

SECOND COMMITTEE: ECONOMIC DEVELOPMENT

SUMMARY RECORD OF SEVENTEENTH MEETING

Held at the Capitol, Havana, Cuba  
Monday, 26 January 1948, at 6.00 p.m.

Chairman: Mr. E. ABELLO (Philippines)

1. DISCUSSION OF REPORT OF SUB-COMMITTEE B ON ARTICLE 12 - INTERNATIONAL INVESTMENT FOR ECONOMIC DEVELOPMENT (document E/CONF.2/C.2/29)

Mr. TORRES (Brazil), Chairman of Sub-Committee B on Article 12, in presenting the Report of that Sub-Committee, said that, in view of the wide range of amendments submitted to that Article the unanimity of the Report reflected a genuine spirit of compromise.

The text of Article 12 as redrafted by the Sub-Committee differed substantially from the Geneva text, although, as in the Geneva text, the new Article recognized that international investments, both public and private, could be of great value in promoting economic development, and that such investments would be stimulated if Member States afforded nationals of other countries opportunities for investment and security for future investment.

After briefly reviewing the new draft of Article 12, Mr. Torres pointed out that paragraphs 1 (d) and 2 (b) of that draft introduced the idea of bilateral or multilateral negotiations which was not contained in the Geneva text, and called attention to the three interpretations of the Article which appeared in paragraph 3 of the Sub-Committee's Report. Paragraph 3 of the Geneva text of Article 12 had been maintained as it met with the unanimous agreement of the Sub-Committee.

Mr. BRUDZINSKI (Poland) said he had no comments to offer regarding the new draft of Article 12. Referring to sub-paragraph (c) of paragraph 3 of the Sub-Committee's Report, he considered that the Articles of Agreement of the International Monetary Fund should also be mentioned in connection with paragraph 1, sub-paragraph (c) of Article 12. He therefore suggested that the words "paragraph 1, sub-paragraph (c) and" should be inserted in sub-paragraph (c) of paragraph 3 of the Report before the words "paragraph 2, sub-paragraph (b)."

/Mr. TORRES (Brazil),

Mr. TORRES (Brazil), replying to Mr. VIRATA (Philippines), said that it was his understanding that the phrase "international agreements" appearing in paragraph 1, sub-paragraph (c) of Article 12 was intended by the Sub-Committee to refer to both bilateral and multilateral agreements. As there was no objection to this interpretation, the CHAIRMAN announced that the phrase in question would be so interpreted.

Mr. LIEU (China), referring to the phrase "to foreign investments or to investments generally" in paragraph 3, sub-paragraph (a) of the Report, considered that the words "to investments generally" should be deleted as they might be interpreted as meaning "domestic investments" which should, in any case, not come under the scope of the ITO.

He also suggested a drafting change in the opening phrase of paragraph 2, sub-paragraph (b) of Article 12, as follows:

"Upon the request of any Member and without prejudice to existing international agreements to which Members are parties to enter into consultation .....

Mr. RUBIN (United States of America), said that the note referring "to foreign investments or to investments generally" was included in order to cover the possibility that requirements might relate only to foreign investments or to all investments, both domestic and foreign. He would, therefore, like the wording of paragraph 3, sub-paragraph (a) retained.

Mr. LIEU (China), referring to the explanations given by the representative of the United States of America, suggested that paragraph 3, sub-paragraph (a) of the Report should be deleted.

Mr. ADARKAR (India) considered that paragraph 3, sub-paragraph (a) of the Report should be retained as it made it clear that the requirements which a Member had a right to impose might relate exclusively to foreign investments as well as to both foreign and domestic investments.

The CHAIRMAN said that, as there appeared to be no support for the deletion of paragraph 3, sub-paragraph (a), he took it to be the sense of the Committee that the interpretation in that sub-paragraph met the approval of the Committee.

Mr. NASH (New Zealand) supported by Mr. BELLOC (Argentina), considered that proposals relating to the Sub-Committee Report should be first circulated to members in order that they might be carefully considered before discussion in Committee.

After a brief discussion in which the CHAIRMAN, the representatives of New Zealand, Cuba and Australia took part, the Chairman announced that the Committee would reconsider such proposals after they had been circulated and after the Report had been discussed as a whole.

/Mr. SUIJENS (Belgium)

Mr. SUIJTERS (Belgium) said that as the new draft of Article 12 tended to weaken the Geneva draft his delegation could not approve it. The new draft contained no adequate provision on non-discrimination. Whereas the Geneva draft contained broad provisions regarding the transfer of property belonging to foreign nationals, the new text did not. Nothing remained in the new text of the interpretative note on compensation which appeared on page 13 of the text of the Geneva draft. Belgium on foreign investments had in the past done a great deal to promote the economic development of underdeveloped countries, but unless serious guarantees were given to her foreign investments Belgium would not be able to provide such assistance in the future. He therefore suggested that paragraph 3 of the new draft should be deleted.

Mr. WOULBROUN (Luxembourg) felt that the new Article 12 would discourage rather than encourage foreign investments. His delegation supported the suggestion that paragraph 3 should be deleted. He proposed also that paragraph 2, sub-paragraph (a) (ii) should read:

"(ii) to avoid any unreasonable discrimination as between  
foreign investments."

Mr. COOMBS (Australia) said that the representatives of Belgium and Luxembourg should take into account the fact that the new Article 12 contained a different approach to the way in which the problem of the treatment of international capital should be dealt with. The Geneva draft had attempted to set down what would be a reasonable code for the treatment of foreign investment within Article 12. The important advance made in the new text was that it recognized, because of the essentially political character of international investments that it was not practicable to include such an Article in the ITO Charter.

