

FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

SUMMARY RECORD OF THE SIXTH MEETING

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

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

CONSIDERATION OF THE REMAINING ITEMS ON THE REPORT OF THE SUB-COMMITTEE

Article 45A

Paragraph 7

The CHAIRMAN, in declaring the meeting open, referred to the brief explanation regarding paragraph 7 of Article 45A, given in paragraph 20 of the Sub-Committee's report, and said that the Geneva Draft of Chapter V did not contain any specific provisions regarding the order of priority as between the laws obtaining in a Member State and the obligation to be assumed under Chapter V. Two widely divergent points of view might be held on that question, i.e. in the first place the contention might be supported that whatever the State ordained had precedence over any obligations arising under Chapter V. That point, however, had been rejected by the majority of the Sub-Committee for the reasons given in paragraph 11 of its Report. The Sub-Committee agreed that when engaging in trade the State assumed the same rights and obligations as private traders. That conclusion did not, of course, imply any reflection on State sovereignty. The second point of view that might be held, i.e. that any enterprise, whether private or publicly controlled and directed, should be subject to the procedure provided for in Chapter V could not be reconciled with the terms of Article 47, paragraph 4. Therefore, the Sub-Committee had decided to write into Chapter V some guidance as to the criterion the Organization should adopt, and that was the reason for the proviso in paragraph 7 of Article 45A.

Referring to the remarks made by the representative of the Netherlands at the previous meeting, the Chairman said that he believed there was no inconsistency between the proviso in paragraph 1 of Article 45A and the proviso in paragraph 7 of that Article. As regards the apparent inconsistency between the proviso in paragraph 1 of Article 45A and that in paragraph 4 of the same Article, he said that the second sentence of the latter paragraph excluded, in the case of a public commercial enterprise,
/any intervention

any intervention by any body except the Member who made the complaint.

He felt that the point raised as to the advisability of requiring prior resort to the consultation procedure laid down in Article 45A in the case not only of public commercial enterprises but also of private commercial enterprises operating under the specific direction of Member States, was not relevant to paragraph 7 of Article 45A.

Mr. de VRIES (Netherlands) said that the proviso in paragraph 7 of Article 45A seemed to make it impossible for the Organization to take action if a State assumed specific responsibility for an enterprise, whether that enterprise was private or publicly controlled. He felt, therefore, that the proviso in question would defeat the whole purpose of Chapter V.

Mr. McINTOSH (United Kingdom) said his delegation also had some doubts regarding the amendment to paragraph 7. That amendment was drafted at a stage in the Sub-Committee's discussions when it was trying to make clear that the administrative actions of a Government agency in carrying out a national economy plan and the actions which commercial enterprises might take on their own initiative were two very different things. It was not until the Report and the amended text of paragraph 7 were considered as a whole by the Sub-Committee that the various amendments suggested were seen in their correct relationship.

The United Kingdom delegation felt that the wording of the proviso to paragraph 7 implied that restrictive business practices engaged in under the specific direction of a Member were a perfectly proper subject for the Organization to investigate under Chapter V, and by that wording the Sub-Committee achieved the direct opposite of the object at which it was aiming when the amendment to paragraph 7 was drafted. The proviso should therefore be deleted in order to make the Sub-Committee's intentions clearer.

Mr. McGREGOR (Canada), Mr. TERRILL (United States of America) and Mr. BLAZEJ (Czechoslovakia) supported the suggestion made by the representative of the United Kingdom that the proviso in paragraph 7 should be deleted.

Mr. McGREGOR (Canada) suggested that the word "that" should be added after the word "and" at the beginning of the first line on page 13.

Paragraph 7 was approved with the deletion of the proviso proposed by the Sub-Committee and the addition of the word "that" suggested by the representative of Canada.

Paragraphs 8, 9 and 10

Approved without comment.

/Mr. McGREGOR (Canada),

Mr. MCGREGOR (Canada), referring back to paragraph 4, suggested that the word "inform" should be substituted for the word "notify" in the second line of that paragraph.

The CHAIRMAN said the Secretariat would be instructed to make the change suggested by the representative of Canada in the draft which had already been approved by the Committee.

Article 46

Approved without comment.

Article 47

Paragraph 1

Mr. de VRIES (Netherlands) suggested that the words "In addition it" in the sixth line of paragraph 1 should be deleted, and the word "and" should be added after the word "Article" in the same line.

Mr. MCGREGOR (Canada) suggested that a semi-colon should be placed after the word "Article" in the sixth line.

Mr. BIRCE (Turkey) felt that the words "in accordance with its constitution or system of law" in the second line of paragraph 1, were too broad in their scope, and requested clarification of the meaning of the term "system of law".

