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LIMITED B
GATT/CP.2/SR.16

ORIGINAL: ENGLISH

GENERAL AGREEMENT ON TARIFFS AND TRADE

Contracting Parties

Second Session

SUMMARY RECORD OF THE SIXTEENTH MEETING

Held at the Palais des Nations, Geneva

on 1 September, 1948, at 3 p.m.

Chairman: Hon. L.D. WILGRESS (Canada)

THE STATUS OF THE PROTOCOL MODIFYING CERTAIN PROVISIONS OF THE AGREEMENT.

The CHAIRMAN stated that the question raised by the representative of South Africa regarding the validity of the Protocol had been held in abeyance since August 21st, and in view of the fact that this issue had a bearing on other questions on hand, he would like to re-introduce the subject and hoped that the Contracting Parties would reach a decision at the present meeting.

Mr. NORVAL (Union of South Africa) made a statement, which with the consent of the meeting, is reproduced as follows:

"It is with some regret that we note that our arguments do not seem to have prevailed upon the contracting parties. We, on our side, find ourselves in the same position of being of the same opinion still. While we have been impressed by the ingenuity of some of the arguments raised against the case we have presented to you, we are constrained to say that we do not feel at all convinced by what has been said in support of the validity of this protocol. Neither have we heard anything to justify the extent to which the basic principles of the agreement

are overridden by the new Article XXXV.

"We do not want to prolong the debate, or to re-open the whole argument, but you will allow me, Mr. Chairman, to touch on just one point, the main legal point raised in the summing up you have given us. You first of all deal with the position which would arise where the majority of the parties authenticating an agreement, decide to amend the text of the draft agreement before it has been accepted in accordance with its provisions, i.e., before it has entered into force. Let us accept, for the sake of argument, that what you have said in regard to this position is sound. You then proceed to apply this, by analogy, to the modifications of the provisional agreement, which the contracting parties sought to achieve by this protocol. But it is precisely at this point, if we may say so, that this whole analogy breaks down completely. When this modifying protocol was made, the provisional agreement had already become a legally binding instrument. It was no longer merely the authenticated text of the draft agreement. There was already in existence paragraph 6 of the provisional protocol, a legally operative agreement, which, read with the Final Act and in the light of the surrounding circumstances, conferred, we contend, a clear right to become parties to a particular agreement before a specified date. Whatever validity, therefore, the construction suggested by you, might have in regard to the text of a draft agreement before it has entered into force, it would not, in our submission, follow that the same construction could appropriately be applied in the peculiar circumstances of this protocol of provisional application after the provisional agreement had actually

entered into operation.

"But however that may be, Mr. Chairman, as I have said, we do not propose to re-open the whole issue. We do not along these lines seem to be getting any nearer to a solution which would be generally acceptable.

"We would, however, like to correct what appears to us to be an incorrect statement of fact. We refer to the statement that South Africa signed the protocol of provisional application in the knowledge that it had been varied. If this implies knowledge of any valid variation we have to point out that our Government have consistently adopted the attitude that legally, whatever the parties may have set out to do, there has in fact been no variation. Knowledge therefore of a variation which we have never recognised cannot, therefore, we submit, be ascribed to us, and an argument then be built on that. That, we feel sure, you will readily concede, would be arguing from false premises and would hardly be fair to us in all the circumstances. Our contention is that there was a definite binding understanding. Our Government were entitled to expect that that understanding would not be set aside by an unconstitutional procedure. They were entitled to accept the provisional agreement, as they have done, with that expectation.

"We would also like to say that we appreciate your suggestion that Article 35 should not be forced upon South Africa. At the same time also, we cannot refrain from pointing out that if the other contracting parties are to be bound as against South Africa, on the revised text, that is really saying that also South Africa is bound on the revised text, because it would then be <u>that</u> text which

would regulate the relations between South Africa and the other contracting parties. You will understand, Mr. Chairman, that that would be in direct conflict with the attitude we have all along adopted. We regret, therefore, that under our instructions, we would not be in a position to accept such a ruling.

