13 December 1954

ARTICLE XXVIII

Propositions under examination in Sub-Group A of Review Working Party II

The Sub-Group has discussed Article XXVIII and allied questions. It has not yet been able to examine Section A of Article XVIII or Article XXVII. The major issues arising in connection with Article XXVIII (as listed in paragraphs (a) to (f) of Section I of document W.9/19) are the following:

(a) Whether the procedures for renegotiation are to be available to contracting parties at any time (as proposed, for example, by the United States), or whether as in the past there are to be fixed periods of firm validity during which the right of renegotiation would not be available.

(b) If there are to be fixed periods of assured life, whether the procedures for sympathetic consideration of requests to renegotiate within the fixed periods are to be incorporated in the Article.

(c) In the case of negotiations under (a) or (b) should there be provision for arbitration by the CONTRACTING PARTIES in the event of failure to reach agreement?

(d) Regardless of the answer to (a) or (b), whether the provision for unilateral action in paragraph 2 is to be deleted.

(e) Whether provisions should be made, along the lines of Article XIX, which would allow a contracting party to take emergency action pending the negotiation to protect the position of a developing industry in circumstances in which delay in increasing the bound rate of duty would be likely to cause damage difficult to repair.

(f) Whether a contracting party proposing to modify a concession should be required to negotiate (instead of merely consult) with contracting parties having a substantial interest in the concession concerned.

The Sub-Group has so far discussed mainly four propositions on these issues. These are set forth in Annexes I to IV.

Delegations wishing to discuss these or any other specific propositions relating to Article XXVIII are invited to contact Miss Matthews in Room A.648, telephone 3027, on Tuesday 14 December. It is intended that delegations interested in discussing these matters will be afforded an opportunity to attend a meeting of the Sub-Group on Wednesday 15 December.
ANNEX I

First Proposition relating to Article XXVIII

I. The following amendments should be made in the existing text of Article XXVIII:

(a) In paragraph 1 for "On or after 1 January 1954", substitute,

either: "On or after 1 January 1958 ...",

or: "Except during such periods of firm binding as may be determined by the CONTRACTING PARTIES ...".

(b) In paragraph 1, insert a provision requiring a contracting party wishing to negotiate for modification of its schedule on the expiry of a period of firm binding to give six months' notice of the list of items which it proposes to negotiate, without prejudice to its right to amend the list in the course of negotiations.

II. A procedure on the following lines, for dealing with requests for modification of concessions during a period of firm binding, should be laid down in the Agreement (either in Article XXVIII or in an Annex with suitable reference in Article XXVIII):

1. When a request for authority to renegotiate with a view to modifying bound rates of duty is submitted to the Organization.

2. Such authority to renegotiate should be granted only in exceptional circumstances, and on the understanding that the negotiations will be conducted with a view to maintaining the level of concessions, i.e., the adjustment should be made by compensation in the schedule of the contracting party requesting renegotiation rather than by the withdrawal of concessions from other schedules.

3. (a) Negotiations

   (i) When the applicant country is authorized to enter into negotiations it should be expected to provide compensation for the contracting parties to whom the concessions had been granted by negotiation.

   (ii) When agreement is reached with the contracting parties to whom the concession had been granted, the applicant country should be free to modify the concession at the same time as it makes the compensation effective.
(iii) If no agreement is reached within sixty days, or at such earlier time as may be agreed upon with the contracting parties to whom the concession had been granted, the applicant country may refer the matter to the Organization. If the Organization determines that the compensation offered is reasonable, the applicant country will be free to modify the concession at the same time as it makes the compensation effective.

(b) Consultations

(i) The Organization should determine the contracting parties which have a substantial interest in the concession. During the negotiations the applicant country should consult with such contracting parties and should endeavour to see that the compensation offered includes compensation for them.

(ii) If agreement is reached in the negotiations and the applicant country modifies the concessions, a substantially interested contracting party which considers it has not been compensated may refer the matter to the Organization. If the Organization determines that the compensation is not reasonable, it should submit its views as to the additional compensation that should be granted. If the applicant country does not grant this additional compensation within thirty days, the substantially interested contracting party should be free, not later than ninety days after the concession has been modified by the applicant country, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the Organization, substantially equivalent concessions initially granted in negotiation to the applicant country and the withdrawal of which the Organization does not disapprove.

(c) Emergency Action

(i) First alternative

In circumstances where delay in affording additional tariff protection would cause damage to a domestic industry which it would be difficult to repair, a contracting party wishing to modify a bound rate of duty, when submitting its request to the Organization under paragraph 1 may request the right to proceed with the modification prior to the conclusion of the negotiations.

