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THIRD COMMITTEE: COMMERCIAL POLICY

SUB-COMMITTEE A (ARTICLES 16, 17, 18, 19)

NOTES OF THE FIFTEENTH MEETING

Held on Tuesday, 6 January 1948, 3.00 p.m.

Chairman: Dr. G. A. IAMSVELT (Netherlands)

Agenda Item 1 - Failure to negotiate; role of Organization (Tariff Committee)

Items 39 and 43 (Peru) - Continuation of discussion.

The delegate for the United States pointed out that Article 17 could have provided either for a flat percentage reduction in tariffs or for reductions by selective negotiations. The former would have been self-enforcing, but the negotiating method being more acceptable was chosen. It was therefore necessary to include the provisions set forth in paragraph 2. The amendments proposed, i.e., to make the Tariff Committee a recommendatory body and to provide for an appeal to the Conference, would place Members not having negotiated pursuant to Article 17 in a position to decide whether or not Members already having negotiated were entitled to withhold concessions. Direct appeal to the Conference would make it almost certain that Tariff Committee decisions would not be upheld because of the common interest among the majority of the Members of the Conference, not yet parties to the General Agreement, at least during the early years of the Organization.

He could not agree to the proposal to provide for direct appeal from Tariff Committee decisions to the Conference. However, his interpretation was that under the present draft Charter (Articles 89 and 90), although Members could not appeal decisions of the Tariff Committee, as such, to the Conference and obtain an order against the Member acting pursuant to a Tariff Committee decision, a Member could appeal to the Conference on the basis of action arising out of a Tariff Committee decision and, if the Conference concurred, that Member could be released from its obligations under the Charter to the Member acting pursuant to the Tariff Committee decision.

The delegate of China favoured providing some method of appeal from Tariff Committee decisions. From the long range point of view, when all Members of the ITO would have become parties to the General Agreement, there

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could, in his view, be no objection to direct appeals from Tariff Committee decisions to the Conference.

The delegate of Australia pointed out that the purpose of paragraph 2 was to provide some protection to Members already having made substantial concessions in negotiations pursuant to Article 17 (which had been generalized to all Members under Article 16) vis-a-vis Members who might fail to fulfill their obligations under Article 17. In his view Article 17 gave considerable protection to new Members, (e.g., the mutually advantageous and selective character of negotiations, recognition of the binding of low tariffs as a concession, etc.) whereas the sole protection for parties to the General Agreement was the procedure set forth in paragraph 2. Even under paragraph 2 parties to the General Agreement would have to continue to extend benefits to Members delinquent in fulfilling their obligations under paragraph 1 unless the Tariff Committee ruled otherwise. His delegation could not accept any material changes in paragraph 2 as drafted.

The delegate for Peru explained that the principal aim of his delegation's amendments was to establish equality of rights for all negotiators whether parties or non-parties to the General Agreement. Under the present draft of paragraph 2, Members of the Tariff Committee in making a determination would, as previously pointed out, be acting simultaneously as parties to the case and in the capacity of judges. The position of parties to the General Agreement would be strengthened by being Members of the Tariff Committee all of whom would be bound by common interests. If no agreement was reached in negotiations between a new Member and Members parties to the General Agreement, the new Member would be in danger of having the advantages accruing to it as a matter of right under Article 16 withdrawn, as well as of forfeiting possible new concessions.

In his view, the Tariff Committee should have investigatory and recommendatory powers only, after which the case should be referred to the Executive Board for a decision. The Executive Board, composed both of parties and non-parties to the General Agreement, and based on a fair geographical distribution, would be in a better position than the Tariff Committee to make an impartial judgment and to defend the interests of the Organization as a whole. Further, the appeal provisions of Chapter VIII should be made expressly applicable to cases arising under paragraph 2 of Article 17.

The delegate for France pointed out that the negotiations in Geneva had succeeded because they were conducted under flexible rules. No attempt had been made to agree in advance all the legal and procedural aspects. There appeared to be two alternatives: (1) either Article 16 could be deleted / and Article 17

and Article 17 redrafted in accordance with the amendments under discussion, or (2) Article 16 could be retained, along with an undertaking on the part of new Members to enter into negotiations as in Article 17. The General Agreement countries could not accept Article 16 in its present form without Article 17. Members having granted important concessions in previous negotiations pursuant to Article 17, and having received no counterpart, must have the right to withhold those concessions, with the Organization's approval from Members not fulfilling their obligations under paragraph 1 of Article 17. The generalization of existing concessions under Article 16 was not unconditional, but was modified by the provisions of Article 17. Even assuming the General Agreement countries were prepared to agree that Article 16 should become applicable only after all Members had negotiated pursuant to Article 17, this would be disadvantageous to new Members in that they would not automatically receive "on joining the Organization benefits by reason of the most-favoured-nation clause.

He believed the General Agreement countries had demonstrated their ability to negotiate and their reasonableness during negotiations in Geneva. He cited the experience of France. One country with which France was negotiating withdrew its offers at the last moment, another made no substantial offers, no agreement could be reached with a third, and one paid a very small entrance fee - yet all these countries were permitted to become parties to the General Agreement.

Although the obligation to negotiate under Article 17 binds both parties and non-parties to the General Agreement, three possible situations may arise:

- (1) new Members may refuse to negotiate while claiming the right to maintain concessions received under Article 16;
- (2) offers made by parties to the General Agreement may be considered insufficient by new Members;
- (3) parties to the General Agreement may refuse to negotiate on the grounds that concessions already made are sufficient.

It was necessary to designate some organ to make a decision in such cases. In his view the Tariff Committee rather than the Conference should be the arbitrator because, at least in the beginning, the Conference would not be an impartial body in this respect. He reiterated his previous proposal that a form of appeal could be provided for by which a Member would have recourse to arbitration if it felt that the other parties to the negotiations had not acted justly. Such an appeal could best be to the International Court of Justice under Article 91. In his view this was a much better solution than deleting Article 16, which would be disadvantageous to new Members, or redrafting Article 17, which would put the General Agreement countries in an untenable position.