"If the contracting parties are going to bring in a finding that Article 35 is valid, that would in effect amount to a finding that South Africa is bound by it, and that the other contracting parties are not bound, as against South Africa, on the unamended text. In our view such a finding would violate what we conceive to be the clear right which South Africa had to become a party to the unamended agreement.

"Mr. Chairman, we would be less than frank if we did not make it clear that, if rights such as we have been trying to vindicate, are to be disregarded by the contracting parties, our Government would see no advantage in sacrificing benefits under bilateral arrangements, in exchange for this multilateral agreement, particularly if Article 35 is to be regarded as part and parcel of it. If, therefore, the contracting parties should take a decision, such as is suggested by you, we could only take note of the decision, and report back to our Government.

"In conclusion, Mr. Chairman, I would like to add that, however much we desire to be co-operative, we feel constrained to maintain that international co-operation cannot possibly be built upon legally questionable procedures. We must make sure that we are building on sound and secure foundations as we are here in the realm of economic relationships where security rests upon contractual obligations".

In reply, the CHAIRMAN stated:

"I thank the representative of South Africa for his statement. We fully appreciate that he will have to refer to his government the conclusions I derived from the course of the discussion on this question and given in the statement I delivered a week ago Monday. I did not expect these conclusions to be agreed to by all the representatives of the Contracting Parties. As I stated then, it is always difficult to resolve questions of a juridical character in a body of this kind, nor can we regard ourselves as a court of last resort. I also stated that we should not adopt too legalistic a position and that we should try to settle the matter by facing the realities with which we are confronted. In other words, we should not try to force Article XXXV on South Africa, but, at the same time, we cannot impose on the Contracting Parties obligations which they had not accepted. To accomplish this end I wish to submit a proposal for the consideration of the Contracting Parties. This proposal is that in view of the discussion which has been held we do not take any decision one way or another on the legal issue, but that we invite the Government of the Union of South Africa to sign the Protocol modifying certain provisions of the General Agreement on Tariffs and Trade, but with a reservation that they do not accept Article XXXV. We can agree now that, if the Government of South Africa signs the Protocol between now and our next session, we shall give sympathetic consideration to approval of the South African reservation at our next session without altering the legal situation as it now exists. This could then have the effect that the other

Contracting Parties would continue to regard themselves as bound by and having the right to apply the provisions of Article XXXV, which do not require any of them to apply the General Agreement, or alternatively Article II of that Agreement, to another contracting party if there have not been tariff negotiations between the two parties and if either of the parties had made a declaration to that effect, while South Africa would continue to regard themselves as not being bound and would presumably apply the General Agreement to all contracting parties, irrespective of whether or not tariff negotiations have taken place between the parties.

"I suggest furthermore that we might also invite Southern Rhodesia to add its signature to the Havana Protocol, it being quite clearly understood, however, that neither invitation in any way implies any admission that South Africa's claims with regard to the invalidity of this protocol are well founded. This point I dealt with in my statement of the other day.

"I wish to know if the proposal I have outlined meets with the approval of the Contracting Parties."

Mr. ADARKAR (India) replied to the statement as follows, the reproduction of this reply in full being similarly approved by the meeting:-

"We are extremely grateful to you for the efforts you have made to find a solution for this complex problem. At this stage, all we can say is that we shall report the solution suggested by you to our Government and seek instructions. In doing so, we shall draw their attention to the ruling given by you a few days ago to the effect that the Protocol modifying certain provisions

of the Agreement, in which Article XXXV occurs, is fully valid. We understand that if, as suggested by you, South Africa signs the Protocol with a reservation as regards Article XXXV and if the Contracting Parties decide to accept the reservation, this will be done only to remove obstacles in the way of South Africa joining the Agreement and that this will not mean that India will then be expected to apply the Agreement to South Africa. India has already exercised her right under Article XXXV and any decision the Contracting Parties may take in regard to acceptance or otherwise of South Africa's reservation will not alter that position. We shall recommend the solution suggested by you for consideration of our Government on that basis."

