AMENDMENT TO ARTICLE 50

Mr. ALCAR (Mexico) said that the sub-committee had wanted to draw a distinction between the procedure related to services and other business practices. The word "only" in Article 50, paragraph 1, failed to do this, and should therefore be deleted in order to avoid any restriction of the procedure.

Mr. TERRILL (United States of America) proposed that if the Mexican amendment were approved, the words "of this Article" should be retained to avoid ambiguity.

Mr. ALCAR (Mexico) agreed that, although the words suggested by the representatives of the United States of America were not absolutely essential, it might be better to retain them.

/Mr. TERRILL

Mr. TERRILL (United States of America) pointed out that in cases referred by the ITO to other specialized agencies, there might be a question as to whether or not the provisions of Chapter VIII would apply. There were some new and proposed specialized international organizations in the various fields of services mentioned in Article 50 (1) which were centred mainly on the technical side of industry. The ITO might therefore be taking over a considerable scope of activity on the economic side of various service industries such as telecommunications, shipping, etc. if the word "only" were deleted.

Mr. LECUYER (France) said that the words of the representative of the United States led him to agree to revert to the original Geneva Draft but it should in no way influence the decision to be taken subsequently on the procedures of Chapters V and VIII.

In reply to a question by Mr. HURTADO (Venezuela) the representative of Mexico stated that the deletion of "only" in no way implied a change regarding the time at which Chapter VIII should be applied, but was merely to eliminate any obstacles in the consideration of the procedures of Article 50 and other cases coming under Chapter V. The word had been meant to imply that Article 50 referred only to services while Articles 45 and 45A referred to other business practices.

Mr. TERRILL (United States of America) agreed with the representative of Mexico but pointed out that there were other Articles in the Chapter which were not encompassed by Article 50. By deleting the word "only" Article 47 was included as far as obligations were concerned.

Mr. OFTEDAL (Norway) reminded the Committee that several delegations had reservations with regard to Article 50, and their positions should not be prejudiced by any decision taken regarding the Mexican amendment.

It was agreed that the Geneva text should stand.

CONSIDERATION OF THE DRAFT TEXT OF THE NOTE TO BE COMMUNICATED TO THE SIXTH COMMITTEE

Mr. COPPOLA d'ANNA (Italy) agreed with the Note as drafted. It was better not to state principles which might afterwards be found to be ill-chosen.

Mr. HAUSWIRTH (Switzerland) understood that a procedure against the enterprise of any member state within the framework of Article 45A could at any time be interrupted if the Member requested that the provisions embodied in Article 89 and the following Articles should be applied.

Mr. TERRILL (United States of America) believed there was no such implication in the Resolution. The Organization as it developed and

/encountered actual

encountered actual cases could lay down certain rules of procedures. This had been foreshadowed in Article 92. Although at present it was difficult to define the principle, a Member should not have the right to interrupt in an improper manner any procedure to which it had agreed to resort.

Mr. FAWCETT (New Zealand) drew attention to document E/CONF.2/C.6/W.57 which amended paragraph 2 of Article 92. This might impinge on the discussion.

The CHAIRMAN pointed out that the reason for the non-committal character of the draft note was because the final text of the relevant chapters had not yet been decided.

Mr. FORTHOMME (Belgium) believed that the Committee should accept the Note as drafted by the working party.

Mr. McINTOSH (United Kingdom) supported the draft note. It would be presumptuous to attempt to establish a categorical position for all time. The Organization should decide on the action to be taken when confronted by particular cases.

Mr. ALCAR (Mexico) said that owing to the situation which might arise regarding the relative procedures of Chapters V and VIII, he reserved his right to reopen the matter in the light of future developments.

Mr. COUILLARD (Canada) believed Chapter VIII should govern Chapter V, but the amount to which it would do so depended on the final wording of the former. The representative of Belgium had been quite correct in emphasizing the bearing the proposed amendment to Article 92 would have on the whole matter.

In answer to a question by the representative of the United Kingdom, the CHAIRMAN said it was understood that as far as Committee VI was concerned the matter was closed, but Mexico or any other Member could reopen the subject at the Plenary Session, pending discussion on other parts of the Charter.

<u>The text of the Note as follows was approved:</u>

RELATION BETWEEN CHAPTER V AND CHAPTER VIII

DRAFT TEXT OF THE NOTE TO BE COMMUNICATED TO THE SIXTH COMMITTEE

After full discussion the Committee felt that the question was full of complexities and that it was difficult to foresee at this stage all implications of the cases that may in practice arise. They therefore agreed that it would be impracticable at this juncture to attempt any precise definition of the relationship between the two chapters.

