

FOURTH COMMITTEE: RESTRICTIVE BUSINESS PRACTICES

SUMMARY RECORD OF TENTH MEETING

Held at the Capitol, Havana, Cuba

16 January 1948 at 10.30 a.m.

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

1. ELECTION OF VICE-CHAIRMAN

Mr. THAGGARD (Norway) regretted that he was unable to accept nomination as Vice-Chairman owing to ill health.

Mr. McINTOSH (United Kingdom), supported by the representatives of CHILE, the NETHERLANDS, MEXICO, GUATEMALA, COLOMBIA and GREECE, proposed that the representative of India should be elected as Vice-Chairman.

The representative of India was unanimously elected Vice-Chairman.

2. ARTICLE 51, Paragraph 1

Mr. THAGGARD (Norway) considered that the second sentence of paragraph 1 of Article 51 should be deleted since the text of paragraph 1 of Article 51 of the Geneva draft referred to particular exceptions granted from the scope of Chapter V, but the present text was a general statement.

Mr. THILLIGES (Belgium) pointed out that the Committee had decided, at the previous meeting, to retain the present drafting of paragraph 1 of Article 51 but to include a note in the report making it clear that the use of the expression "may have" did not entail any extension of the provisions of Chapter V. If such a note did not meet the point of the representative of Norway, then the draft might possibly be changed to provide only for existing harmful practices.

Mr. BANERJI (India) said his delegation attached importance to the wording of the second sentence of Article 51, and felt that there could be no practical objections to its maintenance.

Mr. THAGGARD (Norway) said he would not stress the point which he had raised.

3. WORDING OF CHAPTER V WAS FINALLY ADOPTED

The CHAIRMAN, referring to the remarks he had made at the close of the previous meeting, said that under Chapter V a complaint could be brought against a particular business enterprise, whether privately or publicly owned

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or whether the State had assumed a certain measure of responsibility for it, but not against a Member of ITO.

Under Chapter VIII the complaint was brought against the Member of ITO who had failed to carry out his obligations not merely under Chapter V but under all the other chapters of the Charter. Therefore, although the obligations under Chapter V might come under the purview of Chapter VIII, if no result was achieved under that Chapter the Member, in referring to the Organization under Chapter VIII, was not confined to the arguments set forth in Chapter V. If that were borne in mind it should be comparatively easy to determine what should be the general relationship between Chapters V and VIII.

He suggested that the discussion should begin with the question whether recourse must be had to Articles 45 and 45A before recourse to Article 89.

Mr. GOMEZ-ROBLES (Guatemala) considered that the procedure laid down in Chapter V was different from that of Chapter VIII. The procedure outlined in the former was purely administrative, and should be adopted by States not to settle differences but to avoid and eliminate any obstacles impeding settlement. If those obstacles could not be removed in accordance with the procedure of Chapter V, then recourse should be had to the procedure of Chapter VIII.

Mr. BANERJI (India) felt that the representative of Guatemala agreed that recourse would be had to the provisions of Articles 45 and 45A to establish the fact whether or not a particular business practice complained of was restrictive, and whether or not it was producing harmful effects within the meaning of Article 44. If it were proved that the business practices complained of were producing harmful effects, then recourse would be had to Chapter VIII. Within the framework of Chapter VIII provision was made for consultation and for final appeal to the International Court of Justice.

Mr. HEIDENSTAM (Sweden) agreed with the opinion expressed by the Chairman. Referring to paragraph 3 of Article 50, he asked what would happen if one of the parties to a dispute was not a Member of ITO. He considered that paragraph 3 should contain a provision authorizing the ITO to deal with such a case.

Mr. McINTOSH (United Kingdom) said that, in the opinion of his delegation, all complaints which arose out of Member's obligations under Chapter V should in the first instance be investigated under that Chapter, and a complaint brought against a Member under Article 89 could only be entertained by the Organization if it followed previous investigation under Chapter V.