Mr. USMANI (Pakistan) was doubtful whether from a legalistic point of view, a government could sign a Protocol with reservations, and if so, whether this recognition should be recorded by another Protocol.

The CHAIRMAN assured the representative of Pakistan that in the opinion of the legal advisor he had consulted, the signing of the Protocol with reservations would be valid if it is accepted unanimously by the Contracting Parties, and it would not be necessary to sign another protocol. He would think that a resolution, duly recorded, would be sufficient for this purpose.

Several representatives having shown their willingness to recommend the proposal of the Chairman, this was put to a vote.

The proposal of the Chairman was adopted by 15 votes to none.

Mr. NORVAL (Union of South Africa) thanked the Chairman for his effort and promised not merely to communicate with his Government but to endeavour to interpret the spirit in which the matter was taken by the Contracting Parties.

The CHAIRMAN felt that the representative of South Africa had reciprocated the spirit of the meeting and correctly interpreted the spirit of the proposal. The matter should be reviewed at the next session.

REPORT OF WORKING PARTY 3 ON MODIFICATIONS TO THE GENERAL AGREEMENT (GATT/CP.2/22/Rev.1) (Continued discussion)

Mr. CAMPOS (Brazil), referring to paragraph 14 of the Report, stated that he could not agree to the analogy suggested by the representative of the United Kingdom, which, in his view, was entirely unfounded since the nature of sub-paragraph 1(a) was totally different from that of sub-paragraph 1(b). In fact, the lack of flexibility of the provisions of the existing paragraph 6 of Article XVIII had been recognized by the delegation of the United Kingdom which, in its note (GATT/CP.2/WP.5/3) notifying two protective measures maintained on 1st September, 1947, had attributed the cause of the belated notification to the shortness of time for making enquiries. The provisions of sub-paragraph 1(b), contrary to those of 1(a), were extremely flexible; under that sub-paragraph a country could not only maintain existing measures but also institute new ones provided notification was given at the time of its joining the ITO. A comparison between sub-paragraphs 1(a) and 1(b) of Article 14 clearly indicated that the Contracting Parties were to be treated with a burdensome rigidity such as not to be confronted with by future members of the ITO not contracting parties to the General Agreement. The intention of the Brazilian

delegation in proposing the amendment was to correct to a certain extent the unfair situation. Moreover, apart from the objection to the analogy, the proposal of the Working Party was incorrect also from a logical and legal point of view: it was unreasonable to require a two-thirds majority for a procedural decision while only a simple majority was required for a decision on matters of substance.

Mr. SHACKLE (United Kingdom) said the intention of fixing the dates in paragraph 6 of Article XVIII of the General Agreement and in sub-paragraph 1(a) of Article 14 of the Charter had been to enable the contracting parties to accept or provisionally apply the General Agreement with full knowledge of the measures that were maintained by the other contracting parties. These dates, therefore, were not meant to be changed without special reason or in ordinary cases. To provide for variable dates in this case would be changing the substance of Article 14, and would therefore be going beyond the scope of replacement. It has been declared at Havana that the acceptance of Articles 13 and 14 of the Charter had been regarded as a substantial concession by his delegation; his delegation was therefore not prepared to accept the amendment if further "flexibility" were involved.

M. LECUYER (France) thought that whether a modification of the dates had become necessary would be a matter for the CONTRACTING PARTIES to decide.

Upon a vote being proposed, Mr. CAMPOS enquired as to in which way it would be taken; i.e., whether the adoption of the Brazilian proposal should be effected by a single majority vote or a two-thirds vote.

The CHAIRMAN said that since this involved future acceptance of an amendment by the Contracting Parties, a two-thirds

majority vote was required for its adoption.

