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SECOND SESSION OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT

WORKING PARTY ON TECHNICAL ARTICLES

Summary Record of the Third Meeting held on Monday, 12 May 1947 at 10.30 a.m. in the Palais des Nations, Geneva

Chairman : H.E.Erik Colban

1. Article 20 - Marks of Origin

The Working Party continued its examination of paragraph 7 and the proposals for amendment of this paragraph by the Cuban and French Delegations contained in documents W.29 and W.40. It was decided to appoint an ad hoc Committee consisting of the representatives of Australia, Belgium, Cuba, Czechoslovakia, France, the Union of South Africa, the United Kingdom and the United States, with Mr. SHACKLE, representative of the United Kingdom, as Chairman, to examine the issues which had been raised by delegates in connection with this paragraph. The CHAIRMAN stated that the ad hoc Committee would hold private and confidential meetings and no record of their discussions would be retained. He stated that he was hopeful that the Committee would be able to present an agreed report within a few days. It was suggested that interested countries should send suggestions concerning the wording if this paragraph to the Secretariat and that members of other delegations might attend the meetings of the ad hoc Committee.

2. Article 21 - Publication and Administration of Trade Regulations - Advance Notice of Restrictive Regulations.

In reply to an enquiry concerning the title of this Article, the CHAIRMAN explained that he understood from the discussions of the Drafting Committee that great importance need not be attached to the wording of the titles of Articles since these would fall away once the whole Charter was adopted.

Paragraph 1. The CHAIRMAN remarked that the foot-note relating to this paragraph in the Report of the Drafting Committee appeared to call for no comment or action, and since no amendments to this paragraph had been proposed it appeared to be acceptable to all delegations.

Paragraph 1 was adopted.

Paragraph 2. The Delegate for New Zealand supported the reservation standing in the name of the New Zealand and South African Delegations in the Report of the Drafting Committee. The South African Delegate stated that the matter was being reconsidered by his Delegation and meanwhile he would like his reservation to stand.

It was agreed that paragraph 2 as it appeared in the Report of the Drafting Committee should be adopted without alteration in First Reading, subject to the reservation of the New Zealand and South African Delegations, and subject to the substitution of "shall" for "undertake to" in the fifth line and the deletion of "to" in the sixth line.

The Working Party then considered the proposal of the Canadian Delegation contained in document W. 24 that the following words should be added to the last sentence of paragraph 2 :

> "and their decisions shall be implemented by and shall govern the practice of such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."

This proposal was supported by the Canadian Delegate but was opposed by the Delegate of the United States. The Delegates of the United Kingdom, South Africa, Australia, France and the Netherlands participated in the discussion, and the Chairman directed that the significant statements that had been made by Delegates should be recorded in the minutes.

/NOTE: Extracts from the Verbatim Report will be found in the Annex to this Summary Record./

After discussion the United States Delegate stated that his Delegation could accept the amendment proposed by Canada on the understanding that the Preparatory Committee construed the amendment as meaning that it would be left open to the Central Customs Administration, though not to subordinate officials, to seek judicial correction before a judicial tribunal of what the administration might consider a judicial error. He explained that his interpretation was different from that put forward by the Delegate for Canada. It was then agreed that the Canadian amendment should be adopted in First Reading so as to give interested delegations ample opportunity to examine the full implications of the change.

It was suggested that the first words of the amendment should read "and the resulting decisions shall..... "

Proposed New Paragraph 2(a). The French and Benelux Delegations had proposed that the following new paragraph be inserted after paragraph 2 (document W.42) :

"2(a). The Organization shall be responsible for collecting, analysing and publishing in the most accessible form all laws, regulations and decisions concerning foreign trade and for the periodical collection, in the form of detailed studies, of information concerning the regulations of Member states on a given point."

It was agreed that this proposal should be noted in the minutes of the meeting, but in view of the provisions of paragraph 1 and of Article 61 the Working Party was of the opinion that it was not necessary to include this paragraph in the Article.

Paragraph 3. The French and Benelux Delegates announced that they would withdraw their proposal that paragraph 3 should be deleted (document W. 43) in favour of the new version of the paragraph proposed by the Czechoslovak Delegation (document W.51).

It was agreed that the next meeting should be held on the following day, Tuesday, 13 May at 10.30 a.m. to continue the examination of Articles 21 and 22.

The meeting rose at 1 p.m.

CORRIGENDUM.