The CHAIRMAN said that the discussion should now be closed. He thanked the members of the delegation for their contributions to the discussion.

The CHAIRMAN said the meeting agreed that recourse must in the first instance be had to Article 45 before recourse to Article 89. The recourse under Article 45 was meant to establish whether such a practice existed and whether it had, or was about to have, harmful effects. That procedure having been complied with, the further procedure of Chapter V would be set in motion, and would then, if no satisfactory solution was reached, give rise to possible further complaint against the Member for not complying with his undertakings under Chapter V.

Mr. THILIGES (Belgium) agreed with the representative of Guatemala that before taking recourse to Articles 89 and 90, whenever possible it would be necessary to resort to the specific procedures of Chapter V, but disagreed that Chapter V should not be considered as a first instance and VIII as a second instance or appeal procedure.

Mr. GELDERMAN (Netherlands) agreed with the representative of Belgium.

Mr. LOPEZ ALCAR (Mexico) did not think that the representative of Guatemala had employed the term "instance" in a legal sense; it referred rather to the different stages of procedure to be followed. He had stated that the result of the two procedures would be that the Member States, in accordance with Article 47, would take measures permitted by their constitutions, but if no agreement had been reached, the procedure laid down in Chapter VIII could be followed. It would be better to understand that the member could apply Articles 89 and 90, and in this case Chapter VIII would lay down certain instances. The representative of Mexico agreed with the representative of Belgium on this point.

Mr. GOMEZ-ROBLES (Guatemala) suggested that, in order to avoid the complexities arising from the use of the term "instance", the word "procedure" should be used instead.

The CHAIRMAN pointed out that in using "instance" he had not meant it in the normal juridical sense that the Second Court was bound by the facts found by the First Court. It might be best not to use the word.

He suggested that the Committee Report should contain the following note:

"The Committee considers that in all cases relating to complaints against commercial enterprises, resort shall be had in the first place to the procedures provided for in Chapter V."

Mr. McINTOSH (United Kingdom) suggested that the note should refer to "all cases of complaint relating to restrictive business practices on the part of commercial enterprises."

Mr. COUILLARD (Canada) said it should be stated in the text at what stage the second procedure would be open to a Member: (1) at the time of /decision by

decision by the Organization regarding the harmful effects of the practice, or (2) after the Member had been given a reasonable time to put into force the recommendation of the Organization.

In reply to a question by the representative of EGYPT, the CHAIRMAN said he did not think it was necessary to include the words "whether public or private" in the note, as Chapter V had been made applicable to both types of enterprises.

Mr. THILLIGES (Belgium) said he did not believe it was sufficient to stop at the stage at which a decision had been taken. In Articles 45 and 47 provisions had been made for certain consequences which would follow the decisions. Only after that procedure had been applied could a Member endeavour to find satisfaction under the provisions of Chapter VIII.

The CHAIRMAN supported the remarks by the representative of Belgium, but added that it could be presumed that a reasonable length of time would elapse before it was discovered whether or not a Member was taking full account of all the procedures.

Mr. GOMEZ-ROBLES (Guatemala) felt that there should be a right to resort to Article 89 when a Member considered that a direct or indirect benefit accruing from the Charter had been jeopardized, if one of the provisions in Article 1 was endangered, and the procedures of Chapter V had been exhausted. This should be stated in the Chapter.

Mr. TERRILL (United States) agreed with the CHAIRMAN, but said that the deliberations were taking a grave turn. The opportunity for an injured member to resort to the right that lay behind the Charter unless the Organization made a prior finding, was being foreclosed. The proceedings in determining the harmful effects of restrictive business practices were lengthy and involved. The Committee should consider the matter at some length before taking any irrevocable step in deciding that every procedure in Article 45A had to be exhausted before resort could be had to the provisions of Chapter VIII.

