

THIRD COMMITTEE: COMMERCIAL POLICY

REPORT OF SUB-COMMITTEE D ON ARTICLES 40, 41 AND 43

1. The Third Committee at its seventeenth meeting on 22 December 1947 approved the formation of a Sub-Committee on Section F - Special Provisions - of Chapter IV consisting of the representatives of Argentina, Belgium, Colombia, Denmark, France, Iraq, Italy, Peru, Southern Rhodesia, United Kingdom and the United States of America.
2. The terms of reference of the Sub-Committee were to consider and make recommendations upon the text of Articles 40 to 43 and the amendments submitted to these Articles, with the exception of those amendments to Article 42 which affected the question of preferences and were referred to the Joint Sub-Committee of Committees II and III, and the Swiss proposal for a new provision, which was referred to Sub-Committee G of Committee III.
3. At its twentieth meeting on 31 December 1947, the Third Committee adopted a recommendation by the Joint Sub-Committee of Committees II and III to refer to that Sub-Committee also those proposals relating to Article 42, which had been previously referred to Sub-Committee D.
4. The Sub-Committee held its first meeting on Monday, 29 December 1947, and unanimously elected Mr. R. J. Shackle (United Kingdom) its Chairman.
5. The Sub-Committee held eight meetings. Delegates for several countries not members of the Sub-Committee attended its meetings. Representatives of Afghanistan, Cuba, Netherlands, Norway and Turkey took an active part in the discussion on points of special interest to them.
6. In the course of its work the Sub-Committee examined the text of Articles 40, 41 and 43, all outstanding amendments to these Articles as listed in document E/CONF.2/C.3/11, as well as amendments and observations subsequently submitted by Members and recommendations received from other committees and sub-committees. The Sub-Committee did not examine the text of Article 42 which it considered to be outside its terms of reference, all amendments to that Article having been referred to another sub-committee.
7. The Sub-Committee was able to reach unanimous agreement on most points, only a small number of decisions taken being subject to reservations by individual delegations. The majority of such reservations were concerned with matters forming part of larger issues or related to problems still
/under discussion

under discussion in other sub-committees. The substantial measure of agreement reached was due to the spirit of conciliation shown by members of the Sub-Committee.

8. The text of Articles 40, 41 and 43 as agreed - subject to the reservations mentioned - and recommended by the Sub-Committee for approval by Committee III is attached as an Annex to this Report.

SPECIFIC COMMENTS

Article 40 - Emergency Action on Imports of Particular Products

9. The Sub-Committee did not consider justified a proposal (E/CONF.2/C.3/1/Add.42/Rev.1) to exclude quantitative restrictions on imports of agricultural and fisheries products from the measures provided for in this Article. The delegation of Peru reserved its position in this matter.

10. The Sub-Committee was unanimous in its understanding of this Article that action taken by Members under paragraphs 1 (a), 1 (b) and 3 (b) - as distinct from paragraph 3 (a) - should not involve any discrimination against the trade of any Member. As the text as drafted might leave room for doubts on this point, it was felt that this intention, as interpreted by the Sub-Committee, should be expressly stated in the Charter. The Sub-Committee decided therefore to recommend that this interpretation be embodied in a foot-note attached to the Article and forming part of the Charter. The delegation of Argentina reserved provisionally its position.

11. The question was raised whether, in taking action under paragraph 1, of Article 40, Members would be limited to the reimposition of measures which had been in effect prior to the entry into force of the Charter.

It was agreed that the text as drafted does not limit the measures which Members might take. For example, it would be possible, under this paragraph, for a Member to impose a quantitative restriction on imports of a particular product, if such a restriction were in fact necessary to prevent or remedy serious injury to domestic producers in the face of increased imports, even though a quantitative restriction had not been applied prior to the adoption of the Charter. There would, however, have to be a relationship of cause and effect between (a) the increase in imports resulting in injury, and (b) the obligations assumed by Members under Chapter IV. Such a relationship might exist in the following cases, among others:

(i) The granting of a tariff concession (either the reduction of a duty or the binding of a duty against increase) might lead to injurious imports.

(ii) The elimination of a quantitative restriction existing prior to the adoption of the Charter might lead to injurious imports.

This might happen even though the restriction in question had never been actually applied but had merely been provided for

/under the

under the laws or regulations of a Member.

In view of the broad scope of paragraph 1 of Article 40, as illustrated above, the amendment proposed by the delegation of Cuba (C.3/1/Add.22) was withdrawn.

