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ARTICLE XXVIII

Statement by the Delegate of Cuba on 5 February 1955

The delegation of Cuba has studied carefully the new text of Article XXVIII now being submitted for the consideration of the Working Party in document W.9/166. Our delegation has in fact taken an active part in the discussions held in connexion with this important question, both informally and in the Sub-Group itself.

The text of the new Article XXVIII, which we are now examining, has been submitted by my delegation to the Government of Cuba for its consideration. However, up to the time of writing this statement we have not yet received the relevant instructions. Therefore the views which I am now going to put before you are only those of the Cuban delegation.

On the whole it is safe to say that the draft of Article XXVIII, which we are now studying, does not completely satisfy any delegation, as it is one of compromise, in which it has not been found possible to reconcile all the points in question. In this text therefore, there are many conflicting ideas. However, after careful analysis, the delegation of Cuba has come to the conclusion that this draft could be accepted by its Government, with the exception of one important amendment which is introduced into the first paragraph of the present Article XXVIII. I would like to be more flexible and pleasant but my delegation cannot accept that amendment in view of its far-reaching consequences and complications.

The amendment, to which I am referring, forces the applicant contracting party to enter into negotiations, not only with the contracting party with which it has negotiated the concession, but also with those parties which have a principal supplying interest.

The delegation of Cuba feels that it cannot accept the principle that a contracting party who has not negotiated the concession should participate in the renegotiations, even though this contracting party holds a substantial interest in the product in question, because it would place two parties on an equal footing both legally and from the point of view of proceedings and compensation to be paid, whose rôles with respect to the tariff to be

renegotiated have been entirely different. The contracting party with which the concession has been negotiated has given compensation in order to enjoy this benefit, whereas the other interested parties, since they have received the concession in an indirect manner, have not paid anything at all for this concession.

The fundamental differences between negotiation and consultation are the following. As regards procedure, negotiation is a much more formal act than consultation. As regards compensatory adjustment, the compensation which has to be paid is granted as a direct right to the parties with which negotiations are being carried out, which is not the case with consulting parties.

The general contractual right of each of the contracting parties to concessions under the various Schedules of the Agreement, according to the conditions laid down in Article II, must not be extended too far. In the interpretation of a legal document, no one given point should be considered more important than it really is, and it is essential, in the analysis we are making, to combine within its scope all the fundamental principles of the Agreement.

It is clear that there does exist a general contractual right of each contracting party to the concessions described in the Schedules of GATT, but there exists too, another principle which has governed tariff negotiations, under which it is not possible to ask any government to grant unilateral concessions or to grant concessions to another government without receiving adequate compensation in exchange. Clearly this last principle is made vulnerable if a contracting party which desires to modify or withdraw a concession is forced to grant direct compensation, during the course of a renegotiation, to contracting parties who have paid nothing for these benefits.

We do not deny that it is necessary to protect contracting parties who have a substantial interest in the concession which is being withdrawn or modified. To this end however, we feel that the procedure laid down in the present Article XXVIII of the Agreement is sufficient. This procedure provides, as you know, that negotiations should be carried out with the contracting party with which the concession was negotiated and that consultations should be held with parties who have a substantial interest in the concession. In any case efforts should be made to include compensations which might satisfy the interests of the latter, at the same time as granting the direct compensation to the party with which the concession was negotiated. However, if the contracting parties with a substantial interest do not receive adequate compensation, they will still have the right to apply measures of retaliation in accordance with the last paragraph of the present Article XXVIII. We consider that these measures give adequate protection to the general interests of all contracting parties, and that to try to obtain a more favourable position than this, by demanding the rights of negotiation without having negotiated the concession, and what is even worse, the right to receive direct concessions unilaterally, without having paid anything for them, is going too far, and places our procedure for negotiations on an unfair and unreasonable basis.

Apart from these considerations of a legal nature, we might say that the participation of a contracting party in the renegotiation of a concession which is being withdrawn or modified, without having paid anything for it, seems even more unreasonable if one bears in mind the definition of a contracting party with a principal supplying interest which is given in the new text of Article XXVIII, submitted for our consideration. In accordance with paragraphs 2 and 3 of the "Regulations concerning the application of Article XXVIII", which appear in pages 3 and 4 of document W.9/166, the following group of countries may be considered as contracting parties having a principal supplying interest:

1. those contracting parties which have, at the time of negotiation, a major share in the market of the applicant contracting party;
2. those contracting parties which could have a major share in this market, in the opinion of the Organization, if no quantitative restrictions of a discriminatory nature existed in the market of the applicant contracting party;
3. in exceptional cases, if the concession being negotiated affects trade which constitutes a major part of the total exports of that contracting party to the world market.

