

FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

DRAFT 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 VELDON (South Africa) Vice-Chairman; on Mr. Van VELDON's departure from Cuba on 16 January 1948, Mr. B. N. BANERJI (India) was appointed as his successor.
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: Argentina, 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 eleven 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, Netherlands, Norway and Sweden reserved their positions on Article 50, pending the outcome of discussions on the new Article 18A.

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

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 the relation between Chapter V and Chapter VIII and without prejudice to the right of any delegation to bring up the matter in the plenary session agreed to send the following note to Sub-Committee G of Committee VI:

"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".

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

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, 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.

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 "sellers" 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

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 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"

"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. On the question of whether electricity should be considered as a 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

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 rights to reconsider its position in the plenary session.

PART III

The text of Chapter V as revised by the Central Drafting Committee is being issued as a separate document (E/CONF.2/C.8/2).