/THE UNITED KINGDOM

THE UNITED KINGDOM AMENDMENT TO ARTICLE 45

Mr. McINTOSH (United Kingdom) pointed out that his amendment was not a matter of substance but of clarification. In the Geneva text the procedures with regard to consultation and investigation were in separate paragraphs of the same article, and their relationship to each other was never in doubt. The Sub-Committee had considered it wise to separate the part of Article 45 which dealt with investigation into a new article 45A, but in order not to upset the relstionship between the two procedures, had added a final sentence to the former Article. Its phraseology was open to misinterpretation. On the assumption that a complaining member was free to use either Chapter V or VIII, the member should make up his mind at the beginning which procedure he would choose. If his choice was Chapter V, he should abide by his decision until the Member against whom he had issued complaint had been given the opportunity to show his willingness to submit to investigation under Article 45A. There should be no room for vacillation.

Chapter V should remain in motion whether a public or private enterprise was concerned, until some appropriate stage, or until the third paragraph of Article 45A had been reached and the Organization had had the opportunity to decide whether or not the investigation was justified. He therefore proposed that to bring about this desirable result the following words should be added to the end of Article 45: .... "and if no satisfactory conclusion is reached further action shall be in accordance with the procedures of Articles 45A and 47".

Mr. TERRILL (United States of America) did not support the United Kingdom proposal. At no time in previous conferences had it been suggested that resort to consultation under Article 45 implied that recourse to investigation by the Organization was necessary. At the consultation stage the matter was in the hands of the ITO, but the machinery under Article 45A had not been started or accelerated.

Public enterprises were not losing any advantages given to them by the requirements of Article 45A (1). A Member should submit a complaint on its own behalf, and must consult with the other member concerned. The United Kingdom proposal was a corollary of the proposal just disposed of as to the relation between Chapters V and VIII and if accepted would be a retraction of the previous decision of the Committee. Express consultation under Article 45 might well be accepted as the equivalent under Article 89, and a member might request the Organization to institute investigation under Article 90.

As a matter of principle, a member should not be denied resort to Chapter VIII. The results of consultations under Article 45 might indicate clearly to the injured member that the other member intended to take no action

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and he would not be willing to rely on Article 45A in every single case. The procedure under Article 45A was based on what was found under Article 44 (1), and the representative of the United Kingdom had already described this as "flexible and empirical".

Mr. MADJID (Afghanistan) said the United Kingdom amendment was in conflict with the proposal just approved. It offered a specific solution to a situation which it had just been agreed was insoluble in advance. The representative of Canada had drawn attention to the danger of abuse while waiting to carry out the procedure of Chapter VIII. It would be inconsistent to accept the proposal.

Mr. FORTHOMME (Belgium) supported the United Kingdom amendment. He did not agree that it entailed all the consequences set forth by other speakers.

Mr. WOULBROUN (Luxembourg) pointed out that it had been agreed to leave the presentation by a Member of a "written complaint" under Article 45A to the decision of that Member, but if the two articles were linked, it became compulsory for a member to follow Article 45A. He preferred Article 45 to stand.

Mr. McINTOSH (United Kingdom) was surprised that his amendment should be looked upon as a change in substance. He did not believe it prejudiced the subject referred to in the approved note. In reply to a question by the CHAIRMAN, he said he would listen with sympathy to any suggestion made regarding an improvement in drafting.

Mr. LEQUERICA (Colombia) said his delegation could not support the amendment submitted by the representative of the United Kingdom as it seemed to imply that once the three stages of procedure laid down in Articles 44, 45A and 47 had been exhausted there was no other procedure to which resort might be had in case a Member State complained of an injury, and considered that it would have to present its case to the procedure of Chapter VIII.

Mr. ALCAR (Mexico) considered that the present drafting of Article 45 should be retained unless the draft submitted by the representative of the United Kingdom could be so worded as not to change the meaning of Article 45A.

Mr. OFTEDAL (Norway) felt that the United Kingdom amendment made for clarification, and therefore his delegation supported it.

Mr. COUILLARD (Canada) said that the text of the United Kingdom amendment was more than a drafting change. If the text of that amendment were accepted, the Committee would be reverting to the resolution which had been placed before it at a preceding meeting. His delegation considered that if consultation under Article 45 failed then recourse might be had to Chapter VIII.

/Mr. FORTHOMME (Belgium)

Mr. FORTHOMME (Belgium) suggested that the last sentence of Article 45 should read: "Action under this Article shall be without prejudice to the subsequent application of the procedure provided for in Article 45A and Article 47."