The main difference between the Geneva text and the Havana text was the emphasis placed in the latter text upon the advantage which might accrue to capital-lending countries and capital-receiving countries from the conclusion of bilateral agreements in which the treatment to be given to international capital had a much more specific character than was possible in a Charter such as that of the ITO. It was of fundamental importance for most capital-receiving countries to lay down in advance a guarantee of the type of treatment likely to encourage foreign investors.

Mr. Coombs did not agree that the text of the new Article weakened the Geneva text. In the opinion of the Australian delegation the present text was a more honest one. He could not understand the purpose of the Belgian proposal to delete paragraph 3 of the new draft.

/Mr. TORRES (Brazil)

Mr. TORRES (Brazil) did not think that paragraph 3 of the new text had the connotation put upon it by the representatives of Belgium and Luxembourg. The retention of the paragraph would encourage investment. The present draft expressed the principle that there should be as much co-operation as possible between foreign investors and national capital. The paragraph was not mandatory, and did not necessarily affect the rest of the Article.

Mr. COREA (Ceylon) felt that the representative of Belgium had been precipitate in passing judgment on the Sub-Committee draft before it had been discussed in the Committee, and in stating that his country would not be able to co-operate in facilitating foreign investment if the present text stood. The representative of Ceylon stressed the spirit of realism and equality in the new Article as compared with the Geneva text. There should be no compulsion for one country to accept the investment of another, and paragraph 2 (b) did no more than provide for negotiations between the countries involved. The Sub-Committee had realized that it would be impossible to provide for all possible combinations of circumstances beforehand. He urged the approval of the text in its entirety.

Mr. SUEMENS (Belgium) said that he had only wished to emphasize two points of interest to Belgium. To mention that both parties should enter into negotiations added nothing to the security of the investors. If the "nebulous" terms of the Havana text were considered to be more "honest" than the Geneva text, the only result would be that discriminatory measures would be the rule rather than the exception. If, however, the principle of non-discrimination and the principle of just compensation were not stated more clearly in the Article, his Government could not recommend that any Belgian investor should invest his funds abroad.

Mr. GUTIERREZ (Cuba) did not agree with the representatives of Belgium and Luxembourg that the Havana text was defective. Paragraph 3 merely stated the "appropriateness" of co-operation. The whole world had spoken against allowing foreign investment to foster imperialism. The constitution of a country should be respected and should not have to be modified to give greater security to foreign investors. He believed that paragraph 3 should stand.

Mr. GARCIA-OLDINI (Chile) believed the Havana text was a well-balanced compromise. Although as a small country in need of capital, Chile had been in favour of the Geneva text, she could accept the Sub-Committee draft even with its flexible provisions. He also saw no reason for deleting the third paragraph.

/Mr. ADARKAR (India)

Mr. ADARKAR (India) said that the representative of Belgium might prefer the words "to avoid discrimination" to the present text of the first part of sub-paragraph (a) (ii) of paragraph 2, but it was erroneous to assume that paragraph 2 (a) of the Geneva text applied the principle of non-discrimination in an unqualified form. That passage referred only to the treatment of existing or future investments after they had been made. To adopt the Belgian suggestion would be to widen the scope of paragraph 2 of the Havana text and consequently make it broader than the Geneva text of Article 12.

It had been decided to delete the specific provisions of paragraph 2 of the Geneva text and state the rights of capital-receiving countries in general terms, in order not to shake the confidence of the investing countries and hence defeat the purposes of Article 12. The logical consequence would be, therefore, to state their obligations in equally general terms. If the Belgian proposal of non-discrimination were adopted, under paragraph 1, (c) (iii), for instance, there might be misunderstanding as to whether or not a member had the right to nationalize foreign undertakings without nationalizing its own investments. Other anomalous situations might arise in respect of subsidies which it was desirable to give to national but not to foreign enterprises. The balance embodied in the new Article 12 should be preserved.

Mr. WOULEROUN (Luxembourg) regretted that his statement had caused misunderstanding. It was extremely important to promote foreign investment, but the new draft might not be exactly what was needed. He had not criticized those parts of Article 12 which stressed the rights of capital-importing countries. His amendment to paragraph 2, (a) (ii) did not go counter to the arguments submitted by the representative of India, but he felt the paragraph should have a more positive tone.

Mr. FUMASOLI (Switzerland) said that the new draft of Article 12 seemed to be calculated to discourage rather than to promote foreign investment. He endorsed wholeheartedly the statement by the representative of Belgium.

Mr. PHILIP (France) said that he had understood that after submission of the Sub-Committee's Report, improvements in the draft of Article 12 might be considered but that the problem as a whole would not be reopened. The new text of Article 12 acknowledged that it was impossible to foresee all circumstances. The fundamental difference between the two drafts of Article 12 was that whereas the Geneva Draft set forth definite rules, the Havana made more general statements.

The new draft avoided conflicts between countries wanting to invest and those wanting to receive investment. If there were any complaint,

/it would be

it would be expected to come from one of the small states, since those countries needing foreign capital were in a weaker position in negotiations. The new draft was more realistic than the Geneva text and should be considered in that spirit. In any case deletion of paragraph 3 would not settle the point brought up by the representative of Belgium.

Mr. LIEU (China) pointed out that Article 12 was different from many others. The Article itself did not provide the safeguard for foreign investment; the actual safeguard would come later in the form of the bilateral agreements contemplated. The text as a whole, though open to criticism, should be considered as the lowest common denominator. On this basis he could accept it, although he had previously been in favour of retaining the Geneva text.

The meeting rose at 8.25 p.m.

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