Mr. HEIDENSTAM (Sweden) considered that the new wording of paragraph 1 was an improvement on the Geneva Draft. He noted with satisfaction that in its report the Sub-Committee recognized that the implementation of the obligations of paragraph 1 might vary from country to country.

Mr. McINTOSH (United Kingdom), replying to the point raised by the representative of Turkey, said the primary intention of the term "system of law" was to make it clear that different countries would not take precisely the same preventive or remedial measures in any given case, but that any measures taken would be in accordance with their customary way of dealing with such problems. The phrase "system of law" appearing in paragraph 1 was complementary to the words "constitution" or "basic legislation". The words "constitution" and "system of law" represented two different concepts - one the actual existence of basic or fundamental legislation, and the other the judicial sphere in which remedial action was carried out by a Member of ITO.

Mr. TERRILL (United States of America) felt that it should be placed on record (1) that the term "system of law" had been used in order to distinguish a broad concept from a narrow one, the narrow concept being the specific legislation which might be on the statute books at the time the ITO Charter came into force. The second point should be a positive one,

/i.e. that the Committee

i.e. that the Committee intended to refer to the general framework of law and procedure under the juridical system of any particular Member.

Mr. BIRCE (Turkey) considered that the Charter should contain a specific interpretation of the phrase "system of law", as explanatory notes in the report of the Committee would not be binding.

The CHAIRMAN said that three representatives considered that the wording of the paragraph as at present drafted together with the explanations in the report of the Sub-Committee would be sufficient to remove any doubts on the point raised.

Mr. DUNAWAY (Liberia) asked for clarification of the words "economic organization" which appeared in the second line of paragraph 1. He wondered what "economic organization" had to do with the enforcement of the measures laid down in paragraph 1, and felt that such a reference was unnecessary.

Mr. TERRILL (United States of America) said the words "economic organization" were intended to refer to whatever economic system had been adopted by a Member State.

Mr. McINTOSH (United Kingdom) pointed out that two countries having the same constitution and system of law might have different systems of economic organization and that in each case they would be allowed to take economic measures in accordance with their system of organization.

Mr. GOMEZ (Guatemala) supported the remarks of the representative of Liberia, and considered that the words "economic organization" were redundant.

The CHAIRMAN said that the explanation given by representatives regarding the phrase "economic organization" would be included in the Report of the Fourth Committee to the plenary session of the Conference.

Mr. THILIGES (Belgium) proposed that (1) the French text of paragraph 1 should be amended to read: "...de celles visées aux paragraphes 2 et 3 de l'article 44 et produisent..." to bring it into line with the English text which employed the word "and" and not "which". (2) Both texts should be made consistent with the last phrase in paragraph 1 of Article 44.

The conditions were set out more clearly in Article 44, paragraph 1, which mentioned the specific practices which might produce harmful effects.

Mr. BANERJI (India) pointed out that the phrase under reference was linked to similar phrases in other Articles such as 45A. As the second proposed amendment would entail amendments to other parts of the Chapter, he would not support any change in the English text.

Mr. LECUYER (France) was in favour of changing the word "qui" to "et" in the French text, but believed if the English text were changed the meaning of the paragraph would be disturbed.

/Mr. MCGREGOR (Canada)

Mr. MCGREGOR (Canada) agreed with the representatives of India and France. The added amendments involved would cause confusion.

Mr. THILIGES (Belgium) believed that there was complete similarity between the cases of Articles 44 (1) and 47 (1). Inserting the word "and" did not prejudice the fact that certain practices would produce harmful effects, and suggested "one other" such practice, as mentioned in 44 (1).

Mr. GOMEZ (Guatemala) supported the Belgian proposal. It would serve as clarification.

Mr. BANERJI (India) thought the wording of the paragraph was quite clear. His only objection was to the corresponding changes in other paragraphs.

It was agreed that "et" should be inserted before "oui" in the French text.

With this amendment in the French text, paragraph 1 was taken as read and adopted by the Committee.

Paragraph 2

Taken as read and adopted by the Committee.

Paragraph 3

Taken as read and adopted by the Committee.

Paragraph 4

It was agreed that, as suggested by the representative of Canada, in order to bring this paragraph into conformity with paragraph 1, the third line should be amended to read: "... its constitution or its system of law..."

It was agreed that, as suggested by the representative of France, the French text should be made consistent by using the words "economic system" throughout, instead of "economic organization" which appeared in this paragraph.

Paragraph 4 was taken as read, and adopted with the French and Canadian amendments.

Paragraphs 5 and 6

Taken as read and adopted by the Committee.

Article 47 as a whole was taken as read and adopted by the Committee.

Article 48

Mr. de VRIES (Netherlands) said that although the original text had been amended to remove the ambiguity of the term "remedial order", some of the value of the Article had been lost in the present text, particularly through the omission of paragraph 2.