12. In sub-paragraph 1 (a) the word "relatively" was inserted between "such" and "increased" so as to make it clear that Article 40 could apply in cases where imports had increased relatively to domestic production, even though there might not have been an absolute increase in imports as compared with a previous base period.

13. The Sub-Committee was unable to accept a proposal to delete sub-paragraph 1 (b).

14. The Sub-Committee shared the doubts expressed by the delegation of Argentina as to the exact meaning of the word "critical" in paragraph 2 and recommends its substitution by the words "of special urgency" to follow after "circumstances".

15. The delegation of Argentina recorded a reservation in respect of the words "the suspension of which the Organization does not disapprove" at the end of sub-paragraph 3 (a).

Proposed New Article 40A

16. The Sub-Committee, having given full consideration to the Colombian proposal for insertion of a new Article, decided that internal price regulation and internal taxation were matters outside the scope of Section F and might properly be discussed in relation to Article 18. The proposal of the Working Party composed of the representatives of Colombia and the United States to recommend that a provision dealing with certain aspects of these matters be included in Article 18, was therefore referred to the Sub-Committee dealing with that Article.

Article 41 - Consultation

17. It was decided to add to the measures mentioned specifically in this Article "internal price regulations" and "practices and regulations affecting the freedom of transit", the latter being subject to examination by the Central Drafting Committee.

Article 43 - General Exceptions to Chapter IV

18. The numbering of paragraphs in this Article was changed so as to bring it into line with all other provisions of the Charter since there did not seem to be any reason for departing from the general practice followed elsewhere.

19. Upon recommendation of Sub-Committee I of Committee VI an exception was added concerning "laws and regulations relating to public safety", the latter term, in the view of the Sub-Committee, including the concept of "public order".

"public order".

20. In discussing an amendment to sub-paragraph (a) (v), previously I (d), designed to exempt measures against so-called "social dumping" from the provisions of Chapter IV, the Sub-Committee expressed the view that this objective was covered for short-term purposes by paragraph 1 of Article 40 and for long-term purposes by Article 4 in combination with Articles 89 and 90.

21. The delegation of Australia maintained its reservation in respect of sub-paragraph (a) (viii) of paragraph 1 (formerly I (g)) subject to the final wording of Article 94.

22. Upon recommendation of Committee V a further exception was inserted for measures taken under inter-governmental agreements for the conservation of fisheries resources, migratory birds and wild animals, as a corollary to a similar addition made to paragraph 1 of Article 67. It was thought desirable, however, that the Central Drafting Committee should examine the wording of this provision as well as the question whether it requires to be stated separately or might be incorporated in the present sub-paragraph (x), previously (h).

23. In sub-paragraph (a) (x) (previously I (h) the words "terms of" were substituted for "obligations under" since it was felt that the word "obligation" was liable to misinterpretation. It was agreed that this change should be subject to further examination by the Central Drafting Committee.

24. The Sub-Committee was unable to accept a proposal for deletion of the last part of sub-paragraph (a) (xi) beginning with the words "during periods...". The delegation of Argentina reserved its position on this point.

25. The Sub-Committee expressed the view that governmental measures relating to the orderly marketing of agricultural commodities for which storage facilities in both the countries of origin and destination were insufficient, were covered in paragraph 2 (b) of Article 20. On this understanding the proposal by the delegation of Afghanistan to add a new provision to paragraph 1 (a) was withdrawn.

26. In sub-paragraph (b) (1), previously II (a), the words "general inter-governmental" were substituted for the word "multilateral". In the view of the Sub-Committee the provision is intended to require Members to take guidance not from any multilateral agreement as such, but from agreements of a wide and general character, and the change was made so as to express this intention more accurately. The delegate of Argentina recorded a reservation.

27. The Sub-Committee in considering sub-paragraph (b) (ii) and (iii),

/formerly II

formerly II (b) and (c), agreed that the words "the war" were intended solely to refer to World War II. In the course of the discussion it appeared, however, that not only there might be room for a different interpretation, but that the concept of World War II, as applied to different parts of the world, is in itself not sufficiently precise. It was decided, therefore, to recommend that the Central Drafting Committee examine this provision with a view to removing any ambiguity and vagueness.

28. A proposal to delete the proviso in sub-paragraph (b) (iii), previously II (c), was not accepted. The delegation of Argentina recorded a reservation on this point.