Second alternative

In circumstances where delay in affording additional tariff protection would cause damage to a domestic industry which it would be difficult to repair, a contracting party may modify a bound rate of duty provided that it immediately notifies the Organization of the action it has taken and of the compensation it proposes to offer to the contracting parties to whom the concession was granted in negotiation, and provided it submits its case to the judgment of the Organization as the exceptional circumstances and the state of emergency.
(ii) If the Organization agrees that the circumstances justified the taking of emergency action and would warrant the grant of authority to renegotiate, the applicant country should be authorized to proceed with negotiations and consultations as provided under sections (a) (i) and (b) (i).1

(iii) If in the negotiations no agreement is reached within sixty days, or at such earlier time as may be agreed upon with the contracting parties to whom the concession was granted, the country which modified the duty should be required to refer the matter to the Organization and to grant the compensation which the Organization determines to be reasonable, or restore the concession which it had modified. A contracting party which has been determined by the Organization to have a substantial interest in the concession and which considers that it has not been compensated may refer the matter to the Organization and the provisions of paragraph (b) (ii) shall apply.

4. A decision of the Organization under 3(a)(iii), b(ii) or c(ii) should be given within thirty days unless otherwise agreed with the contracting party which has referred the matter to the Organization.

5. The negotiations should be conducted in Geneva unless the participating contracting parties agree upon some other place.

6. The results or negotiations should be reported to the Executive Secretary over the signature of the participating governments and the Executive Secretary should immediately inform all the contracting parties. The schedule of the applicant country should be modified in accordance with the formal procedures established by the Organization for the modification of schedules.

7. The applicant country should notify the Executive Secretary immediately the resulting changes in its tariff are made effective and the Executive Secretary should inform all the contracting parties.

8. The procedures should include a paragraph in which the Organization would recognize that premature disclosure of the proposed modification of a rate of duty would tend to defeat the object of the negotiations and that, therefore, the Organization should make some provision for the observance of the utmost secrecy in the conduct of any negotiation.

---

1 It would be understood that if the CONTRACTING PARTIES did not agree that the circumstances justified the emergency action or warranted the grant of authority to negotiate, and if no satisfactory solution could be found on the basis of agreement between the contracting parties interested in the concession, the latter might have recourse to Article XXIII.
ANNEX II

Second Proposition relating to Article XXVII

On the assumption that the majority of the contracting parties favour a period of firm rebinding, modification of concessions during each period of firm binding should be allowed under the following conditions:

Paragraphs 1 to 8 of Section II of Annex I with the following amendments:

(a) either delete provisions requiring prior approval before entering into negotiations,

or retain provisions requiring prior approval subject to the Organization agreeing that, in considering any request to negotiate under these procedures, it will take into account certain special circumstances applying in the case of one (or more) contracting parties to which attention has been drawn in discussions in the Sub-Group.

(b) delete the first alternative referred to in paragraph 3(c) (i).
ANNEX III

Third Proposition relating to Article XXVIII

A Formula for Indefinite Rebinding of the Schedules with Procedure for Renegotiation Continuously Available to Contracting Parties

Under the formula herein proposed, the firm life of the schedules would be extended for an indefinite period with a procedure for renegotiation such as that followed in the "sympathetic consideration" procedure available continuously. At the same time the present Article XXVIII:2 would be deleted, thereby eliminating unilateral withdrawals of concessions and providing that renegotiation would be accomplished in all cases by the instroduction of compensatory concessions into the schedule concerned.

Specifically the following changes would be made in the present Article XXVIII:

1. Eliminate from XXVIII:1 the reference to a date.

2. Revise the remainder of para. 1 to make procedure for modification of a concession - by negotiation of compensatory concessions with other contracting parties having a substantial interest in the concession involved - available on a continuous basis for use where the CONTRACTING PARTIES agree that "exceptional circumstances" exist.

3. Delete XXVIII:2 in its entirety.

Under this proposal the firm validity of the schedules would be extended indefinitely. At the same time, however, a procedure similar to the present "sympathetic consideration procedure" would be available, by which a contracting party might apply at any time to the CONTRACTING PARTIES for permission to renegotiate an individual item in its schedule. If "exceptional circumstances" were demonstrated the CONTRACTING PARTIES would grant approval for the applicant to negotiate with all parties having a substantial interest in the concession concerned. The CONTRACTING PARTIES at the same time would designate the contracting parties substantially interested in the concession. The right of unilateral withdrawal under the present para. 2 of the Article having been deleted, such negotiations would be on the basis of providing satisfactory compensatory concessions to take the place of that being withdrawn. Upon reaching agreement with the substantially interested contracting parties, the applicant would be free to withdraw the concession simultaneously placing in force the compensatory concessions agreed upon with the former.
ANNEX IV

Fourth Proposition relating to Article XXVIII

(a) Article XXVIII paragraph 1 to be retained but to commence "As from such dates as the CONTRACTING PARTIES may from time to time decide, any contracting party may ......." The first such date might be 1 January 1958.

(b) The present Article XXVIII paragraph 2 relating to unilateral withdrawal of concessions to be deleted and replaced by a paragraph providing for arbitration by the CONTRACTING PARTIES in the event of no agreement being reached in the negotiations.

(c) Provision in a new paragraph for sympathetic consideration to be given in advance of the date referred to in (a) above, to applications to the CONTRACTING PARTIES for permission to renegotiate in cases of special urgency or other exceptional circumstances.