22 January 1955

REDRAFT OF ARTICLE XXVIII

1. Since the informal discussion which took place on the proposed redraft of Article XXVIII (Spec/18/55) I have been having informal consultations with certain of the representatives who experienced difficulties with the text. These consultations have not led to any solution of the problem but they encourage me to believe that it would be worth resuming the discussion which was discontinued at the previous meeting, and I suggest that we meet again for this purpose on Monday next, 24 January at 3 p.m., in the office of the Chairman (A.650).

The principal difficulty, it will be recalled, centered upon paragraph 4(d) and as a result of the consultations referred to above I have drafted a revised version of this paragraph as follows:

"Upon such reference, the Organization shall promptly examine the matter and submit its views to the contracting parties primarily concerned with the aim of achieving a settlement. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the Organization determines that the applicant contracting party has unreasonably failed to offer appropriate compensation. If such action is taken, the contracting party or parties primarily concerned, and the other contracting parties determined by the Organization under sub-paragraph 4(a) of this Article to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received, by the Organization, such substantially equivalent concessions initially negotiated with the applicant contracting party, the modification or withdrawal of which the Organization does not disapprove."

Sec/49/55
I understand, however, that this draft is not one which the United States delegation feels it could recommend to its Government to accept since they feel that the minimum condition of according the right of withdrawal during a bound period without agreement should be that the Organization should be satisfied that adequate compensation has been offered. A draft which appears to satisfy this point and, at the same time to provide in the Article itself the procedure for the review of compensatory withdrawals is set out below:-

"Upon such reference, the Organization shall promptly examine the matter and submit its views to the contracting parties primarily concerned with the aim of achieving a settlement. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the Organization is satisfied that the applicant contracting party has failed to offer adequate compensation.

If such action is taken, the contracting party or parties primarily concerned, and the other contracting parties determined by the Organization under sub-paragraph 4(a) of this Article to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the Organization, concessions substantially equivalent in value to the value to their trade of the withdrawal or modification made by the applicant, initially negotiated with the latter.

In the event that one or more of the contracting parties primarily concerned, or determined by the Organization under sub-paragraph 4(a) to have a substantial interest modify or withdraw concessions under the provisions of para 4(d) (ii), the applicant contracting party may if it so desires refer the matter to the Organization for a review and determination.
as to whether the modifications or withdrawals made by any contracting party under 4(d) (ii) were in excess of those substantially equivalent to the value to the contracting party in question of the modification or withdrawal originally made by the applicant contracting party under paragraph 4(d) (i)."

2. In order to meet the difficulties raised on paragraph 1. I would suggest that the interpretative note contain, in addition to the note included in Spec/18/55 the following:-

"The object of providing for the participation in the negotiations of any contracting party with a principal supplying interest and for consultation with other contracting parties having a substantial interest in a concession which it has sought to modify or withdraw, is to ensure that these contracting parties in addition to the contracting party with whom the concession was originally negotiated shall be in a position to protect the contractual rights which they enjoy under the Agreement. It is not intended however that these provisions should have the effect that the contracting party seeking to exercise the right of modification or withdrawal should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any quantitative restrictions maintained by the applicant. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the Organization in the application of this paragraph. It is however intended to be interpreted in a common-sense manner and should therefore be construed to cover only those contracting parties which have, or in the absence of quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw a concession."
This interpretative note might be supplemented by further explanation in the Working Party report something on these lines:-

"It was pointed out in the discussion that the effect of including in the negotiations, in addition to the contracting party with which the concession was originally negotiated, any contracting party with a principal supplying interest and of giving to contracting parties substantially interested the possibility of retaliatory withdrawals unless the compensation agreed upon in the negotiations was satisfactory to them, might result in penalising the contracting party seeking to exercise the right of modification or withdrawal. For example, contracting party A in seeking to withdraw or modify a concession in its schedule might be required to negotiate with contracting party B, with whom the concession was originally negotiated, and with contracting party C, which at the time of the proposed modification or withdrawal had become a principal supplier, (or which it has been determined would be a principal supplier in the absence of quantitative restrictions) and to consult with contracting party D, which has been determined to have a substantial interest in A's market. It A were to be required to give B compensation based upon the price originally paid by the latter for the granting of the concession, to give compensation to C equivalent to its present interest in the trade, and to D for its potential interest in the trade - or in the event of failure to find compensation, to suffer retaliatory withdrawals of equivalent amount by all these contracting parties - A would be placed in a most inequitable position. It was therefore agreed, in order to avoid this situation which was clearly not intended to be the result of the provisions of Article XXVIII, to include an interpretative note to this effect in order to make the position quite clear. It was upon this basis that the text of paragraph 1. was agreed to by those contracting parties which had raised objections to it."
3. The following additional proposals have been made to me in the course of the informal consultations referred to above:-

(a) To insert in the interpretative notes a provision to the following effect:-

"At any time within six months prior to 1st January 1958, or such subsequent dates as the contracting parties may from time to time agree upon, any contracting party wishing to modify or withdraw any concession embodied in its schedule may notify the Organization to this effect. The Organization shall then determine the contracting party or contracting parties with which the negotiations and consultations referred to in paragraph 1 shall take place. The contracting party or parties so determined shall participate in such negotiations and consultations with the applicant contracting party with the aim of reaching agreement before the date mentioned in this paragraph."

(b) To make an insertion in paragraph 4(c) as follows:-

"If agreement between the contracting parties primarily concerned is not reached within a period of $\sqrt{60y}$ days, or within such longer period as the Organization may, at the time it gave authority for negotiations, have prescribed, after the negotiations have begun, the contracting party which proposed to modify or cease to apply such treatment may refer the matter to the Organization."

(c) To add a new interpretative note to paragraph 4, as follows:-

"It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item or a very small group of items, could normally be brought to a conclusion in $\sqrt{60y}$ days. It is recognised, however, that $\sqrt{60y}$ days will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items, or items involving exceptional negotiating problems. In such cases any contracting party determined to have a principal supplying interest may propose, at the time the Organization authorizes such negotiations, and the Organization may provide for, an appropriately longer period before the provisions of sub-paragraph 4(d) may be invoked."
(d) to amend the existing interpretative note to Paragraph 1. as follows:

"The Organization may determine one or more contracting parties who are either leading suppliers of the item concerned in the market of the applicant, or would be leading suppliers in the absence of quantitative restrictions currently or recently imposed on the applicant's imports of the item, to have a principal supplying interest. In addition, the Organization may determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of that contracting party's total exports, even though such trade may not constitute a principal share in the market of the applicant country."