29. The Sub-Committee decided to recommend that, instead of including a definite date in the final paragraph, the Organization should be authorized to specify when the measures permitted under sub-paragraph 1 (b), previously II, should be discontinued. It was felt that the conditions due to the war had not improved at the rate and to the extent expected when the Charter was first drafted and that even now it was not possible to foresee with any accuracy when these conditions would be likely to cease. It appeared desirable therefore, not to specify a date in advance, but to empower the Organization to fix the time limit for the termination of all or any measures in the light of future developments.

The delegate of Belgium did not insist on a proposal to leave the present text unchanged and to add a provision empowering the Organization to authorize the application of particular measures in respect of particular products if it considered such measures warranted by circumstances then ruling. A proposal by the delegation of Argentina to delete the last part of paragraph 2 beginning with the words "and in any event" having found no support, the representative of Argentina reserved his position.

ANNEX

Article 40

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under or pursuant to this Chapter, including tariff concessions, any product is being imported into the territory of that Member in such relatively increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
- (b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a Member in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a Member which receives or received such preference, the importing Member shall be free, if that other Member so requests, to suspend the relevant obligation, in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.
2. Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organization as far in advance as may be practicable and shall afford the Organization and those Members having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the Member which has requested the action. In [critical] circumstances of special urgency, where delay would cause damage which it would be difficult to repair, such action may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.
3. (a) If agreement among the interested Members with respect to the action is not reached, the Member which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected Members shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration

Article 40: It is understood that any suspension, withdrawal or modification under paragraphs 1 (a), 1 (b) and 3 (b) must not discriminate against imports from any Member. /of thirty days

of thirty days from the day on which written notice of such suspension is received by the Organization, the application to the trade of the Member taking such action, or, in the case envisaged in paragraph 1 (b) of this Article to the trade of the Member requesting such action, of such substantially equivalent obligations or concessions under this Chapter, the suspension of which the Organization does not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a Member to the domestic producers of products affected by the action, that Member shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such obligations or concessions as may be necessary to prevent or remedy the injury.

4. Nothing in this Article shall be construed (a) to require any Member, in connection with the withdrawal or modification by such Member of any concession negotiated under Article 17, to consult with or obtain the agreement of Members other than those Members which are parties to the General Agreement on Tariffs and Trade, or (b) to authorize any such other Members, not parties to that Agreement, to withdraw from or suspend obligations under this Charter by reason of the withdrawal or modification of such concession.

Article 41

Consultation

Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by any other Member with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, internal price regulations, subsidies, practices and regulations affecting the freedom of transit, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Chapter.

Article 43

General Exceptions to Chapter IV

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Member of measures:

[1.] (a) [(a)]

1. (a) (i) necessary to protect public morals;
- (ii) necessary to the enforcement of laws and regulations relating to public safety;
- (b) (iii) necessary to protect human, animal or plant life or health;
- (c) (iv) relating to the importation or exportation of gold or silver;
- (d) (v) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to customs enforcement, the enforcement of monopolies operated under Section D of this Chapter, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;
- (e) (vi) relating to the products of prison labour;
- (f) (vii) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) (viii) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (ix) undertaken in pursuance of any inter-governmental agreement relating solely to the conservation of fisheries resources, migratory birds and wild animals; Provided that these measures are subject to the requirements of paragraph 1 (d) of Article 67;
- (h) (x) undertaken in pursuance of obligations under the terms of inter-governmental commodity agreements concluded in accordance with the provisions of Chapter VI; or
- (i) (xi) involving restrictions on exports of domestic materials necessary to assure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such
- /restrictions shall

restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Chapter relating to non-discrimination;

II (b) (a) (i) Essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with any multilateral general inter-governmental arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all Members are entitled to an equitable share of the international supply of such products;

(b) (ii) essential to the control of prices by a Member country undergoing shortages subsequent to the war; or

(c) (iii) essential to the orderly liquidation of temporary surpluses of stocks owned or controlled by the government of any Member, or of industries developed in any Member country owing to the exigencies of the war, which it would be uneconomic to maintain in normal conditions; Provided that such measures shall not be instituted by any Member, except after consultation with other interested Members with a view to appropriate international action.

2. Measures instituted or maintained under paragraph II 1 (b) of this Article which are inconsistent with the other provisions of this Chapter shall be removed as soon as the conditions giving rise to them have ceased, and in any event not later than at a date to be specified by the Organization; Provided that such date may be deferred for a further period or periods, with the concurrence of the Organization, either generally or in relation to particular measures taken by Members in respect of particular products.