The last three lines on page 2 of the Summary Record of the Second Meeting (E/PC/T/WP1/SR/2) should be changed as follows :

"The United States Delegate proposed that the word "shall" be inserted in the place of "should" in the second line. He referred to the similar proposal made by the Czechoslovak delegate and supported by the United States in respect of paragraph 3, and wished to state that the two should be on the same footing."

On page 3 of the same Record (lines 3-4) the words "and corresponding changes in the verbs in the following lines" should be deleted.

ANNEX

TO SUMMARY RECORD OF THE THIRD MEETING

ARTICLE 21 Paragraph 2

Extracts from verbatim report of discussion on the amendment proposed by the Canadian Delegation (document W/24):

Mr. SIM (Canada): It is important that once a tribunal has come to a conclusion, that conclusion should be implemented.... The initial decision of a tribunal can be evasive if notice is given that an appeal is going to be made..... This amendment is designed to ensure that once a superior jurisdiction has come to a conclusion, that conclusion should govern the practice of the administrative agencies, but if they disagree with that decision they should proceed to appeal within the same time limit as is given to the importers.....

Mr. JOHNSON (United States): In the United States the result would be a very serious restriction upon the accessibility of importers to our system of judiciary review of administrative decisions..... This would be a very serious restriction upon the importers, much more serious than upon the government, and would require a complete revision to the disadvantage of trade.....

Mr. SIM (Canada):..... If an importer is dissatisfied with an administrative act and has recourse to these tribunals,..... the decision should be implemented or the administrative authorities should lodge the appeal within an appropriate time.

Mr. JOHNSON (United States): The basic question presented by this proposal is whether the principle of res judicata is applied to customs litigation..... We have had for fifty-seven years a system of special customs tribunals. These independent tribunals have eliminated the rule of res judicata for the reason that customs litigation involves very diverse and complex questions of fact..... Since the rule of res judicata does not apply against the government, the government itself exercises its right of appeal just as the importer does..... The government does not pursue this, in actual practice, from the point of view of augmenting the revenue..... The prime occasion for making a new case is when we believe the decision of the court is inconsistent with established principles and we must determine whether the judiciary is establishing a new principle or whether there has been some misunderstanding or some inadequate presentation of the issues.

Mr. SHACKLE (United Kingdom):.... In the United Kingdom we have kept to the doctrine of res judicata..... The administration would not ignore the finding of the courts, but would always consent to an importer bringing another case where he alleges there is a difference of circumstances.

Dr. HOLLOWAY (South Africa):..... If the absence of the doctrine of res judicata is so interpreted that an official can place obstacles in the way of an importer, that would have an exceedingly far-reaching effect for this Conference because it means that we are not negotiating with the government, with the judiciary or legislature behind it, but, instead, the power is in the hands of the officials, and in that case there would be no use coming to an agreement.

Mr. JOHNSON (United States):.... With one very minor exception, the government and the importer have exactly the same time and the same limitations for appeal. That minor exception gives the government 60 days as against 30 days for the importer and it is purely for administrative reasons. There is nothing in our judicial procedure of disregarding the rule of res judicata that has resulted in any arbitrary action or any harassing of importers.....I would suggest that we disregard the amendment and proceed with the full assurance that the United States will welcome any action under Article 35 if there is ever any belief that the United States is attempting to nullify or impair its obligations.

Mr. VAN DEN BERGE (Netherlands):.....In general, when there is a permanent jurisprudence established by the Courts, the administration ought to accept that jurisprudence and, in any case, the minor officials must accept it: but the central administration always has the right - if the decision rendered by the tribunals does not seem clear to it - to go before the Court of Appeal. That is a right which cannot be denied the central administration.

Mr. JOHNSON (United States): If this Canadian amendment were susceptible to the interpretation indicated by the Netherlands Delegate, it would be entirely acceptable to the United States.

.....

Our acceptance is on the understanding that this Committee construes the proposed amendment as leaving it open to the central customs administration, though not to subordinate officials, to seek judicial correction before a judicial tribunal of what the administration might consider a judicial error.

Mr. SIM (Canada): I readily accept the interpretation placed upon this amendment. It was never intended at any time that this should place any obstacle in the way of the central government from appealing in a proper case. It was simply designed to ensure that that appeal will be taken promptly and, unless the appeal is taken promptly, the decision given by the courts should govern.

Mr. JOHNSON (United States): I might repeat that our acceptance is conditioned upon the interpretation which I consider is very different from that expressed by the Delegate for Canada.