/The representative of

The representative of the United States of America, in reply to questions by the representative of the Netherlands stated that the amendments to paragraph (1) of Article 44 and to Article 48, if taken in conjunction, were probably an improvement because the former referred to the co-operation of single members with the Organization, and not to co-operation between members. Co-operation undertaken between two or three members was dealt with separately in Article 48.

If the Sub-Committee's text were amended to read: "...practices which have the effects described in Article 44, shall consult with the Organization and keep it informed with regard to such co-operative action", the value lost through the omission of the second paragraph might be regained.

Mr. LECUYER (France) thought the Organization should be kept informed of every move a Member State intended to make.

Mr. de VRIES (Netherlands) suggested that an amendment to the title of the article should be considered.

Mr. TERRILL (United States of America) emphasized that the United States had agreed with the greatest reluctance to the change in the Geneva Draft of Article 48.

Mr. MCGREGOR (Canada) proposed that, as there now appeared to be no serious disagreement on the principles involved, the appointment of a working group might be obviated if the original wording of the Article were considered at the present meeting.

Mr. BANERJI (India) supported the representative of Canada, and together with the CHAIRMAN pointed out that the doubts surrounding the implications of the term "remedial order" had been removed by changes recommended by the Sub-Committee, and as in any case it did not refer to the subject matter of Article 48, it would not be a point of contention in the consideration of the original text.

Discussion of the Original Draft of Article 48

Mr. ALVAREZ (Colombia), referring to the French text, pointed out that the words "may co-operate" suggested that members were not forced to co-operate, while Articles 44 and 45 implied compulsion in this respect. It should be clearly established that any member who decided to take any measures regarding Article 48 must inform the Organization a priori.

Mr. MCGREGOR (Canada) said it was clear that co-operation should be purely voluntary. In the first paragraph the word "prohibitive" might be deleted, and "order issued" changed to "measures taken". The word "preventative" should be corrected to read "preventive".

It was important that the Organization should be kept aware of what was going on, and therefore paragraph 2 should stand, except for amending the word "notify" to read "inform".

/There was no

There was no difference in meaning between "who co-operate" in the Sub-Committee text, and "may co-operate" in the Geneva text.

Mr. BLUSZTAJN (Poland) pointed out that the word "Charter" in the first paragraph should read "Chapter".

Mr. TERRILL (United States of America) referring to a statement by the representative of Uruguay, suggested adding the words "within their respective jurisdiction" after the word "measures" in the second line, which would make it clear that there could be no investigation of one state by another state.

The last part of the first paragraph might be more concise if re-phrased.

Mr. STEWART (Uruguay), referring to the French text, said the first part of the suggestion by the representative of the United States of America had been covered in the Sub-Committee draft.

Mr. MONTEIRO de BARROS (Brazil) said that as it was mentioned that Members might co-operate, if other Members wished to co-operate they could do so, and this might lead to the infringement of the rights of Member States under the guise of co-operating in certain preventive measures.

Mr. TERRILL (United States of America) presumed that the representative of Brazil was referring to the doctrine of compulsory co-operation. This doctrine had been widely repudiated. To overcome this possible defect in the paragraph, the words "if they so agree" might be inserted in the first line after "other".

Mr. MONTEIRO de BARROS (Brazil) said his point was not fully covered by this amendment. The text should make impossible the infringement by one Member of the jurisdiction of another.

Mr. HURTADO (Venezuela) supported the proposal made earlier by the representative of Chile, that a working party should be established to discuss the draft and report to the next meeting of the Fourth Committee.

Mr. BLUSZTAJN (Poland) supported this suggestion, and stated the position of his delegation regarding Article 48. Nothing in the Charter should preclude Member States from co-operating. This action should be voluntary. There was no difference between the two texts in this respect. Paragraph 2 was satisfactorily worded.

Mr. THILLIGES (Belgium) agreed with the representative of Poland. The mandatory clause was included only in paragraph 2. The Committee should make it clear, (1) whether optional measures should be taken only when a decision had already been taken by the Organization, or if these complementary measures could be taken as regards practice, without any prior interference by the Organization which was considered by certain Members to fill conditions laid down in Chapter V; (2) whether the obligation embodied in

/paragraph 2,

paragraph 2, to inform the Organization of the action taken might not lead to an intervention a posteriori on the part of the Organization.

The CHAIRMAN suggested that the points raised by Belgium and Canada might be put in the form of a note in the Committee's report. This suggestion, together with other proposals would be taken into account by the working group in its report.

It was agreed that the working group should be composed of members of the following countries: Brazil, Canada, Belgium, the Netherlands, the United Kingdom, the United States of America and Uruguay.

The meeting rose at 1.10 p.m.