Mr. COUILLARD (Canada) said his question had been prompted by the same fear as that expressed by the representative of the United States, but he understood that the note did not preclude immediate resort to the Organization under Article 89 after going through the procedures of Chapter V, if benefits were being impaired.

Mr. McINTOSH (United Kingdom) thought that after the fundamental disagreement on the proper way of handling the question of restrictive business practices it had been decided that it was essential to write down a procedure in such terms as to ensure that all countries could take care of the question.

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In spite of differences in doctrine, a workable text had been produced. Chapter V was flexible enough to meet the point raised by the representatives of Canada and the United States. If it was so difficult to agree on the text for Chapter V in handling the question of when Articles 89 and 90 could be invoked, how was it possible for any agreement to be reached on a particular case of restrictive business practice before the empirical tests of Chapter V had been gone through? To admit that the practices of Chapters V and VIII could be invoked alternately or simultaneously would mean that the valuable work on Chapter V would be entirely useless, and nothing would ever be done in the field of restrictive business practices by the ITO.

Mr. LECUYER (France) endorsed the comments of the representative of the United Kingdom.

The vitally important question of restrictive business practices was in a field where no one had had sufficient experience to set down final principles, but there was no doubt that such matters should be subject to a specific procedure. Inquiries should be placed in the hands of a specialized body, and provisions had been made in a previous draft for the establishment of a Committee at a subsequent conference. If the Organization were to function properly and set forth a doctrine for restrictive business practices, then disputes must come before it; otherwise there would be no uniformity in the jurisprudence, and the meaning of Chapter V would be nullified.

Mr. TERRILL (United States) said his point was that no universal binding rule on the subject could be laid down for all time. The first sentence of the note might be amended to read: "The Committee considers that in a matter of general principle . . ." which would retain the element of flexibility and allow the Organization in the future to make its own rules of procedure in the light of particular cases. Members should not be put at a greater disadvantage than if Chapter V did not exist.

Mr. GOMEZ-ROBLES (Guatemala) did not agree with the representatives of Canada and the United States. He cited as an example - that going before a tribunal of the first instance and at the same time a tribunal of the second instance would create anarchy. Any procedure established for consultation in matters concerning restrictive business practices, must be adhered to until it had been exhausted, otherwise more difficulties would arise than those the Committee was trying to eliminate.

Mr. COUILLARD (Canada) pointed out that he, because of his position in the Sub-Committee on Chapter VIII, had merely asked at what point in time it was proposed to block recourse to Chapter VIII and what would happen if the first procedure under Chapter V continued over a long period. He was  
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inclined to support the amendment. It was quite possible that a Member's benefits accruing under the Charter might be impaired, and this should be considered by the Committee.

Mr. JIMENEZ (El Salvador) agreed with the representatives of the United States and Canada. The moment a Member resorted to Article 89, it was the responsibility of the State and not that of a private commercial enterprise. Criteria should be established on this point. If the procedures of Chapter V had to be exhausted first, a member state might procrastinate and the matter would never end.

The CHAIRMAN pointed out that the wording of the note did not exclude the principle related to the length of time an investigation might take and the consequent effect in blocking action. It should not be a function of the Committee completely to tie the hands of the Organization.

Mr. COUILLARD (Canada) preferred the United States amendment.

Mr. McINTOSH (United Kingdom) suggested that the addition proposed by the representative of the United States was unnecessary; amending the word "shall" to read "should" might serve the same purpose.

Mr. HAUSWIRTH (Switzerland) said that ambiguities such as the term "in the first place" should be avoided. There was one first procedure to be followed, and not simply a first procedure in point of time but still linked to another procedure. If the draft were submitted in writing, it could be studied more thoroughly with a view to perfect clarity.

It was agreed that the final wording of the draft should be deferred until the next meeting of the Committee.

The CHAIRMAN expressed his regret at having to leave the work of the Committee.

The meeting rose at 12.50 p.m.