In the first group, the traditional and widespread concept that we all have of a contracting party with a principal supplying interest is not contemplated. Reference is not made to the country which has the principal share in the market of the applicant contracting party but to any country or group of countries which have a major share in that market. It does not make any difference therefore if the concession has been negotiated with the principal supplying country. At the time of modifying this concession, many countries with the so-called principal supplying interest will request the payment of direct compensation for the modification or withdrawal of the concession, in spite of not having paid anything for it and of the fact that they have been benefiting indirectly from the concession up till that time.

In the second group, the situation is equally unreasonable. Let us examine briefly the two assumptions which might be contemplated.

- (i) That of a contracting party which has a major share in the market of the applicant party at the time the concession is negotiated, but later this share is reduced or eliminated on account of quantitative restrictions which are established.
- (ii) When quantitative restrictions exist at the time of negotiation, and consequently the country in question has no interest in the market of the applicant contracting party, either before or after the granting of the concession.

In the first case, the normal procedure would be to appeal to the provisions laid down in Article XXIII of the Agreement, at the time when restrictions are established, on the grounds of impairment of a concession, without awaiting the opportunity when the tariff concession will be modified or withdrawn. In the second case it would be unfounded to claim compensation, because the contracting party has had no interest in the market of the applicant country, either before or after the granting of the concession. In both cases, it would be impossible for the CONTRACTING PARTIES to determine the share which a country might have in any market in the absence of restrictions.

The third case of a contracting party with a principal supplying interest is even more incongruous and unreasonable than the others. The principal or substantial interest which a contracting party might have in the market of the applicant party is not taken into account. It makes no difference if the share in the market of the applicant country is very small. What is considered is the general position of a country in the world market. The consequence would be that a contracting party with a significant share in the market can be stated by the CONTRACTING PARTIES to have a substantial interest, with the right only to consultation; while another contracting party with a minor share in the market of the applicant party could be declared as having an interest of a principal supplying country and the right to negotiation and to receive direct compensation, simply because it exports large quantities of the product to the world market.

As you may appreciate, Mr. Chairman, all this is quite illogical, and its consequences may be both complex and harmful to those contracting parties which feel impelled to adjust their tariffs at frequent intervals. For this reason the delegation of Cuba strongly opposes the above-mentioned amendment. We still hope that the few contracting parties which have been supporting this amendment to paragraph 1 of the draft of the new Article XXVIII, will understand our position and will consider the withdrawal of this undesirable suggestion.

Now, Mr. Chairman, I should like to make some comments on the suggestion of the Secretary that Section A of Article XVIII should be considered as a part of the overall settlement of these questions, and that, in consequence, this Section should be accepted in the form suggested.

In the first place, I must say that on examining the results of the discussions in Working Party I, with respect to the scope of that Article, my delegation has observed with great concern that the facilities provided for economic development are limited to the establishment of new industries. Furthermore the opinion of numerous underdeveloped countries that these special facilities should be also given for the maintenance and development of existing industries as in the present Article XVIII, has been completely ignored. On the other hand, we have seen with much surprise that facilities given in this Article are not limited to underdeveloped countries,

but that practically all countries, even those which are most advanced economically, have the right to benefit from its provisions.

This being the case, it seems to us to be quite unjustifiable to include Section A of Article XVIII in the overall settlement. Because, on the one hand, the advantages provided throughout the Article are not only for countries who are economically weak, but for everybody; and on the other hand, the underdeveloped countries are deprived of the rights and facilities which they at present enjoy under the provisions of Article XVIII now in force. We consider that this is a very odd way of elaborating a formula for compromise.

Nevertheless, my delegation could recommend a more flexible policy to the Government of Cuba in connexion with Article XVIII, if the difficulties which we have pointed out in connexion with Article XXVIII were eliminated. In this case, it would still be necessary to amend in Section A of Article XVIII, which has been submitted to us for consideration, the provisions which stipulate that negotiations be made not only with the contracting party with which the concession has been negotiated but also with those contracting parties substantially interested.

As a final remark in regard to the proposed draft of Article XXVIII, I should like to say, Mr. Chairman, that I am a great admirer of the spirit of compromise, and that the idea of having a package is very attractive to my mind. But let us not make a little package. Let us make a big package and let us put into that package not only Articles XXVIII and XVIII but let us also put the United Kingdom request for the extension of its waiver, the waivers requested by France, Germany, Italy and other countries, and the recent request for a waiver from the United States. And in the light of all these elements let us balance the position in Articles XXVIII and XVIII.

Finally, Mr. Chairman, I desire to inform you that my delegation considers that the project of the resolution which extends the validity of the Schedules for a new period of time, and which appears in the last page of document W.9/166, seems to be acceptable.