Mr. TERRILL (United States of America) felt that the amendment suggested by the representative of Belgium would considerably change the sense of Article 45. The Sub-Committee had endeavoured to indicate that even though a Member had resorted to the procedure of Article 45, had asked the ITO for some assistance, and had not put up a very good case, that Member might resort to the procedure of Article 45A.

Mr. McINTOSH (United Kingdom), in withdrawing the amendment submitted by his delegation, said he adhered to the opinion that in not accepting that amendment the Committee was doing a dangerous thing. It was allowing Members who had a complaint against practices which did not meet the conditions of the second and third paragraphs of Article 44 to open the door to consultation through Article 45, and then, if they did not have a very good case, to start the matter all over again in the very different tribunal of Chapter VIII.

He supported the amendment proposed by the representative of Belgium.

Mr. HEIDENSTAM supported the amendment suggested by the representative of Belgium.

Mr. FORTHOMME (Belgium), replying to Mr. HURTADO (Venezuela), said that in inserting the word "subsequent" in the English text and "postérieur" in the French text of his amendment, he had intended to point out that the situation he envisaged was the one in which the procedure under Article 45 had not led to any satisfactory conclusion and it was therefore necessary, after having exhausted the procedure of that Article, to continue "subsequently" with the provisions of Article 45A.

Mr. HURTADO (Venezuela) said he could not support the amendment suggested by the representative of Belgium as it was similar to that suggested by the United Kingdom delegation.

Mr. ALCAR (Mexico) considered that the present drafting of Article 45 should be maintained.

Mr. OFTEDAL (Norway) and Mr. GELDERMAN (Netherlands) supported the Belgium amendment.

Mr. PAPATSONIS (Greece) supported the proposal made by the representative of the United Kingdom as it clarified the text of Article 45.

Mr. LEQUERICA (Colombia), Mr. MADJID (Afghanistan) and Mr. JIMENEZ (El Salvador) said they could not support the amendment suggested by the representative of Belgium. Mr. Lequerica said that he shared the views expressed by the representatives of Venezuela and of Mexico, and

/considered that the

considered that the present wording of Article 45 should be retained.

Mr. LECUYER (France) considered that the amendment suggested by the representative of Belgium improved the present text of Article 45, and therefore supported that amendment.

The CHAIRMAN said that it was his personal view that there was a difference between the amendment suggested by the representative of the United Kingdom and that suggested by the representative of Belgium. The amendment suggested by the latter, while drawing attention to the fact that the procedures of Article 45A should under normal circumstances follow subsequent to the procedure of Article 45, did not tend to exclude resort to other parts of the Charter as did the amendment suggested by the United Kingdom delegation.

Mr. TERRILL (United States of America) felt that demands for clarification of the text without alteration of the substance of the present Article 45 might be met by inserting in the last line of that Article after the word "to" the words "any subsequent resort by a member to the procedure provided for in Article 45A".

Mr. FORTHOMME (Belgium) said he preferred the wording he had originally suggested, but proposed that in his amendment the word "a" should replace the "the" before the word "subsequent".

Mr. HAUSWIRTH (Switzerland) suggested that the words "Article 47" at the end of the Belgian amendment should be deleted as that Article did not mention procedure.

Mr. McINTOSH (United Kingdom) pointed out that the only procedural point in Article 47 was that mentioned in paragraph 5 where reference was made to discussion with the Organization upon request.

Mr. FORTHOMME (Belgium) said that if the Belgian amendment was not accepted, he would prefer the present text of Article 45 to be retained.

The Committee rejected the amendment to Article 45 proposed by the representative of Belgium by fifteen votes to twelve, and that proposed by the representative of the United States of America by fourteen votes to twelve.

Mr. FORTHOMME (Belgium) said that his delegation wished certain modifications to be made to the French text of the Sub-Committee's report to bring it into harmony with the English text.

Mr. HEIDENSTAM (Sweden), referring to his remarks at the tenth meeting, said that he wished to know what would happen in case one of the parties to a dispute was not a member of an inter-governmental organization. He considered that in such a case the ITO should take the steps laid down in the latter part of paragraph 3 of Article 50.

/The CHAIRMAN said

The CHAIRMAN said that he would ask the Secretariat for clarification and would communicate the reply to the representative of Sweden.

He thanked representatives for their co-operation and said that if necessary a further meeting of the Fourth Committee would be held at a future date to consider the Report of the Committee.

The meeting rose at 1.05 p.m.