Mr. CAMPOS contended that what was to be voted upon was not an amendment to the General Agreement per se, but merely the question whether paragraph 11 as proposed by the Working Party conveyed the substance of paragraph 1 of Article 14 of the Charter.

Mr. LEDDY (United States) supported the representative of Brazil in regard to the question of voting procedure, though he could not subscribe to the proposal itself, which he must regard as widening of the scope of the provisions of Article 14.

Mr. REISMAN (Canada) raised the point of order that since it was a matter of retention or omission of words in the General Agreement, it must doubtless be regarded as an amendment under Article XXX.

The CHAIRMAN affirmed his opinion that it has not been decided that replacement should cover the whole of Article 14, and changes in the text were justifiable by virtue of the words "mutatis mutandis".

M. LECUYER and Mr. CASSIERS (Belgium) thought that there were simply two separate proposals, both being amendments to the General Agreement.

The same view was expressed by Mr. SPEEKENBRINK (Netherlands) and Mr. OFTEDAL (Norway).

The Brazilian proposal was voted upon and was rejected by 12 votes to 4.

Mr. AUGENTHALER (Czechoslovakia) took exception to the provisions referred to in paragraph 4 of the Report for the automatic re-entry into force of Part II in the form then existing if and when the Charter ceased to be in force.

Mr. LEDDY thought this was necessary since many of the provisions in the Part II of today must have become obsolete and many amendments must have been incorporated in the Charter when the contemplated contingency should ever arise, which could not but be many years hence.

Mr. NORVAL (South Africa) proposed to add a clause to paragraph 4 of Article XXIX: "and provided further that no contracting party shall be bound by any provision by which it was not bound by the Havana Charter."

Mr. LEDDY and Mr. AUGENTHALER supported the proposal.

Mr. USMANI (Pakistan) thought that there might be a substantial difference between the provisions of Part II and those of the Charter at the time of the latter's ceasing to be in force.

Mr. SHACKLE also favoured the insertion of the additional clause proposed.

In reply to the representative of Pakistan, the CHAIRMAN pointed out that it was the "provisions" and not the text of Part II that was referred to.

Mr. USMANI proposed to amend the second sentence to read "Pending such Agreement, Part II as modified from time to time, shall again enter into force ....."

Mr. LEDDY thought this would only confuse the situation.

The CHAIRMAN, replying to a question asked by the representative of Pakistan, said that, according to the proposed paragraph, articles in the Charter which had never formed part of Part II of the Agreement, e.g. Articles 26, 27 and 28, would not be replaced therein when Part II should thus automatically re-enter into force.

Mr. OFTEDAL (Norway) thought that the point hardly deserved so much attention as it concerned only a brief period

between the cessation of the Charter and the conclusion of a new agreement.

Mr. AUGENTHALER suggested that the re-entry into force of General Agreement provisions irrespective of Charter changes was tenable since the Agreement had merely been "suspended" for the duration of the ITO, but not cancelled. He would, however, think that the addition proposed by the representative of South Africa would be a sufficient safeguard for the contracting parties in this respect.

Mr. REISMAN suggested the theory that the Agreement being merely suspended, it could be regarded as undergoing changes along with the Charter during its dormancy.

Mr. PANDO (Cuba) agreed with the representative of Czechoslovakia that the added clause was a sufficient safeguard.

Mr. CAMPOS supported the proposal of the representative of Pakistan.

Mr. TONKIN advised the meeting to accept the text presented by the Working Party on the ground that the period in question would be no longer than two or three months.

Paragraph 20 of the Report was approved and Paragraph 4 of Article XXIX was adopted with the following additions: "and provided further that no Contracting Party shall be bound by any provision which did not bind it when the Charter ceases to be in force."

Explaining the provisions of paragraph 6 of Article XXIX in reply to certain questions, Mr. SPEEKENBRINK said that the Working Party had entertained the hope that the membership of the future ITO would embrace most of the Contracting Parties and that therefore the paragraph would not be of great importance.

The Report was approved up to paragraph 23.

The meeting rose at 7:40 p.m.